

The Forum

NEW YORK STATE WETLANDS FORUM NEWSLETTER

MESSAGE FROM THE CHAIR

— Jennifer Brady-Connor

Greeting friends and colleagues!

Once again the NYSWF is sending out a call to members in search of individuals willing to go an extra mile and volunteer on the Board of Directors. It is a great opportunity to learn new skills or apply the ones you have for a great cause: providing unique forums for people to discuss wetland issues. And for those of you who are under the mistaken impression that one must first know everything and anything there is to know about all wetland issues everywhere to be on the Board, let me dispel that myth.

The day I became a board member is vivid in my mind. At the time I had been doing wetlands education and outreach in Saratoga County for the previous two years, my prior wetland experience being a two-week wetland ecology course at the Cranberry Lake Biological Station. One of our Board members (some of whom DO know everything and anything about wetlands) pulled me aside at the annual meeting and began a discussion about the state of HGM methodology, where it might be going, and how it is being applied. Possibly mistaking the blank look on my face for rapt interest, we continued the discussion (my primary role was nodding and murmuring "um hmm") until someone approached me needing assistance with a problem I could solve (like, "where is the lunch room?"). To this day my knowledge of wetland assessment methodologies is comprised of neat little acronyms I picked up along the way when discussing potential sessions for annual meetings.

The moral of my story: the Forum is most in need of people, not necessarily wetland experts, who have time to make the annual meeting happen, to make this newsletter happen, to make the fall meetings happen, and to keep the organization organized. Does this sound like something you have the time to do? Great! Call me at 518-581-8375 and we'll talk further about how you might increase your participation in

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THE REISSUANCE AND MODIFICATION OF NATIONWIDE PERMITS

— Kathleen M. Bennett, Bond, Schoeneck & King, LLP

On January 15, 2002, the Army Corps of Engineers ("ACOE") published a notice in the Federal Register reissuing all of the existing Nationwide Permits ("NWP"), General Conditions and definitions with some modifications. See 67 Fed. Reg. 2,020 (Jan. 15, 2002). NWPs are general permits issued by the ACOE to authorize certain developmental activities while seeking to protect the aquatic environment. Although the reissued NWPs kept the ½ acre limit established by the Clinton Administration, the ACOE made several important changes which roll back other restrictions contained in the NWPs. According to the ACOE, the "revised permits will do a better job of protecting aquatic ecosystems while simplifying some administrative burdens for the regulated public."

The reissued NWPs differ slightly from those proposed in August 2001. See 66 Fed. Reg. 42,070 (Aug. 9, 2001). The January 15, 2002 notice modifies NWPs 14, 21, 27, 30, 31, 32, 37, 39, 40, 42, and 43 and General Conditions 3, 4, 9, 13, 19, 21, 26.¹ The ACOE also added General Condition 27. This article will discuss some of the revisions to NWPs 14, 39, 40, 42 and 43 and General Conditions 19, 26 and 27 and how those revisions changed from the August proposal to the January notice.

The ACOE modified the terms and conditions of NWP 14 (linear transportation projects) by treating both public and private transportation projects the same for tidal and non-tidal waters. Under the reissued NWP, the acreage limits for all linear transportation projects in non-tidal waters is one-half acre and in tidal waters is one-third acre. The change increases the maximum acreage for private transportation projects in non-tidal waters from one-third acre to one-half acre. The ACOE also eliminated the 200 linear foot prohibition because very few projects exceeding 200 linear feet would remain below the one-tenth acre notification threshold. The

low notification threshold allows the ACOE to do a case-by-case review, thereby ensuring that any NWP 14 activity that exceeds this threshold will have a minimal adverse affect on the aquatic environment. According to the ACOE this change eliminates varied interpretations and simplifies the basis for use of the permit.

The ACOE made three changes to NWP 39 regarding residential, commercial and institutional developments. First, the ACOE modified the subdivision provision in an attempt to simplify the language and thereby reduce confusion. The new provision provides that "for residential subdivisions, the aggregate total loss of waters of the U.S. associated with NWP 39 cannot exceed one-half acre. This includes any loss of waters associated with the development of individual lots within the subdivision." Second, the ACOE deleted the one-cfs restriction on stream impacts because it unnecessarily limited the use of NWP 39 in some cases where the impacts are minimal. Finally, the ACOE implemented a project specific waiver of the 300 linear foot prohibition for intermittent streams following a written determination by the ACOE that any adverse environmental affects would be minimal. This is a change from the August proposal which would have permitted the project specific waiver for both intermittent and perennial streams. The ACOE believes this modification strengthens the protection for streams and that the notification provisions will permit a case-by-case review of these projects to ensure the protection of the aquatic environment.

The ACOE implemented a similar project specific waiver of the 300 linear foot prohibition for intermittent streams for projects authorized by NWPs 40, 42, and 43, provided the ACOE determines that the impacts to the aquatic environment will be minimal. This waiver is not available to authorize the loss of more than 300 linear feet of a perennial streambed. To make use of the

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New York State Wetlands Forum

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Mission:

The New York State Wetlands Forum is a non-advocacy group comprised of individuals and groups with diverse backgrounds, interests and viewpoints regarding wetlands and their science, use and management. Incorporated in 1994, the Forum is a 501(c)(3) not-for-profit organization. Its purpose is to improve communication among people interested in wetlands; call attention to and objectively discuss local, statewide, regional, national and global wetland issues as they relate to New York State; improve its members' knowledge and understanding of wetlands; and, make available information about wetlands to its members and the general public.

COMPENSATING FOR WETLAND LOSSES – A REVIEW OF THE NATIONAL RESEARCH COUNCIL FINDINGS

— Kevin Bliss, NYSDEC, Region 7

Are wetland functions replaceable? The short answer would seem to be "yes." Or so one might think from the actions of those that require mitigation for unavoidable impacts to wetlands as permitted by federal and state regulatory agencies. But the question deserves greater consideration because the more accurate answer is, "it depends." Recognizing the complexity of the question, in response to a request from the Environmental Protection Agency, the National Research Council established the Committee on Mitigating Wetland Losses. The Committee's task was to evaluate the current ability of practitioners to restore various aspects of wetland functioning in a variety of environments, as well as options for mitigating wetland loss.

To achieve their research objective, the Committee on Mitigating Wetland Losses reviewed examples of wetland restoration and creation projects in Florida, Illinois, and southern California; received briefings from outside experts; and conducted an extensive review of scientific literature and other data on wetlands provided by a wide variety of experts and organizations. Emphasis was placed on mitigation practices as required under Section 404 of the Clean Water Act. The Committee findings are published in the book, "Compensating for Wetland Losses Under the Clean Water Act."¹ This text is considered recommended reading for policy makers, regulators, environmental scientists, educators, and wetland advocates.

The Committee concludes that the Clean Water Act Section 404 program should be improved to achieve the goal of no net loss of wetlands for both area and functions. The magnitude of the shortfall cannot be precisely determined. Data kept by the U.S. Army Corps of Engineers indicates that there has been since 1993 a ratio of 1.8 acres mitigated for each acre of wetland lost, thus suggesting a net gain at least with regard regulated impacts. (Specifically, 24,000 acres lost vs. 42,000 acres gained.)

However, the Corps data does not address the status of the required compensation. Additional research concluded required mitigation projects often are not undertaken, or fail to meet permit conditions.

The findings of the Committee include several recommendations for improving the Section 404 regulatory program. By extension, these recommendations also apply to State and local wetland mitigation efforts.

Principal among these recommendations is the notion that a watershed (a.k.a. eco-region) approach would improve permit decision making. It was noted that on-site mitigation strategies may prove difficult owing especially to the constraint of modified or impaired hydrological conditions. Likewise, other site features critical to the proper functioning of a wetland may be lost to the developments requiring mitigation. Consequently, it is recommended opportunities for in-kind compensation be sought within a larger landscape context.

Third-party compensation approaches such as mitigation banks and in-lieu fee programs were found to offer some advantages over permittee-responsible mitigation. The Committee does not favor any particular mechanisms, but offers several recommendations intended to insure no net loss of wetlands. For example, when an agency reviews mitigation options it is most important to focus on attributes including who is legally responsible, the timing of the mitigation actions, whether the Mitigation Banking Review Team Process² is used, and whether stewardship requirements are in place.

Support for regulatory decision making must be enhanced if the Committee's recommendations are to be fully achieved. Internally, the federal regulatory authorities can work to improve functional wetland assessment, permit compliance monitoring, staff training, and research.

But it is also important that the Corps of Engineers and the Environmental Protection Agency work with the states to expand their permitting and watershed planning programs to fill gaps in the federal wetland program.

The Committee presents ten operational guidelines for creating or restoring self-sustaining wetlands:

1. Consider the hydrogeomorphic and ecological landscape and climate.
2. Adopt a dynamic landscape perspective.
3. Restore or develop naturally variable hydrological conditions.
4. Whenever possible, choose wetland restoration over creation.
5. Avoid over-engineered structures in the wetland's design.
6. Pay particular attention to appropriate planting elevation, depth, soil type and seasonal timing.

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NEW GUIDELINES FOR EVALUATING IMPACT ON WETLANDS

— Danielle M. McCann, Bond, Schoeneck & King, LLP

On October 31, 2001, U.S. Army Corps of Engineers issued Regulatory Guidance Letter 01-1 (“RGL”) in response to criticism about its approach to preserving the nation’s wetlands. The RGL’s purpose is to outline a holistic approach to mitigation and institute more stringent standards for projects that have an impact upon aquatic ecosystems. Although the new policies are meant to address problems in the system, it appears that critics continue to be disappointed with the Corps’ policies towards preserving the nation’s wetlands.

Wetlands serve an important function because they prevent floods, recharge aquifers, and filter water pollution. Unfortunately, over 50% of the nation’s wetlands have disappeared. For example, in California, more than 90% of its wetlands have been destroyed by farming and development. In 1989, President Bush, due to the importance of wetlands to the ecosystem and the continued decrease in them, established a goal of “no net loss” for the nation’s wetlands. It has been the Corps’ duty to fulfill the objectives of this plan but the Corps has been criticized for not properly carrying out its duties.

The RGL was issued in response to a report by the National Research Council/ National Academy of Science (see article, page 2) criticizing the Corps for the increasing loss of wetlands due to commercial and residential development. The Report found fault with the Corps’ failure to take a “watershed” approach to mitigation, reliance on ineffective mitigation approaches, such as onsite mitigation, and failure to ensure that planned projects were completed. The Corps’ newly issued guidelines are an attempt to cure some of these deficiencies. The RGL is not retroactive for mitigation projects that have already been approved.

The RGL has established a new system for evaluating the negative and positive effects of a development project. Previously, the Corps used an acre for acre evaluation but now it has adopted the terms “credit” and “debit” to evaluate the project’s effects on wetlands. This method of analysis creates an apples-to-apples determination of mitigation and impact efforts. Credits are given when existing wetlands and/or other aquatic wetlands are preserved, protected or maintained. This preservation, in conjunction with establishment, restoration, rehabilitation and enhancement activities, will earn credits if it is demonstrated that the “preservation will augment the functions of the established, restored or rehabilitated or enhanced aquatic resource.” The Corps’ project managers will use district-approved methods for assessing

the impact and assigning credits, but preservation of existing wetlands or aquatic systems may be used as the sole basis for awarding credits.

The Corps outlines several strategies to earn credits and achieve a watershed or holistic approach to mitigation, including buffer zones, upland areas, and preservation. Buffer zones should be used along streams or open water. The buffers should consist of native species and their width should be determined based upon the water quality or aquatic habitat that could be lost. Also, credit can be earned for upland areas in a compensatory mitigation project to the extent that the management of the upland areas enhances and increases the overall ecological functions in the aquatic ecosystem. The use of preservation must be viewed in light of the physical, chemical and/or biological functions the wetlands perform at the mitigation site. In fact, mitigation efforts could take place off-site as long as they are in the same watershed.

The Corps has received criticism about the RGL from numerous environmental groups, including the Sierra Club and Earthjustice. The critics see the RGL as a move away from the no net loss policy because it will allow developers to replace the lost wetlands at other sites so long as they are in the same watershed. Furthermore, the RGL was issued without consulting with other governmental agencies or the public. Howard Fox of Earthjustice comments that if the RGL “was truly protective of wetlands and streams, the Corps wouldn’t have felt the need to rush it onto the street without any public input.” Critics view the Corps’ new guidelines with suspicion because the details of the RGL evidence that the Corps is abandoning the no net loss policy even though it claims that this new method will be an improvement.

The Corp responds to the criticism by stating that the RGL continues to support and reinforce the nation’s no net loss policy for wetlands and is responsive to the Report’s recommendations. Furthermore, the Corps is not required to consult with other governmental agencies or the public before issuing guidelines that are used for its own internal guidance and management.

The Corps is attempting to be responsive to criticism by taking prompt action and adopting a watershed approach to mitigation. It remains to be seen how the Corps will apply this new credit/debit system of evaluating mitigation projects and if this method will be more effective in ensuring that the mitigation projects are actually executed and will perform as they are intended.

ASWM RELEASES POSITION PAPER ON RESOLVING ISSUES RESULTING FROM SWANCC RULING

In response to the turmoil the January 9, 2001 SWANCC ruling has caused the Section 404 regulatory program, the Association of State Wetlands Managers (ASWM) and Association of State Floodplain Managers have released a position paper outlining their concerns and declaring their support for clear regulatory guidance. The two organizations are urging EPA to develop specific guidance to insure that the narrow legal interpretation embodied in the post-SWANCC regulatory memo issued by the Corps and EPA does not get lost as it filters down to the field offices of the Corps and EPA. The position paper outlines 6 key steps expected to resolve the current situation, as follows:

1. Clarify that SWANCC did not invalidate any of the regulatory provisions defining ‘waters of the United States.’
2. Make it clear that SWANCC does not invalidate previously issued permits, and their terms and conditions should continue to be enforced, including mitigation requirements.
3. Adopt the Riverside Bayview “significant nexus” test for determining jurisdiction over wetlands, and establish a presumption that all wetlands within or abutting the 100 year floodplain are to be considered ‘adjacent.’ According to the position paper, “scientists have never recognized the artificial regulatory distinction between ‘adjacent’ and ‘isolated’ wetlands and there is now an opportunity to clarify that it is the function, not the label, that matters.”
4. Clarify that the definition of ‘tributaries’ includes groundwater tributaries and man-made structures, as well as all surface tributaries whether mapped or unmapped.
5. Clarify and expand the ‘significant impact on interstate commerce’ test for jurisdictional determinations. According to the position paper, “the guidance should emphasize that, under applicable Supreme Court decisions, it is the ‘aggregate effect’ of the regulated activities on interstate commerce that must be evaluated, not simply the effect of regulating a particular wetland fill”.
6. EPA and the Corps should jointly institute a program to clarify the extent of jurisdictional wetlands on a state-by-state or regional basis, to take account of the geographic and climatic differences that exist throughout the country.

The position paper was prepared by Pat Parenteau, Professor of Law, Vermont Law School and presented to EPA Administrator Christine Whitman in December of 2001. To review the position paper visit <http://www.aswm.org/swancc/position.pdf>.

U.S. ARMY CORPS OF ENGINEERS CLARIFIES INACCURACIES IN WETLANDS PERMIT REPORTING

Concerned about inaccuracies in news reports regarding nationwide permits, the U.S. Army Corps of Engineers is providing information to clarify them.

"The permitting program is very complex, and we need to ensure that the American public has accurate information about how their federal government is providing environmental protection," said John Studt, Chief of the Regulatory Branch for the Army Corps of Engineers.

There were several topics bearing clarification:

"No net loss"/ acre-for-acre wetlands replacement. Developers (and others who use the permits) are still required to offset damage or impacts, and the standard this year is more restrictive than ever. In the past, Corps districts – which issue the permits – had to ensure that wetland functions were replaced which often resulted in less than one-for-one acreage mitigation. Now they must not only ensure that functions are replaced, but also that the "no net loss" goal is met on an acreage basis within the geographic boundary of the district. This allows area regulators to consider cumulative impacts holistically rather than piecemeal, making decisions in the best interest of the entire watershed.

Current permits revoke previous requirements. "Actually, every time we've issued nationwide permits, they have become more environmentally protective, including this time," said Studt. "And each time we've proposed changes to the program, they have been open to public review and comment." The only change in environmental review

pertains to intermittent streams, which are often no more than stormwater run-off. Allowing Corps regulators to address impacts to these streams with nationwide permits frees them up to focus on more significant environmental issues, like redesigning major projects for fewer impacts or enforcing required mitigation.

Floodplain restrictions. Every protection in place for floodplains in 2000 remains in place today.

Automatic approval. Nationwide permits pertain only to situations with minimal impacts (such as less than ½ acre), and each of these permits will still receive individual attention from Corps regulators (most of whom are biologists). Nationwide permits do not take as much time as individual permits, but that is as it should be, because projects requiring individual permits have greater than minimal impacts and therefore deserve more scrutiny.

Different standards for commercial versus residential developers. The same standard of minimal impact – ½ acre – is applied for those who build shopping centers (commercial) as those who build neighborhoods (residential).

The full text of the nationwide permits is posted in the Jan. 15, 2002, Federal Register at http://www.access.gpo.gov/su_docs/aces/aces140.html.

For more information on the U.S. Army Corps of Engineers Regulatory Program, visit the program's Web page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

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7. Provide appropriately heterogeneous topography.

8. Pay attention to subsurface conditions, including soil and sediment geochemistry and physics, groundwater quantity and quality, and infaunal communities.

9. Consider complications associated with wetland creation or restoration in seriously degraded or disturbed sites.

10. Conduct early monitoring as part of adaptive management.

The efforts of the Committee on Mitigating Wetland Losses are commendable. In pointing out both the positive and negative attributes of the current regulatory system, and providing numerous recommendations for improvement, the Committee is significantly aiding the design of projects that will become ecologically self-sustaining, thereby truly assisting the goal of no net loss. So, are wetland functions replaceable? Perhaps more so now than ever.

¹ "Compensating for Wetland Losses Under the Clean Water Act" is available from the National Academy Press, 2101 Constitution Avenue, N.W., Box 285, Washington, DC 20055; (800) 624-6242; Internet: <http://www.nap.edu> (Copyright 2001 by the National Academy of Sciences).

² Recall that in 1995 the Corps, EPA, NRCS, F&WS, and NOAA published interagency guidance on the establishment, use and operation of mitigation banks (Fed. Reg. 60 (Nov. 28) 58605). This guidance describes a Mitigation Banking Review Team (MRBT) that would review a proposed mitigation bank in conformance with an established process considering the proposed site plan and specifications, a description of the baseline conditions at the bank site, wetland impacts suitable for compensation, financial assurances, and compensation ratios.



WETLAND DELINEATION SEMINAR BEING PLANNED

The New York State Wetlands Forum is interested in planning an informal wetland delineation seminar for October 2002, to be held in the Capital District area. The seminar would be a field outing, with a focus on difficult to delineate areas, such as fallow wet agricultural areas, isolated wetlands and disturbed sites. If you are interested in helping with such a seminar, or have an interesting site to visit, please contact Norbert Quinzer or Barbara Beall at nquenzer@bagdonenvironmental.com or bbeall@chazencompanies.com respectively.

WETLANDS 101 PRIMER

— Barbara B. Beall, PWS, The Chazen Companies

*Prepared for a presentation at
“Wetlands: Capacity Building for New York
Land Trusts”*

Wetlands are transitional ecosystems between uplands and open waters. As such, their boundaries are defined more by regulatory programs than by nature. The overwhelming characteristic in a wetland is the presence of water. This water drives the characteristics of the soils in the wetlands and the vegetation in the wetland. As a result, the federal government and state government utilize specific field indicators for vegetation, soils and hydrology to identify wetlands in the field.

The NYSDEC regulatory program pre-maps wetlands that they will regulate that are 12.4 acres in size or larger, or other smaller wetlands with significant local importance. These regulatory maps illustrate where the wetlands are likely to be found, but state regulatory personnel are responsible for establishing the exact boundary in the field. The regulators typically rely heavily on wetland vegetation for identifying this boundary. The NYSDEC regulations for Freshwater Wetlands Mapping and Classification are found at 6 NYCRR Part 664. A 100-foot buffer is established around the wetlands boundary and is also regulated by the NYSDEC.

The federal regulatory program regulates wetlands of any size that are tied to interstate commerce. The term wetland is defined in the federal regulations as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas”. A standing wetland scientist joke is: “Everybody knows what swamps, marshes and bogs are...it’s those ‘similar areas’ that cause the problems”.

Federal wetlands are delineated in the field using the US Army Corps of Engineers 1987 Manual. This manual establishes field criteria for three parameters – soils, vegetation and hydrology. Indicators for all three parameters must be present for an area to be identified as a wetland. For a good discussion of these parameters, see www.wetlandsforum.org. “Wetland Words and What they Mean” for vegetation, hydrology and soils.

All wetlands are not created equal. The functions and values a wetland will provide depend upon the wetland’s landscape

position, its vegetative community, soil substrate, types of surrounding land use and level of disturbance within the wetland.

Wetland functions are those physical, chemical and biological characteristics of a wetland, or what a wetland does. Values are those characteristics that are important to society. Common functions and values that are reviewed for wetlands include groundwater recharge, ground water discharge, flood flow alteration, sediment stabilization, sediment/toxicant retention, nutrient removal/transformation, production export, wildlife diversity/abundance, aquatic diversity/abundance, uniqueness/heritage, and recreation. There are a variety of assessment methodologies available for evaluating a wetland’s functions and values. These include WET, HGM, HEP, and others. Most techniques do a good job of identifying or qualifying the functions and values, but a poor job of quantifying or measuring the amount of function provided.

Under the federal regulatory program, the US Army Corps of Engineers (ACOE) regulates work or structures in navigable waters of the United States, and regulates the discharge of dredged or fill material (broadly defined) in all waters of the United States with an interstate commerce clause connection (i.e., not “isolated” wetlands)¹.

The federal regulatory program basically uses two types of permits to authorize activities in wetlands. The nationwide permits generally authorize minor types of work in wetlands, generally with impacts less than 0.5 acres. The individual permits are needed for work with greater than 0.5 acre of impacts. Under both regulatory reviews, the applicant must demonstrate that the project has avoided, minimized and mitigated impacts to wetlands to the maximum extent practicable, although the stringency of the review is typically stronger under the individual permit review. The applicant must also demonstrate that they have complied with all associated regulatory reviews including compliance with endangered species review, National Historic Preservation Act, FEMA regulations, Wild and Scenic Rivers, and Section 401 of the Clean Water Act.

The state regulatory program classifies its wetlands into four classes. Class I wetlands are the highest quality of wetlands. Again, 6 NYCRR Section 664 discusses the classification of wetlands, and a Class I wetland would be defined as such, for example, due to its large size, variety of cover types, or because it supports important or rare plant communities. A Class IV wetland, which

would be at the other end of the spectrum, is not as valuable a wetland, and would be identified as such, for example, due to its smaller sizes, monotypic vegetative stands, or low value cover types.

Under the state regulatory program, activities are identified and rated for their compatibility with the wetland area and its 100-foot adjacent buffer. For incompatible activities (and most are defined as such by the regulations), the Applicant must demonstrate compliance with the weighing standards found at 6 NYCRR Part 663.5 (e)(2). The weighing standards are more stringent for Class I wetlands than for Class IV wetlands. Unlike the federal regulatory program, where mitigation can only be used to compensate for unavoidable wetland impacts, under the NYSDEC regulatory program, mitigation can be used to “increase the likelihood that a proposed activity will meet the applicable standards for permit issuance”.²

¹ The recent US Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, ___ U.S. ___, ___ S.Ct. ___, 2001 WL 15333 (2001), has determined that certain isolated wetlands are not subject to the jurisdiction of the US Army Corps of Engineers.

² 6 NYCRR 663.5(g).

(MESSAGE FROM THE CHAIR)

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the Forum, whether it is baby steps (writing an article, filing) to a marathon (chairing a meeting).

Speaking of people who have gone the extra mile, we’d like to thank current Board members Robert Dunn and Barbara Beall for their many years of service to the organization. They have elected to step down at the end of their terms in April. Robert and Barbara have both been terrific supporters and advocates of the organization. Both served as officers on the Board: Robert as Treasurer and Barbara as Secretary and Chair; and both have contributed numerous hours of their busy lives in helping the Forum achieve its goals. Please take a moment to thank them for their contributions if your paths should cross. Thanks to you both, and best wishes as you pursue new activities.

See you at the annual meeting!

CALENDAR OF EVENTS

MARCH 2002

- 4-7 March. Wetland Delineation Workshop: Army Corps of Engineers Method Workshop.** Sarasota, Florida. This 4-day course covers the wetland delineation procedures based on the Army Corps of Engineers Wetland Delineation Manual (Technical Report y-87-1 1987 Manual on-line version). The course is also based, in part, on the training materials developed in conjunction with Section 307(e) of the Water Resources Development Act of 1990 for the Wetland Delineation Program. This training will be useful in preparing for Corps certification upon implementation of the Wetland Delineator Certification Program. For details visit the Florida Surveying and Mapping Society's website at <http://www.fsms.org/education.htm>.
- 7-9 March. Call For Papers: 2002 Annual Meeting of the Western Section of The Wildlife Society.** Visalia Convention Center Visalia, California. For additional information visit www.tws-west.org.
- 18-20 March. 6th Marine and Estuarine Shallow Water Science and Management Conference.** Holiday Inn Boardwalk, Atlantic City, New Jersey. For additional information contact Ralph Spagnolo at spagnolo.ralph@epa.gov or Frank Reilly at frank@thereillygroup.net.
- 20-22 March. Call for Papers: Hydrophytic Vegetation Workshop.** Atlantic City, New Jersey. For additional information contact Ralph Spagnolo at spagnolo.ralph@epa.gov or Frank Reilly at frank@thereillygroup.net.
- 23 March. "Effects of Climate Change on New England Wetlands."** Presented at the Association of Massachusetts Wetland Scientists (AMWS) 2002 Annual Meeting on Saturday March 23, 2002 at the Holiday Inn, Boxboro, MA. Opening address by Secretary of Environmental Affairs, Robert Durand. Seven prominent nationwide experts will address how New England's wetlands will be affected in the coming decades. Important questions to be addressed will include: What do we know about climate change today? What is the historical record? How will wetlands, waterways and vernal pools in the New England region be changed? What affect will rising sea levels have on our fragile coastal areas? Are there solutions? Are there regulatory changes we should anticipate? For more information visit <http://www.amws.org> or contact Robin Reiner at 978/667-4340.
- 25-29 March. 2nd National Floodproofing Conference.** Tampa, Florida. The Assoc. of State Floodplain Manager's Committee conducts this triennial event with sponsorship from FEMA Region IV and the ACOE. It will feature training workshops on Monday and Friday with the technical program, field tours and exhibits running Tuesday through Thursday. The Call for Presenters is available online at <http://www.floods.org/PDF/files/nfpc-cp.pdf>.
- 30 March. 7th International Wildlife Law Conference: Call for Presentations.** Washington College of Law at American University in Washington, DC. The theme for the conference will be "The Convention on Biological Diversity: A Ten Year Report Card." Individuals interested in proposing panels or individual papers are invited to submit abstracts using the site's online abstract submission form, <http://eelink.net/~asilwildlife/programs2.html>. Participants will also be invited to draft longer versions of their papers for inclusion in a special symposium issue of the Journal of International Wildlife Law & Policy, www.jiwlw.com.

APRIL

- 2-4 April. Water Resources: Navigating the New Waterscape.** 9th Regional Wetlands and Water Resources Meeting. Hyatt Regency, Kansas City, Missouri. Agenda highlights include Stream Science; Restoration/Creation of Streams/Wetlands; Urban/Ag Issues; GIS/Tools; Latest Court Decisions; and more. For additional information contact Raju Kakarlapudi at 913-551-7320 or kakarlapudi.raj@epa.gov.
- 8-11 April. Wetland Delineation Workshop: Army Corps of Engineers Method Workshop,** Pensacola, Florida. This 4-day course covers the wetland delineation procedures based on the Army Corps of Engineers Wetland Delineation Manual (Technical Report y-87-1 1987 Manual on-line version). The course is also based, in part, on the training materials developed in conjunction with Section 307(e) of the Water Resources Development Act of 1990 for the Wetland Delineation Program. This training will be useful in preparing for Corps certification upon implementation of the Wetland Delineator Certification Program. For details visit the Florida Surveying and Mapping Society's website at <http://www.fsms.org/education.htm>.
- 20-28 April. Scenic Hudson's Fifth Annual Great River Sweep.** Help with the annual cleanup of the shorelines and public spaces this year as the Great River Sweep enters its fifth year. For a registration form and informational pamphlet, please call the Great River Sweep hotline at (845) 473-TIDE (473-8433) or e-mail volunteer@scenichudson.org.
- 23-26 April. Enhancing the States' Lake Management Programs: Managing Invasive Species in Lakes and Reservoirs.** Congress Plaza Hotel, Chicago, IL. State lake program managers, statewide lake associations, volunteer monitors, and federal and local managers are invited to this national meeting, the 15th consecutive year that lake program managers have convened to discuss successes, evaluate obstacles, and explore new approaches for improving State lake management programs. This year's theme is invasive species, and what States are doing to prevent or manage infestations. Registration is \$165 until March 29. Mark your calendars! For more information, contact Bob Kirschner, Chicago Botanic Garden, bkirschn@chicagobotanic.org, (847) 835-6837.
- April 24-27. The Northeast Natural History Conference VII.** Previously the NY Natural History Conference, it will focus on natural history, biology, anthropology, and geology and includes a conference speaker, workshops, paper and poster sessions, field trips, an illustrator's gallery, a book market and a banquet. Student presentations are encouraged. For more information: bri@mail.nysed.gov/nhc. All forms will be available online.

COOPERATIVE STREAM MANAGEMENT EFFORTS IN THE CATSKILL REGION

— Beth Gelber, Stream Management Program,
New York City Department of Environmental Protection (DEP)

DEP's Stream Management Program and four County Soil and Water Conservation Districts are currently engaged in multi-year stream restoration and management projects on five Catskill streams in New York City's water supply watershed: the Batavia Kill in Greene County, the West Branch Delaware River in Delaware County, the Chestnut Creek in Sullivan County, the Broadstreet Hollow and Stony Clove Creeks in Ulster and Greene Counties.

Each Stream Management project entails a field based assessment of current stream conditions, the construction of a restoration-demonstration based on the principles of Natural Channel

Design, and the drafting of a multi-objective Stream Management Plan with community input.

Natural Channel Design

Natural Channel Design recognizes that the physical structure of the stream channel affects habitat quality, fisheries health, flood behavior, rates of erosion, and ultimately water quality. Unstable channel dimensions are compared with reference conditions – a naturally stable channel of the same stream type. Stable streams are able to handle flood flows without accumulating too much sediment or cutting down their banks. Naturally stable channels with vegetated banks provide cover that regulates water temperature in the summer, and the shallow riffle and deeper pool dimensions that are critical for fish habitat and the macro-invertebrate populations on which they feed.

Watershed Assessment

Last summer, project staff measured the dimensions of the mainstem of each stream to characterize stable and unstable sections. They documented the location of infrastructure such as bridges and road culverts, and major bank failures for future monitoring and restoration, and identified areas where the addition of riparian vegetation may provide additional bank stability, and habitat improvement. The sediment load is also measured – in the rocky Catskill

landscape, sediment supply can have a major effect on stream behavior. Traditional designs for bridges and culverts can be modified to include these calculations of sediment transport and channel dynamics.

Stream Management Plan

The next step for each project team is the process of analyzing and interpreting the data, using a Geographic Information System (GIS)

to create a basemap of the stream in its current condition. This information will be reviewed by a Project Advisory Committee that includes local officials such as town highway and county department of

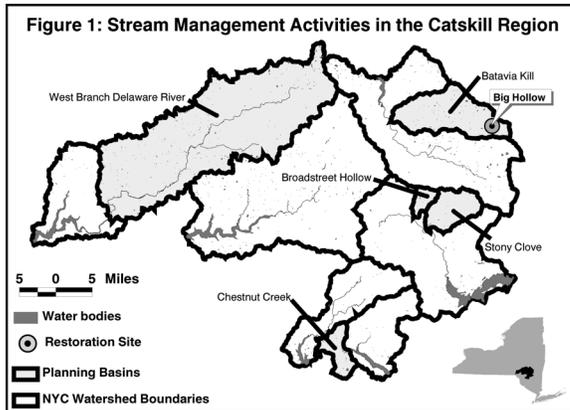
public works, resource managers from state agencies such as the NYS Department of Environmental Conservation and the NYS Department of Transportation, and local landowners. Preliminary findings and recommendations for restoration will be presented to each watershed community for additional input, and will provide the basis for the Stream Management Plan.

A total of nine full time staff are currently working on Stream Management projects in the four District offices. In addition, this is the second year that federal AmeriCorps members have joined the Project teams, through a unique three-way partnership between DEP, the Greene County Soil and Water Conservation District, and the Poughkeepsie-based Youth Resource Development Corporation, a non-profit group that coordinates AmeriCorps programs in the Hudson Valley and Catskill regions.

Batavia Kill / Big Hollow Project Stream Restoration Project

— The Batavia Kill

The 72 square mile Batavia Kill watershed in Greene County is a demonstration watershed for natural channel design and multi-objective stream management. This tributary of the Schoharie Creek flows 21 miles through the northern Catskill towns of Windham, Ashland, and



FINDING THE WETLAND EDGE

— Joseph M. McMullen, Terrestrial
Environmental Specialists, Inc.

As consultants, agency representatives, academic researchers, and others we all spend a lot of time finding the wetland edge. We labor over its exact point, mark it with numbered flags, have it located by survey, plot it on a map, and argue about it with others. Is it really where we say it is? Should it be higher or lower? Is it a good or distinct edge?

I have looked at wetland edges for most of the 28 years I have worked in environmental consulting. I have all the right education, studied all the various federal and state manuals, and acquired all the training and certifications. I have marked the edges of thousands of wetlands from black mangrove swamps in Puerto Rico to wet sedge-grass tundra in Alaska, and littered the landscape with probably hundreds of thousands of flags. My conclusion after all these years is that there are many instances where a defined wetland edge only exists because there are laws that say it does.

In response to these laws, manuals have been developed that instruct us on what field characteristics to use to delineate the edge of this legal entity. Unfortunately, in areas where there is not sharp topographic relief, there is not a point where the manna grass brushes against the base of the sugar maple, the matrix chroma changes from gleyed to 10YR 5/4, and the water goes from pooled to well below the surface. It would make it easier if it did, but it doesn't.

Recently, Ray Nolan of the NYSDEC in Region 7 and I were discussing this subject, particularly in regard to how novice wetland delineators think that wetland edges can be drawn with a fine pencil in the field. Ray commented that individuals sometimes treat the wetland edge as a railing in front of an altar. I'll let all of you sort out the inferences of this statement, but I admire the succinct nature of it.

What I think is that in areas with relatively flat to rolling topography, like we have in the lake plain of central and western New York, the wetland edge moves somewhat from year to year depending on the type of water year. In a really wet year the boundary edge moves out and in a really dry year it recedes back. This is not an earth-shattering revelation. It is a wetland-upland transition area that has been recognized for wetlands and other natural systems for many years. In "Classification of Wetlands and Deepwater Habitats of the United States," Cowardin *et al.*

NEW YORK STATE WETLANDS FORUM, INC.
2002 ANNUAL CONFERENCE AND MEETING
“WETLAND ASSESSMENT AND RESTORATION IN NEW YORK STATE”
HOLIDAY INN, LIVERPOOL, NY
APRIL 17 & 18, 2002
DRAFT AGENDA
Wednesday, April 17

The draft agenda is subject to change. Please visit our website for updates.

* Denotes invited, unconfirmed speakers

- 7:00 am – 8:30 am **Exhibitor Setup**
- 7:00 am – 5:00 pm **Registration**
- 8:30 am – 8:35 am **Opening Remarks** – *Jennifer Brady-Connor, Chair, NYSWF*
- 8:35 am – 9:05 am **Keynote Address: “National Wetland Mitigation Policy and Science – Where is it Going?”**
Dr. William Mitsch, Professor, School of Natural Resources, Ohio State University
- 9:10 am – 10:40 am **CONCURRENT SESSION A**
1. **How to Monitor Wetland Health:**
Moderator: Richard Smardon, SUNY/ESF
Overview of Wetland Assessment Techniques – *Speaker TBD*
Use of “Best Professional Judgment” in Wetland Assessment – *Norbert Quenzer, Bagdon Environmental*
Diverging Viewpoints on Wetland Assessment Techniques – *Speaker TBD*
 2. **Wetland Management Techniques at the Local Level:**
Moderator: Beth Gelber, NYCDEP
Roundtable Discussion on Local Development and Implementation of Wetland Protection Ordinances – *Speakers TBD*
Mitigation Bank Development in Onondaga County – *Les Monostory*, Environmental Planner, Onondaga County Council on Environmental Health*
Pond and Creek Restoration for Municipal Stormwater Treatment – *Amanda Ludlow and Charlie McGuckin, Roux Associates*
 3. **Development Initiatives in New York State:**
Moderator: Kevin Bernstein, Bond, Schoeneck, and King, LLP
Overview of “Build Now-NY” Program – *Peter E. Grevelding, P.E., O’Brien & Gere Engineers, Inc.*
Overview of “Re Build Now-NY” Program – *Virginia C. Robbins, Esq., Bond, Schoeneck and King, LLP*
Case Study on Identifying and Obtaining Approvals for a “Shovel Ready” Site – *John Montagne, The Chazen Companies*
The Corps’ Brownfield Connection – Creative Uses of the Corps’ Continuing Authorities – *Sophie Baj, Buffalo District, U.S. Army Corps of Engineers*
- 10:45 am – 11:15 am **BREAK**
- 11:15 am – 12:30 pm **CONCURRENT SESSION B**
1. **Invasive Threats to NYS Wetlands**
Moderator: Joseph McMullen, Terrestrial Environmental Specialists, Inc.
What Plants are Truly Invasive and Degrading to Wetland Habitats? – *Joseph McMullen, Terrestrial Environmental Specialists, Inc.*
Submerged Aquatic Invasive Species and Their Control – *Bruce Gilman, College of the Finger Lakes*
The Biological Control of Purple Loosestrife at Oak Orchard and Tonawanda Management Areas – *Dan Carroll, NYSDEC*
 2. **Wetland Educational Tools**
Moderator: Jennifer Brady-Connor, Association of State Wetland Managers
NIMO Wetland Training Programs and Techniques – *Ray Cummings, Niagara Mohawk Power Corporation*
New York State Wetland and Watershed Toolkit – *Jennifer Brady-Connor, Association of State Wetland Managers*
 3. **Young Wetland Science – Where Is It Going?**
Moderator: Richard Smardon, SUNY/ESF
Hydraulic Analysis of a Pilot-Scale Treatment Wetland System – *Xiuying Zhao and Thomas Young, Clarkson University, Potsdam*
Evaluating the Wetlands Reserve Program in New York State: An Assessment of Participating Landowner's Attitudes and Reasons for Enrollment – *Candace Blumenfeld, SUNY/ESF, Syracuse*
- 12:30 pm – 2:15 pm **LUNCH AND ANNUAL MEMBERSHIP MEETING**
- 2:15 pm – 3:30 pm **CONCURRENT SESSION C**
1. **General Health of New York State Wetlands**
Moderator: Gary Kleppel, Associate Professor, SUNY Albany
Wetland Health: Is it Measurable? – *Gary Kleppel, Associate Professor, SUNY Albany*
Geographic Analysis of Factors Influencing Wetland Health – *James Zollweg, Assistant Professor of Water Resources, SUNY Brockport Earth Sciences*
Biological Criteria for the Assessment of Wetland Health – *Anna Hartwell, SUNY Albany*
Remote Sensing and Wetland Health – *Jeff Allen*, Clemson University*
 2. **Case Studies on Determinations Made as a Result of SWANCC Decision**
Moderator: Teresa Bakner, Whiteman, Osterman and Hanna
Panelists: *Bernie Carr, Terrestrial Environmental Specialists, Inc.*
 3. **Stream and Waterbody Assessment and Restoration:**
Moderator: Anne Secord, USFWS
Use of Rapid Bioassessment Protocols in Determining Health of Rivers and Streams – *David B. Tompkins, The Chazen Companies*

3:30 pm – 4:00 pm
4:00 pm – 5:15 pm

BREAK

CONCURRENT SESSION D

1. Restoring and Protecting the Health of New York State Wetlands

Moderator: Trish Gabriel, Earth Tech, Inc.

Wetland Protection and Mitigation Efforts at the Montezuma Wildlife Refuge – David O’Dell, NYSDEC

Use of GIS to Monitor Wetland Restoration Efforts – Scott Ingmire*, Madison County Planning Department

2. Land Trust Roles in Wetland Management:

Moderator: Jennifer Brady-Connor, Association of State Wetland Managers

3. Wetland Mitigation Session

Moderator: Barbara Beall, The Chazen Companies

Principles of Wetland Creation and Restoration – Dr. Gary Pierce of Cedar Creek Institute, and Mal Gilbert of MN Gilbert Consulting, Inc.

NAS Wetland Mitigation Report: Replication of Wetlands as Mitigation? – A Statement for Common Sense – Don Ferlow, FASLA, Associate, Senior Wetland Scientist, Stearns & Wheeler, LLC

5:30 pm – 6:30 pm
6:30 pm

COCKTAIL HOUR

DINNER (optional)

Thursday, April 18

8:30 am – 8:45 am
8:45 am – 10:15 am

Announcements

Legislative and Regulatory Panel Session

Moderator: Kevin Bernstein, Bond, Schoeneck, and King

Topics to Include: Update on USEPA’s Wetlands Program, NYSDEC’s Protection of Wetlands in Central New York, USACE RGL on Mitigation, New Nationwide Permits, NYS Wetlands Appeal Board, and Legislative Update – Proposed Laws that Affect Wetlands

Panelists: Daniel Montella, USEPA; Ray Nolan, NYSDEC; Ray Cummings, Niagara Mohawk Power Corporation; Representative from Corps of Engineers to be determined

10:15 am – 11:30 am

Panel Discussion on NAS Wetland Mitigation Paper

Moderator: Barbara Beall, The Chazen Companies

Panelists: Mal Gilbert, MN Gilbert Consulting; Dr. Gary Pierce, Cedar Creek Institute; Dr. William Mitsch, Ohio State University

11:30 am – 5:00 pm

FIELD TRIPS

- 1. Cicero Wetlands Creation Site** – lead by Bernie Carr of Terrestrial Environmental Specialists, Inc.
- 2. Old Fly Marsh** – lead by Richard Smardon of SUNY/ESF
- 3. Nine Mile Creek in-lieu-fee wetlands and Trout Stream** (with degraded wetlands to be visited on the way) – lead by Joe McMullen of Terrestrial Environmental Specialists, Inc. (**Note: trout fishermen should bring their equipment**)
- 4. Montezuma National Wildlife Refuge Wetland Complex** – lead by Tom Jasikoff*, Refuge Manager, USFWS

2002 MEMBERSHIP AND ANNUAL MEETING REGISTRATION FORM

Name _____ Affiliation _____

Address _____

City _____ State _____ Zip _____

Phone _____ Fax _____ E-Mail _____

Registration Category (All registrations include continental breakfast, breaks, April 17 lunch and mixer, workshop materials and field trips)

- Full-time Student with Current School I.D. \$ 40.00
- Speakers and NYS Wetlands Forum Members 85.00
- All Others 100.00
- All On-Site Registrations 115.00
- April 17 Evening Dinner 20.00
- Exhibitor (postmarked on or before March 23 – includes one free registration) 200.00
- Exhibitor (postmarked after March 23 – includes one free registration) 250.00
- Poster session (free with paid registration – circle if interested) no charge
- One-year Forum Membership 25.00

TOTAL ENCLOSED \$ _____

Please make checks out to the *New York State Wetlands Forum, Inc.* EIN# 14-1723859. Mail checks and this form to *New York State Wetlands Forum, Inc., P.O. Box 1351, Latham, NY 12110-1351*, or fax to 518-783-1258.

Hotel Information: The Holiday Inn Syracuse/Liverpool, 441 Electronics Parkway, Liverpool, NY 13088 is conveniently located off Exit 37 of I-90. Please contact the hotel by March 20 to receive reduced room rates of \$70 single and \$80.00 double. Reservations may be made by calling 315-457-1122.

Availability of Scholarships

Thanks to a grant from the US EPA Region 2, numerous scholarships are available for this meeting.

Preference will be given to those individuals who:

- represent county or local municipal governments and are first-time attendees;
- represent county or local municipal governments with a presentation or poster session; or
- are college students with a presentation or poster session.

“THANK YOU”

The New York State Wetlands Forum is pleased to recognize the individuals who provided their membership support in 2001. Without their support, our ability to serve the wetland community would be greatly compromised. If you, too, would like to show your membership support, look for membership information in the mail or fill out and return the enclosed membership form with your dues of \$25.00. Thank you for helping to make the Forum what it is today!

Louis Alexander	Sally Daly	Richard Israel	Norbert Quenzer, Jr.
Eileen B. Allen	Mary Davidson	John Jablonski	Bob Radell
Deborah V. Anderson	Larry Day	Martin Janda	Frances Reese
Joachim Ansoerge	Christine DeLorier	Barbara Kendall	Barb Reuter
Gregory Austin	Marshall W. Dennis	Gary Kleppel	Deborah Roberts
Bruce Baird	Michael D. Difabio, Esq.	Donald Knezick	George Rodenhausen
Jeffrey Baker	Sandie Doran	Carolyn Konheim	Paul Romano
Bryan Bancroft	Robert E. Doscher	Robert Kosior	Sara Rubin
Eugenia M. Barnaba	Terry Doss	Diane Kozlowski	Anthony Russo
Mark H. Bayer	Robert Dunn	John Lortie	Paul Russo, Jr.
Barbara Beall	Lynn Dupuis	Michael Losito	Walt Scheible
Deborah Beck	Marge Elder	Amanda Ludlow	Bernard E. Schmelz
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Charles Benton	Anthony Esposito	Stephen Macavery	Karl Schoeberl
Geoff Benway	William E. Eustance	Mark Magnone	Anne Secord
Brett Berkley	Elizabeth H. Evans	Charles H. Maine	Stephen M. Seymour
Kevin M. Bernstein, Esq.	Dave Fallon	Teresa Mangan	John Shea
Peter E. Black	Mark Fiely	Serese Marotta	Kit Sheehan
Jeff Bohner	Michael S. Fishman	Richard Marx	Julian Shepherd
Charles W. Bowman	Michael Fitzgerald	Marco Marzocchi	Scott D. Shupe
Lynn Braband	Bill Foster	Charles Mason	Robert Singer
Jennifer Brady-Connor	Edward Frantz	Maria Maybee	William V. Slade
Lynn Brass-Smith	S. Christine Fredette	J. Murray McHugh	Richard Smardon
Barbara Brewer	Deborah A. Freeman	Kevin Mcloughlin	Paula Smith
Thomas E. Brewer	Jack Fritz	Joseph McMullen	Jill Snyder
Richard Brickwedde	Barry Fry	Jeff Melworm	Robert Snyder
Patricia Pauli Brooks	Paul Fuhrmann	Edward Michalenko, PhD	Joy Squires
Roy Budnik	Richard P. Futyma	Deana Miller	Susan Stiner
Christopher Bukowski	Patricia Gabriel	Catherine Mills	John Strough
Pauline E. Burnes	Karen Gaidasz	Bethann Mock	Timothy Strout
John Caffry	Jane Geisler	Dennis Money	Janet Thigpen
David Carpenter, Esq.	Beth Gelber	Les Monostory	Artie Tompkins
Charles Carvel	Larry Goehring	Paul H. Muessig	David Tompkins
Douglas Cerretani	Frank Getchell	John Munsey	Jeff Trulick
Vincent P. Chebetar, Jr.	Linda Gibbs	Robert Myers	Virginia Ursutti
Bill Christner, Jr.	Frederick Gilbert	Sheila Myers	James Utter
Mary Clements	Drayton Grant	Jean E. Nagel	Randy Vaas
Robert Clifford, Jr.	Michael A. Greco	Brandee Nelson	Rene VanSchaack
Stephen Coleman	David Hanny	Sally Newman, PhD	Philip Von Bargaen
Janet Collura	Charles R. Harman	Michael Nowicki	Roland R. Vosburgh
Thomas Connare	David C. Hatch	Michael O'Reilly	Cindy Westerman
Linda Cooper	Danielle Hauaniell	George L. Parker	Jeff Williams
Kim Copenhauer	Kurt Heiss	Randall Parsons, AICP	Kyle Williams
Candace E. Cornell	Jennifer Herne	Jim Petreszyn	Donald Wilson
Graham Cox	William E. Hopkins	Jay Pokines	Jeffrey Young
Clark Cummings	Greg Hunt	Michael Priano	Jeffrey Zappieri
Raymond Cummings, Jr.	Janet Hunter	Peggy Pyke-Thompson	

CALENDAR OF EVENTS

[Cont'd. from page 6]

MAY 2002

- 7-8 May. Call for Papers: Brownfield Developments – Where Water Meets Land.** NavCanada Conference and Training Centre, Cornwall, Ont. Canada. For more info visit <http://www.riverinstitute.com/html/conference.html> or <http://www.riverinstitute.com/html/location.html>.
- 9-10 May. Call for Papers: 29th Annual Conference on Ecosystems Restoration and Creation.** Tampa, Florida. This is a national forum for the exchange of results of scientific research in the restoration, creation and management of freshwater and coastal wetland systems, as well as upland systems. Topics include freshwater and marine wetland systems; upland systems; marsh, mangrove and seagrass restoration; upland and mixed ecosystem restoration; mitigation, permitting and regulatory policies; mine reclamation; and management techniques. For more information, contact F.J. Webb, Hillsborough Community College, Plant City Campus, 1206 North Park Road, Plant City, FL 33566. (813) 757-2104; E-mail: fwebb@hcc.cc.fl.us or Patrick Cannizzaro at pcannizzaro@hcc.cc.fl.us.
- 13-15 May. AWRA Spring Specialty Conference: Coastal Water Resources.** New Orleans, LA. Join coastal and water resources engineers, scientists, and managers to address a wide range of interdisciplinary concerns about coastal, estuarine, and inland systems. For complete details visit <http://www.awra.org/meetings/Louisiana2002/>.
- 19-22 May. The Coastal Society 2002 Conference: Converging Currents: Science, Policy and Culture at the Coast.** 18th International Conference. Moody Gardens Hotel, Galveston, TX. For additional information visit <http://www.thecoastalsociety.org/tcs18/> or email coastalsoc@aol.com.
- 20-23 May. 3rd National Water Monitoring Conference – Building a Framework for the Future.** Lake Monona, Madison, Wisconsin. Designed to foster interaction, information sharing, and innovation among colleagues involved in all aspects of water monitoring, including a focus on biological monitoring and wetland concerns. View the call for papers and information on developing and submitting an abstract at <http://www.nwqmc.org>.
- 27 May - 21 June. Summer Institute in Coastal Management 2002.** A month-long, intensive training for coastal management professionals conducted by the Coastal Resources Center (CRC) at the University of Rhode Island. Participants learn tools and techniques which aid them in successfully handling the multifaceted challenges found when dealing with the coast. For more information visit http://crc.uri.edu/train/SI2002_app.html.

JUNE 2002

- 2-7 June. Society of Wetland Scientist's 23rd Annual Conference – Wetland Linkages: A Watershed Approach.** Lake Placid Resort Hotel & Golf Club, Lake Placid, NY. The focus is on how wetlands are integrated into initiatives on managing watersheds, as well as how wetlands are inextricably linked to energy, economic and ecological issues. In addition, the technical program has been established to focus on those wetland issues in the forefront of the news of today. Special symposia already developed include "Isolated" Wetlands, Invasive Species, and Planning, Design and Construction Methods for Wetland Mitigation and Restoration. For conference updates visit <http://www.sws.org/lakeplacid/>.
- 23-28 June. ASFPM Annual Conference: Breaking the Cycle of Repetitive Flood Loss.** Phoenix, AZ. Convened for all persons who work toward reducing flood losses in the nation and the world. The Call for Abstracts is posted at http://www.floods.org/PDF_files/phx_call.pdf.

SEPTEMBER

- 24-26 September. Call for Papers: Chesapeake Bay Watershed Restoration Conference: Riparian and Wetland Stewardship.** Omni Inner Harbor Hotel, Baltimore, Maryland. Vital efforts are underway in the Chesapeake Bay region to work at a watershed level to protect and restore wetland and riparian habitats. This conference will allow people to share critical information regarding watershed conditions, riparian and wetland restoration science, and the tools and techniques used for watershed restoration. Much information applies to wetlands nationwide. For details visit www.potomac.org.
- 29 September - 2 October. NY Planning Federation 2002 Annual Conference.** Saratoga Springs, NY. Updates will be posted to <http://www.nypf.org/institute.html>.

OCTOBER

- 10-13 October. AIA/NYS 2002 Annual Convention.** Buffalo Hyatt Regency Hotel. The Annual Meeting of the New York State Association of Architects. For additional information visit <http://www.aianys.org/>.
- 21-23 October. Conference 2002 – The Race for Clean Water.** Downs Hotel and Conference Facility, Dover, DE. The Sediment and Stormwater Management Program of Delaware's Department of Natural Resources and Environmental Control (DNREC), Division of Soil and Water Conservation announces a call for papers. The Conference will focus on topics related to Erosion, Sediment and Stormwater Management as well as related resources issues. For abstract submittal details and Conference information, please visit the DNREC Sediment and Stormwater Web Page at <http://www.dnrec.state.de.us/dnrec2000/Divisions/Soil/Stormwater/StormWater.htm>.

Although the information in this document has been funded wholly or in part by the United States Environmental Protection Agency under assistance agreement X992664-01-0 to the New York State Wetlands Forum, Inc., it may not necessarily reflect the views of the Agency and no official endorsement should be inferred.

HOMEOWNERS CHALLENGE CORPS ISOLATED WETLANDS DETERMINATION – SUCHYNA ET AL. V. U.S. ARMY CORPS OF ENGINEERS ET AL.

— Chuck Rosenburg

A civil action was filed October 12, 2001 by several homeowners (Thomas and Ann Suchyna et al.) against the U.S. Army Corps of Engineers and Niskayuna Square, LLC, the owner of a 25-acre proposed commercial development site in the Town of Amherst, Erie County, New York. The complaint, which was filed in U.S. District Court (Western District of New York, Case No. 01 CV 0763), challenges a June 29, 2001 Corps' determination that it lacks jurisdiction under Section 404 of the Clean Water Act over the wetlands on the site. The Corps described the wetlands as isolated, non-navigable, intrastate waters. In their letter, the Corps' referenced the January 9, 2001 Supreme Court decision in the case of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*.

The Plaintiffs and their attorney, David J. Seeger Esq., presented two claims for relief in this case. The first claim contends that the Corps' determination that the wetlands in question are non-jurisdictional is in error because it disregards the Clean Water Act-regulated tributaries that extend directly into the wetlands. The Plaintiffs argue that the wetlands are directly connected hydrologically to the Town of Amherst Drainage Ditch No. 18 into which they directly discharge substantial quantities of surface water through intermittent streams. The stream flow is channeled into the town ditch through culverts, forming a continuous hydrological connection across an adjacent road (i.e., Wehrle Drive) right of way. Drainage Ditch No. 18 constitutes "waters of the United States" by reason of being tributary to streams that ultimately flow into Ellicott Creek (one of the principal Erie County waterways) and from there into Tonawanda Creek and Lake Erie, which are navigable waters.

The Plaintiffs further maintain that a direct hydrological connection between the wetlands and waters of the United States has occurred historically. Evidence for the historical connection includes:

- topographic elevations indicating surface water drainage from the wetlands into Drainage Ditch No. 18 and other waters of the United States,
- a continuum of hydric soils extending through the wetlands and across Wehrle Drive into Drainage Ditch No. 18,
- the historical existence of wetlands on the opposite side of Wehrle Drive, straddling Drainage Ditch No. 18, and

- USGS topographic maps and aerial photography spanning many decades that reveals flow from the wetlands into tributaries including, but not limited to, Drainage Ditch No. 18.

The Plaintiff's second claim for relief maintains that the Corps' non-jurisdictional determination is in error because it disregards that Drainage Ditch No. 18 constitutes Clean Water Act-regulated waters and that the wetlands in issue are adjacent to Drainage Ditch No. 18. The wetlands are "adjacent" within the meaning of the regulation because they are separated from other waters of the United States (i.e. Drainage Ditch No. 18) only by a man-made barrier (i.e., Wehrle Drive). The wetlands have a direct hydrological connection to Drainage Ditch No. 18 through culverts channeling the wetlands' surface water discharge a short distance along the edge of Wehrle Drive and then underneath Wehrle Drive, directly into Drainage Ditch No. 18.

The Plaintiffs assert that the Corps' determination was arbitrary and capricious, affected by errors of law, and otherwise violative of the Administrative Procedure Act. Further, they argue that it is inconsistent with numerous administrative and judicial decisions related to the jurisdiction of waters of the United States. On both the first and second claims for relief, the Plaintiffs asked the Court to declare the Corps' determination null and void and to enjoin Niskayuna Square, LLC from placing fill within the wetlands, unless and until a Section 404 permit is issued by the Corps.

The wetlands that are the focus of this case are forested wetlands that are flooded, during a typical year, into early summer. The size of the largest wetland on the site has been disputed. The most recent wetland delineation, performed by the landowner's consultant, determined it to be 6.92 acres.

In proceedings not at issue in the lawsuit are the homeowners' attempts to have the New York State Department of Environmental Conservation (NYSDEC) recognize State jurisdiction over the wetlands. NYSDEC determined the current size of the largest wetland to be 9.48 acres, based on the state wetland delineation methodology. The NYSDEC has not designated the wetland to be state-regulated Freshwater Wetlands, since it calculated the total area of wetlands currently to be less than 12.4 acres, which is its usual jurisdictional threshold. Thomas and Ann Suchyna solicited the NYSDEC in

August 2001 to extend Freshwater Wetlands jurisdiction to the wetlands on the site due to "unusual local importance", citing Section 24-0301(1) of the Freshwater Wetlands Act and 6NYCRR 664.7(c). Of particular significance is the wetland's role in protecting the downstream segment of Ellicott Creek from flooding and water quality problems that have been sustained for many years. As of January 18, 2002, the NYSDEC had not formally replied to the request.

It is noteworthy that the wetlands referenced in this case were identified in a 1983 Grant Agreement between the Town of Amherst and the United States Environmental Protection Agency (USEPA). Grant funds of approximately \$3.9 million were awarded to the Town for the purpose of financing the majority of the costs of constructing certain wastewater treatment facilities in southeast Amherst. The Grant Agreement included a restriction that, for a period of 50 years, no sewer hook-ups or other connections to the sewage treatment facilities would be permitted for any buildings or facilities constructed on vacant parcels containing regulated wetlands or the 100-year floodplain, unless approved in writing by the USEPA Regional Administrator. After a period of less than 20 years, the wetlands that are the subject of this lawsuit are the last remaining wetlands in southeast Amherst that were to be "protected" by the USEPA moratorium.

An update regarding the status of this interesting legal case will be provided in the next issue of *The Forum*.



(COOPERATIVE STREAM MANAGEMENT EFFORTS IN THE CATSKILL REGION)

[Cont'd. from page 7]

Prattville into the Schoharie Reservoir. Since 1999, more than two miles of the Batavia Kill have been reshaped to stable channel dimensions, and densely planted with riparian vegetation on the banks and floodplain.

— Big Hollow

In fall 2001, a half mile of stream was restored at Big Hollow on the Batavia Kill. Restoration efforts involved re-aligning a



Big Hollow Project Site After Construction: Volunteers dig the trench,

severely eroded channel to include meanders, and re-grading its slope to restore shallow riffles and deeper pools that provide trout habitat. Rock structures were installed to protect the stream banks as they re-vegetate. Bioengineering, the planting of native riparian vegetation on the banks and in the floodplain, is critical for maintaining long-term channel stability, and restoring a healthy stream ecosystem.

This project was designed by the Greene County Soil and Water Conservation District, and constructed by a local contractor under District supervision. Following construction and planting, the Big Hollow and other restored sites will be monitored for several years to document improving physical and biological conditions, and assess the need for structural adjustments.

Volunteer planting efforts provide an excellent opportunity for watershed education and community participation. Weekend events coordinated by local chapters of Trout Unlimited, and an upstate-downstate educational partnership with New York City

and watershed high school students brought over 100 individuals to the Big Hollow site in November 2001. The volunteers assembled and installed 2000' of live willow fascines – bundles of branches that are placed in shallow trenches along the bank, willow stakes, and thousands of rooted alder, poplar, and dogwood seedlings on four acres of the floodplain.

The NYSWF encourages dialogue between wetlands and stream practitioners to promote a better understanding of the relationship between riparian and wetland systems in watershed health. Stream and riparian restoration efforts will continue to be offered in the mix of sessions and field trips at Annual meetings.

For more information about the Batavia Kill and other cooperative stream

restoration efforts in Greene County, please visit the Greene County website: www/geswcd.com.



And install a live willow fascine:

Photos courtesy of Greene County SWCD

For more information about ongoing Stream Management projects in the NYC watershed, please call NYCDEP's Stream Management Program at (845) 340-7512.

(THE REISSUANCE AND MODIFICATION OF NATIONWIDE PERMITS)

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waiver, the applicant must first notify the ACOE that the applicant would like to exceed the 300 linear foot limitation on impacts to intermittent streambeds. If the ACOE determines that the activity complies with the other terms and conditions of the NWP and that the adverse environmental affects on the aquatic environment will be minimal, the ACOE may waive the prohibition and authorize impacts exceeding 300 linear feet.

The ACOE also modified some of the General Conditions. For example, the ACOE revised General Condition 19 (mitigation) to allow a case-by-case waiver of the one-for-one mitigation requirement. The ACOE believes the one-for-one acreage requirement is too restrictive and does not allow it to mitigate aquatic impacts to streams and other non-wetland aquatic resources. However, in response to public comments, the ACOE modified its August proposal to add a requirement that each District Office achieve at least one-for-one mitigation of all wetland impacts on an acreage basis for the District as a whole. According to the ACOE, this change reinforces and clarifies its commitment to the "no net loss" of wetlands and will allow it to require mitigation for project impacts that best protect the aquatic environment on a watershed basis.

The ACOE modified General Condition 26 (fills within the 100 year flood plain) to require all projects authorized by NWPs to comply with any applicable Federal Emergency Management Agency ("FEMA"), state or local floodplain management requirements. However, the ACOE deleted the notification requirement for compliance. In other words, although the ACOE requires compliance with FEMA, it no longer requires documentation of such compliance.

Finally, the ACOE added General Condition 27 establishing a construction period. Under the existing NWPs, if a project obtained a NWP verification near the expiration date of the NWP, the permittee could not necessarily rely on that permit to continue in effect through the lengthy and costly process of developing and planning the project. This new condition allows the ACOE to extend the authorization of an activity by a NWP for a reasonable period beyond the expiration of the NWP to allow for project completion.

Environmental groups and other federal agencies, including the Environmental Protection Agency, have expressed opposition

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SUMMARY: WETLAND CAPACITY BUILDING FOR LAND TRUSTS, GENEVA, NY

About 50 people attended the “Wetlands: Capacity Building for NY Land Trusts” in Geneva on a beautiful November day. The workshop brought together land trust staff and volunteers to share and learn about wetland acquisition, management, and monitoring experiences via presentations, round table discussions, and written materials. Topics addressed included a wetlands primer, wetland acquisition criteria, beaver management, partnerships with state, federal and local governments, monitoring methods, public access, invasive species, and restoration.

Joseph McMullen led a lunch-time field trip to a local wetland mitigation site. The 1.5 acre wetland was created by a new manufacturing facility in the city of Geneva in spring of 1997 adjacent to an existing state-regulated wetland. Design features of the wetland related to the stormwater management plan were presented, and acquisition of such areas by Land Trust groups was discussed. Participants asked questions about the pros and cons of constructed wetlands and the long-term management issues constructed wetlands might pose.

General suggestions and ideas generated throughout the day from participants at the workshop included:

- Acquire continued financial support for projects like the Cowaselon Creek Watershed Area muckland project.
- Develop a state-wide pooled restricted fund for fee-title wetland acquisition – What would it take politically or otherwise to pool the funds that DEC, ACOE, and FWS get from Natural Resource Damage?
- Develop a list of questions to present to a developer before accepting a mitigation/created wetland.
- Develop a set of case studies to show where mitigation/created wetland acquisition has been positive for both the developer and the receiving organization.
- Develop a general formula to determine how much stewardship funds are needed to support a created/mitigation wetland.
- Lobby surveyors to get the land trust in the picture sooner, before expensive plans and drawings are generated, so that the land trust can help create a contiguous parcel that they’d be more willing to accept.
- Have a session on wetlands at the Land Trust Alliance New York annual meeting.

- Have a session on Land Trusts and what they do at NYSWF annual meeting.

Deborah Roberts developed a set of draft wetland acquisition criteria for discussion purposes at the workshop. After the group reviewed the draft criteria, some practical realities were brought to the forefront. It was emphasized that wetland acquisition criteria were accurate and would be quite useful if the land meeting the criteria was available for acquisition. Also, it was noted that a look at the historical uses or impacts on the wetland would be important to help avoid past environmental hazards or at least negotiate remediation funds. If the criteria were weighted, more weight should be given to purity of wetland components. If professional assistance were available, it would be useful to use HGM or another assessment method to look at the wetland in the landscape context.

A fundamental issue that affects all decisions a non-profit land trust makes is: is the funding available to support this property in perpetuity? If it benefits the community, will people fundraise for it? If lots of money is offered, is it still worthwhile to accept a low-quality wetland with many management issues? Should there be different criteria for fee acquisition, a wetland donation without stewardship dollars, or a wetland donation with lots of funds? This seems to be the working reality for most land trusts throughout the state. How about the philosophy of trying to acquire now and worry about stewardship funds later or turn away good projects for poorer ones that come with stewardship funds attached?

Another topic that was discussed was wetland mitigation banking and wetland mitigation in general. As is commonly known, a wetland mitigation bank must be protected in perpetuity, so it seems fitting that an organization that protects land in perpetuity seems a likely partner. Many land trusts throughout the state have been approached as potential partners in mitigation banking projects or to receive wetland mitigation sites or funds. Some general suggestions that were raised at the workshop included garnering additional support for use of in-lieu-fee funds for wetland acquisition. Developing guidance to evaluate mitigation offers would be useful. It was also suggested that a study be developed to determine how often Land Trusts are being approached in mitigation projects, to prove or disprove the value of the land trust in wetland mitigation activities. Since the Genesee Land Trust was present to discuss their experience with the Rochester

Cornerstone wetland mitigation bank, it was suggested that they write down the process they went through to come up with the acquisition funds that they requested. A series of case studies might also be useful on the fate of mitigation projects that land trusts accepted or denied. It might be interesting to look at other states in the glaciated northeast to determine liabilities experienced elsewhere.

The 80-100 land trust organizations within the state of New York, like most nationwide, are continually struggling to maximize conservation efforts with limited funds. This project enabled those outside the land trust community to learn more about land trust needs, goals, and processes to form more effective partnerships. To learn more, please visit the New York State Wetlands Forum web site or e-mail Jennifer Brady-Connor at jennifer@aswm.org.

NOTICE OF GRANT AVAILABILITY FOR DAM REMOVAL AND FISH PASSAGE PROJECTS FROM NOAA

American Rivers is seeking proposals for community-based river restoration grants as part of its new partnership with the National Oceanic and Atmospheric Administration (NOAA) Community-Based Restoration Program. The grants are designed to provide support for local communities that are using dam removal or fish passage to restore and protect the ecological integrity of their rivers and improve freshwater habitats important to migratory (anadromous) fish. Grants will be limited to projects in the Northeast, Mid-Atlantic and California. Successful applicants will be given non-renewable grants to assist in the technical application of fish passage or dam removal. Applications will be considered in two cycles in fiscal year 2002 with deadlines falling on December 1 in 2001 and April 1 in 2002. Check this web site for more information: www.amrivers.org/feature/restorationgrants.htm. For more information on the NOAA Community-Based Restoration Program (CRP) see: www.nmfs.noaa.gov/habitat/restoration/community/index

The next deadline is April 1, 2002.

Robert M. Nyman, Director, New York – New Jersey Harbor Estuary Program Office, U.S. Environmental Protection Agency, 290 Broadway, 24th Floor, New York, NY 10007; 212-637-3809 Phone; 212-637-3889 Fax.

EPA ANNOUNCES AVAILABILITY OF TECHNICAL GUIDANCE ON MEASURES TO PROTECT AND RESTORE WETLANDS AND RIPARIAN AREAS FOR THE ABATEMENT OF NONPOINT SOURCE POLLUTION

EPA has developed and is requesting comment on draft technical guidance for protecting and restoring wetlands and riparian areas from sources of nonpoint pollution and using vegetated treatment systems (vegetative filter strips and constructed wetlands) for controlling nonpoint source pollution. This guidance is intended to provide technical assistance to state program managers and others on the best available, economically achievable means of protecting and restoring wetlands and riparian areas from nonpoint source pollution. Additionally, this guidance provides technical assistance for state program managers on the use of vegetated treatment systems to control nonpoint source pollution. The guidance presents many examples of how to protect and restore the many functions of wetlands and riparian areas from the impacts of nonpoint source pollution. The guidance concludes with a variety of illustrations for using vegetated treatment systems to control sources of nonpoint pollution.

The draft technical guidance is entirely consistent with the Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Water (EPA 840-B-92-002), which EPA published in January 1993 under the authority of the Coastal Zone Act Reauthorization Amendments of 1990. The draft technical guidance continues to focus on the protection and restoration of wetlands and riparian areas

and the use of vegetated treatment systems to control nonpoint sources of pollution identified for the 1993 coastal guidance by EPA in consultation with a number of other Federal agencies and other leading national experts.

Specifically, the guidance identifies management measures for the following:

- i. The protection of wetlands and riparian areas.
- ii. The restoration of wetlands and riparian areas.
- iii. Vegetated treatment systems.

The draft document does not supplant or replace the requirements of the 1993 document. It enhances the technical information contained in the 1993 coastal guidance to include inland as well as coastal context and to provide updated technical information based on current understanding and implementation of best management practices (BMP) controls.

Written comments were due to EPA by February 4, 2002.

The complete text of the draft guidance is available on EPA's Internet site on the Nonpoint Source Control Branch's homepage at <http://www.epa.gov/owow/nps>. Copies of the complete draft can also be obtained in electronic or hard copy format by request from Chris Solloway at the above address, by E-mail at Solloway.Chris@epa.gov, or by calling (202) 260-3008.

(THE REISSUANCE AND MODIFICATION OF NATIONWIDE PERMITS)

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to the revisions. These groups claim the proposal substantially weakens protection of the nation's wetlands and streams and would result in a net loss of thousands of wetland acres. Specifically, the environmental groups believe that the reissued permits signal the end of the "no net loss" policy. Industry and development groups believe that the proposal both strengthens and relaxes restrictions under certain conditions. These development groups note that the flexibility provisions are a clear sign that the ACOE is taking efforts to lessen the permitting burden.

Finally, the expiration and effective dates for the current and reissued NWP's must be clarified. For all current NWP's (except for NWP's 3, 7, 12, 14, 27, 39, 40, 41, 42, 43 and 44), the expiration date is February 11, 2002. The expiration date for current NWP's 3, 7, 12, 14, 27, 39, 40, 41, 42, 43, and 44 is March 18, 2002. The NWP's published in the January 15, 2002 Federal Register become effective on March 18, 2002 and expire on March 18, 2007. This means that there will be a five week period during which only NWP's 3, 7, 12, 14, 27, 39, 40, 41, 42, 43 and 44 will be in effect.

¹ The August proposal recommended modifications to NWP's 14, 21, 27, 31, 37, 39, 40, 42, and 43, and to General Conditions 4, 9, 13, 19, 21 and 26.

(FINDING THE WETLAND EDGE)

[Cont'd. from page 7]

(1979) start their definition of wetlands with "Wetlands are lands transitional between terrestrial and aquatic systems...".

The problem in these situations is how to deal with this transition area under the wetland laws? My answer is that we have to be experienced and realistic enough to recognize when these situations occur, then use good professional judgement to establish a wetland edge that is fair. Fair to the land owner, the applicant, the resource agency who is charged with regulating activities within the resource, fair to the law, and fair to the resource itself. I guess this may not always be easy to do, but I think it can be worked out, especially with good experienced delineators.

This is not to say that there is always a broad transition zone where the wetland boundary may be here or there. Sometimes the wetland boundary is very distinct.

I hope to see you along the wetland edge this year. At least where I think it should be.

YOU OUGHT TO BE IN PICTURES – WETLAND PICTURES THAT IS

The New York State Wetlands Forum has been asked by the Society of Wetland Scientists to prepare a short powerpoint slideshow of the wetlands of New York State to be shown in the opening ceremonies of the SWS annual meeting to be held in Lake Placid in June. The Forum would like to try to have the grand unveiling of the powerpoint slideshow at the April annual meeting in Liverpool, and after the SWS meeting, would post the slide-show on the Forum Web Site. Therefore, the Forum is seeking digital images of wetlands, people looking at wetlands, as well as interesting factoids about New York State wetlands for this presentation. For example, did you know that the Cowaselon Creek Watershed Area near Canastota in Madison County has one of the highest concentrations of Wetland Reserve Program sites in the Country?

- Please send your interesting facts and digital images (as jpeg files) either on a CD Rom through the mail (if you have a number of images to send) or via an e-mail attachment (for one or two images).
- Please only send images over which you have the authority to release their use.
- Please include your name, a statement of permission for the Forum to use the image in the powerpoint presentation at the SWS meeting and on the Forum web-site
- Please include a description of where the photo was taken (including the county), and what the photo shows.

Send to Barbara Beall, The Chazen Companies, 110 Glen Street, Glens Falls NY 12801 or bbeall@chazencompanies.com

You will be given credit for your photos in the powerpoint presentation. Thank you for your help.

DUCKS UNLIMITED EXECUTIVE SUMMARY – 404 REPORT – THE SWANCC DECISION: IMPLICATIONS FOR WETLANDS AND WATERFOWL

— Mark Petrie, Ph.D., Jean-Paul Rochon, B.Sc., Gildo Tori, M.Sc., Roger Pederson, Ph.D., Tom Moorman, Ph.D.

On January 9, 2001 the U.S. Supreme Court issued a decision, Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers. The decision reduces the protection of isolated wetlands under Section 404 of the Clean Water Act (CWA), which assigns the U.S. Army Corps of Engineers (Corps) authority to issue permits for the discharge of dredge or fill material into “waters of the United States.” Prior to the SWANCC decision, the Corps had adopted a regulatory definition of “waters of the U.S.” that afforded federal protection for almost all of the nation’s wetlands.

The Supreme Court also concluded that the use of migratory birds to assert jurisdiction over the site exceeded the authority that Congress had granted the Corps under the CWA. The Court interpreted that Corps jurisdiction is restricted to navigable waters, their tributaries, and wetlands that are adjacent to these navigable waterways and tributaries. The decision leaves “isolated” wetlands unprotected by the CWA. These wetlands are very significant to many wildlife

populations, especially migratory waterfowl. This report examines the possible implications to wetlands that are important to waterfowl across the Nation.

We considered other state and federal laws and regulations that would protect isolated wetlands in the absence of Section 404. The most significant Federal provision is Swampbuster, a provision of the Farm Bill that excludes agricultural producers from receiving federal subsidies if they destroy wetlands for crop production. We considered how factors responsible for wetland loss varied regionally. We especially focused on areas that are continentally important to waterfowl and we generally assessed the consequences for the nation’s wetlands as a whole.

East Coast and Great Lakes states generally have laws that offer moderate to strong protection of isolated wetlands even in the absence of Section 404, although there are exceptions. Protection is weak to non-existent in the Mississippi Alluvial Valley (MAV) and Prairie Pothole Region (PPR). However, the

majority of isolated wetlands located in these regions occur on agricultural land where most producers are enrolled in Farm Bill programs and wetlands are afforded some protection under Swampbuster. In the western half of the country state wetland protection laws are generally weaker and a high percentage of wetlands are found on non-agriculture land.

In general, isolated wetlands play a minor role in meeting the needs of waterfowl in areas that are important for migration and wintering. In contrast, the SWANCC decision could have significant consequences for breeding waterfowl, especially in the PPR and migrating waterfowl, especially in the Rainwater Basin. Within these states, Section 404 and Swampbuster represent complimentary wetland protection programs that have proven highly effective in reducing wetland loss. As a result, Swampbuster now remains as the only effective legal or regulatory deterrent to wetland drainage.

To download the complete report visit http://www.ducks.org/conservation/404_report.asp.

ANNUAL MEETING AGENDA
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