

The Forum

NEW YORK STATE WETLANDS FORUM NEWSLETTER

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SACKETT V. EPA: CHALLENGING THE SCOPE OF THE EPA’S AUTHORITY

— Kathleen M. Bennett

On January 9, 2012, the Supreme Court heard arguments in *Sackett v. EPA*, a case challenging the scope of the EPA’s authority to enforce federal environmental protection laws against private land owners. The narrow issue before the Court is whether a property owner who is served with an “administrative compliance order” for violating the Clean Water Act (“CWA”) has a due process right to challenge EPA’s findings in court.

The case arose when Chantell and Michael Sackett, Idaho land owners, filled in one-half acre of their property with dirt and gravel to build a house. The Sacketts’ activities prompted EPA to issue an “administrative compliance order” classifying the Sacketts’ land as a wetland, subject to the CWA, and alleging that the Sacketts violated the CWA by filling their property without first obtaining a permit. The Sacketts sought a hearing in front of the EPA to challenge the facts supporting the compliance order. When the hearing was denied, they filed the instant lawsuit alleging that the denial violated their due process rights under the United States Constitution.

In general, the EPA has three civil enforcement options when it identifies a CWA violation. First, it can impose an administrative penalty, which entitles the alleged violator to “a reasonable opportunity to be heard and to present evidence.” Additionally, the public is entitled to comment, and any assessed penalty is subject to immediate judicial review. Second, the EPA can initiate a civil enforcement action in federal district court for the assessment of civil penalties. Third, the EPA can issue, as it did here, an “administrative compliance order.” A compliance order is a document served on a violator that sets forth the nature of the violation, specifies a time for compliance, and provides that a failure to comply could result in the imposition of sanctions. Importantly, a compliance order is not self-executing and

the EPA is not authorized to impose fines solely based on disobedience of the compliance order. To enforce a compliance order, the EPA must bring an enforcement action in federal court (the second civil enforcement option identified above). If the EPA pursues an enforcement action, disobedience of a prior compliance order can expose the alleged violator to court-imposed civil penalties for violations of the CWA. The compliance order at issue here required the Sacketts to remove the fill material and restore their land to its original condition, or risk up to \$32,500 per day in fines.

The heart of the Sacketts’ argument is that the compliance order immediately allows the EPA to control the use of their property; and, therefore, it should be judicially reviewable prior to the EPA filing an enforcement action in federal court pursuant to the Administrative Procedures Act (“APA”), which broadly provides for judicial review of administrative action. While the Sacketts could choose to disobey the order thereby prompting the EPA to pursue an enforcement action, they argue that the threat of fines for non-compliance is a “Sword of Damocles” that makes disobedience an unreasonable alternative and effectively mandates compliance with the terms of the order.

Both the district court and the Ninth Circuit Court of Appeals rejected the Sacketts’ argument. Citing similar cases from other circuits, the Ninth Circuit concluded that the structure of the CWA, its objectives, its legislative history, and the nature of the administrative action involved all preclude pre-enforcement judicial review, despite the provisions of the APA. Principally, the Ninth Circuit reasoned that authorizing pre-enforcement judicial review of compliance orders would eliminate the EPA’s choice of remedies by enabling those subject to a

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Mission:

The New York State Wetlands Forum is a non-advocacy corporation 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.

MESSAGE FROM THE CHAIR

Hello everyone. We're in the middle of planning our Annual Conference, to be held on March 27 and 28th at the Radisson Hotel in Utica. We look forward to a great event at this central location.

The layout of the conference will remain mostly the same as past years. The first day will be a series of breakout sessions on wetland-related topics. This year, the second day will differ slightly with an early morning (8:30 to 11:00) all-attendees session on Marcellus shale and related issues. Following the Marcellus session, we will hold an hour of legislative and regulatory updates.

Please see the agenda included in this newsletter for speakers and topics. We will have a diverse conference with topics focusing on Marcellus shale, emergency situations, wetland mitigation and restoration, aquatic passage, and we have some great speakers on recent legislative actions with a round-table question and answer period.

We are encouraging students to attend the Annual Conference. We are offering a waived registration fee for students who submit a poster for the Student Poster Session. Get your posters entered!

The "Naturalist Contest" will be especially difficult this year, with the early spring timeframe, good luck! The field trips will be great- there will be a focus on the wildlife passage in Utica, the Onondaga Lake restoration projects, and a tour of Moss Island in Little Falls.

As an evening networking activity, we will be featuring a tour of the Saranac Brewery, with a little "sampling". The event will be held on the night of the 27th.

Please enjoy the agenda for the conference and we'll see you in Utica next month!

Melissa Toni, Chair



Melissa Toni



KW * 1997

Red Crossbills

THE NEXT GENERATION OF MITIGATION

— Charlotte Brett

“The Next Generation of Mitigation: Linking Current and Future Mitigation Programs with State Wildlife Action Plans and Other State and Regional Plans,” was published by the Environmental Law Institute and The Nature Conservancy in 2009. The report can be found online at www.eli.org.

With annual compensatory mitigation expenditures in the U.S. range of \$3.8 billion a year and trends projecting extensive public and private infrastructure investments over the next decade, there are enormous opportunities for mitigation to be harnessed to protect and restore ecosystems on a landscape level.

The Environmental Law Institute and The Nature Conservancy propose that we consider a transition from the current project-by-project approach to mitigation to the next generation of mitigation, which they describe as mitigation that “move[s] beyond what is often a piecemeal response, to a more integrated, consistent, and pro-active approach guided by landscape and watershed planning.”

Key to the next generation strategy is use of State Wildlife Action Plans, other federally recognized conservation plans, and state or regional plans – such as New York State’s Open Space Plan – as the framework for mitigation planning. These plans can be used to direct mitigation efforts toward protection of important habitats (through avoidance and minimization) and restoration of degraded habitats (through compensation) based on landscape or watershed level goals that have been carefully established and vetted through agency and public coordination processes. “Such an approach will deliver more effective conservation outcomes for wildlife, natural landscapes, and the ecosystem services on which communities depend. It will also help business by improving the basis for project planning, increasing mitigation efficiency, and reducing uncertainty and risks,” note the authors.

Mitigation is one of many important topics for presentation and discussion at this upcoming year’s conference in March. If you have thoughts on the next generation approach proposed by ELI and TLC, or experience using this approach for mitigation planning, consider joining the discussion as a presenter or participant.

Q&A with Jessica Wilkinson, Environmental Law Institute Co-author of “The Next Generation of Mitigation”

Your white paper takes a comprehensive look at mitigation programs and suggests numerous ways that they can be improved to ensure better outcomes, including the restoration of priority ecosystems. Are there specific audiences that have expressed support for these ideas?

The conservation community, and federal and state agencies, continue to show support for these concepts. In this era of diminished federal and state budgets, constrained private funds, and unpredictable appropriations and voting trends, these groups are looking for new and creative sources of funding to support land protection and stewardship. They are increasingly coming to realize that mitigation can be harnessed to support their conservation goals – avoidance of priority habitats and landscape-level conservation.

In your research, did you find anything that surprised you?

The lack of transparency and accountability regarding how these funds are used. Mitigation associated with federal and state wetland programs receives a lot of negative attention, and it is true that – at least at the federal level – the Corps provides little to no site-specific information to the public. The sole exception is with mitigation banks (check out the Corps’ RIBITS database at:

ribits.usace.army.mil), however, banking only accounts for less than 30% of the mitigation provided. As incomplete as this picture is, it is actually clearer than that for other compensatory programs – Army Corps Civil Works projects, state and federal endangered species programs, natural resource damage assessment programs, civil settlements, fines, and penalties. Where are the impacts occurring? When offsets are used, where are these projects located? Are the compensation projects supporting landscape-level conservation objectives?

What are you working on now to advance your recommendations?

Since 2009, we have been working with The Nature Conservancy to bring science-based principles to application of the watershed approach to compensatory mitigation decision-making. We have three on-the-ground pilot watershed approach projects in Georgia, Tennessee, and Wisconsin and the U.S. Environmental Protection Agency has funded us to spearhead the development of a watershed approach handbook. It’s a step in the right direction – it will give mitigation providers, state agencies, and conservation organizations a much better sense of how mitigation funds can be used to support landscape-level conservation objectives. And since 2010, we have been working in partnership with the Land Trust Alliance to advance best practices for qualified land trusts seeking to evaluate the role they may play in the long-term protection and stewardship of aquatic resource compensatory mitigation sites. Land trusts are being asked to hold easements on mitigation properties every day across the country and we want to make sure that if they get involved in mitigation, they do so with the full understanding of the liability they are accepting. But it’s also a great conservation opportunity!



PARTNERS RESTORE WETLANDS IN SENECA COUNTY, N.Y.

The Service’s New York Field Office recently restored 3 acres on two wetland sites that provide homes for shorebirds, such as killdeer and spotted sandpiper, and waterfowl, including black duck and northern pintail. The work will help improve water quality in Canoga Creek, a tributary of Cayuga Lake.



New York State Wetlands Forum, Inc. Annual Conference and Meeting

Radisson Hotel – Utica Centre, Utica, New York

(800) 395-7046

<http://www.radisson.com/utica-hotel-ny-13501/utica>

March 27 - 28, 2012

Catastrophic Events, Wetlands and Waters

March 27

6:30 – 7:30 **Exhibitor/Poster Setup**

7:30 – 5:00 **Registration and Review of Exhibits and Posters**

7:30 – 9:00 **Continental Breakfast**

8:30 – 8:35 **Opening Remarks:** Ms. Melissa Toni, Chair, New York State Wetlands Forum

8:35 – 9:05 **KEYNOTE ADDRESS**

9:05 – 9:30 **Break and Review of Exhibits/Posters**

9:30 – 10:50 **CONCURRENT SESSION A**

1. *Wetlands and the Landscape* [Moderator: Ms. Sheila Hess, Conservation Connects]

Combining Maximum Entropy Modeling with a Patch-based Ranking Scheme to Improve Identification of Potential Wetland Mitigation Sites

Speaker: Patrick Raney, SUNY College of Environmental Science and Forestry & Upper Susquehanna Coalition

Food Security Act of 1985 – Wetland Conservation Provisions

Speaker: Shanna Shaw, USDA-NRCS

Created Wetlands in Green Infrastructure, Why Not a Greater Role in 2012?

Speaker: Gregory Liberman, GHD Consulting Engineers LLC

2. *Plants and Plant Community Restoration* [Moderator: Mr. Donald Coogan, Jr., Terrestrial Environmental Specialists, Inc.]

Identification of Wetland and Upland Ferns and Fern Allies

Speaker: Joseph McMullen, Terrestrial Environmental Specialists, Inc.

Restoring Ecosystem Functions Along the Niagara River: Summary of the Niagara Power Project Habitat Improvement Projects

Speaker: James Kooser, Gomez and Sullivan Engineers, P.C.

Using Native Species to Restore Ecological Function and Reduce Invasibility at an Industrial Waste Restoration Site

Speaker: Molly Farrell, SUNY College of Environmental Science and Forestry

3. *Wetlands and Technological Advancements* [Moderator: Mr. Peter Gibbs, USDA]

Landscape Analysis and Biodiversity of Nutrient Rich Swamps in the Sandy Creeks Watershed, NY

Speaker: Lauren Lyons-Swift, Lyons-Swift Ecological Consulting

Air Photo Interpretation for Wetland Regulation in the 21st Century

Speaker: Mark Rooks, NYS Adirondack Park Agency

Using Technology to Streamline Wetland Restoration Monitoring Processes

Speaker: Lisa Telesca and Glenn White, Haley & Aldrich of New York

10:50 – 11:10 **Break and Review of Exhibits/Posters**

11:10 – 12:30 **CONCURRENT SESSION B**

1. *Wetland Mitigation and Banking Strategies* [Moderator: Ms. Charlotte Brett, Wetlands Forum]

Ducks Unlimited – New York In-Lieu Fee Program

Speaker: Chris Theriot, Ducks Unlimited, Inc.

How to Comply with the New Guidance for Financial Assurance for Mitigation

Speaker: Robert Spoth, Ecosystems Insurance Associates, LLC

Mitigation Banking in the Adirondack State Park

Speaker: Kaylie Cagnina, Federal Highway Administration

2. *Streams: Flooding Issues and Disaster Mitigation* [Moderator: Ms. Johanna Duffy, Barton & Loguidice, P.C.]

Flood Mitigation Activities

Speaker: Marianne Pollay, FEMA Region 2, Mitigation Division

Stream Restoration: Pre and Post Disaster

Speaker: Carl Schwartz, Partners for Fish and Wildlife Program, U.S. Fish and Wildlife Service, NY Field Office

The U.S. Flood Control Program at 75

Speaker: Peter Black, Ph.D., SUNY College of Environmental Science and Forestry

3. Wetland Issues [Moderator: Mr. Ed Frantz, NYS Department of Transportation]

The Challenges and Obstacles of Wetland Modification or Removal to Reduce Wildlife Hazards to Aviation

Speaker: Thomas Wirickx, McFarland-Johnson, Inc.

An Overview of the Relationship Between Permit Commitments and Construction Realities

Speaker: Benjamin Brazell and Brian Schwabenbauer, edr Companies

When Sorcerers' Apprentices Fail to Protect Streams and Wetlands

Speaker: James Schmid, Ph.D., Schmid & Co., Inc., Consulting Ecologists

12:30 – 2:00 **Lunch and Membership Meeting**

2:00 – 3:20 **CONCURRENT SESSION C**

1. Wetland Restoration [Moderator: Ms. Stephanie Wojtowicz, NYS Coastal Resources Specialist]

Ecological Value of Restored Wetlands in the St. Lawrence Valley of New York:

An Assessment of Wildlife and Plant Communities as Biological Indicators of Wetland Quality

Speaker: Catherine Benson, Clarkson University

Restoring Wetlands at Hazardous Waste Sites

Speaker: Anthony Esposito, ARCADIS-US

Resolving Conflicts: Restoring Water Quality and Wetlands of a Degraded Landscape within the Context of the Unique Albany Pine Bush Habitat

Speakers: Christopher Einstein, CHA, Inc. and Nathan Carlton, Applied Ecological Services, Inc.

2. Stream Crossings and Aquatic Passage [Moderator: Ms. Melissa Toni, Federal Highway Administration]

Implementing Stream Crossing Standards for Fisheries and Transportation Needs

Speaker: Amy Singler, American Rivers and The Nature Conservancy

NYS DOT Stream Crossing Case Studies

Speaker: Ed Frantz, NYS Department of Transportation

The USACE and Stream Crossing Permitting

Speaker: Andy Dangler and Brad Sherwood, U.S. Army Corps of Engineers, New York District

3. Invasive Species Control [Moderator: Ms. Frances Reese, Barton and Loguidice, P.C.]

Managing Invasive Species Treatments with GIS

Speaker: John Masiewicz, Gomez & Sullivan Engineers, P.C.

Utilizing a Terrestrial Invasive Species Response Team in the Adirondack Park

Speaker: Brendan Quirion, Adirondack Chapter of The Nature Conservancy

Mapping Invasive Species in New York State: Utilizing iMapInvasives

Speaker: Meg Wilkinson, New York Natural Heritage Program

3:20 – 3:40 **Break and Review of Exhibits/Posters**

3:40 – 5:00 **CONCURRENT SESSION D**

1. Upstate New York Highlights [Moderator: Mr. Kevin Bliss, New York State Department of Environmental Conservation]

Introducing the Central New York Wildlife Habitat Management Group

Speaker: Michael Patane, Great Swamp Conservancy

The Wetland Trust's In Lieu Fee Program in New York

Speaker: James Curatolo, The Wetland Trust

Flooding Issues on the NYS Canal System/Mohawk River

Speaker: Jeff Gritsavage, NYS Thruway Authority/Canal Corporation

2. Wetland Mapping [Moderator: Ms. Noelle Rayman, U.S. Fish and Wildlife Service, NY Field Office]

Mapping and Characterization of Wetland Along the Upper Esopus Creek, Ulster County, NY

Speaker: Frank Parisio, NYC Department of Environmental Protection

An Update of NWI Activities in New York: Original Mapping, NWI+ Mapping and Potential Restoration Site Inventory

Speaker: Ralph Tiner, U.S. Fish and Wildlife Service, Northeast Region

3. Endangered Species Act [Moderator: Mr. Michael Fishman, Barton & Loguidice, P.C.]

Proposed Modifications to the 2007 Indiana Bat Summer Survey Protocols

Speaker: Robyn Niver, U.S. Fish and Wildlife Service, NY Field Office

First Court Challenge to New York's New Endangered Species Regulations is Defeated

Speaker: Dominic Cordisco, Drake, Loeb, Heller, Kennedy, Gogerty, Gaba & Rodd, PLLC

Using Grazing on Wetland Reserve Program Easements to Restore Habitat for the Federally Endangered Bog Turtle (*Glyptemys muhlenbergii*)

Speaker: Elizabeth Marks, USDA-NRCS

5:00 – 6:30 **Cocktail Hour**

6:30 **Saranac Brewery Tour and Sampling** (cost: \$5.00)

March 28

7:30 – 8:30 **Registration and Continental Breakfast**

8:20 – 8:30 **Announcements:** Ms. Melissa Toni, Chair, New York State Wetlands Forum

8:30 – 9:50 **Marcellus Shale/Natural Gas Drilling – Part I** [Moderator: Mr. Don Lockwood, Shumaker Consulting Engineering & Land Surveying, P.C.]

Potential Impacts of Increased Marcellus Shale Drilling Activities on Wetlands in New York State

Speaker: Bryan Quinn and Mike McGraw, Applied Ecological Services, Inc.

Positive Impacts on Rare Species in Pennsylvania Due to Marcellus Shale Development

Speaker: Jamie Morgan, Kleinfelder Associates

Permitting for Natural Gas Development in the Marcellus Shale, Pennsylvania

Speaker: Laura Cheney, Kleinfelder Associates

9:50 – 10:00 **Break**

10:00 – 10:50 **Marcellus Shale/Natural Gas Drilling – Part 2** [Moderator: Mr. Don Lockwood, Shumaker Consulting Engineering & Land Surveying, P.C.]

The Role of Wetland Biologists in the Natural Gas Industry

Speaker: Nicholas Basile, RETTEW

Potential Impacts on Wetland Resources in the Marcellus Shale Region of the Lake Ontario Watershed in New York Based on Drilling Activities in Pennsylvania

Speaker: Andie Graham, SUNY College at Brockport

10:50 – 11:50 **Legislative and Regulatory Updates** [Moderator: Ms. Kathleen Bennett, Esq., Bond, Schoeneck and King, PLLC]

Overview of the New Nationwide Permit Program - Speaker: U.S. Army Corps, Buffalo District

Regulatory Update - Speaker: U.S. Fish and Wildlife Service, NY Field Office

Regulatory Update - Speaker: NYSDEC

11:50 – 12:00 **Closing Remarks:** Ms. Melissa Toni, Chair, New York State Wetlands Forum

12:00 – 1:00 **Lunch** (On Your Own)

1:00 – 4:00 **Field Trips:** Mr. Kurt Weiskotten, NYS Thruway Authority/Canal Corporation

Oriskany Flats and Utica/Rome Wetland Mitigation Projects and Judd Road Wildlife Passage

Onondaga Lake Wetlands, Habitat and Waste Bed Restoration Projects - Syracuse

Lock 17 and Moss Island Cultural and Natural History Tour - Little Falls

**NEW YORK STATE WETLANDS FORUM, INC.
2012 ANNUAL CONFERENCE & MEETING**

RADISSON HOTEL – UTICA CENTRE, UTICA, NY

MARCH 27-28, 2012

HOTEL INFORMATION

Rooms are available at the Radisson Hotel – Utica Centre, 200 Genesee Street, Utica, NY 13502. **Reservations should be made before March 19** by calling (315) 797-8010; fax (315) 797-1490. To secure the rate of \$77/single or \$97/double, plus tax. Breakfast is included in the rate. Parking and internet are free. Please let them know you are with the NYS Wetlands Forum.

DIRECTIONS

From East: Take I-90 West (NYS Thruway) to Exit 31 (Utica/I-790). Keep left at the fork and follow sign for Genesee Street South/NY 5 South/Downtown Utica. Turn right onto North Genesee Street. Hotel will be on the right.

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2012 ANNUAL CONFERENCE AND MEETING

RADISSON HOTEL - UTICA CENTRE, UTICA, NY • MARCH 27-28, 2012

Name: _____ Affiliation: _____

Address: _____ City: _____ State: _____ Zip: _____

Phone: _____ Fax: _____ Email: _____

ATTENDEE REGISTRATION (Pre-registration must be received by March 9. *All on-site registration is \$150.*)

Registration fee includes: continental breakfast, breaks, lunch, mixer (Tuesday, March 27), workshop materials, and field trips.

- | | | |
|---|---|----------|
| <input type="checkbox"/> Full Time Student (with valid School ID) - \$50 | <input type="checkbox"/> Full Time Student (oral/poster pres.) - FREE | \$ _____ |
| <input type="checkbox"/> Speakers - \$100 | <input type="checkbox"/> NYS Wetlands Forum Members - \$120 | \$ _____ |
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NYSWF 2012 MEMBERSHIP

(Membership benefits include: conference discounts, NYSWF newsletter subscription, personal invitations to meetings and member-only events, and access to member-only section of web site.)

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EXHIBITOR REGISTRATION (Exhibitors should contact Michael Fishman at (315) 457-5200 or mfishman@bartonandloguidice.com.)

- | | |
|---|----------|
| <input type="checkbox"/> Exhibitor includes one registration - \$250 | \$ _____ |
|---|----------|

TOTAL \$ _____

SPONSORSHIP If you are interested in sponsoring the 2012 Annual Conference and Meeting please contact Michael Fishman at (315) 457-5200 or mfishman@bartonandloguidice.com for more information.

For updated 2012 Annual Conference and Meeting information visit www.wetlandsforum.org.

**Return this completed form and payment to New York State Wetlands Forum, Inc., PO Box 1351, Latham, NY 12110.
Please make checks payable to the New York State Wetlands Forum, Inc. EIN# 14-1723859.**



iMapInvasives
geotracking invasive exotic species

Free training session offered in conjunction with the NYS Wetlands Forum Conference:

Invasive species tracking for volunteers and professionals

*iMapInvasives is an online mapping tool that supports efforts to protect New York State from invasive species.
Learn about the program and how to contribute data by attending this free iMapInvasives training session!*

All interested groups, from land managers to the general public, are encouraged to help keep the NYS map up-to-date and accurate by reporting invasive species locations. Training is required to enter data, with options for basic and advanced data entry.

REGISTRATION IS REQUIRED AS SPACE IS LIMITED.

Please visit

www.imapinvasives.org/NYTraining

for more information and to register for the training.

March 26, 2012

1:00 – 4:00 PM

Utica State Office Building
NYSDOT conference room, 10th Floor
207 Genesee Street
Utica, New York 13501

PLEASE NOTE: You must sign in and show a photo ID (e.g. driver's license) at the security desk.

Questions? Contact:
imapinvasives@nynhp.org



New York
Natural Heritage
Program

Funding for iMapInvasives provided by The Nature Conservancy, and
the NYS EPF through a contract with NYS DEC

INTRODUCING THE CENTRAL NEW YORK WILDLIFE HABITAT MANAGEMENT GROUP

— Kevin Bliss

Many of our readers hopefully remember the 2010 Regional Supplement training conducted as a joint effort by the NYS Wetlands Forum and the U.S. Army Corps of Engineers. A field portion of the training was performed at the Great Swamp Conservancy, Inc. (“GSC”) in Canastota, NY. Since that time, the GSC has continued to promote environmental education in general and wetlands conservation in particular. But quite recently a new endeavor worth mentioning has begun. Early in 2011, the Director of the GSC, Michael J. Patane, brought together a group of professional individuals from various organizations to focus on wildlife habitat management. The initial focus species is the American Woodcock.

The Group’s name is the Central New York Wildlife Habitat Management Group (“CNYWHMG”), and consists of representatives from the New York State Department of Environmental Conservation, the United States Fish and Wildlife Service, the United States Department of Agriculture-Natural Resource Conservation Service, the Ruffed Grouse Society, the Wildlife Management Institute, the New York Audubon Society, the Madison County Planning Department, the New York State Fish and Wildlife Advisory Board, the SUNY College of Environmental Science and Forestry, and the Great Swamp Conservancy. The intention

of the group is to promote the best habitat management practices agreed upon by the entire group, for promotion to public and private landowners.

This summer, the CNYWHMG began a demonstration area for Quaking Aspen (*Populus tremuloides*) regeneration. The hope is this area will provide a desirable habitat for the American Woodcock. The project was started this fall with site preparation by use of a Gyro Trac Toma Ax (see photo). The next step, to be performed this winter, is cutting some of the larger trees while they are dormant so that in the spring the energy of the trees will start the roots shooting new plants in the area that was prepared.

This, and a nearby grassland restoration and regeneration demonstration project also underway now, will serve as very important living natural resource conservation examples. Educational signage is being prepared. Forum members are invited to visit the GSC in Canastota and see the new demonstration areas. The grasslands are adjacent to a 30-acre open water overlook wetland off of Pine Ridge Road. The Aspen regeneration demonstration area is located at the GSC headquarters on the trails east of North Main Street. For further information please feel free to call the GSC at 315-697-2950.



U. S. Fish and Wildlife Service Engineering Equipment Operator Carl Adams (left) and Great Swamp Conservancy Director, Mike Patane (right), discuss progress on a woodcock habitat improvement demonstration project at the GSC in Canastota, NY.

SACKETT V. EPA

[Cont'd. from page 1]

compliance order to force the EPA to litigate all compliance orders in court. Additionally, the court reasoned that because the compliance order itself is non-enforceable, and because sanctions cannot be imposed absent a civil enforcement action, the lack of a pre-enforcement hearing does not violate due process.

The Sacketts and other proponents of pre-enforcement judicial review believe that the Ninth Circuit erred because the CWA’s wetland classification is ambiguous. As a testament to the difficulty of determining federal jurisdiction over wetlands and other waters, the Sacketts note in their brief that the Supreme Court has twice ruled that the EPA and the United States Army Corps of Engineers have overextended their reach under the CWA, in *Rapanos v. United States Army Corps of Engineers* (2006), and in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers* (2001). Since the definition of a wetland is ambiguous, and average citizens may not know whether they have jurisdictional “wetlands” on their property, the Sacketts argue that citizens should not be required to accept the EPA’s analysis without any opportunity for impartial review.

The Ninth Circuit’s APA analysis has also been challenged *amicus curiae* by not-for-profit entities, including the Mountain States Legal Foundation, who argue that Congress never intended to preclude CWA compliance orders from the general review process provided in the APA. The Foundation notes that the CWA does not expressly preclude judicial review, despite the fact that the Act was enacted after the APA, that the compliance order represents the consummation of the agency’s decisionmaking process, and finally, that violation of the compliance order carries with it independent legal consequences.

The EPA and opponents of pre-enforcement review argue that compliance orders should not be reviewable because they impose no new legal obligations beyond those already imposed under the CWA. While a landowner may be subject to fines for violating the compliance order, these fines are related to the underlying violation of the CWA, rather than violations of the compliance order itself. Violations of the CWA are punishable by fines, regardless of the compliance order, which merely warns the violator that the EPA has reason to believe violations have occurred.

[Cont'd. page 12]

THE UPPER SUSQUEHANNA CONSERVATION ALLIANCE AND THE FOREST RESTORATION STRATEGY – AN INTRODUCTION TO LANDSCAPE SCALE CONSERVATION PROJECTS

— Sandra Doran

The Upper Susquehanna Conservation Alliance (“USCA”) was formed in 2010 as a result of efforts put forth by the U.S. Fish and Wildlife Service, New York Field Office, and its landscape level approach to conservation. The Service contacted the Upper Susquehanna Coalition (“USC”) and the Finger Lakes Land Trust (“FLLT”) to initiate this effort. Together, we invited all involved parties located within the Susquehanna River basin to share in our vision to promote the conservation of natural resources in the headwaters region of the Susquehanna River.

The USCA is comprised of 31 agencies, organizations, with a number of individuals representing Federal and State agencies, nonprofit organizations, academic institutions, researchers and private individuals who have come together to work collaboratively to identify major issues and threats in the basin, including threats to fish and wildlife species.

USCA projects promote sustainable working landscapes for the people of the watershed and for the State of New York. Like many of our conservation partners, there is a realization that, with the increasing numbers of species being designated as species of greatest conservation need, or have been Federally or State listed as threatened or endangered, we must approach their recovery in a more holistic manner at the same scale they occur, a landscape scale. Activities we are working on include green infrastructure planning, protection of key habitats including wetlands and enhancement and restoration

of high quality waters and upland habitat for species of greatest conservation need. Two working groups have been established – the Natural Resources Working Group and the Flood Mitigation Working Group. The Natural Resources Working Group consists of Federal and State agencies and local land trusts that work together to find opportunities for preserving or enhancing lands that connect habitat, stream restoration projects that enhance habitat for brook trout and eastern hellbender, and wetland restoration projects. The Flood Mitigation Working Group is working on how to improve communication between involved agencies and organizations as well as reduce impacts to streams from flooding (dredging and channelization).

Working at a landscape scale requires working across political jurisdictions and with our many conservation partners; it requires an integration of efforts with each organization contributing within the scope of its mission. The USCA will continue to hold quarterly meetings with the working groups and hold an annual meeting in November 2012.

In addition to the USCA, the President’s Chesapeake Bay 2010 Executive Order 13518 Strategy for Protecting and Restoring the Chesapeake Bay has tasked the U.S. Forest Service and U.S. Fish and Wildlife Service (“USFWS”) with coordinating development of a Chesapeake Forest Restoration Strategy; one of the joint habitat actions in Executive Order 13518. The USDA will work with the Department of the Interior and other entities

to develop a Chesapeake Bay watershed strategy to maximize forest restoration in priority areas including: residential land currently managed as lawn; areas covered by community tree canopy expansion and green infrastructure programs; gaps in core wildlife habitat; deficient lands such as abandoned mine lands, brownfields areas, and lands with vulnerable soils; and agro forestry areas. (See page 54 of the Executive Order Strategy for Protecting and Restoring the Chesapeake Bay Watershed). There are six Forest Restoration Strategy Teams: Urban/Community, Brownfields, Wildlife Habitat, Agro Forestry, Abandoned Mine Lands, and Green Infrastructure. The Wildlife team is led by the USFWS, New York Field Office, which has included the Upper Susquehanna basin as one of their focal areas. The wildlife team has held three webinars, May, October and November with Federal, State, local, and nongovernmental participants from across the Chesapeake Bay region, including 5 other states – MD, VA, WV, PA, and DE. The wildlife team will use Green Infrastructure to prioritize areas for reforestation including wetlands, riparian areas and upland areas that connect wildlife hubs and corridors. The draft Strategic Plan will be available in March 2012.

Wetlands serve as the keystone between the surrounding uplands and aquatic systems. Relative to plant community succession, an emergent wetland habitat is similar to a successional old-field. However, the presence of water in a wetland influences the groups of plants and animals that inhabit them, which are vastly different from those found in a successional old-field community.

You could say that cattails are to a wetland what golden rods are to a successional old-field; red-winged blackbirds are to an emergent wetland what bobolinks are to grassland; a muskrat is to a wetland what a whistle pig is to a successional old field; a northern watersnake is to a wetland what a garter snake is to upland; or sedges are to wetland what wildflowers are to a meadow. Therefore, the biodiversity of a given area can be further enhanced by not only having high juxtaposition, but by having many different habitat types, especially a mixture of wetland and upland habitats.

Wetland Biodiversity



Upland Biodiversity



COURT DISMISSES LAWSUIT CHALLENGING NYSDEC'S 2010 ENDANGERED SPECIES REGULATIONS

— Dominic Cordisco

On December 1, 2011 the New York State Supreme Court, Albany County, dismissed the lawsuit brought by the Town of Riverhead and other interested parties that challenged the new Part 182 Endangered Species regulations adopted by the New York State Department of Environmental Conservation (“NYSDEC”) in November 2010.

Riverhead, through its local Community Development Agency, is the owner of the Enterprise Park at Calverton (“EPCAL”). EPCAL is a planned redevelopment of a 2,900-acre property formerly known as the Naval Weapons Industrial Reserve Plant at Calverton, assembled by the Navy in the 1950s and leased to the Grumman Corporation for final assembly and flight-testing of military aircraft. In 1996, defense downsizing resulted in closure of the Grumman facility. In September 1998, the U.S. Government transferred the site to the Town of Riverhead Community Development Agency on the condition it be used for economic development to replace thousands of well-paid jobs and tax base lost by the Grumman closure. The NYSDEC identified the EPCAL site as habitat for both tiger salamanders and the short-eared owl, both protected species in New York. The NYSDEC informed Riverhead that any reuse of the property would require an incidental take permit.

The thrust of Riverhead’s challenge related to the new “net conservation benefit” standard for permit issuance. By adopting the 2010 regulations, the NYSDEC significantly changed the regulatory oversight of endangered and threatened species in New York State. The 2010 regulations require an applicant to provide a “net conservation benefit” in order to obtain a permit to “take” a protected species. Taking is broadly defined, and includes any disturbance of a protected species’ habitat. The 2010 regulations require

an applicant to not only mitigate a project’s potential impacts on a protected species, but to enhance the species’ habitat above and beyond what it would be even if the project were not built.

The 2010 regulations [6 NYCRR § 182.2(o)] define net conservation benefit as: A successful enhancement of the species’ overall population or contribution to the recovery of the species within New York. To be classified as a net conservation benefit, the enhancement or contribution must benefit the affected species listed as endangered or threatened in this Part or its habitat *to a greater degree than if the applicant’s proposed activity were not undertaken.* (emphasis added)

Prior to the adoption of the 2010 regulations, a project’s potential impact on protected species has been largely evaluated and mitigated through the State Environmental Quality Review (“SEQR”) process; the NYSDEC has seldom issued endangered species permits (known as Article 11 permits) when a project’s impacts have been addressed through SEQR. Nonetheless, the conservation of endangered species has long been a legislative policy of New York, and ever since the enactment of the State Endangered Species Act in 1972, the NYSDEC has had the authority to require a permit for a take of protected species. But both the enabling legislation and the prior regulations did not provide the NYSDEC with a standard to use in deciding whether to issue such a permit. The prior regulations merely provided the NYSDEC with the discretion to issue such a permit, on conditions that it “may deem appropriate” [6 NYCRR § 182.4 (repealed)]. The State Endangered Species Act simply provides that “the taking ... of any endangered

or threatened species ... is prohibited, except under license or permit from the [NYSDEC]” [ECL § 11-0535(2)]. The 2010 regulations create a new category of permit, called an “incidental take permit,” which requires that an applicant provide not only a mitigation plan, but also a net conservation benefit for the species in order to obtain a permit [6 NYCRR § 182.11(a)].

In its lawsuit, Riverhead claimed, among other things, that the NYSDEC’s adoption of the 2010 regulations was beyond the power delegated to it by the state legislature. In its response, the NYSDEC argued that the lawsuit must be dismissed because Riverhead’s issues were not yet ripe for review given that Riverhead had not yet been denied an incidental take permit. The Court agreed, stating that “the mere fact that [Riverhead] may have to endure the [NYSDEC] review process is not sufficient, without more, to constitute injury” [*Association for a Better Long Island, Inc. v. NYSDEC*, 2011 NY Slip Op 21431].

Riverhead unsuccessfully argued that by requiring an applicant to enhance the habitat of a protected species beyond the *status quo ante*, the NYSDEC has shifted the public goal of protecting endangered and threatened species onto individual applicants. Prior to the 2010 regulations, individual applicants have had to address their own project’s impacts -- not enhance a species’ wider viability. This issue was not addressed by the Supreme Court, as the Court did not reach the merits of the case.

Unless the Supreme Court’s decision is reversed on appeal, any challenge to the 2010 regulations would have to occur after the NYSDEC completes its permit review and either issues or denies an incidental take permit.

The Supreme Court’s decision can be viewed online at: http://www.nycourts.gov/reporter/3dseries/2011/2011_21431.htm.



Drawings by Kurt Weiskotten

SACKETT V. EPA

[Cont'd. from page 9]

Compliance orders thus fall within the broad range of communications that agencies use to inform regulated parties of governing legal requirements and existing violations, to encourage voluntary compliance or remedial measures, and to initiate consultation between the agency and the regulated person. The EPA argues that immediate judicial review of such agency communications would undermine the interests of both the government and the regulated parties by discouraging voluntary compliance, robbing the EPA of one of its statutory enforcement mechanisms, and increasing litigation.

The Supreme Court's decision to hear *Sackett* is surprising given the lack of a circuit split in this area of the law. To date, every circuit that has addressed the issue has agreed that landowners are not entitled to pre-enforcement judicial review of administrative compliance orders. In *Tennessee Valley Authority v. Whitman* (2003), the Eleventh Circuit held that the Clean Air Act violated due process to the extent it permitted the imposition of sanctions solely for violation of a compliance order, without any judicial finding that the order was properly imposed. However, *Tennessee* is clearly distinguishable from the present case, which involves the denial of a hearing to challenge the administrative compliance order itself, prior to the imposition of any

sanctions. The Supreme Court's decision to hear *Sackett* is also surprising in light of its recent denial of *certiorari* in *General Electric v. Jackson* (2010), a case raising substantially similar issues under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

The EPA issues on average 3,000 compliance orders each year pursuant to numerous federal environmental protection laws. A decision in the Sacketts' favor would certainly curtail the EPA's preferred enforcement tool. Moreover, a ruling that the Sacketts have a federal due process right to a pre-enforcement hearing based on an agency's determination that a violation has occurred would have ramifications for landowners subject to a wide variety of federal and state regulatory control.

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