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# The Forum

NEW YORK STATE WETLANDS FORUM NEWSLETTER

## *ENVIRONMENTAL PROTECTION AGENCY SEEKS EXPANSION OF CLEAN WATERS ACT JURISDICTION*

*Kevin R. MacLeod*

### Introduction

On September 17, 2003, the Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers (collectively, the "Agencies") announced a joint proposed rule that purports to clarify which streams and wetlands are considered "waters of the United States" under the Clean Waters Act (the "CWA"). The Agencies sent the proposed rule to the White House's Office of Management and Budget ("OMB") for interagency review, simultaneously withdrawing draft guidance on the issue that had been at the White House since 2012.

At the same time, the EPA released a draft study titled, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence." The study synthesizes the peer reviewed scientific literature regarding the connectivity of streams and wetlands to larger bodies of water.

It is widely thought that the EPA is positioning itself to expand its jurisdiction under the CWA. As discussed below, jurisdiction under the CWA is of great importance and could have a significant impact on any individual that owns or intends to develop real estate near streams or wetlands.

### Relevance of EPA Jurisdiction

The CWA was enacted to, "restore and maintain the chemical, physical and biological integrity of the Nation's waters." To achieve these objectives, the CWA prohibits discharge of any pollutant into "navigable waters." The CWA defines "navigable waters" as, "the waters of the United States, including the territorial seas."

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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*

Welcome to 2014! Now that we have all survived the holiday season, we can officially put 2013 behind us and look forward to a productive and stimulating 2014. Already this year, Mother Nature has put us to the test - polar vortex . . . ice jams . . . what could be next? Regardless of the weather uncertainties that may come our way, you can always count on a quality and informative NYSWF newsletter to lift your spirits.

Inside this edition you will learn about a new initiative the Forum is working on (Research Grant Program), details concerning the recent Northern long-eared bat listing status, the most recent in-lieu fee wetland mitigation program to be approved in New York State, as well as a special guest appearance from Joe McMullen who's back to discuss assessing wetland functions and values. This newsletter edition is practically bursting at the seams with information! Thank you to everyone who has volunteered an interest in contributing to future editions of the newsletter. Feel free to send prospective articles to Kathy Bennett at any time (BennetK@bsk.com).

In addition to all these printed goodies, the Forum Board is continuing to work hard on progressing plans for the 2014 Annual Conference in Rochester (April 29 and 30). There is still time to submit an abstract if you are interested in presenting a poster or an oral presentation. Registration materials and event details are included in this newsletter and can also be found online at the Forum's website (www.wetlandsforum.org). Look for new information to be released as details are confirmed.

Thank you for your continued support of the NYSWF during the 2014 calendar year. I am sure we all have much to look forward to!

*Whose woods these are I think I know.*
*His house is in the village though;*
*He will not see me stopping here*
*To watch his woods fill up with snow.*
~ Robert Frost

Happy winter wanderings!

Johanna Duffy

## *ECOLOGY AND CONSERVATION: A REMINDER OF WHERE WE'VE BEEN*

***Donald J. Lockwood***

A back-woods slough, contentment it does not know, for it is too weak to take any other course, especially where the Eastern Sycamore and Eastern Cottonwood grow. Full grown, they are gentle giants by day, behemoths by the dawn's early light.

And the water, and the earth, and the wood, and the herbs scent the air. Suddenly, the scene is adorned with the majesty of the wood duck, drawn in by the fruit of the oak, plucked by gravity to the earth and water. Denizens to this place by birth, hatched from eggs brooded from within the hollows of the sycamores and cottonwoods, they arrive fast and furious-twisting, turning, whiffling. Then after skidding splashes and muffled pops, from the flick of wings, and some nasally whistling grunts, all is quiet except the ripples created from feathered flesh plowing through the water in pursuit of the food they know has been replenished by gravity since they were here last.

The wood duck's scientific name, *Aix sponsa*, is given after the male's ornate breeding plumage: "water bird in bridal dress."[1] The wood duck is an icon of good ole American conservation, for it was rescued from the brink of extirpation by way of regulated hunting, protective laws, habitat restoration, and nest box programs. Prized as table fare and for the male's breeding plumage, unregulated market hunting in the late 1800's, along with loss of suitable woodland and wetland habitat, resulting from development, nearly brought on the demise of this species by the early 1900's. Not only is the wood duck the splendor of North America waterfowl in the eyes of the observer, it is a secondary cavity nester and the only true perching duck on the continent. The wood duck relies on tree cavities that have been created by means other than its own.

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## *DEC PROPOSES NEW REGULATION ON INVASIVE SPECIES*

The New York State Department of Environmental Conservation (DEC) and the New York State Department of Agriculture have jointly proposed a draft regulation, amending 6 NYCRR to add a new Part 575, targeted to reduce the damage of invasive species. The new rule will make it unlawful to sell, purchase, possess, propagate, introduce, import or transport an "invasive species." Invasive species include the Northern Snakehead, Sea Lamprey and Eurasian Boar, as well as numerous other plants, animals, fish and fungi. It will also be unlawful to knowingly introduce a "regulated species" into a free-living state. Regulated species include, but are not limited to, Gold Fish and Norway Maple. The DEC has provided a complete list of invasive and regulated species at http://www.dec.ny.gov/regulations/93848.html. Under the proposed rule, the penalty for a violation of the rule includes a written warning for a first time offense and a $250 fine for additional offenses.

## *DEC RELEASES DRAFT STUDY ON BEST MANAGEMENT PRACTICES FOR WATER CONSUMPTION AND LOSS MITIGATION*

As part of the its expanded authority to regulate all water withdrawals of 100,000 gallons per day or more pursuant to Environmental Law, Title 15-1501, NYS Department of Environmental Conservation (DEC) contracted with the United States Geological Survey to develop additional guidance for water conservation in New York. The draft study, which is titled "A Survey of Methods for Implementing and Documenting Water Conservation in New York," was released in October 2013 and is available to the public at http://www.dec.ny.gov/docs/water_pdf/waterconnondft.pdf. The draft study provides examples of best management practices for water consumption and loss mitigations for non-drinking water uses such as industrial, commercial, power-generation and institutional water uses including cafeterias, farms, golf courses, medical facilities, textile factories and mines.

The draft study emphasizes the need to first conduct water audits to determine where water is being used and why. The study proceeds to lay out industry specific suggestions on how best practices and technological improvement can decrease water consumption.

## *NEW YORK PARTNERS MAKE PROGRESS TOWARDS RECOVERY OF BOG TURTLES*

***Noelle Rayman, Sandie Doran and Bethany Holbrook***

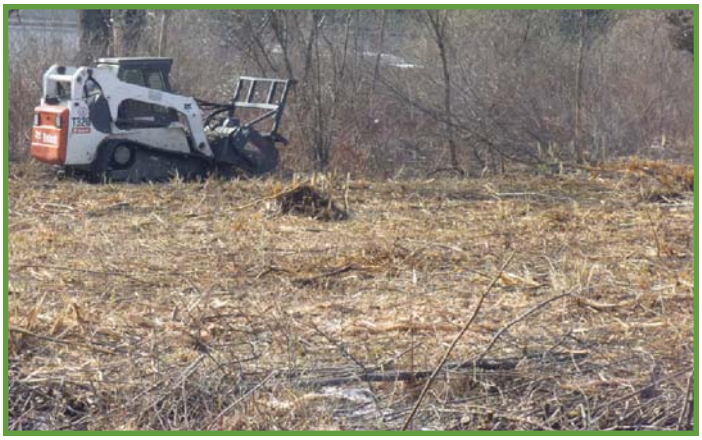
The bog turtle (*Glyptemys [=Clemmys] muhlenbergii*) is New York's smallest turtle species, and even smaller is its population size and distribution across its northern range. In New York, it is estimated that between 40 and 60 wetlands support bog turtles, most of which lie within the southeast region of the state. Despite what seems like a high number of wetlands that support this species, the bog turtle is still listed as "endangered" by the New York State Department of Environmental Conservation (NYSDEC) and "threatened" throughout its northern population range by the U.S. Fish and Wildlife Service (Service). Bog turtles have been dwindling in number over the past few decades primarily as a result of habitat loss, habitat succession, the introduction of invasive species (e.g., purple loosestrife [*Lythrum salicaria*], common reed [*Phragmites australis*]), wetland destruction from commercial and residential development, road construction, the draining of wetlands to create farmland, and hydrological impacts that cause bog turtle habitat to become either too wet or to dry. Development of adjacent uplands that buffers or protects bog turtle wetlands indirectly impacts populations by altering hydrology. It is also suspected that bog turtles may be illegally collected for the pet trade as people find them attractive for their small size and beautiful features. Suitable habitat for these turtles is described as spring-fed meadow wetlands or open-canopy fens that may have fairly mucky, limestone underlayed soil with channels interspersed. These channels are called rivulets and they contain roughly 1-3 inches of water that meander through small islands of sedges (tall grass-like plants).

***An adult bog turtle found during survey efforts in spring 2013. Photo credit: N. Rayman***

To mitigate the decline in bog turtle populations, the Service is leading efforts to recover this species within its northern population range. The Bog Turtle (*Clemmys muhlenbergii*) Northern Population Recovery Plan was developed in 2001 by many partners including federal and state agencies, non-governmental organizations, universities, and private environmental consulting firms. The Plan consists of goals and objectives that partners will achieve to eventually "delist" this species over time, meaning bog turtle populations will be secure enough that state or federal protection will no longer be needed. The goals and objectives of the Recovery Plan are further broken down to what individual states will do over time to bring bog turtle numbers up.

For more information, please visit the Services' website at http://www.fws.gov/northeast/nyfo/es/NYSpecies.htm.

The Service's New York Field Office has been working with many partners to protect and restore wetlands that have been significantly degraded, and provide suitable sites for bog turtles to inhabit. It was a record year for winter 2012-2013 working with private landowners in the Hudson-Housatonic Recovery Unit! Approximately 160 acres of habitat have been restored or enhanced at several sites throughout Dutchess County, the heart of bog turtle country in New York. Restoration mostly consisted of removing areas overgrown with shrubs, invasive plants, or small trees to allow for better growth of native fen plants. Vegetation removal is often followed up with bringing in goats, cows, or sheep into the wetland to eat shrubs or invasive plants in order to keep vegetation height down. Livestock work great as a natural plant control! Most landowners worked with Elizabeth Marks, Natural Resources Conservation Service, to enroll their land in long-term easements in the Wetlands Reserve Program (WRP). Other landowners worked with Gian Dodici, Service's Partners for Fish and Wildlife Program, to enroll their land in short-term conservation easements. Jason Tesauro, from the Mid-Atlantic Center for Herpetology and Conservation (MACHAC), was instrumental in making initial landowner contacts for both of the agencies and providing technical assistance to see each of these projects through. With Jason's help, the Service has an additional two projects planned for winter 2013-2014. The NYSDEC Region 3 biologists also are working to restore approximately 10 acres of habitat at a site in Putnam County where a monoculture of common reed has outcompeted many native plants. This work will be followed with bringing in livestock to graze an additional 25-30 acres to open up more habitat for bog turtles. As a result of these restoration efforts last winter, there is already evidence that bog turtles used the newly restored habitat as a nest at a WRP site this past summer.



*A site in Dutchess County where overgrown vegetation was removed using a skid steer with fecon head attachment. Photo credit: N. Rayman*

In addition, research is being conducted in the Hudson Housatonic Recovery Unit that will help with bog turtle recovery. It includes The Wildlife Conservation Society/ Bronx Zoo health assessments, where different diseases are being identified to see if any are impacting bog turtles. Fordham University is studying nesting ecology to see if there are specific habitat preferences needed for successful nesting.

While all this work is being accomplished to improve populations of bog turtles in New York, and ultimately over their entire range, some may wonder why these partnerships are formed and why they spend all this time and effort and money on New York's smallest turtle. I ask you, do you think it is important? If we find that something is negatively impacting bog turtles, we have to dig deeper to see what is affecting them, their habitat, and more importantly, drive the change that will protect them for future generations. That's why our New York partners continue to work toward recovery of the bog turtle and their special habitat…*because species diversity is important, wetlands are important, and the ecosystem depends on them and us.*

*Gian Dodici, USFWS, using chain saw to remove small trees and shrubs within a restoration site in Dutchess County. Photo credit: J. Wiley*

## *NEW YORK SUSQUEHANNA AND CHEMUNG RIVERS IN-LIEU FEE WETLAND MITIGATION PROGRAM*

The Wetland Trust ("TWT"), a 501c(3) nonprofit corporation has a U.S. Army Corps of Engineers (USACE) approved In-Lieu Fee (ILF) Wetland Mitigation Program. This program covers New York's Susquehanna and Chemung river basins and is separated into five distinct services areas. The program takes a scientifically based watershed approach to ensure wetland mitigation results in the highest quality restorations by targeting the best sites for wetland habitat quality, species diversity and long term sustainability.

For those who are required by the USACE to mitigate a wetland impact, an ILF program is an excellent option.

**How does it work?**

- The USACE determines how much mitigation is required in the form of "Mitigation Credits."
- The permittee contacts TWT regarding the purchase of those credits, a process completed through a simple request and payment.
- Most importantly once purchased, the permittee has fulfilled all wetland mitigation requirements for their project. In addition, the permittee is not held responsible for the long-term success of the wetland those credits represent as is the case with a standard wetland mitigation project.
- One credit costs $91,580 in all five service areas.

For more information contact: James Curatolo, Chair, The Wetland Trust at jc@thewetlandtrust.org; phone/ fax: 607-546-2528; cell: 607-765-4780 or visit **www.thewetlandtrust.org /ILFP**.

## *ASSESSING WETLANDS FUNCTIONS AND BENEFITS: THE IMPORTANCE OF RECOGNIZING ABILITY AND OPPORTUNITY*

***Joseph M. McMullen***

The relative importance of different wetlands has been greatly studied over the years, with numerous attempts made to quantify their worth to both the ecosystem (functions) and to man (benefits, formerly called values). The functions and benefits of wetlands were originally formally recognized by Adamus (1983) and further refined in the Wetland Evaluation Technique methodology (Adamus et al. 1987). The following eleven functions of wetlands were recognized:

- Ground water recharge
- Ground water discharge
- Nutrient removal/transformation
- Production export
- Floodflow alteration
- Sediment stabilization
- Sediment/toxicant retention
- Nutrient removal/transformation
- Uniqueness/heritage
- Wildlife diversity/abundance
- Aquatic diversity/abundance

With a few adjustments, these eleven functions are still recognized today, with recreation and several subsequent benefits also recognized. Although the quantification of these functions and benefits among wetlands remains a rather elusive quarry, there are several reasonable methods of assessing the relative worth that wetlands provide.

Regardless of the method used to assess wetlands functions and benefits, any such assessment should always consider both the **ability** and **opportunity** of a wetland to provide a given function or benefit. This ability versus opportunity assessment can be critical to the determination of how well a wetland provides these attributes.

**Ability or effectiveness** of a wetland to provide a function relates to its innate properties, regardless of its landscape position or connectivity to outside systems. The question when assessing ability is, does the wetland by itself have the capability to provide a given function or benefit?

**Opportunity** is different. When assessing opportunity you need to consider whether a wetland is so located in the landscape and has a connection to outside systems so that it has the chance to provide a function or benefit. Whether it has such properties depends on the nature of the wetland, as well as the characteristics of the surrounding area. The question here is not just whether it has the capability to provide a function, but whether it has the opportunity to do so.

The contrasting nature of ability and opportunity can be best understood by looking at some examples. Let's look at two of the primary functions provided by a wetland: 1) flood water storage, and 2) water filtering.

The flood storage function is formally called floodflow alteration or more appropriately floodflow attenuation. Wetlands can function to store water during storm events and this water storage attenuates flood flows downstream. Wetlands are often topographically configured so that if water is added to the wetland, it will store a certain amount before the water is released into down drainage areas. Wetlands of this nature have ability or effectiveness in providing this function. However, if the wetland is situated in the landscape where it will never receive flood waters, or it has an appropriate landscape position but there is a barrier between the wetland and water source, then it can lack opportunity. In other words, it is good at storing flood water but it never receives any.

Provision of the water filtering function is a similar example. Wetlands are the kidneys of the ecosystem and they can be great filters of both surface water and groundwater. They can have favorable topographic features, vegetation, and soils to enhance their water filtering ability, but they will never be able to provide this function if they do not have the opportunity to receive additional water for filtering. The one difference with this function is that connectivity to both a surface water and groundwater system can be important, with groundwater contributions filtered if groundwater recharge occurs.

For some functions, ability and opportunity differences may not be important. For example, the provision of wildlife habitat may not be different for many species because they have the ability to fly or travel to the wetland habitat provided regardless of landscape position or connectivity. For these species there is no restriction to opportunity when considering wildlife habitat value.

However, for fish or aquatic organism habitat functions, connectivity can be very important in determining whether a wetland has opportunity. A good example is northern pike spawning. Northern pike spawn in very early spring in flooded wetlands with favorable persistent emergent vegetation. A wetland could be located next to a lake or waterway where northern pike occur and have the proper vegetation component for pike spawning, but if there is no surface water connection to provide access for pike to the wetland, then the spawning will not occur. Such a surface water connection is not only important during the early spring spawning period when water levels may be high, but also later in the year when the hatched fish are ready to move out of the wetland into nearby water systems.

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## *PARKING LOT OVER WETLANDS COSTS TRUCKING CO. $100K IN FINES, PLUS RESTORATION*

***Pamela C. Lundborg***

A North Syracuse trucking company agreed to settle both a federal and a state lawsuit, each charging that Riccelli Enterprises, Inc. filled in a portion of protected wetlands of the Cicero Swamp in Onondaga County with a parking lot.

As a result of the settlement, Riccelli Enterprises must pay $50,000 in fines to the New York State Department of Environmental Conservation (DEC), must pay another $50,000 to the United States Department of Justice, and will have an additional $175,000 in penalties suspended, provided the company complies with the settlement with the state DEC. Under both the federal and state settlements, Riccelli will also have to remove the parking lot and restore the wetlands.

According to the consent order from the state lawsuit, Riccelli Enterprises owns 10.44 acres of property off of Taft Road in Cicero, which it purchased in 2004. Part of the property includes freshwater wetlands. Sometime before June 30, 2008, Riccelli Enterprises constructed a 6.2 acre parking lot over the wetlands without obtaining the proper permits from the DEC. The construction of the lot included draining the wetlands, filling in the land with at least 10,000 cubic yards of construction fill materials, cutting timber and vegetation, and grading the land.

On October 17, 2012, Riccelli Enterprises and the state DEC settled the lawsuit when the company agreed to the first $50,000 fine and the suspended $175,000 fine. According to the consent order for the state lawsuit, Riccelli Enterprises had 90 days to submit an acceptable wetland restoration plan. The plan must include a schedule to restore the wetlands within 12 months of acceptance of the plan by the DEC.

Almost a year later, the federal government brought a nearly identical complaint against Riccelli for violating the federal Clean Water Act when it built the parking lot. In that consent decree, signed August 5, 2013, Riccelli agreed to pay another $50,000 to the U.S. Department of Justice and work with the Army Corps of Engineers to restore the wetlands.

Since the two consent decrees were signed, Riccelli has submitted plans and begun the process of obtaining the necessary state permits to begin the restoration process, said Barbara McGinn, Assistant Regional Attorney for the state Office of General Counsel. Before the physical restoration can begin, Riccelli Enterprises must first obtain the necessary storm water construction permits, which are still pending, she said. Once those permits are issued, she said, the company may begin deconstructing the parking lot.

On the federal side, Assistant U.S. Attorney Charles Roberts said he also had no further updates on the progress.

Richard Riccelli, president and chief operating officer of Riccelli Enterprises, was unavailable for comment.

## *BASIC WETLAND DELINEATION TRAINING CLASS AVAILABLE*

***Frances Reese***

Ever wondered how wetlands are delineated? In response to comments received at our last Forum conference, we will be offering a "Basic Wetland Delineation" class on April 30, after the Annual Conference in Rochester. This is your chance to come and see how it's done. No special background or knowledge is required. Just come prepared to get your feet wet and your hands dirty. There will be plenty of opportunities to ask questions. Register early because the course will be limited to 60 participants.

Class participants will learn to recognize several wetland and upland plant species and hydric soil indicators common in the Lake Plain ecozone. Students will also practice filling in the data sheets used for formal wetland delineations. The course will be taught by a team of experienced wetland scientists and soil scientists.

The course will be offered at Braddock Bay Town Park, located in the Town of Greece, along the shoreline of Lake Ontario. The site is easily accessible from the Ontario Parkway and I-390. The site features emergent marsh, as well as shrub and wet woods areas. A picnic shelter and rest rooms are available. Braddock Bay is also a premier site for birdwatching, so bring your binoculars.

Recommended items to bring along: waterproof boots, warm clothing, hand lens, an old towel, a Munsell color book (if you have one), a notebook and pencil, plant identification keys, bird identification keys, and binoculars.

## DEC ISSUES TWO GENERAL PERMITS FOR STREAM CROSSINGS FOR TIMBER HARVESTING

Under the authority of Article 15 Title 5 of the New York Environmental Conservation Law and Section 401 of the Clean Water Act, the New York Department of Environmental Conservation (the "DEC") has issued two general permits for construction of temporary stream crossings for the purpose of timber harvesting.

General Permit GP-0-13-002 allows the placement of temporary bridges no greater than thirty feet long and temporary bottomless arch culverts no greater than four feet wide. General Permit GP-0-13-004, which involves a longer approval process, allows the placement of temporary bridges no greater than sixty feet long and temporary bottomless arch culverts no greater than eight feet wide. Under either permit, crossings are limited to one per 1,000 feet of stream course.

For either permit, applicants must submit a "Request for Authorization," along with a project location map, site photographs, project sketch plan and Permission to Inspect Property Supplement Form. Applicants for a GP-0-13-002 may proceed with the project five days after filing, provided they are not contacted by the DEC. Applicants for a GP-0-13-004 cannot proceed until they receive the DEC's authorization.

When announcing the issuance of these general permits, DEC Commissioner Joe Martens emphasized that New York's forest products manufacturing sector employs approximately 500,000 people and shipments from New York's wood products industry are valued at approximately $6 billion per year. These permits should help this industry continue to shrive.

## NYSWF RESEARCH GRANT PROGRAM SEEKING APPLICANTS

***Charlotte Brett***

The NYSWF's Research Grant Program is currently accepting applications for students conducting wetlands-related research! Applicants must be enrolled for the spring 2014 semester as either a matriculated graduate student or junior or senior at a recognized four-year accredited college or university and must have a cumulative 3.0 grade point average. Preference will be given to students attending a school within New York State, although this is not a requirement.

Selected candidates will be awarded a $500.00 research grant. The grant is to be used at the discretion of the recipient to further his/her independent research. Selected candidates will also be awarded conference admission and lodging for the 2014 NYSWF Annual Conference held April 29-30 in Rochester, NY, where they will have the opportunity to showcase their research and network with NYSWF members, panelists, and other working environmental professionals from the private, public, and non-profit sectors. Award recipients will also receive a one-year subscription to the NYSWF newsletter.

Additional program information and application materials are available for download at www.wetlandsforum.org.

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Had it not been for the conservation efforts, particularly the creation and use of wood duck nest boxes, it's highly likely that the wood duck would be absent from the landscape today. Another icon of American conservation is the bald eagle (*Haliaeetus leucocephalus*).

As conservation efforts continue, so that species treasured by so many remain part of the landscape for not only generation after generation but for the sake of the species, let us not forget where we've been as we look ahead. Tried and true American conservation works. It is important for habitat preservation to continue, but perhaps enhancement in combination with active management of not only newly protected habitat but habitat protected long ago should become the new paradigm. And the more we understand about the ecology the purer the enhancement can be.

[1] Anonymous. No date. Wood Duck (Aix sponsa). U.S. Department of Agriculture, Natural Resources Conservation Service, Madison, MS, and Wildlife Habitat Council, Silver Spring, MD. Fish and Wildlife Habitat Management Leaflet. Jamestown, ND: Northern Prairie Wildlife Research Center Online. http://www.npwrc.usgs.gov/resource/birds/woodduck/index.htm (Version 16AUG99).

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It is important for the connection to be maintained during high spring flows and later during lower levels.

Emphasis on the design of new and replacement stream culverts in recent years is well founded and gets to the significance of connectivity for stream organisms and wetland functions. Improving or maintaining water connections with appropriately designed, sized, and placed culverts may greatly improve the opportunity aspect of functions for both streams and attendant wetlands. Establishing or improving such connections can be a fairly simple means of enhancing (to make better) wetland and stream resources.

One word of caution when it comes to restoring or creating connections, especially stream connections, there is the possibility that the connection could be an avenue for invasive species access. A good example is common carp. Carp are widespread and often destructive. Their lengthy spawning period and activity can be harmful to wetland vegetation and fish and amphibian reproduction. As a result, it is prudent to consider both the positive and potential negatives aspects of restoring connectivity.

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References

Adamus, P. R. 1983. A Method for Wetland Functional Assessment, Volume II. Federal Highway Administration Rep. No. FHWA-IP-82-24.

Adamus, P.R., Clairain, E. J., Smith, R. D., and Young, R.E. 1987. Wetland Evaluation Technique (WET); Volume II: Methodology. Operational Draft Technical Report Y-87-__, U.S. Army Engineer Waterways Experiment Station, Vicksburg, Miss.

## *U.S. FISH AND WILDLIFE SERVICE ANNOUNCEMENT REGARDING NORTHEAST BATS*

***Robyn Niver***

On October 2, 2013, the U.S. Fish and Wildlife Service (Service) made two announcements regarding bats in the northeast. They determined that federal protection under the Endangered Species Act was not warranted for the eastern small-footed bat and they proposed listing the northern long-eared bat as an endangered species.

As part of the rulemaking process, the Service is currently accepting public comments on the determination for NLEB. A final rule for the NLEB is anticipated in the Fall of 2014. The Service released interim conference procedure guidance for projects that may impact NLEB in January 2014 and will have consultation and recovery guidance available in the Fall of 2014. More information can be found at **http://www.fws.gov/midwest/endangered/mammals/nlba/index.html**.

Please contact Robyn Niver in the Service's NY Field Office at 607-753-9334 with any questions.

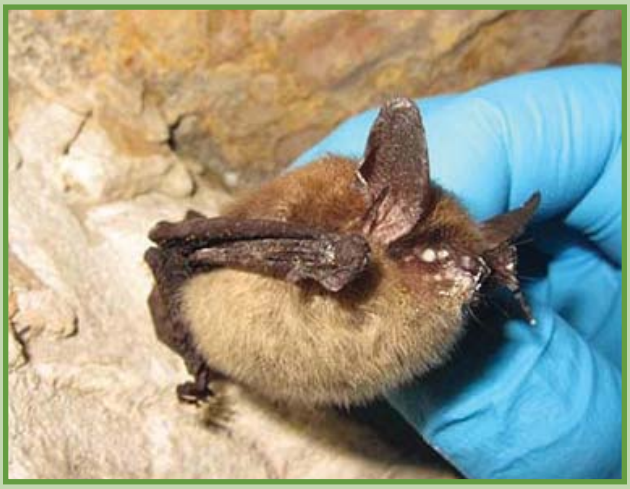

***Photo credit: Steve Taylor, University of Illinois***

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Thus, under the CWA, the federal government's authority to regulate extends only to "the waters of the United States." Regulation of all other waters is left exclusively to state or local governments.

Consequently, the definition of "the waters of the United States" has a huge impact on landowners' abilities to develop wetlands. For example, if waters fall outside the jurisdiction of the EPA, developers can proceed without complying with CWA mechanisms, such as the Section 402 National Pollutant Discharge Elimination System permitting program and the Section 404 Dredge and Fill permitting program. In numerous cases, this jurisdictional boundary has dictated the EPA's ability to bring an enforcement action against a developer. For example, in March 2008, the EPA dropped seventy-seven potential Section 404 enforcement actions because it was uncertain whether it could establish jurisdiction over the waters.

## Supreme Court's Jurisprudence Regarding EPA Jurisdiction

The EPA has long sought to expand the definition of "the waters of the United States." In recent years, the United States Supreme Court has been called on twice to help clarify jurisdiction under the CWA. Pursuant to these cases, the test for what constitutes "the waters of the United States" is now whether, on a case-by-case basis, there is a "significant nexus" between the wetlands and "navigable waters."

First, in *SWANCC v. Army Corps of Engineers*, 531 U.S. 159 (2001), the Supreme Court rejected arguments that abandoned gravel pits fell within CWA jurisdiction. The Court made clear that abandoned pits and isolated seasonal ponds did not have a significant nexus to navigable waters.

More controversially, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Court was asked to determine jurisdiction over several wetlands, which were connected to navigable waters by nearby ditches and man-made drains. Justice Kennedy, who cast the deciding vote in a plurality decision, affirmed the "significant nexus test" and remanded the decision to the lower court. In summary, Kennedy stated that wetlands could fall within CWA jurisdiction if they significantly affect the chemical, physical and biological integrity of other covered waters.

Consequently, the Rapanos decision did little to clarify which wetlands would fall within CWA jurisdiction. Instead, it left the issue open for later argument about the scientific impact of wetlands on nearby navigable waters.

## Implications of the Recent EPA Draft Study

The EPA's draft study appears to be a direct response to Justice Kennedy's opinion. The study attempts to provide precisely the scientific justification necessary to establish a nexus between wetlands and navigable waters. Specifically, the study makes three conclusions:

1. All streams, including perennial, intermittent and ephemeral steams, are physically, chemically and biologically connected to downstream rivers.
2. Wetlands and open waters that have a bidirectional hydrologic exchange (e.g. wetlands in riparian areas and floodplains) are physically, chemically and biologically connected to nearby rivers.
3. There is insufficient data to generalize whether wetlands that lack bidirectional hydrologic exchanges (e.g. prairie potholes, vernal pools and playa lakes) are physically, chemically and biologically connected to other waters, however these wetlands could be connected on a case-by-case basis.

In publishing this study, the EPA's strategy is clear.

If the EPA can establish a scientific connection between wetlands and navigable waters, it could finally achieve blanket jurisdiction that it has long desired. Most importantly, the establishment of a firm scientific connection would allow the EPA to proceed with enforcement actions regarding wetlands in riparian areas or floodplains without the uncertainty of making case-by-case nexus determinations. It is yet to be seen whether the academic community will accept this study as authoritative.

# 2014 ANNUAL CONFERENCE AND MEETING

RADISSON HOTEL ROCHESTER RIVERSIDE, ROCHESTER, NEW YORK • APRIL 29 & 30, 2014

Name: _____ Affiliation: _____

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**ATTENDEE REGISTRATION** (Pre-registration must be received by April 15. ***All on-site registration is $175.***)

Two-day registration fees include: continental breakfast, lunch and mixer (Tuesday, April 29), conference materials and field trips.

❑ Full Time Student (with valid School ID) - **$60** ❑ Full Time Student (oral/poster pres.) - **FREE** **$** _____

❑ Speakers - **$110** ❑ NYS Wetlands Forum Members - **$130** **$** _____

❑ All Others - **$150** ❑ Pre-registration plus NYS Wetlands Forum Membership - **$165** **$** _____

❑ Basic Wetlands Delineation Training (with bag lunch and training materials - Wednesday) - **$25** **$** _____

One-day registration fees include: continental breakfast, lunch, conference materials and mixer for Tuesday; or continental breakfast, conference materials and field trips for Wednesday.

❑ One-day Tuesday (April 29) - **$100** ❑ One-day Wednesday (April 30) - **$100** **$** _____

**NYSWF 2014 MEMBERSHIP -** ❑ Individual Membership - **$35** ❑ Corporate Membership - **$100** **$** _____

(Corporate Membership includes membership for up to four people from the same place of business. See web site for details.)

**EXHIBITOR REGISTRATION -** ❑ Exhibitor includes one registration - **$250** **$** _____

(Exhibitors should contact Johanna Duffy at (315) 457-5200 or jduffy@bartonandloguidice.com ) **TOTAL** **$** _____

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***For updated 2014 Annual Conference and Meeting information visit www.wetlandsforum.org.***

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