

The Forum

NEW YORK STATE WETLANDS FORUM NEWSLETTER

DEFINING WATERS OF THE UNITED STATES: THE SAGA CONTINUES

By Michelle R. Billington

In June 2015, the United States Environmental Protection Agency (EPA) published the controversial Clean Water Rule (CWR) that promulgates a new definition of “Waters of the United States” in the regulations implementing the Clean Water Act (CWA). The CWA applies to protect “navigable waters,” which is defined by statute to mean the waters of the United States, including the territorial seas. The CWR, which took effect on August 28, 2015, was intended to provide a clear statement of exactly which waters qualify as “waters of the United States” and thereby are subject to federal jurisdiction. Specifically, permits are needed to discharge into waters deemed “waters of the United States” under CWA § 402 or to dredge or fill those waters under CWA § 404. Previous United States Supreme Court cases and subsequent interpretations by the U.S. Army Corps of Engineers (the “Corps”) attempting to define the meaning of “waters of the United States” only succeeded in creating confusion, and served as the impetus for this regulatory change.

In its 1985 decision, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) the Supreme Court showed deference to the Corps’ determination that “adjacent wetlands are ‘inseparably bound up’ with the waters to which they are adjacent” and therefore included wetlands in the definition of “waters of the United States.” Several years later, in *Solid Water Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), the Supreme Court reevaluated the definition in the context of filling of abandoned gravel pits—isolated waters—used by certain migratory birds. The Court found the CWA did not bar filling these “isolated” intrastate ponds, since they were not “navigable waters” as defined in the CWA, merely because migratory birds used them. The Court reasoned that Congress intended CWA jurisdiction to be limited to navigable waters and non-navigable waters that have a “significant nexus” to navigable water.

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Editor

Kathleen M. Bennett

Typing and Layout

Katharine Moody

Proofreading

Jennifer Walther

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

There is crispness in the air!

I hope you were able to attend the 2015 NYSWF Conference in Syracuse this past April. What a success! We had a nice mix of students and professionals, a healthy display of research and project posters, along with an almost record attendance! The highlights of the two-day event included a keynote address from Mr. Ken Lynch with the NYSDEC, Region 7, a lunchtime tribute to Dr. Richard Smardon and Dr. Ralph Tiner, a lunchtime presentation by Kevin Bliss which detailed his doctoral research, a session focused on the Onondaga Lake revitalization effort, and the always popular legislative and regulatory update session which included an update on the Northern long-eared bat federal listing.

At the 2015 NYSWF Conference we also said good-bye to two long-standing board members: Ms. Fran Reese and Mr. Peter Gibbs. We took a moment to recognize the many sacrifices and efforts that Fran and Peter have made on behalf of the NYSWF, and I want to take another moment to again acknowledge their dedication to the NYSWF Board for many years and to thank them for their continued support of the organization. The vacancies on the Board allowed for two new individuals to hop aboard: Ms. Andie Graham and Mr. Tim Post. I have heard rave reviews about Andie and Tim, and look forward to adding them into the mix over the next year.

Plans for the 2016 NYSWF Conference are underway! Please save the date for April 5 and 6, 2016. We will be hosted by the Holiday Inn in Saratoga Springs, NY. The conference dates are a bit earlier than normal, but these dates allow us to avoid many other scheduling conflicts that creep up during the month of April. Look for additional details about the 2016 conference in this newsletter.

In the meantime, enjoy your member newsletter and visit the website for information updates.

Johanna Duffy



GRANT WINNERS

Grete Bader

I am an ecology Masters student at SUNY ESF in Syracuse, NY. My thesis research takes place at Benson Mines, an inactive iron mine in the northwestern Adirondacks near Star Lake, NY. The wetland at the base of the mine tailings supports a number of native orchid species, including *Pogonia ophioglossoides*, *Calopogon tuberosus*, *Spiranthes romanzoffiana*, *Liparis loeselii*, *Platanthera clavellata*, and *Platanthera aquilonis*. Populations of three of the orchid species, *P. ophioglossoides*, *C. tuberosus*, and *S. romanzoffiana*, likely surpass 250,000 individuals. *Pyrola asarifolia*, a threatened species in New York, also thrives at the site.

The objectives of my research are to analyze biotic and abiotic drivers of the orchids and *P. asarifolia* at Benson Mines, including soil properties, plant functional traits, and associations with mycorrhizal fungi. *P. asarifolia* and all orchid species depend on compatible fungi for nutrients in order to germinate, and the specificity of these associations is of particular interest. The New York State Wetlands Forum grant has significantly enhanced my work. The grant is being used to cover my field season travel expenses from Syracuse to Star Lake. The funds will also assist with laboratory costs for mycorrhizal fungi identification. Without this support, my data collection and analysis would be much more limited.



Eli Polzer

My thesis research was initiated under the auspices of a larger habitat restoration project in the coastal wetlands of Lake Ontario. The overarching project originated as a result of a pattern of degradation observed that could be attributed to, most notably, lake level regulation and invasive species. Project partners, including Ducks Unlimited, NYS DEC, the Town of Greece, and The College at Brockport, wanted to support the diminishing populations of waterfowl and native fishes that rely upon these wetlands at some stage of their development or lifetime.

More deeply, we understand that it is sedge/grass meadow habitat that serves as the foundation of the proliferation and health of these populations and, thus, the less sedge meadow we have (currently the case witnessed), the less faunal species diversity. Therefore, my particular research looks at the use of a precise sequence of cattail controls, strategic placement of available organic materials, close monitoring of environmental conditions, and active revegetation to revitalize the remaining sedge/grass meadow so important to our wetlands and the creatures therein.

As wetland researchers, we are exceptionally fortunate to have an active and supportive state organization focusing on our efforts and challenges. Of course, one of the primary challenges as a graduate student is sourcing sufficient monies to support our great labors of love. In this way, the New York State Wetlands Forum has been a beacon of hope. Through a student research award provided through NYSWF, I was able to purchase a suite of local, native sedge/grass meadow seedlings to support the active revegetation process on-site. For anyone who has performed a site restoration, you will likely readily agree that if there is no active revegetation (reset that trajectory!), floristic recovery may be an impossibility. So, again and again, when I observe the on-site progress of these seedlings, I feel grateful. Thank you NYS Wetlands Forum!



Riding shotgun on the USFWS amphibious Marsh Master mower during Phase II summer (2015) mowing (one component of Brockport cattail control methodology).

Dr. Ralph Tiner

At this year's conference the NYS Wetlands Forum recognized Dr. Ralph Tiner for his contribution in wetland sciences prior to his retirement from the U.S. Fish and Wildlife Service (USFWS). Ralph is a wetland ecologist with more than 40 years of experience mapping wetlands with most of his time spent in public service. Since 1977, Dr. Tiner has directed wetland mapping in the Northeast U.S. as part of the Service's National Wetlands Inventory (NWI).

Before his service with NWI mapping he worked on Connecticut's original tidal wetland inventory while a graduate student at the University of Connecticut. This survey was done on-the-ground, walking around the state's 15,000 acres of wetlands through all seasons (yes, even in winter), marking the boundaries and recording their location on large-scale aerial photographs.

After graduate school, Ralph accepted a position with the South Carolina Marine Resources Division, where he oversaw an inventory of the state's 500,000 acres of wetlands in addition to evaluating impacts of construction projects in the coastal zone. The South Carolina inventory was done using remote-sensing techniques where aerial photographs were viewed under a stereoscope and boundaries delineated with pen and ink on overlays.

As Regional Wetland Coordinator at USFWS, Ralph worked principally with other federal and state agencies interested in wetland conservation and with universities and private contractors doing the actual image interpretation. While wetland mapping is the focus of these activities, he has also conducted numerous studies of wetland trends and landscape-level assessments of wetland functions.

One special topic of recent interest is the effect of sea level rise on tidal wetlands. While most researchers are focusing on processes within the marshes that affect the ability of marshes to build up their surfaces as sea level rises, Ralph is directing his efforts to monitoring salt marsh migration. This is the process where tidal swamping of neighboring forests eventually converts the woodland to salt marsh. He is working with some of the Northeast refuges and other organizations to establish permanent plots in these lowlands to track long-term changes in vegetation patterns and soil properties. While Ralph doesn't expect to see the conclusion of these studies, he expects to be around to see some significant changes in the next two decades.

Ralph also has served as the U.S. Fish and Wildlife Service's national expert on wetland delineation and has been actively involved in improving delineation techniques for over 20 years. He teaches a fall course in wetlands at the University of Massachusetts, which helps prepare natural resource science students for work in the real world. He has also served as an associate editor for the journal – *Wetlands* – and has written a few books on wetlands.

I have had the good fortune to have known Ralph since around 1990 when I took my first wetland delineation course with him as a Fish and Wildlife Technician at NYS Department of Conservation. As a young Technician trying to delineate wetlands in the Central NY area I always had a copy of his "Field Guide to Non-tidal Wetland Identification" handy as it helped me learn new wetland plants. At the time there were very few reference books on the topic or people like Ralph that were teaching wetland delineation methods. I certainly appreciate Ralph's work and how it has helped me in my career. Many folks echo the same thanks, but most importantly Ralph's efforts have helped improve the conservation of wetlands, benefitting both wildlife and people. We wish him well in retirement, and know we will see him around a swamp somewhere in the future.



By Kevin Bliss

Dr. Richard Smardon

Lunch-time attendees of our 2015 Annual conference in Syracuse heard the NYSWF pay tribute to Drs. Richard Smardon and Ralph Tiner. We've since thought that providing an occasional synopsis of select members may be a nice way to recognize noteworthy accomplishments. Toward that end, the following is provided to recognize Dr. Richard C. Smardon.

Rick has been working on wetland science and management policy since his 1973 master's thesis, "Assessing visual-cultural values of inland wetlands in Massachusetts." He has been involved with wetland research and teaching at the SUNY College of Environmental Science and Forestry (ESF) since 1980, accepting emeritus status in 2014 while continuing as major professor to his remaining graduate students and completing funded research on combined sewer overflow (CSO) treatment wetlands. At SUNY ESF, Dr. Smardon accepted the responsibility of Coordinator for the Graduate Program in Environmental Studies (GPES) and Faculty of Environmental Studies in 1986. He held the position of Chair, Faculty of Environmental Studies from 1998 to 2007. During his faculty tenure, the GPES area of study in Water and Wetland Resource Studies was further developed.



Rick's publications have been seminal. His early work pioneered interdisciplinary research in functional assessment of the visual-cultural aspects of wetlands. His 1983 book, "The Future of Wetlands: Assessing Visual-Cultural Values," stands as a classic. His latest book "Sustaining the Worlds Wetlands; Setting Policy and Resolving Disputes," includes eight international wetland management studies. It is one of the few books that combine wetland management policy with wetland science. In addition to these referenced publications, Rick has written or co-authored more than 100 books, book chapters, or peer reviewed articles and monographs.

Rick has presented frequently on wetland policy and science in national and international conferences and has worked as an intermittent scholar with the US Army Corps of Engineers on wetland assessment methodology. Rick has been a long-serving Board member of the Central New York Land Trust and Chair of the Great Lakes Basin Advisory Council.

Rick's contribution to wetland science is the combination of both social science and humanities with physical science for wetland value identification and wetland management. As a founding member of the NYSWF, Rick has been an integral part of our organization since its inception in 1994. He continually exemplifies the NYSWF's mission by 1) improving communication among people interested in wetlands; 2) calling attention to the need to objectively discuss local, statewide, regional, national, and global wetland issues; 3) improving members' knowledge and understanding of wetlands; and 4) making wetland information and research available to the membership and the general public.

For these reasons, the NYSWF was proud to have sponsored Rick for the Environmental Law Institute's 2015 National Wetland's Award in the Science Research category. We've since learned Rick was a finalist in the competition, which is a very notable accomplishment. Our congratulations goes out to Rick.

"ASK THE NATURALIST"

Dear Mr. Naturalist:

I found this creature attached to a plant stem along the pond in the back 40 – what is it?

Answer on page 6



2014 TREASURY REPORT

By Charlotte Brett, Treasurer

According to the Forum's by-laws, and NY Non-Profit Corporation Law Section 519, the Board is required to present an annual treasury report to the membership. This is usually accomplished during the business meeting luncheon. During the 2015 business meeting, the agenda included special items such as Dr. Kevin Bliss' presentation of his dissertation research and recognition of Dr. Ralph Tiner and Dr. Richard Smardon for their contributions to the field of wetland science. Due to timing constraints, the treasury report was not given at the meeting, so it is included in this newsletter instead.

New York State Wetlands Forum 2014 Treasury Report - Summary	
Item	\$ Amount
Income	
2014 Conference	20,430.60
Bog Turtle Training	6,460.00
Membership Dues (221 members)	5,420.52
Delineation Training	1,282.77
Merchandise	744.00
Bank Interest	69.18
Donations	35.00
Total Income	34,442.07
Expenditures	
Management Services	15,867.25
2014 Conference	15,466.13
Office Expenses	2,462.13
Laptops & Ancillary Equipment	1,726.45
Grant Awards	1,000.00
Merchandise	807.50
Wetland Delineation Training	665.78
Bog Turtle Training	660.00
Bank Fees	36.00
CHAR 500 Payment (NYS Tax Filing)	35.00
Total Expenditures	38,726.24
Change For Year	(4,284.17)
Year-End Cash Position	\$41,076.42

THE NATURALIST RESPONDS

That is a "Snake Doctor" nymph shed skin (on a Purple Loosetrife by the way). Most of us know them typically as Dragonflies! The aquatic larval stage has clambered up a plant stalk and emerged as the familiar flying adult Darning Needle". Larger species like this can spend up to three years underwater, living the life of a fierce predator, eating insects, minnows and tadpoles. Just like cicada shed skins, you can pick these up and hang them off your shirt for a good scare with family and friends!



NORTHERN LONG-EARED BAT UPDATE

By Robyn Niver

A final rule listing the northern long-eared bat (*Myotis septentrionalis*) as a federally-threatened species was published in the Federal Register on April 2, 2015 (<http://www.fws.gov/midwest/angered/mammals/nleb/pdf/FRnlebFinalListing02April2015.pdf>). This rule became effective on May 4, 2015, along with an interim 4(d) rule providing some “take” exceptions for the species. A final 4(d) rule was published on January 14, 2016. Many federally-listed threatened species have the same “take” prohibitions as endangered species but the U.S. Fish and Wildlife Service (“Service”) has the authority under the Endangered Species Act to issue tailored prohibitions found to be necessary and advisable for the conservation of that species. In the case of the northern long-eared bat, several categories of activities were included in the interim rule. Any “take” associated with activities in these categories (that also include conservation measures) was excepted and no incidental “take” permit or incidental take statement was necessary. As of February 16, 2016, the Service’s final 4(d) rule for the northern long-eared bat will be effective. The final rule flipped the way in which we are describing the “take” prohibitions. Most “take” is now exempt except for specific activities described in the final rule.

The following prohibitions apply to the northern long-eared bat:

- i) Purposeful take, including capture, handling or other activities (anywhere).
- ii) Within the WNS zone (Note: all of NY is within the WNS zone):
 - A) Actions that result in incidental take of northern long-eared bats in known hibernacula.
 - B) Actions that result in incidental take of northern long-eared bats by altering a known hibernaculum’s entrance or interior environment if it impairs an essential behavioral pattern.
 - C) Tree-removal activities that result in the incidental take of northern long-eared bats when the activity:
 - 1) occurs within 0.25 miles of a known hibernaculum; or
 - 2) cuts or destroys known occupied maternity roost trees, or any other trees within a 150-ft radius from the tree, during the pup season (June 1 through July 31).
- iii) Possession and other acts with unlawfully taken northern long-eared bats. It is unlawful to possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any northern long-eared bat that was taken in violation of this section or State laws.
- iv) Import and export.

Exceptions from prohibitions:

- i) Any person may take a northern long-eared bat in defense of his own life or the lives of others, including for public health monitoring.
- ii) Any person may take a northern long-eared bat that results from the removal of hazardous trees for the protection of human life and property.
- iii) Any person may take a northern long-eared bat by removing it from human structures, but only if the actions comply with all applicable State regulations.
- iv) Purposeful take that results from actions relating to capture, handling, and related activities for northern long-eared bats by individuals permitted to conduct these same activities for other species of bat until May 3, 2016.
- v) All of the provisions of §17.32 apply to the northern long-eared bat.
- vi) Any employee or agent of the Service, of the National Marine Fisheries Service, or of a State conservation agency that is operating a conservation program pursuant to the terms of a cooperative agreement in accordance with section 6(c) of the Act, who is designated by his agency for such purposes, may, when acting in the course of his official duties, take northern long-eared bats covered by an approved cooperative agreement to carry out conservation programs.

The Service has received many questions about what this rule means and how it should be considered during project reviews. I recommend that you contact your local Service Ecological Services Field Office for questions on any specific projects (Cortland, NY office: 607-753-9334).

However, I offer this general guidance: don’t start by thinking about the 4(d) rule; start by thinking about the project and whether any listed species (like the northern long-eared bat) may be present. If so, is the project likely to impact the species? Impacts to consider for northern long-eared bats include things like: roosting or foraging habitat removal; roosting or foraging habitat alteration; direct effects to bats from tree removal, smoke, light, noise, collision; hibernaculum destruction or modification; and disturbance to wintering bats. The Service has developed guidance in conjunction with several federal agencies (e.g., Federal Highway Administration) regarding the assessment of impacts and the Cortland field office can refer you to those documents for more information. If impacts are anticipated, can the project be modified to avoid those impacts? If so, great! If not, now is the time to consider the 4(d) rule. If the project has no federal permitting, funding, or other involvement, and it meets the 4(d) rule, any “take” is already excepted.

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FORUM PARTNERS WITH USFWS AND TREVOR ZOO ON BOG TURTLE HABITAT TRAINING

David W. MacDougall, CWB®

At the request of New York State Wetland Forum members, the U.S. Fish and Wildlife Service (Service), New York Field Office (NYFO) held the second annual Phase 1 Bog Turtle Habitat Assessment Training at the Millbrook School's Trevor Zoo, Millbrook, NY, on May 19 and 20, 2015. Twenty people were in attendance, including municipal and state agencies and multiple environmental consulting firms. What is a Phase 1 habitat assessment? Phase 1 habitat assessments are recommended by the Service when proposed development is located near a potential bog turtle wetland. If a wetland is found to potentially contain a suitable bog turtle habitat, then the Service may recommend a Phase 2 survey to hand capture bog turtles or a Phase 3 live trapping survey. The training included both classroom and field components to improve surveyor knowledge and understanding of bog turtle habitats in the Hudson-Housatonic Region of southeastern New York.

We had a packed agenda which included an overview of regional recovery efforts, such as population monitoring and habitat restoration, and the federal regulatory review process by Noelle Rayman (NYFO). The do's and don'ts of Phase 1 habitat assessment survey reports and the state regulatory review process was presented by Lisa Masi (New York State Department of Environmental Conservation). Species experts, including Jason Tesauro (Jason Tesauro Consulting, LLC), David MacDougall (Kleinfelder), and Norbert Quenzer (Bagdon Environmental), presented on the natural history and distribution of bog turtles, and wetland habitat characteristics focusing on the vegetation, hydrology and soils. The training covered how to conduct a habitat assessment in the field, complete a Phase 1 data form and procedures for disinfecting field gear to reduce spread of invasive species and potential disease. The field component of the training included a visit to a historic bog turtle site and potential bog turtle site. Students gained hands on experience with identifying key vegetation, soil and hydrologic characteristics in each wetland.



Photo courtesy of Noelle Rayman

For more information on bog turtles, including survey forms, please visit the Service's NYFO website at this link: <http://www.fws.gov/northeast/nyfo/es/bogturtle.htm>.

A cool discovery at one of the sites was finding rare sedge; the New York State threatened Schweinitz's sedge (*Carex schweinitzii*).



Photo courtesy of David MacDougall

The highlight for many people seemed to be when a live bog turtle was presented by the Service to the group before heading out to the field. This turtle was trapped as part of an on-going population monitoring and habitat use project being conducted in Dutchess County.



Photo courtesy of Sandie Doran

So how did we do? Participants were pleased about the detailed presentations complete with vivid photos showing field characteristics, the amount of time spent focusing on indicator plant species, soils and hydrology, face-time with regulatory agencies which allowed participants to ask questions, and the casual nature of the instruction. Participants also enjoyed the meeting location, which provided a unique classroom experience complete with the intermittent distraction of emus and wallabies outside the classroom! We would like to thank Alan Tousignant, Director of the Trevor Zoo, for hosting the training!

SAVE THE DATE!

NYSWF 2016 CONFERENCE & MEETING

Wetland Policy...Conservation or Controversy?

April 5 & 6, 2016

Holiday Inn Saratoga Springs

Saratoga Springs, NY

Join us to learn, share, improve, and discuss wetland science, management, policy, and related matters.



Visit wetlandsforum.org for more information.

NORTHERN LONG-EARED BAT UPDATE

Continued from page 7

If the project has any federal involvement, and “may affect” the northern long-eared bat consultation is needed between that agency and the Service. While the 4(d) rule excepts “take,” it does not remove the requirements for federal agencies to consult with the Service and meet their Section 7(a)(2) requirements. The Service completed an “Intra-Service Programmatic Biological Opinion” (PBO) on our action of issuing the 4(d) rule for the NLEB. This PBO can provide section 7 compliance for other federal agency actions that “may affect” the northern long-eared bat and that do not result in the prohibited acts listed in the 4(d) rule. The Service provided streamlining procedures on our website for utilizing their PBO and additional guidance is forthcoming. Also, remember that northern long-eared bats are listed by the State of New York and so coordinate with the New York State Department of Environmental Conservation!

If you are still confused, don’t worry! We understand that this is a new process to think about and we will get through this. In the short-term, please contact the Service whenever you have a question. More information on the northern long-eared bat can be found at <http://www.fws.gov/midwest/angered/mammals/nleb/>.



Hibernating northern long-eared bat by Ann Froschauer/USFWS

DEFINING WATERS OF THE UNITED STATES

Continued from page 1

Then, in 2006, the Supreme Court addressed whether a wetland or tributary constitutes a “water of the United States” in *Rapanos v. United States*, 547 U.S. 715 (2006), a decision where the justices issued five separate opinions (one plurality, two concurring, and two dissenting) where no single opinion commanded a majority of the Court. The plurality opinion written by Justice Scalia, in which four justices joined, interpreted the CWA to apply to waters that were “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters and to “wetlands with a continuous surface connection to” those relatively permanent waters. This meant that the term “waters of the United States” encompasses only waters that are navigable in the traditional sense and their abutting wetlands. However, Justice Kennedy’s concurrence concluded that “to constitute ‘navigable waters’ under the [Clean Water] Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”

In light of these Court decisions, the Corps and EPA developed guidance on the subject, which, among other things, incorporated both Scalia’s and Kennedy’s tests. However, the guidance failed to provide sufficient information to ensure timely, consistent, and predictable jurisdictional determinations. In 2014, the agencies proposed a rule with the intent to better clarify the scope and definition of “waters of the United States” by increasing the categorical assertion of CWA jurisdiction.

The final CWR defines “waters of the United States” to include specific categories of waters under the jurisdiction of the CWA: traditional navigable waters, interstate waters, territorial seas, impoundments of jurisdictional waters, tributaries, adjacent waters, and other waters determined on a case-specific basis to have a significant nexus to navigable waters. Also included in the definition are neighboring waters, those from the first three categories that are in 100-year floodplains or within 4,000 feet of the high tide line or ordinary high water mark and which are determined on a case-specific basis to have a significant nexus to the first five categories. The first three waters are jurisdictional by rule, which means no further analysis is required.

The CWR also lists waters that are not “waters of the United States,” such as ponds for waste treatment systems, prior converted cropland, and certain ditches. Waters that are normally excluded are not jurisdictional notwithstanding whether they could be “adjacent” waters.

To determine whether other waters are jurisdictional on a case-specific basis, they must have a significant nexus to traditional navigable waters, interstate waters or territorial seas, meaning they must significantly affect the chemical, physical, and biological integrity of those jurisdictional waters. They may be evaluated individually or in a group where they are determined to be “similarly situated” in the region. Functions relevant to the significant nexus evaluation include sediment trapping, nutrient recycling, pollutant transportation and filtering, and runoff storage.

Critics of the CWR contend it is overly broad and subjects nearly any wet area to federal jurisdiction. Several states argue that the CWR extends federal control over small waterways and imposes burdensome regulation and costs. Meanwhile, the agencies contend that the CWR does not protect any new types of waters, create any new permitting requirements for agriculture, or address land use or private property rights.

Lawsuits quickly followed the promulgation of the CWR, with more than a dozen states suing EPA on the ground that the CWR impermissibly expands federal power and violates the CWA, the Constitution, and other federal laws. Several District Court judges issued temporary injunctions blocking enforcement of the CWR, and on October 9, 2015, a three-judge panel of the Sixth Circuit Court of Appeals stayed enforcement of the CWR nationwide while it determines where the various challenges should be heard. The agencies argue that the cases should be centralized in the Sixth Circuit, but industry groups, states, and environmentalists assert that challenges to the CWR should be decided at the district court level. The Sixth Circuit Court of Appeals heard arguments on December 8, 2015, on whether it has exclusive jurisdiction to hear challenges to the CWR, but a decision is still pending. For the time being, the Sixth Circuit’s stay means that the Corps and EPA will continue to render jurisdictional determinations based on its guidance that existed before they promulgated the CWR.

Freshwater fishes

L J G C M G E Q L P U X M E C A A S X E L G G N H
V H Y E A L O Q Q R O D D L N O A L A U D P O G A
T U R A I T V P J Y G Y V L G R P I D U N E Y W A
M E G C W Q F J O L G M I Z E K W W M U G Y R C C
O S F M G M M I A H M S U G I L T D A R T E R A P
V F Y R E K C U S B U H C L T G L E U X D I R Z Z
U X W F V Q L I L H S E L K F S X T P F F P G T T
B C B I V M F U G S K B B Z O Z S A I Z X P D H H
Z F G Z P I E S D I E O F Z H E L N U Y O A L W U
Y T X Z L G Q B P F L W N F K B P Y L C U R W Q E
W X S L I U V N U E L L B A N I P L U C S C U V E
O G I L C K R Y G L U I L N C N O T N H K K U M I
W K L Y T E S E N D N D U K Q N Y N U Y Z C U E P
T B V R H F K U O D G G E M G X P A M A H A T Y H
L R E T R A D T S A E R B E U L B O P X K L K Z A
N O R B L M N X E P E N A Q S C O H G D W B T C L
T O S Q W V V E S L H R C A F N H I U F H U G J Y
N K I K N A T Q H E S L K M E V I N Q M J R U S B
K T D G M I D S I U O A H Y P W O K T J G B U J Y
H R E R X V P F N G N Q E U M B N B P J N O Y N Z
Z O S T N S S F E J S J R K Q H T Y X M Z T K H L
Y U H P V B I H R P Y N R O F C L E N B U A C W Z
U T M D B S Y Z W O N N I M D A E H T A F P R P L
P V I S H N J E A I T U N D N U V V G N G B D I W
H M K E U Y K L Q Y E Z G N V C W F Y I P Y F N I

BLACK CRAPPIE
BLUEBACK HERRING
BLUEBREAST DARTER
BLUEGILL
BROOK TROUT
BURBOT
CARP
CATFISH
CHUB SUCKER
FATHEAD MINNOW
GILT DARTER
KILLIFISH

LAKE STURGEON
LONGEAR SUNFISH
MOONEYE
MUSKELLUNGE
NORTHERN PIKE
PADDLEFISH
PUGNOSE SHINER
PUMPKINSEED
REDFIN PICKEREL
SAUGER
SCULPIN
SILVERSIDES

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