Volume 7, Number 1 Summer 2000

The Forum

NEW YORK STATE WETLANDS FORUM NEWSLETTER

MESSAGE FROM THE CHAIR

— Jennifer Brady-Connor

Greetings to all and hope your summer has been a pleasurable one full of laughter, friendship, and family. The New York State Wetlands Forum has organized for another busy year, including a fall workshop on November 2 in western New York and the Annual Meeting scheduled for late March, early April in Albany. Please pass information about these meetings along to interested friends and colleagues. And while you are at it, urge them to become a member so they too can receive the benefits membership has to offer.

All of our accomplishments are a direct result of the efforts of the Board of Directors and volunteers. Most members pay their (incredibly cheap) dues of $25 a year, receive two or three "The Forum" newsletters annually, and perhaps attend our annual or regional meetings. On occasion, however, a member will take on the added responsibility of serving on a committee or, even more fun, participating on the Board of Directors. The people who choose to give not only of their dollars but also of their time write newsletter articles, organize meeting sessions, assist with long-range planning, or coordinate entire meetings! Some people who have given weeks or years of their time include continuing Board members Kevin Bernstein, our Vice-Chair as well as lawyer and talented newsletter editor; Beth Gelber, Second Vice Chair and Co-Chair of the 2001 Annual Meeting; Robert Dunn, Treasurer since *at least* 1997; Terresa Bakner, a legal eagle and eternal optimist; Barbara Beall, past Chair, Vice-Chair, Secretary, and Girl Friday extraordinaire; Sally Daly, a visionary and one of the original founders of the Forum in 1993; Diane Kozlowski, tireless Chair of the Fall 2000 meeting; and Joseph McMullen, always willing to organize meeting sessions and assist committees. And lets not forget to mention our committee volunteers like Fran Reese, LU Engineers; Norbert Quenzer, Bagdon Environmental, and Maira Senick, US ACOE.

Before I introduce the individuals elected to the Board of Directors at the 2000 Annual Meeting, it is with sadness yet understanding to announce that we accepted the resignation of Michael Corey. Michael, a Coastal Resource Specialist with the NYS Department of State Division of Coastal Resources, has been actively involved with the Forum since 1996 and was an integral part of our team. Spending many hours handling the logistics of our 1998, 1999, and 2000 annual meetings, he was also always willing to lend a hand on other tasks or organize a meeting session. Michael will continue on as a Forum member and to help out when he is available. Thank you, Michael, for your dedication and caring through the years. Your presence and input at Forum Board meetings will be missed.

On a brighter note, we have new Board members, most of whom are well known because of their solid reputations. First to be introduced is Jeffrey Zappieri, a Coastal Resource Specialist in the NYS Department of State Division of Coastal Resources. His primary responsibility is providing guidance and technical assistance regarding aquatic habitat protection and also restoration planning and implementation to municipalities and counties within the State's coastal zone. Prior to that Jeff was VP of Operations and Manager of Environmental Control for the Albany Bridge Corporation where he was responsible for stream corridor restoration and protection activities, among other things. As a Board member, Jeff hopes to facilitate improved communication between scientists, consultants, and agency resource managers.

Many members have also had the pleasure of working with or attending presentations by another new Board member, Anne Secord. Anne joined the Board to assist the Forum and to actively participate in wetland education efforts on behalf of the USFWS, her employer. A biologist with their Office of Federal Activities before becoming Branch Chief in May, 1999, Anne has also been actively studying the impacts of PCB contamination on tree swallows along the Hudson River. Anne is also involved with the Society of Wetland Scientists, Society of Environmental Toxicology and Chemistry and the Hudson River Environmental Society.

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SUPREME COURT TO REVIEW MIGRATORY BIRD RULE

— Lawrence P. Schnapf, Esq.

In *Solid Waste Agency of Northern Cook County v. Army Department*, the Seventh Circuit Court of Appeals affirmed a district court ruling that the Corps had jurisdiction to require the plaintiffs to obtain dredge and fill permits to fill in 17 acres of wetlands that were to be used as a site for a non-hazardous waste landfill. The site contained ponds and small lakes that had been used by over a 100 species of birds.

Under the migratory bird rule, the government has stated that it can regulate the filling of isolated wetlands like prairie potholes, vernal pools, playa lakes, swales, and pocosins, which are usually filled with water only for a part of the year. Landowners have argued that EPA cannot assert jurisdiction over isolated wetlands because they are neither adjacent to nor hydrologically connected to a navigable water. The federal government has argued that it can regulate isolated wetlands under the commerce clause because these wetlands serve as important nesting and feeding sites for migratory birds. Since the birds may be harvested by hunters or viewed by bird watchers, the government has contended that isolated wetlands had an impact on interstate commerce.

The federal government's position has been pejoratively referred to as the "reasonable bird" standard and was rejected by the Seventh Circuit in *Hoffman Homes v. EPA* which held that mere potential presence of migratory birds was a basis for the government to assert jurisdiction because the birds did not engage in interstate commerce. Until the agency could demonstrate some link to human activity, such as hunting or bird watching, the court said the EPA could not invoke the commerce clause. In a footnote, the court suggested that if it adopted the government's argument, a bird landing on a puddle in the middle of a highway would presumably allow EPA to regulate the puddle.

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Mission:

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

HOMEBUILDERS ASSOCIATION SUES CORPS OVER NEW PERMITS WITH HALF-ACRE THRESHOLD

The new nationwide permits have spawned a number of lawsuits. In one such lawsuit, the National Association of Homebuilders (NAHB) charged that the regulations which limit development affecting up to a half-acre of wetlands are "arbitrary and capricious" and exceed Clean Water Act authority (*National Association of Homebuilders v. U.S. Army Corps of Engineers,* D.D.C., No. 1:00CV00379 TPJ, 3/9/00). NAHB filed the suit against the U.S. Army Corps of Engineers in the U.S. District Court for the District of Columbia the same day the package of nationwide permits were published (31 ER 438, 3/10/00).

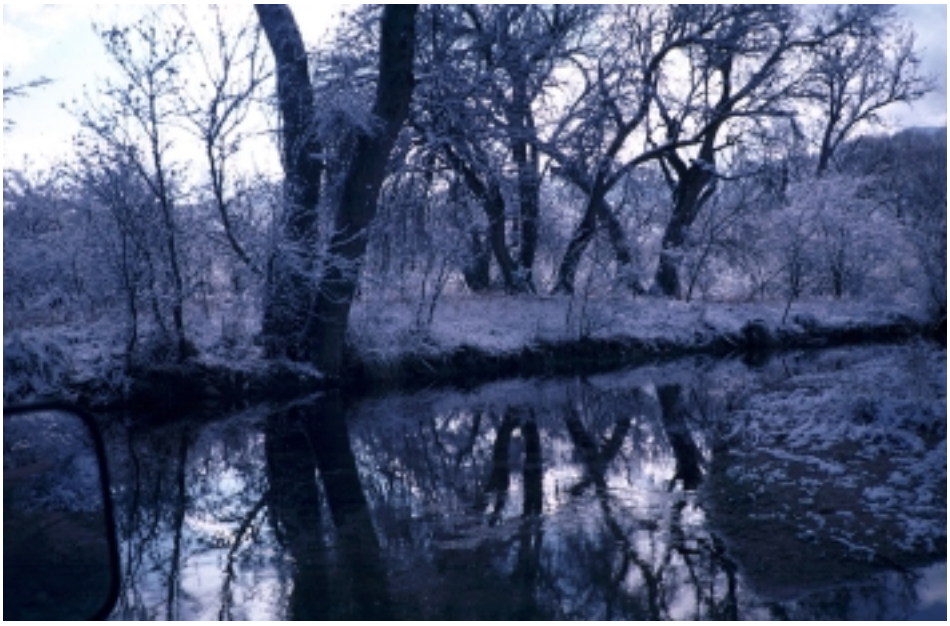
Among other things, the suit challenges provisions in the nationwide permits requiring vegetated buffer strips adjacent to water bodies and reducing the maximum allowable amount of wetlands covered from three acres to a half acre. According to the NAHB suit, the Corps also failed to "articulate an intelligible principle regarding what constitutes 'minimal adverse environmental effects,'" the guiding principle for wetlands regulation under Section 404 of the Clean Water Act. NAHB said the new permits are contrary to the intent of Congress that the Corps provide a streamlined process in its nationwide permitting program.

Finally, the suit said the permits are "arbitrary and capricious" and violate the Administrative Procedure Act by failing to make the determination that the activities covered by the permits adversely affect the environment or should require an individual permit.

Robert Mitchell, NAHB president, said at a press briefing he expected the new restrictions would overwhelm the Corps' ability to manage its permit program. Moreover, he said, the Corps has shown on evidence that the permit program needed to be revised. Homebuilders, he said, are largely responsible for increasing overall wetlands acreage. "In 1998, builders provided two acres of wetlands mitigated for ever wetland filled," he said. "We need a wetlands permit that makes sense and does not go beyond the authority in Section 404." Susan Asmus, director of water and wetlands programs at NAHB, said there has been a net gain of 20,000 acres of wetlands under the nationwide permitting program and that no change is needed.

Meanwhile, at least one member of Congress is considering legislative action to thwart the new permits. Rep. Philip English (R-Pa.), speaking at the NAHB press briefing, said the new permit package does not conform with the Clinton administration's goal of promoting smart growth and taming urban sprawl. Rather, he said, the permits are "no-growth" controls. He promised to bring the matter before the congressional real estate caucus, which he co-chairs, and look into possible legislative solutions. English also said he would not rule out trying to attach a legislative rider to an appropriations bill if "the administration continues to push this policy," although he said he has "been reluctant" to support environmental riders.

As of August 2, 2000, the government and the NAHB were in the midst of filing procedural (but not definitive) motions. *The Forum* will report on the progress of this case in its next newsetter.



(MESSAGE FROM THE CHAIR)

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Dr. Richard Smardon, Chair of and Professor with the Faculty of Environmental Studies of SUNY College of Environmental Studies and Forestry, is also a recent "electee". Rick has expertise in virtually all aspects of wetland management including landscape assessment and management, wetland assessment and mitigation, environmental management and citizen participation, law and aesthetics, transportation system environmental assessment, and Great Lakes and coastal management policy. In his free time Rick also is Director of the Randolph G. Pack Institute, Co-Director of the Great Lakes Research Consortium, Chair of the Great Lakes Basin Advisory Council, an author, and a consultant. Rick has joined the Board due to a strong personal interest in wetland policy and management issues. He is also interested in representing academia regarding wetland policy and management issues and gaining practical orientation from the professional practice perspective in how wetland policy and management works out in reality.

Christine DeLorier rounds out the freshman class of Forum Directors. Christine has been employed in the Regulatory Branch of the New York District Army Corps of Engineers since 1992. Some of you may have met her: she currently reviews and recommends permit decisions on applications submitted for approval pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. She is also responsible for re-issuing and developing new Regional General Permits within the District. In her spare time she is a member of working groups related to watersheds and non-point source pollution and frequently assists FEMA in their disaster response efforts. Christine joined the Board and also accepted an additional role as Secretary to "disseminate and gain knowledge of New York State's water resources and environmental issues, and to facilitate communication with all parties that share this same interest."

There you have them, a talented and diverse group of individuals involved with wetland issues throughout New York. Many thanks to you all for the commitment you have made to this organization. Oh yeah, then there is I, the latest Chairwoman of the Board. It will be a worthy challenge to live up to the energy, dedication, management, long-range thinking and enthusiasm of my predecessors, and I thank you for the opportunity.

If you too feel up to the challenge and are considering participating in the Forum above and beyond basic membership, give me a call at 518-581-8375 or e-mail jennifer@aswm.org. You may achieve enhanced name recognition, possible leadership experience, and endless opportunities to share and implement ideas with people of various backgrounds from around the state. Why not join in the fun?

CORPS COMPLETES DEIS ON MEADOWLANDS MILLS PROJECT

The U.S. Army Corps of Engineers, New York District, announced on July 21, 2000 that it has filed with the U.S. Environmental Protection Agency in Washington, D.C., a draft environmental impact statement (DEIS) on the Meadowlands Mills development project proposed in New Jersey's Hackensack Meadowlands District.

An announcement of the availability of the DEIS was scheduled to appear in the Federal Register on July 28. The DEIS has been prepared to assist the Corps in evaluating a permit application submitted by Empire, Ltd. of Wood-Ridge, N.J. to discharge approximately 2.5 million cubic yards of fill material into 206 acres of wetlands and open waters adjacent to the Hackensack River in the boroughs of Carlstadt and Moonachie and the Township of South Hackensack.

The proposed mixed-use commercial project would be developed by the Mills Corporation of Arlington, Virginia. A super-regional retail-entertainment center, office space, hotel, mass transit facility, warehouse and distribution facilities, and associated parking structures and roadways are proposed for a portion of a 592-acre tract, which is owned by Empire, Ltd. The company has proposed that the remaining acreage on the parcel available after development be used for wetland mitigation activities, including restoration, enhancement and preservation.

A public hearing on the DEIS and the project will be held August 29 from 1 to 5 p.m. and 7 p.m. until the end of the hearing in the Henry P. Becton Regional High School auditorium, Paterson Avenue and Cornelia Street, East Rutherford.

The hearing record will remain open until 5 p.m. Monday, September 11, 2000 for receipt of written comments. Comments should be sent to New York District Corps of Engineers, Regulatory Branch, Jacob K. Javits Federal Building, Room 1937, New York, New York 10278-0090.

HEARD ON THE WETLANDS LISTSERV

Bernie Carr of Terrestrial Environmental Services asked about the designation "Aquatic Resource of National Importance."

In response, Susan-Marie Stedman with the Office of Habitat Conservation of the National Marine Fisheries Service replied:

To clarify - "Aquatic Resource of National Important" is not a FWS designation, it is a criterion used by FWS, NMFS, EPA, and the Army Corps of Engineers to determine whether a proposed permit is of sufficient importance to warrant "elevation" under the 404(q) MOA between Army and the other three departments. Determination of whether a site is or isn't an ARNI is made on a case-by-case basis, although our agency has internal guidelines on how to make and support that determination. Before everyone starts asking for a copy of those guidelines, I want to emphasize that the term ARNI has NO RELEVANCE outside the 404(q) process. The 404(q) MOA has no detailed standards for ARNIs, there are no maps of ARNIs, and just because something was described as an ARNI during a dispute over a proposed 404 permit, it doesn't mean the habitat is any more important than adjacent areas where there are no disputes over permits, and being an ARNI doesn't afford any special protection. Finally, FWS, NMFS, or EPA can call an area an ARNI but the Army Corps can (and frequently does) disagree, and deny an elevation request accordingly.

Frankly, we'd like to get rid of the term because we spend more time arguing with the Army Corps over whether an affected resource is an ARNI than we spend discussing the more important underlying issues.

Hope this helps - the take-home message is that unless you're involved in a 404(q) elevation, you don't need to know about ARNIs.

Editor: The issue of ARNI's is a controversial one and is the subject of ongoing debate among the regulated community and the agencies. If you have any opinion you would like to share on this topic, please write the Forum. Thanks

This is a new column in the Forum. If there are interesting ListServ questions and responses you think we should publish, please forward those to kbernstein@bsk.com.

FEDS ISSUE NEW LIMITATIONS FOR WETLAND DEVELOPMENT PROJECTS

— Louis A. Alexander
Bond, Schoeneck & King, LLP

The federal and state governments have sought to balance the protection of wetland resources and the need for development. Detailed permit procedures have been established by both levels of government for projects or activities that would result in the loss of wetlands. Recent changes to federal permit procedures, which are to become effective on June 7, 2000, will have a significant impact on development activity on properties that contain wetlands.

The federal government, primarily through the U.S. Army Corps of Engineers, exercises jurisdiction over the discharge of dredged or fill material into waters of the United States, which include wetlands. In order to conduct such activities a permit is generally required from the Corps. However, the Corps has issued permits on a nationwide basis that authorize activities which will cause only minimal adverse environmental impacts on wetlands. Activities that fall within the scope of these "nationwide" permits or so called NWP, are not subject to the more time-consuming and detailed process of obtaining a specialized individual permit from the Corps.

One of the best-known nationwide general permits has been "NWP 26", which allows the discharge of dredged or fill material into "isolated waters" or waters located above the headwaters. Many projects that involve the filling of wetlands fall within the scope of NWP 26. For years, NWP 26 allowed such discharges, provided that the loss or substantial modification of wetlands only would be between one and 10 acres and that certain special conditions - not adversely affecting endangered species, for example - were met.

A few years ago, NWP 26 was revised to reduce the maximum fill allowed to 3 acres. Even with that reduction, many environmentalists continued to criticize NWP 26 for inadequately protecting the nation's wetland resources.

On March 9, 2000, the Corps published new regulatory changes for nationwide permits: NWP 26 would expire on June 7, 2000; five new nationwide permits to allow certain activities previously authorized by NWP 26; six existing nationwide permits to be modified; and further environmental protections to be established for designated critical resource waters and 100 year flood plains.

The five new nationwide permits include:

• Residential, Commercial and Institutional Activities - The new NWP 39 covers development activities relating to the construction or expansion of residential, commercial and institutional building foundations, building pads and attendant features that are necessary for the use and maintenance of these structures. They will be authorized in non-tidal waters including wetlands, so long as the discharge does not cause the loss of greater than half an acre of non-tidal waters or the loss of greater than 300 linear feet of a stream bed. Special requirements will apply to real estate subdivisions. NWP 39 provides specific examples of what constitutes "attendant features", and residential, commercial and institutional developments.

• Reshaping Existing Drainage Ditches - The new NWP 41 will allow limited reshaping of currently serviceable drainage ditches constructed in non-tidal waters. However, such reshaping cannot increase the drainage capacity beyond the original design capacity or expand the area drained by the ditch as originally designed. NWP 41 also does not authorize stream channelization or relocation projects.

• Recreational Facilities - The new NWP 42 will allow filling of non-tidal waters for the construction or expansion of a recreational facility, as long as it does not cause the loss of greater than one-half acre of non-tidal waters or the loss of greater than 300 linear feet of stream bed. However, the recreational facility must be integrated into the natural landscape and preconstruction grades and natural landscape contours cannot be substantially changed. Facilities that may be able to utilize NWP 42 include hiking trails, biking paths, nature centers and certain golf courses and ski areas.

• Stormwater Management Facilities - The new NWP 43 authorizes the construction and maintenance of stormwater management facilities as long as it does not cause the loss of more than one-half acre of non-tidal waters or the loss of greater than 300 linear feet of stream bed.

• Mining Activities - The new NWP 44 imposes various restrictions on discharges of dredge or fill material into streams, wetlands and other waters.

Depending upon the amount of wetland to be impacted, the Corps must be notified prior to undertaking the activity under any of these five nationwide permits.

Concerns have been expressed that the new limitations will negatively impact development and unnecessarily restrict private owners' rights to their property. The costs to permit applicants resulting from these new limitations has been estimated at $32 million or more. The Corps will also need additional funding of several million dollars to maintain its current level of service to the public.

A number of environmental groups have expressed support for the new limitations. However, the Corps' initiative has been strongly criticized by the National Association of Home Builders. That organization has filed suit in federal court alleging that the Corps' new and modified nationwide permits to replace NWP 26 have no rational basis, will create an unmanageable regulatory program, and are contrary to the intent of Congress.

For reference, the text of the new permits, and related information, can be found at www.usace.army.mil/inet/functions/cw/cecwo/reg/.

Note: This article first appeared in the April 17, 2000 edition of the Capital District Business Review, which is published weekly in Albany, New York, and is reprinted with permission.

CORPS PROPOSES FURTHER REVISIONS TO THE CLEAN WATER ACT REGULATORY DEFINITION OF "DISCHARGE OF DREDGED MATERIAL"

On August 16, 2000 (65 Fed. Reg. 50108), the Corps proposed further revisions to the regulatory definition of "Discharge of Dredged Material."

The proposal by Environmental Protection Agency (EPA) and the Corps of Engineers would enhance protection of the Nation's aquatic resources, including wetlands, by clarifying those types of activities that are likely to result in a discharge of dredged material subject to Clean Water Act section 404 permitting. The proposed rule would establish a rebuttable presumption that because of the nature of the equipment and activities, mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the United States produce more than incidental fallback and result in a regulable discharge of dredged material subject to environmental review under Section 404 of the Clean Water Act. The presumption of discharge can be rebutted by a case-by-case showing that the activity was designed and conducted so as to result only in incidental fallback. The comment period for the proposed rule ends on Monday, October 16, 2000.

CORPS ISSUES ADMINISTRATIVE APPEAL REGULATIONS

— Kevin M. Pole

In March 1999 (64 Fed. Reg. 11708), the Army Corps of Engineers (Corps) established an administrative appeal process for permit applications denied with prejudice and declined permits. On March 28, 2000 (65 Fed. Reg. 16486), the Corps finalized revisions to its administrative appeal regulations to now allow for the appeal of jurisdictional determinations (JD). This article will focus on the basis for a JD appeal and the appeal process. Under the new regulation, the term JD includes a written reverification of expired JDs, and a written reverification of JDs where new information has become available that may affect a previously written determination.

Criteria For Appeal

Affected parties will be notified in writing of a Corps decision on those activities that are eligible for appeal. For approved JDs, the Corps will provide a Notification of Appeal Process (NAP) fact sheet, a Request For Appeal (RFA) form, and a basis for the JD with the notification. For permit denials, the notification must include a copy of the decision document for the permit application, a NAP fact sheet and an RFA form. Affected parties also have the option of obtaining a copy of the administrative record.

In order to appeal a JD, a completed RFA must be submitted to the appropriate division office. The RFA must be received by the Division Engineer within 60 days of the date of the NAP.

The reasons for the appeal must be clearly stated in the RFA and must go beyond a statement that the affected party received an unsatisfactory determination. For example, the appeal may allege one of the following:

- Procedural error;
- Incorrect application of law, regulation or officially promulgated policy;
- Omission of a material fact;
- Incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands;
- Incorrect application of the Section 404(b)(1) guidelines; or
- Use of incorrect data.

The reasons for appealing a permit denial or declined permit may include jurisdictional issues, whether or not a previous JD was appealed.

The regulations also provide a list of actions that are not appealable:

- An individual permit decision where the permit has been accepted and signed by

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NEW YORK STATE WETLANDS FORUM INC.

FOURTH ANNUAL MEMBERSHIP MEETING

MARCH 30, 2000
BINGHAMTON, NY

MINUTES

Barbara Beall called the meeting to order at 1:05 p.m.

Annual Report by Barbara Beall, Chairwoman

- The current board of directors was introduced along with the consulting staff
- The previous year's accomplishments were reviewed:
  - Long Island Fall Meeting in cooperation with Save the Sound: 75-80 people attended and a local television news station covered the event
  - Hydric Soils Meeting: at the Verona Field Station and included field visits, free and available only to members
  - Successful 1999 Annual Meeting in Syracuse
  - E-mail list available for answering questions, disseminating information
  - Multiple newsletters throughout the year covering issues in which the members are involved
- Treasurer's Report distributed and reviewed. Bottom line is the Forum is still "in the black" for 1999, an admirable position especially considering the costs associated with Administrative Assistant and Executive Director
- Board of Governors Elections: The slate of nominations was unanimously approved. New and re-elected Board members are Jeff Zapieri, Anne Secord, Christine DeLorier, Dr. Richard Smardon, Sally Daly, Terresa Bakner, Beth Gelber, Diane Kozlowski, Barbara Beall, Jennifer Brady-Connor

New Business

- Meeting attendees are urged to complete their evaluation forms as these are used to determine the locations of future meetings, topics, etc.

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(L to R) Unidentified; Doug Dekoskie, Greene County Soil & Water Conservation District; Roland Vosburgh, Columbia County Planning Department; Rene Van Schaack, Greene County Soil & Water Conservation District; Barbara Kendall, Dutchess County Environmental Management Council; Roger Case, The LA Group.

The Greene County Soil & Water Conservation District and the New York City Department of Environmental Protection Stream Management Program are cooperatively developing a Stream Management Plan for the Batavia Kill that will include recommendations for improving stream stability, flood mitigation, recreation, and habitat.

Photo courtesy of Beth Gelber.

PUBLIC COMMENT PERIOD EXTENDED FOR NEW DEFINITION OF FILL MATERIAL

— Lawrence P. Schnapf, Esq.

Section 404 of the Clean Water Act provides jurisdiction to the EPA and the Army Corps of Engineers ("Corps") to regulate the discharge of dredged or fill material into "navigable waters" which has been interpreted to include wetlands. Both agencies have promulgated their own regulations to implement the wetlands program. Since 1977, the agencies have had different definitions of what constitutes "fill material." Both agencies published a proposed rule in the spring that would create a single definition for fill material. In May, the agencies extended the time to comment on a proposed rule to July 19, 2000.

Currently, the Corps uses the "primary purpose test" for determining when a substance is to be regulated as "fill material." Under 33 CFR 323.2(e), the Corps defines "fill material" as any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body, and specifically excludes from the definition any material discharged into the water primarily to dispose of waste. The Corps rule was changed in 1977 to clarify that suspended solids in wastewater that is discharged pursuant to a NPDES permit would not trigger the permit requirements of section 404.

In contrast, the EPA regulations examine the effect of the material. The current EPA definition of "fill material" 40 CFR 232.2 provides that fill material will include any pollutant that replaces a portion of the waters of the U.S. with dry land or that changes the bottom elevation of such waters, regardless of the purpose of the discharge.

The proposed rule would adopt the EPA effect test but specifically exclude discharges subject to EPA effluent limitation guidelines and standards issued under CWA sections 301, 304, and 306, or discharges covered by a NPDES permit. Materials excluded from the definition of "fill material" would include wood chips, coal mining overburden, certain forms of solid waste, and material used to construct solid waste landfills.

The rule was proposed following a decision by the Ninth Circuit Court of Appeals in *Resource Investments Incorporated v. U.S. Army Corps of Engineers, 151 F.3d 1162 (9th Cir. 1998).* In that case, a landfill was proposed to be located in wetlands. The Corps' Seattle District Engineer denied the application for a wetlands permit on the grounds that the landfill could contaminate an important sole source aquifer and that there was a practicable alternative for disposing of the region's solid waste. When the permit applicant sued, a federal District Court upheld the permit denial but the Ninth Circuit reversed. The appeals court held that the layers of gravel, low permeability soil, and synthetic liner that would underlie the solid waste landfill did not constitute fill material under the Corps' "primary purpose" test. The court said the primary purpose for placing these materials in the wetlands was not to change the bottom elevation of a water body or to replace aquatic area with dry land but rather to install a leachate detection and collection system for that landfill. The court did not address the fact that the material that would also be used to construct roads and berms that were part of the project.

The exclusion for wood chips will only apply when this material is scattered as a result of the normal use of wood cutting equipment such as chainsaws, bush hogs, and similar equipment. However, the agencies did indicate that some operators of heavy mechanized equipment place or stockpile wood chips in wetlands to create temporary roads, equipment pads, or for surfacing to facilitate operation of equipment such as trucks, backhoes, and excavation equipment.

In addition, the agencies indicated that in some cases the regular operation of chipping equipment could result in stockpiling or mounding of chips in waters of the U.S. Because the quantity or distribution of the woodchips in those situation would have the effect of fill, the agencies said that the exclusion would not apply in those circumstances and the activity would be subject to regulation under CWA section 404.

Coal mining overburden is often placed in the heads of valleys with a sedimentation pond located downstream of this "valley fill." Under the existing regulations, the EPA and Corps have usually required a wetlands permit for the placement of the coal mining overburden and coal refuse as well as the berms or dams associated with the sedimentation ponds. Under the proposed rule, discharges from coal mining activities or other solid wastes of a homogeneous nature normally resulting from a single-industry site or set of known processes which are covered by a EPA effluent guideline will not be considered "fill material" and will not be subject to section 404. This would include solid wastes in 40 CFR part 440, subpart M (placer mining), 40 CFR part 436, subpart R (phosphate mining), 40 CFR part 440, subpart E (titanium mining), 40 CFR part 436, subpart C (sand and gravel mining), 40 CFR part 423 (steam electric power generation), and 40 CFR part 435 (oil and gas extraction).

In the proposed rule, the Corps is considering allowing the District Engineer complete discretion to refuse to process any permit application to discharge fill material that the District Engineer determines to be "unsuitable fill material." Examples of materials that might be considered unsuitable would include those that have the potential for the leaching of contaminants from the fill material into ground waters or surface waters or fill material that is too light or unstable to serve reliably for its intended purpose (e.g., bank stabilization or erosion control). In most circumstances, heterogeneous solid waste, discarded appliances, and automobile or truck bodies would qualify as unsuitable fill material.

The proposed rule would clarify that liners, berms, and other infrastructure that are constructed of materials such as rock, sand, gravel, clay, soil, plastics, and other materials used in conjunction with the construction of a solid waste landfill would be considered "fill material" and be regulated under section 404 of the CWA. If a landfill has received a wetlands permit, the subsequent disposal of solid waste into the landfill would not be subject to section 404 but would, of course, be required to comply with the requirements of the Resource Conservation and Recovery Act ("RCRA"). Likewise, discharges of leachate from landfills into waters of the U.S. would remain subject to CWA section 402.

This article is reprinted courtesy of Larry Schnapf, who is the founder of the Schnapf Environmental Law Center (www.environmental-law.net).

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(CORPS ISSUES ADMINISTRATIVE APPEAL REGULATIONS)

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the permittee. By signing, the permittee waives his right to appeal.

- Any site-specific matter that has been the subject of a Federal Court decision.
- A final Corps decision that has resulted from additional analysis and evaluation, as directed by a final appeal decision.
- A permit denial without prejudice or a declined permit, where the controlling factor cannot be changed by the Corps decision maker, such as requirements of a binding statute.
- A permit denial case where the applicant has subsequently modified the proposed project. This would constitute an amended application that would require a new public interest review, rather than an appeal.
- Any appeal where the RFA has not been received by the division engineer within 60 days of the date of the NAP.
- A previously approved JD that has been superceded by another approved JD based on new information or data supplied by the applicant. The new approved JD becomes the only appealable matter.
- An approved JD associated with an individual permit that has been accepted and signed by the permittee.
- A preliminary JD.
- A JD associated with unauthorized activities.

Review Officer (RO)

All appeals will be heard by an official at least one level above the decision maker. The Division Engineer may act as the RO, or may delegate the responsibility. The RO must be a Corps employee with extensive knowledge of the Corps regulatory program. Regardless of any delegation, the Division Engineer retains overall responsibility for the appeal process. If the Division Engineer delegates the role of RO, the RO will assist the Division Engineer in reaching and documenting the decision on the merits of the appeal.

In order to remain completely independent, the RO may not be someone who was involved with the decision being appealed. The review consists of an independent review of the administrative record to address the reasons for the appeal. The RO may also conduct an independent review to verify the propriety of the initial decision. The RO may seek expert advice from any employee of the Corps, or any other governmental agency, so long as the person was not involved in the action under review.

Review Procedures

Upon receipt of an RFA, the RO reviews the RFA to determine whether it is acceptable and eligible for appeal. Within 30 days, the RO then notifies the appellant in writing whether the RFA is acceptable, detailing any possible deficiencies.

Within 30 days of receipt of the RFA, the RO will determine if a site investigation is necessary to clarify the administrative record. Any site investigation should be concluded within 60 days of receipt of the RFA. The appellant may request a site investigation, which the RO should grant if it would benefit the record.

The RO may also schedule an informal JD appeal meeting to discuss issues directly related to the appeal to clarify the record.

Final Appeal Decision

The Division Engineer normally makes a final decision on the merits of an appeal within 90 days of the acceptance of a valid RFA. There are exceptions, such as a delayed site investigation due to inclement weather, but the entire process should not extend beyond 12 months from receipt of a valid RFA.

In reaching any decision, the Division Engineer may consult with or seek information from any person, including the District Engineer. The District Engineer's decision will be overturned only if it is shown on some relevant matter to be arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regulation or executive order. The Division Engineer must not substitute his opinion for that of the District Engineer on factual matters so long as the initial determination was supported by substantial evidence in the record. The final decision of the Division Engineer concludes the administrative appeal process.

Exhaustion of Administrative Remedies

No affected party may file a legal action in the Federal courts based on a permit denial or a proffered permit until after a final Corps decision has been made and the appellant has exhausted all applicable administrative remedies under this part. The appellant is considered to have exhausted all administrative remedies when a final Corps permit decision is made. Notably, this means that an appeal of a JD may not be made until after the appellant goes thought the permit process.

(MINUTES)

[Cont'd. from page 5]

- Electronic: web site will be undergoing modest changes including timely updates on wetland issues; also, the Forum will be using e-mail more frequently to keep members abreast of issues
- Steven Wilson remarked that important changes in the NWP program are occurring and it is important that the Forum keep members aware of what is taking place
- Joseph McMullen noted that if members are interested in a full winter botany session in 2001 they should note that on their evaluation forms or e-mail us
- Barbara Beall emphasized that the Forum will continue strategic planning to pursue cooperative efforts, including presentations at meetings by Forum members, with agencies, organizations, and other wetland-related or interested entities
- Barbara Beall suggested a symposium on wetland mitigation – a big picture view; also proposed the creation of a wetland mitigation database for registering potential mitigation sites
- Barbara Beall and Richard Smardon encourage members to think about the possibility of academic involvement through internship brokerage and possible links into Forum web site
- Members are encouraged to let other individuals know about the Forum and to discuss membership benefits, annual meetings, etc.
- Steven Wilson noted that the Hudson River Environmental Society has links to the Forum web site and encouraged others to do the same
- Sally Daly raised the possibility of unbiased Forum representative speaking at planning board meetings to discuss wetland issues and also raised attention to the need to involve additional viewpoints at the Forum meetings, Forum publications, and on the Board of Governors

Meeting was adjourned at 1:20 P.M.

Respectfully submitted,

Jennifer Brady-Connor

VEGETATION SAMPLING – THE DIFFERENCE BETWEEN FREQUENCY AND COVER

— Joseph M. McMullen
Terrestrial Environmental Specialists, Inc.

Two of the most commonly misunderstood terms in quantitative vegetation sampling are frequency and cover. Often the terms are confused or used interchangeably, but they have very different meanings. Take, for example, the following Corps permit condition for monitoring constructed wetlands:

> *"All plant species, along with their estimated relative frequency and percent cover, shall be identified by using plots measuring 10 feet by 10 feet with at least one representative plot located in each of the habitat types within the mitigation site."*

Over the years, I have seen this permit condition attached to many Corps permits where mitigation is involved. It illustrates a misunderstanding of the term frequency and perhaps cover as explained in the following.

Frequency

Frequency is a measure of a species' spatial distribution within a plant community. How uniformly a species is distributed can be determined by its frequency. Frequency is calculated by determining the number of plots in which a species occurs compared to the total number of plots sampled; it is usually expressed as a percentage. For example, if a species occurs in 5 of 10 plots, it has a frequency of 50%. Frequency is a measure of occurrence only. Whether there is 1 individual or there are 100 individuals of a species in a plot does not matter, it still is recorded as occurring there. As a result, it is often called frequency of occurrence.

In the Corps permit condition presented above, if only one plot in each community is sampled, all recorded species will have a frequency of 100%. If there is only one plot, all recorded species occur in all the plots sampled. A number of plots must be sampled to determine frequency.

Frequency is dependent upon the size of the sample plots used. Usually, the smaller the plot size, the lower the frequency will be for a given species. Conversely, larger plots will usually result in higher frequency numbers. As a result, comparisons of frequency values cannot be made among studies where different-sized plots are used. This point is often ignored in most comparison studies.

In the Corps permit condition example, a 10 x 10 foot plot is specified. Although this is a rather large plot for certain layers, especially the herbaceous layer, there is no problem with using large plots if they are practicably manageable (i.e. data can be accurately recorded). However, large plots will affect frequency values. Larger plots will result in higher frequency values than smaller plots. There is a much greater chance of a species occurring in 10 x 10 foot plots than in 1 x 1 foot plots. Frequency is affected by plot size.

Cover

Cover is different than frequency. While frequency is a measure of spatial distribution, cover is a measure of areal (*not aerial*) extent or space occupied by a species. How much of a community is covered or occupied by a species is the percent cover for that species. How many different places (spatially distributed) the species occurs in that community is represented by its frequency.

To clarify this difference, let's look at two examples. In example one, a species covers 25% of a community but it is clumped in only one corner, so it has low frequency. In example two, a different species covers 25% of a community but it is uniformly spread over the community and has high frequency. Both species have similar cover values but very different frequency values.

Cover is also different from frequency in that cover is not affected by sample plot size. It makes no difference if a 10 x 10 foot plot or a 1 x 1 foot plot is used. With adequate sampling, cover for a selected species should be the same.

Cover is used most often in wetland studies to determine dominance. And usually cover is a good measure of dominance. However, the cover value that is used is *relative* cover not *actual* cover. In the Corps permit condition quoted above, they appropriately ask for relative cover.

Actual and Relative Frequency and Cover

Actual value of frequency or cover is what is actually recorded for a species. Relative values are different than actual values in that they are adjusted to the total record. Relative values are adjusted by dividing the value of a species by the total of the values for all species. Actual values of frequency or cover for all species may total higher or lower than 100%, but relative values always total 100%.

To explain these differences, a sample of an emergent wetland may result in the following data.

[Cont'd. page 11]

SUPREME COURT REFUSES TO HEAR TAKINGS CASE

In April 2000, the Supreme Court let stand (denied certiorari) a ruling that makes it far more difficult for landowners to be compensated when government regulation prevents them from developing their land. *Good v. United States*, Fed.Cir.Ct., August 31, 1999, *cert denied*. The Court, without comment, turned away a Florida dispute over the availability of compensation when property owners show regulation deprived them of all economically viable use of their land. The Circuit Court of Appeals held that such a showing is not enough, concluding that landowners also must demonstrate they had "reasonable" expectations of developing the property.

Good owns a 40-acre tract of undeveloped land in Monroe County, Florida. The property, known as Sugarloaf Shores, is mostly comprised of wetlands. Good bought the land in 1973, and his efforts to develop it began in 1980. In 1981, he sought U.S. Army Corps of Engineers permission to fill or excavate 13 acres for a development of 54 houses and 48-slip marina. Permission was granted in 1983.

Good also pursued and received the necessary state and county approvals by mid-1984. But a different state agency then complained about the proposed development, and in 1986 the Florida Land and Water Adjudication Commission ordered Monroe County to review the project under a more stringent standard.

Good sued, and in 1989 again had county permission for the development.

But in 1988, the Lower Keys marsh rabbit was placed on the federal government's endangered-species list. In 1991, the silver rice rat was added to the list. The federal Fish and Wildlife Service said Good's planned development would jeopardize both species.

Relying on that finding, the Corps rejected Good's permit application. He sued in 1994. The Court of Federal Claims ruled for the government, and the U.S. Court of Appeals for the Federal Circuit upheld that ruling. The appeals court rejected Good's argument that a 1992 Supreme Court decision means landowners always are entitled to compensation when government regulation denies all productive use of their land.

In the appeal rejected by the Supreme Court, Good's lawyers noted that the Endangered Species Act had not yet been made a law when he bought the land. Good said he saw the case "as an excuse by the environmental people in U.S. Fish and Wildlife. Those people did not want to see my property developed so they came up with the endangered species thing to stop it…There are no marsh bunnies out there now."

FOURTH CIRCUIT RULES THAT SIDECASTING IN WETLANDS VIOLATES CLEAN WATER ACT

In *United States v. James S. Deaton & Rebecca Deaton*, No. 98-2256 (4th Cir. Apr. 7, 2000), James Deaton contracted to buy a twelve-acre parcel of land in Wicomico County, Maryland, in November 1988. The contract was subject to the area being suitable for developing a small residential subdivision. Deaton applied for a permit for sewage disposal to the local health department. The permit was denied because the department concluded that groundwater was unacceptably high at the proposed disposal site. After the permit was denied, Deaton contacted the Soil Conservation Service (SCS). A representative met him at the property and observed that the wetness problem might be solved by digging a ditch through the middle of the property. Deaton and his wife completed purchase of the property in June 1989.

Before any ditching work began, the property was inspected by the district conservationist at the SCS. He advised Deaton that a large portion of the property contained non-tidal wetlands and that, prior to ditching, a permit from the U.S. Army Corps of Engineers (Corps) would have to be obtained. Ignoring this advice, Deaton hired a contractor to dig a 1,240 foot ditch across the property. The contractor piled the excavated dirt on either side of the ditch as he dug, a practice called sidecasting. The Corps issued stop-work orders. Deaton filed an application for a permit, but it was returned because it was incomplete and Deaton never resubmitted it. Over the next few years, Deaton and the Corps attempted to reach an agreement on remediation. When no agreement was forthcoming, the Corps filed a civil complaint, alleging that the Deatons had violated the Clean Water Act (CWA) by discharging fill material into a regulated wetland.

The district court granted partial summary judgment to the government, holding that wetlands on the property were subject to the CWA and that sidecasting excavated material into those wetlands was a violation. However, after the Fourth Circuit's decision in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1977), the district court predicted that the Fourth Circuit would agree with one judge in *Wilson* who had opined that sidecasting is not the discharge of a pollutant. Therefore, the court vacated its prior determination that sidecasting is the discharge of a pollutant under the CWA and granted summary judgment to the Deatons.

Both sides appealed.

In its decision, the court initially turned to the statutory language of the CWA. "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(a). "Pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

The Deatons argued that, since "discharge of a pollutant" is defined as "any *addition*," the definition could not include sidecasting because there is no addition of materials into the wetlands, only the movement of material from one place to another. According to the Deatons, in order for there to be a discharge of a pollutant there must be the introduction of new material into an area.

The court disagreed. The statute does not prohibit the addition of material; it prohibits the addition of any pollutant. There may be an addition of a pollutant without being the addition of material. According to the court, a material which may not be a pollutant when *in situ* can be transformed into a pollutant by an activity such as ditching. In this case, once the material was removed, it became "dredged spoil," a pollutant under the CWA. The dredged spoil placed on the sides of the ditch thus added a pollutant that was not there before.

The underlying rationale for the prohibition supported the court's interpretation. Wetlands act as a sponge, maintaining water quality by trapping sediment and toxic and nontoxic pollutants before they reach open bodies of water. Over time, many of these materials will decompose. However, if a wetland is dredged and the dredged spoil reintroduced, those pollutants may be released. Furthermore, the increased drainage introduced by ditching may impede the ability of the wetlands to absorb and filter pollutants.

ANNOUNCEMENT:

WETLAND CREATION AND ENHANCEMENT: THE NEW JERSEY EXPERIENCE

The Annual Conference of the New Jersey Section of the American Water Resources Association will be held at the Hackensack Meadowlands Development Commission,1 Dekorte Park Plaza, Lyndhurst, Bergen County, NJ on Friday, September 15, 2000. See the agenda online at http://www.awra.org/state/new jersey.

The conference is cosponsored by the Hackensack Meadowlands Development Commission and Meadowlands Environmental Research Institute.

Purpose

Although wetland creation and enhancement is a relatively new field, there have been many such efforts in New Jersey and around the country. If and when these efforts are successful, and even what is meant by success, is a matter of considerable debate. This conference seeks to explore the issue further, presenting both case studies and synoptic views on the achievement and meaning of success in wetland creation and enhancement.

For a firsthand judgement on success, the conference includes a tour of salt marsh creation/enhancement sites. We will visit the completed Phase 1 of the Marsh Resources Meadowlands Mitigation Bank and HMDC's Mill Creek Wetland Enhancement Site, as well as the Hartz Mountain Mitigation Site, which was completed over 10 years ago. If time permits, we will also visit HMDC's recently completed Harrier Meadow Wetland Enhancement Area.

Keynote Speaker

Dr. Jean Marie Hartman is Associate Professor of Landscape Architecture at Rutgers University in New Brunswick, New Jersey. Dr. Hartman's research is focused on advancing the emerging science of ecological restoration. Through this research, she integrates her training in botany, landscape architecture and ecology. She has published numerous scientific research papers in such journals as "Oikos" and American Journal of Botany". She was a featured speaker at the "Art and Science of Wetland Restoration" symposium at the recent Annual Meeting of the American Association for the Advancement of Science.

EPA CONTINUES WETLANDS ENFORCEMENT ACTIONS

— Lawrence P. Schnapf, Esq.

Section 404 of the CWA prohibits discharges of fill or dredged materials without a permit. However, the drainage of wetlands is not expressly regulated by section 404. EPA has launched an enforcement initiative in the southeast because of reports of significant losses of wetlands due to draining and ditching activities. These losses have occurred since the Court of Appeals for the District of Columbia overturned the so-called "Tulloch Rule."

EPA recently filed an administrative complaint against owners and developers of ten properties located in Tidewater, Virginia for unauthorized ditching and draining wetlands and violated stormwater runoff requirements of the CWA. Five to 45 acres of wetlands were disturbed at the sites. In another location the disturbance included 15 linear miles of wetlands.

EPA and the DOJ also reached a settlement with a landowner who was charged with illegally discharging fill material into almost 6 acres of wetlands during ditching and excavation activities, and draining approximately 325 acres of wetlands. Under the settlement, the landowner agreed to pay an $85,000 penalty and conduct a supplemental environmental project that will involve the donation and preservation of approximately 100 acres of wetlands to the North Carolina Wetlands Restoration Program. The case was the first judicial settlement in EPA's new enforcement initiative to limit the unlawful destruction of wetlands in North Carolina.

An auto body repair shop in Edgewater, Md., agreed to pay a $1,250 penalty for filling in a drainage swale that had been located on its property. As a part of the settlement, the company agreed to restore an area of wetlands greater than that involved in the alleged violation.

In addition to its enforcement authority under the wetlands program, EPA is also using its authority under the stormwater control program to regulate developments that might be causing the loss of wetlands through draining activities.

Under the CWA, construction projects of five or more acres are required to obtain a permit to control and treat stormwater runoff. If the drainage from the sites impacts water quality, the EPA may use its stormwater permit authorities and other CWA authorities to restrain the development.

This article is reprinted courtesy of Larry Schnapf, who is the founder of the Schnapf Environmental Law Center (www.environmental-law.net).

DEVELOPER ASKS SUPREME COURT TO REVIEW TAKINGS CLAIM ON PRE-OWNERSHIP REGULATION

A Rhode Island coastal property owner who was denied a wetlands development permit asked the U.S. Supreme Court June 21 to review whether regulations that predate his ownership of the property can lead to a takings claim requiring compensation under the Fifth Amendment to the U.S. Constitution (*Palazzolo v. Rhode Island ex rel Tavares*, U.S., No. 99-2047, 6/21/00).

Palazzolo appealed a ruling by the Rhode Island Supreme Court that his claim for compensation from an alleged governmental regulatory taking was not ripe, that his property was not deprived of all beneficial use, and that he lacked reasonable investment backed expectations (*Palazzolo v. Rhode Island ex rel. Tavares*, 746 A.2d 707, 50 ERC 1526 (R.I. 2000)).

Palazzolo asked the Supreme Court to review whether regulatory takings claims are categorically barred by the enactment of regulations prior to a claimant's ownership of the property, whether owners who have been denied development permits and asserted regulatory takings claims must apply for permits for lesser uses of the property before the claims are ripe, and whether permissible uses of the property are economically viable solely because the property has a value greater than zero.

Palazzolo came into ownership of 18 acres of wetlands in 1978 in Westerly, R.I., after Shore Gardens Inc. had its corporate charter revoked by Rhode Island. Palazzolo was the president of Shore Gardens since its creation in 1959 and the sole shareholder since 1960.

Shore Gardens gained ownership of the wetlands property in 1959 and sought to gain permits for development of the property numerous times, as did Palazzolo after ownership devolved to him. Palazzolo finally filed an inverse condemnation action alleging that the 1986 denial of a wetlands development permit by the state Coastal Resources Management Council constituted a regulatory taking requiring compensation.

In order for the case to be ripe for judicial review, the state Supreme Court found, Palazzolo needed to apply for a 74-lot subdivision as well as lesser-use applications prior to his claim, which used the subdivision for estimating $3.15 million in lost profits.

But the court also ruled that since regulations limiting the development of wetlands existed prior to 1978, Palazzolo was not deprived of the beneficial use of the property and that he could not have reasonable investment-backed expectations when he came into ownership of the wetlands.

Further, the court found that the wetlands would have a value of $157,500 as an open-space gift and that the upland nonwetlands portion of his property would have a value of $200,000 if developed.

The Supreme Court has not yet determined whether it will Palazzolo's appeal. Stay turned.

MYSTERY PLANT REVEALED

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

One of the many themes at the recent Annual Wetlands Forum meeting was the identification of plants in winter. As part of the winter botany identification session, I brought a "mystery plant" displayed for participants to identify. The species I selected was tall meadow rue (*Thalictrum pubescens* Pursh).

As the name implies, tall meadow rue is a tall-growing (it can reach heights of 7 to 8 feet) herbaceous species common to wetlands in New York. This member of the buttercup family (*Ranunculaceae*) is reported in the New York Flora Association Atlas in nearly every county.

Three individuals (Mike Corey, Bruce Gilman, and Don Leopold) correctly identified the species, and since Mike was the first entry, he won a free membership to the Forum for a year. Several others bravely made an effort at identification, and all of these entries chose species in the carrot family (*Apiaceae*, formerly *Umbelliferae*). Although the buttercup family and the carrot family are worlds apart phylogenetically, (the buttercup family is considered among the most primitive of the dicots), in winter tall meadow rue does give the impression of one of our tall umbels. It has a ribbed fruit that is common in the carrot family, but the inflorescence is a panicle (freely and multiply branched) rather than an umbel (like an inverted umbrella branched from a single point).

I applaud all those who made an attempt to identify this difficult winter—appearing species. I hope that all our efforts will encourage wetland scientists to obtain a well-rounded knowledge of plant identification.

CHANGING THE WAY LAND USE DECISIONS ARE MADE – A SUMMARY OF THE NEMO PROJECT

The NEMO Project

The *Nonpoint Education for Municipal Officials* (NEMO) Project of the University of Connecticut Cooperative Extension System is an award-winning research and outreach program for local land use decision makers that addresses the links between land use and water quality. The project is founded on the principles that water resource protection is a function of land use, that land use is locally controlled, and that the most effective and cost-effective way to effect changes to local land use policies is through research-based, professional outreach education. The emphasis of all NEMO programs is on the water quality impacts of land use decisions, and on helping decision makers to visualize alternatives for their communities. NEMO has been a pioneer in the use of geospatial technologies like remote sensing (RS) and geographic information systems (GIS) to enhance and inform land use educational programs. However, a key aspect of NEMO's approach is that the give-and-take of educational programs can never be replaced by technological tools, no matter how interactive or sophisticated. Educational presentations tailored to the world of local land use officials are the foundation upon which the project is built. NEMO programs focus on various aspects of *natural resource-based planning*, which allows a community to address environmental, economic and community character issues at the same time. Project staff give about 150 presentations per year.

NEMO Goes National

Groups in over 34 states are currently implementing, planning, or seriously considering NEMO adaptations. The groups adopting NEMO vary, but are typically multi-organization partnerships including state regulatory agencies, regional planning agencies, nonprofit watershed organizations, and university-based outreach education programs. With the support and advice of the Connecticut NEMO team, educational slide/computer presentations and written materials are being customized to best serve land use decision makers in their area. National NEMO projects range from large statewide collaborations (Alabama, Ohio); to focused watershed, county or municipal projects (Massachusetts, Maine, Alaska, South Carolina); to coastal initiatives (New Hampshire). NEMO is the process of forging the State efforts into a National Network of projects. The sharing of ideas and educational tools through the "nerve center" of the Connecticut program will be a key element of the National NEMO Network.

Submitted by Sally Daly

(VEGETATION SAMPLING)

[Cont'd. from page 8]

	Actual Cover	Relative Cover
Broad-leaved cattail	75%	50%
Purple loosestrife	30%	20%
Water purslane	30%	20%
Moneywort	15%	10%
TOTAL	150%	100%

The total of all the actual cover values is greater than 100% in this example because of the layering of species. We have two tall-growing species (cattail and loosestrife) over top of two low-growing species (water purslane and moneywort). When we sum the areal extent of all species it totals more than 100%.

Relative values are determined by dividing the actual value of a species by the sum total of all actual values for all species. In this example, cattail has an actual cover value of 75% and when we divide that by 150% (the total of all actual values) and express the result as a percentage, we determine a relative value of 50%. These relative values are used to determine dominance.

Comparisons of frequency and cover values among species can tell you a lot about plant community structure. The aforementioned Corps permit asks for relative frequency, which will help describe each habitat type. It is not absolutely necessary, however, and the permit condition should allow flexibility in the plot size and ask for several plots per habitat type.

(SUPREME COURT TO REVIEW MIGRATORY BIRD RULE)

[Cont'd. from page 1]

However, the government has refused to recognize these adverse decisions outside the states governed by those circuit courts. In May 1998, the Corps issued guidance that allowed it to assert jurisdiction over isolated wetlands in five states: Maryland, North Carolina, South Carolina, Virginia and West Virginia.

After the Seventh Circuit upheld the migratory bird rule in *Solid Waste Agency of Northern Cook County v. Army Department,* the plaintiff asked the Supreme Court to review the decision. The plaintiff asserted that the Seventh Circuit's decision conflicted with the Fourth Circuit's 1997 ruling in *U.S. v. Wilson* that the Corps did not have authority to assert jurisdiction over isolated wetlands. On May 22nd, the Supreme Court granted the petition and agreed to hear the case.

This article is reprinted courtesy of Larry Schnapf, who is the founder of the Schnapf Environmental Law Center www.environmental-law.net).

CALL FOR PAPERS "WETLAND MITIGATION AND WATER QUALITY IMPROVEMENTS IN WESTERN NEW YORK"

CO-SPONSORED BY THE NEW YORK STATE WETLANDS FORUM, INC. AND WESTERN AND CENTRAL CHAPTER OF THE NATURE CONSERVANCY FALL 2000 WORKSHOP

PEEK'N PEAK RESORT, FINDLEY LAKE, NY THURSDAY, NOVEMBER 2, 2000

The fall workshop will focus on various wetland mitigation projects in western New York. Compensatory mitigation may include restoration, creation, enhancement, or preservation. A proposal will often contain a combination of the various forms of mitigation. Efforts toward water quality improvements will also be explored, with particular emphasis on the French Creek watershed. The workshop will include presentations in the morning, followed by lunch, and a local field trip in the afternoon.

Those wishing to make a 20-minute presentation at the Fall workshop should submit a 250-word abstract for consideration to Diane Kozlowski, c/o the U.S. Army Corps of Engineers, 1776 Niagara Street, Buffalo, New York 14207, (716) 879-4433 by SEPTEMBER 15, 2000. Submittals can be typed, on computer disk (MS Word), or by email to diane.c.kozlowski@usace.army.mil. Proposals for exhibits and posters are also encouraged.

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