

# The Forum

NEW YORK STATE WETLANDS FORUM NEWSLETTER

## MESSAGE FROM THE CHAIR

— Jennifer Brady-Connor

Was any one else as thrilled as I to move from the year 2000 into 2001? Yes, the uncompleted work made the transition with me, but for some reason the move from a scratched-up, smudged, and dented calendar to a brand new 2001 calendar provided a much-needed psychological boost. Phew. We made it.

Last year was a good year for the NYS Wetlands Forum, and our volunteer Board of Governors, with the assistance of great consultants, accomplished much. Organizing the annual meeting in Binghamton and the fall meeting in Findley Lake, reviewing and culling seven years of administrative and other organizational files, responding to member and non-member inquiries about wetlands and wetland policy . . . the list goes on. All of these accomplishments are even more remarkable because one-third of our Board has yet to complete their first year. Now that we are all seasoned pros, watch out!

Looking forward, the Forum has much to plan and do. We have all but finished the coordination of the 2001 Annual Meeting on April 11-12 in Albany, NY and have pulled together a diverse group of speakers to discuss the latest in science, policy, and other topics. There is more information and a preliminary agenda inside this newsletter. We are also continually updating our web site, and once our new logo is selected, we will unveil a more navigable design, including a site map, info about the Board, the bylaws, and possibly a members-only section. We are applying for funding from various entities to expand our web site and member services even more. The Forum is also considering locations, dates, and topics for our 2001 fall meeting. Please contact me if you have any suggestions. Finally, we are accepting ideas for a fundraiser/social/educational event for 2001.

Thanks to all who give of their time and keep the Forum moving forward.

Best wishes for the New Year.

## SUPREME COURT RULES THAT MIGRATORY BIRD RULE EXCEEDS THE ARMY CORPS OF ENGINEERS' AUTHORITY UNDER THE CLEAN WATER ACT

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

In a decision issued on January 9, 2001, the United States Supreme Court limited the jurisdiction of the U.S. Army Corps of Engineers ("ACOE") to regulate intrastate wetlands. Section 404(a) of the Clean Water Act (the "CWA") regulates the discharge of dredged or fill material into navigable waters. The ACOE interpreted Section 404(a) to extend its jurisdiction to waters which are or would be used as habitat by birds protected by Migratory Bird Treaties or by other migratory birds which cross state lines (the "Migratory Bird Rule"). In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, \_\_\_ U.S. \_\_\_ (2001), the Supreme Court, by a 5-4 vote, held that the Migratory Bird Rule exceeded the ACOE's authority under the CWA.

### Background

Petitioner, the Solid Waste Agency of Northern Cook County ("SWANCC"), planned to construct and operate a landfill for baled nonhazardous solid waste on an abandoned sand and gravel pit mine. The mine, which was abandoned in the 1960s, gave way to a successional stage forest with a scattering of permanent and seasonal ponds of varying size. The ACOE initially concluded that it had no jurisdiction over the site because it contained no wetlands as defined in the regulations. See 33 CFR § 328.3(b). However, after the Illinois Nature Conservancy informed the ACOE that the site was habitat for a number of migratory birds, the ACOE reconsidered and asserted jurisdiction over the site pursuant to the Migratory Bird Rule.

In 1993, the ACOE refused to issue the required Section 404(a) permit to SWANCC because the proposal was not the least environmentally damaging, most practicable alternative and the impact of the project on area-sensitive species was unmitigatable. SWANCC filed suit in the Northern District of Illinois challenging the ACOE's jurisdiction

over the site and the merits of its denial of the Section 404(a) permit. The District Court granted summary judgment to the ACOE. SWANCC appealed to the Seventh Circuit challenging the ACOE's use of the Migratory Bird Rule. The Seventh Circuit held that the Migratory Bird Rule was a reasonable interpretation of the CWA.

### The Decision

The Supreme Court granted certiorari and reversed the Seventh Circuit decision holding that the Migratory Bird Rule is not fairly supported by the CWA. Section 404(a) authorizes the ACOE to regulate the discharge of fill material into navigable waters, which are defined as "the waters of the United States, including the territorial seas." According to the Court, in enacting the CWA, Congress chose to "recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."

In its reasoning, the Supreme Court examined its earlier decision in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), in which the Court held that the ACOE had jurisdiction over non-navigable wetlands that actually abutted on a navigable waterway. According to the Court, the *Riverside Bayview* decision was based in large part on the significant nexus between the wetlands and the navigable waters. The Court refused to extend the holding under *Riverside Bayview* to ponds that are not adjacent to open waters because the text of the CWA does not allow such a conclusion.

The ACOE argued that Congress charted a new course when it approved the more expansive definition of navigable waters found in the ACOE 1977 regulations. The

## New York State Wetlands Forum

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### Mission:

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

## A LETTER TO THE CORPS

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September 7, 2000

To: Office of the Chief of Engineers  
ATTN: CECW-OR  
Washington, DC 20314-1000

### Comments on 8/16/00 Dredged Material Proposal

#### Summary

Appalling disregard for the National Mining (Tulloch) court decision. More work for district regulators. More delays and expenses for the regulated community. Enforcement nightmare.

#### Not a "Loophole"

Loophole: "An ambiguity or omission in the text through which the intent of a statute may be evaded."<sup>1</sup> The statute applies to discharges of pollutants and not to dredging, draining, or clearing wetlands. It applies to additions, not removals. There is no ambiguity or omission. The "loophole" is only in the eyes of those who believe the Clean Water Act must regulate all digging activities which harm wetlands. The courts have already ruled that it does not.

#### Get a Law First

You already acknowledged the lack of a law when you published the Tulloch Rule in 1993, now struck down by the courts: "Congress should amend the Clean Water Act to make it consistent with the agencies' rulemaking."<sup>2</sup> Maybe so; but it hasn't. Besides, that's not how the sequence is supposed to work.

#### Rebuttable Presumption

"Today's proposal would establish a rebuttable presumption that mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. will result in regulable discharges of dredged material."<sup>3</sup> The government has already announced its belief. Does anyone think the knowledgeable citizen is going to do these things without checking with the Corps first? I would always advise a client to check before performing mechanized excavation in

a wetland should this rule be adopted. And does anyone think the citizen has any chance to rebut the government's presumption if the slightest harm will befall a wetland? You have made your intent clear: show no harm to the wetland and the fallback will all be incidental, not subject to the CWA; otherwise it will be deemed to be more than incidental, subject to the CWA. How can this be? Another step in regulating based on results rather than methods. More bureaucracy, more delay, more work for the Corps districts, more contentious enforcement actions, more regulating without a law.

#### Bay-Houston Case Misstated

You discuss the Bay-Houston case involving peat harvesting in Michigan as if the court ruled that temporary stockpiling of peat in a wetland is a regulable discharge.<sup>4</sup> That's what the government wanted the court to rule when it filed its motion to clarify the January 24, 2000, order on summary judgment. But the court, in its March 21, 2000, order denying the government's motion said: "The issue relating to the depositing of peat soil into field windrows will be resolved at trial." That trial has not occurred.

#### A Step Closer to Regulating the Farmer Plowing his Field

"Where the disc, tine, or rake scrapes or penetrates the ground, soil is displaced in front of the machine and comes to rest in a new location."<sup>5</sup> That's what happens when the farmer plows in a wetland. Huge quantities of material are moved to a new location, albeit quite close. And here's what EPA had to say about plowing in response to the Corps' notorious 1975 press release:

"We are particularly concerned that the false impression that farmers must obtain permits whenever they plow a field be corrected. Since this was clearly not contemplated by either the Corps or EPA and is not required by the statute, we fail to understand how such a statement could appear in this press release. As you are well aware, the primary concern of section 404 is to address situations where dredged or fill material is discharged into wetland areas. By no stretch of the imagination can the simple act of plowing be considered to fall under that category."<sup>6</sup>

#### Tulloch Ruling Overruled

"[T]he use of backhoes . . . will almost

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

## MONTEZUMA WILDLIFE REFUGE, LONG ISLAND COASTAL WETLANDS BENEFIT FROM FEDERAL FUNDING

The Montezuma Wildlife Refuge and coastal wetlands of Long Island are two of 52 separate wetland habitat projects in the United States, Canada and Mexico to receive funding through the North American Wetlands Conservation Act [NAWCA] and the Migratory Bird Conservation Fund [MBCF].

The Migratory Bird Conservation Commission approved acquisition and protection of more than 5,300 acres of important migratory bird habitat in 14 separate National Wildlife Refuges [NWR] in 13 states, improving the refuges' ability to support migratory bird populations. The Cabinet-level commission, chaired by Interior Secretary Bruce Babbitt, approved the expenditure of more than \$4.4 million to acquire the land. Many of the land acquisitions were approved for refuges along one of the migratory waterfowl "flyways," four major travel corridors that migratory birds follow on spring and fall migrations.

Part of the funding will go toward the purchase of 18 acres of red maple swamp within the boundary of Montezuma NWR in north central New York, 35 miles west of Syracuse. This acquisition provides the USFWS with an excellent opportunity to protect existing wooded wetlands that provide feeding and nesting habitat for nesting migratory birds and other forest dwelling species. The refuge also provides important nesting and migration habitat for thousands of waterfowl, including significant populations of Canada geese, mallards and black ducks.

The Migratory Bird Conservation Fund is supported by revenue collected from Federal Duck Stamp sales, import duties collected on arms and ammunition, right-of-way payments to the refuge system and receipts from

national wildlife refuge entrance fees.

The second project, funded by NAWCA, is part of an ongoing effort by public and private partners to restore 10,000 acres of degraded coastal wetlands on Long Island over the next decade. As part of this phase, 126 acres will be acquired, and 2,500 acres of coastal salt marsh restored. The project is funded by a \$295,000 grant and \$5.2 million in partner contributions. Long Island has always been an important nesting, staging and wintering area for waterfowl and other migratory birds in the Atlantic Flyway. In an attempt to control mosquitos, most of the island's tidal wetlands were ditched and drained in the 1930's and 1940's. Restoration of these wetlands will contribute to the natural biological control of mosquito populations, thus reducing pesticide use. The restored wetlands will also reduce erosion, improve water quality and increase habitat for fish and shellfish.

Since its passage in 1989, projects funded under NAWCA have been supported by more than 1000 partners from federal, state and local agencies; private organizations, including environmental groups, small businesses, and farmers and ranchers; and private citizens.

The North American Wetlands Conservation Act provides matching grants to private and public organizations and to individuals to carry out wetland conservation projects. Over the last four years of the program, an average of about \$44 million has been available annually from all sources.

"These projects continue to demonstrate the effectiveness of partnerships, and of the Act that has brought so many people together to preserve and restore migratory bird habitat. In a very real way, these partnerships are making a difference for waterfowl and other

## SUMMARY OF FALL MEETING FIELD TRIP

About ten people ventured out for the field trip at the Forum's fall meeting in Findley Lake, "Wetland Mitigation and Water Quality Improvements in Western and Central New York." Organized by Diane Kozlowski (Army Corps of Engineers) and Susan McAlpine (The Nature Conservancy [TNC]), the field trip involved a visit to Alder Bottom Wildlife Management Area, a rare plant community of "Rich Hemlock Hardwood Peat Swamp" with two federally listed species, Wild Sweet William and False Hop Sedge. TNC has a program in place to try to control purple loosestrife and *Phragmites*. The group also visited a NYS Department of Environmental Conservation wetland restoration site at the south end of Alder Bottom Wildlife Management Area.

The field trip ended at Pleasant View Dairy farm, where Fred Crosscut led us on a tour of best management practices [BMPs] instituted on his farm. Some of the BMPs include strip cropping, lane ways, seeding areas of barnyard, and relocating pastures to avoid having his cows crossing the road. Fred is also working to meet CAFO requirements on his 200 acre farm. For additional information about initiatives on the French Creek, contact Susan McAlpine of The Nature Conservancy, 129 W. Main St., PO Box 310, Sherman, NY 14781; 716-761-4212; smcalpine@tnc.org.

## DEC MONITORING OUTBREAK OF BOTULISM E IN BIRDS ALONG LAKE ERIE

The New York State Department of Environmental Conservation (DEC) is working aggressively to monitor and investigate the cause of a recent outbreak of Type E avian botulism (*Clostridium Botulism*) in water birds along Lake Erie in Erie and Chautauqua counties, according to DEC Regional Director Gerald Mikol.

"Tests conducted through DEC's Wildlife Pathology Unit have confirmed that Type E botulism is responsible for the deaths of thousands of water birds along Lake Erie and the Niagara River," Director Mikol said. "Aggressive action being taken by DEC wildlife professionals to limit the spread of the outbreak and determine its cause will help ensure the health of western New York's critical water bird populations now and in the future."

Type E is a specific strain of avian botulism most commonly affecting fish-eating birds. It is a paralytic, often fatal, disease that

## CLINTON EXECUTIVE ORDER SEEKS TO CUSHION BLOW BY SUPREME COURT

— Kevin M. Bernstein, Esq., Bond, Schoeneck & King, LLP

An executive order announced Jan. 11 by President Clinton which required federal agencies to consider the impact of their activities on migratory birds, attempts to blunt the impact of recent court decisions limiting the federal government's regulatory authority over wetlands.

The executive order comes on the heels of a Jan. 9 decision by the U.S. Supreme Court overturning the Corps' Migratory Bird Rule, which essentially said activities in isolated wetlands could be regulated if it could be shown that the wetland is used by migratory birds (see article elsewhere in this issue of the Forum).

In an effort to protect migratory birds after the decision, Clinton directed federal agencies to develop within two years a memorandum of understanding with the Fish and Wildlife Service if their actions might have a "measurable negative effect on migratory bird populations."

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## ENDANGERED AND THREATENED SPECIES ISSUES AND RECENT CHANGES TO NEW YORK'S LISTED SPECIES

— Joseph McMullen, *Terrestrial Environmental Specialists*

Wetlands permits, like many other state and federal permits, require the assurance that endangered and threatened species are not affected by the permitted activity. For this reason, those involved with the permit process must keep abreast of changes in state and federal regulations regarding such species. These regulations, and the species listed under them, can affect the issuance of a permit and the outcome of a project.

It should be noted that wetlands regulations, like most other regulations, actually reference only listed "endangered and threatened species." All other categories of rarity, such as rare, special concern, candidate, or exploitably vulnerable are not actually referenced in the regulations as determining permit approval. However, the presence of these species may be important considerations during the SEQRA process, and may affect the importance of a given wetland during a functions and values assessment.

For federal Corps wetland permits under Section 404, assurance that federally listed endangered or threatened species or a species proposed for listing are not affected by the project is key to permit approval. Please note that for federal permits the purview is for federal species only, but it includes consideration of the jeopardy of the species as well as the taking of an individual of that species. It is best stated as follows under the Nationwide Permit General Condition No. 11 Endangered Species.

(a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which will destroy or adversely modify the critical habitat of such species.

(b) Authorization of an activity by a nationwide permit does not authorize the "take" of a threatened or endangered species as defined under the Federal Endangered Species Act.

Under New York State wetland law and regulations, similar wording does not exist for state-listed endangered or threatened species. However, it is generally covered under Environmental Conservation Law 11-0503 and 11-0535.

In New York, animals are listed under 6 NYCRR Part 182 as endangered, threatened, and species of special concern. For state-listed animals, the most recent general change occurred in 1999, effective December, 1999.

New York's Protected Native Plants regulation was updated in 2000. Proposed changes were circulated in April, with the rule making being finalized on August 31, 2000. The change included replacement of existing Part 193.3 under 6 NYCRR with a new Part 193.3 that updated the lists of endangered, threatened, rare, and exploitably vulnerable plants to reflect changes in populations since the last list was made in 1989. The law under which such lists are maintained is ECL section 9-1503. Most of the changes involved the movement of species into a rarer category of protection, especially the transfer of species from rare to endangered or threatened. The definitions used for endangered, threatened, rare, and exploitably vulnerable plants were not changed by the update.

As you can see, there are four categories under which plant species are listed: endangered, threatened, rare, and exploitably vulnerable. All plants listed are considered protected plants under the Protected Native Plants law. However, there is considerable difference among the category lists. As noted above, endangered and threatened plants are those that have a high level of rarity and are particularly important during the permit review process. Rare species are slightly less important. The big problem with the Protected Native Plant regulation is with the last category: exploitably vulnerable.

Exploitably vulnerable plants grew (sorry) out of the original Protected Native Plant Law of 1974. At that time, plant rarity was not well known and there was an emphasis on showy species. In the original list, collective categories of plants were included. For example, the list included all clubmosses, native orchids, trilliums, and all but three native ferns. Some of the species within these collective groups happen to be among the most common in the State. Over the years, as terminology became more universal and categories of rarity better defined, plants were properly placed in appropriate categories. The problem was what to do with the species listed under the original Act that did not fit into the categories of endangered, threatened, or rare. The result was the creation of the exploitably vulnerable category under which these plants (reported in the recent list to total 148!) were listed.

The existence of the exploitably vulnerable category does not really bother me, even though it includes some very common

## DEVELOPMENT OF NEW YORK STATE WETLAND TOOLKIT UNDERWAY

— Jennifer Brady-Connor, *Association of State Wetland Managers and Barbara B. Beall, PWS, The Chazen Companies*

The Association of State Wetland Managers (ASWM) is developing a comprehensive Wetland and Watershed Toolkit for use by local governments, nonprofits, as well as wetland professionals in New York State. The Toolkit will compile all those folders everyone has around their office that contain state and federal wetland regulations, soils information, contact names, "The Dry Facts" brochure, etc., into one neatly organized, easy to use and comprehensive package.

The Toolkit will provide background information on wetland identification. The Toolkit explores the importance of wetlands in the watershed and why and how they should be incorporated into comprehensive watershed/landuse plans. The Toolkit describes the interaction between federal wetland permitting and local land use approvals. It describes non-regulatory means of wetland protection, such as conservation easements, and provides information on wetland restoration and technical assistance. The Toolkit also touches upon related topics including beaver management, stream restoration and buffers.

The Toolkit is being designed as a multi-media resource. Each chapter will be organized with a summary or explanation of the topic, and will then use existing materials (brochures, pamphlets, a book or two) and videos to provide more detailed information. It will include a corollary CD-ROM and a web site linking to many of the Toolkit resources available on the Internet. New materials developed by ASWM will also be in the Toolkit including a directory of agency and nonprofit wetland contacts within New York State, as well as two brochures: "Common Questions: Establishing Local Government Wetlands and Watershed Management Programs" and "Common Questions: Resource Protection Options for New York Communities."

After many drafts and review by an advisory steering committee comprised of local, state, and federal agencies as well as nonprofits, the Toolkit is nearing completion. ASWM hopes to distribute the Toolkit to two hundred local governments and nonprofits throughout New York beginning in the

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# EPA AND CORPS SIGN OFF ON FINAL TULLOCH GUIDANCE

— Kevin M. Bernstein, Esq.  
Bond, Schoeneck & King, LLP

EPA and the Corps of Engineers (the “Agencies”) recently agreed to finalize the rule that they hope will address the decision of the courts to invalidate the Tulloch Rule. The Agencies’ rule comes approximately three (3) years after the Tulloch Rule was first invalidated and comes on the heels of additional litigation. The government believes that this rule (66 Fed. Reg. 4550, January 17, 2001) will improve protection for tens of thousands of acres of wetlands and other waters of the United States in a manner “fully consistent with the court’s decision” clarifying the scope of certain activities, such as mechanized landclearing, ditching and draining.

## Background

On August 25, 1993, the Agencies issued a regulation (the “Tulloch Rule”) that defined the term “discharge of dredged material” as including “any addition, including any redeposit, of dredged material, including excavated material, into waters of the U.S. which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation that destroys or degrades waters of the U.S.” The American Mining Congress and several other trade associations challenged the revised definition of the term “discharge of dredged material,” and on January 23, 1997, the U.S. District Court for the District of Columbia ruled that the regulation exceeded the Agencies’ authority under the CWA because it impermissibly regulated “incidental fallback” of dredged material, and enjoined the government from applying or enforcing the regulation. *See American Mining Congress v. United States Army Corps of Engineers*, 951 F. Supp. 267 (D.D.C. 1997) (“AMC”); *aff’d sub nom, National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1339 (D.C.Cir. 1998) (“NMA”).

On May 10, 1999, the Agencies issued a final rule modifying their definition of “discharge of dredged material” in order to respond to the holding in NMA, and to ensure compliance with the District Court’s injunction. Subsequent to the May 10, 1999 rulemaking, the National Association of Homebuilders (NAHB) and others filed a motion with the District Court that issued the AMC injunction to compel compliance with that injunction. The NAHB motion, among other things, asserted that the May 10, 1999 rule violated the Court’s injunction by asserting unqualified authority to regulate mechanized landclearing.

A decision on the NAHB motion was

still pending at the time the Agencies issued their August 16, 2000 proposal (65 Fed. Reg. 50,108) to establish a rebuttable presumption that mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S. will result in regulable discharges of dredged material. The comment period for the proposed rule expired on October 16, 2000. While the public comment period was still open, on September 13, 2000, the District Court denied NAHB’s motion to compel compliance with the AMC injunction, finding that the earlier May 10, 1999 rule was consistent with its decision and injunction, and the decision of the D.C. Circuit in *NMA. American Mining Congress v. U.S. Army Corps of Engineers*, Civil Action No. 93-1754 SSH (D.D.C. September 13, 2000) (hereafter referred to as “NAHB Motion Decision”).

In that decision the Court found that, “[i]nasmuch as this Court in *AMC*, and the Court of Appeals in *NMA*, invalidated the Tulloch Rule because it regulated incidental fallback, the Court’s order enjoining the Agencies from applying or enforcing the Tulloch Rule must be understood to bar the agencies from regulating incidental fallback.” NAHB Motion Decision, slip op. at 8-9. The Court then went on to determine that by making clear that the Agencies may not exercise section 404 jurisdiction over redeposits of dredged material to the extent that the redeposits involve only incidental fallback, the May 10, 1999 rulemaking did not violate the Court’s injunction and is consistent with the decisions in *AMC* and *NMA*. *Id.* at 10-11.

## Summary of New Final Rule

The Agencies final rule modifies the definition of “discharge of dredged material” in order to clarify what types of activities the Agencies believe are likely to result in regulable discharges. Based on the nature of the equipment, the Agencies believe that the use of mechanized earth moving equipment to conduct landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in Waters of the U.S. is likely to result in regulable discharges of dredged material.

However, in response to comments expressing concern that the proposal would result in a shift in the burden of proof and impose undue burdens on project proponents to “prove a negative,” the Agencies have made a number of changes to clarify that this is not their intent and will not be a result of this rule. Because these concerns primarily

appeared to arise out of the proposed rule’s use of a rebuttable presumption formulation, the Agencies have redrafted the rule language to eliminate use of a rebuttable presumption.

The rule now provides that the Agencies regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in Waters of the U.S. as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. By no longer employing a rebuttable presumption, the Agencies are of the belief that it is clear that they are not creating a new process or altering existing burdens under the Clean Water Act to show a regulable discharge of dredged material has occurred.

The Agencies also received a large number of comments requesting that the Agencies provide a definition of “incidental fallback.” As a result, the Agencies have provided a definition in the final rule, which provides that:

Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

In determining if a regulable discharge of dredged material occurs, the Agencies have indicated that they will carefully evaluate whether there has been movement of dredged material away from the place of initial removal. In doing so, the Agencies will look to see if earth-moving equipment pushes or relocates dredged material beyond the place of excavation, as well as whether material is suspended or disturbed such that it is moved by currents and resettles beyond the place of initial removal in such volume as to constitute other than incidental fallback.

The Agencies also will take into account the amount or volume of material that is redeposited. The new rule defines incidental fallback as the “small volumes of dredged material” falling back to substantially the same place as the initial removal. Therefore, the Agencies will consider the volume redeposited in deciding whether the activity results in only incidental fallback.

Although the new rule is not yet effective and therefore it is too early to tell how it will be applied by Corps Districts around the country, one thing is likely—there will be more

**PRELIMINARY AGENDA  
NEW YORK STATE WETLANDS FORUM**

**APRIL 11th & 12th, 2001  
ALBANY, NEW YORK**

**April 11**

7:00-8:30 am     **Registration and Exhibitor Set-Up**

8:30-8:35 am     **Opening Remarks** – *Jennifer Brady-Connor, Chair NYSWF*

8:35-9:10 am     **Keynote Address** – *Ralph Tiner, USFWS*

9:10-10:40 am    **Concurrent Session A**

**Legal Updates**

**Moderators, *Terresa Bakner, Kevin Bernstein***

*Jamie Woods, US DOJ*

*Michele Barczak, [invited] USACOE, Buffalo District*

*Phyllis Feinmark, [invited] USEPA*

**NYS DOT Projects**

**Moderator, *Kyle Williams, NYS DOT***

Environmental Initiative – *K. Weiskotten, NYS DOT*

Utica Rome Expressway Wetland Mitigation – *E. Frantz, NYS DOT*

Invasive Plant Control in the Adirondack Park – *J. Falge, NYS DOT*

Spooner Creek Restoration – *T. Moore, NYS DOT*

**Vegetation Sampling**

**Moderator, *Joe McMullen***

Wetlands Vegetation Sampling and Data Analysis – *J. McMullen*

Sampling of Submerged Aquatic Plants – *B. Gilman, College of the Fingerlakes*

Importance Values–Case Study – *R. Futyma, LA Group*

Classification of Fens – *A. Olivero, NYSNHP*

10:45-11:00 am    **BREAK**

11:00-12:15 pm    **Concurrent Session B**

**Wetland Values and Mitigation**

**Moderators, *Anne Secord and Christine Delorier***

Rochester Cornerstone Mitigation Bank – *R. Brandt or BEAK*

Urban Wetland Values – *D. Ferlow and M. Fishman*

National Perspective on Mitigation Banking – *TBA*

Question and Answer Panel on Mitigation – *TBA*

**Wetland Monitoring**

**Moderator, *Jennifer Brady-Connor***

Montezuma Wetlands Restoration – *S. Sleggs, Ducks Unlimited*

Right of Way Monitoring – *S. Compton, Northern Ecological Assoc.*

Wetland Landscape Approach to Monitoring – *M. Thiesing, USEPA*

**Hudson River**

**Moderator, *Michael Corey***

HR Restoration Plan – *D. Miller, NYSDEC*

Mapping Aquatic Plants of the Hudson River – *E. Barnaba, Cornell University and B. Blair, NYSDEC*

Eagles and Wetland Restoration Management Along the Hudson – *P. Nye, NYSDEC*

12:15-2:00 pm     **LUNCH and Annual Meeting**

2:00-3:15 pm     **Concurrent Session C**

**Stream Restoration**

**Moderator, *Beth Gelber***

Stream Management Planning – *NYCDEP*

French Creek, Greene County, Bentley Creek?

**Wetland Regulatory Issues**

**Moderator, *Terresa Bakner***

NYS Wetlands Permitting–Views of Landowners – *Gurwick & Knuth, Cornell University*

Practical Tips on Wetland Permitting – *TBA*

Wetland Permitting – *B. Goode*

**Wetland Potpourri**

**Moderator, *Robert Dunn***

Small Mammal Trapping at Burnt Swamp – *M. Fedyniak, Ulster County EMC*

Whitney Point – *J. Trulick, USACOE, Baltimore District*

Stormwater Management with Constructed Wetlands – *McGuckin, Roux Assoc.*

**PRELIMINARY AGENDA CONTINUED**

3:15-3:30 pm **BREAK**  
 3:30-4:45 pm **Concurrent Session D**  
     **Advanced Planning for Mitigation in the Capitol Region**  
     *Barbara Beall*  
     **Western NY Region Issues – Watershed Planning**  
     *Diane Kozlowski*  
     **Tidal Wetlands**  
     *Moderator, F. Reese*  
         Jamaica Bay Tidal Wetlands Loss – *D. Fallon, NYSDEC*  
         Hudson River Tidal Wetland Mapper – *E. Picard, NYSDEC*  
         Tidal Wetland Restoration – *J. Roebig, Ecologic*

5:00-6:15 pm **COCKTAIL HOUR** – in Exhibitor Hall (Stonehenge B)  
 6:30 pm **DINNER**

**April 12**

8:30-8:45 am **Announcements**  
 8:45-11:00 am **Legislative and Regulatory Session**  
     *Moderator, Kevin Bernstein*  
     Invited: *John Goodin – EPA, Joe Seebode/George Nieves - Corps, Mike Townsend - NRCS*  
     Attending: *Dan Montella - EPA; Pat Riexinger – DEC*  
 11:15-12:15 pm **Panel Discussion** – Supreme Court decision in *SWANCC*  
 12:15 pm **Field Trips** –  
     Schodack Island State Park Mitigation – *S. McCorkell, B. Carr*  
     Knox Wetland - *D. Driscoll*  
     Albany Pine Bush  
     Catskill Stream Restoration Projects – *B. Gelber*

**New York State Wetlands Forum, Inc.  
 2001 Annual Conference and Meeting  
 “NEW YORK WETLANDS – REGIONAL PROGRAMS FROM A STATEWIDE PERSPECTIVE”  
 APRIL 11TH AND 12TH, 2001**

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\* Exhibits and poster sessions should contact Kevin Bernstein (315) 422-0121 or [kbernstein@bsk.com](mailto:kbernstein@bsk.com). Please make exhibitor checks payable to *New York State Wetlands Forum, Inc. or NYSWF* and mail them to *Kevin M. Bernstein, Esq., Bond, Schoeneck & King, LLP, One Lincoln Center, Syracuse, New York 13202*

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# FEDERAL GUIDANCE ON THE USE OF IN-LIEU-FEE ARRANGEMENTS FOR COMPENSATORY MITIGATION UNDER SECTION 404 OF THE CLEAN WATER ACT AND SECTION 10 OF THE RIVERS AND HARBORS ACT

— Diane Kozlowski

*U.S. Army Corps of Engineers, Buffalo Dist.*

On October 31, 2000, the U.S. Army Corps of Engineers (ACE), U.S. Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (FWS), and the National Oceanic and Atmospheric Administration (NOAA), issued joint guidance on the use of In-Lieu-Fee Arrangements (ILFA) for compensatory mitigation resulting from Section 404 and ten permit actions. The stated purpose of the guidance is to “clarify the manner in which in-lieu-fee mitigation may serve as an effective and useful approach to satisfy compensatory mitigation requirements and meet the Administration’s goal of no overall net loss of wetlands.”

In-lieu-fee mitigation allows a permittee to direct funds to a third party, typically a natural resource management organization, instead of performing project or site specific mitigation, or buying credits in a mitigation bank. The use of ILFA applies when on-site mitigation is not practicable or ecologically sound. In general, in New York State (NYS) ILFA were utilized for minor wetland impacts of low quality wetlands, and situations where the failure to replace wetland functions and values would not adversely affect the resource.

The guidance provides a general overview of existing policies and rulemaking developed by the Federal agencies such as Memorandums of Agreement on mitigation, mitigation banking guidance, and the EPA 404(b)(1) Guidelines. This new guidance affects the regulatory program in the following way:

(a) Individual Permits (IP) – ILFA as mitigation for projects subject to IP must be developed, reviewed, and approved in accordance with procedures outlined in the *Federal Guidance on the Establishment, Use, and Operation of Mitigation Banks (Nov 95)*. The regulated public may avoid the use of ILFA to compensate for impacts subject to IPs due to the lengthy processing timeframes associated with mitigation banks. However, as the regulatory atmosphere improves for the development of mitigation banks in NYS, the length of the process may also become streamlined.

(b) General Permits (GP) – The new and reissued Nationwide Permits (NWP) which became effective in June 2000, acknowledged the use of mitigation banks and ILFA to

compensate for wetland impacts, particularly with the minimum threshold of 1/10<sup>th</sup> acre for many of the permits. The new guidance requires the use of mitigation banks over the consideration of an ILFA unless:

(i) an approved mitigation bank fails to contain the impacted wetland type for compensation, and the ILFA would provide in-kind restoration as mitigation.

(ii) the only available credits within an approved mitigation bank are through preservation, and the ILFA would provide in-kind restoration as mitigation.

There is also a requirement under both of the above situations that the bank be within the service area of the impacted wetland.

The ILF guidance outlines considerations when an ILFA is proposed for use in conjunction with a general permit. Many of these items are already an inherent part of any mitigation proposal (e.g., site selection, technical feasibility). However, additional reviews and a more rigid format for implementation will likely necessitate changes in the current program administered by the Corps District offices. The guidance also appears to minimize the channeling of funds for preservation only. This may effectively reduce the number of sites available for ILF. Some of the non-profit organizations that protect significant habitat through acquisition and preservation will likely find funding of their projects from mitigation reduced. While we should strive to restore and create for wetland losses, preservation has its place in the regulatory program. This guidance appears to down play the value of preserving significant habitat and providing a buffer to that resource.

As a result of this guidance, the Corps District in NYS will have to modify their current programs for ILFA. If you are a participant in an ILFA, you will likely be contacted by the Corps District regarding these changes. All the agencies involved in the guidance have made a commitment to evaluate the guidance within 12 months of the effective date.

## (ENDANGERED AND THREATENED SPECIES ISSUES AND RECENT CHANGES TO NEW YORK’S LISTED SPECIES)

*[Cont’d. from page 4]*

species. It does include species, like American ginseng, that are truly exploitably vulnerable, and it helps to protect landowners from the collection of plants on their property without their permission. And, as everyone should know, plants are the property of the landowner. They are not like animals, which are the property of the state. The real problem is the way exploitably vulnerable species are defined, which is as follows.

Exploitably vulnerable native plants are likely to become threatened in the near future throughout all or a significant portion of their ranges within the state if causal factors continue to be unchecked.

This definition is very misleading. Many of the species listed under this category are so common that they could never, ever possibly become rare, threatened, or endangered. Perhaps equally important is the confusion the exploitably vulnerable list causes with the public, town boards, and many regulators. On many occasions I have heard well-intentioned individuals express opposition for a project because of the destruction of plants, such as ferns and trilliums, that are protected under the Protected Plant Act. Since this is the same law that protects endangered and threatened species, these plants are assumed to be in the same category. They do not realize that these are some of the most common species in the state.

I have commented many times to the NYSDEC regarding this problem. During the most recent update they finally acknowledged that they agreed with my concerns, but they could not make a change because such a change would likely involve a change in the law itself and that is easier said than done. They did hope to clarify the introduction to the exploitably vulnerable list to make it more clear to the public. Unfortunately, they didn’t.



## (SUPREME COURT PROHIBITS MIGRATORY BIRD RULE)

[Cont'd. from page 1]

ACOE based this argument on the fact that Congress failed to pass a bill that would have overturned the ACOE's 1977 regulations. Despite this argument, the Supreme Court concluded that the ACOE failed to make the necessary showing that Congress acquiesced to the ACOE's regulations or the Migratory Bird Rule, which did not first appear until 1986.

Respondents also argued that the extension of jurisdiction in Section 404(g) to waters other than traditional navigable waters indicates that Congress recognized and accepted a broad definition of navigable waters that includes nonnavigable, isolated, intrastate waters. However, according to the Court, Section 404(g) simply refers to those waters as "other . . . waters." The Supreme Court concluded that Section 404(g) was unenlightening because it did not conclusively determine the construction to be placed on the use of the term "waters" elsewhere in the CWA.

Therefore, the Court declined to extend its holding in *Riverside Bayview* to isolated wetlands that serve as habitat to migratory birds. Such a ruling would read the term "navigable waters" out of the statute. According to the Court, the term "navigable" shows what Congress had in mind as its authority for enacting the CWA: "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."

Finally, the ACOE argued that since Congress did not address the precise question of 404(a)'s scope, its interpretation should be entitled to deference under the *Chevron* line of cases. The Supreme Court refused to extend *Chevron* deference here because Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. "Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Whether the Migratory Bird Rule falls within Congress' power to regulate intrastate activities that substantially affect interstate commerce raises significant constitutional questions. Moreover, permitting the ACOE to regulate ponds and mudflats based on the Migratory Bird Rule would result in a significant impingement of the States' traditional and primary power over land and water use. Accordingly, the Supreme Court rejected the ACOE's argument for

administrative deference under *Chevron*.

### The Dissent

According to the Dissent, the Court took "an unfortunate step that needlessly weakens our principal safeguard against toxic water." The CWA is watershed legislation and the scope of its jurisdiction encompasses "all of 'the waters of the United States'" regardless of actual or potential navigability.

First, the Dissent noted that the amendments adopted by Congress in 1977, which broadened the definition of "navigable waters" to encompass all "waters of the United States," supported the ACOE's interpretation that its jurisdiction extends to isolated waters. In fact, the purpose of the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" has nothing to do with navigation at all. The Dissent concluded that "the term 'navigable waters' operates in the statute as a shorthand for 'waters over which federal authority may properly be asserted.'"

Second, the Dissent argued that Congress' failure to pass a bill that would have overturned the ACOE's 1977 regulations showed that Congress acquiesced to the ACOE's regulations, which made it clear that covered waters included isolated wetlands. According to the Dissent, the Court's "broad determination in *Riverside Bayview* that the 1977 Congress acquiesced in the very regulations at issue in this case should foreclose petitioner's present urgings to the contrary."

Third, the Dissent argued that when Congress enacted Section 404(g), it intended the ACOE's jurisdiction to extend beyond just navigable waters, their tributaries, and the wetlands adjacent to each. The majority opinion also overlooked its previous position in *Riverside Bayview* that the CWA should be read *in pari materia*. Even the legislative history showed that limiting the jurisdiction of the CWA with regard to the discharge of dredged or fill material "would cripple efforts to achieve the act's objectives."

Fourth, the Dissent noted that under *Riverside Bayview* and *Chevron*, the ACOE's construction of the CWA was entitled to deference and the majority's conclusion otherwise was unfaithful to both these decisions. Furthermore, the ACOE's interpretation of the CWA does not encroach upon traditional state power over land use because the CWA is not a land-use code.

Finally, the Dissent argued that the ACOE's exercise of jurisdiction over isolated waters under the Migratory Bird Rule was authorized by the Commerce Clause. In its analysis the Dissent noted that when considered in the aggregate, the discharge of dredged or fill material into waters used

by migratory birds would substantially affect commerce. "The power to regulate commerce among the several States necessarily and properly includes the power to preserve the natural resources that generate such commerce."

### Conclusion

Although the Supreme Court's decision only strikes down the Migratory Bird Rule, it will have a significant impact on the ACOE's jurisdiction over all intrastate wetlands. According to the EPA, the decision underscores the need for congressional action to strengthen the laws that protect wetlands. In the meantime, the states may enact their own regulations to cover land and water use

## SUPREME COURT GRANTS DEVELOPER REVIEW OF WETLANDS TAKINGS CLAIM ON PRE-OWNERSHIP RULE

The U.S. Supreme Court on October 10, 2000 agreed to review whether regulations that predate an individual's ownership of property can lead to a takings claim requiring compensation under the Fifth Amendment of the U.S. Constitution (*Palazzolo v. Rhode Island ex rel Tavares*, U.S., No. 99-2047).

Anthony Palazzolo, a Rhode Island coastal property owner, petitioned the Supreme Court on June 26 to appeal 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 (R.I. 2000)).

The U.S. Supreme Court agreed 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 prior to the claims being ripe, and whether permissible uses of property are economically viable solely because the

# WETLAND MITIGATION BANKING COMES TO NEW YORK

— Anne L. Secord, U.S. Fish and Wildlife Service

New York State's first Wetland Mitigation Bank is now operational in the Rochester area. The Cornerstone Group, led by President Roger Brandt, has converted 20 acres of former farmland just south of the Rochester airport into a mixture of aquatic bed, emergent, wet meadow and forested wetlands. Credits from these created wetlands can be purchased to compensate for unavoidable wetland impacts in the Black Creek Watershed, including parts of Monroe and Genesee Counties. The bank also has a secondary service area, the Northern portion of the Genesee River watershed, which may service parts of Livingston County, as well as Monroe and Genesee Counties.

## What is Wetland Mitigation Banking?

The notion of wetland banking was conceived as a way to mitigate for wetland impacts when mitigation at the site of impact was not practicable. As defined by the November 28, 1995 Federal Guidance, wetland mitigation banking is "wetland restoration, creation, and in exceptional circumstances, preservation, undertaken expressly for the purpose of compensating for unavoidable wetland losses in advance of development actions, when such compensation cannot be achieved at the development site or would not be as environmentally beneficial." Since the first bank emerged in 1992, wetland mitigation banking has grown rapidly in popularity. There were 77 banks proposed or operating in the United States in 1995, compared with 230 banks registered with the U.S. Army Corps of Engineers (Corps) as of January 2000.

## Rochester Cornerstone

The U.S. Fish and Wildlife Service has signed the agreement for the Rochester Cornerstone Wetland Mitigation Bank, and along with other members of the Mitigation Banking Review Team (MBRT), we will ensure that wetland credits are released only after success criteria are met and only for projects that are consistent with the USEPA 404 (b)(1) guidelines. This bank has a fairly restricted service area, meaning that it will not generally be used to compensate for wetland impacts that occur more than ten to twenty miles away. In fact, we expect that this bank will be used largely to mitigate for wetland impacts within the greater Rochester area. The bank was constructed before any release of wetland credits, giving us greater assurance that the wetlands are likely to be successful and perform as expected. Also, this 20-acre bank is buffered on three sides by an additional 57 acres of wetlands that are part of

NYSDEC Freshwater Wetland CI-5, a Class II forested wetland.

The author visited the bank site in June of 2000 and was impressed with the variety of water depths created and a surprising plant and animal species diversity, particularly in light of the fact that bank construction was completed the previous July. Aside from a minor incursion of purple loosestrife, common reed, and reed canary grass and some grazing by Canada geese, there have been no major impediments to the establishment of vegetation. The MBRT determined that approximately half of the bank's acres have met the first year's success criteria (50% coverage by facultative, facultative-wet, or obligate plant species and adequate hydrology to maintain this species composition) and the Corps has agreed to release those credits.

## Banking vs. Other Types of Mitigation

Scientists and regulators have often promoted mitigation that strives to replace wetland functions in proximity to the wetland impact. Unfortunately, this type of mitigation may not always be possible if no suitable wetland creation/restoration sites are available nearby or if significant development in the project vicinity makes it unlikely that created wetlands will provide a full range of wetland functions. Under these circumstances, we may end up with a small pockets of created wetlands that are subject to degradation from adjoining, incompatible land uses. These small, isolated wetlands are frequently without long-term management and protection.

Mitigation banks offer the advantage of creating larger, protected tracts of wetland in advance of permitted wetland impacts elsewhere. However, mitigation banks are not a mitigation panacea. There are some environmental organizations and Federal/State agencies that are opposed to banking or at least want to approach this type of mitigation cautiously. Some are concerned that land owners will go straight to the bank to buy down wetland impacts without attempting to avoid and minimize wetland impacts as required by the U.S. EPA 404 (b)(1) guidelines. There is also a worry that wetland mitigation banking, if it catches on to a significant extent, will result in landscape changes - shifting most wetlands away from developing areas to more rural areas.

Consider, for example, the Little Pine Island Wetland Mitigation Bank, one of 32 mitigation banks in the State of Florida. This bank, when completed, will include 1,600 acres of restored mangrove forest, *Juncus* salt marsh, and hydric pine forest on a 4,700 acre island near Fort Myers. While the habitat value alone of this restored wetland will be impressive, its success will be achieved at the expense of significant wetland loss elsewhere within the South Florida area.

## The Future of Banking in New York

At least five more mitigation banks are being discussed in New York, including two public banks that would be used to compensate for unavoidable wetland impacts caused by Federal activities or county highway departments. If New York follows the lead of the southern United States, where banking is big business, we can expect to see more banks develop over the next decade.

## (A LETTER TO THE CORPS)

[Cont'd. from page 2]

always result in discharges to waters of the U.S.<sup>77</sup> The backhoe was always the classic example of how digging could be done with no more than incidental fallback. You would have been far more candid to simply announce that you are reinstating the Tulloch Rule, court decisions to the contrary notwithstanding.

### Navigational Dredging

Apparently the Corps and EPA will continue to apply the exception announced in the now defunct Tulloch Rule that Section 404 does not apply to navigational dredging such as the Corps itself does.<sup>8</sup> This proposal is silent on that issue yet tries to rationalize the expansion of Section 404 to digging with such statements as: "The suspension and distribution of toxics and other pollutants in the water column degrades water quality. Increased turbidity can also harm aquatic life, smothering fish nurseries, mussels and benthic life and killing submerged aquatic life."<sup>9</sup> True enough. Get a law; then regulate. Inconceivable to me how Farmer Brown's backhoe will "almost always" produce more than incidental fallback, but the Corps' 36-inch cutterhead dredge won't. At a minimum, you should announce whether this remarkable inconsistency would continue.

### Significant Regulatory Action

"Because the proposal would not change program jurisdiction, continues to provide that incidental fallback is not subject to regulation, and does not establish new procedures or record keeping requirements, we believe that the economic effects of today's proposal would be small."<sup>10</sup> If this were true, and I firmly believe it is not, why did you determine that this rule was a "significant regulatory action" under EO 12866?

### Advance Notice

You wrote the proposal in a way that disguises whether the digger must serve advanced notice in order to rebut the presumption. The Section 404(b)(1) guidelines presumption regarding alternatives must, of course, be rebutted before a discharge can be legally permitted. In an apparent effort to minimize the perception of the impact of this new rule, the preamble seems to say that the digger can do his own rebutting, go dig, but be prepared to either demonstrate that the presumption was satisfactorily rebutted or to pay the penalties for a CWA violation. Trust me, if that is what was indeed intended, it won't last. And even if a dig-first-then-rebut arrangement survives, it will lead to extensive arguments, mitigation negotiations, and enforcement actions. I believe your true intent is reflected by the actual proposed regulation

language: "This presumption is rebutted if the party proposing such an activity demonstrates that only incidental fallback will result from its activity." Note the use of the word "proposing" rather than "performing." You will indeed add a new procedure – a pre-digging notice. The return of the "PDN"!

### Conclusions

This proposal shows every sign of the seeds for further regulatory creep and increased federal land use control. It will add more burdens on the regulators and regulatees alike. You should deep-six it and turn your attention to amending the law if regulating digging or anything else harming wetlands at the federal level is what you want, which it clearly is. The law has not changed since the Corps wrote in 1986:

"If the intent is to remove material from the water and the results support this intent, then the activity involved must be considered as a 'normal dredging operation' that is not subject to section 404."<sup>11</sup>

Now that the DC Court of Appeals has endorsed that interpretation, I fail to see what right the Corps and EPA have to change it.

Sincerely,

Bernard N. Goode

<sup>1</sup>Webster's Collegiate Dictionary, Tenth Edition, 1993

<sup>2</sup>White House Office on Environmental Policy, Protecting America's Wetlands: A Fair, Flexible, and Effective Approach, August 24, 1993

<sup>3</sup>65 FR 50109, August 16, 2000

465 FR 50110, 50111

<sup>5</sup>65 FR 50111

<sup>6</sup>EPA Administrator Russell Train letter to the Chief of Engineers, May 16, 1975

<sup>7</sup>65 FR 50112

<sup>8</sup>58 FR 45025, 45026, 45036, August 25, 1993; 33

CFR 323.2(d)(3)(ii)

<sup>9</sup>65 FR 50112, 50113

<sup>10</sup>65 FR 50114

<sup>11</sup>51 FR 41210, November 13, 1986

[Editor's Note: We received Mr. Goode's letter prior to the January 17, 2001 final rule and thought the comments would still be relevant to this issue.]

## (DEC MONITORING OUTBREAK OF BOTULISM E IN BIRDS ALONG LAKE ERIE)

[Cont'd. from page 3]

results when the birds ingest toxin produced by the botulism bacterium. It can be toxic to humans and other animals if they consume raw or undercooked birds or animal flesh that have been poisoned by the toxin.

The majority of the birds affected so far by the outbreak are fish eaters or scavengers of other birds that died from botulism E, including common and red breasted mergansers, common loons, grebes, diving ducks, ring-billed gulls and herring gulls. There have been no reports of any human illness associated with the outbreak.

The public is advised not to handle sick birds or allow pets to handle sick or dead water birds found along the shores of Lake Erie and the Niagara River. DEC is actively collecting dead birds found along the shores in an effort to monitor the extent of the outbreak, and to prevent scavengers from consuming the birds. Collected specimens will be delivered to the Department's Wildlife Pathology Laboratory for examination and proper disposal.

Any discovery of dead water birds or water birds showing clinical signs of botulism, which includes an inability to walk or fly or a condition known as "limber neck," resulting from a paralysis of the neck muscles, should be reported to DEC's Bureau of Wildlife in Buffalo at (716) 851-7010.

Botulism outbreaks among waterfowl are typically a warm weather occurrence, happening most frequently during the summer and fall months. An earlier outbreak of Type E Botulism was noted by Canadian authorities in September and October. Recent cold weather conditions are expected to limit the outbreak.

Although no human illness has been identified in association with the outbreak, waterfowl hunters and anglers are reminded to thoroughly cook all fish and game before consumption.

## CONGRESS PASSES ESTUARIES AND WILDLIFE LAW

Public Law No. 106-457, Estuaries and Clean Water Act of 2000, establishes a national goal of restoring one million acres of estuary habitat by 2010, and it authorizes \$275 million in matching funds over the next five years for local estuary restoration projects.

Public Law No. 106-408, Fish and Wildlife Programs Improvement and National Wildlife Refuge System Centennial Act of 2000, signed into law on November 1, amends the Pittman-Robertson Wildlife Restoration Act and the Dingell-Johnson Sport Fish Restoration Act to enhance the funds available for grants to states for fish and wildlife conservation projects. The law also reauthorizes and amends the National Fish and Wildlife Foundation Establishment Act to commemorate the centennial of the establishment of the first national wildlife refuge in the United States on March 14, 1903.

# U.S. SUPREME COURT DECLINES REVIEW OF DECISION IN FEDERAL ENFORCEMENT ACTION

— Kevin M. Bernstein, Bond, Schoeneck & King, LLP

The U.S. Supreme Court announced Nov. 13 that it will not review a Clean Water Act wetlands case in which a developer was fined \$1.2 million (*Krilich v. United States*, U.S., No. 00-239, 11/13/00). The Court said it will not review a federal appeals court decision that upheld the penalty assessed by the Environmental Protection Agency against Illinois developer Robert Krilich.

In a petition filed in August, Krilich had asked the Court to determine whether EPA exceeded its authority in asserting jurisdiction over dredge-and-fill activities in isolated intrastate waters located on property he sought to develop. Krilich alleged that

the actual or potential use of those waters by migratory birds was an insufficient basis for EPA to find they were covered by the Clean Water Act regulating developing in wetlands.

The Court's action leaves in place an April 12 decision by the U.S. Court of Appeals for the Seventh Circuit that upheld the fine after Krilich failed to create mitigation wetlands according to the terms of a consent decree that had settled charges filed against him. The appeals court rejected Krilich's contention that EPA never had jurisdiction over the wetlands (*United States v. Krilich*, 209 F.3d 968 (7th Cir. 2000)).

## (DEVELOPMENT OF NEW YORK STATE WETLAND TOOLKIT UNDERWAY)

[Cont'd. from page 4]

summer of 2001 and requests for copies have already been received. If you have any comments regarding the content of the Toolkit, please contact Barbara Beall by phone at 518-812-0513 or by e-mail at beallbb@aol.com. If you would like to preview an outline of the Toolkit components or would like to be on an advance mailing list for a copy, please contact Jennifer Brady-Connor by phone at 518-872-1804 or by

## ANNUAL MEETING AGENDA AND REGISTRATION ENCLOSED!

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