

The Forum

NEW YORK STATE WETLANDS FORUM NEWSLETTER

MESSAGE FROM THE CHAIR

— Jennifer Brady-Connor

We have been witness to tremendous sorrow, pain, courage, and joy in the past few weeks as a result of terrorist attacks on our nation and state. Many of our friends and colleagues were directly impacted by the tragic events, including Port Authority staff who worked in the World Trade Center, EPA Region 2 staff and New York District Army Corps of Engineers staff who worked nearby. They and all the victims of this tragedy have my thoughts and prayers.

In what now seems like insignificant news, the 7th Annual meeting of the NYSWF in April was our best-attended meeting ever with a grand total of 228 paid registrants, plus quite a few drop-ins who joined us for stimulating presentations and conversations. Almost 25% of attendees were from the nonprofit sector, a few less from NYS agencies, and another 10% each from local and federal governments. The remainder was combined into an “other” category. In my opinion, the 10% from local governments is misleading since many attendees are involved with local governments on a consulting or volunteer basis. In any event, the NYSWF is seeking funding to improve attendance by local governments by providing fee scholarships, travel assistance, and other resources. Stay tuned for developments in that area via our website, www.wetlandsforum.org.

Getting back to the annual meeting, thank you to all who attended and especially to those who filled out and turned in their evaluation forms. These are key in helping us set topics for the agenda and call for papers of the annual and fall meetings. Speaking of evaluation forms, what do you think of our newsletter? Do you have an interest in presenting an article or opinion piece? Do you have suggestions for feature topics or sections? Enclosed is an evaluation form to get your thoughts on our newsletter. Please fill it out and return it to us. One respondent will be randomly selected to receive free registration at the annual meeting in 2002 in Liverpool, New York.

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SUPREME COURT REVIEWS WETLAND TAKINGS CLAIM

PALAZZOLO V. RHODE ISLAND **121 S. Ct. 2448 (2001)**

— Teresa M. Bakner and Tammy Cumo-Smith

The U.S. Supreme Court reviewed whether regulations that pre-date ownership of property can lead to a Constitutional takings claim. The United States Constitution says that private property cannot be taken for public use without just compensation. The Court has not been able to develop a checklist or formula for determining what constitutes a ‘taking’ as that determination has depended heavily upon particular circumstances of a case.

Anthony Palazzolo petitioned the Supreme Court in June to appeal a Rhode Island Supreme Court ruling that his takings claim was not ripe for review, he had no challenge to regulations predating his legal ownership of the property, he was not deprived of all economically beneficial use of the property and he had no reasonable investment backed expectations for development. The U.S. Supreme Court affirmed in part and reversed in part, holding that Palazzolo’s claims were ripe for review and the fact that he acquired title after the regulations were in place did not bar a takings claim; however, the Court also held that Palazzolo’s claim for deprivation of all economic use was barred because he could still use the upland portion for construction of a residence.

The facts of the case are as follows: Petitioner, Anthony Palazzolo, owns waterfront property in Westerly, Rhode Island, which is designated as coastal wetlands. Petitioner and his associates formed Shore Gardens, Inc. (SGI) and bought the property as an investment in 1959. Shortly thereafter, Petitioner bought out his associates to be the sole shareholder of SGI. In 1962, SGI submitted its first development proposal for the tract of land – to dredge from the Winnapaug Pond (which borders the SGI land on the north side) and fill the entire property. The application was denied. In 1963 a similar proposal was submitted. While that was still pending, a third proposal was submitted in 1966. The 1963 and 1966 proposals were

referred to the Island Department of Natural Resources. At first the Departmental staff assented but later changed their position due to the adverse environmental impact of the proposals.

In 1971, Rhode Island created an agency to protect coastal properties. This agency extensively limited development of salt marshes, designating them as ‘coastal wetlands.’ Because of its proximity to Winnapaug Pond, the SGI property received this designation.

In 1978, SGI’s corporate charter was revoked for failure to pay corporate income taxes and title to the SGI property passed to SGI’s sole shareholder, Anthony Palazzolo.

In 1983, petitioner submitted a proposal similar to the 1962 application – it was denied for being ‘vague and inadequate’ and because it would have significant impacts upon waters and wetlands of Winnapaug Pond. Petitioner, with the help of counsel, prepared a more specific proposal, which was also denied because there needed to be a ‘special exception’ to fill in protected coastal properties. Petitioner appealed to the Rhode Island courts alleging that the regulation was a taking without compensation, violating the 5th and 14th amendments. The lower court ruled against Petitioner and the Rhode Island Supreme Court affirmed.

The Supreme Court reviewed the following issues:

Post-regulation acquisition

The Takings Clause of the United States Constitution allows landowners to claim that an exercise of the State’s regulatory power deprives them of their property and constitutes a ‘taking.’ The interference with landowners use of their property may be so unreasonable as to require compensation.

When Palazzolo asserted this claim, the State argued that the regulations he complained of were already in place when he acquired title to the property. The theory they asserted is that successive title holders, when

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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.

MITIGATION PROGRAMS NOT MEETING GOALS OF 'NO NET LOSS,' RESEARCH COUNCIL SAYS

Mitigation programs are not meeting the goal of "no net loss" for wetlands in the United States, the National Research Council said in a recent report. The report, *Compensating for Wetlands Losses Under the Clean Water Act*, found that while 1.8 acres of wetlands were supposed to be mitigated for every acre filled in the course of development activities, data was lacking as to the effectiveness of the program.

Under Section 404 of the Clean Water Act, a permit is required for the discharge of any material into waters of the United States, including wetlands. Development activities should first avoid the filling of wetlands, but where such losses cannot be avoided, Section 404 permit holders can be required to provide compensatory mitigation. This includes restoration, creation, enhancement, or preservation of wetlands.

A research council committee found that the U.S. Army Corps of Engineers, which issues Section 404 permits, did not have adequate data on the status of compensatory wetlands. "The literature on compensatory mitigation suggests that required mitigation projects often are not undertaken or fail to meet permit conditions," the report said. "Therefore, the committee is not convinced that the goal of no net loss for permitted wetlands is being met for wetlands functions."

Wetlands functions include improvements to water quality, water retention to ameliorate the impacts of floods, ground water recharge, shoreline stabilization, and habitat support for a diverse range of plants and animals, including most endangered species.

According to the report, guiding principles dictate that where the impacts to wetlands are permanent, mitigation should be too. However, because the concept of compensatory mitigation is new, no real data is available to show whether that principle is borne out.

A watershed approach should be used in making permit decisions regarding development activities in wetlands, the report said. Federal permitting guidelines emphasize that mitigation should be done as close to the impact site as possible and address the same wetland type and functions. However, the report said these criteria should not necessarily be automatic. Rather, mitigation "should follow from an analytically based assessment of the wetland needs in the watershed and the potential for the compensatory wetland to persist over time."

Some types of wetlands, such as fens and bogs, cannot be effectively restored, and

impacts to them should be avoided, the report said. Moreover, all mitigation wetlands should be self-sustaining, the report said. "This means that the hydrological processes that define a wetland in the ecosystem need to be present and expected to persist in perpetuity," the report said.

The report also said the performance expectations in the Section 404 permitting program regarding mitigation have been unclear, and compliance has often not been assured.

To get to the no net loss of wetlands goal, first articulated during the first Bush administration, performance requirements for compensation sites need to be clearly stated and met. "In many cases, even though permit conditions may have been satisfied, required compensation actions were poorly designed, or carelessly implemented," the report said. "At some sites compliance criteria were being met, but the hydrological variability that is a defining feature of a wetland had not been established." The report recommended that mitigation sites receive long-term stewardship by an interested organization, for example, and that projects be planned and measured by a broader set of wetlands function than are currently employed.

In addition, a reference manual should be developed to help design projects that are more likely to meet permit requirements, the report recommended. The Corps should develop such a manual for each region. Whether mitigation is carried out by the permit holder or a third party, it should be done at the same time or before a wetlands is filled. The mitigation should also be done according to established design criteria that are better monitored and enforced, the report said.

Finally, the report recommended that the Corps and the Environmental Protection Agency work with states to expand their permitting and watershed planning programs to help fill in the gaps in the federal program. The report comes within a month of another report by the General Accounting Office questioning the effectiveness of in-lieu-fee mitigation strategies. The GAO report recommended the Corps, EPA, and other agencies develop ecological criteria to measure the effectiveness of mitigation programs.

CORPS PROPOSES REISSUANCE AND MODIFICATION OF NATIONWIDE PERMITS — *Kathleen M. Bennett, Bond, Schoeneck & King, LLP*

On August 9, 2001, the Army Corps of Engineers (“Corps”) issued a proposal to reissue all of the existing Nationwide Permits (“NWP”), General Conditions, and definitions with some modifications. *See* 66 Fed. Reg. 42,070 (Aug. 9, 2001). The Corps will accept comments on the NWP proposal until October 9, 2001. *See* 66 Fed. Reg. 48,665 (Sept. 21, 2001). To reduce confusion regarding the expiration of the NWPs, the Corps plans to reissue all NWPs and General Conditions including those not scheduled to expire on February 11, 2002. In other words, the NWPs reissued in December 1996 and the new and revised NWPs issued in March 2000 will become effective and expire on the same date.

NWPs are issued by the Corps to authorize certain developmental activities while seeking to protect the aquatic environment. Keeping this goal in mind, the August proposal recommends modifications to NWPs 14, 21, 27, 31, 37, 39, 40, 42, and 43, and to General Conditions 4, 9, 13, 19, 21 and 26. The Corps also proposes to add a new General Condition 27. This article will discuss some of the proposed revisions for NWPs 14, 39, 40, 42 and 43 and General Conditions 13, 19, 26 and 27.

The Corps proposes to simplify the terms and conditions of NWP 14 (linear transportation projects) by treating both public and private transportation projects the same for tidal and non-tidal waters. Under the revised NWP, the acreage limits for all linear transportation projects in non-tidal waters is one-half acre and in tidal waters is one-third acre. The change increases the maximum acreage for private transportation projects in non-tidal waters from one-third acre to one-half acre. The Corps also proposes to eliminate the 200 linear foot prohibition because very few projects exceeding 200 linear feet would remain below the one-tenth acre notification threshold. The low notification threshold allows the Corps to do a case-by-case review, thereby insuring that any NWP 14 activity that exceeds this threshold will have a minimal adverse affect on the aquatic environment.

The Corps proposes three changes to NWP 39 regarding residential, commercial and institutional developments. First, the Corps recommends simplifying the language in the subdivision provision to reduce confusion. The new provision reads “for residential subdivisions, the aggregate total loss of waters of the U.S. associated with NWP 39 cannot exceed one-half acre. This includes any loss of waters associated with the development of individual lots within the subdivision.”

Second, the Corps suggests deleting the one-cfs restriction on stream impacts because it unnecessarily limits the use of NWP 39 in some cases where the impacts are minimal. Finally, the Corps advocates a project-specific waiver of the 300 linear foot prohibition following a written determination by the Corps that any adverse environmental affects would be minimal. The Corps believes the notification provisions will permit a case-by-case review of these projects to ensure the protection of the aquatic environment.

In addition to waiving the 300 linear foot prohibition for projects authorized by NWP 39, the Corps proposes a similar project specific waiver for projects authorized by NWPs 40, 42, and 43 provided the Corps determines that the impacts to the aquatic environment will be minimal. The Corps believes that the 300 linear foot prohibition could in some cases unnecessarily restrict authorization of an otherwise minimal impact activity. To make use of the waiver, the applicant must first notify the Corps that the applicant would like to exceed the 300 linear foot limitation on impacts to streambeds. If the Corps determines that the activity complies with the other terms and conditions of the NWP and that the adverse environmental affects on the aquatic environment will be minimal, the Corps may waive the prohibition and authorize impacts exceeding 300 linear feet. In making its determination, the Corps must consider factors such as the length of the stream impacted and water quality conditions, functions and designations, the size of the watershed drained by the stream, potential impacts to flood retention/resynchronization functions, biological resources, known public concern, and any required mitigation.

The Corps is also proposing modifications to some of its General Conditions. For example, the Corps proposes to modify General Condition 13 (notification) for NWPs 21, 39, 40, 42, and 43. For all projects using NWP 21, and for those projects using NWPs 39, 40, 42 and 43 that will impact intermittent or perennial streambeds in excess of 300 linear feet, the applicant must notify the Corps and obtain explicit authorization before the project can proceed. In addition, the Corps recommends deleting the notification requirement for permanent above-grade fills in waters of the U.S. for projects using NWPs 12, 14, 29, 40, 42, 43 and 44. This change is consistent with the proposed changes to General Condition 26.

The Corps proposes revisions to General Condition 19 (mitigation) that will allow a

case-by-case waiver of the one-for-one mitigation requirement. The Corps believes the one-for-one acreage requirement as currently written is too restrictive and does not allow it to mitigate aquatic impacts to streams and other non-wetland aquatic resources. According to the Corps, this change will allow it to require mitigation for project impacts that best protect the aquatic environment. The one-for-one mitigation requirement may only be waived where the Corps determines that another form of mitigation is the most environmentally appropriate.

The Corps recommends modifications to General Condition 26 (fills within the 100 year flood plain) to require all projects authorized by NWPs to comply with any applicable Federal Emergency Management Agency (“FEMA”), state or local floodplain management requirements. However, the Corps proposes to delete the notification requirement for compliance. In other words, although the Corps requires compliance with FEMA, it no longer requires documentation of such compliance. The Corps also proposes to allow NWPs 12, 14 and 29 to be used in the mapped floodway above the headwaters and to authorize above-grade fills in the mapped floodplains below the headwaters.

Finally, the Corps suggests the addition of General Condition 27 establishing a construction period. Under the existing structure, if a project obtains a NWP verification near the expiration date of the NWP, the permittee cannot necessarily rely on that permit to continue in effect through the lengthy and costly process of developing and planning the project. This new condition allows the Corps to extend the authorization of an activity by a NWP for a reasonable period beyond the expiration of the NWP to allow for project completion.

Environmental groups and other federal agencies, including the Environmental Protection Agency, have expressed opposition to the proposed revisions. These groups claim the proposal substantially weakens protection of the nation’s wetlands and streams and would result in a net loss of thousands of wetland acres. Industry groups believe that the proposal both strengthens and relaxes restrictions under certain conditions. These groups note that the flexibility provisions are a clear sign that the Corps is taking efforts to lessen the permitting burden. However, these groups also think that some aspects of the proposal may serve to nullify the positive aspects, including the requirement for case by case review, mandatory compensatory mitigation, and the establishment of buffer areas.

WETLAND PLANTINGS — A SUGGESTION FOR SELECTING APPROPRIATE WATER DEPTHS

Joseph M. McMullen and Donald L. Coogan, Jr., Terrestrial Environmental Specialists, Inc.

Over the years we have planted vegetation in numerous wetlands throughout New York, mostly new wetlands that were created for mitigation purposes. Our experience has taught us to plant wetland vegetation at shallower depths than where we see it growing naturally.

Every wetland plant species tolerates water within a certain depth range. Some species have a narrow tolerance range, while others are broader. Projecting where the water levels are going to be in a given wetland, and selecting the appropriate depth for planted species is key to successful vegetation establishment.

Wetland vegetation types characteristically occur in different water depth zones. This is called wetland zonation. In deeper portions of a wetland and in deep water habitat, there is a zone of submerged aquatic vegetation. This aquatic bed zone contains plants that root in the bottom substrate at depths of 3 to 6 feet (or more where water clarity permits light penetration). Plants characteristic of this zone include pondweeds, some bladderworts, water celery, coontail, and several others.

At a slightly shallower depth (about 2 to 4 feet), there is a zone of floating aquatic vegetation, which is actually a portion of the aquatic bed. This zone is comprised of species that are rooted in the bottom, but have leaves that float on the water surface. White and yellow water lilies and several pondweeds are characteristic of this zone.

Next is a zone of nonpersistent emergent wetland vegetation. This zone usually occurs in a water depth of 1 to 2 feet. Species in this zone do not persist (non-persistent) in the winter months, but emerge above the surface of the water (emergent) during the growing season. The showy pickerelweed, arrow arum, arrowhead, and water plantain are common examples of this group.

Closer to the edge of standing water in a wetland, is a zone of persistent emergent vegetation. As the name implies, this is a zone characterized by species that persist during the winter months (persistent) and grow out above the water surface (emergent). This zone may be from the saturated surface edge of water about two (2) feet in depth. Cattails are

the commonly known species in this group, but there are many others, like burreed and bulrush.

Wetland vegetation types that occur in areas of saturated substrates or areas that only have water at the surface on a seasonal basis, usually include wet meadows, scrub-shrub wetlands, and forested wetlands. A long list of plant species are found in these areas, including herbaceous plants (rushes, sedges, and mannagrasses), shrubs (willows, dogwoods, and viburnums), and trees (elm, ash, soft maples).

So if we know where these different plants grow, why do we need to plant them shallower than where we consider appropriate? Actually, we're not sure. Part of the problem is likely that the water depths where we see plants growing is different than where they initially become established. By that we mean that once plants establish a healthy population they will spread into deeper water zones; zones where they may not initially take hold or that is not optimum for them. We see arrowhead growing in water one (1) foot deep and assume that this is an appropriate depth for planting, when actually if you plant it at that depth it usually dies.

Other reasons that affect our knowledge of appropriate water depths are as follows:

- 1) We tend to remember plants growing at extremes. We once saw a healthy population of soft-stem bulrush growing in water over two (2) feet deep and remember it vividly. However, when planting soft-stem bulrush it does best at depths around ½ foot;
- 2) We may note water depths that are only temporarily high. Seasonally high water levels of short duration can be very misleading. Water depths recorded at these times can provide erroneous information;
- 3) We may not account for the bottom substrate type in which the species are rooted. Whether the substrate is sand, silt, or muck may play a role in the appropriate water depth;
- 4) We fail to consider that water quality parameters, such as dissolved oxygen, pH, and temperature, may be a factor in a species' water depth requirements;
- 5) Lastly, we may not account for how deeply we are sunk into the substrate when

we note water depths. You may remember that the water was up to your waist at the edge of a cattail stand, but you forgot that you were up to your knees in muck. Narrow measuring sticks can also be readily pushed further into the substrate than we realize, and provide a record of deeper water than actually exists.

In summary, we would recommend planting wetland vegetation at water depths a little shallower than you think is appropriate. As long as the roots are wet, most wetland plants (including many obligate hydrophytes) will survive. However, if planted in water too deep they often die. If species are planted in areas that are ½ to 1 foot shallower than you might expect, you will have more successful vegetation establishment. And, once established, the plants will rapidly spread into the deeper water areas.

MEMBER PROFILE: BETH GELBER

Beth Gelber is a Project Manager and Wetlands Specialist for New York City DEP's Stream Management Program in the Division of Watershed Lands and Community Planning. She has been with DEP since 1993. She has facilitated wetlands education and outreach with communities and landowners in New York City's West of Hudson watershed, and has recently organized riparian plantings at stream restoration sites in the Catskills with local and NYC high school students and teachers.

She is currently working with the Sullivan County Soil and Water Conservation District on a Stream Management plan for the Chestnut Creek. Beth moved to the Hudson Valley in 1989 to work as Environmental Associate for Scenic Hudson, a non-profit environmental group in Poughkeepsie, NY. She earned a Bachelor of Science in Natural Resources from the University of Michigan in 1984, and completed Master's coursework in Environmental Policy and Management at Duke University's School of the Environment in 1988. Beth began participating on the Forum Board because she was impressed by the content of the Annual Meetings and the diverse professional backgrounds of the Board members. She enjoys networking with consultants, agency staff, and educators, and encourages all to attend the 2002 Annual Meeting in Syracuse! An avid hiker and backpacker, Beth often spends her weekend time in the Catskills, the Shawangunks, and the Adirondacks.

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.

BILL TO CODIFY MITIGATION BANKING GUIDANCE HAS SUPPORT OF BUSH ADMINISTRATION OFFICIALS

Bush administration officials have offered their support for a bill (H.R. 1474) that would codify policies and procedures related to wetlands mitigation banking, which allows developers to compensate for wetlands destruction. The bill would essentially codify the 1995 guidance and would require the mitigation banks to meet rigorous financial standards and have a credible long-term operation and maintenance plan, among other things. The concept of mitigation banking has been around since the early 1990s and was generally supported by the Clinton administration as a way to help curb wetlands losses. Government officials estimate that about half of all U.S. wetlands have been lost to agriculture or development since presettlement times.

G. Tracy Mehan, assistant administrator for the Environmental Protection Agency Office of Water, and Dominic Izzo, deputy assistant secretary of the Army for Civil Works, testified on the bill before the House Transportation and Infrastructure Subcommittee on Water Resources and the Environment. Izzo, who oversees the U.S. Army Corps of Engineers regulatory program including the permitting of activities in wetlands, said that while the bill would provide "a strong platform" for using mitigation banks as a way to compensate for wetlands lost to development, he was concerned that the language was too specific and would reduce the Corps' flexibility in overseeing the program. Rather, he said, many of the provisions in the bill could be accomplished through rulemaking. Some are already incorporated in mitigation banking guidance issued in 1995 by the Corps, EPA, and other federal agencies, he said. "Detailed statutory requirements could make it difficult for federal agencies to manage the program

adaptively, to respond to regional needs, and make programmatic adjustments that benefit the public and the environment," Izzo told the subcommittee. Mehan told the panel that the administration supports mitigation banking and asserted that H.R. 1474 largely mirrors the 1995 guidance.

Rep. John Duncan (R-Tenn.), chairman of the subcommittee, said the 1990 "no net loss" policy is biased against mitigation banks because it "creates a preference for mitigating wetlands on the same site as the project that is being permitted." H.R. 1474, he said, would help encourage more mitigation banking. One of the criticisms leveled against the concept of mitigation banking is that the banks are not adequately monitored to ensure that they are not only compensating for lost acreage, but also for lost function.

Rep. Robert Menendez (D-N.J.) said wetlands mitigation should address lost acreage and lost functions. Among other functions, wetlands are valued for their ability to filter pollutants, provide flood control, and serve as habitat for many species of flora and fauna. In response, Izzo said he expected district engineers, who actually issue wetlands permits, to consider mitigation efforts within the framework of the entire watershed and to look at both function and acreage.

Rep. William Pascrell (D-N.J.) said the bill needed to have its enforcement provisions strengthened to ensure the ecological success of the mitigation projects. He was also concerned that in the mitigation banking concept, the bank, and not the developer, is liable for the success of the mitigation. Again in response, Izzo said the banks make money by assuming the risk. "It is appropriate for them to have full responsibility for meeting the requirements of the mitigation."

PERMITTING PROCESS MAY BE EXPEDITED FOR ENERGY PLAN PROJECTS, CORPS OFFICIAL SAYS

With the Bush administration focusing heavily on increased energy production, the Corps is bracing for the onslaught of permit applications associated with drilling and power plant construction. John Studt, chief of the regulatory branch for the Corps, said the Corps will try to expedite the permit process for the construction of power plants. The Bush administration announced an energy policy May 17 that calls for increased oil and gas exploration and production, power plant development, and some conservation measures. Mr. Studt noted that there will be a need for more power transmission lines, and the Corps does not want to unnecessarily delay the permitting of these projects. "We will try to expedite the utility line projects," he said.

The energy policy also recommends an executive order directing federal agencies to consider the energy implications of their regulatory actions. Utility line projects are permitted under Nationwide Permit 12, which Studt said was revised and improved in the package of new and revised permits issued by the Corps in March 2000. The permit authorizes utility line substations, foundations for overhead utility line towers, and permanent access roads for construction and maintenance of lines, among other things.

(HIGH COURT DENIES REVIEW OF RULING ON NEPA COMPLIANCE IN CALIFORNIA CASE)

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The Ninth Circuit disagreed, finding instead that much of the construction, if it ever takes place, would include a hilltop area that falls outside the federal government's interest in protecting wetlands. According to the court, the Corps' decision to limit the scope of its scrutiny of the project was not arbitrary and capricious and did not violate NEPA.

NORTH AMERICAN WETLANDS CONSERVATION ACT: REQUEST FOR SMALL GRANTS PROPOSALS FOR YEAR 2002

Deadline: 30 November 2001.

The U.S. Fish and Wildlife Service and the North American Wetlands Conservation Council, are currently entertaining proposals that request match funding for wetland and wetland-associated upland conservation projects under the Small Grants program. Projects must meet the purposes of the North American Wetlands Conservation Act of 1989, as amended. Funding priority will be given to projects from new grant applicants with new partners, where the project ensures long-term conservation benefits. However, previous Act grantees are eligible to receive funding and can compete successfully on the basis of strong project resource values. Small Grant application instructions may be available by e-mail as a WordPerfect file, upon request. For more information contact: Dr. Keith A. Morehouse, Small Grants Coordinator, Division of Bird Habitat Conservation; tel. 703-358-1784; fax: 703-358-2282; e-mail: r9arw_dbhc@fws.gov.

SEMI-FINAL ANNOUNCEMENT
THE NEW YORK STATE WETLANDS FORUM 2001 FALL MEETING:
“WETLANDS: CAPACITY BUILDING FOR NY LAND TRUSTS”

FRIDAY, NOVEMBER 16, 2001
RAMADA INN, GENEVA LAKEFRONT, GENEVA, NY

Cosponsored by Save-The-County Land Trust and the Land Trust of the Saratoga Region

Hosted by the Finger Lakes Land Trust

Join us for this one-day workshop designed to guide land trusts in decisions in the acquisition and management of wetland resources in New York State. This training workshop will be primarily for Land Trust staff managing wetlands and related aquatic resources. Landowners and others are also welcome. The primary goal is to provide Land Trust staff with the information needed to acquire and manage wetlands. It is also expected to build awareness of partnership possibilities with local landowners, local government, and state and federal agencies. Topics scheduled for presentations and/or discussion include:

Wetlands Primer – Basic Characteristics of Wetlands. Barbara Beall, The Chazen Companies (to be confirmed)

Does Size Really Matter? – Nick Miller, Metropolitan Conservation Alliance (to be confirmed)

In-Lieu Fees: A Tool for Wetland Management – Dr. Richard Smardon, Save-The-County Land Trust

Genesee Land Trust’s Experience with the Rochester Cornerstone Wetland Mitigation Bank - Speaker to be determined, Genesee Land Trust (to be confirmed)

GIS – Tool for Wetland Restoration and Land Use Planning - Scott Ingmire, Madison County Planning Department

Wetland Restoration, Banking and Land Trusts – Michael Pentony, Great Swamp Conservancy

Coexisting with Beaver: Non-Lethal Methods of Beaver Management – Sharon Brown, Beavers, Wetlands, and Wildlife

New York State Wetlands Program and Land Trusts – Kevin Bliss, NYS Department of Environmental Conservation

Roundtable Discussion: Wetland Acquisition Criteria and Costs

Other topics and speakers may be added.

REGISTRATION FORM

Please complete and mail to:

New York State Wetlands Forum, Inc. P.O. Box 1351, Latham, NY 12110-1351

Phone 518-783-1322 OR Fax 518-783-1258 OR E-Mail nysta@capital.net

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

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Registration Category

[All registrations include continental breakfast, lunch, workshop materials and field trip]

Circle Your Payment

Speakers and NYS Wetlands Forum Members \$50.00

All Others \$60.00

One-Year Forum Membership (includes two annual newsletters, personal invite \$25.00
to meetings, and occasional member-only events)

TOTAL ENCLOSED \$ _____



PRELIMINARY CALL FOR PAPERS
NEW YORK STATE WETLANDS FORUM, INC.
2002 ANNUAL CONFERENCE AND MEETING

HOLIDAY INN, LIVERPOOL, NY
APRIL 17 & 18, 2002

This eighth annual meeting of the New York State Wetlands Forum is expected to once again examine a variety of wetland-related issues and developments, and how these issues have impacts both state-wide and regionally. We also anticipate having four research-related sessions and two local government-related sessions. Abstracts are sought on numerous topics [additional topics will be added], including:

- ♦ Effectiveness of Wetland Mitigation in NY
- ♦ Wetlands and Watershed Planning
- ♦ Wetlands and Landowner Rights
- ♦ Invasive Species
- ♦ NYS Freshwater Wetlands Appeal Board
- ♦ Wetland Monitoring
- ♦ Effects of SWANCC and Palazzolo
- ♦ Wetlands and Property Assessments
- ♦ Regional Wetland Concerns
- ♦ Legislative and Regulatory Updates
- ♦ Permitting Case Studies
- ♦ Wetland Restoration (Freshwater and Tidal)
- ♦ Case Law Developments
- ♦ Local Government Wetland Programs
- ♦ Pros and Cons of Wetland Mapping

THIS IS YOUR MEETING. Make it interesting by participating through a presentation of the work or projects in which you have been involved. If you have an idea for a field trip, or would like to host one, please Email or mail it to Christine DeLorier (address below.)

PRESENTATION/POSTER SESSION: Please submit an abstract (in Rich Text Format) and audiovisual needs for either a presentation or poster. Abstracts submitted for consideration must include the title, author(s), address(es) and concise description of the topic in 250 words or less in the following format:

TITLE. Author¹ and Author². Address¹, phone number, fax number, email address. Address².

Abstract

Either E-Mail or mail the abstract in digital form to:

Christine DeLorier, US Army Corps of Engineers, One Bond Street, Troy, NY 12180

Christine.DeLorier@usace.army.mil; Tel: 518-273-7420; Fax: 518-273-2055

DEADLINE IS JANUARY 5, 2002

COOPERATING PARTIES: The Forum is seeking cooperating parties to assist with dissemination of the Call for Papers and updates as they become available. There is no direct financial obligation to be a cooperating party. Please contact Jennifer Brady-Connor, jennifer@aswm.org or 518-581-8375 for additional information.

EXHIBITOR/SPONSOR: Exhibitors and sponsors have the opportunity to advertise their goods and services to the conference participants via floor and table space for displays and also through advertisements in the conference brochure. Space is limited so please inquire and reserve now by returning the registration form or by contacting: Kevin M. Bernstein, Bond, Schoeneck, and King, LLP, One Lincoln Center, Syracuse NY 13202, Kbernstein@bsk.com, (315) 422-0121

For topic and meeting updates visit <http://www.wetlandsforum.org>

HIGH COURT DENIES REVIEW OF RULING ON NEPA COMPLIANCE IN CALIFORNIA CASE

On October 1, 2001, the U.S. Supreme Court decided not to review an appeals court decision that found the U.S. Army Corps of Engineers was not required to consider all environmental effects of a development project when it issued a permit to fill wetlands on the project site (*Wetlands Action Network v. U.S. Army Corps of Engineers*, U.S., No. 00-1692, 10/1/01). The Petition for review was filed by Wetlands Action Network and California Public Interest Research Group and asked the court to address their claim that the National Environmental Policy Act required the Corps to consider the environmental impacts of a 1,000-acre development project on the California coastline.

The petition said the agency should have considered the impacts of the entire project, even though the Corps lacked jurisdiction over

activities on non-wetland areas of the site. As a result of the Court's decision not to review the case, the decision of the U.S. Court of Appeals for the Ninth Circuit that found the Corps did not violate NEPA in concluding, after conducting an environmental assessment, that the wetland filling activities it was permitting would have no significant environmental impact is left standing (*Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 51 ERC 1106 (9th Cir. 2000)).

The petition said that, although the Corps considered the impacts of the development as a whole in preparing an environmental assessment, it refused to consider these same projectwide, cumulative impacts in concluding that it was not required to prepare an environmental impact statement

under the act. NEPA required the consideration of all cumulative impacts before the Corps made its finding that the wetlands permit would not have a significant impact on the environment, the petitioners claimed.

The petition involved a large commercial and residential development to be constructed in phases that the groups said would permanently alter the Ballona marsh ecosystem along the Santa Monica Bay south of Los Angeles. A federal district court ruled in 1998 that the Corps should have produced an environmental impact statement that discussed impacts of the entire, functionally interdependent project. The court found that the wetland and nonwetland activities were inextricably intertwined and had to be assessed as connected actions under NEPA regulations.

[Cont'd. page 5]

Dear Reader:

In order to maximize the value of *The Forum* to our members and readers, the New York State Wetlands Forum is surveying the readership to get feedback on the publication. To help us address your needs and provide you with the most useful information, we need to hear from you! Please take a few minutes to complete this survey and return it to us by October 31, 2001.

Are you a New York State Wetlands Forum member?

How would you describe yourself? (please choose one)

- | | |
|--|---|
| <input type="checkbox"/> Academic researcher | <input type="checkbox"/> Nonprofit environmental organization |
| <input type="checkbox"/> Concerned citizen | <input type="checkbox"/> State or federal government representative |
| <input type="checkbox"/> Consultant | <input type="checkbox"/> Student |
| <input type="checkbox"/> Developer | <input type="checkbox"/> Other _____ |
| <input type="checkbox"/> Local government representative | |

Please indicate your primary area of interest in wetlands: (please choose one)

- | | |
|-------------------------------------|--------------------------------------|
| <input type="checkbox"/> Advocacy | <input type="checkbox"/> Protection |
| <input type="checkbox"/> Assessment | <input type="checkbox"/> Regulation |
| <input type="checkbox"/> Education | <input type="checkbox"/> Restoration |
| <input type="checkbox"/> Management | <input type="checkbox"/> Science |
| <input type="checkbox"/> Monitoring | <input type="checkbox"/> Other _____ |
| <input type="checkbox"/> Policy | |

What are the main ways *The Forum* helps you?

Please indicate three topic areas on which you'd like to see more coverage in *The Forum*:

Currently *The Forum* is printed semi-annually, how often do you feel it should be printed?

Have you ever read or referred to the PDF versions of *The Forum* posted on the NYSWF website? If so, do how often? (please choose one)

- | | |
|--------------------------------------|------------------------------------|
| <input type="checkbox"/> a few times | <input type="checkbox"/> never |
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Would you prefer to receive *The Forum* in print or electronic format? If electronic, e-mail or web?

Do you currently pass along information or articles found in *The Forum*? If so, how often?

Thank you for taking the time to complete this survey. Your answers are very valuable to us as we strive to improve the quality and effectiveness of *The Forum*.

* One evaluation form will be randomly selected from all returned by October 31, 2001 to receive a free registration to the 2002 NYSWF Annual Conference and Meeting in Liverpool, NY.

Please return this evaluation form to:
New York State Wetlands Forum, Inc., P.O. Box 1351, Latham, NY 12110

IN THE AFTERMATH OF SWANCC

COURT REFUSES TO OVERTURN CONVICTION OF MARYLAND DEVELOPER AFTER BIRD RULING

A federal district court rejected efforts by a Maryland developer to overturn a conviction for illegally filling wetlands by arguing that the conduct did not violate the law under the *SWANCC* decision on isolated wetlands (*United States v. Interstate General Co.*, D. Md., No. AW-96-1112 and No. AW-96-0390, 6/12/01). In so doing, the U.S. District Court for the District of Maryland upheld the conviction of the Interstate General Co., which pleaded guilty in 1997 to one felony count of violating the Clean Water Act by placing fill in four parcels of land, considered to be wetlands, without obtaining a permit. A notice of appeal was filed on June 22. The Company had argued that the conviction should be overturned in light of the *SWANCC* decision. Specifically, the company argued that the conduct for which it was convicted is not within the reach of the Clean Water Act.

The district court disagreed. District Court Judge Alexander Williams disagreed with the defendants' assertion that the *SWANCC* ruling amounted to a new line of jurisdiction under the Clean Water Act. Rather, the Supreme Court case, he said, "is a narrow holding" specific to the Migratory Bird Rule. It does not try to determine the precise meaning of "navigable waters" under the Clean Water Act. "Because the Supreme Court only reviewed [the Migratory Bird Rule], it would be improper for this Court to extend the *SWANCC* Court's ruling any farther than they clearly intended," Williams wrote.

MICHIGAN DECISION VACATED

Meanwhile, in a separate case, the Supreme Court vacated a judgment by the U.S. Court of Appeals for the Sixth Circuit against a Michigan developer for discharging pollutants into wetlands without a permit (*Rapanos v. United States*, U.S., No. 00-1428, 6/18/01). The court said it took the action in light of the *SWANCC* decision.

The developer argued that under that ruling, serious constitutional and federalism issues are raised by the jurisdictional reach of the Clean Water Act and that his conviction should be vacated.

THE CORPS' REACTION

Of course, other than a legal memorandum that was issued on the heels of the *SWANCC* decision, no further formal guidance has been issued out of Corps Headquarters or EPA. However, it is apparent that the Corps (in both districts in New York)

[Cont'd. page 10]

CALENDAR OF EVENTS

OCTOBER 2001

26 October. Fifth Annual Great Swamp Art Exhibit and Wildlife Celebration. Pawling, NY. Hosted by Friends of the Great Swamp.

For additional information e-mail Edie Keasby at ekeasbey@bestweb.net

29-31 October. Restoring Streams, Riparian Areas, and Floodplains in the Southwest. Albuquerque, NM. This will be a two-day workshop with an additional one-day field session (proposed). Call for Papers and additional information at <http://www.aswm.org/meeting/stream01.htm>

29 October - 2 November. Fourth Annual Wetlands Regulatory Workshop. Holiday Inn on the Boardwalk, Atlantic City, New Jersey. The purpose of this workshop is to further investigate contemporary wetland regulatory issues that have been addressed in previous workshops. As always, the Workshop strives to increase dialogue and foster partnerships between federal, state, and local regulatory agencies, non-governmental organizations and the regulated community. Representatives from federal, state, and local governments, academia, non-governmental organizations and the private sector are invited to submit abstracts. Contact Ralph Spagnolo, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103-2029 or spagnolo.ralph@epa.gov

NOVEMBER 2001

15-16 November. Wetland Management: Capacity Building for NY Land Trusts: Call for Papers. Geneva, NY. Coordinated by the New York State Wetlands Forum. For additional information visit <http://www.wetlandsforum.org/conferences/2001fm.htm> or e-mail Jennifer Brady-Connor, jennifer@wetlandsforum.org

JANUARY 2002

6-9 January. Phragmites Australia: A Sheep in Wolf's Clothing? Cumberland College, Vineland, NJ. A special technical forum and workshop focusing on new research and critical reviews. For complete details visit <http://www.njmssc.org/Phragmites%20Conference%20Jan%202002/Lead%20Page.htm>

FEBRUARY 2002

27 February - 1 March. Call for Issues: 5th National Mitigation Banking Conference. Washington, DC. The DEADLINE for submissions is JULY 1. For more info on this (and for the CD Rom Proceedings of the 2001 conference), please visit http://www.terrene.org/mitigation_banking.htm and click on National Mitigation Banking Conferences — or call 703/548-5473.

MARCH 2002

30 March. 7th International Wildlife Law Conference: Call for Presentations. Washington College of Law at American University in Washington, DC. The theme for the conference will be “The Convention on Biological Diversity: A Ten Year Report Card.” Individuals interested in proposing panels or individual papers are invited to submit abstracts using the site’s online abstract submission form, <http://eelink.net/~asilwildlife/programs2.html>. The deadline for submitting proposals is September 15 and early submissions are strongly encouraged. Participants will also be invited to draft longer versions of their papers for inclusion in a special symposium issue of the Journal of International Wildlife Law & Policy, www.jiwlpc.com.

APRIL 2002

17-18 April. New York State Wetlands Forum Eighth Annual Conference and Meeting. Holiday Inn, Liverpool, NY. For additional information as it becomes available visit <http://www.wetlandsforum.org>

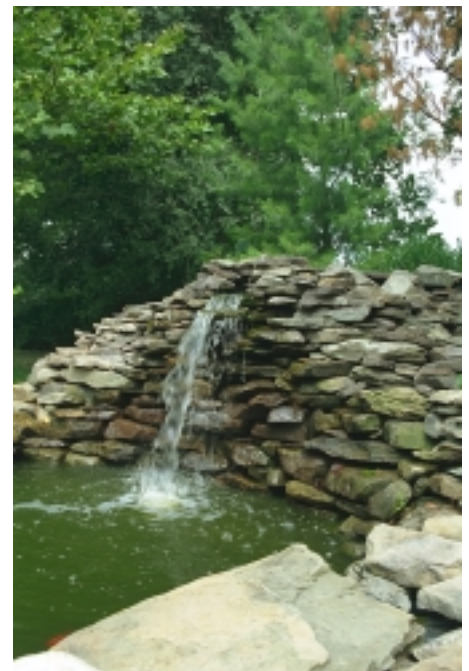
MAY 2002

20-23 May. National Monitoring Conference 2002. Madison, WI. The National Water Quality Monitoring Council is now soliciting abstracts for presentations. Please visit the conference web site at <http://www.nwqmc.org/NationalConference/2002Conference/2000Conf.htm> for more details or to submit an abstract. The deadline to submit is October 12.

JUNE 2002

2-7 June, 2002. Society of Wetland Scientist's 23rd Annual Conference - Wetland Linkages: A Watershed Approach. Lake Placid Resort Hotel & Golf Club, Lake Placid, NY. The focus is on how wetlands are integrated into initiatives on managing watersheds, as well as how wetlands are inextricably linked to energy, economic and ecological issues. In addition, the technical program has been established to focus on those wetland issues in the forefront of the news of today. Special symposia already developed include “Isolated” Wetlands, Invasive Species, and Planning, Design and Construction Methods for Wetland Mitigation and Restoration. For conference updates visit <http://www.sws.org/lakeplacid/>

Please send information on events, meetings and conferences to Kevin Bernstein, kbernstein@bsk.com



EFFECTIVENESS OF IN-LIEU FEE MITIGATION, OTHER STRATEGIES QUESTIONED IN GAO REPORT

The effectiveness of certain compensatory strategies to mitigate for wetlands losses resulting from development were called into question in a recent General Accounting Office (GAO) report. The report, *Wetlands Protection: Assessments Needed to Determine Effectiveness of In-Lieu Fee Mitigation*, questioned whether in-lieu fee and ad hoc arrangements achieved the objectives of mitigating for wetlands losses.

“The extent to which the in-lieu-fee option has achieved its purpose of mitigating adverse impacts to wetlands is uncertain,” GAO said. GAO recommended, among things, that the Environmental Protection Agency, the U.S. Army Corps of Engineers, and other federal agencies develop criteria to gauge the ecological success of wetlands mitigation efforts.

GAO said it surveyed officials in the 38 district offices of the Corps of Engineers, which has regulatory authority over wetlands. Since the late 1980s, the Corps has approved 63 in-lieu fee arrangements to compensate for 1,440 acres of affected wetlands at a cost to developers of more than \$64 million. Ad hoc arrangements, in which developers pay individuals or entities that are neither mitigation banks nor considered by the Corps to be in-lieu fee organizations to perform mitigation, have been approved in 24 Corps districts.

GAO said oversight of mitigation efforts using ad hoc arrangements was “lacking.”

Corps officials said the in-lieu fee option was useful and provides a less cumbersome, timelier mitigation option that benefits the environment and helps the Corps operate more efficiently, GAO reported. However, the report said data supplied by 11 of 17 Corps districts in which the in-lieu fee option was used did not support claims that the wetlands restored, enhanced, created, or preserved equaled or exceeded the amount harmed by development. Further, Corps officials said they had not tried to assess whether mitigation efforts have been ecologically successful, GAO said. Some districts use acreage as a measure for success because no criteria exist.

The Environmental Protection Agency, the Corps, and the Fish and Wildlife Service published guidance on Nov. 7, 2000, designed to clarify when in-lieu fee arrangements are appropriate to compensate for adverse wetlands impacts. The guidance specifies that on-site mitigation is preferred to that which would be conducted off site, but such a preference should not preclude off-site mitigation if an on-site option is not

practicable or less environmentally preferable. When on-site mitigation is not practicable or determined to be less environmentally desirable, using a mitigation bank is preferred to the in-lieu fee structure, the guidance said. The in-lieu fee option may be exercised in cases where the mitigation bank does not provide “in kind” mitigation or the only credits available are for preservation, as opposed to restoration, creation, or enhancement.

Rep. Sherwood Boehlert (R-N.Y.) was one of several members of the House Transportation and Infrastructure Committee to request the GAO report in 1999. The findings, he said, demonstrate that while mitigation banking can be effective, in-lieu fee and ad hoc arrangements still are of questionable value. “This is a classic example where regulatory flexibility must be accompanied by accountability,” Boehlert, who now chairs the House Science Committee, said in a statement. “Agencies and beneficiaries of in lieu fees and ad hoc arrangements must be held accountable; the Corps and EPA should establish criteria and standards for ecological success, monitor restoration, enhancement, creation, and preservation efforts to ensure such success, and hold the proper parties legally responsible when expectations are not met.”

The Department of Defense (DOD), of which the Corps is a part, disagreed with GAO that agencies should develop criteria to measure the ecological success of in-lieu fee options. Instead, DOD said criteria should be developed to determine “that wetlands functions have been adequately compensated” and that the Corps should take the lead in establishing them. Despite this response, the GAO said it continued to believe that EPA should establish the criteria because “the Clean Water Act authorizes EPA to issue such guidance.”

Boehlert said legislation (H.R. 1474) by Rep. Walter Jones (R-N.C.) would address some of the problems raised in the GAO report. The bill would amend the Clean Water Act to include wetlands “no net loss” and “net gain” goals, incorporate the safeguards contained in the 1995 mitigation banking guidance, and require the Corps and EPA to establish standards and criteria for the operation, use, and ecological success of third party mitigation (such as in-lieu fees).

(IN THE AFTERMATH OF SWANCC)

[Cont'd. from page 8]

are listening to arguments to Applicants regarding isolated wetlands. For example, a recent letter issued in a matter out of the New York District had the following in a jurisdictional determination:

It should be noted that, in light of the recent U.S. Supreme Court decision (Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178, January 9, 2001), the second, seventh, eighth and tenth wetlands, as described above, do not meet the current criteria of waters of the United States under Section 404 of the Clean Water Act. The Court ruled that isolated, intrastate waters can no longer be considered waters of the United States, based solely upon their use by migratory birds. The remaining wetlands on the property are part of a tributary system, and are considered to be waters of the United States, under the jurisdiction of the Corps of Engineers.

The Buffalo District has also decided in certain cases not to exercise jurisdiction. In a recent letter, it noted:

*On January 9, 2001, the U.S. Supreme Court issued a ruling that affected the Corps of Engineers authority to regulate isolated, non-navigable, intrastate waters under the Clean Water Act (Solid Waste Agency of Northern Cook County v. the U.S. Army Corps of Engineers, No. 99-1178). Specifically, the case involved statutory and constitutional challenges to the assertion of Clean Water Act jurisdiction over isolated, non-navigable, intrastate waters where the use of the site by migratory birds established the necessary interstate commerce connection. The U.S. Supreme Court found that the use of the site by migratory birds alone is **not** sufficient to establish Federal jurisdiction over isolated wetlands, and that such areas are not waters of the United States and are **not** subject to regulation under Section 404 of the Clean Water Act.*

In light of the recent Supreme Court decision, I have reviewed various maps and the administrative record for the project. Based on this review, I have determined that the wetlands on the subject project site are isolated, non-navigable, intrastate waters that are not subject to regulation under Section 404 of the Clean Water Act. Accordingly, you do not need Department of the Army authorization to commence work on the site.

(SUPREME COURT REVIEWS WETLAND TAKINGS CLAIM)

[Cont'd. from page 1]

they acquire the property, should have notice of restrictions and therefore they take the property subject to those limitations.

The Court rejected the State's argument noting that the unreasonableness does not become mitigated or disappear when title passes. A regulatory taking is different from a direct condemnation. In a direct condemnation of property, the extent and damage of the State's acts are immediately known and the current owner is compensated. Regulatory taking claims are not immediately ready for review; regulatory determinations must be final and the value of the restricted property must be certain. It takes time to obtain these determinations, and often ownership can change hands in the meantime.

In its analysis, the Court doesn't rule out the fact that the post-acquisition regulations may be considered as a factor in a taking determination. The ruling also should be looked at in the context of this particular case. While actual title passed to the Petitioner after the agency's regulations were in place, the land had belonged to Palazzolo long before the

regulations, by way of sole ownership of the corporation that held the title.

Ripeness of Petitioner's claim

An appellate court may only review claims that are ripe, or ready for review. The State challenged the ripeness of this claim but the Court found their arguments unconvincing. First, the State claimed that Petitioner could not ask for review because their must first be a final determination with respect to the use of the tract of land.

The Court found that their was a final determination.

The agency made it clear, several times, that an application proposing filling of the wetland would be unacceptable. The land was adjacent to Winnapaug Pond. The pond was classified as a Type II water body. Land adjacent to Type II water bodies were not to be filled nor were residential structures to be built on the land without a 'special exception.' Such exceptions were to be granted only for a 'compelling public purpose.' While the state argued that not all possible uses of the property had been proposed by Palazzo, the Court found that the agency had an opportunity to decide and explain the regulations and repeatedly rejected any proposed filling because the proposals lacked a 'compelling public purpose.' Requiring the Petitioner to continue to apply for a 'special exception' approval would be repetitive, burdensome and unnecessary and would only function to avoid a final decision.

The State also challenged ripeness because the value of the non-wetland portions was unknown. Typically, for the Court to review an allegation of an unconstitutional taking, the value of the land at issue cannot be uncertain. Rhode Island tried to argue that the case was not ripe for review because the value of the non-wetland portion was in doubt. The Supreme Court rejected this argument because petitioner estimated the non-wetland portion to be worth \$200,000 and the State did not contest this figure in its brief. The State then argued that they did not contest the value because, at trial, Petitioner's claim was based on a total taking under *Lucas v. South Carolina Coastal Council* (505 U.S. 1003 (1992)). At a value of \$200,000, the total taking under *Lucas* would not be met so the State chose not to vigorously contest the figure. The State contended that they would have proceeded differently with respect to the \$200,000 if they had known a different theory would be raised, a *Penn Central* claim (*Penn Central Transp. Co. v. New York City*, 438 U.S. 401 (1978)). Under *Penn Central*, the analysis is different. *Penn Central* is a multi-factor analysis which looks at not only the character of the State's actions but also the economic impact on the landowner. The Court rejected this argument as well, finding that the State was aware of the applicability of *Penn Central* since it was discussed and dismissed by the trial court. With this in mind, the State should have been on notice of potential *Penn Central* claims and could not, at the Supreme Court level, argue that they were not on notice.

Finally, with respect to ripeness, the State argued that landowners should not be allowed to demand damages for a taking based on a project that may be barred by other valid

zoning restrictions. This argument was rejected because any damages awarded would have to take into account the fair market value of the property, considering any valid zoning limitations.

Total taking under *Lucas*

The Court agreed with the State on this one issue. Since the upland parcels could still be improved (i.e. construction of a residence), petitioner could not claim a total taking under *Lucas*. Under a *Lucas* analysis, a landowner had a takings claim if the State's actions left him with property that was 'economically idle' so that really the landowner was left with a mere 'token interest' of no real value. Palazzolo still had 18-acres of which to build a residence on. This cannot be characterized as 'economically idle.' Petitioner had not pursued arguments for treating the wetland portions separate and distinct from the upland portions; therefore, the Supreme Court considered the parcel as a whole and denied the total deprivation claim.

Conclusion

Since the Court found that the claims were ripe for review and that the acquisition of title after regulations were in place did not preclude the takings claim, the case was remanded back to Rhode Island state courts. While the claim under a *Lucas* analysis failed, the state courts should have examined the claim under *Penn Central* as well, and the case was remanded for that purpose.

(MESSAGE FROM THE CHAIR)

[Cont'd. from page 1]

Dr. Richard Smardon and I, with assistance from many others, are coordinating a specialized fall meeting, "Wetlands: Capacity Building for NY Land Trusts" on November 15-16 in Geneva, NY. Finger Lakes Land Trust has agreed to serve as host of the meeting, and we already have many speakers lined up. However, if you have a topic of pressing concern that you'd like to present or have presented, please contact me right away at jennifer@wetlandsforum.org. More information is available in the registration form inside.

Finally, the NYSWF 2002 Annual Meeting is scheduled for April 17-18 at the Holiday Inn in Liverpool, NY. Please look for the call for papers and preliminary registration forms soon. The NYSWF is also going to assist the Society of Wetland Scientists in some way with their June 2002 Annual Meeting in Lake Placid, NY. Look for information on that meeting as well.

Have a terrific autumn,
Jennifer Brady-Connor



BACK BY POPULAR DEMAND!
THE NEW YORK STATE WETLANDS FORUM 2001 FALL MEETING:
“WETLANDS: CAPACITY BUILDING FOR NY LAND TRUSTS”

FRIDAY, NOVEMBER 16, 2001
RAMADA INN, GENEVA LAKEFRONT, GENEVA, NY

Cosponsored by the Land Trust of the Saratoga Region
Hosted by the Finger Lakes Land Trust

Meet the NYS Land Trust community working behind the scenes on:
New York State’s First Wetland Mitigation Bank
Also, help guide the development of model wetland acquisition criteria

Look inside for complete details!

Hotel Information: Conveniently located for easy access from the North, South, East or West, the Ramada Inn Geneva Lakefront is situated on the picturesque shoreline of Seneca Lake – in the heart of New York’s beautiful Finger Lakes Region. It is easily accessible from the NYS Thruway, Exit 42. Single room rates are \$60.00; double room rates are \$70.00. Please contact the hotel directly for reservations relating to the meeting at Ramada Inn Geneva Lakefront, 41 Lakefront Drive, Geneva, NY 14456, telephone 315-789-0400.

Hotel reservations must be made by October 31, 2001
(Indicate NY State Wetland Meeting when registering)

Driving Directions: From the southeast: Follow Interstate 17 west to Exit 52, proceed north on Route 14 to Geneva. From the southwest: Follow Interstate 17 east to Exit 44, proceed north on Route 414 then north on Route 14 to Geneva. From the north: Follow the NYS Thruway to Exit 42, proceed south on Route 14 to Geneva. Once in Geneva:

PLEASE JOIN US FOR A FULL DAY OF LEARNING AND SHARING!
SEMI-FINAL AGENDA AND REGISTRATION FORM ENCLOSED ON PAGE 6

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