

# The Forum

NEW YORK STATE WETLANDS FORUM NEWSLETTER

## CONTENTS

The Lake Tahoe Case: The U.S. Supreme Court Refuses to Require Compensation for Temporary Moratoria on Development ..... 1

Message from the Chair ..... 2

Geographically Isolated Wetlands – Highlights for New York ..... 3

Letter to the Editor ..... 4

Legislation Introduced to Recapture Clean Water Act Jurisdiction ..... 4

EPA Proposes To Continue Grant Of Filtration Avoidance For New York City’s Catskill/Delaware Water Supply ..... 5

NYS Wetland Legislation Update ..... 6

The Matter of Chester Industrial Park Associates and v. Paulius and Associates.... 7

Legal Loophole Leaves “Isolated” Wetlands in Peril, Says New Report ..... 7

Save the County Land Trust ..... 8

Trustees Release Plan to Assess Hudson River Resource Injuries ..... 9

Calendar of Events ..... 10

Developing One of the Gems on the Emerald Green Necklace ..... 11

NYSWF Awards Almost \$2600 in Grants for 2002 Annual Meeting Attendance ..... 11

Call for Papers, 2003 Annual Conference and Meeting ..... 12

Registration Form, 2003 Annual Conference and Meeting ..... 13

House Subcommittee Hearing on “Agency Implementation of the SWANCC Decision” ..... 14

Conserving Vernal Pool Resources: New Publication Released by Regional Conservation Organization ..... 15

Federal Grant Opportunities ..... 15

## THE LAKE TAHOE CASE: THE U.S. SUPREME COURT REFUSES TO REQUIRE COMPENSATION FOR TEMPORARY MORATORIA ON DEVELOPMENT

— Jeffrey L. Zimring<sup>1</sup>

A thirty-two month moratorium on development in the Lake Tahoe region is extended by three years and finally replaced by permanent restrictions on development in much of the area. The owners of the affected lands must be entitled to compensation. Well, maybe. In *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*,<sup>2</sup> the Supreme Court had the opportunity to address this situation. The resulting decision (no *per se* regulatory taking) appears to hand landowners a setback. Like many Supreme Court cases, however, the public controversy does not arise from what the Court decided, rather it arose from what the Court did **not** decide. A brief look at the history behind the case is necessary to fully understand the ramifications of this decision.

Lake Tahoe is undeniably one of the most beautiful lakes in the world. Individuals that are able to purchase land around the lake are fortunate enough to own the object of many people’s dreams. Widespread enjoyment of the lake and the desire to own and develop land near the lake, however, has begun to change the key feature of the lake that initially attracted them in the first place – water that is so clear that it inspired Mark Twain to describe it as “not merely transparent, but dazzlingly, brilliantly so...” Changes in runoff patterns of rain and melting snow resulting from development of the surrounding lands have altered the very biology of the lake. Minerals and organisms that previously never made it into the lake are now being funneled directly into the lake over land that have been made impervious through development. The result has been an increase in the algae that feeds on these nutrients and a decrease in the clarity of the historically crystal-clear water.

The problems associated with over-development of the Lake Tahoe region have been the subject of debate and attempts at government regulation since the 1960’s. In

1980, responding to California and Nevada legislation, the Tahoe Regional Planning Agency (TRPA)<sup>3</sup> began work on a permanent regional plan to deal with the effects of development around Lake Tahoe. When the work began, the TRPA issued a temporary moratorium<sup>4</sup> on development that was intended to last until a final plan could be put into place. The total duration of the moratorium was approximately 32 months. The final plan issued by TRPA in 1984 (the 1984 Plan) was immediately challenged in and enjoined by Federal District Court in the first skirmish of what was to be a protracted legal battle challenging various aspects of the original moratorium, the 1984 Plan, and the revised final plan issued in 1987 (the 1987 Plan).<sup>5</sup>

The issues that actually survived the twelve year journey to the Supreme Court were quite limited. In various proceedings at the District Court level, the plaintiffs in *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency* raised multiple claims pertaining to three distinct time periods; the original thirty-two month moratorium, the period of time after the 1984 Plan was enjoined, and the time period after the 1987 Plan was enacted. Several of the claims concerning the original moratorium were dismissed on statute of limitations grounds. The claims relating to the time period during the 1984 Plan and its injunction were dismissed because the bans on development were found to be directly related to the injunction and not the actions of the TRPA. Finally, the claims arising from the 1987 Plan are the subject of litigation not considered by the Supreme Court under its grant of *certiorari*.

When the Court granted *certiorari*,<sup>6</sup> it agreed to decide whether a temporary moratorium on land development constitutes a taking of property requiring compensation under the Takings Clause of the United States

**2003 ANNUAL CONFERENCE AND MEMBERSHIP MEETING**  
**MARCH 11-12, 2003**  
**CALL FOR PAPERS ENCLOSED**

## 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.

## MESSAGE FROM THE CHAIR

— Jennifer Brady-Connor

What a tremendously tumultuous twelve months it has been. Excluding external events such as September 11 and the stock markets lower and lower peaks and valleys, the Forum has undergone some changes too. Some turnover has occurred within the Board, and some more is expected within the next twelve months due to so many terms ending next year. Our official membership count of 164 is more than twice what we officially had last year and is still growing. And once again we are going through the process of bringing on a part-time consultant to work on behalf of the Forum in increasing our presence and services within New York State. This new consultant will be an advocate – an advocate for the Forum and our mission of non-advocacy. Try explaining that to most people. And if you can do it effectively, please let me know how!

Our members understand the need for an organization like the Forum: one that can help meet the information needs of any person or entity regardless of stance on wetland issues; one that provides information about the existence of pressing legislation but lets you draw your own conclusions; one that allows your voice to be heard and shared without censorship or editing. We are a forum of ideas and facilitator of the exchange of those ideas. Unusual? Maybe. Needed? Definitely.

Support and join the Forum in the transfer of ideas and exchange of information. Please become a member today.



Montezuma Wildlife Refuge, main pond



Montezuma Wildlife Refuge, newly restored muckland

Photos courtesy of Stephen Tomasik

# GEOGRAPHICALLY ISOLATED WETLANDS – HIGHLIGHTS FOR NEW YORK

*Ralph W. Tiner, U.S. Fish & Wildlife  
Service*

“Isolated wetlands” are one of several current-events topics in environmental protection and one especially important to agencies, organizations, and individuals interested in wetlands and water resources. In January 2001, the U.S. Supreme Court ruled that the U.S. Army Corps of Engineers could not regulate “isolated waters” solely by virtue of their so-called “Migratory Bird Rule.” Consequently, in many areas of the country, the Corps has taken steps to reduce the scope of their regulatory program.

The U.S. Fish and Wildlife Service saw the need to produce ecological and status information on isolated wetlands given their significance to wildlife. All wetland biologists know that the Nation’s most important waterfowl production area – the Prairie Pothole Region – is dominated by “isolated” pothole marshes. They also know that “isolated” woodland vernal pools are critical breeding grounds for mole salamanders, wood frogs, and other amphibians in the Northeast and other forested regions. The American public is very interested in wetlands and needs to be better informed on the role these wetlands play ecologically and from other perspectives (e.g., flood water storage). The Service prepared a summary report on “geographically isolated wetlands” – wetlands lacking an apparent surface water connection to rivers, streams, lakes, estuaries, and the ocean. The definition is not a regulatory one, but it is one that can be used for analysis of existing geospatial data. The report does not address regulatory issues.

This brief paper summarizes the results of the national study for New York and neighboring states in addition to another study producing relevant information for two reservoir basins in southeastern New York. The national report – “Geographically Isolated Wetlands: A Preliminary Assessment of Their Characteristics and Status in Selected Areas of the United States” (Tiner et al. 2002a) – presents an introduction to 19 different types of isolated wetlands and describes the status of potentially geographically isolated wetlands in 72 study sites across the country. Among isolated wetland types in New York are woodland vernal pools, coastal plain ponds, coastal zone dune swale and deflation plain wetlands, and various types of ponds. The report is posted on the web for viewing and downloading at: [wetlands.fws.gov](http://wetlands.fws.gov). CD copies of the report may soon be available for purchase. The report on the reservoir basins – “Wetland Characterization and Preliminary Assessment of Wetland Functions for the Neversink Reservoir and Cannonsville Reservoir Basins of the New York City Water Supply Watershed” (Tiner, et al. 2002b) – was produced for the New York City Department of Environmental Protection to aid in watershed and water supply management.

Two of the 72 nationwide study sites were located in New York: Millbrook (in the southeastern part of the state) and Eastern Lake Ontario (in western NY). Each of these study areas covers an area of four large-scale (1:24000) U.S. Geological Survey topographic maps. Geographic information

system (GIS) technology was used to analyze existing digital data, namely the Service’s National Wetlands Inventory maps and U.S. Geological Survey digital line graphs (DLGs) for hydrology and digital raster graphics (DRGs). The report addresses limitations of these data sets (e.g., not all wetlands and streams were mapped; most woodland vernal pools were not mapped), yet they do represent national data that can be used to gain some perspective on the issue of isolated wetlands across the country. In general, geographically isolated wetlands were wetlands surrounded by upland (e.g., not connected to waterbodies that are tributary streams or linked to them such as outflow lakes). The results for the two New York study areas and a few other sites from neighboring states are outlined in Table 1. Also included are data from another Fish and Wildlife Service study that focused on a portion of the New York City water supply watershed (Neversink Reservoir and Cannonsville Reservoir basins) in the Delaware River drainage.

All of the study sites listed above occur in the glaciated portion of the Northeast. The percent of wetland area identified as potentially isolated ranged from less than 1 percent to 28 percent, with the highest percent in Millbrook, NY and the lowest in the Neversink Reservoir Basin. The percent of wetland number that was potentially isolated was much higher since these types are typically much smaller than the non-isolated wetlands (streamside wetlands, floodplain wetlands, and lakeside wetlands). The percent of wetland number that may be isolated ranged from 8 percent (Neversink Reservoir Basin, NY) to 62-67 percent (Millbrook, NY; Newton, NJ; Eastern Lake

[Cont’d. page 5]

**Table 1**

| <b>Study Area</b>              | <b>Wetland Acreage</b> | <b>% of Area In Wetland</b> | <b>Wetland Number</b> | <b>Estimated % of Area Isolated</b> | <b>Estimated % of Number Isolated</b> |
|--------------------------------|------------------------|-----------------------------|-----------------------|-------------------------------------|---------------------------------------|
| Eastern Lake Ontario           | 10,626                 | 7.7                         | 1294                  | 20-22                               | 65-66                                 |
| Millbrook                      | 7,464                  | 5.2                         | 3445                  | 25-28                               | 62-67                                 |
| Bread Loaf (VT)                | 698                    | 0.5                         | 245                   | 14-17                               | 37-41                                 |
| Boonton (NJ)                   | 22,946                 | 15.9                        | 907                   | 5-7                                 | 42-49                                 |
| Newton (NJ)                    | 15,007                 | 10.4                        | 1495                  | 18-19                               | 64-67                                 |
| Lake Como (PA)                 | 4,909                  | 3.4                         | 1321                  | 16-18                               | 42-46                                 |
| Edgemere (PA)                  | 13,657                 | 9.5                         | 1147                  | 15-16                               | 56-59                                 |
| Neversink Reservoir Basin*     | 504                    | 0.8                         | 246                   | >1                                  | 8                                     |
| Cannonsville Reservoir Basin** | 5,818                  | 2.0                         | 1892                  | 5                                   | 35                                    |

\* Data includes 85 ponds

\*\* Data includes 2,898 acres of drawdown wetlands on the exposed shores of the reservoir and 1076 ponds

## LETTER TO THE EDITOR

Dear Editor:

I would like to comment about the New York District's Nationwide Permit 39 Permit Specific Regional Conditions. Specifically I would like to comment on Condition "e" which states, "This authorization is not applicable to new stormwater management facilities."

From a logistical perspective, this means that within the New York District, an applicant cannot apply under Nationwide Permit 39 to construct a stormwater management facility that would impact more than 0.5 acre of wetlands. As a result, any applicant wishing to locate a stormwater management facility in a wetland is required to apply for an individual permit. This requirement is applicable regardless of the type or quality of the wetland being impacted, the area of wetlands impacted, or the public need or benefit associated with the activity.

Imagine my surprise when I received a copy of an ACOE public notice for an individual permit application for a project with less than 0.09 acre of wetland impact and 76 linear feet of stream impact. It was for the North Colonie Central School, and they wanted to construct a stormwater management basin in a manner that would have minimal wetland impact. Wow – an individual permit for less than a 0.1-acre of wetland impact . . . for a school no less.

In comparison to Nationwide Permits, individual permits require, among other things: an analysis of off-site alternatives, maximum of one 8.5 x 11 inch page for all figures (which is a pain for people both making and reviewing the figures), greater coordination with the resource agencies, and a public notice mailing to everyone on the ACOE mailing list. The North Colonie School District, their Consultants, the NY District and the Regulatory Agencies expended all of this effort to review a project with less than 0.1 acre of wetland impact.

The second issue is this – if the North Colonie Central School had chosen to fill up to 0.5 acre of the same wetland to construct a road crossing or for a new school building, the activity could have been permitted under a nationwide permit. No need for an off-site alternatives analysis, no figures on 8.5 x 11 paper, no coordination with regulatory agencies, and no public notice.

Logically, this leads me to wonder which activity has greater environmental impacts – the elimination of wetlands by filling or the modification of wetlands for stormwater management? I would propose that the elimination of wetlands by filling has

a greater impact. Stormwater management facilities by their very nature are designed to improve water quality and lessen impacts associated with stormwater flows. And while it is true that stormwater management facilities typically result in reduced wetland values compared to the original condition, they would not result in less wetland values than a wetland filled under Nationwide Permit 39.

In retrospect, I'd presume that the New York District adopted this permit specific regional condition to discourage the development of stormwater management basins in wetlands. The New York District wanted to inform applicants that wetlands shouldn't be used for stormwater management. They want applicants to do a better job of reviewing alternative on-site layouts to avoid and minimize wetland impacts including those impacts from stormwater management facilities. While these are appropriate goals for the New York District's regulatory program, the implementation methodology does not make sense from a regulatory perspective. An underlying goal of the ACOE's regulatory program has always been to minimize the regulatory burden on applicants while protecting wetland resources. Applicants should not be penalized more under the regulatory program for developing stormwater management facilities than for filling wetlands, especially when an option is available to the ACOE to review all facilities impacting greater than 0.10 acre of wetlands under a Nationwide Permit 39 Pre-Construction Notification.

Sincerely  
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## LEGISLATION INTRODUCED TO RECAPTURE CLEAN WATER ACT JURISDICTION

On July 25, 2002, Senator Feingold and Congressmen Dingle and Oberstar introduced legislation into the Senate and House respectively to protect isolated wetlands now in jeopardy as a result of a 2001 Supreme Court decision, *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*. The bills, which will be called The Clean Water Authority Restoration Act of 2002, were introduced to restore the protection that existed for all waters and wetlands prior to the SWANCC decision by:

1) Adopting a statutory definition of "waters of the United States" based on a longstanding definition of waters in the Corps of Engineers' regulations (at 33 CFR 328.3).

2) Deleting the term "navigable" from the Act to clarify that Congress' primary concern in 1972 was to protect the nation's waters from pollution, rather than just sustain the navigability of waterways.

3) Including a set of findings that explain the factual basis for Congressional assertion of constitutional authority over waters and wetlands, including those that are called "isolated."

The Legislation may be found on Thomas as follows:

S.2780 Clean Water Authority Restoration Act of 2002

Sponsor: Sen Feingold, Russell D.  
(introduced 7/24/2002) Latest Major Action: 7/24/2002 Referred to Senate committee.  
Status: Read twice and referred to the Committee on Environment and Public Works. Title: A bill to amend the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States.

<http://thomas.loc.gov/cgi-bin/bdquery/z?d107:s.02780>:

H.R.5194 Clean Water Authority Restoration Act of 2002

Sponsor: Rep Oberstar, James L.  
(introduced 7/24/2002) Latest Major Action: 7/26/2002 Referred to House subcommittee.  
Status: Referred to the Subcommittee on Water Resources and Environment. Title: To amend the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States.

<http://thomas.loc.gov/cgi-bin/bdquery/z?d107:h.r.05194>:

## **EPA PROPOSES TO CONTINUE GRANT OF FILTRATION AVOIDANCE FOR NEW YORK CITY'S CATSKILL/DELAWARE WATER SUPPLY**

Commissioner Christopher O. Ward of the New York City Department of Environmental Protection (DEP) announced in late May that the United States Environmental Protection Agency (EPA) has proposed to grant a Filtration Avoidance Determination (FAD) to New York City for drinking water from its reservoirs of the Catskill/Delaware supply system. EPA had granted a five-year filtration avoidance waiver in 1997, and, in December 2001, the City submitted to the EPA *New York City's 2001 Watershed Protection Program Summary, Assessment and Long-term Plan*, which included DEP's proposal for a new five-year Filtration Avoidance Determination.

New York City Mayor Michael R. Bloomberg said, "The City and its watershed partners have established outstanding national models for watershed protection. The EPA's plan to grant a new five-year Filtration Avoidance Determination is a tribute to the work of DEP and its partners in the protection of water quality throughout a 1,600 square mile watershed. Based on extensive reviews of our achievements over the last five years and our proposals for implementation of additional long-term watershed protection measures, the EPA clearly recognizes that the City's programs are achieving their goals of protecting water quality for over nine million consumers who rely on the City's supply."

DEP's *Watershed Protection Program Summary, Assessment and Long-term Plan and Assessment*, reported that the comprehensive water quality monitoring and modeling programs confirm that the quality of water in the Catskill/Delaware supply remains high and that specific watershed protection programs are yielding substantial benefits. The report demonstrates that the City's supply continues to meet all objective water quality criteria of the federal Surface Water Treatment Rule and that specific efforts – among them, waterfowl management, Kensico stormwater controls, wastewater treatment plant upgrades and inspections – are showing quantifiable improvements.

Commissioner Ward said, "The EPA's FAD and the Watershed Memorandum of Agreement of 1997 ushered in a new era of watershed protection and partnership with many watershed stakeholders – the State, EPA, certain environmental and public interest groups, and the watershed counties, towns and villages. This unique coalition came together with the dual goals of

protecting water quality and the economic viability of watershed communities for generations to come. The EPA's willingness to grant another five-year FAD confirms that the partnerships have made meeting those goals possible, and that long-term plans are not only feasible but desirable for all concerned."

Under the new FAD, the City will continue and, in some cases, significantly expand certain programs that target key potential pollution sources. Among them are the: Watershed Agricultural Program, including the Watershed Forestry Program; Waterfowl Management Program; New Infrastructure Program for seven West-of-Hudson communities; Wastewater Treatment Plant Upgrade Program; Stream Management Program; Kensico Reservoir protection programs; plus two programs administered by the Catskill Watershed Corporation (CWC) – the Septic Remediation and Replacement Program and the Stormwater Retrofit Program.

In addition, the City will undertake a number of new initiatives, including the Community Wastewater Management Program to address wastewater problems in certain smaller hamlets and villages; a Septic Operation and Maintenance Program that will support proper operation and maintenance of septic systems in the West-of-Hudson watershed; a house-to-house survey to identify failing septic systems in the West Branch and Boyds Corner Reservoir basins; funding for CWC and county staff throughout the West-of-Hudson watershed to undertake comprehensive watershed planning efforts and to identify and prioritize community stormwater needs; a study to evaluate engineering options for reducing levels of turbidity leaving the Schoharie Reservoir; certain efforts to control nonpoint source pollution in those Catskill/Delaware reservoir basins that are east of the Hudson; and a commitment to design and construct an enhanced disinfection facility, utilizing ultraviolet technology, for Catskill/Delaware water.

"We are proud of the work DEP and its partners have done for watershed protection," said Commissioner Ward. "The EPA clearly agrees with us that continuation and enhancement of the program is scientifically supported, comprehensive and will provide continuing protection for the nine million New Yorkers who count on the City's water supply every day."

## **(GEOGRAPHICALLY ISOLATED WETLANDS – HIGHLIGHTS FOR NEW YORK)**

*[Cont'd. from page 3]*

Ontario, NY). Overall, the percentages of isolated wetlands in the most of the sites in New York and adjacent states were at moderate levels when compared to other study sites in the Northeast, although the Neversink Reservoir Basin and Boonton study areas were among those with the least amount of wetland being potentially isolated.

Nationally, isolated wetlands appear to be most abundant and extensive in arid and semi-arid to subhumid regions (e.g., the Dakotas, Nebraska, and the Southwest) and in areas of karst topography (e.g., Florida). These areas had more than 40 percent of their wetland area designated as potentially isolated, with some having nearly all of their wetland acreage in this category.

The Fish and Wildlife Service study provides a national perspective on the status of geographically isolated wetlands. Although it was not designed to generate national, regional, or statewide estimates, it is a starting point. Organizations and agencies with an interest in gaining more insight into the matter for particular areas are encouraged to perform similar analyses.

The data presented in the Fish and Wildlife Service report cannot be readily translated into wetlands that may have lost their jurisdictional status as a result of the recent Supreme Court decision since the definition of "isolated" in this report is not a regulatory one. Moreover, federal regulation of wetlands does not exclude isolated wetlands that are "adjacent" to navigable waters or their tributaries or that meet other criteria. Contact the applicable District for current guidance on identification of regulated areas.

### Literature Cited

Tiner, R.W., H.C. Bergquist, G.P. DeAlessio, and M.J. Starr. 2002a. Geographically Isolated Wetlands: A Preliminary Assessment of Their Characteristics and Status in Selected Areas of the United States. U.S. Department of the Interior, Fish and Wildlife Service, Northeast Region, Hadley, MA.

Tiner, R.W., H.C. Bergquist, and B.J. McClain. 2002b. Wetland Characterization and Preliminary Assessment of Wetland Functions for the Neversink Reservoir and Cannonsville Reservoir Basins of the New York City Water Supply Watershed. U.S. Fish and Wildlife Service, Northeast Region, Hadley, MA. Produced for the New York City Department of Environmental Protection, Valhalla, NY.

# NYS WETLAND LEGISLATION UPDATE

— Jennifer Brady-Connor

Commissioner Christopher O. Ward of the New York City Department of Environmental Protection (DEP) announced in late May that the United . The only bill to make it out of committee and pass the Assembly (by an overwhelming majority) is A00247 “An act to amend the environmental conservation law, in relation to enforcement of the freshwater wetland law.” The purpose of the bill, sent to the Senate on 6/3/02 and referred to the Rules committee, is to increase fines for violations of the freshwater wetland law. This bill increases the maximum civil penalties for violations of the Freshwater Wetlands Act from \$3,000 to \$10,000 and increases the maximum criminal fines to \$5,000 for a first offense and \$10,000 for a subsequent offense. According to the Bill summary, “Increasing the maximum fines and penalties for wetland violations will discourage unlawful activities relating to wetlands and thus strengthen the State’s wetlands protection efforts.”

Some of the more relevant wetland bills in both the Assembly and Senate that continue to reside in various committees include:

## Jurisdiction and Permitting

- A05935 and S04970 Enact the wetlands homeowner’s relief act
- A01892 and S04537 Provide for the creation, maintenance and regulation of freshwater and tidal wetlands mitigation banks
- A02140 Adds vernal pools to the definition of freshwater wetlands and reduces the appropriate acreage to be so identified as such
- S06985 Expands the jurisdiction of the department of environmental conservation over freshwater wetlands by eliminating the definitional requirement of mapping
- A03061 Prohibits the granting of tidal wetlands permits for regulated activities where such activities would adversely impact the use of public lands

## Pesticide Use

- A05194 Provides requirements for pesticide applications in tidal wetlands
- A10156 Prohibits the application of pesticides to tidal wetlands, except during a public health emergency; repealer
- A10157 Prohibits the application of pesticides to freshwater wetlands, except during a public health emergency

## Tax Relief

- A05934 and S04969 Relate to the assessments of designated wetlands by the department of environmental conservation
- A05936 Establishes conservation easements for wetlands protection and enacts the state uniform wetlands compensation/tax abatement board
- A05938 Provides for a real property tax abatement for land subject to freshwater wetland regulation

- S04977 Provides that local assessing units shall determine tax abatement granted to freshwater wetlands, subject to rules and regulations of board of real property services

For complete descriptions and activities on these bill visit the NYS Wetlands Forum web site at <http://www.wetlandsforum.org/news/announce.htm>.



Montezuma Wildlife Refuge, newly restored muckland



Montezuma Wildlife Refuge, bald eagle nest

Photos courtesy of Stephen Tomasiak

# THE MATTER OF CHESTER INDUSTRIAL PARK ASSOCIATES AND V. PAULIUS AND ASSOCIATES

— Jeffrey Zimring<sup>1</sup>

CASE SUMMARY: New York DEC Wetlands Enforcement Action

On June 19, 2002, the New York Supreme Court, Appellate Division, Second Department, affirmed a decision by the Commissioner of the New York Department of Environmental Conservation (“DEC”) assessing \$540,000 in penalties against two developers in Orange County for altering a wetland without the proper permit.

V. Paulius and Associates and Chester Industrial Park Associates began a project intended to develop certain land within the Village of Chester, Orange County, New York. The 12.5 acre parcel under consideration fell completely within an area designated as a Class II Wetland by the DEC. Although New York environmental statutes and DEC regulations require permits prior to any development of wetland area, the DEC case record indicates that the developers neglected to apply for, much less obtain, the necessary environmental approvals for their proposed construction project.

While monitoring the remediation activities of the same developers at a different site, a DEC inspector noticed a drainage ditch draining water from the wetlands area on the northern edge of the 12.5 acre parcel in question. Additionally, further inspection revealed that approximately ten loads (dump-truck sized) of fill had also been dumped on the site. DEC staff served V. Paulius and Chester Industrial Park Assoc. with an order to cease dumping fill on the land and to backfill the drainage ditch. The developers agreed to the order and submitted a plan to comply with its provisions.

Approximately one and one-half years later, the same DEC inspector found that the site had been completely filled and graded with approximately one to two feet of fill over 10 of the 12.5 acres. The entire wetlands character of the parcel had been completely destroyed. Negotiations between the DEC and the developers broke down resulting in the filing of complaints stating wetlands regulations violations against each of the two developers. The complaints initially asked for \$3,000 in damages against each developer.<sup>2</sup>

When all settlement negotiations had completely failed, the DEC amended the complaint to allege ninety separate violations (one for each confirmed truck load) against each developer—a total penalty of \$270,000 each.<sup>3</sup>

At the hearing to determine the merits of the complaint, witnesses for the DEC established that based on the amount of non-wetlands soil deposited at the site, there had to be at least 2,000 truck loads of fill. At the close of evidence, the Administrative Law Judge (“ALJ”) found that the DEC had proved that the developers had intentionally and egregiously ignored applicable law and illegally filled ten acres of the Class II wetland. Noting that based on the 2,000 possible violations, the developers could have been assessed penalties of \$6,000,000 each, the ALJ increased the penalty sought by the DEC to \$500,000 each. The developers were also ordered to fully remediate the area to its original wetlands state. The Commissioner of the DEC at the time, John P. Cahill, affirmed the penalty and the remediation plan.

The developers appealed the ruling and the Commissioner’s affirmation to the New York Supreme Court, Appellate Division, Second Department. The Court, in a unanimous memorandum opinion, found that substantial evidence supported the ALJ and Commissioner’s findings. They also found, however, that the increase in penalty \$270,000 to \$500,000 by the ALJ was improper. The complaint acted on by the ALJ only listed the original ninety violations. Because the maximum penalty was \$3,000 per violation, the developers could only be forced to pay \$270,000 each. The Court left the remediation plan ordered by the DEC completely intact.

## ENDNOTES

<sup>1</sup> Juris Doctor Candidate, Albany Law School of Union University, May 2003.

<sup>2</sup> DEC regulations allow for full penalties to be assessed against each party involved.

<sup>3</sup> The DEC Administrative Law Judge required the DEC staff to substantiate each individual violation before allowing the DEC to revise the penalty request.

# LEGAL LOOPHOLE LEAVES “ISOLATED” WETLANDS IN PERIL, SAYS NEW REPORT

Washington, DC – A July report from the National Wildlife Federation (NWF) and the Natural Resources Defense Council.

(NRDC) warns of serious threats to people and wildlife stemming from a 2001 Supreme Court decision narrowing the scope of federal environmental protection for the nation’s wetlands. The report, “Wetlands at Risk: Imperiled Treasures,” details the vital role played by isolated wetlands across all regions of the country, highlighting the important functions at risk. The report also calls for federal legislation that would clarify Congress’ view that the protection of isolated wetlands is critical to water quality, public safety, wildlife and other public interests, including hunting and fishing and that the Clean Water Act protects isolated wetlands and other waters. The clarification is essential because tens of thousands acres of wetlands of all types continue to be lost each year in spite of Clean Water Act protections.

In addition to supporting new legislation, NWF and NRDC are urging the Bush administration to act quickly and definitively to ensure that federal agencies fully understand the limits of the court’s ruling and their inherent responsibility to safeguard the nation’s water resources. “America can’t afford to squander all the benefits these wetlands provide,” said Julie Sibbing, NWF’s wetlands legislative representative. “The court may have opened the door to misguided wetlands destruction, but Congress can shut it again.” “Wetlands at Risk: Imperiled Treasures” can be found online at <http://www.nwf.org/wetlands/wetlandsatrisk.html>.

# SAVE THE COUNTY LAND TRUST

## OLD FLY MARSH INTERPRETATION DESIGN COMPETITION FOR HIGH SCHOOL, COLLEGE AND COMMUNITY/PROFESSIONAL ENTRANTS

### WHAT

There is 'buried' information in Old Fly Marsh in Pompey, NY. This 'created' wetland contains information about wetland habitat for waterfowl, songbirds, shorebirds, colonial waterbirds, mammals, amphibians, insects and aquatic and upland vegetation. It can tell about traditional heritage uses of wetlands by Native Americans and colonial settlers. There is data for the study of wetland science, wetland creation, hydrology and water level management, wetland habitat, and management of exotic species (e.g. purple loosestrife).

You can use this 'buried' information to address the interpretive needs listed below and submit an entry for the Competition. What we want to do is make this "information available to school children and residents in Central New York. We also want to solve some physical and visual access issues in regard to Old Fly Marsh. We want to make Old Fly Marsh become a state-of-the-art interpretive area that utilized "green" materials, requires no outside energy, and minimum staffing. Finally, we want to celebrate the attributes of Old Fly as a resource for the Central New York area to enjoy and use.

### WHO

**For all interested high school and college students and teachers, and for community and professional entrants** there are the four categories of the Old Fly Design Competition. Choose one category per entry.

### CATEGORIES

1. Entry Orientation System
2. East-side Trail and Southwest Trail Re-designs
3. Interpretive Facility or Outdoor Classroom/Picnic Area
4. Multi-Sensory Trail Design

Below is a more descriptive outline of activities within each category.

### DETAILS

1. Entry Orientation System
  - a. develop system of signage for entry to the parking lot;
  - b. develop text and graphics for orientation to area and trails;
  - c. design marker system for each trail within the Marsh.
2. East-side trail and Southwest Trail Re-designs
  - a. choose either of the two trails; the East-side trail extends to the 'blind' and the Southwest trail extends to the overlook (see map for details);

- b. evaluate trail location and re-design if necessary. Locate stops along the trail segment that you are working on;
- c. design trail guide material to correspond to each stop. The guide should be 1) appropriate to a varied audience and 2) easy and inexpensive to reproduce. It may include a map of the trail, a history of the area, a list/description of various plant and animal species at each stop, a description of what may be seen from various spots;
- d. design a way to permanently mark each stop. Keep in mind cost, ease of repair/replacement, and resistance to vandalism. Suggest any low energy and/or 'green' materials, which might be used.

### 3. Interpretive Facility or Outdoor Classroom/Picnic Area

- a. choose the facility or the classroom/picnic area;
- b. identify location for your choice of facility or area;
- c. describe the necessary structure, giving consideration to the use of 'green' materials, low energy sources, and minimal/low staffing requirements;
- d. describe how your choice would relate to interpretive themes;
- e. describe projected uses for your choice by different user groups.

### 4. Multi-Sensory Trail Design

- a. plan a trail to appeal to visual, olfactory, aural and/or tactile senses;
- b. describe the design strategies used for each sense;
- c. develop a trail guide with designated stops indicated and list appropriate materials and text for each stop;
- d. create a reproducible booklet, slide show and/or video detailing your design.

### TO ENTER

1. Fill out the attached entry form and submit it as detailed below.
2. All plans must be in 8" x 11 1/2" format, in easily reproducible form. Videos should be standard VHS. Slide shows should be on Microsoft PowerPoint, Zip disk or CD.
3. Submit all materials no later than March 1, 2003 to: Richard Smardon, STC Design Competition, Faculty of Environmental Studies, SUNY/ESF, One Forestry Drive, Syracuse, NY 13210

### RESOURCE MATERIAL AVAILABLE

1. A guided tour of Old Fly Marsh can be arranged (for details, see below).
2. A data sheet by Prof. L. VanDruff, a virtual PowerPoint tour by Prof. Richard Smardon, and the Old Fly Management Plan by John Weeks are available by request (see below).
3. The following resource people can be consulted: Prof. Larry VanDruff, Old Fly steward and Professor of Wildlife Biology SUNY/ESF (retired); Jack Gramlich, local naturalist and BOCES instructor; Prof. Richard Smardon, wetland heritage values specialist and Professor of Environmental Studies at SUNY/ESF (see below).

To arrange to use any of these resource materials or persons, call Rick Smardon at 470-6576 or Bob Asanoma at 457-7837.

### DEADLINE FOR ENTRIES

March 1, 2003

### JUDGING CRITERIA

- All entries will be judged for
1. appropriateness to audience;
  2. completeness in covering objective/problem;
  3. originality of approach, i.e., thinking 'outside the box';
  4. quality of production (meeting guidelines for ease of reproduction).

All entries become property of STC Land Trust upon submission, but appropriate credit will be given for all trail guides and plans reproduced or utilized by STC for as long as they used.

### PRIZES

Prizes will be awarded to the winner and runner-up in each category for each type of entrant (high school student, college student, community group, and professional entrant. Announcement of winners and awarding of prizes will occur on April 22, 2003. Winning entries will be displayed in a prominent public location.

## (THE LAKE TAHOE CASE)

[Cont'd. from page 1]

Constitution. The only time period under consideration, therefore, was the thirty-two month period immediately before the issuance of the 1984 Plan. The question before the Court was whether an agency may restrict the use of property for a fixed amount of time without compensating the owner.

The Takings Clause of the United States Constitution requires the government to compensate property owners whenever the government acquires private property for public use. The Supreme Court has recognized that property may be “taken” without physically depriving the owner of the possession of that property. The Court has held, in the words of Justice Holmes, that “[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>7</sup> Takings jurisprudence requires compensation when the regulation of property “does not substantially advance a legitimate state interest,” or if it denies the owner of the property of all “economically viable use of his land.”<sup>8</sup> The Court has, however, recognized that there are certain categories of takings that do not require any showing of a public interest or need for the regulatory taking before the Constitution requires compensation—*per se* takings.<sup>9</sup> The owners of the land affected by the TRPA’s moratorium tried to convince the Court that temporary bans on development should be considered *per se* takings.

The Court refused to classify temporary moratoria as a categorical, *per se*, taking. It also, however, refused to say that a temporary moratorium would never be a taking. Both sides tried to persuade the Court that its past decisions required the Court to answer the question as “yes, always” or “no, never.” The Court took a more neutral stance. It acknowledged that always classifying temporary restrictions on development as takings would affect routine building permits and zoning decisions that inevitably require time to consider. Additionally, setting an arbitrary time limit on temporary restrictions would unnecessarily bind government agencies trying to consider a multitude of factors and arrive at equitable solutions to very real land-use problems.

Critics of the decision claim that the Court has eroded the property rights of individuals by refusing to require compensation for temporary restrictions.<sup>10</sup> The Court has committed itself; however, to the proposition that government regulation of private property can go too far. It points out

that there are other decisions that provide tests for deciding whether a restriction on an individual’s property amounts to a regulatory taking. In this case, the Court did not set out to decide if those tests indicate that a taking has, in fact, occurred. The Court was only asked to decide whether temporary restrictions should be given their own legal category. It decided that they should not.

Many people own land in the Lake Tahoe region that cannot be developed. The Supreme Court appears to have turned back the landowner’s attempts at recovering investment money lost due to TRPA restrictions. It is important to remember, though, that the Court did not say that the landowners did not suffer a taking. It merely said that it was unwilling to create a new mandatory compensation requirement for every temporary restriction that is placed on an individual’s land. The decision left open other avenues of appeal for landowners who disagree with the TRPA, including other takings arguments like those in made in *Penn. Central Transp. Co. v. New York City*.<sup>11</sup>

### ENDNOTES

<sup>1</sup> Juris Doctor Candidate, Albany Law School of Union University, May 2003. Currently a summer associate at Whiteman, Osterman & Hanna.

<sup>2</sup> 122 S.Ct. 1465(2002)

<sup>3</sup> Originally created in 1969 by a California and Nevada legislative compact with subsequent Congressional approval.

<sup>4</sup> The moratorium was actually comprised of two temporary restrictions – Ordinance §1-5, which was to last until the original date planned for the unveiling of the final plan, and Resolution 83-21, which was a stop-gap measure needed because the TRPA was not able to finish on schedule. The District Court later found that the delay was reasonable and not due to any lack of diligence on the part of the TRPA.

<sup>5</sup> Both the 1984 Plan and the 1987 Plan contained restrictions that put considerable limitations on development in the Lake Tahoe region.

<sup>6</sup> 121 S.Ct. 2589

<sup>7</sup> *Pennsylvania Coal v. Mahon*, 43 S.Ct.158, 160 (1922).

<sup>8</sup> *Agins v. City of Tiburon*, 100 S. Ct. 2138, 2141 (1980).

<sup>9</sup> See *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2893 (1992).

<sup>10</sup> See David G. Savage, *Landowners Dealt a Blow by Justices*, LOS ANGELES TIMES, April 24, 2002 (interpreting the case as loss of property rights for the owners of the affected land); Linda Greenhouse, *Justices Weaken Movement Backing Property Rights*, NEW YORK TIMES, April 24, 2002 (classifying the decision as “sharp setback” for the property rights movement); Robert S. Greenberger, *Landowners Lose High-Court Ruling in Property Case*, THE WALL STREET JOURNAL, April 24, 2002 (interpreting the case as stating that landowners are not entitled to compensation for temporary takings).

<sup>11</sup> 98 S. Ct. 2646 (1978).

## TRUSTEES RELEASE PLAN TO ASSESS HUDSON RIVER RESOURCE INJURIES

Trustees from the National Oceanic and Atmospheric Administration, the U.S. Department of Interior, and New York State who are responsible for assessing the impacts of polychlorinated biphenyls (PCBs) on the Hudson River, released a comprehensive plan for studying the river environment, including fish and wildlife, surface waters and geological resources.

The Hudson River Natural Resource Damage Assessment (NRDA) Plan describes the broad range of studies completed, under way, or to be undertaken as part of an assessment of potential PCB-related injuries to living resources such as birds, fish, mammals, amphibians, reptiles and invertebrates; surface water and river sediments; geological resources including flood plain soils; groundwater; and air. The assessment will be used to help the trustees evaluate and determine actions, including projects to restore resources, to mitigate damages to these resources.

The trustees include representatives of the New York State Department of Environmental Conservation (DEC), the National Oceanic and Atmospheric Administration (NOAA), the U.S. Department of the Interior/U.S. Fish and Wildlife Service (USFWS) and National Park Service (NPS). The trustees act on behalf of the public to assess and restore natural resources injured by hazardous substances.

“As we continue our efforts to restore the Hudson River, we must ensure that we clearly understand how the river environment has been impacted by the release of PCBs and how we can best address these impacts,” DEC Commissioner Erin M. Crotty said. “Through the NRDA process, we are undertaking a range of scientific studies that will provide us with valuable information on the nature and extent of damages to our natural resource that will help us move forward with a strategy for restoring the historic Hudson River and its ecosystems.”

According to Dr. Mamie Parker, regional director for USFWS, the NRDA plan represents an “important milestone in the Hudson River’s trip back from PCB contamination.”

“We believe this plan points the way toward a thorough assessment of PCB contamination to our resources,” Parker said.

The public will have the opportunities to provide comments on the plan in a series of

[Cont'd. page 14]

## CALENDAR OF EVENTS

- 24-25 October.** Clean Water Act Law and Regulation. Advanced New ALI-ABA Course of Study. Washington, D.C. (Madison Hotel). Plus Optional Field Trip and Introductory Lecture on Wednesday, October 23. Updates experienced attorneys and related professionals and provides general practitioners with an excellent framework for understanding the law and counseling clients in a complex area. <http://www.ali-aba.org/aliaba/CH041.HTM>
- 3-7 November.** AWRA Annual Water Resources Conference. Philadelphia, PA. Issues to be addressed include Effects of Urbanization on Riparian and Aquatic Ecosystems; Wetlands ~ Riparian and Aquatic Ecosystems ~; Lakes and Ponds; Water Policy, Planning and Management. <http://www.awra.org>
- 12-14 November.** Mid-Atlantic/Northeast Stream, Floodplain and Wetland Restoration Workshop. Bear Mountain Inn, Bear Mountain, NY. Stream stability and natural channel design concepts in stream, riverine wetland, floodplain and watershed management and restoration. <http://www.aswm.org/>
- 14 November.** England Chapter of the Society of Wetland Scientists Regional Conference. College of the Holy Cross, Worcester, Massachusetts. Papers will be presented from individuals who have conducted research or executed innovative projects in the fields of wetland ecology, management, restoration, policy or other related areas. <http://www.sws.org/regional/newengland>
- 2003**
- 28-30 January.** Emerging Technologies, Tools, and Techniques for managing our Coasts. Cocoa Beach, Florida. The theme is "Coasts and Oceans: Assessment, Management, Restoration, and Measuring Results" For more information contact Noemi Mercado at 202-566-1256.
- 11-12 March.** Wetlands '03: Ninth Annual Conference and Membership Meeting of the NYS Wetlands Forum. Sheraton Saratoga Springs Hotel & Conference Center, Saratoga Springs, NY. The ninth annual meeting of the New York State Wetlands Forum will once again examine a variety of wetland-related issues and developments, and how these issues have impacts both state-wide and regionally. Call for papers and sessions will be prepared and distributed soon. <http://www.wetlandsforum.org> or e-mail [info@wetlandsforum.org](mailto:info@wetlandsforum.org)
- 24-28 March.** Society for Ecological Restoration, Northwest Chapter, Regional Conference. Theme: The Restoration Toolbox. Portland, Oregon. Call for abstracts and updates <http://216.119.67.178/2003conf/Index.htm>
- 13-16 April.** Call for Presentations: Restore America's Estuaries Inaugural National Conference on Coastal and Estuarine Habitat Restoration. Hyatt Regency Inner Harbor, Baltimore, MD. <http://www.estuaries.org/>
- 23-25 April.** 6th National Mitigation Banking Conference - Practice and Policy: the Nation's Hands-on Conference for Mitigation & Conservation Banking. <http://www.mitigationbankingconference.com>
- 11-16 May.** Lessons Learned, Gateway to Flood Mitigation. St. Louis, Missouri. ASFPM's annual conference. [www.floods.org/StLouis](http://www.floods.org/StLouis)
- 13-15 May.** Large River Systems ~ Under Stress. NavCanada Conference Centre, Cornwall, Ontario. 10th Annual International Conference on the St. Lawrence River Ecosystem. <http://www.navcanada.ca/ncti/english/efacil.htm>
- 8-13 June.** Wetland Stewardship: Changing Landscapes and Interdisciplinary Challenges. The 24th Annual Conference of the Society of Wetland Scientists. New Orleans, Louisiana. <http://www.sws.org/neworleans>
- 23-26 June.** Urban and Rural Streams Symposium [in conjunction with the World Water and Environmental Resources Congress]. Philadelphia, Pennsylvania. <http://www.asce.org/conferences/eventsmore.cfm>
- 29 June-2 July.** AWRA Summer Specialty Conference: "Watershed Management for Water Supply Systems". New York City, New York. [www.awra.org](http://www.awra.org)
- 13-17 July.** Coastal Zone '03: Coastal Zone Management Through Time. Baltimore, Maryland. The largest conference for the world's coastal resource management community. For more information, please visit [www.csc.noaa.gov/cz2003/](http://www.csc.noaa.gov/cz2003/)

### WETLAND TRAINING OPPORTUNITIES

#### Environmental Concern, Inc. 2002 Professional Course Schedule

**Evaluation for Planned Wetlands** – EPW functional assessment procedure, use in functional wetland design, and use as a mitigation site selection procedure for functional ability. Theory and practical applications for six wetland functions as they pertain to shoreline bank stabilization, water quality, wildlife, fisheries, sediment stabilization, and uniqueness/ heritage. Instructor: Albert McCullough, III, P.E. Oct. 16-18 9:00-5:00pm, Meadowlands Env. Center, Lyndhurst, NJ; Oct. 23-25 9:00-5:00pm, New Jersey EcoComplex, Bordentown, NJ. \$575 includes materials. Visit [www.wetlands.org](http://www.wetlands.org)

**Winter Woody Plant ID** – Taxonomic keys and field excursions will be utilized to identify over 80 woody species. Woody Plants in Winter by Core and Ammons included. Background in botany preferred but not necessary. Instructor: Bill Sipple. Environmental Concern St. Michael's, MD. Date: February 6-8, 2003. Cost: \$475 Registration and instructor info at [www.wetland.org](http://www.wetland.org) or call (410) 745-9620

**Winter Wetland Delineation:** Designed for professionals already familiar with the Corps of Engineers wetland delineation method looking to further enhance their skills. Conquer the difficulties in delineating after leaf drop along with unpredictable soil and hydrology conditions. Instructor: Albert McCullough, III, P.E. Location: Patuxent National Wildlife Visitor's Center, Laurel, MD. Date: February 18-20, 2003. Cost: \$575 Registration and instructor info at [www.wetland.org](http://www.wetland.org) or call (410) 745-9620

#### Institute For Wetland & Environmental Education and Research

For course descriptions, instructors, and other details visit <http://www.wetlanded.com>. Course schedule: **October 23-24:** Wetland Regulations and Policy/Kalla/Pruitt Athens, GA \$300; **November 1-2:** Photointerpretation for Project Planning and Resource Management/Huber & Tiner Amherst, MA \$350; **November 2:** ID of Winter Woody Plants/ Sipple Lothian, MD \$130; **December 7:** ID of Winter Woody Plants/ Tiner South Natick, MA \$130

## **DEVELOPING ONE OF THE GEMS ON THE EMERALD GREEN NECKLACE**

Save the County Land Trust (STC) is one of the oldest environmental organizations in the Central New York area. STC was established in 1972 as a private not-for-profit organization whose charter was to acquire and manage natural areas for the benefit of all the residents of Central New York. Many of you will recall the annual Walk to Save The County, which, for over 25 years, was a rite of spring in this county. Through the Walk, STC raised money to preserve natural areas in Central New York. In all, STC has 36 sites containing about 2,100 acres, including Baltimore Woods in Marcellus, Old Fly Marsh in Pompey, Mud Pond/Silver Lake in Oswego County, and 250 acres of Nine-Mile Creek floodplain. The organization has always looked to the community – for support in acquiring natural areas and as beneficiaries who use and enjoy those acquisitions. Now it is turning to the community again to help design and enhance its natural areas for the benefit of all. I ask you to join in this effort.

STC has instituted an area-wide design competition. It will involve schools, community organizations and individuals in the redesign or reprogramming of Old Fly Marsh in Pompey. Old Fly is one of STC's oldest properties, acquired in the early 1970's. It is actually a created wetland that hosts migratory waterfowl in the fall and spring plus song birds, shorebirds and water birds, such as Great Blue Herons, the rest of the year. The area is reasonably accessible to the community, but can be made more so through the creative efforts of design competition participants.

The idea of the design competition is to challenge school children, their teachers, college students, and community groups about how to showcase information about ecology, natural history, heritage uses of

wetlands, and much more from this 88 acre site. We have in Central New York unique natural areas that are the "green infrastructure" and provide valuable information and natural services. It is about time we celebrated these valuable resources.

I am asking you to help celebrate these natural areas and to help STC Land Trust enhance and show off Old Fly Marsh. Join the design competition and accept the challenge. There are multiple categories for educational programs and physical designs of Old Fly Marsh. There are classes of competition for grade schools, middle schools, high schools, college students and community groups. There are also partners helping STC with the competition such as SUNY College of Environmental Science and Forestry, which is providing judges and student assistance, and the Rosamond Gifford Zoo, which will be the site of the awards ceremony for all the competition classes on Earth Day of 2003. Save The County needs more partners to assist with this endeavor. I ask you to participate in improving this valuable community resource.

If you want an entry form – go to the SUNY/ESF web site at <http://www.esf.edu> and look under ESF in the High Schools. If you need more information or want to partner in this venture contact Rick Smardon, President of STC, [rsmardon@mailbox.syr.edu](mailto:rsmardon@mailbox.syr.edu) at 315-470-6576 or Bob Asanoma, Executive Director of STC, [rasanoma@worldnet.att.net](mailto:rasanoma@worldnet.att.net) at 315-457-7837. Take the challenge, stretch your minds, be creative, and help develop one of the true "green gems" of Central New York.

Sincerely,

Richard Smardon, President Save-the-County Land Trust and Wetland Forum Board Member

## **NYSWF AWARDS ALMOST \$2,600 IN GRANTS FOR 2002 ANNUAL MEETING ATTENDANCE**

— Jennifer Brady-Connor, Chair

The New York State Wetlands Forum awarded \$2,598 in scholarship, travel, and lodging grants for the 2002 Annual Meeting and Conference in Syracuse, NY. The funds were used to bring speakers from vastly different experiences to the event: renowned researchers, local government leaders and visionaries, and students still struggling through graduate school. This was the first time any of the recipients had attended a NYSWF conference, and almost all became members in part due to the dynamic, engaging atmosphere found there.

The grant funds were dispensed as part of a grant agreement between the NYSWF and the US EPA Region 2. The goal of the funding was to improve the exchange of ideas, experiences, policy initiatives, and research results regarding wetlands among local government representatives, nonprofits, universities, and the NYSWF. For additional information about the grant responsibilities and goals visit the NYSWF website at [www.wetlandsforum.org](http://www.wetlandsforum.org).

There remains about \$2,500 in scholarship monies available for the 2003 Annual Meeting and Conference in Saratoga Springs, NY on March 11 and 12. Scholarship application guidelines and requirements will be distributed along with the Call for Papers in November and will also be made available on the NYSWF website.

### **COMMENT FROM "WETLAND FORUM" ATTENDEE**

*"Thank you for having such a wonderful and knowledgeable speaker for the first forum! It was truly an informative morning and I look forward to upcoming future forums."*

— Debra Dunbrook, NYS DOT

Thanks to all who attended the inaugural "Wetland Forum": "Judicial, Policy and Constitutional Issues Post-SWANCC" on May 23 in Albany. Vermont Law School Professor Patrick "Pat" Parenteau presented a terrific run-down of court cases, decisions, and legislative actions spurred by the January 2001 Supreme Court SWANCC decision. Some terrific discussions ensued, and we received requests for additional visits from Professor Parenteau. Thank you, Pat, for your time and energy devoted to this program!

"Wetland Forum" is a fledgling service provided by the New York State Wetlands Forum to provide in-depth presentations on a wetland policy, legal, or research issue. The "Wetland Forum" enables the audience to learn more about the wetland policy, legal, or research issue than is possible during the regular NYSWF conferences. To suggest topics for future "Wetland Forums" send e-mail to [forum@wetlandsforum.org](mailto:forum@wetlandsforum.org).

**CALL FOR PAPERS**  
**NEW YORK STATE WETLANDS FORUM, INC.**  
**2003 ANNUAL CONFERENCE AND MEETING**  
**SHERATON SARATOGA SPRINGS, SARATOGA SPRINGS, NY**  
**SAVE THE DATES! MARCH 11-12, 2003**

This ninth 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 at least two local government-related sessions. Abstracts are sought on numerous topics [additional topics will be added], including:

- ♦ Wetlands and Watershed Planning
- ♦ Wetlands and Landowner Rights
- ♦ Winter Botany
- ♦ NYS Freshwater Wetlands Appeal Board
- ♦ Nutrient Cycling in Wetlands
- ♦ Legislative and Regulatory Updates
- ♦ Wetlands and Endangered Species
- ♦ Wetland Restoration/Remediation in Urban Settings
- ♦ Tidal Wetlands and Special Aquatic Sites
- ♦ SEQRA and Wetlands
- ♦ Watershed Protection at the Local Level
- ♦ Waterfront Revitalization Programs
- ♦ Stormwater Management and Treatment Wetlands
- ♦ Adirondack Park Wetlands
- ♦ Tribal Wetlands: Programs and Perspectives
- ♦ Wetlands and Golf Courses
- ♦ Wetlands and Archaeology

**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 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. Audiovisual needs.

**Submit an abstract via E-Mail or mail the abstract in digital form to:**  
Christine DeLorier, US Army Corps of Engineers, 1 Bond Street, Troy, NY 12180  
Christine.DeLorier@usace.army.mil; 518-273-7420; Fax: 518-273-2055

**DEADLINE IS JANUARY 31, 2003**

**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: **Jennifer Brady-Connor, New York State Wetlands Forum, PO Box 1351, Latham, NY 12110-1351, 518-581-8375 or jennifer@nyswf.org.**

*For registration, topic and meeting updates visit <http://www.wetlandsforum.org>!*

**New York State Wetlands Forum, Inc.**  
**2003 ANNUAL CONFERENCE AND MEETING**  
**SHERATON SARATOGA SPRINGS, MARCH 11TH AND 12TH, 2003**  
**REGISTRATION FORM**

NAME \_\_\_\_\_

AFFILIATION \_\_\_\_\_

ADDRESS \_\_\_\_\_

CITY, STATE, ZIP \_\_\_\_\_

PHONE: \_\_\_\_\_ FAX: \_\_\_\_\_ E-MAIL: \_\_\_\_\_

**Registration Category Circle Your Payment**

[All registrations include continental breakfast, breaks, March 11 lunch and mixer, workshop materials, and field trips]

- |   |  |
|---|--|
| <input type="checkbox"/> Full-time Student with Current School I.D.   | \$ 40.00   |
| <input type="checkbox"/> Speakers and NYS Wetlands Forum Members  | 85.00  |
| <input type="checkbox"/> All Others   | 100.00   |
| <input type="checkbox"/> All On-Site Registrations  | 115.00   |
| <input type="checkbox"/> March 11 Evening Dinner  | 20.00  |
| <input type="checkbox"/> Exhibitor – Postmarked before February 23 (includes one free registration)   | 200.00   |
| <input type="checkbox"/> Exhibitor – After March 23 (includes one free registration)  | 250.00   |
| Exhibitors should contact Jennifer Brady-Connor at<br>518-581-8375 or Jennifer@nyswf.org  |  |
| <input type="checkbox"/> One-Year Forum Membership (includes two annual newsletters, personal<br>invite to Meetings, and occasional member-only events) | 25.00 before January 1, 2003<br>35.00 on/after January 1, 2003 |

**TOTAL ENCLOSED** \$ \_\_\_\_\_

Please make checks out to the New York State Wetlands Forum, Inc. EIN# 14-1723859. Mail checks and this form to New York State Wetlands Forum, Inc., P.O. Box 1351, Latham, NY 12110-1351, or fax to 518-783-1258.

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**Hotel Information:** The Sheraton Saratoga Springs, Saratoga Springs, NY 12866 is conveniently located off Exit 15 of I-87. Please contact the hotel by February 8 to receive reduced room rates of \$95 single and \$110.00 double. Government attendees are offered the per diem room rate of \$75.00 single and \$90.00 double. Reservations may be made by calling 518-584-4000 and referencing the NYS Wetlands Forum conference.

**AVAILABILITY OF SCHOLARSHIPS**

Thanks to a grant from the US EPA Region 2, numerous scholarships are available for this meeting. Preference will be given to those individuals who:

- represent county or local municipal governments and are first-time attendees;
- represent county or local municipal governments with a presentation or poster session; or
- are college students with a presentation or poster session.

**To apply for a scholarship, please complete the information below and return it with your registration form.** A representative of the New York State Wetlands Forum will contact you to coordinate the final details if your scholarship application is approved.

**1. Please check the box if the following represents you:**

- First time attendee
- Representative of local or municipal government with presentation or poster session (please provide abstract and include with registration).
- Student with a presentation or poster session (please complete abstract and include with registration).

**2. Please answer the following questions on a separate sheet of paper:**

How much of a scholarship do you require, and how did you determine this amount?

How do you plan to use the information and contacts you gain at this meeting?

## **(TRUSTEES RELEASE PLAN TO ASSESS HUDSON RIVER RESOURCE INJURIES)**

*[Cont'd. from page 9]*

public availability sessions in October. The trustees will review the comments and may incorporate them into the plan, which will continue to be developed and potentially revised as the damage assessment progresses.

The NRDA Plan for the Hudson River is the third step in the damage assessment process. The first step, a pre-assessment screen of Hudson River PCB contamination, was completed in 1997. The second step, a request for ideas on potential restoration projects, began in 2000 and is ongoing, with trustees continuing to accept proposals.

At the conclusion of the assessment, the trustee agencies will prepare a report that includes the NRDA Plan, public comments, responses to those comments, and additional study plans that were developed during the process, as well as other information relevant to the assessment.

Under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or Superfund), parties that have released hazardous substances to the river and caused injury to natural resources can be held responsible for the costs of restoring the environment. Following an evaluation of the PCB contamination of the Hudson River, the trustees will determine whether to pursue legal action against polluters under the Superfund law. All funds recovered must be designated to the restoration of the river's ecosystem.

The trustees have produced the following documents about the effects of PCB contamination in the Hudson River:

"Injuries to Hudson River Fishery Resources" (June 2001);

"Hudson River Fish Health Assessment" (Fall 2001);

"Progress Report on Hudson River Mammals: Polychlorinated Biphenyl (PCB) Levels in Mink, Otter, and Muskrat and Trapping Results for Mink, the Upper Hudson River Drainage, 1998-2000" (Winter 2002);

"Hudson River Natural Resources Damage Assessment, Floodplain Soil and Biota Screening Sampling Report, February 2002";

"Preliminary Investigations of Bird Injuries" (winter 2002); and "Preliminary Investigation of Snapping Turtles" (June 2002).

The Hudson River Natural Resource Damage Assessment Plan is available at various libraries and other repositories throughout New York State and can be viewed at the following websites:

<http://www.darp.noaa.gov/neregion/hudsonr.htm>.

<http://www.dec.state.ny.us/website/hudson/index.html>.

<http://contaminants.fws.gov/restorationplans/HudsonRiver.gfm>.

NOAA acts as a trustee on behalf of the public to restore coastal and marine resources injured by hazardous substances.

## **HOUSE SUBCOMMITTEE HEARING ON "AGENCY IMPLEMENTATION OF THE SWANCC DECISION"**

On Thursday, September 19 the US Representatives' Committee on Government Reform's Energy Policy, Natural Resources, and Regulatory Affairs Subcommittee held a hearing on "Agency Implementation of the SWANCC Decision." This is not a committee that would normally be expected to hold a hearing on SWANCC and there is speculation that it was scheduled to strongly encourage the Bush Administration to issue guidance.

According to written testimony of Dominic Izzo, the Army Corps' principal deputy assistant secretary for civil works, "The Corps, EPA, and DOJ have been monitoring . . . newly decided cases and have been working closely together in an effort to develop guidance concerning CWA jurisdiction following SWANCC . . . our efforts have focused on determining what categories of water are jurisdictional or not jurisdictional, and where rulemaking might be advisable and necessary to reinforce the appropriate scope of CWA jurisdiction." Izzo also states that the Army and EPA are considering the pursuit of rulemaking to address "jurisdictional status of intermittent and ephemeral streams and waters that pass through man-made conveyances, and wetlands adjacent to these waters."

General counsel of EPA Robert Fabricant added, "The agencies will continue to work closely together to issue appropriate guidance, in the form of internal policy statements and/or proposed revised regulations as soon as possible."

The Committee on Government Reform has provided the testimony of most participants on their website, <http://reform.house.gov/reg/hearings/index.htm#September192002>. Unfortunately the testimony of Vermont Law School Professor Patrick Parenteau and former EPA General Counsel Gary Guzy was not included on the official website of the subcommittee but they are posted online at <http://www.aswm.org/fwp/swancc>.

### **AN INTRODUCTION AND USER'S GUIDE TO WETLAND RESTORATION, CREATION, AND ENHANCEMENT"**

The pre-print version of "An Introduction and User's Guide to Wetland Restoration, Creation, and Enhancement," developed by the Interagency Workgroup on Wetland Restoration, is now available online. The "document is designed to achieve two goals: introduce non-technical readers to the basics of wetland projects including planning, implementing, and monitoring; and direct interested persons to documents and resources specific to a particular region or wetland type." It is nicely organized and has lots of good information for the layperson, along with valuable resource and technical appendices and a checklist for going through the process. Preview your copy online at <http://www.nmfs.noaa.gov/habitat/habitatconservation/publications/index.htm> or contact Susan Marie-Stedman, NOAA Fisheries F/HC, 1315 East-West Highway, Silver Spring, MD 20910 301/713-2325 [susan.stedman@noaa.gov](mailto:susan.stedman@noaa.gov)

## **CONSERVING VERNAL POOL RESOURCES: NEW PUBLICATION RELEASED BY REGIONAL CONSERVATION ORGANIZATION**

The Metropolitan Conservation Alliance, a program of the Bronx Zoo-based Wildlife Conservation Society, has just released a new publication entitled "Best Development Practices (BDPs): Conserving Pool-Breeding Amphibians in Residential and Commercial Developments in the Northeastern United States," by Drs. Aram J.K. Calhoun and Michael W. Klemens. This is the latest addition to MCA's Technical Paper Series, which translates concepts in science and land use law into conservation tools for land use decision-makers. By drawing upon scientific literature and the collective experiences of the authors, additional vernal pool and wetland experts, and developers, this publication provides solutions for communities as they seek a balance between economic growth and the conservation of these often neglected, biologically diverse resources.

The manual begins with a description of vernal pool resources and a rationale for conserving vernal pool landscapes. It then outlines methods for conducting town-wide assessments of vernal pools, including aerial photo-based inventories and a technique for ranking individual pools according to their importance as amphibian breeding habitat. Based on the results of the ranking process, specific development and management recommendations are made for three distinct zones: (1) the vernal pool depression, (2) the envelope (upland immediately adjacent to the

pool), and (3) the critical terrestrial habitat (surrounding uplands, required by pool-breeding amphibians during the non-breeding season). Further recommendations are made to reduce the impacts of specific development practices on vernal pool wildlife; these include road and driveway configuration, construction activities, stormwater management, outdoor lighting, wetland creation and mitigation, and post-construction activities. Color photos, illustrations, appendices, and case studies are provided to supplement the concepts provided in the text.

The Metropolitan Conservation Alliance is based in the tri-state New York metropolitan region. Our mission is to integrate science-based information about wildlife and conservation into the land use planning process, to promote awareness of the ecological impacts of sprawl, and to create and disseminate tools that will enable land use decision-makers to maintain ecological integrity while allowing for economic growth. To order our vernal pool publication (at a cost of \$10, shipping costs included), or for more information about our program, please contact us at:

Metropolitan Conservation Alliance  
Wildlife Conservation Society  
68 Purchase Street, 3<sup>rd</sup> Floor  
Rye, NY 10580  
Phone: 914-925-9175  
Email: [mca@wcs.org](mailto:mca@wcs.org)

## **FEDERAL GRANT OPPORTUNITIES**

### **USFWS Distributes More Than \$7 Million in Grants for Recovery Land Acquisition**

The USFWS has awarded more than \$7 million in grants to wildlife agencies in California, Washington and the Pacific Islands to purchase land that will benefit federally threatened and endangered species or federal candidate species. Congress first funded Recovery Land Acquisition grants in 2001 in response to states' and landowners' growing interest in managing their lands in ways that benefit species and their habitats. <http://news.fws.gov/newsreleases/>

### **FWS Seeks Proposals under Two Grant Programs**

The USFWS announced it is seeking proposals for funding under the Bush Administration's innovative Landowner Incentive Program (LIP) and its Private Stewardship Grants Program. These two forward-looking programs, managed by the Service, are making \$50 million in Federal grant money available to State and territorial fish and wildlife agencies, to federally-recognized Tribes and to private landowners under the President's FY 2002 budget. The Administration's budget request for 2003 includes an expansion of funding to \$60 million for the two programs combined. <http://news.fws.gov/newsreleases/>

### **Office of Environmental Justice Small Grants Program—Application Guidance**

EPA has released guidance outlining the purpose, goals, and general procedures for the 2003 Environmental Justice Small Grants Program. EPA will make available about \$1,500,000 in grant funds to eligible organizations (pending availability of funds); \$1,000,000 of this amount is available for Superfund projects only. Applications due 12/18/02 to the appropriate EPA regional office. The purpose of this grant program is to provide financial assistance to eligible community groups and federally recognized tribal governments that are working on or plan to carry out projects to address environmental justice issues. [http://www.access.gpo.gov/su\\_docs/fedreg/a020927c.html](http://www.access.gpo.gov/su_docs/fedreg/a020927c.html)

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