

Understanding Wetlands Protection

Wetlands perform a number of functions that are critical for sustaining New York's environment. They reduce erosion and help prevent floods by slowing surface runoff, filter sediment and chemicals out of water before it enters streams and reservoirs, and are instrumental in recharging groundwater. There are a number of different types of wetlands habitats in New York: **Tidal Wetlands**, such as tidal marshes and swamps and **Non-Tidal Wetlands**, such as marshes, wet meadows, kettle shrub pools, hardwood swamps, and vernal pools. **Riparian corridors** include wetlands which are located next to rivers and streams. There are also a number of agencies, permitting processes, and regulations concerning wetlands protection. While these various overlapping elements may appear to be a tangle of unneeded bureaucracy, federal and state wetlands regulations are critically important to the preservation of important wetlands in the face of increasing development pressures. This article will help sort through the federal and state wetlands regulatory system and present a clearer picture of the wetlands protection system in New York State.

Agencies and Jurisdictions

Three agencies, the **U.S. Environmental Protection Agency (EPA)**, the **U.S. Army Corps of Engineers ("the Corps")**, and the **New York State Department of Environmental Conservation (DEC)**, are largely responsible for the development and enforcement of state and federal wetlands protection regulations.

The EPA's main role is in formulating national environmental policy, including policy concerning wetlands protection.¹ There are several federal laws which contain provisions for the preservation of wetlands. The 1977 **Clean Water Act (CWA)** is the most important federal regulation. It mandates the regulation, through permitting and legal enforcement, of many activities that are harmful to wetlands. The Act established water quality standards for a number of pollutants and regulates the discharge of wastewater by industry. The CWA also established the National Pollutant Discharge Elimination System (**NPDES**), which contains provisions regulating Municipal Separate Storm Sewer Systems ("**MS4s**"), and requires municipalities to prevent or reduce discharge from storm water systems into "receiving waters."² EPA also develops the general structure for regulation and enforcement of environmental legislation, dictating the roles of the other main agencies. The EPA also has some say in selecting the criteria other agencies will use to evaluate the merit of development projects and potentially harmful activities in protected areas.³

Another piece of Federal regulation, the 1985 **Food Security Act**, contains a series of "Swampbuster" provisions which create economic disincentives for farmers to convert or fill wetlands.⁴

Acting as the main enforcement agency for wetlands protection, the U.S. Army Corps of Engineers is responsible for the day-to-day regulation of any activities which could damage waters under its jurisdiction.⁵ Section 502 (7) of CWA extends the jurisdiction of the Corps to "all waters of the United States"⁶ — a term whose that is defined in the Code of Federal Regulations as all waters, including wetlands, implicated in "interstate or foreign commerce," those that cross state boundaries, and all wetlands adjacent to these waters.^{7, 8} The current definition of waters of the

¹ "Wetland Regulatory Authority," EPA <http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf>

² "Stormwater Frequently Asked Questions," EPA <<http://cfpub.epa.gov/npdes/faqs.cfm#19>>

³ "Wetland Regulatory Authority," EPA <http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf>, EPA.

⁴ "Food Security Act of 1985 Summary, *The Center for Regulatory Effectiveness* <http://www.thecre.com/fedlaw/legal14coast/food_security_act_of_1985_legal_matters.htm>

⁵ 33 Code of Federal Regulations Part 320.1, accessed at <<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/33cfr320.htm#320.1>>

⁶ Clean Water Act Section 502(7), accessed at <http://www.epa.gov/region5/water/pdf/ecwa_t5.pdf>

⁷ 33 Code of Federal Regulations Part 328.3, accessed at <<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/33cfr328.htm#328.4>>

⁸ Part 328.3.a.3 includes all other intrastate waters, including wetlands, which could affect interstate or foreign commerce; Part 328.3.a.7 includes wetlands adjacent to all above-listed waters, if they are not wetlands themselves. Personal correspondence, Laurie Machung, July 9, 2006.

United States does not require adjacency for wetlands. However, it is widely acknowledged that Congress intended to protect certain non-navigable waters in order to restore and maintain the “chemical, physical, and biological integrity of the Nation’s waters.”⁹ Under the auspices of this intention and, more concretely, under Section 404 of the CWA, the Army Corps of Engineers has, for the past thirty years, exercised jurisdiction over many recognized wetlands in the United States.¹⁰

However, the extent of the Corps’ jurisdiction was challenged by a 2001 Supreme Court decision, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*). In *SWANCC*, the Supreme Court held that the Corps had “exceeded its authority” in protecting wetlands, and mandated that the Corps limit its protection measures to waters that either cross state boundaries, are navigable, can be exploited in interstate or foreign commerce, or are directly adjacent to these waters.¹¹ Specifically, the Supreme Court invalidated the use of the migratory bird rule for regulating isolated, intrastate waters, which the Corps widely relied upon to bring isolated wetlands into jurisdiction, thereby removing federal protection of isolated wetlands.

A recent Supreme Court decision, *Rapanos, John et. al. v. U.S./Carabell, June et. al. v. Army Corps of Engineers et. al.*, will further erode the Army Corps’ ability to protect wetlands. The decision vacated and remanded the lower court rulings, with split decisions, offering very little guidance for the appellate court, or any other future courts, to operate under, creating uncertainty in the future of wetlands protection. Two rulings by lower courts which upheld the Corps’ jurisdiction as it appears in the Code of Federal Regulations.^{12, 13} While the Supreme Court decision did not change the operative definition of “waters of the United States,” which determines the jurisdictional reach of the Army Corps, it will delegate much of the authority for determining jurisdiction in toss-up cases to lower courts. It also sends a clear message to developers that the Army Corps’ permitting decisions won’t be enforced by the Roberts Supreme Court, and that fighting court battles to allow development on regulated wetlands may pay off. The Corps may be hesitant to regulate wetlands in difficult cases in the future, in order to avoid costly, time-consuming litigation. As a result of *SWANCC v. Army Corps* and *Rapanos v. U.S./Carabell v. Army Corps*, many New York wetlands habitats that were once safeguarded by the Corps and EPA will no longer receive this protection.

While the DEC protects some of these wetlands, its jurisdiction is limited. Under the 1975 **Freshwater Wetlands Act (FWA)**, the DEC can regulate certain activities on wetlands, including the use of pesticides and filling, logging, construction and drainage projects.¹⁴ However, the FWA only covers wetlands that are 12.4 acres or larger, and a few smaller wetlands of ‘unusual’ local importance.¹⁵ Most of New York’s wetlands are smaller than 12.4 acres and thus fall outside of the DEC’s jurisdiction. Large cuts to the DEC’s budget have further reduced the DEC’s ability to monitor illegal activities within wetlands and enforce the FWA.¹⁶ The elimination of federal protection for many ecologically important wetlands in *SWANCC* widened these gaps in New York’s protection system; as a result around 20% of New York’s wetlands remain unprotected.¹⁷

The **Clean Water Protection and Flood Prevention Act**, a bill currently residing in the State Senate Committee on Environmental Conservation, could help patch some of the gaping holes in wetlands protection by extending DEC’s jurisdiction to cover all freshwater wetlands larger than

⁹ *Federal Register* Volume 68 no. 10, 15 January 2003

¹⁰ Clean Water Act, Section 502(7), accessed at <http://www.epa.gov/region5/water/pdf/ecwa_t5.pdf>

¹¹ *Federal Register* Volume 68 no. 10, 15 January 2003

¹² 33 Code of Federal Regulations Part 328.3, accessed at <<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/33cfr328.htm#328.4>>

¹³ “Justices Divided on Protections Over Wetlands,” *The New York Times*, 20 June 2006.

¹⁴ “A Brief Description of the Freshwater Wetlands Act and What it Means to Wetlands Landowners”, *New York State DEC* <<http://www.dec.state.ny.us/website/dfwmr/habitat/wetdes.htm>>

¹⁵ “A Brief Description of the Freshwater Wetlands Act and What it Means to Wetlands Landowners”, *New York State DEC* <<http://www.dec.state.ny.us/website/dfwmr/habitat/wetdes.htm>>

¹⁶ “Weakening the Clean Water Act: What it Means for New York,” *Environmental Advocates of New York*, 10 April 2006 <<http://www.eany.org/issues/water.html>>

¹⁷ “Water,” *Environmental Advocates of New York*, 10 April 2006 <<http://www.eany.org/issues/water.html>>

one acre,¹⁸ however, many of our ecologically important but small (<1 acre) and isolated vernal pools, fens, and other small wetlands will still remain unprotected under this proposed legislation. The bill has already been passed by the State Assembly but despite several years of deliberation inside and outside of committee, it has not yet passed the Senate. This crucial bill is unlikely to pass without vocal public support.

A growing number of towns now have passed their own wetland ordinances that protect small, isolated wetlands. Local ordinances may ultimately protect wetlands more effectively than State or the Federal oversight. While the State protects a 100-ft adjacent area around jurisdictional wetlands, the Corps mostly does not (although these are sometimes included in permit conditions). But town ordinances can be written to protect small, isolated wetlands, as well as large wetlands, and to establish protected buffer zones around all of them.

Permitting

Given the overlapping and limited jurisdictional reach of the Army Corps and DEC, projects in wetlands can require a permit from either the Corps or DEC, both, or neither, as is frequently the case. For instance, a small wetland which isn't adjacent to any body of water implicated in interstate commerce (through fishing or the use of water in industrial processes, for example) may not be protected by either DEC or the Corps, therefore construction projects and other potentially harmful activities can proceed in these wetland without regulation. A large (> 12.4 acre), isolated wetland would most likely be afforded protection by the DEC (especially if listed on the Freshwater Wetlands map), but not necessarily by the Corps. A large wetland adjacent to a navigable waterway may be protected by both the DEC and the Corps.

Under the Freshwater Wetlands Act and Section 404 of the Clean Water Act, only certain activities within wetlands require permits from the appropriate agency. DEC and the Corps weigh permit decisions based on the ecological importance of the wetlands in question, the potential impact the proposed activities will have on the integrity of the wetlands, and the potential benefits the activities may have for the community. Both agencies generally permit maintenance activities, such as the reparation of structures and roads, and seek to mitigate (but not always prevent) damage to wetlands caused by new, large-scale construction, or the dumping of materials in wetland habitats. The Corps frequently issues "general" permits, which aren't reviewed individually, for common or small-scale activities.¹⁹ Intensive activities with potentially damaging impacts on wetlands are usually subjected to a more rigorous individual review. Upon reviewing a project proposal, the Corps or DEC may require developers to change the location, size, methods or materials used in their project in order to reduce its anticipated ecological impact. However, the Corps denies less than 3% of all permit applications, and often does not pose a significant barrier to development.²⁰

Delineating Wetlands

Both DEC and the U.S. Fish and Wildlife Service (FWS) publish maps of wetlands areas.²¹ FWS is in the process of conducting a **National Wetlands Inventory (NWI)**, and is preparing maps of wetlands for the entire country, while DEC's **Freshwater Wetlands maps** generally apply to New York wetlands over 12.4 acres in size. Both the DEC and the FWS use aerial photography to classify wetlands habitats, and supplement this observation with limited field testing.²²

¹⁸ "Senator Marcellino's Bill to Expand Wetlands Protection Moved out of Committee," *Bedford Audubon Society*
<<http://www.bedfordaudubon.org/conserv/05-04-05-wetlands.html>>

¹⁹ "Wetlands Permitting FAQs", *U.S. Army Corps of Engineers*
<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/frequently_asked_questions.htm#waste>

²⁰ "Wetlands Permitting FAQs", *U.S. Army Corps of Engineers*
<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/frequently_asked_questions.htm#waste>

²¹ Biodiversity Assessment Manual for the Hudson River Estuary Corridor, Hudsonia Ltd, 2001, p. 57

²² Biodiversity Assessment Manual for the Hudson River Estuary Corridor, Hudsonia Ltd, 2001, p. 57

The DEC Freshwater Wetlands Maps and the FWS/NWI maps can be helpful in planning a field study or observation of a suspected wetlands area, but should not be relied upon to delineate the boundaries of wetlands.²³ Even the FWS/NWI maps, which include many smaller wetlands, “are not of sufficient accuracy to depict actual federal wetlands jurisdictional boundaries, and should not be used for that purpose,” according to Hudsonia Ltd., a highly esteemed environmental research organization located in the Hudson Valley.²⁴ The most reliable way to determine if an area is a wetland, according to the Corps, is to look for several indicators:

- the presence of hydrophytic vegetation (plant community adapted to growing in hydric soils),²⁵
- hydric soils (soils that are saturated for a long enough period to create anaerobic conditions),²⁶ and
- the frequent presence of water at or near the wetlands surface.²⁷

If a property owner suspects that there may be wetlands on their property based on the above criteria, and is planning any type of construction or project, they should contact the Army Corps or DEC and request a professional delineation of wetlands on their property. Delineations are conducted by department biologists, and are free, although waiting periods for delineations are usually long (up to five years) due to limited staffing. Alternatively, the Army Corps or DEC will provide a list of qualified delineators who may be hired to perform the delineation. The delineator should then provide the reviewing agency with their report, including both the raw data and their findings, for verification.

Dylan Cate is an Urban Studies major at Vassar College. His internship with Hudson River Sloop Clearwater in Spring 2006 focused on wetlands regulations.

²³ Biodiversity Assessment Manual for the Hudson River Estuary Corridor, Hudsonia Ltd, 2001, p. 57

²⁴ Biodiversity Assessment Manual for the Hudson River Estuary Corridor, Hudsonia Ltd, 2001, p. 58

²⁵ Food and Agriculture Organization of the UN <<http://www.fao.org/docrep/W7224E/w7224e04.htm>>

²⁶ “Hydric Soils Overview,” National Technical Committee for Hydric Soils <<http://www.pwrc.usgs.gov/wli/whited/introterm.ppt#257>>

²⁷ “How we delineate wetlands,” U.S. Army Corps of Engineers <<http://www.mvn.usace.army.mil/ops/regulatory/recwet.htm>>