New York State Bar Association

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NYSBA

Memorandum in Support

ENVIRONMENTAL LAW SECTION

ELS MEMORANDUM #2 May 16, 2007

S. 3835	By:	Senator Marcellino
A. 7133	By:	M. of A. Sweeney
	Senate Committee:	Environmental Conservation
	Assembly Committee:	Environmental Conservation
	Effective Date:	Immediately

AN ACT to amend the environmental conservation law, in relation to freshwater wetlands and repealing section 24-1305 of such law relating thereto

LAW AND SECTIONS REFERRED TO: Article 24 of the New York State Environmental Conservation Law

MEMORANDUM PREPARED BY THE ENVIRONMENTAL LAW SECTION

THE SECTION SUPPORTS THIS LEGISLATION

The Executive Committee of the Environmental Law Section of the New York State Bar Association voted at its Annual Meeting on January 26, 2007 to recommend to the Governor and the Legislature that New York amend the Freshwater Wetlands Law and move pursuant to 40 CFR, Part 233 to assume the administration of the federal freshwater wetlands program in New York.

We recommend this in order to accomplish both environmental protection for the wetlands that the federal program omits, and a better business climate for our State.

PURPOSE OR GENERAL IDEA OF BILL:

We recommend that the State Freshwater Wetlands Act be amended to enable New York to assume the federal freshwater wetlands program.

SUMMARY OF SPECIFIC PROVISIONS PROPOSED:

We recommend that such an amendment to the State Freshwater Wetlands Act include the following elements:

- require the Department of Environmental Conservation to seek to assume the federal wetlands program administration pursuant to 40 CFR 233;

- lower the jurisdictional threshold for regulation of freshwater wetlands from the current 12.4 acres to conform to the federal standard, which has no lower size limit;

- adopt the federal standards for wetland delineations;

- amend the wetland definition to conform with the federal definition;

- retain the New York State wetland buffer provisions for wetlands of 12.4 acres or larger, and for wetlands of unusual local importance;

- request the Attorney General to prepare an analysis for the EPA to determine the adequacy of the laws of New York to allow it to assume the program;

- request the Governor to request assumption of the federal wetlands program; and

- direct the Department of Environmental Conservation to prepare a Memorandum of Agreement with the Regional Administrator of the U.S. Environmental Protection Agency, Region 2, for assumption of the federal 404 wetlands program pursuant to 40 CFR 233.

DISCUSSION:

Federal wetlands program authority was narrowed in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 US 159 (2001). The Supreme Court ruled that the federal commerce clause, which was the constitutional authority that Congress relied upon in enacting the Clean Water Act, did not extend to isolated headwater wetlands that are used by migratory birds. More recently, the multiple opinions in the Supreme Court case, *Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers*, 126 S.Ct. 2208 (2006), raised many questions concerning the extent of Clean Water Act jurisdiction for wetlands and headwaters. Justice Scalia and three other justices joined in the opinion that U.S. Army Corps jurisdiction does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. Justice Kennedy concurred in a separate opinion. There are, therefore, freshwater wetlands that may no longer be protected by the U.S. Army Corps.

The New York State Freshwater Wetlands Act is based on the State's ownership of the waters of the State. It regulates development of wetlands that are 12.4 acres or larger in size, or of unusual local importance. It also provides for a buffer of 100 feet around the wetlands. The State law requires the DEC to propose maps and map revisions for wetlands it deems qualify for regulation, notify the landowner of its intension to map, hold a hearing and make a determination. Smaller wetlands are infrequently mapped in this system.

Therefore there is a regulatory gap, even with two programs, that fails to regulate isolated wetlands of less than 12.4 acres. This gap led to several previous bills before the State legislature, but none have found sufficient support to become law.

Instead, many local governments have enacted a wetlands law of their own. These laws are consistent with Article 24 of the Environmental Conservation Law, which does not preempt local jurisdiction asserted either as a delegated program, of which there are few, or as a part of local land use law.

This welter of wetlands laws is creating a problem in New York with which our Section members are well acquainted. Despite the gap in coverage for some wetlands, there are more commonly wetlands where developers face a multilayered approval process. Those who need wetlands permit approvals can be faced with three different permits, one federal, one state and one local, each with different definitions, procedures, standards and practices. This is expensive and wasteful. It is a disincentive to development.

If New York State were to assume the federal program, the result would be the protection of important wetlands without the State having to demonstrate a nexus to interstate commerce. Assumption would streamline the review process for developers, who would no longer have to apply to the federal government for freshwater wetlands permits.

The result would be a more predictable and uniform procedure for the protection of wetlands and for development, with less expense and waste. But State assumption does not eliminate federal jurisdiction completely. The Act provides for the substitution of state for federal jurisdiction over "navigable waters .... other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce .... including wetlands adjacent thereto." 33 USC § 1344(g)(1). The U.S. Army Corps of Engineers retains jurisdiction in tidal waters and their adjacent wetlands and navigable waters and their adjacent wetlands. The Corps would continue to regulate navigable waters under Section 10 of the Rivers and Harbors Act of 1899 (§10 has no assumption provision).

State assumption of the federal program would also lessen the impetus for local governments to pass their own laws and further burden both the developers and the local governments with the expense and difficulties of administering a wetlands program locally.

The above referenced bill, A-07133, includes some but not all of the amendments that would be necessary for the State of New York to seek assumption of the freshwater wetlands program. We urge that the bill be amended as recommended in this memorandum to enable such assumption.

Memorandum prepared by: New York State Bar Association Environmental Law Section

Section Chair: Walter Mugdan