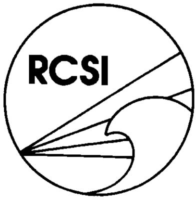

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The New York State Freshwater Wetlands Act of 1975

By: George G. Berg
September 1975

THE ROCHESTER COMMITTEE FOR SCIENTIFIC INFORMATION
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Summary

The Freshwater Wetlands Act is summarized. It is a law with important precedents for statewide land use planning, but with weak powers of enforcement. The most critical loopholes were left for potential misuses of wetlands in farming. The Commissioner of the Department of Environmental Conservation will produce a map and a set of rules to carry out the law. The entire impact of the Act depends on his choice of small wetlands to put on the map, and on details of the rules.

Introduction

Several bills regulating the uses of freshwater wetlands in New York State were introduced to the State Senate by Senators Eckert, Smith and others, and to the Assembly by Messrs. Hoyt, Abrahamson and others. Governor Carey also proposed a wetlands protection bill. The Governor's and the Legislators' bills were not alike. The RCSI testified at a hearing concerning changes in the bills that we believed would insure the preservation of the ecologically important wetlands (see News Note to Members, May 1975). The bills have now been revised and a compromise version has been signed by the Governor. This Bulletin is a digest and discussion of its key provisions.

A law is divided into numbered parts, called "Titles". All the Titles of this bill are listed below. Some numbers are missing because they did not appear in the law.

CONTENT:

Name: "Freshwater Wetlands Act", Article 24 of the Environmental Conservation Law. Effective date 1 September 1975.

Title 1. Freshwater wetlands are declared an invaluable public resource. It is now the policy of the State to conserve them and to prevent their further despoilation. The benefits to be preserved include flood control and recharge of ground water, wildlife habitat and breeding, natural pollution abatement and erosion control, recreation and open space, and nature study. The boundaries of wetlands are defined in terms of water levels and in terms of characteristic patterns of vegetation.

COMMENT:

This law set two important precedents: 1) Wetlands boundaries were defined in ecological terms, rather than in simple surveyors' terms of contour and elevation (see RCSI Bulletin #84 in which Dr. Forest explained the need for ecological boundary markers for protected land areas); and

2) This is a case in which the State has assumed the duty of imposing a statewide standard of environmental conservation on the zoning powers of the local governments.

CONTENT:

Title 3. A tentative map of wetlands in New York State will be published by the Commissioner of the Department of Environmental Conservation. Included in it will be all wetlands of 12.4 acres or more, and smaller wetlands "having local importance for one or more of the benefits" set forth in this law. Each owner of a designated wetland will be notified (and given details of boundaries if he asks); public hearings will be held; and finally an official map will be published. Wetlands shown in that map will be protected and regulated.

COMMENT:

Some of the work toward preparing the map has already been done because the Department of Environmental Conservation (DEC) began preparing an inventory of wetlands in 1974. The Monroe County Environmental Management Council has mapped most wetlands for Monroe County and completed field surveys for about 70 mucklands. The 12.4 acre limit is a response by the Senate to testimony by environmental organizations because the original Senate-Assembly bill set the limit at 20 acres (see News Note to Members, May 1975). It is also a compromise because the Governor's proposed bill set a minimum size of 6.4 acres. The 12.4 acre limit fails to protect many smaller wetlands that are ecologically useful and their fate is now in the hands of Commissioner Reid. How will he interpret the term "unusual importance"? In the light of past RCSI bulletins, this term should be applied to every wetland at the entry of a stream into a lake and every wetland on the shoreline or floodplain of a river or stream.

CONTENT:

Title 5. Wetland protection is placed in the hands of city and town and village governments. If they adopt local ordinances to enforce this Act within one year of its effective date (Sept. 1, 1975), they get the authority to administer the permits (Title 7, below). If they fail, the County may take over. The DEC may take over if the Commissioner finds that the Act is not properly enforced by a local government or if he reserves a class of wetlands for management by the DEC. The Adirondack Park Agency will administer the Act in the Park.

COMMENT:

The Commissioner is allowed to enforce the Act, but the law does not put him under any obligation to do so. There is no provision for interested citizens to request action, if a wetlands is being destroyed contrary to the Act. Here, as in all parts of the Act, the word "may" is used in place of the word "shall" in prescribing enforcement actions. This puts an undue political pressure on the Commissioner in his dealings with local governments.

CONTENT:

Title 7. Permits and Moratorium. A permit is required for any activity that could dry up, dig up, pollute, or otherwise impair a wetland listed on the official map, and this requirement extends out to activities a hundred feet beyond the mapped boundary. The hundred foot setback can, however, be changed to "any greater or lesser distance, as determined by the appropriate local government". Legally, this is a major loophole for abuses of the Act.

The Commissioner of the DEC will make the rules for giving out permits. Permit applications will cost a fee, and the procedure will include public notices in the papers and a public hearing. The applicant has to prove that his activity is in accord with the Freshwater Wetland Act. Permits may be revoked or suspended for non-compliance and bonds may be required. As long as the map is not ready, all freshwater wetlands are protected from activities banned by the Act. An owner may find out ahead of time, whether his wetland will be omitted from the map (and exempt from regulation), but only if he can demonstrate to the Commissioner that waiting for the map will cause hardship.

COMMENT:

The Act is a strong environmental conservation law, because the burden of proving that a change will do no harm is on the person who would change a wetland; and because the moratorium applies to all wetlands of any size. The hundred foot setback is important in environmental conservation, and law makers may consider extending it from wetlands to all shorelines of streams, rivers and lakes. The Act is weakened, however, by the use of "may" when it comes to enforcing the conditions listed in the permits; and by the long list of exceptions that follows:

CONTENT:

Title 7. Exceptions. (a) Conversion of wetlands for farming and grazing does not require a permit. Instead, farmers have only to notify the DEC of the intended changes. The land drained or dredged under this exemption, however, remains on the map as a wetland, and all other uses are restricted as before, including all construction.

COMMENT:

This exemption sacrifices a large fraction of remaining ecologically important wetlands and fails to make a provision for restoration of mucklands. It provides a legal barrier to development of drained farmlands. The barrier is weak. A stronger law would make sure that a permanent limitation on uses was entered in the property title to every wetland on the map. Elsewhere in the Act (24-0905) the restrictions on the uses of wetlands are called the same as an easement for tax purposes. In any case, there will be enormous pressure to reverse this provision in the future when the wetland is gone and the land is in the hands of a developer.

CONTENT:

(b) Mosquito control activities in wetlands are placed under the authority of the Commissioner; he "may require" modifications. Other public health activities, however, remain under the authority of the Department of Health; the Commissioner "may request" modifications, but that is all.

(c) Planned Unit Developments (PUD) can be exempted from the setback provisions of the Act and from restrictions on most activities -"if local government affirms that such activities will not despoil said wetland". There is no check in the law on the "affirmation", which may be short enough to fit on a rubber stamp.

(d) Permits can be given without a hearing if the responsible authority considers them of minor importance, and if no one objected to the application. The objections by outsiders, however, would have to be in response to a small ad in the paper, because only the owners of adjacent lands and water rights at a wetland will be notified by letter.

COMMENT:

Wetlands have been dried for three main reasons: for farmland, for public health, and for housing. The lawmakers made a major concession to the established interests behind each of these activities. The exception made for PUD appears especially unnecessary as well as harmful to wetlands. It is even contrary to the intent of a federal law which would curb development in flood-prone areas (see RCSI Bulletin #172).

CONTENT:

Title 9. Land use regulations for freshwater wetlands will be made by the Commissioner of the DEC. Local government may adopt equivalent regulations in order to administer wetlands in their own areas or other agencies that manage wetlands may make cooperative agreements with the DEC; but the final responsibility for enforcement of the Act lies with the Commissioner. There will be public hearings before the new regulations take force, and "any person aggrieved by any such order or regulation may seek review" as specified in the next section.

There is also a tax abatement clause, which protects owners of wetlands from being assessed for uses that are forbidden by the regulations.

COMMENT:

The future preservation of New York wetlands, and the pace of progress toward statewide land use planning, will be determined by the land use regulation which Commissioner Reid must write to comply with this law. It is a strong feature of the law that the proposed regulation will be open to objections by all "aggrieved persons", and not just people with special interests. All conservation organizations and planning organizations should prepare now, in advance, to take part in hearings, and should make a special effort to review both the proposed maps and the proposed rules for completeness and fairness. County environmental management councils throughout New York State should follow the lead of Monroe County and get their own wetland surveys done well in advance of the hearings.

CONTENT:

Title 11. An Appeals Board is created, which takes orders from no one, sits as a court of appeals, and can "affirm, remand or reverse" action that authorities take to enforce this Act. This Board has five members (one appointed by the Governor, two by the Commissioner of Agriculture and Markets, and two by the Commissioner of the DEC), and three of the five are lawyers.

An appeal can also be made to the Supreme Court in each county (concerning wetlands in that county). The court has higher authority than the Appeals Board, and will hear appeals from the decisions of the Appeals Boards.

Appeals can be made by any "resident or citizen of the local government". The Act pays special attention to the conflict between the constitutional property rights and the need for protection of wetlands. If the court finds that the land merits protection, but the action amounts to "a taking without just compensation" then the court may allow the Commissioner to buy the land by means of condemnation.

COMMENT:

The provisions for appeals are so one-sided, that they were probably written before the law was amended to keep farms out of regulation. The office of the Commissioner of the DEC is seriously and unfortunately weakened; he is now subject to the authority of a politically appointed board. While the Act provides especially for putting lawyers on this board, it makes no provision for training or competence of board members in the environmental problems with which they will deal. On the contrary, there is only one slot out of five where the Commissioner may place a trained environmental expert, such as a limnologist. The Appeals Board is not needed to resolve disputes over property rights, because the courts will do this. It is not designed to handle technical problems of conservation or flood control. It appears to be a political device, which may do more to stir disputes between departments than it will to resolve them. Legislators should re-examine the need for this board during the next session.

CONTENT:

Title 13 and 23. DEC officials have the right to come in and inspect property subject to this Act. Government officials in charge of wetland management may order a violator to cease violations and to restore wetlands to prior condition. They can not, however, levy fines or take violators to court. Only the Attorney General can prosecute; the courts can levy fines or even put a violator in jail for misdemeanor.

A stronger wording is applied to cases of pollution of wetlands: there the Commissioner "shall take appropriate action" to abate the pollution, and may order cessation of any waste disposal that pollutes.

COMMENT:

In the experience of the RCSI, the strongest enforcement of pollution control and sanitation laws was seen where the enforcing agencies had direct police powers, and where private citizens could take violators directly to court. The next best was for the enforcing agency to use its own legal staff in suing the violators. The weakest and least effective enforcement was seen, where the agency has to wait for the Attorney General to take its case. This Act provides only the last, and weakest means of law enforcement.

General Conclusion

The law provides that, by 1978, the Commissioner will bring before the Legislature his suggestions for changes and/or improvements in the law. This bulletin points out some of the strengths and weakensses of the Act. The real value of the Act will become apparent as we watch what happens to the remaining wetlands in Monroe County and in counties upstream in our watersheds.