

Planning Ulster



Ulster County Planning Board 244 Fair Street, Kingston NY 12401

Local Wetland Regulations Ulster County Open Space Plan

The Ulster County Planning Board (UCPB) has responsibilities for review of local land use regulations under the General Municipal Law of New York State. The UCPB also provides technical assistance to local governments and is involved in construction projects initiated by Ulster County. The following was developed to provide guidance to the County Planning Board in exercising its responsibilities in these areas and to aid communities in their approach to the development of local land use tools and conducting project reviews. This Planning Guide is consistent with the Ulster County Open Space Plan that recommends a coordinated approach that recognizes federal, state and local responsibilities for wetland protection . (See the plan at: www.co.ulster.ny.us/planning/ospace.shtml)

Protection of Wetlands & Local Land Use Controls

Introduction

Wetlands are arguably some of the most important ecological features in the landscape. Seen as the cornerstone of diverse wildlife populations, they are also home to divergent plant species, serve as pollution filters, reduce flood heights and control erosion.

More than half of the original wetlands that existed in the continental US at the beginning of European settlement were

gone by the 1980's. Between the 1950's and 70's it is estimated that more than 85% of the wetlands lost were due to agricultural conversion.

Federal efforts to stop the loss of wetlands are not be found in any specific national wetlands law. Instead, many laws intended for other purposes have been brought to bear on wetland protection. As a result, wetland protection jurisdiction is

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spread over several agencies, policies are continually changing and the interagency coordination required for effective regulation is not always apparent.

Applicable federal wetland protection laws span a time frame from 1899 (Rivers and Harbor Act) to 1991 (Wetlands Reserve Program) and include several executive orders. The workhorse of today's federal wetland protection efforts resides in the Federal Water Pollution Control Act ("Clean Water Act") Section 404 Program. Although wetlands are not directly mentioned in Section 404, The Act grants authority to the Army Corps of Engineers (ACE) to establish provisions to regulate the dredging and filling of materials in the "waters of the United States."

Under this authority, the ACE issued revised regulations in 1975 that defined wetlands, their importance, and required a "404 Permit" for any dredge and fill activity associated with them. In some instances



Bog wetlands, such as the one above, are recognized as a significant habitat type.

New York State has a role in this process through its Protection of Waters regulatory program.

Today, federal policies on wetlands are principally guided by the National Wetlands Policy Forum of 1988. The Forum articulated a "no net loss" concept:

"to achieve no overall net loss of the nation's remaining wetlands base and to create and restore wetlands where feasible, to increase the quantity and quality of the nation's wetland resource base" (National Policy Forum, 1988).

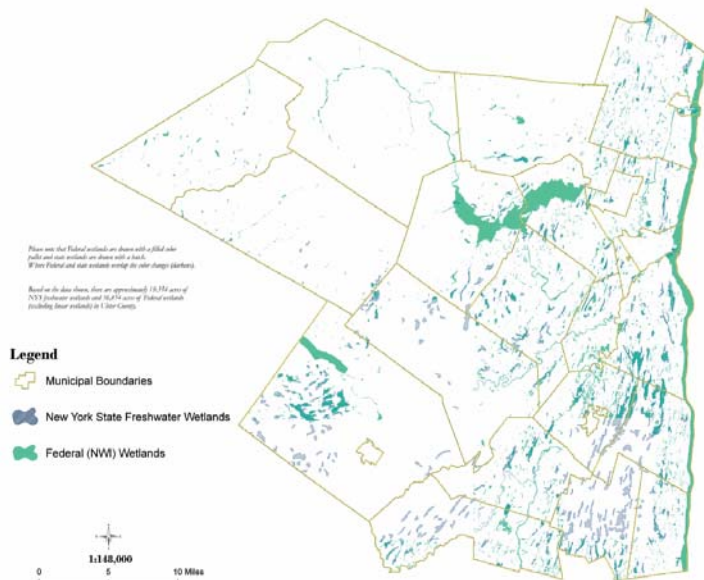
New York State's primary wetland protection statutes are found in the 1971 Tidal Wetlands Act and the 1975 Freshwater Wetlands Act. These acts manage development, dredging and filling around associated wetlands. The Freshwater Wetland Act provides protection for wetlands of 12.4 acres or more and certain smaller wetlands of unusual local importance. The Act is implemented by the Department of Environmental Conservation (DEC) although local governments may also assume the authority to regulate freshwater wetlands under the Act. Mapping requirements are found in 6NYCRR Part 663, permit regulations in 6NYCRR Part 664 and local authority in 6NYCRR Part 665.

The current status of both the federal and New York State regulatory approaches leaves many wetlands of local significance unregulated. DEC regulations are

applicable only when wetland size reaches 12.4 acres and the ACE cannot protect wetlands unless they are connected to a navigable waterway. Federal courts have ruled that wetlands not connected, so called “isolated wetlands” are not within the ACE’s jurisdiction. The ACE regulations also lack buffer requirements and of necessity focus on dredging and filling, often overlooking important habitat issues.

The state and federal regulatory approaches are not aligned with the increasing understanding of the important role wetlands have in protecting landscape scale ecological integrity. In addition to the evident gaps in both, neither manages wetlands from the combined perspectives of water quality, habitat, and land use.

Local governments then should consider their own regulations to manage wetlands from these combined perspectives.



Mapped Wetlands in Ulster County.

To accomplish this, municipalities can:

- ◆ Exercise their existing powers within the broad scope of land use regulations to alter the overall pattern of land development and allowed uses in relationship to sensitive wetland areas; and
- ◆ provide additional protection for wetlands that arise directly from the regulatory gaps in federal and state programs.

One of the most important areas where local wetland protection is needed is prevention of inadvertent filling of wetlands.

Guidance #1: Integrate wetland protection considerations into existing land use regulations wherever possible.

The protection of wetlands and the upland areas that surround them and contribute to their continued viability should be part of local land use controls. Integrating these considerations into existing statutes should be part of a community’s response to wetland protection.

Wetland/water quality protection should be included in the purpose statement of zoning and subdivisions statutes.

Zoning statutes should provide for an overall pattern of development and restrictions of uses around wetlands compatible with their continued viability.

Communities should consider creation of sensitive overlay districts in areas of known wetland concentrations or where multiple natural resources exist that include wetlands. These overlay districts could increase open space requirements, reduce allowed impervious surface coverage, require cluster development, and restrict uses such as mining. Similarly, buildable area calculations could omit wetlands or a portion of their area as meeting density requirements.

Statutes should be amended, if necessary, adding language to ensure that wetland considerations are part of those issues to be considered by local boards in making decisions on site plans, special permits, and subdivisions.

Communities should also utilize the State Environmental Review Act (SEQRA) in addressing wetland protection issues. Local SEQRA reviews should utilize the federal and state policy to avoid, minimize or mitigate, in that order, impacts on wetlands in making project decisions. Project alternatives, including downsizing, should be part of the analysis and findings when wetland disturbance is contemplated by a project proposal.

Guidance #2: Provide sufficient regulation and information to prevent inadvertent filling and disturbance of wetlands.

Small, and sometimes even large wetlands may be filled or otherwise disturbed when permits are issued by local government



Portion of Town of Marbletown Natural Systems Map—Behan Planning Associates, LLC

agencies for as-of-right uses without thought to the potential for wetland disturbance. To prevent this, communities should require wetlands to be identified and considered as part of the permit process for as-of-right uses. Prior to the issuance of building permits and highway access permits, local natural resource inventories and other GIS based information should be utilized to ascertain the presence of wetlands. Having a local wetland specialist certify the presence or lack thereof of wetlands in sensitive/suspect areas of the community is also appropriate.

Communities should also find resources to map locally important wetlands in cooperation with land owners. The effort can be patterned after the work now ongoing in many communities to map important biodiversity areas.

Many communities also lack regulations for clearing and grading. This can allow

substantial disturbance to occur with site work beginning prior to submitting an application. Disposal of fill on sites may also take place without review. Either activity may impact wetlands.

The absence of clearing and grading regulations places other natural resources such as wildlife habitat, archeological resources, and water quality at risk as well.

Clearing and grading statutes are a must for communities and wetland considerations should be part of their structure as should disposal of fill material.

Guidance #3: Regulate clearing of vegetation within wetlands and any established buffers.

Wetlands and the upland area (“buffer”) that surrounds them combine to offer important habitat area. Buffers also provide protection for the wetland as well. DEC regulations prohibit clearing within wetlands and control activities within buffers. ACE regulations do not offer protection for buffers and, with the exception of forested wetlands, do not restrict clearing within wetlands. Local wetland regulations need to close this ACE regulatory gap.

Guidance #4: The width of buffers for wetlands should be tied to the activity and sensitivity of the wetland.

Wetland buffers are an important part of local wetland regulations. Buffer widths in



Vernal Pool— unprotected by either state or federal regulations. Photo by Tom Lautzenheiser.

statutes vary significantly and can be function based or fixed. The use of function based buffers offers a wide range of options to a municipality that fixed buffers do not. Suggestions for consideration include:

- ◆ Minimal non-disturbance buffers with additional setbacks where discretionary zoning permits are required.
- ◆ Matrix based buffers that consider the proposed activity and the size and sensitivity of the wetland resource.
- ◆ Fixed minimal buffer with case by case analysis for possible additional buffer requirements.

Statutes should allow local boards engaged in project review to exercise a degree of discretion as to the size of the buffers. Boards should be guided by wetland and habitat specialists in making their decisions. A local Conservation Advisory Council or Board may also be involved in the review.

Guidance #5: Where projects are large enough to require the preparation of Stormwater Pollution Prevention Plans (SWPPP), hydrologic (water quantity) and chemical (water quality) analysis of stormwater specifically associated with wetland impacts should be required.

Under Phase II of the Environmental Protection Agency's stormwater rules, construction activities that commenced on or after March 10, 2003 that disturb one or more acres of land must be authorized by a SWPPP.

SWPPP's provide hydrologic and hydraulic analysis of all of the structural components of the stormwater system. Information on changes in the hydrologic regime is critical in determining the potential for wetland impacts, yet wetlands analysis is not always considered separately from other stormwater issues in the SWPPP. Local approving bodies should require this information when wetlands are present on the site and local wetland regulations should incorporate this analysis. Communities should also consider incorporating Low Impact Design (LID) standards for the management of stormwater to aid in wetland protection efforts. LID offers a means to create a hydrologically functional landscape for more "natural" stormwater treatment that can enhance wetland areas.



Bioretention: Provide stormwater treatment for runoff from impervious surfaces using bioretention areas or rain gardens that can be integrated into required landscaping areas and traffic islands.

(Source: http://www.dec.ny.gov/docs/water_pdf/bsdcomplete.pdf, 8/8/08)

Guidance #6: Regulation of fills and disturbances should be consistent with the ACE and DEC regulatory structure.

In some instances, fills and disturbances of wetlands may be unavoidable or may be under consideration on the basis of meeting other community objectives. Both the ACE and the DEC provide for disturbance of wetlands via permit. DEC regulations provide considerable guidance on permitted disturbances for both wetland buffers and the wetland itself. An individual permit for filling a DEC wetland is available. The ACE regulations also provide for the issuance of an individual permit. In addition, the ACE regulatory structure utilizes a nationwide permit approach that allows limited filling under various circumstances without an individual permit. Both the ACE and DEC follow the principles of avoid, minimize, or

mitigate, in that order, regarding wetland disturbance. In exercising local control of wetlands, communities should model their regulatory structure for disturbance after the ACE and DEC. In addition, the local regulatory scheme should allow the approving board to consider other community objectives in authorizing disturbance of non DEC or ACE wetlands. Finally, where fills or disturbances are authorized by ACE or DEC through the issuance of an individual permit, community regulations should respect this determination.

Guidance #7: Identify areas acceptable for mitigation.

There may be areas within the community where the creation of wetlands could play an important part in helping to meet community goals such as reducing flooding and increasing biodiversity or groundwater recharge. Communities should consider identification of these areas as part of a local wetland mitigation strategy. Creation of wetlands would be directed to these areas should wetland disturbance is permitted elsewhere. The ACE and DEC should be involved in selection of these areas.

Guidance #8: Recognize the unique circumstances associated with agriculture and other uses.

Agricultural activities enjoy certain exemptions from state and federal wetland regulations that should be included in local statutes when the activity is conducted

within a state certified agricultural district by a farm operation as defined by State Agricultural and Markets law. Other uses or activities should also be considered for special treatment under local statutes. These include, trails, municipal infrastructure (water and sewer lines), and widening or reconstruction of local roads to name a few.



Spotted Salamander at Shaupeneak Ridge, Town of Esopus.

Excerpts on Wetlands from the Ulster County Open Space Plan*:

Definition:

A wetland is a transitional area between aquatic and upland ecological communities, often occurring where groundwater is near or at the surface, saturating the soil and the root zone of the plants that grow there. Wetlands come in many shapes and sizes: open water wetlands, bogs, forested wetlands, wet meadows, shrub wetlands, and vernal pools. Wetlands are among the most valuable natural resources in any community. They provide water retention during floods, filtration of water, storm water runoff control, and productive habitats.

Management Issues:

Requirements differ among federal, state, and local regulations. Mapping is outdated and incomplete and can lead to inadvertent or illegal filling. Public education regarding the ecological and filtration value of wetlands is needed.

Recommendations:

- a. Encourage the establishment of wetland mitigation policies at a county level.
- b. Encourage a coordinated approach that recognizes State, Federal and local responsibilities for wetland and vernal pool protection.
- c. Continue to upgrade and refine the wetland database at local and regional levels.

*The Ulster County Open Space Plan was adopted by the Ulster County Legislature in December 2007. Visit the plan at: www.co.ulster.ny.us/planning/ospace.shtml

Useful Links on Wetlands

US Environmental Protection Agency Wetlands Home Page

<http://www.epa.gov/owow/wetlands/>

NYS Department of Environmental Conservation Wetlands Home Page

<http://www.dec.ny.gov/lands/305.html>

Association of State Wetland Managers

<http://www.aswm.org/>

NYS DEC Environmental Resource Mapper Internet access to wetland mapping

<http://www.dec.ny.gov/ismaps/ERM/viewer.htm>

US Fish and Wildlife Service Digital Data (wetlands geodatabase)

<http://wetlandsfws.er.usgs.gov/NWI/download.html>

North Carolina State University - Overview of Federal Wetland Authority

<http://www.water.ncsu.edu/watershedss/info/wetlands/index.html>



"Spring Thaw" by Warren Hurley, New Paltz.

Ulster County Planning Board
 Box 1800
 244 Fair Street
 Kingston, NY, 12401
 Phone: (845) 340-3340
 Fax: (845) 340-3429
www.co.ulster.ny.us/planning