



STATE ENVIRONMENTAL REGULATION

Expert Analysis

Wetlands Strategy Finalized by New York City

New York City has just re-leased what very well may be the last major environmental regulatory action of the Bloomberg administration: the final New York City Wetlands Strategy.¹ The Strategy was issued pursuant to New York City Local Law 31 of 2009, which called for the creation of a plan to “conserve, protect, enhance, stabilize, restore, and expand wetlands and associated buffer areas.”² The Strategy is intended as a comprehensive effort to meet those goals.

The City’s Wetlands

Much of New York City’s natural waterfront consists of wetlands, generally considered as including swamps, marshes, bogs, and similar areas.³ Wetlands serve a number of important environmental purposes, such as helping to improve water quality and control floods by trapping pollutants and capturing stormwater runoff. Wetlands also provide habitats for local and migratory birds, fish, and other wildlife.⁴

New York City estimates that only 1 percent of its historic freshwater wetlands and 10 percent of its historic tidal wetlands currently exist.⁵ Existing maps indicate that the city currently has between approximately 5,600 acres to a little over 10,000 acres of coastal wetlands.⁶ About 2,000 acres of freshwater wetlands remain from the 224,000 acres that historically existed in New York City.⁷

The city’s tidal wetlands are concentrated in Brooklyn (principally around Jamaica Bay), Queens (principally around Jamaica Bay and its north shore along the East River and Long Island Sound), northwest Staten Island, and the Bronx (along the north side of the upper East River).⁸ The Arthur Kill watershed contains some of the most productive wetland habitats in the city.⁹ The city’s freshwater wetlands are primarily found in some of its large parks (principally Van Cortlandt Park in the Bronx, Alley Pond Park and Forest Park in Queens, and the Greenbelt Park System in Staten Island and along its south shore).¹⁰

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The City’s Goals

The city sets forth dual goals in the Strategy. First, there should be no further net loss of wetlands. Second, there should be improvement of the quality of the city’s remaining wetlands and maximization of their “ecological functions” to the greatest extent possible.¹¹ Toward that end, the Strategy addresses four distinct areas: protection, mitigation, restoration, and assessment.¹²

Protection of Wetlands

The Strategy sets forth several steps relating to the protection of wetlands. First, the Strategy says that the city will increase its protection of vulnerable wetlands, including by transferring more city-owned wetlands to the city’s Department of Parks and Recreation (DPR) and Department of Environmental Protection (DEP).¹³ In fact, the

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Strategy specifically provides for the transfer of 10 city-owned wetlands parcels to the DPR and nine city-owned wetlands parcels to the DEP (for inclusion in the Staten Island Bluebelt system) by Dec. 31, 2013.¹⁴

The city also is planning to acquire “vulnerable” privately owned sites, in particular, privately owned small freshwater wetlands parcels that are not protected by state or federal regulations.¹⁵ Additionally, the Strategy provides for the Department of City Planning to update the

Waterfront Revitalization Program (WRP),¹⁶ which is the city’s regulatory program for balancing potentially competing interests such as economic development, natural resources protection, and public access on the shoreline, to designate additional sites of ecological importance, and to offer greater protection to those sites.¹⁷

Mitigation

There are five distinct steps in the Strategy relating to mitigation of damage to the city’s wetlands, beginning with working with state and federal regulators, to evaluating changes to the mitigation policy and providing guidelines.¹⁸ According to the Strategy, the city will seek to create a “clear mitigation policy” based on existing scientific information that includes guidance on requirements for types of mitigation, ecological criteria and assessment of impacts, amounts of compensation and replacement ratios, financial guarantees, monitoring and maintenance, and geographic service area.¹⁹ The Strategy also provides for the city to seek “creative approaches” to enhance wetlands functions, such as debris removal and hazardous material remediation, that are suited to the city’s urban conditions.²⁰

Another interesting mitigation idea in the Strategy is to create a wetlands mitigation banking or in-lieu fee mechanism for public projects. These are methods of undertaking restoration projects that can provide “credits” to multiple projects that require mitigation.²¹

Mitigation banking allows permit applicants for projects of all sizes to purchase “credits” from a restored, established, enhanced, or preserved wetland, stream, or other aquatic resource. Based on a wetlands assessment, a mitigation bank assigns habitat/ecological value to those resources in the form of credits that can be sold by the bank to permit applicants to offset losses of natural resources due to dredge and fill activities. Bank credits can be disseminated for projects within a delineated geographic region, or service area. Assigning credits and standardizing mitigation ratios (for example, one acre of wetland impact could require three acres of restoration) make the process more predictable.²²

As the Strategy explains, “In-lieu fee mitigation involves permit applicants designating an approved third-party organization to undertake wetland creation, restoration, and/or enhancement.”²³ The

third-party organization, usually a governmental agency or non-profit entity, will have in place an agreement with appropriate regulatory agencies to use the fees from the applicants for mitigation, often complex wetlands restoration projects.²⁴

Restoration

It is costly to restore wetlands, which can require fill removal, re-grading, clean soil placement, native plant installation, erosion control, and invasive plant management. Recent projects in the city have had an average restoration cost of nearly \$500,000 per acre.²⁵ Despite that, the Strategy provides for a rather significant amount of wetlands restoration.

In particular, the Strategy says that, by the end of 2013, the city will work with state and federal regulators to complete investments of nearly \$48 million at 16 sites to restore and enhance nearly 122 acres of wetlands and adjacent habitat, including projects at Meadow Lake, Yellow Bar, Black Wall, and Rulers Bar in Queens; Paerdegat Basin and Calvert Vaux Park in Brooklyn; Inwood Park in Manhattan; Freshkills Park, Pralls Island, Crescent Beach, and Brookfield Landfill in Staten Island; and Pugsley Creek, Soundview Park, Tallapoosa, Turtle Cove, and further upstream along the Bronx River in the Bronx.²⁶

With a combination of public and private resources, the city also intends to create a natural areas conservancy to support the restoration and management of public wetlands throughout the city. The conservancy will also raise funds, advocate for natural areas, promote sustained government investment, and engage with communities.²⁷

Additionally, the Strategy provides for the city to work with state and federal regulators to complete and implement the Hudson-Raritan Estuary Comprehensive Restoration Plan by revising the draft document by identifying and refining restoration and land acquisition opportunities.²⁸ As might be expected, one potential obstacle is funding—the Strategy says that the city will work to seek federal funding for these projects; of course, given the current state of the federal budget, it is not clear whether the city will be able to obtain that funding.

Assessment

Understanding the nature of the problems afflicting wetlands is an important step toward improving the state of the city's wetlands, and "assessment" is one of the four key areas addressed by the Strategy. In that regard, the Strategy seeks to improve wetlands mapping in the city by turning existing preliminary wetlands mapping and analysis into a final wetlands regulatory map for the city.²⁹ New mapping will reflect changes in wetlands location and composition over the past 20 years and, according to the Strategy, provide greater certainty to both regulators and landowners.

In addition, the city intends to evaluate which wetlands are vulnerable to a prospective rise in sea level and examine how to improve the resilience of these areas through restoration or protection efforts.³⁰ The city will install additional Surface Elevation Tables to measure and monitor wetlands changes, will identify opportunities for the inland migration of wetlands as sea level rises, and will

determine data needs and seek funding to conduct horizontal marsh migration analyses.³¹

Moreover, the city will assess the conditions and functions of wetlands to set appropriate priorities and improve management and protection efforts. As provided by the Strategy, it also will implement tidal rapid assessments on city properties to help better characterize conditions and impacts.³²

Finally, the city will develop a research agenda to address wetlands challenges, including undertaking scientific research to understand the causes of habitat degradation and to facilitate a coordinated approach toward corrective actions. The Strategy provides that the city will continue to work with state, federal, academic, and environmental parties throughout the region to develop and implement a research agenda to address wetlands challenges.³³

Conclusion

The Strategy is not the city's first words on its wetlands. The WRP, originally adopted in 1982 and then revised in 1999, explicitly called, in Policy 4, for the city to prevent the net loss of wetlands. Then, in 2007, the city released the Jamaica Bay Watershed Protection Plan to evaluate the current and future threats to the bay and establish strategies to address water quality, restoration ecology, stormwater management, and public education and outreach. In that same year, the city also released a report of the Wetlands Transfer Task Force recommending transfer of city-owned wetlands to the DPR and DEP for protection and management.³⁴ Then, in March 2011, the city released "Vision 2020: New York City Comprehensive Waterfront Plan," which established a goal and initiatives to restore degraded natural waterfront areas and protect

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wetlands and shorefront habitats.³⁵ One can question how successful these efforts were.³⁶

Given the state of the current economy, one also might justifiably wonder whether, or to what extent, the city will be able to implement the Strategy. As just one example, the public-private partnership that has resulted in the very successful Central Park Conservancy and Prospect Park Alliance may not be replicable when it comes to the less mainstream and less visible city wetlands.³⁷

The public will know how the Strategy works, because it provides for the city to report on the progress of these initiatives in existing progress reports, such as the annual report for PlaNYC.³⁸ Additionally, pursuant to Local Law 31 of 2009, the city is obligated to submit a report on the Strategy to the mayor and speaker of the City Council no later than April 22, 2015, and no later

than every fourth year thereafter. It certainly will be interesting to study that report to determine to what extent the city will have been able to stabilize and restore the city's wetlands and obtain the funding needed for the various steps contemplated by the Strategy.

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1. Available at http://www.nyc.gov/html/planyc2030/downloads/pdf/nyc_wetlands_strategy.pdf.

2. New York City Administrative Code §24-528(c)(1).

3. Wetlands are areas "inundated or saturated by surface or groundwater at a frequency and duration sufficient to support vegetation typically adapted for life in saturated soil conditions." Strategy, supra, at 9.

4. Id., supra, at 9.

5. New York City Wetlands Policy Paper, "New York City Wetlands: Regulatory Gaps and Other Threats," January 2009, ("Wetlands Policy"), at 4, available at <http://www.nyc.gov/html/om/pdf/2009/pr050-09.pdf>.

6. Strategy, supra, at 3.

7. Wetlands Policy, supra, at 9.

8. Strategy, supra, at 10.

9. Wetlands Policy, supra, at 11.

10. Strategy, supra, at 11.

11. Id., at 3.

12. Id., at 3-5, 22-39.

13. Id., at 4, 22-23.

14. Id., at 40.

15. Id., at 4, 23-24.

16. <http://www.nyc.gov/html/dcp/html/wrp/wrp.shtml>.

17. Strategy, supra, at 4, 25.

18. Id., at 25-26.

19. Id.

20. Id.

21. Id., at 26.

22. Id., at 26-27.

23. Id., at 27.

24. Id.

25. Id., at 18.

26. Id., at 28.

27. Id., at 31.

28. Id., at 32.

29. Id., at 33.

30. Id., at 34.

31. Id., at 34.

32. Id., at 35-36.

33. Id., at 36-37.

34. <http://www.nycgovparks.org/greening/natural-resources-group/wetlands-transfer-task-force>.

35. Strategy, supra, at 7.

36. It may be worth noting that although wetland protection is referred to in Art. XIV, §4, of the New York State Constitution, wetlands have suffered in New York City—and throughout the state. That provision of the Constitution states:

The policy of the state shall be to conserve and protect its natural resources and scenic beauty.... The Legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution..., the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources.

37. The Central Park Conservancy was founded in 1980 and, between its incorporation and 2007, spent more than \$450 million on restoring and maintaining Central Park. Today, the Central Park Conservancy provides 85 percent of Central Park's \$37.4 million annual budget and hires 80 percent of its staff. The Prospect Park Alliance, founded in 1987, today supports a staff of more than 100 at a cost of approximately \$13 million per year. Id., at 31.

38. See www.nyc.gov/planyc.