

TERRESTRIAL ENVIRONMENTAL SPECIALISTS, INC.

SPRING 2011 NEWSLETTER

Significant Changes to New York's Endangered Species Act Regulations

Effective November 10, 2010 the New York State Department of Environmental Conservation (NYSDEC) revised their Endangered and Threatened Species regulations. Contrary to the Department's position, these regulation changes have significant implications for the mining, utility, and development industry projects throughout New York.

New York's endangered and threatened species are protected by Environmental Conservation Law (ECL) Article 11, Part 0535 (the State Endangered Species Act). Regulations developed pursuant to this ECL are provided in 6 NYCRR Part 182. These regulations provide lists of what animal species are considered endangered, threatened, and species of special concern in the state. It should be noted that protected plants are not affected by these changes, as they are listed in a separate regulation.

The recent changes do not modify the species listed in the regulations. However, other changes to the Part 182 regulations are significant. To understand these changes, the following key terms defined in the regulations are important (underlinings are added for emphasis).

Essential behavior: means any of the behaviors exhibited by a species listed as endangered or threatened in this Part that are a part of its normal or traditional life cycle and that are essential to its survival and perpetuation. Essential behavior includes behaviors associated with breeding, hibernation, reproduction, feeding, sheltering, migration and overwintering.

Occupied habitat: means a geographic area in New York within which a species listed as endangered or threatened in this Part has been determined by the

department to exhibit one or more essential behaviors.

Adverse modification of habitat: means any alteration of the occupied habitat of any species listed as endangered or threatened in this Part that, as determined by the department, is likely to negatively affect one or more essential behaviors of such species.

Lesser acts: means, for the purposes of this Part, harassing, harming, maiming, wounding or collecting any species listed as endangered or threatened in section 182.5 of this Part, any act which is likely to cause the death of or injury to any individual member(s) of a species listed as endangered or threatened in section 182.5 of this Part, any adverse modification of habitat of any species listed as endangered or threatened in section 182.5 of this Part, and any interference with or impairment of an essential behavior of a species listed as endangered or threatened in section 182.5 of this Part.

Take or taking: means the pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting of any species listed as endangered or threatened in this Part, and all lesser acts such as disturbing, harrying or worrying.



There is a process identified in the regulations to request a decision from the NYSDEC as to whether an activity is subject to regulation. This process will determine whether an Incidental Take Permit is required. In reviewing the above definitions, a key component of this determination will be how "essential behavior" is interpreted.

Fairly detailed information is required for the incidental take permit application, including a mitigation plan. Such a permit will only be issued when the proposed mitigation measures will result in a net conservation benefit to the species of issue.

The effect of these changes depend on the NYSDEC's posture on the definition of essential behavior, occupied habitat, and adverse modification of habitat, which will be used to determine what constitutes "take."

TES has extensive experience addressing endangered and threatened species issues throughout New York. This experience will be instrumental in assisting our clients to comply with the new regulations.

Inside this issue:

Corps Regional Supplement Implementation/ National Wetland Plant List Changes	2
Woodland Pool Wildlife	2
New SPDES General Permit for Pesticide Application to Surface Waters of New York	3
Endangered and Threatened Species	3
Energy Production and Distribution for the Utility Industry	3
Corps Proposes Wetland Permit Changes	4

Corps Regional Supplement Implementation/ National Wetland Plant List Changes

Regional Supplement — In March 2010 the U.S. Army Corps of Engineers (Corps) instituted the use of the *Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northeast and Northcentral Region* for all wetland delineations. This manual supplements the 1987 Corps delineation manual. In reality, it provides sweeping changes to the field indicators used to determine whether the vegetation, soils, and hydrology of a given area meet the definition of a wetland.

According to the Corps, the changes provided in the Regional Supplement are to make wetland delineations more scientific and are not intended to alter the wetland boundary established using the Supplement as opposed to the 1987 Corps manual. However, the changes very likely will expand the wetland boundary.

For example, with the hydrology parameter there are primary and secondary field indicators. To establish wetland hydrology, you need to have one primary or two secondary indicators. Several indicators that were considered secondary in the 1987 manual were moved to primary in the Supplement. As a result, hydrology is more easily met. Another change was the elimination of the + and — modifiers to the indicator status rankings for facultative plants. This means that many more plants were added to the list of species considered to be indicative of wetlands. These changes, and many others, can only result in an expanded wetland boundary.

A resultant effect of the Regional Supplement implementation is that wetland delineations will be more expensive. The field data sheets required for delineations using the Supplement are much more time-consuming to complete. This is especially true for the details required for the soil descriptions.

National Wetland Plant List — Another change underway in the federal wetland program is the revisions to the National Wetland Plant List (NWPL). Notice of the revised NWPL was published for review and comment in the Federal Register on January 6, 2011. The NWPL provides rankings of plant species as to their affinity to occur in wetlands. These are called wetland indicator status rankings. When plant status rankings are changed to a wetter category, it can affect whether a given area will be considered to have wetland vegetation.

The NWPL is currently under review and comment and the final status rankings have not yet been established. The significance of these changes in performing wetland delineations will depend on what changes are made. TES biologists participated in the review process by providing comments on the species we felt were incorrectly classified based on our years of experience.

Woodland Pool Wildlife

Woodland pools, also commonly known as vernal pools, are relatively small, isolated wetlands in the forest that fill and dry seasonally. Although small in size and temporary in nature, vernal pools support a high amount of biodiversity and are important links in the food web. While every woodland pool is unique, they usually have four common characteristics: (1)

they are temporary; (2) they are isolated and are not connected to a surface water flow; (3) they do not support fish populations; and (4) they are utilized by certain indicator species.

Certain species have adapted to take advantage of these habitats and are considered indicators of woodland pools. Woodland pool indicator species include wood frog, mole salamanders, and fairy shrimp.

Wood frog

While most people associate frogs with ponds and wet areas, wood frogs actually spend the majority of their lives in upland forest. They use woodland pools for just a few weeks in early spring for breeding.



Mole salamanders



Mole salamanders are so named because they live in underground burrows or under logs, rocks, or leaf litter. Like wood frogs, these amphibians primarily use the forested habitats surrounding their woodland pool breeding grounds. Species of mole salamanders in New York include spotted salamander, Jefferson salamander, and blue-spotted salamander.

Fairy shrimp

Fairy shrimp are tiny crustaceans that live just a few weeks, but their entire lives are spent within woodland pools. Before a pool dries, the females release egg cases which remain on the pool bottom throughout the remainder of the year and over the winter. The eggs hatch when the pool refills, continuing the cycle.



Because vernal pools are relatively small and isolated, they are often not protected by New York State or federal wetland regulations. The federal jurisdiction may change and TES will keep you informed of any changes. Some New England states and municipalities have developed regulations on woodland pools. TES has biologists on staff who have the ability to recognize vernal pools in both wet and dry phases and can identify the organisms depending on them. TES also has expertise in designing vernal pools for wetland mitigation projects.

Photograph courtesy of Jennifer Schlick
www.jenniferscottschlick.com

New SPDES General Permit for Pesticide Application to Surface Waters of New York

In 2006, the U.S. Environmental Protection Agency (EPA) issued National Pollution Discharge Elimination System (NPDES) Pesticide Rules. In 2007, petitions were filed by industry and environmental groups. The U.S. Sixth Federal Circuit Court of Appeals ruled on January 7, 2009 that: (1) the Federal Clean Water Act includes "biological pesticides" and "chemical pesticides" with residuals within the definition of "pollutant," and (2) A NPDES Permit would be required for the discharge of biological and chemical pesticides that leave a residue into Waters of the U. S.

The EPA was granted a two year stay of the decision. The U.S. Supreme Court denied a request by petitioners to review the U.S. Sixth Court of Appeal's decision. The decision will take effect on October 31, 2011.

In response to the Court's decision, on December 22, 2010, the NYSDEC issued a Draft State Pollution Discharge Elimination System (SPDES) General Permit for Point Source Discharges to Surface Waters of New York from Pesticide Application.

The SPDES General Permit "authorizes point source discharges to surface waters of the State by operators from the application to, in or over surface waters of the State of any New York registered pesticide that is labeled for aquatic uses." In addition to this general permit, other permits may be required, including Article 15 (pesticide) and Article 24 (wetland) permits. Under the General Permit, the operators must submit a Notice of Intent (NOI) to the NYSDEC.

Endangered and Threatened Species

TES provides a wide variety of environmental consulting services for our clients. TES biologists are especially skilled in the study of rare, threatened, and endangered species and significant natural habitats.

Environmental permits require due diligence for addressing whether or not endangered and threatened species will be impacted. For example, a general permit condition for Corps permits states "No activity is authorized under any Nationwide Permit which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for, or which will destroy or adversely modify the critical habitat of such species."



Some species have very specific habitat requirements, while others use a variety of habitat types or have more general habitat requirements. TES biologists are

skilled at recognizing potential habitats for a wide assortment of endangered and threatened animals and plants.

If potential, suitable habitat exists, TES will perform searches for endangered and threatened species. Field search efforts vary considerably depending on the species, but usually have seasonal constraints that must be considered in project planning. The searches can include visual observations, call surveys for birds and amphibians, or intense trapping efforts for several days or even weeks.

If endangered or threatened species are found on a project site, TES will help our clients to avoid and minimize impacts to species and their habitats. We work with involved regulatory agencies to prepare mitigation plans. Through negotiations, we often find that compromises can be made to keep projects viable.

Energy Production and Distribution for the Utility Industry

Since our inception, TES has provided a variety of services for energy producers and distributors. TES has performed environmental studies on many major projects including hydroelectric facilities, natural gas and coal fired power plants, wind farms, nuclear power plants, electric transmission and distribution

lines, and natural gas pipelines. Although most of our utility work is in New York and other areas of the Northeast, we have worked on projects as far away as the Susitna River hydroelectric project in Alaska.



Our studies have included wildlife, fisheries, and vegetation surveys; GIS database review and mapping; endangered and threatened species searches and habitat assessments; wetland delineations; vegetation inventories and right-of-way (ROW) vegetation management recommendations; wetland mitigation area design and monitoring; construction monitoring; ROW research; state-issued general permits for maintenance work and herbicide treatments in wetlands; state and federal wetland permitting; Public Service Commission Article VII permitting and FERC licensing and renewals.

TES has worked for a wide range of utility clients including the New York Power Authority, National Grid, New York State Electric and Gas, Iberdrola Renewables, Sithe Energies, Inc. (Dynergy, Inc.), Constellation Energy, Tennessee Gas Pipeline, Talisman Energy USA, Upstate NY Power Corporation, and Otsego Electric Cooperative. TES is clearly one of the leading environmental consulting firms with diverse utility project experience and capabilities.

Corps Proposes Wetland Permit Changes

On February 16, 2011 the Corps published a Federal Register Notice on their proposal to reissue and modify the Nationwide Permits (NWP). The Corps is required to review their NWPs every 5 years. The existing NWPs are set to expire on March 18, 2012, and the recent Notice starts the process of the NWP review.

The intent is to have the new NWPs finalized and published in the Federal Register by December 2011. The final NWPs would then go into effect 90 days from that publication date.



This is to allow state agencies time to make decisions relative to their related Section 401 Water Quality Certification approval.

The recent Notice includes the reissuance and modifications to the NWPs, as well as the General Conditions that apply to the NWPs. The wording of the General Conditions is as important as the NWPs themselves. Corps District offices can also add Regional Conditions to the permits. The Regional Conditions proposed by the Buffalo and New York Districts of the Corps were jointly issued on March 9. The comment period is open until April 25, 2011.

The proposed changes to the NWPs are not as sweeping as they have been in the past. Generally, they are fairly minor, but there are some changes of importance to both the NWPs and the General Conditions. They are also proposing two new NWPs for renewable energy generation projects.

TES has updated the design of our website.

Please check it out at

www.tesenvironmental.com

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