May 8, 2019

A.3658 (Englebright)/S.5576 (Mayer)

Title: An Act to amend the Environmental Conservation Law in relation to freshwater wetlands and repealing section 24-1305 of such law relating thereto.

Provisions: A.3658 proposes several important amendments to strengthen and improve New York's freshwater wetland protection law, especially as the Trump administration rolls back crucial federal protections within New York. The bill amends the definition section of the law to allow New York State Department of Environmental Conservation (DEC) to protect smaller wetlands. Existing law regulates wetlands that are 12.4 acres and larger. Smaller wetlands may be subject to regulation if these wetlands are deemed to be of “unusual local importance” by the Commissioner of DEC. A.3658 would make wetlands one acre or larger subject to regulation as well as smaller wetlands that are adjacent to water bodies, or those that are deemed to be of significant local importance by the DEC Commissioner.

The bill also reforms the use and effectiveness of New York’s freshwater wetland maps. Currently, in order for a wetland to be subject to regulation under the law, it has to be delineated on existing freshwater wetland maps prepared by DEC after lengthy public comment. Most of these maps have not been updated in over twenty years making them significantly incomplete. Map amendments conducted by the DEC in 2005 for Putnam and Dutchess Counties included an additional 5,450 acres not present in the original mapping. A 2009 survey of the Genesee valley, the Wallkill watershed, and the Oswego/Onondaga watersheds produced over 50,000 acres of wetlands not currently on official DEC maps. But political pressure from land developers has prevented the DEC from releasing these maps to the public – essentially blocking them from state protection. **Although not an implicit part of the legislation, the legislature should be pressuring the DEC to finally make these maps public.** This bill would change the definition of “wetland” so that wetlands meeting the environmental criteria in the law would be subject to regulation without the requirement that they also appear on DEC’s wetland maps. Other changes proposed by the bill include eliminating the current four-part wetland classification system and removing a provision of current law that grandfathers subdivisions and other activities in wetlands that were permitted prior to the passage of the law in 1975. Finally the bill would require that permits issued by DEC be included in the deed for the property. This provision will ensure that future prospective purchasers receive notice that structures on the property were constructed in wetlands.

Statement in Support: On January 9, 2001, in Solid Waste Agency of Northern Cook County v. United States, (SWANCC), 531 U.S. 159 (2001), the U.S. Supreme Court decided by a vote of 5-4 that the US Army Corps of Engineers (Corps) did not have authority under section 404 (the dredged and fill material permit program) of the Clean Water Act to assert jurisdiction over wetlands that were considered waters of the US solely due to their use by migratory birds.

Prior to the SWANCC decision, the Corps asserted comprehensive regulatory jurisdiction over activities that threaten wetlands. After the SWANCC decision, the Corps limited the waters over which it asserts jurisdiction to “waters of the United States,” defined as tidal, interstate and navigable water bodies and their adjacent wetlands. Wetlands are considered to be adjacent and subject to federal jurisdiction if they are connected by surface water to waters of the US. Wetlands that are not
connected by surface water to waters of the US – so-called isolated wetlands – are no longer afforded federal protection. A survey of Corps records conducted by the Natural Resources Defense Council in 2004 found 183 instances in which the Corps allowed unregulated destruction of wetlands that previously would have been federally regulated prior to SWANCC. Since then both the Buffalo and New York District Offices of the Corps websites listed a growing number of wetlands that are no longer afforded protection by the federal wetlands protection program. Through 2015 more than 730 wetlands through direct applications for dredging and development have lost protection in New York State. The New York Wetland Protection Act (ECL Article 24) was passed by the legislature and signed into law in 1975. Article 24 establishes jurisdiction for DEC to regulate land use in wetlands that are on the State wetlands map. DEC is directed to place on the map, wetlands that are 12.4 acres or larger, or wetlands that are of unusual local importance. New York’s wetland protection program overlaps with the federal program for wetlands that are 12.4 acres or larger and in limited circumstances for smaller wetlands as well. Up until now, the federal program nearly universally regulated wetlands that fell below the 12.4-acre threshold. In the aftermath of the SWANCC decision, however, so-called isolated wetlands that fall below the 12.4-acre threshold will only be protected in those limited instances where DEC has found that the wetland is of unusual local importance.

In May 2015, under the direction of the Obama administration, the EPA released a new rule on the definition of "waters of the United States" (WOTUS), which clarified, that, indeed, isolated wetlands and intermittent headwater streams are under the regulatory control of the federal government. On February 28, 2017 President Trump signed an executive order rolling back Obama’s clean water rule under the Clean Water Act, once again endangering huge swaths of NY’s wetlands and suggesting even greater cut backs in enforcement by the Army Corps of Engineers. Currently, EPA is holding public comment on the Trump Administration’s "Dirty Water Rule" and there is no better way for NYS to respond than enacting law that guarantees protection for all the state’s wetlands.

Protection of wetlands is a vital issue for New York’s environmental quality and quality of life. Wetlands perform a variety of important functions that benefit both people and the natural world. For example, wetlands soak up water run-off from rain and snowmelt, preventing floods. Studies by the U.S Fish and Wildlife Service show that an acre of wetland can store more than 1.5 million gallons of floodwater. A study by the Illinois State Water Survey found that destroying just 1% of a watershed’s wetlands increases total flood potential in the watershed volume by almost 7%. Clearly, filling wetlands increases the risk of flood. Protecting people from flooding is one compelling reason to protect wetlands.

Water that is held in wetlands percolates into the ground, replenishing aquifers that serve both private and municipal water systems. Wetlands also filter out contaminants, protecting water quality in streams, lakes and rivers. This function of wetlands is especially important for municipalities that rely on surface supplies of water, like New York City and Albany. Rare migratory birds species as well as a myriad of reptile, amphibian, and invertebrate species rely on wetlands as places to live and find food. In addition, the flood control and purification functions of wetlands help to maintain the water quality and flow in streams and rivers necessary to support healthy populations of fish.

Protecting New York’s wetlands promotes flood control, water purification and habitat. In addition, there are consumer protection purposes that are served by protecting wetlands. In numerous cases, New Yorkers who have purchased homes that have either been built in filled wetlands or adjacent to filled wetlands have suffered flooding and in some instances structural damage to their homes. In order to preserve the valuable environmental and public safety functions performed by wetlands, and in light of the anticipated rollbacks in regulation by the federal government, New York must expand the jurisdiction of its wetland protection law to cover smaller wetlands.

Sierra Club Atlantic Chapter Strongly Urges Your Support of A.3658/S.5576