

## MEMORANDUM

To: Town Board, town attorney, town engineer  
From: Susan Siegel  
Re: Comments on Draft #2 of proposed new wetlands law  
Date: February 27, 2017

The following are general comments only and would need to be fashioned into legislative language by the town attorney. I am making these comments in advance of a public hearing in order to give members of the Town Board and staff ample time to consider them prior to the Board finalizing a draft that will be advertised for a public hearing and in order to avoid making substantive comments at the "11<sup>th</sup> hour" when Board members may consider it too late to make any changes to the version of the proposed law that is the subject of the public hearing.

I would welcome an opportunity to discuss these comments in greater detail when the Board discusses revisions to draft #2 in a work session format.

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### **Definition: Threshold size for wetlands (178-4)**

Both the NYCDEP and the Conservation Board have expressed deep concern about this provision. The current 1,000 sf threshold should be kept.

One of the major pluses in the proposed ordinance is that it incorporates the concept of evaluating a wetland's function. But, in many instances a wetland's function may be even more important than its size, a point emphasized by both the DEP and the CB. A small wetland can be significantly more important than a larger one.

While the wetlands expert at the Westchester County Planning Department was specifically directed not to review draft #2, the expert did review the proposed Lewisboro law – at the request of the town's supervisor. And the expert made the same comment about size and function.

To say that Yorktown should follow the U.S. Army Corps of Engineer's definition of a wetland is a non sequitur; the Hallocks Mill, Hunters Brook, or Barger streams are not the Mississippi River. It is also hypocritical to argue that Yorktown should follow the example of other towns that use 0.1/acre as a threshold when the Board totally ignores the laws of these very same towns on other issues.

Further, it should be noted that while New Castle's wetland's law applies to wetlands of 0.1/acre or greater, the law also includes a provision that recognizes the importance of smaller wetlands when it states: "Any area either larger or smaller than 1/10 of an acre, meeting all other requirements of a wetland, within 100 feet of other similar areas shall be considered as one wetland if the total of the areas is greater than 1/10 of an acre."

### **Functional analysis**

As noted above, I fully support the concept of incorporating a functional analysis into a new wetlands law. But — let's be honest. Assessing the function of a wetland is very subjective. For that reason, I suggest adding language to the law requiring that the functional analysis be done by the independent consultant, paid for by the applicant.

### **Applicability of the law**

Section 178-6 (15) says that the town does not need a wetlands permit to remove trees on town owned property and repair or maintain an existing stormwater facility. Are there any circumstances under which the town will need a wetlands permit if it wants to undertake an otherwise "regulated" activity" on town owned land, such as constructing or installing a new stormwater facility, dredging, grading, excavating or removing materials in order to achieve some town purpose? Who will review the town's plans? Will abutting private property owners, and the public, be notified about the town's planned activity?

### **Wetland delineation (178-5)**

I suggest you review the proposed language as it appears to contain some contradictions and may be confusing. For example, the first sentence says, “the boundaries..shall be determined by field investigation and flagging.” But it doesn’t say who does the field investigation or flagging. A subsequent sentence says the approval authority MAY require the boundary to be delineated by a licensed land surveyor.

The current ordinance is much clearer. It reads: “The boundaries of a wetland ordinarily shall be determined by field investigation, flagging and subsequent survey by a licensed land surveyor, unless the last is waived by the approval authority.” But even here, I would eliminate the ability of the approval authority to waive the surveyor. It would be helpful if you had input from the Planning Board on this specific issue, e.g., if it has ever waived this requirement, and if so, how often, and under what circumstances.

### **Permit procedures (178-8)**

Do the procedures, including the referrals outlined in 178-8 apply to ALL permit applications, including those for engineer permits? Does it make sense for all those referred bodies to comment on ALL submissions?

An alternative to the above could be memorializing the e-panel concept into the new law, at least for some application categories. Experience has shown the value of the e-panel which assists both property owners and staff with an informal but important pre-application review.

### **Notification for engineering permit**

Draft #2 makes the town engineer the approval authority for a much broader list of permit applications. But, when the town engineer is the approval authority, there are no provisions for notifying abutting property owners that the neighboring property owner is requesting a permit to disturb a wetland or wetland buffer -- a disturbance that may negatively impact on their property.

At a minimum, a provision should be added to the law that requires a certified letter be sent to abutting property informing them that an application has been filed. And in lieu of a public hearing, those receiving the letter should be given a fixed set of time, e.g., 30 days, to communicate any concerns they have to the town engineer. The applicant would be responsible for sending out the letters.

### **Permitted activities (178-6A (13))**

Why allow a NEW deck to be built in a wetland buffer as-of-right, especially as there are some properties where the entire house may be in the buffer.

### **Buffer restrictions**

The definition of buffer includes a “restricted buffer” in the first 50 feet – but nowhere else in the draft are these possible restrictions spelled out.

### **Engineer permits (178-7 (A) )**

A 30 day turn-around time appears rushed, especially if the engineer’s time is unexpectedly diverted to some other emergency or time sensitive project. 60 or 90 days appear much more reasonable. The 30 day requirement also does not address the issue of whether the 30 days is from the date a COMPLETE application has been submitted or just submitted.

### **Permit length (178-12)**

It doesn’t make sense for board permits to be valid for three years when site plan and subdivision approvals are only good for one year. If a site plan or subdivision approval includes a wetlands permit, then the latter should be subject to the same expiration and renewal requirements as the former. Draft #1 was more appropriate than draft #2.

### **Emergency permits (178-7 (C) )**

This should not say that emergency must be townwide. It could be a site specific emergency, e.g., the town's experience in 2010 with the Flamingo Pond dam issue that needed an immediate permit; it wasn't a townwide emergency.

**Mitigation policy (178-13)**

A site is a wetland because of the confluence of a variety of factors and it may be difficult/unlikely that a new wetland, offering the same or an equivalent functional benefit can be satisfactorily reproduced elsewhere. For that reason, I urge the board to consider the recommendation of the Conservation Board that the sentence in the existing law, as well as draft #1, regarding a greater than 1:1 replacement in areas where there's a high probability of failure be retained.

**Review and appeal (178-15)**

A similar provision in the Tree Law is currently under review by the Supreme Court. Pending the outcome of the court's decision, this provision should be eliminated.

**Submission of applications**

To further the town's digital goals, should submissions, at least when board permits are involved, ONLY be in digital format? And if a licensed engineer is the person submitting the documents for an engineering permit, it would appear reasonable to require that these documents also be submitted in digital form. In absence of a digital submission, should there be a "handling fee" for paper submissions?