NEW YORK COUNTY LAWYERS' ASSOCIATION
14 VESEY STREET
NEW YORK, NY 10007

ENVIRONMENTAL LAW COMMITTEE

COMMENT ON A04231

Prepared by

Craig T. Donovan, Co-Chair
Ronald E. Steinvurzel, Co-Chair
Erik B. Bluemel, Vice-Chair

Intro A04231

An act to amend the environmental conservation law, in relation to conservation easements.

EXECUTIVE SUMMARY

The Committee on Environmental Law (CEL) of the New York County Lawyers' Association urges the disapproval of New York State Assembly Bill A04231, a bill in relation to conservation easements. A04231, establishing a State Uniform Wetlands Compensation and Tax Abatement Board, should not be passed or proposed again in its current form. The bill lacks clarity, is unnecessary, creates an incentive structure that thwarts the purposes of the Conservation Easement Law and the Environmental Conservation Law, is inconsistent with existing law, and does not consider the implications of the public trust doctrine on wetlands designation.

The bill lacks clarity because it fails to identify essential information with respect to the operation of, assignment to, and tenure of Board positions. Furthermore, the bill fails to clarify to which wetlands it applies, what designations are encompassed within its rubric, to account for buffer zone changes, or to indicate when such conservation easements must be created in relation to a wetlands designation in order to require just compensation.

Furthermore, the bill lacks clarity with respect to parcels under 12.4 acres, a current minimum acreage for designation as state wetlands.

The bill is unnecessary and confusing in its compensation scheme, given the current jurisprudence and regulatory scheme governing compensation for establishing conservation easements under "just compensation" and "fair market value" schema, and the methods by which such values are determined. These methods are not consistent with existing practice. The bill further creates an incentive structure that thwarts the purpose of the Conservation Easement Law. The bill modifies the Conservation Easement Law by allowing landowners to reap windfalls by establishing conservation easements in order to receive just compensation even when landowners have no intention of developing the property or are restricted from doing so from pre-existing wetlands designations.

Given the current jurisprudential structure of compensation, the bill is unnecessary as landowners are free to reject entering into a voluntary conservation easement if the compensation is deemed insufficient. However, by mandating a particular level of compensation for establishing conservation easements, landowners may be doubly and triply compensated under other legislative schema, including income tax, estate tax and property tax deductions designed around the current compensation scheme. Furthermore, the mandating of compensation at "fair market value" precludes an often-utilized "bargain sale" of conservation easements, which allows for compensation at below market value in exchange for a reduced tax burden based on the charitable contribution of the "bargain."

Finally, the bill may not only effect an unjustified expansion of the compensation requirement of the Takings Clause, but it also denies the right of New York State to invoke the public trust doctrine as a means of protecting wetlands for public enjoyment and use.

For these reasons, the Committee on Environmental Law of the New York County's Lawyers' Association stands in opposition to A04231.

RECOMMENDATION: THIS BILL IS DISAPPROVED

The Committee on Environmental Law (CEL) of the New York County Lawyers' Association urges the disapproval of New York State Assembly Bill A04231, a bill in relation to conservation easements. A04231, establishing a State Uniform Wetlands Compensation and Tax Abatement Board, should not be passed or proposed again in its current form because the bill lacks clarity, is unnecessary, creates an incentive structure that thwarts the purposes of the Conservation Easement Law and the Environmental Conservation Law, is inconsistent with existing law, and does not consider the implications of the public trust doctrine on wetlands designation.

This legislative Comment begins with Part I, which generally describes the bill and its relevant aspects. Part II discusses the importance of wetlands conservation. The Comment continues in Part III to discuss the technical reasons for CEL's disapproval of the bill. Part IV reviews the substantive reasons for CEL's disapproval of the bill, while Part V discusses the relation of the public trust doctrine to the bill as another reason for rejection of the bill as currently written.

I. Overview of A04231

A. Purpose

A04231 proposes to modify Section 24-0905 and Subdivision 7 of Section 49-0305 of, and add Section 49-0306 to, the Environmental Conservation Law[1] to provide for the creation of a wetlands compensation/tax abatement board that shall "justly compensate landowners for wetlands designations of such land at fair market value" and assess the value of properties containing freshwater wetlands subjected to land use regulations based upon the value of the remaining uses of the property according to the real property tax law. The board is also authorized by A04231 to "issue rules and regulations necessary" to carry out such a mandate.

The "Board shall consist of seven members: two shall be legislators of different political affiliations; one attorney; one New York State certified real estate appraiser; one member of a school board; and two real property owners within the medium-priced real estate market."

B. Political Influence

[1] N.Y. ENVTL. CONSERV. LAW §§ 01-0101 et. seq. (2003).

This piece of legislation is one of a number of wetlands-related bills before the Assembly sponsored by Assemblyperson Robert Prentiss (R-Albany, Saratoga) and cosponsored by Assemblyperson James Tedisco (R-Saratoga, Schenectady). A04231, like the other bills,[2] appears to be a response to the Department of Environmental Conservation's attempted remapping efforts in Saratoga County. The original wetlands map was filed on May 6, 1987.[3] The proposed amendments to the freshwater wetlands map of Saratoga County outside the boundaries of Adirondack Park was initiated because DEC "'found inaccuracies on the wetland maps first filed in 1987 that [DEC] now want[s] to correct,' Commissioner Cahill said. '[DEC] want[s] the boundaries of mapped wetlands to reflect actual "on-the-ground" conditions.'"[4] Commissioner Cahill continued: "'[f]reshwater wetlands improve water quality, prevent floods, and provide open space and fish and wildlife habitat . . . . This amendment will ensure that important wetlands resources will be protected in Saratoga County.'"[5]

The proposed wetlands map resulted in a "significant acreage of wetlands added to the [wetland] maps" for the towns of Charlton and Northumberland in Saratoga County.[6] This added acreage had the effect of "doubling the jurisdictional wetlands to more than 50,000 acres and thereby brining 4,200 additional private parcels into its domain" in the county, according to Carol W. Lagrasse, President of the Property Rights Foundation of America, Inc., a local nonprofit property owners' association that established the "Wetlands Justice Project" to push for property owner protection against wetlands designations.[7]

The proposed amendments were brought to public hearing and a number of information sessions where local property owners became apprised of DEC's desire to amend the wetlands map. Nearly every one of 42 oral statements and 95 written public comments received "expressed a concern with a map amendment, the map amendment process, or the Department's implementation of the freshwater wetlands permit program."[8] Many of the

---

[2] The other bills, A2811 (tax abatement and real property law) and A2812 (buffer zone around house) propose a Citizens Expertise Fund to reimburse property owners for challenges made to wetlands designations and a detailed tax abatement program.

[3] N.Y. Dep't of Envtl Conserv., New York State Article 24 Freshwater Wetland Map Filing Dates by County, http://www.dec.state.ny.us/website/dfwmr/habitat/CountyFilingDates.html (last revised Apr. 3, 2003).

[4] N.Y. Dep't of Envtl. Conserv., News: DEC Proposes to Amend Freshwater Wetland Maps: Saratoga County to be remapped, May 5, 1999, http://www.dec.state.ny.us/website/press/pressrel/99-55.html.

[5] *Id*. (quoting Commissioner Cahill).

[6] N.Y. Dep't of Envtl. Conserv., News: DEC Sets Additional Meetings on Saratoga County Wetlands Maps, June 15, 1999, http://www.dec.state.ny.us/website/press/pressrel/99-85.html.

[7] *See* Carol W. Lagrasse, *DEC Should Revisit Wetlands Mapping*, Bus. Rev., Sep. 27, 1999 (hereinafter Lagrasse, *Revisit Wetlands Mapping*), *available at* http://Albany.bizjournals.com/Albany/stories/1999/09/27/editorial4.html (last visited June 6, 2003); Carol W. Lagrasse, *Commentary: Protecting Wetlands and Landowners' Rights*, Times Union, Sept. 22, 1999 (Albany, N.Y.) (hereinafter Lagrasse, *Commentary*) (citing Patricia Riexinger, DEC Freshwater Wetlands Program Manager).

[8] N.Y. Dep't of Envtl. Conserv., Letter to Property Owner from Gerald A. Barnhart, Director, Division of Fish, Wildlife & Marine Resources (Nov. 15, 2000) (hereinafter DEC Letter), *available at* http://prfamerica.org/DEC-

criticisms of the mapping process seem to be traceable to DEC's alleged errant designations[9] and method of wetlands designations, which is alleged to have "invented a tricky new way of measuring wetlands area that brings many very small wetlands artificially up to the 12.4-acre minimum" (termed the "string of beads" method), and that "[w]hereas soil type, vegetation species and water saturation are required to make a true wetland, DEC often bases its classification on just one characteristic, such as vegetation like purple loosestripe, which also can grow on dry land."[10] Lagrasse claims that the "string of beads" method, whereby "[t]he DEC connects small (2-, 4-, 7-, etc. acre) wetlands along a tiny brook until the 12.4-acre minimum has been achieved," "is the main reason the wetlands area is being doubled without any changes in the law."[11]

In response to these comments, DEC "suspend[ed] the current map amendment effort in Saratoga County . . . ."[12] DEC commented: "[w]hile the Department recognizes the value of accurate wetland maps, it also recognizes the compelling importance of maintaining the public's confidence in the mapping program."[13] This comment was made despite the fact that 688 property owners (of the 4,264 to which notices were sent) requested that DEC "verify and delineate the actual wetland boundary located on their property" in light of DEC's current view towards wetland mapping.[14] A04231 was introduced which provides compensation only to wetlands designated conservation easements. Conservation easements sold by landowners in other critical or vulnerable ecologically important areas are not similarly compensated by this legislation. This therefore seems to be a direct response to DEC's wetlands remapping efforts and is an attempt to circumvent New York takings jurisprudence.[15]

C. Mapping Issues and Compensation Policies

Letter11-15-00.html (last visited June 8, 2003).

[9] The proposed maps allegedly contained "many egregious errors" including noting "houses and dry woodlots" as wetlands. *See* Lagrasse, *Commentary*, *supra* note 7.

[10] Lagrasse, *Revisit Wetlands Mapping*, *supra* note 7. Although in certain circumstances the presence of the other two characteristics may be inferred from the presence of one of the characteristics, and this methodology of designating wetlands is acceptable under the United States Army Corps of Engineers' 1989 Delineation Manual, funding for designations made under that manual has been cut, causing the USACE to resort to delineations under the 1987 Delineation Manual, which indicates that all three characteristics must be present. *See* Sharon M. Mattox, *Regulatory Obstacles to Development and Redevelopment: Wetlands and Other Essential Issues*, SC18 ALI-ABA 893, 904-07 (Am. L. Inst. Sept. 25, 1997). The DEC Freshwater Wetlands Delineation Manual does not require the presence of all three characteristics (despite likening itself to the 1987 USACE Delineation Manual), but does require the presence of hydrophytic vegetation. *See* N.Y. DEP'T OF ENVTL. CONSERV., NEW YORK STATE FRESHWATER WETLANDS DELINEATION MANUAL (1995), *at* http://www.dec.state.ny.us/website/dfwmr/habitat/wdelman.pdf. Of course, wetlands smaller than 12.4 acres can be designated if they have "unusual local importance." *See id*. at 1.

[11] Lagrasse, *Revisit Wetlands Mapping*, *supra* note 7.

[12] *Id*.

[13] *Id*.

[14] *Id*. *Compare* Lagrasse, *Revisit Wetlands Mapping*, *supra* note 7 ("At least 550 property owners made formal requests that the designation of their property be reconsidered"). Of course, the proposed amendments did not constitute a final agency determination with regards to wetlands designations. DEC Letter, *supra* note 8.

[15] *See infra* Part IV.E.

CEL has not studied the methods by which DEC mapped Saratoga County wetlands for its proposed amendments to the original designations and therefore refrains from comment on that issue. CEL, however, does believe that the methods used by DEC to map the Saratoga wetlands are irrelevant to the purposes of A04231 to provide just compensation and tax abatements for wetlands designations. While the threat of increased designations may have prompted the proposed bill, A04231 should not be regarded as a solution to claims of "overzealous" designations.[16] Because compensation for wetlands designations would not come out of DEC's budget,[17] there is little accountability for DEC designations provided under A04231.[18] Therefore, A04231 must be scrutinized even more carefully if the allegations are correct—if the re designation process would yield a doubling of the designations, and those designations were required to be compensated, the New York State budget could be very significantly impacted by the designation of Saratoga County conservation easements as wetlands. That, however, does not, in and of itself, justify disapproval of the bill, as considerations of clarity, fairness, regulatory consistency, notice and public trust must also be considered. These issues are discussed more fully below.

II. Importance of Wetlands

A. Social and Ecological Benefit of Wetlands

It has become almost axiomatic that wetlands provide important benefits to aquatic ecosystems.[19]

1. Wildlife

One of these recognized benefits is the ability to provide "critical food sources, spawning grounds and nurseries for coastal fish and shellfish . . . ."[20] These important

---

[16] *See* Lagrasse, *Revisit Wetlands Mapping*, *supra* note 7.

[17] They could come from a number of sources, such as the Department of Taxation and Finance, the Conservation Fund, the Environmental Protection Fund, or the Clean Water/Clean Air Bond Act funds, none of which directly impact the operation of DEC. *See* N.Y. STATE FIN. LAW § 83(b) (2003); *infra* note 191 and accompanying text.

[18] For a review of the problem of regulator accountability in the takings context, see Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 88-100 (2003).

[19] D.D. HOOK, THE ECOLOGY AND MANAGEMENT OF WETLANDS 7-8 (1988); *see also* Part V.C *infra*.

[20] Coastal Zone Management: Hearing Before the Nat'l Ocean Pol'y Study of the Comm'n on Commerce, Sci. and Transport of the Senate, 100th Cong., 1st Sess. 1, 38 (1987) (statement of Dr. Donald F. Boesch, Executive Director, Lousiana University Marine Consortium); Linda A. Malone, *The Coastal Zone Management Act and the Takings Clause in the 1990s: Making the Case for Federal Land Use to Preserve Coastal Areas*, 62 U. COL. L. REV. 711, 712 (1991); Mark A. Chertok, *Federal Regulation of Wetlands*, SG101 ALI-ABA 1049, 1051

benefits extend beyond coastal aquatic life to freshwater species as well, many of which depend upon the proper functioning of wetlands for survival.[21] Besides aquatic species, "[w]etlands also provide nesting, feeding, and resting sites for waterfowl and migratory birds."[22] As a result, "[m]any endangered or threatened species are heavily dependent on wetlands for continued survival."[23]

2. Water Quality

Also of critical importance is the ability of wetlands to "purify storm water by filtering out nutrients, sediments and pollutants, thereby protecting both surface and ground water."[24] Wetlands contribute to water quality by capturing upland runoff as nutrients are taken up by plants or absorbed and stored in the soil.[25] This purification process reduces contaminants from the drinking water supply and from waters used for irrigation of farmlands.

3. Flood Control

Wetlands also serve to protect lowlands from flooding, as wetlands store and release storm waters.[26] Even where wetlands are unable to absorb the additional storm water, they still serve a valuable function of slowing the velocity of such waters, thereby reducing

---

(2002) (citing M. Holloway, *High and Dry: New Wetlands Policy Is a Political Quagmire*, SCI. AM., Dec. 1991, at 20).

[21] Forrest Stearns, *Management Potential: Summary and Recommendations*, *in* FRESHWATER WETLANDS: ECOLOGICAL PROCESSES AND MANAGEMENT POTENTIAL 360 (Ralph E. Good et al. eds. 1978); William Odum, *Non-Tidal Freshwater Wetlands in Virginia*, 7 VA. J. NAT. RESOURCES L. 421, 431 (1988); Bhavani P. Nerikar, Comment, *This Wetland is Your Land, This Wetland Is My Land: Section 404 of the Clean Water Act and Its Impact on the Private Development of Wetlands*, 4 ADMIN L.J. 197, 203 (1990).

[22] Richard C. Ausness, *Regulatory Takings and Wetland Protection in the Post-Lucas Era*, 20 LAND & WATER L. REV. 349, 356 (1995) (internal citations omitted).

[23] *Id*. at 1051-52.

[24] *Id*. at 1051. *See also* HOOK, *supra* note 19, at 52-53.

[25] ANNE D. MARBLE,A GUIDE TO WETLAND FUNCTIONAL DESIGN 31-66 (1992); S. Wesley Woolf & James E. Kundell, *Georgia Wetlands: Values, Trends, and Legal Status*, 41 MERCER L. REV. 791, 793 (1990); Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 3, 88-89 (1983); Odum, *supra* note 21, at 433; Wetlands Conservation: Hearings Before the Subcomm. on Fisheries and Wildlife Conserv. and the Env't of the House Comm. on Merch. Marine and Fisheries, 101st Cong., 1st Sess. 1, 236 (1989) (statement of Janice L. Goldman-Carter, Fisheries and Wildlife Div., Nat'l Wildlife Fed'n); Jeter M. Watson & Richard H. Sedgley, *Land Use Regulation by the Virginia Marine Resources Commission: The Virginia Wetlands Act and Coastal Primary Sand Dune Protection Act*, 7 VA. J. NAT. RESOURCES L. 381, 386 (1988); Kevin O'Hagan, Comment, *Pumping with Intent to Kill: Evading Wetlands Jurisdiction Under Section 404 of the Clean Water Act Through Draining*, 40 DEPAUL L. REV. 1059, 1063-65 (1991).

[26] O'Hagan, *supra* note 25, at 1064; Denis Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1, 18-19 (1972); Houck, *supra* note 25, at 76; Mary K. McCurdy, *Application of the Public Trust: Public Trust Protection for Wetlands*, 19 ENVTL. L. 683, 697 (1989).

damages caused by flood waters.[27] The ability to insulate development and protect against storm damage is not limited strictly to river systems, as coastal wetlands provide coastal development an invaluable buffer zone against the brunt of oceanic storms.[28]

4. Recreational and Other Benefits

Wetlands also provide numerous other, more intangible social benefits including providing open space for unique recreational enjoyment, fertile grounds for scientific experimentation and aesthetic beauty.[29] Of course, wetlands also provide valuable natural resources that can be extracted or harvested for consumption purposes including timber, agricultural products, peat and other such highly marketable products.[30]

B. New York State View on the Importance of Wetlands

As a result of a number of studies conducted regarding the value and function of wetlands, DEC and the legislature have both recognized the need to protect wetlands because of the important functions they serve.

DEC noted that wetlands provide a number of important functions, some of which are recited above:

> *Flood and Storm Water Control*: Wetlands are important in how water moves in a watershed. They absorb, store, and slow down the movement of rain and melt water, minimizing flooding and stabilizing water flow.
>
> Surface *and Groundwater Protection*: Wetlands often serve as groundwater discharge sites, maintaining base flow in streams and rivers and supporting ponds and lakes. In some places, wetlands are very important in recharging groundwater supplies.
>
> *Erosion Control*: Wetlands slow water velocity and filter sediments, protecting reservoirs and navigational channels. They also buffer shorelines and

---

[27] OFC. OF TECH. ASSESSMENT, WETLANDS: THEIR USE AND REGULATION 44 (1984) [HEREINAFTER WETLANDS USE AND REGULATION].
[28] D.F. WHIGHAM ET AL., WETLAND ECOLOGY AND MANAGEMENT: CASE STUDIES 64-65 (1990); WETLANDS USE AND REGULATION, *supra* note 27, at 46.
[29] Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 ENVTL. L. 1, 3 (1993); Hope Babcock, *Federal Wetlands Regulatory Policy: Up to Its Ears in Alligators*, 8 PACE ENVTL. L. REV. 307, 309 (1991); Stewart L. Hofer, Comment, *Federal Regulation of Agricultural Drainage Activity in the Prairie Potholes: The Effect of Section 404 of the Clean Water Act and the Swampbuster Provisions of the 1985 Farm Bill*, 33 S.D. L. REV. 511, 527 (1987); *see also* JANET LYONS & SANDRA JORDAN, WALKING THE WETLANDS 171 (1989).
[30] Woolf & Kundell, *supra* note 25, at 797.

agricultural soils from water erosion.

Pollution Treatment and Nutrient Cycling: Wetlands cleanse water by filtering out natural and many man-made pollutants, which are then broken down or immobilized. In wetlands, organic materials are also broken down and recycled back into the environment, where they support the food chain.

Fish and Wildlife Habitat: Wetlands are one of the most productive habitats for feeding, nesting, spawning, resting and cover for fish and wildlife, including many rare and endangered species.

Public *Enjoyment*: Wetlands provide areas for recreation, education and research. They also provide valuable open space, especially in developing areas where they may be the only green space remaining.[31]

The Freshwater Wetlands Act,[32] as passed by the New York State legislature, states:

> It is declared to be the public policy of the state to preserve, protect and conserve freshwater wetlands and the benefits derived there from, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetland, consistent with the general welfare and beneficial economic, social and agricultural development of the state."[33]

Finally, the Conservation Easement Law under the Environmental Conservation Law states:

> The legislature hereby finds and declares that in order to implement the state policy of conserving, preserving and protecting its environmental assets and natural and man-made resources, the preservation of open spaces, the preservation, development and improvement of agricultural and forest lands, the preservation of areas which are significant because of their scenic or

---

[31] N.Y. Dep't of Envtl. Conserv., A Brief Description of the Freshwater Wetlands Act and What it Means to Wetlands Landowners, *available at* http://www.dec.state.ny.us/website/dfwmr/habitat/wetdes.htm (last visited April 7, 2003); *see also* N.Y. Dep't of Envtl. Conserv., Wetlands Functions and Values, *available at* http://www.dec.state.ny.us/website/dfwmr/habitat/fwwprog2.htm (last visited June 25, 2003) (noting that wetlands provide functions and benefits that include: flood protection and abatement, erosion and sediment control, water quality maintenance, recharging groundwater supplies, maintaining surface flows, fish and wildlife habitats, nutrient production and cycling, recreation, open space, educational and scientific research, and biological diversity).

[32] N.Y. ENVTL. CONSERV. LAW §§ 24-0101 et. seq. (2003).

[33] *Id*. § 24-0103 (2003).

> natural beauty or wetland, shoreline, geological or ecological character, and the preservation of areas which are significant because of their historical, archaeological, architectural or cultural amenities, is fundamental to the maintenance, enhancement and improvement of recreational opportunities, tourism, community attractiveness, balanced economic growth and the quality of life in all areas of the state.[34]

The policy of the State of New York, then, is to protect wetlands from overconsumption and despoliation.[35] This recognition has come about, however, only after more than half of the state's wetlands have been destroyed.[36]

C. Destruction of Wetlands

Since the Department of Interior report,[37] New York has seen something of a revival of its wetlands. Since the mid-1980s, New York has seen a net gain of nearly 15,500 acres of wetlands.[38] Unfortunately, this revival is more illusory than anything else: 99% of the gains came from reversion to wetlands (from abandoned agricultural lands) and modified hydrology resulting in increased runoff; 99% of the losses came from increased urbanization and its associated impacts.[39] Furthermore, "[n]et gains posted for some States may be due to underestimates of original wetlands, or represent real gains through incidental or intentional wetland creation or restoration associated with water impoundments and other projects."[40] Given DEC's recent remapping efforts, it seems the former is a very plausible explanation.[41] In sum, the gains in wetlands claimed by New York are attributable primarily to abandoned lands[42] and increased designations after incorrect initial designations which, although

---

[34] *Id*. § 49-0301 (2003).
[35] *Id*.
[36] *See* THOMAS E. DAHL & CRAIG E. JOHNSON, U.S. DEP'T OF INTERIOR, STATUS AND TRENDS OF WETLANDS IN THE COTERMINOUS UNITED STATES: MID-1970S TO MID -1980S 2-3 (1991).
[37] *See id*.
[38] N.Y. Dep't of Envtl. Conserv., Freshwater Wetlands Status and Trends, *available at* http://www.dec.state.ny.us/website/dfwmr/habitat/fwwprog3.htm (last visited June 25, 2003).
[39] *Id*. In the United States generally, agricultural conversion is the largest cause of inland wetland losses, while port development and other transportation hub-related dredging is the largest cause of estuarine wetland losses. *See* WETLANDS USE AND REGULATION, *supra* note 27, at 7, 170; DAHL & JOHNSON, *supra* note 36, at 2; Joseph G. Theis, *Wetlands Loss and Agriculture: The Failed Federal Regulation of Farming Activities Under Section 404 of the Clean Water Act*, 9 PACE ENVTL. L. REV. 1, 4 (1991); James T.B. Tripp & Michael Herz, *Wetland Preservation and Restoration: Changing Federal Priorities*, 7 VA. J. NAT. RESOURCES L. 221, 221 n.2 (1988).
[40] MARGOT ANDERSON & RICHARD MAGLEBY, AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS, 1996-1997, 310 (1997).
[41] For a list of filing dates of DEC wetlands maps by region, see N.Y. Dep't of Envtl. Conserv., New York State Article 24 Freshwater Wetland Map Filing Dates by County, *available at* http://www.dec.state.ny.us/website/dfwmr/habitat/CountyFilingDates.html (last visited June 25, 2003).
[42] Reduced farm incomes appear to be a large cause of such reversions. *See* ANDERSON & MAGLEBY, *supra* note 40, at 316 (noting greatly reduced agricultural conversions between 1982-1992, and the elimination of

representing short term gains in nominal wetlands, does little "to substantiate a change in the long-term continuing decline" of wetlands.[43]

This general trend toward declining wetlands acreage is made evident by the fact that over 300,000 acres of wetlands are lost each year.[44] These losses to development are generally irreversible.[45] The resultant loss of valuable social and ecological functions include not only the reduced value of wetlands noted above[46] but also the reduced economic value of products derived from, or related to, the wetlands.[47] In total, between 1992 and 1997, over eleven million acres were developed for the first time—this rate far surpasses the development growth rate for any previous five years.[48]

III. Technical Deficiencies of A04231

Because wetlands are recognized as possessing important social and ecological functions and their preservation at existing levels are an explicit goal of New York statutory law, it should be clear that any amendments to existing environmental legislation should comport with that purpose and effect such conservationist and preservationist goals. Unfortunately, A04231 fails to do just this for varied technical reasons. Were such technical deficiencies corrected, the bill still should be rejected as unjustified, unnecessary, confusing and contrary to existing law.[49]

---

government payments as part of farm income derived from converted lands); OFC. OF ENVTL. POL'Y & COMPLIANCE, DEP'T OF INTERIOR, THE IMPACT OF FEDERAL PROGRAMS ON WETLANDS, Vol. 2, ch. 15 (1994) ("It may be technically possible for wet cropland drained . . . to revert to wetlands, and in the absence of the subsidized drainage, farm operators might ultimately find it financially unattractive to continue working the land and allow the reversion."), *available at* http://www.doi.gov/oepc/wetlands2/index.html (last visited June 25, 2003).

[43] *See, e.g.*, Tex. Parks & Wildlife Dep't, Texas Wetlands, *available at* http://www.tpwd.state.tx.us/wetlands/ecology/wetland_types.htm (last visited June 25, 2003).

[44] Wetlands Conservation: Hearings Before the Subcomm. on Fisheries and Wildlife Conserv. and the Env't of the House Comm. on Merch. Marine and Fisheries, 101st Cong., 1st Sess., 1, 9 (1991) (between 300,000 and 450,000 acres lost annually) (statement of Ralph Morgenwerk, Asst. Dir. of Fish and Wildlife Enhancement, U.S. Fish and Wildlife Serv.); U.S. FISH AND WILDLIFE SERV., WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 31 (1984) (400,000 acres lost annually); Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 698 (1989) (between 300,000 and 500,000 acres lost annually).

[45] Robert H. Levin, Note, *When Forever Proves Fleeting: The Condemnation and Conversion of Conservation Land*, 9 N.Y.U. ENVTL. L.J. 592, 598-99 (2001) ("Irreversibility looms large in the background of every conservation and condemnation question. Once land is developed, it is nearly impossible, for economic and ecological reasons, for it to ever return to its natural state.").

[46] D.F. WHIGHAM ET AL., *supra* note 28, at 68; Jan Goldman-Carter, *Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of* Lucas v. South Carolina Coastal Council, 28 LAND & WATER L. REV. 425, 450-52 (1993); MICHAEL WILLIAMS, WETLANDS:A THREATENED LANDSCAPE 302 (1990); Woolf & Kundell, *supra* note 25, at 796.

[47] *See, e.g.*, Monica K. Kalo & Joseph J. Kalo, *The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust*, 64 N.C. L. REV. 565, 567 (1986) (noting the decreased yield from commercial and recreational fishing as a result of reduced coastal marshlands).

[48] NATURAL RES. CONSERV. SERV., U.S. DEP'T OF AGRIC., SUMMARY REPORT: 1997 NATIONAL RESOURCES INVENTORY 39 (2000), *available at* http://www.nrcs.usda.gov/technical/NRI/1997/summary_report/report.pdf.

[49] *See infra* Parts IV & V.

A. Structure of State Uniform Wetlands Just Compensation/Tax Abatement Board

A04231 establishes a wetlands compensation/tax abatement board that shall "justly compensate landowners for wetlands designations of such land at fair market value" and assess the value of properties containing freshwater wetlands subjected to land use regulations based upon the value of the remaining uses of the property according to the real property tax law. The board is also authorized by A04231 to "issue rules and regulations necessary" to carry out such a mandate. Unfortunately, there exist very clear gaps in the construction of the Board. No guidance is provided as to how an individual within an identified class of eligible members becomes a member of the Board. It is unclear whether or not these positions are appointed, and if so, by which agency or office. Furthermore, there is no indication of the length of term that individuals serve. While the Board may constitute an agency for purposes of judicial review, there is no indication what office or department supervises the actions of the Board, how a member of the Board may lose such membership, or what happens when the Board is not comprised of the identified seven members. Given that wetlands designations and valuations are extremely controversial, it seems unwise to leave such crucial determinants of the value of the property in limbo.

While these shortcomings can be remedied through more precise language, CEL believes that there is insufficient justification to establish the Board as currently proposed and that the resultant transaction costs would be significantly raised for each valuation. The Internal Revenue Service (IRS) requires that any conservation easement donation over $5,000 be valued by a qualified appraiser in order for such a donation to be eligible for a tax benefit.[50] Furthermore, the "fair market value" of conservation easements is generally "established by the opinions of qualified real estate appraisers."[51]

As a result, there is no justification why the particular classes of individuals that are eligible for participation on the Board have knowledge in the valuation of wetlands properties, could replace a qualified appraiser or are even necessary given the need for a qualified appraiser.[52] Additionally, the Board, as currently proposed, seems very likely to succumb to "agency capture" by interested parties because they are not technocratic

---

[50] Tug Hill Comm'n, Issue Paper Series: Conservation Easements 4 (2000), *at* http://www.tughill.org (noting that the federal regulations governing such appraisals are extensive). For additional information regarding methods of appraising conservation easements, see Deb Brighton & Davis J. Cable, Taxation Of Land Subject To Conservation Easements In Vermont:A Lister'S Guide (Nov. – Dec. 1992).

[51] Richard J. Kohlman, *Condemnation of Easements*, 22 AM. JUR. *Trials* 743 § 3(e) (2003).

[52] Though the Internal Revenue Code (IRC) only deals with the donations of properties or bargain sales, *see infra* Parts IV.C.1 & IV.C.3, there is no reason why such a system should not be similarly used in the context of sales, since the valuation process is the same.

specialists in land valuation but include interested community persons and other generalists.[53] Because the Board will be comprised of individuals not otherwise qualified to appraise or calculate the value of a conservation easement and because the Board members with the power over the valuation process include laypersons, the Board is susceptible to greater politicization of the valuation process than currently exists, personal bias, improper favoritism or even corruption. Moreover, as the Board does not have any definite standards regulating its actions, there are no assurances that the Board will act fairly or appropriately, despite the requirement of a "fair market value" standard.

B. Definitional Uncertainty

1. Which Wetlands (tidal, freshwater, all)

It is not clear from the statute, which deals only with lands containing conservation easements, whether compensation is required for designations of all wetlands, or whether or not compensation is limited only to freshwater wetlands, regulated under Articles 15 and 24 of the Environmental Conservation Law, tidal wetlands, regulated under Article 25 of the Environmental Conservation Law, or both.

The United States Fish and Wildlife Service (FWS) has divided wetlands and deepwater habitats into five distinct types: (1) marine systems consisting of open ocean and coastline; (2) estuarine systems consisting of tidal marshes, mangrove swamps and intertidal flats; (3) riverine systems consisting of freshwater river and stream channels; (4) lacustrine systems consisting of lakes, reservoirs and deep ponds; and (5) palustrine systems encompassing most inland marshes, bogs and swamps.[54]

The proposed bill amends § 24-0905 of the ECL which deals with the assessment of properties designated as freshwater wetlands for tax purposes. The bill does not include such an amendment to the language of § 25-0302(2) of the ECL, which uses nearly identical language to note that

> [t]he placing of any tidal wetlands under a land-use regulation which restricts its use shall be deemed a limitation on the use of such wetlands for the purposes of property tax valuation, in the same manner as if an easement or right had been acquired under the general municipal law. Assessment shall be based on present use under the restricting regulation.[55]

---

[53] For a discussion of the origin of agency "capture" theories, see Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. Rev. 437, 441 (2003); *see also* Bradford C. Mank, *Superfund Contractors and Agency Capture*, 2 N.Y.U. Envtl. L.J. 34, 49-54 (1993).

[54] U.S. Fish And Wildlife Serv., Wetlands Of The United States: Current Status And Recent Trends 5 (1984). *See also* Ausness, *supra* note 22, at 353-54.

[55] N.Y. Envtl. Conserv. Law § 25-0302 (2003).

A04231, however, only deals with the means by which the tax valuation would be assessed. It does not affect the level or availability of compensation, distinguished by wetland type, and therefore may provide unequal compensation to sellers of freshwater and tidal wetlands conservation easements.

2. What Designations

i. Classes

Of particular concern is the lack of clarity the bill provides with respect to the different classes of wetland designations that may be issued. DEC specifically states that "not all wetlands are equal" and that "[d]ifferent wetlands provide different functions and benefits to different degrees."[56] As a result, it classifies Freshwater Wetlands into four classes of wetlands, with different protections provided each class.[57] Similarly, DEC has established a number of categories of tidal wetlands[58] and has classified them in classes of one to four, in order of level of protection provided.[59] DEC has further provided a list of activities that are presumptively compatible with different types of tidal wetlands.[60] Given the clear efforts which DEC has taken to distinguish wetlands based upon their differing values and functions, the proposed bill seems at odds with the intent of DEC to regulate and value wetlands according to function.

A04231, as proposed, seeks to provide compensation for conservation easements based upon the diminished property value to the landowner, not based upon the value of the particular wetlands. This is inconsistent with the current efforts of DEC, described above, and would skew incentives for the actors involved in conservation easements.[61] Because different wetlands classes result in different approval rates for proposed development schemes, wetlands labeled Class I wetlands are very heavily protected, while Class IV wetlands are less so. Conservation easements established under each different class of wetlands may

---

[56] N.Y. Dep't of Envtl. Conserv., A Brief Description of the Freshwater Wetlands Act and What it Means to Wetlands Landowners, *available at* http://www.dec.state.ny.us/website/dfwmr/habitat/wetdes.htm (last visited April 7, 2003).

[57] *Id*. This authority is provided by N.Y. COMP. CODES R. & REGS. tit. 6, § 664 (2003). A supplemental classification process is currently being undertaken as part of DEC's Natural Heritage Program. *See* N.Y. Dep't of Envtl. Conserv., Other Wetlands Conservation Programs, *available at* http://www.dec.state.ny.us/website/dfwmr/habitat/fwwprog7.htm (last visited June 25, 2003).

[58] N.Y. Dep't of Envtl. Conserv., Tidal Wetlands Categories, *available at* http://www.dec.state.ny.us/website/dfwmr/marine/twcat.htm (last visited June 25, 2003).

[59] N.Y. Dep't of Envtl. Conserv., Tidal Wetlands Permit Program: Standards for Issuance, *available at* http://www.dec.state.ny.us/website/dcs/tidalwet/tidalwet05.html (last visited June 25, 2003).

[60] *See* N.Y. Dep't of Envtl. Conserv., Tidal Wetlands Land-Use Regulations (6 N.Y.C.R.R. Part 661), available at http://www.dec.state.ny.us/website/dcs/tidalwet/tw009.html (last visited June 25, 2003).

[61] *See infra* Part IV.A.

improperly overcompensate landowners for their easements. If a landowner established a conservation easement, and that land was designated a wetlands, then the owner must be compensated based upon the "fair market value" of the designation.[62] The difficulties with the standard of valuation are discussed in depth below.[63] What results, however, is that all conservation easements will be valued based upon the same formula, applying a one-size-fits-all approach to wetlands valuation to which DEC clearly stands opposed.[64] The danger of this legislation with respect to the valuation of the conservation easements, therefore, lies in its inability to provide different valuation schematics for each conservation easement that includes wetlands.[65]

In sum, wetlands differ in functional importance, and therefore conservation easements in different locations will be valued differently. As always, "[t]he expenditure of public funds should be commensurate with the public benefit derived from the easement."[66] An "assessment of the overall public benefit versus the expenditure of public funds, considering both the project itself and alternative uses of the funds" is required to ensure that public funds are not being improperly spent.[67] Appraisals based on a functional utility adjustment of easements have been approved by the New York courts, thus opening the door to public-value based pricing of easement acquisitions.[68] Nevertheless, this proposed

---

[62] This "fair market value" standard applied in the Conservation Easement Law does not ensure that there is a "minimum acceptable level of public benefits that should be expected from an easement funded in whole or in part with public funds" given the vast variety of easements possible. NORTHERN FOREST ALLIANCE, CONSERVATION EASEMENTS IN THE NORTHERN FOREST, *available at* http://www.northernforestalliance.org/newspubs/1easements/NFAeasements.htm (last visited June 30, 2003) [hereinafter NORTHERN FOREST EASEMENTS]. While the Open Space Plan establishes minimum standards, as well as for easements purchased with Clean Water/Clean Air Bond Act monies, this does not guarantee such a minimum level of public benefit, or a proper cost-benefit analysis prior to entering into the easement agreement. *See* N.Y. ENVTL. CONSERV. LAW § 56-0307(1) (2003); *see also infra* Part IV.A.1.

[63] *See infra* Part III.C.

[64] This one-size-fits-all approach has been soundly criticized. For instance,

> [t]wo overarching concepts must be considered with these, or any, principles regarding conservation easements. First, easements will differ based on the values and objectives of the landowner, the easement holder, the funders, and the public at large. Public interests are particularly important where public funds are involved or where a public agency will be the easement holder. Second, every easement will be tailored to the unique characteristics of the land it covers—its size, biophysical character, and geographical context—and must be based on a comprehensive resources analysis of the property. There is no such thing as an ideal "one-size- fits-all" easement.

NORTHERN FOREST EASEMENTS, *supra* note 62.

[65] Other conservation easement laws, however, create categories of easements based upon levels of protections afforded, thus starting the process of valuing easements by function. *See, e.g.*, Forest Conservation Law, Montgomery County Council, Md. (July 1, 1992) (creating categories of conservation easements, with different activities restricted and allowed for each category of easements). While "[e]very easement is unique and tailored to the particular property and the interests of the landowner, the easement holder, and the programs or organizations providing funding for the easement's purchase," NORTHERN FOREST EASEMENTS, *supra* note 62, the proposed law does not do enough to assist the Board in valuing easements based upon the value of the easement to the public, but rather requires the valuation to be based upon the value lost to the landowner, despite the voluntary nature of the transaction.

[66] NORTHERN FOREST EASEMENTS, *supra* note 62.

[67] *See id*.

[68] *See, e.g.*, *In re* Acquisition of Easements by Albany County Airport Auth., 265 A.D.2d 720, 696 N.Y.S.2d 305

legislation seeks to value the easement based upon the speculative value of the property to some unknown developer, rather than to the public that would pay for the easement, and provides no guidance as to how to value different classes of wetlands differently.

ii. Buffer Zones and Uplands

Another distinction in the proposed legislation that needs more clarity is the recognition that not only landowners, but also neighboring properties are affected by wetlands designations. Properties located within the "buffer zone" of wetlands, or within 100 feet of a wetlands designation, are also affected by wetlands designations.[69] Lands located in such buffer zones have limitations placed upon their development in a manner similar to that placed upon lands containing the wetlands. Permits and approval are required for certain development projects located within such buffer zones.

The proposed legislation does not contemplate the effects of wetlands designations upon holders of land within buffer zones, and how such designations impact conservation easements located in the buffer zones. The legislation specifies that compensation will be provided to conservation easement lands that are designated as wetlands. This means that such buffer zones are not included within the rubric of this legislation, which is not only unfortunate but also improper given that the same interests are at play in conserving wetlands and wetland buffer zones, though perhaps at different levels.

These same concerns apply to uplands territories as well, which, although not designated wetlands, are important to wetlands conservation. The United States Fish and Wildlife Service has recognized as much and used its monies available from its Partners for Wildlife Program to purchase conservation easements in such important uplands.[70] This proposed legislation does not recognize the crucial importance of buffer zones and uplands to wetlands ecological health, and does not provide equity between landholders near wetlands and those within wetlands.

iii. 12.4 Acre Minimum

This proposed bill also creates more questions than answers with respect to the minimum acreage of wetlands impacted by the legislation. While DEC-regulated wetlands are only those wetlands that encompass a minimum of 12.4 acres,[71] wetlands smaller than

---

(3d Dep't 1999), *lv. denied*, 94 N.Y.2d 758, 705 N.Y.S.2d 5 (2000).

[69] N.Y. ENVTL. CONSERV. LAW § 24-0701(2) (2003) imposes restrictions upon development within the buffer zone of wetlands designations.

[70] Am. Conserv. Real Estate, Conservation Easements, *available at* http://www.conservationrealestate.com/coneasements.htm (last visited June 30, 2003) [hereinafter Conservation Easements].

[71] This is not the only means of becoming a DEC-regulated wetland, as wetlands smaller in size than 12.4 acres

12.4 acres may nevertheless be regulated. The question that arises, then, is what constitutes a "designation" for purposes of the Conservation Easement Law.

As discussed below in Part IV.A.2, over-compensation was noted as a concern because regulated wetlands are regulated without compensation and the added value of a conservation easement (given that development occurring without an easement can only occur if it does not negatively affect the regulated wetlands). This same concern does not exist for unregulated parcels under 12.4 acres as no development restrictions exist. Therefore, compensating landowners for affirmatively entering into conservation easements for wetlands parcels smaller than 12.4 acres is neither likely to skew incentives nor compensate landowners where no compensation is warranted.

However, if such parcels are not of "unusual local importance" thus bringing them under the umbrella of DEC regulation, then such parcels may not be worth preserving in perpetuity and therefore it may not be desirable to create a compensation scheme to encourage their preservation. In either case, decisions about entering into a conservation easement and whether or not compensation for an easement should be provided is a decision that should be made on a case-by-case basis, depending upon the functional importance of the wetland, and the incentive structure surrounding the individual parcel.[72]

C. Compensation Amount

The language used by the proposed amendment in the valuation of wetlands designation is confusing and inappropriate. The proposed bill states that the "Board shall justly compensate landowners for wetlands designations of such land at fair market value . . . ." Why such language is necessary in the context of conservation easements is unclear. The purpose of the New York State Eminent Domain Procedure Law is to

> provide the exclusive procedure by which property shall be acquired by exercise of the power of eminent domain in New York state; to assure that just compensation shall be paid to those persons whose property rights are acquired by the exercise of the power of eminent domain; . . . to give due

---

may be regulated by DEC if such parcels, in combination with other parcels, constitute 12.4 acres, or if such wetlands, though being smaller than 12.4 acres, nevertheless are so locally important as to warrant regulation. N.Y. DEP'T OF ENVTL. CONSERV., NEW YORK STATE FRESHWATER WETLANDS DELINEATION MANUAL 1 (1995), *at* http://www.dec.state.ny.us/website/dfwmr/habitat/wdelman.pdf. Nevertheless, for the purpose of this Comment and simplification purposes, we treat this acreage minimum as the sole jurisdictional ground under which DEC may assert its regulatory powers over wetlands.

[72] See *infra* Part IV.C.2 for a discussion of the desirability of the double incentive structure proposed by A04231. This double incentive may be desirable in certain circumstances, while in others, not. Therefore, under such a system, the functional value of the particular parcel of wetlands to be conserved is of utmost importance in determining the amount of compensation that should be tendered, and categorical compensation is therefore inappropriate.

> regard to the need to acquire property for public use as well as the legitimate interests of private property owners, local communities and the quality of the environment; . . . to encourage settlement of claims for just compensation and expedite payments to property owners; to establish rules to reduce litigation, and to ensure equal treatment to all property owners.[73]

The state land acquisition policy, which requires the pursuit of less-than-full-fee purchases such as conservation easements from willing sellers before invoking eminent domain procedures, nevertheless requires that acquisition offers be provided to landowners.[74] These offers must be in accordance with Section 303 of the New York State Eminent Domain Procedure Law,[75] which reads:

> The condemnor shall establish an amount which it believes to represent just compensation for the real property to be acquired. The condemnor shall make a written offer to acquire the property for one hundred per centum of the valuation so established. In no event shall such amount be less than the condemnor's highest approved appraisal. Wherever practicable, the condemnor shall make the offer prior to acquiring the property and shall also wherever practicable, include within the offer an itemization of the total direct, the total severance or consequential damages and benefits as each may apply to the property.[76]

Furthermore, the state land acquisition policy establishes a seven-member State Land Acquisition Advisory Council that helps set acquisition goals and priorities and makes recommendations regarding specific sites considered for acquisition.[77] While this standard does not apply to sellers actively seeking to sell conservation easements on their property, it applies to all sellers who choose to sell the property rather than fight the eminent domain procedure.

Standard doctrines invoking the phrase "just compensation" unanimously provide that just compensation is compensation at "fair market value."[78] Before just compensation can be awarded, however, the compensation amount must be determined which requires fixing the

---

[73] N.Y. EM. DOM. PROC. LAW § 101 (2003).
[74] N.Y. ENVTL. CONSERV. LAW § 49-0203(3) (2003).
[75] *Id*.
[76] N.Y. EM. DOM. PROC. LAW § 303 (2003).
[77] N.Y. ENVTL. CONSERV. LAW § 49-0211(1), (3) (2003); N.Y. JUR. 2D *Envt.* § 65 (2003).
[78] *See* Christopher A. Bauer, Note, *Government Takings and Constitutional Guarantees: When Date of Valuation Statutes Deny Just Compensation*, 2003 B.Y.U. L. REV. 265, 273 (2003); DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 169 (2002); *see also* Keator v. State, 23 N.Y.2d 337, 296 N.Y.S.2d 767 (1968).

date of valuation.[79] New York has not statutorily fixed the date of valuation, and therefore must rely upon common law standards for determining the date of valuation.[80] Fixing the date of valuation is not easy and relies upon a number of policy considerations that are in tension.[81] Fixing the date of compensation is of importance especially if a conservation easement has already been established.[82] The remaining value to the property owner is limited as is the added value caused by designating the property is limited. Nevertheless, a designation may occur.

Given the canon of statutory construction to construe all terms to avoid superfluity, the phrase used by the proposed legislation is confusing and misleading. Does the term "justly compensate" impose restrictions or limitations upon the phrase "fair market value?" If so, what limitations would these be and how would they be applied?

1. Just Compensation

The analysis of the compensation language used by the proposed amendment must begin with a look at the doctrine of providing just compensation, with its origins in the takings context. While the federal constitutional standard is controlling, New York State has similarly codified the right to just compensation when private property is taken.[83] Although it is clear that a taking requires just compensation, it is less clear what just compensation means. In fact, just compensation has taken many different forms, as have determinations of fair market value.

Just compensation, in the takings context, means that the landowner should be restored to the position she would be in had the taking not occurred.[84] The term just compensation, while claimed by some to be superfluous in and of itself,[85] has generally been taken to mean that the compensation should be fair to both parties.[86] Therefore, "compensation should be just to the public as well as to the condemnee."[87]

It has been noted that there is more than one standard of compensation that could be provided—the fair market value need not be the only standard.[88] Indeed, either a benefit to

---

[79] CARMEN F. RANDOLPH, THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 285, at 262 (photo. reprint 1991) (1894).
[80] *See* Bauer, *supra* note 78, at 276 & n.62.
[81] *See id*. at 283-84, 296-98.
[82] *See infra* Part IV.A.1.
[83] N.Y. CONST., art. I, § 7(a). See also 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN §8.01 n.14 (rev. 3ded. 2001), for judicial applications of the constitutional provision of "just compensation."
[84] *See, e.g.*, Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984).
[85] *See, e.g.*, J.D. EATON, REAL ESTATE VALUATION IN LITIGATION 13 (2d ed. 1995).
[86] *See, e.g.*, Sidney Z. Searles, *The Law of Eminent Domain*, SB48 ALI-ABA 1, 8 (Am. L. Inst. 1997)
[87] Searl v. Schl. Dist., 133 U.S. 553 (1890).
[88] Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 117-18 (2002) (citing

the taker or a loss to the owner standard could be selected, either of which may result in higher awards than a fair market value standard.[89] Just compensation, it has been noted, relates to general damages, which means the fair market value of the property, and ignores other consequential damages, such as an increase in value realized by the taker that might be recoverable under theories of restitution or indemnification.[90] Therefore, just compensation does not necessarily mean fair market value. This legislation seeks to impose the fair market value standard in the regulatory takings context to conservation easements established under a voluntary arrangement.

2. Fair Market Value

Fair market value is "what a willing buyer would pay in cash to a willing seller."[91] It includes not only the value that the taker is willing to pay for its desired use of the property, but also includes the speculative value of all those uses for which other users might wish the property.[92] As a result, the fair market value means that "[u]nder established rules for determining just compensation . . . compensation is based on the highest and best use of the property other than the use contemplated by the taker."[93]

There exist different appraisal methods for determining market value of a property. These include the "market data method," which compares the property sales price to other similar properties nearby and the "income valuation approach," which looks at the capitalized income derived from the property and compares that to income derived from comparable

---

Roger P. Smith, *Real Property Valuation for Foreign-Wealth Deprivations*, *in* 1 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 141 (Richard B. Lillich ed., 1972)).

[89] A benefit to the taker standard of compensation, or a restitution/unjust enrichment theory of compensation, would result in higher awards because "condemnations of land typically increase the value of the property taken." *Id*. at A loss to owner standard of compensation, or indemnification standard, would also result in higher awards by providing compensation for the subjective value of the property to the individual owner as well as consequential damages such as lost profits, locational benefits, moving expenses, etc., otherwise lacking in a "fair market value" standard. *Id*. at 118-19. While it is possible for an indemnification standard to result in a lower award, that would only occur "in those relatively rare cases where an owner obtains some offsetting benefit from the taking." *Id*. at Merrill views the "fair market value" standard as providing incomplete compensation. *Id*. at 111.

[90] *See id*.

[91] Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984). The Court noted that this standard of compensation does not fully indemnify the owner for particularized sentimental or specialized value placed on the property, but that the "need for a clear, easily administrable rule governing the measure of 'just compensation'" outweighed such occasional inequities. *Id*. at 10 n.15 (internal citations omitted).

[92] 4 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN §12.02[1], at 12-60 to 12-67 (rev. 3d ed. 2001)

[93] *In re* Lido Blvd., Town of Hempstead, Lido Beach, Nassau County, 43 A.D.2d 45, 349 N.Y.S.2d 422 (2d Dep't 1973), *aff'd*, 39 N.Y.2d 958, 386 N.Y.S.2d 886; Thomas W. Merrill, *supra* note 88, at 118 (citing United States v. Causby, 328 U.S. 256, 261 (1946)). This means that awards are not limited to compensating landowners for the value of the current uses, but based upon the most advantageous use to which the land could be developed. Matter of Town of Esopus, 162 A.D.2d 829, 557 N.Y.S.2d 732 (3d Dep't 1990), *lv. denied*, 77 N.Y.2d 801, 566 N.Y.S.2d586; Dillenbeck v. State, 193 Misc. 542, 83 N.Y.S.2d 308 (N.Y. Ct. Cl. 1948), *aff'd*, 275 A.D. 871, 88 N.Y.S.2d 389 (3d Dep't 1949).

investments elsewhere.[94]

While the compensation scheme proposed by the legislation is not exactly the fair market value standard typically used by the courts in the takings context, it is important to look at the justifications for that fair market value standard of compensation to understand its applicability and appropriateness in the conservation easement context.

Three reasons justifying the fair market value standard that incompletely compensates owners used in American takings jurisprudence have been identified: loss spreading, maintaining efficient incentives and subsidizing public goods.[95]

The argument in favor of loss spreading is that decreasing the cost of administration of a standard of compensation is desirable because such a simplified standard allows more access to compensation and "owners would prefer a broad but incomplete promise of compensation to a promise of full compensation that applies more selectively."[96] Obviously such a simplified administrative system is desirable from a statist perspective as well.

The efficiency argument maintains that incomplete compensation provides the necessary incentive to government to regulate socially undesirable activity.[97] In the case of wetlands, the proposed amendment provides a possible incentive to voluntarily enter into conservation easement agreements (though this is questionable given the timing issue discussed below). If, however, the government has to compensate all easements located in wetlands, it may be less inclined to designate such properties as wetlands even if such designation results in heightened protection under the easement agreement. How much of an impact this proposed regulation would have in discouraging mapping of wetlands is uncertain, however, since not all designations of wetlands will require compensation, but only those on easement properties, which may very well be so small a class of properties that no real disincentive is created. Nevertheless, there is little incentive created by this legislation to promote designations or for public bodies to enter into conservation easement agreements. Disincentives, on the other hand, abound. Therefore, it seems likely that this bill will result in a greater privatization of conservation easements which means more strained resources of not-for-profit organizations in the management and enforcement of such easements.[98] It also means that the bill contradicts existing law by promoting the conservation of open spaces and wetlands through all available means.

The subsidization argument, however, also seems appropriate here. In the case of wetlands, where lands are condemned because they provide large social and ecological value to the public, such condemnations are properly considered actions in furtherance of the public

---

[94] Searles, *supra* note 86, at 9.
[95] *See* DANA & MERRILL, *supra* note 78, at 169-90.
[96] Merrill, *supra* note88, at 130.
[97] *Id*. at 132.
[98] Levin, *supra* note 45, at 602.

good,[99] or "public use" of the property.[100] If designation of wetlands is done for the public benefit, and positive externalities in the form of those described in Part II.A result from such a designation, then those designations should be encouraged to the point where the externality enjoyed by society is reduced from the cost of procuring the designation (i.e., the amount of required compensation). Land is never valued in such a manner for takings purposes because of the inherent value we hold in the ability to own real property without unnecessary government interference.[101] As a result, higher (and more inefficient) costs are deemed beneficial in the takings context to discourage such unnecessary takings.[102] While such concerns are important, it is also important to properly establish incentives for public benefit-related government takings— forcing the government to pay the full cost of the loss to the owner of the taking is an improper method of valuing a conservation easement taken for the public benefit. A better method under this theory would be compensating the landowner based upon the public benefit received which does not calculate all possible speculative uses.

3. Valuing Conservation Easements

The right to condemn lands for environmental protection is broad and without limitation.[103] Even though a conservation easement may be attached to lands, such easements may similarly be condemned.[104] However, "it means little to call a conservation easement 'perpetual' if it can be readily extinguished through condemnation."[105] Such a condemnation, if held by a private landowner, would require compensation.[106] "Public property generally

---

[99] *See infra* Part V.

[100] *See id*.

[101] For a discussion of the inherent value of property in defining personhood, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

[102] Levin, *supra* note 45, at 626 (proposing a "comprehensive set of procedural and substantive restrictions that reflect the complexities of conversion and condemnation," thereby "raising the cost and time it takes to convert or condemn conservation property" in order to prevent "rash and unnecessary conversions and condemnations").

[103] *See, e.g.*, Bath & Hammondsport R. Co. v. Dep't of Envtl. Conserv., 73 N.Y.2d. 434, 541 N.Y.S.2d 732 (1989); *In re* Fowler, 53 N.Y. 60 (1873).

[104] Wechsler v. Dep't of Envtl. Conserv., 153 A.D.2d 300, 550 N.Y.S.2d 749 (3d Dep't 1990), *aff'd*, 76 N.Y.2d 923, 563 N.Y.S.2d 50; Application of Residents of Summer Haven, Hamlin, NY, 202 Misc. 682, 110 N.Y.S.2d 186 (N.Y. Sup. 1952); Richard J. Kohlman, *Condemnation of Easements*, 22 AM. JUR. *Trials* 743 § 5 (2003).

[105] Levin, *supra* note 45, at 600. This is of particular concern since "[p]rotected conservation land will almost always be a less expensive condemnation option than an already developed site. The disparity is even more glaring if the government already owns the protected property, for it need not go through condemnation proceedings or acquire right-of-way access." *Id*. at 600, 626-37 (arguing that greater procedural roadblocks to conversion or condemnation of conservation easements are necessary to ensure that they are not unduly taken). A telling example of the ease with which such conservation easements can be extinguished is the case of Massachusetts, which, although requiring that such condemnations be approved by a 2/3 vote by both the municipality and the state legislature, over 85% of the proposed condemnations were passed by both and undertaken. *See id*. at 605-06 (citing OPEN SPACE SUBCOMM'N OF THE JOINT COMM'N ON LOCAL AFFAIRS, GEN. CT. OF MASS., NEW SCHOOL CONSTRUCTION AND THE LOSS OF ARTICLE 97 LAND 13 (2000).

[106] Ossining Urban Renewal Agency v. Lord, 39 N.Y.2d 628, 385 N.Y.S.2d 28 (1976). However, "[h]uge

enjoys greater protection from condemnation than does private property."[107] This means that publicly held conservation easements are generally more desirable than privately held conservation easements if the goal is to protect wetlands from development. Of course, the ability of the government to purchase conservation easements is severely restricted by funding limitations and therefore the government has generally sought means other than purchase to obtain such easements.

The rules of compensation discussed previously deal with complete takings. Partial takings, on the other hand, bring different compensation standards. Conservation easements, because they don't impact the landowner's right to use the property in manners not inconsistent with the easement, are best considered partial takings, and therefore the standard of compensation of partial takings is most appropriate. Methods by which these figures are determined vary widely. The Land Trust Alliance has put together a book on some of the various methods of appraising conservation easements.[108]

The standard generally used is the fair market value of the taking plus the loss suffered through diminished value in the remaining property.[109] Therefore, "[i]n the partial takings case, not only is the part taken valued, but an award is also usually made for damages to the property that is left after the taking."[110]

> The usual rule is for a court to fix damages by including the value of the part taken . . . and adding to this severance damages, i.e., the damages to the property that is left The part taken is assessed by measuring its value as part of the whole property as it was before the 'taking'….[111]

Severance damages, in turn, include either the "[l]oss or impairment of use to the remainder by reason of the partial taking," or "[d]amages to the residue caused by construction of a project."[112]

This standard, or a fair market value of what was taken from the owner (not what was

---

economic incentives are the major driving force behind the high number of Massachusetts conversions, as the towns need not pay to convert their open space land." Levin, *supra* note 45, at 606 (internal citations omitted).

[107] *Id*. at 610-12 (but noting that "governmental acquisition programs are not created to protect property from imminent condemnation").

[108] LAND TRUST ALLIANCE & NAT'L TRUST FOR HISTORIC PRESERVATION, APPRAISING EASEMENTS (1990).

[109] *See* Bauman v. Ross, 167 U.S. 548, 574 (1897); Donaloio v. State, 99 A.D.2d 335, 472 N.Y.S.2d 946 (3d Dep't 1984), *aff'd*, 64 N.Y.2d 811, 485 N.Y.S.2d 924; 4A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN §14A.01[2], at 14A-4 (rev. 3d ed. 2001). It may also be important, though for different reasons, to compute the fair market value of the real property interest of the holder of the easement. See INTERAGENCY COMM. FOR OUTDOOR RECREATION, GUIDELINES FOR USE OF CONSERVATION EASEMENTS: RIPARIAN HABITAT GRANT PROGRAM 17 (1999), for an example of how to compute such a value.

[110] Searles, *supra* note 86, at 13.

[111] *Id*.

[112] *Id*. at 13-14.

acquired by the taker, the usual rule) constitutes a shift "toward an indemnification standard."[113] One prominent author notes that "[t]he rationale for shifting part way toward an indemnification standard in partial takings cases has never been clearly spelled out."[114] The author then points out a few possible explanations, including the inherent preference for indemnification, the fact that partial takings do not make inquiries into residuum damages administratively cost- prohibitive, the concern that partial takings are "especially prone to unfair outcomes under the fair market value standard," and the cost of interference "with the scale of the owner's unit of property."[115]

Another option for valuing partial takings is called the "before and after" rule, which "evaluates the entire property before the taking and then values the remainder in the after taking situation. The difference is the loss of value for which compensation is payable."[116] This is the method used by the United States Internal Revenue Service (IRS). The Internal Revenue Code requires that any conservation easement donation over $5,000 be valued by a qualified appraiser,[117] who "estimates the value of the property before and after the easement restrictions are applied. The difference between the two values is the amount of the charitable gift for tax purposes."[118]

The New York Court of Appeals has adopted something of this modified fair market value standard in regulatory takings cases, awarding the difference (including interest on that difference) between the fair market values of the property before and after the taking.[119] Compensating landowners for conservation easements has proceeded similarly. The amount of damages awardable as compensation for an easement must be valued based on what rights the State appropriated under the terms of the easement.[120] The end valuation is based on how those rights taken impact the value of the land to the landowner. This "fair market value" to the owner is "established by the opinions of qualified real estate appraisers."[121]

These fair market value-based standards of appraisal work well when there exists a functioning market. However, there exists no such market for conservation easements.[122] While conservation easements are not forced exchanges, they do nevertheless occur in thin markets with a monopoly seller competing for the highest bidder of the government or

---

[113] Merrill, *supra* note 88, at 122.

[114] *Id*.

[115] *Id*. at 122-23.

[116] Searles, *supra* note 86, at 13.

[117] *See* TUG HILL COMM'N, *supra* note 50, at 4..

[118] FLATHEAD LAND TRUST, PURSUING A CONSERVATION EASEMENT 5 (2002), *at* http://www.flatheadlandtrust.org/images/Easement%20Fact%20Sheet%20.pdf.

[119] *See* 520 East 81st Street Assocs. v. New York, 2002 N.Y. LEXIS 3459 (Nov. 14, 2002).

[120] Lorig v. State, 58 A.D.2d 734, 396 N.Y.S.2d 122 (4th Dep't 1977), *appeal dismissed*, 42 N.Y.2d 1101, 399 N.Y.S.2d 1029.

[121] Richard J. Kohlman, *Condemnation of Easements*, 22 AM. JUR. *Trials* 743 § 3(e) (2003).

[122] See NORTHERN FOREST EASEMENTS, *supra* note 62 ("[Conservation easements] are particularly valuable for protecting values that are not adequately conserved by market forces.").

generally non- competitive (and perhaps collusive) land trusts for the easement. Purchasers of wetlands in the private market are either developers who believe they can develop the property consistent with the requirements under the Environmental Conservation Law and other laws or are land trusts and other similar conservation-minded organizations that desire the easement to protect the land from development. The latter have fewer resources, do not necessarily intend to exploit the resource for economic gain and therefore may not value the easement as highly as may a profit- minded developer who values the property based on its speculative value. A developer's willingness and ability to pursue the development, therefore, is not equivalent to the conservation movement's willingness and ability to pay to prevent the development from occurring. Therefore, although there is some limited competition for the property and easement, the competition is really occurring at different levels and by individuals of very different abilities to pay. As a result, the market for conservation easements is not a smooth-functioning market. In fact, conservation easements under the Conservation Easement Law can only be held by public bodies and not-for-profit conservation organizations.[123] Therefore, the market for conservation easements is limited as it consists entirely of non-profit bodies.

> In practice, however, government condemnations occur almost exclusively in thin markets, where there is only one seller who has a monopoly over some resource needed for a public project. Takings are forced exchanges of unique property rights, typically rights in land, that occur in circumstances where voluntary exchange has failed and there are no good substitutes for the land in question insofar as the condemning authority is concerned.[124]

Because there is no truly viable market for conservation easements, the concept of fair market value is purely theoretical and is based on an opinion or educated guess about what the negotiated price of the property would have been if, contrary to fact, the owner had sought to sell it and a willing buyer had sought to buy it on the day of the taking."[125] While a conservation easement may be voluntarily entered into by the landowner, and therefore analogously "sold" to the government or owner of the easement, there is still the tricky issue of valuing the easement when the easement was not offered on a public market.

The proposed method of valuing the easement, based on the fair market value, means that the value of the easement will be determined based upon the value of the property prior to the easement as compared with the value of the property without the easement. This,

---

[123] N.Y. ENVTL. CONSERV. LAW § 49-0305(3)(a) (2003).
[124] Merrill, *supra* note 88, at 116.
[125] *See id*. at 116-17.

however, bases the value of the easement solely in reference to the landowner,[126] and does not seek to create a value that is fair to both parties. This is especially evident given that purchasers of conservation easements typically are land trusts and they purchase such easements from landowners at very low prices for the right to conserve the property in perpetuity. The private market system exists because landowners suffering from economic downturn or low farm incomes, and unable to exploit the "normal exemptions" practices at a reasonable rate of return, sell the easements to earn some income and a tax deduction from land that would otherwise be near valueless because developers would likely be unable to pursue further development.

When the market value cannot be applied to a property the value of the property is determined by the "reproduction-cost method." Simply, this method combines the value of the land and improvements made thereon, less depreciation.[127] This is also known as the "sound- value method" of appraisal.[128] This alternate form of valuing property is used because the courts have "refused to make a fetish even of market value, since it may not be the best measure of value in some cases."[129] This is an alternate model of compensation that may be more appropriate in the wetlands conservation easement context.

In the end, the fair market value approach does not work when there is no market. Alternate methods of valuation are needed, and the approach that is ultimately chosen must be just for both the seller of the conservation easement and the public that purchases it. Overvaluing the conservation easement in the takings context makes sense as a means to protect the sanctity and inviolability of private property. In the voluntary context of the sale of a conservation easement, however, a requirement that the easement be sold at fair market value, which references the foregone speculative development opportunities (which may or may not be approved with a federal or state wetlands development permit), is inappropriate and unjust. Appropriate consideration must be given to the voluntary nature of the transaction and an appropriate level of subsidization to enhance the public welfare is appropriate. Therefore, while CEL does not endorse any mandated valuation standard because CEL believes that such a standard inhibits such conservation easement agreements by limiting the compensation options of landowners, CEL does believe that a benefit-to-the-taker standard of valuation to be a more appropriate standard of compensation for voluntary conservation easements.

---

[126] Even where assessing the value to the landowner, it does so objectively, without referencing the subjective value attached to the land by the owner, "ranging from psychological attachment to the property, to features of the property that have been customized to the owner's tastes, to nontransferable benefits associated with the location, to a desire to avoid the hassles of moving" despite the fact that "if an owner has not sold the property, it is likely that the owner has a subjective value higher than the market value." *Id*. at 119.

[127] Searles, *supra* note 86, at 9.

[128] *Id*. at 9-10 (citing *In re* Simmons, 127 N.Y.S. 940 (1910)).

[129] United States v. Cors, 337 U.S. 325, 332 (1949).

4. Valuing Wetlands Development

The valuation of the easement must consider existing restrictions.[130] Thus it seems that the easements will be near valueless especially because "[e]ven the most restrictive easements typically permit landowners to continue traditional uses of the land."[131] In the valuation process for wetlands condemnations a court must determine whether or not DEC would have granted a development permit under the particular circumstances and what that development would have entailed.[132] If the "highest and best use" of the property is the same both before and after the easement as a result of the wetlands development restrictions, then no consequential damages are justified.[133] If the "highest and best use" has been altered by the taking of an easement, then consequential damages are awardable.[134]

Wetlands regulations typically allow the same traditional uses through their exemption clauses and other regulatory allowances as are allowed under conservation easements.[135] Thus there seems to be little difference between the easement and the existing wetlands regulation except for the inflated value of speculation that the wetlands designation will change in the future. If such a designation changes, however, the conservation easement may be extinguished because there would likely no longer be any reason to maintain its existence. Moreover, most easements have such a provision for extinguishment when the resource to be conserved is no longer extant.[136] New York allows for the termination of a conservation easement under two situations: (1) when the easement agreement itself provides for destruction, or (2) when the easement is of "no actual and substantial benefit" because of changed conditions.[137] Therefore, under the fair market value standard, the difference in value

---

[130] TUG HILL COMM'N, *supra* note 50, at 4; Berwick v. State, 159 A.D.2d 544, 552, N.Y.S.2d 409 (2d Dep't 1990), *lv. denied*, 76 N.Y.2d 884, 561 N.Y.S.2d 544 (appropriation of wetlands for conservation easement required downward adjustment of valuation given development limitations imposed by wetlands regulations).

[131] TUG HILL COMM'N, *supra* note 50, at 3.

[132] Chase Manhattan Bank, N.A. v. State, 103 A.D.2d 211, 479 N.Y.S.2d 983 (2d Dep't 1984).

[133] Sun Oil Co. of Pa. v. State, 50 A.D.2d 983, 377 N.Y.S.2d 252 (3d Dep't 1975). Otherwise, such consequential damages are warranted. *See, e.g.*, Yochmowitz v. State, 25 A.D.2d 930, 270 N.Y.S.2d 333 (3d Dep't 1966), *lv. denied*, 18 N.Y.2d 579, 274 N.Y.S.2d 1027; *see also* Bd. of Supervisors of Monroe County v. Frisbee, 18 N.Y.S.2d 668 (1940) (where private character had been lost, the granting of an access easement entitled the landowner only to nominal damages); Cooper v. State, 48 N.Y.S.2d 212 (1944) (same). These damages are determined based on the difference between the market value of the remainder before and after the easement was taken. Bohm v. Metropolitan El. Ry. Co., 129 N.Y. 576 (1892); S.J. & J. Serv. Station, Inc. v. State, 74 A.D.2d 707, 426 N.Y.S.2d 112 (3d Dep't 1980), *appeal dismissed*, 50 N.Y.2d 927, 431 N.Y.S.2d 1033.

[134] 3775 Genesee St., Inc. v. State, 99 Misc.2d 59, 415 N.Y.S.2d 575 (N.Y. Ct. Cl. 1979).

[135] TUG HILL COMM'N, *supra* note 50, at 3 ("Even the most restrictive easements typically permit landowners to continue traditional uses of the land.").

[136] For example, ECL § 3-0305(15) allows for the extinguishment of a temporary easement when "the purposes for which such easement right was acquired have been accomplished and that the exercise of such easement is no longer necessary." N.Y. ENVTL. CONSERV. LAW § 3-0305(15) (2003). Temporary easements, however, are treated quite differently than permanent easements, as the taking of a temporary easement is compensated by the value of the lost rental income caused thereby. Matter of County of Nassau, 148 A.D.2d 533, 538 N.Y.S.2d 865 (2d Dep't 1989); Kauffman v. State, 43 A.D.2d 1004, 353 N.Y.S.2d 61 (3d Dep't 1974), *aff'd*, 36 N.Y.2d 745, 368 N.Y.S.2d 164.

[137] N.Y. ENVTL. CONSERV. LAW § 49-0307(1) (2003); *see* Bd. of Educ., E. Irondequoit Cent. Schl. Dist. v.

between the conservation easement and a status quo with wetlands regulations is almost wholly attributable to the speculation that the area will be redesignated as non-wetlands. If that situation arose, however, the easement could be extinguished and the full development value of the property restored.

IV. Substantive Concerns Regarding A04231

Not only does the proposed legislation create a vast amount of uncertainty with respect to its application, scope and effect, but it is also objectionable for more substantive reasons. The proposed legislation is unnecessary–it is inconsistent with existing law and creates an incentive structure that fails to promote the creation of conservation easements, instead threatening to undermine existing incentives to create such easements by promoting game-playing and over- compensation of landowners. Furthermore, this bill seeks to wreak havoc with New York takings jurisprudence by either expanding the compensation formula to allow increased compensation of landowners or by wholly circumventing New York takings law. These substantive concerns demand that the proposed bill be rejected in its current form and in any future form, even where its application, scope and effect are clearly delineated.

A. Skewing Incentives

The proposed bill, as has been alluded to earlier in this Comment, creates unintended incentives for conservation easements that run contrary to the purposes of the Conservation Easement Law. A04231 seeks to establish incentives for the formation of voluntary conservation easements. The bill, however, discourages such conservation agreements and encourages game- playing to the detriment of wetlands and the state budget.

The proposed legislation provides compensation not for conservation easements generally, but only for those conservation easements that are designated as wetlands.[138] Therefore, there are two scenarios under which the proposed bill may operate: (1) landowners establish conservation easements and are then compensated when such easements are designated as wetlands, or (2) landowners possessing designated wetlands establish conservation easements to protect such wetlands. Under either scenario, the proposed bill operates to create unintended consequences that undermine the purposes of the bill.

1. Scenario One

Doe, 88 A.D.2d 108, 113, 452 N.Y.S.2d 964, 967 (4th Dep't 1982).

[138] This is because the scope of the Conservation Easement Law is limited to conservation easements. *See* N.Y. ENVTL. CONSERV. LAW § 49-0309 (2003).

Under scenario one, the improper incentive structure is easily discernable. If landowners are required to have a conservation easement prior to obtaining compensation and that compensation is contingent on an unrelated event, namely the designation of the lands on which the easement operates, then there exists no real incentive for establishing such conservation agreements (unless landowners operate on the speculation that such lands will be designated as wetlands sometime in the future). Landowners may have the ability to speculate quite effectively on the remapping of their properties given that such remapping requires public notice and comment and often a public hearing. Once a landowner becomes apprised of a possible remapping the landowner could, under the proposed bill, follow one of three options: (1) sell the property (the land may be sold to an unsophisticated purchaser unaware of the proposed remapping, thus providing the seller a windfall); (2) wait until the property is redesignated then attempt to develop the property and, if that proposal is rejected, seek compensation under the Due Process Clause;[139] or (3) prior to the redesignation as wetlands the property owner can seek to establish a conservation agreement and upon the redesignation seek compensation under the proposed legislation.[140]

Obviously, each of these situations is fraught with game-playing and is difficult to control through legislative decree and judicial rule-making. An added danger under this scenario is that the government could capitalize on the landowners' speculation by proposing redesignations, awaiting the speculating landowners' entrance into conservation agreements, then deciding not to redesignate the properties. This would result in a windfall for the government because no compensation would necessarily be required in this situation.

In reality, under this first scenario, the only landowners that would seek compensation would be those landowners that have no true desire (or economic capability) to develop the properties in the first instance. These property owners, therefore, would seek either the first (sale) or second option (conservation easement). If unable to sell the property and minimize losses, the property owner that has no reasonable investment-backed expectations whose subjective value of the property is not so great as to justify continued ownership of the property despite the decreased value, would seek to obtain whatever income possible. In the end, then, this first scenario serves, at best, to subsidize landowners for unproductive use of the land. Farmlands no longer profitable will capitalize on the conservation easement compensation requirement to earn income where such income would not otherwise be forthcoming because (1) the normal agricultural practices exemption to wetlands restrictions will not sustain the property value because such practices are no longer profitable, and (2) other activities would be precluded from operation on the wetland. Thus, for such

---

[139] Two possible outcomes, of course, remain: the proposed development may be approved, or the courts may find that no taking has occurred.

[140] Conservation easements take a minimum of three to six months to obtain from start to finish, which provides ample time to start and finish the process upon notice of intended remapping. *See* FLATHEAD LAND TRUST, *supra* note 118, at 2.

unprofitable farmlands, this legislation provides a windfall for otherwise poor investments.

This is a plausible scenario because New York farmers bear the brunt of the highest per acre tax of any agricultural state.[141] This tax is so burdensome that in ten counties property taxes have doubled the net farm income for the area.[142] The high taxes are largely a result of increasing development pressures from surrounding suburban sprawl, which drive up the land values and thus the property tax base.[143] Of course, rising land values are a large reason why county and state acquisition programs are lagging behind targeted conservation goals.[144] As a result, such government bodies have sought to develop alternate strategies to promote conservation including the enactment of zoning and clustering provisions.[145] Forcing the state then to bear the brunt of these rising property values based on speculation of future development will inevitably be quite expensive for the New York treasury.

Some farmers oppose conservation easements generally because they fear a loss of equity, that may reduce the amount for which the farmer can mortgage the property.[146] LaGrasse and others believe that the result of a conservation easement may be the loss of the remainder of the property, which may result in one of two situations: (1) the reduced mortgage value is insufficient to help farmers through tough times, thus requiring them to sell their property, or (2) uses prohibited by the easement become feasible, whereas allowed uses become undesirable or are no longer economically viable.[147] Because conservation easements are difficult to maintain and protect, she and other farmers believe "the only buyer for the land may be the government" in such circumstances and thus "the conservation easement is in essence a step along the way from 100 percent private to 100 percent government

---

[141] Dave Tetor, *We are Number One! We are Number One!*, LAND & LIVING, Dec. 1995 – Jan. 1996, at 7; *see also* ADVISORY COUNCIL ON AGRIC., N.Y. DEP'T OF AGRIC.& MKTS., FARM PROPERTY TAXES IN N.Y. STATE 18 (1996) (noting that "tax levies on farm property are 'high' compared to other states").

[142] Tetor, *supra* note 141, at 7. However, "[f]armers' complaints about property taxes are often related to the tax rate rather than the property assessment." Sean F. Nolon Cozata Solloway, Note, *Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State*, 17 PACE L. REV. 591, 637 (1997).

[143] HENRY H. STEBBINS, SCENIC HUDSON, INC., PRESERVING WORKING FARM LANDSCAPES IN THE HUDSON VALLEY: A FEASIBILITY STUDY 2 (1995) (calling this situation the "impermanence syndrome"); John R. Nolon, *The Stable Door is Open: New York's Statutes to Protect Farm Land*, *in* LAND USE L. REP., May 1994, at 5.

[144] *See, e.g.*, PATRICK G. HALPRIN, SUFFOLK COUNTY PLAN. COMM'N, FARMLAND PRESERVATION PROGRAM: HISTORY AND CURRENT PERSPECTIVE 1, 17 (1990).

[145] *Id*. at 10. One way to do this would be to increase the minimum acreage required for development, which would decrease the number of subdivisions allowed from a large property such as a farm. Solloway, *supra* note 142, at 619-20 (internal citations omitted). Another possible means of regulating development not through acquisition is through a transferable development rights (TDRs) scheme that has as a sending zone made up of lands the State wishes to conserve, and a receiving zone located in an environmentally noncritical or nonvulnerable area. *Id*. at 630-34.

[146] LaGrasse, A Critical Look at Conservation Easements, speech to Tompkins County Farm Bureau (Oct. 26, 2000), *available at* http://www.prfamerica.org/ConsEaseCriticalLook.html (last visited June 30, 2003) [hereinafter LaGrasse, Critical Look]; *see also* AGRIC. ADVISORY COMM. OF THE HUDSON RIVERY VALLEY GREENWAY, THE AGRICULTURAL LANDSCAPE:A POLICY RECOMMENDATION FOR THE HUDSON RIVER VALLEY GREENWAY 13 (1990) [hereinafter AGRIC. ADVISORY COMM.].

[147] LaGrasse, Critical Look, *supra* note 146; *see also* AGRIC. ADVISORY COMM., *supra* note 146, at 13.

ownership."[148]

This view, however, is misguided, because selling the easement allows for the realization of equity without having to sell the land.[149] "The proceeds can be invested for future equity, used to purchase more land, or otherwise invested in the farm. Plus, if the farmer has neighboring land that is not under easement, the value of that land will increase, providing equity."[150] Furthermore, "funds received by the landowner are placed back into the local economy as an investment in the efficiency of the farm and through retail activity."[151] The increasing value of remaining and surrounding properties as a result of the granting of an easement, as well as the increased equity in the remaining lands through increased efficiency result in stabilized farmland prices.[152]

In general, conservation easements are desirable from both the farmer's perspective and the state's perspective as an effective per dollar tool to preserve wetlands. However, under this scenario, there is no incentive to enter into conservation easements except to capitalize on a technicality in the law on the hope that the lands will be designated as wetlands, a situation which, under most circumstances, would not be compensable as a taking under existing law.

2. Scenario Two

In the second scenario, wetlands are designated and then landowners are provided compensation for establishing a conservation easement. This would create a scenario of over-conservation. Landowners, already precluded from developing in a manner inconsistent with the continued viability of wetlands and required to mitigate the damages caused by such development, are now provided compensation for not developing the land and protecting it from such development in the future. This conservation, however, is unnecessary given the current legislative structure because such lands are already protected under current law. If landowners actually wanted to develop the property (as opposed to purchasing the property for conservation purposes), and such desired development is expected to net more profit than the income derived from a conservation agreement, then the landowners will nevertheless attempt such development. When frustrated, the landowners have the possible greater compensation of a takings to satisfy their economic interests in the property.

This overpaying for conservation is clear in the case of the private market. Not-for-profit conservation organizations are empowered under the current statute to

---

[148] *Id*.; *See, e.g.*, Letter to Jack & Bev Sparrowk from Joe Mehrten, Regarding the Murphy Creek proposal, (Jan. 6, 2002).
[149] *See* Solloway, *supra* note 142, at 608-09 (internal citations omitted).
[150] *Id*. (internal citations omitted).
[151] *Id*. at 610 (internal citations omitted).
[152] *Id*. (internal citations omitted).

purchase conservation easements in perpetuity. Should these conservation organizations purchase such easements, they may be able to seek complete subsidization from the government, thereby creating a cycle of conservation easements that overlimit development because, presumably, the conservation agreements will contain restrictions on development more stringent than existing wetlands regulations. Otherwise there is no value in promoting such agreements for conservation purposes.[153]

As in the previous scenario, landowners, in attempting to seek fair market value of the designation, will attempt to show that they intended to develop the lands but the designation (and not the conservation easement) precluded them from doing so.[154] This game-playing inevitably will increase the transactional cost of determining the value of compensation. Valuing compensation on some other measure, such as the benefit of the wetlands designation (likely to be zero if provided after the easement agreement), or conservation easement will serve to reduce the cost of administering A04231 should the legislature decide to make it law. The fair market value, as discussed above in Part III.C.2, is incomprehensible where no attempt was made to develop the property, alternative development schemes were not explored and there exists a thin market for such conservation easements/designations.

B. Unnecessary

Providing for compensation under the Conservation Easement Law should be rejected as well because it is clearly unnecessary given current law, and risks doubly and triply compensating landowners such that they may receive a massive windfall.

This bill is unnecessary for a very simple reason: landowners must enter into conservation easement agreements voluntarily so they can always reject low bids and seek land trusts willing to pay more. Landowners are not forced into selling conservation easements under the existing law so this bill is clearly unnecessary, as the negotiation process would value the easement at a just price amenable to both parties.[155] Furthermore, this bill is unnecessary because current law provides for compensation and appropriate tax benefits for conservation easements and because land trusts are already protecting important lands,

---

[153] It should be noted that the Conservation Easement Law does not indicate under which circumstances the government should enter into conservation easement agreements nor what the agreements should contain, thereby making the Board very vulnerable to "agency capture." However, though the language of the proposed statute indicates that compensation is derived from the designation as opposed to the provision of the easement, such a reading seems difficult to sustain because the proposed legislation primarily amends the Conservation Easement Law, and not the articles dealing with wetlands.

[154] This analysis would apply equally, though in a different manner, if compensation was predicated on the establishment of an easement agreement and not on the designation. In such an instance, the landowner would attempt to illustrate that her entrance into the conservation easement agreement was based on some desire to enhance the public good, reduce transaction costs (by not attempting to seek a development permit first), etc. Both arguments are summarily dismissible.

[155] *See supra* notes 86-87 and accompanying text.

making the expenditure of state funds unnecessary—therefore, no additional incentives are necessary.

1. Land Trusts

Over 1,200 land trusts exist in the United States,[156] with most of them located in the Northeast,[157] and more forming at a rapid rate.[158] These land trusts have conserved over 6.2 million acres with 2.6 million of those acres conserved through conservation easements.[159] As an example, The Nature Conservancy has protected over twelve million acres since it was formed more than fifty years ago.[160] It owns or holds conservation easements in nearly 1.2 million acres in its private preserve system.[161]

In New York, conservation organizations have been a leader in the conservation easement movement.[162] In 2003, twenty-four land trusts received funds from the newly established New York Conservation Partnership Program, "the nation's first program in which a state has dedicated a portion of its environmental budget to strengthening nonprofit conservation partners."[163] The program, funded at $250,000, is paid from the New York Environmental Protection Fund.[164] While the program itself only provided for the conservation of approximately 644 acres, it did provide seed money to a number of conservation organizations that help "lay the foundation to conserve much more," according to Ezra Milchman, LTA Northeast Program Director.[165] As a result, "a tool that is increasingly used [to protect special resource areas] is the conservation easement."[166]

---

[156] Land Trust Alliance, 1990s Bring Surge in Land Conservation as Regional, Local Land Trusts Attract 1 Million Supporters, *at* http://www.lta.org/aboutlta/census.shtml (last visited July 3, 2003) ("1,263 local and regional land trusts were in operation in 2000, a 42 percent increase over the number (887) that existed in 1990 [hereinafter Land Conservation Surge].

[157] Land Trust Alliance, National Land Trust Census: Charts and Graphs, *at* http://www.lta.org/newsroom/census_charts.htm (last visited July 3, 2003); Kevin Kasowski, *Growth Management and Green Spaces: Rural America at a Crossroads, Developments*, NAT'L GROWTH MGMT. LEADERSHIP PROJECT NEWSL., July, 1993, at 3.

[158] Land Conservation Surge, *supra* note 156.

[159] *Id*. This is a 475% increase in the use of conservation easements to protect lands since 1990, and an overall increase of 226% of lands conserved since 1990. *Id*.

[160] Margaret Jordan, Press Release: Nature Conservancy Celebrates 50 years of Saving Last Great Places, Oct. 22, 2001, *at* http://nature.org/wherewework/northamerica/states/northcarolina/press/press449.html (last visited July 3, 2003).

[161] Carol W. LaGrasse, *Land Trusts Threaten Private Property: Conservation Easements: Easy Government Money—Future Problems*, (citing RON ARNOLD, UNDUE INFLUENCE 162 (Merril Press 1999), *available at* http://www.prfamerica.org/LandTrustsThreatenPP.html (last visited June 30, 2003).

[162] "California, New York and Montana led the nation in the amount of acreage protected by local and regional land trusts." *Id*.

[163] Land Trust Alliance, 24 Land Trusts Receive Grants from Innovative NY Program, *available at* http://www.lta.org/regionallta/ny_regrants03.html (last visited June 30, 2003) [hereinafter Land Trust Grants].

[164] *Id*.

[165] *Id*.

[166] TUG HILL COMM'N, *supra* note 50, at 1; Levin, *supra* note 45, at 598, 608.

2. New York Law and the Environmental Conservation Law

Under New York law, the right to just compensation for takings is very clear.[167] While the right to condemn property is legislative, the right to determine compensation due condemnees is granted to the courts.[168] Adding an additional layer of valuation, or a mini-tribunal which still can be reviewed in a court determination for fairness and legality creates an unnecessary layer of bureaucracy and adds little to the process.

The New York Environmental Conservation Law (ECL) actively seeks out wetlands conservation easements for acquisition and provides for the adequate compensation of landowners under existing law.

> Conservation types of easements have existed for many years and were established or granted under the general easement laws and rules. However, under those laws and rules several weaknesses existed. Under those general laws, it was necessary to have the easement 'appurtenant' to other land and this is not always possible, practical or desirable. [169]

Under the New York Conservation Easement Law, which ended such anachronistic requirements,[170] "[m]any public-spirited land owners are granting conservation easements in their lands, while others are being paid to do so. At the same time, under proper conditions, conservation easements can be obtained by the eminent domain laws."[171] Conservation easements are becoming a favored method of conservationists because conservation easements "can stretch the per-dollar value of land conservation."[172]

Conservation easements constitute a Type II action under NYCRR Part 617.5(c)(20) and (27); they are also set forth in ECL 49-0303(1). The ability to establish local conservation easements is established under Section 119-o of the New York General Municipal Law. Using the ECL and Conservation Easement Law, DEC already holds most of the several thousand acres of conservation easements in Tug Hill.[173] Clearly, there exist ample incentives for

---

[167] *See supra* Part III.C.1; *see also* N.Y. CONST., art. I, § 7(1)(a) ("Private property shall not be taken for public use without just compensation.").
[168] N.Y. EM. DOM. PROC. LAW § 512 (2003); Sowma v. State, 203 Misc. 1105, 121 N.Y.S.2d 468 (N.Y. Ct. Cl. 1953).
[169] Richard E. Hitchcock, *Conservation Easements: Recent Modifications to Traditional Law*, *available at* http://prfamerica.org/ConsEaseHitchcock.html (last visited June 30, 2003).
[170] Philip Weinberg, Practice Commentaries to ECL § 49-0301 (2003 Elec. Update) (1997); Solloway, supra note 142, at 599 (internal citations omitted).
[171] *Id*.
[172] NORTHERN FOREST EASEMENTS, *supra* note 62.
[173] TUG HILL COMM'N, *supra* note 50, at 1.

landowners to enter into conservation easement agreements.

Aside from the general authority provided for conservation easements under the Environmental Conservation Law, the State Finance Law also provides money out of the Conservation Fund for preservation of tidal and freshwater wetlands through the purchase or acquisition of lands or rights therein for the protection of marine and shellfish resources and habitats.[174] The State Finance Law empowers DEC to obtain land rights or lands by gift, eminent domain or acquisition.[175] Furthermore, DEC has the authority to acquire any real property by purchase or appropriation that is necessary for the purposes or functions of the department.[176]

In fact, funds raised from licenses under the Conservation Easement Law are specifically authorized for use in acquiring "public rights or opportunities to utilize suitable lands for hunting and fishing, habitat management and improvement, and species propagation of game, game birds and game fish."[177] Acquisition of wetlands is allowed under all of these funds as well as money derived from the sale of voluntary migratory bird stamps and art prints.[178] Under existing law, funds are authorized for purchasing wetlands conservation easements and such acquisitions, if done through eminent domain procedures, must be done on terms that provide just compensation. If the property is sold to a willing buyer, however, there is no such requirement, thus allowing for possibilities such as the bargain sale. Of course, if the seller is not willing to sell at a reduced price and the State is not willing to purchase a conservation easement at the full price under existing law, the use of eminent domain will likely not be invoked as not cost- effective. While some have called for pre-agreement for periodic renegotiation in conservation easements,[179] this would negate the purpose with which perpetual conservation easements are created and would violate the perpetuity requirement of the IRS, making unavailable important income tax deductions.

3. Open Space Plan

The public is also becoming more willing to allocate bond money to open space conservation measures.[180] The New York State Open Space Conservation Plan specifically

---

[174] N.Y. STATE FIN. LAW § 83(a) (2003).
[175] *Id*. § 83(b).
[176] N.Y. ENVTL. CONSERV. LAW § 3-0305 (2003).
[177] N.Y. STATE FIN. LAW § 83(d) (2003).
[178] *Id. §* 83(e).
[179] *See generally* Carol W. LaGrasse, *Renegotiating the Conservation Easement*, *available at*http://prfamerica.org/ConsEaseRenegotiation.html (last visited June 30, 2003).
[180] In New York, of the thirteen open space conservation measures proposed in 2002, 92% passed, totaling over $400 million in funds allocated to such conservation. LAND TRUST ALLIANCE, LAND VOTE 2002: AMERICANS INVEST IN PARKS & OPEN SPACE 11 (2003), *available at* http://www.lta.org/publicpolicy/landvote2002.pdf. Interestingly enough, in Saratoga Springs, a ballot measure passed with approximately a 75% approval rate authorizing $5,000,000 in funds for conservation. *Id*. at 12.

authorizes the purchase of conservation easements for the protection of open space.[181] Under this authority, DEC has preserved "more than 400,000 acres in the past eight years."[182] There seems to be little need to provide additional incentives for the creation of conservation easements as conservation is occurring in the status quo. Furthermore, given Governor Pataki's goal of conserving one million acres of open space lands, it seems likely that few additional incentives are needed to create conservation easements.[183]

The New York State Open Space Conservation Plan establishes a system to:

- identify specific places with exceptional natural resource or recreational values which may be threatened by land use change or which could serve critical recreational needs;
- determine the most appropriate strategy for conserving the resource values of those places including what action should be taken by DEC or [Office of Parks, Recreation, and Historic Preservation (OPRHP)];
- evaluate the costs and benefits of individual land conservation actions;
- establish priorities for land conservation actions given limited public resources;
- when State acquisition of land is the most appropriate strategy, ensure that land is worthy of public investment and clearly meets the goals of this Plan;
- provide for statutory and reasonable outside input into the project evaluation process.[184]

The purpose of the Open Space Plan is to ensure that "decisions on land conservation action by [DEC and OPRHP] are being made in a rational way which directs the expenditure of state funds to the most important and worthy land conservation projects."[185] In fact, the Open Space Plan goes so far as to state that consideration of an acquiring fee or conservation easements for conservation include "the cost of the project in relation to its resource value."[186]

The process for acquisition under the Open Space Plan proceeds on multiple layers. First, a suggested conservation area is screened as "one of the three types of primary resource areas of interest" covered by the Plan.[187] Each subcategory has minimum eligibility qualification requirements.[188] Once the area passes the initial screening, it passes through a

---

[181] N.Y. ENVTL. CONSERV. LAW § 54-0301 (2003).
[182] Erin M. Crotty, Comm'r, Dep't of Envtl. Conserv., *quoted in* Land Trust Grants, *supra* note 163.
[183] *See* Land Trust Grants, *supra* note 163 (quoting Sen. Carl L. Marcellino).
[184] 2002 NYS OPEN SPACE CONSERVATION PLAN, ch. 4, at 69 (2002).
[185] *Id*.
[186] *Id*. at 78.
[187] *Id*. at 70; *see also id*. ch. 3.
[188] See *id*., app. A, for a detailed look at these requirements.

series of ranking systems, which evaluates the site's vulnerability or criticalness based on a number of criteria. The criteria include "any announced plans for the site, including their nature, timing, scope and environmental compatibility; any pending applications for any form of governmental approval for the use or development of the site; the land use pattern and development trends in the area; and a number of other considerations."[189] The site is then reviewed to see if some strategies, other than acquisition of the fee or a conservation easement, would protect the resources adequately.[190] "The final executive decision to purchase must take account of many other factors, including the landowner's willingness to sell.[191] Among the other factors is the statutory requirement to consider the possibility of an easement."[192] Land use and development patterns are considered because lands are chosen for acquisition whose conservation purpose is less likely to be thwarted by surrounding development and will therefore increase the success rate of each State dollar spent.[193] Because "[c]onservation easements often result in fragmented, instead of contiguous, preservation of lands," this selection criteria is of special importance.[194]

Because the State must first consider obtaining an easement via voluntary means under current law,[195] if the State is able to enter into such an agreement, under the proposed bill, the State must pay full compensation and cannot enter into a bargain sale with the landowner. This interplay with existing legislation could result in enormous costs being placed on the New York treasury.

Under the Open Space Plan, resources that can be protected by means other than obtaining a fee or conservation easement are ranked higher than other similarly valuable resources.[196] As a result, this proposed bill, which creates incentives for landowners to hold out for a sale of their easements, rather than donate them, ranks such lands lower, and thus

---

[189] *Id*. at 71-72.

[190] *Id*. at 73. Some of these strategies are discussed in the Open Space Plan. *See id*., ch. 6, fig. 7.

[191] Acquisition using funds from the Clean Water/Clean Air Bond Act requires a willing seller. The Environmental Protection Fund has a similar requirement, though it allows departure in extenuating circumstances. *Id*. at 78. Both of these funds would be available to wetlands easement acquisitions. The Open Space Plan, therefore, "recommends that any pursuit of acquisitions with unwilling sellers be as a last resort and resulting from unique circumstances." *Id*. at 78. As a side note, "[t]he State Finance Law requires that individual open space conservation projects that are proposed for funding through the EPF be included as specific line appropriations in the capital project budget prepared each year." *Id*. at 79.

[192] *Id*. at 74. This requirement comes from ECL § 49-0203(2). It states that [t]he department and the office shall first consider in each acquisition whether acquisition of conservation easement or other less than full fee title interests would fulfill the purposes for which the particular acquisition is sought. If it is determined that a conservation easement or other interest would fulfill such purposes, the department or the office will use its best efforts to acquire such easement or interest, where practicable. N.Y. ENVTL. CONSERV. LAW § 49-0203(2) (2003). Furthermore, the department and office must "pursue acquisitions through voluntary agreement to the maximum extent practicable to achieve the purposes of this article. Accordingly, the process of eminent domain shall only be used when reasonable efforts to obtain a voluntary agreement have been exhausted." *Id. §* 49-0203(3).

[193] 2002 NYS OPEN SPACE CONSERVATION PLAN, ch. 4, at 75 (2002).

[194] Solloway, *supra* note 142, at 608 (internal citations omitted).

[195] N.Y. ENVTL. CONSERV. LAW § 49-0203(2) (2003).

[196] 2002 NYS OPEN SPACE CONSERVATION PLAN, ch. 4, at 74.

under the Open Space Plan system, such lands are less likely to be conserved.[197] That is, because preference is given to gifted lands, then to lands voluntarily sold at reduced prices, then to fair market value lands, this last group of lands is likely to be left out of the mix given the meager State treasury and the State's unwillingness to consider eminent domain.

C. Landowner Reaps a Windfall

The proposed bill seeks to create a windfall for landowners who can already receive a number of benefits in the establishment of a conservation easement. These preexisting incentives have proven sufficient to induce the creation of voluntary conservation easements. The addition of these other incentives creates the possibility of multiple compensations for landowners entering into such agreements or, in the alternative, could serve to limit the options of landowners seeking to enter into conservation easements and to limit the compensation ultimately due to landowners.

1. Tax Benefits

Under the current structure, donation of conservation easement lands results in a number of tax benefits. "[A] landowner may claim an income tax deduction based on the value of the rights foregone. The reduction in . . . value associated with a conservation easement can also lower estate and gift taxes, helping families pass their land intact to the next generation."[198] Donations avoid capital gains taxes, which may be quite significant if the land has appreciated considerably.[199] This is a likely scenario in undeveloped wetlands where development pressures have increased land values and property taxes, thus making it more difficult for traditional use landowners to maintain the viability of such activities, such as in the scenario described above in Part IV.A.1.[200] A combination of these factors has resulted in the nationwide donation of over 300,000 easements.[201]

i. Income Tax Benefits

[197] Bargain sales do rank sites higher than sites whose landowners are unwilling to sell the easement at anything lower than the full market value based on speculation. *See id*. at 76. However, such ranking occurs at the qualitative review stage, and after the numerical ranking has already occurred. *Id*. at 74-76.
[198] Am. Conserv. Real Estate, An Introduction to Conservation Easements, *available at* http://www.conservationrealestate.com/coneasements.htm (last visited June 30, 2003); *see also* FLATHEAD LAND TRUST, *supra* note 118, at 2.
[199] FLATHEAD LAND TRUST, *supra* note 118, at 8.
[200] LEELANAU CONSERVANCY, CONSERVATION EASEMENTS:A GUIDEBOOK FOR LANDOWNERS IN LEELANAU COUNTY 7-8 (2002), *at* http://www.theconservancy.com/protection/guidebook.doc; Stephen Longmire, *Push Incentives for Preservation*, E. HAMPTON STAR, Apr. 3, 2003, *available at* http://www.lta.org/newsroom/news_star_040303.htm (last visited June 30, 2003) (quoting Russell Shay, Public Policy Director, Land Trust Alliance).
[201] TUG HILL COMM'N, *supra* note 50, at 5.

The Internal Revenue Service provides tax benefits for conservation easements given as charitable gifts.[202] These benefits include a 30% deduction from the donor's adjusted gross income and can be carried over up to five additional years.[203] The appraisal and legal fees associated with establishing the donation are similarly deductible if such miscellaneous costs exceed 2% of the donor's adjusted gross income.[204]

In order to be eligible for an income tax benefit, the property must have "significant" conservation values.[205] Properties containing wetlands are considered to have such values.[206] Furthermore, the conservation easement must be granted in perpetuity[207] to a qualified 501(c)(3) organization or public agency, must be dedicated to a conservation purpose that prohibits surface mining. Such purposes include: preservation of lands for education of, or recreation by, the public; protection of relatively natural habitat for fish, wildlife, plants or ecosystems, preservation of open space for scenic purposes or pursuant to a clearly delineated government policy. Data regarding the conservation values must be collected prior to the donation.[208] Easements granted by a developer in exchange for a development purpose does not provide any income tax benefit under the Internal Revenue Code, as such an easement is best viewed as an exaction.[209]

Therefore, the income and capital gains deductions for the donation of conservation easements are significant and provide a good incentive to landowners to enter into conservation agreements under existing law.

ii. Estate Tax Benefits

---

[202] See IRC § 170 (2003); *see also* STEPHEN J. SMALL, LAND TRUST ALLIANCE, THE FEDERAL TAX LA W OF CONSERVATION EASEMENTS WITH SUPPLEMENT (1986). For a more detailed, though slightly outdated, discussion of the income tax implications of conservation easements, see John C. Partigan, *New York's Conservation Easement Statute: The Property Interest and its Real Property and Federal Income Tax Consequences*, 49 ALBANY L. REV. 430 (1985).

[203] IRC § 170(b)(1)(B) (2003); *see also* FLATHEAD LAND TRUST, *supra* note 118, at 5-6. This may change, as "Senate Bill 701 would increase the portion of adjusted gross income landowners could deduct from their federal taxes for donating conservation easements to land trusts or local governments from 30 to 50 percent." Longmire, *supra* note 200. Furthermore, "the deduction could taken for up to 16 years, instead of the current six, until the appraised value of the gift was exhausted." *Id*. In addition, "the CARE Act proposes a 25-percent cut in the capital gains tax now due when land or a conservation easement is sold, not given, to a land trust or government." *Id*.

[204] FLATHEAD LAND TRUST, *supra* note 118, at 6; LEELANAU CONSERVANCY, *supra* note 200, at 5.

[205] IRC § 170(h)(4)(A) (2003); LEELANAU CONSERVANCY, *supra* note 200, at 3.

[206] LEELANAU CONSERVANCY, *supra* note 200, at 3.

[207] An interesting question that is beyond the scope of this report is the applicability of the Rule Against Perpetuities in the sale of a conservation easement. *See* LaGrasse, Critical Look, *supra* note 146. "Of the fort-seven states that have conservation easement statutes, all allow, or even require, the easement to be perpetual." Levin, *supra* note 45, at 599 (internal citations omitted).

[208] IRC § 170(h); *see also* FLATHEAD LAND TRUST, *supra* note 118, at 3-4.

[209] FLATHEAD LAND TRUST, *supra* note 118, at 5.

Although the income and capital gains tax deductions are significant, "[m]any ranch families are 'land-rich' but 'cash-poor,' and as a result benefit little from income tax deductions associated with the gift of a conservation easement."[210] For these individuals, as well as other, more cash-rich families, estate tax deductions are another valuable tax deduction available through the donation of a conservation easement.

"State and federal taxes are based on the fair market value of the property at the time of…death, not the original purchase price or current use value."[211] The estate tax levied may reach the millions of dollars, making cash-poor heirs incapable of inheriting the lands.[212]

> The easement decreases the value of the property, and thus decreases the value of the estate for tax purposes. Some farm operations will be exempt from estate tax after the easement if it causes their estate value to be below the minimum required for the tax. Decreasing the amount of estate taxes that must be paid may allow the family to keep the farm rather than having to sell part of it off to pay the taxes.[213]

On the other hand, "[c]onservation easements can be a useful estate-planning tool to reduce estate tax liability and allow land to remain in the family."[214]

iii. Property Tax Benefits

Finally, there are property tax benefits to donating conservation easements to land trusts or public agencies, though this issue is slightly more complicated. In some areas, such as the Adirondack and Catskill parks and the Tug Hill region, the State must pay the property taxes on conservation easements acquired by the State.[215] This presents a difficult issue and

---

[210] Conservation Easements, *supra* note 70.

[211] FLATHEAD LAND TRUST, *supra* note 118, at 6. This is "usually the amount a developer or speculator would pay." TUG HILL COMM'N, *supra* note 50, at 4. It is also termed the "highest and best use" of the property. Longmire, *supra* note 200.

[212] FLATHEAD LAND TRUST, *supra* note 118, at 6. "The resulting estate tax can be so high that the heirs must sell the property to pay the taxes." TUG HILL COMM'N, *supra* note 50, at 4.

[213] Solloway, *supra* note 142, at 611 (internal citations omitted).

[214] TUG HILL COMM'N, *supra* note 50, at 4. This is because "an individual can give up to $1,000,000 (including land) during his/her lifetime and/or at death that is not subject to federal gift or estate tax." *Id*. Conservation easements can therefore save hundreds of thousands of dollars in estate taxes, and allow the remaining property to be inherited by its rightful heirs. *Id*. at 6-7.

[215] Philip Weinberg, Supp. Practice Commentaries to ECL § 49-0301 (2003 Elec. Update) (1999); N.Y. REAL PROP. TAX LAW § 533, as amended by Chapter 419 of the Laws of 1998 (July 22, 1998); TUG HILL COMM'N, *supra* note 50, at 1. Of note is that the group that in large part helped passed this bill, the East Branch of Fish Creek Working Group, concluded that "conservation easements are the best way to protect water quality in the watershed while still allowing for timber production, hunting, fishing, trapping, and snowmobiling." TUG HILL COMM'N, *supra* note 50, at 1. Governor Pataki noted that Section 533 "is consistent with the recommendations of the State Open Space Plan, which calls for the use of 'Working Forest' conservation easements in the Tug Hill region, coupled with the payment by the State of its proportionate share

serves as a deterrent for establishing conservation easements in that ecologically sensitive area. A04231, however, also recognizes the importance of maintaining the property tax base in order to ensure that local jurisdictions can service their population's needs adequately. Under the Open Space Plan, for instance, DEC and OPRHP look at the economic benefits and burdens associated with different ecologically important sites in determining whether or not to acquire them, by looking at the impact on the real property tax base.[216] The goal is therefore to obtain easements that "may lessen a landowner's tax burden while keeping conserved lands on local tax roles."[217] Generally, however, if the local property taxes are not paid by the State, the "conservation easement should reduce the assessed valuation of the burdened property."[218]

This occurs because "[l]and under conservation easement is treated for tax purposes as if it were in an agricultural district, and should clearly receive a lower valuation. Some assessors are slow to reassess the property, however, and even a reassessment may not result in lower taxes, depending upon the situation."[219] One such situation, for instance, is where the remaining land unaffected by the conservation easement increases in value as a result of the easement, thereby offsetting the tax benefits received by the easement.[220] Nevertheless, applying this agricultural assessment tool to conservation easements has resulted in a reduced tax burden of approximately $47 million per year.[221] The issue as presented by this review, therefore, is that the law provides for a reduced tax assessment upon the creation of a conservation easement but that implementation of the existing legislation is lacking. The proposed bill will do little to resolve this situation.

Generally, if a property is being taxed at its development value, then most likely an easement will reduce a landowner's property taxes because an easement will generally reduce the allowable development.[222] In fact, in *Adirondack Mountain Reserve v. Board of Assessors of Town of North Hudson*,[223] the Third Department found that the impact that an easement has on the market value of the parcel in question must be considered in assessing the property tax.[224]

---

of local taxes." Governor Pataki, Memorandum Approving 1998 Amendments to Real Property Tax Law § 533, 1998 McKinney's Sess. Laws 1474. Real Property Tax Law § 533 requires the State to pay property taxes on conservation easements obtained in a number of areas. N.Y. REAL PROP. TAX LAW § 533 (2003). However, such designated areas do not include all possible areas, and therefore some areas leave the property tax question less well defined.

[216] NYS OPEN SPACE CONSERVATION PLAN, ch. 4, at 76.

[217] NORTHERN FOREST EASEMENTS, *supra* note 62.

[218] Philip Weinberg, Practice Commentaries to ECL § 49-0301 (2003 Elec. Update) (1997).

[219] Solloway, *supra* note 142, at 612 (citing N.Y. Agric. & Mkts. Law § 306(1)) (internal citations omitted).

[220] *Id*. (internal citations omitted).

[221] ADVISORY COUNCIL ON AGRIC., N.Y. DEP'T OF AGRIC.& MKTS., FARM PROPERTY TAXES IN N.Y. STATE 47 (1996).

[222] LEELANAU CONSERVANCY, *supra* note 200, at 5.

[223] 99 A.D.2d 600, 471 N.Y.S.2d 703 (3d Dep't 1984).

[224] *Id*. at 601, 471 N.Y.S.2d at 705.

Vermont law assesses property taxes in a manner similar to the one described by the proposed legislation, which provides a decreased assessment "only upon the value of those remaining rights or interests to which [the owner] retains title."[225] Because New York State law looks at the speculative uses of the property in assessing its taxable level, an easement should normally reduce the property tax assessment of lands containing easements.[226] Of course, in some cases, the difference between the speculative value and the agricultural or recreational value is minimal.[227]

2. Double Compensation

A further concern of the compensation scheme intended by the proposed bill is the potential for double compensation. Although income tax benefits are generally unavailable to properties and rights for which compensation is received,[228] other tax benefits may be available. Furthermore, it is possible that a court would require compensation both for the conservation easement and for a taking. This might occur in a situation where a landowner's property is designated as a wetland, thereby constricting development. The landowner attempts to develop the property but is denied a permit. The landowner sues under the Due Process Clause for "just compensation" of the regulatory taking and is awarded such compensation for the lost development rights. The landowner, however, still retains title to the property and perhaps still pays some property taxes. The landowner then seeks to relieve itself of all tax liability and executes a conservation easement agreement with the State, whereby the landowner is compensated not only by a reduced tax burden but is also compensated the fair market value of the easement, which awards the landowner the speculative value of the property based on predictions that the property will be re-designated as non-wetlands. Because the compensation requirement is automatic under the law and because the Board may not have knowledge of the landowner's suit in court for compensation under the Takings Clause, such compensation under the proposed Conservation Easement Law is a possibility. Because the Board and the court system operate on two distinct levels and do not carry precedential authority on one or the other and because the compensation schemes could theoretically operate at two different levels (one for the designation of the property as a wetland and the other for the conservation easement), such double compensation is a very real possibility. This proposed bill, therefore, risks acting as a price support, compensating landowners for conservation easements by "paying the farmer twice."[229]

---

[225] 10 VT. STAT. ANN. tit. 10 § 6306 (1995).
[226] Nolon, *supra* note 143, at 4.
[227] Solloway, *supra* note 142, at 637 (internal citations omitted).
[228] *See* IRC § 701 (2003).
[229] Solloway, *supra* note 142, at 609.

On the other hand, courts may be reluctant to allow game-playing by landowners and may therefore reject claims for compensation under the Due Process Clause as unripe until a landowner seeks compensation from the Board. This may have the result of increasing transaction costs and reducing the amount of the total award provided landowners–courts may be reluctant to provide a second round of compensation given the claim to provide just compensation at fair market value for the designation of wetlands. Whether there is a difference between the valuation methods utilized by the Board or the courts are uncertain given the lack of clarity of the legislation, but for consistency and equity across wetland and non-wetland conservation easement sellers, one centralized process is desirable. That the courts have experience and authority in such valuation procedures and that even under the proposed legislation would have judicial review of the quasi-judicial determination of the Board, leaving such valuation processes in the hands of the courts seems most appropriate and efficient.

If the situation were reversed, and the landowner sought compensation under the Conservation Easement Law first, and then for compensation under the Takings Clause, the landowner would likely not receive such compensation except any residual compensation due for consequential damages not properly accounted for in the sale of the easement. This is because courts attempt to avoid duplicative awards of damages and therefore will limit one award based on compensation received in prior proceedings.[230]

3. Bargain Sale

Apart from donating conservation easements under existing law, the possibility exists for a landowner to sell the conservation easement at a bargain sale. This possibility exists because "[l]and trust and government agencies are sometimes willing, though often not able, to buy conservation land."[231] For landowners in need of immediate income, yet desiring to conserve the property, a bargain sale is a good option. A bargain sale means that a landowner sells the land at a price below its fair market value.[232] "The difference between the land's appraised fair market value and its sale price is considered a charitable donation and may be able to be claimed as an income tax deduction."[233] Therefore, "[i]f an easement donor wishes to claim tax benefits for the gift, he or she must donate or sell it for less than fair market value to a public agency or to a conservation or historic preservation organization that qualifies as a public charity under Internal Revenue Code Section 501(c)(3)."[234]

---

[230] *See* Tarbell Road Realty, Inc. v. State, 28 A.D.2d 819, 281 N.Y.S.2d 852 (4th Dep't 1967).
[231] FLATHEAD LAND TRUST, *supra* note 118, at 9.
[232] *Id*.
[233] *Id*.
[234] TUG HILL COMM'N, *supra* note 50, at 3.

As an example, Lancaster County, Pennsylvania has a program that provides the landowner with numerous options in the release of a conservation easement including "a bargain sale with tax benefits, the holding of proceeds in a tax escrow account with deferred payments over a five year period, and a payment method of either a lump sum or installment payments."[235] Even though the county only pays approximately $2,000 per permanent conservation easement acre, there are still more than 150 farms on the waiting list.[236] Requiring the State to pay the full fair market value of the conservation easement as the value lost to the landowner would increase the price of the easements significantly and make nearly impossible Governor Pataki's goal of conserving one million acres.

Another problem with this proposed legislation is that it fails to account for the differing values and goals of landowners willing to release conservation easements. Some landowners are more cash-poor than others. For some landowners, it is more advantageous to donate the conservation easement, not pay capital gains tax on the sale of the property and receive an income tax deduction (as well as a reduced estate tax assessment for future heirs) than it is to sell the property at full value and bear the full brunt of the tax system. Many landowners, if not most, lie somewhere in between—tangible cash is important for improvements to say, the farm, and serves to capitalize some of the equity, but the capital gains tax and other taxes prove to be too burdensome to sell the property at full value. For these landowners, a bargain sale is the ideal option. Eliminating this option would reduce the incentives for landowners to create conservation easements and would reduce the ability of the government to enter into conservation easements due to budgetary constraints. Finally, the proposed legislation may result in more leased development rights (LDRs).[237] Because LDRs can provide tax abatement in return for a temporary conservation easement.[238] However, LDRs are clearly a less desirable alternative because such temporary arrangements do not provide a long-term guarantee that the land will be protected, nor do they provide the landowners with income tax benefits.

D. Enforcement Concerns

Under the proposed legislation, compensating landowners at fair market value provides no funds for the monitoring and enforcement of the terms of the easement. Thus, if a landowner violates the terms of the easement, the State must expend more of its finite resources to enforce the agreement. In a private situation, such funds are contracted into the agreement and do not constitute a drain on taxpayers' money because "[e]asement holders

---

[235] Solloway, *supra* note 142, at 605 (internal citations omitted).
[236] *Id*. at 605, 607-08.
[237] LDRs are authorized under N.Y. GEN. MUN. LAW § 247 (2003).
[238] STEBBINS, *supra* note 143, at 11.

typically ask landowners for a financial contribution to a stewardship fund to ensure the ability to monitor and enforce the easement in perpetuity."[239] "Proper stewardship of easements requires that the easement holder have the technical and financial capacity to ensure that easement terms are being honored in perpetuity."[240] Because the State may or may not be able to guarantee the monitoring of such lands into perpetuity without guaranteed funds derivative from the easement agreement, private management of the lands or a less than fair market value compensation arrangement is more desirable to ensure that the easement is adequately enforced.

E. Expansion of Takings Doctrine

1. Review of Current Takings Jurisprudence

Designation of property as containing a protected wetland is not sufficient to trigger a takings claim.[241] Furthermore, the requirement that a property owner obtain a permit prior to developing wetlands does not constitute a taking.[242] Therefore, before a takings claim can become ripe for review, a development permit must first be sought.[243] This bill attempts to either change New York takings law or circumvent takings law through the compensation requirements it intends to establish.

While this bill deals only with voluntary arrangements, it nevertheless predicates compensation on the designation of lands as wetlands and provides compensation for those wetlands. This bill seeks to add a subsection (c) to Subdivision 7 of Section 1 of ECL § 49-0305 which reads: "[t]he State Uniform Wetlands Compensation/Tax Abatement Board shall justly compensate landowners for wetlands designations of such land at fair market value. . . " Therefore, the bill seeks to statutorily compensate landowners solely on the basis of the status of their land, without requiring a showing of preclusion of intended development by the application and denial of a permit, or by illustrating how the redesignation thwarted the landowner's reasonable investment-backed expectations. Because DEC's Mitigation Guidelines provide ample means to allow development to occur despite a designation of a

---

[239] FLATHEAD LAND TRUST, *supra* note 118, at 3; TUG HILL COMM'N, *supra* note 50, at 3; *see, e.g.*, LEELANAU CONSERVANCY, *supra* note 200, at 3 (noting that "the Conservancy asks all easement donors to make a financial contribution to the Conservancy's Endowment Fund" to help it annually monitor its easements for violations).

[240] NORTHERN FOREST EASEMENTS, *supra* note 62.

[241] Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983).

[242] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985) ("[T]he mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking.Only when a permit is denied and the effect of the denial is to prevent economically-viable use of the land in question can it be said that a taking has occurred.").

[243] United States v. Byrd, 609 F.2d 1204, 1211 (7th Cir. 1979).

property as wetland,[244] this automatic compensation requirement stands at odds with existing law. Furthermore, it is equivalent to a requirement that landowners be compensated for a rezoning of their property even if the landowner's intended development project was unaffected by the redesignation. Because compensation is predicated on the designation of the easement, rather than the establishment of the easement itself, there appears to be no exhaustion requirement analogous to other takings requirements.[245]

While A04231 operates under the rubric of the Conservation Easement Law and is specifically limited to conservation easements, A04231 appears to attempt an expansion of traditional compensation law.[246] Significantly, the Conservation Easement Law notes that: "[n]othing in this title shall be construed to alter the authority otherwise available to any public body to acquire conservation easements for the purposes of section 49-0301 of this title by eminent domain."[247] Allowing this bill to pass in any form would do just that: it would reduce the capabilities of DEC to enter into conservation easement agreements or redesignate properties as wetlands due to budgetary constraints. Furthermore, this bill would make this provision moot because under the Open Space Plan, prior to an eminent domain proceeding, 90 days notice must be given to landowners to provid an opportunity to sell their property at fair market value.[248] Because this process provides for fair market value compensation already, restricting the ability of DEC to enter into such conservation easement agreements with respect to wetlands properties by limiting the value that can be paid for such properties to the fair market value makes this provision unnecessary. The existence of Section 49-0309 indicates that the legislature intended different levels of compensation for conservation easements obtained voluntarily and those obtained under eminent domain. Allowing this bill to pass would undermine this legislative purpose.

2. Application to Easements

Conservation easements are considered negative easements and are often treated as exactions. Even if viewed as an exaction, conservation easements would not be compensable unless they were unrelated to the intended project or overly restrictive for the intended

---

[244] *See* N.Y. DEP'T OF ENVTL. CONSERV., FRESHWATER WETLANDS REGULATION GUIDELINES ON COMPENSATORY MITIGATION (2003).

[245] *See, e.g.*, Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 185-97 (1985); DANA & MERRILL, *supra* note 78, at 254-73.

[246] If the intention of the legislation is to seek compensation for the establishment of conservation easements on wetlands properties, although an unlikely reading of the statute, the proposed bill would nevertheless be contrary to existing takings law because the compensation would be predicated on a voluntary action, and not upon a deprivation of property without Due Process. Certainly it does not make sense for the State to pay more to acquire property from a willing property owner than it does for the State to acquire a property against the landowner's wishes.

[247] N.Y. ENVTL. CONSERV. LAW § 49-0309 (2003).

[248] *Id*. § 49-0203(3).

purposes. Because the intended project is the conservation of the lands and is not a predicate which must be satisfied prior to development of the remaining unaffected lands, these conservation easements would not be compensable, even if viewed as an exaction. As discussed above, conservation easements are generally not more restrictive than wetlands restrictions and therefore would not be unduly restrictive.[249]

3. Role of Notice

Finally, this proposed bill raises some very serious concerns about the role of notice in compensation. If a property owner purchases a property with awareness of the requirement to obtain a development permit, such knowledge generally precludes the owner from arguing that her reasonable investment-backed expectations have been frustrated.[250] This notice requirement has been dealt with substantially in the New York courts.[251]

This bill seeks to do away with the notice limitation on the right to compensation by allowing individuals, fully aware of the status of a property as a wetland, to purchase that property, enter into a conservation easement agreement with DEC and receive the fair market value of that designation, even though the landowner may have paid a price for the land that was below the fair market value. This can happen because the individual purchased the property when it was valued based upon the value of existing potential uses. The individual then turned around to sell the easement at the fair market value of the designation, which incorporates the speculative value of developing the property and the speculative value of such wetlands restrictions being lifted. This speculative value will inevitably be higher in the long-term given the long-time horizon and the uncertainty of such designations. Therefore the fair market value of the designation of the easement will inevitably be higher than the fair market value of the same easement for a limited period of time. Because property values are based on a shorter time horizon than perpetuity, landowners acting with notice will be rewarded contrary to the notice requirement. Although this provides an incentive to land speculators to establish conservation easements, such an incentive comes at the price of a markup suffered by the public and at the price of undermining the notice requirement and increasing the game-playing by land speculators.

V. A04231 Fails to Address New York State's Right to Invoke the Public Trust Doctrine as a Defense to Compensation for Wetlands Conservation

---

[249] *See supra* note 131 and accompanying text.

[250] Ciampetti v. United States, 18 Cl. Ct. 548 (1989).

[251] *See, e.g.*, Anello v. Zoning Bd. of Appeals, 89 N.Y.2d 535, 656 N.Y.S.2d 184 (1997); Basile v. Town of Southampton, 89 N.Y.2d 974, 655 N.Y.S.2d 877 (1997); Gazza v. Dep't of Envtl. Conserv., 89 N.Y.2d 603, 657 N.Y.S.2d 555 (1997); Kim v. City of New York, 90 N.Y.2d 1, 659 N.Y.S.2d 145 (1997); *see also* Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533 (2002).

A04231 should not be passed or proposed again in its current form. Section 1, Subdivision 7(c) of the bill reads, "[T]he state uniform wetlands compensation/tax abatement board shall justly compensate landowners for wetlands designations of such land at fair market value and the board shall implement rules and regulations necessary to implement the provisions of this subdivision." A04231 sec. 1, subdiv. 7(c) (Proposed Bill 2003). The language of this subdivision assumes that the government should automatically compensate landowners for the loss of their land when DEC designates wetlands on their private property. In addition, this language reflects the view that private property owners possess an unencumbered right to use their property. The Committee On Environmental Law (CEL), however, asserts that DEC, as an agent of the State, has the authority under the public trust doctrine to regulate for the environmental conservation of wetlands on private property and limit the use of private property for the protection of biodiversity. A04231 fails to address the public trust doctrine as a valid agency defense to a private landowner's claim for compensation when DEC designates a wetland for protection on a landowner's property. More importantly, the passage of the bill would diminish an important source of authority for the State under the public trust doctrine to manage and control natural resources for the benefit of the citizens of New York State.

In the seminal case *Lucas v. South Carolina Coastal Council*, the United States Supreme Court attempted to determine when a regulatory action constituted a taking.[252] The case concerned a land developer who bought two residential lots located on a barrier island off the coast of South Carolina.[253] Two years after the developer bought the property and was about to build, South Carolina passed the Beachfront Management Act in order to prevent the erosion of South Carolina's beaches.[254] The Act prohibited any development seaward of a baseline connecting historical points of erosion on the barrier island.[255] The developer sued in the South Carolina Court of Common Pleas arguing that the legislation's ban on the development of his lots in the restricted area was a taking of his property without just compensation.[256] The Court agreed and awarded Lucas damages.[257] An appeal was taken.[258] The South Carolina Supreme Court reversed.[259] The United States Supreme Court granted certiorari.[260] Justice Scalia, writing for the Court, held that the regulatory action was a taking

---

[252] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[253] *Id*. at 1006-07.
[254] *Id*. at 1008-10.
[255] *Id*.
[256] *Id*. at 1009.
[257] Id. at 1009-1010.
[258] *Id*.
[259] *Id*.
[260] *Id*. at 1010. *See* Lucas v. S.C. Coastal Council, 502 U.S. 966 (1991) (granting petition for writ of certiorari to

for which the developer was entitled to compensation because the regulation deprived the developer of all productive uses of his land.[261]

The Court, quoting from the 1980 holding in *Agins v. Tiburon*, explained, "[T]he Fifth Amendment is violated when land use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'"[262] The Court noted, however, that one could successfully challenge a takings claim if one could show that the governmental regulation was grounded in the background common law principles of property law or nuisance law prohibiting the use that the property owner intended or carried out on his land.[263] In order to defeat a takings claim the government has to show that the public harm against which the regulation protects is one that historically has had major importance.[264]

In 1970, Professor Joseph L. Sax, in his book entitled Defending the Environment: A Strategy for Citizen Action and article *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention* acknowledged the public trust doctrine as an important legal doctrine for preservation of the environment rooted in the background principles of the State's property law.[265] Legal scholars of regulatory takings have given careful attention to Sax's work and argued that the public trust doctrine falls within the exception to a taking under the *Lucas* case.

A. Origin of the Public Trust Doctrine

The property principle of the public trust has its roots firmly established in the common law. In Roman law, the doctrine of the public trust originated during the reign of Emperor Justinian and was based on the idea that "certain common properties such as rivers, the seashore, and the air, were held by government in trusteeship for the free and unimpeded use of the general public."[266] Human beings were believed to have a common right to the beneficial use of these resources. These resources included rivers, air, oceans, certain aquatic wildlife and the shores.[267]

---

the Supreme Court of South Carolina).

[261] *Id*. at 1019-22.

[262] *Id*. at 1016 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

[263] *Id*. at 1028-31.

[264] Oliver A. Houk, *Why Do We Protect Endangered Species, And What Does That Say About Whether Restrictions On Private Property To Protect Them Constitute "Takings?"* 80 Iowa L. Rev. 297, 308 (1995). "[T]o prevail in a takings case the government could not be preventing simply any public harm; it must be preventing something recognized as harmful for quite a long time and, by some measure, as major harm."

[265] JOSEPH L. SAX, DEFENDING THE ENVIRONMENT:A STRATEGY FOR CITIZEN ACTION 163-165 (1970); Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 489-502 (1970).

[266] *Id*.; *See also* Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393, 97-398 (1991).

[267] Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include the Protection of Wildlife*, 19 ENVTL. L. 723, 728 (1991).

Similarly, English common law adopted the idea of the state acting as a trustee of common property such as natural resources. The seashore, rivers, air and submerged lands were held to be under the control of the English crown for posterity.[268] "The King held his preserves and his waters not as an absolute despot, but in trust for the people."[269] In America, the public trust doctrine became part of the legal system of the thirteen original colonies when the colonies adopted the system of English common law. After the War of Independence, title to lands previously held by the Crown in England passed to the people of the States where the land was located by virtue of the change in nationality, independence of the country and different treaties made.[270] In addition, the passage of the Northwest Ordinance of 1787 established the doctrine of "equal footing."[271] This doctrine held that when a new state entered the Union, the new state would be granted the "same sovereignty and jurisdiction over the territory within its limits as the original thirteen states."[272]

Similarly, the existence of the public trust in New York began with a land grant by Charles II to the Duke of York on June 29, 1674 by letters patent.[273] These letters patent did not give ownership in navigable waters and the soil beneath them to the Duke of York. Therefore, the Duke of York was a private property owner who could not parcel and sell the navigable waters associated with his property or the subsurface lands to individuals for personal gain. Rather, the letters patent established a "public domain that was to serve as a trust for the common use of the new community about to be established."[274] After the War of Independence, New York became a sovereign government and the people of New York, like the citizens of other states, succeeded the King in owning all lands within the State subject to the public trust.[275]

The public trust doctrine resembles the elements of a private trust. First, the natural resources protected by the doctrine are viewed as the corpus, or *Yes* of the trust.[276] Resources are viewed as assets managed under the public trust framework.[277] Second, the public trustee, the State, fictionally "owns" the resources.[278] State governments act as fiduciaries with the

---

[268] 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 40 (S. Thorne trans. 1968).
[269] People of Town of Smithtown v. Poveromo, 71 Misc.2d 524, 526, 336 N.Y.S. 2d 764, 769 (N.Y. Dist. Ct. 1972).
[270] *Id*. at 770.
[271] Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Areas,* 20 VT. L. REV. 84-85 (1995); *See* Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842).
[272] *Id.*
[273] *Poveromo*, 336 N.Y.S. 2d at 771-72.
[274] *Id*. at 771 (citing and quoting Martin v. Waddell's Lease, 41 U.S. 367 (16 Pet.) (1842).
[275] *Id.* at 772-73.
[276] Ill. Cent. R. Co. v. State of Ill., 146 U.S. 387, 452-53 (1892).
[277] *Id*.
[278] *Id*.

right to manage, sell and develop these assets in order to achieve the purposes of the trust.[279] Third, the public serves as the beneficiary of the trust assets in the benefits gained from the use and preservation of these assets.[280]

B. Expansion of the Public Trust Doctrine

Under English common law, tidelands were solely subject to the public trust. In the United States, however, state case law has expansively interpreted the doctrine to include inland navigable and non-navigable fresh and marine waters and tidal areas.[281] In addition, the United States Supreme Court and several state courts, including the New York Court of Appeals, have extended the doctrine to other types of resources such as wildlife, public parks, beaches, estuaries and other important aquatic ecosystems including wetlands.[282]

In *Phillips Petroleum v. Mississippi*, the United States Supreme Court faced the issue of whether the public trust doctrine extended to navigable tidal wetlands only or also encompassed non-navigable and non-tidal wetlands.[283] The case concerned ownership of 42 acres of land beneath the northern branch of Bayou LaCroix and eleven small drainage streams in southern Mississippi.[284] Petitioners, record title holders of the property, filed suit against the State of Mississippi to remove clouds from title resulting from oil and gas leases granted by the State.[285] The State of Mississippi claimed ownership of the property and issued oil and gas leases on the basis that the State possessed ownership of the property under the public trust doctrine when Mississippi entered the Union in 1817.[286]

The United States Supreme Court granted certiorari to review the Mississippi Supreme Court's decision, which held that the submerged lands belonged to the State of

---

[279] *Id*.
[280] *Id*. at 453-54.
[281] Archer & Stone, *supra* note 268, at 84-85.
[282] *See* Thornton v. Hay, 462 P.2d 671 (Or. 1969); Nat'l Audubon Soc'y v. Super. Ct. of Alpine County (Mono Lake), 658 P.2d 709 (Cal. 1983) (holding that the public trust doctrine included such values as preserving the biological and ecological integrity, and the human recreational and aesthetic uses of Mono Lake); Mountain States Legal Found. v. Hodel, 854 F. Supp. 843 (D. Wyo. 1994) (holding that "wild animals are . . . common property whose control and regulation are to be exercised 'as a trust for the benefit of the people'"); Geer v. Connecticut, 161 U.S. 519, 528-29 (1896) (holding that the preservation of wildlife is to be exercised by the State as a trust for the benefit of the people); Paepke v. Pub. Bldg. Comm'n, 263 N.E. 2d 11 (Ill. 1970) (holding that private property owner could not assert property right in a public park because municipal bodies as agents of the state hold the property in trust for uses and purposes specified in the statute and for the benefit of the public); People v. The New York and Staten Island Ferry Company, 68 N.Y. 71 (1877) (holding that New York State under the public trust doctrine could prohibit construction of a wharf more than the width prescribed by law in New York Harbor because the construction interfered with the public's right in the harbor as a natural highway for passage and commerce).
[283] Phillips Petroleum v. Mississippi, 484 U.S. 469 (1988).
[284] *Id*. at 472.
[285] *Id*.
[286] *Id*.

Mississippi by virtue of the public trust doctrine.[287] The Court affirmed the decision of the Mississippi Supreme Court and held that Mississippi "owned" the property upon its admission to the Union in 1817 and that the doctrine of the public trust extended to all types of wetlands.[288] The Court stated:

> [i]t has long been established that the individual States have the authority to define the limits of the lands held in public trust and recognize private rights in such lands as they see fit. . . States have interests in lands beneath tidal waters which have nothing to do with navigation. . . .If States do not own lands under non-navigable tidal waters, many state and land grants based on our earlier decisions might now be invalid.[289]

Likewise, in *Adirondack League Club Inc. v. Sierra Club*, the Third Department of the New York Supreme Court, Appellate Division considered the question of whether the public had the right to use a navigable river for canoeing under the public trust doctrine even if a landowner claimed ownership of the land underneath the water.[290] Plaintiff, a private club, brought an action for trespass to land against the defendant, Sierra Club, seeking permanent injunctive relief and a declaration to have a twelve-mile portion of a river declared non-navigable.[291] The defendants had canoed in the South Branch of the Moose River in the Adirondack Mountains. The defendants canoed through twelve miles of the river located over submerged lands of which the plaintiff claimed ownership.[292] The State and another organization intervened as defendants and counterclaimed that "no trespassing" signs erected by the private club constituted a nuisance.[293] Both parties made motions for summary judgment. The Supreme Court denied the motions.[294] The plaintiff appealed.[295] The Appellate Division held that the plaintiff was not entitled to summary judgment and that the public had rights in the South Branch of the Moose River due to the existence of the public trust doctrine in New York State.[296] The Appellate Division stated, "[T]he public has certain rights in the South Branch of the Moose River. Pursuant to the public trust doctrine, the public right of navigation in navigable waters supersedes plaintiff's private right in the land under the

---

[287] *Id*. at 473, 476.
[288] *Id*. at 484.
[289] *Id*. at 475-83.
[290] Adirondack League Club Inc. v. Sierra Club, 201 A.D.2d 225, 615 N.Y.S.2d 788 (3d Dep't 1994).
[291] *Id*. at 227, 615 N.Y.S.2d at 789.
[292] *Id*.
[293] *Id*. at 228, 615 N.Y.S.2d at 790.
[294] *Id*.
[295] *Id*. at 228-29, 615 N.Y.S.2d at 790.
[296] *Id*. at 232, 615 N.Y.S.2d at 792.

water."[297]

C. The Importance of Wetlands as Ecological Assets to Be Protected for the Public Benefit

The holding of the *Lucas* case suggests that the government can defeat a takings claim if the government demonstrates that the public harm against which the regulatory action protects is one that historically has had major importance.[298] DEC can demonstrate that the conservation of wetlands on private property protects against harm to the public health, safety and welfare.[299] The preservation of wetlands in New York State and throughout the United States confers important benefits on future generations. First, wetlands are places of great biodiversity. One of the major benefits of wetland conservation is the preservation of communities of animals, plants and microorganisms that play a vital role in ecosystem services.[300] Biodiversity is vital to maintaining healthy ecosystems of which human beings are a part by cycling nutrients and gases, disposing of wastes, pollinating plants and protecting crops and animals from overpopulation and pests.[301] Paul R. Ehrlich, Professor of Biological Sciences at Stanford University, writes that "[t]he extirpation of populations and species of organisms exerts its primary impact on society through the impairment of ecosystem services. When a population playing a certain role is wiped out, ecosystem services suffer."[302]

Edward O. Wilson, the renowned Professor of Sciences and Entomology at Harvard University's Museum of Comparative Zoology, echoes this view in his book entitled, The Diversity of Life. Wilson writes:

> [b]iological diversity—is the key to the maintenance of the world as we know it. . . .Every species is part of an ecosystem, an expert specialist of its kind. . . .as it spreads its influence through the food web in other species, reducing or even extinguishing others, risking a downward spiral of the larger assemblage.[303]

---

[297] *Id*. *See also* People of Town of Smithtown v. Poveromo, 71 Misc.2d 524, 336 N.Y.S.2d 764 (N.Y. Dist. Ct. 1972) (holding that the doctrine of the public trust in New York State requires the preservation and conservation of the vital natural resource of wetlands and the enforcement of protective measures against infringements by nominal owners, be they private or governmental).
[298] *See, e.g., supra* note 263.
[299] *See, e.g.*, *supra* Part II.
[300] EDWARD O. WILSON, THE DIVERSITY OF LIFE 308 (1992).
[301] JON NAAR ET AL., THIS LAND IS YOUR LAND: A GUIDE TO NORTH AMERICA'S ENDANGERED ECOSYSTEMS 302 (1993).
[302] Paul R. Ehrlich, *The Loss of Diversity: Causes and Consequences,* BIODIVERSITY 21, 24 (Edward O. Wilson ed. 1986).
[303] WILSON, *supra* note 300, at 15, 308.

Second, preservation of wetlands and their biodiversity have value for the public health and welfare as genetic reservoirs.[304] Animals and plants have unique combinations of genetic characteristics that enable them to adapt to different environments.[305] Scientists believe that preserving gene pools, the sum of all the genes of individual members in a given population, can prove useful to future generations in the discovery of medicines and understanding certain diseases.[306] Wilson writes:

> [f]ew are aware of how much we already depend on wild organisms for medicine. . . .In the United States a quarter of all prescriptions dispensed by pharmacies are substances from plants. Another 13 percent come from microorganisms and 3 percent more from animals, for a total of over 40 percent that are organism derived.[307]

Preservation of wetlands is therefore critical in the preservation of our health.

Third, wetlands nurture wildlife, purify water, revitalize groundwater systems, maintain water tables in ecosystems and prevent floods.[308] Wetlands located in inland areas provide important habitat for freshwater fish and wildlife including one-third of all the bird species in North America.[309] Populations of birds thrive in wetlands because wetlands provide them with a dense concentration of food sources and protection from predators.[310] Birds, in turn, benefit humans by scattering seeds, pollinating flowers and controlling overpopulation of species. Prof. Neil A. Campbell, in his book entitled Biology, describes the important relationship between animals and flowering plants. Campbell writes:

> [r]elationships between angiosperms and animals are also evident in the edible fruits of angiosperms. One of the most common colors of ripe fruit, is red, a color that insects can't see very well. Thus, most of the fruit is saved for birds and mammals, animals large enough to disperse seeds. Again, we see that one of the keys to angiosperm success has been the interaction with animals.[311]

Preservation of wetlands is therefore also critical in the preservation of our food supply.

---

[304] JOSEPH A. MORAN, INTRODUCTION TO ENVIRONMENTAL SCIENCE 466-67 (1986).

[305] *Id*.

[306] *Id*.

[307] WILSON, *supra* note 300, at 283-84.

[308] NAAR ET AL., *supra* note 301, at 62-63.

[309] *Id*. at 63.

[310] *Id*. at 62.

[311] NEIL A. CAMPBELL, BIOLOGY 579 (3d ed. 1993).

Lastly, the preservation of wetlands and their biodiversity protects against harm to the public health, safety and welfare by saving both money and the environment for the public.[312] Conserving wetlands saves the cost of installing or enlarging storm sewer systems, filters runoff from impervious surfaces and pollution, reduces the need for tax payer money to operate water pollution control programs, maintains the ecological health of lakes, streams and other bodies of water encouraging beach, fishing, boating and tourism, enhances property values of residential neighborhoods by keeping neighborhoods beautiful, and improves the lives of the public by providing places of recreation, reflection and wonder in experiencing wildlife in its natural habitat and exploring green spaces.[313]

D. Courts Recognize the Nearly Paramount Importance of Wetlands and Biodiversity Preservation

Federal and state courts including courts in New York State have recognized that regulatory actions conserving wetlands and biodiversity protect the public health, safety and welfare and that the purpose of such regulation is a firmly-established value of great importance in the American legal tradition. In *Missouri v. Holland*, Justice Holmes writing for the United States Supreme Court in 1920 acknowledged that preservation of wildlife such as migratory birds was very nearly a paramount public interest because the continued survival of migratory birds maintained the well-being of the nation's forests and raising of crops for the public. Justice Holmes wrote:

> [h]ere a national interest of very nearly the first magnitude is involved. . . There soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.[314]

Similarly, in *Barret et al. v. State*, the New York Court of Appeals in 1917 held that the preservation of species such as beavers was a matter of important public interest within the discretion of the government and that the legislature had the general right to act as a trustee to protect them. The Court of Appeals stated that "the general right of the government to protect wild animals is too well established to be now called into question. Their

---

[312] *The Bluebelt: Brilliant Program Saves Tax Dollars and Greenspaces* in Bruce Kershner, SECRET PLACES OF STATEN ISLAND 134 (1998).

[313] *Id*. *See also* Robert Gavin, *Pataki Oks wetlands building ban,* STATEN ISLAND ADVANCE, June 28, 2003, at 1 (stating that development will be banned for one year around wetlands from South Beach to Great Kills, under a bill signed into law by Gov. Pataki. The legislation outlaws any construction near the waterways the city has designated "Mid-Island Bluebelt," a natural flood control system relying on existing streams and ponds, as opposed to the construction of new sewers).

[314] Missouri v. Holland, 252 U.S. 416 (1920).

ownership is in the state in its sovereign capacity, for the benefit of all the people. Their preservation is a matter of public interest."[315]

Likewise, in *Goldhirsch v. Flacke*, the Second Department of the New York Appellate Division recognized that a denial of a building permit for the construction of homes was proper because the construction would have an adverse impact on freshwater wetlands that provide specific important benefits to the public such as "open space and aesthetic appreciation in a major urban area, wildlife habitat for diverse species, storm control and recreation."[316] In the same way, the New York State Supreme Court in *Rappl & Hoenig Co., Inc. v. New York State Department of Environmental Conservation* acknowledged that "[i]t is . . . the public policy of the state to preserve, protect and conserve . . . wetlands and the benefits derived there from, to prevent the despoliation and destruction of . . . wetlands, and to regulate use and development of such wetlands to secure the natural benefits of . . . wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the state."[317]

[315] Barret et al. v. State, 116 N.E. 99, 100 (N.Y. 1917).
[316] Goldhirsch v. Flacke, 495 N.Y.S.2d 436, 438 (2d Dep't 1985).
[317] Rappl & Hoenig Co., Inc. v. New York State Dep't of Environmental Conservation, 387 N.Y.S.2d 985, 986 (1976).

CONCLUSION

A04231 should not be passed or proposed again in its current form because the language of the proposed bill lacks clarity, creates an incentive structure that undermines the purposes of the Conservation Easement Act, is inconsistent with existing law, and assumes that the government should automatically compensate landowners for the loss of use of land when DEC designates wetlands on their private property. The bill is deficient in that it does not address the authority DEC has under the public trust doctrine to regulate for the environmental conservation of wetlands on private property and limit the use of private property for the protection of biodiversity. Moreover, the passage of the bill would diminish an important source of authority for New York State government under the public trust doctrine to manage and control natural resources for the benefit of the citizens of New York State. For all the foregoing reasons presented in this legislative report, A04231 should not be passed or proposed in the future in its current form.

Dated: September 4, 2003

Craig T. Donovan, Co-Chair

Ronald E. Steinvurzel, Co-Chair

Erik B. Bluemel, Vice-Chair