LOST IN THE SHADOWS:

THE FIGHT FOR A SENATE VOTE ON WETLANDS PROTECTION LEGISLATION

I. Introduction

The New York Legislature's internal operating rules are still in need of significant reform. To their credit, both chambers made changes to their rules earlier this year. Several of those changes enhanced the transparency and deliberativeness of the legislative process, particularly in the Assembly. But even after those changes, it is far too difficult for lawmakers to get bills that have been voted favorably out of committee, or have the support of a majority of a chamber, onto the legislative floor for debate and vote by the entire body.

The result is that, too often, the Legislature fails to publicly debate, consider or vote upon legislation that a majority of its members claim to support. Not only are rank-and-file members deprived of an opportunity to debate and vote on popular legislation, but the public is equally deprived of the opportunity to obtain full consideration of such legislation and to discern whom they should hold responsible for a failure of passage.

Recent attempts to amend New York's wetlands preservation laws provide a textbook example of this problem. The governor and the great majority of legislators in both chambers have publicly stated that they favor measures to increase New York's wetlands preservation laws.[1] A wetlands preservation bill passed through the full Assembly and was voted out of the Senate's Environmental Conservation Committee (chaired by the bill's sponsor) by overwhelming margins in both 2004 and 2005. And just last week, Governor Pataki announced introduction of his own legislation to increase New York's wetlands protection.[2] In spite of this broad support, the Senate leadership has used its operating rules to prevent wetlands preservation legislation from reaching the Senate floor for debate and a vote. It has done this without any public explanation.

The Brennan Center for Justice takes no position on the merits of the current Senate proposal to amend New York's wetlands preservation laws. But the recent history of that legislation provides tangible evidence of the legislature's lack of transparency. It also highlights the enormous roadblocks to full consideration faced by important legislation, even where such legislation has garnered overwhelming support among rank-and-file members.

II. Background: How the Content of New York's Wetlands Preservation Laws Became Particularly Significant

For several years, environmental groups have called New York's wetlands protection laws the weakest in the Northeast. Until recently, this complaint did not attract the attention of most New Yorkers or government officials because state wetlands not

[1] *Governor Pataki Proposes Additional Wetlands Protections*, Environment DEC Newsletter, May 2005. For a discussion of legislator support of greater wetlands protections see *infra* at pp. 4-5.
[2] *Id.*

protected by New York State law were protected by the federal wetlands protection program.[3]

However, the 2001 Supreme Court decision in *Solid Waste Agency of Northern Cook Co. v. U.S. Army Corps of Engineers*[4] ("*SWANCC*") and subsequent actions by the Environmental Protection Agency (EPA) and Army Corps of Engineers (Army Corps) changed this. Specifically, the *SWANCC* Court struck down one criteria used by the Army Corps to assert jurisdiction over wetlands under the Clean Water Act.[5] In response to this decision, the EPA and the Army Corps dramatically reduced federal protection of state wetlands and shifted significant responsibility for such protection to the states.[6] All wetlands that were "isolated," or not connected by surface water to waters of the United States, were determined to be outside the jurisdiction of federal agencies.[7] These wetlands could only be protected by state or local governments.

Following these developments, many states found that significant portions of their wetlands were no longer protected. Several of these states reacted by fully debating and implementing changes in their protection of local wetlands.[8]

New York is among those states substantially affected by *SWANCC* and its aftermath. With a few notable exceptions,[9] New York law currently only protects wetlands that are (a) 12.4 acres or larger *and* (b) on the state wetlands map. As a result, a significant portion of New York's small and unmapped wetlands are without any legal protection.[10]

II. Procedural History: Failed Attempts to Obtain a Vote on New York's Wetlands Preservation Laws After the *SWANCC* Decision

With the cutback in federal protection following the *SWANCC* decision, Governor Pataki and a number of legislators followed the lead of other states, and called for changes to New York's wetlands preservation laws. Four years after the decision, however, the issue has still not come to the Senate floor for debate or a vote.

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[3] AMERICAN RIVERS AND SIERRA CLUB, WHERE RIVERS ARE BORN: THE SCIENTIFIC IMPERATIVE FOR DEFENDING SMALL STREAMS AND WETLANDS (September 2003).
[4] 531 U.S. 159 (2001)
[5] *Id.* at 171-3.
[6] Critics assert that this reaction to the SWANCC decision was overly broad and has resulted in the unnecessary loss of Clean Water Act protections for many wetlands that Congress intended to protect. *See, e.g.*, Earthjustice, National Wildlife Federation, Natural Resources Defense Council and Sierra Club, *Reckless Abandon: How the Bush Administration is Exposing America's Waters to Harm* at 1 (2004).
[7] *Id.* at 2.
[8] *See, e.g.*, Cat Lazarof, *Wisconsin Law Closes Gap in Wetlands Protection*, Environmental News Service (May, 10, 2001). In addition to Wisconsin, Ohio and Indiana also passed new wetlands protection laws after the *SWANCC* decision. Other states, such as North Carolina, California and New Mexico, have increased state protection of wetlands through state regulatory, rather than legislative, action. Telephone Interview with Julie Sibbling of the National Wildlife Foundation (May 11, 2005).
[9] Under New York law, wetlands of "unusual local importance" may also be protected from development or destruction. N.Y. Envtl. Conserv. Law 24-0301 (2004).
[10] *NRDC's Review of Post-SWANCC U.S. Army Corps of Engineers' Wetlands Jurisdictional Determinations in New York State* (2004) at 1-2.

A. The 2004 Session

In 2004, the Assembly passed a wetlands protection bill (A. 7905), drafted by Assemblyman DiNapoli.[11] This bill proposed to reduce the size threshold for protection of wetlands from 12.4 to 1 acre, ensuring that small wetlands would be protected. The bill also stated that wetland status should be based on scientific criteria, rather than upon whether a wetland area is listed on the state wetlands map.[12]

Senator Marcellino, chairman of the Senate's Environmental Conservation Committee, introduced the same bill in the Senate. S.4480 was favorably voted out of the Senate Environmental Conservation Committee in early June.[13] Pursuant to Senate rules, the bill was sent to the Rules Committee, which must consider all bills moved through standing committees after late May of every session.[14]

For the next six months, the bill sat in the Rules Committee, which is chaired by the Senator Majority Leader. Environmental groups state that during this six-month period, Senator Marcellino and other Senate supporters or their staff claimed to have asked Senator Bruno on several occasions to move S.4480 through the Rules Committee and onto the floor for a vote.[15]

The Sierra Club estimates that if the bill had reached the floor it would have passed overwhelmingly.[16] Only two Senators publicly expressed concerns about the bill, and even those concerns were never explained in any detail in public.[17] Yet the bill was never sent to the floor for debate and a vote. The 2004 session ended without consideration of a new wetlands protection law.

B. The 2005 Session

In January 2005, Assemblyman DiNapoli and Senator Marcellino reintroduced their bills as A.2048/S.2081. The Assembly passed DiNapoli's bill on February 2, 2005.[18]

In the Senate, the bill passed through the Environmental Conversation Committee by an 11 to 1 vote.[19] Despite this lopsided vote, and the facts that (1) Senator Marcellino chairs the Environmental Conservation Committee, and (2) the bill appears to be supported by

[11] E-mail correspondence from John Stouffer, Legislative Director for the Sierra Club (March 19, 2005).
[12] A.7905 (2004), Section 2.
[13] Telephone interview with Senator Marcellino's office (April 22, 2005).
[14] Rules of the Senate of the State of New York, Rule VII, Section 5 (2005).
[15] E-mail correspondence from Legislative Director for the Sierra Club (March 19, 2005).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Telephone interview with Senator Marcellino's office (April 22, 2005).

49 of the Senate's 62 members,[20] it is unclear that it will ever reach the Senate floor for debate and a vote.

To reach the Senate floor for full consideration, the bill must be placed on the Senate's "Active List." Whether and when a bill gets onto the Active List are decisions made at the sole discretion of the Senate Majority Leader and his staff.[21]

III. The Barriers: The New York Legislature's Operating Rules Still Thwart Public Debate and Legislative Deliberations

The Senate and Assembly should be congratulated for amending their operating rules this past January to begin creating a more open and democratic legislative process. Unfortunately, among other failures, both chambers neglected to reduce significantly the power of legislative leaders to block public discussion and consideration of legislation that is supported by a majority of rank-and-file legislators, even when the legislation has been favorably reported out of committee.

The result is that the full legislature still does not openly debate and vote on numerous important bills. This is true even when the bills are supported by a majority of New Yorkers and their legislators.

A. The Power of Senate Committee Chairs to Block Legislation

New York's legislature has more barriers to getting bills out of committee than any other state legislature in the country.[23] In the Senate, it is impossible for the members of a committee to force a vote on a bill without the chair's consent.[24]

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[20] Telephone interview with John Stouffer (April 29, 2005). The Sierra Club estimates that at least 49 of the Senate's 62 members currently support Senator Marcellino's bill. This estimate is calculated as follows: on the Democratic side, all 26 Senators either co-sponsored the bill, voted to report the bill favorably out of the Environmental Conservation Committee, or represented to the Sierra Club that they supported the bill. On the Republican side, in addition to Senator Marcellino, there were ten co-sponsors of the bill, plus two more Republican Senators who voted to report the bill favorably out of the Environmental Conservation Committee, plus ten more Republican Senators who have indicated to the Sierra Club or Upper St. Lawrence Riverkeeper that they support the bill.

[21] Telephone interview with Frank Luchowski, Legislative Counsel to the Majority (April 29, 2005).

[23] JEREMY M. CREELAN & LAURA M. MOULTON, THE NEW YORK LEGISLATIVE PROCESS: AN EVALUATION AND BLUEPRINT FOR REFORM 14-19 (2004). Both chambers did slightly ease their restrictions on "discharge" motions (motions to get bills out of committee by vote of the full chamber). Specifically, in the Senate, a motion to discharge cannot be considered until it has been before a standing committee for thirty days (as opposed to the previous sixty days) and may now be considered if noticed prior to the fourth Tuesday in April (as opposed to previous deadline of the second Tuesday in April). In the Assembly, the time to consider motions to discharge has been extended by two weeks. Even with these changes, New York has more restrictions on motions to discharge than any other state legislature in the country. *See id.* at 18.

[24] To its credit, the Assembly allows committee members to file a "Form 99" to request that the chair have the committee act on a particular bill within the legislative session by placing it on the agenda and either reporting or holding it. In practice, this tool is not as effective as it could be because the time frame in which a committee chair must act includes the entire two-year legislative session.

In 2005, Senator Marcellino's wetlands legislation was supported by 11 of 12 members of the Environmental Conservation Committee. But this level of support was no guarantee that the bill would even get a vote in the committee, much less be reported out favorably. If Chairman Marcellino – rather than a rank-and-file committee member – had been the sole opponent to wetlands preservation legislation, he could have refused to allow the Committee to vote on it and there would have been no procedural mechanism to produce such a vote.[25]

B. The Barriers to Floor Consideration of Bills Voted out of Committee Favorably: How a Bill Gets Lost in the Shadows

Senator Marcellino's wetlands preservation bill was helped out of the Environmental Conservation Committee by an obvious advantage: *he is the Committee's Chairman.* Without the support of the Senate's leadership (and specifically the Senate Majority Leader), however, his bill has no chance of being considered and debated by the full chamber, much less of becoming law.

i. The Rules Committee

In 2004, Senator Marcellino's bill was not voted out of committee until June, which under the Senate's rules meant that the bill had to be sent to the Rules Committee before it could get to the Senate floor. The Rules Committee is chaired by the Majority Leader. As in the Assembly, the Senate leadership has historically used its Rules Committee to kill bills before they could get to the chamber floor.[26] This is exactly what happened to Senator Marcellino's wetlands preservation bill in 2004. Without providing any public explanation or any on-the-record vote, the Rules Committee prevented Senator Marcellino's bill from getting to the Senate floor and allowed it to die at the end of the 2004 session.

ii. The "Active List"

In 2005, Senator Marcellino's bill was favorably voted out of Committee in early February, bypassing the Rules Committee. Under the Senate's rules, bills reported favorably out of a standing committee this early in the session do not go to the Rules Committee. Instead, they are printed for each Senator and read on the Senate floor on three separate days.[27] The rules state that "the question of [the bill's] final passage shall be taken immediately thereafter."[28] This language is misleading. In fact, bills that are

[25] Interview with the Legislative Counsel to the Majority (April 29, 2005).
[26] In January 2005, the Assembly made significant changes to the way its Rules Committee operates. The Assembly Rules Committee must now hold public meetings and record its votes. Prior to 2005, the Senate's Rules Committee already held public hearings and recorded the votes of its members.
[27] Rules of the Senate of the State of New York, Rule VIII, Sections 2 and 3. The Assembly's procedures are substantially similar, with "three separate readings on three separate days," for nearly all bills before they may be voted upon by the full Assembly. Rules of the Assembly, Rule III, Section 7(a) (2005).
[28] Rules of the Senate of the State of New York, Rule VIII, Section 2(b) (2005).

reported favorably out of committee, and which receive their "three readings," are not automatically sent to the Senate floor for debate and a vote.[29]

Instead, the Senate Majority Leader and his staff determine which bills will make it onto the Active List on any particular date.[30] If the Majority Leader does not place a bill on the Active List before the end of session, the bill will die before being considered by the full Senate chamber.[31]

IV. The Solution: Change the Rules

The Senate Majority Leader and other Senators may have legitimate reasons for opposing the recent proposals to amend New York's wetland preservation laws. In a well-functioning legislature, these reasons would be publicly aired and debated. All legislators would have an opportunity to consider the opposition and make compromises where necessary. Ultimately, the proposed changes would be considered by the full legislature and, based upon a full and open debate and with whatever amendments are appropriate, each chamber would vote to adopt or reject the legislation. New Yorkers could judge the performance of their individual representatives accordingly.

Radical change is not necessary to bring more open debate, transparency and accountability to New York. A few simple rules changes would make a tremendous difference:

- Create a way for committee members in the Senate to force a timely and "on the record" committee vote on a particular bill, even over the objection of a

[29] The same is true for bills in the Assembly. Telephone Interview with A, legislative director for Assemblyman A (May 2, 2005). Unlike the Senate, the Assembly does not even have an "Active List." Instead, the Assembly Majority Leader (with the assistance of his staff and the Speaker's staff) may create multiple "calendars" for any particular day. Each morning, the Majority Leader will announce which bills on the calendars will be voted upon or debated. As in the Senate, many bills that are on a floor calendar and have passed through their three readings are *never* brought to the floor for debate or a vote by the Majority Leader. *Id.*

[30] Telephone interview with the Legislative Counsel to the Majority (April 29, 2005). Some argue that this process is necessary to ensure the efficient disposition of bills; specifically, some bills must be acted upon more quickly than others, and it would be impossible to vote on all bills that received their third reading on any particular day. To be sure, the timing of bringing bills to the floor must be managed efficiently by the leadership. This fact does not, however, justify keeping certain bills from *ever* being considered by the full chamber.

[31] It has been suggested that a committee informally known as the "Working Rules Committee" plays a role in determining which bills are placed on the Active List. The Working Rules Committee is not an official committee and there is no public listing of its members. In interviews with staff members and Senators, the Brennan Center has confirmed that its members are exclusively senior Republican Senators, and its meetings are not open to the public or publicly recorded. The Legislative Counsel to the Majority has indicated that the Working Rules Committee plays no direct role in the determination of which bills are placed on the Active List. *Id.*

committee chairperson;[32]

- Require committee members in the Senate to be present for committee votes, and eliminate proxy voting of any kind;

- Further relax New York's limits on discharge motions in both chambers, so that motions to discharge may be (a) made at any time in the legislative session, (b) considered by the full chamber within a day of being made, and (c) debated by the entire chamber;[33] and

- Provide a mechanism for rank-and-file legislators in the Senate and Assembly to bring bills that have been voted favorably out of committee, or have the support of a majority of members, to the floor for debate and a vote (even over the objection of the Majority Leader or Speaker). [34]

The first three changes should ensure that a committee chairperson (or, indirectly, the

[32] And in the Assembly, reduce the period of time by which a Committee Chair must act upon a "Form 99" request to vote on a bill.

[33] Also known as "motions to petition" in the Senate, discharge motions are intended to allow supporters of a bill to obtain consideration by the full chamber despite the opposition or inaction of the committee (or its chair) to which the bill was referred. New York's Legislature makes it more difficult than any other legislature in the country to discharge a bill from a committee for the full chamber to consider. *See* CREELAN & MOULTON, *supra* note 22, at 14-18. Among other restrictions, discharge motions in New York are currently only permitted for a limited time during Senate and Assembly sessions, may only be brought by sponsors of the legislation, and may not be considered for at least five calendar days after being made. In the Senate, the sponsor of the petition may speak for ten minutes to explain the reasons for the discharge, but there is otherwise no public debate or discussion. In both chambers, only the Senate Majority Leader or Assembly Speaker can waive these restrictions.

[34] There are at least four different ways to do this. First, the Senate and Assembly could provide that, on the motion of a majority of members of the chamber, any bill will immediately come to the floor for debate and a vote. The United States House of Representatives and the Massachusetts Senate, among other chambers have adopted similar practices. In both chambers, a majority of members can force a bill to the floor for a vote through a discharge vote (or series of discharge votes) both before *and* after the bill has been voted out of committee. Telephone Interview with James V. Saturno, Specialist on the Congress, Congressional Research Service (May 16, 2005); Telephone Interview with David Sullivan, Counsel for the President of the Massachusetts Senate (May 12, 2005). Second, the Senate and Assembly could mandate that all bills come to the floor for debate and a vote within a certain number of days after they have been voted out of committee and passed through their automatic "second" and "third" readings. The California Senate and the Massachusetts Assembly, for example, have adopted this approach. Telephone with David Valvereti, Chief Assistant to the Secretary of the California Senate (May 12, 2005); Telephone Interview with Steve Jay, Massachusetts Clerk of the Assembly (May 13, 2005). Third, the Senate and Assembly could allow any member to bring a bill out onto the floor by his or her own motion once it has been reported out of committee, as is done in the Pennsylvania Assembly and Wisconsin Senate. Telephone Interview with Joseph Murphy, Counsel for the Majority in the Pennsylvania House (May 13, 2005); Telephone Interview with Dennis Nelson, Chief Clerk of the Wisconsin Senate (May 13, 2005). Finally, the Senate and Assembly could permit members to bring non-germane amendments to most bills. In practical terms, this would mean allowing legislators to obtain a floor vote on nearly any piece of legislation, as long as it was presented as an "amendment" to pending legislation, whether or not it was relevant to that legislation. This is often how minority party and rank-and-file members of the United States Senate bring legislation to the floor. Telephone Interview with James V. Saturno, Specialist on the Congress (May 16, 2005).

Majority Leader or Speaker) cannot easily block a bill from being voted out of committee. The final change would ensure that bills that are favorably reported out of committee, or supported by a majority of legislators, receive consideration and a vote by the full chamber. All four reforms would also ensure that if a bill does not reach the floor for a vote, citizens can hold individual representatives accountable by reviewing committee or chamber voting records.