



Pennsylvania

# Landowner

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## PROPERTY RIGHTS UPHELD! Courts Rule on Unconstitutional "Takings"

Two major victories were recently won in favor of property rights as preservationists again tried their hand at "takings" through the regulatory process. In a recent state Supreme Court case, Philadelphia's historical preservation law, which is aimed at preserving old buildings and related sites, was declared unconstitutional upon interpretation of Article 1, Section 10 of Pennsylvania's constitution, which mirrors the Fifth Amendment to the U.S. Constitution. The ruling, which came on July 10, 1991, stated that the Boyd Theatre, an ornate movie house, could not be ordered preserved as a historical building over the objection of its owner, United Artists Theatres. "By designating the theatre building as historic, over the objections of the owner, the City of Philadelphia through its Historical Commission has 'taken' the owner's property for public use without just compensation," wrote Justice Rolf Larsen. The designation prevents the owners from doing anything other than painting or wallpapering the inside or outside of the building.

Justice Rolf Larsen also stated in the court opinion that by designating the theatre over the owner's objections, "the commission obtained almost absolute control over the private property, including the physical details and the uses to which it could be put."

Richard A. Sprague, the theatre's attorney, discounted complaints from historical preservationists who fear that the court ruling has taken away the city's power to save old buildings. "Nobody is saying they cannot designate something as historic," Sprague said. "But if the city wants to take over the aspects of someone's private property, they have to properly compensate him."

The ruling will not affect buildings designated as historic with the owner's consent.

**THE REAHARDS** - In another ruling in Bonita Springs, Florida, Richard and Ann Reahard won a round in federal court on the argument that protecting wetlands unfairly confiscated their property. For the Reahards, it's a matter of justice for thousands of property owners who lost the investment they made in their land when the rules on development changed. "The environmental rules and regulations are baloney," Reahard said. "I hope that this lawsuit will convince people that we are entitled to ownership of this property."

A federal magistrate recently told Lee County that if it was going to forbid the couple from building more than one house on their 40 acres of

to Jeff Garvin, the Reahard's attorney, "... he's just trying to earn a living from his land... if the county wants the land, they ought to come in and pay them for it. The county just can't go on and on and say, 'Sorry, you can't do anything here. We are protecting the public, that's why we are taking your land.'"

**CHANGING TRENDS** - Both the Reahard judgment and the Philadelphia ruling follow several significant cases related to regulatory takings. Some of these include *Florida Rock v. United States* and *Loveladies Harbor v. United States*, both filed on property takings due to wetland designations and subsequent restrictions. Property owners in both cases



*"By designating the theatre building as historic, over the objections of the owner, the City of Philadelphia through its Historical Commission has 'taken' the owner's property for public use without just compensation," — Justice Rolf Larsen.*

property declared to be wetlands, it was the same as confiscating the property. The county would have to buy it, at \$700,000 plus interest.

According to an article released by the Associated Press, the judgment caught environmentalists and county officials by surprise, stating they are worried they will have to rewrite a major portion of the regulations governing wetlands, or risk bankrupting the county by trying to save the land. Obviously, it makes a difference who's "flipping the bill." Environmentalists and regulators are eager to restrict land use when the associated costs are coming from the pockets of private property owners. According

were awarded million dollar settlements.

*Whitney Benefits v. United States* was a case where property owners were forbidden land use by being denied the right to extract coal resources. The court awarded nearly \$120 million for economic loss.

A related case in Erie County, PA was that of Baldwin Brothers Developers where property taxes were reduced to \$1 on residential lots containing wetlands and the subsequent imposition of severe land use restrictions. Judge George Levin ruled in favor of the property owners stating "To tax an asset without value is analogous to taxing a privilege which does not exist."

## SUPPORT THROUGH DOLLARS

Many thanks are due to our loyal members for their outstanding support of private property rights. The 1991 - 1992 renewal season is currently underway with many members not only repledging their individual support, but donating additional dollars by renewing as an associate, business, or corporate member to generate needed dollars for the private property rights cause. Membership dollars and private donations are the Association's primary source of income by which to educate and inform our members, legislators, and the general public about issues affecting private property owners, and to lobby for needed changes and support.

Countless hours are also donated by Board members, regional and committee chairmen, and concerned individuals across the state in pursuit of fair land use laws and regulations.

Thanks to all those members who have so promptly renewed their membership. This saves the Association much time and monetary resources. If you have not yet taken time to do so, please take a moment to renew your support.

— Board of Directors



Shown above are recipients of Plaques of Recognition for their outstanding contributions in support of the Association and private property rights issues. Standing (left to right) Rhonda McAtee, PLA Executive Director who presented recognition awards, Robert Brace, President, Brace Farms, Inc. (Corporate Gold Club Member); Lee Stitzinger, Lumber-Sales Manager, Brookville Wood Products, Inc., (Corporate Silver Club Member) and Cliff Troyer, President, Troyer Potato Products, Inc. (Corporate Gold Club Member).

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### Penn State Hosts Education Institute for Agricultural Educators

Lowell Morton, Executive Secretary of the PA Vocational Agricultural Teachers Association (PVATA) presents PLA Executive Director Rhonda McAtee with a Certificate of Appreciation for her presentation regarding wetland policies and regulatory effects upon landowners and resource based groups. The three day seminar was held July 8-10 at Penn State University and was sponsored by the PA Dept. of Education, PVATA, and Penn State.

## Bush's Swamp Thing

George Bush has a thing about wetlands. During the 1988 campaign he pledged there would be "no net loss" of the nation's swamps, bogs and marshes. Under Jimmy Carter's "moral equivalent of war" we were faced with energy-policy socialism; with George Bush's swamp thing we're threatened by wetlands-policy socialism.

Wetlands can of course play a valuable role in containing floods and maintaining the quality of the nation's water supply. The problem is that not all "wetlands" are ecologically valuable. Some are wet for only a week or so a year. Others are glorified potholes. Nonetheless, federal bureaucrats have seized on the President's well-intentioned statement to pursue a fanatical enforcement campaign that treats all things wet as equal. The Environmental Protection Agency and the Army Corps of Engineers are turning wetlands enforcement into national zoning and land-use direction.

In the process, inevitably, they are engaging in uncompensated takings of someone's property. If this sounds abstract, the list of victims hosed by the wetlands police is a long one:

- A non-profit group in Juneau, Alaska, wanted to build a shelter and workshop for the handicapped, and won city permission to use some low-lying land that was easily accessible. But permission to build was denied, and the project had to wait until a private party donated another property. That parcel was just as "wet" as the first, but because it had been tilled it didn't count as a wetland.
- The city of Hampton, Virginia, was forced to stop construction of a new educational and recreational center after the Corps of Engineers declared the land a wetland - even though it sits on some of the highest ground in the city. The project has already cost \$12.8 million, but now appears to be stalled permanently.

- In 1988, Irma and Joseph Phillips invested their life savings in a 44-acre Maryland farm. They planned to build a retirement home with the proceeds from the sale of part of it. The Corps of Engineers said they had bought a wetland and refused to let them build. Because the Phillipses had sold their home to buy the property, they soon

While this simple definition would end a lot of petty tyranny, we would go further, requiring compensation for any change in property values from new wetlands regulation - as indeed the courts should require under our 200-year-old Constitution.

Wetlands fanaticism has its defenders in the Bush administration.

*"It was not the original intent of Congress to enact a wetlands protection statute, but a water quality act."*

became homeless and had to move in with their daughter's family.

- An elderly woman in Wyoming has been barred from planting a bed of roses on her land for fear it will lead to water pollution.

As outrageous as these cases are, it is even more disturbing to learn that Congress has never written a wetlands protection law. The current crack-down is based on a court ruling that the 1972 Clean Water Act protecting "the navigable waters of the United States" could be interpreted to cover isolated spots of wetland miles from any waterway.

Federal regulators have extended this to mean that any activity that disturbs a wetland -- even if no pollutant is involved - can be prosecuted under the Clean Water Act. Bernard N. Goode, the former chief wetlands regulator for the Corps of Engineers, admitted to Reason magazine that *"It was not the original intent of Congress to enact a wetlands protection statute, but a water quality act."*

Outraged property owners have convinced the White House that the regulatory manual defining wetlands should be rewritten. A key reform would define as "wetlands" only areas that are covered or saturated with water for at least 21 days a year, contain vegetation that can grow only in a wet environment and have soil of a certain type. Currently, a piece of property can be labeled a wetland if it meets only two of these criteria.

Bob Grady, the author of Mr. Bush's "no net loss of wetlands" statement, is now an OMB associate director working on the new manual and seems determined to protect his brainstorm at all costs. EPA Director William Reilly, a longtime champion of wetlands, recently went so far as to release EPA's version of the new wetlands manual despite explicit warnings it had not been cleared by the administration. Ironically, Congress is now scrambling to finally write a wetlands policy into law. It may wind up providing more protection for property rights than the White House's "reforms."

Despite his concern for wetlands preservation, President Bush also supports an end to excesses in their regulation. *"You've got zealots in various levels of the bureaucracy,"* he complained to a group of journalists last year, *"I think, we can handle it pretty well at the top."*

But the problem is that the resistance to wetlands reform begins in the highest circles of the Bush administration. The administration's wetlands policy is well on its way toward becoming a symbol of mindless and crippling central planning imposed from Washington, and changing its course may take intervention from the top man himself.

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# BEWARE OF SCENIC RIVER DESIGNATIONS

Scenic river designations around the country have private landowners concerned, and in many cases outraged, as preservationists continue to push Congress for stringent land use controls.

In March of this year, H.R. 1323 was introduced by Representative Bill Clinger (R-23) and Representative Peter Kosmayer (D-8) which proposes to designate approximately 85 miles along the Allegheny River running from Kinzua Dam to Emlenton, Pennsylvania. The bill was passed by the House of Representatives in June and is now awaiting passage by the U.S. Senate.

Additionally, S.606 was introduced by the late Senator John Heinz in March of this year and is now under consideration by both Senator Arlen Specter (R) and Senator Harris Wofford (D).

Of extreme concern to private property owners are the land use restrictions which could be placed upon

the designated area. Both bills call for advisory committees to establish a management plan, in consultation with the Commonwealth, local governments, and the public, with the objective of "... protecting the outstandingly remarkable values of the Allegheny Wild and Scenic River..." Many are concerned, with good cause, to be fearful of those restrictions contained in the management plan, due to examples cited from other river designations. Neither H.R. 1323 or S.606 provide for clear guidelines outlining what types of land use controls are to be implemented. Neither is a provision included addressing possible "takings" of property through excessive land use controls. Thus, property owners are clearly warranted to be skeptical of supporting the river's designation.

The following two articles depict controls along the Lower Wisconsin and Michigan Riverways provided by Marilyn Hayman of Citizens for Re-

sponsible Zoning and Landowner Rights and Steven Borell, Executive Director of The Alaska Miners Association. Restrictions such as those outlined in the following articles are the reasons which make private landowners wary of supporting "scenic designations."

As an additional note, H.R. 1323 also calls for a river study to be done on the Clarion River and Mill Creek for possible future designations.

Those concerned with passage of the Allegheny River designation should contact the offices of both Senator Arlen Specter and Senator Harris Wofford to voice your concerns. Addresses and phone numbers are listed below. For additional information, members may also contact Lorraine Bucklin at the Association's office at (814) 796-3578. Only YOUR voice can ensure protection of private property rights.

## SENATOR ARLEN SPECTER

303 Senate Hart Building • Washington, D.C. 20510  
(202) 224-4254

## SENATOR HARRIS WOFFORD

277 Senate Russell Building • Washington, D.C. 20510  
(202) 224-6324

The Alaska Miners Association is a non-profit industry support organization with approximately 1000 members. Many of those members have had personal experience with the effects that result from designating rivers into special categories such as Wild and Scenic Rivers.

Such designations have been utilized by preservationist groups to stop development. The private landowners affected are promised fair treatment, compensation, and due process, but this does not materialize. Once the designation is set the individual is up against the overwhelming bureaucracy of the federal government and timely and fair treatment are only a promise from the past. Access is also promised in the legislation and original intent but in the end the restrictions, costs, and time to wait become so onerous as to effectively deny access.

Some have argued that water quality will be protected or improved by special designations. However, the requirements of the Clean Water Act are already in place and no special designation

of the stream will change these extremely stringent standards.

Once the special designations are in place, the focus shifts from a corridor "x" feet (or miles) wide to make the corridor "2x" or "4x" wide. In Alaska the declared goal of the Wilderness Society and American Rivers is that the existing 25 Wild and Scenic Corridors that are one mile wide on each side of the river be increased to two miles on each side of the river.

In Alaska there are 25 officially designated Wild and Scenic Rivers. However, there are actually many thousand such rivers with tens of thousands of miles now being managed so there is no development of any kind. There is a total of over 144 million acres that are in Parks, Preserves, Wilderness Areas, Wildlife Refuges, and Wild and Scenic River Corridors.

We are, therefore, very knowledgeable about the effect of special "lock-up" designations and urge you to not force these kinds of problems on other states also.

— STEVEN C. BORELL, P.E.  
Executive Director

*"The private landowners affected are promised fair treatment, compensation, and due process, but this does not materialize. Once the designation is set the individual is up against the overwhelming bureaucracy of the federal government and timely and fair treatment are only a promise from the past."*

— Comments submitted to Congressman Bruce Vento, Chairman, National Parks and Public Lands Subcommittee regarding Michigan Rivers designation.

# SCENIC RIVERWAY CONTROLS

by Marilyn F. Hayman

Since passage of the Lower Wisconsin Scenic Riverway Law in 1989, people living along this riverway have experienced the full impact of land use controls. They may no longer build a home which would be visible from the river, even though as life-long residents they have owned the land and paid taxes. Those lucky enough to have built prior to the law are now prohibited from making additions or improvements, largely to protect the sensibilities of recreationists below. A governing board must issue a permit before you may erect a birdhouse or birdfeeder, (really!) a clothesline, swing set, or any other "structure" within view of the river.

The harvest of timber has been drastically curtailed -- this, in a poor agricultural area where timber sales often make the difference between profit and debt. Mining and quarrying of sand and gravel, development of private roads, docks and boat houses, and walkways to the river are totally prohibited or strictly limited. The value of the land has been severely reduced with few buyers except for the State Department of Natural Resources, which is purchasing the most scenic lands for a fraction of their original value.

Now the entire state of Wisconsin is to be a "beneficiary" of this model ordinance. One legislator has proposed these same restrictions to regulate lands along the Mississippi River,

Preservationists are claiming the blufflands along the Mississippi are threatened and must be preserved" . . . for our children's children." They admit it is beautiful and remarkably well-cared for, but fear future owners will be less responsible. A parade of "experts" recommend a solution of regional control under state, or better still, a tri-state "regional commission."



A regional agency claiming to be "uncommitted" and "unbiased" held a series of public forums, ostensibly to determine public opinion. Despite limited opportunity to openly discuss the issues, public "input" overwhelmingly opposed area-wide planning. This public resistance is being largely ignored; the agencies are continuing to push for uniform regulations. People who oppose such excessive regulation are being characterized as greedy and green-eyed, interested only in profit. Perhaps unwittingly, the media serve as advocates, so the general public hears only the preservationist viewpoint.

control. A Madison-area legislator has similar plans for many smaller rivers in the state. He, too, believes the LWSR Law is an appropriate model and is working on a proposal to add many of these rivers to the growing list of Wild and Scenic Rivers.

Both legislators are keenly aware of growing public resistance and are keeping their plans protected from public scrutiny. Many farmers and landowners are unaware of the serious threat this legislation poses to their Constitutional rights to private property. People living in cities and towns do not understand this represents an assault of *THEIR* rights, as well.

There is little time to stop this disastrous policy of "taking" piece by piece. If you are a resident or own property in Wisconsin or Minnesota, you should be aware and *involved* in stopping this legislation. We need people throughout the state to register protests to their local and state representatives, and also to the governor.

*"Many farmers and landowners are unaware of the serious threat this legislation poses to their Constitutional rights to private property."*

*"A governing board must issue a permit before you may erect a birdhouse or birdfeeder, a clothesline, swing set, or any other "structure" within view of the river."*

We would like to unite with any individual or any group anywhere which is concerned about the growing bureaucracy and over-regulation that is strangling our democratic free enterprise system.

a stretch over 200 miles long, containing thousands of farms and perhaps millions of acres. The plan is designed" . . . to facilitate and encourage the fullest beneficial public use of these (private) areas." Similar plans are being designed for southeastern Minnesota, for adoption at a county level.

No boundaries have been delineated for the Mississippi plan. Advocates of regulation ignore the open-ended nature of the proposal which allows for expansion if the governing body believes this to be in the best interests of "protecting" the area. This leaves not only the corridor, but the entire watershed open to eventual



— Marilyn Hayman is President of Citizens for Responsible Zoning and Landowner Rights. Interested parties may contact her at P.O. Box 16, Maiden Rock, WI 54750.

BUZZWORD OF THE 90's ?

Through our concern for our environment and stewardship responsibilities, we have been faced with increasing our environmental vocabulary by learning the meanings of many new terms associated with our ecosystem. Yet another buzz-word, biodiversity, is appearing more frequently when concerns involve environmental matters. Biodiversity is all encompassing, and is offered as a reason to preserve land, undefined and undocumented but certainly constricting human activity.

Recently, the Pennsylvania timber industry, more specifically the Al-

legheny National Forest (ANF) became obtrusively involved with the biodiversity issue through an environmental group called Preserve Appalachian Wilderness (PAW). PAW filed an appeal to the Supervisor of the Allegheny National Forest to stop a timber sale on the ANF. The sale, Crazy Gray Project in Forest County, was halted until the appeal could be settled. According to PAW, the group advocates "the restoration and preservation of native biodiversity, healthy ecosystems, and natural processes and evolutionary integrity through the implementation of

effective legislation and progressive public lands management."

Presently, the Forest Management Plan includes a ten year management period and is a detailed document including input from many concerned groups and individuals to provide a multi-use management plan which balances wilderness, wildlife, recreation and natural resources. By law, forests are harvested to cut no more timber than is being grown and law also dictates regenerating the forest after harvesting.

Upon consideration of the impacts such an appeal could generate to both public and private lands if successful, the PLA Board of Directors filed a request for intervenor status. In so doing, this assured PLA with further input and communication within the appeals process. If successful, the appeal could stop all management of the forest area since the intent of PAW is "to prohibit tree cutting, fencing trees, applying herbicide or otherwise altering the natural condition of the area."

On August 12, 1991, Theodore Beauvais, District Ranger for the Forest Service, issued a letter to both the appellant and intervenors. The letter indicated his decision to withdraw management activities within the 840 acre affected area. He also stated his intent to re-evaluate the situation and that an analysis should be completed and a decision rendered sometime during September 1991. Any decision made by the Forest Service will be considered a "new decision" and also subject to appeal.

PLA will continue to monitor the situation. Over 96 groups filed for intervenor status.

**Price Tag of Preservation:  
Mother Nature pays, too**

The brown discolorations that plague Oregon's eastside forests are an undeniable sign of a dying ecosystem. Wildlife biologist Jack Ward Thomas, who makes his home in the once-picturesque Willowa Mountains, says our precious forests are "unraveling."

Experts are tracing the unraveling process to preservation policies that tie their hands, prohibiting them from managing these forests. As a result, the Price Tag of Preservation is growing:

- Nearly a billion acres of dead spruce, pine and fir trees now stand between the Willowa-Whitman and Umatilla National Forests because of bug infestation and disease. If conditions go unchecked, experts say we'll lose 70-100% of these forests.

- A sick forest is a breeding ground for hazards that can contaminate and even kill. At risk are clean air, pure water, wildlife, fish habitat and recreation opportunities.

- With 60% of these forests already dead or dying, the entire region is in jeopardy as fire season nears. Drought and acre after acre of dead trees make these mountains easy prey for wildfires.

On the surface, the culprits are the spruce budworm, bark beetle and tussock moth. But land managers say insects are merely a symptom. The real problem: misguided public pressure, timber sale appeals and special-use designations.

Misguided public pressure to preserve forests rather than manage them is, in fact, killing trees.

*"People have heard the Sierra Club say we need to 'preserve' nature in its 'pristine' form," said Larry Cribbs of Citizens Natural Resource Group, LaGrande. "The fact is, Mother Nature is a cruel manager. If we don't harvest those old, dying trees, she will."*

Timber sale appeals and special-use designations have paralyzed our ability to manage forests responsibly. Non-management restrictions that come with appeals and designations translate to blind neglect inviting bugs and disease. They also invite massive fires because dry, dead material works as a fire fuel.

*"There are people filing appeals because they think logging should stop — period," said Judy Wortman, Citizens Natural Resource Group. "But salvage logging prevents bugs from spreading. It also protects us from fires that kill whole forests, start serious erosion, degrade fish spawning streams and hurt water quality."*

The answer, say plant ecologists and wildlife experts, is an aggressive, integrated approach, reintroducing light grazing and even some burning as regeneration tools. This approach would include logging to stop bugs, lessen the fire risk and stimulate biodiversity.

— OREGON LANDS COALITION

**Land use problems?  
Legal Questions?**

The firm of Buchanan Ingersoll, P.C. contains a reputable staff of attorneys dedicated to representing private land rights. Their environmental law section is available to help you with legal questions and assistance. For more information, members may contact Hank Ingram in Pittsburgh, PA at (412) 562-1695 or John Ward in Harrisburg, PA at (717) 237-4815.

# UPDATES

• **WETLANDS** - Progress continues to be made and support for legislative changes continue to grow. H.R. 1330, the Comprehensive Wetlands Management and Conservation Act introduced by Pennsylvania Congressman Tom Ridge and Louisiana Congressman Jimmy Hayes has garnered much support. Currently, over 170 co-sponsors have signed on from 40 different states. Committee hearings have continued to be delayed but are expected late this summer.

Meanwhile, positive steps have taken place, including White House endorsement of several changes to wetland policy. In a press release offered August 9, 1991, the White House endorsed several key proposals, many of which are included in H.R. 1330. Key changes include:

• **A revised wetland definition which would require the presence of surface water for 15 consecutive days or saturation to the surface for 21 days. The current definition enables property to be declared a wetland if saturation is found 18" below ground surface for as little as 7 days.**

• **Classifications of wetlands by value.**

• **Streamlining the permitting process by delegating the Army Corps of Engineers as the single agency in determining a final permit condition and requiring a permit answer within 6 months.**

• **Allowing offsite mitigation.**

• **Clarifying normal farming, ranching, and silviculture activities exempted from the 404 program, including lands exempted from the Swampbuster program.**

• **Acquisition of high quality wetland resources.**

PLA feels mitigation requirements for private property owners still needs to be addressed in both state and federal legislation. Current costs associated with mitigation will not allow the majority of property owners to replace wetlands. Currently, wetland replacement will be required with all class "B" or intermediate wetlands in order to receive permit approval for land use. Members should contact Congressman Ridge to voice your concerns, as well as contacting your own Congressional Representative. Congressman Ridge may be contacted by writing to:

Honorable Thomas Ridge  
1714 LHOB  
Washington, D.C. 20515

Also, thank your Congressman for his support if he has officially signed on as a co-sponsor to H.R. 1330. Supporting Pennsylvania Congressmen include Tom Ridge, Bill Clinger, Joe Kolter, Joe McDade, Austin Murphy, Don Ritter, Richard Santorum, Bud Shuster, Bob Walker, Gus Yatron and George Gekas.

Additionally, S.1463, a companion bill to H.R. 1330, has been introduced in the U.S. Senate by Senator John Breaux (D) of Louisiana. This bill currently boasts 24 co-sponsors. Members should contact Senator Arlen Specter's office at (202) 224-4254 and Senator Harris Wofford's Office at (202) 224-6324 and urge them to sign on.

On the state level, Senator David Brightbill of Lebanon County has indicated his intent to proceed this fall with legislation. **Calls and letters need to be sent to his office indicating support of mandatory compensation for permit denials and an amendment grandfathering mitigation requirements for property owners who owned land prior to passage of legislation.** These are two major inequities not addressed in the current bill, S.B. 982. The senator can be reached by phoning (717) 787-5708, or by addressing correspondence to:

Honorable David Brightbill  
Main Capital Building  
Harrisburg, PA 17120

**Members are urged to stress that legislation, not regulation, is the only solution to the wetland dilemma. Write your legislators!**

• **PA GAME COMMISSION** - Recently, the PA Game Commission publically proposed a tax surcharge for any posted private property. This proposal was being considered as a method to improve deer management across the state. However, after great public outcry, all considerations have currently been dismissed regarding this tax surcharge. On August 9, 1991, PGC Executive Director, Peter Duncan, announced that "In order to put to rest growing public concern, the PGC has reaffirmed it has no intentions of seeking legislation to impose a surtax on posted, private property." He further stated, "Rest assured this was no more than a suggested topic of discussion and never a formal proposal by the Game Commission." The Commission also stated it has no plans to advance this idea now or in the future.

• **PRIVATE PROPERTY RIGHTS** - On June 7, 1991, by a margin of 55-44 the Senate voted to support

passage of S.50, the Private Property Rights Act introduced by Senator Steve Symms (R-ID). The bill was added as an amendment to pending legislation S.1204, the 1991 Surface Transportation Act which later passed the Senate with ease.

In the House of Representatives, Rep. Jim Olin (D-VA) introduced a version of the Private Property Rights Act known as 1572, which gained significant support in the House, boasting well over 100 co-sponsors. As in the Senate, it was intended that the Private Property Rights Act would be added to the House version of the Transportation bill. Unfortunately, this did not occur as the chairmen of the House Judiciary (Rep. Jack Brooks (D-TX), House Government Operations (Rep. John Conyers (D-MI), and House Interior (Rep. George Miller (D-CA) Committees claimed jurisdiction over the proposed amendment.

However, when the House Public Works and Transportation Committee met to mark-up the Highway Bill, several members of the Committee expressed support for private property rights. Rep. Jimmy Hayes (D-LA) spoke in favor of legislation to protect these rights, and his statement was supported by Reps. Bob Roe (D-NJ), Norman Mineta (D-CA), and Paul Hammerschmidt (R-AR). Rep. Ron Packard (R-CA) also expressed his views on private property rights.

Representative Tom Foley (D-WA), Speaker of the House, has decided to send the bill back to the House Public Works and Transportation Committee due to a variety of disagreements regarding the bill's language. Further action of the Private Property Rights Act, either as an amendment to the transportation bill or as free standing legislation, will occur after Congress reconvenes on September 10. **Members . . . your voices are needed ! The following legislators need to hear from you. Contact them voicing your support of H.R. 1572. Additionally, contact your congressman urging his support of this bill.**

**Rep. Thomas Foley, Speaker of the House, 1201 LHOB, Washington, D.C. 20515.**

**Rep. Jack Brooks, Chairman, House Judiciary Committee, 2449 RHOB, Washington, D.C. 20515.**

**Rep. John Conyers, Chairman, House Government Operations Committee, 2426 RHOB, Washington, D.C. 20515.**

**Rep. George Miller, Chairman, House Interior Committee, 2228 RHOB, Washington, D.C. 20515.**

# BANKS HAVE STAKE IN WETLANDS DEBATE

Just three miles out of Fairbanks, Alaska, sits a 55-acre parcel of land that's of no use to its bankrupt owner, of no value to his lender, and of dubious worth to anyone.

The property has been tainted. But the troublesome substance isn't leaking petroleum or radioactive waste - it's plain water.

This becomes an issue due to concerns over the loss of the nation's wetlands. Cases such as this, recounted in more detail below, are spurring revisions to existing federal wetlands rules and a competing array of legislation.

**Underwater loan.** The property mentioned serves as collateral for a loan extended by \$2 billion-assets National Bank of Alaska, Fairbanks. When the bank granted the loan to the developer, there were high hopes the parcel would prove a useful property, according to James C. Lund, senior vice-president.

One use is a typical one for Alaskan industry - harvesting natural resources. In this case, the developer mined part of the property for gravel.

Unfortunately, the water table tends to be high in Alaska. As mining progressed, operators hit ground water. Eventually the quarry site filled with enough water to form a lake of roughly 15 acres.

Although the small lake only came about through the mining operation, both the bank and the borrower realized that it had become large enough to qualify under current federal definitions of wetlands. Further development would have required negotiating a difficult government permit process. Even then, it was believed any permit granted would have been extremely restrictive. And the borrower was already in financial difficulty.

"He offered us the property, but we don't want it," says Lund. "There's no use for it." An opportunistic bidder offered the bank and the borrower, who went bankrupt, one-tenth the tax-assessed value of the property. The offer was declined, the bank refusing to release its collateral for so little.

The potential for more such cases gnaws at Lund. He notes that much of the state currently qualifies as a



"This photo portrays a federally designated wetland." True or false? Surprisingly, true. This Arizona parcel is a wetland under rules that give lenders and landowners fits. (Courtesy of Rep. Jimmy Hayes' (D-La.) office.)

wetland. He adds that this includes most populated areas, where most development would likely take place.

Like many Alaskans, Lund says he recognizes the importance of preserving natural resources, but he is concerned about the direction federal wetlands enforcement could take.

"We have 'wetlands' here where you could die of thirst," says Lund.

**What's wet?** Though the state is unusual in the high proportion of its territory classified as wetlands, it is by no means the only area so affected.

Federal regulation has resulted in many areas that aren't obviously wetlands being classified as such.

Dierks says areas of Louisiana, Virginia, and Maryland are among the trouble spots for lenders. Banks needn't be financing development to be affected.

Case in point is The Bank of Tidewater, a \$75 million-assets institution based in Virginia Beach. Chairman and CEO J. Burton Harrison, Jr., recounts the case of one developer who readied a subdivision for homebuilding. The lots were ready for sale and then the government classified the site as a wetland.

The ensuing review process wound on for two years, says Harrison, "and bankrupted him." In

*"... closings on loans secured by land can be delayed as long as 18 months until either a private engineering firm or the government provides a reading on the property's status."*

Attempting to develop such property requires embarking on a federal permitting process that consultant Kenneth A. Dierks characterizes as "a step through the looking glass." In other cases builders can't obtain financing until they can certify to a lender that a property is not a wetland, according to Dierks. He is a principal with the engineering firm of Langley and McDonald, Virginia Beach, Va.

time, the ruling was reversed, but too late for the developer. While Harrison's bank hadn't financed the development, the developer owed the institution more than \$30,000 in other debt.

Experiences like that have affected the lending process in his area, says Harrison. He says closings on loans secured by land can be delayed as long as 18 months until either a

private engineering firm or the government provides a reading on the property's status.

**Controversial rules.** A confusing and controversial mix of federal and state regulation dealing with wetlands has grown out of the federal Clean Water Act. Much of the relevant regulation arises from the act's Section 404.

Critics of the process say the intent of the act was twisted to enable federal agencies to embark on a wetlands preservation program that often doesn't distinguish an environmentally valuable tract, such as an estuary, from less-worthy sites or even inadvertently created ones.

At the heart of the debate is a publication called *The Federal Manual for Identifying and Delineating Jurisdictional Wetlands*. The manual is a joint publication of four agencies that play a role in wetlands regulation: the Army Corps of Engineers, which handles the permit process; the Environmental Protection Agency, which holds veto power and sets certain rules in the permit process, and which shares enforcement authority with the Corps; and the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, which serve in advisory roles.

**Sources of friction.** Controversy arises from several aspects of this setup.

One concerns what a wetland is. Under the manual's current definition, if water is present as much as 18 inches below the surface for seven days, the property is likely going to be considered a wetland. Other indicators include the types of soils present and types of plants growing on the site.

Another cause of controversy is the permit process. As indicated earlier, it can be lengthy. The Corps of Engineers takes many factors into account, including its own environmental assessment of the site in question, public comments, and evidence taken in hearings. Even if the Corps decides to grant a permit, the scope may be limited. Approximately 15,000 permit requests are filed annually, with about 67% approved in some form. The Corps maintains that the vast majority are processed in less than 60 days.

In many ways, says consultant Dierks, the process is stacked against the landowner. And as congressional staff members point out, current law provides no automatic reimbursement to owners whose land is taken out of commission.

Restrictions on usage can be so strong as to constitute a "taking," according to Mark Holman, aide to Rep. Thomas Ridge (R.-Pa.), a co-

sponsor of remedial legislation. Holman and others believe this should entitle the landowner to some form of reimbursement, "the same as if a federal highway were put across their land." Presently, a landowner must sue.

**Manual revision.** A revision to the current federal manual that some expect would create a "wetter" definition of wetlands is pending. However, draft materials released by EPA state that the revisions will "tighten" standards and "NOT change the definition of wetlands . . ."

## "We have 'wetlands' here where you could die of thirst."

It's somewhat a matter of semantics. The materials characterize the revisions as changes to the government's "burden of proof." For example, they state that one anticipated change will be to double the seven-day standard noted earlier in most circumstances and to require that the water be at the surface.

In late May the document was under review by the Office of Management and Budget. An EPA spokesman said at the time that OMB was expected to release the manual for publication sometime in June. The spokesman said the document would be released as a proposal for public comment thereafter.

Critics of the current process are skeptical about the revision, parts of which have been leaked around Washington.

Congressional aide Mark Holman says what he's heard about the actual document leads him to believe it will be "an administrative dust-off." The Clean Water Act is up for reauthorization during this Congress, he notes, and "a comprehensive legislative solution is very timely and very much in order."

Robert G. Szabo, an attorney representing the National Wetlands Coalition, a business lobbying group, notes that there's been no indication that the revised manual would distinguish between wetlands of varying ecological significance.

**Legislative efforts.** Numerous bills relating to wetlands have been introduced, some specific to individual states. House committee hearings were expected to begin in June. Here are highlights of comprehensive House packages:

- H.R. 251 — This is considered an environmentalist's bill, as its name, "Wetlands No Net Loss Act of 1991," would indicate. Key points include establishment of a nonprofit trust to acquire wetlands for preservation and

a requirement that permits granted for development of wetlands include provisions for replacement of the affected.

- H.R. 1330 — This package enjoys broad support, with 127 sponsors, and is the favored vehicle of Szabo's group. Among its facets: a 21-days-of-surface-water test for classification as a wetland; division of wetlands into those with high, medium, and low ecological value, with differing treatment for each; various types of compensation for landowners; elimin-

ation of EPA's veto power; and creation of "one-stop" regulation at the Corps of Engineers.

This bill is the only one recounted here that does not include a "no net loss" provision.

- H.R. 404 — This bill is viewed as more of a middle ground approach. While it provides for different levels of protection, it is less specific on this point than H.R. 1330. It also leaves the compensation issue with the courts. However, it does adopt a 21-day standard.

- H.R. 2400 — This is also regarded as a middle-of-the-road approach. Among other facets, it adjusts the definition of wetlands to one similar to that envisioned under the revised manual.

Much less has been introduced on the Senate side, where one House staffer says the sentiment has been to deal with wetlands separately from the clean water legislation. Szabo says the Senate Environment and Public Works Committee has typically resisted the type of legislation his group proposes. However, he says he expects widespread dissatisfaction with the current wetlands program to trigger hearings later in the summer.

A question mark in all this is the Administration. Although President Bush's promised policy is "no net loss of wetlands," different parts of the Administration favor different approaches, according to Szabo.

Szabo sees the Clean Water Act re-authorization as the engine that will pull any eventual law through Congress. The complexity of the matter, he says, make it more likely that something would pass in the second session, than the first.

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"AND IT COMES WITH A GUARANTEED EXEMPTION FROM THE CLEAN WATER ACT..."

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