



P E N N S Y L V A N I A LANDOWNER

VOLUME XVIII - NUMBER 2

FALL 2004

Defenders Represent PA Farmer against EPA

After a long-fought battle against the government to obtain compensation for the taking of their farmland, Robert Brace may finally see his day in court before the end of this year.

Mr. Brace's battle with the government began in 1987 when the U.S. Environmental Protection Agency and the U.S. Corps of Engineers told Mr. Brace he could no longer farm on part of his Erie County land because it was considered wetlands. This was land that Mr. Brace had purchased in December of 1975 from his father and which he intended to use to continue and expand his family farming business. Although the soil on this land was highly productive for farming, it was considered to be poorly drained and in need of drainage to make it suitable for production of cabbage and potatoes. Thus, with the assistance and funding of another federal governmental agency, the U.S. Department of Agriculture, he arranged for and began excavation and burying of plastic tubing, "drainage tile," to improve soil conditions for row crops. This was a common practice in Erie County during that time period and was encouraged by the USDA.

After Mr. Brace had expended considerable sums to install this drainage system and maintain it so that the land would be productive for crops, the EPA told Mr. Brace he was in violation of the Clean Water Act and brought an enforcement

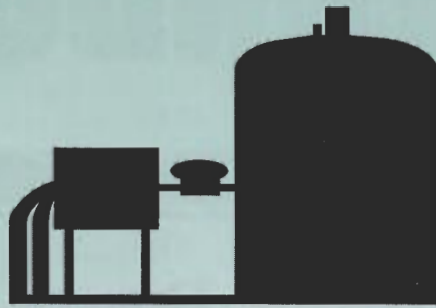
lawsuit against him in a Pennsylvania federal district court. Although the district court in 1993 agreed with Mr. Brace that his activities should be considered "normal farming practices," which are exempt from the Clean Water Act's provisions, the Third Circuit Court of Appeals reversed that decision. After the Supreme Court denied his petition for certiorari, Mr. Brace was forced to enter into a consent decree in which he agreed to remove a major part of the drainage system he had installed on his land and restore thirty acres of his land to unusable and undevelopable wetlands "in perpetuity" according to a restoration plan drafted by EPA. He was also forced to pay a \$10,000 fine.

*Mr. Brace filed
the present lawsuit
in order to seek
compensation for
the taking of
his land in 1998.*

Mr. Brace then filed the present lawsuit in order to seek compensation for the taking of his land in 1998. However, before he could obtain his day in court, he was forced to face numerous motions filed by the federal government to try to keep the case from going to trial. Since 1998, the government has filed two motions for summary judgment, one in 2000 and one in 2001, alleging that it had not taken Mr. Brace's land. Both those motions were denied. In 2002, the government filed a motion to dismiss, claiming Mr. Brace had failed to state a claim, and that motion was also denied. With no more legal avenues for the government to delay trial of the case, the parties proceeded with identification of their witnesses and discovery.

continued on page 3

This issue sponsored by BCD Properties, Inc.



B C D

PROPERTIES, INC.

PRODUCER OF NATURAL GAS

Robert H. Brace, Owner

**1131 Route 97, P.O. Box 338
Waterford, PA 16441**

Phone: 814/796-2174 Fax: 814/796-1434

*As Hank Ingram said,
"Wake up... Don't relax - get our heads out of the sand and stay involved."*

Please see our newly added INDEX, on [page 15](#) to help you find the topic that interests you the most!

Defenders Represent PA Farmer against EPA

continued from page 1

Currently, both Mr. Brace and the government have identified the key witnesses they intend to present at trial, including expert witnesses, and have just wrapped up depositions of those witnesses.

In addition to his own testimony, Mr. Brace will present two fact witnesses at trial and one expert, a land appraiser. One witness is Joseph Burawa, who is now retired, but was County Executive Director for the Agricultural Stabilization and Conservation Service (ASCS) for Erie County, part of the USDA, from 1967 to 1989. Mr. Joseph Burawa, will testify that from 1975 to 1985, the ASCS actively encouraged farmers by providing them financial assistance and technical assistance (through its sister agency, then known as the Soil Conservation Service or SCS) to maintain, improve, and expand agricultural drainage systems on their farms in Erie County. He will testify that Mr. Brace sought assistance from ASCS and SCS in the mid 70's to prepare a drainage plan for his land. He will further testify that SCS provided him technical assistance in preparing and implementing the drainage plan and that ASCS partly funded the project.

Another witness for Mr. Brace is John Burawa, a commercial lender with Mercer County State Bank in Erie County, who has had a financial relationship with Mr. Brace since late 1970s. He will testify to the severe impact that the government's actions in this case have had on Mr. Brace's farming operations and financial condition. He will also testify that it is only due to Mr. Brace's exceptional business acumen that he has been able to keep his business afloat and provide for his family during these hard times. Mr. Burawa will further testify to his knowledge of the feasibility of farming and value of farmland in Erie County, having had decades of experience in lending to farmers in the area.

Finally, Mr. Brace will present at trial an expert land appraiser, James Lignelli of Diversified Evaluation Company in Pittsburgh, Pennsylvania. Mr. Lignelli valued Mr. Brace's property (a 58 acre tract) at its most profitable possible use, known as the "highest and best use," for a residential subdivision development. Based on a conceptual development of a subdivision with 125 lots, Mr. Lignelli will testify that the property in 1996 (when it was taken by the government) was worth \$455,000. He will also testify that after the government took 30 acres of that land, requiring Mr. Brace to remove the extensive drainage tiles he had installed on those acres, fill in ditches, and restore the property to wetland, the entire tract has no fair market value.

The government has identified three fact witnesses and one expert. According to the government, one of its identified witnesses, Jeffrey Lapp, currently the Wetlands and Oceans Program Manager for EPA's Region 3, will primarily testify at trial regarding his role in drafting the restoration plan for Mr. Brace's property in his position then as Wetlands Enforcement Coordinator. In deposition, he testified regarding the extensive work that Mr. Brace was required to undertake in order to "restore" his drained farmland to unusable wetland. A second witness, David Putnam, who is currently a wildlife biologist with the U.S. Fish and Wildlife Service, will testify at trial regarding his involvement in the enforcement action against Mr. Brace. At deposition, he stated that FWS and EPA, as well as several other governmental agencies, all believed that they had a strong case against Mr. Brace in the enforcement action and that it was clear that the government had jurisdiction over the 30 acres of land that ultimately became subject to the consent decree. Finally, the government may present at trial the testimony of Lewis Steckler, the District Conservationist for the Natural Resources Conservation Service (formerly SCS) in Erie County. He stated in deposition that SCS did indeed assist Mr. Brace in preparing and implementing a drainage plan on his property. He also stated that after the consent decree, he personally observed Mr. Brace being forced to rip out the extensive drainage system on his land, only days before Christmas in 1996.

Finally, the government will present the testimony of its expert witness, George Silver, of Burlington, Vermont. Mr. Silver valued Mr. Brace's property (135 acre tract) for a highest and best use of a diversified cash crop operation, concluding a value of \$355,000 before the entry of the consent decree despite the fact that, as he stated in deposition, he failed to talk personally with real estate developers or brokers in Erie County to see where trends toward development of such land were going. After the 30 acres were made subject to the restoration plan in the 1996 consent decree, Mr. Silver valued the property at \$305,000, only \$50,000 less than the value before the consent decree, despite the fact that those 30 acres were rendered completely unusable and must be kept as such "in perpetuity."

Now that depositions of the key witnesses have concluded, the next step is for the court to set a trial date. Both sides have proposed possible trial dates before the end of the year and filed a proposed trial schedule with the court on July 2, 2004.

Testimony of Roger J. Marzulla Before the House of Representatives Committee on the Judiciary Subcommittee on the Constitution

Subcommittee Hearing on "The GAO's Recent Report on the Implementation of
Executive Order 12630 and the State of Federal Agency Protection of Private Property Rights"
Thursday, October 16, 2003, 2141 Rayburn House Office Building

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity of testifying today with respect to the federal government's implementation of Executive Order 12630, "*Governmental Actions and Interference With Civil Constitutionally Protected Property Rights*." I congratulate the Subcommittee on instituting the first inquiry in more than a decade into whether federal agencies are complying with their obligations under the Takings Executive Order, which is designed to protect individual constitutional liberties in property while saving money for the federal government. Regrettably, in a report issued today by Defenders of Property Rights, we conclude that widespread noncompliance with the Takings Executive Order has resulted in massive violation of constitutionally-guaranteed property rights, subjecting the federal government to liability for \$1 billion or more.

I take special interest in this Subcommittee's investigation because, as an attorney with the United States Justice Department, I had the honor of being designated by former Attorney General Edwin Meese III to head up the team that helped draft the Takings Executive Order and the Attorney General's guidelines. Today, I serve as General Counsel to Defenders of Property Rights, the nation's only nonprofit legal foundation dedicated exclusively to the protection of our cherished constitutional right to own, use and possess private property. At Defenders of Property Rights, every day we receive urgent requests for help in vindicating constitutionally guaranteed property rights of homeowners and retirees, farmers and ranchers, small businessmen, and ordinary Americans who see government with impunity destroying their homes, their businesses and their dreams. The Takings Executive Order was designed to minimize this violation of constitutionally-protected property rights, but it can do so only if federal agencies comply with the analytic

and planning tools which the Takings Executive Order provides.

I. WHY CONSTITUTIONAL PROPERTY RIGHTS ARE IMPORTANT

If you believe in individual freedom, then you must believe in property rights. As the Supreme Court has said:

Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth a "personal" right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972).

The protection of rights in property lies at the heart of our constitutional system of government. The Founding Fathers, in drafting the Constitution, drew upon classical notions of legal rights and individual liberty dating back to the Justinian Code, Magna Carta, and the Two Treatises of John Locke, all of which recognize the importance of property ownership in a governmental system in which individual liberty is paramount. Concurrently, the constitutional framers drew upon their own experience as colonists of an oppressive monarch, whose unlimited powers vested him with the ability to deprive his subjects of their God-given rights of "life, liberty, and property."

The United States Constitution imposes a duty on government to protect private property rights. Thus, within the Bill of Rights, numerous provisions directly or indirectly protect private property rights. **The Fourth Amendment guarantees that people are to be “secure in their persons, houses, papers, and effects . . .” The Fifth Amendment states that no person shall “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation . . .” The Fourteenth Amendment echoes the Due Process Clauses of the Fifth Amendment, stating that no “State shall deprive any person of life, liberty, or property without due process of law . . .”** Additionally, the Contracts Clause of the Constitution indirectly protects property by forbidding states from passing any “law impairing the Obligation of Contracts.”

The protection of private property receives such strong emphasis in the United States Constitution because the right to own and use property was historically understood to be critical to the maintenance of a free society. To understand this concept, one must understand that property is more than just land. Property is buildings, machines, retirement funds, savings accounts, and even ideas. In short, property is the fruit of one’s labor and the ability to use, enjoy, and exclusively possess the fruits of one’s labor is the basis for a society in which individuals are free from oppression. Arguably, there can be no true freedom for anyone if people are dependent upon the State for food, shelter, and other basic needs. Under such a system, nothing is safe from being taken by a majority or a tyrant because the citizens, as government dependents, are powerless to oppose any infringement of their rights.

The United States Supreme Court has repeatedly explained that the primary purpose for protecting property rights is to bar government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹ During the birth and growth of the administrative regulatory state, federal government agencies ignored these principles and implemented policies that deprived owners of the use and benefit of their property without providing compensation. Moreover, Congress consistently failed to codify property rights protection into federal law and the judicial system’s maze-like procedures

... Congress consistently failed to codify property rights protection into federal law and the judicial system’s maze-like procedures and hurdles made seeking redress for the infringement of private property rights in the courts impractical for many property owners. Thus, private property rights have become one of our most endangered liberties.

and hurdles made seeking redress for the infringement of private property rights in the courts impractical for many property owners. Thus, private property rights have become one of our most endangered liberties.

II. THE TAKINGS EXECUTIVE ORDER

In June of 1987 the United States Supreme Court handed down two blockbuster cases, *First English Evangelical Church v. County of Los Angeles*² and *Nollan v. California Coastal Commission*.³ The *First English* and *Nollan* cases sent a shock wave through the federal government, where new and far-reaching regulatory programs such as Superfund,⁴ the Clean Water Act,⁵ and the Endangered Species Act⁶—all good ideas—could now not be implemented without paying for the private property rights taken in the process. Former United States Attorney General Edwin Meese III was among the first to realize that the government lacked any plan for avoiding unnecessary regulatory takings, or for paying those whose property had been taken by regulation. His concerns quickly reached the White House and the Office of Management and Budget—and the President.

Accordingly, in his legislative and administrative message to the Congress of January 25, 1988, President Reagan discussed the significance of these two landmark Supreme Court decisions, simultaneously reaffirming the central importance of property rights to our constitutional system and the need to plan for inevitable just compensation obligations of the government:

*It was an axiom of our Founding Fathers and free Englishmen before them that the right to own and control property was the foundation of all other individual liberties. To protect these rights, the Administration has urged the courts to restore the constitutional right of a citizen to receive just compensation when government at any level takes private property through regulation or other means. Last spring, the Supreme Court adopted this view in *Nollan v. California Coastal Commission*. In a second case, the Court held that the Fifth Amendment requires government*

*to compensate citizens for temporary losses that occur while they are challenging such a government regulatory "taking" in court. In the wake of these decisions, this Administration is now implementing new procedures to ensure that federal regulations do not violate the Fifth Amendment prohibition on taking private property; or if they do take a citizen's property for public use, to ensure that he receives constitutionally required just compensation.*⁷

On March 15, 1988, President Reagan signed Executive Order 12630, "Governmental Actions and Interference With Constitutionally Protected Property Rights."⁸ Executive Order 12630 draws heavily upon the regulatory coordination function of the Office of Management and Budget established by Executive Order 12291⁹ and the Executive Order on federalism. Threads of the environmental assessment process under the National Environmental Policy Act are woven into the fabric of this Order, as are aspects of the budgetary planning process. Executive Order 12630 reflects thoughtful consideration and vigorous debate throughout the affected government agencies, establishing a practical and workable procedure for implementing the Supreme Court's holdings in *Nollan* and *First English*.

The legitimacy of the Executive Order is premised both upon the duty of the government to respect constitutional protections afforded by the Bill of Rights and upon the management principle that government should not undertake programs without knowing and planning for their potential costs:

*Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.*¹⁰

The Executive Order requires that "[i]n formulating or implementing policies that have takings implications, each

Executive department and agency shall be guided" by the principles established in *Nollan* and *First English*. These "general principles," set forth in Section 3 of the Executive Order, include the doctrines of nexus and proportionality established by *Nollan* and the self-actuating right to just compensation set forth in *First English*. Although some actions are exempted from coverage, most traditional government regulatory functions fall within the scope of the Order. The presidential Order singles out permitting processes and the creation of restrictions upon private property use, requiring that all departments and agencies observe the doctrines of nexus and proportionality and that they minimize processing delays.

Perhaps the most challenging of the Order's requirements, however, is the takings implications analysis (or "TIA,") which must be prepared "before undertaking any proposed action regulating private property use for the protection of public health or safety" or for other purposes. When regulations focus on public health and safety purposes, the TIA must identify "with as much specificity as possible" the public health and safety risk created by the proposed private property use, establish that the proposed governmental action "substantially advances the purpose of protecting public health and safety against the specifically identified risk," establish that the proposed restrictions are "not disproportionate" to the landowner's contribution to the overall risk, and "estimate, to the extent possible, the potential cost to the government in the

Former United States Attorney General Edwin Meese III was among the first to realize that the government lacked any plan for avoiding unnecessary regulatory takings, or for paying those whose property had been taken by regulation.

event that a court later determines that the action constituted a taking."¹¹ To encourage thoroughness and candor, the TIA will normally be considered an internal deliberative document not subject to production under the Freedom of Information Act, and, in any event, the Executive Order "is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person."¹²

Finally, the Order requires that the attorney general promulgate guidelines for the evaluation of risk and the avoidance of unanticipated takings "to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order."¹³ This guidance discusses the constitutional principles that *Nollan* and *First English* established and, to some degree, also identified issues on which the Supreme Court had not at that time opined. To

avoid obsolescence, the Attorney General was ordered to periodically review and update the guidelines to reflect subsequent clarification of constitutional principles by the Supreme Court. Those guidelines were issued on March 18, 1988.¹⁴ They have not been reviewed or updated since.

III. FINDINGS OF OUR INVESTIGATION

To determine whether the Executive Order process, ostensibly in effect for fifteen years, had reduced government impairment of private property rights, we initially sought government records tabulating just compensation payments for inverse condemnation. We found none. We sought annual reports to the Office of Management and Budget, which agencies are required to file under the Executive Order, summarizing takings judgments entered against those agencies. Again, we found none. We sought records or reports of TIA, required under the Executive Order. We found one prepared by the Environmental Protection Agency in 1990. We sought anecdotal evidence, and learned that many agency officials of this and prior administrations had never even heard of Executive Order 12630, and were doing nothing to comply with it. Finally, we decided to undertake an examination of court records to at least find out how much court-ordered just compensation had been paid in cases filed after January 1, 1991 (a date after the Executive Order for which a database was available) through August 1, 2003.

Because avoiding unnecessary takings protects both constitutional rights and the public treasury, the Executive Order is an important tool for management of regulatory programs. Adherence to the requirements of the Executive Order should thus result in a sharp decline in non-condemnation takings of private property, and in the amounts of taxpayer money paid out in just compensation for such takings. To determine whether such a decline in takings and just compensation payments had occurred since issuance of the Executive Order, we undertook a review of more than 500 taking suits filed against the federal government since 1991. In brief, our findings were:

- **In that time period more than 500 new taking cases have been filed against the federal government in the Court of Federal Claims.**
- **Of these nearly 400 have been resolved.**
- **In those cases, the court has awarded \$111,966,012.10 in just compensation.**
- **Approximately 22.4% of the successful cases were awards against the Corps of Engineers.**

- **Approximately 24.4% of the successful cases were awards against the Department of Interior and the Forest Service.**
- **Approximately 6.1% of the successful cases were awards against EPA.**
- **Another 80 cases were dismissed on joint motion of the parties, representing in most cases a settlement the amount of which could not be ascertained but which can be estimated at more than \$200 million.**
- **Federal agencies, including the Corps of Engineers, Department of Interior, Forest Service and EPA, have made almost no effort to avoid unnecessary takings or to provide compensation for unavoidable takings of private property.**

Since issuance of the Attorney General's guidelines in 1988, scores of important decisions on private property rights have been handed down by the United States Supreme Court, as well as the United States Court of Appeals for the Federal Circuit and the Court of Federal Claims.

We have provided the Subcommittee with copies of our report, and request that it be included in the record of this hearing.

The report is also available at www.yourpropertyrights.org

IV. RECOMMENDATIONS

We urge Congress in the strongest terms to address this massive violation of the Takings Executive Order, and callous disregard for constitutional rights. Our recommendations are:

1. Immediately update the Attorney General's guidelines under the Executive Order to reflect important Supreme Court takings decisions over the past fifteen years, as well as, decisions of the Federal Circuit and Court of Federal Claims.
2. Immediately update the agency guidelines, at least those of the Corps of Engineers, Interior Department, Forest Service (which has none) and EPA (which are not publicly available).
3. Pass legislation making the Executive Order legally enforceable, similar to NEPA, Small Business Regulatory Reform Act, and the Paperwork Reduction Act.

Thank you again for the opportunity to address this important constitutional issue. I would be happy to answer any questions the Subcommittee may have.

United States House of Representatives

Committee on the Judiciary

Subcommittee on Commercial & Administrative Law

May 2, 1996

TESTIMONY OF ROBERT BRACE

Mr. Chairman & Members of the Subcommittee:

My name is Bob Brace and I am a third generation farmer and for over forty years I have farmed my land. My story demonstrates that government agencies must be required to give fair warning about their rules before proceeding to destroy a productive citizen's way of life.

My 137-acre homestead farm is located in northwestern Pennsylvania. This farm was originally acquired by my grandfather in the early 1900's and has been farmed by each family generation since that time. In 1975, my father retired from running a dairy and beef operation on the farm. Even though interest rates were soaring at the time, I bought the farm in order to keep it in the family and I began growing crops. However, in order to improve the farm's productivity for row crops, the existing drainage system needed to be renovated.

During the 1940s the Pennsylvania Game Commission had introduced beavers to the area. Over the course of 30 years those beavers multiplied and built dams in the farm's existing drainage system. This resulted in flooding part of the land. In order to grow crops the land had to be returned to its natural state.

In 1976 and 1977, I began working with the U.S. Agriculture Stabilization and Conservation Service in order to renovate the existing drainage system. This project was encouraged by the USDA because it promoted soil and water conservation. The ASCS drew up the original plan to repair the drainage system and I worked closely with them for the next eight years in repairing the drainage system. This restoration cost

me thousands of dollars. Little did I dream, or have any reason to, that someday bureaucrats and appellate judges would declare my farm to be waters of the United States and my normal farming activity to be unlawful dredge and fill of such waters.

Little did I dream, or have any reason to, that someday bureaucrats and appellate judges would declare my farm to be waters of the United States and my normal farming activity to be unlawful dredge and fill of such waters.

my farming activity. During this time I also worked with the Pennsylvania Game Commission who gave me permission to remove the beaver dams. Furthermore, I consulted with the Pennsylvania Fish Commission and the Pennsylvania

The U.S. Department of Agriculture issued a wetlands commencement determination that stated that work such as mine, which was started before December 1985, could continue if completed by 1995. Also, they paid me to clean out the drainage ditches after a season of heavy rainfall. From 1977 until 1987- neither the Department of Agriculture nor any other agency ever indicated or stated that I needed a Clean Water Act (or Section 404) permit to pursue Department of Environmental Resources. Both of these agencies told me that my restoration activities did not need any wetland permits because the activity was covered by the applicable state agricultural exemption.

In May 1987, seven different agencies representing the federal, state, and local governments descended on my farm without notice or permission. They excavated soil and took a sampling of plants. Two months later I received notices from the EPA, the

U.S. Army Corps of Engineers, the U.S. Fish & Wildlife Service, and the state Department of Environmental Resources stating that I had destroyed "wetlands" by cleaning my farm's drainage ditches. I was ordered to turn my farm back into a so-called "wetland" or face civil and criminal penalties

I find it unfair that the Environmental Protection Agency can override decisions made by other federal, state, and local agencies, holding individuals like myself liable for information given to me by agencies which I thought I could rely upon.

Testimony of Robert Brace

as high as \$50,000 per day, as well as the possibility of imprisonment.

I applied for an after-the-fact permit but it was denied. I was not given an opportunity to apply for the agricultural exemption. For the next seven years I was forced, at great cost to my family, my farm, and my livelihood to prove that I was innocent. The only way I could assert my rights was to stop farming and wait for the government to sue me so I had a forum in which to assert my rights and challenge the government's actions. I won at the district court level but appellate courts turned deaf ears and now I am faced with the loss of my farm.

This disastrous situation could have been avoided if the government agencies involved would have given me fair notice and warning of the need for a wetland permit, or taken responsibility for the lack of information which they provided. Additionally, I find it unfair that the Environmental Protection Agency can override decisions made by other federal, state, and local agencies, holding individuals like myself liable for information given to me by agencies which I thought I could rely upon. This is why the legislation that is before you is critical, just, and fair. In my case, the lack of fair warning has resulted in taking productive farm land permanently out of use.

I strongly urge you to vote in favor of this legislation. Thank you for allowing me to testify.

TAKING THE OFFENSIVE

BY BOB BRACE

Anyone reading the testimony of Roger Marzulla regarding Executive Order 12630 (page 4) or my testimony in 1996 before the Subcommittee on Commercial & Administrative Law may understand why I want to make a few remarks about landowners being on the offense instead of the defense.

Section 404 program and its control of all flood plains and pasture land throughout the country.

After 17 years of fighting for property rights, and the right to own and use property as our Constitution guarantees, I believe we must get property rights victims and landowner groups working on new property rights legislation modeled after Executive Order 12630 rather than constantly defending ourselves against anti-property rights initiatives. After 17 years of going through the court system myself, I know that it is an unbearable burden for individuals and American businesses to fight under the "Tucker Act", which I hope to further explain after my trial in January of 2004.

We don't have enough resources to fight every regulation and administrative law that government hands down and we shouldn't be expected to expend these resources in a country with private property rights guarantees. Under administrative law we don't have due process and are guilty upon receiving an order. So in getting our state and federal legislatures to support Ronald Regan's Executive Order 12630, we have to think back to the mid 90's when our friend Hank Ingram told us to "Wake up... Don't relax - get our heads out of the sand and stay involved." I urge you to write your state and federal representatives asking them to support bills that would pay compensation for any takings case. We have tried to work since the mid 90's with environmental groups and have lost ground by doing so.

We don't have enough resources to fight every regulation and administrative law that government hands down and we shouldn't be expected to expend these resources in a country with private property rights guarantees.

We, as victims and property rights groups had hoped for relief and justice from the Bush Administration. Recently, the Administration went against us on National Heritage areas (NHA's), and we have seen no relief from wetland and endangered species regulations, or the Clean Water Act

Our land is our resource for educating people, it is a long process to undue 40 years of individuals being told that there

continued on page 11

A Message from the President

by Keith Klingler



It never ceases to amaze me how private landowners who claim to be conservative property rights advocates can't resist grabbing the dangling green carrot called taxpayer funded subsidies. These landowners (mostly large corporate) don't seem to be satisfied with existing programs, so they are lobbying for more, such as a state forest legacy program. Even though groups like PLA have pointed out how unethical, unaffordable, and bad for the free market system these programs are, some landowners seem determined to wipe out as much of this competition as they can. By consuming as many tax dollars as they can get their hands on, these mostly large land owners see no problems padding their bottom line at our expense. The result is devastating to the competitors of **these companies, because with large taxpayer funded checks, they can pay well over appraised value for land that's on the market.** The next step is that they will immediately apply for subsidies for these new lands they've purchased, and the beat goes on.

Remember, the biggest subsidy game is conservation easements. This is where

development rights are purchased by a Land Trust or Conservancy using state, federal or local tax dollars as the funding source. The question I've asked and have yet to get answered, is how does an appraiser determine the value of development rights? I've done several small subdivisions in my time and believe me there is enough regulation out there to put most of Pennsylvania's vacant land off limits to development. First, in some areas, you have township subdivision regulations to deal with, **including zoning.** Then you have county **subdivision** ordinances to deal with. These are mostly surveyor and boundary line related. Last you have the grand finale called the state sewage facility planning module. In this document you have to prove every lot has an acceptable on lot sewage site. If the soils are determined to be "marginal" you'll need two approved sites.

Pennsylvania Landowner BOARD OF DIRECTORS

Keith Klingler
President
Titusville, PA

Robert Brace
Vice President
Waterford, PA

Mark Troyer
Waterford, PA

Douglas E. Carlson
Tionesta, PA

Don Ranck
Paradise, PA

Dale Anderson
Ridgway, PA

Norm Clark
Springville, PA

Lynn Joines
Thompson, PA

Pennsylvania Landowner

is published as a member service by the Pennsylvania Landowners' Association (PLA).
Reproduction and/or use of editorial or graphic contents in any manner is welcomed with permission.
For reproduction or comment on newsletter content, change of address notices or subscription requests, please direct to:

Pennsylvania Landowners' Association

P.O. Box 391
Waterford, PA 16441
Phone: 1-800-757-5178
Fax: 814-796-1434
Email: info@palandowners.org
www.palandowners.org

This is the most difficult part of the planning module, as our states soil, especially in Northwestern Pennsylvania are not the best for this type of use. Even if your soil passes the test pit & perk test portion other factors may fail your sites such as slope, (must be under 15%), proximity to an oil or gas well, spring or other water course, boundary lines or right of way. Your property must be plotted on topography, floodplain, and wetland maps along with a half dozen pages of other information. This is all based on the assumption that your lots have public road frontage. If road building is necessary then you fall under another host of regulations which will include the federal government. So to those DCNR and U.S. Forest Service employees who think developers can just plop down a subdivision anywhere, therefore government needs to "protect" all the vacant land in PA by buying the development rights, think again. In my humble estimation 75% of PA's land is off limits to development simply due to current regulations. Just think about the 15% slope issue alone. If the only

way you could develop this land is if you had public sewage and water how much is under development threat?

To accurately determine development right value, the applicant should have to prove that the property can pass all the relative regulations pertaining to subdivisions. This would include soil testing with a backhoe on a grid layout over the entire property, I guarantee that none of these things have happened on the land where development rights have been purchased.

Therefore, we may never know how much of this land was already off limits to development, and taxpayer's money was wasted. The answer to this dilemma is simple. Our legislators must place into the application for easement funds the requirements that the development potential must be proven by going through the subdivision process for each property. The only other solution is to eliminate all state and federal taxpayer funding of private easement acquisition. Believe me, PLA prefers the latter.

Testimony of Roger J. Marzulla

continued from page 7

FOOTNOTES

- ¹ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
- ² 482 U.S. 304 (1987).
- ³ 483 U.S. 825 (1987).
- ⁴ Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2003).
- ⁵ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq. (2003).
- ⁶ 16 U.S.C. §§ 1531 et seq. (2003).
- ⁷ President's Legislative and Administrative Message to Congress, 24 WEEKLY COMP. PRES. DOC. 91 (Jan. 25, 1988).
- ⁸ Exec. Order No. 12630, 53 Fed. Reg. 8859 (Mar. 18, 1988).
- ⁹ Exec. Order No. 12291, 3 CFR 128 (1981).
- ¹⁰ Exec. Order No. 12630, 53 Fed. Reg. 8859 (Mar. 18, 1988).
- ¹¹ *Id.*
- ¹² *Id.*
- ¹³ *Id.*
- ¹⁴ U.S. Attorney General, "Guidelines for the Evaluation and Avoidance of Unanticipated Takings (June 30, 1988.).

Taking The Offensive

continued from page 9

is no such thing as private property rights by our regulators. Posting massive amounts of land is a critical key. Don't let recreationists use property which we can't unless they want to learn about today's injustices upon landowners and help us in soliciting cooperation from our legislators.

COME ON... LET'S GET ON THE OFFENSIVE ONCE MORE.

Call 1-866-PLA.POST (1-866-752-7678) ask for property ID # 1025 or visit our Web Site at www.palandowners.org

Call the White House 202-456-1111(comments) or 202-456-1414 (switchboard) and let them hear your voice.

In remembrance of our dear friend and fellow Board Member here at PLA, we dedicate this issue of the Newsletter and the several following additions to Henry McConnell Ingram, Esquire. Throughout these issues you will find articles Hank submitted to the Newsletter over the years. Please take time to remember...



Henry McConnell Ingram

(1939-2003)

AMERICAN VALUES

BY HENRY INGRAM, ESQ.

Except for sports, C-Span, and some political talk shows like Hannity & Colmes, I don't watch very much television. As a consequence, I miss a lot of what the Networks palm off on their viewers as news and entertainment. Obviously what goes up on the screen is a reflection of our popular culture. It also reveals the level of our shared or common understanding as a nation and our whole value system. My sense from sporadic tube watching is that the big boys in New York and Los Angeles think we're all a little stupid, immune to poor taste and lacking what we used to call American values. At the risk of offending some readers who may be avid viewers, when I do catch network shows, it all seems pretty tasteless, unnecessarily vulgar and not particularly stimulating (as in "*Does it make you think about anything of importance?*"). The same goes for the "News." I get the impression that the lead guys are chosen for their looks and unctuous preachiness. They give 30 seconds or so of World or National news (*skewed toward the Left if you believe Rush or Michael Reagan*) and then switch you over to some breathless, on the scene reporter who provides, a shallow, pre-investigation of the facts, analysis of some tragic occurrence or act of human stupidity or evil which usually is blown out-of-proportion, brayed on and on about and repeated well beyond the point of being news.

What results is a reduction in the level of discourse to tiivia. We spend hours hearing yak about Al Gore's new hair style or George W. in his early days as a hell raiser. Some reporter is probably investigating how many iced teas Mr. Gore had when he missed all the talk about political fund-raising at the Buddhist Temple in Los Angeles. What bothers me is that the mainstream press, or the media, or whatever you want to call it or them, and their editors, always seem to let politicians get away with deflecting any serious discussion of issues such as: "Who would you appoint to the Supreme Court?" or "Why shouldn't you cut taxes if we(!) are generating a surplus for the government?"

It is obvious that the media companies, publishers, producers, networks and studios bringing us the news and cultural stimulation (*a fancy term I coined for a level of entertainment just a little more edifying than WWF*) are satisfied to dumb us all down and pitch everything to the lowest common denominator. What is even more astonishing and galling is when some intellectual thug like Al Sharpton or some vacuous, air-head entertainer is interviewed on some public issue, purportedly to get the perspective of some imagined constituency-for balance I suppose. They have to have a pretty low impression of the audience when a network puts on some dippy TV personality to interview Puff Daddy on evolving trends in minority education.

Our legislators and other elected officials, as a whole, aren't much better. How many times have you seen a supposedly serious political figure flip flop on an issue; like Elian Goes or Elian Stays or "Now we need relief from wetlands regulation and compensation for takings and now we don't." The media lets the politicians get away with it and they know a lot of us are too dumb or lazy to think it through and we'll soon forget the flips and the flops. As long as they look good and sound good, they can slide by and keep on saying whatever they think will cuny favor (*and votes and contributions*) from whatever group or constituency they're proselytizing at that particular moment. Politicians must really believe that the public believes that consistency is the Hobgoblin of small minds. Don't even mention tired old notions such as keeping campaign promises!

How many times have you seen or heard some "all smiles" Congressman-Dick Gephart comes to mind-try to pull the wool over our eyes. They tell us we can't have a tax cut because they can't figure out how "to pay for it." I have seen people start to scratch their heads and begin to think about that one. "Hmm..." goes the thought. "How will they pay for it?" But they forget - "we" are paying for it. All

Gephart and his cronies are doing is moving your tax money around and, in basest political terms, using your money to buy votes for them.

If something as obvious as that doesn't bother us, how can we cope with some real complex issues that the politicians scam us on?

In thinking about it, I blame the erosion of our fundamental values on our own intellectual laziness accelerated by the lack of clarity and gravitas in our public discourse. There is very little serious discussion—it's all Entertainment. Some editor writes something that we know is wrong but we shrug it off. It's time to go to work or switch to the NASCAR series on the tube.

But as the fallen Angel, Newt Gingrich, puts it: "Words are important." The way we talk about American values tells who and what we are and where we are going.

Let's think about some of these American values. Take, for example, in the Takings clause, the concept of "public use." It used to mean something. How about the concept or value of "multiple use" in the context of publicly owned lands. Or how about "wetlands?" Over time, the words haven't changed but the values underlying them have.

Let me give you some examples. First, here is a press release from the Allegheny Defense Project:

Responding to a public call for forest protection, today Representatives Jim Leach (R-IA) and Cynthia McKinney (D-GA), along with 44 co-sponsors, re-introduced the bipartisan National Forest Protection and Restoration Act (NFPPRA) in the U.S. Congress. NFPPRA would end the national forest commercial timber sale program, save taxpayer dollars, and re-direct funds to create jobs in critically-needed forest restoration, worker retaining, and development of alternative fibers and building materials. The bill has been endorsed by nearly 300 organizations, businesses, and religious groups (including the Christian Environmental Council,) who have formed the National Forest Protection Alliance, a national grassroots coalition whose mission is to protect America's public lands from commercial exploitation.

"Our National Forests were reserved for the people of the U.S. over 100 years ago, and they should remain that way. The forests have provided clean drinking water for our communities, outstanding recreation for families, and unexcelled wildlife and fish habitat," said Congresswoman McKinney.

If you stop thinking right there, it probably sounds OK and you move on. That's wrong, however. National Forests weren't set up like National Parks. When Congress used your money to "do" the Forests, the "multiple use" concept was embedded in the legislation. The Supreme Court recognized that there exists a significant legislative difference between national forests and national parks. National forests "are not parks set aside for non-use," they were "established for economic reasons." 438 U.S. at 708. National forests, unlike national parks, are not wholly dedicated to recreational and environmental values.

The Supreme Court recognized that there exists a significant legislative difference between national forests and national parks. National forests "are not parks set aside for non-use," they were "established for economic reasons."

This save the Forests stuff sounds good and makes "good press," but I don't have to tell readers of the *Landowner* about the devastation of our communities and disruption of the economy in Northwestern Pennsylvania if the ANF were to be locked up as a nature preserve. So far, no Pennsylvania Congressman has signed on to this legislation, but don't be surprised if one or two (no doubt from the "sprawl" areas) do sign

on. How do you think the media will play that one? Most of them probably believe "multiple use" is a disease!

Let's take another one. We talk about it all the time. It's the bedrock constitutional principle: **"...nor shall private property be taken for public use without just compensation."** **There was a time when we all knew what the last clause of the Fifth Amendment meant.** If the Government has some [legitimate] use for your property, it could take it and pay you for it. Highways, schools, parks—we understood that.

Without going into a history of constitutional evolution brought on by the incredible growth of government regulation, suffice it to say the Courts had to step in to prevent the complete evisceration of the Fifth Amendment by excessive government regulation at all levels. *Pennsylvania Coal v. Mahon*, *Lucas*, *Whitney Benefits* and *Dolan and Nollan* stand out as beacons, even if somewhat faint ones, in the fog surrounding the Fifth Amendment. If government goes too far or goes about it too irrationally, the Fifth Amendment may protect you...if you live long enough and have enough money to fight a major war against the Leviathan. Regrettably, just

like environmentalism, the Fifth Amendment is a rich man's game.

But let's take a look at what's going on around the edges of the Fifth Amendment. Lo and behold, politicians are using it as a tool-some would say the tool is a bludgeon. Here is the way it works. A politician says to himself "I can take private property if I (*meaning the taxpayers*) pay for it. No problem. I have the money. Now all I have to do is conjure up a little public use. Make it sound like a highway, school or park-you know-the real public stuff."

For example, in Pittsburgh, the City wants Heinz to expand. Why shouldn't the City want that? It is a wonderful company which contributes greatly to all aspects of the community. But can the government take a neighbor's (*the little guy's*) private property to make it available to a multi-national corporation Ketchup, pickles, jobs-sounds like public good although it may be not quite the same as public use, but us dim bulbs out there that the Mayor is dealing with may not recognize or care about the difference.

Or how about buying up a bunch of small businesses in downtown Pittsburgh so some out-of-town investors can develop the site and the Mayor will get a lot of credit for saving Pittsburgh. You could argue public good but it's a little harder to see public use in "take A's property and give it to B at taxpayers' expense." The solution: drag out the old "blighted area" designation. A "blighted area" designation supplies the public use and the politicians are off to the races. Talk about us being dumbed down. **We may buy into that one but think about that third generation businessman whose family-worked hard, provided jobs, paid taxes and in return gets the old "your property is in a blighted area" scam thrown in his face.**

The same game seems to be starting at Presque Isle. Some swell Conservancy group gets a little edgy when the common man (*do they refer to us as Joe Sixpack and family?*) begins to "over use" the Park. "Better slow it down ... too much habitat fragmentation (*watch out when you hear that one ... it's like "blight!"*) going on." And by the way, all those businesses near Waldameer are drawing people like flies. May be we better try to use some more politically correct fly paper-like a fancy new Visitors' Center. Let's make people focus on the better things-talk about habitat preservation, the DCNR, Rachel Carson, our natural heritage etc., etc.

You can really do a lot if you can just slip your hand into the cookie jar through "Growing Greener" and "Key 93" money and various other sundry grants. At the end the taxpayer pays.

Let's see how this plays out. Have you ever seen a politician who didn't want to cut the ribbon on a new Visitors' Center? All you have to do is steamroll over some small business owners. And-as would please Gephart and his pals-we (*meaning you, the taxpayer*) can pay for it. Public use, public good ... who cares? The public is asleep and if it wakes, it will be to the sound of some TV reporter gushing over how good we all feel about the brand new Visitors' Center.

All you have to do is look at the wetlands issue to see how we can be manipulated out of our fundamental American values which, after all is said and done, provide the underpinnings for our personal freedom and individual liberty. As the Virginia Slims people say it: "We've come a long way, Baby!"

I keep on my desk two maps of the United States. One shows acreage of "wetlands" declared by the United States in 1920 to be in need of drainage. We spent years and years and millions and millions of dollars to subsidize improvement of poorly drained land to enhance it for farming. Surely that was done for public good. The other map shows the same areas-now referred to as "artificially drained agricultural land." 87% of wetland losses (*you*

just have to accept that wetland loss is a bad thing because the media and the politicians say so) were caused by government subsidized draining the "wet, swamp and overflowed lands," as a matter of public policy choice, beginning in the 1920's and continuing for 50 years.

Now we're going beyond the pale. We've come from "Drain the Wetlands" through "No Net Loss" (*and where do you start to count?*) and we're off to a goal of "Net Gain of Wetlands." Planners in their Guccis or Birkenstocks are scrambling to come up with ideas and schemes to get more wetlands. If you follow all this to its logical conclusion (*and if you assume for the sake of rational discussion that creating even more wetlands is a good idea*), it all comes down to cleaning up a mess the Government created and we have to pay for it. And you wonder why some people still trust government programs!

The heck with it. Let's watch NASCAR or pick up some pointers from Rosie O'Donnell.

If government goes too far or goes about it too irrationally, the Fifth Amendment may protect you...if you live long enough and have enough money to fight a major war against the Leviathan. Regrettably, just like environmentalism, the Fifth Amendment is a rich man's game.

UPCOMING EVENTS

“Real Solutions To Real Problems”

Sandusky, Ohio, September 10-12

National leaders will headline a strategy session for protecting land owner's rights against government. The unlawful taking of property by government entities is a growing epidemic across the country. In the United States today, there are over 450 property rights organizations and tens of thousands of American's whose basic Constitutional rights are being violated. Complete information on specific speakers, accommodations, agenda, online registration and lodging options can be found on the conference website at <http://www.prconf.com>

Cover: Defenders Represent PA Farmer against EPA	Page 9: Taking the Offensive <i>By Bob Brace</i>
Page 2: Our Sponsor! BCD Properties, Inc.	Page 10: A Message from the President <i>By Keith Klingler</i>
Page 3: Defenders Represents PA Farmer against EPA	Page 10: <i>Board of Directors</i>
Page 4: Testimony of Roger J. Marzulla Before the House of Representatives Committee on the Judiciary Subcommittee on the Constitution	Page 11: A Message from the President (continued)
Page 5: Testimony of Roger J. Marzulla (continued from page 4)	Page 11: Testimony of Roger J. Marzulla (continued from page 7)
Page 6: Testimony of Roger J. Marzulla (continued from page 5)	Page 11: Taking the Offensive (continued from page 9)
Page 7: Testimony of Roger J. Marzulla (continued from page 6)	Page 12: American Values <i>By Hank Ingram</i>
Page 8: Testimony of Robert Brace Before the United States House of Representatives Committee on the Judiciary Subcommittee on Commercial & Administrative Law	Page 13: American Values (continued from page 12)
Page 9: Testimony of Robert Brace (Continued)	Page 14: American Values (continued from page 13)
	Page 15: Upcoming Events
	Page 15: Index
	Back Cover: Membership Categories PLA Educational Materials

SANDUSKY, OHIO • SEPT. 10-12, 2004
**NATIONAL
PROPERTY
RIGHTS
CONFERENCE**
2004

INDEX:

Show Your Commitment To Preserve Property Rights!

The membership categories listed below were initiated with the presumption that those owning higher acreage were, in all probability, relying more on their land as a source of livelihood and therefore, had a much higher stake in the property rights debate. Since PLA relies solely on individual membership dues and contributions to meet its financial needs, we hope you will join under the appropriate category. If however, finances preclude you from meeting the suggested guidelines, your education on private property rights issues is more important than the amount of your membership, therefore, you may enroll in a more affordable classification.

PLA Membership Categories

Please indicate: New Member Renewal

- Individual I** \$25.00
Any individual supportive of private property rights.
(owning 0-15 acres)
- Individual II** \$35.00
(owning 16-100 acres)
- Individual III** \$50.00
(owning 101-250 acres)
- Individual IV** \$100.00
(owning 251-500 acres)
- Individual V** \$200.00
(owning over 500 acres)
- Associate I** \$100.00
Any business entity supporting for free enterprise system
and the principle of private property ownership.
(local business in communities)
- Associate II** \$250.00
Trade associations.
(organizations supportive of private property rights)
- Associate III** \$300.00
Major suppliers to land use entities.
(resource development, construction, agriculture)
- Affiliate** \$50.00
Local or regional grassroots, non-profit organizations.
- Business I** \$750.00
Corporations or entities whose activities involve ownership,
use and/or development of acreage in excess of 100 acres,
but less than 500 acres.
- Business II** \$1,250.00
Same as Business I, but in excess of 500 acres.

Any land owning member (excluding Individual I) purchasing PLA signs and participating in the "Posting for Support" program is entitled to a 50% reduction in membership fees for the current membership year. Membership dues and contributions may be deductible as a "Business" expense. Please consult your tax advisor regarding your particular situation.

Enclose form with check or money order payable to:
Pennsylvania Landowners' Association
P.O. Box 391, Waterford, PA 16441
Please allow 2-4 weeks for your membership card.

PLA Educational Materials

- PLA's "Posting for Support" Program**
Yes, I wish to become a participant in this program.
Please send me _____ signs.
I have enclosed 60¢ for each sign ordered.
- I am a current participant in the "Posting for Support" program.
- I am a new participant in the "Posting for Support" program.

**** NEW! RECENTLY UPDATED! ****

- USA v. Brace & Brace Farms Videotape (VHS)**
"One farmer's 15 year battle with federal wetlands provisions."
A must see for all land owners and resource providers!
\$15.00 donation.
- Wetlands Videotape (VHS)** Part I Part II
"Our environment, Whose Property?"
\$15.00 donation for each part.

Name: _____

Address: _____

Country: _____

Acreage Owned: _____

Phone Number: (_____) _____

Fax Number: (_____) _____

Acres of land posted: _____ acres

Membership Amount + \$ _____

Less 50% fee reduction if "Posting for Support" - \$ _____

Amount of signs purchased + \$ _____

Additional Contribution + \$ _____

Total remittance enclosed - \$ _____

Pennsylvania Landowners' Association, Inc.
P.O. Box 391 • Waterford, PA 16441

Return Service Requested

PRSR STD
U.S. Postage Paid
Waterford, PA
Permit No. 35

Wetlands Desperado

THE WALL STREET JOURNAL

August 23, 2004

A mere land owner does not present as attractive a cause for civil libertarians these days as some al Qaeda operative getting his three squares a day down in Gitmo. But when an American citizen faces prison time for moving dirt on his own property, we say it's time to break out the editorial torches and pitchforks — especially when even the judge doesn't want to sentence the man.

The developer is John Rapanos, a 68-year-old Michigan man found guilty of violating the Clean Water Act. Though this probably conjures up images of a factory belching toxic chemical waste into a nearby stream, what we have here is a wetlands case. To put it another way, Mr. Rapanos's "crime" is to have moved sand on his own property without a federal permit. Last Wednesday, just when jail looked inevitable, federal Judge Lawrence Zatkoff put off sentencing Mr. Rapanos until October, by which time he hopes the U.S. Supreme Court will have offered some clearer guidelines for how U.S. law should treat such dastardly criminals.

Good luck. As Judge Zatkoff knows all too well, the reason Mr. Rapanos finds himself in this preposterous position is that our wetlands law is a hopeless swamp. The blame extends all around, from the politicians responsible for the Clean Water Act, and the federal bureaucrats who have used it to define almost any puddle as a wetlands to a Supreme Court apparently happy to leave everyone in the muck.

Let's be clear about what Mr. Rapanos did. He ignored cease-and-desist orders to stop filling in what the feds and state environmental authorities claim are wetlands on his property. Mr. Rapanos admits he went ahead and moved sand around. But he maintains that what the government is calling a wetlands is really a cornfield filled with drainage ditches.

The words of the 1972 Clean Water Act give the federal government authority over the "navigable waters of the United States." What's at issue, notes the Pacific Legal Foundation, which is defending Mr. Rapanos, is whether this control extends to farmland more than 10 miles away from the nearest such body of water, in this case the Kawkawlin River. That argument was given a boost in 2001 when the Supreme Court ruled that the government lacked authority over an Illinois wetland because it was not abutting a larger waterway.

Unfortunately, several appellate courts have since issued conflicting rulings in other cases, rendering the intent of the Supreme Court's ruling, well, muddy.

Then there's the definition of "wetlands." In the early 1990s the county's drain commission dug ditches on Mr. Rapanos's property to make it suitable for farming. The Mackinac Center's Russ Harding, a former director of Michigan's environmental agency who's actually been on the property, says that it is not a wetlands because the drains do what they were meant to do: keep the land dry by draining the water.

Over the past 20 years or so, we've written about other American citizens who've gone to jail for running afoul of wetland regulators. These include John Pozsgai of Pennsylvania, whose crime spree consisted of improving a lot he bought that was filled with 7,000 old tires. Bill Ellen was another hardened wetlands criminal, a maritime engineer who actually ran afoul of the wetlands ~~regulators~~ while trying to create a wildlife sanctuary in Maryland.

Now it's Mr. Rapanos's turn. At his original sentencing hearing in 1998, the same Judge Zatkoff highlighted the absurdity of the situation when he pointed to a drug dealer he'd sentenced that day in the same courtroom. "Here we have a person," Judge Zatkoff said, "who commits crimes of selling dope and the government asks me to put him in prison for 10 months. And then we have an American citizen, who buys land, pays for it with his own money, and he moves some sand from one end to the other and [the] government wants me to give him 63 months in prison. Now, if that isn't our system gone crazy, I don't know what is. And I am not going to do it. I don't believe he got a fair trial."

Thus far Judge Zatkoff is the only sane voice we can find in all officialdom. Congress has shirked its job by failing to spell out whether it really meant to give regulators all the powers they've assumed under the Clean Water Act, the Supreme Court punts on cases that would clarify its earlier decision, and the Bush Administration has backed down on its own plans for wetlands regulatory reform because of pushback from environmentalists. The result is that law-abiding citizens such as John Rapanos can go to jail for moving sand on their own land.

**How the
Clean Water Act
can make anyone
a 'criminal.'**