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PROTECTING ECOLOGICALLY VALUABLE WETLANDS WITHOUT DESTROYING PROPERTY RIGHTS

INTRODUCTION

The White House is wrestling with America's "wetlands" policy. This is because the federal government has been coming under heavy criticism for abusing its powers to declare private property a "wetland" and then to restrict how owners use their land. This criticism and the broad confusion over wetlands policy, and even over the definition of "wetlands," has prompted the President's cabinet-level Council on Competitiveness, chaired by Vice President Dan Quayle, to examine and plan revisions of the federal government's "Wetlands Delineation Manual."[1] This manual sets criteria for use by all Executive Branch agencies and departments in determining what is a wetland. In addition, the White House Domestic Policy Council is conducting a broad overview of wetlands policy in general.

Checking Regulators. The Competitiveness Council's revisions are to be completed by month's end and then released for public comment before taking effect. If they are to contribute to government's dual task of preserving ecological integrity and creating an environment that spurs economic growth, then the Council's revisions must check the impulses of regulators to declare even dry pieces of land to be wetlands and place them under government jurisdiction. Too often such action restricts the rights of owners without any compensation.

1 *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (1989).

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

Imprecise Definition. There are two problems with the federal government's current policy toward wetlands. First, the definition of a "wetland" is very imprecise, allowing many plots of essentially dry land to be classified as "wet." Under this definition, for example, even if a plot of land is dry for 358 of the 365 days in a year, it still can be a target of government regulators.

Second, because the definition of wetlands is imprecise, the federal government has expanded the use of the "wetlands" designation beyond what law originally intended. This law, the Clean Water Act of 1977, correctly seeks to limit discharges of pollutants into the nation's waterways. Under the law, the federal government can regulate pollutants dumped into wetlands if there is a danger that the pollutants will seep into other nearby bodies of water, like lakes, rivers, or other wetlands.

The Clean Water Act is the principal instrument of America's wetlands policy, with the focus exclusively on stopping pollution. Yet over the years, the Army Corps of Engineers and the Environmental Protection Agency steadily have expanded their jurisdiction, using the Clean Water Act as a means to protect wetlands and the flora and fauna that depend on them for their own sake. In effect, the Clean Water Act has been transformed into a "Wetlands Protection Act." Yet Congress has never passed such a law. If the wetlands merit protection as wetlands and if Congress and the Bush Administration want to protect wetlands as such and the wildlife that use them, they should debate the issue on its own merits and draw up laws tailored specifically to that task. The federal government should not use the Clean Water Act to do a job for which it was not originally designed.

Attacking Private Property. The definition of a wetland might seem like an obscure and unimportant detail buried harmlessly in mountains of government regulations. In fact, the use of the current definition by the federal government could affect most landowners in the country, depriving them of the use of their property without compensation. Under this law, for example, a Colorado farmer was indicted for redirecting a river, which had been diverted onto his land, back into its original bed. Under this law, too, a Pennsylvania man was jailed for cleaning up tires in his backyard and hauling in clean fill dirt, considered a pollutant, to level his land in preparation for building a garage. The federal government threatened a Pennsylvania couple with legal action for installing a tennis court on their property on the grounds of polluting the water. A woman in Wyoming was denied a permit to plant roses on her land. These are but a few of thousands of similar cases of federal regulators moving against private property in the name of preventing pollution or protecting wetlands where no threat or where no wetland existed.

The Council on Competitiveness can head off such abuses in the future and bring balance to the treatment of wetlands by advising the President to tighten the definition of a wetland. To restore the original purpose of the Clean Water Act, that is, to prevent pollution from spreading from one body

of water to another, the revised wetlands Delineation Manual should exclude the "wetlands" designation to any tract if:

1) it is not located close enough to another "water of the United States" for natural water flows to carry pollutants from the wetland into another such water, or
2) the physical nature of the wetland makes it generally impossible for pollutants to be carried out of the wetland via normal water flows.

This change would restore and confine the Clean Water Act to its original status as an anti-pollution statute. If the government specifically wishes to protect wetlands and wildlife, specific statutes should deal with them.

Such proposed charges surely will be resisted by many officials in the Army Corps of Engineers and the Environmental Protection Agency, who will protest a redefinition that restricts their power to use the Clean Water Act to protect wetlands simply because they are wetlands. Even if such far-reaching changes are not politically feasible at this time, at a minimum, the Council should try to tighten the definition of what land actually qualifies as "wet." The new definition should:

- ♦ Raise the minimum soil inundation and saturation requirements.
- ♦ Limit the list of plants used as indicators of whether an area is a wetland to those that grow exclusively in such an environment.
- ♦ Require designated wetlands to meet all three traditional wetland identification criteria: degree of saturation, type of vegetation, and type of soil.
- ♦ Place the burden of proof on the government to prove that an area in fact is a wetland covered by the Clean Water Act when a property owner is charged with polluting a wetland.
- ♦ Drop the ambiguous "Difficult-to-Identify" category for wetlands.
- ♦ Reevaluate all land currently designated as a wetland in accordance with the criteria of the new manual.

Comprehensive Review. The Domestic Policy Council, another cabinet-level group, meanwhile is comprehensively reevaluating how to deal with those areas determined to be wetlands. If the government's purpose is to preserve wetlands or wildlife, then instead of using the Clean Water Act to deny landowners permits for the use of their land, the government either should purchase the land or pay the owners to conserve it as a wetland. A principal purpose of government is to protect private property. The federal government can perform this task and deal with legitimate environmental concerns as well by defining wetlands in a reasonable manner and using the Clean Water Act for its original purpose of preventing pollution of the nation's waterways.

FROM CLEAN WATER STATUTE TO A NATIONAL ZONING LAW

In 1965, Congress passed the Federal Water Pollution Control Act to limit water pollution. The Act was amended in 1972 and again in 1977, when it was renamed the Clean Water Act. The Act makes the "discharge" of any "pollutant" from any "point source" into any "waters of the United States" illegal unless the person responsible has obtained a permit from the Secretary of the Army through the Army Corps of Engineers. Rather than spell out what substances were deemed harmful, Congress deliberately defined "pollutant" broadly, allowing the Corps of Engineers to assess the threat to water quality posed by any given pollutant in any given waterway case-by-case. The Corps may grant or deny permits, or attach various conditions. A decision to grant a permit is subject to veto by the EPA.

The Act was amended in 1972 to cover all "waters of the United States," which include all interstate waterways as well as all bodies of water that drain into other waters that can carry pollutants across a state or national boundary.

Originally the Army Corps of Engineers did not apply the Clean Water Act to wetlands, usually defined as "marshes, bogs, swamps, mud flats, prairie potholes, and other forms of land flooded or saturated by water."[2] In 1975, however, a federal district court ordered the Clean Water Act to be applied to wetlands.[3] The rationale was that pollutants discharged into a wetland might be carried out of the wetland and into an adjacent body of water by natural water flows, and from there be carried downstream and eventually across a state line. To the extent that there is an actual physical water connection between a wetland and another water body (itself perhaps a wetland) that is capable of carrying pollutants, then this wetland is plausibly a "water of the United States" as defined in the Clean Water Act in 1972. Many wetlands, however, do not fit this definition.

Broad Definition. To make matters more confusing, the Army Corps of Engineers has defined "waters of the United States" to include "All waters which are currently used, or were used in the past, or may be susceptible [in the future] to use in interstate or foreign commerce...."[4] The Corps has used this definition to extend even further the jurisdiction of the Clean Water Act. For example, a wetland becomes a "water of the United States" simply if it can be used for recreational purposes by interstate or foreign travelers. In litigation, the Corps and the EPA have argued that a wetland can be a "water of the United States" for purposes of the Clean Water Act if it actually or

2 Richard Miniter, "Muddy Waters: The Quagmire of Wetlands Regulation," *Policy Review* No. 56 (Spring 1991), p. 70. See also William A. Niering, *The Audubon Society Nature Guides: Wetlands* (New York: Alfred A. Knopf, Inc., 1988), pp. 18-134.

3 *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

4 33 C.F.R. 328.3(a)(1).

potentially can be used by migratory waterfowl that may have crossed a state or national boundary while traveling to or from the wetland.

A NATIONWIDE WETLAND

The expansive interpretation of the Clean Water Act and the phrase "waters of the United States" has meant that areas of little or no ecological value are classified as "wetlands." This subjects these areas to the permit requirements of the Clean Water Act. By one estimate, 104 million acres, or 5 percent of all land in the lower 48 states, is now officially classified as wetland.[5] The Soil Conservation Service estimates that, under the current definition, as many as 70 million acres of existing farmland could be considered wetlands subject to federal control.[6] According to economist Warren Brookes, the federal government's jurisdiction under the Clean Water Act, as defined by the regulators, now encompasses "at least half of all farmland, and as much as 60 percent of U.S. total land area."[7] According to other estimates, most of the eastern United States and 40 percent or more of California may fit the current Delineation Manual's definition of wetlands.[8] Approximately 75 percent of the usable land in Alaska, that which is neither a mountain nor a glacier, is classified as wetland, by definition, because for much of the year the ground is frozen and water is locked underneath the surface.[9]

THE CURRENT WETLANDS QUAGMIRE

Expansive interpretation of the Clean Water Act by federal regulators has denied Americans the legitimate use of their property.

Example: A self-employed truck mechanic in Morrisville, Pennsylvania, John Pozsgai, was sentenced to three years in prison and fined $202,000 for removing old tires and rusting car parts from his land, and then hauling in clean fill dirt to level the property in preparation for building a garage. The trouble, Pozsgai was told, was that he did not first obtain a permit from the Army Corps of Engineers. This permit was necessary because, in the eyes of the federal government, by cleaning up his land Pozsgai ostensibly was discharging pollutants into a water of the U.S. Under the definitions used by the Corps of Engineers and the EPA, the clean fill dirt constituted a "pollutant," and his land constituted a "water of the United States."

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5 Betsy Carpenter, "In a murky quagmire," *U.S. News & World Report*, June 3, 1991, p. 45.
6 Rick Henderson, "The Swamp Thing," *Reason*, April 1991, pp. 32-33.
7 Warren Brookes, "Swamping the economy?" *The Washington Times*, April 11, 1991, p. 63.
8 Henderson, *op. cit.*, pp. 32- 33.
9 Miniter, *op. cit.* p. 73.

Example: A corn farmer in Missouri, Rick McGown, is being prosecuted for repairing a sunken levee on his property, thereby restoring 150 acres of brushland to cropland, on which corn is now planted. For McGown, the problem was his failure to obtain a Corps of Engineers permit. The Corps considers his cornfield a wetland, and thus a "water of the United States," because a Corps official claimed to have found cattails, a kind of marsh plant, growing on the land. However, what the official thought was cattail was actually sorghum, a plant that may look like a cattail but which grows on dry land. The sorghum, moreover, had been planted by McGown. Like Pozsgai in Pennsylvania, McGown is charged with illegally polluting the water.

Example: In Juneau, Alaska, plans to expand a private shelter for the homeless were held up recently for over a year because the land underneath the shelter was declared to be a wetland, thus making a permit from the Army Corps of Engineers necessary before the addition could be built. It made no difference that the plot of land was in the middle of a city block.

Example: In Maryland and California, federal wetlands regulations have blocked the construction of low-income housing projects.

Example: A young couple in Pennsylvania recently was threatened with suit by federal authorities for installing a tennis court in their yard. The charge: polluting the water.

Example: An elderly woman in Wyoming was prohibited from planting a bed of roses on her land, again in the name of enforcing the Clean Water Act.

Example: Around the country, farmers have been warned that their land is a federally protected wetland, and hence that they absolutely must not plow it or plant crops on it unless they first obtain a permit.

These and countless similar incidents[10] have two things in common: 1) The land involved is basically dry, or only marginally wet at most, making its characterization as a "water of the United States" highly dubious; and 2) the "pollutants" allegedly being "discharged" into these putative "waters of the United States," and the activities for which a permit is being required, almost always pose not even a remote threat to water quality.

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10 For documentation of these and other incidents, see Miniter, *op. cit.*; Henderson, *op. cit.*; Rick Raber, "Wetlands statutes bog down residents," *The Times of Trenton*, February 3, 1991, p. B7. See also Carpenter, *op. cit.*.

For the Army Corps of Engineers and the EPA to move against such lands, therefore, amounts to these agencies making zoning or land-use decisions under the guise of enforcing the Clean Water Act.

Usurpation of Authority. The Corps of Engineers and the EPA have been using the Clean Water Act as a de facto Wetlands and Wildlife Protection Act – even though no such legislation exists.[11] Anytime the agencies feel that a particular parcel of land may be beneficial to wildlife, they arbitrarily apply the wetlands definition to the parcel to prohibit the owner from using the land.

This usurpation and abuse of authority by federal regulators affects all Americans, not just those who own land. Federal wetlands regulations reduce the availability of land for housing and thus raise the costs of all housing, including rental units. Requiring a contractor and developer to obtain a Corps of Engineers or EPA permit delays construction of state and federal housing projects and thus raises their costs to taxpayers and eventual tenants.[12] Similarly, food costs increase as the amount of land available for farming is reduced and the costs of complying with bureaucratic red tape are passed on to consumers.

POLLUTION PREVENTION OR ARBITRARY ECOLOGY?

The Council on Competitiveness, chaired by Vice President Quayle, has the responsibility for reviewing federal regulations to determine whether laws are being enforced in the most efficient and least costly manner. At the highest level the Council consists of the Secretary of the Treasury, Nicholas Brady, Attorney General Richard Thornburgh, Secretary of Commerce Robert Mosbacher, the Director of the Office of Management and Budget, Richard Darman, the Chairman of the Council of Economic Advisors, Michael Boskin, and the Chief of Staff to the President, John Sununu. Other cabinet members are invited to participate when the Council deals with issues affecting their agencies. The Executive Director of the Council is Allan Hubbard.

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11 Although the Clean Water Act has never been amended by Congress to make it a Wetlands Preservation and Wildlife Protection Act, Congress has enacted a wholly separate statute that specifically addresses these subjects: the "Water Bank Program for Wetlands Preservation," codified in Chapter 29 of Title 16 (Conservation) of the United States Code. The Water Bank Program authorizes the Secretary of Agriculture to negotiate with landowners and to pay them a fee to keep their land in its natural condition.

12 See, e.g., Advisory Commission on Regulatory Barriers to Affordable Housing, *"Not In My Back Yard": Removing Barriers to Affordable Housing* (July 8, 1991); Jack Kemp, "Free Housing from Environmental Snobs," *The Wall Street Journal*, July 8, 1991, p. A6; Brookes, *op. cit.*

The Council now is reviewing the definition of "wetland" as used in the Wetlands Delineation Manual. By this review, the Council has the opportunity to restore fairness and balance to the definition of wetlands, and to end abuses of the Clean Water Act.

Many of the problems result from the attempt to use the Clean Water Act not for the purpose of dealing with pollution but as a means to preserve wetlands and wildlife for ecological reasons. To restore the Clean Water Act to its original purpose, it is necessary to define "wetland" in the context of preventing pollution. By this definition, a plot of land is not a wetland covered by the Clean Water Act if:

- ♦ it is not located close enough to another "water of the United States" for natural water flows to carry pollutants from the wetland into the other such water; or
- ♦ the physical nature of the wetland makes it generally impossible for pollutants to be carried out of the wetland via normal water flows.

Such a redefinition would allow the EPA to focus its attentions and efforts on the original purpose of the Clean Water Act: to prevent the spread of pollutants in America's lakes and rivers. If there is a need for separate laws to protect wetlands and wildlife for their own sake, the Administration and Congress should consider this issue on its merits and develop guidelines and regulations appropriate to the task.[13]

PUTTING THE "WET" BACK IN WETLANDS

The Council on Competitiveness, however, may find it difficult to adopt a definition of wetlands that focuses exclusively on pollution prevention. This is because the EPA and other agencies will resist changes that prevent them from continuing to use the Clean Water Act for purposes in addition to pollution prevention. If Quayle and Hubbard are unable to convince the full Council on Competitiveness to restore the definition of wetlands to the original intent of the law and if they are forced to accept some definition of wetlands that transforms the Clean Water Act into a charter to preserve wetlands and wildlife for their own sake, then Quayle and Hubbard should press the Council on Competitiveness to revise the Delineation Manual so that at least wetlands no longer means puddles in people's backyards or damp vacant lots in the middle of cities. A revised definition of wetlands at least should:

♦ ♦ **Raise the minimum soil inundation and saturation requirements.**

13 One possible option, of course, would be to expand one of the existing programs that already deal with the protection of wetlands and wildlife, such as the Water Bank Program for Wetlands Preservation mentioned in note 11 above.

The current version of the Delineation Manual allows an area to be classified as a wetland if it is either inundated or saturated with water for a mere seven days a year. This is an unreasonable definition. For land to have significant ecological value as a wetland, its soil must be saturated long enough for vegetation and wildlife to adapt to the saturated conditions. Most types of wildlife dependent on wetlands, such as amphibians or immature water fowl, need more than 14 days to complete the water phase of their life cycle. The minimum periods of inundation or saturation required for an area to be classified as a wetland therefore should be around 30 consecutive days. Critics of the current wetlands definition suggest at least 21 days. These days of inundation or saturation, moreover, should be during the growing season. Inundation or saturation occurring outside the growing season, which is the time when the aquatic phase of most animals' and plants' lifecycle occurs, is of no use to such wildlife and should not count in deciding whether an area is a wetland.

The Manual's new definition should require saturation at the surface, in contrast to the current Manual's requiring merely that saturation occur within 18 inches of ground surface. This change apparently makes sense to the former head of the Corps wetland regulatory office, Bernard Goode, who helped write the current Delineation Manual. According to a recent article, Goode "suggests basing the delineation of wetlands on one parameter: the presence of enough surface water for a sufficient amount of time to support typical wetland plants. To meet this criterion, the water table – not merely a random puddle – must be at or above the surface for 30 days during the growing season."[14]

♦♦ Limit the list of plants used as indicators of whether an area is a wetland to those that grow exclusively in such an environment.

Often the inundation and saturation characteristics – or "hydrology" – of an area are difficult to determine. As such, as indicators of whether a plot is a wetland, federal regulators look at the vegetation growing in the area. The EPA recognizes some 7,000 "indicator species" of plants: If any of them are present, EPA presumes that the land is a wetland. A major problem with this long EPA list of indicators is that it includes many "facultative" species – those that are equally adapted to wet or dry conditions. As a result, federal regulators now can designate land as a wetland even if the only plant species growing on it are all capable of growing in dry conditions. Many areas designated as wetlands, therefore, from an environmental perspective, are not wetlands at all. The list of plants used to indicate whether a plot is a wetland should be confined to species that can grow only in a wet environment.

14 Henderson, *op. cit.*, p. 35 . (The quotation is Henderson's summary of Goode's suggestion.)

♦♦ **Require designated wetlands to meet all three traditional wetland identification criteria.**

The EPA normally looks at three factors in determining whether to classify an area as a wetland: the number of days per year that the area is inundated or saturated with water; whether the area has at least one of the 7,000 indicator species of plants growing on it; and whether the area is composed of any kind of "hydric" soil, that is "earth that is chemically changed by water, usually with a peat, muck, or mineral base."[15] Typically, the EPA classifies an area as a wetland if any two of these factors exist. This predictably increases substantially the amount of land deemed wetlands. And this then substantially increases the cost to the American public of complying with the Clean Water Act. To reduce these compliance costs to a level commensurate with the environmental benefits conferred, only areas that meet all three wetland identification criteria should be designated as wetlands and subject to permitting requirements.

♦♦ **Place the burden of proof on the government to prove that an area in fact is a wetland covered by the Clean Water Act when a property owner is charged with polluting a wetland.**

When the government accuses a property owner of violating the Clean Water Act, the courts have tended to accept the government's determinations that an area is a wetland subject to the jurisdiction of the Act, notwithstanding the fact that the burden of proof is supposed to be on the government. As a practical matter, the property owner must prove that his or her land is not wetland. The burden of proof, however, in wetlands cases as in all others, always should be on the government. The federal agencies should be required to prove that the area in question is a "water of the United States," as defined by the Clean Water Act, and that the owner is guilty of polluting in violation of the Act.

♦♦ **Reject the ambiguous "Difficult-to-Identify" category for wetlands.**

Some officials in the Bush Administration suggest that the new Delineation Manual include a special section for "Difficult-to-Identify Wetlands." They fear that without such a definition, some wetlands might be overlooked. Yet no "Difficult-to-Identify" section is necessary. If a "difficult-to-identify" area truly is a wetland, it will be covered by the Manual's definition. Mainly what a "Difficult-to-Identify Wetlands" category would do is preserve the very ambiguities in the current Manual that are responsible for current problems. Many plots of land now designated "wetlands" appear to have been done so arbitrarily, because they are considered environmentally valuable, even though they are not covered by the Clean Water Act. The "Difficult-to-Identify" designation seems devised to allow such classifications in the future.

15 Miniter, *op. cit.* See also Niering, *op. cit*

◆◆ **Reevaluate all land currently designated as a wetland in accordance with the criteria of the new Manual.**

To remedy, in part, past abuses, and to apply the new regulations fairly, all land should be presumed not to be wetland. The EPA then should review every case to determine which property is a wetland for the purposes of enforcing the Clean Water Act.

AN HONEST WETLANDS PROTECTION POLICY

On a parallel track to the questions being considered by the Council on Competitiveness, another cabinet-level group, the Domestic Policy Council, is conducting a broad overview of general wetlands policy. One of the questions the Council is considering is what to do with an area after it is determined to be a wetland. Under the current policy, the government denies owners the use of their land. This raises a very important legal question. The Fifth Amendment to the U.S. Constitution guarantees that when the federal government takes private property for public use, it must pay the owner just compensation. This is the Constitution's so-called "takings clause." When the Clean Water Act is used in the manner originally contemplated by Congress, to prevent water pollution, no compensation is required. The "takings clause" is not at issue. The government simply prevents one landowner from dumping a pollutant into a body of water that might flow on to someone else's property. A landowner does not have a right to create a nuisance on his property if it damages the property of another.

The situation is quite different when the government denies an owner a permit to use this property for activities that do not constitute pollution. Then the owner is being deprived of a legitimate use of his or her land. The "takings clause" thus applies, and the government is obligated to pay compensation.

Recognizing Landowners' Rights. The courts are beginning to recognize that the "takings clause" is being violated by some wetland permit practices of the Army Corp of Engineers and the EPA. Last year, in the case of *Florida Rock Industries v. United States*, the U.S. Claims Court held that a landowner who had been denied a permit under the Clean Water Act for discharging "pollutants" that did not adversely affect water quality into wetlands was entitled to just compensation.[16] The Claims Court awarded the landowner over $1 million in damages, applying the well-established doctrine of takings law "that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."[17]

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16 *Florida Rock Industries v. United States*, 21 Cl. Ct. 161 (July 23, 1990). See also *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (July 23, 1990).

17 *Florida Rock Industries v. United States*, 21 Cl. Ct. 161, quoting *Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980).

This case sets a precedent. If the Corp of Engineers and the EPA continue to use the Clean Water Act as a vehicle for preserving wetlands, they probably face more court judgments requiring them to pay just compensation to landowners whose property is, in effect, taken for public use. If the government wants to set aside and preserve ecologically valuable wetlands, it should take the legal and just approach: it should pay for them. The government, for instance, could purchase "conservation easements" by paying the owners not to change the land. Or the government could purchase the land outright.[18]

Conservation Easements. Some may complain that paying to preserve valuable wetlands may be expensive. Yet there may be no choice. The courts seem ready to require that compensation be paid to landowners denied their property rights. There is, of course, another source of funds besides taxes that could be used for wetlands purchases. The federal government already owns between one-quarter and one-third of all the land in the U.S. Some of this could be sold and the proceeds used to purchase conservation easements on ecologically valuable wetlands.[19] By doing so, the government would be substituting high-priority lands for low-priority lands in its overall land holdings. This would achieve George Bush's goal of "no net loss of wetlands" in a manner consistent with the equally important goal suggested by economist Warren Brookes: "no net loss of private property."

CONCLUSION

The Clean Water Act originally was designed to prevent pollutants from flowing from one body of water to another. To this end, the federal government could claim jurisdiction over wetlands that may be a source of such pollutants. Over the years, however, regulators have used the Act's open-ended terms for a purpose for which the Act was not intended: to protect wetlands as such. The Clean Water Act is an inappropriate and inefficient vehicle for this end. Because the goals of a wetlands policy and the best means to implement it have never been considered and debated publicly in a coherent manner by policy makers, often there is little connection between the government's use of the "wetlands" designation and any legitimate environmental goal. Worse, under the guise of protecting wetlands, the federal government arbitrarily deprives owners of the full use and enjoyment of their land without compensation.

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18 The federal government already does this, to a limited extent, through programs such as the Water Bank Program for Wetlands Preservation mentioned in note 11 above. Thus, all that is really necessary is to expand an existing program.

19 Alternatively, as San Francisco attorney Mark Pollot has suggested, the federal government could compensate landowners whose land it wishes to preserve as wetlands by simply giving them substitute land directly. See Henderson, *op. cit.*, p. 35.

Restoring A Balance. Protecting private property rights is a principal purpose of government. Preventing a pollutant from being dumped in a body of water or a wetland does not necessarily violate property rights. Quite the contrary. Preventing a pollutant from flowing from water on one person's property into water on another's protects the property rights of the latter. It is when the government arbitrarily limits an owner's use of his property without compensation, as it often has in the name of protecting wetlands, that it oversteps it purpose.

The Bush Administration can restore a balance to the government's wetlands policy by revising the Delineation Manual and can begin an open public debate on the role of the federal government in protecting wetlands for their own sake.

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