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A GUIDE TO WETLANDS POLICY AND REAUTHORIZATION OF THE CLEAN WATER ACT

INTRODUCTION

Congress is considering legislation to reauthorize the Clean Water Act, passed in 1972 to clean up the nation's rivers, lakes, and streams.[1] One of the key issues being debated is federal wetlands policy. In practice, the Clean Water Act is being used as a legislative vehicle to restrict any disturbance of wetlands, even though wetlands are not mentioned in the legislation.

Wetlands can be defined very loosely as lands that are wet, such as swamps, and their protection has long been a politically contentious issue. Although the Administration recently claimed that its new proposal "broke the gridlock on wetlands policy,"[2] its claim is far from accurate; the controversy continues unabated, in large part because of the confusing and onerous nature of existing wetland policy. Specifically:

- ✓ There is great doubt whether the executive branch is authorized to protect wetlands under the Clean Water Act as currently written.
- ✓ The official definition of what constitutes a wetland uses a one-size-fits-all approach, has fluctuated frequently, and has been overly broad.
- ✓ Disagreement exists over whether the nation already has achieved its wetland goal of "no net loss" in light of evidence that in 1994 there will be a wetlands net gain of nearly 60,000 acres.

1 The forerunner of the Federal Water Pollution Control Act, as the Clean Water Act also is known, was passed in 1948 as the Water Pollution Control Act of 1948, Public Law 809-845. The Clean Water Act's structure is much different, but built upon the 1948 foundation.

2 "Highlights of the Clinton Administration's Environmental Accomplishments," released by the White House April 21, 1994.

✓ The government consistently has refused to compensate property owners for the lost value of land when, to preserve wetlands, owners are denied the right to develop or use their land.

Congress should address these problems in its consideration of the Clean Water Act and in subsequent legislation. Failure to do so will mean continued and valid charges of injustice in federal policy, and the resulting lawsuits will continue to clog the court system. Equally important, failure will mean that the nation's scarce economic resources will continue to be misdirected to low-priority environmental problems. Specifically, Congress should:

1) **State clearly in the Clean Water Act reauthorization that protection is limited to water pollution and that wetlands are not protected under the Act.**

2) **Decide whether wetlands should be protected for their own sake.** If the answer is yes, a separate Wetlands Protection Act should be passed that provides clear authority to the executive branch to regulate wetlands for their ecological value. This new Act should require the executive branch to define different categories of wetlands according to their ecological structure and value. The categorization should include the economic value of land, to ensure that the country obtains the "biggest bang for every environmental buck."

3) **Require a Presidential Report to Congress detailing a county-by-county breakdown of the number of acres being converted from wetlands to productive use and the number of acres being restored to wetland status,** highlighting any conflicts in the current government wetland data.

4) **Require the government to pay landowners that are denied the right to use their land the fair market value — plus 15 percent — of the rights taken.** This additional premium would compensate owners on average for their inconvenience and for the lost personal value of their land. Additionally, it would discourage highly disruptive government actions that are only marginally beneficial.[3]

If these solutions are not enacted, America will continue to misspend its resources pursuing a misguided policy on wetlands protection that it is not clearly authorized by law to regulate. And irate landowners will continue to oppose government wetland policy because of its fundamentally unfair nature. Wetlands protection should not be an issue clogging the courts. It needs instead to be addressed properly and definitively by Congress.

3 See footnote 41 for a discussion of why a premium is needed.

ACTION ON CAPITOL HILL

Congress is having difficulty reauthorizing the Clean Water Act because of the varied and complex issues surrounding the law. In addition to dealing with the heated wetlands controversy, Congress is considering how best to control what is known technically as "non-point source pollution," or pollution that enters waterways from no specific source, such as from agricultural run-off. These issues have slowed considerably the progress toward reauthorization.

The Senate Clean Water bill reported by the Environment and Public Works Committee (S. 2093), which is the rewrite of S.1114 and S. 1304, is co-sponsored by Senators Max Baucus (D-MT), Chairman of the Environment and Public Works Committee, and John Chafee (R-RI), ranking Republican on the same committee.[4] Unfortunately, the bill does little of substance to solve the major problems with current wetland policy. Significantly, it does confer legislative authority on the executive branch to regulate wetlands. But this authority would do far more harm than good unless the other major problems listed above are addressed as well.

At this time, the status of the bill's consideration is uncertain. Although Chairman Baucus has indicated he intends to bring the bill to the floor as soon as possible, significant opposition may forestall that step. One indication of this is a bipartisan letter to Baucus in late April from 46 Senators detailing their extensive substantive problems with S. 1114 (now incorporated in S. 2093), including its failure to address key wetland reforms.[5] Senate Majority Leader George Mitchell, however, has indicated he will move forward with the present bill despite these concerns.

On the House side, Representative Norman Mineta (D-CA), Chairman of the Public Works and Transportation Committee, is sponsoring that chamber's version of reauthorization legislation (H.R.3948). The bill, introduced on March 3, originally ignored the wetland issue but has been changed in fundamental ways by Chairman Mineta with little input from Committee members. Although it now includes a wetland provision providing legislative authority for regulation, like the Baucus bill it still lacks the fundamental reforms needed.

The House bill has been as controversial as the Senate version because there were no hearings before mark-up originally was scheduled for May 3. Chairman Mineta, however, did not have the votes to send the bill out of committee. Also, Members in May circulated a "Discussion Draft Bi-partisan Alternative" to H.R. 3948 that would address many of the problems now existing in Clean Water Act

4 S. 2093 is a substitute bill that combined the substantive provisions of S. 1114 and S. 1304 as well as other minor bills. Thus, it was reported as an original bill.

5 Specifically, the letter states that "S.1114 fails to address needed wetland reform. Prior converted wetlands should be excluded, regardless of the crop grown. Agricultural lands cropped a majority of the time should be excluded from jurisdiction. Classification of wetlands should be established....We also have concerns with the following issues:...prior converted wetlands, agricultural lands definition, definitions for pollutant and discharge...." Letter to The Honorable Max Baucus from 46 Senators (bipartisan), April 25, 1994.

and wetland policy. Under pressure from his committee members, and because of the possibility an alternative bill might succeed, Chairman Mineta consented to hearings just days before the intended May 3 mark-up, which was postponed until after hearings are concluded.

An important bill that is substantially incorporated in the alternative proposal is H.R.1330, sponsored by Representative James Hayes (D-LA). The Hayes bill would require the Army Corps of Engineers to classify wetlands according to their ecological value. During hearings, Environmental Protection Agency Administrator Carol Browner stated that several of the alternative bill's provisions "would be detrimental to wetlands protection."[6] Specifically, she opposed plans to categorize and rank wetlands, change wetlands delineation criteria, and pay owners for government purchase of high-value wetlands.

Another important House bill concerning wetlands (H.R.3875) is sponsored by W.J. "Billy" Tauzin (D-LA), who calls his bill the "private property owners' Bill of Rights" because it mandates compensation to landowners when government action to protect wetlands or endangered species results in a fifty percent reduction in property value. While this bill is not tied to the Clean Water Act reauthorization, it has gained widespread support in the policy community. Opposition to the Tauzin bill also has mounted, making action doubtful at this time.

FUNDAMENTALS OF WETLAND POLICY

Wetlands, traditionally known as swamps or bogs, have been disappearing at a rapid rate during this century. The fundamental reason for their disappearance earlier in the century is also the reason for efforts to protect them now: wetlands or swamps are unique ecosystems. Wetlands are valued by many Americans for the very practical reason that they can act as a buffer against flooding and can purify streams and rivers, in addition to providing a home for diverse species of wildlife. Others despise wetlands as "mosquito-infested swamps," and indeed they typically are breeding grounds for disease-carrying mosquitoes. Historically, the vast majority of Americans have fallen into the latter group and have supported efforts to eradicate wetlands, but increased public recognition of the positive qualities of some wetlands in recent decades has led to demands for preservation.

Ironically, the organization in the United States most responsible for destroying these swamps is now the primary organization charged with their protection—the Army Corps of Engineers. In 1780, before the Corps' systematic campaign to fill in wetlands, there were 221 million acres of wetlands in the lower continental United States. Today only an estimated 104 million acres are left.[7] The Corps has taken on the mission of wetland protection as one of its primary activities and, in

6 Speaking before the Committee on Public Works and Transportation's Water Resources and Environment Subcommittee on May 24, 1994. Technically, the Administrator did not address herself to the alternative bill, but the specific issues that she addressed are the core wetlands provisions in the alternative bill.

7 "Wetlands Losses in the United States 1780's to 1980's," U.S. Department of Interior, U.S. Fish and Wildlife Service, 1990.

conjunction with the Environmental Protection Agency (EPA), zealously punishes violators of its complicated regulations. For example, Bill Ellen, an environmental engineer and consultant, inadvertently violated federal wetlands regulations in 1988 by making duck ponds on his employer's privately owned wildlife preserve. He paid for this error by being jailed as a felon four years later. His case is not unique.

Under federal regulations as now written, a landowner intending to build on, clear, or otherwise disturb wetlands must obtain permission from the EPA and the Corps through a permit application process.[8] If the permit is denied or carries conditions, the landowner cannot use his property as he intended. Thus, for example, if an application for a permit to alter a wetland in order to construct a duck pond or building were denied, the landowner would be an owner in name only.[9]

Since the inception of wetland protection, many fundamental problems and issues have arisen which have caused a growing backlash against the EPA and the Corps, as well as against environmentalists.[10] Traditionally, environmental laws regulate bigger firms by mandating that they use certain "environmentally friendly" technologies or meet specific standards when conducting large-scale operations. The Clean Water Act, for the most part, uses this same regulatory structure designed for big business, but under recent wetland policy, the Act's structure also applies to smaller landowners.

The Clean Water Act has been enlarged through statutory interpretation to authorize the federal government to regulate anyone who wishes to use his land if that land is found to meet the government's definition of a wetland. Thus, homeowners, small entrepreneurs and developers, and retirees hoping to build their dream homes all have come under the direct authority of EPA and the Corps. Essentially, ordinary Americans have been forced to deal with legal requirements designed for businesses with lawyers on staff or retainer. But what is an irritation for a large firm can be a costly legal nightmare for a small landowner, and many of those complying with requirements lose valuable rights when the federal government denies them permission to alter their own land. Faced with heavy mortgage notes on now nearly worthless land, many of those affected have joined in a

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8 Sections 301 and 404 of the Federal Water Pollution Control Act, as amended.

9 The owner would have title to the land, and would pay taxes on land, but would not in practice be able to use the land. The landowner, however, still would retain the right to exclude others from his property. While this retained right can have value if the land is close to a home or for a similar reason, in the absence of the right to beneficial use, this right to exclude is frequently worthless. Counties increasingly are taking this decreased value into account in terms of property taxes. In Anchorage, Alaska, for example, the value of an acre of non-usable wetlands is deemed to be $100. This has the effect of reducing local taxes significantly. Yet, while it relieves the burden of the owner from paying high taxes on worthless property, the productive value of the property is lost. Thus, the local economy loses both economic value and tax revenues.

10 The backlash against environmentalists has occurred because they are perceived correctly as driving the government's increasingly strict wetlands policy. Moreover, they have lobbied actively against payments to landowners when their land is taken on the premise that it would cost too much. But there is a cost either way to taking the land; the only question is who pays the cost.

growing grass-roots movement to combat what they view as heavy-handed and legally unauthorized federal actions.[11]

In any serious discussion of wetland policy, four issues are of paramount importance.

ISSUE #1: The "Law" That Is Not A Law

The first issue is the apparent lack of legislative authority under existing law for current executive branch policy on wetlands protection. The Clean Water Act does not protect explicitly any wetland; in fact, neither the word "wetland" nor any synonym is mentioned or implied in the language of the Clean Water Act. Thus, on its face, the Act authorizes no federal protection of wetlands. Section 404, the center of the controversy, prohibits the "discharge of dredged or fill material into the navigable waters" of the United States unless a permit for such activity is issued.[12] According to the wording of this clause, Congress clearly intended to limit the ability of individuals to choke waterways that were navigable by limiting the practice of dumping dirt into them. By requiring governmental permission, Congress ensured that navigation remained clear for boat traffic.

The clause, however, has been broadly interpreted by the Army Corps of Engineers, the Environmental Protection Agency, and other agencies to prohibit virtually *any* activity in connection with land that has a certain minimum water content —whether or not it is navigable. The ostensible justification for this position is that any form of pollutant, including clean fill dirt, that comes into contact with wet soil will make its way via ground water flows into navigable waterways. While minute quantities can make their way into navigable waterways, this rationale has been stretched so far that the government now considers any mechanical disturbance, such as bulldozing of soil already naturally in the wetland, to be a violation of the Clean Water Act. But Congress never intended to prevent such minor movements of soil. Indeed, the legislative history of the original Act shows that not a single Congressman voiced support for the strained interpretation the executive branch now reads into it. Not a single lawmaker even uttered the word "wetland."

Nevertheless, it is arguable that certain kinds of wetland are protected under the Clean Water Act.[13] The legislative history may provide some rationale for supporters of current protection in its discussion of "navigable waters," a term used

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11 In many of these cases, the owners cannot simply abandon the mortgage note because the land affected is generally only a portion of the whole property. Thus, the regulated owner may own a home on the same site that also acts as security on the note. Even when the note could be abandoned, this merely transfers the economic loss to another individual or firm.

12 33 U.S.C.A. sec. 1344; Permits for dredged or fill material, FWPCA sec. 404.

13 For an in depth and thorough treatise on the question of wetland protection authority, see William G. Laffer III, "The Meaning and Scope of the Clean Water Act, and Especially Section 404, As Applied To Wetlands," February 14, 1992 (revising original dated January 21, 1991. Comments filed with EPA pursuant to 56 Fed. Reg. 40446.)

to specify the type of waterways the overall Clean Water Act was meant to regulate.[14] In presenting the Conference version of the Clean Water bill to the House, Representative John Dingell (D-MI), who was a member of the Conference Committee, explained that:

> the conference bill defines the term "navigable waters" broadly *for water quality purposes*....Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, *for water quality purposes*....No longer are the old, narrow definitions...going to govern.[15]

While this statement and others in the record indicate that navigability should be construed broadly, this extension of the term still was meant to apply only to waters that drain or flow into navigable waters. The legislative history shows the focus of the definition was to widen the requirement that directly affected waters be those navigable by vessels. More precisely, the term was broadened specifically to prevent the migration of pollutants to navigable waterways from tributaries.[16]

Although it is possible to stretch that meaning to encompass some wetlands, not all wetlands can contribute pollutants to navigable waters. Most crucially, isolated wetlands which do not interact with waters flowing into navigable waterways (technically known as "non-adjacent wetlands") cannot by any stretch of interpretation fall under the Act because there is no possibility a pollutant can enter a waterway.[17] Indeed, the Seventh Circuit Court of Appeals in May 1994 held that pollutants are not covered under the Act even if they can migrate to navigable waters via ground water. The court indicated that pollutants were covered only if they could migrate via surface waters to navigable waterways.[18]

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14 Courts often rely on formal comments by Congressmen during the legislative process to assist them in their determination of the meaning of specific provisions of laws. The effort is based on the presumption that the legislative record provides evidence of what meanings were intended by Congress as a whole when it passed the law. A major problem with reliance on legislative history, however, is that comments in the record virtually never reflect the views of all those who vote on the issue. Hence, the record may inaccurately reflect and even contradict congressional understanding. The legislative record is useful, however, to demonstrate that the common understanding of clear and plain language was not contradicted during debate. See William N. Eskridge, Jr. and Philip P. Frickey, *Legislation: Statutes and the Creation of Public Policy*, American Casebook Series (St. Paul, Minn.:West Publishing Co., 1988).

15 1 *Legislative History* 250 (House Consideration of S. Conf. Rep. No. 1236, 92d Cong., 2d Sess.) (Oct. 4, 1972) (emphasis added).

16 "Water moves[,]...and it is [therefore] essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements [of the Act] must be made to the navigable waters, portions thereof, and their tributaries. S. Rep. No. 414, 92d Cong., 1st Sess. 77 (1971), reprinted in 2 *Legislative History* 1945.

17 The factors that would have to be present for a wetland to be legitimately covered under the Clean Water Act are, at a minimum: 1) a discharged material; 2) through drainage or flow via either ground water or surface water; 3) could migrate to an interstate water. Even this interpretation of the extent of authority is likely overreaching and broad since section 404 refers specifically to dredge and fill material.

18 *Oconomowoc Lake v. Dayton Hudson Corp.*, Seventh Circuit Court of Appeals, No. 93-3380, May 18, 1994.

In short, the Act was intended to reduce pollution at its source, not to protect wetlands *per se*.[19] If an activity would not produce pollution downstream in a truly navigable water by fostering migration of pollutants through surface water tributaries, it should not fall under the authority of the law as written.

Despite their highly questionable authority to regulate wetlands, the Corps and the EPA have issued regulations restricting any wetland interference without permission, which averages over a year to obtain and often is not granted. Despite numerous court challenges, enforcement of these regulations largely has been supported by the courts. But this support has not been uniform.[20] Moreover, since the Supreme Court has yet to address the issue squarely, the issue remains unsettled, which merely fuels further litigation.[21]

Recommendation: Given the executive branch's murky authority to protect wetlands under the Clean Water Act, Congress should decide legislatively whether wetlands as such should be protected.

In either case, Congress should add a provision during reauthorization specifically limiting Section 404 to its original purpose of regulating dredge and fill material, and not protecting wetlands for their own sake. If Congress also wants to protect wetlands for their own sake, it should enact separate legislation that consolidates all wetlands policy and legislation. Thus all enforcement, mitigation, and restoration programs intended to promote wetlands should be made part of a "Wetlands Policy Act." Such a new law also should contain relief measures for landowners once the Bush-Clinton goal of no-net-loss is achieved (see below).

ISSUE #2: The Problem Of Definition

The second issue is simply one of definition: what exactly is a "wetland"? Although this would appear to be a relatively simple matter, it has proven much more difficult for experts to define than most people would imagine. Hence the ridicule when former Vice President Dan Quayle questioned "how wet" land had to be under the Act. Quayle understood this complicated environmental issue while his detractors did not. The problem of defining what is a wetland was characterized succinctly by Robert Pierce of the Army Corps of Engineers in the *National Wetlands Newsletter*:

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19 See Laffer, "Meaning and Scope," *op. cit.* A final important argument is that Congress does not have the authority to regulate intrastate wetlands that have no intercourse with interstate waters because these rights are reserved to the states. The Supreme Court, however, routinely grants such authority under the Commerce clause. U.S. Constitution, Article I, Section 8, clause 3. While the judicial reasoning behind the Court's interpretation of the Commerce clause is fatally flawed, it nevertheless remains the law of the land. See *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

20 See *Oconomowoc*, *op. cit.*

21 The Supreme Court did decide, in a case dealing with adjacent wetlands, that the term navigable did not require the water actually be navigable, but rather only that, from water, a pollutant could flow into navigable waters. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). This is consistent with the discussion preceding the accompanying text.

> Ecologically speaking, the term "wetland" has no meaning: natural systems exist on a hydrolic gradient from ocean to desert. Somewhere in the middle are what society calls wetlands. For regulatory purposes, a wetland is whatever we decide it is. The type of natural systems that have been defined as wetlands has changed virtually every year for the last decade.[22]

Not only has the definition of what is or is not a wetland changed over time, but the definitions often have been overly broad. As Senator David Pryor (D-AR) stated last year, "one definition would designate the entire eastern half of Arkansas to be a wetland and any activity—be it for commercial, agricultural, or other purposes—could be considered breaking the law."[23]

Such disagreements as to what constitutes wetlands and how broadly they should be defined have caused the government to change its official definition twice since former President Bush made his "no net loss of wetlands" pledge during the 1988 presidential campaign.[24] At that time, the 1987 Wetlands Delineation Manual specified the official definition of a wetland.[25]

Fundamental changes in this standard were made in 1989, however, when President Bush's new appointees decided to broaden the definition of a wetland. This new definition was severely criticized as overreaching any reasonable definition of land that is wet. By some estimates, 40 percent of drought-stricken California (even before the winter rains of 1992-1993) would have qualified as wetlands under the 1989 standard.[26] The 1989 Delineation Manual stayed in effect until 1992, when an appropriations amendment sponsored by Senator Bennett Johnston (D-LA) limited funding to enforcement of the 1987 standard. In effect, the 1989 standard was put on the shelf. Although the definition issue was re-evaluated yet again by the Clinton Administration, the White House decided to let the 1987 definition stand temporarily.

Basically, three factors are considered when determining whether an area is a wetland under the 1987, 1989, and other definitions:

1. The number of days land is inundated or saturated with water;
2. Whether the area has hydric soil, or "earth that is chemically changed by water, usually with a peat, muck, or mineral base;"[27] and
3. Whether the area has one of approximately 7,000 "indicator" species of plants growing on it.

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22 *CEI Update* (Competitive Enterprise Institute),Vol. 7, No. 4, citing Robert J. Pierce, "Redefining Our Regulatory Goals," *National Wetlands Newsletter*, November/December 1991, p. 12.

23 "Wetlands Caucus Created in Senate," EPA WATCH, August 31, 1993, p. 3.

24 Bill Peterson, "Bush Vows to Fight Pollution, Install 'Conservation Ethic'; Speech Distances Candidate From Reagan," *The Washington Post*, September 1, 1988, p. A1.

25 *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (1987).

26 Rick Henderson, "The Swamp Thing," *Reason*, April 1991. pp. 32-33.

27 Richard Miniter, "Muddy Waters: The Quagmire of Wetlands Regulation," *Policy Review*, Spring 1991, p. 72.

Most of the problems in defining a wetland have arisen not from disagreements over the appropriate factors, but over how many factors must exist and to what degree. For instance, should two or all three factors exist for a given site to be classified as a wetland? How many days should it be saturated with water and to what depth?

Much of the problem with both the 1987 and 1989 Delineation Manuals has centered on the "one-size-fits-all" approach to wetlands designation. Ecological systems by nature are typically varied in their structure, sensitivity, and ecological and economic value. These considerations, currently neglected in forming decisions,[28] should be given utmost attention whenever a determination is made as to whether a particular site should be declared a wetland and preserved or declared a "dry" land with no restrictions against development (or even declared a wetland that should be developed anyway because the economic value in a specific situation far outweighs its limited ecological value).

Recommendation: If Congress wants to extend protection to wetlands legislatively, the Wetlands Protection Act should require the Army Corps of Engineers to classify lands according to their ecological value.

Wetlands would be divided into classes, such as "A," "B," "C," etc. Government would be authorized to acquire only those with the highest ecological value (class "A"), which would merit the highest degree of protection. Lower categories or classes could be given lesser degrees of protection.[29] This would avoid the inherent waste of spending scarce economic resources on relatively unimportant low-value wetlands and enable the country to target its efforts toward protection of more valuable ecosystems. Moreover, since the government would be obligated to purchase only the highest-valued wetland property, its intrusion into the personal affairs of middle-class Americans would be kept to a minimum.

ISSUE #3: Wetland Gains and Losses

The third issue centers on whether wetland protection legislation is necessary at all.[30] Despite the statement last year by EPA Administrator Carol Browner that nearly 300,000 acres of wetland are lost annually, 300,000 acres are not being lost.[31] Her estimates are based on figures over a decade old.[32] More recent data suggest a much different picture. Based on government figures, a recent study by

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28 There is some limited flexibility in the 1987 Wetlands Delineation Manual, but this flexibility cuts both ways; an EPA regional office has the flexibility to ignore mitigating factors in its decision making process.

29 Congressman James Hayes' bill, H.R.1330, would put just such a system into place by dividing wetlands into three categories and requiring payment to affected landowners in Class "A" wetlands.

30 For a more detailed, but concise treatment of this topic, see Jonathan Tolman, "Gaining Ground: Analysis of Wetland Trends in the United States," Washington, D.C.,Competitive Enterprise Institute, May 1994.

31 *Ibid.*, citing *USA Today*, August 25, 1993.

32 This figure reflects the annual loss rate of 290,000 estimated for the 1974-1983 period, see T.E. Dahl and C.E. Johnson, *Status and Trends of Wetlands in the Coterminous United States, Mid-1970's to Mid-1980's*, U.S. Department of Interior, Fish and Wildlife Service, Washington, D.C., 1991.

Jonathan Tolman of the Competitive Enterprise Institute estimates that America will have 59,000 *more* acres of wetlands at the end of 1994 than it did at the beginning.[33]

Tolman's estimate does not imply that wetlands no longer are converted to productive use such as agriculture or development (although the loss rate has slowed), but rather that wetland restoration has increased significantly. The most recent data available on wetland conversion rates were compiled by the Department of Agriculture's Soil Conservation Service as part of its National Resources Inventory, which is updated every five years.[34] Unfortunately, the Administration and groups calling for preservation of wetlands have not made a point of publicizing the results, perhaps because the results do not support their cause: the data show that wetland conversion is slowing. From 1982-1987, the annual loss rate was 131,000 acres, significantly less than estimated by the Department of Interior for the previous decade. Moreover, the loss rate slowed even more from 1987-1991, when only 108,000 acres were lost annually.

The rate of increase in wetland restoration, on the other hand, has been dramatic in recent years, not because of the Clean Water Act's prohibitions, but because of incentives to private landowners under three other programs: the Partners for Wildlife program, the Conservation Reserve Program, and the Wetlands Reserve Program. These three programs, which are designed to encourage landowners to create new wetlands, are responsible for the restoration of over 560,000 acres over the last seven years, and the annual rate has been increasing. Based on annual trends and restoration authorizations, Tolman estimates that in 1994 a total of 167,000 acres will be restored—compared with only 108,000 acres lost—for a net gain of 59,000 acres of wetland.[35]

Recommendation: Congress should require a presidential report outlining all known information on wetland conversion and restoration.

This report should present a breakdown of conversions and restorations on a county-by-county, state-by-state basis. Contradictory government data should be highlighted and relevant considerations discussed. Whenever discrepancies in the data exist, the report should show the range of conversion and restoration estimates based on all data. The report should be updated yearly. Moreover, if a "Wetlands Protection Act" is considered necessary, Congress should incorporate a provision giving relief to landowners from denial of permits to use their land if in any consecutive two years there is a net gain of wetland acres. Landowners, after all, should not be denied the fruits of their labor if their actions will not result in a

33 Tolman, *op. cit.*

34 U.S. Department of Agriculture, Soil Conservation Service, *1991 Update of National Resources Inventory, Wetlands Data For Non-Federal Rural Lands*, Iowa State University Statistical Laboratory.

35 Tolman, *op. cit.* The study contains good charts illustrating this trend line, as well as more information on the particulars of the wetlands restoration programs. Note that the 108,000 acres converted figure is probably conservative since the trend, at least for agricultural conversions, has been downward. Thus, the net gain figure is likely understated.

reduction of the "wetland stock."

ISSUE #4: Whose Property Is It, Anyway?

The fourth issue concerns the *de facto* taking of property through regulation, known popularly as "regulatory takings," that now occurs under regulation of wetlands and other property.[36] One of the most unfair and burdensome hardships inflicted by regulatory takings is that wetland owners are not reimbursed for their loss. For instance, if an elderly couple spends a large portion of their retirement savings to buy property to build their dream home and that property is subsequently designated a wetland, the value of their property—and their savings—is gone. Unfortunately, tales of financial hardship caused by government designation of lands as wetlands have become commonplace.

The Administration is on record as opposing payments to landowners whose property is designated a wetland. Office of Management and Budget Director Leon Panetta says it would be "an unnecessary and unwise use of taxpayer dollars" and a drain on the federal budget.[37] Landowners counter that regulatory takings are a drain on the family budget.[38] Wetlands regulation has evolved into a question of whether constitutionally guaranteed property rights are being infringed; and since the courts have been of limited help, landowners are in need of legislative protection.

To understand why legislative protection for landowners is appropriate, it is necessary to understand the broader issue of governmental taking of property. The Fifth Amendment to the U.S. Constitution implicitly recognizes that the federal government may take private property for public use. This power, known as eminent domain, was recognized by the Supreme Court as early as 1795 in *Vanhorne's Lessee v. Dorrance* when the court found that "the despotic power, as it has been aptly called by some writers, of taking private property, when state necessity requires it, exists in every government... government could not subsist without it."[39]

The Fifth Amendment explicitly mandates, however, that government must pay the property owner for the land confiscated. This concept, embodied in the clause "nor shall private property be taken for public use, without just compensation,"

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36 For in depth research and clear analysis of constitutional issues surrounding regulatory takings, see the book by Mark Pollot, *Grand Theft and Petit Larceny: Property Rights in America* (San Francisco: Pacific Research Institute, 1993). Pollot also authored Executive Order 12630, signed during the Reagan Administration, that requires agencies to do a Takings Impact Analysis (TIA); essentially, the agencies are required to consider the potential that their actions will result in a taking of property requiring just compensation and, where alternatives to achieve the statutory goal exist, to adopt the alternative least intrusive to the landowner.

37 Speaking at a hearing before the Committee on Public Works and Transportation's Subcommittee on Water Resources and Environment, U.S. House of Representatives, May 26, 1994.

38 Often ignored in the debate is that many families have mortgages on the regulated land. While the regulated portions of their land may become almost worthless, these families must continue to make large mortgage payments or lose their homes situated on unregulated land financed by the same mortgage.

39 2 U.S. (2 Dall.) 304, 311 (1795).

ensures that property taken for public use is paid for by those who benefit—the public—and not by the citizen unfortunate enough to own land the government wants.[40] In its most basic sense, this is a fairness issue: Why should one American bear the entire burden of the government's pursuit of a national good?

The Founders well understood the positive economic consequences of protecting owners' investments in their property. If property is to be put to its best and most highly valued use, ownership must reside in the hands of those who value it for as much or more than the fair market value.[41] If government had a free hand to take property without payment, its incentive to confiscate property that conferred only a small benefit on the public would be large; after all, even small benefits outweigh a zero cost. The problem is that costs are nonexistent only to the government. The actual costs, borne by someone else, often are substantial.

Another positive result of requiring just compensation is increased security. The Founders well understood that protection of property restrained usurpation of other rights recognized by the Constitution. It is this relationship to which Supreme Court Justice Potter Stewart referred in *Lynch v. Household Finance Co. Inc.* when he stated that there is a "fundamental interdependence...between the personal right to liberty and the personal right to property."[42]

Practically speaking, governments can control a wide spectrum of individual activities if they can control whether individuals remain financially secure or must surrender their property. The majority truly can tyrannize a disfavored minority if property rights are uncertain. As James Madison characterized the problem of individual rights in Federalist Paper No. 10, "it is that [pure] democracies have ever been spectacles of turbulence and contention; have ever been incompatible with personal security or the rights of property." It was to restrict just such tyranny over individuals that the Framers put severe limits, such as the requirement of just compensation, on the unchecked will of the majority.

The Supreme Court has been clear in requiring federal, state, and local governments to pay just compensation whenever governmental bodies physically take or occupy land or real estate.[43] Essentially, the Court has held that, even if only a

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40 Constitution of the United States, Amendment V, clause 3

41 By definition, owners personally value their property more highly than the government even when just compensation is paid for an involuntary taking of land, or else the owner would have sold it voluntarily. This "idiosyncratic" or subjective value by the owner is real, but is a premium above the amount that could be obtained in a fair market transaction. Due to this generally small discrepancy, even when the government pays fair market value, it is purchasing the property in a sense at a bargain price because the payment is less than the value of the property to the seller. Nevertheless, since the subjective value cannot be measured accurately, the objective standard of fair market value properly should be paid as just compensation by the government, with perhaps a fixed percentage of additional compensation to offset the damage to the owner forcibly separated from control of his land. A fair percentage would be perhaps 15 percent. Of course, under this additional compensation arrangement, there would be "winners" and "losers" in the sense that the 15 percent premium would be more or less than the owner's subjective value compared with the market price. But on average landowners would be more fairly compensated and the government would be discouraged from taking disruptive actions that are only marginally beneficial to the public.

42 405 U.S. 538, 552 (1972).

small amount of real property is involved, a taking has occurred and just compensation is required.[44] Unfortunately, however, the Court's decisions regarding regulatory takings have been less clear and consistent. One landmark case essentially found that if *any* compensation was provided, whether at a just level or not, a taking had not occurred.[45] This reasoning was faulty because the question of whether a property right has been taken is independent of the issue of compensation, which by definition can take place only if property has been taken or lost. If a small payment negates the finding of a taking, it also would negate the requirement of "just" compensation.[46]

The Supreme Court in recent years has begun slowly to move back toward protection of property owners.[47] In its most recent regulatory taking case, *Lucas v. South Carolina Coastal Council*,[48] the Court in 1992 found that a regulation prohibiting property use which also destroyed 100 percent of the property's value was a taking requiring just compensation. The Court, however, specifically declined to address the issue of whether anything less than a complete devaluation was a taking.[49] Thus, it is uncertain whether the government must compensate owners when the property retains, say, 20 percent of its previous fair market value.

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43 The requirement of just compensation by the federal government under the 5th Amendment is extended to the states under the 14th Amendment. It also applies, by further extension, to localities since their authority is derived from the state.

44 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

45 *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). This was one of many holdings in the case.

46 This is clearly absurd on its face. Such a construction completely negates the effect of the just compensation clause and, instead, substitutes the requirement of a token payment.

47 See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 96 L.Ed. 2d 250 (1987) (finding a temporary restriction on property to be a taking) and *Nollan v. California Coastal Commission*, 107 S.Ct. 3141, 488 U.S. 825, 97 L. Ed. 2d 677 (finding that the government could not engage in "extortion" by requiring a homeowner to provide public access to the beach in order to get a permit to build a second story on his bungalow. The Court found that there was an insufficient nexus between the Coastal Commission's mission of protecting the coastal view and providing public access to the beach).

48 *Lucas v. South Carolina Coastal Council*, 505 U.S. ____, 120 L. Ed. 2d 798, 112 S.Ct. 2886 (1992).

49 Essentially, the Court makes the same mistake here as it did in *Penn Central* in defining a property right as being its value. Simply put, property rights are fixed legal rights of an individual to use and enjoy property. Since property can be used in many different ways, there are consequently many different rights the individual owns. For instance, an owner of land can sell an easement to a neighbor allowing the neighbor to walk across the land, yet retain all other rights to that land himself. By focusing on the value of the rights infringed rather than on the substance of the rights denied to an owner, the court confuses fixed legal rights with the ever fluctuating fair market value of those rights. The value of the rights taken certainly is important in determining the level of compensation that is just, but it is irrelevant in determining whether a legal right has been taken in the first place. The Supreme Court heard its most recent property rights case, *Dolan v. Tigard*, on March 23, 1994. The case centered on whether the City of Tigard could condition the issuance of a permit for store expansion on Dolan's relinquishing of title to land; for a greenway and a bicycle path to be constructed at Dolan's expense. The decision is expected this summer.

Recommendation: In light of the ambiguous and limited protection against uncompensated regulatory takings, a Private Property Protection Act is necessary to ensure private property rights are fully protected.

If the government infringes any property right by denying an owner use of his own land, the affected landowner should be given the full fair market value of any reduction in the value of his property. While any devaluation should be compensated, the Act should specify that a 25 percent devaluation of real property after an infringing governmental action is a presumptive taking requiring full compensation for the value of the land taken.[50] The owner also should be allowed to elect payment for the entire value of the regulated land — rather than just the reduction in value — if he forfeits title to the government.[51] These provisions will constrain judicial latitude and thus minimize the possibility of misguided judicial interpretation limiting protection to property owners.

Moreover, a 15 percent premium over fair market value should be paid. This premium roughly would compensate owners for their inconvenience and for the lost personal value of their land.[52] It also would reduce highly disruptive actions that are only marginally beneficial to the government.

CONCLUSION

Unfortunately, the wetland policy that has emerged in recent years is fraught with problems that have contributed to a growing backlash from property owners. While the issues are many and varied, four basic problems have fueled the controversy. First, clear legislative authority to protect wetlands as wetlands is lacking in law. Second, a one-size-fits-all definition of what constitutes a wetland is used but is crude and inappropriate. Third, new evidence has shown that America has met its no-net-loss of wetlands goal and more wetland acres are being restored than lost. Fourth, landowners whose valuable property rights are infringed to pursue this public benefit are not compensated for their loss.

Each of these problems can be solved. For example, the lack of legislative authority to protect "wetlands as wetlands" can be dealt with by clarifying that Section 404 of the Clean Water Act is not intended to protect wetlands. If protection of "wetlands as wetlands" is desired, a Wetlands Protection Act should be passed to encompass all federal efforts to maintain the current number of wetlands, including restoration of wetlands as well as efforts to slow wetland losses. This Act also should require the Army Corps of Engineers to classify wetlands ac-

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50 The Act should include a section that a taking has not occurred if the governmental action is to abate a nuisance as defined by background principles of common law within the state the property is situated.

51 It is important to note that this provision should apply only to land directly affected by the governmental action, including permit denial, and would not allow the property owner to demand payment for the value of acreage not affected by the regulatory action. If the owner does not elect to forfeit his title, the government should pay only the differential between the fair market value prior to and after the regulatory taking since no additional rights have been condemned and compensated.

52 See note 41 for a discussion of why a premium is needed.

cording to their ecological value so that the nation's economic resources are not squandered on land that is of little ecological significance. Moreover, it may be unnecessary to limit the private development of wetlands at all in light of new evidence that the nation likely will gain almost 60,000 net acres of wetlands due to increased restoration. Congress can answer the charges of unfairness by landowners who have seen their life savings destroyed by onerous wetlands regulations simply by requiring the government to pay for the value of the land it takes.

Although the Clean Water Act never was designed as a vehicle to protect wetlands, it has evolved into a regulatory nightmare for ordinary Americans who simply want to use their land as they intended when they took out a mortgage on their property. If Americans still believe in the basic concepts upon which this nation was built—liberty, opportunity, and the right to reap the rewards of hard effort—they must reverse the current wetland policy of essentially confiscating land from the nation's most productive and valuable citizens.

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