

# MUDDY WATERS

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## The Quagmire of Wetlands Regulation

RICHARD MINITER

With the black waves of Boston Harbor at his back, candidate George Bush pledged that under his presidency there would be “no net loss of the nation’s remaining wetlands.”

Bush had swooped into then-Governor Michael Dukakis’s backyard to steal the environmental vote. His green battle-cry—“no net loss”—was the brainchild of Conservation Foundation president William K. Reilly, who subsequently became Bush’s Environmental Protection Agency (EPA) administrator. And in contrast to the reversal of his “no new taxes” stand, this is a promise the president has conspicuously tried to keep.

Unfortunately, the “no net loss” policy has perpetuated and worsened an absurd regulatory regime that imposes unfair burdens on landowners, while doing little to protect wetlands—marshes, bogs, swamps, mud flats, prairie potholes, and other forms of land flooded or saturated by water—of the greatest ecological importance. By mistakenly treating all wetlands as equal, “no net loss” has held up development on properties of little ecological significance. And the focus on containing loss has diverted attention from public policy reforms that would *expand* wetlands—primarily reductions in crop insurance and other federal farm subsidies, and a loosening of certain regulations.

In the name of wetlands protection, the EPA and the Army Corps of Engineers have punished a truck mechanic who cleaned up a tire dump in Pennsylvania, held up expansion of a homeless shelter in Alaska, penalized a farmer for plowing up a pasture in Missouri, required a forest to be levelled to compensate for wetlands lost when a highway was widened in Georgia, and temporarily stopped a Virginia county from providing clean drinking water to its residents. They have erected a system of national land-use regulation that brings minimal ecological benefits and substantial harm to the liberties of Americans.

### Criminalization of Dirt

Section 404 of the Clean Water Act of 1972 makes it unlawful to put dredged or fill material into “the navigable waters of the United States” without first receiving a permit from the Army Corps of Engineers, subject

to veto by the EPA. The legislation was intended to safeguard major waterways, municipal water supplies, shellfish beds, and fishing and recreational areas from contamination by toxins that might be contained in dredged or fill material. Wetlands were not defined or even mentioned in legislation that applied to rivers, streams, bays, and lakes. “It was not the original intent of Congress to enact a wetland protection statute, but a water quality act,” says Bernard N. Goode, former chief of the wetland regulatory office of the Corps.

Wetlands regulation dates from a 1975 decision by the District of Columbia Circuit Court of Appeals, *Natural Resources Defense Council v. Callaway*, which held that the Clean Water Act covers not only rivers but wetlands that drain into rivers. There was a certain logic to the decision, because wetlands near waterways can contain floods, filter water, and otherwise provide a measurable impact on water quality. Unfortunately the decision gradually came to be applied to isolated wetlands with no connection to waterways at all. The result is that a statute intended to protect rivers is now used to regulate all soggy land.

To make matters worse, enforcement of restrictions on the dumping of dredged or fill material has shifted from the legislation’s concern with toxic wastes to a prohibition of landfill itself. “In 99 percent of the cases that the Corps regulates, there is no threat of a true pollutant getting into drinking water,” says Pacific Research Institute legal scholar Mark Pollot. “Most often, the pollutant in question is dirt, and usually dirt dumped on the same land it was dug from.”

Indeed in 1983, the Fifth Circuit Court of Appeals held in *Avoyelles Sportsmen’s League v. Marsh* that the term “discharge” may include “redeposit” of soil from the same site. This ruling was cited in a July 1990 Corps Regulatory Guidance Letter that states: “It is our position that mechanized landclearing activities in jurisdictional wetlands result in a redeposition of soil that is subject to regulation under section 404.” Almost any activity that disturbs the soil of a “wetland”—even if no genuine

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RICHARD MINITER is an environmental policy analyst at the Competitive Enterprise Institute.



Florida Game & Fresh Water Fish Commission

**All wetlands are not created equal. Protecting the Everglades (pictured here) is more important than preserving a mud puddle.**

pollutant is involved—is subject to regulation under the Clean Water Act.

### **Hauling an Iceberg**

Officials of James City County, Virginia, recently learned just how badly regulators have lost sight of the purpose of the Clean Water Act. The county faced a crisis: its population was growing and its water table was falling. An emergency ban on well-drilling had already been instituted. And so the county wanted to dam France Swamp and build a reservoir to provide safe drinking water for its residents.

The EPA cared little about the county's impending water shortage. Damming the swamp, the EPA declared, would deposit dirt and other fill material and therefore violate the Clean Water Act, one of whose purposes was to protect drinking water. In the name of clean water, it was illegal to expand clean water supplies.

What was the county supposed to do? A lawyer representing James City County told a federal panel in 1990 that "a high-ranking official of EPA's regional office actually told me that 'hauling icebergs from the Arctic was a plausible candidate for further investigation.'"

James City County decided to fight it out in court. The EPA, the Justice Department, and several environmental groups testified against the county. U.S. District Judge John Mackenzie ruled, however, that the EPA's arguments were "nonsense." Pending appeal, James City County can now build its reservoir, though because of litigation delays it must now spend an additional \$12 million.

The "no net loss" principle has added some perverse incentives of its own. A highway-widening project near

Savannah, Georgia, would have eliminated about 4.2 acres of adjacent marshes. To achieve the "no net loss" goal the Georgia highway department levelled a nearby pine forest to create offsetting wetlands—surely not what ecology-minded lawmakers have in mind.

### **No Predictability**

As regulators have lost their statutory moorings, the law has lost all its predictability. Highway builders and others involved in long-term projects often find themselves caught in a confusing web of changing rules and conflicting interpretations.

The Virginia Department of Transportation is a case in point. The Corps claims that the highway authority destroyed more than 40 acres of wetlands while building a 2.3-mile stretch of the East-West Expressway near Hampton, Virginia. The highway authority contends that only six acres were disturbed. Its environmental program manager, Melvin H. Thomas, maintains that the department filed all of the necessary forms, but that wetlands regulations changed three times in the past seven years.

The 1984 rules said that wetlands not flowing into any body of water can be altered without a permit. (In fact, a 1984 environmental impact study conducted by the Corps said that the area along the highway route included no "significant" wetlands.) The 1986 rules allowed one acre of isolated wetlands to be altered without a permit and up to 10 acres if the Corps granted a permit. The highway authority claims it received approval from the Corps. The 1989 rules, incorporating Bush's "no net loss" principle, required permits for any wetland to be converted to other uses.

The highway authority may now have to buy land and

create new wetlands—a complicated, costly, and sometimes unsuccessful task—in order to offset wetland loss. Cost to taxpayers: estimates begin at \$1 million and go much higher.

### Arbitrary Definition

While wide-ranging and rapidly changing wetland regulations make life difficult for landowners, the often absurd definitions of wetlands offered by federal officials raise other questions. The legal definition of a “wetland” has proven so mutable that the law seems arbitrary, confusing, and uncertain.

Not all wetlands are soggy enough to require hip boots or even boots at all. Today wetland regulations cover virtually every piece of ground touched by some form of

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## Pools of spring rain, arctic tundra, even desert can be considered wetlands under EPA rules.

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water. As the *National Law Journal* puts it: “woody areas, dry desert furrows, cornfields that were once marshy, all have been judged to qualify” as wetlands. Pools of spring rain or melting snow are wetlands. Arctic tundra are wetlands. Even deserts occasionally inundated with water can be considered wetlands.

The EPA briefly defines wetlands as “Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” This definition is then spelled out in detail in a manual that is several inches thick.

The EPA’s rule of thumb is that a wetland is a plot of land with at least two of the three following characteristics: it contains water for at least seven days per year, it has one of 7,000 “indicator species” of plants growing on it, and it has a hydric soil—earth that is chemically changed by water, usually with a peat, muck, or mineral base.

### Unightly Dumping Ground

This over-inclusive definition has led to countless horror stories of over-intrusive regulation.

• John Pozsgai, a self-employed truck mechanic in Morrisville, Pennsylvania, was handed a stiff fine and a three-year jail sentence after hauling away over 7,000 old tires and rusting car parts and dumping clean fill on his own—occasionally wet—property without a federal permit. Federal authorities admit no toxic waste was involved.

“The Pozsgai property along West Bridge Street is no marshy bog where snowy egrets might lay eggs. It is an unsightly stretch of hard brown soil, bordered on one

side by a narrow stream where Bucks County residents for two decades dumped tires and debris illegally,” wrote Howard Kurtz of the *Washington Post*. The EPA nevertheless argued that the property was a wetland because a stream, dry for most of the year except for storm water runoff, was partly trapped by the discarded junk and created several standing pools of water, and because the lot contained skunk cabbage, a common weed, and sweet gum, a common tree—both of which are among the EPA’s more than 7,000 “wetland indicator species.” And these indicator species include many that grow on uplands as well as wetlands.

The EPA used aerial photographs and staked out the site with a hidden camera to record Pozsgai’s “crime.” These photographs were used to establish federal jurisdiction (apparently, state authorities were happy to see Pozsgai clean up the place). A small stream on Pozsgai’s property was supposed to jump an expressway and run into the Pennsylvania Canal, which hasn’t been used for interstate commerce in over 50 years.

Pozsgai was put on trial in 1988 and found guilty of 41 violations of the Clean Water Act. Although this was his first offense, he was sentenced to three years in prison, a \$202,000 fine, five years probation, and a court order to restore the property—not to what it was—a dump-site—but to pristine condition. The judge was unpersuaded that Pozsgai’s fine was excessive, though his attorney showed that Pozsgai had a negative net worth and a tiny income. Pozsgai is now doing time at Allenwood Federal Penitentiary.

• When Paul Tudor Jones, a well-heeled Wall Street commodities trader, ran afoul of wetlands regulations he was socked with \$2 million in fines and restitution, 18 months on probation, a binding agreement that permanently bars development of his property (thereby lowering its resale value), and a court order not to hunt game birds or waterfowl for 18 months. “That’s as close as you can come to restitution for them [the birds],” ruled U.S. District Judge Frederic N. Smalkin.

Jones’s crime was his failure to supervise William B. Ellen, the manager of his 3,272-acre private hunting reserve on Maryland’s Eastern Shore, who was accused of filling in more than 86 acres of wetlands with dirt and other natural materials without a permit. Ellen maintains only 14 acres were affected. No toxic wastes or pollutants were used, EPA officials concede.

• Missouri farmer Rick McGown faces prosecution because he restored 150 acres of brushland to cropland. (The property yielded an unusual 150 bushels of corn per acre.) The Corps declared his land to be a wetland because it contained cattails, but closer inspection revealed these “cattails” were actually sorghum. “They are using the Clean Water Act to capture farmers’ property,” McGown told reporters. If McGown loses his suit against the Corps he will forfeit one-third of his farm and pay a \$7,500 fine.

Wetlands rules, in the words of the *New York Times*, have created “a web that has now entangled farmers, environmentalists, and federal agencies in legal disputes across the country. About 70 million acres of privately owned farmland may be “wetlands” according to the Soil Conservation Service. What a runaway bureaucracy wants



them to do, farmers say, is convert good cropland into bogs and marshland...with total disregard of property rights guaranteed under the Constitution."

### Alaska's Big Chill

Alaska is probably the state most affected by wetlands regulations. About 75 percent of the usable land (anything that is neither a mountain nor a glacier) is considered a wetland by federal definition. Most of Alaska meets EPA's broad wetlands guidelines because the land freezes periodically—locking water beneath the surface.

Wetlands regulation blocked the planned expansion of a Juneau, Alaska, homeless shelter. It took over a year, and a lot of political arm-twisting, for the St. Vincent de Paul Society to get a permit to add accommodations for five more homeless families in its shelter, according to Paul Paradis, director of the society.

"Anytime anyone wants to do anything in Alaska, he needs a permit," says Dwayne Gibson, an assistant to U.S. Senator Ted Stevens. Building a house or laying a driveway requires a permit. Even burying the dead in Alaska may soon require federal permission. The average permit processing time in Alaska is about eight months.

In 1989 the Corps and the EPA issued a nationwide joint "memorandum of agreement" (MOA) that required mitigation for any alteration of an existing wetland, regardless of "need, societal value, or the nature or investment objectives of the project sponsor."

This set off alarms in the 49th state. "We had more



U.S. Army Corps of Engineers

**The Army Corps of Engineers and other federal agencies caused 30 percent of the wetlands destruction in the lower Mississippi Valley.**

prized by commercial and sport fishermen in the Gulf of Mexico depend on coastal wetlands.

Furthermore, wetlands act as natural filters for ground water, check soil erosion, and mitigate spring floods in some areas. Sediment-laden waters are filtered as they pass through a wetland, much like kidneys in a human body. Swamp plants and microorganisms use water impurities as nutrients.

Wetlands, by acting as coastal buffer zones, break the force of floods and shield the inland from powerful tides that would swallow coastlines. A mangrove swamp, for example, can absorb and dissipate a lot of a storm's energy. Trees and other plants in swamps also slow the speed of floodwater.

Wild rice, marsh hay, and hardwoods are among the commercial crops harvested in wetlands. Over \$10 billion is spent every year on recreational activities in America's wetlands. Nearly 40 percent of the wild fur and hide harvested annually, as well as all of the \$1-billion-per-year commercial fish and shellfish industry, depends on wetlands. Louisiana's extensive necklace of coastal wetlands makes it the largest single fishery in the country, producing (by weight) 30 percent of the nation's commercial catch each year.

### Benefits of Draining

Since the Pilgrims landed, the EPA loosely estimates, the continental United States has lost roughly half its wetlands. The total loss of over 100 million acres represents an area about the size of California. The EPA also estimates that some 350,000 acres of wetlands disappear every year from the United States. The EPA estimate may be artificially high. Even so, this is an annual loss of about one-300th of our remaining wetlands acreage.

The greatest losses in total acreage have occurred in Florida, Louisiana, Texas, Arkansas, Minnesota, and Illinois. States that have already lost the overwhelming majority of their wetlands include Ohio, Missouri, and California. Louisiana loses more wetlands every year than any other state, and accounts for 80 percent of the nation's total loss of coastal wetlands. Louisiana cedes 40 square miles a year of its coastline to the Gulf of Mexico, according to EPA estimates.

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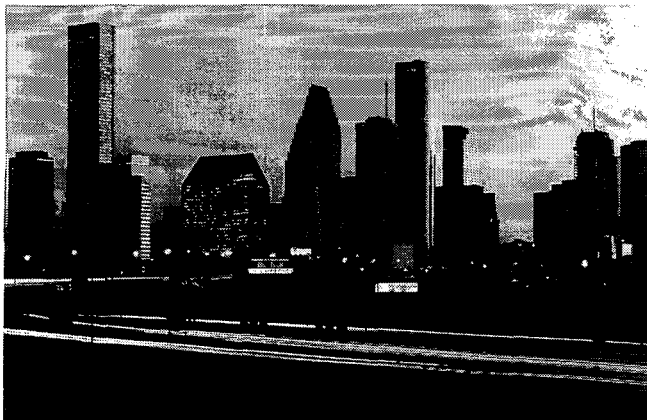
**Property-owners are severely punished for altering a few acres of wetlands by the same federal government that has itself destroyed millions of acres.**

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phone calls [from Alaska] related to the MOA between the Corps and the EPA in the first few days than we had during the first few days after the *Exxon Valdez* oil spill," says Lee Forsgren, minority counsel for the House Interior Committee.

### Rich Habitat

Many wetlands are important to protect. Almost one-third of the animals on the endangered species list live or depend on wetlands—including manatees, Florida panthers, whooping cranes, American alligators, and the Schaus swallowtail butterfly. Louisiana's swamps provide wintering grounds or resting areas for most of the migratory birds, including two-thirds of North American species of ducks and geese, that trace the Mississippi from its headlands to the open sea. Most of the species



Greater Houston Partnership

**Houston could not have been built under current rules. Other cities built on former wetlands include New Orleans and the Foggy Bottom section of Washington, D.C.**

Wetland losses, however, are not the nationwide catastrophe some make them out to be. Alaska, according to a 1990 Fish and Wildlife Service report, has converted about one-tenth of 1 percent of its total surface area from wetland to other uses since 1780. Other regions with most of their original wetlands remaining include the Pacific Northwest, the Mountain States, and New England.

Moreover, much of the wetland conversion in our history has been beneficial. Many low-lying areas would not have been habitable during malaria outbreaks if swamps had not been drained for mosquito control—and even today wetlands can be breeding grounds for Eastern equine encephalitis, which has recently been reported in five states and is fatal in half of human cases. Mosquitoes from wetlands may disperse and transmit disease five to 50 miles from where they are hatched.

If colonists had to wait for permits to arrive from London before they could break ground, the American Revolution might have happened a bit sooner. Nowadays landowners have to await permits from Washington, D.C. But that center of wetlands regulation wouldn't have been built if current laws had applied in the 1790s. The tidal basin and much of the area surrounding Capitol Hill required significant amounts of fill to change it from a fetid marsh into a capital city. Other cities built on former wetlands include Houston and New Orleans.

Most wetland conversion in American history has been done to increase food production. Drained wetlands provide plentiful water and rich topsoil, and thereby boost crop yields. As farmers drained wetlands over the past 200 years, they provided food to a hungry, growing nation.

Wetland conversion is rarely irreversible. Almost all wetlands converted to cropland can revert back to wetlands. Nature is more flexible than man: without human interference, former wetlands will fall back into the natural cycle of wetlands creation and destruction.

### **Uncle Sam's Havoc**

One of the great injustices of wetlands regulation is that property owners are severely punished for altering a few acres of wetlands by the same federal government

that has itself destroyed millions of acres. Mammoth federal flood control projects, navigation and channelization efforts, canal building, agricultural subsidies, loans, and insurance, as well as interstate highway construction and other government development programs, have each contributed toward wetlands destruction.

Beginning in 1929, public works projects reduced the amount of sediment delivered by the Mississippi River onto the banks of its large, fan-shaped delta. The Corps repeatedly dredged the river to remove sandbars and other barriers to navigation. The river itself is walled off by miles of levees built by the Corps to protect the shore from the very floods that once nourished it. As a result of this dredging and containment, the river no longer changes course to create new wetlands. The levee system extends throughout the Mississippi Delta, meaning that silt carried by the river that once replenished the wetlands, today flows straight into the deep waters of the Gulf of Mexico. Without the silt and nutrients provided by periodic flooding, wetlands are left to starve and erode.

A recent study by Harvard economists Robert Stavins and Adam Jaffe estimates that federal flood control and drainage projects by the Corps and Soil Conservation Service caused 30 percent of the destruction of forested wetlands in the lower Mississippi Valley. Where once there were 26 million acres of such wetlands, there are only 5.5 million acres today. About one-half of the current annual wetland loss is due to erosion caused by

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federal flood-control projects, according to the American Farm Bureau Federation.

Government flood control projects are also responsible for Louisiana's sinking coastline. For hundreds of feet down, river sediment and organic material make up the foundation of the Mississippi Delta. This ground is constantly sinking and compacting. Until federal engineers prevented the river from shifting its course or depositing new sediment, the natural process of soil compaction wasn't a problem. New sediment was simply placed upon the land that had subsided. Now 183 million tons of this sediment are annually washed out to sea.

One especially destructive Corps channelization project was the Mississippi River Gulf Outlet, built in 1961 to provide a shortcut from New Orleans to the Gulf of Mexico. Since the 1960s, more than 20,000 acres of freshwater marsh have been lost to saltwater and more than 28,000 acres of land have washed away. The canal

has widened from 500 feet to 2,000 feet as shoreline erosion progressed. Vital duck habitat has been lost.

The federal government wreaked havoc upstream, too. It constructed five large dams and reservoirs along the main stem of the Missouri River in the 1950s and 1960s. These projects destroyed nearly all of the riverbank wetlands and oxbow lakes in North and South Dakota—over 388,000 acres in all.

Criticism of federal projects that alter wetlands is not new. Marjory Stoneman Douglas in her 1947 history of the Florida Everglades lamented federal and state dredging operations that channelized and made straight the shallow, meandering streams of that unique environment. Douglas pointed out that the government made the Everglades prone to fire and to flood and inhospitable to much of its native wildlife. "Where there had been the flow of the river of grass, there were only drying pools," she wrote.

Bernard Goode, who as a young engineer was responsible for draining the Kissimmee River, which winds through the Everglades, admits the project was "an absolute mistake. When I saw the land before and after, I realized something was wrong." The Army Corps of Engineers and other government agencies are now planning to spend \$700 million to undo the damage they did earlier to the Everglades.

The Army Corps of Engineers engages today in many fewer projects that destroy wetlands. And as if to atone for its past history, it bends over backwards to hold up any form of private construction on wetlands. The punishment of small-scale wetlands converters is grossly disproportionate to the harm done, and is particularly inappropriate coming from a government agency that has itself been responsible for large-scale conversion.

### **Farm Subsidies as Culprit**

Agriculture accounts for about four-fifths of America's overall wetlands losses, with the federal government bearing a good part of the responsibility. Farmers in the 18th and 19th centuries drained swamps and marshes before federal crop subsidies. But in the 20th century federal farm subsidies have encouraged the conversion of wetlands to croplands that otherwise would not have been profitable to cultivate.

Price and income supports and loans encourage farmers to maximize production, and therefore to drain and fill in wetlands. More important, disaster payments and federal crop insurance have given farmers an incentive to farm areas most subject to the vagaries of nature. Most wetlands are bottomlands, which are very prone to flooding, so farmers are often reluctant to expose themselves to this risk. Subsidized crop insurance transfers the risk to the taxpayer. In 1987, crops on over 41 million acres were insured for a total value of \$9.8 billion. A substantial proportion consisted of converted wetlands.

"Swampbuster" legislation in the 1985 farm bill makes farmers ineligible for price supports, federal farm loans, and disaster payments and crop insurance on newly converted wetlands. A recent EPA report found that cutting off subsidies to farmers who drain wetlands all but eliminated wetland conversion in six of the seven states examined. In 1986, however, the Department of

Agriculture suspended Swampbuster provisions in North Dakota at the instigation of Senator Mark Andrews, a Republican who was facing a tough reelection battle. And in 1990 Swampbuster penalties were watered down for the entire country.

### **The Ducks Unlimited Model**

Most valuable wetlands are already off-limits to developers and farmers, as a result of state laws, federal legislation to protect the habitats of endangered species, and laws protecting the fishing areas of bays and estuaries. Many wetlands are also ostensibly protected by state and national parks and wilderness areas.

However, the values sought in wetlands—recreation, water protection, biodiversity—are often best protected by private individuals and conservation foundations. A good example is Ducks Unlimited, a 51-year-old non-profit organization of over 600,000 hunters and conservationists who want to defend duck habitat from development and farming. It has raised about \$400

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## **The best way for the federal government to protect wetlands is to enforce "Swampbuster" provisions in farm legislation.**

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million to purchase and protect about four million acres of duck habitat, all of which is wetland, and has constructed over 3,000 wetlands projects.

Between 1978 and 1988, the duck population in North America fell from 100 million to 66 million, according to the U.S. Fish and Wildlife Service. One reason is that prairie potholes—small, water-filled depressions in Iowa, the Dakotas, and Montana, as well as the western provinces of Canada—have been disappearing. These small ponds and marshes, most of which cover less than an acre, are vital rest areas for ducks travelling along the Mississippi flyway. But farmers regard potholes as a nuisance to plow around and often plow them under instead. Ducks Unlimited has purchased many of these potholes, compensating the farmer for his troubles and safeguarding important duck habitat at the same time. Nesting ducks also need tall grasses to hide themselves and their eggs. If farmers plow up the grassy areas near wetlands, they expose the ducks to predators. So Ducks Unlimited buys these areas too.

Ducks Unlimited seeks to protect "wherever waterfowl breed, nest, migrate, or winter." This goal has led Ducks Unlimited to construct dams and dikes to assure quality habitat throughout North America. The organization also protects upland breeding and nesting sites in Canada—where some 70 percent of North America's waterfowl are hatched and raised.



Ducks Unlimited's wetlands conservation measures help more than just ducks. Over 600 species of wildlife, including several that are endangered—the whooping crane, bald eagle, peregrine falcon, piping plover, and least tern—benefit from Ducks Unlimited wetlands.

### **Private Marsh Management**

Natural resources companies also have a special incentive to conserve coastal wetlands, lest they lose title to their land when marshes erode and sink beneath the waves. "When wetlands give way to open water, those water bottoms become the property of the state," Shea Penland, director of the Louisiana Geological Survey, told the *New York Times*. "If you're a private landowner you face the possibility of losing your mineral rights," he says. Indeed after decades of government-sponsored degradation and destruction, the healthiest marshes in Louisiana are those managed by private oil companies.

Since 1954 the Louisiana Land and Exploration Company (LL&E), an oil and gas concern, has built and financed projects to check the erosion of marshland, reduce the salinity of the water, and slow the speed of wave action and water flow. LL&E chose strategic points in tidal channels and placed structural safeguards. This approach is called marsh management. In one area of

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## **It took an Alaska homeless shelter over a year to get a permit to add accommodations for five families.**

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the Pelican State, LL&E placed over five miles of weirs to shelter coastal wetlands. In all, LL&E has built more than 400 structural marsh defenses on its 600,000 acres. These weirs stop saltwater from mixing with the brackish water of the marsh and killing plants there.

Although the Corps remains skeptical of LL&E's marsh management techniques, LL&E claims there is a dramatic difference between managed and unmanaged marshland. While LL&E has been successfully employing marsh management for over 30 years, the U.S. Fish and Wildlife Service only began studying the concept in 1990. Government researchers will create four marsh management sites of 75 to 400 acres and compare them with unmanaged sites. The study will not be completed until 1994, by which time—according to EPA figures—Louisiana will have lost another 160 square miles.

Much of what LL&E once did to preserve bottoms and washes, however, would be illegal today. "No one in Washington realized that they would also stretch their long arm so far as to stop a little old man with a shovel from repairing his dike. The same regulations advocated and lobbied by strident environmentalists have come back to haunt and destroy the very same marshes they were trying to protect," writes Ed A. Wright in *Our Land*,

an outdoor magazine.

Ironically, even environmental organizations have been strangled by red tape. The Audubon Society, which owns several bird sanctuaries in Louisiana, has tried for several years to get a permit to repair a levee. "The 404 [wetlands permit regulation] was originally set up to save the wetlands, but now it's a hindrance," admits Lonnie Lege, manager of the 40-square-mile Paul J. Rainey Sanctuary. The Audubon Society has a history of lobbying for stricter wetlands laws.

Allan Ensminger, a wetlands consultant to LL&E, is more blunt: "There has been a conservation paralysis through regulation."

### **Restoring the Fifth Amendment**

The current wetlands regime creates national land-use regulations with all the disadvantages of zoning but with none of the supposed advantages. The government has wrested a substantial amount of power from property owners with no compensation.

If the government confiscated land to set up a wildlife sanctuary or to build a water filtration plant or flood control project, any court would compel the government to pay fair compensation. This limit on state action is embodied in the Fifth Amendment to the Constitution. Yet, if the government gains control over the land through regulation for the same purposes, few federal agencies pay compensation. To correct this abuse and return to a policy more attuned to the Fifth Amendment, President Reagan issued an executive order compelling agencies to consider the takings issue.

A move afoot in some state legislatures would follow similar principles. A bill to provide compensation to land owners who lost a measure of their property value when state regulations denied certain land uses was narrowly defeated in the Vermont state legislature in 1990. State lawmakers will try again this year. The American Legislative Exchange Council (ALEC) has drafted model legislation to help state lawmakers limit government takings of private property. ALEC's model requires that any time the implementation of a state law causes a 50 percent reduction in the fair market value of real estate the state must pay fair compensation.

U.S. Senator Steve Symms (R-Idaho) has offered legislation consistent with the Fifth Amendment that would require federal agencies to perform takings assessments prior to enforcement of their regulations. Symms' legislative assistant Trent Clark indicated recently that support for the "Private Property Rights Act of 1991" has spread to some lawmakers who opposed it only last year. The Symms bill has also won the support of the administration, the EPA, the Corps, and the Department of Agriculture.

### **One Man's Wetland**

Reauthorization hearings on the Clean Water Act are currently underway. Congress should abolish Section 404 of that statute and set to work writing a genuine wetlands protection bill.

The best way for the federal government to protect wetlands is to enforce Swampbuster provisions in farm legislation or, better yet, abolish farm price supports and

crop insurance altogether—thus discouraging wetlands conversions that would not normally be profitable. Restrictions on construction and repair of coastal weirs and levees should also be eased to allow private property owners to expand wetlands.

The White House is considering a recommendation that the Interior Department be placed solely in charge of administering wetlands regulations. The Army Corps of Engineers has been so involved in wetlands destruction itself that now it overcompensates for its past excesses by stopping small-scale wetlands conversion. Congress should prevent whichever agency it puts in charge from regulating isolated wetlands, order it to rank wetlands according to importance and publish their findings, compensate owners when wetland regulations prevent their land from being developed, and respond quickly to permit applications. The permit process could be streamlined by granting blanket exemptions to development affecting less than 10 acres of wetland at a time and exempting entire states, like Alaska, which have no shortage of undeveloped wetlands. Punishments should be proportionate to harm clearly caused. Finally, the definition of wetland should be refined to include the Everglades and exclude mud puddles, irrigation ditches, vernal pools, and arctic tundra.

This is a daunting task, however. One man's wetland is another's bog. Every individual places a different value on natural objects. One man might choose to farm a wetland, while another might think it better to let it lie fallow. The law should acknowledge that wetlands are valued differently by different individuals at different points in time. Further, courts must recognize that wetlands conversion is not a crime, like murder, that all of society naturally abhors in all cases.

Wetlands regulation is out of control. Traditionally, courts and legislatures took private land only when faced with a compelling public need and, even then, the owner was given fair compensation. Under the current wetlands regime, land is taken without compelling need or compensation. This may be changing. Last July, the U.S. Court of Claims awarded over \$1 million to Florida Rock



The Bettmann Archive

**Wetlands act as nature's kidneys. They filter ground water, check soil erosion, and contain spring floods.**

Industries and over \$2 million to a New Jersey developer. Both had lost their holdings through wetlands "regulatory takings." Now when regulators overstep their bounds and take private property through rule-making they may have to pay for it. Perhaps this will encourage federal officials to concentrate on protecting the wetlands that really matter. Saving the bayous of Louisiana and the Everglades of Florida, both of which have suffered from past government efforts, is too important to ignore in order to stop a farmer from plowing up a muddy cornfield.



# FAIR GAME

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## Government Benefits for the Well-to-Do

MEREDITH BISHOP

One of the most important political issues of the '90s will be the battle over the definition of "fairness." Last year the Democrats won the first round with their tax-the-rich rhetoric. This year the Bush administration has swung a good punch with a budget proposal that targets programs benefitting the wealthy. In so doing, Bush has focused attention on some of the government programs that waste taxpayers' money as they inflate overall budget expenditures. From farm programs to Medicare, to child nutrition and student loans, the Bush budget challenges the practice of subsidizing the better off with federal dollars. Although the proposed program changes are limited in scope and will not save much money initially, their purpose is to establish the principle that the government should concentrate its help on those who need it most.

Although the budget proposal mainly targets programs that benefit the wealthy, the biggest subsidies go to an even larger group of "non-poor" individuals—the middle class. We must ultimately ask why the government should subsidize anyone who is not truly in need. Is it "fair" that the government takes from all citizens—the poor, the middle class, and the rich—in the form of taxes in order to dole out benefits to the most politically organized members of the middle class? This is redistributionist politics at its worst.

### Living High on the Hog

A vision of starvation and poverty often kindles a government program, while convenience for the well-to-do sustains it. A classic example of this phenomenon is found in federal farm programs. Fed by the image of the struggling family farmer, most farm payments in reality go to the largest farms and the wealthiest farmers. Farmers with annual sales over \$100,000 received 71 percent of all direct federal payments in 1989. Yet they represent only 18 percent of all U.S. farmers. Farm programs are harder to justify as farmers are making more money than ever. Only 5 percent of all farms found themselves in a vulnerable financial position in 1989, according to the Department of Agriculture, while 63 percent were in a favorable financial position. Average gross cash farm income in 1989 was \$199,915 for com-

mercial farms. After expenses, these same farms walked away with an average of \$53,942 in profits.

The Bush budget proposal seeks to end federal payments to "gentleman farmers" making over \$125,000 in non-farm income. A more comprehensive proposal by Representative Richard Armey (R-TX) and Charles Schumer (D-NY) to limit payments to farmers making over \$100,000 in any income was killed on the House floor by a powerful farm lobby earlier this year. Opponents of the Schumer-Army bill justified paying huge sums to wealthy farmers by saying that farm payments are a form of supply management, not income subsidies. But programs that pay farmers not to farm and artificially inflate the price one must pay for food are not justifiable by any stretch of the imagination. Is it "fair" to boost a few farmers' income so that low-income families must rely on Food Stamps to buy groceries? Although more timid than the Schumer-Army bill, the Bush proposal, if successful, could begin to chip away at such notions.

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**Government programs should not make life more posh for middle- and upper-income individuals. Budget deficits are born of such excess.**

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The Bush budget proposal also targets the voluntary part B of the Medicare program, seeking to make the wealthy elderly pay more in premiums than the poor. The proposal would raise monthly premiums to \$63.60 per person, up from the scheduled \$31.80 beginning next year, for individuals with incomes above \$125,000 and couples making over \$150,000 per year. This change will affect only 500,000 beneficiaries out of a total of 33

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MEREDITH BISHOP is assistant editor of Policy Review.