

Preserve Wetlands Or Rights

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can force the landowner to preserve it?" asked Foster.

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The Federal Swamp and Land Act of 1849 allowed individuals to obtain wetlands free from the government if they drained and converted the land into something more useful. Until 1972, the government cost-shared the farmer's expense to turn the "waste land" into productive agricultural lands.

But that has changed. Wetlands are no longer considered useless. They help purify surface water and ground water. Wetlands help prevent flooding by acting as a sponge to absorb storm water, and they provide habitats for endangered plants and animals.

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While farmers agree that wetlands do have value and should have some protection, many do not believe the farmer should suffer economically because environmental and regulatory groups insist that wetlands need to be protected no matter what the consequences.

They refer to the Fifth Amendment to the Constitution of the United States: No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The purpose of amendment was to bar the government from forcing

some people alone to bear public burdens that should be borne by the public as a whole.

Foster said, "For the farmer who already owns the ground and is suddenly deprived of its use, the DER regulations are an out-and-out confiscation of property without compensation."

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In 1978, a Meadville couple purchased 127 acres of land. When the husband died, his wife was left with a substantial mortgage payment. When she tried to sell the land, a wetland delineation stated that 90 percent of the property was a wetland, even though no surface water existed. The surviving spouse is now faced with a continuing mortgage and annual taxes on land that she cannot use and will not be able to sell as long as current regulations remain in effect.

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State requirements are tougher than federal requirements when it comes to wetlands. No matter how large or small a wet area is, a state permit is required by DER for any activity in a wetland. Permit approval must be obtained from both the Army Corps of Engineers and DER. Applicants often complain that agencies give contradictory advice. Of further complications, The Environmental Protec-

tion Agency under the authority of the Clean Water Act can veto permit approvals.

Tom Filip of U.S. Army Corps of Engineers said that the Corps issued 4,500 permits in 1989 and denied only 11. But farmers say they are often forced to drop their applications because they know it

will be denied or that the process doesn't seem worth the hassle or the paperwork or that it is too costly to do the studies.

Such was the case of an Erie farmer who wanted to use water from his wetlands as a secondary source to irrigate his strawberry crops. DER told him that he would need to present a "mitigation" plan to offset the loss of wetlands.

The farmer dropped his plans when he realized the process was too costly and his application would be denied anyway.

Paul and Mark Miller of Elizabethtown decided to withdraw their application also. The two brothers operate a dairy and poultry business on their 85-acre farm. Since the pasture has a few wet areas, the farmers wanted to install a water trough to tap in water for the cows in the pasture. It was less than one-half acre in a 12-acre pasture.

Two years ago the Millers worked with the Soil Conservation Office to have a plan submitted to DER, Corps, and the Fish Commission. The Corps designated a larger area of wetlands than Der.

"It seemed at that time that no one really knew the answers, that it was too complicated a process to continue," Miller said.

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Consequently, they dropped the application. Miller said, "We see value on having some type of regulation, but the approval process should definitely be more streamlined."

Although the Millers aren't asking to be reimbursed for wetlands on their land, they don't believe that small plots of wetland have that much value to the environment; therefore, small parcels should not be designated as wetlands.

There is another reason, farmers drop their applications. Take the case of Robert Brenneman from Strasburg who got a permit from DER for the plan worked out by the Soil Conservation District. Brenneman said he started his application two years ago. The Corps did not issue a permit to him, but neither did they say "no."

The frustration of waiting and the red tape caused Brenneman to write a letter to the Corps demanding a yes or a no by the fall of 1990.

What Is The Pennsylvania Landowners Association?

The PENNSYLVANIA LANDOWNERS ASSOCIATION is a network of landowners working together to protect property rights and economic opportunity while promoting responsible environmental stewardship on a state and national level.

- The Association supports the concept of preserving wetlands that truly have environmental value, but they believe the Constitution requires the government to compensate the landowner at fair market value.

- As far as endangered species they believe that no species is as valuable as the human species. When the loss of a particular species poses a threat to society sufficient to warrant restrictions on the use of privately owned land, then the entire threatened society should pay the landowner for the loss of use of the land.

- They encourage voluntary conservation practices and support federal incentives that promote voluntary participation in Conservation Easement programs. They oppose conservation easements by government agencies as mitigation devices or conditions attached to the permitting process. They believe the attachment of Conservation Easements to farmland repossessed by the federal government is especially onerous. The practice not only removes the most productive farmland from the agricultural community, it also reduces the local tax base forcing tax increases upon other landowners.

- They are concerned about all legislation that diminishes the entrepreneurial creativity of individuals who participate in the free enterprise system, or infringes upon the rights of those individuals to own and use their property at its most productive capacity.

For more information, write to PLA at P.O. Box 391, Waterford, PA 16441 or call (814) 796-3578.

The Corps did not respond.

"The work would have improved the water quality and made it much easier for use to keep it looking nice," Brenneman said.

He had a spring on his property that he wanted to use to pipe water to the meadow for the cows. Twenty-five years ago a waterway had been installed, but the upkeep had deteriorated. The Corps would not allow Brenneman to repair it. According to the Corps interpretation, the wetlands on the farm was twice as much as the Soil Conservation District had assigned.

"They made my lawn a wetland," said a perplexed Brenneman.

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not give primacy for DER, and would allow public input on exceptional value wetland designations.

While the Brightbill/Hess proposal attempts to put an end to "the bureaucratic nightmare," some farmers claim that it does not protect the farmer enough. The Pennsylvania Landowners Association, an outgrowth of a coalition of landowners supporting private land ownership, supports the federal proposal but not the state proposal. (Refer to chart for a comparison of the two proposals).

Lorraine Bucklin of the PLA said that while the Brightbill/Hess proposal begins to address the issue of constructive confiscation, it does not go far enough and leaves too many details to be determined by later regulations. The burden is on the landholder to prove all aspects of the law to get any compensation. This process is bound to be long, costly, and contested at every juncture by DER. The burden should be on the DER and the state to prove it does not owe the landowner full compensation whenever a permit is denied or some condition imposed.

"A fair wetlands protection program must balance both public interest and private rights."

PLA Analysis Of Federal And State Wetland Legislative Proposals

H.R. 1330/Ridge-Hayes

1. Provides mandatory compensation for type "A" wetlands (exceptional value) as well as mandatory compensation for any permit denial in a class "B" wetland where a permit must first be secured.

2. Legislative definition given to wetlands rather than a regulatory definition. Surface water must be present for 21 consecutive days, as well as obligate or water dependent plants being found on site.

3. Place limits on permit fees.

4. Places wetland authority with one federal agency, the Army Corps of Engineers, to eliminate interagency contradictions.

5. Defines in law what constitutes "Normal farming and silviculture practices."

6. Federal bill states the need to address the health hazards of wetlands, as well as the benefits.

Brightbill/Hess

1. No mandatory compensation provided for exceptional value wetlands or for permit denials.

2. Will follow regulatory definition currently in place until legislative definition is obtained. This may cause problems if state mapping occurs prior to federal definition being implemented.

3. No permit fee limits.

4. Does not delegate one sole state agency to handle the state program. State law should eliminate the PA Fish Commission from having regulatory authority over wetlands.

5. Does not define what constitutes "normal farming."

6. State bill only promotes education regarding wetland values.

7. State bill should contain a provision mandating that state law cannot be more stringent than federal law.