

Originally Processed With FOIA(s):
1998-0004-F[1]; 2015-0141-F

FOIA Number:
S

FOIA MARKER

**This is not a textual record. This is used as an
administrative marker by the George Bush Presidential
Library Staff.**

Record Group/Collection: George H.W. Bush Presidential Records
Collection/Office of Origin: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files

OA/ID Number: 29174
Folder ID Number: 29174-007

Folder Title:
Wetlands 1991 [2]

Stack:	Row:	Section:	Shelf:	Position:
G	15	25	4	5

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From Gary Andres to John Sununu Re: Wetlands Meeting (1 pp.)	5/15/91	P5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Wetlands 1991 [2]

Open on Expiration of PRA
 (Document Follows)
 By *JF* (NLGB) on 10/28/05

Date Closed: 1/5/2005	OA/ID Number: 29174-007
FOIA/SYS Case #: 1998-0004-F[2]	Appeal Case #:
Re-review Case #: 2005-0426-S	Appeal Disposition:
P-2/P-5 Review Case #:	Disposition Date:
AR Case #:	MR Case #:
AR Disposition:	MR Disposition:
AR Disposition Date:	MR Disposition Date:

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
 P-3 Release would violate a Federal statute [(a)(3) of the PRA]
 P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
 P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
 P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
 (b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
 (b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
 (b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
 (b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
 (b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE
WASHINGTON

May 15, 1991

5/21
1:15

MEMORANDUM FOR GOVERNOR SUNUNU

THROUGH: FREDERICK D. MCCLURE *FM*

FROM: GARY J. ANDRES *GJA*

SUBJECT: Wetlands Meeting

THE CHIEF of STAFF
has seen

We have scheduled a meeting tomorrow morning for Congressman Tom Ridge (R-PA), Congressman Don Young (R-AK) and Congressman John Paul Hammerschmidt (R-AR) to meet with you regarding the wetlands issue. They all support the President's "no net loss" policy, but desire to see this policy implemented through legislation, rather than regulation.

This is primarily a listening session for you. They will make the following points:

1. Because this issue cuts across a variety of agencies, (Corps of Engineers, EPA, Agriculture, etc.) they want to make sure the Administration speaks with "one voice" on the issue. Hearings are scheduled next week in the House Public Works Committee on the bill. Several Administration agencies, including the Corps, EPA and Agriculture have been asked to testify.
2. Because they believe their legislation is consistent with the President's policy, they would like the Administration's support for all or parts of their bill. The Ridge bill has bipartisan support from about 120 House Members.
3. They will suggest a great deal of flexibility on their part with respect to the substance of their legislation and offer to work with the Administration on changes that we want.

While the legislation is consistent with the "no net loss" policy, it would require some changes to the existing 404 program. I've attached a summary of H.R. 1330, the Ridge bill, for your review.

**SECTION-BY-SECTION OF THE
THE COMPREHENSIVE WETLANDS
CONSERVATION AND MANAGEMENT ACT OF 1991**

H.R. 1330

PURPOSE OF THE BILL

To replace the current Section 404 of the Federal Water Pollution Control Act with a new Section 404 that: (1) provides a concise and structured program for the identification and delineation of wetlands based upon their functions and values for regulatory purposes; and (2) balances the need for the effective and complete protection of the nation's important wetlands with the needs for essential community growth and the constitutional rights of landowners.

CRITICISMS OF THE CURRENT 404 PERMITTING PROCESS

The Army Corps of Engineers and the Environmental Protection currently administer the 404 program, with the EPA having final veto authority over the Corps' decision. The many criticisms of the current 404 process include:

- * It fails to cover activities that are destructive to wetlands.
- * It has become a bureaucratic morass for private landowners and local governments to survive due to its inadequately devised > decision-making process.
- * It ignores basic, fundamental rights of private property owners.
- * It covers privately-owned lands that provide minimal wetland functions and values at best.
- * It fails to provide incentives and flexibility to encourage private landowners and wetlands-users to act responsibly and invest in wetlands restoration, enhancement and preservation.

**GOALS OF THE NEW SECTION 404 AS IMPLEMENTED BY
THE COMPREHENSIVE WETLANDS CONSERVATION AND
MANAGEMENT ACT OF 1991**

The new legislation reforms the current 404 program to:

- * Cover additional activities that are destructive to wetlands.
- * Narrow the jurisdictional scope of the program to functional wetlands.
- * Categorize wetlands into three types with the most valuable class being more strictly regulated than under current law, the middle class being treated similarly to current law, but benefiting from the injection of a new balancing approach to the system, and the third class, which provides no wetland functions and values, being virtually unregulated.
- * Provide that the classification of a wetland in the highest category is considered a "taking" for which just compensation must be made.

- * Encourage the establishment of state programs that attempt to address wetland conservation on an ecosystem or watershed basis.
- * Unify the program in the Army Corps of Engineers.

SECTION 1:

"The Comprehensive Wetlands Conservation and Management Act of 1991."

SECTION 2.

Contains the findings and purpose of the legislation.

SECTION 3:

This section establishes the new Section 404 law.

Section 404 (a) prohibits the following activities from occurring in wetlands or waters of the U.S. without a permit issued by the Army Corps of Engineers:

- * The discharge of dredged or fill material into the waters of the U.S. or wetlands; and
- * The draining, channelization or excavation of wetlands;

Section 404 (b) authorizes the Secretary of the Corps to issue or deny permits in accordance with this act.

Section 404(c) establishes the guidelines and time frames for the classification of wetlands. In short, Type A wetlands are those that are of "critical significance to the long-term conservation of the ecosystem." Such conditions include their use in providing critical habitat, their size, and their scarcity. Type B wetlands are those that provide "ecologically significant wetlands functions." Type C wetlands are those that serve "limited or de minimus wetlands functions," or are "prior converted croplands."

Section 404 (d) establishes the procedure for providing compensation to landowners who owns lands that have been classified as Type A. In brief, the landowner is provided the option to seek compensation at the fair market value and transfer title to the government, or to retain the title to the property and abide by the prohibitions established for Type A wetlands. The landowner is given time to make the decision and is provided with the right to recover costs that may be incurred in determining "fair market value." The landowner may challenge any federal offer in the U.S. Court of Claims as currently provided for under the Constitution.

Section 404 (e) provides the terms and conditions under which the Secretary may issue 404 permits. In Type A wetlands, permits shall not be issued unless the activity would: cause only de minimus surface disturbance; may be a part of an active marsh management program; be in response to an "overriding public interest."

In Type B wetlands permits may be issued if, through the terms and

conditions of the permit, the watershed or ecosystem will not suffer a significant or unacceptable loss or degradation of wetlands functions and values. The factors considered here shall be: the quality and quantity of ecologically significant functions served by the area; the opportunities to reduce the impact through cost-effective avoidance or minimization; the environmental benefits that may occur through mitigation efforts.

Mitigation efforts may include:

- * minimization of impacts through project design;
- * the preservation, enhancement, creation or restoration of wetlands;
- * contributions to a state sanctioned mitigation bank program;
- * off-site compensation;
- * the construction of coastal erosion protection projects;
- * any properties that have already been acquired or which have > otherwise been set aside for preservation purposes shall not be > available for crediting as compensation in order to eliminate > potential "double-dipping."

Mitigation banks shall be created within each state with the primary objective of such programs to be the restoration, enhancement, or, where feasible, creation of ecologically significant wetlands.

Activities in areas that have been classified as Type C wetlands may be undertaken without authorization pursuant to this act.

Section 404 (f) delineates which activities that do not require permits. Some of the activities which would be exempt include:

- * Normal farming, silviculture, and aquaculture practices, and minor drainage;
- * Maintenance of such areas as dikes, dams, water control structures, levees, breakwaters, causeways and transportation structures.
- * Construction or maintenance of farm or stock ponds or irrigation ditches;

Section 404 (g) requires the Secretary to establish new standards, by rule, that will govern the delineation of lands as "wetlands." Such rule shall be established after consultation with the U.S. Fish & Wildlife Service, the U.S. Environmental Protection Agency, and the U.S. Soil Conservation Service. As described under this section, no rule shall result in the delineation of lands as wetlands unless clear evidence of wetlands, hydrology, hydrophytic vegetation and hydric soils are found to be present, nor shall it result in a finding of wetlands hydrology unless water is found at the surface for at least 21 consecutive days during the growing season. Wetlands incidentally created due to unintentional or temporary impacts of development activities shall also not be classified for jurisdictional purposes.

Section 404 (h) provides for the advanced classification of

wetlands by the U.S. Fish & Wildlife Service, in consultation with the Soil Conservation Service. The project shall be completed within 10 years and will classify the nation's wetlands into Type A, B and C. A public hearing in each county, parish, borough where land is being classified is also required to allow public comment prior to the implementation of the classification. The specific classifications shall be recorded in the property records of the county, parish or borough to the fullest extent practicable in order to avoid future misrepresentations of property in sales.

Section 404 (i) provides that the rules and regulations implementing the new Section 404 shall be adapted pursuant to public notice and opportunity for public comment. This is in direct response to historical problems involving the promulgation of regulations without public input.

Section 404 (j) clarifies that enforcement and penalties provisions under the new Section 404 process shall reflect current law.

Section 404 (k) provides for the treatment of federal projects.

Section 404 (l) states that this act shall not preclude or deny the right of a state or interstate agency to control the discharge of dredged or fill material into a navigable water within the jurisdiction of the state.

Section 404 (m) provides for the delegation of the program established by this section to the states under specific terms and conditions.

SECTION 4:

Provides the definitions of such terms as "wetlands," "normal farming activities," and "temporary impacts."

THE COMPREHENSIVE WETLANDS CONSERVATION AND MANAGEMENT ACT OF 1991

COSPONSORS OF H. R. 1330

ALABAMA

Sonny Callahan R
Bill Dickinson R
Claude Harris D

ALASKA

*Don Young R

ARIZONA

Jon Kyl R
John Rhodes R
Bob Stump R

ARKANSAS

*Beryl Anthony D
John Paul Hammerschmidt R

CALIFORNIA

Glenn Anderson D
Randy Cunningham R
William Dannemeyer R
John Doolittle R
Robert Dornan R
Wally Herger R
Duncan Hunter R
Jerry Lewis R
Al McCandless R

COLORADO

Wayne Allard R
Joel Hefley R
Dan Schaefer R

GEORGIA

Doug Barnard D

GUAM

Ben Blaz R

IDAHO

Richard Stallings D

ILLINOIS

Terry Bruce D
Jerrv Costello D

KANSAS

Jim Slattery D
Pat Roberts R

KENTUCKY

Jim Bunning R
Harold Rogers R

LOUISIANA

*Jimmy Hayes D
Richard Baker R
Clyde Holloway R
Jerry Huckaby D
William Jefferson D
Bob Livingston R
Jim McCrery R
*Billy Tauzin D

MICHIGAN

Dave Camp R
Guy Vander Jagt R

MINNESOTA

Vin Weber R

MISSISSIPPI

Mike Espy D
Sonny Montgomery D
Mike Parker D

MISSOURI

Bill Emerson R
Mel Hancock R
Ike Skelton D

MONTANA

Ron Marlenee R

NEBRASKA

Bill Barrett R

NEVADA

Barbara Vucanovich R

NEW YORK**NORTH CAROLINA**

Cass Ballenger R
Howard Coble R
W.G. Hefner D
Martin Lancaster D
Charlie Rose D
Charles Taylor R
Tim Valentine D

NORTH DAKOTA

Byron Dorgan D

OHIO

Doug Applegate D
John Boehner R
Paul Gillmor R
Bob McEwen R
Michael Oxley R
Donald Pease D

OKLAHOMA

Bill Brewster D
Mickey Edwards R
James Inhofe R

OREGON

Bob Smith R

PENNSYLVANIA

Bill Clinger R
Joe Kolter D
Joe McDade R
Austin Murphy D
*Thomas Ridge R
Don Ritter D
Richard Santorum R
Bud Shuster R
Bob Walker R
Gus Yatron D

SOUTH CAROLINA

Butler Derrick D
Robin Tallon D

TENNESSEE**TEXAS**

Joe Barton R
Jack Brooks D
Jim Chapman D
Larry Combest R
Tom DeLay R
Jack Fields R
Pete Geren D
Greg Laughlin D
Bill Sarpalius D
Charlie Stenholm D
Charlie Wilson D

UTAH

James Hansen R

VIRGINIA

Herb Bateman R
Rick Boucher D
Jim Olin D
Lewis Payne D
Owen Pickett D
Norman Sisisky D

WASHINGTON

Rod Chandler R
Sid Morrison R

WYOMING

Craig Thomas R

Jerry Costello D
Phil Crane R
Dennis Hastert R
Glenn Poshard D

INDIANA
Dan Burton R

IOWA
Fred Grandy R
Jim Lightfoot R
Jim Nussle R

NEW YORK
Ben Gilman R
Arno Houghton R
John LaFalce D
Mike McNulty D
Dave Martin R
Bill Paxon R

TENNESSEE
Bob Clement D
John Duncan R
Bart Gordon D
James Quillen R
Dan Sundquist R

47-D
 72-R

Total: 119

***boldface denotes
 authoring members
 5/13/91**

** TOTAL PAGE.006 **

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. Memo	From Roger Porter to John Sununu Re: Congressional Wetlands Meeting (2 pp.)	5/16/91	P/5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff, White House Office of
Series: Sununu, John, Files
Subseries: Issues Files
WHORM Cat.:
File Location: Wetlands 1991 [2]

Open on Expiration of PRA
 (Document Follows)
 By *SP* (NLGB) on 10/28/05

Date Closed:	1/5/2005	OA/ID Number:	29174-007
FOIA/SYS Case #:	1998-0004-F[2]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
AR Disposition Date:		MR Disposition Date:	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
 P-3 Release would violate a Federal statute [(a)(3) of the PRA]
 P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
 P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
 P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

(b)(1) National security classified information [(b)(1) of the FOIA]
 (b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
 (b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
 (b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
 (b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
 (b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE

WASHINGTON

May 16, 1991

THE CHIEF of STAFF
has seen

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: ROGER B. PORTER *RBP*
SUBJECT: Congressional Wetlands Meeting

You are currently scheduled to meet with Congressmen Ridge (R-PA) and Young (R-AK) on Tuesday, May 21, 1991, to discuss wetlands. The Congressmen are seeking Administration support for H.R. 1330, the "Comprehensive Wetlands Conservation and Management Act of 1991." The bill currently has 120 co-sponsors -- 46 Democrats and 74 Republicans.

Ridge and Young may also seek assurances that Bill Reilly's public statements opposing any legislative changes to the 404 program do not reflect the Administration's views. The Congressmen may also raise questions about the Delineation Manual. While the Manual is now undergoing OIRA review, EPA has distributed (without authorization) their version of the Manual to several Committees on the Hill, along with a series of Q's and A's.

BACKGROUND

H.R. 1330 would significantly change the way the government regulates wetlands under Section 404 of the Clean Water Act. Specifically, it would:

- Narrow the definition of wetlands to areas that are saturated at the surface for 21 consecutive days. (The revised Manual now going through OIRA review requires only 14 days of saturation at the surface - which can be measured at depths of 12 inches below the surface.)
- Eliminate EPA's 404(c) veto, and provides the Corps with complete permitting authority.
- Expand the scope of 404 to include wetlands destroyed by excavation and channelization.
- Eliminate FWS, NMFS, NOAA, and EPA's consulting role on individual permits.
- Classify wetlands into three categories and require the government to compensate owners of higher-value wetlands (Class A wetlands) for takings if landowners

elect to seek compensation.

- Allow development in Class A wetlands if the Corps determines one of the following: (1) there will be minimal damage; (2) overriding public interest requires use of the land; or (3) the project will result in overall environmental benefits.
- Require the Corps to determine permit conditions in Class B wetlands (alternative site analysis, minimization, and mitigation) sufficient to ensure no significant degradation of wetlands functions and values. The Corps, however, may waive compensatory mitigation requirements under one of the following conditions: (1) the adverse impacts are limited; (2) there is an abundance of similar wetlands in the area; (3) special hardship would occur; (4) no practicable and reasonable means of mitigation is available.
- Allow development to occur in Class C wetlands without restrictions.
- Establish a mitigation banking program on a state-by-state basis.

STRATEGY CONSIDERATIONS

While H.R. 1330 contains provisions which the Administration cannot support, such as the takings compensation requirements, it also contains many elements that we can support. These include the categorization of wetlands, the elimination of the use of strict sequencing; the development of mitigation banks; the introduction of a public interest test; and the streamlining of the program. In several areas, the bill goes farther than the reform options receiving majority support in the DPC process. Bill Reilly has objected to any legislation on the 404 program and is particularly resistant to measures, such as those included in H.R. 1330, that would eliminate EPA's role in wetlands protection.

The DPC is tentatively scheduled to meet on wetlands on May 28th. The objective is to produce a set of principles with regard to the 404 program that the Administration can ask Congress to include in legislation. Several of these principles will be supportive of H.R. 1330 without committing the Administration to support the entire bill. This would place the Administration slightly to the "left" of the House cosponsors of the bill. Such a position maybe helpful given that environmentalists have been successful in preventing the introduction of similar legislation in the Senate.

Typical Examples of Alaska Wetlands Horror Stories

St. Vincent de Paul Homeless Shelter

In Alaska the Corps based on EPA and Fish and Wildlife Service prevented the construction of a badly needed homeless shelter in Juneau because it was required to have a small parking lot which was to be built between the shelter and the road. This in an area with a parking lot across the street and parking lots on each of the adjoining lots. The parking lots on these properties were in the same relative location as the proposed lot for the homeless shelter.

Backscatter Radar

In 1989 the Department of Defense was attempting to construct an updated over the horizon missile detection and warning system. The antennas for this radar were going to have to be built on wetlands since the Corps and EPA consider 75% of the land in Alaska that is not rock or glacier ice to be wetlands. As a result of the required 404 permit process the local office of the Fish and Wildlife Service demanded that the permit be denied because "with the current state of "glasnost" and "perestroika" within the Soviet Union and the overall lessening of tensions between the two countries it is no longer in the 'Public' interest for these wetlands to be disturbed. (The construction would have resulted in the filling of less than 5 acres and the disturbance of less than 300 acres. This in a state with at least 130 million acres and a usage rate of 5/100 ths of 1%) The Corps did disregard the comments but agreed to deny 3 private permits that were pending as a sort of penance. It is very frightening that some GS-9 at the Fish and Wildlife Service is attempting to regulate the defense needs of this country.

CASE SUMMARY

LOCATION: 7th Congressional District - St. Martins Parish, LA

FACTS:

Melvin Wayne Domnigue, a St. Martins Parish crawfish farmer, obtained land on November 1988 for the purpose of constructing crawfish ponds. Previously the site was used as an illegal trash dump until Mr. Domingue hauled 30 truck loads of trash off of it. He obtained the permits he thought were necessary for constructing the ponds and then began building. The site has since become habitat for a variety of birds and wildlife.

VIOLATION:

Approximately two years later and near completion, the Army Corps of Engineers issued a cease and desist order to Mr. Domingue for violating Section 404 of the Clean Water Act. Mr. Domingue applied for an after-the-fact permit upon advice from the Corps.

OUTCOME:

Mr. Domingue corresponded with the Corps on numerous occasions regarding his case and asked for an expedient response so that he may complete his ponds by the 1991 season. It wasn't until Feb. 4, 1991 that Mr. Domingue heard back from the Corps after the application went through the lengthy public notice process. As a result, the Corps denied his request for a permit and ordered him to return the area to its original condition by August 1991.

SOURCE: (not available)

5/13/91

**SECTION 404 VIOLATION
CRAWFISH PONDS**

St. Martin Parish, Louisiana

Eighteen months after construction began on 35 acres of crawfish ponds in St. Martin Parish, Louisiana, the crawfish farmer was ordered by the Corps of Engineers to remove the levees for his ponds and return the area to its original condition by August, 1991. The farmer, who is 36 years old and a father of three, had mortgaged his home to pay for the cost of developing the ponds and now faces extreme financial hardship. The land in question includes two roadbeds, previously built for a proposed subdivision. The roadbeds gave public access to the property which in turn began to be used by the public as an unauthorized trash dump. Prior to development of the ponds, the crawfish farmer had removed well over 30 truck loads of accumulated trash from the site. The ponds have proven to be attractive habitat for birds and other wildlife that feed on the crawfish.

In fact, the site has become habitat for three families of rare Louisiana river otter. During the recent severe flooding of south Louisiana, the crawfish pond levees have served as habitat for many mammals that have been driven from their normal habitat by the flood waters.

The crawfish farmer had been unaware of the Section 404 permitting program. When his violation was brought to the attention of the Corps of Engineers, he applied for an after-the-fact permit. Following the public notice process, the permit was denied, primarily on the basis of the alternative site analysis that is required by the Section 404(b)(1) guidelines of the Environmental Protection Agency for "non-water dependent" activities.

The story of Melvin Wayne Domingue is a graphic illustration of the seemingly senseless difficulties that can face citizens as they unwittingly encounter the Section 404 permitting program.

CHRONOLOGY OF EVENTS:

• **November, 1988:**

Melvin Wayne Domingue, an employee of the City of Lafayette, Louisiana, began researching the development of an independent crawfish farm. Crawfish farming consists of shallow ponds surrounded by levees in which crawfish are cultivated for commercial use. He located land in St. Martin Parish, Louisiana that had been repossessed by the Evangeline Bank and Trust Company of

ville Platte, Louisiana after an unsuccessful development project. The unused property was serving as an unofficial trash dump site. Because he was not financially able to purchase the land, the bank agreed to allow Domingue to use the land and was willing to sell the land to him if his crawfish farming operation proved successful.

Domingue attempted to determine the permits that were needed for the project. He spoke to Parish officials, an attorney and the officials of the bank. He was informed that he needed a permit for an irrigation well, which he received. He did not know that the land was considered to be a "wetland" for Section 404 permitting purposes nor was he aware of the program itself.

After hauling away the trash -- 30 truck loads - and mortgaging his property for capital, he began to construct his ponds. The levees for the ponds were completed by October, 1989.

- April 18, 1990:

Domingue received a Cease and Desist Order from the Corps of Engineers for violating Section 404 of the Clean Water Act because he had no Section 404 permit for the levee construction. At this point, Domingue calculated that his ponds were 80% complete.

- April 19, 1990:

Domingue sent a letter to the Corps discussing his situation and seeking guidance.

- April 30, 1990:

The New Orleans District of the Corps sent Domingue a letter indicating that, since he was a first offender and "considering the nature of the work and your willingness to cooperate" no judicial proceedings would be convened "at this time". The Corps indicated that Domingue could file an application within 30 days for an after-the-fact permit for the work done as well as for the work remaining to be done. Domingue was sent an application form and a set of guidelines for completing the application.

- May 4, 1990:

Domingue filed the application for an after-the-fact permit with the required attachments. Domingue

indicated his need for quick action on the permit application since all work on the ponds needed to be completed by September, 1990 if the ponds were to be ready for the 1991 crawfish season.

- **May 10, 1990:**

The Corps acknowledged receipt of the application, which the Corps referenced as "SW (St. Martin Parish Wetlands) 90".

- **May 16, 1990:**

The Corps wrote Domingue asking for additional information.

- **May 17, 1990:**

Domingue sent the additional information and again asked for quick action on his permit request action due to the impending 1991 crawfish season.

- **June 7, 1990:**

The State of Louisiana Department of Environmental Quality sent Domingue a notice to be published in the official State Journal with respect to his application for a Water Quality Certification for the crawfish pond project.

- **July 17, 1990:**

The State of Louisiana Department of Environmental Quality issued the requested Water Quality Certification for the crawfish pond operation.

- **August 17, 1990:**

The Corps published a notice of application by Domingue for a Section 404 permit. (See attached).

- **August 21, 1990:**

During the public notice process for the after-the-fact permit application, the Corps received a letter of objection from the Orleans Audubon Society. The Society, through Mr. Joseph L. Vincent of Morrero, Louisiana, a member of the Society's Conservation Committee, stated:

"The application must be denied. The reasons are obvious..." (and references the objections to an

application for catfish ponds filed by Mr. Louis Harrell, referred to as SW (Rapids Parish Wetlands) 14.)" (See attached).

- **August 24, 1990:**

The Corps sent Domingue the objection from the Orleans Audubon Society and asked for a response within 20 days.

- **August 29, 1990:**

At the request of the U.S. Fish and Wildlife Service, the public comment period was extended until September 16, 1990.

- **September 7, 1990:**

Domingue responded in writing to the concerns of the Orleans Audubon Society. (See attached).

- **September 29, 1990:**

The Corps sent Domingue the written objections of the U.S. Fish and Wildlife Service and the Environmental Protection Agency. (See attached).

- **February 4, 1991:**

The Corps of Engineers denied the requested Section 404 permit for failure to comply fully with the EPA's Section 404(b)(1) guidelines. Specifically, the Corps stated that crawfish cultivation is considered to be a non-water dependent activity and that a "less damaging practicable alternative site appears to be available." The Corps ordered Domingue to "degrade to natural ground elevations all unauthorized impoundment levees which require Section 404 permits within 180 days of February 4, 1991." (See attached).

- **March 2, 1991:**

Domingue complained to the Corps of the lack of notice that he was operating in regulated wetlands, complained of the financial hardship of this decision, and stated his desire to appeal the Corps decision. (See attached).

- **March 19, 1991:**

The Corps responded that "there is no method for appeal within the Department of the Army permit program." (See attached).

CASE SUMMARY

LOCATION: 1st. Congressional District - Statesboro, GA

FACTS:

In 1982, Ray Hendley owned 11 acres of land in Statesboro of which he sold to a developer. The developer divided the land into 10 lots and constructed 2 homes before he went bankrupt. Thus, in 1989, Mr. Hendley repurchased the land from the bank and began building five of the eight remaining lots.

VIOLATION:

Three months later, he received a cease and desist order from the Army Corps of Engineers for violating the Clean Water Act. Mr. Hendley hired former Corps employee, Joel Hardy, to represent his negotiations with the Corps. Mr. Hardy told him that the cease and desist order only applied to the vacant lots. Acting on his advice, Mr. Hendley continued building the five homes and in March 1990, the Corps notified him that he was in violation of the cease and desist order.

OUTCOME:

After four months, he was told to remove the seven houses, including the two he didn't build. After further negotiation, he only had to remove two homes. However, because of the misunderstanding, he estimates that it has cost him \$250,000 in land development and construction costs. These costs do not include the future costs of restoration that is required for the damaged wetlands.

SOURCE: The Washington Post - Sat., May 11, 1991 - pg. E1 & E10

National Assoc. of Home Builders
15th & M St. N.W.
Washington, DC 20005
March 1991

WETLANDS CASE STUDY: STATESBORO, GEORGIA

In May 1982, Ray Hendley bought 11 acres in Statesboro, Georgia. He sold it to a developer who divided the site into 10 building lots and constructed two homes. This developer went bankrupt, so the bank asked Mr. Hendley if he would buy the property back. Mr. Hendley repurchased the land and, in September 1989, began construction on 5 of the remaining 8 lots, not suspecting he might be building in a wetlands.

In December 1989, Mr. Hendley received a Cease & Desist Order from the Army Corps of Engineers for violation of the Clean Water Act. Mr. Hendley hired a wetland consultant, Joel Hardy who used to work for the Corps, to represent him in the negotiations. He inquired and was informed by the Corps that Joel Hardy was qualified. Mr. Hardy advised Mr. Hendley that the Cease & Desist Order only applied to the vacant lots because he had found no wetlands on them. While Mr. Hardy began negotiations with the Corps over the extent of the wetlands, Mr. Hendley continued to work on the five homes he had started before the Cease & Desist Order was issued, and completing these homes in several months. Seven homes now stood on the site, with three vacant lots remaining.

In March 1990, the Corps notified Mr. Hendley that he was in violation of the Cease & Desist Order. Because EPA had requested to take the lead in investigating any enforcement action against Mr. Hendley, he contacted them to arrange a meeting. He was told that he would be allowed to discuss the situation once EPA received the paperwork from the Corps. Four months later, he was notified by letter that EPA had conducted an inspection of the site and that he had to remove all seven homes--*even the two homes he did not build*--and restore the wetlands to its original condition. After several meetings, the agencies and Mr. Hendley reached a compromise: only two homes needed to be demolished.

Mr. Hendley estimates that his misunderstanding of wetlands regulations has cost him \$250,000 in land development and construction costs, not to mention the future costs for leveling and restoration. Had Mr. Hendley sold these homes, instead of renting them, the agencies said

they would not have required the homes be taken down. In the meantime, Mr. Hendley waits for April when the first of the two leases expires and he must evict the tenants and raze their home. The second lease expires in June. Mr. Hendley may also face criminal penalties.

REAL ESTATE



The house on the right has to be moved or torn down because of wetland restrictions, while the house on the left can remain in a Statesboro, Ga., subdivision.

Protection of Wetlands Stirs Intense Debate

By H. Jane Lehman
Special to The Washington Post

To the untrained eye, little suggests that the two new houses standing next to each other in a Georgia subdivision are perched on anything but dry land.

Yet one of the \$60,000 homes falls on the wrong side of an invisible line where the federal government says the underground reaches of a nearby cypress swamp, considered to be federally protected wetlands, stops.

Consequently, the builder must move the offending house and one other to new locations within the next two weeks or tear them down.

The plight of Statesboro, Ga., builder Ray Hendley, who said he unwittingly built two of five homes on what a private consultant assured him was dry land, is the kind of anecdote land owners and developers revel in telling as debate over the

fate of the nation's wetlands intensifies.

The wetlands issue is coming to a head as the 1972 Clean Water Act comes up for reauthorization by Congress this year or next. Part of the law is aimed at protecting the country's bogs, swamps and marshes by requiring landowners to obtain a permit from the Army Corps of Engineers before filling in a wetlands area.

Wetlands, environmental advocates say, play a vital ecological role by providing habitat for fish and wildlife, improving water quality through trapping and filtering sediment, serving as a natural flood control system and preventing shoreline erosion.

With the reauthorization deadline looming, at least 15 wetlands-related bills have been introduced in Congress during the past four months and several hearings on the subject have been held.

Only 5 percent of the total landscape of the continental U.S. is wetlands, but much of it is concentrated along coastlines and in Florida, Georgia and Louisiana, according to the Corps of Engineers.

Three-quarters of the country's wetlands is privately owned and each year about 300,000 acres are lost to development, farming and other activities, according to the Corps. A recent U.S. Fish and Wildlife Service study found that the nation has lost more than half of the wetlands acreage that existed 200 years ago.

However, some landowners and users claim that federal regulators and the courts unreasonably have stretched the wetlands permit program to protect wetlands with marginal ecological value, dry ground, and pools and puddles that have been unintentionally created.

Some developers also have faced waits of two to three years to obtain

a wetlands permit to build on their land, said Milan Yager, environmental policy director for the National Association of Home Builders.

At the same time, he said, some builders spend hundreds of dollars in legal and engineering fees to clear the permit hurdle.

"The environmentalists have lost control here. Any reasonable person can see this is not reasonable," Yager said.

Stepped-up enforcement activities by the federal regulators also have drawn attention to the wetlands issue, said Robert G. Szabo, lobbyist for the National Wetlands Coalition, a group representing landowner interests, but primarily those of gas and oil companies.

"At least five Americans are in jail today because they were not sophisticated enough about wetlands law and didn't stop when told to," Szabo said.

See WETLANDS, E10, Col. 1

Wetlands Protection Issue Swamped in Controversy

WETLANDS, From E1

A soon-to-be-released report by a presidential task force is also expected to add further fuel to the wetlands controversy. The report identifies the current wetlands law as one of several areas of government regulation that needlessly run up the cost of housing by failing to differentiate between critical and marginal wetlands.

Seeking relief from the wetlands law, developers, farmers and other landowners are lining up in support of legislation recently introduced by Rep. Jimmy Hayes (D-La.), a measure fiercely opposed by the environmental community.

The proposal would narrow the scope of the protection program to areas where surface water is present for 21 straight days, replacing the current definition of water present 18 inches below the surface for seven days.

In addition, the legislation separates wetlands into three classifications, according to their value and function. The most pristine wetlands under the classification system could not be developed, but the federal government would have to compensate the owners for the fair market value of the property.

Wetlands falling in the middle-value range could be developed subject to the government permit process. The least valuable wetlands, however, no longer would fall under the federal jurisdiction under the Hayes plan.

The Hayes proposal also would allow developers to create new wetlands in order to gain permission to destroy existing wetlands. Current regulations do not allow "mitigation" efforts to enter the decision-making process until alternatives to disturbing the wetlands, including relocation to a site not owned by the applicant, are ruled out.

The environmental community is not taking the legislative challenge lying down, said Pamela Goddard, a lobbyist for the Sierra Club.

"The other side has spent a lot of money on this issue, but we have something they don't have: thousands of people who care about wetlands."

The Sierra Club believes the proposed classification plan gives landowners a loophole to get around President Bush's pledge that no net loss of wetlands will occur during his administration, Goddard said.

"If a classification system is adopted, what is a wetland today will not be a wetland tomorrow, so it will be easy to say there is no net loss," Goddard said.

Scott Feierabend, an official with

the National Wildlife Federation, rejected the deregulation of so-called dry wetlands, saying they should enjoy the same government protection.

"Environmental policies should be grounded in good science," Feierabend said. "It is not what a lay person considers to be a wetlands, but what the science community tells us is."

Scientists, he continued, are still learning about the functions dry wetlands perform, such as for nutrient retention and carbon recycling.

Goddard and Feierabend said their organizations would oppose the Hayes provision compensating landowners for pristine wetlands. "The ascribing of a public resource for private gain is a cost of doing business," Feierabend said.

The increased emphasis on mitigation in the Hayes bill is troubling, Goddard said, because "people who can afford [to build new wetlands] could then buy their way out of the law."

What's more, many efforts to create new wetlands have failed, Goddard said.

As for wetlands created accidentally, some have come to play "very valuable" roles worthy of protection, said Michael Davis, a Department of the Army assistant for regulatory affairs who oversees the Corps of Engineers' wetlands regulatory program.

Goddard said that it is unfair to blame wetlands protection for increasing the cost of housing. "A contractor has to get all kinds of permits," she said.

Any incremental increases in the cost of a home created by the wetlands permit process, she added, "is the price we pay for protecting our people and our environment."

Noting that less than 5 percent of permit applications are denied, Feierabend said environmentalists are nonetheless sympathetic to the delays permit seekers face. However, he contended that the solution lies not with wholesale changes in the law but with adequately funding and staffing the existing protection program.

The Corps already is trying to deal with the workload problems, Davis said. It plans to increase the regulatory staff 25 percent by September 1993 by shifting funds from other parts of the agency.

However, Davis said, the wetlands permit program is "not broken to the extent many people would have us believe."

Of the 10,000 applications evaluated last year, Davis said, more than 50 percent were handled in less than 60 days and most of the remaining decisions reached in less than a year.

CASE SUMMARY

LOCATION: 1st. Congressional District - Kitty Hawk, NC

FACTS:

Mr. Brian Newman bought a parcel of land in North Carolina with the intent of building a subdivision of townhomes. Upon buying the land he met with the Corps so that they could delineate what areas were wetlands. Two years later, Mr. Newman submitted an application to request a permit to fill wetlands only to find out that they had no record of the previous delineation. Thus, the entire delineation process had to be repeated in order to approve his application.

VIOLATION:

(not applicable)

OUTCOME:

Four years and thousands of dollars later, Mr. Newman finally resolved his problem with the Section 404 regulatory process after making a trip to Corps Headquarters in Washington D.C. They granted him a permit to fill .12 acres of wetlands under Nationwide Permit #26; however, he still awaits a response on a permit to fill .44 acres of wetlands under General Permit 31.

SOURCE: National Association of Home Builders
15th & M St. N.W.
Washington, DC 20005
December 1989/March 1991

CASE STUDY

The Promenade

Kitty Hawk, NC

SUMMARY

ACRES:

Project: 27.7

Wetlands: 5.08

Amount of wetlands
to be disturbed:
61,000 sq. ft.

COST:

Land: \$600,000.00

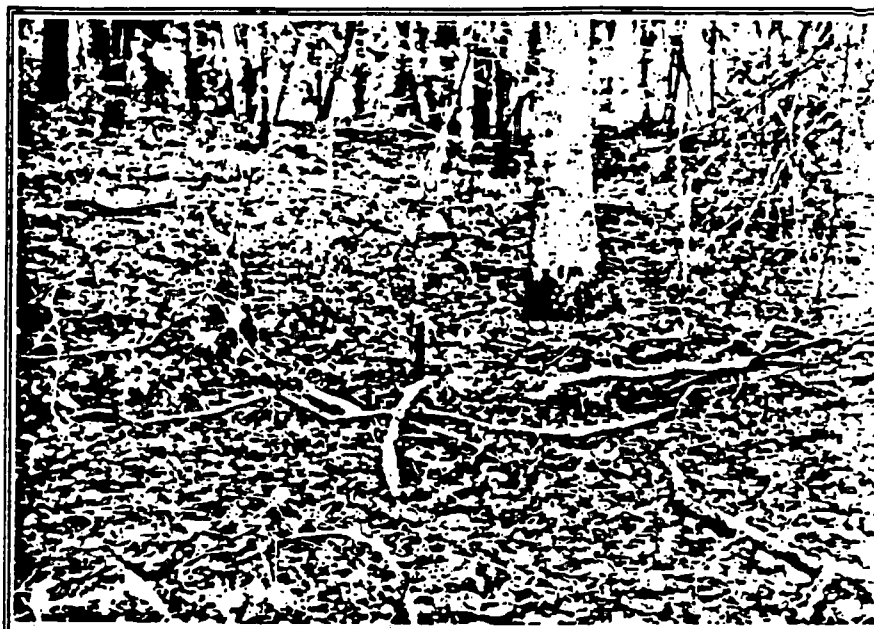
Project: \$13,850,000.00

ISSUE:

- timing involved acquiring local and federal permits
- delineation

ENVIRONMENTAL VALUE:

none assigned



A wetland on the site for *The Promenade*

Introduction

In December, 1985, Brian Newman first considered purchasing a parcel of land in Kitty Hawk, North Carolina, with the intention of developing it. Four years and thousands of dollars later, Brian has not yet broken ground on his development. He encountered problems with the Section 404 regulatory process: in his case, the timing involved in acquiring a permit from the federal government and then having the permit lapse as his local government took more than two years to issue its permit. On top of this, Brian was caught in the transition from the old to the new wetlands delineation manuals.

The Condition of the Land and the Wetlands

Kitty Hawk is located on the outer banks of North Carolina. The Outer Banks contain numerous long, narrow barrier islands characterized by relatively steep, broad, quartz sand beaches. These islands protect large landward sound complexes and front against a high energy and sometimes turbulent ocean. Some of the Outer Banks are

wetlands. Brian's parcel is located on the bay side of the Outer Banks. The land is characterized by a series of ridges and swales created by dune movement. Some of the swales on his land contain wetlands.

Brian bought this land originally with the intent of building a small subdivision of town homes. After many meetings with the town council, he changed his plans to constructing a mixed-recreational area. The town was pleased with his designs because he wanted to work with the shape and character of the land. He first had in mind to dig out the swales more in order to create large open ponds. The town preferred to maintain the integrity of the land so his current designs reflect minimal disturbance, developing only the high ground.

The Actions Taken by the Developer

On December 11, 1985, Brian met with a representative from the Corps and two engineers to assess the presence of wetlands and whether the Corps would have jurisdiction. They scheduled a second meeting to flag and delineate the Corps regulatory jurisdiction for January 7, 1986. Using this information, Brian placed an option to buy the land on December 31, 1985, bargaining with the seller on the basis of usable land *versus* total land area.

On March 18, 1986, Brian again met with a Corps representative in addition to a representative from the North Carolina Division of Coastal Management. Brian received a letter from the Corps district office, dated March 26, 1989, confirming that "the property was walked and the wetlands delineated." The letter went on to say that the project would primarily develop the high ground and that the building would be pile supported with no major filling taking place. The letter warned against allowing fill to be placed in wetland areas without "obtaining the required Federal authorization."

Brian then began negotiating with his local town council and the town planner to approve his plans and build his project. Brian located or paid to have done himself several studies: (1) a wetlands study conducted by Bissell Associates, an environmental consulting and engineering firm; (2) an environmental study on the area surrounding his land conducted by the University of North Carolina, which included climate, soil, geology, hydrology, hydrography, topography, biology, habitats, and species; (3) traffic studies regarding patterns and traffic signals necessary conducted by North Carolina Division Traffic Engineer; and (4) a demographic study conducted by the Chamber of Commerce.

The §404 Process

In November, 1988, Brian submitted an application to the Corps of Engineers to place fill in wetlands to construct two piers. The Corps reviewed his application and then declared that they had no record of the survey lines delineating the wetland boundaries, although they agreed that the meetings had taken place.

In January, 1989, the Corps representative investigated the site. She met with Brian's wetlands consultants but refused to verify the previously delineated wetlands. She also declared that the filled crossing requests would not be viewed favorably by the Corps. In March, 1989, Brian was told that a new delineation would have to be performed using the new joint manual, *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*. Further, the Corps district office had recently issued a new regulatory guidance letter [RGL] on the definition of adjacency that would apply to Brian's case.

Brian believed he had satisfied all of the requirements under the regulations. He continually worked with federal, state, and local officials. He believed that he had fulfilled his legal obligations because he met with the Corps on the site while the Corps representative placed flags delineating wetlands. The Corps sent him letters confirming the meetings. He was not trying to circumvent the regulations, but to work with them. Frustrated with the system, Brian arranged meetings with the Chief of the Regulatory Branch of the Wilmington District, Corps of Engineers. He came to Washington, D.C. to plead his case to the acting Chief of the Regulatory Branch of the Washington Corps office and to his senator.

The Problems

Brian did not want to destroy the wetlands on his property. Quite the contrary, he wanted to maintain them for their aesthetic benefits, as well as their environmental benefits.

In some cases, however, he was dealing with wetlands that were barely bigger than the span of his arms, as shown in the photograph to the right. For his project to succeed, he needed to place fill in the small wetlands to construct bridges and piers that would go over the wetlands, rather than through them.



Brian Newman standing in a wetland on his site

Throughout the §404 process, Brian kept meticulous notes of all his dealings with officials, including meetings and telephone calls. His meetings with the Corps led him to believe he had fulfilled his obligations. According to his records, the Corps representative had his own copy of the wetlands survey and made notes on it.

Once Brian received the March 26th letter from the Corps, he believed he could continue with his project. There was no sunset provision in this letter, nothing to indicate that this statement from the Corps would one day no longer be valid. Brian's project was destined to fail because of the *Catch-22*: the Corps permit was only good for two years but the local planning process took more than two years.

Current Status

After the meeting with the acting Chief of the Regulatory Branch in Washington, Brian met with the Chief of the Regulatory Branch in Wilmington. A new official visited the site to redesignate and recertify the wetlands. August 1, 1989, Brian Newman received a permit to fill .12 acres of wetlands under Nationwide Permit 26. He is awaiting a response on a permit to fill .44 acres of wetlands under General Permit 31 to construct road crossings. Brian will then check with the town council before beginning construction.

WETLANDS CASE STUDY: KITTY HAWK, NORTH CAROLINA

In December, 1985, Brian Newman first considered purchasing a parcel of land in Kitty Hawk, North Carolina, in order to develop it. Mr. Newman met with a Corps representative and two engineers to assess the presence of wetlands and whether the Corps would have jurisdiction. They scheduled a second meeting to flag and delineate the Corps regulatory jurisdiction for January 7, 1986. Using this information, Mr. Newman placed an option to buy the land on December 31, 1985, reducing his offer to the seller on the basis of usable land versus total land area.

In March 1986, Mr. Newman again met with a Corps representative and a representative from the North Carolina Division of Coastal Management, later receiving a letter from the Corps confirming that "the property was walked and the wetlands delineated." The letter went on to say that the project would primarily develop the high ground and that the building would be pile supported with no major filling taking place. Once Mr. Newman received the letter, he believed he could continue with his project. Mr. Newman then began negotiating with his local town council and the town planner to approve his plans and build his project.

In November, 1988, Mr. Newman submitted an application to the Corps of Engineers to place fill in wetlands to construct two piers. The Corps reviewed his application and then declared that they had no record of the survey lines delineating the wetlands boundaries, although they agreed that the meetings had taken place. In January, 1989, the Corps representative investigated the site, but refused to verify the previously delineated wetlands. She also declared that the Corps would not view the filled crossing requests favorably. In March, 1989, Mr. Newman was told that a new delineation would have to be performed using the new joint manual, **FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS**. Further, the Corps district office had recently issued a new regulatory guidance letter on the definition of adjacency that would also apply to Mr. Newman's case.

The first letter Mr. Newman received back in March 1986 contained no sunset provision or anything to indicate that the delineation statement from the Corps would one day no longer be valid. The Corps now told him that permits were only good for two years. Mr. Newman's project was destined to fail because of a Catch-22: assuming he did receive a permit, the local planning process took more than two years.

Mr. Newman took his case to the acting Chief of the Regulatory Branch in Washington, D.C. Eventually, a new official visited the site to redesignate and recertify the wetlands. On August 1, 1989, Mr. Newman received a permit to fill .12 acres of wetlands under Nationwide Permit 26. Later, he was granted a permit to fill .44 acres of wetlands under a state General Permit 31 to construct road crossings.

It cost Mr. Newman four years, thousands of dollars, and a trip to Corps Headquarters in Washington, D.C. to resolve his problems with the Section 404 regulatory process. His project had trouble with having his federal permit lapse while the local government took more than two years to issue its permit. Lacking a grandfather provision, he had also been caught in the transition from the old to the new wetlands delineation manuals.

CASE SUMMARY

LOCATION: 1st. Congressional District - Newport News, VA

FACTS:

Buddy Spencer and Dick Ashe owned a large site of land in Newport News where they intended to build single family homes. In 1983, they obtained approval and zoning from the county to construct Phases 1 and 2. Three years later they submitted plans to continue development of Phases 3, 4, and 5 on the remaining property. The local Corps stepped in claiming they had jurisdiction because of a Regulatory Guidance Letter (RGL) issued by Corps headquarters. They denied the permit because there was a possibility that migratory birds were present on the site.

VIOLATION:

(not applicable)

OUTCOME:

After 4 years and a lawsuit, Spencer and Ashe were able to continue work on the last three sections. The estimated damage is \$770,000 in carrying costs over the four years. This cost, however, did not include attorneys fees.

SOURCE: National Association of Home Builders
15th & M St. N.W.
Washington, DC 20005
December 1989

WETLANDS CASE STUDY: NEWPORT NEWS, VIRGINIA

Buddy Spencer and Dick Ashe owned a large site in Newport News, Virginia, on which they envisioned building a multi-phase development project to be called Tabb Lakes. In 1983, the York County Board of Supervisors formally adopted a land use plan, and classified Tabb Lakes property for single family residential development. In May 1984, Tabb Lakes' preliminary plan was formally approved; specifically, Phases 1 & 2 were approved, recorded, and developed.

In August 1986, Messrs. Spencer and Ashe submitted development plans for the remainder of property, 168 acres to be developed as Phases 3, 4, and 5. In November 1986, the Corps told the developers that there were wetlands on the site and that they were adjacent to "navigable waters of the United States." The Corps required the developers to prepare an environmental report documenting the project's purpose, the need for the project, alternatives to filling the wetlands (including complete avoidance of wetlands, the feasibility of purchasing an alternative, non-wetlands site, and building no project at all), the environmental impact of filling the wetlands, and mitigation.

In February 1987, the Corps changed its mind and stated that the wetlands were isolated but asserted that the Corps still had jurisdiction to regulate them. The local Corps district was using a Regulatory Guidance Letter issued by Corps headquarters to claim jurisdiction over the wetlands on the basis of the *possible* presence of migratory birds. This RGL had been issued without the public being allowed to comment on it. In May 1987, after negotiations, Messrs. Spencer and Ashe submitted a revised mitigation plan to the Corps agreeing to mitigate approximately 21 acres. The county and city agreed with the plan. One month later, the Corps reversed itself and denied the permit.

Messrs. Spencer and Ashe consulted an attorney, who said that the Corps' assertion of jurisdiction on the basis of the migratory birds RGL might be a violation of the Administrative Procedures Act. In September 1987, the developers filed a complaint seeking a declaratory judgment that

the RGL could not be used by the Corps to gain jurisdiction over these wetlands. In November 1988, the U.S. District Court for the Eastern district of Virginia, issued a summary judgment, declaring that the Corps did not have jurisdiction. In September 1989, the Court of Appeals denied the government's appeal and affirmed the lower court's ruling. The result of this decision is to render this RGL ineffective in the Fourth Circuit. It remains unchallenged in the rest of the country.

Four years, one lawsuit, and hundreds of thousands of dollars later, Messrs. Spencer and Ashe were able to begin work on the last three sections of their project. At the time their work had been stopped by the Corps they had expended \$1,279,000 in land acquisition and construction costs. While their project was on hold, they were paying *over \$30,000 per month* in carrying costs. The developers estimate that the first year of delay cost them \$339,000, not including the \$700,000 the mitigation plan would have cost, had the Corps had jurisdiction. After 18 months, the damage total had reached \$554,000. When they were finally able to continue construction 25 months after the Corps had ordered them to stop, the damage total reached nearly \$770,000, not including their attorneys fees.

CASE SUMMARY

LOCATION: 8th. Congressional District - Bucks County, PA

FACTS:

John Pozsgai, a Hungarian emigre, bought a 14-acre tract of land on the edge of his property. He acquired the land so that he could expand his truck repair business. Originally the land was used as an old dump site. However, when he bought it, he cleaned it up, maintained a fence along the stream, and placed clean fill on a few acres of land that were claimed wetlands. The land was classified as a wetland by the Corps and EPA although it wasn't indicated on the National Wetland Inventory Map.

VIOLATION:

The Corps and EPA charged him with violating the Clean Water Act. They also contend that he blatantly and knowingly filled wetlands and that his actions constituted a negligent disregard for the law.

OUTCOME:

Mr. Pozsgai was given the maximum sentence for an environmental crime. He was sentenced to 3 years imprisonment and fined more than \$200,000. He appealed his case and the Appeals Court upheld the original sentence. The twist to this case, however, is that state officials told Mr. Pozsgai that he didn't need a permit for clean fill and, because of the confusing process, the federal prosecutor was not sure what permit was required in this case.

SOURCE: Washington Times - Wed., Dec. 20, 1989 - Commentary/Editorial Section, Pg. F2

Washington Post - Wed, Feb. 7, 1990 - Editorial Section, pg. A22

Washington Post - Sat, Feb. 10, 1990 - Editorial Section, pg. A21

Environmental Reporter - Jan. 12, 1990 - pg. 1574

Current Development - July 20, 1990 - pg. 505

Washington Times - Wed, Aug. 8, 1990 - Commentary/Editorial Section, pg. G2

Wall Street Journal - Mon, Aug. 20, 1990 - pg. A6, Col. 1

The Associated Press - Mon., Oct. 1, 1990 - Washington Dateline Section

United Press International - Tues, Oct. 2, 1990 - Regional News Section

Universal Press Syndicate - Jan. 30, 1990

114TH STORY of Level 1 printed in FULL format.

Copyright (c) 1989 News World Communications Inc.;
The Washington Times

December 20, 1989, Wednesday, Final Edition

SECTION: Part F; COMMENTARY; EDITORIAL; Pg. F2

LENGTH: 575 words

HEADLINE: Wetlands first; people second

BYLINE: THE WASHINGTON TIMES; THE WASHINGTON TIMES

BODY:

John Pozsgai probably didn't expect any medals for cleaning up an unsightly dump site to put his business there. The Hungarian emigre just wanted a chance to expand his small truck-repair business to help support his wife and daughters. Well, not to worry about the medals. If the Environmental Protection Agency gets its way, Mr. Pozsgai's reward will be three years in prison.

His crime? In removing the more than 7,000 tires, the rusted auto parts and assorted junk that had piled up over the years at his Morrisville, Pa., property, Mr. Pozsgai put down top soil and earth. That, said the EPA, is a violation of wetlands protections laid out in the Clean Water Act.

There is, you see, a small stream that, when it's not bone dry, runs along the eastern edge of the 14-acre property. That supposedly makes a junkyard a wetland, even if it's bounded by two major highways, a tire dealership and an automobile salvage yard. Never mind that it's not on the Department of Interior's National Wetland Inventory Map. Never mind that, as the government acknowledges, Mr. Pozsgai put no pollutants or hazardous waste on the property. Or that he didn't threaten endangered species or water quality.

Under the prodding of EPA officials waving President Bush's "no-net-loss-of-wetlands" campaign pledge, a district court sentenced him to the maximum three years in jail and fined him more than \$200,000. This is the longest jail term ever for environmental violations, even for real polluters.

Mr. Pozsgai's real crime in this case seems to be that neither he nor the engineers he consulted were immediately able to negotiate the regulatory maze that allows you to put topsoil on your property. It takes a permit to do that on a wetland, depending on which regulations you read, whose advice you get and what day of the week it is. Washington Legal Foundation lawyers representing Mr. Pozsgai, who had no prior criminal record, say he didn't need a permit. But EPA undercover-types, who secretly filmed trucks bringing the illicit topsoil to the property, say he did. An appeals court has tentatively scheduled a hearing on the case next month.

Mr. Pozsgai, unfortunately, isn't the only one to run afoul of the wetlands police. A Florida retiree and his son were jailed after putting a half-acre of clean fill and topsoil on his property without permit, although state officials told him none was needed. And Alaska officials are understandably worried that a no-net-loss policy would mean no net growth and no new oil there because more than half the state, and almost all the

LEXIS® NEXIS® LEXIS® NEXIS®

(c) 1989 The Washington Times, December 20, 1989

37-million-acre oil-rich North Slope, is considered wetlands.

These are the sorts of problems that occur when save-the-whales-style environmentalism jumps off the bumper stickers and starts chasing real people in real life. Acid-rain legislation means throwing coal miners out of their jobs, global-warming activists want to keep the Third World in pristine low-emission poverty - all for uncertain benefit.

Likewise, wetlands worship may be nice in the abstract, but in practice it means putting the nation's energy security on hold and beating up on small businessmen. The irony is that Mr. Pozsgai, who fled communist oppression in Hungary, now finds his freedom trampled under the EPA jackboot. If this is what Mr. Bush and EPA Administrator William Reilly mean by a kinder and gentler America, let them explain it to John Pozsgai.

147TH STORY of Level 1 printed in FULL format.

Copyright (c) 1990 The Washington Post

February 7, 1990, Wednesday, Final Edition

SECTION: EDITORIAL; PAGE A22; LETTERS TO THE EDITOR

LENGTH: 88 words

HEADLINE: A Medal for John Pozsgai

SERIES: Occasional

BODY:

I was shocked to read James J. Kilpatrick's insensitive op-ed column on the EPA's prosecution of one John Pozsgai ["Don't Cry for John Pozsgai," Jan. 30].

Mr. Pozsgai got what he asked for, eh? Three years in a federal prison and a \$ 200,000 fine for cleaning up a dump site next door to his property whose only ' ' wetlands ' ' were caused by thousands of discarded rubber tires blocking a small stream on the property? Mr. Pozsgai should have gotten a medal instead of a jail sentence. SAMUEL SHEPARD JONES JR. Washington

TYPE: LETTER

73RD STORY of Level 1 printed in FULL format.

Copyright (c) 1990 The Washington Post

February 10, 1990, Saturday, Final Edition

SECTION: EDITORIAL; PAGE A21; FREE FOR ALL

LENGTH: 588 words

HEADLINE: Dumping on the Wrong Man

SERIES: Occasional

BODY:

James J. Kilpatrick's Jan. 30 op-ed column lambasted The Wall Street Journal for its sympathetic portrayal of John Pozsgai, a Pennsylvania man who got a three-year jail term and a fine of more than \$ 200,000 for failing to obtain a permit for putting topsoil and fill on five acres of his own property. Kilpatrick's version of the case was so partisan that it sounded as though it came straight from the federal government's court brief -- and it did.

Kilpatrick had read the government's brief but not the briefs filed on behalf of Pozsgai. When, after the column appeared, he learned more of Pozsgai's side of the case, he seemed to revise his opinion and agree with me in a personal conversation that three years in the slammer was a little harsh for Pozsgai's "crime."

Pozsgai, a Hungarian immigrant and self-employed truck mechanic, had no criminal history. He had cleaned up a 14-acre dump site near Trenton, N.J., and had removed junk and thousands of old tires from a tiny stream that ran along his property's edge. He also had maintained a protective fence along the length of the stream and put topsoil and clean nontoxic fill on a few acres that the Corps of Engineers and the EPA claimed were "wetland."

No one, though, ever accused Pozsgai's property of resembling what the government calls "familiar" types of wetlands -- "marshes, swamps and bogs." The former dump site supported no fish or wildlife, and a probation report concluded that Pozsgai's actions constituted no serious crime. Even Corps of Engineers regulations allow up to 10 acres of isolated wetlands to be filled -- and Pozsgai's property could be so considered, the federal government conceded.

Yet the three-year prison term Pozsgai received was the maximum under the law and the longest sentence by several times over ever imposed in U.S. history for any environmental crime. Pozsgai was also one of the first people to be criminally prosecuted for a regulatory offense that had previously been enforced in civil courts.

As Kilpatrick admitted, the "wetlands provisions of the Clean Water Act are not models of draftsmanship" -- especially since the word "wetland" appears nowhere in that act.

In fact, the law is so confusing that the federal prosecutor argued that Pozsgai would have needed a "National Pollutant Discharge Elimination Permit" from the EPA to bring fill onto his land. Not so. In reality, this permit is not required for filling activity but for factories that want to discharge waste

LEXIS® NEXIS® LEXIS® NEXIS®

(c) 1990 The Washington Post, February 10, 1990

into rivers. Surely Pozsgai's confusion was understandable when even the prosecutor didn't know what permit was required in the case. State officials added to the confusion when they told Pozsgai that he didn't need a permit for clean fill.

The EPA and the Corps of Engineers want a "no net loss of wetlands" policy that would promise more such Draconian enforcement. The issue, however, obviously is complicated and requires, as President Bush has stated, that "needs of a clean environment" be reconciled with "needs of a strong economy."

In his State of the Union address, Bush announced his intention to make the EPA into a Cabinet post, which offers hope that overzealous enforcement activities will fall under more responsible supervision. Otherwise, we can expect more cases of environmental officials using strong-arm tactics against small landowners and businessmen, farmers and senior citizens. -- Paul D. Kamenar

The writer is executive legal director of the Washington Legal Foundation, which represents John Pozsgai.

GRAPHIC: PHOTO

TYPE: LETTER

Litigation

APPLICATION OF FEDERAL SENTENCING GUIDELINES CHALLENGED IN APPEALS OF TWO WATER ACT CASES

Three men sentenced for criminal Clean Water Act violations have argued that the U.S. Sentencing Guidelines used to compute their sentences were misapplied in their cases in appeals filed in two federal appeals courts.

Ocie Mills and his son Carey C. Mills argued that sentences imposed after they were convicted of illegally filling wetlands on their property in Florida were improperly determined and overly harsh (*U.S. v. Mills*, CA 11, No. 89-3325).

John Pozsgai, sentenced July 13, 1989, to serve three years in prison for placing clean fill on property the federal government said was wetlands, filed his appeal in the U.S. Court of Appeals for the Third Circuit (*U.S. v. Pozsgai*, CA 3, No. 89-1640).

Both cases assert a series of reasons for invalidating the convictions of the three men, and they challenge the way the sentencing guidelines were applied to calculate the sentences imposed against them. The sentencing guidelines were prepared by the U.S. Sentencing Commission after Congress passed the Sentencing Reform Act in 1984 and were upheld by the U.S. Supreme Court in January 1989 (*Mistretta v. U.S.*, US SupCt, No. 87-7028, 1/18/89; 19 ER 2131).

The guidelines were established to help standardize sentences for similar criminal violations regardless of where the offenses were committed or which federal judge does the sentencing. Different crimes are assigned different base levels, and prosecutors may suggest either increases or decreases in the levels, depending on various mitigating or exacerbating factors. A corresponding sentence is then imposed, based on a formula contained in the guidelines themselves.

Mills First Sentenced Under Guidelines

The Mills were the first to be sentenced for environmental crimes using the guidelines when they were ordered to serve 21 months in prison, pay \$5,000 fines, and restore the wetlands after being convicted by a jury of knowingly discharging fill on their property (*U.S. v. Mills*, DC NFla, No. 88-03100-WEA, 4/13/89; 19 ER 2633).

Court papers filed by the Mills' attorney, Ronald W. Johnson, challenged the sentences on the grounds that the sentencing guidelines were incorrectly applied.

The Mills argued that the base offense level No. 6, for "Mishandling of Other Environmental Pollutants" under Section 2Q1.3(a) of the guidelines, was improperly increased by six levels under Section 2Q1.3(b)(1)(A) because the offense allegedly involved ongoing pollutant emissions that resulted in "actual environmental contamination."

According to their brief, enhancement of the sentence under that section should not have been allowed because the fill material was sand and other dredged material indigenous to the area and no actual contamination occurred. A government witness admitted that the site was not damaged and could be completely restored by removing the fill material, they said.

The appeal also argued that the base level was improperly enhanced on the grounds that the violation involved filling wetlands without a permit, even though failure to obtain a permit was already part of the base offense. The Mills' brief said they were being unreasonably punished twice for the same behavior.

The brief concluded that the sentences imposed in the case amount to cruel and unusual punishment in violation of the

Eighth Amendment to the U.S. Constitution, considering that no person and no habitat was harmed.

Johnson told BNA Dec. 20, 1989, that he is trying to get the two men released pending appeal but that his efforts to that point had been unsuccessful. He also said that no date had been set for oral argument in the case.

Legal Foundation Challenges Pozsgai Prosecution

John Pozsgai was sentenced to serve three years in prison and pay a \$202,000 fine after he was convicted of placing earth, topsoil, and bricks on 5 acres of an old dump site without a Water Act permit (*U.S. v. Pozsgai*, DC EPA, No. Cr.88-00450, 7/13/89; 20 ER 579).

Pozsgai, a self-employed truck mechanic, bought the property to build a garage for a small truck repair business he owns, according to the Washington Legal Foundation, a pro-free enterprise public interest law and policy center that agreed to take his case.

In papers filed with the U.S. Court of Appeals for the Third Circuit the foundation attacked the prosecution and sentencing on a variety of theories.

First, the group challenged the government's alleged failure to prove that the dumping involved land adjacent to waters of the United States under the jurisdiction of the U.S. Army Corps of Engineers. Also, the filling activity was not illegal because it qualified for a nationwide permit applicable to wetlands located above the headwaters of navigable water, the brief said.

"Remarkably, with all of the Corps engineers examining Mr. Pozsgai's property for more than a year, with the secret electronic surveillance set up by EPA with their video cameras, and with numerous aerial and land photographs, no evidence was introduced to prove that this tiny stream had any water in it that flowed into the Pennsylvania Canal," the appellate brief argued.

The trial court should have acquitted Pozsgai on these grounds, the brief said.

Even if the prosecution was proper, however, the sentencing was not, according to the brief. It argued that Sections 2Q1.3(b)(1) and (4) of the guidelines were misapplied to reach a penalty that was overly harsh considering there was negligible harm to the environment. If the guidelines were applied properly then the guidelines are themselves flawed, the brief concluded.

Finally, the brief argued that imposition of such a sentence on an elderly man with no prior criminal violations and meager earnings constituted cruel and unusual punishment in violation of the U.S. Constitution, especially in light of the "minor gravity of the offense."

Paul D. Kamenar, an attorney with the foundation, told BNA Dec. 11, 1989, that oral argument in the case was scheduled for Jan. 12. Pozsgai is free pending his appeal.

Solid Waste

BUSH ADMINISTRATION WILL NOT OFFER TAX ON VIRGIN MATERIALS TO ENCOURAGE RECYCLING

The Bush administration Jan. 3 denied it would propose a tax on the use of virgin raw materials as a way to encourage the use of recycled materials.

"Darman said it isn't true," a White House spokesman said, referring to Office of Management and Budget Director Richard Darman.

Other officials said the administration, eager to encourage recycling, was considering an unspecified per-ton charge on virgin materials used in the manufacture of paper, glass,

► Prohibits expansion of in-state waste treatment facilities if expansion is designed to accommodate wastes generated outside the state.

Case Governed By Prior High Court Ruling

The council said in a June 28 press statement that the approach taken by South Carolina is similar to one that was invalidated by the U.S. Supreme Court in 1978. That decision, *Philadelphia v. New Jersey*, found that New Jersey's attempt to prevent out-of-state wastes from being disposed of in its landfills violated the Constitution's Commerce Clause (437 U.S. 617, 11 ERC 1770; 9 ER 356).

Since that time, however, at least one federal court has found that a state could reasonably restrict access to its hazardous waste treatment facilities. The court in *National Solid Wastes Management Association v. Alabama Department of Environmental Management* ruled that Alabama's law, which prohibited disposal of hazardous wastes from states that have no waste disposal facilities or that prohibit disposal of those wastes within their borders, did not violate the Commerce Clause (729 FSupp 792, 30 ERC 1985, 1/12/90; 20 ER 1621). The decision is on appeal to the U.S. Court of Appeals for the Eleventh Circuit.

The council said that it was sympathetic to the state's concern that it not be made to assume more than its fair share of the United States' hazardous waste disposal burden. It also said that it is working with other states to prod them to develop hazardous waste disposal capacity and share responsibility for managing those wastes. The state should, however, pursue its goals through constitutional means, the council said.

"In a search for equity the state cannot undermine the commercial and industrial fabric of this nation. These laws bar access to two incinerators and a secure landfill in South Carolina that are needed to properly dispose of hazardous wastes produced in other states. The hazardous wastes being brought to South Carolina are the result of manufacturing cars, home appliances, and other things for use by South Carolina citizens—we are one nation when it comes to manufactured goods, we must have one nation for disposal of the waste resulting from those goods," said Richard C. Fortuna, the council's executive director.

Fortuna urged states that had developed hazardous waste disposal capacity to pressure the Environmental Protection Agency to do more to get recalcitrant states to assume their waste disposal responsibility. He concluded that the unconstitutional approach taken by South Carolina could do more harm than good and might actually "encourage generators to use unsafe and even illegal facilities for waste disposal that will create our next generation of superfund sites."

Litigation

GOVERNMENT FILES BRIEF IN POZSGAI APPEAL ADMITTING ERRORS IN LOWER COURT PROCEEDINGS

An appellate brief the government filed in a major criminal wetlands prosecution misrepresented photographs the government introduced at trial, the Justice Department admitted July 11 (*Pozsgai v. U.S.*, US SupCt, No. 89-1735, 7/11/90).

The brief filed with the U.S. Court of Appeals for the Third Circuit erroneously said the photographs showed a stream on the defendant's property that connected with a Pennsylvania canal, the department said. The photos, which supported the government's claim that it had jurisdiction over the defendant's property, do not show such a connection, DOJ admitted.

The admission was contained in a reply brief filed in response to a petition for Supreme Court review filed May 9 by attorneys for the defendant, John Pozsgai (21 ER 270).

The government also admitted that a prosecutor and a probation officer involved in Pozsgai's sentencing for criminal wetlands violations may have misled a federal district court when they stated that the minimum fine under the Clean Water Act and federal sentencing guidelines was \$200,000. The minimum fine was actually \$5,000 if Pozsgai was sentenced to serve time in federal prison, the brief said.

Pozsgai was convicted of violating the Water Act by placing fill material on wetlands on his property without a permit. He was ordered to pay the \$200,000 fine and sentenced to three years in prison (20 ER 579). Pozsgai's appeal was rejected by the U.S. Court of Appeals for the Third Circuit in January (20 ER 1659).

Even though the government admitted that the photographs used at the trial did not actually show that the stream and canal were connected, it recommended that the high court decline review of the case. The government said in its brief that "the record is admittedly quite thin" without the photographs. But the jury could have inferred from other evidence available at trial that the government had jurisdiction over the filling activities on Pozsgai's property, DOJ said.

Photographs Were Only Evidence, Kamenar Says

Paul D. Kamenar, executive legal director for the Washington Legal Foundation and Pozsgai's attorney throughout the appeals process, told BNA July 18 that the admission concerning the photographs was important. He said the photographs were the only evidence of the federal government's jurisdiction over the property at the time the misrepresentation was made to the appeals court. That admission should require the high court to vacate and remand the Third Circuit's denial of Pozsgai's appeal, he added.

Kamenar also said the Supreme Court should address the question of whether the Water Act's definition of "pollutant"—requiring placement of fill or other materials "in water"—precludes a prosecution where earth is placed on earth.

The case gives the high court an opportunity to rein in efforts by the Army Corps of Engineers and the Environmental Protection Agency to exercise jurisdiction over dry lands that do not actually exhibit wetlands characteristics, he added.

Kamenar said several Missouri farmers had filed an *amicus curiae* brief in the case that described how EPA and the corps were improperly regulating dry farm land based on an argument that the farm lands were technically wetlands.

Water Pollution

MULTISTATE DIOXIN LOADING STANDARD UNREALISTIC, UNWORKABLE, INDUSTRY SAYS

PORTLAND, Ore.—(By a BNA Staff Correspondent)—The Environmental Protection Agency's proposed dioxin standard for the Columbia River basin is unrealistic and unworkable, several paper industry representatives said July 17.

Eight U.S. bleached kraft pulp mills would be affected by the proposed standard. Representatives from the companies said at an agency hearing that the proposed standard was based on bad science and would be impossible to achieve. They also said EPA was wrong for taking over a state function in setting the standard, which they claimed would put Northwest paper mills at a competitive disadvantage with mills in other states.

39TH STORY of Level 1 printed in FULL format.

PAGE 26

Copyright (c) 1990 News World Communications Inc.;
The Washington Times

August 8, 1990, Wednesday, Final Edition

SECTION: Part G; COMMENTARY; EDITORIAL; Pg. G2

LENGTH: 534 words

HEADLINE: Guilt by inference

BODY:

Oops. Remember John Pozsgai, the guy who cleaned up a Pennsylvania tire dump only to be dragged off to jail in handcuffs? Prosecutors charged he polluted wetlands when he put topsoil on the property, and a judge subsequently hit him with a three-year jail term and a \$200,000 fine. Well, it turns out that the Justice Department was missing a key part of its case, such as evidence that the old tire dump was a federally protected wetland in the first place. This new twist in the case says as much about the government's zany idea of "wetlands" as it does about Mr. Pozsgai's guilt or innocence.

To prove someone is guilty of wetlands violations, the government has to show, at a minimum, that the accused has dumped a "pollutant" into water and that the water in question is used for interstate commerce and therefore subject to federal jurisdiction.

Now, Mr. Pozsgai hardly qualifies as a water polluter. He cleaned up what The Washington Post described as "a ragged, weed-covered lot bordered by a four-lane state highway, a tire shop, a lumberyard and a junkyard filled with smashed cars."

But then, this lot hardly qualifies as a byway of interstate commerce and the feds who prosecuted him never bothered to prove otherwise. Assistant U.S. Attorney Seth Weber, who prosecuted the case, said the government had photos showing that a "stream" adjacent to the Pozsgai property ran into the Pennsylvania Canal and that the canal was used for interstate commerce. This hipbone-connected-to-the-thighbone argument sounds bizarre enough. Worse, the government lied. It had no such photos. As Solicitor General Kenneth W. Starr recently conceded, prosecutors' claims were "inaccurate. We have examined the photographs and determined that they do not show the stream flowing into the canal."

But Mr. Starr isn't giving up on the photos. In a brief opposing Mr. Pozsgai's appeal of his sentence and fine, the solicitor general argues that the stream flowed toward the canal and the jury "could reasonably infer" they connected. He further says that the canal "obviously could have handled" shipping and that the jury could infer it was "susceptible to use in interstate commerce [emphasis added]." Finally, he argues that when last seen, the canal "ran toward the New Jersey border," and so met the interstate requirement. Presumably Mr. Starr means people to take these kangaroo-court arguments seriously, and in view of the fact that a man's liberty hangs in the balance there's little choice. But we wonder how Mr. Starr and Mr. Weber would like to be slammed into jail for three years on could-bes, might-have-beens and references to emanations, essences and gravitational possibilities.

(c) 1990 The Washington Times, August 8, 1990

PAGE 27

Yesterday the Washington Legal Foundation filed a brief on Mr. Pozsgai's behalf in its continuing campaign for high-court review of the case. Actually that's not going far enough. When a guy who cleans up a tire dump ends up behind bars, thanks to a "conservative" often mentioned as a potential Supreme Court justice, and when an anti-water-pollution law condones federal land-use zoning, then the concept of wetlands protection needs review. Or so one could reasonably infer.

89TH STORY of Level 1 printed in FULL format.

Copyright (c) 1990 The New York Times Company:
Abstracts
WALL STREET JOURNAL

August 20, 1990, Monday

SECTION: Section A; Page 6, Column 1

LENGTH: 69 words

HEADLINE: WHOSE WETLANDS MISTAKE

ABSTRACT:

Editorial notes that John Pozsgai was sentenced to three years in prison and fined \$202,000 for placing topsoil and clean fill on part of his Pennsylvania property that was considered 'wetland' by EPA; contends that blunt use of 'wetland' statute in Pozsgai case reflects troublesome tendency of environmental movement to use full weight of law and its own heavy arrogance to bludgeon those who stand in its path

GRAPHIC: Photograph

TYPE:
EDITORIAL

SUBJECT:
WETLANDS; ENVIRONMENT; EDITORIALS; SENTENCES (CRIMINAL)

ORGANIZATION:
ENVIRONMENTAL PROTECTION AGENCY (EPA)

NAME:
POZSGAI, JOHN

POZSGAI, JOHN

71ST STORY of Level 1 printed in FULL format.

The Associated Press

The materials in the AP file were compiled by The Associated Press. These materials may not be republished without the express written consent of The Associated Press.

October 1, 1990, Monday, PM cycle

SECTION: Washington Dateline

LENGTH: 500 words

HEADLINE: Court Turns Down Appeal of Pennsylvania Man in Environmental Case

BYLINE: By RICHARD CARELLI, Associated Press Writer

DATELINE: WASHINGTON

KEYWORD: Scotus-Pozsgai

BODY:

The Supreme Court today turned down the appeal of a Pennsylvania man given the longest prison sentence and biggest fine in U.S. history for any person convicted of an environmental crime.

The court, without comment, let stand the three-year prison term and \$200,000 fine John Pozsgai of Morrisville, Pa., received for violating the Clean Water Act.

Pozsgai's lawyers told the justices his punishment was unfairly severe for "what was essentially a regulatory offense."

"There was no evidence that any wildlife or fishery habitat was harmed, or that water quality was impaired," Pozsgai's appeal said.

Yet his punishment included, the appeal said, "the longest unsuspended jail term imposed in the history of the United States for any environmental crime, including the dumping of extremely toxic and hazardous wastes and where people were even injured and killed."

Pozsgai, 57, operates a truck-repair business from a garage behind his house in the small town near Trenton, N.J. Across the street from his house is a 14-acre lot that for years had been used as a dumping site, mainly for thousands of old tires.

A small stream ran through the lot, leaving at a point not far from the Pennsylvania Canal.

While Pozsgai in 1986 was negotiating to buy the lot, engineering and environmental consultants told him the lot was considered protected "wetlands." Any development would have to be approved by the U.S. Army Corps of Engineers, Pozsgai was told.

He began filling a portion of the property even before finalizing the purchase in June 1987.

The Associated Press, October 1, 1990

In April of that year, a Corps of Engineers inspector warned Pozsgai that federal law barred him from continuing to deposit fill on the land without first obtaining permits.

According to court records, truckloads of fill continued to be dumped on the land.

In September 1987, Pozsgai was informed that the filling was a violation of the Clean Water Act and was ordered to stop all such activity. The filling continued.

The federal government sued Pozsgai in the summer of 1988 and obtained a court order directing him to immediately stop depositing fill on the land.

In a jury trial, Pozsgai was convicted on 40 counts of violating the Clean Water Act. Asked by federal prosecutors to "send a message to all property owners," U.S. District Judge Marvin Katz sentenced Pozsgai to three years in prison, five years of probation and one year of supervised release. He also fined him \$200,000.

The 3rd U.S. Circuit Court of Appeals upheld the conviction and sentence last January.

In the appeal acted on today, Pozsgai's lawyers argued that his due-process rights had been violated at trial and that his punishment was too stiff.

"Since the Justice Department has announced its intention to use this case and others like it to bring a 'reign of terror' upon environmental violators, however minor the offense, this court should ensure that the rules they play by are lawful ones," the appeal said.

The case is Pozsgai vs. U.S., 89-1735.

65TH STORY of Level 1 printed in FULL format.

Proprietary to the United Press International 1990

October 2, 1990, Tuesday, BC cycle

SECTION: Regional News

DISTRIBUTION: New Jersey

LENGTH: 374 words

HEADLINE: High court rules in Bucks Co. wetlands case

DATELINE: MORRISVILLE, Pa.

KEYWORD: PA- WETLANDS

BODY:

A Hungarian emigre who lives in Bucks County has lost his bid to stay out of prison after the nation's high court refused to review his case involving a wetland.

John Pozsgai, 58, of Morrisville, had sought the Supreme Court's aid in reviewing his conviction and sentence for illegally filling in a wetland so he could expand his truck-repair business.

The decision means he must report to a federal prison next month to begin serving a three-year sentence imposed in July 1989. He also was fined \$202,000 by U.S. District Judge Marvin Katz.

The Washington Legal Foundation, a conservative legal think tank that supported Pozsgai, said the prison sentence is the longest ever given for an environmental crime.

Paul Kamenar, executive legal director of the foundation, told the Philadelphia Inquirer the case was a "miscarriage of justice."

"This guy was dumping clean fill on his own property, he was not dumping toxic hazardous wastes," Kamenar said. "John Pozsgai would have gotten less time for managing a crack house."

Seth Weber, assistant U.S. attorney who prosecuted the case, told the Inquirer: "Our office ... believed this was an appropriate case to prosecute, and we're glad the Supreme Court upheld the circuit and the District Court."

Pozsgai is free on bail, although a move probably will come next week to revoke the bail.

The Pozsgai case drew national attention as only the second criminal case involving wetlands that was prosecuted under the federal Clean Water Act. It was also prosecuted at a time when the federal government was focusing attention on the rapidly disappearing wetlands in the 1970s.

Environmentalists say wetlands, or swamps, are important in flood control and as wildlife habitats.

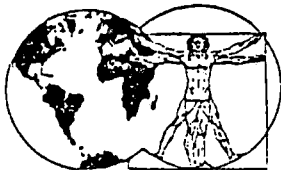
Proprietary to the United Press International, October 2, 1990

In December 1988, a federal court jury convicted Pozsgai of 40 counts of violating the Clean Water Act for filling in a five-acre swamp in Morrisville even after he was repeatedly denied permits for the work.

His initial appeal to the Third U.S. Circuit Court of Appeals was denied without comment.

Pozsgai still is appealing a denial by the state Department of Environmental Resources of his belated application for a permit to fill in the Bucks County site.

eco
environmental
conservation
organization



1300 Maybrook Drive,
Post Office Box 9
Maywood, IL 60153-2434
708-344-0700

November 15, 1990

DIRECTORS:

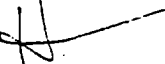
John Burnham
Michigan

Jim Jacobs
Michigan

Henry Lamb
Illinois

Rhonda McAttee
Pennsylvania

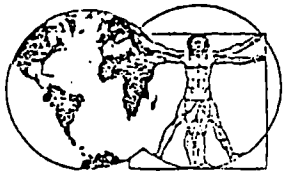
Rick McGown
Missouri

TO: ECO Participating Organizations
FROM: Henry Lamb 
RE: Revised Petition Letter

Enclosed is a revised petition letter for Ocie Mills and John Pozsgai. We have made several changes in the wording of the original letter.

Please use the new letter for future signature solicitation. If you have signatures collected on the first form, please send them to us now. Thank you.

ECO
environmental
conservation
organization



1300 Maybrook Drive,
Post Office Box 9
Maywood, IL 60153-2434
708-344-0700

DIRECTORS:

John Burnham
Michigan

Jim Jacobs
Michigan

Henry Lamb
Illinois

Rhonda McAttee
Pennsylvania

Rick McGown
Missouri

November 15, 1990

The Honorable George Bush, President
United States of America
1600 Pennsylvania Avenue N.W.
Washington, DC 20500

Dear President Bush:

Ocie Mills and his son Carey, and John Pozsgai have all been convicted of violating the Federal Clean Water Act. Ocie and his son placed 19 loads of sand on their own property. John cleaned up an old dump and placed fill material on his private property. Ocie and Cary spent 21 months in jail and face another year of probation and John is serving three years in Allenwood Prison in Pennsylvania and has been fined \$202,000. They were convicted of polluting the "waters of the United States." The "waters of the United States" they were convicted for polluting is in fact dry land that they own, and their actions resulted in no adverse environmental impact.

These prosecutions and convictions are a gross abuse of governmental authority and the sentences imposed are clearly excessive and are, in fact, "cruel and unusual" punishment. Therefore, on behalf of the undersigned petitioners, we urge you to personally intervene and issue a Presidential Pardon and/or Commutation for Ocie and Cary Mills, of Milton, Florida, and John Pozsgai, of Morrisville, Pennsylvania.

Sincerely,

James Jacobs, Chairman of the Board
ENVIRONMENTAL CONSERVATION ORGANIZATION

NAME

ADDRESS

_____	_____
_____	_____
_____	_____

NAME

[illegible]

PART

eco
environmental
conservation
organization

LAND IMPROVEMENT
CONTRACTORS
OF AMERICA

POLITICAL ACTION RESPONSE TEAM

BULLETIN

November 14, 1990

TO: ECO Participating Organizations
& LICA Chapters

FROM: Henry Lamb

RE: John Pozsgai

John Pozsgai is going to jail the day after Thanksgiving. John is the Pennsylvania man, featured in our video "Wetland Victims," who was convicted for cleaning up an illegal dump site and polluting the "waters of the United States" when he placed topsoil on his own property.

John and his family have depleted all their resources fighting this case all the way to the Supreme Court. John's wife, now in her 60's, faces the next three years with no means of earning a living. The youngest daughter, Vicky, is going to move back into the home and attempt to provide for the mother, but she needs a job.

Pennsylvania Landowners Association (PLA) would like to employ Vicky, but their budget will not accommodate the new position. We can think of no better way to help John Pozsgai than by helping Vicky get a job that will let her take care of her mother. Vicky's experience with the case and her writing ability will be a valuable asset to PLA and to the entire movement. We can all help by helping PLA increase its budget to accommodate a position for Vicky.

If you or your organization can help in any amount, please make your check payable to:

PENNSYLVANIA LANDOWNERS ASSOCIATION - FOR POZSGAI
P.O. Box 391
Waterford, PA 16441

If you have not already received it, you will soon be getting a petition form requesting a Presidential Pardon for both Pozsgai and Ocie Mills. These people have carried the ultimate burden for all of us who believe the law must be changed. We now have the opportunity to help them in a very meaningful way. Thanks!

Jan 30, 1990

James J. Kilpatrick

Don't Cry for John Pozsgai

On Jan. 11, The Wall Street Journal went into editorial lamentations over the case of John Pozsgai, who had been sentenced to three years in prison and fined \$202,000 for violating the wetlands provisions of the federal Clean Water Act. On Jan. 12, the U.S. Court of Appeals for the Third Circuit upheld the sentence. Thereby hangs this tale.

To The Journal, Pozsgai was a "flabbergasted truck mechanic" who discovered to his sorrow "how little regard the Environmental Protection Agency has for property rights." The Journal depicted Pozsgai as a hard-working immigrant who sought only to improve an illegal dump next to his home. Poor abused, mistreated Mr. Pozsgai! He could be forgiven "for wondering why he ever fled communist Hungary in 1956."

Balderdash! The Journal's indignation should be focused on a better cause. The only flabbergasting aspect of this case can be found in the defendant's flabbergasting contempt for the law.

In October 1986, when the chronology begins, Pozsgai was operating his diesel truck-repair business on West Bridge Street in Morrisville, Pa. He wanted to expand by purchasing an adjoining 14-acre tract. Douglas Mason, the real estate broker representing the owner, gave Pozsgai the first of a dozen warnings he was to receive: the property probably was a protected "wetland" that could not be developed.

Pozsgai consulted three engineering firms. They confirmed Mason's opinion. They told him he could not fill the tract without getting a permit from the Army Corps of Engineers. Pozsgai paid no attention. He began to deposit fill, even though he didn't own the land.

In April 1987, Martin Miller, an inspector for the corps, learned of the fill operation. He examined the site and found typical wetlands vegetation. On April 29, Miller advised Pozsgai that he could not continue to fill without permission. The advice was ignored.

The record shows that Miller repeated his warning on May 14. The warning had no effect. On June 19, Pozsgai bought the property at a reduced price (because of the wetlands determination). Miller

came back on Aug. 17 and saw that additional fill had been deposited. On Sept. 3, the Corps of Engineers issued a formal cease and desist order. Pozsgai ignored the order. On Dec. 2, the EPA issued a written notice. Pozsgai ignored the notice. On Dec. 17, the corps filed a notice of violation. Pozsgai ignored this notice also.

Seven months passed in which the owner made no attempt to apply for the necessary permits. The violations continued, and adjoining properties began to suffer flood waters. The natural drainage into the Pennsylvania Canal had been disturbed.

On Aug. 24, 1988, the Department of Justice concluded that this defiance had gone on long enough. The government obtained a court order directing Pozsgai immediately to cease and desist his fill operations. On the very next day, Pozsgai was back at his forbidden task. An indignant neighbor, Joan Sevits, allowed EPA agents to install video equipment in her home. Over the next 10 days the camera documented 32 violations of the order. Chief District Judge John P. Fullam imposed a fine of \$5,000 for contempt of court.

Indicted on 40 counts of unlawfully destroying protected wetlands, Pozsgai went on trial before a jury. The evidence against him was overwhelming. He challenged the Clean Water Act as an unconstitutional abridgment of his property rights; he complained on appeal of ineffective counsel; he sought to show that the property was not a wetlands after all.

In a presentence report, the U.S. probation officer described the defendant as a stubborn man: "No one, not even the government, will tell him what to do." The U.S. attorney "strongly recommended" a prison sentence because of Pozsgai's blatant disregard of the law. "The defendant is a willful and knowing criminal to the environment."

So much for The Journal's poor little flabbergasted immigrant. The wetlands provisions of the Clean Water Act are not models of draftsmanship. There are ambiguities that need better definition. But protection of our remaining wetlands is absolutely vital to the national ecology, and in this case there was no abuse. Pozsgai went looking for trouble. He got what he asked for.

