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Land of the Free?

June 24, 2008

Virginia has become home to a disturbing trend in environmentalism. Private property rights are being sacrificed in the name of protecting streams, wetlands (defined to include almost any low-lying land) and, as of recently, ditches. The Virginia Department of Environmental Quality informed Liberty University in late May that it had decided to extend governmental protection to drainage ditches all over the state.

When the United States Congress passed the Clean Water Act in 1972, intentions were good and the law was necessary given the condition of America's rivers at that time. The law served its purpose by stopping industries from dumping toxins in rivers and killing fish and wildlife in the process. Then, the abuse of CWA by extreme environmentalists began with the U.S. Army Corps of Engineers and other federal agencies playing a duplicitous role.

The definition of "waters of the United States" was broadened to include not only navigable waterways, but also swamps, small streams and even isolated wetlands. The definition of "pollution" was broadened to include dirt and silt from any cleared land except farmland.

The federal government contended that migratory birds flying from state to state and making their homes in isolated wetlands constituted interstate commerce, thus placing private property under federal control. This meant that landowners could not disturb or develop any low-lying portion of their property if it contained certain types of plants that government-approved "scientists" defined as wetland plants.

Finally, in Virginia in 1997, the United States Court of Appeals for the 4th Circuit ruled that the CWA was never intended by Congress to grant the government such broad powers over the properties of private citizens. For Virginia and the rest of the 4th circuit, property rights were returned to the citizens — but not for long.

Environmentalists then used the fact that so many acres of wetlands were being drained as justification for enacting state laws to regulate wetlands and streams that were now off-limits to

the federal government. The environmentalists' champion was Del. Preston Bryant, then a Republican from Lynchburg.

Many Lynchburg area voters mistakenly assumed that Bryant, who attended Lynchburg Christian Academy, was a conservative because of his party affiliation.

The state legislation co-sponsored by Bryant, who is now the Secretary of Natural Resources for Democratic Gov. Tim Kaine, defines "state waters" broadly to include "all water on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands."

Thanks to Bryant, all the abuses of the Clean Water Act that were stopped by federal court action were now embraced by the Commonwealth of Virginia and codified into law. In practicality, the state law means that no property owner in Virginia may excavate, drain, fill, dump or engage in any other activity impacting a stream or wetland without an extremely costly permit issued by state government.

Because of its rapid growth, Liberty University often finds itself in negotiations with the Virginia Department of Environmental Quality, which seems to provide a moving target with the regulations it enforces. Until recently, the DEQ only regulated intermittent streams, and the DEQ allowed developers to disturb or pipe up to 300 linear feet of stream or one-tenth of an acre of wetland without penalty or mitigation. The DEQ also allowed landowners to impact up to one-third of an acre of wetlands without penalty or mitigation.

But now, under the Bryant regime, the state has informed LU that ephemeral streams (basically ditches that fill up during heavy rain) will fall under government regulation.

That sudden rule change will mean that the Crossroads Colonnade Shopping Center planned near the LU campus will incur increased state regulation and unnecessary costs.

When developers face such obstacles and retail projects are delayed, many projects are cancelled. That could rob the region of millions of dollars in sales tax revenue, a shortfall that will be mitigated on the backs of local taxpayers.

The stifling effects of government overreach and its subsequent increased costs may also adversely impact the future development of Liberty University, the Lynchburg area's premier growth industry.

LU had planned to build a 130-acre lake in the middle of 5,000 acres of forestland that it owns along the U.S. 460/U.S. 29 corridor. The lake would have been used for recreation for the college community and the general public.

Liberty University officials were told that they must convince DEQ officials that Liberty really needed a lake of that size. State government officials have the power to completely deny the permit if they determine that the property owner has not shown a justifiable purpose or need for the proposed improvement.

Should the bureaucrats decide that Liberty University will be permitted to build the lake, mitigation will be required because the DEQ says that a lake “destroys” the wetlands and streams that are flooded by it just as if a 130-acre parking lot were being built on top of the streams and wetlands.

This should be frightening to all citizens of Virginia. Since almost every piece of real estate in the state includes streams or drainage ditches of some type, this means that private landowners no longer have the right to decide how their property is used. Instead, state bureaucrats now have that power. If Bryant’s goal in passing the wetlands legislation was to stifle economic development and abolish private property rights in Virginia, then he succeeded. It is amazing that this happened without any outcry from the citizenry.

The state’s estimate price tag for Liberty’s permit to build the lake: \$16 million in contributions to environment-alist mitigation efforts.

Who says America is a free country?