Order Code RL30423

Wetlands Regulation and the Law of Property Rights "Takings"

Updated February 17, 2000

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ABSTRACT

Federal and state wetlands regulation continues to generate lawsuits claiming that a wetland owner's property has been "taken," and therefore should be compensated. This report reviews the large body of law developed in court decisions in this area, as a backdrop to congressional efforts to reauthorize the federal wetlands permitting program. The report discusses the takings test used when permission to fill a wetland is denied, when mitigation conditions are imposed, and when regulation causes lengthy project delays. Several cross-cutting issues are broken out for separate treatment.

Wetlands Regulation and the Law of Property Rights "Takings"

Summary

When a wetland owner is denied permission to develop, or offered a permit with very burdensome conditions, the property's value may drop substantially. Wetlands programs also may impose costly development delays. For these reasons, federal and state wetlands regulation continues to generate "takings" lawsuits by land owners. Such suits allege that by narrowing or eliminating the economic uses to which a wetland can be put, the government has "taken" (permanently or temporarily) the wetland under the Fifth Amendment Takings Clause.

As background for continuing congressional efforts to reauthorize the federal wetlands permitting program, this report reviews the takings cases involving wetlands regulation. We include not only federal wetlands permitting program cases, but state ones as well. Inclusion of the latter seems particularly appropriate in light of the debate as to whether states should be given a larger role in implementing the federal permitting program, with the specter of state liability for takings.

For at least the last five years, there have been no final, reported court decisions finding takings of wetlands, in either federal or state courts. Notwithstanding, the influence of takings law on how wetlands programs are implemented and its relevance to future legislative efforts commends attention to the issue.

A taking claim cannot proceed unless it is "ripe" — e.g., unless there has been a "final decision" by the regulator. Mere assertion of jurisdiction over a wetland is rarely deemed final action. However, the wetland owner need not pursue government approvals or variances if doing so would be futile.

State appellate courts generally are more willing to accommodate regulator concerns than the U.S. Court of Federal Claims (CFC) and Federal Circuit, and often have required a total or near-total deprivation of economic impact as a prerequisite to finding a taking. As a result, the several CFC decisions during the 1990s finding a taking on the basis of federal wetlands permit denials were not matched by a similar trend in the state appellate courts.

Two issues in the wetlands takings cases have been especially pivotal. First, how to define the physical extent of property to be used in the taking analysis to gauge the impact of the government's action? Most parcels contain intermixed wetlands and uplands, so that a bar on development of the wetland leaves the entire parcel with sufficient economic use to defeat a taking claim. Second, what role is to be played by the fact that the wetlands scheme predates plaintiff's acquisition of the property? Several recent decisions have spurned takings actions on the ground that the preexistence of such a scheme defeats legitimate development expectations.

Other issues arising in the wetlands takings cases include how to attribute taking liability when more than one level of government is involved at the same wetland, and whether post-permit-denial offers to purchase from speculators, conservation groups, or government agencies, are proper evidence of the wetland's "after value."

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Talk about wetlands preservation today and you may soon be talking about private property and takings. The reason is simple enough: while the need for wetlands preservation is widely conceded, many are privately owned — in the case of the federal wetlands permitting program, almost 75% of the covered acreage in the lower 48. When a wetland owner is denied a permit to develop property (or offered a permit with very burdensome conditions), its value may drop substantially. Even when a permit is granted, permit processing time or agency errors may on occasion impose costly development delays. Accounts of land owners aggrieved by wetlands regulation have been widely circulated by the property rights movement, and challenged by environmentalists.

The conflict, as viewed by some, is straightforward. The benefits of wetlands preservation, they argue — water filtration, wildlife habitat, protection against flooding and erosion — inure to the public. By contrast, the burdens of wetlands preservation, in terms of development denied, fall on the wetland owner. (The burden is enhanced because coastal regions, lake fronts, and riversides are especially coveted areas in which to build.) The public receives the benefits of wetlands without having to compensate the wetland owner.

Others, however, assert that not only the public, but the restricted wetland owner too, receives benefit from the regulatory scheme (e.g., prevention of flooding), through the comparable restrictions placed on other wetland owners. These benefits should be regarded as "offsetting" the burdens imposed. Moreover, they contend, wetlands regulation should not be viewed as creation of a public benefit, but rather as avoidance of a societal harm — from the loss of the above wetlands functions. It is bad public policy, they argue, to compensate landowners for not inflicting injury.[1]

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[1] Wetlands regulation is hardly unique among land-use-oriented government programs in posing this public benefits/private burdens quandary. Consider, for example, protection of endangered species habitat and historic landmarks.

A prime example of the "offsetting benefits" debate is in one of the leading Supreme Court "takings" decisions, Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). The 6-justice majority opinion found that the city's historic landmark ordinance conferred benefits on the plaintiff-landmark owner, as well as burdens, through its preservation of hundreds of other buildings citywide. The 3-justice dissent, to the contrary, asserted that "no such reciprocity exists." *Id*. at 140.

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In the courts, wetlands regulation continues to generate "takings" lawsuits by landowners.[2] Such a suit alleges that by severely curtailing the economic uses to which a wetland can be put, the government has permanently "taken" the wetland. Or that administrative delays and errors have brought about a temporary taking. Accordingly, plaintiffs seek compensation under the Fifth Amendment Takings Clause: "[N]or shall private property be taken for public use, without just compensation."

In Congress, the "property rights issue" has played out with particular force in the area of wetlands regulation. Many property rights bills have targeted wetlands regulation. Congressional efforts to amend the wetlands permitting program's charter[3] — section 404 of the Clean Water Act[4] — have been stymied for years now, in part because of polarized views on how private property rights should be accommodated. The result is that the wetlands permitting program remains what it has long been: a major environmental initiative built upon statutory language that only awkwardly accommodates it, and that gives the administering agencies (the Army Corps of Engineers and Environmental Protection Agency) little in the way of clear guidance.

As background for continuing congressional efforts to give the federal wetlands permitting program an explicit legislative charter, this report reviews the takings cases involving wetlands regulation. We include not only federal wetlands program cases, but state and local ones as well. The inclusion of non-federal wetlands cases seems particularly appropriate with regard to the long-simmering debate as to whether states should be given a larger role in implementing the federal permitting program, and the specter of state and local liability for takings that such proposals arguably raise.

A final prefatory note. As the title of this report makes clear, our concern is exclusively with government wetlands programs of a *regulatory* nature. The reason: non-regulatory approaches generally do not spawn takings claims. The reader should be aware, nonetheless, that non-regulatory approaches are in wide use alongside regulatory ones. Non-regulatory approaches include the federal "swampbuster"

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[2] There are more takings challenges to the federal wetlands program than to any other federal environmental program. *See generally* U.S. General Accounting Office, *Clean Water Act: Private Property Takings Claims as a Result of the Section 404 Program* (RCED-93-176FS 1993); Richard C. Ausness, *Regulatory Takings and Wetlands Protection in the Post-Lucas Era*, 30 Land and Water L. Rev. 349 (1995). As a matter of perspective, however, it should be noted that environmental programs are involved in only a minority of takings actions against the United States, the bulk of such cases dealing with a diverse assortment of other matters.

[3] *See generally* (name redacted) and (name redacted), *Wetland Issues*, CRS Issue Brief IB97014.

[4] 33 U.S.C. § 1344 (implementing regulations at 33 C.F.R. part 323). Under Clean Water Act section 301, 33 U.S.C. § 1311, discharge of dredged or fill materials into "navigable waters," broadly defined by the Act as "waters of the United States," is forbidden unless authorized by a Corps of Engineers permit pursuant to section 404.

program for agricultural wetlands,[5] as well as various federal and state approaches such as real estate tax incentives, technical assistance and grants, and land acquisition from voluntary sellers.[6]

I. Brief overview of takings law

Takings law is the body of principles courts have articulated in interpreting the Takings Clause of the U.S. Constitution (and similar clauses in state constitutions). While complex and often vague, its precepts share a simple goal: to ascertain when government so severely interferes with private property rights that it should compensate the property owner for the taken value.

Before a court can reach a property owner's taking claim, however, several threshold hurdles have to be surmounted. Has the statute of limitations expired? Is the taking claim ripe — for example, has the government agency rendered a "final decision"? Should a federal court facing a challenge to state or local land-use regulation abstain, deferring to a state tribunal? Was the plaintiff the owner of the tract when the alleged taking occurred?

Once these (and other) matters are resolved in plaintiff's favor – and only then – the court can proceed to the taking issue in the case. There are at least two types of takings: physical and regulatory. Physical takings may occur when the government effects a physical invasion of private land, as by back-up waters from a government dam. Regulatory takings may occur when government severely restricts the use to which property may be put. Many observers, recognizing the distinct body of law the Supreme Court has developed, would define a third type of taking: when an exaction condition on issuance of a development permit is unrelated, in its goal or degree of burden imposed, to the impact of the proposed development.

When a government regulation of private wetlands raises a taking issue, it almost always will be of the regulatory taking variety.[7] The Supreme Court canon for recognizing regulatory takings divides into two approaches. First, there are *per se* rules, defining circumstances that constitute automatic takings (if exceptions do not apply). In the wetlands context, the only important *per se* rule has been the "total taking" rule of *Lucas v. South Carolina Coastal Council*.[8] The *Lucas* total taking rule holds that government action eliminating *all* economic use of land is necessarily a taking — *if* the barred use was not prohibitable under "background principles" of

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[5] 16 U.S.C. §§ 3821-3823.

[6] Association of State Wetlands Managers, State Wetlands Regulation: Status of Programs and Emerging Trends 31-34 (1994).

[7] Explicitly noting the appropriateness of the regulatory taking framework for takings challenges to the federal wetlands permitting program, and the inappropriateness of a physical takings approach, are Forest Properties, Inc. v. United States, 177 F.3d 1360, 1364 (Fed. Cir.), *cert. denied*, 120 S. Ct. 373 (1999), and Plantation Landing Resort, Inc. v. United States, 30 Fed. Cl. 63, 69 (1993).

[8] 505 U.S. 1003 (1992).

law existing when the property was acquired.[9] An earlier formulation of *Lucas*, in *Agins v. City of Tiburon*, is often cited by state courts in lieu of *Lucas*.[10]

The second approach applies when the government action does not come under a *per se* rule — for present purposes, when its impact falls short of a *Lucas* total taking. This approach consists of a multi-factor balancing test, first announced by the Court in *Penn Central Transportation Co. v. City of New York*.[11] The factors in this test are the economic impact of the government action, the extent to which it interferes with reasonable investment-backed expectations, and its "character." Application of these factors is fact-intensive and *ad hoc;* critics say unprincipled.

By definition, a plaintiff able to fit the challenged government action within a *per se* rule wins his/her case (if no exceptions apply), and is generally compensated. Thus, wetlands owners often assert a *Lucas* "total taking" as their opening salvo. Plaintiffs relegated to the *Penn Central* balancing test typically lose — though recent developments in a prominent federal wetlands/taking case portend change here.[12]

II. The historic pendulum in wetlands/takings case law

Comparing the history of regulatory takings decisions involving state and local wetlands programs with that of case law on the federal program, one discovers a common feature. Each displays a distinct point in time when the relevant courts shifted sharply in how they balanced the benefits and burdens of wetlands preservation. As a crude generalization, not without exception, state-program cases shifted toward greater deference toward government; federal-program cases, toward less.

Cases involving state and local wetlands programs

1960s and early 1970s. This first generation of wetlands/takings cases saw state courts respond sympathetically to the aggrieved wetlands owner, probably because the public goals of the new wetlands statutes were contrary to prevailing attitudes about such ecosystems. Typical of the period is *Morris County Land Improvement*

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[9] Another *per se* rule of takings law has never been exclusively relied on to find a wetlands taking, in the rare case where it has been invoked and found violated. This is the due-process-like rule of Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), declaring that government action effects a taking if, among other things, it fails to substantially advance a legitimate government interest.

[10] 447 U.S. 255, 260 (1980). The Court there stated that a land use regulation effects a taking if it "denies an owner economically viable use of his land." No explanation was provided by the Court as to how this test related to the multifactor *Penn Central* test announced just two years before.

[11] 438 U.S. 104 (1978).

[12] *See* text accompanying notes 81-84.

Co. v. Township of Parsippany-Troy Hills,[13] addressing a township zoning ordinance. The court found "[o]f the highest legal significance" that the prime object of the zoning was to retain plaintiff's land substantially in its natural state — that is, in the court's view, to secure a public benefit rather than prevent a harm. Hence, the zoning restriction was seen as likely compensable.[14]

Early 1970s to the present. This era began with a judicial pendulum swing from suspicion to acceptance of wetlands regulation. Few *final* decisions during this period find takings, even though more states have wetlands protection regimes in place. *Just v. Marinette County* represents an early high water mark of judicial sensitivity to wetlands.[15] States well represented in the case law of this period are Connecticut, Florida, Massachusetts, Michigan, New Hampshire, and New York.[16] These courts appeared to accept the special status of wetlands, and often stretched to find noncompensable even the strictest of regulations. Even after the landowner-friendly takings decisions since the late 1980s from the Supreme Court, Federal Circuit, and Court of Federal Claims, state-court final decisions show little willingness to find takings as the result of wetlands regulation.[17]

The restriction of the above discussion to *final* state-court decisions is important. Several of the wetlands/takings cases during this period initially produced trial court and/or intermediate appellate decisions for the property owner, only to be reversed by the state high court. A recent decision by the intermediate appellate court of South

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[13] 40 N.J. 539, 193 A.2d 232 (1963).

[14] Other takings holdings in favor of wetland owners during this period include Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965) (on remand, lower court found taking); State v. Johnson, 265 A.2d 711 (Me. 1970); and Bartlett v. Town of Old Lyme, 161 Conn. 24, 282 A.2d 907 (1971)

[15] 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

[16] The parade of cases from New Hampshire is illustrative. All of them find no taking. Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975); Claridge v. New Hampshire Wetlands Bd., 125 N.H. 745, 485 A.2d 287 (1984); New Hampshire Wetlands Bd. v. Marshall, 127 N.H. 240, 500 A.2d 685 (1985), and Rowe v. Town of North Hampton, 131 N.H. 424, 553 A.2d 1331 (1989).

[17] Final, reported state wetlands decisions during the 1990s finding no taking include Brotherton v. DEC, 252 A.D.2d 499, 675 N.Y.S.2d 121 (1998); Volkema v. DNR, 542 N.W.2d 282 (Mich. App. 1995), *aff'd*, 457 Mich. 884, 586 N.W.2d 231, *cert. denied*, 119 S. Ct. 590 (1998); Alegria v. Keeney, 687 A.2d 1249 (R.I. 1997); Gazza v. New York State, 89 N.Y.2d 603, 679 N.E.2d 1035, *cert. denied*, 118 S. Ct. 58 (1997); FIC Homes of Blackstone, Inc. v. Conservation Comm'n, 673 N.E.2d 61 (Mass. App. 1996), *rev. denied*, 424 Mass. 1104, 676 N.E.2d 55 (1997); Zealy v. City of Waukesha, 201 Wis. 2d 365, 548 N.W.2d 528 (1996); and Mock v. DER, 154 Pa. Commw. 380, 623 A.2d 940 (1993), *aff'd*, 542 Pa. 357, 667 A.2d 212 (1995), *cert. denied*, 517 U.S. 1216 (1996). In Gardner v. New Jersey Pinelands Comm'n, 125 N.J. 193, 593 A.2d 251 (1990), the vitality of a 1960s state-court decision finding a wetlands taking was said to have eroded due to the subsequent rise in societal environmental awareness.

Research reveals only one final, reported state wetlands decision during the 1990s that found a taking: Vatalaro v. DER, 601 So.2d 1223 (Fla. App. 1992).

Carolina, finding a taking of a wetland, may provide the next test of this pattern when the state supreme court rules.[18]

Cases involving the federal wetlands program

1970s and early 1980s. The first takings decision involving the federal wetlands program was *Zabel v. Tabb*,[19] decided in 1970. This case, and the few others during the period, found no takings[20] — paralleling the new resistance to takings in contemporaneous state challenges. Court decisions cited the Supreme Court's tendency to uphold land-use restrictions if soundly based on public interest, even where landowners suffer dramatic value loss. Also, the challenged permit denials were held not to deny all reasonable uses of the landowner's property *as a whole* (see section VIII)— either because the property included unregulated uplands, or because a permit had been granted for the filling in of some, even if not all, of the wetlands on the parcel.

Mid-1980s to the present. By the mid-1980s, the winds of change were blowing — possibly because the federal wetlands program had now taken hold and confronted a more conservative federal bench. In 1983, a federal wetlands permit denial was judicially deemed a taking for the first time.[21] Then followed two important interim rulings favorable to the wetland owner. In 1986, in *Florida Rock Industries v. United States*, the U.S. Court of Appeals for the Federal Circuit again weighed the public interest in wetlands preservation against the landowner's loss, as it had above in the early 1980s. But this time it tipped toward the landowner.[22] Two years later, a key ruling on the "property as a whole" issue went against the United States in another wetlands/taking case: *Loveladies Harbor, Inc. v. United States*.[23] When the trial-level U.S. Claims Court reached the takings question in these two cases, it found takings in both.[24]

(A word about court names. Trial jurisdiction over most takings claims against the United States is vested in the U.S. Court of Federal Claims, with appeals to the U.S. Court of Appeals for the Federal Circuit, and thence to the Supreme Court. It was not always so, however. Prior to 1982, both trial and appellate jurisdiction over

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[18] McQueen v. South Carolina Coastal Council, 329 S.C. 588, 496 S.E.2d 643 (Ct. App. 1998), *appeal pending*.

[19] 430 F.2d 199 (5th Cir. 1970). Being pre-section 404, this case involves permitting under only the Rivers and Harbors Act of 1899.

[20] The leading decisions of this period are Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982), and Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

[21] 1902 Atlantic Limited v. Hudson, 574 F. Supp. 1381 (E.D. Va. 1983) (dictum).

[22] 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987). Notwithstanding the rebalancing, the court on other grounds vacated the holding below in favor of the landowner.

[23] 15 Cl. Ct. 381 (1988).

[24] *Florida Rock*, 21 Cl. Ct. 161 (1990); *Loveladies Harbor*, 21 Cl. Ct. 153 (1990).

such claims were vested in a U.S. Court of Claims. In 1982, Congress split the two jurisdictions, placing the trial jurisdiction in a U.S. Claims Court and the appellate responsibility in a newly created U.S. Court of Appeals for the Federal Circuit. In 1992, Congress gave the U.S. Claims Court its current name: the U.S. Court of Federal Claims.)

These decisions, and other claims court rulings of the time, embodied an unmistakably different balancing of the equities in wetlands/takings cases than did earlier federal decisions. *Florida Rock* and *Loveladies Harbor* in particular decided key unresolved issues of takings law against the government. In the following round, in 1994, the Federal Circuit affirmed *Loveladies*[25] and remanded *Florida Rock*[26] with guidance to the Court of Federal Claims (CFC) that led that court in 1999 to find a taking once again.[27]

Since 1994, and despite the 1999 CFC decision in *Florida Rock*, this swing of the judicial pendulum toward the property owner has been less clear. Indeed, a review of final, reported federal wetlands/takings decisions shows that the United States has won every one since the 1994 decision in *Loveladies Harbor*. (At this writing, the 1999 CFC decision in *Florida Rock* is still appealable.) One recent case in particular, *Good v. United States*, generated no-taking holdings on difficult facts that easily could have produced contrary rulings.[28] Still, we remain in a period where the United States must offer a convincing defense; its almost-six-year winning streak may stem more from an increased willingness at the Department of Justice to settle the difficult cases than from any substantial judicial pendulum shift back to the government side.

With so few wetland-owner wins, why this report?

The discussion above reveals that particularly recently, there have been precious few final, reported takings decisions in which the wetland owner won. Notwithstanding, the application of takings law to wetlands protection repays attention, for several reasons. Most important, takings law and the potential of government liability influence how wetlands agencies implement and enforce their regulatory programs. One may speculate whether the significant recent reduction in the annual number of permit denials by the Corps of Engineers was influenced by the greater vulnerability of outright denials, as opposed to conditioned approvals, to takings actions.[29] Nor, in this regard, does it take more than an occasional adverse court decision to maintain the hot breath of taking liability on the regulator's neck.

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[25] 28 F.3d 1171 (Fed. Cir. 1994).

[26] 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995).

[27] 45 Fed. Cl. 21 (1999).

[28] 38 Fed. Cl. 81 (1997), *aff'd*, 179 F.3d 1355 (Fed. Cir. 1999)

[29] The Corps denied 393 individual-permit applications in FY 1992 (8.8% of applications), as compared to 158 in FY 1998 (3.2% of applications). See web site of Public Employees for Environmental Responsibility, **www.peer.org/corps** (visited on Aug. 30, 1999).

Today, state and federal wetlands regulators know how far they can go before a property owner's threats of a taking action must be taken seriously, and often act accordingly.

In addition, state wetlands managers report that in fact there *are* final court decisions in favor of the landowner. However, they are unreported state trial-court decisions that do not get appealed[30] — often because the wetlands agency reaches a compromise with the landowner.

Finally, the property-owner complaints and government counter-arguments that crop up in wetlands takings litigation may shape future legislative efforts in the wetlands protection area.

III. Ripeness

Ripeness doctrine is concerned with the timing of litigation. It seeks to ensure that disputes are not brought to the courts too early, involving them in issues that are not yet clearly defined or that may yet resolve themselves without judicial intervention. The Supreme Court has been particularly attentive to the demands of ripeness doctrine in the context of takings litigation.

"Final decision"

For a claim of permanent taking of land to be ripe, the government generally must have reached a "final decision" as to the nature and extent of development permitted on the property.[31] "Final decision" is a legal term of art, with much case law gloss. To get a final decision, the Supreme Court says, it may be necessary for the property owner, after his/her initial proposal is rejected, to reapply with scaled-down or reconfigured proposals. Also, variance opportunities have to be exhausted.

Typically, the final-decision prerequisite means that the wetland owner's taking claim is not ripe until at least one application for a development permit has been submitted and ruled upon, based on the merits.[32] An agency's mere designation of a

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[30] One such decision, following the Massachusetts high court's remand in Lopes v. City of Peabody, is described in a later high court ruling in the case at 430 Mass. 305, 718 N.E.2d 846, 849 (1999).

[31] Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). Though this decision addressed takings-ripeness in the federal courts, many state-court cases as well have adopted its insistence on a final decision.

[32] Discussed later are two exceptions to the need for a permit denial: (1) the futility exemption (this section) and (2) claims of *temporary taking* based on unreasonable delay in an agency's processing of the permit application (section VII). A third exception, more specialized, was enunciated in Robbins v. United States, 40 Fed. Cl. 381, *aff'd without op.*, 178 F.3d 1310 (Fed. Cir. 1998), *cert. denied*, 119 S. Ct. 2400 (1999). *Robbins* held that events need not reach the permit denial stage when the claimed taking is not of land, but rather

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parcel as within its wetlands permit jurisdiction cannot by itself be a taking, since it leaves open the possibility that the permit, if applied for, will be granted.[33] The same holds true when the government orders construction on a wetland to cease and desist until the owner secures a permit.[34] Little better is the incomplete permit application; Corps of Engineers rejection of an incomplete application through a "denial without prejudice" confers no ripeness, unless in actual fact rejection was based on the merits of the application.[35]

The CFC and Federal Circuit have looked at whether administrative, judicial, and political efforts to overturn a wetlands permit denial negate its status as "final" — in the context of determining whether takings claims were filed within the statute of limitations. (The limitations period begins to run only when the taking claim becomes ripe. See section IV.) *Creppel v. United States* held that such post-permit-denial skirmishing, resulting in the Corps' reversing its initial position, ended any temporary taking that might have been caused by the initial decision and allowed a second, completely new alleged taking to begin when EPA exercised its permit veto authority.[36] Thus, while the temporary taking claim was untimely, the permanent taking claim based on the later EPA veto was timely.

More recent decisions seek to limit *Creppel*. They suggest that post-decision efforts to overturn a denial, *where unsuccessful*, do not undermine the "final" status of an agency decision for ripeness purposes.[37] When such efforts take the form of an

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[32](...continued)
of a land purchase contract cancelled by the buyer upon learning that the Corps had found jurisdictional wetlands on the property. (The claim was rejected on the merits.)

[33] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). *Accord, Robbins,* 40 Fed. Cl. 381; Marcantonio v. Russo, 684 N.Y.S.2d 567 (Supr. Ct. App. Div. 1999); Carabell v. DNR, 478 N.W.2d 675 (Mich. App. 1991); Wedinger v. Goldberger, 71 N.Y.2d 488, 522 N.E.2d 25 (1988).

The fact that agency jurisdictional determinations do not ripen takings claims is particularly important because at least at the Corps of Engineers, their number vastly exceeds that of permit denials.

[34] Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 800-801 (Fed. Cir. 1993).

[35] *Compare* City National Bank v. United States, 33 Fed. Cl. 759 (1995) (ripeness found notwithstanding Corps' describing permit denial as "without prejudice," since denial actually was merits based) with Heck v. United States, 134 F.3d 1468 (Fed. Cir. 1998) (ripeness lacking, since denial without prejudice was based, as Corps asserted, solely on application's incompleteness). *See* 33 C.F.R. § 320.4(j)(1) (Corps of Engineers' definition of permit denials without prejudice).

[36] 41 F.3d 627 (Fed. Cir. 1994).

[37] Bayou des Familles Devpmt. Corp. v. United States, 130 F.3d 1034 (Fed. Cir. 1997); Cristina Investment Corp. v. United States, 40 Fed. Cl. 571 (1998). *Bayou des Familles* does not reject post-decision developments as decisively as *Cristina*, since it seems to allow that on the facts presented, finality may have been established not upon permit denial, but when that denial was upheld by the district court some years later. Using either date, plaintiff's taking claim was untimely.

administrative appeal of a permit denial, however, the new Corps administrative appeals rule may have preempted this case law (see page 11).

Other finality ripeness issues: For how long must a wetlands permit applicant wrangle with the government over what permit conditions (e.g., for compensatory mitigation) are mutually acceptable?[38] Can a claim that the government has taken plaintiff's *entire* wetland be ripe if based on the denial of a permit to fill only a fraction thereof?[39]

"Final decision": reapplications, variances, appeals

In the state courts, wetlands/takings plaintiffs have been denied finality ripeness owing to their failure, following first permit denial, to reapply with modified proposals.[40] On occasion, this duty of the wetland owner to reapply has led courts to express impatience with state agencies that issue permit denials without any indication of what they *would* accept.[41] The issue is a pervasive one in takings law, pitting the needs of the landowner against the limited resources government can commit to developing alternatives to submitted proposals. If variance and appeal mechanisms are available, the landowner may have to exhaust them, too.

In the CFC, by contrast, reapplications and variances have not been a problem for plaintiffs. As for reapplications, the CFC consistently has read the Corps'

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[38] In Plantation Landing Resort, Inc. v. United States, 30 Fed. Cl. 63 (1993), *aff'd without pub. op.*, 39 F.3d 1197 (Fed. Cir. 1994), *cert. denied*, 514 U.S. 1095 (1995), the court said it could not view a Corps permit denial as a taking when the denial was the result of a failure to reach agreement with the landowner on mitigation requirements. Though the decision was not couched in the language of ripeness, since the permit was denied, it nonetheless highlights the duty of the wetland owner to pursue reasonable negotiations as to permit conditions before claiming a taking.

[39] *Compare* Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986) (claim that entire parcel was taken by denial of permit for portion is premature), *cert. denied*, 479 U.S. 1053 (1987) *with* Formanek v. United States, 18 Cl. Ct. 42 (1988) (claim that entire parcel was taken is ripe). In the most recent Florida Rock opinion, the CFC addressed wetlands acreage not covered by the permit denial by requesting the parties to come up with a compensation plan for submission to the court. 45 Fed. Cl. 21 (1999).

[40] *See, e.g.*, Hoffman v. Town of Avon, 28 Conn. App. 262, 610 A.2d 185 (1982) (no taking where plaintiff submitted only one application). One court held that four denials of permit applications to build a home (three on the merits) was insufficient for ripeness. Gil v. Town of Greenwich, 219 Conn. 404, 593 A.2d 1368 (1991). Though the lot was zoned residential, its wetland classification should have warned the buyer, said the court, that development would be difficult. Moreover, the four applications were similar to each other and out of keeping with other homes in the neighborhood.

Failure to reapply has also been analyzed by state courts in a non-ripeness context — as showing in the merits analysis that the wetland owner failed to establish the requisite economic impact for a taking. See, e.g., Emond v. DEM, Civ. No. PM96-4584 (R.I. Super. Ct. Oct. 5, 1999); Alegria v. Keeney, 687 A.2d 1249 (R.I. 1997); Carabell v. DNR, 191 Mich. App. 610, 478 N.W.2d 675 (1991).

[41] *See, e.g., Emond.*

language accompanying the initial permit denial as precluding its approval of *any* development on the parcel.[42] Thus, the initial permit denial made the taking claim ripe. Nor have section 404 takings plaintiffs been required to exhaust variance possibilities, since Corps procedures offer none.

A new development is the March, 1999 promulgation by the Corps of Engineers of an administrative appeal process.[43] Under it, applicants for 404 permits may appeal within the Corps a denial with prejudice by the district engineer, or a declined proffer by the Corps of an individual permit. Important here, the new regulations assert that no federal-court action based on such denials or declined permits may be filed until the applicant "has exhausted all applicable administrative remedies ...."[44]

Absent this exhaustion provision, it is unclear whether appeal within the Corps is a ripeness prerequisite to a taking action against the agency. Courts are divided on whether finality ripeness can be established without exhausting such "vertical" appeals to a higher administrative authority. The sounder position under Supreme Court precedent is that vertical exhaustion is required when challenging the *validity* of a government act, but not when compensation is sought per the Takings Clause. Rather, takings claims are subject only to "horizontal" reapplication and variance-seeking requirements.[45]

Futility exemption

The key exception to these ripeness requirements of permit application, negotiation, reapplication, and variance pursuit is futility doctrine: a landowner should not have to pursue government procedures when doing so would be pointless. Courts have often invoked this "futility exemption" to ripeness prerequisites where the government's conduct, or its rationale for denying the permit, indicates that no development of economically viable extent would be allowed on the wetland. Recall the just-discussed CFC cases finding no reapplication necessary.

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[42] *See, e.g.*, Cristina Investment Corp. v. United States, 40 Fed. Cl. 571 (1998); Formanek v. United States, 18 Cl. Ct. 785, 792-793 (1989); Beure-Co. v. United States, 16 Cl. Ct. 42, 47-51 (1988); Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 385-386 (1988).

[43] 64 Fed. Reg. 11708 (March 9, 1999); codified at 33 C.F.R. part 331.

[44] 33 C.F.R. § 331.12.

[45] *See, e.g., Cristina Investment Corp.*, 40 Fed. Cl. 571; Good v. United States, 38 Fed. Cl. 81, 101-102 (1997), *aff'd*, 179 F.3d 1355 (Fed. Cir. 1999), *pet. for cert. filed. Contra*, Bayou des Familles Devpmt. Corp. v. United States, 130 F.3d 1034, 1040 (Fed. Cir. 1997) (suggesting prophetically that if Corps allowed agency appeals of section 404 permit denials, applicants would have to pursue them to establish ripeness). *Cristina and Good* take their cue from the leading takings/ripeness decision, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), in which the Supreme Court was at pains to distinguish between avenues for adjusting the scope of the land-use agency's initial decision, such as variances, and challenges to the validity of that decision, such as appeals to a higher administrative body. Unless futile, it said, the former must be pursued for finality ripeness; the latter need not.

On the other hand, the wetlands owner cannot plead futility "whenever faced with long odds or demanding procedural requirements"[46] — absent a more definitive indication from the government that the permit cannot be obtained. The permit application process must be pursued to the end even when several federal agencies have recommended to the Corps that the permit be denied, since the Corps in the past has not always followed such recommendations.[47] Similarly, the fact that section 404's presumptions against development that is not water-dependent reduce the probability of receiving a permit does not support a futility argument.[48]

Moreover, use of the futility exemption to excuse making the *initial* permit application, has been rejected by some courts;[49] it is generally applied to soften the requirement for later, scaled-down or reconfigured proposals.[50] To be sure, confining the futility exemption to reapplications runs counter to CFC cases holding that in some instances, the administrative process itself may be so burdensome as to deprive the property of value.[51] In the two wetlands/takings cases where this unduly-burdensome-process argument was pressed, however, it has been rejected.[52] One case held, unsurprisingly, that a permit applicant cannot claim futility based solely on unsupported allegations that analysis of the environmental impacts of development at alternative sites, required by section 404 regulations, would be overly burdensome.[53]

The Corps of Engineers reports that some section 404 permit applicants are now seeking "wall to wall" development of their wetlands parcels, and seem uninterested in negotiation with the Corps over compromise possibilities. For such applicants, the Corps has issued a permit for a portion of the proposed project even though the applicant has not sought it. This strategy may permit the Corps to avoid argument by the applicant-turned-plaintiff that scaled-down proposals would be futile, and to

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[46] Heck v. United States, 37 Fed. Cl. 245, 252 (1997), *aff'd*, 134 F.3d 1468 (Fed. Cir. 1998).

[47] *Id*.

[48] *Id*.

[49] *Heck*, 134 F.3d at 1472 (Fed. Cir. 1998), *citing* Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 504 (9th Cir. 1990).

[50] *See, e.g.*, Marks v. United States, 34 Fed. Cl. 387 (1995), *aff'd without pub. op.*, 116 F.3d 1496 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 852 (1998); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 157 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994); Formanek v. United States, 18 Cl. Ct. 785, 792-793 (1989); Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062, 1068 (1987) (en banc), *cert. denied*, 486 U.S. 1022 (1988).

[51] *See, e.g.*, Hage v. United States, 35 Fed. Cl. 147, 164 (1996).

[52] Robbins v. United States, 40 Fed. Cl. 381, *aff'd without op.*, 178 F.3d 1310 (Fed. Cir. 1998), *cert. denied*, 119 S. Ct. 2400 (1999); Lakewood Assocs. v. United States, 45 Fed. Cl. 320 (1999).

[53] *Lakewood Assocs*.

defend the case based on the more government-friendly ground of residual economic value.[54]

The usual insistence of ripeness doctrine on at least one agency decision might, one suspects, tempt an agency to attempt forestalling a ripe claim by simply refusing to deny the permit application. To circumvent this, ripeness may be found, lack of a permit denial notwithstanding, where the agency's position on the necessary mitigation conditions seems final and non-negotiable and plaintiff asserts that such conditions are overly restrictive.[55] Contrariwise, refusal to deny is perfectly acceptable, and does not confer ripeness, when the application lacks adequate information and the agency has yet to take a final position.[56]

Role of statutes

Statutes may affect the ripeness determination by adding procedures that must be utilized by the wetland owner before filing suit. In New Jersey, a "safety valve" provision in the state's wetlands statute was judicially interpreted to mean that the state and the land developer must confer whenever the state takes an initial position that would be a taking.[57] Because the process leading to permit denial was thus seen to be incomplete until the state decides whether its opening-shot restrictions might be relaxed, the taking claim was held not ripe until that reconsideration and subsequent denial.

But while statutes may add procedures, they may not always subtract them. The Massachusetts high court rejected use of a state statute to authorize the filing of takings suits based on individual land-use decisions regardless of whether they constitute final determinations.[58]

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[54] *See, e.g.*, Walcek v. United States, No. 94-315 L (Fed. Cl., filed May 13, 1994). Plaintiff applied for a section 404 permit for a subdivision occupying the full extent of a 14.5 acre property, including 13.2 acres of jurisdictional wetland. Later he offered to reduce the proposal to 8 acres, though this may have been simply a recognition that the state was unlikely to issue a permit for the 5 acres of tidal wetlands. The Corps ultimately issued a permit for 1.3 acres of the jurisdictional wetland, a "lesser included" element of one of the development scenarios then under discussion. The Corps is now seeking summary judgment on the parcel's remaining value, which it contends leaves the plaintiff with at least a quarter million dollar profit.

In *Walcek*, the unilateral permit offer was made during litigation. Reportedly the Corps is now making such offers purely as an administrative matter.

[55] *See, e.g.*, Taylor v. United States, No. 99-131L (Fed. Cl. Aug. 18, 1999) (where agency refused to process endangered species permit application or deny permit until plaintiff agreed to mitigation conditions it proposed, ripe taking claim exists).

[56] *See, e.g., Lakewood Assocs.*

[57] East Cape May Assoc. v. State of New Jersey, 300 N.J. Super. 325, 693 A.2d 114 (1997).

[58] Daddario v. Cape Cod Comm'n, 425 Mass. 411, 681 N.E.2d 833, *cert. denied*, 522 U.S. 1036 (1997). *Daddario* arose from an effort to mine sand and gravel, and apparently

(continued...)

[58](...continued)
did not involve wetlands.

IV. Statutes of limitations

Ripeness (section III) dictates that takings claims not be filed too early. Statutes of limitations dictate they not be filed too late. Several wetlands/takings cases in the CFC, some noted in section III, have foundered on that court's statute of limitations.[59] Under it, takings cases must be filed within six years after the date of the taking.

The date of taking occurs, and the limitations period begins to run, when the taking claim becomes ripe.[60] Usually, this is the date when the wetlands permit is denied on the merits. This is particularly true in the CFC and Federal Circuit, which, as noted in section III, have yet to require a rebuffed section 404 permit applicant to submit subsequent, scaled-down proposals. Recall, however, the several exceptions noted in section III, where events other than permit denial defined the moment of ripeness.

Interestingly, the linkage between ripeness and when to start the limitations period creates two opposing classes of property owners. A ruling favorable to the plaintiff with a statute of limitations problem, picking a trigger date occurring *late* in his/her dealings with regulators, is a ruling that is unfavorable to future plaintiffs lacking statute of limitations problems, who want takings claims to ripen at an *early* stage of developments.

> *Note: sections V through VII show how the general takings tests in section I have been applied in the specific context of wetlands regulation. Some important cross-cutting issues are broken out for separate treatment in sections VIII through XI.*

V. Regulatory takings test: permission to fill denied

The landowner is in the clearest position to assert a taking claim when he/she has been formally denied a permit on the merits.

Cases involving state and local wetlands programs

Overview. As noted, final, reported state-court decisions in recent decades have been less likely to find takings based on wetlands regulations than their CFC and Federal Circuit counterparts. Perhaps the reason is that such state-court decisions more often speak of the public benefit (or public trust) in wetlands, generally finding it to outweigh even substantial detriments to the wetland owner. Then, too, many state courts insist outright that for a regulatory taking to be discerned, plaintiff must

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[59] 28 U.S.C. § 2501.

[60] Bayou des Familles Devpmt. Corp. v. United States, 130 F.3d 1034 (Fed. Cir. 1997); Cristina Investment Corp. v. United States, 40 Fed. Cl. 571 (1998).

have lost *all or nearly all* economic use of the parcel[61] — seemingly rejecting, or narrowly confining, the *Penn Central* test for less-than-total takings.

Other reasons exist, too. For one, state appellate courts have accepted rather modest post-permit-denial uses of wetlands properties as sufficient to deflect the land owner's taking argument — e.g., seasonal placement of a trailer,[62] camping,[63] a single family home,[64] and agricultural/open space use.[65] (State trial courts have not always agreed, however.[66]) For another, state courts have not placed as much importance as the CFC and Federal Circuit on whether the plaintiff is able to recover its initial investment following permit denial.[67]

Harm/benefit. Interwoven with the prevailing state test is the classic distinction in regulatory takings law between government curtailment of property use to prevent harm, generally held not to be takings, and use constraints that secure public benefits, often held to be takings. Many state courts have long embraced this dichotomy to find wetlands preservation efforts noncompensable as a prevention of public harm.[68] For example, one court explained that the wetlands restriction before it was not to be thought of as securing a benefit by maintaining land in its natural state; rather, it prevented harm from the change in the natural character of the land that, given its location on a lake, would pollute water and degrade fishing and scenic beauty.[69]

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[61] State wetlands cases requiring elimination of all or nearly all economic use in order to find a taking include Mock v. DER, 154 Pa. Commw. 380, 623 A.2d 940 (1993), *aff'd*, 542 Pa. 357, 667 A.2d 212 (1995), *cert. denied*, 517 U.S. 1216 (1996); Vatalaro v. DER, 601 So. 2d 1223 (Fla. Ct. App. 1992); Wedinger v. Goldberger, 71 N.Y.2d 488, 522 N.E.2d 25 (1988); State v. Capuano Bros., Inc., 120 R.I. 58, 384 A.2d 610 (1978); Brecciaroli v. Comm'r of Envtl. Protection, 168 Conn. 349, 362 A.2d 948 (1975).

[62] Hall v. Board of Envtl. Prot., 528 A.2d 453 (Me. 1987).

[63] Claridge v. New Hampshire Wetlands Bd., 125 N.H. 745, 485 A.2d 287 (1984).

[64] Moskow v. Comm'r, 384 Mass. 530, 427 N.E.2d 750 (1981).

[65] April v. City of Broken Arrow, 775 P.2d 1347 (Okla. 1989).

[66] *See, e.g.*, East Cape May Assoc. v. State of New Jersey, 300 N.J. Super. 325, 693 A.2d 114 (1997) ("minimal uses" insufficient to undermine taking claim, citing *Lucas*).

[67] *See, e.g.*, Alegria v. Keeney, 687 A.2d 1249, 1253 (R.I. 1997).

[68] *See, e.g.*, Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 638 F. Supp. 126, 135 (D. Nev. 1986), *aff'd in part, rev'd in part on other grounds*, 911 F.2d 1331 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991); Graham v. Estuary Properties, 399 So. 2d 1374 (Fla.) (conceding that harm/benefit dichotomy unclear), *cert. denied*, 454 U.S. 1083 (1981); Moskow v. Comm'r, 384 Mass. 530, 427 N.E.2d 753 (1981); Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975); Just v. Marinette Cty., 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

[69] *Just*, 201 N.W.2d at 768.

The harm/benefit distinction was undercut in 1992 by the Supreme Court's rejection of it as manipulable and value-laden.[70] Many government actions, said the Court, can plausibly be characterized as *either* harm preventer or benefit securer, citing wetlands protection as an example.

"Background principles". If a proposed property use is prohibitable under "background principles of the state's law of nuisance or property" existing when the property was acquired, it cannot under *Lucas* be a taking. The scope of the "background principles" concept, however, has been debated since its introduction. The *Lucas* majority opinion, in discussing the concept, focusses on common-law nuisance doctrine and pre-existing easements.[71] The concurring and dissenting opinions in the case read the majority opinion as precluding outright the inclusion of pre-existing *statutes* as background principles. Subsequently, however, considerable case law has endorsed statute eligibility (see section IX). Bringing state statutes in as background principles is a crucial development, since it allows states and localities to defend taking actions on the ground that the wetland was acquired after the state wetlands statute was enacted — regardless of whether the proposed wetland use constitutes a nuisance.

A recent Rhode Island decision may be the first instance of a wetlands fill proposal being held a nuisance in a *Lucas*-based taking analysis.[72] Based on its nuisance status, the court held, the state's thwarting of the proposal could not under *Lucas* be a taking, even if it eliminated all economic use of the property.

Public trust doctrine. Under this amorphous, much-debated concept, there *is* no right to use property impressed with the trust in a manner that impairs trust interests, however one defines them. Plainly, viewing the waters of a state as natural resources infused with a public trust serves to bolster wetlands regulation against takings challenges.[73]

One variant of the public trust doctrine is in *Just v. Marinette County*: "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."[74] Relying on this principle, the court found no taking in a county requirement that a permit be secured to fill in wetlands along a pristine lake, where such fill might harm water quality and recreational values. At the same time, the court explained that it would not find the requisite harm to the rights of others in *all* instances of wetlands destruction, as in the

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[70] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1024-1026 (1992).

[71] 505 U.S. at 1028-1029.

[72] Palazzolo v. Coastal Resources Mgmt. Council, No. 88-0297 (R.I. Super. Ct. Oct. 24, 1997) (unpublished).

[73] *See, e.g.*, Orion Corp v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987) (en banc), *cert. denied*, 486 U.S. 1022 (1988).

[74] 201 N.W.2d at 768.

case of an "isolated swamp unrelated to a navigable lake or stream."[75] The *Just* rule is the pinnacle of judicial protection of wetlands, and has been adopted in a handful of states.[76]

A tantalizing question is whether the public trust doctrine in any of its incarnations will be accepted by courts as the kind of "background principle of property ... law" referred to in *Lucas*. At least in those states in which the doctrine is well-established, it would seem to qualify.[77]

Cases involving the federal wetlands program

Overview. In the CFC/Federal Circuit, two elements of the *Penn Central* test, economic impact and interference with investment-backed expectations, have eclipsed the third, the "character" of the government action. The character factor, where it is mentioned at all,[78] appears to function mainly as a buttress to takings determinations reached on the basis of the other two factors.[79]

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[75] *Id*. at 769.

[76] Rowe v. Town of North Hampton, 553 A.2d 1331, 1335 (N.H. 1989); Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1382 (Fla.), *cert. denied*, 454 U.S. 1083 (1981); American Dredging Co. v. DEP, 391 A.2d 1265, 1271 (N.J. Super. Ct. Ch. Div. 1978), *aff'd*, 404 A.2d 42 (N.J. Super. Ct. App. Div. 1979). *Just* has also been reaffirmed recently in its state of origin. Zealy v. City of Waukesha, 201 Wis. 2d 365, 548 N.W.2d 528 (1996) (clarifying that *Just* rule goes beyond geographic limits of traditional public trust doctrine).

[77] Agreeing with the text proposition are Hope M. Babcock, The Impact of Lucas v. South Carolina Coastal Council on *Wetlands and Coastal Barrier Beaches*, 19 Harv. Envtl. L. Rev. 1 (1995), and Paul Sarahan, *Wetlands Protection Post-Lucas: Implications of the Public Trust Doctrine on Takings Analysis*, 13 Va. Envtl. L.J. 537 (1994). Mr. Sarahan argues that owing to interrelated hydrology, the doctrine may even be applicable to wetlands adjacent to public trust waters. He suggests that when imposing development restrictions on wetlands, states develop data as to the probable impact of the proposed development on those waters.

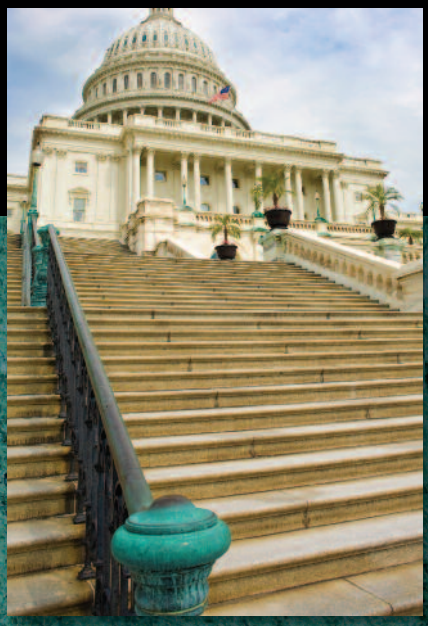
A pre-Lucas view of the public trust concept is Mary K. McCurdy, *Public Trust Protection for Wetlands*, 19 Envtl. L. 683 (1989).

[78] The Federal Circuit recently admonished the CFC (in a wetlands case) to address all *three* of the *Penn Central* factors when deciding a regulatory taking case, including the character of the government action. Broadwater Farms Joint Venture v. United States, 121 F.3d 727 (Fed. Cir. 1997) (unpublished). The CFC had looked at only the economic impact of the government action.

It remains to be seen whether the Circuit's directive will result in more than perfunctory consideration of the character factor. On remand, the CFC noted with understatement that "[c]ourts do not always examine the character of the Government action in a partial takings analysis." 45 Fed. Cl. 154 (1999). And in Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999), *petition for cert. filed*, the Federal Circuit itself said that where there is a complete absence of reasonable development expectations, no other *Penn Central* factors need be scrutinized.

[79] To some extent, this uncertain role for the character factor results from the Supreme Court's failure to give it much content beyond saying that it refers to the fact that takings are

(continued...)



A Practical Guide to Preparing and Delivering Testimony Before Congress and Congressional Hearings for Agencies, Associations, Corporations, Military, NGOs, and State and Local Officials

By William N. LaForge

Testifying Before Congress

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Economic impact. While state courts generally translate the economic impact factor of the regulatory takings test into an examination of the property's remaining economic *uses*, the CFC and Federal Circuit focus heavily on the property's remaining economic *value*. These latter courts typically do detailed analyses of the parcel's fair market value before and after the permit denial.[80] Typically, the CFC will figure the value diminution as a percentage, and then, if it is great enough, look for other circumstances (almost always found) supporting a taking.

Until 1994, the value diminutions in section 404 permit denial cases held great enough to constitute a taking ranged upwards of 88%.[81] In that year, a Federal Circuit ruling in *Florida Rock* asked, in discussing the concept of a "partial regulatory taking," whether a value diminution of only 62% might be sufficient to take.[82] On remand, this query bore fruit when the CFC found a partial regulatory taking based on a 73.1% value loss.[83] Though the courts have never explicitly established any particular percentage of value loss as necessary to establish a taking, these developments in *Florida Rock* suggest an easing of the quantum of economic impact

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[79](...continued)
more likely to result from physical invasions than from purely regulatory interference. Adding to the confusion, some Federal Circuit decisions have defined "character" to mean that if the regulation prevents a nuisance, no taking occurred. *See, e.g.*, Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994). This seems highly redundant, since the nuisance status of the proscribed landowner activity is already part of the takings analysis through the "background principles" and "reasonable investment-backed expectations" concepts.

[80] *Florida Rock*, 18 F.3d at 1567. The most frequently used method of ascertaining fair market value is through comparable sales, where they exist.

[81] Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (99% value loss); Florida Rock Industries, Inc. v. United States, 21 Cl. Ct. 161 (1990), *vacated and remanded*, 18 F.3d 1560 (Fed. Cir. 1994) (holding that trial court used improperly low "after value," but not disputing that such value warranted finding a taking), *cert. denied*, 513 U.S. 1109 (1995) (95% value loss); Bowles v. United States, 31 Fed. Cl. 37 (1994) (finding 100% value loss, but holding that even if government estimate of 92% value loss was correct, there was a taking); Formanek v. United States, 26 Cl. Ct. 332 (1992) (88% value loss). *See also* 1902 Atlantic Limited v. United States, 26 Cl. Ct. 575, 579 (1992) (88% value loss from permit denial satisfies economic impact factor in *Penn Central* test, though no taking found).

[82] 18 F.3d at 1567. The underlying issue is what function the Supreme Court-invented concept of regulatory takings should serve. If regulatory takings doctrine only seeks to compensate when the regulatory restriction is so total as to be the functional equivalent of a physical ouster of the land owner, as some decisions suggest, diminutions in value much below 100% should not be compensated. If a broader view of the doctrine is contemplated, compensation for regulatory losses well short of 100% may be perfectly proper.

[83] 45 Fed. Cl. 21 (1999).

needed to support a regulatory taking.[84] Moreover, if the CFC ruling becomes final, it will establish a clear difference between federal and state takings jurisprudence.

At the opposite end of the value-loss spectrum, losing the use of only 15% of one's land while still able to turn a profit on the entire parcel is plainly not a taking,[85] nor is a 25% loss in value where the remaining value far exceeds plaintiff's cost basis.[86] Given the general canon that takings law requires severe impact on the property owner, these no-taking holdings at the low end of the value-loss spectrum are unsurprising. The battle right now is for the high middle ground of value loss.

Other ingredients of the economic-impact stew tend, as mentioned, to be secondary to the value-loss calculation. One, as just noted, is whether a wetland owner, following permit denial, can recoup his/her cost basis in the parcel.[87] For example, the CFC rejected a taking attack on a 404-permit denial in part because plaintiffs had previously sold the upland portion of the parcel for more than twice the original cost of the parcel as a whole (deemed to include the upland portion).[88]

A second economic-impact factor is "average reciprocity of advantage" — an inquiry into whether the burdens imposed on the property owner by the challenged regulatory regime have been offset by benefits accruing to the owner from the very same regime. In finding a taking, the CFC in *Florida Rock* found that plaintiff's "disproportionately heavy burden was not offset by any reciprocity of advantage."[89] There is some ambiguity in Federal Circuit opinions as to just how completely the burdens on the landowner have to be offset by such benefits.[90]

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[84] Partial regulatory takings also raise issues of remedy. Previous wetlands/takings cases in the CFC, based as they were on near-total value losses, were compensated by requiring the United States to buy fee simple title. With 26.9% of its value remaining, however, the CFC in *Florida Rock* could not require the United States to buy the acreage outright — the government cannot be required to buy what it has not taken. Thus, the CFC required the United States to pay for only the right to use the property, not the right to sell to speculators that accounted for the remaining value. 45 Fed. Cl. at 43.

Of course, the United States has acquired less-than-fee interests in the past as part of *settlements* in its wetlands/takings litigation.

[85] Forest Properties, Inc. v. United States, 177 F.3d 1360 (Fed. Cir.), *cert. denied*, 120 S. Ct. 373 (1999).

[86] Ciampitti v. United States, 22 Cl.Ct. 310, 320 n.5 (1991).

[87] The canonical statement of this factor is in Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 905 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987): "In determining the severity of economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored." *Accord*, Ciampitti v. United States, 22 Cl. Ct. 310, 320 n.5 (1991), Walcek v. United States, 44 Fed. Cl. 462, 466 n.5 (1999).

[88] Palm Beach Isles Assocs. v. United States, 42 Fed. Cl. 340, 364 (1998), *appeal pending*. Cost basis is not limited to the original purchase price, but may include other capital expenditures on the property. Walcek, 44 Fed. Cl. at 466 n.5.

[89] *Florida Rock*, 45 Fed. Cl. 21, 37 (1999).

[90] The second Federal Circuit opinion in *Florida Rock* can be read to mean that the (continued...)

A third factor is the availability of transferrable development rights (TDRs) that may soften the economic impact of permit denial. TDRs are a widely used land use planning mechanism that seeks to direct development away from environmentally sensitive areas such as wetlands and toward land more suitable for development. TDRs do this by granting the owner of restricted property the right to build on another property he/she owns at a density greater than otherwise allowed, or to sell such development rights to other property owners. Thus, the availability of TDRs to a wetland owner may confer value on a development-prohibited wetland that otherwise would have little. Whether such TDR-conferred value may be used to deflect a taking claim (rather than being confined to the calculation of compensation, where a taking occurs) is a lively issue in takings law today. A majority of the current Supreme Court appears disposed to answer the question in the affirmative.[91] And a recent wetlands case so held.[92]

As in land valuation generally, where the government seeks to support its valuation of a permit-denied wetland by alleging remaining uses, they must meet a "showing of reasonable probability that the land is both physically adaptable for such use *and* that there is a demand for such use in the reasonably near future."[93] In similar fashion, plaintiff cannot base pre-permit-denial value on projects that fail this test.[94]

Investment-backed expectations. This *Penn Central* factor has come to be the vehicle in the Federal Circuit for defeating wetlands takings claims when the plaintiff acquired the wetland after the section 404 program was put into place (or some related date). A fuller treatment of this "notice rule" is in section IX.

When the land was acquired *before* there was a 404 program (or related date), interference with investment-backed expectations may or may not cut in favor of

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[90](...continued)
landowner's burden must be *fully* offset — a powerful principle for landowners, if followed. See 18 F.3d at 1570.

[91] *See* Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997). The underlying issue, widely debated since *Lucas* in 1992, is whether the regulatory taking determination hinges on a property's remaining *use* — in the sense of immediate development potential — or remaining value. If remaining use (as defined), TDRs are plainly not part of the takings analysis, and the Court's explicit endorsement of TDRs in *Penn Central* as part of that analysis, 438 U.S. at 137, is no longer good law. If remaining value, the endorsement of *Penn Central* still stands. Significantly, the majority's rationale in *Suitum*, a post-*Lucas* decision, presumes the relevance of TDRs to the takings analysis.

[92] Good v. United States, 39 Fed. Cl. 81, 108 (Fed. Cl. 1997), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999), *pet. for cert. filed. Good* rejects the argument that *Suitum* somehow undercuts the relevance of TDRs to the takings determination. An early wetlands decision supporting use of TDRs in takings analysis is Deltona v. United States, 657 F.2d 1184, 1192 n.14 (1981), *cert. denied*, 455 U.S. 1017 (1982).

[93] *Loveladies Harbor*, 21 Cl. Ct. 153, 158 (1990) (emphasis in original), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994).

[94] *Palm Beach Isles*, 42 Fed. Cl. at 364.

finding a taking. The CFC in *Florida Rock* recently explicated this circumstance.[95] Such interference points more strongly towards a taking, it said, when the plaintiff's "primary" expectations for the site were thwarted. (Plaintiff bought the wetland solely to mine the underlying limestone; that objective was entirely thwarted.) Also significant is how much of the parcel has been burdened by the regulation. (The limestone underlay the entire parcel.) And finally, the investment-backed expectations factor may include a look at plaintiff's ability to earn a reasonable return on his/her investment — similar to the recoupment of cost basis noted above under economic impact.

Elsewhere, the CFC has noted that state and local restrictions must be considered in determining the presence or absence of reasonable investment-backed expectations to engage in the proscribed use.

"Background principles". Usually, the CFC/Federal Circuit take a narrow view of the *Lucas* "background principles" concept. Most of their decisions addressing the issue accept as a source of background principles only the state's common law of nuisance,[96] or the state's common law of nuisance and property, or the latter plus state statutes rooted in the state's common law of nuisance and property.[97] Generally, federal statutes have been excluded from "background principles"[98] — though, importantly, they are very much a part of the subsequent *Penn Central* analysis of investment-backed expectations (see section IX).

In the same vein, and unlike some state courts, the CFC/Federal Circuit have shown no disposition to embrace anything resembling a public trust doctrine.[99] Nor has the CFC/Federal Circuit ever accepted the United States' argument that the proposed wetlands fill would constitute a nuisance.[100]

A big exception to the CFC/Federal Circuit's usual emphasis on state law as the source of background principles is their post-*Lucas* endorsement of the federal navigation servitude as an absolute defense to takings, where the wetlands are within

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[95] 45 Fed. Cl. 21.

[96] The chief affirmation of the state-common-law-of-nuisance view is in the plurality opinion in Preseault v. United States, 100 F.3d 1525, 1538 (Fed. Cir. 1996) (en banc), a rails-to-trails case. Wetlands cases endorsing the view are *Loveladies Harbor*, 28 F.3d at 1179, and Bayou des Familles Devpmt. Corp. v. United States, 130 F.3d 1034, 1038 (Fed. Cir. 1997). All three opinions are by Judge Jay Plager.

[97] *Good*, 39 Fed. Cl. at 105.

[98] *Contra*, M&J Coal Co. v. United States, 47 F.3d 1148, 1153 (Fed. Cir.) (background principles "may also stem from federal law"), *cert. denied*, 516 U.S. 808 (1995).

[99] *See, e.g., Loveladies Harbor*, 15 Cl. Ct. 381, 395 (1988).

[100] *See, e.g.*, Florida Rock Industries, Inc. v. United States, 45 Fed. Cl. 21 (1999); Forest Properties, Inc. v. United States, 39 Fed. Cl. 56, 70-71 (1997), *aff'd*, 177 F.3d 1360 (Fed. Cir.), *cert. denied*, 120 S. Ct. 373 (1999).

the servitude's shoreward reach.[101] The servitude, noted the CFC in language intended to invoke *Lucas*, "inheres in a private landowner's title."[102] To be sure, *Lucas* virtually dictates this conclusion, its emphasis on state law notwithstanding. In that decision, the Court stated that no compensation is owed when government merely "assert[s] a permanent easement that was a pre-existing limitation on the landowner's title," citing as illustrative one of the Court's federal navigation servitude decisions.[103]

Harm/benefit. Both before and after *Lucas*' rejection of this dichotomy, the CFC and Federal Circuit have viewed wetlands preservation as the creation of a benefit, rather than (as in many state courts) the prevention of a harm.[104] To reiterate, a benefit-creation characterization of wetlands preservation disposes a court to find a taking.

Cancelled land-purchase contract. The preceding addresses only claims that *land* was taken. What happens when a land owner suffers cancellation of a contract to buy his/her property, or the loss of a prospective contract, when the buyer learns that the parcel contains jurisdictional wetland? Is there a taking of the contract itself? In *Robbins v. United States*, such a claim was rejected.[105] "It is well settled," said the CFC, "that government action that merely frustrates expectations under a contract does not constitute a taking."[106] The court also noted that it was the contract parties, not the Corps, that caused the contract to be cancelled.

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[101] For example, in both Marks v. United States, 34 Fed. Cl. 387 (1995), *aff'd without op.*, 116 F.3d 1496 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 852 (1998), and Palm Beach Isles Assocs. v. United States, 42 Fed. Cl. 340 (1998), *appeal pending*, the CFC readily rejected on navigation servitude grounds the portion of a wetlands taking claim based on lands below the high water mark. *See also Good*, 39 Fed. Cl. at 96-97 (affirming *Marks* but holding that United States failed to show that all limitations on plaintiff's property overlapped servitude). At the Federal Circuit level, the status of the navigation servitude as a defense to takings is asserted in a non-wetlands decision: M & J Coal Co. v. United States, 47 F.3d 1148, 1153 (Fed. Cir. 1995).

[102] *Palm Beach Isles*, 42 Fed. Cl. at 351.

[103] 505 U.S. 1003, 1028-1029 (1992), citing Scranton v. Wheeler, 179 U.S. 14 (1900). *See also* United States v. 30.54 Acres of Land, 90 F.3d 790, 795 (3d Cir. 1996).

Lucas, together with the navigation servitude decisions in note 101 *supra*, suggest that the Federal Circuit's 1986 rejection of the navigation servitude as a defense to regulatory takings claims is no longer good law. Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 900 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987). Running against the tide, however, is the CFC's 1999 ruling in *Florida Rock*, which spoke approvingly of this Federal Circuit assertion. 45 Fed. Cl. at 28 n.7.

[104] *Florida Rock*, 791 F.2d at 904 (Fed. Cir. 1986), 45 Fed. Cl. 21 (1999).

[105] 40 Fed. Cl. 381, *aff'd without op.*, 178 F.3d 1310 (Fed. Cir. 1998), *cert. denied*, 119 S. Ct. 2400 (1999).

[106] 40 Fed. Cl. at 385.

Cumulative impacts

It may happen that the loss of some wetland acreage in a particular area is seen by government regulators as ecologically acceptable, but that further losses are not. Thus, the first few persons seeking to fill in pieces of an extensive wetland may be granted permits, while the person who comes along next is denied.

Takings law does not accommodate this situation well. The takings cases repeatedly refer with disapproval to government actions that "single out" a property owner for different treatment than those similarly situated.[107] Thus, while the Corps of Engineers must, as part of its review of permit applications, consider cumulative impacts, its doing so may lead to denials that are hard to defend from a takings standpoint.

VI. Regulatory takings test: mitigation conditions

Though the large majority of wetlands/takings cases address outright permit denials (section V), such denials are actually quite infrequent in the federal and most state wetlands programs.[108] Far more often, the government wetlands agency offers to grant the permit — with conditions. Often, these conditions require the permit applicant to "mitigate" the environmental impacts of the proposed project, possibly at considerable expense. It behooves us, therefore, to examine the takings implications of these conditions.

In the section 404 program, mitigation generally means first, seeking to avoid to the extent practicable the adverse impact of the proposed development; second, minimizing to the extent practicable those impacts that cannot be avoided; and third, requiring compensatory mitigation for remaining impacts.[109] This is called "mitigation sequencing," and is an important component of state programs as well. Compensatory mitigation may take the form of restoration of existing degraded wetlands, creation of man-made wetlands, or use of an approved mitigation bank. Importantly, mitigation conditions may attach to activities under both individual and nationwide permits. Mitigation serves the national commitment to no net loss of wetlands while allowing reasonable development to occur.

But *how much* compensatory mitigation to require? While many section 404 permits require compensatory mitigation at a ratio of only 1:1 (one acre of restored or created wetland for each acre filled), or at most 2:1, occasional reports of much higher ratios exist. Perhaps unavoidably given the diversity of aquatic resource functions and values, the EPA-Corps Memorandum of Agreement provides little in

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[107] *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987); *Florida Rock*, 45 Fed. Cl. at 37.

[108] *See* note 29 *supra*.

[109] Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 55 Fed. Reg. 9210 (Mar. 12, 1990).

the way of concrete guidance. The memorandum notes only that the amount of compensatory mitigation demanded of the landowner be "appropriate to the scope and degree of [the unavoidable impacts] and practicable in terms of cost, existing technology, and logistics ...." The compensatory ratio "may be greater [than 1:1] where the functional values of the area being impacted are demonstrable higher and the replacement wetlands are of lower functional value or the likelihood of success of the mitigation project is low." This guidance leaves Corps district engineers with much discretion.

Given their ubiquity, it is curious that mitigation conditions on wetlands permits have kept such a low profile in the takings cases. Perhaps the dearth of case law reflects the fact that mitigation conditions often are arrived at after protracted negotiations between applicant and agency, so that the applicant, having had a hand in the result, is likely to perceive it as reasonable. Then, too, developers generally would rather build than litigate.

Research reveals but one federal wetlands decision (reported) in which mitigation conditions figured significantly. In *Plantation Landing Resort, Inc. v. United States*, the court said it could not view a Corps permit denial as a taking when the denial was the result of plaintiff's having cut off negotiations with the Corps over mitigation requirements — especially where the Corps had provided several mitigation alternatives.[110] Thus, a certain amount of good faith negotiations over mitigation appears to be essential before filing a taking claim; a "my way or else" attitude is disfavored.[111] It would seem, however, that once an agency's minimum conditions become clear, a taking claim alleging that the project with those conditions is not economically viable should be possible. Indeed, a recent Endangered Species Act case holds that the landowner may ripen a taking claim without the one permit denial usually required (see section IV) if the mitigation conditions demanded up front by the government are prohibitive.[112]

Once the government's final, absolute-minimum conditions are reached, the takings test is presumably the same as for permit denials — that is, either *Lucas* or *Penn Central.* In some cases, however, the heightened scrutiny applied by the Supreme Court to exaction conditions on development permits might be appropriate. Heightened scrutiny demands that such a condition further the same objective as the permit to which it is attached ("nexus" requirement) and that the burden imposed on the applicant by the permit condition be "roughly proportional" to the impact of the

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[110] 30 Fed. Cl. 63 (1993), *aff'd without pub. op.*, 39 F.3d 1197 (Fed. Cir. 1994), *cert. denied*, 514 U.S. 1095 (1995).

[111] Two cases from the wildlife protection area that make this point are Southview Assocs. v. Bongartz, 980 F.2d 84 (2d Cir. 1992) (taking claim unripe where state, in denying permit, indicated that reapplication with appropriate mitigation would be accepted, but landowner failed to reapply); Killington, Ltd. v. State, 668 A.2d 1278, 1282-1283 (Vt. 1995) (similar).

[112] Taylor v. United States, No. 99-131L (Aug. 18, 1999).

proposed development on the community.[113] Though the Supreme Court recently gave the rough proportionality standard a narrow scope,[114] at least some conditions on section 404 permits arguably remain subject to it.[115] CFC/Federal Circuit decisions have not yet explored this issue. In any event, rough-proportionality challenges to Corps permit conditions should be rare if the Corps is complying with the EPA-Corps Memorandum of Agreement statement that compensatory mitigation should be "appropriate to the scope and degree" of the project's unavoidable impacts.[116]

Takings issues also have been raised in connection with mitigation banking. As with the transferrable development rights long used by local land-use agencies, the hope of mitigation banking proponents is that by imparting value to unusable wetlands, mitigation banking or credits trading may deflect takings claims.[117]

VII. Regulatory takings test: project delays

Two types of temporary takings actions have been brought based on delays in developing wetlands caused by the actions or inaction of wetlands agencies. Almost all the cases involve the federal section-404 program.

Processing delays

Courts have grappled with the sometimes lengthy processing time before a wetlands permit is issued, holding that the key factor in the temporary taking analysis

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[113] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (announcing "nexus" criterion); Dolan v. City of Tigard, 512 U.S. 374 (1994) (announcing "rough proportionality" criterion).

[114] City of Monterey v. Del Monte Dunes, Inc., 119 S. Ct. 1624, 1635 (1999).

[115] Under the 404 program, easements are usually recorded on mitigation property to permanently dedicate the property to mitigation. In *City of Monterey*, the Court left the rough proportionality test applicable to "exactions — land use decisions conditioning approval of development on the dedication of property for public use" *Id*. Some have argued that *City of Monterey* leaves the rough proportionality test applicable as well to purely monetary exactions. Dollar exactions reportedly are not used by the Corps, except that the agency will accept payments to mitigation providers in lieu of mitigation performed by the wetland owner itself.

[116] *See* text following note 109 *supra*.

[117] *See generally* William J. Haynes II and Royal C. Gardner, *The Value of Wetlands as Wetlands: The Case for Mitigation Banking*, 23 Envtl. L. Rptr. 10261, 10262 (1993); Jeffrey Zinn, *Wetlands Mitigation Banking: Status and Prospects*, CRS Report 97-849 ENR. Mitigation banking thus raises the same issue posed by transferrable development rights: whether the taking determination depends on residual use or residual value. See note 91 *supra*.

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is whether the wait was, under the circumstances, unreasonable or "extraordinary."[118] Was it unduly protracted in light of the complexity of the regulatory scheme? Did the owner fail to take actions that might have shortened the processing time? To date, federal courts have held that waiting periods for section 404 permits up to two years did not, under the circumstances presented, work a taking.[119]

Teasing apart the delay attributable to the agency from that caused by the plaintiff can be pivotal to the case. In *Walcek v. United States*, all but one year of an eight-year span between first permit application and issuance of a limited permit was laid at the feet of the wetland owners.[120] Their applications, said the court, had lacked the requisite information and state permits, and they had opted for litigation over completing the application or submitting a scaled-down proposal. The one year of government-caused delay, it held, is not the sort of "extraordinary" delay that makes out a temporary taking, particularly where no bad faith or negligence is shown.

Agency error

Another delay scenario is when an agency's assertion of jurisdiction over a wetland, or its denial of a permit, is judicially set aside. In *Tabb Lakes, Inc. v. United States*,[121] the Corps of Engineers issued a cease-and-desist order requiring a developer to stop work until it obtained a section 404 permit, only to be judicially informed three years later that its claim of jurisdiction over the property was procedurally defective. The three-year delay caused no taking, said the Federal Circuit. The cease-and-desist order had specifically left the door open to development by obtaining a permit. Invoking a powerful principle for government planners, the court further cited the Supreme Court's assertion that "mere fluctuations in value during ... government decisionmaking, absent extraordinary delay, ... cannot be considered a taking."[122]

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[118] *See, e.g.*, Walcek v. United States, 44 Fed. Cl. 462, 467 (1999); 1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575, 581 (1992). *See also* Norman v. United States, 38 Fed. Cl. 417, 427 (1997) (collecting cases).

[119] *1902 Atlantic*, 26 Cl. Ct. at 579 (15 months); Dufau v. United States, 22 Cl. Ct. 156 (1990) (16 months); Lachney v. United States, 22 Env't Rptr. (Cases) 2031 (Fed. Cir. 1985) (2 years).

[120] 44 Fed. Cl. at 468.

[121] 10 F.3d 796 (Fed. Cir. 1993).

[122] *Id.* at 801 (quoting Agin v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980)). Similar to *Tabb Lakes* is Littoral Development Co. v. San Francisco Bay Conservation and Devpmt. Comm'n, 33 Cal. App. 4th 211, 39 Cal. Rptr. 2d 266 (1995). As in *Tabb Lakes*, the government agency's assertion of wetlands jurisdiction was invalidated. The resultant delay was held not a taking because the government's legal arguments, though erroneous, had been plausible, and because use of the property continued during the dispute.

Whether government errors should be considered a normal, to be expected, part of land use regulation processes, and hence not a taking, is in contention now in the state courts.

The result was the same where the takings challenge was to a judicially invalidated wetlands permit denial.[123]

The CFC and Federal Circuit consistently have held that "unauthorized" government actions cannot form the basis of takings actions against the United States.[124] The Federal Circuit recently clarified this rule, stating that not all erroneous federal actions are "unauthorized" — only those that are *ultra vires*, that is, either explicitly prohibited or outside the normal scope of the agency official's duties.[125] It is likely, then, that a permit action by the Corps of Engineers asserted to be unlawful merely because of a reasonable misinterpretation of section 404 could simultaneously be the subject of a taking action in the CFC.

Takings actions against state wetlands programs are much less likely to get embroiled in the question of whether the government action is *ultra vires*. Typically, the *ultra vires* or otherwise erroneous status of a government act is seen by state courts as irrelevant to whether a taking occurred.

Economic return

A source of confusion is whether a project's economic return *during* the restricted period should play a role in a taking analysis. The better view is that when a restriction is plainly temporary at the time imposed, the absence of any economic use during the period of restriction (reasonably limited) is not material. One reason is that Supreme Court takings cases rejecting the physical segmentation of property in takings analysis can be read to disfavor as well a narrow focus on the restricted segment of time.[126] Another reason is that the strong likelihood of future economic use when the restriction is lifted, supports present economic value.[127] Where, on the other hand, the development restriction is of presumptively indefinite duration, such as a permit denial on the merits, the property may be left with no development potential to sustain present market value, and a taking may indeed occur.

CFC and Federal Circuit decisions indicate no awareness of this distinction. The *Tabb Lakes* trial court, in addressing a temporary taking challenge to a Corps cease and desist order, homed in on the existence of lot sales during the development prohibition, and noted that plaintiff's tax returns during that period showed

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[123] *1902 Atlantic*, 26 Cl. Ct. 575.

[124] The rationale is that such conduct by an official "will not ... represent the United States, and ... cannot create a claim against the Government." Hooe v. United States, 218 U.S. 322, 335 (1910).

[125] Del Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358 (Fed. Cir. 1998).

[126] *See, e.g.*, Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258 (1992), *cert. denied*, 508 U.S. 960 (1993). See section VIII (Parcel as a whole).

[127] This raises yet again the question of whether the takings determination should key off a property's residual value or residual use, an issue noted earlier in connection with transferrable development rights and mitigation banking.

profitability.[128] Yet it was clear at the outset that the Corps order would terminate upon the occurrence of likely future events. And in another wetlands case, the CFC stated without qualification that in evaluating temporary takings claims, courts look at whether the delay was extraordinary *and* "whether the government's actions have temporarily deprived the property owner of all or substantially all economically viable use of their [sic] property."[129]

Should a taking be found based on permit denial, an eventual reversal of the denial decision does not undo the taking, but only defines the termination date for the period of the temporary regulatory taking.

VIII. Parcel as a whole

As noted, the frequently invoked *Penn Central* test for regulatory takings requires a court to consider, among other things, the extent to which the government action caused the property owner (a) loss of the property's economic value or use, and (b) frustration of his/her reasonable investment-backed expectations for the property. Both these factors are assessed in a relative, rather than absolute, sense. For example, a $1 million drop in land value due to a wetlands permit denial points much more strongly to a taking if that loss deprives the owner of substantially all the property's value, rather than only a modest fraction thereof. For this reason, it becomes critical for a court to define with care the precise physical extent of the property it will look at — in the lingo of takings law, the "parcel as a whole" or "relevant parcel."

The parcel as a whole conundrum is pervasive in the wetlands takings cases. Quite often, for example, a tract consists of both restricted wetlands and unrestricted, still developable uplands. Or the permit is denied for some, but not all, of the wetland on the parcel. The relevant parcel issue requires a court to ask whether the developable portion should be counted in the taking analysis.

The relevant parcel determination is often a make-or-break one — the litigant that prevails on this issue likely will win on the taking claim. The "total taking" rule of *Lucas* — elimination of all economic use of a parcel is a *per se* taking, if no "background principles" apply — buttresses this point. Deeming the wetland portion alone to be the relevant parcel increases the chances that the court will find elimination of all economic use, hence a taking, when the permit is denied.[130]

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[128] 26 Cl. Ct. 1334 (1992), *aff'd*, 10 F.3d 796 (Fed. Cir. 1993).

[129] Walcek v. United States, 44 Fed. Cl. 462, 467 (1999).

[130] In *Tabb Lakes*, 10 F.3d at 802, the Federal Circuit refused to narrow the parcel as a whole to solely the wetlands portion of a tract, explaining that wetlands permit denials "would [then], ipso facto, constitute a taking in every case ...." *See generally* Stephen M. Johnson, *Defining the Property Interest: A Vital Issue in Wetlands Taking Analysis After Lucas*, 14 J. Energy, Nat. Res. & Envtl. L. 41 (1994).

The *Tabb Lakes* court was incorrect in asserting that a wetlands-only relevant parcel would *always* be a taking. Most obviously, development of some portion of the wetland might

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Congressional proponents of property rights legislation are also aware of this issue, often writing into their bills a value-loss criterion for which agency actions are compensable that is measured against the *affected portion* of the property.[131]

The Supreme Court holds that takings law "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[132] From this and other Court pronouncements, it seems that one may not exclude acreage from the parcel as a whole *solely to isolate the restricted portion* of a plaintiff's property. Thus, a court will spurn a taking claim when the wetland owner fails to show that economic use of the unrestricted upland portion of the same parcel is infeasible. The different regulatory status of the upland is not, of itself, a reason to exclude it.

The different-regulatory-status rule doubtless has inhibited many a wetland owner from filing a taking action. The intermingling of wetlands and uplands on most land parcels has meant there is generally an economic use remaining after the wetland has been ruled off limits.

Relevant factors

The preceding paragraphs leave open the door for plaintiffs to attempt whittling down the relevant parcel through many factors other than different regulatory status. Wetlands owners have argued that acreage should be excluded because it is (1) not contiguous with the regulated tract, (2) subdivided as different lots, (3) owned by a different, though related, entity, (4) owned by plaintiff in different form (e.g., legal title versus equitable title), (5) in a different zoning or tax assessment status, (6) acquired at a different time or through a different transaction, (7) beyond the scope of the permit being sought, (8) beyond the scope of the project for which the permit is sought, or at least capable of separate development, or was (9) sold off (or at least developed) before the permit was denied, or even before the regulatory scheme was enacted.

The CFC and Federal Circuit have been in the forefront on relevant parcel issues. An early federal wetlands decision took a broad view of the parcel as a whole. After asserting that contiguous uplands had to be included in the relevant parcel, *Deltona Corp. v. United States* suggested inclusion as well of sections of the original purchase that had been developed and sold off prior to the permit denial on the contested

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[130](...continued)
be permitted. More important, some wetlands activities of economic value do not require permits at all.

[131] *See, e.g.*, H.R. 925, 104th Congress (Contract with America bill passed by House), reintroduced in 106th Congress as H.R. 2550.

[132] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-131 (1978). The Court most recently reiterated the sentiment in Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 644 (1993).

section.[133] In *Loveladies Harbor*, however, the CFC went with a narrow definition, refusing to factor in two pieces of the developer's original 250-acre purchase: the lots it had developed and sold off by the date of the alleged taking (193 acres), and developed but not yet sold upland lots that were not contiguous with the land for which the permit was denied (6 acres)[134]

On appeal, the Federal Circuit in *Loveladies Harbor* announced the position now followed in both federal and several state courts. In defining the parcel as a whole, courts should use "a flexible approach, designed to account for factual nuances."[135] So, it said, the divergent results in *Deltona* and *Loveladies Harbor* were consistent — simply the product of the different facts in each case. The Circuit affirmed the Claims Court's acreage exclusions, endorsing its newly minted rationale that land "developed or sold before the regulatory environment existed" should not be included.[136] The 193 acres had been sold, and the 6 upland acres at least developed, before the "regulatory environment" of Clean Water Act section 404 was enacted in 1972.[137]

Other recent uses of the *ad hoc* approach to relevant parcel determinations have proved less hospitable to landowners. In *Palm Beach Isles Assocs. v. United States*, the CFC held that the converse of the *Loveladies Harbor* rule was that the portion of plaintiff's property sold *after* the regulatory structure was imposed *should* be included in the relevant parcel.[138] Thus, where plaintiff sold a large upland portion of its tract in 1968, following expiration of its Rivers and Harbors Act of 1899 (RHA) permit and after the Corps started to enforce a broader RHA scheme, that portion was deemed part of the parcel as a whole — defeating the taking claim. Inclusion of the upland portion was also deemed appropriate because the permit denial giving rise to the taking action followed an application under not only section 404, but the RHA as well.

How the developer itself treated the acreage in question has proved key. For example, the fact that a tract owned by the plaintiff is not contiguous with the tract generating the taking claim normally is a reason not to include the first parcel in the

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[133] 657 F.2d 1184, 1192 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

[134] 15 Cl. Ct. 381, 391-93 (1988). The six acres of uplands were valued at $2.4 million near the time of the taking, compared with the $300,000 paid by the developer for the entire 250-acre tract. These dollar figures make plain that the court's exclusion of this small fragment of the original tract was essential to its finding of a taking.

[135] 28 F.3d 1171, 1181 (Fed. Cir. 1994). The decision in East Cape May Assoc. v. State of New Jersey, 300 N.J. Super. 325, 693 A.2d 114 (1997), contains a particularly extensive discussion of the parcel as a whole issue.

[136] 28 F.3d at 1181 (emphasis added).

[137] *But see* Broadwater Farms Joint Venture v. United States, 35 Fed. Cl. 232 (1996) (subdivision sector developed and sold off before *date of alleged taking* by Corps not included in relevant parcel, where no evidence of strategic behavior), *vacated and remanded*, 121 F.3d 727 (Fed. Cir. 1997) (unpublished decision, not citable as precedent, explicitly affirming lower court on relevant parcel issue).

[138] 42 Fed. Cl. 340, 361 (1998).

parcel as a whole. In *Ciampitti v. United States*,[139] however, the Claims Court lumped a developer's wetland with a nearby, but noncontiguous, upland it owned that was "inextricably linked in terms of purchase and financing" with the wetland.[140] More conventionally, the Federal Circuit in *Forest Properties, Inc. v. United States*[141] found that the developer had treated its combined lakebottom/upland parcel as a single income-producing unit for purposes of financing, planning, and development. It could not now segregate the wetland portion, said the court, for purposes of its taking claim.

These cases were influential in a state case: *K&K Construction Co. v. DNR*.[142] There, the Michigan Supreme Court held that where a permit application contemplated a single comprehensive development encompassing three of four contiguous tracts in common ownership, the relevant parcel was "at least" those three tracts. The single development proposal negated the fact that the tracts were zoned differently.

K&K, *Ciampitti*, and *Forest Properties* say that the scope of a unified development plan sets the minimum size of the relevant parcel.[143] It does not, however, fix the maximum. In *Zealy v. City of Waukesha*,[144] the Wisconsin Supreme Court rejected the view that a land owner's anticipated use of contiguous parcels caps the size of the relevant parcel. This decision turned on the fact that the non-wetland acreage, whether or not part of the development proposal, formed a single contiguous parcel with the wetland portion.[145]

Wetlands decisions of the CFC and Federal Circuit have differed over whether individual subdivision lots in common ownership should be considered together for

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[139] 22 Cl. Ct. 310 (1991).

[140] The planned integrated use of mainland and island tracts also gave rise to a single parcel as a whole, despite noncontiguity, in Town of Jupiter v. Alexander, 1998 Westlaw 634705 (Fla. App. Sept. 16, 1998), *rev. denied*, 729 So. 2d 389 (1999), a non-wetlands case.

[141] 177 Fed. Cir. 1360, 1365 (Fed. Cir.), *cert. denied*, 120 S. Ct. 373 (1999).

[142] 456 Mich. 570, 575 N.W.2d 531, *cert. denied*, 119 S. Ct. 60 (1998). As to *Forest Properties*, the text statement refers to the CFC decision in the case; the Federal Circuit decision on appeal, which affirmed the trial court in all key respects, came after the state high court's ruling.

[143] More recently, in Volkema v. DNR, 457 Mich. 884, 586 N.W.2d 231, *cert. denied*, 119 S. Ct. 590 (1998), the Michigan Supreme Court affirmed a judgment as "correct pursuant to K&K Construction ...." At the same time, the court disapproved the reliance of the court below on *Loveladies Harbor*. This cryptic language, offered with no explanation, probably should be read as underscoring the importance attached by the state high court to the scope of the developer's plans in setting the minimum bounds of the relevant parcel.

[144] 201 Wis. 2d 365, 548 N.W.2d 528 (1996).

[145] *Accord*, Brotherton v. DEC, 657 N.Y.S.2d 854 (Supr. Ct. 1997) (two parcels should be treated as a whole, even though bulkhead/fill plan involves only one, given contiguity and unity of use and ownership), *aff'd*, 252 A.D. 499, 675 N.Y.S.2d 121 (1998). *See also K&K Construction*, 575 N.W.2d 531 (rejecting *per se* rule excluding tract from relevant parcel because not part of development plan).

takings purposes. The more extended analyses, dealing with situations where the lots were purchased together and sought to be developed together, have strongly rejected individual consideration.[146] A state wetlands decision takes the same view.[147]

Strategic behavior

How a court formulates its relevant-parcel doctrine may well affect whether individuals arrange their land transactions so as to put themselves in the best position for bringing a taking action, should a permit someday be denied. This is the "strategic behavior" issue. For example, the developer might sell the nonwetland portion of its property before applying to fill in the wetland — then, if a permit is denied, claim a severe percentage loss in value as to the wetland. Or, the land owner might segment the development, as by separate acquisition, planning, and financing, submitting a separate permit application for each phase.

Thus far, the developer conduct described in the wetlands/takings cases reveals little in the way of sophisticated, planned well in advance, strategic behavior. Efforts to segment parcels for purposes of the takings analysis seem to be largely after the fact. Nonetheless, several courts have indicated awareness of the strategic behavior implications of their relevant parcel formulations.[148]

IX. Prior regulatory scheme ("notice rule")

Can the wetlands buyer have a reasonable expectation of being able to develop when it was "on notice" at time of purchase that a wetlands permit might have to be applied for, and could be denied? Or does such foreknowledge, without more, defeat

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[146] Tabb Lakes, Inc. v. United States, 10 F.3d 796 (Fed. Cir. 1993); Broadwater Farms Joint Venture v. United States, 121 F.3d 727 (Fed. Cir. 1996) (unpublished). Cf. Bowles v. United States, 31 Fed. Cl. 37, 41 n.4 (1994) (taking claim based on denial of section 404 permit for subdivision lot evaluated without considering plaintiff's ownership of ten adjacent lots obtained at same time).

[147] FIC Homes of Blackstone, Inc. v. Conservation Comm'n, 41 Mass. App. 681, 673 N.E.2d 61 (1996), rev. denied, 424 Mass. 1104, 676 N.E.2d 55 (1997).

[148] The United States pressed strategic behavior concerns in Loveladies Harbor v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994). The court may have found merit in them, since the court's adopted rule — land developed or sold before the regulatory environment existed is excluded from the relevant parcel — could act to minimize strategic behavior. Later wetlands/takings decisions noting strategic behavior concerns are Palm Beach Isles Assocs. v. United States, 42 Fed. Cl. 340, 363 (1998), *appeal pending*; Forest Properties, Inc. v. United States, 39 Fed. Cl. 56, 73 (1997), *aff'd*, 177 F.3d 1360 (Fed. Cir.), *cert. denied*, 120 S. Ct. 373 (1999); Broadwater Farms Joint Venture v. United States, 35 Fed. Cl. 232, 240 (1996) (subdivision sector sold off before date of alleged taking by Corps not included in relevant parcel, where no evidence of strategic behavior), *vacated and remanded*, 121 F.3d 727 (Fed. Cir. 1997) (unpublished decision endorsing CFC's discussion of relevant parcel); and K&K Construction, Inc. v. DNR, 456 Mich. 570, 575 N.W.2d 531 (rejecting per se rule excluding tract from relevant parcel because not part of development plan; would encourage "piecemeal development"), *cert. denied*, 119 S. Ct. 60 (1998).

the taking claim? If it does not, would pre-purchase knowledge of additional facts suggesting that a permit would be denied foreclose a viable taking suit? Need such knowledge be actual, or can it be imputed by law?

To the extent courts rebuff wetlands takings actions based on such a notice rule, those actions may become rare. As the years pass, fewer permit applicants will be able to argue that they bought before the enactment of the governing regulatory scheme, and thus escape the notice rule. Even now, the federal wetlands permitting program, and many state ones, are decades old.

Cases involving state and local wetlands programs

A number of state cases endorse a notice rule, holding that the existence of a wetlands (or other) regulatory regime at the time of land purchase forecloses any later taking claim that the purchaser (or its successors in interest) might have as a result of government actions under that program.[149] The issue is discussed in either of two places in the contemporary takings analysis: (1) as a threshold inquiry, per *Lucas*, into the extent to which the pre-existing regulation limits the property rights acquired, or (2) as a subsequent inquiry, per *Penn Central*, into whether the existence of such regime reduces the interference with reasonable investment-backed expectations when it is eventually applied to deny use of the property.

An example of a *Lucas* analysis is *City of Virginia Beach v. Bell*.[150] There, a municipal sand dune protection ordinance had been adopted two years before the property was acquired. No taking resulted from the ordinance's use to block the owner's development plans, said the court: "[Plaintiffs] cannot suffer a taking of rights never possessed." An example of a *Penn Central* analysis is *Claridge v. New Hampshire Wetlands Bd.*: "A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights ...."[151]

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[149] But not a later challenge to the *validity* of the regulatory program. *See, e.g.*, Lopes v. City of Peabody, 417 Mass. 299, 629 N.E.2d 1312 (1994).

[150] 255 Va. 395, 498 S.E.2d 414, *cert. denied*, 119 S. Ct. 73 (1998). *Accord*, Wooten v. South Carolina Coastal Council, 333 S.C. 469, 510 S.E.2d 716 (1999); Brotherton v. DEC, 252 A.D.2d 499, 675 N.Y.S.2d 121 (1998).

[151] 125 N.H. 745, 485 A.2d 287, 291 (1984). *Accord*, Alegria v. Keeney, 687 A.2d 1249 (R.I. 1997); FIC Homes of Blackstone, Inc. v. Conservation Comm'n, 41 Mass. App. 681, 673 N.E.2d 61 (1996), *review denied*, 424 Mass. 1104, 676 N.E.2d 55 (1997); Namon v. State, 558 So. 2d 504 (Fla. App. 1990); Rowe v. Town of North Hampton, 131 N.H. 424, 553 A.2d 1331 (1989). The minority view, that regulatory foreknowledge does not disable the taking claim, is embodied in cases such as K & K Construction, Inc. v. DNR, 217 Mich. App. 56, 551 N.W.2d 413 (1996), *rev'd on other grounds*, 456 Mich. 570, 575 N.W.2d 531, *cert. denied*, 119 S. Ct. 60 (1998); and Vatalaro v. DER, 601 So. 2d 1223 (Fla. App. 1992). *Vatalaro* and *Namon*, both Florida cases, are difficult to reconcile.

The wetland owner faces a particularly uphill climb where the amount paid for the wetland clearly reflected diminished development expectations based on the existing regulatory program.[152]

Wetlands owners have also been disappointed in their attempts to avoid the prior-regulation defense by moving up the operative date of acquisition to a time before the regulatory program began. This has arisen in cases where the sequence of events was: (1) a corporation in which the plaintiff owns a large share acquires a wetland/beachfront property, (2) the regulatory regime at issue takes effect, (3) the corporation dissolves and transfers the land to the plaintiff-shareholder. Courts have rejected plaintiffs' arguments that the pre-regulation corporate acquisition should govern for takings purposes. Instead, they have noted the traditional separateness of the corporate entity, and held plaintiff to the later, corporation-to-shareholder transfer date.[153]

Cases involving the federal wetlands program

Like the state and local program cases, CFC and Federal Circuit decisions give importance to the legal landscape at date of property acquisition, barring takings whenever the application of a regulatory scheme to a property precedes purchase. More than the state and local cases, however, the CFC and Federal Circuit stress the effect of such regulation on the investment-backed expectations factor in the *Penn Central* test, rather than on the plaintiff's bundle of property rights.

In *Deltona Corp. v. United States*, the Court of Claims (now the Federal Circuit) first articulated the defense in a wetlands/taking case.[154] The developer, it said, *knew* when it bought the property that development could take place only with the necessary permit. More recently, the trial-level Claims Court spurned a taking action after noting that the developer had ample warning before purchase "that the property was encumbered by a likelihood it could not be developed."[155] In yet another

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[152] *Compare* Gazza v. New York State, 89 N.Y.2d 603, 679 N.E.2d 1035 (purchaser who paid $100,000 for previously designated wetland worth $396,000 if unregulated cannot complain of taking when development permit is denied), *cert. denied*, 118 S. Ct. 58 (1997), *with* Gil v. Town of Greenwich, 219 Conn. 404, 593 A.2d 1368 (1991) (purchaser who paid $50,000 for previously designated wetland worth $80,000 if buildable *can* complain of taking, since discount might have reflected nothing more than anticipated difficulties of resolving tension between property's listing on residential subdivision map and wetlands constraints).

[153] City of Virginia Beach v. Bell, 255 Va. 395, 498 S.E.2d 414, *cert. denied*, 119 S. Ct. 73 (1998); Brotherton v. DEC, 252 A.D.2d 499, 675 N.Y.S.2d 121 (1998). Outside the wetlands area, the argument that a pre-regulation option to purchase a parcel bypasses the notice rule also has been rejected. Superior-FCR Landfill, Inc. v. County of Wright, 59 F. Supp. 2d 929 (D. Minn. 1999).

[154] 657 F.2d 1184 (Ct. Cl. 1981).

[155] Ciampitti v. United States, 22 Cl. Ct. 310, 321 (1991).

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instance, the CFC confined the defense to instances when plaintiff lacks an "objectively reasonable" belief that it could build.[156]

The leading Federal Circuit endorsement of the notice rule arrived in 1994, in *Loveladies Harbor*. The investment-backed expectations factor of *Penn Central*, said the court, limits takings to "owners who ... bought their property in reliance on a state of affairs that did not include the challenged regulatory regime."[157] This now-canonical statement has thus far been construed as an absolute bar on takings claims based on land purchased after the critical date. Otherwise put, an absence of reasonable development expectations at time of acquisition dispenses with the need to consult the other *Penn Central* factors.[158] The *Loveladies Harbor* statement thus reflects the Federal Circuit's rejection of the predominant state-court approach, allowing preexisting laws to define away sticks in the plaintiff's bundle of property rights,[159] while achieving the same fatal result for the taking claim.

Other issues with the *Loveladies Harbor* doctrine are still being worked out. For example, precisely what is the date after which land acquisitions come with constrained expectations? This is particularly important for the federal wetlands permitting program, where the evolution from statutory enactment to regulations to wetlands delineation manual took many years.[160] Presumably, the determinative inquiry is when a regulatory scheme was known (or should have been known) by plaintiff to apply to his/her wetland. But what to make of the shifting terminology used in the decisions to specify the date — ranging from the onset of a "regulatory climate" to the (presumably much later) existence of an actual "restriction"?[161] And should events following acquisition – in particular, the increasing stringency of the

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[156] Bowles v. United States, 31 Fed. Cl. 37, 51 (1994).

[157] 28 F.3d at 1177. The CFC and Federal Circuit have reaffirmed this principle several times since, in the context of section 404 cases. *See, e.g.*, Forest Properties, Inc. v. United States, 177 F.3d 1360, 1367 (Fed. Cir.), *cert. denied*, 120 S. Ct. 373 (1999).

[158] *See, e.g.*, Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999) (absence of reasonable development expectations dispenses with need to apply other *Penn Central* factors), *pet. for cert. filed*; Broadwater Farms Joint Venture v. United States, 45 Fed. Cl. 154 (1999).

[159] *See, e.g., Forest Properties*, 177 F.3d at 1366-1367; *Loveladies Harbor*, 28 F.3d at 1177.

[160] *Forest Properties*, for example, places importance on the date when the Corps' guidance governing section 404 permitting was issued: "[T]hose guidelines made it clear that filling wetlands to construct housing on the reclaimed land was disfavored ...." 177 F.3d at 1366. *Florida Rock*, on the other hand, focussed on earlier dates: the enactment of the Clean Water Act in 1972 and the administrative extension of Corps jurisdiction to wetlands such as the plaintiff's in 1977. 45 Fed. Cl. 21 (1999).

[161] Two recent opinions assert that the *Loveladies Harbor* formula looks not only at whether the "specific regulatory restrictions at issue" were in place when the land was bought, but also at the "regulatory climate" at that time. *Good*, 189 F.3d at 1361; Palm Beach Isles Assocs. v. United States, 42 Fed. Cl. 340, 357-358 (1998), *appeal pending*. Under this view, there can be a loss of reasonable development expectations even before the statute that is the basis of the taking claim has been enacted.

regulatory program – be considered with regard to long-delayed development efforts made by the property owner after such events?[162]

Another issue is whether the land owner's sophistication about regulatory restrictions on property should play a role in notice-rule cases. In many of the wetlands/takings cases, the CFC/Federal Circuit have buttressed the chronology (regulation preceded acquisition) by stressing that plaintiff, often a developer, was knowledgeable as to the possibility of future restrictions and/or expressly acknowledged when buying the property that permits would be difficult to obtain.[163] At the very least, the existence of a plaintiff sophisticated in matters of land use regulation makes it easier for the court to charge plaintiff with constructive knowledge of the relevant scheme.

Advisability of an absolute rule

Some observers argue that an absolute rule disabling takings claims in every instance where regulation predates purchase is unfair. For one thing, the regulatory landscape and the definition of a wetland may evolve after the wetland is bought in ways unforeseeable at time of purchase. This factor alone, they argue, makes it inequitable to reject takings claims as a hard-and-fast rule where the wetland was bought after some sort of wetlands preservation program was on the books. Even when the definition of a wetland has not changed over the relevant time span, the judgmental leeway in applying the definition can leave buyers unclear as to what they bought.[164] Finally, physical changes in the land may occur: what is a wetland when

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[162] Yes, said *Good*, at least under the circumstances presented. The Federal Circuit noted that plaintiff "wait[ed] seven years [after land acquisition], watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval." While such inaction does not preclude a taking, the court said, "it reduces [plaintiff's] ability to fairly claim surprise when his permit application was denied." 189 F.3d at 1362-1363.

[163] *See, e.g., Good*, 189 F.3d at 1357 (sales contract for wetlands property recognized "certain problems ... with the obtaining of State and Federal permission for dredging and filling operations"); Broadwater Farms Joint Venture v. United States, 45 Fed. Cl. 154 (1999) (plaintiff familiar with Clean Water Act wetlands program from previous development projects); Ciampitti v. United States, 22 Cl. Ct. 310, 321 (1991) (plaintiff knew before purchase that developing wetlands would be difficult; purchases reflect gerrymandering to avoid state-designated wetlands); Forest Properties, Inc. v. United States, 39 Fed. Cl. 56, 77 (1997) ("As a sophisticated real estate developer, [plaintiff] would be charged with knowledge of this [preexisting] regulatory scheme."), *aff'd*, 177 F.3d 1360 (Fed. Cir.), *cert. denied*, 120 S. Ct. 373 (1999).

[164] The text point applies to the federal section 404 program and the minority of state programs that do not adopt areawide wetlands delineations on officially filed maps, but rather leave it to the property owner to initiate the jurisdictional determination. (The Corps does rely on National Wetlands Inventory maps made available by the U.S. Fish and Wildlife Service, but only as a way to give a quick estimate of whether lands will be regulated.) By contrast, state programs that proactively offer wetlands delineation maps leave little room for doubt as to whether a parcel being considered for purchase contains jurisdictional wetland. It has been suggested that the section 404 program emulate this approach, to minimize post-purchase surprise, although there is obviously an added cost. *See generally* Association of State

(continued...)

the government denies the permit may not have been one when bought. The query in each case must be, is it reasonable to charge the land buyer with the expectation that the contingencies leading to restricted development of that land would in fact occur? (Some property rights partisans would go much further, arguing that the concept of expectations should be dropped from takings jurisprudence entirely. In this view, the buyer of property acquires all rights that the seller had, regardless of changes in the legal landscape since the seller acquired the property.)

The counter-arguments, supporting an absolute foreclosure of takings claims based on a pre-acquisition regime, are not without force. Surely, it might be contended, the development expectations on a given parcel have become more qualified since the first settler took ownership, perhaps centuries ago. Property rights evolve, and change in regulatory demands over time are a near certainty. And does not any discount in the price paid for a parcel due to the presence of wetlands reflect, in an efficient market, the purchaser's gamble that wetlands regulations will impose no roadblocks? If so, should the government have to rescue the purchaser, through compensation, when the wager turns out unfavorably?

Possible developer responses to notice rule

Two ways have been suggested for wetlands buyers to bypass the notice rule. One way is to have the *seller* submit the development application — if the seller's title predates the wetlands regulatory regime. After the permits are obtained, the property is conveyed to the buyer-developer. Another way is to use contingency contracts, under which the developer agrees to buy only if he/she can obtain the needed permits.

X. Intergovernmental issues: liability attribution and "before value"

Often, more than one level of government is involved at the same wetlands site. The existence of multiple government actors raises several issues for the takings analysis.

Liability attribution

Which government entity is responsible for a taking when two or more governments play a role in restricting the wetland's use? For example, who pays when permission to fill the wetland is denied by both state or local government, and the United States? Is the fact that the restriction is imposed under a delegated program a sufficient basis to impute takings liability to the delegating government? Does it matter whether a political subdivision of a state was coerced by the state, or merely enticed, into participation?

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[164](...continued)
Wetlands Managers, State Wetland Regulation: Status of Problems and Emerging Trends 14 (1994).

The chance of state or local takings liability may in part explain why few states have assumed responsibility for the federal section 404 program within their borders.[165] Possible support for this view is found in a recent court decision in which a delegated state (Michigan) initially offered the 404 applicant a very limited permit designed to satisfy federal EPA concerns. The applicant rejected most of the permit, and filed a taking action against the state. The state then issued a state-only permit with relatively few limitations, in effect notifying the wetland owner that any further quarrel it had was with the United States, not the state.[166]

The few cases to wrestle with liability attribution questions so far suggest that when the defendant-government's action is truly coerced, absolution will be granted. Thus, a state court granted a county's motion to be dismissed as a party to a taking case, since the county had acted to restrict the wetland owner under the direction and control of the state — that is, had acted as the state's agent.[167] By contrast, where a city prohibited development on beachfront lots under an ordinance that it had been authorized, but not required, by the state to adopt, the city, rather than the state, was the proper defendant.[168]

Arguably the denial of a federal wetlands permit based on prior state denials is an instance that falls in between the foregoing cases of direction and no direction. On the one hand, the Clean Water Act and Coastal Zone Management Act state that the Corps has no choice but to deny the permit.[169] (The administrative reality is somewhat different.[170]) On the other hand, the United States voluntarily imposed the denial requirement on the Corps in enacting those statutes. In the only case to address this matter, the court rejected the Corps' argument that the compulsory

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[165] So far, only Michigan and New Jersey have done so.

[166] Michigan Peat v. EPA, 175 F.3d 422 (6th Cir. 1999).

[167] Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987) (en banc), *cert. denied*, 486 U.S. 1022 (1988). Reflecting the same principle, the state of Minnesota has mandated that whenever its counties impose wetlands restrictions pursuant to state requirements, any statutory compensation liability is to be borne by the state. 1996 Minn. Laws ch. 462, § 36.

[168] City of Virginia Beach v. Bell, 255 Va. 395, 498 S.E.2d 414, *cert. denied*, 119 S. Ct. 73 (1998). The importance of the non-mandatory nature of the state statute is not explicit in this decision, but seems reasonably implied.

[169] Clean Water Act section 401(a), 33 U.S.C. § 1341(a), and Coastal Zone Management Act section 307(c)(3), 16 U.S.C. § 1456(c)(3), both prohibit the Corps from granting a wetlands permit until the applicant has received specified state approvals, or state approval is waived or presumed through inaction.

[170] An issue of longstanding concern to the states is the fact that, if a state denies approvals under these statutes, the Corps does not necessarily consider the state's action sufficient cause to deny issuance of the federal permit. See (name redacted), *Nationwide Permits for Wetlands Projects: Permit 26 and Other Issues and Controversies*, CRS Report 97-223 ENR, at 13 (1999). This fact obviously could undercut a we-had-no-choice defense to a taking action against the Corps.

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nature of the permit denial creates a *per se* defense to takings liability.[171] At the state level, a taking claim has been brought against a state agency whose opposition allegedly compelled the Corps' permit denial.[172]

Whether the mere fact of delegation points the taking finger at the delegator has not been addressed.[173] To be sure, a state that takes over the federal wetlands program does so voluntarily, suggesting that takings liability would not transfer to the United States. If, however, delegated states are regarded as instrumentalities or extensions of the United States for program purposes, the picture becomes less clear.[174]

Finally, there is the issue of sequential regulation: say, for example, that a county bans development of a wetland under an agricultural zoning ordinance, after which the Corps of Engineers denies a section 404 permit for the parcel. Is the Corps liable even though development was previously prohibited? Is it sufficient that the necessary local permits would *likely* have been denied? It appears that this question has only been answered (in the wetlands cases) in its alter ego, as a valuation issue, per the following paragraph.

Restrictions reflected in property's "before value"

Suppose that a county adopts a comprehensive plan under which a wetlands development ban is applied to a given property. Later on, the Corps denies the owner a section 404 permit, who thereupon sues the United States for a taking. In this situation, the CFC held that where the local ban is only remotely linked to federal Clean Water Act requirements, the value loss induced by the local ban is appropriately reflected in the pre-permit denial value used in the takings analysis.[175] Using this lowered "before value," the court discerned no further value loss on account of the federal permit denial. Hence, there was no federal taking.

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[171] Ciampetti v. United States, 18 Cl. Ct. 548, 555-556 (1989). The court's ruling was despite the fact that Corps permit denials based on nonreceipt of state approvals are "without prejudice" — that is, subject to the wetland owner eventually obtaining such approvals.

[172] Ventures Northwest, Ltd. v. State, 914 P.2d 1180 (Wash. App. 1996).

[173] The CFC has indicated awareness of the issue, however. City National Bank of Miami v. United States, 33 Fed. Cl. 759, 763 and 763 n.4 (1995).

[174] Federal Circuit takings decisions outside the wetlands area have imputed state actions to the United States where the state, though acting voluntarily, was seen to be an agent or instrumentality of the federal program. Hendler v. United States, 952 F.2d 1364, 1378-1379 (Fed. Cir. 1991) (state acting pursuant to EPA access order under Superfund Act); Preseault v. United States, 100 F.3d 1525, 1551 (Fed. Cir. 1996) (en banc) (state accepting responsibility for trail management under federal Rails-to-Trails Act).

[175] City National Bank of Miami v. United States, 33 Fed. Cl. 759 (1995). *See also* Lakewood Assocs. v. United States, 45 Fed. Cl. 320, 339 n.12 (1999) (dictum to same effect, but without qualification that local prohibition lacks a linkage to federal section 404).

XI. Offers from speculators, conservation groups, and governments as evidence of property's "after value"

Speculators

Even if permit denial robs a wetland of all *immediate* economic use, it may retain value for persons willing to gamble that restrictions on the tract may change in the future. The Federal Circuit takes the view that "after value" necessarily includes the value of land to speculators.[176]

At the same time, post-permit-denial offers from speculators are adequate to establish residual value only if the speculator can reasonably be assumed knowledgeable of all regulatory restrictions. Offers from "suckers" — e.g., victims of fraud or persons unfamiliar with American law — must be discarded. This standard does not require a detailed inquiry into the sophistication of each buyer of a comparable parcel, said the Federal Circuit. Though clearly discrepant sales may be disregarded, "an assessor may not disregard an *entire* market as aberrational."[177]

The issue of whether a parcel's residual market value is sufficient to defeat a taking claim independent of the residual potential for immediate development has been playing out on several non-wetlands fronts. Property rights advocates have argued that it is *only* "turn dirt" potential that counts, and find support in *Lucas*' references to remaining "beneficial use." In *Suitum v. Tahoe Regional Planning Agency*, however, the Supreme Court suggested indirectly that residual value is relevant, even where no actual development of the subject lot is permitted.[178] Contrariwise, a Ninth Circuit ruling adopts the view that residual value, while relevant generally, is not a consideration when all immediate development has been prohibited.[179]

Conservation groups and governments

The CFC has given little weight to post-permit denial offers by conservation groups and governments to buy the wetland for preservation in its natural state. Stated the CFC in *Formanek v. United States*: "[A]n offer to purchase made by a conservation group which would maintain the property in its natural state is not a speculative, commercial, or recreational use which would refute plaintiffs' taking

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[176] Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 902-03 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

[177] *Florida Rock*, 18 F.3d 1560, 1567 (Fed. Cir. 1994) (emphasis in original), *cert. denied*, 513 U.S. 1109 (1995).

[178] 520 U.S. 725 (1997). A three-justice concurrence by Justice Scalia took issue with the majority's suggestion. *Id*. at 747-750. Any residual value imparted by transferrable development rights, it said, is relevant only once a taking is found, as an offset to the constitutionally required compensation.

[179] Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1432-1433 (9th Cir. 1996), *aff'd*, 119 S. Ct. 1624 (1999).

claim as a matter of law."[180] Other CFC-suggested grounds for ignoring such offers include that (1) the amount offered was far less than the land's fair market value prior to government restriction in question,[181] and (2) the offer was contingent on the availability of funds.

[180] 18 Cl. Ct. 785, 798 (1989). Though this decision only rejected the government's motion for summary judgment, the government's use of conservation group and government offers was rejected a second time after trial. 26 Cl. Ct. 332, 340 (1992) ("offers ... from nature conservationists do[] not establish that there exists a solid and adequate fair market value").

[181] *Formanek*, 26 Cl. Ct. at 340. *See also* Loveladies Harbor v. United States, 15 Cl. Ct. 381, 394 (1988) (finding that at $13,725, post-permit denial value of property based on possible conservation group or government purchase pointed to taking).

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