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The Erosion of the Clean Water Act Through Inverse Condemnation: Can Wetlands Withstand the Takings Clause of the Fifth Amendment?

Despite increasing evidence of their ecological value,¹ wetlands² in the United States are lost at a rate of 200,000 to 400,000 acres a year.³ The vast majority of losses in the past have been due to draining and clearing of land for farming. However, in many states, urbanization and clearing of land for farming. However, in many states, urbanization is responsible for over ninety percent of coastal wetlands losses.⁴ When landowners seek to develop wetlands, their interests in developing the property often conflict with environmental interests in preserving wetlands.

Federal regulation seeks a compromise between these competing interests by requiring wetlands developers to obtain regulatory permits before development.⁵ When developers are denied permits, they often

1. Wetlands are one of the earth's most productive ecosystems. For example, they (1) capture and store sunlight, (2) protect against floods by storing and gradually releasing peak water flows, (3) contribute to groundwater discharge and recharge, (4) provide shoreline anchoring and dissipate erosive forces, (5) store nutrients and efficiently recycle materials, (6) help to cleanse polluted and silt-laden water, (7) provide an important link in supporting the aquatic food chain (a function important to the production of commercial and sport estuarine fish and shellfish), and (8) provide important habitat for fish and wildlife. See generally P. SCODARI, WETLANDS PROTECTION: THE ROLE OF ECONOMICS 9-18 (1990); D. SALVESEN, WETLANDS: MITIGATING AND REGULATING DEVELOPMENT IMPACTS 14-18 (1990). Army Corps of Engineers (Corps) regulations provide that "[w]etlands are vital areas that constitute a productive and valuable resource, the unnessecary alteration or destruction of which should be discouraged as contrary to the public interest." 33 C.F.R. § 320.4(b)(1) (1990). The section goes on to identify the functions that wetlands perform (essentially as identified above). See 33 C.F.R. § 320.4(b)(2)(i)-(vii) (1990).

2. The term "wetlands" means "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 C.F.R. § 328.3(b) (1990). This broad definition has sometimes made it difficult for developers to determine when they are actually filling a "wetland." See, e.g., *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990), cert. denied, 59 U.S.L.W. 3582 (1991) (holding that Corps jurisdiction extended to an artificially created salt pit even though it was only wet during the rainy season). This comment suggests ways to map wetlands so this confusion may be reduced.

3. P. SCODARI, *supra* note 1, at ix, 8-9. These losses are attributed to agricultural use, urban development, vacation homes, and water resource projects.

4. D. SALVESEN, *supra* note 1, at 18-19. The U.S. Fish and Wildlife Service estimates that over 50% of U.S. wetlands have been destroyed in the past two centuries. Eleven million acres of wetlands—an area over twice the size of New Jersey—were converted to other uses between the mid-1950s to the mid-1970s. The Central Valley Wetlands, still the most important winter habitat for waterfowl in North America, have been reduced in acreage by 95%. *Id.*

5. See, e.g., The Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (1988), which requires

allege that such regulation has denied them the opportunity to constructively use their property and demand compensation for a "taking" under the fifth amendment. The constitutional status of restrictive governmental land use regulations is one of the most controversial issues in land use law.⁶

Part I of this comment analyzes the factors considered in determining when a regulation becomes a taking. Part II discusses the history of federal wetlands regulation and "takings" cases generated by such regulation. Part III analyses the impacts of "takings" regulation and suggests alternatives for successful wetlands regulation which will help to avoid inverse condemnation claims while providing protection to important wetlands.

I. THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

The takings clause of the fifth amendment⁷ has proven to be the most pervasive and significant limitation on the power of the government to regulate private land use.⁸ Courts have traditionally denied "takings" claims when property has not been physically taken. However, recent decisions indicate a possible trend toward allowing fifth amendment claims for "takings" of land through land use controls.⁹ In fact, the Supreme Court has held that a landowner may claim a taking under the fifth amendment, even when land is only *temporarily* "taken" through land use controls.¹⁰

developers to obtain "dredge and fill" permits from the Corps. Such permits are required by § 404 of the Clean Water Act. *Id.* at § 1344(a).

6. See Note, *Compensation and Valuation for Regulatory Takings*, 35 DE PAUL L. REV. 931, 931-32 (1986). Underlying this controversy is the tension between the government's authority to regulate land use for the public welfare and the protection accorded private property by the fifth amendment's just compensation clause. Compensation is not ordinarily required when the government restricts the use of private property by enacting zoning ordinances or land use control laws. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593 (1962). However, a land use regulation may so infringe upon the landowner's use and enjoyment of the property right that it constitutes a *de facto* taking of private property for public use. This is known as inverse condemnation. The Supreme Court has defined inverse condemnation as "the manner in which a landowner recovers just compensation for a taking when condemnation proceedings have not been instituted." *United States v. Clarke*, 445 U.S. 253, 257 (1980).

7. U.S. CONST. amend. V. The fifth amendment provides, in relevant part, that "private property [shall not] be taken for public use, without just compensation." *Id.*

8. Ragsdale, *A Synthesis and Integration of Supreme Court Precedent Regarding the Regulatory Taking of Land*, 55 UMKC L. REV. 213 (1987).

9. See *Florida Rock Indus. v. United States*, 21 Cl. Ct. 161 (1990); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990).

10. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (ruling on the issue of temporary takings without ruling on the merits of the case). On remand from the United States Supreme Court, the California Court of Appeal held that the

In *Pennsylvania Coal Co. v. Mahon*,¹¹ the Court recognized that land use regulations enacted pursuant to the police power may constitute a taking if the regulations effectively infringe upon the beneficial use and enjoyment of private property to an unconstitutional degree.¹² Recently, the United States Claims Court ruled that the denial of a section 404 permit,¹³ which excluded all economically viable uses of a property, was a "taking" requiring just compensation, even though the denial of the permit was a valid exercise of the police power.¹⁴

Takings are permitted only after certain requirements are satisfied. First, the "takings" claim must be ripe.¹⁵ A fifth amendment claim is not ripe when a claimant has been denied a permit for only one proposal or for property not included in that proposal, unless that denial effectively precludes any subsequent proposals.¹⁶ Second, if the claim is ripe for review, the owner must show that the regulation does not substantially advance a legitimate governmental interest or that he or she has been deprived of *all* reasonable economic use of his or her property.¹⁷ It is not enough to have been denied the highest and best use of the property.¹⁸ Finally, the government can only be held liable

regulation involved in this case did not amount to an unconstitutional taking and denied the "takings" claim. *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989).

11. 260 U.S. 393 (1922).

12. *Id.* at 413. Justice Holmes stated that "the general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." *Id.* at 415.

13. All developers desiring to dredge or fill a wetland area must (as required by the Clean Water Act) obtain a § 404 permit from the Corps before proceeding. 33 U.S.C. § 1344(a) (1988).

14. *See Florida Rock Indus. v. United States*, 21 Cl. Ct. 161 (1990); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990).

15. *Formanek v. United States*, 18 Cl. Ct. 785, 791-94 (1989).

16. In *Formanek*, the plaintiffs were denied a permit to develop 11 acres of a 112 acre site, 12 acres of which were upland and 100 acres of which were wetland. The United States Claims Court concluded that the claim was ripe for review for the entire site because the denial of the permit to develop the 11 acres effectively precluded the development of the entire site, including the 12 acres of upland. *Id.* at 798; *see also Loveladies*, 21 Cl. Ct. at 159 (concluding that the plaintiff was entitled to a takings claim for 12.5 acres of land even though the § 404 permit was only for 11.5 acres, because denial of the permit on the 11.5 acres of wetland also effectively precluded development of the 1 acre upland site); *cf. Florida Rock*, 21 Cl. Ct. at 175-76 (refusing to extend the denial of a § 404 permit for 98 acres of a 1,560 acre site to the entire site, even though the plaintiff argued that the denial would apply equally to the rest of the site).

17. *Florida Rock Indus. v. United States*, 791 F.2d 893, 901 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987); *Deltona Corp. v. United States*, 657 F.2d 1184, 1193 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982) (emphasis added).

18. *Florida Rock*, 791 F.2d at 901; *Deltona*, 657 F.2d at 1193. The concept is that if a property owner receives any nominal value for its property, there can be no taking as a matter of law. However, taking jurisprudence has not required such an outcome. *Loveladies*, 21 Cl. Ct. at 160-61 n.7. "[T]he determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an

for a taking when its own regulatory function is so extensive or intrusive as to amount to a taking.¹⁹

II. HISTORY OF FEDERAL WATERS REGULATION AND "TAKINGS" CASES

A. *Federal Laws Which Regulate the Use of Wetlands*

Man's concept of the value of wetlands has changed significantly in the past three decades. Scientific recognition of wetlands values has encouraged the enactment of several federal laws.²⁰ Federal regulations prohibiting discharges into the nation's waters date back to the Rivers and Harbors Act of 1899 (Rivers Act).²¹ Since then, various federal laws have provided regulations which can restrict development in wetlands. Since the Rivers Act was enacted, the Army Corps of Engineers (Corps) has been responsible for keeping the nation's navigational waters open. Section 10 of the Rivers Act prohibits dredging or discharging material in navigable waters without a permit.²² The primary goal of this act was to maintain navigability for interstate commerce.²³ However, in 1968, in response to growing national concern, the Corps revised its permit review to include consideration of environmental matters.²⁴

1. *The National Environmental Policy Act*

In 1969, the National Environmental Policy Act²⁵ (NEPA) was enacted. NEPA attempts to reconcile conflicts between economic

exercise of state power in the public interest." *Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980).

19. *De-Tom Enterprises v. United States*, 213 Ct. Cl. 362, 365, (1977) (finding that a local county zoning action, not federal regulation, was responsible for the diminution of value and, therefore, the "taking" was exclusively non-federal). However, the Constitution would not preclude a fifth amendment remedy merely because two government entities acting jointly or severally cause a taking. *See Ciampetti v. United States*, 18 Cl. Ct. 548, 556 (1989).

20. *See R. GOOD, FRESHWATER WETLANDS: ECOLOGICAL PROCESSES AND MANAGEMENT POTENTIAL* 341-45 (1978).

21. Ch. 425, 30 Stat. 1151 (codified as amended at 33 U.S.C. §§ 401-467 (1988)); *see also R. GOOD, supra* note 20, at 344-45.

22. 33 U.S.C. § 403 (1988).

23. D. SALVESEN, *supra* note 1, at 21.

24. Until at least 1968, the Corps restricted its concern to issues of navigation only. The Corps has since been required to evaluate all permits with regard to "all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, esthetics, ecology and the general public interest." R. GOOD, *supra* note 20, at 345. This is known as a "public interest review" in which the Corps balanced a project's reasonably foreseeable adverse impacts (environmental impacts) with its positive impacts (economic development). D. SALVESEN, *supra* note 1, at 21.

25. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4347 (1988)).

growth and environmental protection. It directs all federal agencies to consider the impacts of "major federal actions" on the environment and requires that an environmental impact statement (EIS) be prepared for actions it believes may significantly affect the quality of the human environment.²⁶

2. *The Clean Water Act*

Although various laws can restrict development in wetlands, the Clean Water Act of 1977 (CWA),²⁷ particularly section 404, has had the greatest impact.²⁸ The CWA extends the jurisdiction of the Corps.²⁹ Under the CWA the Corps and the Environmental Protection Agency (EPA) share responsibility for determining whether an area is a wetland and requires a section 404 permit. Although the Corps is responsible for issuing or denying permits, it must make decisions in accordance with environmental guidelines promulgated by the EPA. The EPA and the Fish and Wildlife Service (FWS) review permit applications and provide recommendations concerning issuance, restriction, or denial to the Corps.³⁰

The Corps evaluates section 404 permit applications under a "public interest" standard.³¹ This standard requires an evaluation of the probable impacts, including cumulative impacts, of the proposed activity on the public interest. A balancing test is used to weigh the benefits against the detriments.³² Generally, a permit will be granted unless

26. *Id.* NEPA does not prohibit development in environmentally sensitive areas but requires all federal agencies to consider the environmental impact of any federal decision. Although CWA section 404 permit applications are subject to this provision, the Corps estimates that less than 0.5% of applications cover projects that, because of their likely impacts on the environment, will require an environmental impact statement (EIS). Baldwin, *Wetlands: Fortifying Federal and Regional Cooperation*, 29 ENV'T. 19 (No. 7 1987).

27. Pub. L. No. 95-217, 91 Stat. 1567 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)).

28. D. SALVESEN, *supra* note 1, at 21. The CWA prohibits "any discharge," including fill, into the "navigable waters" of the United States, except as provided by the Act. 33 U.S.C. § 1341(a) (1988).

29. The Corps now has jurisdiction not only over navigable waters in fact but also over their tributaries, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce. See 33 C.F.R. 329 (1990); see also *Natural Resources Defense Council v. Calloway*, 392 F. Supp. 685 (D.D.C. 1975) (holding that the term "waters of the U.S." should be interpreted broadly).

30. D. HOOK, *THE ECOLOGY AND MANAGEMENT OF WETLANDS* 373 (1988); see also Note, *National Wildlife Federation v. Hanson: Content-Based Review of Corps Wetlands Determinations Under the Citizens' Suit Provision of the Clean Water Act*, 67 N.C.L. REV. 695, 699 (1989).

31. 33 C.F.R. § 320.4(a) (1990).

32. For example, the Corps would weigh the benefit to the public to provide housing, against the detriment to the environment by developing the wetland.

the Corps determines that the action would be contrary to the public interest.³³ Important wetlands (those with greater ecological, economic, or aesthetic value), however, are subject to heightened scrutiny. This stricter standard requires that the permit be denied if the detriments equal the benefits.³⁴

3. *Other acts which affect wetlands regulation*

Other acts which provide protection to wetlands are the Coastal Zone Management Act of 1972,³⁵ the Endangered Species Act of 1973,³⁶ the Coastal Barrier Resources Act of 1982,³⁷ and the Fish and Wildlife Coordination Act of 1934.³⁸ Each of these acts provides protection for wetlands areas in addition to wetland protection statutes or regulations developed by the individual states.

B. *The Judicial Pendulum in "Takings" Cases*

One of the first wetlands cases to address a takings claim was *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*.³⁹ There, the New Jersey court applied the "harm/benefit" theory, concluding that land may be regulated to prevent a public harm but not to confer a public benefit.⁴⁰ In 1972, the Wisconsin Supreme

33. 33 C.F.R. § 320.4(a) (1990); *see also* *Formanek v. United States*, 18 Cl. Ct. 785, 788 (1989).

34. *See* 33 C.F.R. § 320.4(b)(4) (1990).

35. Pub. L. No. 92-583, 86 Stat. 1280 (codified as amended at 16 U.S.C. §§ 1451-1464 (1988)). The Coastal Zone Management Act provides financial incentives for states to adopt federally-approved coastal zone management programs to protect coastal resources, which include wetlands. Federal actions must conform with a federally-approved state program. If not, the state may veto the federal action. *See* W. MITSCH & J. GOSSELINK, *WETLANDS* 445 (1986); D. SALVESEN, *supra* note 1, at 23.

36. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1988)). The Endangered Species Act of 1973 was enacted to protect rare plants and animals. The Act requires federal agencies to ensure that any action authorized will not directly jeopardize endangered or threatened species, or destroy their habitat, which may include wetlands.

37. Pub. L. No. 97-348, 96 Stat. 1653 (codified as amended at 16 U.S.C. §§ 3501-3510 (1988)). The Coastal Barrier Act restricts or eliminates federal subsidies for building on undeveloped coastal barriers. The Act does not prohibit development, but it does prohibit federal expenditures and financial assistance for such development.

38. Ch. 55, 48 Stat. 401 (codified as amended at 16 U.S.C. 661-667e (1988)). The Fish and Wildlife Act requires the Corps to consider the comments of federal and state fish and wildlife agencies before issuing a § 404 permit.

39. 40 N.J. 539, 193 A.2d 232 (1963).

40. For example, a land use regulation may prohibit industrial uses in residential districts because it prevents the industrial uses from harming a residential neighborhood. However, a land use regulation requiring preservation of historic landmarks confers a public benefit and thus may constitute a taking. *See* D. MANDELKER, *LAND USE LAW* 24-28 (2d ed. 1988). In *Morris*, the New Jersey court held that the municipal flood protection ordinance was designed to promote a public benefit—flood protection—not to prevent a public harm and was therefore a taking. 40

Court provided a different interpretation of the "harm/benefit" rule in *Just v. Marinette County*.⁴¹ There, a Wisconsin statute required all counties to adopt a state-approved shoreland zoning ordinance. Marinette County's ordinance required a permit to fill wetlands within a certain distance from navigable waters.⁴² The Just family claimed that the ordinance constituted a taking since it diminished the economic value of their land. The Wisconsin Supreme Court found that the ordinance was a reasonable exercise of the police power to prevent harm to environmental resources. The court concluded that the ordinance did not improve the public condition but only preserved the natural environment from being destroyed by unregulated activities.⁴³

In *Penn Central Transportation Co. v. New York City*,⁴⁴ the Supreme Court rejected the "harm/benefit" rule and adopted a "whole parcel" rule. In *Penn Central*, the Court upheld an historic landmark designation of Grand Central Station in New York City and prevented Penn Central from constructing a high-rise office building in the air space above the terminal. The Court refused to separate the air rights from the property below and instead viewed the property as a whole.⁴⁵ The Court agreed that the landmark designation imposed a severe restriction on Penn Central's use of its property but refused to conclude that this alone constituted a taking.⁴⁶

The *Penn Central* decision has significant implications for wetlands law. Many wetlands regulations restrict development in wetlands but allow development on the upland portion of a site. Under the "whole parcel" rule, such regulation will not be considered a taking if the property owner is left with some viable economic use for the remaining portion of the property.⁴⁷

The United States Court of Claims applied this rule in *Deltona Corp. v. United States*.⁴⁸ There, the court held that a denial of a section 404 permit for development on two of Deltona's five tracts of land was not a taking since Deltona could still develop its other three

N.J. at 555-57, 193 A.2d at 241-42.

41. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

42. *Id.* at 9-10, 201 N.W.2d at 764.

43. *Id.* at 23-24, 201 N.W.2d at 771.

44. 438 U.S. 104 (1978).

45. *Id.* at 130-31.

46. *Id.* at 136-38. The Court noted that the designation benefitted all citizens of New York City and that Penn Central was being forced to shoulder the entire burden of the designation. However, the Court also reasoned that, as a member of the community, Penn Central also received benefits from the designation. *Id.* at 134-35.

47. See D. SALVESEN, *supra* note 1, at 35.

48. 657 F.2d 1184 (Ct. Cl. 1981).

tracts.⁴⁹ The court also applied a two-part takings test (*Agins* test),⁵⁰ first adopted by the Supreme Court in *Agins v. City of Tiburon*⁵¹ and later upheld in *Keystone Bituminous Coal Association v. DeBenedictis*.⁵² Under the *Agins* test, a taking occurs if a regulation does not substantially advance a legitimate governmental interest or if a regulation leaves the landowner with no economically viable use of the property.⁵³ The court in *Deltona* found that the Corps' regulations substantially advanced legitimate and important governmental interests and did not deprive Deltona of all economically viable use of its property.⁵⁴

In *Florida Rock Industries v. United States*,⁵⁵ the Claims Court seemed to retreat from its position in *Deltona*. Instead of placing value on the legitimate and important governmental interest, the court held that the Corps' denial of a permit to mine phosphate in wetlands constituted a taking. It reasoned that rock mining was the only economically viable use for the company's land.⁵⁶ The court noted that leaving the plaintiff with a commercially worthless piece of property in the name of preserving wetlands would be charging the plaintiff with more than its fair share of this public cost.⁵⁷ *Florida Rock* is significant because it was the first case to hold that denial of a section 404 permit was a taking.⁵⁸

The Claims Court again applied the *Agins* test in *Loveladies Harbor, Inc. v. United States*⁵⁹ and reached a similar result. In that case, the plaintiffs had purchased 250 acres of land in 1956 and had developed 199 acres of that land before the enactment of both federal and state statutes regulating wetlands. The court held that the "whole parcel" rule only applied to the 12.5 acres at issue in the permit request and that if there were no economically viable use for that property without a section 404 permit, then the denial would constitute a taking.⁶⁰ The court based its decision solely on the second prong of the *Agins* test, stating that it would be "hard to imagine a takings claim

49. *Id.* at 1192.

50. *Deltona*, 657 F.2d at 1191-92.

51. 447 U.S. 255 (1980).

52. 480 U.S. 470 (1987).

53. *Agins*, 447 U.S. at 260.

54. *Deltona*, 657 F.2d at 1192.

55. 8 Cl. Ct. 160 (1985).

56. *Id.* at 164.

57. *Id.* at 177.

58. See D. SALVESEN, *supra* note 1, at 36. The takings claim in *Florida Rock* was recently upheld by the Claims Court on rehearing. *Florida Rock Indus. v. United States*, 21 Cl. Ct. 161 (1990).

59. 15 Cl. Ct. 381 (1988).

60. *Id.* at 398-99.

more deserving of compensation" given the severity of the economic impact.⁶¹ The court concluded on rehearing that while a mere diminution of value will not constitute a taking, a taking does occur if plaintiffs are denied *all* economic use of their property.⁶² The court concluded that denial of a section 404 permit to fill 11.5 of the remaining 51 acres resulted in a taking and awarded just compensation for the 12.5 acres at issue.⁶³ With the takings found in these two cases, the judicial pendulum appears to have swung in favor of landholders, and, in a relatively short period of time, wetlands law seems to have come full circle: from the "harm/benefit" theory in *Morris Land* to the "whole parcel" rule in *Deltona*, and after *Loveladies* and *Florida Rock*, back again to the original "harm/benefit" theory found in *Morris Land*.⁶⁴

However, these decisions should not inhibit current wetlands regulation. *Florida Rock* involved an extreme situation where the factual circumstances necessitated a taking.⁶⁵ Were the "whole parcel" rule to be literally applied to *Loveladies*, the holding would likely be reversed on appeal.⁶⁶ These cases are a striking reminder that as wetlands juris-

61. *Id.* at 396. The court discredited the "legitimate governmental interest" prong since "no court has ever found that a taking has occurred solely because a legitimate state interest was not substantially advanced." *Id.* at 390.

62. *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 157-60 (1990) (emphasis added). The court concluded that use for recreation and conservation were not viable uses because of the low dollar value per acre. *Id.* at 159.

63. *Id.* at 161.

64. Federal courts have not yet placed considerable weight on permanent disruption to the environment in determining whether a taking has occurred. Were the federal courts to use the "harm/benefit" theory to prevent harm to environmental resources as the Wisconsin Supreme Court did in *Just*, the result in *Florida Rock* and *Loveladies* might have been different. When the Supreme Court has considered takings claims where the character of the government purpose was to eliminate a public nuisance or serious threat to the public health, it has found no taking. The rationale is that there is no property interest or reasonable expectation in the maintenance of a common law nuisance. *Keystone*, 480 U.S. at 489-91; see also *Miller v. Schoene*, 276 U.S. 272 (1928); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Mugler v. Kansas*, 123 U.S. 623 (1887). With the growing national concern for the environment, the destruction of wetlands for development might begin to be seen as a public nuisance, and the nuisance exception might then become viable in wetlands takings claims. For a general discussion of the value of wetlands, see *supra* note 1. It should be noted, however, that the nuisance exception has never been used to deny compensation where the entire value of the property has been taken. *Keystone*, 480 U.S. at 513 (Rehnquist, J., dissenting).

65. The property was purchased before there were applicable federal statutes that required a permit, the disruption was temporary, and, most importantly, the permit denial deprived the plaintiffs of the only currently economically viable use of their property. See D. HOOK, *supra* note 30, at 384-85.

66. The facts in *Loveladies* were strikingly similar to those in *Deltona*. In each case, the owners had purchased their property before federal statutes required wetlands regulation, each had developed a substantial portion of their site before § 404 permits were required, and each had already earned a substantial return on their investment before the permit denial. *Loveladies*, 21 Cl. Ct. 153 (1990); *Deltona*, 657 F.2d 1184 (Ct. Cl. 1981). Applying the facts equally, it would seem incongruous to hold that a taking had occurred in *Loveladies* using the "whole parcel" rule

diction expands to areas well beyond traditional navigable waterbodies, it will produce more conflicts with the land-use expectations of private property owners. Because regulation to protect important natural resources is so firmly entrenched, it will likely continue, and permit denials will rarely be found to constitute takings.⁶⁷ However, these rulings should lead the Corps to make regulatory changes to prevent what might otherwise be takings.

III. ANALYSIS OF THE IMPACT OF TAKINGS REGULATION ON WETLANDS AND SUGGESTED MITIGATION ALTERNATIVES

A. *The Impact of Takings Regulation*

Continued judicial insistence on finality and the refusal to separate a single parcel into discrete segments as prerequisites to the takings clause should, ideally, encourage regulators and developers to achieve their respective objectives through negotiations and agreements rather than through judicial decisions. Developers should be prepared to make concessions up front and should expect to include some sort of mitigation in their development plans. Successful applicants should be able to prove "not only that they have done all they could to minimize the adverse environmental impacts of their project, but that their projects may actually enhance the environment."⁶⁸

Regulatory agencies will, on the other hand, need to be careful about what conditions they place on a permit and must "ensure that a reasonable connection exists between the mitigation requirements and a public purpose."⁶⁹ In fact, Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights,"⁷⁰ might require them to do just that. This order directs federal agencies to "evaluate carefully the effect of their administrative, regulatory and legislative actions on constitutionally protected property" in order to "prevent unnecessary takings."⁷¹ Depending on how rigorously it is implemented, the order could dampen federal enthusiasm to regulate wetlands.⁷²

To alleviate this problem, there will need to be policies established to address some of the deficiencies in current wetlands programs. In 1987, the Conservation Foundation held a National Wetlands Policy

as applied in *Deltona*.

67. D. HOOK, *supra* note 30, at 385.

68. D. SALVESEN, *supra* note 1, at 37.

69. *Id.*

70. 53 Fed. Reg. 8859 (Mar. 18, 1988).

71. *Id.*

72. D. SALVESEN, *supra* note 1, at 37.

Forum to address these issues. The Foundation recommended that the United States establish a wetlands policy to achieve "no net loss" of wetlands⁷³ over the short run and to increase the wetlands base over the long run.⁷⁴ The following section will discuss possible alternatives to accomplish these goals.

B. *Mitigation Alternatives*

The Corps has several mitigation alternatives: (1) avoid the impact altogether by not taking a certain action; (2) minimize the impact by limiting the degree of the action; (3) rectify the impact by repairing, rehabilitating, or restoring the affected environment; (4) reduce or eliminate the impact over time by preservation and maintenance operations; or (5) compensate for the impact by replacing or providing substitute resources.⁷⁵ Several options are available to help meet these objectives.

1. *Clarify agency policy*

One approach to more effective wetlands regulation is through clarification of agency policies. Continued clarification and refinement of federal wetlands policies through generic administrative guidance and judicial decisions will be necessary to reduce controversies and conflicts which arise after persons have invested considerable time and resources in development proposals.⁷⁶

2. *Provide regional administration*

One of the most significant limitations of the current program is that it depends almost entirely upon an ad hoc, permit-by-permit approach. No action is taken until a specific development is proposed, and then the agencies involved react on a site-specific basis.⁷⁷ Environmentalists contend the case-by-case method allows wetlands to be destroyed piece-by-piece, with individual projects slowly chipping away at a larger wetlands ecosystem with little thought given to cumulative im-

73. This means that wetlands created will balance wetlands destroyed.

74. D. SALVESEN, *supra* note 1, at 38. The forum also recommended:

- expanding wetlands programs to cover all kinds of wetlands alterations, such as draining and excavation, and not just deposit of fill;
- implementing stronger mitigation requirements;
- expanding government wetlands acquisition and preservation programs;
- developing incentives to protect wetlands; and
- delegating responsibility for all wetlands regulations to the states.

Id.

75. *Id.* at 32.

76. See D. HOOK, *supra* note 30, at 375.

77. *Id.*

pact.⁷⁸ A more effective approach would be to set management objectives for wetlands experiencing significant threats on a regional basis. This would allow the government to tailor policies and programs on a regional basis to protect wetlands of different values from potential wetland conversion activities.⁷⁹

3. *Implement a national ranking system*

Development of a national wetlands ranking system is another possible approach to improved regulation. Under a ranking system, the EPA and/or state agencies would rank wetlands according to their relative value. The degree of regulatory stringency would be varied, with the highest levels of protection being given to those wetlands with the highest value.⁸⁰ Maps, which would provide information on the likelihood of obtaining a permit for conversion activities in a particular wetland, could then be made available to landowners and permit applicants. The maps would also guide the agency in its permit review.⁸¹ The EPA currently lacks the resources and information to apply this approach nationwide. However, with intensive effort, wetlands can be mapped and ranked on a local, and perhaps, a statewide scale.⁸²

4. *Enact technology-forcing legislation*

Another method of protecting wetlands would be technology-forcing. Under this approach, Congress would encourage rapid technological development by establishing presumptions that wetlands serve specified important functions with specified high values which would be diminished by development. A federal agency seeking to overcome these presumptions against development would need to furnish scientific proof that they overvalued a specific wetland or wetland region. This would encourage agencies to sponsor research into actual wetland functions and values.⁸³ This would also help speed up the ranking process.

78. D. SALVESEN, *supra* note 1, at 37. The Corps is now required to consider the cumulative effects of wetlands regulation in its permit process. 33 C.F.R. § 320.4(b)(3) (1990).

79. D. HOOK, *supra* note 30, at 375-76.

80. *Id.* at 377. The ranking scheme would develop categories of regulatory response. The most stringent category would be permit denial or a designation that the site is unsuitable for alteration. A somewhat less stringent response applicable to a site ranked as more moderate in value might allow issuance of permits where loss of wetland functions was relatively slight and was fully mitigated on-site. A greater degree of impact might be accepted for sites at the next tier of ranking, if fully offset by off-site mitigation. Even at the lowest category, adherence to EPA guidelines would be required to assure that indiscriminate filling, even of low value wetlands, was avoided. *Id.* at 379.

81. *Id.* at 377-78.

82. *Id.* at 381.

83. P. SCODARI, *supra* note 1, at 85.

Each of the above methods will provide developers with meaningful information when purchasing wetland property and, therefore, will put them on notice. This notice may effectively preclude a taking.⁸⁴ However, there will still be times when regulations reduce the expectations of property owners such that alternatives will need to be made available to them.

5. *Permit development of artificial wetlands*

EPA guidelines prohibit discharge of fill material into wetlands "if there [are] practicable alternatives which would have less adverse impact on the aquatic ecosystem."⁸⁵ An alternative is practicable if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."⁸⁶ One practicable alternative is to develop an artificial wetland on a tract of land not presently owned by the applicant.⁸⁷ It should be noted, however, that although the Corps believes that properly designed and constructed artificial wetlands can provide the same values and functions as natural wetlands, the EPA and FWS disagree.⁸⁸ In fact, "[t]here are few, if any, published studies that have proven replacement wetlands to be equal to natural wetlands in terms of all their functions over a meaningful time span."⁸⁹

6. *Provide reciprocal benefits*

There may be direct reciprocal benefits to offset regulatory impacts, such as tax reduction or tax abatement⁹⁰ and transferable development rights.⁹¹ Such benefits will be highly useful in the balancing

84. See *Ciampetti v. United States*, 18 Cl. Ct. 548, 557-58 (1989).

85. 40 C.F.R. § 230.10(a) (1990).

86. *Id.* at § 230.10(a)(2).

87. See *Formanek v. United States*, 18 Cl. Ct. 785, 788 (1989); see also *Bersani v. United States Env'tl. Protection Agency*, 674 F. Supp. 405 (N.D.N.Y. 1987).

88. D. SALVESEN, *supra* note 1, at 33.

89. D. HOOK, *supra* note 30, at 369-70.

90. If an owner of regulated land has been denied a section 404 permit and can show that he is not earning a reasonable return on the property in its present state, the ordinance may include a plan which would enable the owner to earn a reasonable return on the site. This plan may include partial or complete tax exemption or remission of taxes. See *e.g.* *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 112-13 n.13 (1978).

91. Although a regulation may restrict an owner's control over his parcel, an ordinance may provide for a transfer of development rights which may even enhance his economic position. This may include: a transfer of development rights to an adjoining parcel (e.g., a 10 acre site with development rights of four units per acre would normally yield 40 units. If seven of these acres are wetland, then the entire 40 units would be allowed on the three acre upland. An additional bonus may even be applied for good design.); a transfer of development rights to another parcel owned by the owner of the restricted parcel (e.g., transferring the 40 units from the above example to

process required by a takings analysis. As the Court noted in *Penn Central*: "While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed . . . and, for that reason, are to be taken into account in considering the impact of regulation."⁹²

IV. CONCLUSION

The fact that wetlands will be filled is inescapable, given the present political and social climate in the United States. It is imperative, therefore, that regulators steer the direction of wetland loss away from the most important wetlands. The extensive annual loss of wetlands creates a need to assure more effective protection of important wetlands values. At the same time, a need exists to improve the predictability and certainty of regulatory decisions and to provide the public with a more coherent view of federal regulatory requirements. The management, maintenance, and preservation of wetlands can only succeed if built on strong scientific conclusions. "The case for protecting rather than developing [wetlands] will succeed only if people can be convinced of the functional values; sentiment carries little weight on economic balance sheets."⁹³

Regulatory takings issues do not present clear cut bodies of constitutional law, and a formula needs to be set to determine where regulation ends and taking begins. Although recent decisions have helped clarify federal agency roles, they have also muddied the waters. However, if federal and state agencies continue working toward providing a more consistent, predictable approach to regulating wetlands, the waters may begin to clear, and wetlands will receive the protection necessary to remain a viable part of our ecosystem. As Theodore Roosevelt once said: "Men with the muckrake are often indispensable to the well-being of society, but only if they know when to stop raking the muck."⁹⁴

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another site entirely); or the possibility of selling these development rights to the owner of another non-regulated parcel (i.e., receiving the value of 40 additional units to another developer). See e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 113-15 (1978).

92. *Id.* at 137.

93. E. MALTBY, *WATERLOGGED WEALTH* 174 (1986).

94. Theodore Roosevelt (Address given at the laying of the cornerstone, House Office Building, Washington, D.C., April 14, 1906).