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PROTECTING WETLANDS AND REASONABLE INVESTMENT-BACKED EXPECTATIONS IN THE WAKE OF *LUCAS v. SOUTH CAROLINA COASTAL COUNCIL*

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OVERVIEW: *LUCAS* IS A LIMITED, YET SIGNIFICANT SWIPE AT WETLANDS PROTECTION

When the Environmental Protection Agency (EPA) convened its Scientific Advisory Board to prioritize the environmental risks facing our society, its members concluded that among the highest risks we face as a society is the rapid loss of our natural ecosystems, particularly wetlands, and the biological diversity they support.[1] Unfortunately, the Supreme Court majority deciding *Lucas v. South Carolina Coastal Council*[2] on the last day of the 1991-1992 term did not seem to recognize these societal risks.

The *Lucas* Majority [hereinafter Majority] opinion ignores the social harm in destroying wetlands and other natural ecosystems, while favoring stringent protection of private property rights. Justice Scalia, joined by Justices O'Connor, White, Rehnquist, and Thomas, clearly stretching to reach the merits of this case, abandon their usual insistence on judicial restraint.[3] The primary motivation for this newfound judicial activism seems to be the Majority's distaste for the South Carolina Supreme Court's "categorical disposition" of Mr. Lucas' claim, in favor of the State's regulatory scheme for protecting coastal beach-dune ecosystems.[4]

The Majority specifically targets ecosystem protection regulations. The Majority observes that regulations which deprive landowners of all economically beneficial use of land are "typically" those that require land "to be left substantially in its natural state,"[5] and that such regulations are more likely than others to involve private property being "pressed into some form of public service under the *guise* of mitigating serious public harm."[6] Equating government efforts to protect wetlands and coastal areas with aesthetic open space and scenic easement efforts, the Majority refuses to acknowledge that

1. Relative Risk Reduction Strategies Committee, U.S. Environmental Protection Agency, Reducing Risk: Setting Priorities and Strategies for Environmental Protection. Science Advisory Board, A101, SAB-EC 90-021 (September 1990).

2. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

3. *Id.* at 2907-11 (Blackmun, J., dissenting); 2919-20 (Stevens, J., dissenting); 2925-26 (Souter, J., statement).

4. *Id.* at 2890-92, 2898-99, 2901-02. A second motivation appears to have been a desire to establish clear-cut, categorical takings rules to clean up the "messy" takings case law that comes from case-specific inquiry targeted at achieving fairness. *Id.* at 2892-93 referencing Professor Epstein's commentary on the "incomprehensible" "array of ad hoc [takings] decisions." *See also id.* at 2925 (Souter, J., statement)(suggesting that the purpose of taking the *Lucas* case was to "clarify the concept of total (and, in the Court's view, categorically compensable) taking. . .").

5. *Id.* at 2894-95.

6. *Id.* at 2895.

the protection of wetland and coastal ecosystems can be crucial to public safety and welfare.[7]

The Majority's ecological blind spot is confirmed at the close of the opinion. Despite well-documented and uncontested legislative findings that clearly demonstrate the public and private harm attributable to beachfront development,[8] the Court observes, in dicta, that it is unlikely that South Carolina common law principles would have prevented the development of Lucas' land.[9]

By the Court's own admission, the *Lucas* case is of very limited application.[10] The decision is based upon the factual finding by the South Carolina trial court that the application of the South Carolina Beachfront Management Act[11] to Lucas' two beachfront lots deprived him of *all* economically viable use of his two lots, rendering them, in the words of the trial court — "valueless."[12] Consequently, the Court's decision only addresses those "relatively rare," indeed, "extraordinary" circumstances "when *no* productive or economically beneficial use of land is permitted . . . ."[13] Even this fundamental factual premise is highly suspect in the *Lucas* case.[14]

In addition, the Majority's sweeping compensation requirements for "total takings" are made strictly on the basis of a temporary taking — and a questionable one at that. In 1990, two years after the challenged restriction became effective, the South Carolina Legislature amended the Beachfront Management Act, authorizing the Coastal Council to issue special permits in certain circumstances for construction of habitable structures within the restricted area.[15] This special permit authority offers Lucas an as-yet-untapped administrative remedy which may indeed allow him to build on his lots. Consequently, the only cognizable deprivation suffered by Lucas at the stage of this Supreme Court review was the possible taking of his right to build on or sell his two lots during the period between 1988

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7. *Id. See also*, Zalkin, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 CAL. L. REV. 205 (1991).

8. *Lucas*, 112 S. Ct. at 2896; 2904-07. *See also* n.1.

9. *Lucas*, 112 S. Ct. at 2901. "It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioners' land; they rarely support prohibition of the 'essential use' of land." *Id.* (*citing* Curtis v. Benson, 222 U.S. 778, 86 (1911)).

10. *Lucas*, 112 S. Ct. at 2894-95.

11. S.C. CODE ANN. §§ 48-39-250 to -360 (Supp. 1992).

12. *Lucas*, 112 S. Ct. at 2890, 2895, 2896 n.9.

13. *Id.* at 2894 (emphasis in original).

14. *Id.* at 2903 (Kennedy, J., dissenting); 2910, 2908 n.6 (Blackmun, J., dissenting); 2919-20 n.3 (Stevens, J., dissenting); 2925 (Souter, J., statement).

15. S.C. CODE ANN. § 48-39-290(D)(1) (Supp. 1992).

and 1990. This temporary taking was not demonstrated in the record before the Supreme Court.[16]

In light of these factual limitations, the practical effect of this decision with respect to Mr. Lucas' property may be minimal. When the South Carolina Supreme Court revisited the *Lucas* case on remand,[17] it found no state common law principles to support a "total taking" without compensation, and determined that Lucas did in fact have a temporary taking claim. The South Carolina Supreme Court seemed to rely heavily on its conclusion that its earlier "categorical disposition" of the case on nuisance grounds had precluded Lucas from asserting his temporary takings claim after the law changed in 1990. The South Carolina Supreme Court did not address the underlying factual issue of whether Lucas was actually deprived of all economic use of his land.[18]

Having determined that Lucas was entitled to pursue his temporary takings claim in the lower court, however, the South Carolina Supreme Court held that Lucas must establish actual damages resulting from the restrictions on his lots between 1988 and the Court's November 1992 order. While the parties are being permitted to supplement the record for this purpose, the record before the U.S. Supreme Court suggests that a large award is not likely to be forthcoming.[19]

The importance, and in this author's view, the tragedy of the *Lucas* decision lies more in the signals it sends private investors than in the new takings law it creates. The Majority demonstrates its own subjective preferences for sacrosanct private property rights over serious public health and welfare concerns. As Justice Stevens notes, the Court's ruling is, in effect, a form of insurance against certain changes in land-use regulations, encouraging developers to over-invest "safe in the knowledge that if the law changes adversely, they will be entitled to compensation."[20] Insulating developers against risks associated with ecologically-harmful development will surely accelerate the decline of this country's functioning natural ecosystems.

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16. *Lucas*, 112 S. Ct. at 2919, 2917 n.1 (Stevens, J., dissenting); 2909, 2908, n.5 (Blackmun, J., dissenting) Mr. Lucas testified at trial that he was "in no hurry" to build "because the lot was appreciating in value."). *Id.*

17. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992).

18. *Id.* at 486.

19. Had it not been for the South Carolina Supreme Court's earlier "categorical disposition" of the Lucas claim, the Court, on remand, possibly could have rejected the takings claim on standing or ripeness grounds, absent a showing that he had exhausted all administrative remedies and demonstrated a concrete injury. The court also might have concluded that substantial economically viable use of the land remains. *See* dissenting opinions cited *supra* note 14 and *infra* notes 51-56 and accompanying text.

20. *Lucas*, 112 S. Ct. at 2921-22, n.5 (Stevens, J., dissenting) (*citing* Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON.. 125 (1992)).

Despite the limited immediate application of the *Lucas* opinion, the decision surely will influence future governmental efforts to maintain and restore wetlands.[21] This article first analyzes the *Lucas* opinion with a particular focus on its implications for federal wetlands regulation,[22] and its relationship to the basic purposes of the Fifth Amendment Just Compensation Clause. The article then explores common law bases for wetlands regulation and potential measures which may be help to protect wetlands, as well as reasonable investment-backed expectations, in the wake of the *Lucas* decision.

I. THE *Lucas* Decision and Wetlands Protection

In 1977, the South Carolina Legislature passed the Coastal Zone Management Act[23] in response to passage of the federal Coastal Zone Management Act of 1972.[24] Originally, the South Carolina law required owners of coastal zone land within defined "critical areas" (beaches and adjacent sand dunes) to obtain a permit from the South Carolina Coastal Council prior to converting such land to a new use.[25] In the late 1970's, Lucas became a resident, as well as a developer, of the "Wild Dune" development on the Isle of Palms, a barrier island east of Charleston, South Carolina. Lucas was, and is a contractor, manager, and part owner of the development.[26]

In 1986, Lucas purchased, for $975,000, two of the four remaining vacant lots in one of the "Wild Dune" residential subdivisions. At the time of Lucas' purchase, these two lots were zoned for single family residences, and they were not within a "critical area" under the 1977 state coastal management law. However, the two lots and the immediately surrounding shorefront were "notoriously unstable."[27] It is these two lots that are the subject of the Supreme Court's decision.

Lucas' two lots changed hands numerous times between 1979 and the time he purchased them in 1986. Each transaction reflected rapidly escalating prices for the lots. The appreciation continued even after the 1988 land use restrictions were imposed. The record provides no explanation as to why none of these purchasers chose to build on

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21. *See infra* notes 51-103 and 144-193 and accompanying text.

22. Section 404 of the Federal Water Pollution Control Act (FWPCA) authorizes the only purely regulatory federal wetlands protection program. 33 U.S.C. 1344 (1988). Most state regulatory programs are similar, sometimes identical, in their general approach to regulation. Consequently, this article focuses on the FWPCA § 404 permit program for its analysis.

23. S.C. CODE ANN. §§ 48-39-10 to -220 (1987).

24. 16 U.S.C. §§ 1451-1464 (1988).

25. *Lucas,* 112 S. Ct. at 2889.

26. *Id.* at 2889, 2905 (Blackmun, J., dissenting).

27. "In roughly half of the last 40 years, all or part of petitioner's property was part of the beach or flooded twice daily by the ebb and flow of the tide." *Id.*

the lots, other than the evidence of the lots' instability and Lucas' own testimony that he was "in no hurry" to build on the sites in light of their appreciating value.[28] The record does not reflect any immediate plans by Lucas to build on or sell the property.[29]

In 1988, the South Carolina Legislature enacted the Beachfront Management Act.[30] The Act was passed in response to a Blue Ribbon Panel Report finding critical coastal erosion and proposing additional developmental restrictions to control it. The Act amended the original state coastal management law, expanding development restrictions to broader critical areas. These critical areas, based on the "best scientific and historical data available," were defined as the areas seaward of a baseline connecting points of beach erosion. Lucas' lots came within the erosion baseline, primarily because they were located adjacent to tidal inlets which had not been secured with groins, riprap, or other structural erosion control measures.[31]

Mr. Lucas immediately filed a takings claim in the South Carolina Court of Common Pleas. The trial court found that the prohibition on permanent, habitable structures rendered Lucas' lots "valueless." The court ordered the Council to pay $1.23 million in compensation.[32] In 1990, after the case was briefed and argued before the South Carolina Supreme Court, but before the Court reached a decision, the South Carolina Legislature amended the Beachfront Management Act to authorize issuance of special permits. These permits allow for development in the critical areas under certain circumstances. While potentially eligible for such a special permit, Lucas has not yet availed himself of this administrative remedy.[33]

When the South Carolina Supreme Court decided the appeal in 1991, it did not require pursuit of the special permit remedy. Nor did the Court require the trial court to develop a fuller record on the diminution in value attributable to the 1988 restriction. Instead, it concluded that the Beachfront Management Act restrictions were clearly intended to prevent serious public harm and that, as a result, no compensation was required regardless of the restrictions' impact on Lucas' property value.[34] It was this conclusion of the South Carolina Supreme Court that was taken on appeal to the United States Supreme Court.

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28. *Id.* at 2905 n.3, 2908-09, n.5.

29. *Id.* at 2919, 2917 n.1 (Stevens, J., dissenting); 2908-09, n.5 (Blackmun, J., dissenting).

30. S.C. CODE ANN. §§ 48-39-250 to -360 (Supp. 1992).

31. *Lucas*, 112 S. Ct. at 2889 n.1 (*citing* S.C. CODE ANN. §§ 48-39-270(7) and 48-39-280(A)(2) (Supp. 1988)).

32. *Id.* at 2890-91.

33. *Id.* (citing S.C. CODE § 48-39-290(D)(1) (Supp. 1991)). The Coastal Council raised the issue of ripeness before the South Carolina Supreme Court, but the Court chose to dispose of the case on the merits. *Lucas*, 112 S.Ct. at 2890-91.

34. *Id.* at 2890-92.

II. THE MAJORITY'S CATEGORICAL RULE REQUIRING COMPENSATION FOR A "TOTAL TAKING"

A. The Categorical Rule

The first prong of the *Lucas* holding is the pronouncement of a categorical rule that "regulatory action is compensable *without case-specific inquiry into the public interest advanced* in support of the restraint . . . where regulation denies all economically beneficial or productive use of the land."[35] The Majority justifies its categorical rule first by equating the regulatory "total taking" with a physical appropriation of property, which almost always requires compensation.[36] The Majority further reasons that in the "extraordinary circumstance" of a total taking, it is both difficult to assume that regulation secures an "average reciprocity of advantage" to everyone concerned, and difficult to argue that compensation requirements will seriously hamstring important government operations.[37] Finally, the Majority observes that regulations which result in a "total takings" carry "a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[38]

While the Majority's rationale certainly explains why the total deprivation of economically viable use of one's land is an important factor in determining whether the Fifth Amendment requires compensation, it does not provide a convincing rationale for a categorical rule requiring compensation. Jurists and commentators have identified two primary and related purposes for the Just Compensation Clause: allowing for governmental action while (1) ensuring fairness and justice in the government's treatment of private property, and (2) protecting reasonable investment-backed expectations in the face of governmental action.[39]

The Just Compensation Clause "was designed to bar [g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[40]

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35. *Id.* at 2892-93 (emphasis added).

36. *Id.* at 2894-95.

37. *Id.* (*citing* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-415 (1922)).

38. *Lucas*, 112 S. Ct. at 2895.

39. Frank I. Michelman, *Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192-1193 (1967) [hereinafter Michelman]; Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 60 (1964) [hereinafter Sax]; Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1 [hereinafter Epstein]; *Lucas*, 112 S. Ct. at 2923 n.7 (Stevens, J., dissenting), 2903 (Kennedy, J., concurring).

40. Armstrong v. United States, 364 U.S. 40, 49 (1960); Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893). The Framers of the Constitution were clearly concerned with the potential of the government—or factions thereof—to single out certain individuals arbitrarily to bear the load of the public enterprise through property confiscation.

The Takings Clause was written to protect against the unfair confiscation of property by the government. Clearly, governmental fairness in the treatment of private property is an important component of individual liberty.

From a utilitarian standpoint, the Just Compensation Clause protects private property in order to foster private investment and labor for a productive society.[41] An individual's secure expectations that rules governing the use and enjoyment of property will be followed motivate the individual labor and investment required for the production of goods and services that benefit society as a whole. From this utilitarian theory comes the Supreme Court's emphasis on "reasonable investment-backed expectations."[42]

Clearly, respect for private property is essential to individual liberty and productivity. Yet, these private property interests must also be balanced against concerns for the public health, safety, and welfare that prompt government regulation. United States Supreme Court just compensation decisions have consistently turned on "the particular circumstances of each case," with "the ultimate conclusion necessarily requir[ing] a weighing of private and public interests."[43] A categorical rule requiring compensation for "total takings" is inconsistent with the underlying purposes of the Just Compensation Clause and a clear departure from Supreme Court precedent.

B. Segmentation of Property Interests—Footnote 7

The *Lucas* Majority assures us that total takings are an "extraordinary circumstance." Yet, this may not be so in the future if property owners are permitted to isolate the specific property interests burdened by regulation from their total real estate investments, and to successfully claim a "total taking" of that particular interest. The *Lucas* Majority has surely invited a new round of litigation to exploit this issue by unnecessarily raising it in Footnote 7 of the opinion.[44]

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41. Michelman, *supra* note 39, at 1210-11.

42. *Id.* at 1213. "The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment." *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring).

43. Agins v. City of Tiburon, 447 U.S. 255, 261 (1980); *Lucas*, 112 S. Ct. at 2911 (Blackmun, J., dissenting), 2919-20 (Stevens, J., dissenting).

44. 112 S. Ct. at 2894. Footnote 7 adds nothing to the holding in the *Lucas* case since the Majority accepts at face value the state court's determination that the coastal land use restriction rendered Lucas' two beachfront lots without economic value. Flyers advertising a recent legal seminar on the *Lucas* decision illustrate the potential for upcoming litigation on this issue. A key agenda item reads: "How to use Justice Scalia's 'Footnote 7' to your advantage. How to define 'the parcel' or property unit to demonstrate 'deprivation of all economically-feasible use,' thereby enhancing your ability to prove a regulatory taking requiring compensation. How to fractionalize current property holdings to discourage regulation?" National Real Estate Development Center, *How to Successfully Resolve Land Use and Real Estate Regulation Issues in the Wake of Lucas* (1992).

One might ask whether such manipulation of property interests can ever allow for a realistic assessment of a landowner's "investment-backed expectations". . . never mind a realistic assessment of "fairness and justice." See *supra* notes 39-42 and accompanying text.

In Footnote 7, the Majority states that its categorical rule for "total takings" does not clearly delineate the "property interest" against which the loss of value is to be measured. The Court either ignores or explicitly rejects existing Supreme Court precedent requiring consideration of the parcel as a whole.[45]

The Majority also suggests that the "interest in land" at issue in this case is Mr. Lucas' fee simple interest in his two beachfront lots, and that each of these two lots is clearly distinct property interests which form the denominator of two separate takings fractions.[46] As Justice Stevens notes, past Supreme Court takings cases spoke of a taking where a regulation "denies an owner economically viable use of his *land,*" not the use of an "interest in land." Justice Stevens concludes that Footnote 7 suggests landowners may be entitled to compensation for a total taking of *any* real property interest.[47]

Numerous legal commentators have noted the great potential for abusing a categorical "total takings" rule, particularly because of the potential for artificially segmenting property interests.[48] Clearly, allowing property owners to artificially segment their property holdings in order to ensure compensation for governmental restrictions does not promote either fairness or the preservation of reasonable investment-backed expectations.[49] It is also clear that judicial sanction of such manipulation of property interests will increase the likelihood of "total takings." This judicial sanction will require compensation, and unduly stymie worthy government efforts to protect public health, safety, and welfare through the protection of natural ecosystems. Moreover, in the short-term, Footnote 7, alone, will trigger a plethora

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45. The Majority explicitly rejects the approach to this issue taken in *Penn Central Transportation Co. v. New York City*. 366 N.E. 2d 1271, 1276-77 (1977), *aff'd*, 438 U.S. 104 (1978). The court apparently rejects this approach because the "denominator" in the diminution fraction included consideration of the railroad's other property holdings "in the vicinity." *Lucas*, 112 S. Ct. at 2894, n.7. The alternative proposed by the railroad would have recognized the airspace above Grand Central Terminal as a separate property right that had been totally taken by the City of New York, forcing the City to pay the railroad for that lost property right. *See, Penn Central*, 438 U.S. at 130. The Majority also clearly ignores *Keystone Bituminous Coal Assn. v. DeBenedictis*, which also required consideration of the parcel as a whole. 480 U.S. 470, 497-502 (1987).

46. *Lucas*, 112 S. Ct. at 2894, n.7.

47. *Lucas*, 112 S. Ct. at 2919-20 (Stevens, J., dissenting). Justice Stevens graphically illustrates how the segmentation of property interests could be manipulated to force compensation:

> An investor may, for example, purchase the right to build a multi-family home on a specific lot, with the result that a zoning regulation that allows only single-family homes would render the investor's property interest 'valueless.'

Id. See also *id.* at 2914-15 (Blackmun, J., dissenting).

48. *See* Frank I. Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1614 (1988); Michelman, *supra* note 39, at 1192-1193; Sax, *supra* note 39, at 60; Epstein, *supra* note 39, at 15-18.

49. *See supra* notes 39-42 and accompanying text.

of artificial real estate transactions and opportunistic litigation. The resulting transaction costs will be inefficient, undercutting a primary function of the Just Compensation Clause: to protect and encourage productivity.[50]

III. THE IMPACT OF THE TOTAL TAKINGS RULE ON WETLANDS REGULATION

A. Wetlands Regulations Rarely Prohibit All Economically Viable Uses of Property As a Whole

Section 404 of the Federal Water Pollution Control Act requires a permit only for activities involving discharges of dredged or fill material into waters of the United States including, but not limited to, wetlands.[51] Certain "economically viable" activities can be conducted in wetlands without actually dumping fill material or moving dirt into the wetland. For example, timber and other renewable resources can sometimes be economically harvested from wetlands without discharging dredged or fill material.[52] In addition, landowners can charge for the use of their wetlands for recreational activities such as camping, fishing, birdwatching, hunting, trapping, and scientific study.[53] Landowners can also sell easements or fee title interests for these purposes.[54] Section 404 also includes broad exemptions for "normal agricultural and silvicultural activities."[55] Such uses of wetlands should not constitute takings as the courts have often held that a taking is not caused by "a mere denial of the 'highest and best use,' i.e., most profitable use, that would be available in the absence of regulation."[56]

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50. *See* Michelman, *supra* note 39, at 1212. *See also supra* notes 39-42 and accompanying text.

51. 33 U.S.C. § 1344(a)(1988).

52. *See, e.g.*, L.D. Harris et al. *Bottomland Hardwoods: Valuable, Vanishing, Vulnerable.* 1984. School of Forests Resources and Conservation, University of Florida, in cooperation with Florida Cooperative Fish and Wildlife Research Unit and U.S. Fish and Wildlife Service; Paul F. Scodari, *Wetlands Protection: The Role of Economics* 9-11 (1990).

53. *Id. See also* Hendricks v. United States, 14 Cl. Ct. 143, 156-57 (1987); Loveladies Harbor v. United States, 15 Cl. Ct. 381, 395 (1988); *Lucas*, 112 S. Ct. at 2909 (Blackmun, J., dissenting); Lovequist v. Conservation Comm'n of Town of Dennis, 393 N.E. 2d 858, 866 (Mass. 1979); Orion Corp. v. State, 747 P. 2d 1062, 1085 (Wash. 1987).

54. *See Lucas*, 112 S. Ct. at 2909 (Blackmun, J., dissenting) and cases cited therein; 2919-20 n.3 (Stevens, J., dissenting). In *Formanek v. U.S.*, Mr. Formanek refused offers by the Minnesota Department of Natural Resources to purchase the regulated wetlands, including one offer for approximately 50% of the value of the wetlands based upon Formanek's own appraisal. 22 ELR 20893 (Cl. Ct. May 14, 1992).

55. *See* 33 U.S.C. § 1344(f) (1988).

56. *See, e.g.*, Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 901 (Fed. Cir. 1986), *cert denied*, 479 U.S. 950 (1987); Deltona Corp. v. United States, 657 F. 2d 1184, 1192 (1981) *cert denied*, 455 U.S. 1017 (1982); Jentgen v. United States, 657 F. 2d 1210, 1213 (1981) *cert denied*, 455 U.S. 1017 (1982); Goldblatt v. Hempstead, 369 U.S. 590, 592 (1962).

The focus of the § 404 permitting program, and most state wetland regulatory programs, is not to prohibit land use, but to guide development activity out of wetlands and other ecologically sensitive aquatic areas.[57] Even when a landowner's proposed use of his or her land requires a § 404 permit, that permit is generally issued, insuring the landowner's ability to put his property to an economically viable use. The Army Corps (Corps) permit statistics demonstrate that in 1990, only 500 (3%) of the approximately 15,000 individual permit applications were denied. Another 75,000 additional activities were authorized by general permit,[58] lowering permit denials to 0.56% of all regulated activities.[59]

The § 404 permitting standards, known as the § 404(b)(1) guidelines, reflect the intent to steer development activity out of wetlands and sensitive aquatic areas.[60] The regulations require that a permit applicant first establish that there are no "practicable alternatives" to the proposed discharge which would have "less adverse impact on the aquatic ecosystem" and no other significant adverse environmental consequences. "Practicable" is defined as "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[61]

Often, project proposals can be modified to avoid discharges into wetlands by down-sizing or reconfiguring a development proposal. While such alternatives may (or may not) decrease the anticipated profit from a development, they by no means leave the subject land parcel economically idle.[62]

A more difficult case arises when a practicable alternative to the proposed project is identified on an entirely different tract of land. If the Corps denies a permit on this basis (a very uncommon result),[63]

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57. *See infra* notes 60-62 and accompanying text.

58. Section 404 general permits typically involve minimal Corps scrutiny for environmental impacts, minimal public notice and input, and minimal restrictions on regulated activities. They must, by statute, be limited to activities with minimal individual and cumulative adverse impact. *See* 33 U.S.C. § 1344(e) (1988); U.S. Army Corps of Engineers Nationwide Permit Regulations, 56 Fed. Reg. 59,134 (November 22, 1991) (to be codified at 33 C.F.R. Part 330).

59. EPA Office of Water, Office of Wetlands, Oceans & Watersheds, based on FY 1990 permit statistics collected by the Corps of Engineers.

60. 40 C.F.R. Part 230 (1990).

61. 40 C.F.R. § 230.10(a) (1990). *See also*, 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, Admin. Matls. 20 ELR 35223 (February 6, 1990) [hereinafter Mitigation MOA].

62. *See, e.g.*, Brecciaroli v. Connecticut Comm'r of Envtl. Protection, 362 A.2d 948, 952 (Conn. 1975) (no taking because landowner denied a permit to fill 5.3 acres of wetlands on his 20.6 acre lot could reapply to fill fewer wetlands which could then be combined with the 3.1 acres of upland on his property for an economically viable use).

63. *See supra* note 59 and accompanying text. *See also*, Michael C. Blumm and D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence,*

the question arises as to what uses can the property be put to which are either unregulated (such as those described above), or for which there are no practicable alternatives in accordance with the § 404(b)(1) guidelines. While such a permit denial should be carefully considered by a regulatory agency prior to issuance, it must be recognized that the permit denial is not an outright prohibition on wetland development on the site. It is a prohibition of discharges associated with the particular proposed activity for which the agency has determined a practicable alternative does exist.[64]

If the Corps and EPA determine that there are no practicable alternatives to discharging into wetlands or other waters, the landowner is next required to *minimize* the adverse impacts of his or her activities in aquatic areas through "appropriate and practicable" steps.[65] Again such measures typically include down-sizing and reconfiguring project elements to reduce the damage to aquatic areas.[66] They also include a wide range of other practices, such as avoiding or minimizing disruptions in water flow, reducing soil erosion into aquatic areas, and avoiding discharges during fish spawning and nursery periods.[67] Obviously, this requirement is geared to minimizing impacts of a development proposal, recognizing that the proposed activity will go forward.

The third basic requirement is that the permit applicant minimize the aquatic impacts of his or her proposed activity by compensating for lost functions and values of wetlands and other waters, to the extent "appropriate and practicable."[68] Usually, such compensation takes the form of restoring, creating, or enhancing wetlands on or in relatively close proximity to the site of the wetlands lost to the development proposal. Clearly, compensatory wetland mitigation has evolved as a way to allow development to go forward, while minimizing the damage resulting from widespread wetlands destruction. Consequently, compensatory mitigation requirements should logically not trigger takings claims.[69]

Intergovernmental Tension, and a Call for Reform, 60 U. COLO. L. REV. 695, 767-768 (1989) [hereinafter Blumm and Zaleha]; Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws,* 60 U. COLO. L. REV. 773 (1989).

64. 40 C.F.R. § 230.10(a) (1990).

65. 40 C.F.R. § 230.10(d) (1990) and Subpart H; *see also* Mitigation MOA, *supra* note 61.

66. *Id.*

67. *Id.*

68. *Id. See also* Mitigation MOA, *supra* note 61, at Section II.C.3.

69. A word of caution is in order. The Supreme Court's decision in *Nollan v. California Coastal Commission* requires that permit conditions be closely tied to the purposes the regulation is intended to advance. 483 U.S. 825 (1987). The further from the nexus of replacing the aquatic area functions and values lost to the development proposal, the more the mitigation conditions look like "exaction," and the less "legal cover" the regulatory agency has for its permit decision.

Usually, if these "sequential mitigation" requirements are met, and the proposed discharge does not violate other substantive federal environmental laws and state water quality standards, the § 404 permit will be issued and the proposed use will be allowed to proceed in accordance with permit conditions.[70] However, there are occasions where the Corps and/or EPA will decide that the unavoidable adverse impacts of a proposal on wetlands and waters will be so damaging to the aquatic ecosystem as to be unacceptable.[71] The Corps may deny a § 404 permit on grounds that the proposed activity will cause or contribute to the "significant degradation" of wetlands or other waters of the United States.[72] Adverse effects contributing to significant degradation include the effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites, including wetlands. Also included are adverse effects on fish and wildlife, their habitat, loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy, adverse effects on the recreational, aesthetic, and economic values of wetlands and other waters of the United States.[73]

Even if the Corps decides to issue a § 404 permit in the face of such impacts, EPA can veto the permit issuance under § 404(c).[74] The EPA can issue a § 404(c) veto if the Administrator determines that the proposed discharge of dredged or fill material will have an "unacceptable adverse effect" on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.[75] "Unacceptable adverse effect" is, in turn, defined as an impact on a wetland or aquatic ecosystem which is likely to result in "significant degradation" of municipal water supplies (including surface or groundwater) or significant loss of, or damage to fisheries, shellfishing, wildlife habitat or recreation areas.[76]

As in the case of a denial based upon practicable alternatives, a permit denial based on significant degradation will raise questions about the potential for economically viable use of the regulated wetlands or waters consistent with § 404.[77] Such uses may well be available, as discussed above.[78] While there is some risk of a "total taking" in such a permit denial, it must also be recognized that a Corps or

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70. *See* 40 C.F.R. § 230.10 (1990).

71. 40 C.F.R. § 230.10(c) (1990). *See also infra* notes 73-74 and accompanying text; Blumm and Zaleha, *supra* note 63, at 739-744.

72. 40 C.F.R. § 230.10(c) (1990).

73. *Id.*

74. 33 U.S.C. § 1344(c) (1990); *see also* Blumm and Zaleha, *supra* note 63, at 740-744.

75. *Id.*

76. This § 404(c) determination also considers the factors and compliance requirements set forth in the § 404(b)(1) guidelines. 40 C.F.R. § 231.2(e) (1990).

77. 33 U.S.C. § 1344 (1988).

78. *See supra* notes 52-55 and accompanying text.

EPA finding of significant degradation will usually, if not always, involve the kind of potentially severe harm to public and private interests that *should* fall within "an objectively reasonable application" of nuisance and property principles.[79]

Even in the few cases in which § 404 permits are denied and the regulated wetlands or waters are severely restricted in their economic use, economically viable use can still be made of the upland areas on the property. Consequently, when the property is viewed as a whole, there is usually no taking.[80] In over 15 years and hundreds of thousands of permit decisions,[81] a taking based on a § 404 permit denial has been found in only three federal cases.[82] Moreover, these three takings decisions may not stand because they do not appear to be consistent with existing takings law on diminution of value.[83] The decisions are all trial court decisions and two of the three may be reversed on appeal.[84]

B. Segmentation of Property Interests Would Increase Total Takings in Wetland Regulation Cases

Section § 404 permit conditions and denials are far more likely to result in "total takings" if courts begin to confine their diminution of value analysis to the particular restricted wetland or stream bed which is part of a larger parcel of land. Judge Loren Smith's ruling

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79. *See Lucas*, 112 S. Ct. 2902, n.18. *See also infra* notes 144-193 and accompanying text.

80. *See, e.g.*, Deltona Corp. v. United States, 657 F.2d 1184 (1981) (court looked at the value and use of the entire 10,000 acre parcel purchased and partially developed between 1964 and 1976, and determined that § 404 permit denials for two particular developments in 1976 did not deprive Deltona of the economically viable use of its land); Jentgen v. United States, 228 Cl. Ct. 527, 657 F.2d 1210, 1213 (1981), cert denied, 455 U.S. 1017 (1982); Ciampitti v. United States, 22 Cl. Ct. 310, 318 (1991).

81. *See supra* note 59 regarding government statistics establishing that the Corps receives approximately 15,000 individual permit applications each year. The § 404 permit program, enacted into law in 1972, has been actively regulating most waters of the U.S. since about 1977. *See infra* notes 212-213 and accompanying text. *See also* Blumm and Zaleha, *supra* note 63, at 706-710 (describing the historical evolution of the § 404 permitting program).

82. Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161 (1990); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990); Formanek v. United States, 22 ELR 20893 (Cl. Ct. May 14, 1992).

83. For example, in *Formanek*, not only did the Court allow "segmentation" of certain access and fee title property rights to maximize the potential for severe diminution in value, the Court also ignored the market for the property as a nature preserve (approximately $500,000), and ignored a proven alternative access, ensuring economically viable use of the 12+ unrestricted upland acres on the property. In addition, the Court attached a *35% rate of return on equity* to the 65.8 acres of developable land on the property, some of which was apparently upland. 22 ELR 20893 (Cl. Ct. May 14, 1992).

84. *Florida Rock Indus.*, 21 Cl. Ct. at 160; *Loveladies Harbor, Inc.*, 21 Cl. Ct. at 153; *Formanek*, 22 ELR at 20893.

in *Loveladies Harbor*[85] is a case in point. In that case, plaintiffs purchased for $300,000 a 250 acre parcel of land in coastal New Jersey in 1956. They developed and sold homes on 199 acres of the 250 acre parcel at a healthy profit.[86] Yet, Judge Smith focused exclusively on the 12.5 wetland acres subject to a § 404 permit denial. Judge Smith ignored the plaintiffs' intensive economic use of the remaining 80% of the parcel *and* ignored the potential economically viable recreational uses which could be made on the wetlands themselves. Judge Smith found a taking, and ordered the payment of $2,658,000 plus interest in compensation.[87] This decision is clearly contrary to the binding precedent in *Deltona Corp.*[88] The *Loveladies* decision also clearly fails to strike a balance between satisfying the developer's "reasonable investment-backed expectations" and furthering the collective goals of protecting remaining coastal New Jersey wetlands.[89]

The *Formanek*[90] decision also illustrates how segmenting property interests can undermine the collective goal of protecting wetlands. Mr. Formanek owned a 3/4 interest in a 160 acre land parcel in Savage Minnesota in 1966.[91] The trial court found that the property at issue in the case consisted of 12 upland acres and 99 wetland acres.[92] In 1979, Mr. Formanek was informed that the wetland area was part of the Savage Fen Wetland Complex and included an ecologically rare and sensitive calcareous fen plant community.[93] In the early 1980's, the Minnesota State Natural Heritage Program offered to buy Formanek's property for $590,000, approximately 50% of Formanek's own appraisal. Negotiations broke down and were terminated sometime around 1983 or 1984.[94]

In November 1983, the Corps of Engineers determined that fill activity in a core 40-acre portion of the fen on Formanek's property would require an individual § 404 permit application, and could not be authorized simply by general permit.[95] In 1984, Mr. Formanek sold a portion of his land, either fortuitously or strategically losing in the bargain his access to the 12 acres of unregulated upland on his property.[96] In March 1985, the Corps extended its individual per-

85. *Loveladies Harbor, Inc.*, 21 Cl. Ct. at 153.
86. *Id. See also* David Coursen, *Lucas v. South Carolina Coastal Council: Indirection in the Evolution of Takings Law*, 22 ELR 10778, 10783 n. 77 (Dec. 1992).
87. *Loveladies Harbor, Inc.*, 21 Cl. Ct. at 153.
88. Deltona Corp. v. United States, 657 F.2d 1184 (1981). *See also* Tabb Lakes, Inc. v. United States, 26 Cl. Ct. 1334, 1345-46 n.17 (1992).
89. *See supra* note 86 and accompanying text.
90. *Formanek*, *supra* note 82.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 20894.
96. *Id.*

mit requirement over all of Formanek's wetland acreage.[97] In October 1985, Formanek applied for a § 404 permit to build an access road to his uplands.[98] The Corps denied the permit for the access road, not for any other site development activity.[99] Litigation followed shortly thereafter.[100]

The Court's taking decision ultimately turned, in large part, on the quality of access to the upland portion of the site.[101] The *Formanek* chronology certainly suggests the possibility that Mr. Formanek could have manipulated his property holdings to force the government into a choice between a possible taking or granting Formanek a new, preferred access right through the precious fen.[102] Even if the 1984 sale precluding access to Formanek's access was not premeditated, it certainly suggests the potential for strategic abuse.

Clearly, if Courts allow property owners to artificially segment land into the discrete wetland property interests which are restricted, "total takings" of those discrete interests will become more frequent. Such a result seems likely to hamstring the regulatory program and the courts with compensation claims that will rarely be warranted, either to protect reasonable investment-backed expectations or to achieve a fair and just result.[103]

IV. THE MAJORITY'S NUISANCE AND PROPERTY LAW EXCEPTION

A. The Holding

Having decided that "the South Carolina Supreme Court was too quick to conclude that [the nuisance] principle decides the present case," the second prong of the *Lucas* decision attempts to apply the "nuisance exception" to its categorical "total takings" rule.[104] The Majority rejects the "harmful or noxious uses" principle as nothing more than an early articulation of what is now a broad State police power to regulate without an obligation to compensate. The Court concludes that the distinction between regulations that "prevent harm" and regulations that "confer benefit" is often difficult to determine on an objective basis.[105] Accordingly, the *Lucas* Majority rejects legislative pronouncements of harm prevention as sufficient justification

97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 20895.
102. *Id.* at 20896.
103. *See supra* notes 39-42 and accompanying text.
104. *Lucas*, 112 S. Ct. at 2896-97.
105. *Id.* at 2897-99.

for avoiding compensation when all economically viable use of land is prohibited.[106]

The Majority then holds that, where a "total taking" occurs, the government can avoid compensation only where the proscribed use interests were not part of his title to begin with:

> Any limitation so severe [as to effect a "total taking"] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.[107]

But what are these "background principles" of state property and nuisance law? The Majority suggests a limitation on the nuisance and property law exception to those situations that "merely duplicate the results that could be achieved in the courts."[108] However, the Court's own analysis belies such a strict interpretation. The very reference to "background principles of the State's law of property and nuisance" potentially allows for consideration of a broad range of tort and property law principles beyond common law nuisance.[109] The Court's allowance for State exercise of its police power "to forestall other grave threats to the lives and property of others" also suggests a potentially broad exception to the Court's categorical compensation requirement.[110]

To help clarify its reference to background principles of nuisance and property law, the Court offers the example of a landowner denied a permit to conduct a landfilling operation that would result in downstream flooding of other landowners. According to the Majority, the landowner is not entitled to compensation for governmental restrictions on this use of land.[111] Similarly, the corporate owner of a nuclear generating plant is not entitled to compensation when it is required to remove all improvements from its land upon discovery that the plant is located on an earthquake fault.[112]

The Court reasons that these land uses, which are now *explicitly* prohibited under a state or federal law such as FWPCA § 404, were always *implicitly* unlawful under state "background principles of property and nuisance law."[113] Yet, because the Court's examples

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106. *Id.* at 2899.
107. *Id.* at 2900.
108. *Id.*
109. *See infra* notes 136-142 and accompanying text.
110. *Lucas*, 112 S. Ct. at 2900 n.16.
111. *Id.* at 2900-01.
112. *Id.* at 2900.
113. *Id.* at 2901.

both involve prohibitions on land use to prevent future harm, it is questionable whether a state court would actually find a nuisance at common law and enjoin the challenged land use.[114] The Court's analysis must indeed envision the application of broad *principles* of nuisance and property law, rather than a strict application of the common law.

The Majority cites Michelman in support of its notion that prohibitions are not takings where legislation simply makes explicit an already implicit background restriction.[115] However, Michelman's analysis is not limited to prohibitions which were implicit in "background principles of nuisance and property law." Michelman argues more broadly that investment-backed expectations are not reasonable for:

> [i]nvestments which, when they were made, either (a) interrupted someone else's enjoyment of an economic good, as should have been apparent; or (b) were of a sort which society had adequately made known should not become the object of expectations of continuing enjoyment.[116]

According to Michelman, then, property interests are not protected when they interfere with another's property interests, as in the case of noxious or nuisance-like uses of land. Property interests are also not protected where society has given adequate notice to landowners that it is "preempt[ing] the exploitation of a certain narrowly described class of resources . . . and that no one is to form any inconsistent expectations about the *future* use and control of those resources."[117] This notice can be implicit or explicit.[118]

Justices Kennedy, Blackmun and Stevens interpret the Majority opinion as rejecting legislatively-articulated nuisance and property

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114. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 826, 827 (1977). The Restatement nuisance analysis emphasizes, particularly in the absence of a nuisance statute, the necessity of proving an unreasonable interference which, in turn, is based on proof of substantial harm. Future substantial harm is, of course, far more difficult to prove than tangible, physical damage that has already occurred.

115. *Lucas*, 112 S. Ct. at 2900-01 (citing Frank I. Michelman, *Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1239-1241 (1967)).

116. Michelman, *supra* note 39, at 1239-1241.

117. *Id.* at 1240.

118. *Id.* at 1240. For example, the U.S. Government's dominant interest in navigable waters, leaving private vested rights in navigable waters noncompensable. *Id.* n.128 (citing U.S. v. Chandler-Dunbar Power Co., 229 U.S. 53, 62-64 (1913) (Supreme Court found it "inconceivable" that anyone should acquire a vested right to exploit the navigable waters of the nation); U.S. v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950) ("There . . . has been ample notice over the years that such property is subject to a dominant public interest"). One might ask why current or future governmental declarations of the public's interest in all "waters of the U.S." (e.g., wetlands) should not have the same effect.

principles, and recognizing only judge-made law.[119] Yet, as discussed above, the Majority's analysis and the Michelman reasoning relied upon by the Majority certainly do not support such a restriction.[120]

The Majority does not clearly define its "background principles of nuisance and property law." However, the Court does set forth a required "total takings" inquiry which must analyze:

> (1) the degree of harm to public resources, or adjacent private property, posed by the claimant's proposed activities;
>
> (2) the social value of the claimant's activities and their suitability to the locality in question; and
>
> (3) the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike.[121]

B. The Restatement (Second) of Torts Nuisance Inquiry

Turning to the Restatement (Second) of Torts for guidance, § 826 provides that a nuisance occurs when either:

> (1) the gravity of the harm (in this case, to public resources) outweighs the utility of the actor's conduct; or (2) the harm caused by the conduct is serious and the financial burden of compensating for such harm would not make the actor's conduct infeasible. This balancing of harm versus utility depends upon the particular facts in each case and is normally made by the trier of fact upon a thorough consideration of the factors stated in §§ 827 and 828.[122]

Section 826(e) also notes that, with respect to some types of conduct, there has been a "crystallization of legal opinion as to the gravity of harm versus utility equation, rendering certain conduct unreasonable and therefore a nuisance as a matter of law. This crystallization may appear in the form of a legislative enactment or it may be the result of a series of judicial decisions . . . . These judicial crystallization, however, . . . are applied only in particular fact situations and are constantly re-examined in the light of changing com-

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119. *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring); *Id.* at 2920-21 (Stevens, J., dissenting); *Id.* at 2915 (Blackmun, J., dissenting).

120. *See supra* notes 113-118 and accompanying text. *See also infra* notes 121-131 and accompanying text.

121. *Lucas*, 112 S. Ct. at 2901 (*citing* RESTATEMENT (SECOND) OF TORTS, §§ 826-28, 830 (1977)).

122. RESTATEMENT (SECOND) OF TORTS § 826(e) (1977).

munity conditions and views." The Restatement itself thus clearly considers the legislature as playing an active role in formulating nuisance law and, in any event, sees the gravity of harm versus utility balance as evolving over time "in light of changing community standards and views."[123]

Restatement (Second) of Torts § 827 requires that the gravity of harm side of the balance consider all relevant factors, including the following:

(1) the extent of the harm;
(2) the character of the harm;
(3) the social value that *the law* attaches to the type of use invaded (here, the social value of the public resource);
(4) the suitability of the use invaded to the locality; and
(5) the burden on the person harmed of avoiding the harm.

The gravity of the harm may be found to be so severe that it does not require compensation regardless of the utility of the proposed conduct.[124]

On the other side of the balance is the social value, or utility, of the claimant's conduct. The Restatement (Second) of Torts § 828 identifies three important factors in this analysis:

(1) the social value that *the law* attaches to the primary purpose of the conduct;
(2) the suitability of the conduct to the locality; and
(3) the impracticability of avoiding the invasion.[125]

In determining social value of the primary purpose of the conduct, the court will consider "in each case the community standards of relative social value prevailing at the time and place, and also what courts have traditionally regarded as the relative social value of various types of human activity."[126]

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123. *Id.* cmt. e. *See also* William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999-1000 (1966).

124. RESTATEMENT (SECOND) OF TORTS § 827 cmt. b (1977). Restatement § 827 cmt. f provides the following guidance with respect to the social value of the public resource:

> Uses of land for residential, agricultural, business, industrial, recreational or other beneficial purposes have a general or intrinsic social value. They are essential to the functioning of organized society and substantial interferences with them under almost any circumstances are relatively serious. How much social value a particular type of use has in comparison with other types of use depends upon the extent to which that type of use advances or protects the general public good. (*See* §828, Comment e). The greater the general social value of the particular type of use or enjoyment of land which is invaded, the greater the gravity of the harm from the invasion.

125. RESTATEMENT (SECOND) OF TORTS § 828 (1977).

126. *Id.* cmt. f. The primary purpose of the conduct has social value "if the general public good is in some way advanced or protected by the encouragement and achievement of the purpose. It does not have social value if the general public good is impaired by the encouragement or achievement of the purpose." *Id.* cmt. e.

Avoidance is the third major factor in the Majority's "total takings" inquiry. Restatement (Second) of Torts § 828(h) explains the avoidance factor as follows:

> When a person knows that his conduct will interfere with another's use or enjoyment of land and it would be practicable for him to prevent or avoid part or all of the interference and still achieve his purpose, his conduct lacks utility if he fails to take the necessary measures to avoid it. It is only when an intentional invasion is practically unavoidable that one can be justified in causing it; and even then, he is not justified if the gravity of the harm is too great.[127]

With respect to the suitability of the use to its locality, the Court notes that when particular conduct has been engaged in over a long period by similarly situated owners, there is usually not a common-law prohibition, though "changed circumstances or new knowledge may make what was previously permissible no longer so."[128] Moreover, if other similarly situated owners are permitted to continue the use denied to the claimant, there is also usually not a common-law prohibition.[129]

The Restatement (Second) of Torts thus suggests that a nuisance determination is based in large part on a case-by-case legal balancing of the social value of the public resource being protected, versus the social value of the restricted land use.[130] Both the Restatement and Prosser suggest that both judge-made law and legislation should form the basis for these judgments.[131]

Using the Restatement as an interpretive guide, the Majority seems to hold that the government need not compensate the landowner for a "total taking" if it establishes that the public harm likely to be caused by the particular prohibited land use outweighs the utility of the prohibited land use in the circumstances in which the land is presently found.[132] Such a reading is consistent with the Court's apparent interest in forcing a more careful, case-specific balancing of public harm and private utility by the South Carolina Supreme Court in the instant case.[133] In addition, this reading is not a significant

127. *See also* RESTATEMENT (SECOND) OF TORTS, §§ 827 cmt. e, 830 (1977).
128. *Lucas*, 112 S. Ct. at 2901.
129. *Id.*
130. RESTATEMENT (SECOND) OF TORTS, §§ 826-831 (1977).
131. *See supra* notes 121-123 and accompanying text.
132. *Lucas*, 112 S. Ct. at 2901-02 and n.18.
133. *Id.*

departure from existing takings jurisprudence.[134] Moreover, this reading of the Majority's nuisance exception strikes a careful balance between the goal of protecting reasonable investment-backed expectations on the one hand, and respecting governmental efforts to protect wetlands and other natural ecosystems on the other.[135]

C. *Other Property Law Principles*

Beyond the analysis of nuisance principles, there are other principles of property law that may limit the use of land. According to the Majority's reasoning, these principles also would preclude a compensation requirement where the challenged governmental restriction merely made explicit a restriction that was already implicit in state property law.[136] Applying Michelman's analysis, any property statute or common law that clearly signaled the preemption of "the exploitation of a certain narrowly described class of resources" should act as a restriction on future land use.[137]

In particular, public trust rights such as those in navigable and tidal waters should now clearly be recognized as an inherent title restriction which is not "taken" when a government restriction explicitly precludes destruction of public trust resources.[138] The public may also have "prescriptive rights" in private lands that may limit private land use rights. A prescriptive right is acquired where there is open and continuous use for an extended period with the landowner's knowledge.[139]

Other state property principles, such as the doctrine of implied warranty of suitability or habitability, might also constitute a background principle of property law that inherently restricts specific land

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134. Most Supreme Court decisions relying on the harmful or noxious use abatement principle involved a similar balancing of public harm versus private utility. *See, e.g.* Goldblatt v. Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887). The *Lucas* decision may, however, more clearly define a governmental burden of proving nuisance where a "total taking" is found to occur.

135. *See* discussion of reasonable investment-backed expectations, *supra* notes 39-42 and accompanying text.

136. *Lucas*, 112 S. Ct. at 2900.

137. *See supra* notes 116-118 and accompanying text.

138. *See, e.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 477 (1988); Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1380-83 (Fla. 1981), *cert. denied sub. nom.* Taylor v. Graham, 454 U.S. 1983 (1981); Orion Corp. v. State, 747 P 2d 1062 (Wash. 1987); *cert. denied sub nom* Orion Corp.v. Washington, 486 U.S. 1022 (1988); Just v. Marinette, 201 N.W. 2d 761 (Wis. 1972). *See also supra* note 118 and accompanying text.

139. Jon Kusler, *Public Liability and Natural Hazards: The Common Law and Regulatory Takings*, Omni Press, for the National Science Foundation. (forthcoming 1993; manuscript currently available from Association of State Wetland Managers, Box 2463 Berne, New York 12023) [hereinafter Kusler]. *See, e.g.*, Rendler v. Lincoln County, 709 P. 2d 721, 726-27 (Or. Ct. App. 1985), *aff'd*, 728 P.2d 21 (Or. 1986); Matcha v. Mattox, 711 S.W. 2d 95 (Tex. Ct. App. 1986), *cert. denied*, 481 U.S. 1024 (1987).

uses contrary to such a warranty.[140] In many states, new home buyers may rescind sales or obtain damages if lands purchased are subject to flooding or are otherwise not suitable for their intended uses.[141] Finally, additional tort restrictions on land use, such as trespass, negligent conduct, and strict liability for abnormally dangerous activities might well preclude requirements for governmental compensation.[142]

As with the nuisance inquiry, if the Majority opinion is read to recognize these property principles as inherent restrictions on land use, the opinion strikes a balance that accommodates *reasonable* investment-backed expectations without crippling government efforts to protect wetlands and other natural ecosystems. In contrast, the *Lucas* decision would be a departure from current takings law, current nuisance and property law, and good public policy, if it is interpreted as actually confining the analysis of "background principles of nuisance and property law" to judge-made common law. Justices Kennedy, Blackmun, and Stevens all challenge such a limitation as "too narrow a confine for the exercise of regulatory power in a complex and interdependent society."[143]

V. WETLANDS RESTRICTIONS WILL OFTEN FALL WITHIN THE NUISANCE AND PROPERTY LAW EXCEPTION

A. General Common Law Nuisance and Property Law Principles

The Restatement (Second) of Torts Section 821D defines a private nuisance as a "nontrespassory invasion of another's interest in the private use and enjoyment of land."[144] A landowner is liable for

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140. *Id.*

141. *Id. See, e.g.*, Jordan v. Talaga, 532 N. 2d 1174 (1989); Gilmore v. Garrett, 582 So. 2d 387 (Miss. 1991); Waggoner v. Midwestern Development, Inc., 154 N.W. 2d 803 (1967); Beri, Inc. v. Salishan Properties, Inc., 580 P. 2d 173 (Or. 1978).

142. Kusler, *supra* note 139.

143. *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring); *Id.* at 2915 (Blackmun, J., dissenting); *Id.* at 2920-22 nn.5-6 (Stevens, J., dissenting).

According to Justice Stevens, the Court's holding freezes the State's common law and denies the legislature its traditional power to revise property law, contrary to Supreme Court precedent which recognized that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Id.* at 2921 (Stevens, J., dissenting) (citing *Munn v. Illinois*, 94 U.S. 113, 134 (1877)). Justice Stevens also cautions that "arresting the development of the common law" is "profoundly unwise":

> The human condition is one of constant learning and evolution — both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined "property." On a lesser scale, our on-going self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species, the importance of wetlands, and the vulnerability of coastal lands, shapes our evolving understandings of property rights.

Id. at 2921.

144. RESTATEMENT (SECOND) OF TORTS § 821D (1977).

a private nuisance if his conduct amounts to an intentional and unreasonable invasion, or an unintentional invasion otherwise actionable under liability rules for negligent conduct, reckless conduct, or strict liability.[145] Whether an intentional invasion is unreasonable is determined in accordance with the Restatement (Second) of Torts Sections 826-831, as discussed above.[146]

These rules are generally applicable to public nuisances as well.[147] The Restatement (Second) of Torts § 821B defines a public nuisance as "an unreasonable interference with a right common to the general public." Conduct which involves a "significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience" may constitute a public nuisance.[148] Also important to the determination is whether the conduct "is proscribed by a statute, ordinance or administrative regulation," and whether the conduct is "of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."[149]

The Restatement (Second) of Torts § 856(g) defines "public rights in water" as "legally protected rights to use navigable and other public waters for transportation, pleasure boating, fishing, swimming, skating, hunting and other purposes."[150] In some states, these public rights have greater legal protection as absolute property rights under the state's public trust doctrine.[151]

B. Nuisances and Public Rights Violations Arising from the Pollution of Waters

Restatement (Second) of Torts § 832 states that,"[a]n invasion of one's interest in the use and enjoyment of land or water resulting from another's pollution of surface waters, ground waters or water in watercourses and lakes may constitute a nuisance under the rules stated in Sections 821A-831 of this Chapter."[152] This rule applies to both private and public nuisances. Section 832(c) defines the pollution of water as:

> [T]he alteration of its physical, chemical, or biological qualities so as to make it harmful to domestic, commercial, in-

145. RESTATEMENT (SECOND) OF TORTS § 822 (1977).
146. *See supra* notes 122-129 and accompanying text.
147. *See* RESTATEMENT (SECOND) OF TORTS §§ 821B(e), 826-31 (1977).
148. *Id.*
149. *Id.*
150. RESTATEMENT (SECOND) OF TORTS § 856(g) (1977). *See also* RESTATEMENT (SECOND) OF TORTS § 821B(g) (1977).
151. RESTATEMENT (SECOND) OF TORTS § 856(g) (1977). *See also* cases cited *supra* note 138 and accompanying text.
152. RESTATEMENT (SECOND) OF TORTS § 832 (1977).

> dustrial, agricultural, recreational or other beneficial uses of water or uses of land, or detrimental to public health, safety and welfare or to livestock, wild animals, birds, fish or other aquatic life.[153]

Restatement (Second) of Torts § 849(e) specifically provides that, "[t]here is no riparian right or privilege to pollute water, nor do landowners have rights to pollute surface or ground water found on or within their land."[154] Water pollution which kills fish in a public stream has long been recognized as a public nuisance at common law.[155] Water pollution has also been found a private nuisance at common law.[156]

Wetlands drainage and filling often increase water pollution by channeling sediment, fertilizers, and other chemicals from uplands and wetlands into streams, lakes, rivers, and estuaries.[157] Such reductions in water quality can, in turn, cause significant declines in fish populations, affecting both commercial and sport fishing industries.[158] The draining and development of the freshwater "pocosin" wetlands along the coast of North Carolina illustrate the relationship between wetland conversion and lost fishing rights.

Natural pocosin wetlands slow down and diffuse the influx of fresh water storm run off into coastal streams and bays that contain saline water and support marine life, allowing these coastal waters to gradually assimilate the fresh water without drastic fluctuations in salinity.[159] This buffering capacity is lost when pocosins are drained and an artificial drainage system channels the freshwater runoff rapidly and directly to coastal waters. Introduced in such concentration to coastal waters, this freshwater runoff can actually become a pollutant, significantly harming shrimp and other marine organisms.[160]

When pocosin wetlands are cleared, drained, and converted to other land uses, the normally acidic and nutrient poor soil is often

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153. *Id.* at § 832(c).

154. *Id.* at § 849(e).

155. *See* RESTATEMENT (SECOND) OF TORTS § 832(b) (1977); W. PAGE KEETON ET AL., PROSSER & KEETON, LAW OF TORTS, § 88, at 583-590 n.57 (5th ed. 1984) [hereinafter Prosser].

156. *See* Prosser, *supra* note 155, § 89, at 601 n.36.

157. See Daniel, *infra* notes 159-63.

158. *See infra* notes 164-67.

159. CHARLES C. DANIEL, III, *Hydrology, Geology, and Soils of Pocosins: A Comparison of Natural and Altered Systems* POCOSIN WETLANDS, AN INTEGRATED ANALYSIS OF COASTAL PLAIN FRESHWATER BOGS IN NORTH CAROLINA 100-101 (Curtis J. Richardson ed. 1981) [hereinafter Daniel]; MICHAEL STREET AND JOSEPH MCCLEES, *North Carolina's Coastal Fishing Industry and the Influence of Coastal Alterations,* POCOSIN WETLANDS, AN INTEGRATED ANALYSIS OF COASTAL PLAIN FRESHWATER BOGS IN NORTH CAROLINA 238-251 (Curtis J. Richardson ed. 1981) [hereafter Street and McClees].

160. Daniel, *supra* note 159 at 100-01; Street & McClees, *supra* note 159 at 238-51.

treated to prepare it for these new uses.[161] The freshwater runoff rapidly channeled into coastal streams and bays also carries with it excess nutrients such as magnesium, calcium, bicarbonate, sulfate, nitrate nitrogen, phosphorus, and additional suspended sediments.[162] This run off can result in algal growth, eutrophication, and ultimate disruption of the marine habitat along the coastal fringe.[163]

In 1978, North Carolina's commercial and recreational fishing industry contributed more than $325 million to the coastal economy, and employed over 23,000 persons.[164] Estuarine-dependent species, such as Atlantic croaker, menhaden, penaeid shrimp, blue crab, and oysters accounted for more than 90% of the commercial landings from 1974 to 1978.[165] Brown shrimp, in particular, but possibly oysters, crabs, and finfish as well, are highly susceptible to salinity changes. Drainage of North Carolina's pocosins and other freshwater wetlands is a suspected cause of reductions in North Carolina's shrimp and oyster production, as well as other problems with North Carolina fisheries.[166] The relationship between wetland conversion and fishery declines has also been convincingly traced in such places as Florida's Apalachicola River and the Everglades, the Chesapeake Bay, and the rivers and estuaries of the Pacific Northwest.[167]

C. *Wildlife Habitat*

Wetlands provide critical habitat for a wide diversity of animal life.[168] Wetlands drainage and filling has also destroyed the habitat

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161. Daniel, *supra* note 159, at 101-04; CURTIS J. RICHARDSON, POCOSIN WETLANDS, AN INTEGRATED ANALYSIS OF COASTAL PLAIN FRESHWATER BOGS IN NORTH CAROLINA" 135, 141 (Richardson ed. 1981).

162. *Id.*

163. *Id.*

164. STREET AND MCCLEES, *supra* note 159, at 238-39.

165. STREET AND MCCLEES, *supra* note 159, at 244.

166. STREET AND MCCLEES, *supra* note 159, at 247-249; Sandra L. Postel, *The Economic Benefits of Pocosin Preservation* [hereinafter Postel] in POCOSIN WETLANDS, AN INTEGRATED ANALYSIS OF COASTAL PLAIN FRESHWATER BOGS IN NORTH CAROLINA 283, 290-91 (Richardson ed. 1981).

167. Environmental Defense Fund and World Wildlife Fund, *How Wet is a Wetland?* 44-52 (1992)[hereinafter *How Wet is a Wetland*]; J.R.Chambers, in press. *Coastal Degradation and Fish Population Losses.* National Marine Fisheries Service, Washington, D.C.; Hinman, K. *Stemming the Tide* (1991). National Coalition for Marine Conservation. Savannah, GA. 35 pp.; *Fisheries in Crisis: Making the Habitat Connection.* 1990. The National Fisherman. Portland, Maine.

168. *See, e.g.*, Harris ET AL, *supra*, at n.42; Harris and Gosselink, *Cumulative Impacts of Bottomland Hardwood Conversion on Wildlife, Hydrology, and Water Quality, EPA.* 1986 [hereinafter Harris and Gosselink]; Charles H. Wharton et al., *The Fauna of Bottomland Hardwoods in the Southeastern United States, in* "Wetlands of Bottomland Hardwood Forests" 87-127 (Clark and Benforado eds. 1981) [hereinafter Wharton]; Tom Monschein, *Values of Pocosins to Game and Fish Species in North Carolina, in* POCOSIN WETLANDS, AN INTEGRATED ANALYSIS OF COASTAL PLAIN FRESHWATER BOGS IN NORTH CAROLINA 155-70 (Curtis J. Richardson ed. 1981) [hereinafter Monschein]; *How Wet is a Wetland?, supra* note 167, at 52-57.

of numerous species of wildlife. Waterfowl and other migratory bird populations have declined precipitously as wetlands have been drained and filled.[169] Over 30% of the federally-protected threatened and endangered species are wetlands dependent.[170] Wetlands conversion has been a significant, and in some cases the exclusive factor, in bringing many of these species to the brink of extinction.[171] In many states, the common law already recognizes wildlife as a public trust resource which the state has both the right and the duty to protect.[172] Consequently, wetlands conversion which results in the loss of valuable wildlife habitat may well constitute either a common law nuisance or violation of a common law public property right.

D. Nuisances Arising from Interference with the Flow of Surface Waters

The Restatement (Second) of Torts Section 833 provides that, "[a]n invasion of one's interest in the use and enjoyment of land resulting from another's interference with the flow of surface water may constitute a nuisance under the rules stated in §§ 821A-831."[173] At a bare minimum, there is the type of wetlands use even the Majority acknowledges as "previously impermissible" under relevant nuisance and property principles: the case where the landowner is denied a permit to fill in a lake bed where the filling would cause the flooding of downstream property.[174]

Flooding from wetlands drainage and filling is by no means an isolated event. Wetlands provide extremely important natural flood storage capacity.[175] When wetlands are drained or filled, water from

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169. *See* How Wet is a Wetland?, *supra* note 167, at 32-36, 61-62, and 91-93; Tiner, *Wetlands of the United States: Current Status and Recent Trends.* U.S. Fish and Wildlife Service, National Wetlands Inventory. GPO: 1984-439-855-814/10870. 59 pp.; 1990 Status of Waterfowl and Fall Flight Forecast. 1990. U.S. Fish and Wildlife Service, Washington, D.C., p. 45.

170. *See* Feierabend, *Endangered Species, Endangered Wetlands: Life on the Edge.* National Wildlife Federation (Sept. 1992); *How Wet is a Wetland?, supra* note 167, at 52-57; *Aquatic Animals: Endangerment Alert.* The Nature Conservancy Magazine. March/April 1991 [hereinafter Aquatic Animals].

171. *Id.*

172. *See* Michael J. Bean, THE EVOLUTION OF NATIONAL WILDLIFE LAW 37-47 (1983); In re Steuart Transportation Co., 495 F. Supp. 38 (E.D. Va. 1980).

173. Interference with the flow of surface water may also constitute a public nuisance if there is an invasion of a public right. RESTATEMENT (SECOND) OF TORTS § 833 (1977). "Interference with the flow of surface waters" is defined as "an obstruction, diversion or alteration of the natural or normal flow of surface waters in the particular place where the interference occurs." *Id.* at § 833(b).

174. Lucas v. South Carolina Costal Council, 112 S. Ct. 2886, 2900-01 (1992). Situations such as this may also be impermissible (and therefore not warranting compensation) on negligence or trespass grounds. *See* Kusler, *supra* note 139.

175. *See, e.g.*, How Wet is a Wetland?, *supra* note 167, at 36-39; Hubbard and Linder, *Spring runoff retention in prairie pothole wetlands,* 41 J. Soil and Water Cons. 2:122-125 (1986); Ludden, ET AL., *Water storage capacity of natural wetland depressions in the Devils Lake Basin of North Dakota,* 38 J. SOIL AND WATER CONS. 1: 45-48(1983).

spring runoff and storm events is no longer stored in wetlands, but run directly overland or into streams causing nearby flooding. There are literally thousands of reported cases involving disputes over flooding from wetlands drainage and filling.[176]

In the celebrated § 404 enforcement case, *Pozsgai v. U.S.*,[177] Mr. Pozsgai's filling of wetlands on his property flooded his neighbors' yards and basements, causing significant property damage.[178] Research in North and South Dakota confirms that agricultural wetlands drainage upstream causes downstream flooding.[179] Downstream farmers on the Lower Wabash River complain to their congressional representative about increased flooding from upstream wetland drainage.[180]

Flooding attributable to wetland development is cognizable as a public nuisance as well. Such flooding can destroy public highways, bridges, and other infrastructure, forcing public expenditures to repair the damage and to prevent future flood damage.[181] The Minnesota Department of Natural Resources (MDNR) estimates that it costs $300 to replace each acre-foot of flood storage lost due to wetlands conversion.[182]

A prominent Florida real estate developer, insistent on building a large planned community in wetlands on the eastern edge of the Florida Everglades, ended up saddling its unwary purchasers and the community with a huge bill for flood control and water supply.[183]

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176. Kusler, *supra* note 139. Indeed, Restatement (Second) of Torts § 833(b) illustrates its definition of interference with surface water flow as follows: When one person drains or cultivates his land, grades it or builds roads, structures or embankments upon it, he usually interferes with the flow of surface waters upon or across it; and this interference often causes harm to a neighbor in the use and enjoyment of his land. That harm may arise from the backing up of water on the neighbors land or from an increase in the flow of the water or from a change in its direction or velocity. *Id.*

177. *See* U.S. v. Pozsgai, No. 88 Crim. 00450 (D. Pa. July 13, 1989).

178. *Id.* In another publicized case, a Georgia developer filled in a bald cypress swamp to build new homes in violation of § 404 and flooded the property of adjacent landowners. *See* WASH. POST, May 11, 1991; Moyer and Feierabend, STATEMENT OF THE NATIONAL WILDLIFE FEDERATION BEFORE THE SUBCOMMITTEE ON ENVIRONMENTAL PROTECTION OF THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE ON WETLANDS PROTECTION AND FEDERAL WETLANDS LEGISLATION (Summer 1991).

179. L.J. Brun, ET AL. *Stream Flow Changes in the Southern Red River Valley of North Dakota*, 38 N.D. FARM RES. 5, 11-14 (1981); D.E. Hubbard & R.L Linder, *Spring Run-off Retention in Prairie Pothole Wetlands*, 41 SOIL AND WATER CONS. 2:122-125 (1986); A.P. Ludden, ET AL. *Water storage capacity of natural wetland depressions in the Devils Lake Basin of North Dakota*, 38 SOIL AND WATER CONS. 1:45-48 (1983).

180. Interview with John Divine, Staff Assistant to Indiana Congressman Frank McCloskey (March, 1992).

181. *See supra* notes 179 and *infra* note 182 and accompanying text.

182. Testimony presented by Ron Narang, Director, Division of Waters, to the Domestic Policy Council's Wetlands Task Force. Bismark, North Dakota, August 17, 1990.

183. John deGroot & Chuck Clark. *Should This City Have Been Built?* SUNSHINE: THE MAGAZINE OF SOUTH FLORIDA, September 15, 1991/No. 415. at 6 [hereinafter deGroot & Clark]. Fact situations such as these might give rise to violation of an implied warranty of suitability under state law. *See* Kusler, *supra* note 139.

An elaborate flood control system was required to pump water off the wet home sites, and a deeper brackish water source had to be substituted for the shallow freshwater aquifer source.[184] The freshwater aquifer, which had been recharged by the wetlands prior to their destruction, could no longer supply water to the new homeowners.[185] The community is now faced with a $600 million debt and increased utility bills.[186]

Clearly, many wetland conversions cause the types of water pollution, habitat destruction, flooding, and groundwater depletion harms to public and private interests that have long been recognized as nuisance or other property rights violations at common law.

E. Wetlands Regulation Under a Restatement Nuisance and Broader Property Law Inquiry

While water pollution, flooding, groundwater depletion, and loss of fish and waterfowl populations are harms recognized as "impermissible" under the common law of many states, other harms resulting from wetlands destruction may not be well-established in the state's common law. Under the Restatement nuisance analysis and a "Michelman" view of background property principles, a court could apply a harm versus utility balancing test, taking into account existing state and federal statutes. Through this analysis, the court could determine that an activity was restricted prior to obtaining title, either implicitly or explicitly, as a nuisance or a violation of another countervailing property right.[187] In this way, activities which are newly-recognized as harmful, based upon new scientific information, might still be cognizable as nuisances or property right violations which do not warrant compensation when restricted.

The conversion of seasonal wetlands, such as Southern California's vernal pools and Southwest Texas' playa lakes, offers an illustration. On these arid lands, seasonal wetlands support diverse plant and animal communities dependent upon the moisture they provide in the winter and spring.[188] Widespread destruction of these seasonal wetlands has brought some of these plant and animal species to the brink of extinction.[189] Continued destruction will eventually extinguish these species, negating public expenditures to recover their popula-

184. deGroot and Clark, *supra* note 183.
185. *Id.*
186. *Id.*
187. *See supra* notes 111-143 and accompanying text.
188. How Wet is a Wetland?, *supra* note 167, at 54-57, 141. *See also,* Aquatic Animals, *supra* note 170.
189. *Id.*

tions. The biological diversity and abundance of flora and fauna will decline in these arid regions.[190]

The social utility of agricultural operations threatening these wetlands is limited by the relative ease with which these ecological harms can often be avoided. Farming and ranching operations can often avoid destroying these wetlands by working around them, fencing them from livestock to prevent overgrazing, and, where necessary, leaving a buffer area to avoid chemical and sediment run-off into them.

Under a Restatement nuisance test, a good case can be made that agricultural production destroying these seasonal wetlands is an unreasonable interference with a public right, *i.e.*, a public nuisance. The public interest in preserving the biological diversity and abundance of flora and fauna supported by these wetlands outweighs the utility of the agricultural production on these seasonal wetlands. In many cases, the public harm is one that is most easily avoided by the agricultural producer, and many of these seasonal wetland areas are not suitable for agriculture in any event.[191] Consequently, compensation would not be warranted because the destruction of natural wetlands supporting diverse plant and animal species would be found to be a nuisance, a land use which was already implicitly prohibited under prevailing tort law.[192]

F: The § 404(b)(1) Guidelines and the Corps' Permit Regulations Mirror the Restatement Nuisance and Public Rights Inquiries

The Clean Water Act in general, and § 404 in particular, are designed to protect the same public resources so highly valued in the common law of nuisance and the public trust doctrine. The primary objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[193] Specific goals articulated throughout the CWA are to maintain and improve the aquatic environment to provide for "the protection and propagation of fish, shellfish, and wildlife," to provide for recreation, and to

190. *Id.*

191. Because agricultural operations should be able to proceed around vernal pools and playa lakes, wetland and endangered species restrictions on the conversion of these seasonal wetlands to agriculture should not be deemed a "total taking" if the parcel is viewed as a whole, and the takings inquiry need not ever even reach the inquiry into the nuisance and property law exception. However, if the courts permit the agricultural producer to claim a total taking of the regulated wetlands only, then a court could find a total diminution in value, and the nuisance and property law exception would then be pertinent.

192. Similarly, the argument might be made that the vernal pool and playa lake wetlands and the unique flora and fauna they support are public trust resources that the landowner never owned the right to destroy. *See supra* note 138 and accompanying text.

193. 33 U.S.C. § 1251(a) (1988).

protect public water supplies.[194] The aquatic resources and public rights which the CWA attempts to protect are remarkably similar to those described in the Restatement (Second) of Torts definitions of water pollution, nuisance arising from water pollution, and public rights in water.[195]

The § 404(b)(1) guidelines for permit review incorporate a "public harm versus private utility" balancing test very similar to the Restatement nuisance analysis described in *Lucas*.[196] First, the guidelines accord a higher social and ecological value to "special aquatic sites" including wetlands, which the guidelines define as geographic areas "[p]ossessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values . . . [and] significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region."[197]

Second, the § 404 guidelines' "alternatives test" clearly balances the public harm attributable to wetlands destruction against the basic purposes of the proposed wetland conversion activity.[198] This "alternatives test" requires permit denial where the permit applicant has a "practicable alternative" that would achieve his or her basic purpose without destroying the wetland.[199] If the Corps and EPA determine that there is no available "practicable alternative" to the proposed activity in wetlands, typically the permit is issued unless the wetland destruction is expected to cause the "significant degradation" of the aquatic environment.[200] This scenario also mirrors the Restatement balancing test, which states that the gravity of the public harm may be so great as to outweigh any private land use, regardless of its utility.[201]

Similarly, the Corps' permit regulations employ a "public interest review" that explicitly balances the public harm attributable to wetlands destruction against the need for and utility of the proposed

194. *See, e.g.*, 33 U.S.C. §§ 1251(a), 1252(a), 1313(c)(2)(a), 1314(A)(2), 1343(C)(a), and 1344(c) (1988).

195. *See supra* notes 152-186 and accompanying text.

196. *See* detailed discussion of § 404(b)(1) guidelines, *supra* notes 51-80 and accompanying text; detailed discussion of Restatement nuisance analysis, *supra* notes 121-132 and accompanying text.

197. 40 C.F.R. §§ 230.3(q)-1, 230.40-.45 (1992).

198. 40 C.F.R. § 230.10(a) (1992). Compare RESTATEMENT (SECOND) OF TORTS §§ 827(e); 828(c); (h); 830 (private conduct lacks utility where it would be "practicable" to avoid part or all of the interference [with land use or public rights] and still achieve the purpose of the conduct).

199. *Id.*

200. *See* more detailed discussion of the § 404(b)(1) guidelines, *supra* notes 70-76 and accompanying text.

201. *See supra* note 124 and accompanying text.

private activity affecting wetlands.[202] Typically, it is only where the proposed activity in wetlands fails these balancing tests that a § 404 permit is denied.[203] These conditions for permit denial are remarkably similar to conditions in which a nuisance would be found under the Restatement test.[204]

Because many wetland conversion activities do fall within the Restatement definition of a nuisance or public trust violation, and because the § 404 regulations so closely mirror the applicable common law tests for nuisance and public trust violations, wetland permit denials should rarely require compensation, even when they arguably result in a total diminution in value.[205] As discussed above, such "total takings", based upon consideration of the property as a whole, should indeed occur only in "extraordinary" circumstances.[206]

G. The Cumulative Impacts Caveat

There exists at least one important caveat to the conclusion that wetlands regulations (properly applied by agencies and properly reviewed by courts) should rarely require compensation. This is the cumulative impacts caveat. It will often be difficult to identify and measure the discrete public harm attributable to a particular wetland conversion. Typically, it is the accumulation of numerous acts of wetlands drainage, filling, and pollution that result in severe declines in surface and groundwater quality, fish and wildlife habitat, diversity, and populations, and in increased flooding and groundwater depletion.[207] Even where the specific harm can be identified, it may not be viewed as of sufficient magnitude to outweigh the private development interests in the nuisance or public trust balancing tests.[208] Consequently, unless the *cumulative* impacts of the wetland conversion are recognized in the balance, courts may require compensation where the *individual* adverse impacts of a particular proposed land use seem relatively small.

VI. PROTECTING WETLANDS AND INVESTMENT-BACKED EXPECTATIONS

The primary objective of the Just Compensation Clause is to ensure fairness and protect reasonable investment-backed expectations when governmental regulations restrict the use of private property to

202. 33 C.F.R. § 320.4(a) (1990).
203. *See supra* notes 57-59 and accompanying text.
204. *See supra* note 196.
205. *Id.*
206. *See supra* notes 51-103, 144-204 and accompanying text.
207. *See, e.g.*, 40 C.F.R. § 230.11(g) (1990).
208. *See supra* notes 122-143 and accompanying text.

advance public health, safety, and welfare.[209] This section suggests measures which may help to better define reasonable investment-backed expectations, improve program fairness, and strike a better balance between the public interest in protecting natural wetland ecosystems and private property interests. Such measures may bolster wetlands programs in the face of future takings challenges.

A. Clear Notification that Reasonable Property Expectations Do Not Include Wetlands Destruction

Some uses of wetlands and waters have been generally recognized by the courts as unreasonable interferences with private property rights or public interests, thus amounting to common law nuisances.[210] Beyond common law nuisance, it also seems apparent that during the 1970s the federal government clearly signaled that future investments in land uses which require the conversion of wetlands to uplands are not based upon reasonable expectations and that those investors will not be able to proceed with wetland conversion.[211] Consequently, compensation is generally not warranted to protect *future* investments in non-compatible uses of wetlands.

It is essential, however, that the Corps and EPA continue to provide stable and consistent regulation of wetlands. This ensures that investors do not receive mixed signals with regard to their wetland property rights. The Corps' decentralized and variable regulation of certain activities in wetlands fosters continued speculation in wetlands on the chance that the Corps' permit restrictions can be avoided.[212]

In addition, the delineation of wetland boundaries continues to be a matter of public debate and equivocation at the highest levels

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209. *See supra* notes 39-42 and accompanying text.

210. *See supra* notes 104-143 and accompanying text.

211. *See, e.g.*, Joseph Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*. 14 UNIV. CAL-DAVIS L. REV. 185, 187-194, (1980); Ciampitti v. United States, 22 Cl. Ct. 310, 320-321 (1991)(*citing* Ruckelshaus v. Monsanto Co., 467 U.S.986, 1006-07 (1984); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 227 (1986)). Section 404 was first enacted in the Federal Water Pollution Control Act (FWPCA) of 1972, Pub L. No. 92-500. Application of § 404 to wetlands was further clarified in NRDC v. Callaway, 392 F. Supp. 685 (D. D.C. 1975); in Corps regulations published in 1977, 42 Fed. Reg. 37122, 37123-24 (July 19, 1977); and in the 1977 Clean Water Act amendments to the FWPCA, Pub.L. No. 95-217.

212. For example, when § 404 was first enacted, the Corps insisted that the new law applied only to traditionally navigable waters, and not to tributary streams, wetlands, and other non-navigable waterbodies. While that issue was settled in *NRDC*, 392 F. Supp. at 685, the Corps continued to avoid the regulation of wetlands through such measures as the widespread use of general permits and its "de minimis" exception to § 404 permit requirements. These and other similar policies have undoubtedly prompted some investors to "hedge their bets" in wetlands. *See e.g., supra* note 44.

of government.[213] Yet, there can be little doubt that the high visibility of the debate has sent a clear signal to investors. Investing in land that would be considered wetland under the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands is "risky business", and expectations that these wetland areas can be converted to non-compatible uses should not be recognized or protected through compensation. It is, however, essential to both protecting private property interests and protecting wetlands that a scientifically defensible, administratively workable, wetlands definition and delineation methodology be agreed upon and then consistently implemented over the long-term.

Ideally, property expectations for wetland uses would be clearly circumscribed by highly accurate, readily accessible maps that would clearly delineate regulated areas. Wetlands mapping is being conducted at the federal level by the U.S. Fish and Wildlife Service, by many states, and by some local governments.[214] The computer technology involved in such mapping is advancing quickly, and such mapping should be increasingly available to investors.[215] However, in the short-term, high resolution mapping is extremely costly.[216] Governments with limited resource management budgets must carefully weigh the advantages of high-tech mapping against the considerable expense of map production.[217] The recordation of regulatory wetlands maps with property deeds would provide the most certain form of notice to potential wetland investors.[218]

Clear, consistent notice to investors regarding the geographical boundaries of wetlands and the regulatory standards to be applied to them, and consistent enforcement of those standards, should effectively limit compensation judgments to *pre-existing* investments in wetland areas.[219]

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213. *See, e.g., Back in the Bog on Wetlands*, N.Y.TIMES, November 26, 1991; *EPA, OMB At Odds Over Proposed Manual Defining Wetlands*, REGULATION, ECONOMICS AND LAW [BNA]; *DPC Manual Canceled* at A-14, A-15 (June 26, 1991); *Agreement on Wetlands Manual Eludes Agencies, Talks Expected to Continue*, REGULATION, ECONOMICS AND LAW [BNA], at A-16, A-17 (July 5, 1991); Jan Goldman-Carter, *The Unraveling of No Net Loss*, 14 NAT'L WETLANDS NEWSL., 12-14 Sept.-Oct. 1992, at 12.

214. *See* WORLD WILDLIFE FUND, STATEWIDE WETLANDS STRATEGIES; A GUIDE TO PROTECTING AND MANAGING THE RESOURCE 36-39, 175-186 (1992); MICHAEL A. MANTELL ET AL. CREATING SUCCESSFUL COMMUNITIES: A GUIDEBOOK TO GROWTH MANAGEMENT STRATEGIES (1990). The Conservation Foundation. Island Press. Washington, D.C. 36-37; Maryland Department of Natural Resources, *Maryland Nontidal Wetlands Program: 1991 Summary Report* (March 1992) at 3-5.

215. *Id.*

216. *Id.*

217. *Id.*

218. The author's recent examination of hundreds of § 404 individual permits nationwide indicates that many Corps districts are requiring the recordation of § 404 permit restrictions with property deeds.

219. Of course, prior notice of property restrictions is not always determinative of whether property expectations are reasonable or whether an uncompensated restriction passes muster on fairness grounds.

B. Clear Identification of Wetland Functions and Values and the Social Costs of Wetlands Destruction

The State of South Carolina carefully studied, and clearly explained in the Beachfront Management Act, the reasons why it was important to the South Carolina public to prohibit development on and adjacent to South Carolina's coastal beach/dune systems.[220] However, these legislative findings did not satisfy the *Lucas* Majority.[221] To avoid a similar result when significantly restricting non-compatible uses in wetlands, it will be important to: (1) tailor legislation, regulations, and site-specific restrictions as closely as possible to underlying state property and nuisance principles; and (2) supplement detailed legislative findings with site-specific findings and documentation.

Specific findings in the permit decision record should include the particular wetland functions and values of the restricted wetland, and the social harm and externalized social costs of converting the wetland to non-compatible uses. Ideally, this "functional assessment" would occur in a watershed context, where the benefits of wetlands protection and the external social costs of wetlands conversion can be more readily identified and understood.[222] Such watershed-level assessments will be particularly important in clarifying the cumulative impacts of numerous smaller wetland conversions within the watershed, and identifying the social costs of those cumulative impacts.[223]

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220. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2896-99, nn.10-11 (1992); *Id.* at 2904-05 (Blackmun, J., dissenting). The Beachfront Management Act includes the Legislature's express findings that South Carolina's coastal beach/dune systems act as storm barriers that protect life and property, support a healthy tourism industry, provide important fish and wildlife habitat, and provide important recreational opportunities for the well-being of South Carolina's citizens. The Act's findings also state that many miles of South Carolina's beaches are eroding, and that developments situated to close to the beach/dune systems are accelerating the erosion and degradation of these systems, and endangering adjacent property. *Id.*

221. *Id.* at 2896-2899, 2901.

222. *See, e.g.*, OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA/503/9-92/002, THE WATERSHED PROTECTION APPROACH: AN OVERVIEW (December 1991). EPA defines a watershed as "a geographic area in which water, sediments, and dissolved minerals drain to a common outlet — apoit on a larger stream, a lake, an underlying aquifer, an estuary, or an ocean." EPA defines the "watershed protection approach" as one in which "[l]ocal decisions on the scale of geographic unit consider many factors, including the ecological structure of the basin, the hydrologic factors of underlying ground waters, the economic uses, the type and scope of pollution problems, and the level of resources available for protection and restoration projects." *See also* WORLD WILDLIFE FUND, *supra* note 214, at 168 (Understanding Cumulative Impacts).

223. *See* discussion of cumulative impacts, *supra* notes 207-208 and accompanying text. *See also*, Gosselink and Lee, Cumulative Impact Assessment in the Bottomland Forests. Wetlands, 9: 83-174 (1989); Gosselink, Shaffer et al., CUMULATIVE IMPACT ASSESSMENT AND MANAGEMENT IN A FORESTED WETLAND WATERSHED IN THE MISSISSIPPI RIVER FLOODPLAIN. CEI-89-02. Center for Wetland Resources, Louisiana State University, Baton Rouge. (1989); WORLD WILDLIFE FUND, *supra* note 214, at 168.

If wetlands, other surface water, groundwater, and drainage patterns within a watershed are carefully mapped and assessed for their ecological function and social value, the relationships between human land uses and the local aquatic environment become more easily understood. An agricultural producer, asked to preserve wetlands as water quality filters and flood moderators, can better understand how he or she will also benefit from cleaner water, reduced flooding, and improved wildlife habitat from wetlands protection by his or her upstream neighbors. Each landowner subjected to wetlands restrictions can see more easily that many other landowners in the watershed will be similarly burdened in the interest of maintaining and restoring the important natural functions of aquatic resources within the watershed.[224]

Wetlands restrictions which are convincingly justified as providing significant community benefits watershed-wide *and* broadly dispersed burdens should be acceptable on fairness and social productivity grounds, and generally should not require compensation.[225]

C. Limiting Property Value Impacts

To minimize disappointment of investment-backed expectations while still advancing aquatic resource protection and harm prevention goals, it is essential that restrictions on each parcel of land be carefully tailored to achieve specific regulatory objectives. Broadly drafted statutory or administrative restrictions will likely restrict land use on some parcels more than is necessary to achieve discrete public returns in terms of harm reduction or resource protection. Special permits offer a means of reducing governmental restrictions on particular parcels where the landowner can demonstrate that further restrictions are unwarranted to achieve the social objectives of the regulatory program.

Adverse property value impacts can also be minimized by restricting the smallest portion of specific parcels necessary to achieve the objectives of the regulatory program. Often, wetland restrictions can be tailored such that considerable developable portions of a parcel remain.[226]

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224. According to Michelman's Just Compensation analysis, compensation is not required when there are "visible reciprocities of burden and benefit, or when burdens similar to that for which compensation is denied are concomitantly imposed on many other people." Michelman, *supra* note 39, at 1223.

225. *Id.* at 1218, 1223, 1225-26. According to Michelman, individuals may tolerate some disappointment of reasonable investment-backed expectations, without losing productivity, if the government regulation is recognized as clearly producing social gains (i.e., increased output of satisfactions).

226. As long as courts continue to view land parcels "as a whole," rather than segmenting "interests in land", a taking should not result in these cases. *See supra* notes 44-50, 85-103 and accompanying text.

Where severe restrictions cannot be avoided, property value impacts can be mitigated by adjusting real estate taxes and tax assessment policies to reflect significantly reduced development potential.[227] Providing a market for transferable development rights also reduces the adverse impact on property value.[228]

Wetland regulators might also use available maps and other resource and economic databases to actively identify those properties that are likely to be heavily restricted in order to serve the objectives of harm prevention and resource protection. Regulators could then work directly with these landowners to propose compatible land uses, tax incentives, and land purchase options that might forestall future takings claims.

D. Comprehensive Application of Wetlands Regulations

Typically, what has prompted an environmental restriction is the cumulative adverse impacts of numerous development activities. The activities that actually prompted the regulation are granfathered in and allowed to continue, while similar land uses are henceforth prohibited in order to stem the loss of valuable natural resources. Thus, in *Lucas*, several of the residential sites around Mr. Lucas' property had already been developed when the coastal development restriction was imposed on Mr. Lucas.[229] In *Florida Rock*, limestone mining in wetlands was apparently continuing in nearby wetland areas.[230] These apparent inconsistencies in property restrictions were a consequence of timing, not an attempt to "single out" a class of landowners. However, they sometimes raise fairness questions which are troubling to some courts.[231]

Permit-by-permit decisions on wetland restrictions will often raise questions of consistency and fairness. One way to minimize these problems is to develop a comprehensive plan for wetlands protection based upon the type of watershed inventory and assessment described above.[232] Such a comprehensive plan would identify wetland areas and

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227. *See* WORLD WILDLIFE FUND, *supra* note 214, at 148 and references cited therein.

228. WORLD WILDLIFE FUND, *supra* note 214, at 146 and references cited therein; *See also*, Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (The Court found that the transferrable development rights available to Penn Central were a relevant factor in determining whether a taking had occurred).

229. *See Lucas*, 112 S. Ct. at 2904 (Kennedy, J., concurring).

230. Florida Rock Indus. Inc. v. United States, 791 F.2d 893, 901 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987); Florida Rock Indus. Inc. v. United States, 21 Cl. Ct. 161 (1990) (appeal pending).

231. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2903 (1992) (Kennedy, J., concurring). *See also, Florida Rock*, 21 Cl. Ct. 161 (1990). *See also*, ROBERT MELTZ, FEDERAL WETLANDS REGULATION AND THE TAKINGS ISSUE: WADING THROUGH THE SWAMP. 3 (April 1992) (American Law Division, Congressional Research Service).

232. *See supra* notes 222-225 and accompanying text.

wetland functions which advance the goal of maintaining and restoring the functioning of the watershed's aquatic resources and therefore warrant protection from non-compatible uses.

Incorporating such a comprehensive wetlands plan into local land use plans and zoning provisions would also add much-needed consistency to wetlands regulation. The *Formanek*[233] case illustrates the importance of consistency between wetlands and other land use regulation. In that case, the Court noted that the Fen Complex on Formanek's property was indeed identified for protection in the City's comprehensive plan.[234] Yet, the City was actively promoting and subsidizing the industrial development of the same area.[235] Indeed, part of the Claims Court's rationale for the marketability of the land and the need to compensate Formanek was the fact that the market for industrial development was being artificially inflated by the very government that had targeted the Fen for protection in the public interest.[236]

Consistent, comprehensive land use plans that address the community's resource needs as well as its land use and infrastructure needs, would certainly improve both the efficiency and the fairness of federal, state, and local wetland regulation.

E. Establishment of Compensation Reserves and Acquisition Programs

Even with clear notice to investors, objective cost and benefit justification, and consistent implementation of regulations, there may still occur isolated takings. This occurs when the demonstrable contribution of a particular wetland to achieving the social goal of maintaining functioning ecosystems is determined to be significantly less than the costs that will be imposed on the private landowner.[237] Such takings are more likely where the investment occurred prior to establishment of the § 404 regulatory program in the 1970s, and was therefore less informed of wetland-related restrictions.[238] Takings are also more likely where opportunities to recoup the investment have been minimal.[239] In addition, takings are more likely where the regulated wetland is hydrologically isolated from other waterbodies and already significantly degraded.[240]

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233. Formanek v. United States, 22 ELR 20893 (Cl. Ct. May 14, 1992).
234. *Id.* at 20896.
235. *Id.*
236. *Id.*
237. *See supra* notes 132-135 and accompanying text.
238. *See supra* notes 116-118, 211-212 and accompanying text.
239. *See supra* notes 45-49 and 85-103 and accompanying text.
240. *See supra* notes 151-192 and accompanying text. The social benefits of wetlands that are isolated from the rest of a watershed's hydrologic regime, and/or already highly degraded, will often be more difficult to that confirm and to explain.

Section 404 clearly provides the means to balance these harms and benefits within the permitting process, and often an accommodation is reached that minimizes wetland losses while avoiding a taking.[241] However, federal, state, or local governments could determine, particularly where significant cumulative losses have already occurred, that the wetland still warrants protection to achieve the purpose of protecting functioning aquatic ecosystems. Because of these potential situations, governmental regulation of wetlands should be complemented by wetlands acquisition programs and compensation "reserves" which allow governments to reach fair out-of-court settlements with wetland owners.[242]

F. Clarification of the Standard for Just Compensation

When a governmental restriction requires compensation, the black-letter law of eminent domain requires the government to either pay the fair market value of the property prior to the governmental restriction, and to take possession of the land, or to lift the restriction.[243] However, the fair market value standard seems to ignore the external costs of destroying wetlands and the public subsidies which sometimes artificially inflate the market value. This is inconsistent with our society's maturing ecological values which prize the maintenance and restoration of functioning ecosystems.[244]

"Just compensation" for regulatory takings should generally be set to restore the landowner to his financial position prior to the investment, not to insure him a high rate of return on his investment.[245] Compensation awards should also discount government subsidies which have already benefitted the landowner and inflated the value of his wetland property.[246] Finally, governments should have the flexibility to pay only for the property rights it is actually restricting, and not necessarily have to purchase the entire parcel in fee title.[247]

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241. *See supra* notes 51-79 and 196-206 and accompanying text.

242. *See* World Wildlife Fund, *supra* note 214, at 118-119 and 139-141.

243. Compensation may be required for a temporary deprivation of property use while the restriction remained in force. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

244. In *Formanek v. United States*, for example, the Court figured that just compensation required a *37% return on equity*. The Court clearly went far beyond making the landowner "whole", rewarding his wetland speculation and his refusal to sell the area as a nature preserve. *See, supra* notes 82-103 and accompanying text. 22 ELR 20893 (Cl. Ct. May 14, 1992).

245. *See, e.g.*, PLATER, ET AL. TAKINGS REMEDIES IN ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY. West Publishing Co. 1992.

246. *Id.*

247. *Id.*

CONCLUSION

The *Lucas* decision signals a crossroads in defining private property rights: will private property rights developed in an age of plenty be held increasingly sacrosanct in an age of relative scarcity? Or will the definition of property rights evolve in recognition of our dependence on wetlands and other natural ecosystems? While the *Lucas* majority seems to strongly favor private property rights over the public's interest in wetlands protection, the *Lucas* holding can be read as a more careful balance that preserves fairness and reasonable investment-backed expectations without crippling governmental efforts to protect wetlands and other natural ecosystems.

The § 404 regulatory framework is remarkably consistent with the Restatement law of nuisance and public rights, and allows for a careful accommodation of the fairness and property expectation concerns underlying the Just Compensation Clause. Existing wetland regulatory programs typically will not deprive landowners of all economically viable use of their land and therefore will not require the payment of compensation, unless the Supreme Court unwisely begins to sanction the artificial segmentation of property interests. Even when wetlands restrictions do severely restrict the economically viable use of land, they are often restricting land uses that amount to a public or private nuisance or a violation of public trust rights, and therefore still do not warrant compensation.

Regardless of how the Supreme Court rules in future cases, governments with aggressive wetlands regulatory programs can take measures to reduce the likelihood of compensation judgments and prepare for the isolated events in which compensation may be required. Government agencies must implement stable and consistent regulatory programs which clearly signal to investors that wetlands are "off-limits" to non-compatible uses. Careful mapping of wetland boundaries and scientific assessments of wetland functions and values, particularly if prepared in a watershed context, will provide clear notice to future investors, and will help to justify wetland restrictions as both fair and in the interest of society as a whole. Incorporating such wetland maps and assessments into local comprehensive land use plans and zoning ordinances will help to ensure consistency in wetland regulation. Site-specific restrictions should be tailored to limit adverse property value impacts to those actually necessary to achieve regulatory objectives.

Governments should prepare for the compensation contingency by funding compensation reserves and acquisition programs, and by pressing for a new standard for compensation awards in regulatory takings cases that provides fair restitution to the excessively burdened landowner, but does not reward speculation in public resources. It

is hoped that these measures can preserve wetlands and educate landowners in the short-term, while gradually fostering a widespread and deeply-rooted change in property expectations that will ensure the continued long-term protection of wetlands and other natural ecosystems.