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REGULATORY TAKINGS AND WETLAND PROTECTION IN THE POST-*LUCAS* ERA

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INTRODUCTION

In June 1992, the United States Supreme Court decided *Lucas v. South Carolina Coastal Council*.[1] The case involved a claim for compensation against the State of South Carolina by a landowner who was prohibited from placing structures on two of his beachfront lots.[2] The Court declared that the landowners must be compensated when government regulations deprive them of all economically beneficial or productive uses of their property[3] unless the proscribed uses were not permitted as part of their original titles.[4]

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1. 112 S. Ct. 2886 (1992).

2. *Id.* at 2887.

3. *Id.* at 2895 ("[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.").

4. *Id.* at 2899 ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think that it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.").

Although some legal commentators have praised the *Lucas* decision,[5] others have strongly condemned it.[6] A common criticism of *Lucas* is that will have a detrimental effect on wetland protection programs.[7] Indeed, the *Lucas* Court itself observed that wetland regulations might give rise to takings claims by affected landowners.[8] This Article, however, takes a somewhat more benign view of the *Lucas* decision. No doubt *Lucas* will force governments to compensate property owners when wetland regulations strip the land of all economic value; but in such cases, the government ought to pay. On the other hand, *Lucas* does not pose much of a threat to wetland protection regulations that recognize the interests of landowners as well as the needs of the environment.

Part I of this Article looks at the nature of wetlands, their environmental and social value, and the extent to which they are being harmed by human activities. Part II examines existing wetland protection statutes,

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5. *See, e.g.*, Richard C. Ausness, *Wild Dunes and Serbonian Bogs: The Impact of the Lucas Decision on Shoreline Protection Programs*, 70 DENV. U. L. REV. 437, 438 (1993) ("The categorical takings rule set forth by the majority in *Lucas* is analytically sound and fully consistent with the true meaning of the Takings Clause."); Michael J. Quinlan, Lucas v. South Carolina Coastal Council: *Just Compensation and Environmental Regulation—Establishing a Beach Head Against Evisceration of Private Property Rights*, 12 TEMP. ENVTL. L. & TECH. J. 173, 185-86 (1994) ("Although the Court in *Lucas* did not clear up the confusion surrounding the regulatory takings doctrine, it properly rejected South Carolina's proffered police powers argument."); Kent A. Meyerhoff, Note, *Regulatory Takings—Winds of Change Blow Along the South Carolina Coast:* Lucas v. South Carolina Coastal Council, 72 NEB. L. REV. 627, 640 (1993) ("In establishing a new per se takings rule premised on preventing deprivation of all economically beneficial uses and in establishing a public nuisance standard for evaluating regulations, the Supreme Court has taken a positive step toward ensuring that oppressive regulations that strip property owners of all of their rights will not be enforced without compensation.").

6. See William W. Fisher III, *The Trouble with* Lucas, 45 STAN. L. REV. 1393, 1410 (1993) ("[T]he ruling in *Lucas* is not a step in the right direction."); John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 3 (1993) ("[O]ne possible effect of *Lucas* may be to stunt, if not arrest, the evolution of statutory protections from nuisance-like and other detrimental uses of land."); Glenn P. Sugameli, *Takings Issues in Light of* Lucas v. South Carolina Coastal Council: *A Decision Full of Sound and Fury Signifying Nothing*, 12 VA. ENVTL. L.J. 439, 456 (1993) ("The precedential value of *Lucas* is undercut by numerous analytical contradictions and inconsistencies."); Marshall C. Cook, Casenote, Lucas v. South Carolina Coastal Council: *Low Tide for the Takings Clause*, 44 MERCER L. REV. 1433, 1440 (1993) ("The Court's per se rule in this area is flawed because it does not accomplish any other results than those available under the old ad hoc analysis, creates a per se rule more complicated than the ad hoc inquiry, and may inhibit legislatures from passing needed regulations in the future.").

7. *See* Jan Goldman-Carter, *Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of* Lucas v. South Carolina Coastal Council, 28 LAND & WATER L. REV. 425, 438 (1993) (denial of dredge and fill permits by the Corps based on significant degradation grounds raises the risk of a total taking); John A. Humbach, *What Is Behind the "Property Rights" Debate?*, 10 PACE ENVTL. L. REV. 21, 38 (1993) (The no economically viable use theory of *Lucas* presents a danger to our natural landbase because many important landforms, such as wetlands, have essentially no economically viable use in terms of current commercial values.).

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

with particular emphasis on the federal dredge and fill permit program administered by the U.S. Army Corps of Engineers. Part III explores takings law prior to *Lucas* and discusses some representative cases involving wetland protection regulations. Part IV evaluates the *Lucas* decision and some post-*Lucas* cases involving wetlands. Finally, Part V analyzes the number of issues raised by *Lucas* and its progeny. Based on a preliminary assessment of these cases, the author concludes that *Lucas* will not adversely affect the enforcement of most wetland protection regulations.

I. WETLANDS

Wetlands constitute about five percent of the land area of the lower forty-eight states.[9] Although they are an essential resource, wetlands are disappearing at an alarming rate as the result of dredging, filling, drainage, and other human activities.[10]

A. Wetland Characteristics

Wetlands are transitional areas, lying between identifiable bodies of water and dry land.[11] Most scientists agree that wetland areas are characterized by the presence of: (1) hydric soils,[12] which are typically saturated with water during much of the growing season; (2) hydrophytic vegetation,[13] which is adapted to or tolerant of saturated soils; and (3) sufficient

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9. Office of Technology Assessment, Wetlands: Their Use and Regulation 3 (1984) [hereinafter *Use and Regulation*]. In a recent study, the Fish and Wildlife Service estimated that there were 103.3 million acres of wetlands in the contiguous United States. This study classified 97.8 million acres as freshwater (or inland) wetlands; the remaining 5.5 million acres were categorized as estuarine (or coastal) wetlands. *See* Thomas E. Dahl and Craig E. Johnson, *U.S. Dept. of Interior, Status and Trends of Wetlands in the Coterminous United States: Mid-1970's to mid-1980's* (1991) [hereinafter *Status and Trends*]. An additional 200 million acres of wetlands are located in Alaska. *See* Sherry L. Jacobs, Comment, *Strengthening Wetland Protection Through State Regulation*, 21 U.C. DAVIS L. REV. 227, 228 (1987).

10. *See* Thomas Hanley, Comment, *A Developer's Dream: The United States Claims Court's New Analysis of Section 404 Takings Challenges*, 19 B.C. ENVTL. AFF. L. REV. 317, 322 (1992) (Wetlands are an endangered natural resource, disappearing at a rate of more than 300,000 acres per year.).

11. *See* Michael Williams, *Wetlands: A Threatened Landscape* 7-9 (1990). *See also* Lee E. Caplin, *Is Congress Protecting Our Water? The Controversy Over Section 404, Federal Water Pollution Control Act Amendments of 1972*, 31 U. MIAMI L. REV. 445, 455 (1977).

12. Hydric soils are "soils that are saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions in the upper part." *See* FISH AND WILDLIFE SERVICE, ENVIRONMENTAL PROTECTION AGENCY, DEP'T OF THE ARMY, & SOIL CONSERVATION SERVICE, FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS § 2.6 (1989) [hereinafter 1989 FEDERAL MANUAL].

13. Hydrophytic vegetation refers to "macrophytic plant life growing in water, soil or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content." *See* 1989 FEDERAL MANUAL, *supra* note 12, § 2.1.

water to support such vegetation.[14] The Fish and Wildlife Service has divided wetlands and associated deepwater habitats into five ecological systems: (1) marine, (2) estuarine, (3) riverine, (4) lacustrine, and (5) palustrine.[15] Wetlands can be further classified according to their dominant vegetation. For example, forested wetlands are characterized by trees more than twenty feet high, emergent plants[16] that are tolerant of saturated soils predominate in emergent wetlands; while shrub wetlands are dominated by woody plants less than twenty feet high.[17]

The Marine System generally consists of open ocean and its associated coastline.[18] It is mostly a deepwater habitat,[19] with marine wetlands limited to intertidal areas like beaches, rocky shores and coral reefs.[20] The Estuarine System includes tidal marshes, mangrove swamps, and intertidal flats, as well as deepwater bays, sounds and coastal rivers.[21] Estuarine emergent wetlands, which are characterized by grass or grasslike plants, can be divided into "salt marshes" and "brackish tidal marshes."[22] Salt marshes are flooded by tides for varying periods depending on elevation and tidal amplitude.[23] They are usually located behind barrier islands and beaches in relatively high salinity waters. Brackish tidal marshes are commonly found in coastal rivers where seawater is diluted by fresh water.[24] Intertidal flats lie seaward of tidal marshes and mangroves, at river

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14. *See* John G. Lyon, PRACTICAL HANDBOOK FOR WETLAND IDENTIFICATION AND DELINEATION 20, 24 (1993). *See also* Denis C. Swords, *The Comprehensive Wetlands Conservation and Management Act of 1991: A Restructuring of Section 404 that Affords Inadequate Protection for Critical Wetlands*, 53 LA. L. REV. 163, 174 (1992). Wetlands do not necessarily have to be covered with water, even temporarily; it is sufficient that enough water is present to saturate the soil. *See Wetlands Conservation, Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 639 (1991) (statement of Prof. Francis C. Golet, Univ. of R.I. Dep't of Natural Resources Science).

15. *See* U.S. FISH AND WILDLIFE SERVICE, WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 5 (1984) [hereinafter CURRENT STATUS].

16. *See* Elinor L. Horwitz, COUNCIL ON ENVIRONMENTAL QUALITY, OUR NATION'S WETLANDS 6 (1978) [hereinafter OUR NATION'S WETLANDS]. Emergent vegetation refers to plants that are rooted in the soil but thrust through the surface of the water. *Id.*

17. *See* STATUS AND TRENDS, *supra* note 9, at 18.

18. *See* STATUS AND TRENDS, *supra* note 9, at 17.

19. Deepwater habitats are "environments where surface water is permanent and often deep, so that water, rather than air, is the principal medium within which the dominant organisms live." *See* STATUS AND TRENDS, *supra* note 9, at 18.

20. *See* CURRENT STATUS, *supra* note 5, at 5. The Fish and Wildlife Service's classification system includes nonvegetated wetlands. *See* FEDERAL MANUAL, *supra* note 12, at 3.

21. *See* CURRENT STATUS, *supra* note 15, at 5.

22. *Id.*

23. *Id.* at 6. Cordgrass and marsh hay are the prevailing forms of vegetation in East Coast salt marshes, while glasswort and a different species of cordgrass predominate on the West Coast. *See* OUR NATION'S WETLANDS, *supra* note 16, at 8.

24. *See* CURRENT STATUS, *supra* note 15, at 6.

mouths or along rocky coasts.[25] Estuarine shrub wetlands are characterized by salt-tolerant woody vegetation less than 20 feet in height.[26] Mangrove swamps, which are found along the southern Florida coastline, are illustrative of estuarine shrub wetlands.[27]

The Riverine System is limited to freshwater river and stream channels and is mainly a deepwater habitat system.[28] The Lacustrine System, which is also a deepwater system, includes lakes, reservoirs and deep ponds.[29] The Palustrine System encompasses the vast majority of the country's inland marshes, bogs and swamps.[30] Palustrine forested wetlands contain trees taller than 20 feet.[31] These wetlands are commonly found along the floodplains of rivers, where they are referred to as "bottomland hardwood forests" or "bottomland hardwood swamps."[32] Palustrine emergent wetlands are dominated by grasses, rushes and sedges.[33] These wetlands are called marshes, wet meadows, fens or inland salt marshes, depending on the region of the country and the particular characteristics of the wetland area.[34] Palustrine shrub wetlands, known as bogs, pocosins, shrub-carrs or shrub swamps, are dominated by woody vegetation.[35]

B. Social and Environmental Value of Wetlands

Until recently, wetlands were considered to be unproductive, and even hazardous, when left in their natural state.[36] Consequently, during the nineteenth and much of the twentieth century, both federal[37] and

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25. *Id.* at 7-8.
26. *Id.* at 8-9.
27. *Id.*
28. *Id.* at 5.
29. *Id.*
30. *Id.*
31. *Id.* at 11.
32. 1 D.D. Hook, THE ECOLOGY AND MANAGEMENT OF WETLANDS 214 (1988). *See also* William Odum, *Non-Tidal Freshwater Wetlands in Virginia*, 7 VA. J. NAT. RESOURCES L. 421, 426 (1988). In the northern United States, tamarack, white cedar, black spruce, balsam, red maple, and black ash are commonly found in wooded swamps. In the South, water oak, white oak, tupelo gum, swamp black gum and cypress are dominant. *See* USE AND REGULATION, *supra* note 9, at 30.
33. *See* OUR NATION'S WETLANDS, *supra* note 16, at 10.
34. *See* CURRENT STATUS, *supra* note 15, at 9.
35. *Id.* at 11.
36. Williams, *supra* note 11, at 2. *See also* Steven L. Dickerson, *The Evolving Federal Wetlands Program*, 44 SW. L. J. 1473-74 (1991) ("Wetlands have historically been regarded as wastelands, fit only for the breeding of mosquitoes, flies, and snakes."); Joan M. Ferretti, *Restoring the Nation's Wetlands: Can the Clean Water Act's Dredge and Fill Guidelines Do the Job?*, 1 PACE ENVTL. L. REV. 105, 105-06 (1983) (In the past, wetlands were seen as unproductive until drained or filled.).
37. *See* Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. REV. 873, 877 (1993) (Congressional policy encouraged the draining and filling of wetlands); Kenneth E. Varns, Note, United States v.

state[38] governments encouraged the sale and reclamation of wetlands so that they could be converted to more productive uses. Of course, it is now known that wetlands significantly contribute to the maintenance and wellbeing of many aquatic ecosystems.[39] For example, wetlands provide food resources and habitat for fish and wildlife.[40] They also help to maintain the integrity of watersheds by mitigating the effect of floods, by controlling erosion and by purifying the water.[41]

Wetlands also serve as food sources and spawning grounds for many of the fish and shellfish that are harvested along the Atlantic and Gulf coasts.[42] Numerous species of Pacific coast commercial fish and shellfish,[43] as well as many freshwater species[44] depend upon wetlands as well.

Larkins: *Conflict Between Wetland Protection and Agriculture: Exploration of the Farming Exception to the Clean Water Act's Section 404 Permit Requirements*, 35 S.D. L. REV. 272, 278 (1990) (National policy up to late 1960's was to reclaim land by draining and filling as much wetland area as possible.). For example, the Swamp Lands Acts, 9 Stat. 352 (1849), 9 Stat. 519 (1850), 12 Stat. 3 (1860), granted nearly 65 million acres of federal public domain land to the states. *See* Michael C. Blumm, *The Clean Water Act's Section 404 Permit Program Enters Its Adolescence: An Institutional and Programmatic Perspective*, 8 ECOLOGY L.Q. 409, 412 n.10 (1980). The states were supposed to reclaim these wetlands by constructing levees and drains in order to encourage settlement and agricultural development. *See* S. Wesley Woolf & James E. Kundell, *Georgia's Wetlands: Values, Trends, and Legal Status*, 41 MERCER L. REV. 791, 807-08 (1990).

38. *See, e.g.*, Mark J. Hanson, *Damming Agricultural Draining: The Effect of Wetland Preservation and Federal Regulation on Agricultural Drainage in Minnesota*, 13 WM. MITCHELL L. REV. 135, 138-43 (1987) (describing state efforts in Minnesota to drain wetlands for conversion to agricultural use); Cheryl L. Jamieson, *Protection of the Everglades Ecosystem: A Legal Analysis*, 6 PACE ENVTL. L. REV. 23, 27-28 (1988) (discussing efforts by the state of Florida to drain the Everglades); David A. Rice, *Estuarine Lands of North Carolina: Legal Aspect of Ownership, Use and Control*, 46 N.C. L. REV. 779, 787-95 (1968) (discussing North Carolina statutes that authorized the sale of state-owned wetlands to private developers).

39. *See* Hook, *supra* note 32, at 7-8. *See also* Hanley, *supra* note 10, at 317, 322 ("Wetlands are valuable both for their intrinsic qualities and their ecological functions."). *Id.*

40. *See* Hook, *supra* note 32, at 213, 239. *See also* V. Donald Hilley, Note, *The Warren S. Henderson Wetlands Protection Act of 1984: Enough Protection?*, 9 NOVA L.J. 141, 141-42 (1984).

41. 2 Hook, *supra* note 32, at 52-53. *See also* Joseph A. Hedal, Note, *The Clean Water Act—More Section 404: The Supreme Court Gets Its Feet Wet*, 65 B.U. L. REV. 995, 996 (1985).

42. *See Coastal Zone Management: Hearing Before the National Ocean Policy Study of the Comm. on Commerce, Science, and Transport of the Senate*, 100th Cong., 1st Sess. 1, 38 (1987) (statement of Dr. Donald F. Boesch, Exec. Dir., La. University Marine Consortium) (Seventy percent of our nation's fisheries are dependent on estuaries for part of their life cycle); Linda A. Malone, *The Coastal Zone Management Act and the Takings Clause in the 1990's: Making the Case for Federal Land Use to Preserve Coastal Areas*, 62 U. COLO. L. REV. 711, 712 (1991) (Seventy percent of U.S. commercial fisheries catch consists of species that are dependent upon estuarine environments during their life cycles.).

43. *See* OUR NATION'S WETLANDS, *supra* note 16, at 2; William L. Want, *Federal Wetlands Law: The Cases and the Problems*, 8 HARV. ENVTL. L. REV. 1, 3 (1984).

44. Forrest Stearns, *Management Potential: Summary and Recommendations*, in FRESHWATER WETLANDS: ECOLOGICAL PROCESSES AND MANAGEMENT POTENTIAL 360 (Ralph E. Good et al eds. 1978). *See also* Odum, *supra* note 32, at 421, 431 (many freshwater fish species spawn in wetlands or depend on them for food); Bhavani P. Nerikar, Comment, *This Wetland Is Your Land, This Wetland Is My Land: Section 404 of the Clean Water Act and Its Impact on the Private Development of Wetlands*, 4 ADMIN. L.J. 197, 203 (1990) (almost all freshwater fish are dependent on wetlands).

Wetlands also provide nesting, feeding, and resting sites for waterfowl and migratory birds.[45] For example, ducks and geese breed in the wetlands of the prairie pothole region of Nebraska[46] and rely on wetlands in all parts of the country for feeding and cover during migration and overwintering periods.[47] In addition, game birds, such as grouse, partridges, pheasants, doves, snipes, woodcocks and wild turkeys,[48] and many other animals depend heavily upon wetlands for their survival.[49]

Wetlands contribute to water quality by capturing upland runoff and filtering nutrients, waste, and sediment.[50] When nutrient-rich waters flow into wetlands, nutrients are taken up by growing plants[51] or stored within wetland soils.[52] Wetlands also remove heavy metals from water by trapping them in sediment.[53] Finally, sediment from upland runoff is trapped and held in place by wetland vegetation.[54]

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45. *See* OUR NATION'S WETLANDS *supra* note 16, at 21-22; Kevin O'Hagan, Comment, *Pumping with Intent to Kill: Evading Wetlands Jurisdiction Under Section 404 of the Clean Water Act Through Draining*, 40 DEPAUL L. REV. 1059, 1063 (1991) (wetlands serve as nesting, feeding and resting areas for many species of waterfowl and migratory birds).

46. *See* Milton W. Weller, *Management of Freshwater Marshes for Wildlife*, in WETLANDS ECOLOGICAL PROCESSES AND MANAGEMENT POTENTIAL 267 (Ralph E. Good et al eds. 1978). *See also* Stewart L. Hofer, Comment, *Federal Regulation of Agricultural Drainage Activity in the Prairie Potholes: The Effect of Section 404 of the Clean Water Act and the Swampbuster Provisions of the 1985 Farm Bill*, 33 S.D. L. REV. 511, 526 (1987).

47. *See* USE AND REGULATION, *supra* note 9, at 52. For example, an estimated one million ducks and half a million geese winter in the Chesapeake Bay marshes each year. *See* Denis Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1, 22 (1972). Large numbers of ducks and geese also overwinter in Louisiana marshes. *See* Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 3, 88-89 (1983).

48. *See generally* O. STEPANEK, BIRDS OF HEATH AND MARSHLAND (1962). *See also* Binder, *supra* note 47, at 23 n.173.

49. HOOK, *supra* note 32, at 183-226. *See also* Ferretti, *supra* note 36, at 106 (wetlands provide nesting, breeding and feeding grounds for a wide variety of mammals, birds, reptiles and amphibians); Mary K. McCurdy, *Application of the Public Trust: Public Trust Protection for Wetlands*, 19 ENVTL. L. 683, 696 (1989) (mammals and reptiles use wetlands for feeding, drinking and habitat).

50. *See* ANNE D. MARBLE, A GUIDE TO WETLAND FUNCTIONAL DESIGN, 31-66 (1992). *See also* Woolf & Kundell, *supra* note 37, at 793 (wetlands filter nutrients, wastes and sediment from upland runoff); Nerikar, *supra* note 44, at 207 (wetlands remove nutrients from water).

51. *See* HOOK, *supra* note 32, at 373-75. *See also* Houck, *supra* note 47, at 78 (marsh organisms convert nutrients into new life at bottom of new food chains); Jeter M. Watson & Richard H. Sedgley, *Land Use Regulation by the Virginia Marine Resources Commission: The Virginia Wetlands Act and Coastal Primary Sand Dune Protection Act*, 7 VA. J. NAT. RESOURCES L. 381, 385 (1988) (wetland plants absorb nutrients).

52. *See* HOOK, *supra* note 32, at 307. *See also* Odum, *supra* note 32, at 433 (wetlands store nutrients within their soils).

53. *See Wetlands Conservation, Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 236 (1989) (statement of Janice L. Goldman-Carter, Counsel, Fisheries and Wildlife Division, National Wildlife Federation). Heavy metal removal efficiencies vary from 20 percent to 100 percent, depending on the metals involved and the physical and biological variations that exist in wetland habitats. *See* USE AND REGULATION, *supra* note 9, at 49.

54. *See* 2 HOOK, *supra* note 32, at 140. *See also* Watson & Sedgley, *supra* note 51, at 386 (de-

Wetlands also store and release flood waters.[55] The soil of freshwater wetlands absorbs large amounts of water during overflow conditions[56] and wetland vegetation reduces floodpeaks downstream by slowing the velocity of floodwaters.[57] Coastal wetlands absorb some of the force of ocean storms,[58] thereby reducing damage to buildings and other structures near the seashore.[59]

Finally, wetlands provide significant recreational, scientific, and aesthetic benefits.[60] Recreational activities include hunting, fishing, birdwatching, boating, photography and hiking.[61] In addition, a variety of natural products, including timber, peat, cranberries and blueberries, and wild rice, can be harvested from wetlands.[62]

C. Destruction of Wetland Habitats

Almost half of America's original wetlands have disappeared.[63] Although this rate has lessened in recent years because of protective legislation,[64] at least 300,000 acres of wetlands are destroyed in the United States

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scribing the process of sediment removal by wetland vegetation); O'Hagan, *supra* note 45, at 1065 (wetlands trap sediment in their vegetation).

55. *See* HOOK, *supra* note 32, at 44-45. *See also* O'Hagen, *supra* note 45, at 1064 (wetlands affect the storage and discharge of flood waters).

56. *See* HOOK, *supra* note 32, at 136. *See also* Binder, *supra* note 47, at 18-19 (wetlands absorb vast quantities of water from overflowing rivers); Houck, *supra* note 32, at 76 (a 10-acre wetland can hold 1.5 million gallons of water); McCurdy, *supra* note 49, at 697 (wetlands store and slow water, thereby reducing flood peaks).

57. *See* USE AND REGULATION, *supra* note 9, at 44; Nerikar, *supra* note 44, at 207 n.57 (wetland vegetation reduces velocity of flood water flow downstream).

58. *See* USE AND REGULATION, *supra* note 9, at 46 (wetlands protect against shoreline erosion).

59. D. F. WHIGHAM ET AL., WETLAND ECOLOGY AND MANAGEMENT: CASE STUDIES 64-65 (1990). *See also* Nerikar, *supra* note 44, at 206 (coastal wetlands help to protect structures from storm damage).

60. LYON, *supra* note 14, at 2. *See also* Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 ENVTL. L. 1, 3 (1993).

61. JANET LYONS & SANDRA JORDAN, WALKING THE WETLANDS 171 (1989). *See also* Hope Babcock, *Federal Wetlands Regulatory Policy: Up to Its Ears in Alligators*, 8 PACE ENVTL. L. REV. 307, 309 (1991) (wetlands provide valuable recreational opportunities such as birdwatching, canoeing, hunting and fishing); Hofer, *supra* note 46, at 527 (wetlands support such recreational activities as hunting, fishing, hiking, camping, birdwatching, nature study and photography).

62. LYONS & JORDAN, *supra* note 61, at 26-89. *See also* Woolf & Kundell, *supra* note 37, 797 (wetlands provide a variety of harvestable natural products).

63. WILLIAMS, *supra* note 11, at 297. *See also* Simeon D. Rapoport, *The Taking of Wetlands Under Section 404 of the Clean Water Act*, 17 ENVTL. L. 111, 112 (1986) (almost half of U.S. wetlands have been destroyed). According to the Fish and Wildlife Service, twenty-two states have lost 50 percent or more of their original wetlands since the 1780's. *See* STATUS AND TRENDS, *supra* note 9, at 3. These states are Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Mississippi, Missouri, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, and Texas. *Id.* at 2.

64. WILLIAMS, *supra* note 11, at 328. *See also* McCurdy, *supra* note 49, at 698-99.

each year.[65] Agricultural conversion has caused most inland wetlands losses,[66] while dredging for marinas, canals, and port development is primarily responsible for the destruction of estuarine wetlands.[67]

This destruction of wetland areas imposes a number of economic and environmental costs on society. For example, loss of coastal marshlands decreases the yield from commercial and recreational fishing.[68] Wetlands drainage and filling also destroys wildlife habitats[69] and increases water pollution by channeling sediment and nutrients into streams, lakes, rivers and estuaries.[70] Finally, loss of wetlands in floodplain areas aggravates flood damage by increasing the quantity and velocity of downstream flow.[71]

II. STATE AND FEDERAL WETLAND PROTECTION LEGISLATION

Since the 1960's a great many states have enacted legislation to regulate developments in wetland areas. The federal government, through the U.S. Army Corps of Engineers, also protects wetlands through its dredge and fill permit program.

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65. *See Wetlands Conservation, Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 9 (1991) (wetland losses are running at 300,000 to 450,000 acres per year) (statement of Ralph Morgenwerk, Asst. Director of Fish and Wildlife Enhancement, U.S. Fish and Wildlife Service); CURRENT STATUS, *supra* note 15, at 31 (wetlands are disappearing at the rate of 400,000 acres per year); Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 698 (1989) (wetlands losses are estimated at 300,000 to 500,000 acres annually); Kerry T. Scarlott, Note, *Federal Regulation of Wetlands and the Public Nuisance Exception to the Takings Clause: The Case for Insulating Wetlands Against Regulatory Takings Challenges*, 54 U. PITT. L. REV. 917, 944 (1993) (approximately 300,000 acres of wetlands disappear annually).

66. *See* USE AND REGULATION, *supra* note 9, at 170; James T.B. Tripp & Michael Herz, *Wetland Preservation and Restoration: Changing Federal Priorities*, 7 VA. J. NAT. RESOURCES L. 221, 221 n.2 (1988). A recent update concluded that agricultural conversion still account for 54% of wetland losses. *See* STATUS AND TRENDS, *supra* note 9, at 2; Joseph G. Theis, *Wetlands Loss and Agriculture: The Failed Federal Regulation of Farming Activities under Section 404 of the Clean Water Act*, 9 PACE ENVTL. L. REV. 1, 4 (1991).

67. *See* USE AND REGULATION, *supra* note 9, at 7.

68. *See* Monica K. Kalo & Joseph J. Kalo, *The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust*, 64 N.C. L. REV. 565, 567 (1986). *Cf.* WHIGHAM, *supra* note 59, at 55-61.

69. *See* WHIGHAM, *supra* note 59, at 68. *See also* Goldman-Carter, *supra* note 7, at 451-52.

70. *See* WILLIAMS, *supra* note 11, at 302. *See also* Goldman-Carter, *supra* note 7, at 450.

71. *See* CURRENT STATUS, *supra* note 15, at 21. *See also* Woolf & Kundell, *supra* note 37, at 796.

A. State Legislation

In 1963, Massachusetts became the first state to implement a regulatory scheme specifically aimed at wetlands protection.[72] Since that time many other states have enacted wetlands protection legislation.[73] These statutes vary considerably in terms of regulatory scope and purpose. Many states have enacted legislation specifically to protect estuarine or coastal wetlands,[74] while other states include coastal wetland protection in comprehensive shoreline management programs.[75] A number of states have also enacted legislation to protect freshwater wetlands[76] and some states regulate both coastal and inland wetlands under the same statutory framework.[77] Finally, a few states protect wetlands under broad land use or environmental protection statutes.[78]

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72. *See* OUR NATION'S WETLANDS, *supra* note 16, at 53.

73. *See* WILLIAM L. WANT, LAW OF WETLANDS REGULATION §§ 13.01-.02 (1994). For a discussion of specific state wetland protection statutes *see generally* Gregory W. Blount, *From Marshes to Mountains: Wetlands Come Under State Regulation*, 41 MERCER L. REV. 865 (1990) (Georgia); Jerry F. English & John J. Sarno, *Freshwater Wetlands Protection Act: Give and "Take" in New Jersey*, 12 SETON HALL LEGIS. J. 249 (1989) (New Jersey); David C. Forsberg, *Minnesota Wetlands Conservation Act of 1991: Balancing Public and Private Interests*, 18 WM. MITCHELL L. REV. 1021 (1992) (Minnesota); Kalo & Kalo, *supra* note 68, at 565; Richard H. McNeer, *Nontidal Wetlands Protection in Maryland and Virginia*, 51 MD. L. REV. 105 (1992) (Maryland & Virginia); Mary F. Smallwood, Silvia M. Alderman & Martin R. Dix, *The Warren S. Henderson Wetlands Protection Act of 1984: A Primer*, 1 J. LAND USE & ENVTL. L. 211 (1985) (Florida); Watson & Sedgley, *supra* note 51, at 381 (Virginia); Woolf & Kundell, *supra* note 37, at 791 (Georgia).

74. *See, e.g.* CONN. GEN. STAT. ANN. §§ 22a-28 to 28a-35 (West 1985 & Supp. 1994); DEL. CODE ANN. tit 7, §§ 6601 to 6620 (1991); GA. CODE ANN. §§ 12-5-280 to 12-5-297 (1992); MD. NAT. RES. CODE ANN. §§ 9-101 to 9-603 (1990 & Supp. 1994); MISS. CODE ANN. §§ 49-27-1 to 49-27-69 (1988 & Supp. 1994); N.J. STAT. ANN. §§ 13:9A1 to 13:9A10 (West 1991); N.Y. ENVTL. CONSER. LAW §§ 25-0101 to 25-0601 (McKinney 1984 & Supp. 1995); N.C. GEN. STAT. §§ 113-229 to 113-230 (1994); OR. REV. STAT. §§ 196.800 to 196.900 (1993 & Supp. 1994); VA. CODE §§ 28.2-1300 to 28.2-1320 (Michie 1992 & Supp. 1994).

75. *See, e.g.*, ALA. CODE §§ 9-7-1 to 9-7-20 (1987); ALASKA STAT. §§ 46.40.010 to 46.40.210 (1991 & Supp. 1994); CAL. PUB. RES. CODE §§ 30000 to 30900 (1986 & Supp. 1995); HAW. REV. STAT. §§ 205A-1 to 205A-49 (1985 & Supp. 1994); LA. REV. STAT. ANN. tit 49 §§ 214.1 to 214.41 (West Supp. 1995); S.C. CODE ANN. §§ 48-39-10 to 48-39-360 (Law. Co-op. 1987 & Supp. 1993); WASH. REV. CODE §§ 90.58.010 to 90.58.930 (1992 & Supp. 1995).

76. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 22a-36 to 22a-45 (West 1985 & Supp. 1994); MD. NAT. RES. CODE §§ 8-1201 to 8-1211 (1990 & Supp. 1994); MICH. COMP. LAWS ANN. §§ 281.901 to 281.966 (West 1979 & Supp. 1994); MINN. STAT. ANN. §§ 103G.001 to 103G.145 (West Supp. 1995); N.J. STAT. ANN. §§ 13:9B-1 to 13:9B-30 (West 1991 & Supp. 1994); N.Y. ENVTL. CONSERV. LAW §§ 24-010 to 24-1305 (McKinney 1984 & Supp. 1995); N.D. CENT. CODE §§ 61-32-01 to 61-32-11 (Supp. 1993); R.I. GEN. LAWS §§ 2-1-18 to 2-1-24 (1987 & Supp. 1994).

77. *See, e.g.*, FLA. STAT. ANN. §§ 403.91 to 403.939 (West 1993 & Supp. 1995); MASS. GEN. LAWS ANN., ch. 131, §§ 40 to 40-A (1989 & Supp. 1994); N.H. REV. STAT. ANN. §§ 482-A:1 to 482-A:15 (1992 & Supp. 1994); VT. STAT. ANN. tit. 10, §§ 851-865 (1984).

78. *See, e.g.*, ME. REV. STAT. ANN. tit. 38, §§ 480-A to 480-U (West 1989 & Supp. 1994); WIS. STAT. ANN., §§ 61.351, 62.231 (West 1988).

B. Federal Legislation

The permit program authorized by section 404 of the Clean Water Act is the federal government's principal wetland protection tool.[79] The Clean Water Act[80] is administered by the Environmental Protection Agency (EPA).[81] Section 301 of the Act prohibits the discharge of pollutants[82] from any point source[83] into the waters of the United States without a permit.[84] Section 402 authorizes the issuance of such permits.[85] This permitting program is known as the National Pollution Discharge Elimination System (NPDES).[86] However, the U.S. Army Corps of Engineers (Corps), rather than the EPA, is responsible for enforcing the provisions of section 404.[87] This section of the Clean Water Act prohibits dredging[88] and filling[89] operations in waters of the United States without a permit from the Corps.[90]

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79. Other programs include the Emergency Wetlands Resources Act of 1986, 16 U.S.C. §§ 3901-3932 (1988 & Supp. V 1993), which authorizes the U.S. Fish and Wildlife Service to purchase wetlands, and the "swampbuster" provisions of the Food Security Act of 1985, 16 U.S.C. § 3821 (1988 & Supp. V 1993), which makes farmers who produce agricultural commodities on wetlands converted into upland after 1985 ineligible for most USDA financial assistance.

80. Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993) (commonly referred to as the Clean Water Act).

81. 33 U.S.C. § 1251(d) (1988).

82. The term "pollutant" means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water." 33 U.S.C. § 1362(6) (1988).

83. The Act defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (1988).

84. 33 U.S.C. § 1311(a), (e) (1988).

85. 33 U.S.C. § 1342(a) (1988). The EPA may delegate its permitting authority to states that have adopted similar, qualified programs. 33 U.S.C. § 1342(b) (1988).

86. 33 U.S.C. § 1342 (1988 & Supp. V 1993).

87. 33 U.S.C. § 1344(a), (d) (1988). This permitting authority was given to the Corps because it was already administering a dredge and fill program under section 10 of the Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1151, now codified at 33 U.S.C. § 403 (1988). Eric W. Nagle, Note, *Wetlands Protection and the Neglected Child of the Clean Water Act: A Proposal for Shared Custody of Section 404*, 5 VA. J. NAT. RESOURCES L. 227, 230-31 (1985).

88. "Dredged material" means "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c) (1994).

89. "Fill material" means "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act." 33 C.F.R. § 323.2(e) (1994).

90. 33 U.S.C. § 1344 (1988).

1. Jurisdictional Issues

The section 404 permit system is not intended to be a comprehensive wetland protection scheme. First of all, the Corps' authority under the Clean Water Act only extends to discharges into waters of the United States. In addition, the definition of jurisdictional wetlands, though quite broad, leaves some wetland areas unregulated. Finally, section 404 itself expressly exempts certain types of activities from regulation.

a. Waters of the United States

During the early years of the section 404 permit program, the Corps construed its regulatory authority narrowly, exercising jurisdiction only over discharges occurring in waters that met the traditional definition of navigability.[91] However, after this practice was successfully challenged in court,[92] the Corps issued new regulations which broadened its regulatory authority beyond traditional navigable waters.[93] This expanded jurisdiction was upheld by the United States Supreme Court in *United States v. Riverside Bayview Homes, Inc.*,[94] and the Corps now regulates discharges into rivers, lakes, wetlands, and many other aquatic systems, even though they may not be navigable in the conventional sense.[95]

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91. Nagle, *supra* note 87, at 232. The Corps took this position because it believed that the powers given to it under section 404 were coterminous with its authority under section 10 of the Rivers and Harbors Act. *See* Gerald Torres, *Wetlands and Agriculture: Environmental Regulation and the Limits of Private Property*, 34 KAN. L. REV. 539, 546-49 (1986).

92. Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975). The court in *Callaway* declared,

> Congress by defining the term "navigable waters" in section 502(7) of the Federal Water Pollution Control Act Amendments of 1972 to mean "waters of the United States, including the territorial seas," asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability.

Id. at 686 (citations omitted).

93. *See* 40 Fed. Reg. 31,320 (1975) (interim final regulation); 42 Fed. Reg. 37,122 (1977) (final regulation, incorporating comments received on interim final regulation and responding to problems which became apparent during first two years of administering the program under the interim regulations (now codified at 33 C.F.R. pts. 320-340 (1994))).

94. 474 U.S. 121, 134 (1985) ("In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.").

95. According to the Corps' regulations, "waters of the United States" include:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent

Another jurisdictional issue that has arisen in the past was the need for a nexus between wetland regulation and interstate commerce.[96] At one time, the Corps declined to assert jurisdiction over isolated wetlands which had no obvious connection with interstate commerce.[97] However, in 1986, the Corps announced that it would regulate discharges into any waters which were, or could be, used as a habitat by migratory birds and endangered species.[98] This action was subsequently upheld by the courts[99] and current regulations effectively eliminate any interstate commerce limitation on the Corps' wetlands jurisdiction.[100] Wetlands now fall within the definition of waters of the United States if they are adjacent to waters that otherwise qualify as waters of the United States.[101]

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streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

33 C.F.R. § 328.3(a) (1994).

96. *See generally* WANT, *supra* note 73, § 4.05; Dennis J. Priolo, *Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction Over Isolated Wetlands*, 30 LAND & WATER L. REV. 91 (1995).

97. *See* Jerry Jackson, *Wetlands and the Commerce Clause: The Constitutionality of Current Wetland Regulation Under Section 404 of the Clean Water Act*, 7 VA. J. NAT. RESOURCES L. 307, 319-20 (1988) (discussing refusal of the Corps to assert jurisdiction over isolated wetlands of Madrona Marsh in California and Hilton Head Island, South Carolina).

98. *See* 51 Fed. Reg. 41,217 (1986).

99. *See, e.g.*, Hoffman Homes Inc. v. United States Environmental Protection Agency, 999 F.2d 256 (7th Cir. 1993) ("We also agree . . . that it is reasonable to interpret the regulation as allowing migratory birds to be that connection between a wetland and interstate commerce."); Leslie Salt Co. v. United States, 896 F.2d 354, 360 (9th Cir. 1990) ("The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species."); Nat'l Wildlife Fed'n v. Laubscher, 662 F. Supp. 548, 549 (S.D. Tex. 1987) ("[A] wetland visited by migratory birds is a wetland within the jurisdiction of the federal defendants.").

100. *See* WANT, *supra* note 73, § 4.05[3] (language in current regulations covers practically all wetlands and eliminates interstate commerce standard as a limitation on the Corps' jurisdiction over wetlands).

101. The Corps' regulations state that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c) (1994). The wetlands themselves do not have to have any demon-

b. Identification of Jurisdictional Wetlands

The Corps defines jurisdictional wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[102] The Corps has also published a manual that establishes procedures for identifying jurisdictional wetlands and delimiting their boundaries.[103] According to this manual, three conditions, wetland hydrology, hydrophytic vegetation, and hydric soils, must be present if an area is to be treated as a wetland for regulatory purposes.[104] The wetland hydrology element is a water requirement. The source of the water is not important.[105] Moreover, hydrologic factors do not have to exist continually; wetlands need only be subject to periodic inundation.[106] The hydrophytic vegetation element requires that the vegetation in the area include plants that are typically adapted for life in saturated soils.[107] Marsh grasses, willows, tupelos, gum trees and cypress

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strable effect on interstate commerce, nor do the wetlands have to have any physical connection or effect on the stream or water body. Jackson, *supra* note 97, at 321.

102. 33 C.F.R. § 328.3(b) (1994).

103. 1989 FEDERAL MANUAL, *supra* note 12. The Corps first published a wetlands delineation manual in 1987. The EPA subsequently issued its own manual. WANT, *supra* note 73, § 4.09[1]. In 1989, four federal agencies published a new manual which incorporated a uniform wetland identification procedure. *Id. See also* Theis, *supra* note 66, at 21-24; Babcock, *supra* note 61, at 340-50. Critics of the 1989 Manual claimed that it improperly expanded the scope of the Corps' section 404 jurisdiction. Theis, *supra* note 66, at 24. Under pressure from the White House, the four federal agencies agreed to issue a proposed revised wetlands delineation manual which was more restrictive than the 1989 Manual. WANT, *supra* note 73, § 4.09[1]. *See* 56 Fed. Reg. 40,446 (1991) (requesting public comment on proposed revisions to manual). This, in turn, generated opposition from environmentalists. *See* Flint B. Ogle, Comment, *The Ongoing Struggle Between Private Property Rights and Wetland Regulation: Recent Developments and Proposed Solutions*, 64 U. COLO. L. REV. 573, 592-96 (1993) (discussing the proposed revisions). President Bush signed a provision which prohibited the Corps from using the 1989 Manual in permit application proceedings. Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102-104, 105 Stat. 510, 518 (1991). The Corps now uses the 1987 Manual, although EPA continues to rely on the 1989 Manual. WANT, *supra* note 73, § 4.09[1].

104. 1989 FEDERAL MANUAL, *supra* note 12, § 2.0. An area is subject to regulation even if these conditions do not exist naturally, but are the product of human activity. *See, e.g.*, United States v. Akers, 651 F. Supp. 320, 322 (E.D. Cal. 1987) (wetlands that are dependent upon manmade irrigation and flood control structures for their water supply are subject to regulation by the Corps under section 404); Track 12, Inc. v. District Engineer, U.S. Army Corps of Eng'rs, 618 F. Supp. 448, 450 (D. Minn. 1985) ("[F]ederal jurisdiction is determined by whether the site is presently wetlands and not by how it came to be wetlands") (quoting United States v. Ciampitti, 583 F. Supp. 483, 494 (D.N.J. 1984)).

105. *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985) (wetlands sustained by ground water are still subject to regulation under section 404). *See also* Bailey v. United States, 647 F. Supp. 44, 47-48 (D. Idaho 1986).

106. *See* Avoyelles Sportsmen's League, Inc. v. Alexander, 511 F. Supp. 278, 289 (W.D. La. 1981) ("We find absolutely no basis for the contention that the words 'for life' means that 'wetlands' vegetation must spend all of its life in inundated or saturated soils.") *aff'd in part & rev'd in part sub nom.* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983).

107. 1989 FEDERAL MANUAL, *supra* note 12, § 3.1. Wetland plants do not have to live their entire

trees are examples of hydrophytic vegetation.[108] Finally, wetlands must contain hydric soils. Hydric soils are "soils that are saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions in the upper part."[109]

c. Exempted Activities

Congress has exempted certain activities from compliance with section 404's permit requirements. Most of these activities are exempted because they are not likely to have any significant impact on wetland areas.[110] Some, however, substantially reduce the scope of the Corps' permit program. One of these is the exemption for "normal farming, silviculture, and ranching activities."[111] This exemption is intended to apply to established everyday farming activities such as plowing, harvesting and minor drainage activities that have minimal effect on wetlands.[112] Certain federal construction projects are also exempted from regulation under section 404. This exemption is limited to projects specifically authorized by Congress and entirely planned, financed, and constructed by a federal agency.[113] Furthermore, the Corps has exempted by regulation de minimis, incidental soil movement occurring during normal dredging operations.[114] Activities exempted from regulation may be covered by the exemption's "recapture" provision.[115] Under this provision, exempted activities may be brought back under regulation if they involve a major change in use.[116] This provision has been invoked to prevent

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life cycle in saturated soil as long as a significant portion of the growing season is spent in such soil. In addition, the presence of plant types other than hydrophytic vegetation does not preclude an area from being classified as a wetland. O'Hagan, *supra* note 45, at 1072.

108. O'Hagan, *supra* note 45, at 1072.

109. 1989 FEDERAL MANUAL, *supra* note 12, § 2.6.

110. Exempted activities include such things as maintenance and emergency repair of currently serviceable structures, and general maintenance (but not construction) of drainage ditches. 33 U.S.C. § 1344(f)(1) (1988).

111. 33 U.S.C. § 1344(f)(1)(A) (1988).

112. *Cf.* United States v. Larkins, 852 F.2d 189, 192 (6th Cir. 1988) (farming exemption does not apply to clearing timber in wetlands in order to convert the area into upland suitable for cultivation of new crops), *cert. denied*, 489 U.S. 1016 (1989); United States v. Akers, 785 F.2d 814, 819 (9th Cir. 1986) (conversion of swampland into farmland suitable for growing crops not within farming exemption), *cert. denied*, 479 U.S. 828 (1986); United States v. Huebner, 752 F.2d 1235, 1241-43 (9th Cir. 1985) (farming exemption does not exempt ditching and other activities associated with large cranberry farming operation), *cert. denied*, 474 U.S. 817 (1985); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 925-26 (5th Cir. 1983) (clearing land in order to convert wetland from silviculture to agricultural use is not within farming exemption).

113. 33 U.S.C. § 1344(r) (1988). *See* Blumm, *supra* note 37, 424-28 (discussing the federal construction exemption).

114. 33 C.F.R. § 323.2(d)(ii) (1994).

115. 33 U.S.C. § 1344(f)(2) (1988).

116. Section 404(f)(2) declares that any discharge incidental to a change in use of the waters of the United States which impairs the flow or reach of waters of the United States requires a permit. 33 U.S.C.

farmers from converting wetlands to agricultural use without obtaining a dredge and fill permit.[117]

2. The Permit Application Process

The Corps receives approximately 15,000 applications for individual permits each year.[118] In theory, the permitting process for individual permits is a rigorous one.[119] Upon receiving an application,[120] the Corps district office provides notice of the proposed discharge to the public, EPA, Fish and Wildlife Service and various state and local environmental protection agencies.[121] The District Engineer may also prepare an Environmental Impact Statement if one is required by the National Environmental Policy Act.[122] In some cases, a public hearing may be held.[123] However, the heart of the review process is the evaluation of the application for compliance with the EPA's section 404(b)(1) Guidelines[124] and the review to ensure compliance with the Corps' public interest criteria.[125] Once this review process is complete, the District Engineer will deny the permit application, issue the permit in accordance with the applicant's original plan, or issue the permit subject to special conditions.[126]

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§ 1344(f)(2) (1988). *See* Tripp & Herz, *supra* note 66, at 236-38 (discussing § 404(f)'s recapture provision).

117. *See, e.g.*, Conant v. United States, 786 F.2d 1008, 1010 (11th Cir. 1986); United States v. Akers, 785 F.2d 814, 822-23 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986); United States v. Huebner, 752 F.2d 1235, 1240-41 (7th Cir. 1985); United States v. Cumberland Farms, Inc., 647 F. Supp. 1166, 1176-77 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1016 (1988).

118. Sugameli, *supra* note 6, at 486 (1993) (15,064 permit applications were made in 1992).

119. For a description of the permit application process see Dickerson, *supra* note 36, at 1485-88; Andrew H. Ernst & Wade W. Herring, II, *Water, Water Everywhere, Better Call the Corps: Section 404 Regulation of Wetlands*, 41 MERCER L. REV. 843, 851-59 (1990).

120. Property owners may consult with staff members in Corps district offices prior to submitting a permit application to determine if a permit is required for their proposed activity. 33 C.F.R. § 325.1(b) (1994).

121. 33 C.F.R. § 325.3 (1994).

122. 42 U.S.C. §§ 4221-4347 (1988). *See generally* Ellen K. Lawson, Note, *The Corps of Engineers' Public Interest Review Under Section 404 of the Clean Water Act: Broad Discretion Leaves Wetlands Vulnerable to Unnecessary Destruction*, 34 WASH. U. J. URB. & CONTEMP. L. 203, 212-15 (1988) (discussing the applicability of NEPA to the section 404 permit application process).

123. 33 C.F.R. § 327.4 (1994). If a public hearing is held, the district engineer or a deputy acts as the presiding officer. *Id.* § 327.5(a)(1).

124. 33 U.S.C. § 1344(b) (1988). *See* discussion *infra* part II.B.2.b.

125. 33 C.F.R. § 320.4 (1994). *See* discussion *infra* part II.B.2.a.

126. Each year, the Corps denies about 3 percent of the permit applications it receives. The Corps also significantly modifies approximately 33 percent of these permit applications and approves 50 percent without modification. The remaining 14 percent are withdrawn by the applicants. Hanley, *supra* note 10, at 324, n.51. However, many of those who withdraw their application for an individual permit are able to qualify for a general permit. Swords, *supra* note 14, at 177-78 (the Corps issues approximately 10,000 individual permits each year, denies about 500 permit applications, and another 4,500 applicants either qualify for a general permit or withdraw their applications).

a. The Public Interest Review

One of the most important elements of the section 404 permit program is the public interest review process. The Corps' regulations identify a variety of factors that must be considered in the public interest review process.[127] These include economics, aesthetics, effects on wetlands, historic preservation, fish and wildlife values, effects on flood plains, land use, navigation, recreation, energy needs and "in general, the needs and welfare of the people."[128] Taking these factors into account, the Corps balances the benefits to be derived from the proposed project against its foreseeable costs.[129] The Corps may grant a permit if the results of this balancing process are positive, but it must deny the application if the costs of the proposed discharge are found to outweigh its gains.[130]

b. Section 404(b)(1) Guidelines

The Corps also evaluates the proposal for consistency with section 404(b)(1) Guidelines.[131] According to these Guidelines, proposals may be permitted only if: (1) no practicable alternatives are available;[132] (2) there will be no significant degradation to waters of the United States;[133] (3) all reasonable mitigation measures will be employed;[134] and (4) no statutory violations will occur.[135]

First, the Guidelines require the applicant to show that there are no practicable alternatives to the proposed discharge.[136] Where the discharge will occur in wetlands or other special aquatic sites,[137] the Guidelines assume that practicable alternatives exist when the proposed discharge is for non-water dependent activity.[138] To rebut this pre-

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127. *See generally* Blumm & Zaleha, *supra* note 65, at 731-36; Robert E. Steinberg & Michael G. Dowd, *Economic Considerations in the Section 404 Wetland Permit Process*, 7 VA. J. NAT. RESOURCES 277, 282-87 (1988); Lawson, *supra* note 122, at 218-26.

128. 33 C.F.R. § 320.4(a)(1) (1994).

129. *Id.*

130. *Id.*

131. 33 U.S.C. § 1344(b)(1) (1988); 40 C.F.R. §§ 230.1-230.80 (1994). *See generally* Blumm & Zaleha, *supra* note 65, at 736-40; Ernst & Herring, *supra* note 119, at 856-58; Ferretti, *supra* note 36.

132. 40 C.F.R. § 230.10(a) (1994).

133. *Id.* § 230.10(c).

134. *Id.* § 230.10(d).

135. *Id.* § 230.10(b).

136. *See* 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, 798-813 (discussing the "no practicable alternative" requirement).

137. In addition to wetlands, special aquatic sites include wildlife sanctuaries and refuges, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes. 40 C.F.R. §§ 230.40-230.45 (1994).

138. *Id.* § 230.10(a)(3) (1994). *See* Louisiana Wildlife Fed'n v. York, 603 F. Supp. 518, 527 (W.D. La. 1984) ("The determination that a project is non-water-dependent simply necessitates a

sumption, the applicant must "clearly demonstrate" that practicable alternatives do not in fact exist.[139]

The Guidelines also prohibit the issuance of a permit if the discharge "will cause or contribute to significant degradation of the waters of the United States."[140] The Guidelines further provide that "[f]indings of significant degradation shall be based upon appropriate factual determinations, evaluations, and tests."[141] Among the factors that must be considered are the effects of the discharge of the pollutants on (1) human health or welfare, (2) aquatic and other wildlife, (3) aquatic ecosystem diversity, productivity and stability, and (4) recreational, aesthetic and economic values.[142]

In addition, the Guidelines provide that no permit shall be issued "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem."[143] In some cases the mitigation requirement may be satisfied by reducing the area the applicant proposes to dredge or fill.[144] In other cases, the applicant may be required to restore degraded wetlands by seeding, regrading or irrigation measures.[145] Where these alternatives are not feasible, the Corps may order the applicant to compensate for the destruction of existing wetlands by creating new wetlands elsewhere.[146]

Finally, the Guidelines declare that the permit must not violate applicable federal and state regulations.[147] This requirement is designed to ensure that discharges permitted under section 404 do not interfere with the operation of federal or state statutes that protect wildlife sanctuaries, endangered species, or the coastal zones or regulate the discharge of toxic substances.[148]

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more persuasive showing than otherwise concerning the lack of alternatives."), *aff'd in part & vacated in part*, 761 F.2d 1044 (5th Cir. 1985).

139. *See* Hough v. Marsh, 557 F. Supp. 74, 84 (D. Mass. 1982) (invalidating permit because applicants failed to clearly demonstrate that no feasible alternatives to project were available); Shoreline Assoc. v. Marsh, 555 F. Supp. 169, 180 (D. Md. 1983) (upholding permit denial under section 404(b)(1) Guidelines because alternative was available for non-water-dependent project), *aff'd*, 725 F.2d 677 (4th Cir. 1984).

140. 40 C.F.R. § 230.10(c) (1994).

141. *Id.*

142. *Id.*

143. 40 C.F.R. § 230.10(d) (1994). Mitigation is also an important aspect of the Corps' public interest review process. 33 C.F.R. § 320.4(r) (1994).

144. Lawson, *supra* note 122, at 217.

145. Ferretti, *supra* note 36, at 120.

146. *See* Virginia C. Veltman, Comment, *Banking on the Future of Wetlands Using Federal Law*, 89 NW. U. L. REV. 654, 657-58 (1995) (describing offsite mitigation procedures). *See, e.g.*, Friends of the Earth v. Hintz, 800 F.2d 822, 826 n.3 (9th Cir. 1986) (required conversion of 17 acres of pasture back into wetlands); Nat'l Wildlife Fed'n v. Marsh, 721 F.2d 767, 772 (11th Cir. 1983) (required creation of six green tree reservoirs and implementation of intense wildlife management program).

147. 40 C.F.R. § 230.10(b) (1994).

148. Ferretti, *supra* note 36, at 121.

c. EPA Veto Authority

Section 404(c) of the Clean Water Act authorizes the EPA to veto the granting of a permit if it determines, after notice and an opportunity for a hearing, that the proposed discharge will have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."[149] Although seldom used, this veto power gives the EPA considerable power over the section 404 permit process.[150]

3. General Permits

Section 404 authorizes the Corps to issue "general permits" on a state, regional, or nationwide basis, thereby exempting certain classes of users from individual permit requirements.[151] The purpose of the nationwide permits is to reduce unnecessary federal regulation and red tape.[152] In 1992, about 42,000 persons qualified for general permits.[153]

The Corps has issued thirty-seven nationwide permits to date, covering such activities as fish harvesting, bank stabilization, minor road crossing fills and bridge building.[154] Of particular importance to wetlands is Permit Number 26, which authorizes discharges of fill material into wetlands smaller than ten acres located above the headwaters of nontidal waters or into "isolated waters" that are not part of a surface tributary stream.[155] This effectively exempts many activities on agricultural wetlands from section 404's individual permitting requirements.[156]

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149. 33 U.S.C. § 1344(c) (1988). *See* Bersani v. United States Envtl. Protection Agency, 674 F. Supp. 405, 411, 420-21 (N.D.N.Y. 1987) (upholding EPA veto based on finding that there were practicable nonwetland sites available for proposed project), *aff'd*, 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989). *See also* Blumm & Zaleha, *supra* note 65, at 742-44 (1989) (discussing the *Bersani* case).

150. Ernst & Herring, *supra* note 119, at 860.

151. 33 U.S.C. § 1344(e)(1) (1988).

152. A nationwide permit is automatically granted for those who qualify and no application is needed before beginning the discharge activity. Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 583, 585 (D. Colo. 1983), *aff'd*, 758 F.2d 508 (10th Cir. 1985). However, district engineers have the authority to modify, condition or revoke general permits when necessary to ensure that wetlands are protected. 33 C.F.R. §§ 325.4, 325.7 (1994).

153. Sugameli, *supra* note 6, at 486 (in 1992, the Corps issued 26,054 nationwide general permits and 15,930 regional general permits).

154. 33 C.F.R. § 330 app. A (1994).

155. *Id.*

156. Theis, *supra* note 66, at 20. These permits exempt about 17 million acres of wetlands from compliance with individual permitting requirements and authorize 40,000 discharges annually. Nagle, *supra* note 87, at 237. *See also* Blumm & Zaleha, *supra* note 65, at 726.

III. PRE-*LUCAS* TAKINGS CASES

A. The Law of Regulatory Takings

The Takings, or Just Compensation, Clause of the Fifth Amendment to the United States Constitution declares that private property may not be taken for public use without payment of just compensation.[157] The original purpose of this provision was to require the government to pay compensation when it physically appropriated private property for public use.[158] However, with the increase in governmental regulation in the twentieth century, the courts began to recognize that a compensable taking could occur in the absence of a physical occupation. This type of taking, known as a regulatory taking, takes place when the government places such severe restrictions on the use of property that it leaves the owner with little more than bare legal title.[159]

Pennsylvania Coal Co. v. Mahon[160] was the first case to hold that the government must compensate landowners when regulations unreasonably restrict the use of their property.[161] In *Mahon*, a coal company challenged the validity of a state statute that prohibited the mining of anthracite coal in residential areas in order to protect overlying structures against subsidence damage. The Court in *Mahon* concluded that a taking had occurred even though the government had not physically destroyed or cuppied the coal company's property.[162] According to the Court, regulatory restrictions on the use of land were ordinarily valid even though they decreased the value of affected property.[163] However, the government would be required to compensate property owners when its regulations went "too far."[164]

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157. U.S. CONST. amend. V. The Takings Clause is binding on the states through the application of the Fourteenth Amendment. *See* First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 310 n. 4 (1987); Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 241 (1897).

158. *See* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081-83 (1993) (the Takings Clause was intended to apply to eminent domain); William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985) (the purpose of the Takings Clause was to assure compensation for physical takings). During the nineteenth century and later, the Supreme Court relied on the Takings Clause to mandate compensation for landowners whose property had been physically invaded as the result of governmental action. *See* United States v. Lynah, 188 U.S. 445, 469 (1903) (overflow from navigation project turned plaintiff's rice plantation into a bog); Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. 166, 167, 181 (1871) (state authorized dam on river caused upstream lake to overflow its banks and flood plaintiff's land).

159. *See* James W. Sanderson & Ann Mesmer, *A Review of Regulatory Takings After* Lucas, 70 DEN. U.L. REV. 497, 498 (1993); Lynda G. Cook, Comment, Lucas *and Endangered Species Protection: When "Take" and "Takings" Collide*, 27 U.C. DAVIS L. REV. 185, 201 (1993).

160. 260 U.S. 393 (1922).

161. Patrick Kennedy, Comment, *The United States Claims Court: A Safe "Harbor" from Government Regulation of Privately Owned Wetlands*, 9 PACE ENVTL. L. REV. 723, 726 (1992).

162. *Mahon*, 260 U.S. at 414.

163. *Id.* at 413. "[S]ome values are enjoyed under an implied limitation and must yield to the police power." *Id.*

164. *Id.* at 415. "[W]hile property may be regulated to a certain extent, if the regulation goes

The approach that the *Mahon* Court used to determine when compensation must be paid has come to be known as the diminution-in-value test.[165] To apply this test, the court must first determine the value of the affected property before and after the regulation is applied.[166] It then calculates the percentage of the decline in value and decides if the resulting loss is sufficient to justify compensation.[167]

During the period between *Mahon* and *Lucas*, the Court employed two different approaches to determine whether a regulatory taking had occurred.[168] The first approach, which originated in *Penn Central Transportation Co. v. New York City*,[169] determines whether a taking has occurred by balancing the interests of the public against those of the property owner.[170] Under the second test, derived from *Agins v. City of Tiburon*,[171] the Court may find that a taking exists if the regulation does not substantially advance a legitimate state interest or if it deprives the landowner of all economically viable use of his or her property.[172]

1. The *Penn Central* Balancing Approach

In *Penn Central,* the Court identified three factors to be considered in a regulatory takings case: (1) the character of the governmental action involved; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the economic impact of the regulation upon the property owner.[173]

The first factor is concerned with whether the governmental action in question is a physical invasion or whether it is an accepted form of

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too far it will be recognized as a taking." *Id.*

165. *See* Donald W. Large, *This Land Is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039, 1056.

166. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1229-34 (1967).

167. *See* Donald W. Large, *The Supreme Court and the Taking Clause: The Search for a Better Rule*, 18 ENVTL. L. 3, 19-20 (1987).

168. *See* Laurie G. Ballinger, Note, *A House Built on Sand: Lucas v. South Carolina Coastal Council*, 71 N.C. L. REV. 928, 934 (1993).

169. 438 U.S. 104 (1978).

170. *See* Scarlott, *supra* note 65, at 919. *Penn Central* arose out the refusal of the New York Landmarks Preservation Commission to allow the Penn Central Co. to construct a multistory office building over Grand Central Station Terminal. Penn Central claimed that the Commission's action deprived it of the use of the airspace above the Terminal. *Penn Central*, 438 U.S. at 115-17. The Court, however, upheld the validity of the Landmarks Preservation Law. *Id.* at 138.

171. 447 U.S. 255 (1980).

172. *Id.* at 260.

173. *Penn Central*, 438 U.S. at 124-25.

economic regulation.[174] For example, in *Loretto v. Teleprompter Manhattan CATV Corporation*,[175] the Court struck down a New York statute because it required landlords to permit cable television companies to install cable facilities on their property.[176] The Court characterized this as a physical invasion of the plaintiff's property.[177] Similarly, in *Kaiser Aetna v. United States*,[178] the Court held that the Corps of Engineers, which had allowed a landowner to construct a marina on a nonnavigable pond and to connect the pond to the ocean, could not subsequently compel him to admit members of the general public to the pond and the marina.[179] Once again, the Court reasoned that the Corps' action was tantamount to a physical invasion, and thus a *per se* taking.[180]

The second factor focuses on "investment-backed expectations."[181] The purpose of this inquiry is to determine whether a property owner who commits significant resources to a project has good reason to think that the government will not subsequently impose regulations that prevent the project from being completed or add substantially to its original cost.[182] The underlying assumption is that a landowner's reasonable expectations should not be frustrated by subsequent governmental action unless the need to regulate is very compelling. However, to claim interference with an investment-backed expectation, property owners must be able to point to specific facts and circumstances that make their expectations reasonable.[183] Thus, in *Penn Central*, the Court rejected the landowner's investment-backed expectations claim because these expectations were based on the Terminal's present use as a railroad station rather than on possible future uses of the airspace above the Terminal. Since the Landmarks Preservation Law only restricted a use of the airspace, the Court concluded that it did not frustrate Penn Central's expectations with respect to use of the Terminal.[184]

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174. *See* Thomas A. Hippler, Comment, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" from* Mugler *to* Keystone Bituminous Coal, 14 B.C. ENVTL. AFF. L. REV. 653, 713 (1987).

175. 458 U.S. 419 (1982).

176. *Id.* at 426.

177. *Id.* at 438.

178. 444 U.S. 164 (1979).

179. *Id.* at 179-80.

180. *Id.* at 180.

181. Penn Central Transport Co. v. New York City, 438 U.S. 104, 124 (1978). Prof. Frank Michelman apparently coined this phrase. *See* Michelman, *supra* note 166, at 1233 (A taking occurs when a claimant is deprived of "distinctly perceived, sharply crystallized, investment-backed expectation[s].").

182. *See* Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?* 31 WASH. U. J. URB. & CONTEMP. L. 3, 42 (1987).

183. *See* Richard G. Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 NOTRE DAME L. REV. 1, 41 (1989).

184. *Penn Central*, 438 U.S. at 136. On the other hand, the landowner in *Kaiser Aetna* was able to persuade the Court that the actions of the Corps of Engineers in allowing it to improve the

The final factor to be considered is the economic impact of the regulation upon the property. When a regulation severely burdens a property owner, a court may conclude that a taking has occurred even though the other factors weigh in the government's favor.[185] However, the courts employ several techniques to undercut allegations of adverse economic impact by property owners. One technique, commonly referred to as the principle of "average reciprocity of advantage,"[186] allows a court to offset losses by taking into account any benefits to the property owner that arise from the regulation.[187] For example, in *Penn Central*, although the Court acknowledged that the property owner was burdened by the regulation, it concluded that benefits that accrued from the regulation largely offset this burden.[188]

In addition, when a court evaluates a regulation's economic impact, it often looks at the entire property interest involved, rather than at some lesser interest.[189] In *Penn Central*, the landowner claimed that the Landmarks Preservation Law deprived it of all gainful use of the airspace above the Terminal.[190] However, the Court declared that it must consider the economic impact of the regulation on Penn Central's entire "bundle of rights" in the Terminal rather than focusing solely on the regulation's effect on airspace.[191]

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pond gave rise to an expectation that the landowner could continue to exclude the public from the pond and the marina. *Kaiser Aetna*, 444 U.S. at 179-80.

185. *See* Raymond R. Colette, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 349 (1990). "The Court has consistently maintained that economic harm, especially when disproportionately concentrated on a few individuals, may form the basis of a regulatory takings claim." *Id.*

186. "Average reciprocity of advantage" originally meant that compensation need not be paid when a party giving up property received in exchange a new benefit, not shared by the general public. *See* Catherine R. Connors, *Back to the Future: The "Nuisance Exception" to the Just Compensation Clause*, 19 CAP. U. L. REV. 139, 173 (1990).

187. Collette, *supra* note 185, at 351 ("[R]eciprocal advantages contribute to an economic mix wherein the level of a regulation's impact may be effectively diluted.").

188. *Penn Central*, 438 U.S. at 134-35. *But see* Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 485 (1983) (contending that there was no plausible reciprocity of advantage to the landowner in *Penn Central*); Alfred P. Levitt, Comment, *Taking on a New Direction: The Rehnquist-Scalia Approach to Regulatory Takings*, 66 TEMP. L.Q. 197, 208-09 (1993) (criticizing the Court's reliance on reciprocity of advantage in *Penn Central*).

189. *See, e.g.*, Andrus v. Allard, 444 U.S. 51, 65-66 (1979). "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.*

190. *Penn Central*, 438 U.S. at 130.

191. 438 U.S. at 130-31. The Court employed a similar approach in Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987). In that case, coal owners challenged the validity of regulations adopted pursuant to a state subsidence control statute. The regulations required landowners to keep 50% of the coal in place beneath buildings in order to provide surface support. *Id.* at 476-77. The plaintiffs in *Keystone* claimed that coal in place was a separate property interest for taking issue purposes. *Id.* at 496-97. However, the Court concluded that this coal did not constitute a separate property interest distinct from the plaintiffs' coal reserves as a whole. *Id.* at 498.

The Court reaffirmed the *Penn Central* requirements in *Connolly v. Pension Benefit Guarantee Corp.*,[192] a case which involved the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980.[193] In *Connolly*, the Court declared that it would consider the following factors in takings cases: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with the claimant's distinct investment-backed expectations; and (3) the character of the governmental action.[194]

2. The *Agins* Formula

In *Agins v. City of Tiburon*,[195] the plaintiffs challenged the validity of two local ordinances that limited the number of residential dwellings that could be constructed on their five-acre tract of land. The plaintiffs maintained that the city's density restrictions made it economically impossible for them to develop their property.[196] On appeal, the Court first declared that the question of identifying a regulatory taking involved a "weighing of public and private interests."[197] However, the Court then proposed a two-factor test that appeared to involve no balancing at all.[198] According to the *Agins* Court, a taking would occur if: (1) the regulation failed to substantially advance a legitimate state interest; *or* (2) if it deprived the landowner of all economically viable use of his or her property.[199] In other words, each prong of the *Agins* analysis was apparently sufficient to sustain a taking claim and the plaintiff did not have to prove both parts of the test.[200]

The requirement that a regulation "substantially advance legitimate governmental goals" is traditionally associated with substantive due pro-

192. 475 U.S. 211 (1986).

193. 29 U.S.C. §§ 1381-1461 (1988).

194. *Connolly*, 475 U.S. at 225.

195. 447 U.S. 255 (1980).

196. The California Supreme Court upheld the validity of the ordinance. *See* Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979).

197. *Agins*, 447 U.S. at 261.

198. *See* Ann T. Kadlecek, Note, *The Effect of* Lucas v. South Carolina Coastal Council *on the Law of Regulatory Takings*, 68 WASH. L. REV. 415, 419-20 (1993) (the *Agins* two-part test does not involve a balancing of interests); R. Blair Norman, Comment, Lucas v. South Carolina Coastal Council: *The "No Economically Viable Use Test," Not a Panacea for Individual Property Owners, but a Step in the Right Direction*, 18 OKLA. CITY U. L. REV. 153, 162 (1993) (the *Agins* formula is categorical). However, some courts appear to have balanced public and private interests to determine whether the landowner has established that the first prong of the *Agins* test has been met. *See, e.g.*, Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 388-90 (1988) (weighing the government's interest in preventing pollution against the economic interests of the landowner).

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

200. *See* Jan G. Laitos, *The Taking Clause in America's Industrial States After* Lucas, 24 TOLEDO L. REV. 281, 297 (1993).

cess.[201] In *Agins*, however, the Court incorporated this principle into its takings analysis.[202] In that case, the Court concluded that the Tiburon ordinance substantially advanced legitimate governmental goals by protecting the public against the adverse effects of uncontrolled urbanization.[203]

The *Agins* Court also held that an otherwise valid regulation would constitute a taking if it deprived the claimant of all economically viable use of his property.[204] The Court in *Agins* did not explain what it meant by the expression "all economically viable use" because it concluded that the plaintiffs had not shown that they had suffered any loss as a result of the ordinances.[205] However, the *Lucas* Court later relied this principle to construct its categorical "total takings" rule.[206]

B. State Takings Cases

In the 1960's and early 1970's, a number of environmental zoning ordinances and statutes were struck down by state courts.[207] For example, in *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*[208] the New Jersey Supreme court held that a zoning ordinance, designed to preserve a nearby wetlands area, was "constitutionally unreasonable and confiscatory" because it prevented a gravel pit operator from making any beneficial use of his land.[209] The Connecticut Supreme Court made a similar finding in *Dooley v. Town Plan & Zoning Commission.*[210] The ordinance in question established a flood plain zone along a tidal stream and prohibited filling within that area. The court concluded that the uses permitted by the ordinance were impracticable, resulting in a 75 percent decrease in the market value of the plaintiff's property.[211] Finally,

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201. *See* John A. Humbach, *A Unifying Theory for Just Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 270 (1982). "The first type of limit referred to [in *Agins*] . . . corresponds essentially to the limits, albeit extensive, of the police power itself, and is rooted in the due process clauses of the Constitution." *Id.*

202. *See* Norman Williams, Jr. et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193, 213-14 (1984) (criticizing the Court for injecting substantive due process concepts into takings analysis).

203. *Agins*, 447 U.S. at 261.

204. *Id.* at 260. The expression "no economically viable use" originated in a footnote in the *Penn Central* case. *See* Penn Central Transport Co. v. New York City, 438 U.S. 104, 138 n.36 (1978).

205. *Agins*, 447 U.S. at 262-63.

206. *See* Norman, *supra* note 198, at 173.

207. For a discussion of these early cases, see Robert C. Ausness, *A Survey of State Regulation of Dredge and Fill Operations in Nonnavigable Waters*, 8 LAND & WATER L. REV. 65, 73-84 (1973).

208. 193 A.2d 232 (N.J. 1963).

209. *Id.* at 242.

210. 197 A.2d 770 (Conn. 1964).

211. *Id.* at 774. *See also* Bartlett v. Zoning Comm'n of Town of Old Lyme, 282 A.2d 907, 910 (Conn. 1971) (holding a local ordinance which restricted uses on tidal marshland to wooden walkways, wharves, duck blinds, public boat landings and public ditches was unreasonable and confiscatory).

the Supreme Judicial Court of Maine reversed the denial of a dredge and fill permit in *State v. Johnson*.[212] The court determined that the plaintiff's property, which lay within a salt marsh, would have no commercial value if filling were not permitted.[213]

However, in recent years, state courts have become increasingly hostile to takings claims brought by disappointed landowners.[214] The reason for this change is that many state courts now recognize the value of wetlands and the need to protect them against harm.[215] *Candlestick Properties, Inc. v. San Francisco Bay Conservation & Development Commission*,[216] decided in 1970, was one of the first cases to consider wetland values as part of its takings analysis. In *Candlestick*, the San Francisco Bay Conservation and Development Commission (BCDC) refused to allow the plaintiff to deposit fill on his partially submerged property in San Francisco Bay.[217] The trial court upheld the Board's deci-

212. 265 A.2d 711 (Me. 1970).

213. *Id.* at 716.

214. *See, e.g.*, Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 89 Cal. Rptr. 897, 906 (Cal. Ct. App. 1970); Gil v. Inland Wetlands & Watercourses Agency of Town of Greenwich, 593 A.2d 1368, 1374 (Conn. 1991); Manor Dev. Corp. v. Conservation Comm'n of Town of Simsbury, 433 A.2d 999, 1002 (Conn. 1980); Brecciaroli v. Comm'r of Envtl. Protection, 362 A.2d 948, 952-53 (Conn. 1975); Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1382 (Fla. 1981), *cert. denied*, 454 U.S. 1083 (1981); Potomac Sand & Gravel Co. v. Governor of Maryland, 293 A.2d 241, 248 (Md. 1972), *cert. denied*, 409 U.S. 1040 (1972); Moskow v. Comm'r of Dept. of Envtl. Management, 427 N.E.2d 750, 753-4 (Mass. 1981); Lovequist v. Conservation Comm'n of Town of Dennis, 393 N.E.2d 859, 866 (Mass. 1979); Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287, 292 (N.H. 1984); State Wetlands Bd. v. Marshall, 500 A.2d 685, 690 (N.H. 1975); Sibson v. State, 336 A.2d 239, 243 (N.H. 1975); American Dredging Co. v. State Dept. of Envtl. Protection, 391 A.2d 1265, 1271 (N.J. Super. Ct. Ch. Div. 1978); De St. Aubin v. Flacke, 496 N.E.2d 879, 886 (N.Y. 1986); Carter v. South Carolina Coastal Council, 314 S.E.2d 327, 329 (S.C. 1984); Just v. Marinette County, 201 N.W.2d 761, 771 (Wis. 1972); *but see* Vatalaro v. Dept. of Envtl. Regulation, 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App. 1992) (upholding a takings claim by a landowner who was limited by state agency to construction of an elevated wooden boardwalk over a portion of her wetlands property).

215. *See, e.g.*, Brecciaroli v. Comm'r of Envtl. Protection, 362 A.2d 948, 951 (Conn. 1975) ("[I]t is declared to be the public policy of this state to preserve the wetlands and to prevent the despoliation and destruction thereof."); *Graham*, 399 So. 2d at 1379 ("Because of the sensitive nature of the land, it was not unreasonable for the commission to place a great deal of weight on the environmental impact of the proposed development."); Potomac Sand & Gravel Co. v. Governor of Maryland, 293 A.2d 241, 249 (Md. 1972) ("[S]ites in question support such species of fish as herring, American shad, hickory shad, striped bass, white perch and el perch."); Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287, 292 (N.H. 1984) ("the public policy of the State has recognized the importance of these wetlands, and strong regulations to protect wetlands have been enacted"); American Dredging Co. v. State Dept. of Envtl. Protection, 391 A.2d 1265, 1269 (N.J. Super. Ct. Ch. Div. 1978) ("Water, land and air cannot be misused or abused without dire present and future consequences to all mankind."); Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972) ("[S]wamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams.").

216. 89 Cal. Rptr. 897 (Cal. Ct. App. 1970).

217. *Id.* at 899.

sion.[218] On appeal, the court in *Candlestick* reviewed various legislative findings on the value of San Francisco Bay's tideland areas and the need to prevent further harm from unrestricted filling.[219] In response to the plaintiff's takings claim, the court declared that "[i]n view the necessity for controlling the filling of the bay, as expressed by the Legislature in the provisions discussed above, it is clear that the restriction imposed does not go beyond proper regulation such that the restriction would be referable to the power of eminent domain rather than the police power."[220] Accordingly, the court affirmed BCDC's denial of the permit.[221]

Another reason why takings claims often fail is that state courts refuse to find that a takings exists unless the landowner can establish that the regulatory agency will not allow any amended applications to be submitted.[222] Courts that dismiss takings claims on "ripeness" grounds assume that a landowner who keeps submitting new applications will eventually be allowed to make some productive use of the land, thereby obviating the need for compensation.[223] *Gil v. Inland Wetlands & Watercourses Agency of the Town of Greenwich,*[224] decided by the Connecticut Supreme Court in 1991, illustrates how this ripeness requirement may be invoked to defeat a takings claim. The plaintiff in *Gil* purchased a four-acre tract in a residential zone of Greenwich, Connecticut.[225] More than 90 percent of the plaintiff's property consisted of wetlands and was, therefore, subject to regulation by the town's inland and watercourses agency.[226] In 1982, Gil applied for a permit to construct a single-family residence, but the agency refused to issue a permit.[227] The landowner filed

218. *Id.*

219. *Id.* at 900-01.

220. *Id.* at 906.

221. *Id.*

222. *See, e.g.*, Brecciaroli v. Comm'r of Envtl. Protection, 362 A.2d 948, 952 (Conn. 1975) ("The plaintiff may still be permitted on subsequent application to fill a lesser portion of his wetland to be used in conjunction with the 3.1 acres of the parcel not classified as wetland."); Sands Point Harbor, Inc. v. Sullivan, 346 A.2d 612, 614 (N.J. Super. Ct. App. Div. 1975) ("Plaintiff has not availed itself of the procedures set forth in the statute to determine the extent to which the purposes for which its lands may be used. Under the circumstances we have no hesitancy in concluding that no taking has occurred.").

223. The United Supreme Court has been receptive to this approach in zoning cases. *See* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) (finding that a takings claim cannot be adjudicated until county makes a final and authoritative determination of type and intensity of development that it would permit on plaintiff's property); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 190-91 (1985) (holding that a takings claim could not be properly evaluated until agency made a final, definitive decision about how the regulation would be applied to the plaintiff's property).

224. 593 A.2d 1368 (Conn. 1991).

225. *Id.* at 1370.

226. *Id.*

227. *Id.*

a second application in 1984, but it too was denied by the agency because it was found to be incomplete. Gil's third permit application, filed in 1985, was also denied even though he offered to mitigate some the harmful effects of the proposed construction.[228] Gil brought suit after the agency turned down his fourth application in 1988.[229] Both the trial court and an intermediate appellate court concluded that the permit denial amounted to a regulatory taking.[230] However, the Connecticut Supreme Court, while conceding that the plaintiff was entitled to develop his land in some fashion,[231] declared that a regulatory takings claim would not be entitled to judicial review on the merits until the landowner established the finality of the agency's determination.[232] Even though the agency had rejected four permit applications, the court suggested that the agency might grant a permit for a smaller house than Gil's earlier applications had proposed.[233]

Finally, some courts deny takings claims because they believe that the government should not have to pay compensation when a regulation merely restricts wetland property to its "natural" condition.[234] This theory, a variant of the harm/benefit test, was first suggested by the Wisconsin Supreme Court in *Just v. Marinette County*.[235] *Graham v. Estuary Properties, Inc.*,[236] decid-

228. *Id.* at 1370-71.

229. *Id.* at 1371.

230. *See* Gil v. Inland Wetlands & Watercourses Agency, 580 A.2d 539 (Conn. Ct. App. 1990).

231. 593 A.2d at 1373-74.

232. *Id.* at 1374.

233. *Id.* at 1374-75.

234. *See, e.g.*, Sibson v. State, 336 A.2d 239, 243 (N.H. 1975) ("The board has not denied plaintiffs' current uses of their marsh but prevented a major change in the marsh that plaintiffs seek to make for speculative profit."); Carter v. South Carolina Coastal Council, 314 S.E.2d 327, 329 (S.C. 1984) (quoting Just v. Marinette Co., 201 N.W.2d 761, 768 (Wis. 1972)) ("While unquestionably respondent's wetland would have greater value to him if it were filled, '[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.'").

235. 201 N.W.2d 761 (Wis. 1972). The plaintiffs in *Just* owned a parcel of land along the south shore of a navigable freshwater lake in Wisconsin. Much of the land was designated as wetlands in accordance with the provisions of Marinette County's shoreland zoning ordinance. *Id.* at 766. The ordinance required landowners to obtain a permit to fill within such areas. *Id.* When the Justs began to fill a portion of their property near the shore of the lake, the county brought suit to enjoin them from further filling until they had applied for the requisite permit. *Id.* at 767. On appeal, the Justs argued that the ordinance constituted a taking of their property without just compensation. *Id.* at 767. The court, however, upheld the validity of the ordinance and associated state shorelands protection statute. *Id.* at 772. The court distinguished between regulations that were intended to obtain a benefit and those that were intended to prevent a future harm. According to the court, the state would be required to compensate injured parties in the former situation, but not in the latter. *Id.* at 767. In the court's view, the purpose of the ordinance was to preserve the existing value of the wetlands and to prevent pollution of lakes and streams—an objective that did not require compensation to affected property owners. *Id.* at 768-69. The court in *Just* also proposed the following corollary to the harm-benefit rule: "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." *Id.* at 768. This suggests that landowners may not be entitled to

ed by the Florida Supreme Court in 1981, provides a more recent illustration of this principle. In 1975, Estuary applied to the Board of County Commissioners for approval to construct a development on a 6500-acre site located along Estero and San Carlos Bays near Fort Meyers, Florida.[237] Estuary's plan called for the construction of 26,500 dwellings and commercial facilities for an eventual population of 73,000.[238] The proposed development was large enough to qualify as a Development of Regional Impact and was, therefore, subject to the permitting requirements of the Florida Environmental Land and Water Management Act.[239] Estuary planned to construct most of its development in a tidal wetland area populated by red and black mangroves.[240] Although Estuary did not plan to carry out any construction in the red mangrove forest, it did intend to dredge a 7.5 mile interceptor waterway through the black mangroves.[241]

Estuary submitted its development plan to the Board of County Commissioners and the Southwest Florida Regional Planning council (SWFRPC). After extensive review, SWFRPC recommended that it be rejected.[242] After a series of public hearings, the Board of County Commissioners adopted SWRPC's findings and recommendations and concluded that the proposed development would degrade the waters of Estero and San Carlos Bays.[243] Accordingly, the Board denied both the zone change and the application for development approval.[244] The Board listed twelve conditions that would have to be met before it would agree to approve Estuary's development plan.[245] Estuary unsuccessfully appealed the Board's decision to the Florida Land and Water Adjudicatory Commission (LWAC).[246] Estuary then sought further review from the district court of appeal, which held that the Board's action constituted a regulatory taking.[247]

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compensation when the government restricts developmental activities in order to preserve wetlands in their natural state.

236. 399 So. 2d 1374 (Fla. 1981), *cert. denied sub nom.* Taylor v. Graham, 454 U.S. 1083 (1981).

237. *Id.* at 1376.

238. *Id.*

239. FLA. STAT. ANN. § 380.06 (1988 & 1994 Supp.).

240. *Estuary Properties*, 399 So. 2d at 1376. There were about 2800 acres of red mangroves located at the seaward edge of the proposed development. These were subject to the daily ebb and flow of the tide. An 1800-acre forest of predominantly black mangroves was located immediately inward from the red mangroves. The black mangroves were also subject to tidal action during most of the year. The remaining 1800 acres of Estuary's property ranged from two to five feet above sea level. Only 526 acres of Estuary's property was sufficiently dry to be classified as upland. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 1377.

245. *Id.*

246. *Id.*

247. Estuary Properties, Inc. v. Askew, 381 So. 2d 1126, 1138-39 (Fla. Dist. Ct. App. 1979).

On appeal, the Florida Supreme Court invoked the harm/benefit test to reject Estuary's takings claim.[248] The court in *Graham* agreed with the Board and LWAC that destruction of the mangroves and creation of the interceptor waterway would pollute the surrounding waters.[249] Therefore, according to the court, the Board's action was intended to prevent a future harm from occurring.[250] This, in the court's view was quite different from regulatory action that was intended to create a public benefit that did not exist before.[251] To bolster this conclusion, the court quoted with approval language from the *Just* decision which declared that property owners did not have an absolute right to alter the natural condition of their land.[252] Consequently, the court in *Graham* remanded the decision to the district court of appeal with instructions.[253]

C. *Federal Takings Cases*

A landowner whose permit application is denied may bring a claim for compensation against the federal government under the Tucker Act.[254] The Tucker Act vests the United States Claims Court with exclusive jurisdiction to hear all claims founded upon the Constitution for which plaintiffs seek judgment against the federal government in excess of $10,000.[255] In recent years, a number of landowners have brought takings claims in federal courts with varying degrees of success.

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248. *Estuary Properties*, 399 So.2d at 1381-82. The court also disagreed with Estuary's claim that it could make no productive use of its land if it were not allowed to construct an interceptor waterway through the black mangrove forest. *Id.* at 1382.

249. *Id.* at 1382.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 1383.

254. 28 U.S.C. § 1491(a)(i) (1988). As an alternative to an action against the federal government for compensation under the Tucker Act, a landowner can seek judicial review of the agency's decision to deny the permit. The Corps' denial of a permit and the EPA's exercise of its veto power under section 404 constitute final agency action reviewable under the Administrative Procedure Act. If the applicant prevails, the agency action will be reversed and the application will be granted or remanded to the agency for further consideration. *See* E. Manning Seltzer & Robert E. Steinberg, *Wetlands and Private Development*, 12 COLUM. J. ENVTL. L. 159, 181 (1987)

255. 28 U.S.C. § 1491(a)(i) (1988). This court was originally known as the United States Court of Claims. *See* Act of Feb. 24, 1855, ch. 22, 10 Stat. 612 (1855). In 1982, Congress reorganized the court and changed its name to the claims court. Federal Courts Improvement Act, 28 U.S.C. §§ 171-77 (1988). The claims court was renamed the United States Court of Federal Claims in 1992. *See* Court of Federal Claims Technical and Procedural Improvements Act of 1992, § 902, Pub. L. No. 102-572, Title IX, 106 Stat. 4516 (1992). Parties may appeal claims court decisions to the United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(3) (1988). The Federal Circuit has exclusive jurisdiction to hear such appeals and that court's decisions are binding upon the claims court. *See* Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 388 (1988).

Deltona Corporation v. United States,[256] decided in 1981, was one of the first cases in which a landowner sought compensation from the federal government for denial of a section 404 dredge and fill permit. Deltona purchased a 10,000-acre parcel of land on Marco Island on the Florida Gulf Coast in 1964.[257] The property contained large areas of dense mangrove vegetation.[258] According to Deltona's master plan, the proposed development was to be completed in five stages. The areas, in order of scheduled completion, were Marco River, Roberts Bay, Collier Bay, Barfield Bay and Big Key.[259] When fully completed, the Marco Island was expected to have more than 12,000 single-family residences as well as multifamily structures, shopping centers, marinas and other facilities.[260] However, in order to increase the amount of waterfront property available for development, Deltona planned to create numerous "finger fills," a process that would require considerable dredging and filling.[261]

The Corps granted a dredge and fill permit for the first and second phases of the Marco Island development in 1964 and 1969.[262] Deltona sought permits for its three remaining areas in 1973.[263] The Corps granted a permit for the Collier Bay area in 1976, but denied permit applications for Barfield Bay and Big Key.[264] The Corps denied Deltona's permit applications because it felt that the proposed development would destroy mangrove forests in these areas.[265] After an unsuccessful appeal of the Corps' decision,[266] Deltona brought a claim for compensation in the Court of Claims.

While declining to adopt any specific takings test, the court focused on economic impact and frustration of investment-backed expectations. Citing *Penn Central*, the court stated that mere diminution in value was not enough to establish a taking.[267] Instead, the court declared, it must determine if any reasonable uses were permitted by the regulation.[268] In addition, the court determined that it must look to the regulation's effect on the parcel as a whole.[269] Turning to the case at hand, the court ob-

256. 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).
257. 657 F.2d at 1188.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.* at 1188-89.
265. *Id.* at 1189.
266. *See* Deltona v. Alexander, 504 F. Supp. 1280 (M.D. Fla. 1981).
267. *Deltona Corp.*, 657 F.2d at 1191.
268. *Id.*
269. *Id.* at 1192.

served that the areas affected, Barfield Bay and Big Key, included only 20 percent of the acreage that Deltona had purchased in 1964.[270] Furthermore, Barfield Bay and Big Key contained 111 acres of uplands which were not affected by the Corps' denial of dredge and fill permits. According to the court, these upland areas were now worth more than twice what Deltona paid for the entire Barfield Bay and Big Key areas in 1964.[271] The court, therefore, concluded that economic impact of the permit denial on Deltona was not sufficient to constitute a taking.[272]

Deltona also argued that unforeseen changes in the Corps' dredge and fill permit program made it impossible for Deltona "to capitalize upon a reasonable investment-backed expectation which it had every justification to rely upon until the law began to change."[273] The court, however, observed that when it acquired the property in 1964, Deltona was aware that it would have to obtain dredge and fill permits from the Corps and that the standards and conditions governing the issuance of these permits might change in the future.[274] Deltona also contended that its investment-backed expectations were frustrated because it had already entered into contracts of sale for approximately 90 percent of the lots in Barfield Bay and Big Key.[275] However, the court was unimpressed with this argument and chastised Deltona for entering into contracts of sale before obtaining the permits that would be necessary for it to develop the land.[276] Therefore, Deltona's claim for compensation was firmly rejected.[277]

Jentgen v. United States[278] was decided by the Court of Claims on the same day as *Deltona*. In 1971, Jentgen purchased a 100-acre tract near the Everglades National Park for $150,000.[279] Jentgen planned to develop the site as a water-oriented residential community. About 80 acres of the tract were wetlands, while the remaining 20 acres were upland.[280] The developer applied for a section 404 dredge and fill permit in 1975. However, the Corps denied the application, largely because the project would harm mangrove wetlands located on the property.[281] Jentgen

270. *Id.*
271. *Id.* The court stated that Deltona paid $1.24 million for Barfield Bay and Big Key in 1964. In 1981, the upland portions of these tracts were worth $2.5 million. *Id.*
272. *Id.* at 1192-93.
273. *Id.* at 1191.
274. *Id.* at 1193.
275. *Id.* at 1189.
276. *Id.* at 1194.
277. *Id.*
278. 657 F.2d 1210 (Ct. Cl. 1981).
279. *Id.* at 1211.
280. *Id.* at 1212.
281. *Id.*

rejected an offer to allow development on 20 acres covered by the application and instead brought suit in the Court of Claims.[282] Jentgen contended that he had been deprived of all economically viable use of his property and, therefore, had suffered a taking as a consequence of the permit denial.[283] The court, however, rejected this argument, observing that Jentgen could still develop 40 acres of his 100-acre tract.[284] Furthermore, the court observed, even after the permit application was denied, the property was still worth between $80,000 and $150,000.[285] The court concluded that the property had not suffered sufficient diminution in value to establish a takings claim.[286]

The landowner in *Ciampitti v. United States*[287] also failed to convince the court that he was entitled to compensation. The property in question was located in the Diamond Beach area of Lower Township, New Jersey.[288] In 1980, Ciampitti bought 42 lots from Diamond Beach Venture Associates (DBVA) for $32,000. Shortly thereafter, he sold these lots for $303,700. Ciampitti then purchased another 82 lots from DBVA for $150,000. Most of these lots were eventually improved and sold to a developer named Conklin. None of the lots involved in these first two purchases were located in wetland areas. During the next two years, Ciampitti acquired an additional 21 lots from DBVA for a total price of $31,000. Most of these lots were in state-designated wetland areas.[289] In 1983, Ciampitti purchased another 45 acres (about 23 blocks) of undeveloped land from DBVA for $3.3 million. 14 acres of this property, located on the western or inland side of the island, were state-designated wetlands. At the time of this last purchase, Ciampitti had obtained a commitment from Siana & DiDonato (DiDonato), another developer, to purchase four eastern or ocean side blocks for $3 million. DiDonato subsequently obtained an option to purchase another two blocks on the eastern side of Diamond beach for $1.6 million. DiDonato eventually exercised both of these options.[290]

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282. *Id.* Jentgen did not seek judicial review of the permit denial under the provisions of the Administrative Procedure Act. *Id.*

283. *Id.* at 1213.

284. *Id.*

285. *Id.*

286. *Id.* at 1214.

287. 22 Cl. Ct. 310 (1991).

288. *Id.* at 311. Lower Township is located on a barrier island near the extreme southern coast of New Jersey. Lower Township includes the beach, upland and marsh areas between Wildwood Crest on the north and Cape May city on the South. The western portion of Diamond Beach adjoins an area of marsh and open water known as Jarvis Sound, which separates the island from the mainland. *Id.*

289. *Id.* at 312. Most of the state-designated wetlands were located in the western or inland area of Diamond Beach. *Id.*

290. *Id.* at 312-13.

In 1983, Ciampitti applied to the Corps for permission to fill eleven blocks of his property and to dredge an area for a marina.[291] The area involved amounted to about 18 acres. The Corps denied the permit in 1986 because Ciampitti's project was inconsistent with the state's Coastal Zone Management Program and because he had failed to obtain a dredge and fill permit from the state.[292] Ciampitti then brought suit in the claims court to obtain compensation for an alleged taking. The court considered the economic impact of the permit denial and the extent to which it interfered with Ciampitti's reasonable investment-backed expectations.[293]

At trial, appraisers for both parties agreed that the wetlands area was commercially unmarketable in its existing condition.[294] However, the government also claimed that the upland portion of Ciampitti's property was now worth $14 million.[295] The government argued that the court should consider the economic impact of the permit denial on the entire tract, while Ciampitti maintained that it should focus solely on the property that was involved in the permit application.[296] The court declared that such factors as the degree of contiguity, dates of acquisition, whether the parcel had been treated as a single unit, and whether the protected lands would enhance the value of the remaining property were all relevant to this issue.[297] The court then concluded that the eastern and western parts of Diamond Beach were "inextricably linked in terms of purchase and financing" since Ciampitti purchased the eastern portion solely in order to acquire and pay for the western portion of the property.[298] Since the upland portion of Ciampitti's property was still worth $14 million, the court concluded that the economic impact of the permit denial was not serious enough to constitute a taking.[299]

The court also ruled that the permit denial did not interfere with Ciampitti's reasonable investment-backed expectations. The court noted that Ciampitti was well aware of the difficulties of developing in wetland areas and had carefully avoided purchasing state-designated wetland areas when he first began to acquire property in the area.[300] Apparently, the on-

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291. *Id.* at 315-16. Ciampitti applied for a permit only after the Corps obtained a preliminary injunction to prevent him from continuing any further unauthorized dredge and fill operations on his property. *See* United States v. Ciampitti, 583 F. Supp. 483, 499 (D.N.J. 1984).

292. *Id.* at 316.

293. *Id.* at 318.

294. *Id.* at 317.

295. *Id.*

296. *Id.* at 318-19.

297. *Id.* at 318.

298. *Id.* at 319.

299. *Id.* at 320.

300. *Id.* at 321.

ly reason Ciampitti purchased wetland property was his mistaken belief that riparian grants from the state to some of his predecessors in title would immunize him from state and federal regulation.[301] The court, however, declared that Ciampitti's reliance on these riparian grants was completely unreasonable and that he had ample warning prior to his purchase of the property that state and federal officials might deny permission to develop the wetlands portion of his property.[302] Consequently, the court rejected Ciampitti's investment-backed expectations argument.[303]

Not all takings claims, however, were unsuccessful prior to the *Lucas* decision, as *1902 Atlantic Limited v. Hudson*[304] and *Formanek v. United States*[305] illustrate. *1902 Atlantic Limited* was the first case in which a federal court ruled that denial of a permit by the Corps, if allowed to stand, would constitute a taking.[306] The landowner in 1981 for a section 404 permit to fill an borrow pit in the City of Chesapeake, Virginia.[307] The borrow pit, which consisted of eleven acres of sand and mud flat bottom area, contained less than three quarters of an acre of wetlands.[308] The borrow pit was triangular in shape and was completely contained within the embankments of three manmade structures.[309] An industrial fertilizer plant, an oil refinery, a coal fired power station, and an automobile junkyard were located in the immediate area.[310] The landowner intended to convert the borrow pit to upland so that it could be used as an industrial site.[311]

The landowner applied to the Corps for a dredge and fill, but the Corps denied the application because 32,000 square feet of wetland would be destroyed, the creation of an industrial site was not a water-dependent activity, and alternative upland sites were available for the project.[312] The landowner

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301. *Id.* at 321.
302. *Id.*
303. *Id.* at 321-22.
304. 574 F. Supp. 1381 (E.D. Va. 1983).
305. 26 Cl. Ct. 332 (1992).
306. *See* Seltzer & Steinberg, *supra* note 254, at 195.
307. *Atlantic Limited*, 574 F. Supp. at 1384.
308. *Id.* The borrow pit was created in 1954 when the site was excavated to provide fill for the creation of a bypass. Later, someone dug a ditch from Mill Dam Creek to the pit, thereby causing it to be periodically inundated by tidal flow from the creek. As a result of this inundation, saltwater wetland vegetation grew up along the fringe of the pit on two sides. *Id.*
309. *Id.* The northwestern side of the borrow pit was bordered by a railroad embankment. Military Highway, a four-lane limited-access divided highway, enclosed the south side of the pit, and the northeast side of the pit was located next to Interstate Highway 464. The site could only be entered from Military Highway. *Id.*
310. *Id.*
311. *Id.* at 1385.
312. *Id.*

then brought suit, contending that the Corps had acted arbitrarily and capriciously, abused its discretion, and otherwise failed to act in accordance with law in violation of the Administrative Procedure Act.[313] The landowner also claimed that the Corps' denial of its permit application destroyed all of the property's value, thereby causing a taking.[314]

The landowner conceded that the wetlands in the borrow pit were subject to the Corps' jurisdiction under section 404 of the Clean Water Act,[315] but alleged that the Corps had placed excessive weight on the water dependency requirement and had failed to engage in any meaningful balancing of other costs and benefits when it reviewed the permit application.[316] The court agreed with this allegation and concluded that the Corps' conduct was arbitrary and capricious.[317]

The landowner also argued that the Corps' action amounted to a regulatory taking of its property.[318] In its discussion of the taking issue, the court relied primarily on the *Agins* formula, with particular emphasis on the "no viable economic use" factor.[319] The court determined that the borrow pit in its present condition was commercially worthless.[320] In the court's view, the denial of all viable economic use of the landowner's property was sufficient to constitute a taking without regard to any other consideration.[321] However, the court conceded that the landowner must bring suit in the Court of Claims under the Tucker Act if it desired to seek compensation from the federal government.[322]

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313. *Id.* at 1384-85.

314. *Id.* at 1384.

315. *Id.* at 1393. However, the landowner successfully argued that waters within the borrow pit were not "navigable waters" and thus subject to the Corps' jurisdiction under section 10 of the Rivers and Harbors Act even though they were subject to the ebb and flow of the tide. *Id.* at 1393-96.

316. *Id.* at 1397.

317. *Id.* at 1403-04. The court remanded the case to the Corps for reconsideration. The Corps, however, again refused to grant a permit. After further litigation, the Corps finally issued a permit in 1986. *See* 1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575, 577 (1992).

318. *Atlantic Limited*, 574 F. Supp. at 1404.

319. *Id.*

320. *Id.* at 1405.

321. *Id.* The court also rejected the Corps' claim that no compensation was required because the waters of the borrow pit were subject to the federal government's navigation servitude. *Id.* at 1405-06. The navigation servitude doctrine provides that the federal government does not have to compensate landowners whose property is injured when it exercises its power over navigable waters under the Commerce Clause. *See, e.g.*, United States v. Grande River Dam Auth., 363 U.S. 229, 233 (1960) (federal government not liable to owner of fast lands for water power rights); United States v. Willow River Power Co., 350 U.S. 499, 509-10 (1945) (federal government not required to pay owner of hydroelectric dam for reduction in water flow caused by construction of flood control project).

322. 574 F. Supp. at 1406-07. The landowner chose to seek a permit from the Corps rather than pursuing its claim for compensation in the Court of Claims. However, the landowner later argued unsuccessfully that the delay in issuing the permit constituted a temporary taking. *1902 Atlantic Ltd.*, 26 Cl. Ct. at 582.

The plaintiff in *Formanek v. United States*[323] chose this latter alternative after being denied a dredge and fill permit by the Corps. The landowner in *Formanek* owned an undivided interest in a tract of land in the Minneapolis-St. Paul metropolitan area.[324] Twelve acres were upland, while the remaining ninety-nine acres were wetlands.[325] Forty-five acres of Formanek's wetland property were located in the Savage Fen Wetland Complex, a rare wetland plant community.[326] Although the Formanek's property qualified for a nationwide general permit, the Corps ruled that landowners whose property lay within the Fen must apply for an individual permit if they wished to dredge or fill.[327] Formanek applied for an individual permit in 1985 to place fill material on the property to build an access road, but his application was promptly denied.[328] Rather than appealing the permit denial, the plaintiff brought suit against the government in the claims court.

The court in *Formanek* focused almost entirely on the economic impact of the permit denial on the plaintiff's property.[329] As part of its analysis, the court declared that it must compare the value of the property before and after the permit denial.[330] Formanek claimed that the property was worth $1.2 million if used for an industrial site, based on its location, access to highways, and existing zoning.[331] The government contended the Corps' action did not lower the value of Formanek's property because the state Department of Natural Resources would never grant the necessary permits.[332] The court rejected this contention, however, pointing out that state authorities had not yet made any attempt to assert jurisdiction over the plaintiff's land.[333] The court found that the property was suitable for use as an industrial site and that there was no market for the property unless it could be filled.[334] The court estimated the value of the property prior to the permit denial at about $934,000 and its value after the permit denial at essentially zero.[335] According to the court, a reduction in value

323. 26 Cl. Ct. 332 (1992).
324. *Id.* at 333.
325. *Id.*
326. *Id.*
327. *Id.* at 334.
328. *Id.*
329. *Id.* at 335. The court also mentioned interference with investment-backed expectations as a consideration, but did only briefly discussed this issue in its opinion. *Id.* at 335, 341.
330. *Id.* at 335.
331. *Id.*
332. *Id.* at 336.
333. *Id.* at 336-37.
334. *Id.* at 339-40.
335. *Id.* at 340.

of this magnitude was sufficient to constitute a taking.[336] Accordingly, the court awarded the landowner the full amount of the property's estimated value prior to the permit denial.[337]

IV. POST-*LUCAS* TAKINGS CASES

In *Lucas v. South Carolina Coastal Council*,[338] the Supreme Court made it clear that complete deprivation of economic use was sufficient, standing alone, to constitute a regulatory taking.[339] During the short period that has elapsed since *Lucas* was decided, the Court's "total takings" analysis has had a significant impact in several decisions involving wetland protection regulations.

A. The Lucas *Decision*

In 1986, the plaintiff in *Lucas* purchased two unimproved beachfront lots on the Isle of Palms near Charleston, South Carolina for $975,000.[340] All of the surrounding landowners had constructed single-family homes on their property and Lucas intended to do the same. At the time Lucas purchased the property, neither lot was subject to regulation under the existing Coastal Management Act.[341] However, because the shoreline along this property had fluctuated significantly over the past forty years,[342] the statute required that a construction setback line be established some distance landward of the Lucas property.[343] Because of the location of the construction setback line, the

336. *Id.* at 340-41.

337. *Id.* at 341. The court also ordered the plaintiff to convey the property to the United States upon payment of the judgment. *Id.*

338. 112 S. Ct. 2886 (1992).

339. *Id.* at 2893 ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.").

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

341. *Id.* at 2989-90. South Carolina's original shoreline regulation statute, enacted in 1977, required landowners to obtain permits from the Coastal Council before building homes or other structures in "critical areas," which included beaches and primary sand dunes. S.C. CODE ANN. § 48-39-10(J) (1987). Consequently, the 1977 Act gave the Coastal Council no control over residential development landward of existing beaches. In 1987, a Blue Ribbon Committee established by the Coastal Council to study erosion control, recommended a setback program that would move development sufficiently inland that residential structures would not be threatened by the natural erosion cycle. *See* Newman J. Smith, *Analysis of the Regulation of Beachfront Development in South Carolina*, 42 S.C. L. REV. 717, 720 (1991). This suggestion led to the enactment of the 1988 Beachfront Management Act. 1988 S.C. Acts 607, codified at S.C. CODE ANN. §§ 48-39-10, 48-39-130, and 48-39-270 to 48-39-360 (Law. Co-op. Supp. 1990).

342. John R. Nolon, *Private Property Investment,* Lucas *and the Fairness Doctrine*, 10 PACE ENVTL. L. REV. 43, 49 (1992).

343. The 1988 Act provided for the establishment of a "baselines" in coastal regions. The Act distinguished between standard erosion zones and inlet erosion zones. A standard erosion zone was defined as a

statute effectively prohibited Lucas from building a structure on either lot except for a small deck or walkway.[344] Lucas brought suit against the state, alleging that the statutory restriction constituted a taking of his property without just compensation. The trial court found in his favor and awarded Lucas more than $1.2 million.[345]

This decision was reversed on appeal by the South Carolina Supreme Court.[346] Although the court acknowledged that economic impact was as a relevant factor,[347] it chose to rely on the noxious use theory which upholds regulation without compensation when the state acts in order to prevent a serious harm to the public.[348] The South Carolina court observed that the landowner had not challenged the Beachfront Management Act's legislative findings that new construction causes serious public harm.[349] For this reason, the court concluded that Lucas had implicitly conceded that the proposed use would be harmful and thus fall within the noxious use no compensation rule.[350] Accordingly, the court ruled that

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segment of shoreline that was subject to the same set of coastal processes, had a fairly constant range of profiles and sediment characteristics, and was not influenced directly by tidal inlets or associated inlet shoals. S.C. CODE ANN. § 48-39-270(6) (Law. Co-op. Supp. 1993). The Act defined an inlet erosion zone as a segment of shoreline along or adjacent to a tidal inlet that was directly influenced by the inlet and the inlet's associated shoals. S.C. CODE ANN. § 48-39-270(7) (Law. Co-op. Supp. 1993). The property in *Lucas* was located in an inlet erosion zone. *See Lucas*, 112 S. Ct. at 2889 n.1.

Ordinarily, the baseline in the standard erosion zone would be located along the crest of the primary oceanfront sand dune in that area. However, if the shoreline was altered, either naturally or because of artificial structures, the baseline was to be placed where the crest of the primary oceanfront sand dunes would have been if the shoreline had not been altered. S.C. CODE ANN. § 48-39-280(A)(1) (Law. Co-op. Supp. 1993). Where inlets had not been stabilized by jetties, groins, or other structures, the baseline was to be located at the most landward point of any erosion in the last forty years unless the best available scientific and historical data indicated that the shoreline was unlikely to return to its former location. S.C. CODE ANN. § 48-39-280(A)(2) (Law. Co-op. Supp. 1993).

Once a baseline was established in a coastal area, the 1988 Act directed the Coastal Council to establish a construction setback line landward of the baseline. This setback line would be either forty times the annual erosion rate or twenty feet, which ever was greater. S.C. CODE ANN. § 48-39-280(B) (Law. Co-op. Supp. 1993). The Act generally prohibited the construction of habitable structures seaward of the setback line. S.C. CODE ANN. § 48-39-300 (Law. Co-op. Supp. 1990). Normal repairs were allowed, but a structure that had been completely destroyed could only be replaced if certain conditions were met. S.C. CODE ANN. § 48-39-290(B)(1)(b)(iv) (Law. Co-op. Supp. 1993). Furthermore, no damaged structure could be reconstructed seaward of the baseline. S.C. CODE ANN. § 48-39-290(B)(1)(b)(iv) (Law. Co-op. Supp. 1993). Finally, new erosion control structures were banned outright by the Act and replacement of damaged structures was severely restricted. S.C. CODE ANN. § 48-39-290(B)(2) (Law. Co-op. Supp. 1993).

344. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 896 (S.C. 1991).

345. *Id.*

346. *Id.* at 902.

347. *Id.* at 899.

348. *Id.*

349. S.C. CODE ANN. § 48-39-250 (4) (Law. Co-op. Supp. 1990) (indicating development sited too close to beach/dune system jeopardizes the stability of this system, accelerates erosion, and endangers adjacent property).

350. *Lucas*, 404 S.E.2d at 900.

Lucas was not entitled to compensation even though the regulation deprived him of all economically viable use of his property.[351]

The South Carolina Supreme Court's decision, however, was reversed on appeal by the United States Supreme Court.[352] Writing for the majority, Justice Scalia set forth a new "categorical rule" to govern regulatory takings.[353] The Court identified two types of regulatory action where balancing was not permitted: the first involved physical invasions or appropriations of private property,[354] while the second consisted of cases in which a regulation denied the landowner all economically beneficial or productive use of the land.[355] The Court reasoned that a regulation that allowed no economically beneficial use was like a physical appropriation and, therefore, should be treated similarly.[356] In *Lucas*, since the state had conceded that the regulation completely destroyed the economic value of the beachfront lots, the Court concluded that compensation was required under the second categorical rule.[357]

Finally, the *Lucas* Court declared that when the government deprived a landowner of all economically beneficial use, it could avoid liability only by showing that the interest destroyed was not part of the landowner's title.[358] In other words, any limitations on land use that relieved the government of the duty to compensate "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."[359] The Court warned that common-law principles would seldom, if ever, prevent all construction or improvement on a landowner's property.[360] In addition, the Court declared that the state could not simply cite legislative findings

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351. *Id.* at 902.

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

353. Justice Scalia was joined by Chief Justice Rehnquist, Justice White, Justice O'Connor, and Justice Thomas. Justice Kennedy concurred in the result, but preferred to decide the case by using an investment-backed expectations rationale. Justice Blackmun and Justice Stevens each wrote a dissenting opinion and Justice Souter issued a separate statement on the question of ripeness.

354. *Lucas*, 112 S. Ct. at 2893 ("The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property.").

355. *Id.* ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.").

356. *Id.* at 2894 ("[T]otal deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation.").

357. *Id.* at 2893-94.

358. *Id.* at 2899 ("Where the State seeks to sustain regulation that deprives land if all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."). Justice Stevens labeled this as the "nuisance exception." *Id.* at 2920.

359. *Id.* at 2900.

360. *Id.* at 2901.

or make conclusionary applications of common-law maxims in order to sustain the regulation.[361] In effect, the state would have to show that construction of a house on the beachfront property would constitute a common-law nuisance.[362] The Court then remanded the case back to the South Carolina court to determine whether the proposed construction of residential structures seaward of the setback line could be prohibited under background principles of state nuisance or property law.[363] On remand, the South Carolina Supreme Court concluded that no state common-law nuisance or property doctrines justified a regulatory taking of the Lucas property without compensation.[364]

Thus, under "total taking" inquiry proposed by *Lucas*, the landowner makes out a prima facie case for compensation if the court finds that the regulation deprives the landowner of all economically beneficial use of the land. To avoid liability, the government must prove that the restriction imposed on the landowner by the regulation merely replicates a restriction that already existed under background principles of state property or nuisance law.

B. State Takings Cases

At the present time, only a few state courts have considered the effect of the *Lucas* decision on wetland takings claims. One recent case, *Lopes v. City of Peabody*,[365] discussed *Lucas* in general terms, but remanded the case to a lower court to resolve the takings issue involved.[366] The property in question, a quarter-acre lot located in Peabody, Massachusetts, was bounded on the south by a railroad right of way, on the east by a public road, and on the west and north by Devil's Dishful Pond.[367] Virtually the entire lot had been placed within a wetlands conservancy district under the provisions of a city zoning ordinance because its elevation was less than 88.5 feet.[368] The landowner alleged, without contradic-

361. *Id.*

362. *Id.* at 2901-02.

363. *Id.* ("Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.").

364. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).

365. 629 N.E.2d 1312 (Mass. 1994).

366. *See also* Zerbetz v. Municipality of Anchorage, 856 P.2d 777 (Alaska 1993), which held that the mere designation of the landowner's property as "conservation wetlands" did not constitute a regulatory taking, cited the *Lucas* case in a footnote, but did not attempt to apply it to the facts. *Id.* at 782 n.5.

367. *Lopes*, 629 N.E.2d at 1313.

368. *Id.*

tion, that the ordinance effectively prohibited him from constructing a residence on the property.[369] Nevertheless, both the Land Court and the Appeals Court upheld the validity of the ordinance.[370] After the Supreme Judicial Court of Massachusetts denied further review,[371] Lopes petitioned the United States Supreme Court for a writ of certiorari. The Court granted the writ, but remanded the case to the appeals court for further consideration in light of the *Lucas* decision.[372] At this point, the Supreme Judicial Court undertook to review the *Lopes* case.

According to the court, under *Lucas*, a regulatory taking would occur if the ordinance stripped the land of all economically beneficial use unless the restriction was consistent with established principles of nuisance or property law.[373] The court the declared that the case should be remanded to the Land Court to determine if the ordinance's 88.5-foot minimum elevation was higher than necessary to achieve legitimate governmental objectives.[374] However, even if the Land Court found that the ordinance advanced legitimate state interests, it would be required under *Lucas* to invalidate the ordinance, as applied to the Lopes property, if it concluded that the restriction on development deprived the landowner of all economically beneficial use.[375]

In *Mock v. Department of Environmental Resources*,[376] a Pennsylvania court held that landowners who were denied a permit to dredge and fill failed to establish a takings claim under the *Lucas* rationale.[377] The land in question consisted of 5.2 acres located along a highway in Bucks County, Pennsylvania.[378] The Mocks purchased the property, which contained 3.94 acres of wetlands, in 1963.[379] In 1988, they applied to the Department of Environmental Resources for a permit to fill .87 acres of wetlands in order to construct an auto repair shop on the lot.[380] The Department, however, refused to grant the permit because it felt that the proposed development would be detrimental to the environment.[381] On ap-

369. *Id.* at 1313-14.
370. Lopes v. City of Peabody, 595 N.E.2d 812 (Mass. Ct. App. 1992).
371. Lopes v. City of Peabody, 600 N.E.2d 171 (Mass. 1992).
372. *See* Lopes v. City of Peabody, 113 S. Ct. 1574 (1993).
373. *Lopes*, 629 N.E.2d at 1315-16. However, the court also pointed out that Lopes did not make a claim for compensation, but rather challenged the validity of the regulation. *Id.* at 1314.
374. *Id.* at 1316.
375. *Id.*
376. 623 A.2d 940 (Pa. 1993).
377. *Id.* at 941.
378. *Id.* at 942.
379. *Id.*
380. *Id.*
381. *Id.* at 942-43.

peal, the landowners claimed that *Lucas* was applicable because their property was essentially worthless in its present condition.[382] While the court agreed with the plaintiffs' allegation, it determined that *Lucas* was not controlling. Unlike the situation in *Lucas*, where the statute prohibited all construction seaward of the setback line, the regulatory agency in *Mock* did not rule out the possibility of a permit if the landowners submitted a new proposal.[383]

C. Federal Takings Cases

In three recent cases, federal courts have relied on *Lucas*, at least to some extent, to resolve takings claims involving wetlands.[384] The first case, *Tabb Lakes, Ltd. v. United States*[385] involved a temporary takings claim. The property owner in *Tabb Lakes* intended to create a residential subdivision on a 167-acre tract of land in York County, Virginia.[386] Construction work on the project began in 1984. In 1986, the U.S. Army Corps of Engineers discovered that some of the property contained wetlands and ordered the plaintiff to apply for a section 404 permit.[387] After a series of negotiations with the Corps, the plaintiff withdrew its permit application and obtained a declaratory judgment in federal court that the property was not subject to the Corps' jurisdiction.[388] Later, the plaintiff brought suit in the claims court, seeking damages for the alleged temporary taking of its property between October, 1986, when the Corps issued a cease and desist order against further construction activities on the land, and December, 1989, the date on which the court of appeal's decision in favor of the plaintiff became final.[389] The claims court discussed the *Lucas* case and concluded that it authorized compensation for regulatory takings even though the landowner's loss was not sufficient to satisfy the requirements of the categorical rule.[390] However, the court concluded that no taking had occurred because the plaintiff continued to sell upland lots during the period involved and because the delay caused by the Corps' actions was not extraordinary.[391]

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382. *Id.* at 946.

383. *Id.* at 947.

384. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994); Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994); Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993).

385. 10 F.3d 796 (Fed. Cir. 1993).

386. *Id.* at 798.

387. *Id.*

388. Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726, 729 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

389. Tabb Lakes, Inc. v. United States, 26 Cl. Ct. 1334 (1992).

390. *Id.* at 1350-51.

391. *Id.* at 1357.

This decision was affirmed by the Federal Circuit Court of Appeals.[392] Tabb Lakes argued that a taking existed at the time that the Corps issued its cease and desist order, and that sales and other events after that date could have no bearing on whether a taking had occurred, but were only relevant to the issue of damages or to the question of when the taking ended.[393] While agreeing with the plaintiff's underlying theory, the court declared that it must determine whether the cease and desist order actually interfered with the plaintiff's property sufficiently to constitute a taking.[394] The court observed that the cease and desist order did not prevent the plaintiff from obtaining permission from the Corps to develop his property at some future time.[395] Furthermore, the court refused to limit itself to a consideration of the order's economic effect on lots that were subjected to a ban on development.[396] Instead, the court relied on the Supreme Court's "parcel as a whole" analysis[397] to look at the entire development. This led the court to conclude that the plaintiff's land did not lose all viable economic use during the period of Tabb Lakes' dispute with the Corps because the plaintiff continued to develop and sell lots from other portions of its property during that period.[398] Finally, the court of appeals rejected the plaintiff's claim that a temporary taking occurred as a result of delays in the permitting process.[399]

In *Florida Rock Industries v. United States*[400] the Federal Circuit Court of Appeals considered the economic effect of a permit denial on the value of the plaintiff's wetland property. In 1972, the plaintiff purchased a 1,560-acre wetland parcel in Dade County, Florida.[401] Florida Rock intended to mine the underlying limestone, a process that would have destroyed the wetlands.[402] The purchase price for the entire tract was $2,964,000 or about $1900 per acre.[403] In 1979, Florida Rock applied to the Corps for a permit to conduct mining operations on 98 acres of its property.[404] However, the Corps denied the application. The court of

392. Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993).

393. *Id.* at 800.

394. *Id.*

395. *Id.* at 800-01.

396. *Id.* at 802.

397. *Id. See* Concrete Pipe & Prods., Inc. v. Const. Laborers Pension Trust, 113 S. Ct. 2264, 2290 (1993); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978).

398. *Tabb Lakes*, 10 F.3d at 802.

399. *Id.* at 802-03.

400. 18 F.3d 1560 (Fed. Cir. 1994).

401. *Id.* at 1562.

402. *Id.*

403. *Id.*

404. *Id.* Florida Rock initially began mining on its property without obtaining the requisite permit. The Corps discovered this and issued a cease and desist order in 1978. After restoring the

appeals concluded that "the proposed mining would cause irremediable loss of an ecologically valuable wetland parcel and would create undesirable water turbidity."[405] At this point, Florida Rock filed suit against the United States, alleging that the permit denial amounted to a regulatory taking of its property.[406]

The claims court found that rock mining was the only viable economic use available to the landowner.[407] This use, however, was foreclosed as a result of the Corps' denial of the necessary permit.[408] Therefore, the court reasoned, the government's action had caused Florida Rock's property to become virtually worthless.[409] The court also firmly rejected the government's contention that "compensation need never be paid where an activity is prohibited that has been 'found by Congress to be detrimental to the public welfare.'"[410] In particular, the court disagreed with the proposition that plaintiff's proposed discharge constituted pollution merely because all discharges were defined as such by section 404. Instead, the court insisted that the government must prove that Florida Rock's proposed mining operations would actually cause a significant amount of pollution.[411] The government offered evidence that limestone mining would contaminate the Biscayne Aquifer, but the court remained unpersuaded.[412] The government also claimed that plaintiff's proposed mining would destroy habitat and food chain resources that were dependent upon the wetland.[413] According to the government, the plaintiff had no right to deprive the public of these values by destroying the wetland environment; consequently, the government should not have to pay compensation when it acted to preserve these existing amenities for the pub-

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land as best it could, Florida Rock applied for a permit to mine its entire tract. The Corps, however, informed Florida Rock that it would only issue permits for parcels no larger than that necessary to permit three years of mining. In this case, the Corps estimated that a 98-acre parcel would be sufficient and Florida Rock amended its permit accordingly. *Id.* at 1562-63.

405. *Id.* at 1563.

406. Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160, 164 (1985).

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.* at 169.

411. *Id.* at 171.

412. *Id.* at 172-75. The government claimed that the peat or muck layer, located immediately above the limestone rock at the bottom of the marsh, filtered out chemicals, heavy metals and pesticides that would otherwise enter the aquifer. According to the government, mining operations would remove this peat layer and thereby expose the aquifer to contamination from these substances. *Id.* at 172. The government also contended that limestone mining would create deep water pools which would facilitate the release of heavy metals into the aquifer. *Id.* at 173. Finally, the government argued that rock mining caused contamination of the aquifer by allowing pollutants from surface sources direct access to the aquifer. *Id.* at 174.

413. *Id.* at 175-76.

lic.[414] The claims court, however, disagreed[415] and concluded that a regulatory taking had occurred when the Corps denied Florida Rock's permit application in 1980.[416] In a subsequent proceeding, the court awarded Florida Rock $1,029,000 for loss of the 98 acres.[417]

The claims court's decision, however, was vacated by the Federal Circuit Court of Appeals.[418] The court declared that neither Florida Rock nor the claims court could dispute the Corps' finding that the proposed mining activities would cause water pollution in a proceeding under the Tucker Act since the Corps would have no jurisdiction over the plaintiff's property under section 404 unless its activities produced at least some pollution.[419] The court of appeals then addressed the takings claim. It stated that the three-factor test set forth in *Penn Central* and *Connolly* was the most appropriate approach to apply in regulatory takings cases.[420]

Like the claims court, the court of appeals focused primarily on the permit denial's economic impact on Florida Rock's property. However, the court of appeals disagreed with the lower court's method of calculating the residual value of Florida Rock's property. The claims court had assumed that the property was worthless unless it could be used for mining because it was too far away from urban areas to be suitable for residential use at the present time.[421] The court of appeals, on the other hand, declared that the residual value of Florida Rock's property was not limited to the land's value for immediate use, but must be based on fair market value, a concept that would take into account the present value of potential future uses of the property.[422] Fair market value was determined by what a "willing buyer" would pay a willing seller for the property at the time the permit was denied.[423] According to the court, Florida Rock's property might still have considerable market value to land speculators

414. *Id.* at 176.

415. *Id.* at 176-77.

416. *Id.* at 179.

417. Florida Rock Indus. v. United States, 791 F.2d 893, 897 (Fed. Cir. 1986). The award was conditioned upon Florida Rock's agreeing to convey the 98 acres in question to the federal government. *Id.*

418. *See* Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986).

419. *Id.* at 899. According to the court, the Tucker Act only authorized compensation for valid governmental conduct. If the Corps had no jurisdiction because Florida Rock's activities would not cause pollution, the claims court would have no jurisdiction over the matter and the plaintiff would be required to challenge the Corps' action in a federal district court. *Id.* at 899.

420. *Id.* at 900-01. The court also noted that the government had abandoned its earlier claim that the "noxious use" test should be applied. *Id.* at 900.

421. *Florida Rock*, 8 Cl. Ct. at 164.

422. *Florida Rock*, 791 F.2d at 903.

423. The court conceded, however, that a "willing buyer" must be one who is correctly informed about the physical character of the land, as well as legal restrictions on its use. *Id.* at 902.

who were prepared to gamble that they could obtain permits from the Corps at some future date to develop the property for commercial or residential purposes.[424]

Finally, the court of appeals rejected the government's contention that there was no taking because only 98 acres of the original 1560-acre tract were affected by the permit denial. The court acknowledged that this argument had prevailed in *Deltona* and *Jentgen*, but observed that in those cases the Corps had allowed the remaining property to be developed, while in this case, the Corps' denial of Florida Rock's present application strongly indicated that it would prohibit the landowner from mining on any of its property.[425] The case was remanded to the claims court to determine the fair market value of Florida Rock's property immediately after the permit denial.[426]

On remand, the claims court reaffirmed its earlier determination that Florida Rock's property was worth $10,500 an acre prior to denial of its permit application.[427] Witnesses for the government, relying on sales of comparable property in the area, testified that Florida Rock's land had a fair market value for investment purposes of $4000 an acre even after denial of the permit.[428] Plaintiff's experts, on the other hand, claimed that there was no market for such property among knowledgeable investors, that its highest and best use after the permit denial was as a government-owned site for "future recreational/water management purposes," and that its fair market value was no more than $500 per acre.[429] The court agreed with the plaintiff's approach and declared that a valuation based on evidence of comparable sales was not relevant unless the government could show that the buyers of such property were knowledgeable about the existing regulatory environment.[430] Accepting the plaintiff's valuation at face value, the court concluded that a diminution in value from $10,500 to $500 per acre was sufficient to constitute a taking.[431]

Once again, the government appealed.[432] Since *Lucas* had been decided in the interim, the Court of Appeals for the Federal Circuit exam-

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424. *Id.* at 902-03.
425. *Id.* at 904.
426. *Id.* at 905.
427. *Florida Rock*, 21 Cl. Ct. at 169.
428. *Id.* at 172.
429. *Id.*
430. *Id.* at 174.
431. *Id.* at 175-76.
432. Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994). Both the opinion in this case, and the most recent court of appeals opinion in *Loveladies Harbor*, were written by Judge S. Jay Plager, a former law professor, and a well-known authority on water law.

ined the Supreme Court opinion to see if it controlled the disposition of the *Florida Rock* case. First, the court of appeals disagreed with the claims court's decision to exclude evidence based on comparable sales unless it could be affirmatively shown that the buyers were fully informed about the regulatory situation. The court declared that detailed knowledge of existing regulations was only relevant to buyers who were intending to make some immediate use of the property. Market prices, however, might also be set by speculators who were interested in future development and, therefore, were not concerned about current restrictions on the property.[433] Therefore, the court reasoned, it was improper for the lower court to ignore price data generated by the vigorous speculative market that in fact existed for land like that owned by Florida Rock.[434] Since the claims court had not correctly calculated the residual value of Florida Rock's property, its conclusion that the Corps' action was a "categorical" taking of all economic use of the land could not be upheld.[435] Once again, the court remanded the case to the claims court to determine, under the proper valuation formula, if *Lucas's* categorical taking rule was applicable to Florida Rock's property.[436]

The court of appeals went on to discuss how the claims court should proceed if it concluded that the categorical rule did not apply—that is, if the permit denial merely amounted to a "partial" rather than a "total" deprivation of the property's economic value.[437] The court acknowledged that the *Lucas* decision did not provide a clear answer to this question.[438] Nevertheless, the court concluded that compensation for partial takings was justified in appropriate cases.[439] The problem with partial takings, according to the court, was that there was no bright line rule to distinguish compensable partial takings from noncompensable diminutions in value.[440] Consequently, the only way to decide such cases was to balance competing private and governmental interests.[441]

The court of appeals mentioned a number of factors that should be considered in a partial takings case. The first was reciprocity of advantage,[442] a principle that did not seem particularly applicable to the situation in *Florida*

433. *Id.* at 1565-66.
434. *Id.* at 1567.
435. *Id.*
436. *Id.* at 1568.
437. *Id.*
438. *Id.*
439. *Id.* at 1570.
440. *Id.*
441. *Id.*
442. *Id.* at 1570-71.

Rock. The character and function of the regulatory imposition was another relevant consideration. The court declared that government should not shift the burden of achieving a public good on to a few people, nor should it act in a way that frustrated reasonable investment-backed expectations.[443] Finally, the court stated that the lower court must consider any loss of economic use to the property as well as any compensating benefits to the property owner.[444] This approach, of course, is similar to the balancing test that the Supreme Court set forth in *Penn Central* and *Connolly*.

Loveladies Harbor, Inc. v. United States[445] involved a 12.5-acre parcel located in Ocean County, New Jersey. The property consisted of one acre of filled land and 11.5 acres of wetlands.[446] Loveladies applied to the Corps for a permit in 1981;[447] however, its application was denied in 1982.[448] Loveladies challenged the permit denial in federal court, but was unsuccessful.[449] Loveladies then proceeded with an action, filed earlier in the claims court, seeking compensation for the permit denial.[450] The principal issue in the case was whether the Corps' action deprived the plaintiff of all economically viable use of its land.[451] The court rejected the proposition that the entire 250 acres should be considered in determining the economic effect of the permit denial on the plaintiff's property and limited its inquiry to the land that was the subject of the permit application.[452] Furthermore, the court declared that while the regulation promoted the public welfare, it did not, when balanced against the interests of the plaintiff, clearly advance a valid governmental interest.[453]

The claims court devoted most of its opinion to a comparison of the value of the plaintiff's property before and after the permit deni-

443. *Id.* at 1571.

444. *Id.*

445. 28 F.3d 1171 (Fed. Cir. 1994).

446. *Id.* at 1173-74. The 12.5-acre parcel was part of a 250-acre tract that Loveladies acquired in 1958. Loveladies developed 199 acres of this property prior the enactment of the Clean Water Act in 1972. *Id.* at 1174. Loveladies originally intended to develop the remaining 51 acres. However, after unsuccessful litigation and lengthy negotiations with the New Jersey Department of Environmental Protection, Loveladies agreed to limit its development proposal to the 12.5 acre tract in question. *See* Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 383-84 (1988).

447. On two previous occasions, Loveladies had applied to the Corps for a permit. However, the Corps rejected these applications because Loveladies had not obtained the necessary permits from the Department of Environmental Protection. *Loveladies Harbor*, 15 Cl. Ct. at 384.

448. *Loveladies Harbor*, 28 F.3d at 1174.

449. *Id.*

450. Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381 (1988).

451. Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 155 (1990).

452. *Loveladies Harbor*, 15 Cl. Ct. at 393.

453. *Id.* at 388-90. *See also Loveladies Harbor*, 21 Cl. Ct. at 160.

al.[454] The court agreed with the plaintiff's contention that the highest and best use of its property was as the site for a 40-lot residential development.[455] Furthermore, the court agreed that the property's fair market value for this purpose was $2,658,000.[456] Conversely, the court found that the property had little market value after the permit denial.[457] The court accepted the plaintiff's allegation that there was no chance that the Corps would grant a permit if Loveladies submitted a revised proposal at some future time.[458] The court also agreed with the plaintiff's claim that as a result of the permit denial, the land could now only be used for conservation or recreational purposes.[459] The court found that the property's market value under these circumstances was no more than $1000 an acre.[460] Finally, the court concluded that the diminution in value, from $2,658,000 to $12,500, was sufficient to qualify as a taking.[461] Accordingly, the court awarded the plaintiff $2,658,000 plus interest from the date of the taking.[462]

The Federal Circuit Court of Appeals affirmed the decision of the claims court.[463] The court declared that, after *Lucas*, a regulatory taking occurs if: (1) there is a denial of economically viable use of the property as a result of the regulation; (2) the property owner has distinct investment-backed expectations; and (3) the interest involved is not within the power of the state to regulate under common-law nuisance doctrines.[464] Since there was no doubt that the investment-backed expectation requirement was met, the court focused on the remaining two criteria.[465]

In its discussion of the first criterion, the court acknowledged that under the categorical rule announced in *Lucas*, the government would be required to compensate a landowner when a regulation left the property with no economic use. However, the court also reaffirmed its holding in *Florida Rock* that compensation might be required in some cases where a regulation amounted to a partial deprivation of economically beneficial use.[466] The court then considered whether Loveladies stated a claim for a

454. *Loveladies Harbor*, 21 Cl. Ct. at 155.
455. *Id.* at 157.
456. *Id.*
457. *Id.* at 160.
458. *Id.* at 157.
459. *Id.* at 159.
460. *Id.*
461. *Id.* at 160.
462. *Id.* at 161.
463. *Loveladies Harbor*, 28 F.3d at 1183.
464. *Id.* at 1179.
465. *Id.* at 1178.
466. *Id.* at 1181.

partial or a total taking. This in turn, required the court to determine the exact property that was adversely affected by the permit denial.[467]

The government contended that the appropriate tract for the court to consider in its takings analysis was the original 250-acre parcel that Loveladies had acquired in 1958.[468] The plaintiff, on the other hand, urged the court to adopt a bright line rule to the effect that only property actually subject to the permit in question would be considered.[469] The court, however, opted for an approach that took several factors into account.[470] One of these factors was the timing of transfers in light of the developing regulatory environment.[471] In Loveladies' case, no attempt had been made to regulate the property until after 199 acres of the original 250-acre tract had been developed.[472] In addition, the court observed that another 38.5 acres had been promised to the state of New Jersey in return for permission to develop the remaining 12.5 acres.[473] Consequently, the court determined that only this remaining 12.5-acre tract could be considered in its takings analysis.[474] Finally, the court concluded that the categorical rule of *Lucas* was applicable to Loveladies' claim because the permit denial denied the property owner all economically feasible use of its land.[475]

The court then examined the third criterion—whether the "nuisance exception" of *Lucas* affected Loveladies' total takings claim. First, the court pointed out that state authorities had granted a permit to fill the 12.5 acres under consideration.[476] Next, the court noted that the government had raised the nuisance issue at trial and the claims court had found that Loveladies' proposed development would not amount to a common-law nuisance.[477] Finally, the court observed that the state did not include in its original conditions for development of the property any restrictions on the filling of the 12.5-acre tract.[478] In other words, nothing in the state's conduct indicated that it believed that filling wetlands on Loveladies' remaining property would be a nuisance.[479]

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467. *Id.* at 1180.
468. *Id.*
469. *Id.*
470. *Id.* at 1180-81. The court cited Deltona Corp. v. United States, 657 F.2d 1184 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982), and Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952 (1991), as examples of this flexible approach.
471. *Id.* at 1181.
472. *Id.*
473. *Id.*
474. *Id.*
475. *Id.* at 1182.
476. *Id.*
477. *Id.*
478. *Id.* at 1183.
479. *Id.*

V. THE EFFECT OF *LUCAS* ON REGULATORY TAKINGS CLAIMS

Some commentators maintain that the *Lucas* decision will have a substantial impact on regulatory takings claims,[480] while others believe that *Lucas* will eventually turn out to be a relatively unimportant case.[481] This portion of the Article will examine some of the issues raised by the *Lucas* decision and evaluate their possible impact on wetland-related regulatory takings claims.

A. The Categorical "Total Takings" Rule

The categorical rule requiring the government to compensate landowners when it imposes regulations that strip the land of all economically beneficial use is a major contribution to the law of regulatory takings. Even prior to *Lucas*, a number of federal courts had acknowledged the validity of takings claims when wetlands regulations destroyed the value of a landowner's property.[482] *Lucas* affirms this

480. *See, e.g.*, John J. Delaney, *Advancing Private Property Rights: The Lessons of* Lucas, 22 STETSON L. REV. 395, 408 (1993) ("There is now every reason to conclude that [*Lucas*] will afford greater protection for private property rights in future regulatory takings cases."); Robert M. Washburn, *Land Use Control, the Individual, and Society:* Lucas v. South Carolina Coastal Council, 52 MD. L. REV. 162, 164 (1993) ("In the short time since it was issued, [*Lucas*] has become a landmark addition to land use regulatory takings jurisprudence."); Paul F. Haffner, Note, *Regulatory Takings—A New Categorical Rule:* Lucas v. South Carolina Coastal Council, 61 U. CIN. L. REV. 1035, 1065 (1993) (" . . . the Court has developed a categorical rule which will likely cause a dramatic increase in the number of successful challenges to regulations of property"); Celia D. Lapidus, Note, *Constitutional Law—Takings Clause—Increasing a Landowner's Protection to Use His Land Without Interference from the Government*, 23 CUMB. L. REV. 465, 482 (1993) ("Having defined the boundaries of governmental power to regulate land use, the *Lucas* decision will have a significant impact on future cases."); Jeffrey T. Palzer, Note, *"Taking" Aim at Land Use Regulations:* Lucas v. South Carolina Coastal Council, 26 CREIGHTON L. REV. 525, 553 (1993) (" . . . the decision in *Lucas* may serve as a springboard for a new era of property rights.").

481. *See, e.g.*, Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 67 (1995) ("*Lucas*, despite its rhetoric and the Cassandra-like cries of its dissenters, may influence takings jurisprudence less than its authors intended and early critics feared."); Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411, 1427 (1993) (because environmental protection laws almost never result in total economic deprivations, categorical presumption of *Lucas* will rarely apply); Nolon, *supra* note 342, at 61 (*Lucas* does very little that is new and has limited applicability to the regulatory takings debate); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1437 (1993) ("The [*Lucas*] case is not as far reaching as its rhetoric suggests."); Sugameli, *supra* note 6, at 504 ("The [*Lucas*] decision does not . . . offer any practical encouragement to pro-takings advocates for whom it is indeed proving to be a case 'full of sound and fury signifying nothing.'").

482. *See* Formanek v. United States, 26 Cl. Ct. 332, 340-41 (1992); 1902 Atlantic Ltd. v. Hudson, 574 F. Supp. 1381, 1404 (E.D. Va. 1983).

principle and makes it clear that economic impact is not merely part of a balancing process, but is sufficient in its own right to determine the outcome of a takings claim.[483]

The argument for a *per se* or categorical approach in total taking cases is a persuasive one. The essential meaning of the Takings Clause is that the rights of individuals should not be sacrificed to promote a benefit to the general public.[484] Although wetlands are a critical environmental resource and it is highly desirable that they be protected against further destruction, the burden of achieving this objective should not fall solely on the shoulders of a few property owners. Unfortunately, governmental agencies, in their desire to protect the environment, are sometimes tempted to ignore this principle. To the extent that the categorical rule in *Lucas* prevents oppressive government interference with property rights, it is fully consistent with the spirit and intent of the Takings Clause.

Another rationale for the Takings Clause is that it promotes economic efficiency by requiring governmental entities to internalize the costs of their regulatory activities instead of shifting them to individual property owners.[485] Without some economic accountability, governments may impose restrictions on property owners that achieve little, if any, public benefit.[486] In theory, the substantive due process require-

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483. *Lucas*, 112 S.Ct. at 2892-95.

484. *See* Thomas Ross, *Modeling and Formalism in Takings Jurisprudence*, 61 NOTRE DAME L. REV. 372, 401 (1986) ("In its literal reading, it [the Takings Clause] expresses a principle which denies the legitimacy of individual sacrifice to achieve the greater good."); Glen E. Summers, Comment, *Private Property Without* Lochner: *Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837, 875-76 (1993) (stating most fundamental concern embodied in Takings Clause is that government not advance public interests at the expense of particular individuals and minorities).

485. *See* Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENTARY 259, 274-75 (1992) ("By making legislators put their money where their mouths are, the public use and compensation requirements force legislators to act responsibly in appropriating private property . . . ."); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 44 ("[T]he [Takings] Clause forces the government officials to put their money where their mouth is when they assert that certain social gains are worth the private costs that they impose."); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on* Michelman, 88 COLUM. L. REV. 1697, 1706 (1988) ("The compensation requirement can be understood as a way to force public policymakers to consider the opportunity costs of their proposed actions.").

486. This theory, known as fiscal illusion, assumes that legislatures and agencies will undervalue private property that is affected by government projects or regulations. *See* Lawrence Blume & Daniel L. Rubenfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 621 (1984) ("Fiscal illusion arises because the costs of governmental actions are generally discounted by the decisionmaking body unless they explicitly appear as a budgetary expense."); Robert I. McMurry, Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. REV. 711, 731 (1982) ("Government entities have little financial incentive to seek the most efficient means to achieve public goals when they know they will

ment imposes some restraint on inefficient government regulation.[487] However, courts traditionally accord a great deal of deference in due process cases to legislative judgments regarding regulatory means and ends.[488] Therefore, the *Lucas* Court's categorical rule is necessary to provide protection against "inefficient" regulations by making governments compensate landowners for the costs of such regulations.

Finally, the *Lucas* Court has made it clear that its categorical rule protects the commercial or developmental value of property.[489] Although landowners are not entitled to make the "highest and best" use of their land,[490] *Lucas* at least ensures that they will not be required to leave their land in a wholly unproductive state.[491] This makes sense if one assumes that an essential aspect of property ownership is "the right to make some money from it."[492] Consequently, residual uses, such as wildlife preservation or maintenance of water quality, which have no pecuniary value to private landowners, should not be considered "economically beneficial uses" for purposes of a takings analysis. This also means that *Lucas* is inconsistent with the reasoning of *Just v. Marinette County*[493] and other

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not be forced to pay for even the most excessive regulations."); *but see* Douglas T. Kendall, Note, *The Limits to Growth and the Limits to the Takings Clause*, 11 VA. ENVTL. L.J. 547, 584 (1992) (questioning whether a compensation requirement provides a check on arbitrary or unwise legislative action); Note, *Taking Back Takings: A Coasean Approach to Regulation*, 106 HARV. L. REV. 914, 923-24 (1993) (disputing the validity of the "fiscal illusion" theory).

487. A substantive due process analysis involves a consideration of two factors: (1) whether the regulation advances any valid governmental interest; and (2) whether the means chosen provide a rational method for achieving the regulation's objectives. *See* Lawton v. Steele, 152 U.S. 133, 137 (1894) ("To justify the state in thus interposing its authority in behalf of the public, it must appear, First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.").

488. *See* Humbach, *supra* note 201, at 271. ("[I]t is well accepted that substantive due process standards do not place particularly stringent limitations on the government's power to act upon or regulate economic interests."); Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 ST. JOHN'S L. REV. 433, 447 (1988) ("Until recently, governments could expect courts to defer to their judgment on the means chosen to achieve their end, as well as on their choice of end.").

489. *See* Lynda L. Butler, *Private Land Use, Changing Public Values, and Notions of Relativity*, 1992 B.Y.U. L. REV. 629, 634 ("The Supreme Court's opinion in the 1992 decision *Lucas v. South Carolina Coastal Council* provides clear evidence of the law's continuing support for a landowner's exploitive tendencies."); Sanderson & Mesmer, *supra* note 159, at 505 (1993) ("value" means developmental value to the *Lucas* Court).

490. *See* Jentgen v. United States, 657 F.2d 1210, 1213-14 (Ct. Cl. 1981); Deltona Corp. v. United States, 657 F.2d 1184, 1193 (Ct. Cl. 1981).

491. *Lucas*, 112 S. Ct. at 2895 ("We think . . . that when the owner of real property has been called upon . . . to leave his property economically idle, he has suffered a taking.").

492. *See* Rubenfeld, *supra* note 158, at 1106. *See also*, Matthew B. Smith, Note, *Defining Property in the Post-*Lucas *World*, 1994 U. ILL. L. REV. 443, 456-57 (contrasting the "self-regarding" concept of property rights with the "communitarian" view).

493. 201 N.W.2d 761 (Wis. 1972).

cases[494] that concluded that property owners have no inherent right to change the "natural" character of their land.[495] Although no court has directly addressed this issue, the holdings in *Florida Rock* and *Loveladies Harbor* strongly suggest that the government cannot restrict property to its natural condition without running afoul of the categorical rule.[496]

Although the categorical rule is a welcome addition to takings law, the *Lucas* Court left unanswered questions about how the rule would apply in actual cases. One question is whether a regulation must destroy all market value before a landowner is eligible for compensation under the categorical rule. The results in *Florida Rock* and *Loveladies Harbor* suggest a negative answer to this question. In *Florida Rock*, the claims court excluded evidence of any possible speculative value the property might have and concluded that it had a residual value of not more than $500 an acre as a government-owned recreational or water management site.[497] On appeal, the Federal Circuit Court of Appeals held that "fair market value" included speculative value if there was in fact a market for the property.[498] The court of appeals in *Florida Rock* assumed that the speculative value of the landowner's property exceeded the claims court's estimate;[499] however, it left open the question of whether a residual value of $500 an acre was low enough to constitute a total taking under the categorical rule of *Lucas*.[500] This suggests that property need not be literally worthless to come within the purview of the categorical rule.

Likewise, in *Loveladies Harbor, Inc. v. United States*,[501] the same court of appeals upheld a claims court decision in favor of a landowner whose 12.5-acre tract of property allegedly fell in value from $2,658,000 to $12,500 as a result of a permit denial.[502] Thus, in the court's view, *Lucas'* categorical rule was applicable even though the claimant's proper-

494. *Id.* at 768; *see also* Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1382 (Fla. 1981), *cert. denied sub nom.* Taylor v. Graham, 454 U.S. 1083 (1981); Sibson v. State, 336 A.2d 239, 243 (N.H. 1975); Carter v. South Carolina Coastal Council, 314 S.E.2d 327, 329 (S.C. 1984).

495. *Lucas*, 112 S. Ct. at 2894-95 ("[R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.").

496. *Florida Rock*, 21 Cl. Ct. 161, 167 (1990), *rev'd*, 18 F.3d 1560 (Fed. Cir. 1994); *Loveladies Harbor*, 21 Cl. Ct. 153, 158-59 (1990).

497. *Florida Rock*, 21 Cl Ct. at 175. *See also, Loveladies Harbor*, 21 Cl. Ct. 153, 158 (1990) (birdwatching, hunting and harvesting of salt hay deemed to be economically impractical).

498. *Florida Rock*, 18 F.3d at 1567-68.

499. *Id.* at 1566.

500. *Id.* at 1572-73.

501. 28 F.3d 1171 (Fed. Cir. 1994).

502. *Id.* at 1174-75.

ty was still worth $1,000 an acre.[503] The court's interpretation of the categorical rule in *Florida Rock* and *Loveladies Harbor* seems completely justifiable. Since every piece of property will have some value no matter how strictly it is regulated,[504] the goals of the *Lucas* Court would be frustrated if courts insisted that property be rendered completely valueless or unmarketable as a prerequisite for applying the categorical rule. It must be conceded, however, that an element of subjectivity is inevitably introduced when a court is allowed to apply the categorical rule to landowners whose property has some market value.

B. Abolition of Traditional "No Compensation" Rules

The categorical total takings rule of *Lucas* effectively abolishes the noxious use rule and the harm/benefit rule, two doctrines that courts have relied upon for years to deny compensation to landowners whose property values have been destroyed by highly restrictive governmental regulations.[505]

1. The Noxious Use Rule

The *Lucas* Court expressly repudiated the traditional noxious use rule.[506] Under the noxious use rule, activities that created a risk of significant harm to the public could be prohibited regardless of the regulation's economic effect on the regulated parties.[507] The justification usually given

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503. *Id.* at 1180-83.

504. *See* Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160, 167 (1985) ("Common sense suggests that regulatory action will never entirely eliminate the market value of the real property it affects.").

505. *See* Ausness, *supra* note 5, at 463-64.

506. *Lucas*, 112 S. Ct. at 2899 ("[I]t becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation.").

507. *See* Michael J. Quinlan, *supra* note 5, at 176. Mugler v. Kansas, 123 U.S. 623, 668-69 (1887), is thought to be the origin of the noxious use test. *See* Thomas P. Glass, Comment, *Property Law: Takings and the Nuisance Exception in the Aftermath of* Lucas v. South Carolina Coastal Council, 18 DAYTON L. REV. 509, 513 (1993). The United States Supreme Court has often relied on the noxious use rule to uphold severe restrictions on the use of property. *See, e.g.*, Miller v. Schone, 276 U.S. 272, 279 (1928) (upholding law which required destruction of cedar trees infected with cedar rust parasites); Samuels v. McCurdy, 267 U.S. 188, 195-96 (1925) (upholding law prohibiting possession in plaintiff's home of alcoholic beverages purchased before passage of state prohibition law); Pierce Oil Corp. v. City of Hope, 248 U.S. 498, 499 (1919) (upholding ban on oil and gasoline storage tanks near residential dwellings); Hadacheck v. Sebastian, 239 U.S. 394, 410-11 (1915) (upholding prohibition of brickyard in residential area); Reinman v. City of Little Rock, 237 U.S. 171, 177 (1915) (upholding ban on livery stables in residential area); Murphy v. California, 225 U.S. 623, 629 (1912) (upholding ordinance against pool halls); L'Hote v. New Orleans, 177 U.S. 587, 598 (1900) (upholding ban on houses of prostitution in certain areas); Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) (upholding closure of plaintiff's brewery). It should be noted that the Supreme Court in *Keystone* included the noxious use concept as part of the "character of government" element in its balancing test. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 489-90 (1987). *See also* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I—A Critique of*

for the denial of compensation is that no one can obtain a vested right to injure or endanger the public.[508] The noxious use rule would be unobjectionable if it were strictly limited to obvious nuisances,[509] but over the years the rule has been expanded beyond common-law nuisance situations.[510] This has encouraged some courts to arbitrarily classify normal land use activities as "noxious" in order to foreclose serious consideration of takings claims.[511] Even prior to *Lucas*, federal courts in *Formanek* and *Florida Rock* rejected arguments against compensation based on the noxious use rule.[512] The *Lucas* Court has settled this issue once and for all by replacing the noxious use rule with a narrower "nuisance exception."[513]

2. The Harm/Benefit Rule

Lucas also implicitly rejects the harm/benefit rule. The harm/benefit rule is a derivation of the noxious use rule.[514] It provides that no taking occurs if a regulation merely prevents property owners from causing harm to others, although compensation will be required if the purpose of the regulation is to confer a benefit on the public that it does not currently enjoy.[515] Under this approach, no compensation is required even when the

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Current Takings Clause Doctrine, 77 CAL. L. REV. 1299, 1329 (1989) (*Keystone* Court interpreted first part of *Agins* test to include an inquiry into whether the government was seeking to prevent a noxious use).

508. *See* Gardner v. Michigan, 199 U.S. 325, 330 (1905); New Orleans Gas Light Co. v. Drainage Comm'n, 197 U.S. 453, 462 (1905). *See also* Laura McKnight, *Regulatory Takings: Sorting Out Supreme Court Standards After* Lucas v. South Carolina Coastal Council, 41 U. KAN. L. REV. 615, 632 (1993) (if the common law prohibits noxious uses of property, a legislature does not take any property right away from the owner when it regulates such uses).

509. *See* Peterson, *supra* note 508, at 86 (suggesting that the noxious use rule should be applied only when the public would regard the regulated activity as "wrongful").

510. *See* Nathaniel S. Lawrence, *Means, Motives, and Takings: The Nexus Test of* Nollan v. California Coastal Commission, 12 HARV. ENVTL. L. REV. 231, 234 (1988) ("[T]he scope of the [noxious use] doctrine historically has been extended beyond simple nuisance prevention."); Rose-Ackerman, *supra* note 485, at 1709 ("In practice, however, [when applying the noxious use rule] courts do not seem to limit themselves to common-law nuisances.").

511. *See* Keystone Bituminous Coal Ass'n v. DeBenectictis, 480 U.S. 470, 490-92 (1987) (suggesting that mining operations that harmed surface owners were similar to noxious uses).

512. *See* Formanek v. United States, 26 Cl. Ct. 332, 340 (1992); Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160, 169-71 (1985), *aff'd*, 791 F.2d 893, 900 (Fed. Cir. 1986). *See also* Florida Rock Indus, Inc. v. United States, 21 Cl. Ct. 161, 167 (1990).

513. *See* Washburn, *supra* note 480, at 196 (the nuisance exception in *Lucas* is much narrower than the traditional noxious use test); *but cf.* Lazarus, *supra* note 481, at 1426 ("The Court engaged in a shell game by pointedly rejecting a 'noxious' or 'harmful use' exception to the Takings Clause, only to adopt its analytical equivalent dubbed 'background principles of nuisance and property law.'"). *But see* Babcock, *supra* note 481, at 4 ("[T]he Supreme Court has conceptually expanded the 'harmful' or 'noxious use' principle of takings jurisprudence, giving the principal new vitality.").

514. *See* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 48 (1964) (the harm/benefit test is a modern version of the noxious use rule).

515. *See* Michelman, *supra* note 166, at 1196 ("The idea [of the harm/benefit rule] is that compensation is required when the public helps itself to good at private expense, but not when the public

regulation allows no profitable use of the property.[516] While there may be a meaningful difference in theory between preventing a harm and securing a future benefit on behalf of the public,[517] it is difficult to maintain this distinction in practice.[518] Nevertheless, the inherent ambiguity of the harm/benefit rule enabled some courts in the past to uphold burdensome restrictions on development under the guise of preventing harm to the public.[519] Hopefully, the *Lucas* decision will discourage any further reliance on the harm/benefit test in regulatory takings cases.

C. The Nuisance Exception

According to the *Lucas* Court, when the government deprives a landowner of all economically beneficial use, it can avoid the duty to compensate only by showing that the interest destroyed by the regulation was not part of the landowner's title.[520] This is known as the "nuisance exception" to the categorical rule.[521] At first blush, the *Lucas* court's nuisance exception appears to be nothing more than a reincarnation of the old noxious use rule. However, the nuisance exception is narrower than the noxious use rule.[522] Furthermore, unlike the noxious use rule, which was an exception to any takings claim, the nuisance exception is only an exception to the categorical rule in total takings cases.[523]

There are two parts to the nuisance exception: First, the government will not be required to compensate a landowner if the prohibited use was not part of the landowner's original title at the time of purchase.[524] Thus,

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simply requires one of its members to stop making a nuisance of himself.").

516. *See* David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 324 (1988).

517. *See* Allison Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 665-66 (1958).

518. *Lucas*, 112 S. Ct. at 2897 ("The distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."). *See also* Connors, *supra* note 186, at 184; Glynn S. Lunney, Jr., *A Critical Examination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1933-35 (1992).

519. *See, e.g.*, Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1382 (Fla. 1981); Just v. Marinette County, 201 N.W.2d 761, 768-69 (Wis. 1972). It is interesting to note that both the claims court and the Court of Appeals in *Florida Rock* concluded that wetland preservation measures did not prevent a harm, but were intended to obtain a public benefit. *See* Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160, 176-77 (1985), *aff'd*, 791 F.2d 893, 904 (Fed. Cir. 1986). *See also* Blumm & Zaleha, *supra* note 65, 756-57 (criticizing the claims court's use and misuse of the harm/benefit test in *Florida Rock*).

520. *Lucas*, 112 S. Ct. at 2899 ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.").

521. *Id.* at 2920-21 (Stevens, J., dissenting).

522. *See* Washburn, *supra* note 480, at 196.

523. *See* Laitos, *supra* note 200, at 309.

524. *See* Palzer, *supra* note 480, at 547.

such concepts as the public trust doctrine may limit a landowner's rights in wetland property.[525] Second, compensation will be denied when the regulation duplicates a result that could have been achieved through the application of common-law nuisance principles.[526]

Furthermore, the *Lucas* Court took steps to ensure that the nuisance exception does not swallow up the categorical rule. First, the Court has placed the burden of proof on the government to establish that the nuisance exception applies to a takings claim.[527] Second, the Court has specified that legislatures cannot not bring an activity within the nuisance exception simply by declaring it to be a nuisance.[528] Thus, in order for the nuisance exception to apply, the activity in question must be prohibited by existing common-law principles of property or nuisance law. Some commentators have criticized this aspect of the nuisance exception because it vests courts with control over matters which are best left to legislatures.[529] However, legislatures are unlikely to be either knowledgeable or objective about principles of property or nuisance law.[530] Courts, on the other hand, have expertise in dealing with complex legal doctrines and are more likely to act as impartial decisionmakers.[531]

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525. *See* Babcock, *supra* note 481, at 37-38 (stating government regulators may rely on the public trust doctrine to justify their actions under the *Lucas* takings rule); McCurdy, *supra* note 49, at 711-15 (arguing that the public trust doctrine ought to protect wetlands from destructive activities by landowners); Paul Sarahan, *Wetlands Protection Post-*Lucas: *Implications of the Public Trust Doctrine on Takings Analysis*, 13 VA. ENVTL. L.J. 537, 586 (1994) (suggesting non-compensable regulation of wetlands, even after *Lucas*, may be justifiable under the public trust doctrine).

526. *See* Kadlecek, *supra* note 198, at 430-31 (*Lucas* indicates that the nuisance exception will only apply to common-law nuisances).

527. *Lucas*, 112 S. Ct. at 2900-02. *See also* Delaney, *supra* note 480, at 402; James B. Wadley & Pamela Falk, Lucas *and Environmental Land Use Controls in Rural Areas: Whose Land Is It Anyway?*, 19 WM. MITCHELL L. REV. 331, 349 (1993).

528. *Lucas*, 112 S. Ct. at 2900 ("Any limitation so severe 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.").

529. *See* Cotton C. Harness, III, Lucas v. South Carolina Coastal Council: *Its Historical Context and Shifting Constitutional Principles*, 10 PACE ENVTL. L. REV. 5, 19 (1993) (narrowing legislative discretion will chill its ability to respond to evolving problems); John A. Humbach, *"Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U. L. REV. 771, 772 (1993) ("What the Supreme Court did in *Lucas* itself was to reassign flat-out a portion of this nation's ultimate environmental and land use authority from the legislatures, which traditionally had it, to the courts."); Laitos, *supra* note 200, at 310 ("*Lucas* leaves open the very real possibility of a court having to make subjective judgments when it identifies the background principles of nuisance law that will be applied to any given case."); Cook, *supra* note 6, at 1440 ("The Court's per se rule in this area is flawed because it . . . may prohibit legislatures from passing needed regulations in the future.").

530. *See* Washburn, *supra* note 480, at 197 (to allow a governmental entity to determine the parameters of its own liability would deprive the Takings Clause of its protective purpose); Levitt, *supra* note 188, at 211-12 (determination as to whether a law regulates a nuisance cannot safely be left entirely to state legislatures).

531. *See* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1413 (1991) (courts are less likely than legislatures to initiate self-interested steps that deprive owners of

It remains to be seen whether courts will invoke the nuisance exception in order to uphold highly restrictive wetland regulations. At least one commentator has contended that dredge and fill operations in wetlands should automatically fall within the nuisance exception.[532] In *Loveladies Harbor*,[533] however, the Court of Appeals for the Federal Circuit concluded that the nuisance exception was not applicable and allowed the landowner to recover under the categorical rule.[534]

D. The Nonsegmentation Rule

To ascertain whether a regulation has deprived a landowner of all economically beneficial use, a court must first identify the "property" that will be examined in its takings analysis. Obviously, the breadth of this definition will often determine whether the regulation is deemed to be a taking or not.[535] Delimitation of the relevant piece of property is especially important in wetlands regulation because often only part of the original parcel will be directly affected by the Corps' permitting requirements.[536]

In the past, most courts have looked at the entire physical tract when evaluating the economic impact of a governmental regulation upon a piece of property.[537] Under this approach, a regulation may validly prohibit all development on a portion of the land as long as the rest of the land can be put to beneficial use.[538] This is known as the nonsegmentation or the "parcel as a whole" doctrine. Prior to *Lucas*, courts often applied this

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control over their resources); *but see* Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 316-18 (1993) (state courts may manipulate principles of property or nuisance law).

532. *See* Scarlott, *supra* note 65, at 921 ("Where the government exercises its authority under the Clean Water Act to prevent landowners from destroying wetlands, the public nuisance exception should insulate the government from taking claims by those landowners.").

533. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994).

534. *Id.* at 1182-83.

535. Fisher, *supra* note 6, at 1402.

536. Kennedy, *supra* note 161, at 730.

537. Robert H. Freilich & Elizabeth A. Garvin, *Takings After* Lucas: *Growth Management, Planning, and Regulatory Implementation Will Work Better Than Before*, 22 STETSON L. REV. 409, 420-21 (1993); Jan G. Laitos, *Water Rights, Clean Water Act, Section 404 Permitting, and the Takings Clause*, 60 U. COLO. L. REV. 901, 916-17 (1989).

538. Kadlecek, *supra* note 198, at 423. This same principle provides that discrete "interests" in property should not be evaluated separately for purposes of a takings analysis. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130 (1978) ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) ("Where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.").

principle to defeat takings claims by owners of wetland property.[539] Many commentators maintain that the nonsegmentation rule is an essential corollary to the Court's categorical total takings rule.[540] They argue a court may even consider property that has been sold prior to a permit application in its takings analysis; otherwise, they contend, the government will be required to compensate landowners who have fully recouped their original investment.[541] Furthermore, without a nonsegmentation rule, landowners may artificially segment their holdings in order to qualify for compensation under the categorical rule.[542]

Lucas did not explicitly address the segmentation issue because Lucas's entire tract was affected by the construction setback line.[543] However, one can argue that *Lucas* requires courts to focus solely on the property being regulated and to ignore any unregulated property the plaintiff might also own.[544] This position is supported by an analogy to the physical takings rule, whereby compensation is required if even a small portion of property is occupied, regardless of whether the landowner owns other property that is not occupied.[545] Since the *Lucas* Court treated deprivation of all economic value as equivalent to a physical occupation,[546] this suggests that the government should pay for property that is totally devalued by a regulation even if some other portion of the property is unaffected by the government's action.

Recent cases, however, have retained the nonsegmentation rule. For example, in *Tabb Lakes, Ltd. v. United States*,[547] the Federal Circuit Court of Appeals invoked the rule to rebut a temporary takings claim by a landowner whose permit was delayed for three years. The court declared that no taking had occurred because the landowner had continued to develop other lots in the subdivision during the time its

539. *See, e.g.*, Jentgen v. United States, 657 F.2d 1210, 1213 (Ct. Cl. 1981); Deltona Corp. v. United States, 657 F.2d 1184, 1192 (Ct. Cl. 1981); Ciampitti v. United States, 22 Cl. Ct. 310, 320 (1991); *but see* Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 904-05 (Fed. Cir. 1986) (confining takings to 98 acres of 1560-acre tract affected by permit denial because Corps indicated that it would deny permits for remaining acreage as well).

540. Humbach, *supra* note 529, at 807.

541. *Id.* at 801.

542. Goldman-Carter, *supra* note 7, at 434. *See also* Rubenfeld, *supra* note 158, at 1107 ("Because of the parceling problem, the smaller your parcel of rights, the better off you are under the "total taking" approach affirmed in *Lucas*.").

543. Washburn, *supra* note 480, at 203.

544. Sanderson & Mesmer, *supra* note 159, at 506-07 ("Physical invasions are compensated even though a potentially small part of one's property might be taken. Thus, partial takings should be compensated no matter how small.").

545. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

546. *Lucas*, 112 S. Ct. at 2894.

547. 10 F.3d 796 (Fed. Cir. 1993).

permit application was delayed.[548] On the other hand, in *Loveladies Harbor, Inc. v. United States*, the Court of Appeals for the Federal Circuit rejected the government's claim that it should consider the value of the plaintiff's original 250-acre tract instead of just the 12.5-acre tract directly affected by the permit denial.[549] After analyzing a number of factors, however, the court decided to consider only the 12.5-acre tract for purposes of its total takings inquiry.[550]

E. The Ripeness Issue

Between the time that Lucas brought suit and the time that his case was decided by the South Carolina Supreme Court, the legislature amended the Beachfront Management Act to create a special permit procedure under which the landowner could request the Coastal Council to allow construction seaward to the setback line.[551] Consequently, the U.S. Supreme Court could have concluded that the Coastal Council had not made a "final and authoritative determination" with respect to Lucas because it had not denied his application for a special permit.[552] Instead, the Court declared that it would treat the case as a temporary takings claim for loss of use of the property between 1988 and 1990.[553]

It is surprising that the U.S. Supreme Court did not rely on the ripeness requirement to avoid a decision on the landowner's takings claim in *Lucas*. Perhaps, as Justice Blackmun speculated, the court simply wanted to decide Lucas's takings claim on its merits.[554] Another possibility is that the court felt that it would be unfair to require Lucas, who had already litigated his claim in three courts, to go through additional administrative proceedings and litigation before his case was finally resolved.[555] If this latter theory is correct, the Court's action in *Lucas* may stand as an invitation to the lower courts to reject ripeness arguments when the facts indicate that further permit applications to the regulatory agency are likely to be futile.

The ripeness issue has not arisen in the federal courts since the *Lucas* case was decided. A Pennsylvania court relied on a ripeness

548. *Id.* at 802.
549. 28 F.3d 1171, at 1180-82.
550. *Id.*
551. S.C. CODE ANN. § 48-39-290(D)(1) (Law. Co-op. Supp. 1994).
552. *See, e.g.*, MacDonald, Somer & Frates v. Yolo County, 477 U.S. 340, 348 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 190-91 (1985).
553. *Lucas*, 112 S. Ct. at 2891.
554. *Id.* at 2909.
555. Ausness, *supra* note 5, at 461-62.

argument to avoid the effect of the *Lucas* Court's categorical total takings rule in *Mock v. Department of Natural Resources*.[556] However, the evidence in that case indicated that the regulatory agency was genuinely prepared to consider a new permit application from the landowners.[557] Thus, it remains to be seen whether the *Lucas* opinion will have any effect on the way courts deal with ripeness arguments in wetlands cases.

F. "Partial" Takings

Because the state tacitly conceded that its coastal construction setback regulation deprived the landowner of all economically beneficial use of his land, the *Lucas* Court did not set forth a rule to deal with regulations that deprived a landowner of some, but not all, economically beneficial use.[558] However, the Court did suggest that courts might resolve a "partial takings" claim in such a case by applying the *Penn Central* balancing test.[559]

The "partial takings" issue arose recently in *Florida Rock Industries, Inc. v. United States*,[560] where the Federal Circuit Court of Appeals considered whether partial deprivations of beneficial use could ever be compensable. The court had reversed a judgment in favor of the landowner because it determined that the claims court had not calculated the property's residual fair market value correctly.[561] Remanding the case to the claims court for further proceedings, the court of appeals encouraged the lower court to consider the landowner's claim for a "partial taking" if it found that the categorical rule of *Lucas* did not apply.[562] The court acknowledged the difficulty of determining when a regulation "goes too far," and declared that the decision on this issue would involve a "classic exercise of judicial balanc-

556. 623 A.2d 940 (Pa. 1993).

557. *Id.* at 947.

558. *Lucas*, 112 S. Ct. at 2896.

559. *Id.* at 2895 n.8 ([A]n owner [whose property is diminished in value by less than 100 percent] might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally."). *See also* Freilich & Garvin, *supra* note 537, at 419 ("If the landowner is left with some value of the property, the inquiry will return to the balancing of interests."); Summers, *supra* note 484, at 883 ("The opinion [*Lucas*] posits that when the two per se rules are not applicable to the case at bar, the Court will return to 'case specific inquiry into the public interest advanced in support of the restraint.'").

560. 18 Fed. 3d 1560 (Fed. Cir. 1994).

561. *Id.* at 1567.

562. *Id.* at 1570.

ing of competing values."[563] The court of appeals, however, did suggest that the claims court take into account such factors as reciprocity of advantage, the purpose and function of the regulation, and the regulation's economic impact on the landowner.[564] The court of appeals subsequently revisited the partial takings issue in *Loveladies Harbor* and reaffirmed its earlier conclusion that a landowner could recover without proving deprivation of all economically beneficial use.[565]

CONCLUSION

One can view the *Lucas* decision from a number of perspectives. In one sense, it reflects the Court's desire to make takings law more principled by introducing additional "bright line" rules.[566] Regrettably, this effort is probably doomed to failure because the takings issue is simply too complex to be reduced to a series of fixed rules. Even such seemingly straightforward concepts as "deprivation of all economically beneficial use" and "background principles of nuisance and property law" will probably turn out to be difficult to apply in the context of actual controversies.

Lucas can also be viewed as an example of the Court's increasing willingness to protect property owners against oppressive government regulation.[567] However, the rhetoric in *Lucas* promises more than its holding actually delivers. The categorical rule is too restrictive to help property owners much and the nuisance exception narrows the rule's reach even further. For this reason, *Lucas* does not radically change

563. *Id.*

564. *Id.* at 1570-71. Judge Nies, in a lengthy and passionate dissent, questioned the majority's partial takings theory. *Id.* at 1573-81 (Nies, C.J., dissenting). However, Judge Nies' primary concern seemed to be that the various interests in the land, such as mining rights, might be singled out for separate treatment under a total takings analysis. *Id.* at 1578-79. Thus, the disagreement between the majority and the dissenting judges in *Florida Rock* may really have simply been a matter of semantics rather than one of substance.

565. *See* Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994). The court did not pursue this issue further since it held that the regulation resulted in a total taking under the *Lucas* categorical rule. *Id.*

566. Summers, *supra* note 484, at 879 (*Lucas* represents an attempt, reflected first in *Loretto*, 458 U.S. 419, "to reduce the necessity for ad hoc determinations by establishing categorical rules delineating situations in which a per se taking has occurred.").

567. Ausness, *supra* note 5, at 467-68 (1993) (suggesting that *Lucas* is the most recent holding in a line of Supreme Court cases upholding property rights against burdensome government regulations). *See also* James S. Burling, *Property Rights, Endangered Species, Wetlands, and Other Critters—Is It Against Nature to Pay for a Taking?*, 27 LAND & WATER L. REV. 309, 313 (1992) ("In recent years, the Supreme Court has shown an increased solicitude towards the preservation of private property rights.").

existing takings doctrine, nor will it have any direct and immediate impact on wetland-related takings claims.

However, *Lucas* may also be viewed as a signal to other courts that it is necessary to curb burdensome environmental regulations.[568] If this is so, it does not seem to have had much impact at the state level. Federal courts, on the other hand, may respond more positively to the *Lucas* Court's anti-regulatory message. In particular, the claims court, which has often been receptive to takings claims in the past,[569] may be persuaded by the rhetoric of *Lucas* that it is permissible to broaden the protection afforded landowners by the Takings Clause. So far, however, this tendency has been checked by the Court of Appeals for the Federal Circuit, which tends to be a bit less sympathetic to property owners than the claims court.[570]

It remains to be seen what impact, if any, the *Lucas* decision will have on wetland protection regulation. Although *Lucas* provides some additional protection to property owners, it does not represent a major change in takings jurisprudence. Consequently, *Lucas* is unlikely to significantly affect the administration of existing wetland protection schemes.

568. Lazarus, *supra* note 481, at 1413 (Supreme Court opinions often signal doctrinal or policy shifts which lower courts are encouraged to develop and amplify).

569. Hanley, *supra* note 10, at 348.

570. *But see* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (affirming a decision by the claims court that denial of a dredge and fill permit constituted a regulatory taking).