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Loveladies Harbor, Inc. v. United States: Application of Traditional Regulatory Taking Law to the Regulation of Wetlands

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Casenotes

LOVELADIES HARBOR, INC. v. UNITED STATES: APPLICATION OF TRADITIONAL REGULATORY TAKING LAW TO THE REGULATION OF WETLANDS

I. INTRODUCTION

IN *Loveladies Harbor, Inc. v. United States*,[1] the United States Claims Court awarded $2.6 million to the owner of twelve and one-half acres of land on the New Jersey shore as just compensation for a taking of the owner's property based on the denial of a permit to reclaim the owner's land for residential development.[2] The court held that such denial constituted a taking under the Fifth Amendment[3] and, thus, required a payment of just compensation.[4]

The Fifth Amendment to the United States Constitution guarantees that private property shall not "be taken for public use, without just compensation."[5] The Fifth Amendment "was designed to bar [g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[6] When the government forces a property owner to bear a public burden through a land use regulation which substantially interferes with the use or enjoyment of his land, the regulation may amount to a taking.[7] This Note presents and analyzes the evolution of judicial decisions regarding regulatory takings including the factors which influence a taking determination. Next, this Note introduces the application of

1. 21 Cl. Ct. 153 (1990).

2. *Id.* at 161. For further discussion of *Loveladies Harbor*, see *infra* notes 111-82 and accompanying text.

3. The Fifth Amendment to the United States Constitution provides in pertinent part, "[N]or shall any person . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

4. 21 Cl. Ct. at 161.

5. U.S. CONST. amend. V.

6. Armstrong v. United States, 364 U.S. 40, 49 (1960).

7. *Id.* This argument, when based on a due process claim, has typically resulted in invalidation of the regulation or statute, rather than monetary damages. William L. Want, *The Taking Defense to Wetlands Regulation*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10,169 n.5 (April 1984).

regulatory taking analysis to the regulatory taking of wetlands. Finally, this Note examines the state of the law of regulatory takings of wetlands under *Loveladies Harbor, Inc. v. United States*.

II. BACKGROUND

A. Overview of Taking Law

The law of regulatory takings has evolved from the law of eminent domain.[8] Eminent domain involves the physical taking by the government of private property for public use.[9] The power of eminent domain is an "attribute to sovereignty" which is limited by the just compensation clause of the Fifth Amendment.[10] The government can, therefore, "take" private property for a public purpose as long as it compensates the owner.[11]

Under the Fifth Amendment, the federal government has authority to condemn or take property for a public use.[12] Traditionally, courts interpreted this to mean that the "taken" property must be used by the public or by the inhabitants of a town or state rather than by a particular individual.[13] Most courts, however, no longer require that the property "be put into use for the general public."[14] Instead, these courts require that the taking be rationally related to a conceivable public purpose or public advantage.[15] Using this modern analysis, courts will find that the taking of property to enlarge resources, or to further community interests in a particular area, contributes to the general welfare, constitutes a public use and does not require the payment of just

8. Monique D. Winther, *Private Property and Environmental Regulatory Takings: A Forward Look into Rights and Remedies, as Illustrated by an Excursion into the Wild Rivers Act of Kentucky*, 73 KY. L.J. 999, 1001 n.13 (1984-85).

9. *Id.*

10. Jacques B. Gelin & David W. Miller, THE FEDERAL LAW OF EMINENT DOMAIN § 1, at 1 (1982). For the text of the Fifth Amendment, see *supra* note 3 and accompanying text.

11. This Note discusses only the federal government's power of eminent domain. The Just Compensation clause, however, was applied to the states through the Fourteenth Amendment in *Chicago B&Q R.R. v. Chicago*, 166 U.S. 226 (1897).

12. For the text of the Fifth Amendment, see *supra* text accompanying note 3.

13. 7 Patrick J. Rohan & Melvin A. Reskin, NICHOLS ON EMINENT DOMAIN § 7.02[1], at 7-33 (3d ed. 1991); *see City of Statesville v. Roth*, 336 S.E.2d 142 (1985)(taking for installation of sewer line, storm drain and water line to promote construction of new businesses not public use).

14. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984). *See generally* Rohan & Reskin, *supra* note 13, § 7.02.

15. Rohan & Reskin, *supra* note 13, § 7.02[2]; *Hawaii Hous. Auth.*, 467 U.S. at 241.

compensation.[16] Moreover, courts will not require compensation for a taking merely because there is an incidental benefit to private individuals.[17]

B. Regulatory Takings

In taking property for a public use, the government does not always, and is not required to, act formally by condemning the property.[18] A statute or regulation which does not require outright condemnation of the property may unconstitutionally "take" the property as a result of prohibitions against use of the property.[19]

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16. *Hawaii Hous. Auth.*, 267 U.S. at 241-44. Valid public purposes for which the government often exercises its power of eminent domain include building roads, hospitals or other public facilities.

17. *Id.* at 243-44.

18. Gelin & Miller, *supra* note 10, § 1.5, at 37.

19. *Id.* § 1.5, at 39. When the government fails to condemn the property, the individual who believes his property has been taken must initiate an action, referred to as an inverse condemnation, to receive just compensation. *Id.* § 1.5, at 37.

The difference between eminent domain and a legitimate exercise of the police power has been explained as follows: "through the right of eminent domain the state gains by the acquisition of property, through the police power by the destruction or regulation of property." Carman F. Randolph, THE LAW OF EMINENT DOMAIN § 23 (1894). The Connecticut Supreme Court, in *Vartelas v. Water Resources Comm'n*, explained the difference as follows: "The police power regulates use of property because uncontrolled use would be harmful to the public interest. Eminent domain, on the other hand, takes private property because it is useful to the public." 153 A.2d 822, 824 (1959).

The police power may be used as a regulatory tool by governments to prevent or curb abusive private land uses. Winther, *supra* note 8, at 1001-03. The government may assert the police power only for the public welfare; it must show a "substantial relation[ship] to the public health, safety, morals or general welfare." Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (citing Cusack Co. v. Chicago, 242 U.S. 526, 530-31 (1917)).

The government enacts a regulation not within the scope of its police power when the regulation violates a specific provision of the Constitution. Mugler v. Kansas, 123 U.S. 623, 663 (1887). *Mugler* involved an amendment to the Kansas Constitution and a statute which prohibited the manufacture and sale of intoxicating liquids. *Id.* at 653. A brewery owner was indicted for violation of the statute and claimed a denial of liberty and property without due process of law. *Id.* at 657. The Court upheld the indictment establishing that the prevention of a noxious use of property neither amounts to a taking nor deprives an owner of property without due process of law. *Id.* at 671-73. In interpreting the limits of the police power, the Court stated the following:

> Undoubtedly the State, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government.

Id. at 663 (citations omitted); *cf.* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393

Every regulation which interferes with private property rights, however, does not amount to a regulatory taking of the property.[20] A valid exercise of the police power and the other facts of the case may vitiate any taking argument because the government's police power has primacy over the Just Compensation Clause.[21] Specifically, courts will refuse to find a taking when the regulation acts to prevent a serious public harm or nuisance.[22] On the other hand, when legislative interference with property rights involves a physical invasion of the property, courts will eas-

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(1922) (stating government's power to regulate is limited only by "justice and fairness"). An unconstitutional exercise of the police power can occur, for example, when the ordinance or regulation violates the due process clause of the Fifth or Fourteenth Amendments. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915). In *Hadacheck*, the plaintiff argued that an ordinance which made it unlawful for any person to establish or operate a brick yard within city limits deprived him of his property without due process of law. *Id.* at 398. The court, employing a standard of arbitrariness, held that the ordinance was within the city's police power. *Id.* at 411.

The exercise of police power is presumed to be valid. *See* Bibb v. Navajo Freight Lines, 359 U.S. 520, 529 (1959); Salsburg v. Maryland, 346 U.S. 545, 553 (1954); United States v. Carolene Prods. Co., 304 U.S. 144, 152-54 (1938). Therefore, the burden is on the opponent of the regulation to prove that it is unreasonable and not within police power limits. *Carolene Prods.*, 304 U.S. at 152-54. The Court in *Euclid* admitted that the line between a legitimate and illegitimate exercise of police power is not capable of precise delimitation, but varies with the circumstances. 272 U.S. at 387.

20. Gelin & Miller, *supra* note 10, § 1.5, at 41. When the regulation does not interfere with interests which constitute "property" under the Fifth Amendment, a court will not find a taking. United States v. Willow River Power Co., 324 U.S. 499 (1945) (holding that interest in high-water level of river is not property); Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) (holding that interest in navigable waters is not property). In addition, the courts have upheld zoning ordinances which interfere with use of property. *Euclid*, 272 U.S. at 397. *Euclid* involved a challenge to a municipality's comprehensive zoning plan. *Id.* at 379. A landowner challenged the ordinance on the ground that, among other things, it deprived him of property without due process of law. *Id.* at 384. The undeveloped land owned by Ambler Realty Co. was zoned for residential use. *Id.* at 382. It was particularly suited, however, for industrial use and the owner planned to sell it for such use. *Id.* at 384. The court upheld the zoning ordinance as a valid exercise of the police power. *Id.* at 397.

21. *Mugler*, 123 U.S. at 668-69. "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking." *Id.*

22. *See* Miller v. Schoene, 276 U.S. 272 (1928) (holding that state action to prevent infection of apple orchards by destroying certain diseased cedar trees is not unconstitutional taking); Curtin v. Benson, 222 U.S. 78, 86 (1911). In *Mugler v. Kansas*, the Court established a nuisance exception to the just compensation requirement, whereby no taking will be found when individuals are prohibited, "by a noxious use of their property, [from] inflict[ing] injury upon the community." 123 U.S. at 669.

ily find an unconstitutional taking.[23] In addition, courts generally will find a taking when the regulation interferes with an owner's right to exclude others from his property.[24] Under other circumstances, courts will also find a regulatory taking of the property and require just compensation.[25]

In *Pennsylvania Coal v. Mahon*,[26] the Supreme Court of the United States introduced the doctrine of regulatory takings by examining the limits on the extent to which a regulation can interfere with property rights without requiring just compensation.[27] The challenged regulation prohibited mining in any way which would cause subsidence of the surface land and house.[28] To determine if a regulation effects a taking, the Court suggested that it must consider the "particular facts" of the case.[29] The Court found that the land in question was not taken for a public use, but rather to protect private interests.[30] Because the public interest in the regulation involved neither the prevention of a public nuisance nor the protection of personal safety,[31] such an extensive

23. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-38 (1982); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

24. *See, e.g.* Kaiser Aetna v. United States, 444 U.S. 164 (1979). In *Kaiser Aetna*, the Court held that "the 'right to exclude' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." *Id.* at 180.

25. *See, e.g.* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). For further discussion of circumstances where courts will find a regulatory taking, see *infra* notes 26-60 and accompanying text.

26. 260 U.S. 393 (1922).

27. *Id. See* Winther, *supra* note 8, at 1003. Prior to *Pennsylvania Coal*, cases challenging land regulations were most often based on the due process clause. *See, e.g., Mugler*, 123 U.S. at 623 (holding that prohibition on manufacture and sale of intoxicating liquids not denial of due process); Lawton v. Steele, 152 U.S. 133 (1894) (holding that statute prohibiting fishing not a denial of due process because preservation of fish within police power of state). Some cases after *Pennsylvania Coal* were also based on a due process challenge. *See, e.g.*, Gorieb v. Fox, 274 U.S. 603, 610 (1927) (holding that ordinance requiring building be set back certain distance from street not deprivation of property without due process); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (holding that comprehensive zoning plan not deprivation of property without due process).

In dicta, the Court in *Mugler* indicated that any regulation which prohibits use of property for purposes which would injure the public health, safety or welfare does not amount to a taking because "[s]uch legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it." 123 U.S. at 668-69.

28. *Pennsylvania Coal*, 260 U.S. at 412-13.

29. *Id.* at 413.

30. *Id.* at 414-16. The Court stated that the damage was neither common nor public. *Id.* at 413.

31. *Id.* at 413-14. Protection of personal safety was provided for in the statute by a notice requirement. *Id.* at 414.

invasion of property rights was not warranted.[32] Moreover, the Court examined the resulting diminution in the value of the property and determined the diminution was so great that the state must exercise its power of eminent domain and compensate the landowner.[33] The Court held that where the coal company had reserved the right to mine the coal, the statute had taken their property.[34]

Fifty-six years later, the Supreme Court in *Penn Central Transportation Co. v. New York City*,[35] enunciated factors relevant to determining if a regulation effects a taking.[36] In *Penn Central*, the owners of Grand Central Station challenged a New York City ordinance enacted to preserve buildings with historic and aesthetic significance.[37] The ordinance provided guidelines for maintenance of such buildings and required approval of plans for alteration of the exterior of the building.[38] The Court indicated that the relevant inquiries included the economic impact of the regulation, the extent the regulation has interfered with distinct investment-backed expectations and the character of the governmental action.[39] The Court emphasized that the regulation did not interfere with the present uses of the property which had been the same for sixty-five years.[40] Thus, the regulation did not interfere with the reasonable expectations of the owners.[41] Furthermore, the economic effect of the regulation was not significant because the owner could transfer its development rights to other properties.[42] The Court concluded that the regulation did not constitute a taking.[43]

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32. *Id.* The Court stated that "the extent of the public interest is shown by the statute to be limited." *Id.* at 413-14.

33. *Pennsylvania Coal*, 260 U.S. at 413. The Court concluded that what made the land in question valuable was mining coal at a profit. *Id.* at 414. The Court also stated that the greatest weight must be given to the judgment of the legislature in enacting the regulation. *Id.*

34. *Id.* at 414-15. The landowners purchased the property from Pennsylvania Coal Co. in 1878. *Id.* at 412. The deed specifically reserved to the coal company the right to remove all the coal under the land which was conveyed to the land owners. *Id.*

35. 438 U.S. 104 (1978).

36. *Id.* at 124.

37. *Id.* at 107.

38. *Id.* at 111-12.

39. *Id.* at 124.

40. *Penn Central*, 438 U.S. at 136.

41. *Id.*

42. *Id.* at 136-37.

43. *Id.* at 138.

In *Agins v. Tiburon*,[44] the Supreme Court complicated the taking analysis by referring to the *Penn Central* factors, but purportedly establishing two independent tests to determine if there has been a taking.[45] The Court recognized that a regulation effects a taking if it does not advance legitimate state interests or if it denies an owner economically viable use of his land.[46] The Court further asserted that "the question necessarily requires a weighing of public and private interests."[47]

In *Agins*, the owners of five acres of land in the city of Tiburon challenged a zoning regulation which restricted them to building no more than five single family homes on the property.[48] The Court determined that the ordinances did substantially advance the legitimate state interest of protecting citizens from the ill effects of urbanization.[49] Moreover, the court found that the owners could still use their land in accordance with their investment-backed expectations because they could build up to five residential homes on the property.[50] The Supreme Court held that the zoning ordinance on its face did not take the challengers' land.[51]

The Supreme Court, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[52] further confused the taking analysis. The Court applied the terminology enunciated in *Agins*, but created confusion as to whether *Agins* established one test with two factors, or two separate tests.[53] The Court examined both the public purpose

44. 447 U.S. 255 (1980).

45. *Id.* at 260.

46. *Id.* The converse of this statement is found in *Nollan v. California Coastal Comm'n*, where the Court stated that "[w]e have long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land'." 483 U.S. 825, 834 (1987) (citations omitted). The effect of this grammatical change is to shift the burden of proof from the landowner to the government.

The *Agins* Court cited Nectow v. Cambridge, 277 U.S. 183, 188 (1928) as support for the proposition that the regulation must "substantially advance a legitimate state interest." 447 U.S. at 260. The *Nectow* case, however, did not involve a taking challenge.

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

48. *Id.* at 257-58.

49. *Id.* at 261.

50. *Id.* at 262. The Court stated that the ordinance merely limits development, but does not prevent the best use of the land or extinguish a fundamental attribute of ownership. *Id.*

51. *Id.* at 261.

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

53. *Id.* at 485. The Court first discussed "[t]he two *factors* that the Court considered relevant. . . ." and then referred to "[the] [a]pplication of these *tests*." *Id.* (emphasis supplied). If *Agins* established one test with two factors, the land-

behind the regulation and the diminution of value and investment-backed expectations.[54]

In applying these inquiries to the facts of the case, the Court found a legitimate state interest because the Commonwealth of Pennsylvania enacted the Subsidence Act to "protect the public interest in health, the environment, and the fiscal integrity of the area."[55] The statute was intended to prevent the subsidence of land which may result from mining.[56] The Court, examining the Subsidence Act in a facial challenge, found that the requirement that landowners leave twenty-seven percent of their coal in place was not sufficient to meet the burden of proving a denial of economically viable use of the land.[57] Thus, the Court held that the Subsidence Act did not effect a taking of the challengers' land.[58]

In summary, the Supreme Court has not yet established clear guidelines to determine whether a regulation effects a taking.[59] As a result, the Supreme Court has decided each case by examining its relevant facts. Lower courts, therefore, have had little guidance in deciding takings cases.

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owner would have to establish both factors to prove that the regulation has taken his property. If *Agins* established two separate tests, the landowner would only have to satisfy one test for the court to find a taking. *See also* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224-25 (1986) ("[W]e have identified three factors which have 'particular significance' ").

54. *Keystone Bituminous*, 480 U.S. at 485-97. The Court implied that its finding of a legitimate state interest could be conclusive that no taking had occurred. *Id.* at 492. The Court stated that "we need not rest our decision on this factor alone. . . ," thus indicating that it could do so. *Id.*

55. *Id.* at 488.

56. *Id.* at 485-86.

57. *Id.* at 499. The Court noted that seventy-five percent of the coal could not be mined profitably in any event. *Id.* In addition, the land owners could not establish that the act interfered with their reasonable investment-backed expectations just because it required them to retain a small percentage of the coal to support the structures on the land. *Id.*

58. *Id.*

59. The Court will have the opportunity to clear up this uncertainty when it decides the case of Lucas v. South Carolina Coastal Commission, 404 S.E.2d 895 (S.C. 1991), *cert. granted* 112 S. Ct. 436 (1991). The court in *Lucas* noted that " 'takings' cases have been decided by the Supreme Court on a case-by-case basis, with the Court considering a variety of factors depending upon the circumstances before them. *See also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("[s]o the question depends upon the particular facts"); Agins v. Tiburon, 447 U.S. 255, 260 (1979) ("no precise rule determines when property has been taken"); Andrus v. Allard, 444 U.S. 51, 65 (1979) ("[r]esolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic"); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1977) ("the Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated. . . .").

C. Regulatory Takings of Wetlands

The prohibition against discharge and the permit requirements of the Federal Water Pollution Control Act have recently prompted a number of taking challenges.[60] The owners of wetlands[61] have argued that the government's denial of a permit to fill and develop the wetlands is essentially a taking of this land.[62] Typically, courts have granted injunctions against the permit denial rather than just compensation, but recently courts have become more willing to award just compensation.[63]

In *1902 Atlantic, Ltd. v. Hudson*,[64] a court first found a taking from an Army Corps of Engineers' denial of a development permit under section 404 of the Clean Water Act.[65] Owners of eleven acres of wetlands in Virginia sought a permit to fill this land for use as an industrial park.[66] The United States District Court for the Eastern District of Virginia found a taking because the permit denial destroyed all economically viable use of the property.[67] The court found that it left the owners with no reasonably beneficial use of their land and rendered their land commercially worthless.[68] The district court ordered the Army Corps

60. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1977) [hereinafter Clean Water Act]. The Clean Water Act makes unlawful "the discharge of any pollutant by any person." Clean Water Act § 301(a), 33 U.S.C. § 1311(a). The "discharge of a pollutant" is defined in the Clean Water Act as "any addition of any pollutant to navigable waters from any point source." Clean Water Act § 502(12), 33 U.S.C. § 1362(12). Under section 404 of the Clean Water Act, however, the Secretary of the Army may issue permits for the discharge of dredged or fill material into navigable waters. Clean Water Act § 404(a), 33 U.S.C. § 1344(a). It is this permit provision which allows the owners of wetlands to fill them in so they will be suitable for development. Without such a permit, any discharge into wetlands is illegal. Clean Water Act, § 301(a), 33 U.S.C. § 1311(a).

61. Wetlands are defined by regulation as including "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." 33 C.F.R. § 328.3(b) (1991).

62. Want, *supra* note 7, at 10,169. Before the Supreme Court's decision in Kaiser Aetna v. United States, 444 U.S. 164 (1979), the government defended any taking challenge by claiming its navigable servitude. *Id.* at 175. *See, e.g.* United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913).

63. Want, *supra* note 7, at 10,170; *see, e.g.*, Pamel Corp. v. Puerto Rico Highway Authority, 621 F.2d 33, 35 (1st Cir. 1980).

64. 574 F. Supp. 1381 (E.D. Va. 1983).

65. *Id.* at 1385, 1406.

66. *Id.* at 1385.

67. *Id.* at 1405.

68. *Id.* The court asserted that a taking would occur if the regulation denied an owner the economically viable use of the land or if it did not substan-

to reconsider the permit denial or to invoke the government's power of eminent domain and pay just compensation.[69]

Similarly, the United States Court of Appeals for the Federal Circuit considered a taking claim in *Florida Rock Industries v. United States*.[70] The landowner in this case acquired a tract of land in southern Florida for the sole purpose of mining limestone.[71] For six years the land had remained idle, but when the owner began mining, the Army Corps required him to apply for a permit and then denied the request.[72] The court of appeals balanced public and private interests to find "a private interest much more deserving of compensation for any loss actually incurred."[73] The wetlands were being preserved solely for the benefit of the public, yet the landowner would be required to maintain the wetlands with no public contribution.[74] The court remanded the case for a determination of whether the economic impact of the regulation requires the court to hold that the regulation unconstitutionally had taken the property.[75]

On remand, the claims court held that the permit denial resulted in a taking of the property.[76] The court examined the economic impact of the regulation (as required by the Federal Circuit Court of Appeals) and concluded that the permit denial resulted

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tially advance a legitimate state interest. *Id.* at 1404-05. Without specifically analyzing the facts in relation to this test, however, the court stated that it could not, under either standard, "imagine a more compelling instance for concluding that a taking has occurred." *Id.* at 1405.

69. *1902 Atlantic*, 574 F. Supp. at 1407. The court did not simply award just compensation because plaintiffs did not request such an award. *Id.*

70. 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

71. *Id.* at 895.

72. *Id.* at 895-96. The district engineer denied the request because it "would not be in the public interest." *Id.* at 896.

73. *Id.* at 904. The court reached its conclusion because the owner would be required to maintain the wetlands to benefit the public. *Id.* The owner would have to pay all taxes and other expenses, but would receive no income in return. *Id.*

74. *Id.* The court contrasted this situation to one in which a person wanted to put toxic wastes in drinking water and would "encounter a balancing of public and private interests most unfavorable to his position and not likely to result in a compensation award." *Id.*

75. *Florida Rock*, 791 F.2d at 905. The trial court erroneously determined the economic impact of the regulation by applying a use value formula. *Id.* The federal circuit court determined that the lower court should examine the market value of the property after the regulation in comparison to the market value before the regulation and the owner's basis or investment. *Id.* The court suggested that if the owner could not recoup its investment or better, the regulation took the property and required just compensation. *Id.*

76. Florida Rock Industries v. United States, 21 Cl. Ct. 161, 163 (1990).

in a ninety-five percent reduction in the value of the property.[77] The court also analyzed the permit denial's effect on the owner's reasonable investment-backed expectations and noted that because the property was purchased for the purpose of mining, no other business would allow the owner to recoup its investment.[78]

The United States Claims Court has decided a number of other cases in which landowners have claimed a taking of their land as a result of a Clean Water Act permit denial.[79] In both *Deltona Corp. v. United States*[80] and *Jentgen v. United States*[81] the United States Claims Court refused to find a taking as a result of a development permit denial. In *Deltona*, the court asserted that all federal navigational and environmental laws "substantially advance legitimate and important federal interests."[82] In addressing economically viable use of the land, the court examined the market value of the whole piece of property, after a permit denial to develop a small part of it, and concluded no taking had occurred.[83]

More recently, the claims court heard summary judgment motions in similar takings cases, but refused to find a taking of the land.[84] In *Ciampitti v. United States*,[85] the claims court denied a taking claim when the owner of eighteen acres on the New Jersey

77. *Id.* at 175. The court found that the property value was $10,500 before the permit denial and $500 after the permit denial. *Id.*

78. *Id.* at 176.

79. *See infra* notes 80-88 and accompanying text.

80. 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982). In *Deltona*, a landowner sought a permit from the Army Corps to develop 10,000 acres of land into 12,000 single family homes, schools and shopping centers. *Id.* at 1188. The owners had already acquired the necessary state and county permits at the time of the permit denial. *Id.* at 1189. In applying the traditional constitutional analysis, the claims court found a legitimate state interest and no denial of the economically viable use of the land. Although the court found a substantial frustration of reasonable investment-backed expectations, it concluded that no taking had occurred, partly because the wetlands area constituted only 20% of the land originally purchased by Deltona Corp. *Id.*

81. 657 F.2d 1210 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982). In *Jentgen*, decided the same day as *Deltona*, the landowner purchased 101.8 acres of land in Florida to build a water-oriented residential community. *Id.* at 1211. Jentgen, the landowner, submitted a permit application to develop 80 of these acres. *Id.* at 1212. This application was denied. *Id.* The Army Corps offered a modified permit covering twenty of these acres. *Id.* The court held that there had been no taking of Jentgen's land because there was merely some diminution of value and frustration of reasonable expectations. *Id.* at 1214.

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

83. *Id.*

84. Bowles v. United States, 23 Cl. Ct. 443 (1991); Rybachek v. United States, 23 Cl. Ct. 222 (1991).

85. 22 Cl. Ct. 310 (1991).

shore was denied a permit to reclaim his land for development.[86] The claims court determined that a twenty-five percent reduction in value did not remove all economic viability from the property because the remaining value far exceeded the investment.[87] Moreover, the permit denial did not interfere with the owner's investment-backed expectations because the owner had advance notice of state wetlands regulation in the area.[88]

D. Unit of Property Considered in Taking Analysis

In determining whether a regulation effects a taking, the court must focus on the nature of the interference with rights in the parcel as a whole.[89] " '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."[90] If the burden is only on a small fraction of the property, the land has not been taken.[91]

In *Keystone Bituminous Coal*, the Supreme Court considered whether a regulation which prevented the owners of mineral rights from mining a small percentage of their property constituted a taking.[92] The owners claimed that the coal which they had to leave in the ground as a support estate had been taken because there was no other use for it.[93] The Court found that this support estate was merely a part of the entire bundle of rights possessed by the owner and consequently that there was no taking of this land.[94]

In cases involving the taking of wetlands, courts have had particular difficulty in defining the unit of land subject to the takings analysis. The court must determine, in these types of cases, whether to consider land formerly owned, but already sold; land not subject to the Clean Water Act; land for which the owner has

86. *Id.* at 320.

87. *Id.* at 320 n.5.

88. *Id.* at 321. "Ciampitti had knowledge of the difficulty attendant upon developing wetlands well before any of the purchases at issue." *Id.*

89. *Penn Central*, 438 U.S. at 130; *see also* Andrus v. Allard, 444 U.S. 51, 65-66 (1979) ("At least 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").

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

91. *Id.* at 130-31.

92. *Keystone Bituminous*, 480 U.S. at 499.

93. *Id.* at 498.

94. *Id.* at 501.

not applied for a section 404 permit; and land which is not contiguous to land subject to the permit denial.

In *Florida Rock Industries v. United States*,[95] all of the 1,560 acres of the landowner's property was wetlands and, thus, subject to regulation under the Clean Water Act.[96] In this case, the Federal Circuit affirmed the lower court's finding that only the ninety-eight acres for which a permit was sought can be considered in the analysis.[97] The court stated that the mere possibility that a permit would not be granted is not sufficient to require the court to consider all 1,560 acres.[98]

The claims court in a summary judgment proceeding in *Ciampitti v. United States*[99] considered the taking of land not all of which was either contiguous or subject to wetlands regulation.[100] The claims court first stated that only property subject to action by the government can be considered in a takings claim.[101] Thus, the court dismissed the claim with respect to all land not included in the permit which the Army Corps denied.[102]

At the subsequent trial, the claims court then considered the whole parcel of property, including the wetlands subject to the permit denial and adjacent uplands still owned when the Corps denied the permit, in determining whether a taking had occurred.[103] The court identified a number of factors helpful in defining the unit of property to consider.[104] These factors include "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, [and] the extent to which the protected lands enhance the value of remaining lands."[105]

In *Jentgen v. United States*[106] and *Deltona v. United States*,[107] the claims court considered all of the land, both wetlands and uplands, owned by the challengers. In *Jentgen*, because almost half

95. 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).
96. *Id.* at 895.
97. *Id.* at 904-05.
98. *Id.*
99. 18 Cl. Ct. 548 (1989).
100. *Id.* at 549-50.
101. *Id.* at 553. The landowners sought compensation for 421 lots which were not included in their permit application. *Id.*
102. *Id.*
103. *Id.* at 318-19.
104. *Ciampitti*, 18 Cl. Ct. at 320.
105. *Id.* at 318.
106. 657 F.2d 1210 (Ct. Cl. 1981).
107. 657 F.2d 1184 (Ct. Cl. 1981).

the tract consisted of developable uplands and because the owners could recoup their original investment by developing these lands, the claims court found no taking of the property.[108] Likewise, the claims court in *Deltona* found no taking of the challenger's property.[109] The court noted that even looking at only the portions of the landowner's property subject to the permit requirements, there were enough developable acres of land that the owners could recoup twice their original investment.[110]

III. DISCUSSION

Against this background, the United States Claims Court in *Loveladies Harbor, Inc. v. United States*[111] held that the denial of a permit under section 404 of the Clean Water Act was a regulatory taking of wetlands and awarded the owners just compensation.[112] In 1956, plaintiffs purchased 250 acres of land on Long Beach Island in New Jersey for $300,000.[113] By 1972, they had filled and developed 199 of these acres.[114] The New Jersey Wetlands Act of 1970[115] required plaintiff to obtain a permit from the New Jersey Department of Environmental Protection (NJDEP) before filling the remaining fifty-one acres.[116] Under section 404 of the Clean Water Act, plaintiff also needed a permit from the Army Corps of Engineers.[117]

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108. *Jentgen*, 657 F.2d at 1213. Forty acres of 101.8 acres owned by the challenger were uplands. *Id.* The court concluded that the challenger could develop and sell these lands for between $80,000 and $150,000. *Id.* The challenger had purchased all 101.8 acres for $150,000 six years earlier. *Id.*

109. *Deltona*, 657 F.2d at 1194.

110. *Id.* at 1192. There were at least 111 acres of developable land in these tracts. *Id.* The market value of this area was $2.5 million, while all of these tracts were purchased for only $1.24 million. *Id.*

111. 21 Cl. Ct. 153 (1990).

112. *Id.* at 161.

113. *Id.* at 153.

114. *Id.*

115. N.J. STAT. ANN. § 13:9A (West 1991).

116. *Loveladies Harbor*, 21 Cl. Ct. at 153-54 n.1.

117. 33 U.S.C. §§ 1311, 1362 (1988). Any discharge of dredged or fill materials into "navigable waters" is forbidden unless authorized by a permit granted by the Army Corps of Engineers pursuant to 33 U.S.C. § 1344. *Id.*

Section 10 of the Rivers and Harbors Act of 1899 prohibits the excavation or filling of any "navigable water of the United States" without prior authorization of the Secretary of the Army acting through the Chief of Engineers. 33 U.S.C. § 403 (1988). The Rivers and Harbors Act was not intended to reach the full extent of the federal government's Commerce Clause powers under article 1, section 8 of the United States Constitution. *1902 Atlantic*, 574 F. Supp. 1381, 1392 (E.D. Va. 1983) (citing United States v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974), *cert. denied* 420 U.S. 927 (1975)).

Plaintiff applied for state permits in 1973, 1977, and 1981.[118] Plaintiff was granted a permit by the state of New Jersey in 1981.[119] Plaintiff also applied to the Army Corps of Engineers for a federal permit on three separate occasions.[120] The third, and final, application was denied in 1981.[121] The Corps denied the permit application because of a desire to preserve wetlands along with its wildlife and vegetation.[122]

Plaintiff brought the present action[123] in the claims court to challenge the permit denial.[124] On August 12, 1988, the claims court denied both parties' motions for summary judgment.[125]

118. Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 383-84 (1988). In 1973, plaintiffs submitted an application to develop the remaining fifty-one acres of their land. *Id.* This permit was denied without prejudice because it failed to contain sufficient information. *Id.* at 384. The 1977 application was denied on its merits and the plaintiffs appealed. *Id.* NJDEP offered plaintiff a settlement which would allow them to fill 12.5 acres, but they rejected this offer. *Id.* In the administrative hearing on appeal, plaintiff also asserted that the permit denial constituted a taking of its property. *Id.* Following another rejection of its claim, plaintiff appealed to the New Jersey Superior Court. *Id.* They lost this appeal as well. *Id.*; *see* In re Loveladies Harbor, Inc., 422 A.2d 107 (N.J. 1980), *cert. denied*, 427 A.2d 588 (N.J. 1981).

119. *Loveladies Harbor*, 21 Cl. Ct. at 154. In 1981, plaintiff submitted an application for a permit to develop only the 12.5 acres which the NJDEP had suggested in a settlement offer in 1977. 15 Cl. Ct. at 384. The NJDEP accepted this 1981 application and issued the permit for 11.5 acres of wetlands (one acre had already been filled) subject to the condition that it mitigate the destruction of wetlands by creating a corresponding amount of new wetlands. *Loveladies Harbor*, 21 Cl. Ct. at 154.

120. *Id.*

121. *Loveladies Harbor*, 15 Cl. Ct. at 384. The final permit request was denied on May 5, 1982. This was the date of the alleged taking. *Id.*

122. *Id.*

123. Plaintiff initially challenged the permit denial in the United States District Court for the District of New Jersey. After losing a challenge to the permit denial there, it appealed to the United States Court of Appeals for the Third Circuit which affirmed the district court opinion. *See* Loveladies Harbor, Inc. v. Baldwin, Civil No. 82-1948 (D.N.J.), *aff'd without opinion*, 751 F.2d 376 (3d Cir. 1984).

124. The Tucker Act, 28 U.S.C. §§ 1346, 1491 (1976), vests the claims court with exclusive jurisdiction to hear contract claims seeking judgment against the United States in excess of $10,000. *Id.* Thus, the challengers must seek just compensation for the taking rather than an injunction against enforcement of the regulation. *See* Want, *supra* note 7, at 10,175. For support of claims court jurisdiction over taking cases involving claims for monetary relief in excess of $10,000, see 1902 Atlantic, Ltd. v. Hudson, 574 F. Supp. 1381, 1406 (E.D. Va. 1983); Parkview Corp. v. Department of Army, 490 F. Supp. 1278, 1281 (E.D. Wis. 1980).

125. *Loveladies Harbor*, 15 Cl. Ct. at 384. In its motion for summary judgment, defendant argued that no taking had occurred; in their motion for partial summary judgment, plaintiff argued that the Army Corps' refusal to issue a fill permit constituted a taking under the Fifth Amendment to the United States Constitution. *Id.* at 383.

The court concluded that the private interest in developing and utilizing the property in question was greater than the public interest of preserving the wetlands.[126] Thus, one factor of the takings analysis was satisfied. The court further held that there was a reduction in value of the land, but submitted the case for trial to determine whether there were any remaining commercial or economic uses for the land.[127] The court also determined that it must look at only the remaining twelve and one-half acres of land in its taking analysis.[128]

After the trial, the claims court stated in an opinion, issued on July 23, 1990, that "the value of the property virtually has been eradicated as a result of government action."[129] The court held that the government had taken the land by denying a "dredge and fill" permit under section 404 of the Clean Water Act.[130] The court required the federal government to pay plaintiffs $2,658,000 for the twelve and one-half acres.[131]

IV. ANALYSIS

The United States Claims Court in *Loveladies Harbor* failed in essential aspects of its analysis resulting in the determination that the government had taken the plaintiff's land at Loveladies Harbor. Primarily, the *Loveladies Harbor* court, in the summary judgment proceeding, failed in its definition of the parcel of property to consider in measuring the effect of the regulation.[132] The court noted that most of the case law provided little guidance in determining the appropriate parcel to include in the analysis when only part of the originally purchased land is still owned.[133] In applying precedent, however, the court quoted the Supreme Court, out of context, to conclude that only property held at the time of the taking can be considered.[134]

126. *Id.* at 399. The court was unable to determine if the land had lost its economic viability as a result of the regulation. *Id.*

127. *Id.* The court asserted that if the land must remain as an empty lot, plaintiffs would prevail at trial. *Id.*

128. *Id.*

129. *Loveladies Harbor*, 21 Cl. Ct. at 160.

130. *Id.*

131. *Id.* at 161.

132. *Loveladies Harbor*, 15 Cl. Ct. at 391.

133. *Id.* at 392.

134. *Id.* The court stated, "the Supreme Court defined the value of the parcel as a whole as 'the value that remain[ed] in the property' when the taking was said to have occurred." *Id.* (quoting *Keystone Bituminous*, 480 U.S. at 497). The Supreme Court actually had stated that "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the

The claims court also dismissed *Deltona*, stating it "cannot be read to require a rigid rule that the parcel as a whole must include all land originally owned by plaintiffs."[135] In *Deltona v. United States*,[136] the court looked at one segment of the owners' property which had increased in value so much that it was worth more than their original investment.[137] As a result, the court failed to find any deprivation of economic viability of the land.[138]

The *Loveladies Harbor* court also determined that six and one-half acres of land not contiguous to the other twelve and one-half acres could not be considered in the analysis.[139] These acres were not affected by the government permit.[140] The court relied on *Penn Central Transportation Co. v. New York City*[141] in which the Supreme Court considered only the landmark site in its determination, even though the company owned other properties scattered throughout Manhattan.[142]

The *Loveladies Harbor* court then relied on *Florida Rock Industries v. United States*[143] to find that only the land for which a state permit had been requested can be considered in the analysis.[144] In that case, the Federal Circuit Court of Appeals refused to consider 1,462 of 1,560 acres because the landowner did not apply for a permit to mine this land.[145] By analogy, the *Loveladies Harbor*

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value that remains in the property, one of the critical questions is determining how to define the unit of property." *Keystone Bituminous*, 480 U.S. at 497. It appears the Court meant that in its taking determination, it had to compare the value of the property before the regulation with the value remaining after regulation, which raises the issue of what part of the property should be used.

135. 15 Cl. Ct. at 392.

136. 657 F.2d 1184 (Cl. Ct. 1981).

137. *Id.* at 1192. For a further discussion of *Deltona*, see *supra* notes 82-83, 109-10 and accompanying text.

138. *Id.*

139. 15 Cl. Ct. at 393.

140. *Id.*

141. 438 U.S. 104 (1978).

142. *Id.* at 115. The Court referred to these other properties because they were sites to which Penn Central could have transferred its development rights. For further discussion of *Penn Central*, see *supra* notes 35-43 and accompanying text.

143. 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

144. *Loveladies Harbor*, 15 Cl. Ct. at 392-93.

145. *Florida Rock Industries*, 791 F.2d at 904. The court stated that any attempt to obtain a permit for this land would be futile. *Id.* at 905. This was the only land which Florida Rock attempted to mine and the only land which it would need to mine within the next three years. *Id.* The court also refused to find a taking of this land because its use would be remote in time. *Id.* The court preferred to allow the government to determine whether denial of a permit for this land would be wise, considering the amount of money required for compensation of the landowner. *Id.*

court excluded land for which the owner could not, but had attempted to, obtain a permit from the state of New Jersey.[146] The claims court erred in not considering all of the land originally purchased by Loveladies Harbor. The court noted that *Deltona* was the only case in which the challenger owned a different amount of acreage at the time of the permit denial.[147] The *Loveladies Harbor* court dismissed this case, however, because the *Deltona* court only examined the value of the property which the challenger still owned.[148] The flaw in this analysis is that in *Deltona* the court found that it had to look only at the land still owned to determine that no taking had occurred.[149] The court did not say that it would not have looked to the other land if necessary to find that the challenger could recoup its original investment.

In *Loveladies Harbor*, the owner had purchased 250 acres of land in 1956 for $300,000.[150] The court never investigated whether the sale of the 199 acres which Loveladies Harbor had already developed enabled the challenger to recoup its original $300,000 investment.

The *Loveladies Harbor* court also erred in finding that no legitimate state interest existed for the permit denial and that the plaintiff's land had no remaining economic viability.[151] In analyzing whether the regulation substantially advanced a legitimate state interest, the claims court erroneously balanced the intended public benefit against the harm inflicted upon the landowner.[152] As a result of this balancing, the court found no substantial advancement of a legitimate state interest.[153] In following the pre-

146. 15 Cl. Ct. at 392-93. The landowner in *Loveladies Harbor* had previously applied for a permit for this 38.5 acres of land. *Id.* at 383-84. This request was denied by both the state and federal governments. *Id.* *See supra* notes 111-22 and accompanying text.

147. *Id.* at 392.

148. *Id.*

149. *Deltona*, 657 F.2d at 1192. The court stated that "If we focus solely upon the three construction areas which became subject to the new federal restrictions. . . ." and then noted that "*even* within Barfield Bay. . . there are 111 acres of uplands which can be developed. . . ." *Id.* (emphasis added).

150. *Loveladies Harbor*, 15 Cl. Ct. at 383.

151. Due to the confused state of regulatory taking law, it is unfair to criticize most of the claims court's conclusions and findings. *See supra* notes 18-59 and accompanying text.

152. 15 Cl. Ct. at 388.

153. *Id.* The court stated that "the determination of whether there is a substantial advancement of a legitimate governmental interest necessarily requires that the governmental regulation was intended to promote the public welfare, rather than some private interest." *Loveladies Harbor*, 15 Cl. Ct. at 388.

cedent of the United States Supreme Court,[154] the claims court would have considered such factors as the nature of the menace against which the regulation will protect and the availability of other less drastic measures.[155] In doing so, the claims court should have found that there was a legitimate state interest. The claims court in *Deltona Corp. v. United States*[156] held that all federal environmental laws substantially advance legitimate state interests.[157] The balancing test as discussed in *Keystone Bituminous Coal Ass'n v. DeBenedictis*[158] and *Agins v. Tiburon*[159] indicates that the entire taking analysis, rather than merely this factor, requires an overall balancing of these interests.[160]

Finding no substantial advancement of a legitimate state interest, the *Loveladies Harbor* court was reluctant to hold that a taking had occurred solely on this basis.[161] The court made this statement even after it had declared that a taking could be found in either of two ways: (1) if no legitimate state interest was substantially advanced or (2) if the governmental regulation deprived the owner's land of all economic value.[162] The *Loveladies Harbor* court then contradicted its original statement by indicating that the lack of a legitimate state interest must be considered as

154. *See* Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Andrus v. Allard, 444 U.S. 51 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

155. *See* Goldblatt v. Hempstead, 369 U.S. 590 (1962).

156. 657 F.2d 1184 (Cl. Ct. 1981).

157. *Deltona*, 657 F.2d at 1192; *see supra* note 82 and accompanying text.

158. 480 U.S. 470 (1987).

159. 447 U.S. 255 (1980).

160. For further information regarding this overall balancing test, see *supra* note 40 and accompanying text. The *Loveladies Harbor* court relied on the following statement by the United States Court of Appeals for the Federal Circuit to determine that no legitimate state interest existed: "[T]his appears to be a situation where the balancing of public and private interests reveals a private interest much more deserving of compensation. . . ." *Loveladies Harbor*, 15 Cl. Ct. at 388 (quoting Florida Rock Indus. Inc. v. United States, 791 F.2d 893, 904 (Fed. Cir. 1986), *cert. denied* 479 U.S. 1053 (1987)).

161. *Id.* at 389. The court was reluctant to find a taking at this point due to problems in applying a harm to landowner/benefit to public distinction. *Id.* Under this distinction, the court must determine whether the government is acting to preserve benefits or to prevent harm. *Id.* The court believed that any state action could be characterized either way. *Id.* at 387. It also felt that the balancing test was "generally not a useful guideline for making a takings determination." *Id.* at 389 (citing *Agins*, 447 U.S. at 261).

In light of the confusion generated by the Supreme Court, the hesitance of the claims court is understandable. For further discussion of the state of takings law, see *supra* notes 18-59 and accompanying text.

162. *Id.* at 387.

one of several overall factors.[163]

The court also found that the land had no remaining economic viability.[164] The court easily made the determination that the permit denial had a severe economic impact on the value of plaintiff's land.[165] It began by comparing the value of the property before and after the regulation's interference.[166] The court found that plaintiff lost over ninety-eight percent of the value of its property as a result of the permit denial.[167]

The court reasoned that diminution of value could not alone establish a taking so it continued by determining whether the land had been deprived of all reasonably viable economic uses.[168] Ironically, the court stated that these uses "need not be limited to those activities which are commercially profitable but also can include those activities of recreational value."[169] Because the court believed that this could not be determined as a matter of law, it reserved the issue for trial.[170]

In the 1990 opinion following a trial on this issue, the court considered the highest and best use of the land prior to the regulation and the uses remaining after the regulation.[171] The court determined that the best use of the property before the government action was a forty-lot residential development.[172] The value of the property if used in this way would be $2,658,000.[173] The

163. 15 Cl. Ct. at 390.

164. *Id.* at 395.

165. *Id.* at 394.

166. *Id.* at 394-95. The court stated that "(t)he economic impact approach measures the differing market values of the property." *Id.* at 391.

167. *Id.* The court, on defendant's motion for summary judgment, stated that the parties agreed that the property had decreased in value from $3,790,000 to $13,725.50. *Id.* at 394.

168. *Loveladies Harbor*, 15 Cl. Ct. at 394.

169. *Id.* at 395. From this statement, the court concluded that this determination could not be decided in a motion for summary judgment as a matter of law. *Id.* at 399.

170. *Id.* at 398-99.

171. 21 Cl. Ct. at 156-59.

172. *Id.* at 157.

173. *Id.* The measure of just compensation is beyond the scope of this Note. For further information on the measure of just compensation, see Kirby Forest Indus., Inc. v. United States, 467 U.S. 1 (1984); Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973); United States *ex rel* Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943); Olson v. United States, 292 U.S. 246 (1934); Yuba Natural Resources, Inc. v. United States, 904 F.2d 1577 (Fed. Cir. 1990); United States v. 1291.83 Acres of Land, 411 F.2d 1081 (6th Cir. 1969); Mills v. United States, 363 F.2d 78 (8th Cir. 1966); United States v. Whitehurst, 337 F.2d 765 (4th Cir. 1964); Southern Amusement Co. v. United States, 265 F.2d 34 (5th Cir. 1959).

court then looked to determine if there were any remaining uses for the property.[174] Plaintiff claimed that the best remaining use for the property was for conservation or recreational purposes, rendering the value of the property $12,500.[175] Defendant argued that the property's potential uses included bird watching, hunting and harvesting salt hay; the property could also be used as a marina, for a mitigation site, for aquaculture, and for sale to neighbors.[176] The court found that these uses propounded by defendant "do not meet a 'showing of reasonable probability that the land is both physically adaptable for such use *and* that there is a demand for such use in the reasonably near future.' "[177] Each of defendant's theories was in some way discounted by the court.[178]

V. CONCLUSION AND IMPACT

The claims court incorrectly decided *Loveladies Harbor, Inc. v. United States*. First, if the court had looked at the original investment of Loveladies Harbor, it may have found that the inability to develop fifty-one acres not only did not constitute a taking, but also enhanced the value of the already developed land. Second, the court erred in not concluding that the preservation of wetlands is a legitimate state interest.[179] In addition, if the court had given greater weight to this legitimate state interest, it may have determined that if there were *any* remaining value for this land, no taking could have resulted.

If the decision in *Loveladies Harbor* is followed, it could lead other courts to find a taking in similar circumstances.[180] As a consequence, the federal and state governments may be forced to relax their standards for granting permits, due to the high cost of

174. *Loveladies Harbor*, 21 Cl. Ct. at 157-59.

175. *Id.* at 159.

176. *Id.* at 158. The court dismissed this final possibility by stating that the neighbors would not pay for something which the government is giving them for free, by taking the land and preserving it in its natural state. *Id.* at 159.

177. *Id.* at 158 (emphasis in original) (quoting United States v. 341.45 Acres of Land, 605 F.2d 108, 111 (8th Cir. 1980), *cert. denied sub nom* Bassett v. United States, 451 U.S. 938 (1981)).

178. *Loveladies Harbor*, 21 Cl. Ct. at 158-59. For example, the court found the construction of a marina unlikely due to deed restrictions, zoning requirements, the destruction of wetlands and the degradation of water quality. *Id.* at 159.

179. *See supra* notes 152-60 and accompanying text.

180. A number of cases involving wetlands regulatory takings are currently being considered by the claims court. *See, e.g.*, Formanek v. United States, 18 Cl. Ct. 785 (1989); Beure-Co. v. United States, 16 Cl. Ct. 42 (1988).

compensating landowners for takings.[181] This will ultimately result in the destruction of more and more of this country's wetlands. This result could be prevented by future courts holding that a landowner's[182] property was not taken if he were able to recoup his original investment through the sale of any portion of his property, and if any use remained for the wetlands. This type of holding is essential to the preservation of wetlands, a valuable resource.

Judith A. Johnstone

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181. The Federal Circuit, in *Florida Rock Indus.*, stated that "if the instant case, after the remand, still results in a substantial award against the government, the Army engineers probably would want to consider whether the continued protection of the 1,560 acres of wetlands was worth the damage to the public fisc. This right should be preserved to them." 791 F.2d 893 (Fed. Cir. 1986).

182. This result would apply only to a landowner who purchased his property prior to the promulgation of the Clean Water Act. If the landowner had purchased the property after it became subject to wetlands regulation under the Clean Water Act in 1972, the landowner would have been on constructive notice of the restrictions and would not be able to establish a taking. *See* Ciampitti v. United States, 21 Cl. Ct. 310, 312 (1991). For further discussion of *Ciampitti*, see *supra* notes 85-88 and accompanying text.