THE CONDEMNING OF AMERICA: REGULATORY "TAKINGS" AND THE PURCHASE BY THE UNITED STATES OF AMERICA'S WETLANDS

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I. INTRODUCTION

Since the first pilgrim stepped on America's shore,[1] Americans have been developing wetlands. The colonists found it necessary to locate near water sources for both transportation and power. Even today, most Americans live near rivers, lakes and the oceans.[2] These water systems generate approximately ninety-nine million acres of wetlands.[3] Because of the close proximity of these wetlands to the major population centers, the pressures to develop wetlands are enormous. It is estimated that approximately 200 to 300 thousand acres of wetlands are converted to other uses each year.[4]

The developmental pressures on wetlands becomes even more dramatic when one understands the definition of wetlands. The United States Fish & Wildlife Service defines wetlands as those lands having vegetation which is comprised predominantly of hydrophytes, having soils which are predominately hydric, and

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[1] Plymouth Rock would be classified by the United States Fish and Wildlife Service as wetlands being rocky shore, intertidal, marine. *See generally* FISH AND WILDLIFE SERV., UNITED STATES DEP'T OF THE INTERIOR, CLASSIFICATION OF WETLANDS AND DEEPWATER HABITS OF THE UNITED STATES (L. Cowardin, V. Carter, F. Golet & E. La Roe, eds. 1977) (hereinafter CLASSIFICATION OF WETLANDS).

[2] Ten percent of all Americans live within 50 miles of New Brunswick, New Jersey. *See* FISH AND WILDLIFE SERV., UNITED STATES DEP'T OF THE INTERIOR, WETLANDS OF NEW JERSEY 2 (1985).

[3] 2 ENVIRONMENTAL LAW INST., LAW OF ENVIRONMENTAL PROTECTION, ch. 12 at 122 (S. Novick, D. Stever, & M. Mellon, eds. 1987).

[4] FISH AND WILDLIFE SERV., UNITED STATES DEP'T OF THE INTERIOR, WETLAND VALUES AND MANAGEMENT 1 (1985).

having soils saturated by water at some time during the growing season.[5] This definition encompasses both lands covered with standing water and lands subject only to episodic flooding. Thus, bottom land forests and transitional lands which lie between dry uplands and aquatic systems are also defined as wetlands.[6] Many of these lands appear to the lay person to be dry lands and only a skilled wetland ecologist can determine whether the lands are wet or dry.

Many developers have turned toward the underdeveloped lands near the population centers with an eye toward meeting the legitimate growth needs of these areas only to be confronted with the fact that these lands may be protected wetlands. When privately owned wetlands cannot be developed because of state and federal regulations, the question arises: has a "taking" occurred which requires compensation under the just compensation clause of the fifth amendment.[7] If the answer is yes, then state and federal governments would face potential inverse condemnation awards exceeding ninety-nine billion dollars.[8] Recent United States Supreme Court decisions suggest this result.[9]

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[10] the Court held that a regulatory "taking" of private property, even if only temporary in nature, requires monetary compensation.[11] *First English* evidences the Court's concern for the interests of property owners who are denied all viable economic use of their land by the exercise of a governmental agency's regulatory authority. Competing with this interest,

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5 CLASSIFICATION OF WETLANDS, *supra* note 1, at 5.

6 *Id.* at 5–6.

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

8 The author bases his conclusion on a conservative per acre valuation of $1000, which when multiplied by the 99 million acres of existing wetlands would generate a 99 billion dollar government expenditure.

9 *See, e.g.*, Nollan v. California Coastal Comm'n, 107 S. Ct. 3143 (1987) (conditioning building permit on transfer of easement to public across homeowner's beachfront property without paying compensation violates fifth amendment where condition does not substantially further legitimate governmental interest); First English Evangelical Luthern Church v. County of Los Angeles, 107 S. Ct. 2378 (1987) (where ordinance is invalidated which denied property owner all use of his land, property owner may recover monetary damages for period that ordinance effected "taking" of his property). *See also supra* notes 119-42 and accompanying text (discussing *Nollan*) and notes 79-92 and accompanying text (discussing *First English*).

10 107 S. Ct. 2378 (1987).

11 *See id.* at 2389.

however, is the compelling need to protect and preserve the nation's wetlands.[12] In recognition of this need, federal, state and local governments have increased regulation of these environmentally sensitive ecosystems.[13]

In *United States v. Riverside Bayview Homes, Inc.*,[14] the Supreme Court ruled that the regulatory authority of the Army Corps of Engineers (Corps), as provided by the federal Clean Water Act, extends to all wetlands adjacent to open bodies of water.[15] The Court observed, however, that the denial of a Corps permit to fill privately owned wetlands may amount to a "taking" requiring monetary compensation to landowners denied viable economic use of their land.[16]

This article will focus on the ramifications of the Court's holdings in *First English* and *Riverside*. It will examine the effect of increased governmental regulation of our nation's wetlands on the fifth amendment "takings" question. Finally, it will discuss the extent to which the government will be required to purchase the nation's wetlands, and the price the government will be required to pay.

II. The Governmental Regulation of Wetlands

Wetlands "consciousness raising" is a relatively recent phenomenon. For most of our nation's history, marshes, swamps and bogs were considered valueless wastelands. Wetlands were frequently drained or filled to accommodate agricultural, residential or industrial development.[17] Today, the indiscriminate alteration of these environmentally sensitive areas cannot be tolerated because of their importance in preserving water quality, maintaining groundwater supplies, preventing flooding and providing habitat for wildlife.[18] The growing public awareness of

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12 For a discussion of the importance of protecting wetlands, see *infra* notes 17-18 and accompanying text.

13 For a discussion of increasing of governmental regulation of wetlands, see *infra* notes 19-24 and accompanying text.

14 474 U.S. 121 (1985).

15 *Id.* at 134.

16 *Id.* at 127.

17 The "reclamation" of wetlands was a national policy during the nineteenth century. The Swamp Lands Acts of 1849, 1850 and 1860 opened approximately 65 million acres for reclamation in 15 public domain states. *See* United States Dep't of the Interior, Fish and Wildlife Service Circular No. 39, Wetlands of the United States 5 (1956).

18 *See* M. Blumm, Wetlands Protection and Coastal Planning: Avoiding the Perils of Positive Consistency, 5 Colum. J. Envt'l L. 69 (1978). "Wetlands furnish spawning and nursery areas for commercial and sport fish, act as natural cleansers

the need to preserve the nation's wetlands, and the commensurate increase in regulatory control of these areas, dictate that all landowners develop a consciousness of wetlands.

Section 404 of the Clean Water Act (section 404) is the primary national vehicle for protecting wetlands.[19] Enacted in 1972, section 404 regulates the discharge of dredge and fill materials into the "navigable waters of the United States" by means of a permit program administered by the Corps.[20] While the term "navigable waters" defines the limit of the Corps' jurisdiction, Congress intended that the term "be given the broadest constitutional interpretation."[21] The federal courts have enforced this congressional mandate by requiring that the Corps exercise its jurisdiction to the maximum extent permissible under the commerce clause.[22]

In regulations promulgated pursuant to the judicially imposed interpretation of section 404's jurisdictional reach, the Corps defines the term "navigable waters" to comprise, not only waters suitable for navigation, but also wetlands for which "the use, degradation or destruction . . . could affect interstate or foreign commerce."[23] Wetlands in turn are defined as lands "inundated or saturated by surface or groundwater at a frequency and duration sufficient to support . . . a prevalence of vegetation typically adapted for life in saturated soil conditions."[24] Under these definitions any parcel of land where ground water levels are high enough to support vegetation adapted to withstand wet soil conditions may fall within the Corps' jurisdiction.

The Corps' broad jurisdiction over wetlands was upheld by the United States Supreme Court in *United States v. Riverside Bayview Homes, Inc.*[25] Riverside Bayview Homes (Riverside)

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of airborne and waterborne pollutants, provide recharge areas for water supplies, afford natural protection from hazardous floods, supply essential nesting and wintering areas for waterfowl, and serve as high-yield food sources for aquatic animals." *Id.* at 69-70.

19 Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 404, 86 Stat. 816 (codified as amended as Clean Water Act, 33 U.S.C. § 1344 (1982)).

20 Clean Water Act, 33 U.S.C. §§ 1344(a), (b), (c) (1982).

21 S. REP. No. 1236, 92d Cong., 1st Sess. 144 (1972), *reprinted in* [1972] U.S. CODE CONG. & ADMIN. NEWS 3822.

22 *See, e.g.*, Natural Resources Defense Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) (term "navigable waters" encompasses all waters within constitutional reach of the commerce clause).

23 33 C.F.R. § 328.3(a)(3) (1987).

24 *Id.* § 328.3(b).

25 474 U.S. 121 (1985).

owned eighty acres of low-lying marsh near Lake St. Clair in Michigan. Riverside had planned to build a housing development on sixty acres of this property. In 1976, in preparation for the anticipated construction, Riverside began to fill the land without having first obtained a section 404 permit.[26]

The United States Attorney filed suit at the request of the Corps to enjoin Riverside from further fill activity.[27] The district court determined that Riverside's property was a wetland subject to the Corps' regulatory authority.[28] The government was granted a permanent injunction and Riverside appealed.[29]

The Sixth Circuit reversed.[30] The appellate court defined the term "navigable waters" to comport with a narrow interpretation of congressional intent in delegating section 404 jurisdiction to the Corps.[31] Noting that statutory language made no reference to flooded lands or wetlands, the Sixth Circuit maintained that the Corps' jurisdiction was limited to "navigable waters and perhaps the bays, swamps, and marshes into which those navigable waters flow."[32] Accordingly, the appellate court limited the

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26 United States v. Riverside Bayview Homes, Inc., 729 F.2d 391, 393 (6th Cir. 1984), *rev'd*, 474 U.S. 121 (1985). In November 1976, Riverside submitted an application for a section 404 permit. *Id.* Before the Corps had acted upon the application, however, Riverside began filling the property. *Id.* On December 22, 1976, the Corps ordered Riverside to cease and desist its filling activities. *Id.* Riverside ignored the order. *See id.*

27 *Id.*

28 *Riverside*, 474 U.S. at 125.

29 *Id.* In determining that Riverside's property was within the Corps' jurisdiction, the district court had relied on Corps regulations issued in 1975. *See id.* at 124-25. The 1975 regulations described freshwater wetlands as including "marshes, shallows, swamps and similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation." 33 C.F.R. § 209.120(d)(2)(i)(h) (1976). These regulations provided further that " '[f]reshwater wetlands' means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." *Id.*

On appeal, the Sixth Circuit remanded the case for reconsideration in light of the Corps' 1977 regulation amendments. United States v. Riverside Bayview Homes, 615 F.2d 1363 (6th Cir. 1980). The amended regulation defined 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. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. § 323.2(c) (1978). On remand, the district court continued its permanent injunction. *Riverside*, 474 U.S. at 125. Riverside, once again, appealed.

30 *Riverside*, 729 F.2d at 392.

31 *Id.* at 397-98.

32 *Id.* at 397.

Corps' jurisdiction over wetlands, to lands subject to "frequent flooding by 'navigable waters' " at a frequency sufficient to support the growth of aquatic vegetation.[33] Consequently, the appellate court held that Riverside's property could not be considered a section 404 wetland, because it was not subject to flooding from an adjacent, navigable body of water.[34]

In a unanimous decision by Justice White, the Supreme Court reversed the Sixth Circuit and reinstated the district court's grant of permanent injunction.[35] Rejecting the Sixth Circuit's narrow interpretation of "navigable waters," the Court noted the express intent of Congress to define broadly the waters covered by the Clean Water Act. The Court observed that "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the [Corps] to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined."[36] The Court further asserted that there is no requirement that the lands in question be frequently inundated by these adjacent waters; rather, mere saturation by ground water is sufficient to establish wetlands subject to the Corps' jurisdiction.[37]

The Supreme Court's liberal interpretation of the Clean

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[33] *Id.* at 398.

[34] *Id.* The court further stated:

> [I]t [is not] clear that Congress intended to subject to the permit requirement inland property which is rarely if ever flooded. Nor is it clear that the statute was intended to cover a piece of property a mile inland from Lake St. Clair which has been farmed in the past and is now platted and laid out for subdivision development with the fire hydrants and storm sewers already installed.

Id. at 397-98.

The Court also noted a potential fifth amendment problem:

> To prohibit any development or change of such property by the landowner raises a serious taking problem under the fifth amendment. It is well established that government regulation can effect a fifth amendment taking. The rationale, as stated by Justice Brennan, is that "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property."

Id. at 398 (citing San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 620, 652 (1981) (Brennan, J., dissenting)).

[35] *Riverside*, 474 U.S. at 126.

[36] *Id.* at 133.

[37] *Id.* at 134-35. Specifically, the Court stated:

> 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

Water Act, and the breadth of the Corps' jurisdiction as announced in *Riverside*, have been utilized by courts to uphold Corps' jurisdiction over artificially created wetlands.[38] In *Bailey v. United States Army Corp of Engineers*,[39] for example, property owners challenged the Corps' jurisdiction over a sixty-five-acre parcel of land which they intended to fill with sand.[40] The land in question was not inundated with surface or groundwater and one area was not saturated at the surface. At trial, the property owners produced an expert who testified that the wetlands had been artificially created by construction of a dam, which had produced a rise in the water table and caused the soil to become saturated.[41]

The United States District Court for the District of Idaho upheld the Corps' jurisdiction over these lands.[42] Citing *Riverside*, the court held that, for an area to be classified as wetlands it need only be sufficiently saturated to support wetland-type vegetation.[43] The court maintained that evidence with respect to the artificial creation of the wetlands was irrelevant.[44] Consequently, the court held that "federal jurisdiction is determined by whether the site is presently wetlands and not by how it came to be

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for a legal judgment that adjacent wetlands may be defined as waters under the Act.

This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water. The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands.

Id. at 134.

38 *See, e.g.*, Bailey v. United States Army Corps of Eng'rs, 647 F. Supp. 44 (D. Idaho 1986) (Corps has jurisdiction to regulate lakeside property); United States v. Larkins, 657 F. Supp. 76 (W.D. Kan. 1987) (Corps has jurisdiction to regulate wetlands adjacent to rivulets; soil analysis and aerial photographs are sufficient to establish that lands in question are wetlands); United States v. Rivera Torres, 656 F. Supp. 251 (D.P.R. 1987) (Corps has jurisdiction to regulate mangrove forest in Puerto Rico which has firm soil, stagnant water pools and palm trees); United States v. Akers, 651 F. Supp. 320 (E.D. Cal. 1987) (Corps has jurisdiction to regulate wetlands which receive water from man-made sources or conduits, regardless of whether the wetlands were created by the property owner's own irrigation and flood control structures).

39 647 F. Supp. 44 (D. Idaho 1986).

40 *Id.* at 45.

41 *Id.* at 48.

42 *Id.*

43 *Id.* at 47-48 (citing United States v. Bayview Homes, Inc., 474 U.S. 121 (1985)).

44 *Id.* at 48 (citing Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); Swanson v. United States, 600 F. Supp. 802 (D. Idaho 1985); United States v. Ciampitti, 583 F. Supp. 483 (D.N.J. 1984)).

wetlands."[45]

The Corps is not the only federal governmental agency with jurisdiction over wetlands. The Environmental Protection Agency (EPA) has concurrent jurisdiction over all wetlands under the jurisdiction of the Corps, pursuant to its veto power under section 404(c) of the Clean Water Act.[46] The EPA enjoys broad discretion in its exercise of jurisdiction over wetlands and in the evaluation of the propriety of section 404 permit approvals.[47] Thus, even if the Corps issues a section 404 permit to fill wetlands, the EPA can in certain instances veto the Corps approval and proscribe alteration of the property.[48]

The extent of the EPA's power under section 404(c) was discussed in *Newport Galleria Group v. Deland*.[49] Newport Galleria Group of the Pyramid Companies (Pyramid) sought to build a shopping center on eighty acres of land, fifty of which were a wetlands tract known as "Sweedens Swamp."[50] After reviewing Pyramid's application, the Corps approved the proposed development.[51] The EPA then initiated proceedings in federal court under section 404(c) and suspended issuance of the permit.[52] Pyramid challenged the EPA's authority and sought to en-

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45 *Id.* (quoting United States v. Ciampitti, 583 F. Supp. 483, 494 (D.N.J. 1984)).

46 33 U.S.C. § 1344(c) (1982).

47 *Id.* Section 404(c) of the Clean Air Act provides:

> The Administrator [of the EPA] is authorized to prohibit the specification (*including the withdrawal of specification*) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (*including the withdrawal of specification*) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary [of the Army, acting through the Chief of Engineers]. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

Id. (emphasis added).

48 *See id.*

49 618 F. Supp. 1179 (D.D.C. 1985).

50 *Id.* at 1180.

51 *Id.* at 1181. The Corps' approval was conditioned on several requirements. *Id.* Principal among these was the creation of a mitigating project, or artificial wetland, to replace Sweeden's Swamp. *Id.* Pyramid was required to locate a mitigating site, conduct habitation evaluations and hydrological studies, and develop project plans and specifications. *Id.* No significant alteration of Sweeden's Swamp was to begin until the artificial swamp was functioning to the Corps satisfaction. *Id.*

52 *Id.*

join the EPA from suspending the permit.[53] Upon the EPA's motion for summary judgment, Pyramid's complaint was dismissed.[54]

In dispensing with Pyramid's claims, the court upheld the EPA's wide discretion with respect to proceedings under section 404(c).[55] The court observed that the regulations promulgated pursuant to section 404(c) permitted the Administrator of the EPA to exercise his authority whenever he "had *reason to believe* after evaluating the information available to him . . . that an 'unacceptable adverse effect' *could* result."[56] Additionally, the court noted that the EPA is not limited to information provided by the Corps when initiating a section 404(c) proceeding; rather, the EPA may consider any information available to it.[57]

The federal government is not the only governmental entity interested in protecting the nation's wetlands, many states have also adopted wetland protection programs.[58] Indeed, all but two of the coastal states have programs to protect their coastal wetlands,[59] and as many as fifteen states have adopted programs to protect inland wetlands.[60] Several of these programs were adopted only recently,[61] evidencing a growing trend of increased

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53 *Id.* at 1180.

54 *Id.*

55 *Id.* at 1182.

56 *Id.* at 1181 (quoting 40 C.F.R. § 231.3(a) (1984) (emphasis added by the court)).

57 *See id.* at 1182 n.2. The court stated: "Indeed, it would be extraordinary if Congress granted the EPA a veto power over the Corps' permit decisions, but precluded it from reconsidering those issues the Corps considered in deciding to grant the permit in the first place." *Id.*

58 State statutes which may have a direct or indirect impact upon the use and development of wetlands are conveniently compiled in [1-3 State Water Laws] Env't Rep. (BNA).

59 These two states are Texas and Illinois. Pursuant to the Coastal Zone Management Act (hereinafter CZMA), 16 U.S.C. § 1451 (1982), the EPA may approve and make appropriations for state coastal wetland permitting programs. *See* 16 U.S.C. § 1458. Texas and Illinois are the only coastal states which do not have programs approved by the EPA pursuant to the CZMA. The CZMA's definition of a coastal state includes states bordering the Great Lakes, 16 U.S.C. § 1453(4), and thus Illinois is considered a coastal state.

60 These fifteen states are Connecticut, Florida, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Vermont and Wisconsin.

61 On July 1, 1987, for example, New Jersey enacted the Freshwater Wetlands Protection Act, N.J. STAT. ANN. 13:9B-1 (West Supp. 1988). The statute mandates strict regulation of freshwater wetlands. Under rules proposed to implement the Act, the State Department of Environmental Protection "will regulate a large variety of activities which are destructive of freshwater wetlands, including placement of fill, removal of vegetation and alteration of drainage patterns." Division of

governmental concern and regulation of wetlands.

III. TEMPORARY REGULATORY "TAKINGS" REQUIRE MONETARY COMPENSATION

As previously stated, the development of our nation's wetlands has been the subject of increased governmental regulation. Whether the effect of these regulations on a particular parcel of land amounts to a "taking" in violation of the fifth amendment has yet to be confirmed by the Supreme Court. Recent Court decisions suggest, however, that wetland property owners must be compensated for the losses they incur when government regulations deny them viable economic use of their land.

A. The Decline of the Police Power Theory

The issue of regulatory "takings" frequently arises when a landowner in the process of constructing a commercial or residential development receives a cease and desist order[62] from the Corps. The order notifies the landowner that the land under development constitutes "wetlands" and proscribes all further filling activities until a section 404 permit is obtained. The landowner must then apply for an after-the-fact permit. If the permit is denied, the landowner may challenge the permit denial as an unconstitutional interference with the land or seek compensation for a "taking" pursuant to an inverse condemnation proceeding.[63] Yet, even if a court declares the permit denial unconstitutional, or the Corps reconsiders the application and decides to issue the permit, until recently, the property owner would not have been entitled to compensation for a loss incurred while the matter was before the court.

An affirmative response to this injustice was first enunciated

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Coastal Resources, Department of Environmental Protection, Freshwater Wetlands Protection Act Rules, Proposed New Rules: N.J.A.C. 7:7A, 19 N.J. Reg. (1987). Maine, North Dakota, New York and Vermont have adopted similar wetland protection programs within the last three or four years. In addition, Florida amended its program in 1984 to provide for stricter requirements for wetland development permits.

62 The Corps has authority to issue a cease and desist order under section 404(S)(1) of the Clean Water Act, 33 U.S.C. § 1344(S)(1) (1982).

63 Inverse condemnation is the manner by which a property owner receives compensation for property which has been "taken" without formal condemnation proceedings. Eminent domain is the procedure by which the "government asserts its authority to condemn property." *See* Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980). In inverse condemnation actions, the proceeding is commenced by the landowner, rather than the government, hence the condemnation is "inverse." *See* San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981).

in Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*.[64] San Diego Gas & Electric (SDG & E) sought to construct a nuclear power plant on a 214 acre tract which it had acquired at a cost of about $1,770,000.[65] Subsequent to SDG & E's purchase of the land, the City of San Diego rezoned the property as an open-space area and proposed that it be preserved as parkland.[66] SDG & E then instituted a state court action in inverse condemnation for damages, alleging that it had been deprived of all beneficial use of its land.[67]

In California, a landowner's sole remedy for "taking" of property without compensation by the operation of a zoning ordinance was invalidation of the ordinance.[68] Monetary relief was not available. California courts based this rule on a distinction between a state's police power and its eminent domain power. When California was exercising its police power, the landowner was not entitled to monetary compensation.[69] SDG & E challenged this rule.[70]

Ultimately SDG & E's appeal to the United States Supreme Court was dismissed because of the absence of a final judgment with respect to whether a "taking" had occurred.[71] In a dissenting opinion, however, Justice Brennan maintained that the majority had misinterpreted the California Court of Appeal decision.[72] Concluding that there had been a final decision on the merits,[73] Justice Brennan argued that the California Court of

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64 450 U.S. 621 (1981).

65 *Id.* at 624.

66 *Id.* at 624-25.

67 *See id.* at 625-26.

68 *Id.* at 628. This rule was propounded by the California Supreme Court in Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25 (1979), *aff'd*, 447 U.S. 255 (1980). When *Agins* reached the United States Supreme Court, however, the Court did not rule on the issue of whether compensation must be paid in inverse condemnation actions because there was no taking. *Agins*, 447 U.S. at 263. *See infra* notes 105-11 (discussing *Agins*).

69 *SDG & E*, 450 U.S. at 639 (Brennan, J., dissenting). This was the view taken by the California Court of Appeal. *See* San Diego Gas & Elec. Co. v. City of San Diego, 80 Cal. App.3d 1026, 146 Cal. Rptr. 103 (1978).

70 *SDG & E*, 450 U.S. at 623.

71 *Id.* at 633.

72 *Id.* at 637 (Brennan, J., dissenting). The Supreme Court has been hesitant to rule that a "taking" has occurred unless all possible administrative and procedural remedies have been exhausted. *See, e.g.*, MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561, 2568-69 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 294-95 (1981); Agins v. City of Tiburon, 447 U.S. 255, 263 (1980).

73 *SDG & E*, 450 U.S. at 646 (Brennan, J., dissenting).

Appeal decision should be reversed, and that SDG&E should receive monetary compensation from the government.[74] Justice Brennan interpreted the California decision as holding that a "taking" of SDG & E's property had occurred by the open-space ordinance, but that "the city's exercise of its police power, however arbitrary or excessive, could not as a matter of *federal constitutional law* constitute a 'taking' under the Fifth and Fourteenth Amendments."[75]

Justice Brennan rejected this reasoning. He asserted that invalidation of the regulation, without monetary compensation, would fall short of fulfilling the purpose of the just compensation clause of the fifth amendment.[76] Justice Brennan asserted that when a "taking" results from the operation of a police power regulation, the property owner should be compensated "for the period commencing on the date the regulation first effected the 'taking' and ending on the date the government entity chooses to rescind or otherwise amend the regulation."[77]

Justice Brennan recognized that the rule he proposed would in effect establish a monetary compensation remedy for temporary "takings." He straightforwardly stated that "[n]othing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory 'taking' render compensation for the time of the 'taking' any less obligatory."[78] It was this rule which the majority would ultimately adopt in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.

In *First English*, the First English Evangelical Lutheran Church, had acquired a twenty-one acre tract of land upon which it operated a campground, retreat center and playground for handicapped children.[79] In 1978, the buildings on this property were destroyed by flooding from a nearby stream. Subsequently, and in response to the natural conditions which had caused the flooding, the County of Los Angeles adopted an interim ordinance which proscribed any construction, reconstruction, placement or enlargement of any building or structures within the

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74 *See id.* at 653 (Brennan, J., dissenting).

75 *Id.* at 639. The takings clause of the fifth amendment applies to the states through the fourteenth amendment. *See* Chicago B. & Q.R. Co. v. City of Chicago, 166 U.S. 226 (1897).

76 *SDG & E*, 450 U.S. at 656 (Brennan, J., dissenting).

77 *Id.* at 658 (Brennan, J., dissenting).

78 *Id.* at 657 (Brennan, J., dissenting).

79 *First English*, 107 S. Ct. at 2381.

boundaries of a "flood protection area."[80] This area included the church's land.

The church filed suit in inverse condemnation for damages against the county alleging that the ordinance denied it all use of its property.[81] The trial court granted a motion to strike the complaint and the California Court of Appeal affirmed.[82] The appellate court held that damages are unavailable to redress a temporary regulatory "taking", and thus, the complaint must fail. The church's only means of redress, the court held, was to seek invalidation of the ordinance.[83] The California Supreme Court denied review.[84]

The church then appealed to the United States Supreme Court seeking relief similar to that requested in *San Diego*: monetary compensation for land temporarily taken as a result of a police power regulation.[85] Unlike the *San Diego* case, however, the issue of compensation was isolated for the Court's review. The question of whether a "taking" had actually occurred in this instance was not addressed because that issue had not been considered by the lower courts.[86] While remanding the "taking" issue back to the California courts, the Supreme Court held that the remedy for a temporary regulatory "taking" may not preclude monetary relief.[87]

The Court directly referred to the language of the fifth amendment, which provides in part that "private property [shall

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80 *Id.* In 1977, a forest fire destroyed nearly 4,000 acres of the watershed area upstream from the parcel owned by First English, creating a major flood hazard. *Id.*

81 *Id.* at 2382. The complaint alleged that (1) the county had allowed a "dangerous condition" on its property to injure First English's land, and (2) that the county had inversely condemned First English's land and committed a tort by seeding clouds during the storm which caused the flood that destroyed First English's property. *Id.*

82 *Id.* The trial judge relied on Agins v. City of Tiburon, 24 Cal.3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). *First English*, 107 S. Ct. at 2382.

83 *See id.* 2382-83. The California Court of Appeal also relied on *Agins*. *See id.* at 2382 (citation omitted).

84 *Id.* at 2383.

85 *See id.*

86 *See id.* at 2384. The Court noted that *San Diego* and three other cases had presented the "takings" issue, but, for "one reason or another" the Court had been unable to consider the problem. *Id.* (citing MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980)).

87 *Id.* at 2389.

not] be taken for public use, without just compensation."[88] The Court asserted, however, that while property may be regulated, if the regulation is too restrictive, it will amount to a "taking."[89] Although the Court recognized that land-use planners need a degree of freedom in carrying out their functions, it maintained that the fifth amendment commands that monetary compensation be provided for regulatory "takings" even if only temporary in nature.

The majority adopted the rule proposed by Justice Brennan in *San Diego* and asserted that temporary "takings" which deny a landowner all use of his property are not significantly different from permanent "takings," for which the Constitution clearly mandates compensation. In support of this rule, the *First English* majority reviewed cases in which the government had temporarily exercised its right to use private property.[90] The Court noted that in each of these cases, the government was required to pay compensation for its interference with the landowner's use of the property.[91]

Although the rule established in *First English* may appear to have the potential to dramatically affect the future of land use regulations, the Supreme Court severely limited its applicability to situations "where the government's activities have already worked a 'taking' of *all use* of property."[92] Moreover, the Court's holding did not address cases of normal delays in obtaining building permits, changes in zoning ordinances, vacancies and the like. Finally, the *First English* decision did not articulate the elements necessary to establish a "taking." A regulation which goes *too* far can effect a "taking," but unanswered is how far is too far?

B. The Regulatory "Takings" Inquiry

The question of what constitutes a "taking" for the purposes of the fifth amendment and inverse condemnation proceedings

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88 *Id.* at 2385 (quoting U.S. CONST. amend v.).

89 *Id.* at 2386 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

90 *Id.* 2387-88 (citing Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945)). A dissenting opinion, filed by Justice Stevens, criticized the majority's reliance upon these precedents, because each involved physical invasions of the property in question. *First English*, 107 S. Ct. at 2395 & n.8 (Stevens, J., dissenting).

91 *Id.* at 2387.

92 *Id.* at 2389 (emphasis added).

eludes facile resolution, because the fifth amendment "takings" clause has not always been construed literally. The interpretation of the terms "property," "taking" and "just compensation" has been made on an essentially ad hoc basis. The Supreme Court "quite simply has been unable to develop any 'set formula' for determining when 'justice and fairness' require [compensation]."[93] The Court has nevertheless, identified several relevant factors for resolving the "takings" issue.

In determining whether particular regulatory restrictions effect a "taking," appropriate inquiries include: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with investment backed expectations; and (3) the character of the governmental action.[94] With respect to the character of governmental action, it has been held that "even minimal physical occupations constitute "takings" which give rise to a duty to compensate."[95] However, it is not clear how much governmental interference with a property owner's investment is necessary to constitute a "taking."

The Supreme Court has held that a land-use regulation may amount to a "taking" "if the [regulation] does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."[96] "Economically viable use," however, is not equivalent to the best or most profitable use, or the use intended by the property owner. Rather, the relevant constitutional inquiry is whether all possible alternative uses for the land have been foreclosed.[97] If the Court finds that *some* viable economic use is permitted or that the property owner has not exhausted his administrative remedies, it may conclude that no "taking" has occurred or that no final decision has been rendered, and thus deny review.

In *Penn Central Transportation Co. v. New York*,[98] for example, the Penn Central Transportation Co. (Penn Central) sought compensation for a governmental "taking" when approval was denied for the construction of a fifty-five-story office building on

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93 Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

94 *Id.* (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)).

95 *First English*, 107 S. Ct. at 2393 (Stevens, J., dissenting) (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

96 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

97 *See, e.g.*, MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561, 2568 (1986); Agins v. City of Tiburon, 447 U.S. 255, 262-63 (1980); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136-37 (1978).

98 438 U.S. 104 (1978).

top of the Grand Central Terminal Building (the Terminal). New York City had designated the Terminal a landmark pursuant to the city's landmark preservation law which restricts the physical alteration of landmark sites.[99] The United States Supreme Court stated that a use restriction may amount to a "taking" if it has an "unduly harsh impact on the owner's use,"[100] or "so frustrate[s] distinct investment-backed expectations as to amount to a 'taking.' "[101] The majority concluded, however, that these concerns were not at issue in that case. Significant to the Court's determination was the fact that Penn Central was permitted to "continue to use the property precisely as it ha[d] . . . for the past 65 years."[102] Additionally, the Court stated that "[s]ince [Penn Central has] not sought approval of a smaller structure, we do not know that [it] will be denied any use of any portion of the airspace above the Terminal."[103] The Court concluded, therefore, that a fifth amendment "taking" had not been effected by operation of the Landmarks ordinance.[104]

Similarly, in *Agins v. City of Tiburon*,[105] the Court held that an ordinance does not amount to a "taking" when alternative uses of the property were available.[106] The claimants in *Agins* had acquired a five acre tract of unimproved land in the city of Tiburon, California, for a residential development. Thereafter, the city adopted open-space ordinances which restricted development on the claimants' land "to one-family dwellings, accessory buildings, and open-space uses."[107] The density of development was also

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99 *See id.* at 114-15. The ordinance defined a "landmark" as "[a]ny improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and has been designated as a landmark pursuant to the provisions of this chapter." NEW YORK CITY, N.Y., ADMIN. CODE ch. B-A, § 207-1.0(h) (1976). The law required approval by the city's Landmarks Preservation Commission before altering a landmark building's exterior architectural features or adding any exterior improvements. *Id.* at §§ 207-4.0 to 207-9.0.

100 *Penn Central*, 438 U.S. at 127.

101 *Id.* (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412-16 (1922)).

102 *Id.* at 136. The Court asserted that "the New York City law [permitted] Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment." *Id.* at 136.

103 *Id.* at 137.

104 *Id.* at 138.

105 447 U.S. 255 (1980).

106 *See id.* at 262-63.

107 The ordinances were adopted in response to a state law which required preparation of a general plan relating both to land use and the preservation of open space. *Id.* at 257 (citation omitted).

limited to a maximum of five dwellings on the property.[108] Rather than seeking approval for a development plan for their land, the claimants filed an action for inverse condemnation of the property and a declaration that the ordinances were unconstitutional.[109]

The Supreme Court held that the effect of the ordinances on the claimants' land had not been established because approval for the development of the property had not been sought.[110] With respect to the constitutionality of the ordinance, the Court held that, "although the ordinances limit development, they neither prevent the best use of the land, nor extinguish a fundamental attribute of ownership."[111] Thus, even if a property owner can establish that a land use regulation diminishes the value of his property or that the most profitable use of the land has been denied, a landowner will not have a "takings" claim if alternative uses for the land are available.

Penn Central and *Agins* suggest that a landowner who is denied a section 404 permit to fill and develop wetlands may not have a valid "takings" claim if there are alternative uses for the property, or if the fill restriction is limited to a portion of the land. As discussed above, the Supreme Court has not established a formula for determining when a landowner has a valid "takings" claim.[112] The validity of such a claim will, therefore, depend upon the characteristics of the particular parcel of land and the uses for which it is suited. Conceivably, a landowner who is denied a permit to fill a large wetlands site would be permitted to fill and develop a smaller area within the tract. Since no standards have been set, a court confronted with a "takings" claim may well rule that a landowner who is granted a section 404 permit to fill only a portion of his land is effectively denied all viable economic use of his property if it is economically unfeasible to fill the smaller allotment.[113] Alternatively, a court could hold that

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108 *Id.*

109 *Id.* at 257-58.

110 *See id.* at 262-63.

111 *Id.* at 262 (citing Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979); United States v. Causby, 328 U.S. 256, 262 & n.7 (1946)).

112 *See supra* notes 93-97 and accompanying text.

113 Fill is expensive. It may be that a smaller portion could be filled, but it may not be economically feasible to build the project when only limited development is permitted. For example, a one million dollar mitigation plan may be spread over 50 houses which would add $20,000 to the purchase price of each unit. If only 10 houses are permitted, the developer may not be able to add $100,000 to the purchase price based on the market.

the landowner must be compensated for the acreage for which he was denied a fill permit.[114]

Moreover, the mere fact that some viable economic development or use of the land is permitted does not necessarily preclude the property owner's right to compensation for a permit denial. Two situations exist where the government would be required to compensate the landowner even if all economically viable use of the land has not been denied. The first is where the governmental restriction does not substantially advance legitimate state interests.[115] The second is where the restriction so substantially frustrates the property owner's investment-backed expectations that a "taking" results.[116]

C. *Legitimate State Interests.*

The United States Supreme Court has held that the application of a zoning law or regulation to a piece of property constitutes a "taking" if the law or regulation does not substantially advance a legitimate state interest.[117] Although the Court has on several occasions identified governmental purposes which are considered to be legitimate state interests,[118] it has not devised a set standard for determining what constitutes a "legitimate state interest." Recently, however, the Supreme Court attempted to more clearly define the meaning of this phrase.

In *Nollan v. California Coastal Commission*,[119] the appellants were owners of beachfront property upon which they desired to build a three bedroom house.[120] To do so, they were required to obtain a permit from the California Coastal Commission (the Commission) pursuant to the California Public Resources

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114 *See* Florida Rock Indus. Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986); *see also* note 163 (discussing *Florida Rock*).

115 *See* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987) (compensation required for government easement across landowner's property where easement does not substantially advance legitimate state interests); *see also infra* notes 119-42 and accompanying text (discussing *Nollan*).

116 *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

117 *E.g.*, Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928).

118 *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (regulation of pesticides); Agins v. City of Tiburon, 447 U.S. 255 (1980) (open-space preservation); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (landmark preservation); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (residential zoning).

119 107 S. Ct. 3141 (1987).

120 *Id.* at 3143.

Code.[121] The Commission granted the permit with the condition that the Nollans grant an easement across a portion of their property in order to facilitate access to public beaches located on both the north and south sides of the Nollans' property.[122] The Nollans filed a petition for writ of administrative mandamus in the California Superior Court opposing the easement condition on the grounds that it constituted a "taking" of property without just compensation.[123] The California Superior Court remanded the case to the Commission for an evidentiary hearing on the issue of whether the Nollans' proposed house would adversely impact the public's access to the beach.[124]

On remand, the Commission upheld the permit restriction. The Commission found that the proposed house would block the sight of the ocean and create a psychological barrier to the use of the public beaches.[125] The Nollans then filed a second petition in the California Superior Court, which reversed the Commission on the grounds that the administrative record did not sufficiently support a finding that the house would have a "direct or cumulative burden on public access to the sea."[126] On appeal by the Commission, the California Court of Appeal reversed the superior court decision and reinstated the Commission's permit restriction.[127] Rejecting the merits of the Nollans' constitutional challenge, the appellate court held that the imposition of the condition was sufficiently related to the purpose of preserving public access to the sea, and that it did not deprive the Nollans of all reasonable use of their property.[128] The Nollans subsequently appealed to the United States Supreme Court.[129]

In a five to four decision, the Supreme Court held that the Nollans were entitled to compensation for the governmentally imposed easement across their property.[130] The Court determined that the beach access condition was a "permanent physical occupation" requiring compensation unless the condition *sub-*

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121 *Id.* *See* CAL. PUB. RES. CODE §§ 30106, 30212, 30600 (West 1986) (detailing procedural requirements for a coastal development permit).

122 *Id.* at 3143. The Commission determined that an easement across the Nollans' property would make it easier for the public to reach the public beaches. *Id.*

123 *Id.*

124 *Id.*

125 *Id.* at 3143-44.

126 *Id.* at 3144 (citation omitted). The Nollans argued that the mandatory easement violated the fifth amendment takings clause. *Id.*

127 *Id.*

128 *Id.*

129 *Id.* at 3145.

130 *Id.* at 3150.

stantially advanced the purpose of the local land-use regulation.[131]

The Court concluded that the Commission's justification for the imposition of the easement condition was not reasonably related to the land-use regulation requiring public beach access.[132] The majority found no merit in the Commission's argument that an easement across the Nollans' property would alleviate any impairment of "visual access" to the beach.[133] The Court noted that by imposing the easement condition, the Commission was simply attempting to create a continuous strip of beach for public use.[134] However pleasant or beneficial such a strip of beach would be to the public interest, the Court maintained, the cost of realizing this interest could not be borne by the Nollans alone; the public as a whole must bear this burden.[135]

In a dissenting opinion, Justice Brennan criticized the majority for applying an inappropriate standard of review for an administrative decision.[136] The Justice asserted that the majority misinterpreted the Commission's findings and essentially ignored the fact that the "proposed development would present . . . an increase in private use of the shorefront . . . [which] would burden the public's ability to traverse to and along the shorefront."[137] The dissent stated that the Commission had both a constitutional and legislative mandate to preserve overall public access to the coastline,[138] and that the record was "replete

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131 *Id.* at 3146 (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)). *See also* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of substantial government purpose.").

132 *Id.* at 3148.

133 *Id.* at 3148-49. The Court asserted: "It is quite impossible to understand how a requirement that people who are already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house . . . [or] how it lowers any 'psychological barrier' to using the public beaches." *Id.* at 3149.

134 *Id.* at 3150.

135 *Id.*

136 *Id.* at 3151 (Brennan, J., dissenting).

137 *Id.* at 3155 (Brennan, J., dissenting) (citation and emphasis omitted).

138 *Id.* at 3153 (Brennan, J., dissenting). The harshness of the majority's standard becomes apparent when one considers the following provision in the California Constitution:

> No [person] . . . shall be permitted to exclude the right of way to . . . [any navigable] water whenever it is required for any public purpose . . . and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

CAL. CONST. art. x, § 4. The majority found this constitutional provision inapplica-

with references to the threat to public access along the coastline resulting from the seaward encroachment of private development along a beach whose mean high tide line was constantly shifting."[139]

Maintaining that the Commission's access condition was a legitimate exercise of its police power, the dissent asserted that the government need not compensate the Nollans, because the easement would not unreasonably impair the value and use of their land.[140] The dissent characterized the physical intrusion permitted by the easement as minimal and likened it to a sidewalk dedication in front of a private residence.[141] Finally, the dissent maintained that the majority's insistence upon a precise standard for determining the rationality of an administrative decision was inconsistent with the need to protect our natural resources by regulation of ever increasing development.[142]

It is difficult to ascertain the impact that the *Nollan* decision will have on "takings" claims involving section 404 permit conditions and denials. Different legislation will be involved and thus different permit conditions and justifications will be presented. It is apparent, however, that a clear and unequivocal nexus between the proposed condition and the purported justification is now required.

Generally, in a case involving the Clean Water Act,[143] the most probable justification the Corps would propose is the preservation of the integrity of the nation's waters.[144] In addition, the Corps may assert other probable justifications, such as protection of wildlife or vegetation at the site, flood protection, or preservation of open-space and scenic values of the land. In a

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ble because (1) the right of way sought was not *to* a navigable waterway but *along* it, and (2) the Commission did not raise it in its arguments. *Id.* at 3145-46.

139 *Id.* at 3155 (Brennan, J., dissenting).

140 *Id.* at 3157-58 (Brennan, J., dissenting).

141 *Id.* at 3157 (Brennan, J., dissenting).

142 *Id.* at 3161-62 (Brennan, J., dissenting).

143 33 U.S.C. § 1251 (1982).

144 In 1974, the Corps first published regulations under the Clean Water Act to define the "navigable waters of the United States" which would be under their jurisdiction pursuant to the section 404 permit program. 33 CFR § 209.260 (1974). Under these regulations, the Corps' jurisdiction was limited to those waters that were under its jurisdiction pursuant to the River and Harbors Appropriation Act of 1899; the only wetlands it regulated were those that were so frequently inundated so as to be considered part of a navigable body of water. In July 1977, the Corps published final regulations by which it asserted jurisdiction over all wetlands that are adjacent to (1) navigable waters as traditionally defined; (2) the tributaries of navigable waters; and (3) interstate waters, whether navigable or not, and their tributaries. *See* 33 C.F.R. § 209.260 (1977).

given set of circumstances, however, it is conceivable that a landowner might prove that the Corps' decision to prohibit filling activities would not *substantially* advance these goals.[145] Such proof would naturally depend upon the characteristics of the land in question and the facts of the particular case.

D. Investment-Backed Expectations.

Although the previously discussed decisions address the importance of the availability of alternate land uses and the advancement of legitimate governmental interests, these decisions do not extensively address the impact of a property owner's investment-backed expectations on the "takings" issue. Consider the situation of a wetlands property owner who, prior to the 1977 amendments to the Clean Water Act, had begun development pursuant to a thirty year master plan. This landowner might well have invested considerable time and money in the development of these wetlands, with considerable investment in infrastructure. Yet, the Corps, in the exercise of its jurisdiction over the wetlands, could prohibit further filling activities until a permit is obtained.

If the property owner is denied approval or is required to conduct extensive mitigation to compensate for the loss of wetlands from the prior filling activities, will this property owner have a valid "takings" claim on the basis of investment-backed expectations? The answer must be yes. If further development is necessary for completion of the project, a blanket denial of further development would amount to a "taking." Additionally, it may not be necessary that either the investments be made or the expectation arise prior to 1977 in order to establish a "reasonable investment-backed expectation."[146] The right to use and develop the property without governmental interference may vest and pass with the property as it is transferred.

The foregoing analysis finds support in the Supreme Court's ruling in *Ruckelshaus v. Monsanto Co.*.[147] Monsanto had sought declaratory and injunctive relief to prohibit the Administrator of the EPA from disclosing information which it believed to be "trade secrets," but which it was required to submit to the EPA pursuant to the Federal Insecticide, Fungicide, and Rodenticide

145 This is particulary true where the wetlands are substantially degraded. Past acts, such as diking may cause a wetland to lose its wetland characteristics and become degraded so that the lands no longer function as wetlands.

146 *See* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3146 n.2 (1987).

147 467 U.S. 986 (1984).

Act (FIFRA).[148] Under FIFRA, all pesticides must be registered with the EPA prior to their sale.[149] The applicant must present information regarding the pesticide ingredients along with research and test data.[150] A 1972 amendment to FIFRA provided that data submitted to the EPA be publicly disclosed, except for information that the registrant classified as "trade secrets."[151] The amendment failed to provide a definitional standard for the designation a "trade secret." Consequently, the EPA enjoyed broad discretion in determining whether the data submitted by a registrant was related to a valid trade secret. In response to the ambiguity resulting from the 1972 amendment, FIFRA was again amended in 1978 to provide that public disclosure was not authorized for any information that "disclose[d] manufacturing or quality control processes."[152] Monsanto argued that the public disclosure of data concerning their products, on which considerable amounts of time and money had been expended, constituted a "taking" of property.

After first acknowledging that Monsanto had a property right in its data, the Supreme Court denied Monsanto relief for the periods after 1978 and before 1972. The Court asserted that an investment-backed expectation is more than a "unilateral expectation, or an abstract need," but that "Monsanto could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential beyond the limits prescribed in the amended statute itself."[153] The Court declared that since Monsanto had notice that data submitted after 1978 might be disclosed, its voluntary submission of data in order to obtain a registration, precluded the argument that the disturbance of its investment-backed expectations resulted in a "taking."[154] However, because the government had explicitly guaranteed Monsanto confidentiality of its trade secrets during the period between 1972 and 1978, the Court stated that the EPA's disclosure of information submitted during this time frame without just compensation, would result in a "taking."[155]

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148 7 U.S.C. § 136 (1982).

149 *Id.* § 136a.

150 *Id.*, § 136a(c).

151 Act of Oct. 21, 1972, Pub. L. No. 92-516, § 10(A), 86 Stat. 973, 989 (codified as amended at 7 U.S.C. § 136h(d) (1982)).

152 Act of Sept. 30, 1978, Pub. L. No. 95-396, § 15(1), 92 Stat. 819, 829-32 (codified as amended at 7 U.S.C. § 136h(d)(A) (1982)).

153 *Monsanto*, 467 U.S. at 1005-06.

154 *Id.* at 1006-07.

155 *Id.* at 1016. The Court nonetheless did not rule that there was a "taking"

Justice Brennan relied on *Ruckelshaus* in his dissent in *Nollan*. Justice Brennan opined that the Nollans could have had no reasonable investment-backed claims because they "surely could have had no expectation that they could obtain approval of their new development and exercise any right of exclusion afterward"[156] when they were aware of the possibility of a public access provision. At the time the Nollans submitted their application for a construction permit, the Commission had conditioned all proposals made for development along the beach tract on provisions of deed restrictions which ensured access to the beach.[157] Justice Brennan posited that since the Nollans were aware of the permit conditions and voluntarily submitted a permit request to obtain approval for development, they could have no "takings" claim on the grounds that their investment-backed expectations were disturbed.[158]

The majority did not address the issue of the Nollans' notice of the public access provisions in regard to their investment-backed expectations. Rather, the Court based its holding on the grounds that the government's access requirement was not substantially related to its justification.[159] In a footnote, however, the majority did distinguish the factual situation in *Ruckelshaus* in order to reply to Justice Brennan's expectation argument.[160] The majority noted that in *Ruckelshaus*, Monsanto voluntarily submitted data to the government in exchange for a valuable government benefit—the registration of an insecticide. In contrast, the Court noted that

> the right to build on one's own property . . . cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange" . . . that we

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without just compensation. The fifth amendment does not proscribe "takings" per se, but rather it proscribes "takings" without adequate compensation. Since no findings had been made with respect to the value of the trade secret data at issue and further proceedings may result in Monsanto being adequately compensated, any finding by the Court that there was a "taking" would have been premature. *Id.* at 1013 (citation omitted).

156 *Nollan*, 107 S. Ct. at 3159 (Brennan, J., dissenting).

157 *Id.*

158 *Id.* at 3158-59 (Brennan, J., dissenting).

159 *Id.* at 3148-49. *See supra* notes 119-42 and accompanying text (discussing *Nollan*). Because Justice Brennan found that the permit condition was a valid exercise of the state's police power, he apparently found it necessary to dispose of all other arguments that may have been proposed by the Nollans.

160 *Id.* at 3146 n.2.

> found to have occurred in *Monsanto*. Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.[161]

The foregoing lends support to the proposition that a property owner who has been denied a section 404 permit may have a valid "takings" claim on the basis of investment-backed expectations regardless of whether the investments were made after the Corps acquired jurisdiction over the lands in question.[162] If the Corps could not prohibit development by prior property owners without compensating them, then the Corps must tender compensation to present property owners who have been denied development rights. It would certainly be unwise, however, for a developer to continue to invest in filling activities on lands which the Corps had indicated may constitute wetlands without first seeking a permit.

Implicit in a "reasonable investment-backed expectation" inquiry is the question of reasonableness and fairness. It may appear unreasonable for a property owner to invest in filling wetlands if this constitutes a violation of the Clean Water Act. In any case, the reasonableness of the investments and the validity of the property owner's claim would depend upon the facts of the case and the impact of the permit denial upon the investments and expectations of the developer.[163]

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161 *Id.*

162 *See supra* notes 146-60 and accompanying text.

163 When a taking is effected, is the developer entitled to receive his "expectation interest" or profit he would have received had the project been completed as anticipated? At least one court which addressed this issue before the *First English* and *Nollan* decisions answered in the negative.

In Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), Florida Rock Industries, Inc. (Florida Rock) had purchased 1,500 acres of land in 1972 for the sole purpose of mining limestone. In 1978, Florida Rock began mining operations without first obtaining a section 404 permit. The Corps issued a cease and desist order proscribing all further mining activity until a permit was obtained. *Id.* at 895. Although Florida Rock had intended to apply for a permit to mine the entire 1,500 acres, the Corps refused to consider more than 98 acres, so Florida Rock accordingly limited the scope of its application. *Id.* The Corps subsequently denied the permit, and Florida Rock instituted inverse condemnation proceedings in the United States Court of Claims. *Id.* at 896.

At trial, Florida Rock introduced evidence of its investment in the property, its intentions to mine the land and its anticipated profit. *Id.* The Court of Claims rejected the anticipated profits basis of Florida Rock's evidence and instead calculated the compensation necessary by evaluating property values for neighboring lime stone quarries, where mining was permitted. *Id.* at 897. The Corps appealed

IV. CONCLUSION

It follows from the statutory and decisional law discussed above that federal and state governments will be required to purchase wetlands that they "take" pursuant to regulations promulgated under the Clean Water Act or state legislation. As previously stated, a land-use regulation may effect a "taking" by either: (1) denying the property owner all use of the land; (2) restricting the use of the land in such a manner that the restriction does not substantially advance the purposes behind the regulation; or (3) interfering with the property owner's investments to such an extent that a "taking" results. Still to be resolved, however, is the extent to which denial of a permit to fill wetlands or an onerous mitigation requirement will constitute a "taking." There is, as yet, no fixed formula to determine whether a given set of circumstances constitute a "taking," because most of the inquiries to date have been conducted on an ad hoc basis. It is equally unclear what price the government will be required to pay. What is certain, however, is that if governmental regulations and restrictions concerning the use and development of wetlands continues, the government will be required to pay a substantial price for condemning the wetlands of America.

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and Florida Rock cross-appealed claiming that it should have been awarded compensation for all 1,500 acres. *See id.*

In dispensing with Florida Rock's cross-appeal, the Federal Circuit noted that Florida Rock could not realistically mine more than 98 acres within the next three years. *Id.* at 905. The court asserted that an issue would not arise for three years as to whether the denial of viable economic use of all 1,500 acres of Florida Rock's land would be sufficient to constitute a taking. Consequently, Florida Rock's compensation was limited to the 98 acres currently affected by the section 404 permit denial. *Id.* at 905-06.

Without reversing the lower court's evaluation of the compensation required to be paid to Florida Rock, the Federal Circuit remanded the case for further proceedings to determine whether a "taking" had actually occurred. *Id.* at 905. Because sale would constitute a viable economic use of the land, the court reasoned that if Florida Rock could sell its land for a price equal to the fair market value prior to the permit denial, no taking would have occurred. *Id.* at 903. Thus, the lower court was instructed to determine the difference, if any, between the fair market value of the land before permit denial and its fair market value after the denial. *Id.* at 905.