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## Wedinger v. Goldberger: A Victory for Freshwater Wetlands

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## NOTES AND COMMENTS

### *Wedinger v. Goldberger*: A Victory for Freshwater Wetlands

#### I. Introduction

New York State's Freshwater Wetlands Act<sup>1</sup> (FWA) establishes that freshwater wetlands are "invaluable resources for flood protection, wildlife habitat, open space and water resources."<sup>2</sup> The FWA directs the Department of Environmental Conservation (DEC) to "preserve, protect and conserve freshwater wetlands"<sup>3</sup> by identifying and mapping the wetlands.<sup>4</sup> In *Wedinger v. Goldberger*,<sup>5</sup> the common issue raised by the appellants was whether the DEC's failure to designate their properties on a tentative map exempted the properties

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1. N.Y. ENVTL. CONSERV. LAW § 24-0101 to -1305 (McKinney 1984 & Supp. 1989).

2. *Id.* § 24-0105(1).

3. *Id.* § 24-0103. The FWA's policy (hereinafter *Policy*) provides:

It is declared to be the public policy of the state to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the state.

*Id.*

4. *Id.* § 24-0301. Section 24-0301(1) provides, in part, that:

The commissioner shall, as soon as practicable, conduct a study to identify and map those individual freshwater wetlands in the State of New York which shall have an area of at least twelve and four-tenths acres or more, or if less than twelve and four-tenths acres, (a) have, in the discretion of the commissioner, and subject to review of his action by the board created pursuant to title eleven of this article, unusual local importance for one or more of the specific benefits set forth in subdivision seven of section 24-0105 or (b) are located within the Adirondack Park and meet the definition of wetlands

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*Id.*

5. 71 N.Y.2d 428, 522 N.E.2d 25, 527 N.Y.S.2d 180, *cert. denied*, 488 U.S. 850 (1988).

from DEC jurisdiction and regulation. The New York Court of Appeals held that the DEC properly exercised jurisdiction over all freshwater wetlands until a final map was promulgated,<sup>6</sup> and that a landowner could not establish a temporary regulatory taking until a permit had been sought from and denied by the DEC.<sup>7</sup>

The *Wedinger* decision resolved a series of suits challenging the DEC's designation and regulation of freshwater wetlands in Staten Island, New York (Richmond County).<sup>8</sup> The decision reflects the New York Court of Appeals' continuing deference to the DEC's interpretation of the state's environmental regulations.<sup>9</sup> This note will review the DEC's jurisdiction over freshwater wetlands, and the requirements for establishing a taking claim under the FWA.

## II. Background

### A. *Freshwater Wetlands Act*

The FWA directs the DEC to identify and map all freshwater wetlands that "have an area of at least twelve and four-tenths acres or more, or . . . [have] . . . unusual local importance . . . ."<sup>10</sup> The DEC identifies freshwater wetlands by the presence of water and specific botanical species.<sup>11</sup> After the

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6. *Id.* at 439, 522 N.E.2d at 28, 527 N.Y.S.2d at 183.

7. *Id.* at 440, 522 N.E.2d at 29, 527 N.Y.S.2d at 184.

8. Separate proceedings had been conducted in the lower courts. In *Wedinger*, the court of appeals combined the following proceedings: *Chesed Avraham Hacohn Found. v. Williams*, 129 A.D.2d 670, 514 N.Y.S.2d 652 (2d Dept. 1987); *Marine Equities Co. v. Williams*, 129 A.D.2d 685, 514 N.Y.S.2d 653 (2d Dept. 1987); *Dora Homes, Inc. v. Moore*, 129 A.D.2d 704, 514 N.Y.S.2d 653 (2d Dept. 1987); *Wedinger v. Goldberger*, 129 A.D.2d 712, 514 N.Y.S.2d 474 (2d Dept. 1987).

9. See *Modjeska Sign Studios Inc. v. Berle*, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977) (DEC regulation prohibiting erection of advertising signs did not effect a taking), *appeal dismissed*, 439 U.S. 809 (1978); *Consolidated Edison v. DEC*, 71 N.Y.2d 186, 519 N.E.2d 320, 524 N.Y.S.2d 409 (1988) (upholding DEC regulation of major petroleum bulk facilities).

10. N.Y. ENVTL. CONSERV. LAW § 24-0301(1). See *supra* note 4.

11. N.Y. ENVTL. CONSERV. LAW § 24-0107. The criteria for designating an area as a freshwater wetland are set forth in N.Y. COMP. CODES R. & REGS. tit. 6, § 662.1(k) (1986):

Freshwater wetlands or wetlands means lands and waters . . . [which] contain any or all of the following:

DEC identifies the freshwater wetlands, it issues a tentative

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1. lands and submerged lands commonly called marshes, swamps, sloughs, bogs, and flats supporting aquatic or semi-aquatic vegetation of the following types:

(i) wetland trees, which depend upon seasonal or permanent flooding or sufficiently water-logged soils to give them a competitive advantage over other trees, including, among others, red maple (*Acer rubrum*), willows (*Salix* spp.), black spruce (*Picea mariana*), swamp white oak (*Quercus bicolor*), red ash (*Fraxinus pennsylvanica*), black ash (*Fraxinus nigra*), silver maple (*Acer saccharinum*), American elm (*Ulmus americana*), and larch (*Larix laricina*);

(ii) wetland shrubs, which depend upon seasonal or permanent flooding or sufficiently waterlogged soils to give them a competitive advantage over other shrubs, including, among others, alder (*Alnus* spp.), buttonbush (*Cephalanthus occidentalis*), bog rosemary (*Andromeda glaucophylla*), dog-woods (*Cornus* spp.), and leatherleaf (*Chamaedaphne calyculata*);

(iii) emergent vegetation, including, among others, cattails (*Typha* spp.), pickerelweed (*Pontederia cordata*), bulrushes (*Scirpus* spp.), arrow-arum (*Peltandra virginica*), arrowheads (*Sagittaria* spp.), reed (*Phragmites communis*), wild rice (*Zizania aquatica*), bur reeds (*Sparganium* spp.), purple loosestrife (*Lythrum salicaria*), swamp loosestrife (*Decodon verticillatus*), and water plantain (*Alisma plantago-aquatica*);

(iv) rooted, floating-leaved vegetation, including, among others, water lily (*Nymphaea odorata*), water shield (*Brasenia schreberi*), and spatterdock (*Nuphar* spp.);

(v) free-floating vegetation, including, among others, duckweed (*Lemna* spp.), big duckweed (*Spirodela polyrrhiza*), and watermeal (*Wolffia* spp.);

(vi) wet meadow vegetation, which depends upon seasonal or permanent flooding or sufficiently waterlogged soils to give it a competitive advantage over other open-land vegetation, including, among others, sedges (*Carex* spp.), rushes (*Juncus* spp.), cattails (*Typha* spp.), rice cut-grass (*Leersia oryzoides*), reed canary grass (*Phalaris arundinacea*), swamp loosestrife (*Decodon verticillatus*), and spikerush (*Eleocharis* spp.);

(vii) bog mat vegetation, including, among others, sphagnum mosses (*Sphagnum* spp.), bog rosemary (*Andromeda glaucophylla*), leatherleaf (*Chamaedaphne calyculata*), pitcher plant (*Sarracenia purpurea*), and cranberries (*Vaccinium macrocarpon* and *V. oxycoccos*);

(viii) submergent vegetation, including, among others, pondweeds (*Potamogeton* spp.), naiads (*Najas* spp.), bladderworts (*Utricularia* spp.), wild celery (*Vallisneria americana*), coontail (*Ceratophyllum demersum*), water milfoils (*Myriophyllum* spp.), muskgrass (*Chara* spp.), stonewort (*Nitella* spp.), waterweeds (*Elodea* spp.), and water smartweed (*Polygonum amphibium*);

(2) lands and submerged lands containing remnants of any vegetation that is not aquatic or semi-aquatic that has died because of wet conditions over a sufficiently long period, provided that such wet conditions do not exceed a maximum seasonal water depth of six feet, and provided further that such conditions can be expected to persist indefinitely, barring human intervention;

freshwater wetlands map and must hold a public hearing to allow the public to propose additions or deletions from the map.<sup>12</sup> The DEC then evaluates the hearing testimony in light of the policy and purposes of the FWA.<sup>13</sup> The DEC may then issue a freshwater wetlands map after a period of at least sixty days after the public hearing.<sup>14</sup> Typically, aerial photographs,<sup>15</sup> soil maps,<sup>16</sup> and field surveys<sup>17</sup> provide the necessary data for developing a freshwater wetlands map.<sup>18</sup>

Wetlands "less than twelve and four-tenths acres . . . [and] not of unusual importance"<sup>19</sup> may be regulated by a lo-

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(3) lands and waters substantially enclosed by aquatic or semi-aquatic vegetation . . . or by dead vegetation . . . the regulation of which is necessary to protect and preserve the aquatic and semi-aquatic vegetation;

(4) waters overlying the areas set forth in paragraphs (1) and (2) of this subdivision and lands underlying the areas set forth in paragraph (3) of this subdivision; and

(5) [T]wo or more areas of land and/or water, as defined in paragraphs (1) through (4) of this subdivision, may be considered to be a single wetland for regulatory purposes if they are determined by the commissioner to function as a unit, or to be dependent upon each other, in providing one or more of the wetland benefits . . . and if they are no more than 50 meters (approximately 165 feet) apart.

*Id.*

12. N.Y. ENVTL. CONSERV. LAW § 24-0301(4).

13. *Id.* § 24-0301(5). See *Policy*, *supra* note 3.

14. N.Y. ENVTL. CONSERV. LAW § 24-0301(5).

15. Aerial photographs are photographs which reveal topography. SMITH, *THE CAMBRIDGE ENCYCLOPEDIA OF EARTH SCIENCES* 413-14 (1980).

16. A soil map shows soil types and classifies soils according to their suitability for various crops, grasses, and trees. DURRENBERGER, *DICTIONARY OF THE ENVIRONMENTAL SCIENCES* 221 (1973).

17. Field surveys establish the boundaries of a freshwater wetland by identifying the presence of plant species and assessing the soil conditions. The U.S. Soil Conservation Service publishes a hydric soil survey which leads to initial investigation areas. Field verification of soil characteristics is necessary. See GOVERNMENT INSTITUTES, INC., *WETLANDS AND REAL ESTATE DEVELOPMENT* 23 (1988).

18. See J. KUSLER, *REGULATING SENSITIVE LANDS* 34 (1980).

19. N.Y. ENVTL. CONSERV. LAW § 24-0507.

The commissioner can designate a wetland as having unusual local importance if it provides one or more of the benefits listed in section 24-0105(7). The benefits are:

(a) flood and storm control by the hydrologic absorption and storage capacity of freshwater wetlands;

(b) wildlife habitat by providing breeding, nesting and feeding grounds and cover for many forms of wildlife, wildfowl and shorebirds, including migratory wildfowl and rare species such as the bald eagle and osprey;

(c) protection of subsurface water resources and provision for valuable

cal government or the county.<sup>20</sup> Local regulations may not be less protective of the wetlands than the measures enacted by the DEC.<sup>21</sup>

The central feature of the FWA is the permit requirement;<sup>22</sup> landowners are required to have a permit before conducting any regulated activity on a freshwater wetland.<sup>23</sup> The DEC must respond to a completed permit application within specified time periods.<sup>24</sup> The DEC grants permits if the appli-

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watersheds and recharging ground water supplies;

(d) recreation by providing areas for hunting, fishing, boating, hiking, bird watching, photography, camping and other uses;

(e) pollution treatment by serving as biological and chemical oxidation basins;

(f) erosion control by serving as sedimentation areas and filtering basins, absorbing silt and organic matter and protecting channels and harbors;

(g) education and scientific research by providing readily accessible outdoor bio-physical laboratories, living classrooms and vast training and education resources; and

(h) open space and aesthetic appreciation by providing often the only remaining open areas along crowded river fronts and coastal Great Lakes regions; and

(i) sources of nutrients in freshwater food cycles and nursery grounds and sanctuaries for freshwater fish.

*Id.*

20. N.Y. ENVTL. CONSERV. LAW § 24-0507.

Section 24-0501 allows a local government to implement ordinances governing wetlands identified by the DEC. *See also* Drexler v. Town of New Castle, 62 N.Y.2d 413, 465 N.E.2d 836, 477 N.Y.S.2d 116 (1984) (upholding a locality's right to regulate wetlands without preparing or filing a freshwater wetlands map).

21. N.Y. ENVTL. CONSERV. LAW § 24-0501(2).

22. *Id.* § 24-0701.

23. *Id.* § 24-0701(1). Activities regulated under section 24-0701(2) include: [A]ny form of draining, dredging, excavation, removal of soil, mud, sand, shells, gravel or other aggregate from any freshwater wetland, either directly or indirectly; and any form of dumping, filling, or depositing of any soil, stones, sand, gravel, mud, rubbish or fill of any kind, either directly or indirectly; erecting any structures, roads, the driving of pilings, or placing of any other obstructions whether or not changing the ebb and flow of the water; any form of pollution, including but not limited to, installing a septic tank, running a sewer outfall, discharging sewage treatment effluent or other liquid wastes into or so as to drain into a freshwater wetland; and any other activity which substantially impairs any of the several functions served by freshwater wetlands or the benefits derived therefrom . . . .

*Id.* Exempted activities are listed in N.Y. ENVTL. CONSERV. LAW § 24-0701(3) to -(4).

24. N.Y. ENVTL. CONSERV. LAW § 70-0109 (McKinney 1984 & Supp. 1989). Applications requiring a public hearing must be responded to within sixty days after the

cations are consistent with the DEC's freshwater wetlands regulations<sup>25</sup> and with the FWA's policy.<sup>26</sup> Adverse determinations made by the DEC or a local government may be reviewed by either the Freshwater Wetlands Appeals Board<sup>27</sup> or the judiciary.<sup>28</sup> Administrative sanctions and criminal penalties can be imposed for a violation of a freshwater wetlands regulation or permit.<sup>29</sup>

### B. *Facts of the Case*

In March 1981, the DEC issued its first tentative freshwater wetlands map for Staten Island. The map designated approximately 700 acres as freshwater wetlands.<sup>30</sup> Property owners were given the opportunity to comment on the freshwater wetlands designations at a public hearing.<sup>31</sup> From the comments received at the hearing, the DEC realized it had not identified a substantial number of freshwater wetlands.<sup>32</sup> Subsequently, in 1986, the DEC issued a second tentative map which nearly doubled the designated freshwater wetlands to 1,300 acres.<sup>33</sup> The DEC issued its third and final map in

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compilation of a complete record. *Id.* § 70-0109(3)(a)(ii). Completed applications not requiring a hearing must be responded to within ninety days. *Id.* § 70-0109(3)(a)(i).

25. The DEC classifies each wetland according to its most appropriate use. Land use regulations permit only those uses compatible with a wetland's characteristics. See N.Y. ENVTL. CONSERV. LAW § 24-0903.

26. N.Y. ENVTL. CONSERV. LAW § 24-0705(3). See *Policy*, *supra* note 3.

27. N.Y. ENVTL. CONSERV. LAW § 24-1103. For an extensive review of the appeals process and the Freshwater Wetlands Appeals Board, see N.Y. ENVIRONMENTAL LAW HANDBOOK § 5.05 (N. Robinson ed. 1988).

28. N.Y. ENVTL. CONSERV. LAW § 24-1105. This section makes inapplicable the requirement in N.Y. CIV. PRAC. L. & R. § 7801(1) (McKinney 1981) that administrative appeal must be unavailable. An "Article 78" proceeding is designed to review the judicial, quasi-judicial, and administrative decisions of agencies and officers. *Id.*

29. N.Y. ENVTL. CONSERV. LAW § 71-2303 (McKinney 1984). A court can impose monetary and criminal penalties and order the violator to restore the wetland to its original condition. *Id.*

30. *Wedinger v. Goldberger*, 71 N.Y.2d 428, 436, 522 N.E.2d 25, 27, 527 N.Y.S.2d 180, 182, *cert. denied*, 488 U.S. 850 (1988).

31. *Id.*

32. *Id.*

33. *Id.* Section 24-0301 does not expressly authorize a second tentative map. See *Wedinger*, 71 N.Y.2d at 441, 522 N.E.2d at 30, 572 N.Y.S.2d at 185.

September 1987.<sup>34</sup>

During the mapping process, prospective landowners continued to rely on the 1981 tentative freshwater wetlands map, despite having the opportunity to require the DEC to make a definitive determination of a parcel's freshwater wetlands status.<sup>35</sup> In 1984, the litigants in *Wedinger* purchased several land parcels in Staten Island;<sup>36</sup> which the DEC had not designated as freshwater wetlands on the 1981 tentative map.<sup>37</sup> The *Wedinger* litigants did not seek specific DEC determinations as to each parcel's freshwater wetlands status.

Among the *Wedinger* litigants were the Wedingers who had purchased a parcel with the intention of building their retirement home.<sup>38</sup> In early 1985, the Wedingers commenced preconstruction activities at the site.<sup>39</sup> Meanwhile, the DEC had begun its freshwater wetlands study of the Wedinger's parcel.<sup>40</sup> On October 21, 1985, the DEC issued a letter to the Wedingers directing them to cease all construction activities.<sup>41</sup> The DEC maintained that the parcel was subject to regulation under the FWA as a freshwater wetland.<sup>42</sup> The Wedingers attempted to reach a compromise with the DEC, but were unsuccessful.<sup>43</sup>

On November 26, 1985, the Wedingers filed an Article 78 proceeding<sup>44</sup> challenging the DEC's regulation of their prop-

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34. *Wedinger*, 71 N.Y.2d at 437, 522 N.E.2d at 27, 572 N.Y.S.2d at 182.

35. *Id.* See N.Y. ENVTL. CONSERV. LAW § 24-0703(5). The DEC is required to respond to a written inquiry concerning a parcel's status within thirty days. *Id.*

36. *Wedinger*, 71 N.Y.2d at 437, 522 N.E.2d at 27, 527 N.Y.S.2d at 182. Separate proceedings were conducted in the lower courts. See *supra* note 8.

37. *Wedinger*, 71 N.Y.2d at 437, 522 N.E.2d at 27, 527 N.Y.S.2d at 182.

38. Brief for Petitioners-Appellants at 10, *Wedinger v. Goldberger*, 71 N.Y.2d 428, 522 N.E.2d 25, 527 N.Y.S.2d 180 (1988).

39. *Wedinger*, 71 N.Y.2d at 437, 522 N.E.2d at 27, 527 N.Y.S.2d at 182.

40. *Id.*

41. *Wedinger v. Goldberger*, 129 A.D.2d 712, 713, 514 N.Y.S.2d 474, 476 (2d Dept. 1987), *aff'd*, 71 N.Y.2d 428, 522 N.E.2d 25, 527 N.Y.S.2d 180, *cert. denied*, 488 U.S. 850 (1988).

42. *Id.* See N.Y. ENVTL. CONSERV. LAW § 24-0703(5); N.Y. COMP. CODES R. & REGS. tit. 6, § 662.2 (1986). The DEC requires interim permits in order for a landowner to alter a wetland prior to the promulgation of a final map.

43. *Wedinger*, 129 A.D.2d at 713, 514 N.Y.S.2d at 76.

44. N.Y. CIV. PRAC. L. & R. § 7801 (McKinney 1981).

erty as arbitrary and capricious and constituting a deprivation of property without just compensation and notice.<sup>45</sup> The Wedingers refused to follow the DEC's advice to seek an interim permit.<sup>46</sup> In July 1986, the DEC issued its second tentative freshwater wetlands map, which designated the petitioners' newly purchased parcel as a freshwater wetland.<sup>47</sup> The DEC issued its final freshwater wetlands map on September 1, 1987, which designated all of the contested parcels as freshwater wetlands.<sup>48</sup>

### III. Court Decisions

#### A. New York Supreme Court

The Supreme Court of Richmond County determined that the DEC lacked jurisdiction over the petitioners' property since the parcel was not designated by the DEC as a freshwater wetland on the 1981 tentative map.<sup>49</sup> The court construed section 24-0301 of the N.Y. Environmental Conservation Law, the mapping provision, to require the DEC to provide prior notice and a hearing to the petitioners' before it could designate their land as a freshwater wetland or amend a temporary or final map.<sup>50</sup>

The supreme court's analysis of the DEC's jurisdiction proceeded on the theory that the FWA is similar to a zoning ordinance in derogation of the common law.<sup>51</sup> The court began its analysis by examining how the FWA defines a freshwater wetland.<sup>52</sup> The court found two sections of the FWA relevant.

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45. *Wedinger*, 71 N.Y.2d at 437, 522 N.E.2d at 28, 527 N.Y.S.2d at 183.

46. *Id.* See *supra* note 42.

47. *Wedinger*, 71 N.Y.2d at 437, 522 N.E.2d at 27, 527 N.Y.S.2d at 182.

48. *Id.*

49. *Wedinger v. Goldberger*, 131 Misc. 2d 109, 111, 499 N.Y.S.2d 600, 602 (Sup. Ct. Richmond Co. 1986), *rev'd*, 129 A.D.2d 712, 514 N.Y.S.2d 474 (2d Dept. 1987), *aff'd*, 71 N.Y.2d 428, 522 N.E.2d 25, 527 N.Y.S.2d 180, *cert. denied*, 488 U.S. 850 (1988).

50. *Id.* at 114, 499 N.Y.S.2d at 604.

51. *Id.* Zoning ordinances limit common law property rights and are subject to constitutional limitations. See *French Investing Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *cert. denied*, 429 U.S. 990 (1976).

52. *Wedinger*, 131 Misc. 2d at 110, 499 N.Y.S.2d at 601.

Section 24-0107(1) defines a freshwater wetland as "land and water within the state as shown on the freshwater wetlands map."<sup>53</sup> A freshwater wetlands map under section 24-0107(2) is a map "promulgated by the DEC pursuant to section 24-0301 on which are indicated the boundaries of any freshwater wetland."<sup>54</sup> The supreme court reasoned that, since the petitioners' parcel was not on the 1981 tentative freshwater wetlands map, it was not a freshwater wetland.<sup>55</sup>

The supreme court also found that the DEC's failure to provide notice and a hearing to the petitioners removed their parcel from DEC jurisdiction. The court concluded therefore, that temporary and final maps were equivalent freshwater wetlands boundary maps under section 24-0107.<sup>56</sup> The court then applied section 24-0301(6), which requires notice for the readjustment of boundary maps.<sup>57</sup> The court concluded that the DEC had to provide prior notice and a hearing before the Department designated the petitioners' parcel as a freshwater wetland.<sup>58</sup>

### B. Appellate Division

The appellate division, second department, reversed the supreme court's decision, holding that the DEC's "failure to designate the subject property as a wetland area on the 1981 tentative map . . . [did] not preclude regulation of the property pursuant to the Act."<sup>59</sup> The court rejected the supreme court's interpretation of section 24-0107(1) which defines a freshwater wetland, and deferred to both the FWA's policy

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53. *Id.*

54. *Id.*

55. *Id.* at 111, 499 N.Y.S.2d at 602. N.Y. ENVTL. CONSERV. LAW § 24-0301(6) requires that notice of a boundary adjustment be given in the same manner as set forth in section 24-0301(5). Section 24-0301(5) requires the promulgation of a final map after a hearing is held pursuant to section 24-0301(4).

56. *Wedinger*, 131 Misc. 2d at 114, 499 N.Y.S.2d at 604.

57. N.Y. ENVTL. CONSERV. LAW § 24-0301(6).

58. *Wedinger*, 131 Misc. 2d at 115, 499 N.Y.S.2d at 605.

59. *Wedinger v. Goldberger*, 129 A.D.2d 712, 714, 514 N.Y.S.2d 474, 476 (2d Dept. 1976), *aff'd*, 71 N.Y.2d 428, 522 N.E.2d 25, 527 N.Y.S.2d 180, *cert. denied*, 488 U.S. 850 (1988).

and to the DEC's interpretation of the provision.<sup>60</sup> The appellate division found that section 24-0107(1) referred only to designated wetlands "subsequent to the promulgation of the final freshwater wetlands map."<sup>61</sup> The court followed the description of the DEC's jurisdiction already framed in *Tri Cities Indus. Park v. Commissioner*,<sup>62</sup> noting that "a limitation of the DEC's jurisdiction to only those wetlands which appear on a previously filed tentative map conflicts with the 'tentative' nature of the map itself . . . ."<sup>63</sup>

The court also addressed the petitioners' takings claim. The court held that the tentative designation of the petitioners' property as a freshwater wetland could not by itself constitute a taking.<sup>64</sup> The availability of administrative remedies precluded a deprivation of property. Since the petitioners failed to apply for an interim permit to use and develop their property, the taking issue was "not ripe for judicial review."<sup>65</sup>

### C. Court of Appeals

The New York Court of Appeals affirmed the appellate division's reversal of the supreme court's decision.<sup>66</sup> The court of appeals' decision highlighted the operative provisions of the

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60. *Id.* at 715, 514 N.Y.S.2d at 477. The court stated: "It is firmly established that the construction given by the agency responsible for their administration is entitled to great deference . . . ." *Id.* See also N.Y. COMP. CODES R. & REG. tit. 6, § 662 (1986).

61. *Wedinger*, 129 A.D.2d at 714, 514 N.Y.S.2d at 476.

62. 76 A.D.2d 232, 235, 430 N.Y.S.2d 411, 413 (3d Dept. 1980), *lv. denied*, 51 N.Y.2d 706, 413 N.E.2d 369, 433 N.Y.S.2d 1026 (1980). *Tri Cities* provides that section 24-0301 confers "jurisdiction in DEC for the entire period between the effective date of the act and promulgation of a final map." *Id.* at 236, 430 N.Y.S.2d at 413.

63. *Wedinger*, 129 A.D.2d at 714, 514 N.Y.S.2d at 477.

64. *Id.* at 716, 514 N.Y.S.2d at 478. This conclusion may have formed the basis for granting the plaintiff's leave to appeal to the New York Court of Appeals. The court of appeals granted leave to appeal after the U.S. Supreme Court decided *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987), on June 9, 1987. Leave to appeal *Wedinger* to the New York Court of Appeals was granted on July 7, 1987.

65. *Wedinger*, 129 A.D.2d at 716, 514 N.Y.S.2d at 478. The court's decision was consistent with the supreme court's decision on the taking issue. See *Wedinger*, 131 Misc. 2d at 112, 499 N.Y.S.2d at 603.

66. *Wedinger v. Goldberger*, 71 N.Y.2d 428, 441, 522 N.E.2d 25, 30, 527 N.Y.S.2d 180, 185, *cert. denied*, 488 U.S. 850 (1988).

FWA and the DEC's jurisdiction over the regulation of freshwater wetlands.<sup>67</sup> The court dismissed the petitioners' claim that the tentative designation of their property as a freshwater wetland constituted a temporary regulatory taking.<sup>68</sup> Furthermore, the court reaffirmed the two-step process it had previously established in *Spears v. Berle*<sup>69</sup> for finding a taking under a freshwater wetlands statute.<sup>70</sup>

The court rejected the supreme court's interpretation of the DEC's freshwater wetlands jurisdiction under section 24-0107(1), because the supreme court ignored "other relevant and integrated portions of the statutory scheme and the plain purpose of the 'Freshwater Wetlands Act'."<sup>71</sup> The court adopted the *Tri Cities*<sup>72</sup> formulation of the DEC's jurisdiction and held that the DEC had continuing jurisdiction over the petitioners' properties until the DEC issued its final freshwater wetlands map.<sup>73</sup>

In response to the petitioners' contention that the FWA did not authorize a second tentative map, the court noted the FWA did not expressly authorize or prohibit a second tentative map.<sup>74</sup> Citing the legislative record,<sup>75</sup> the court stated: "[T]his statute, when interpreted reasonably, contemplates a mapping process, however long; it does not create an artificial intermittently circumscribed jurisdictional anomaly."<sup>76</sup> In

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67. *Id.* at 436, 522 N.E.2d at 27, 527 N.Y.S.2d at 182.

68. *Id.* at 440, 522 N.E.2d at 29, 527 N.Y.S.2d at 184.

69. 48 N.Y.2d 254, 261, 397 N.E.2d 1304, 1306, 422 N.Y.S.2d 636, 638 (1979). *Spears* affirmed the constitutionality of the Freshwater Wetlands Act. *Spears* required a landowner to demonstrate a permit denial and "that under no permissible use would the parcel as a whole be capable of producing a reasonable return or be adaptable to other suitable private use." *Id.* at 263, 397 N.E.2d at 1304, 422 N.Y.S.2d at 636.

70. *Wedinger*, 71 N.Y.2d at 439, 522 N.E.2d at 29, 527 N.Y.S.2d at 184.

71. *Id.* at 438, 522 N.E.2d at 28, 527 N.Y.S.2d at 183. The court relied on section 24-0703(5) (the interim permit section applicable to tentative freshwater wetlands designations). *Id.*

72. *Tri Cities Indus. Park v. Commissioner*, 76 A.D.2d 232, 430 N.Y.S.2d 411 (1980). See *supra* note 62.

73. *Wedinger*, 71 N.Y.2d at 439, 522 N.E.2d at 28, 527 N.Y.S.2d at 183.

74. *Id.* at 441, 522 N.E.2d at 30, 527 N.Y.S.2d at 185.

75. Memoranda in Governor's Bill Jacket to 1975 N.Y. LAWS ch. 614.

76. *Wedinger*, 71 N.Y.2d at 441, 522 N.E.2d at 30, 527 N.Y.S.2d at 185.

support of this reasoning, the court relied on subsequent legislation<sup>77</sup> which provided for additional administrative review and appeals procedures for landowners who suffered "undue hardship"<sup>78</sup> as a result of the second mapping.<sup>79</sup>

Addressing the petitioners' contentions that "the mere tentative designation as a 'wetland' amount[ed] to a deprivation of property without just compensation and without prior notice,"<sup>80</sup> the court explained that the petitioners' reliance on *French Investing Co. v. City of New York*<sup>81</sup> was misplaced.<sup>82</sup> The tentative designation of the petitioners' property as a wetland did not create public ownership of the property.<sup>83</sup> The court viewed the designation as merely requiring the landowner to obtain an administrative permit before engaging in certain activities on the wetland.<sup>84</sup> The petitioners, in "resorting to the courts instead of exhausting administrative remedies, . . . acted prematurely and are [therefore] not enti-

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77. See N.Y. ENVTL. CONSERV. LAW §§ 24-1104, 24-1301(4) (McKinney 1984 & Supp. 1989). The Legislature requires the DEC to prove by a preponderance of the evidence that the parcels in Richmond County are wetlands. *Id.* § 24-1104. Normally, a DEC freshwater wetlands designation will be upheld by the Freshwater Wetlands Appeals Board if it is supported by substantial evidence. N.Y. ENVTL. CONSERV. LAW § 24-1103(2)(d) (McKinney 1984).

78. 1987 N.Y. LAWS ch. 408 § 1. The legislature found that the mapping of freshwater wetlands in Richmond County created an undue hardship for many property owners due to the mapping process. A landowner may seek review by the Freshwater Wetlands Appeals Board of a DEC decision or order. N.Y. ENVTL. CONSERV. LAW § 24-1103(1)(d). See *supra* note 27. The Freshwater Wetlands Appeals Board is authorized to review designations for evidence of unnecessary hardships in the mapping process. N.Y. ENVTL. CONSERV. LAW § 24-1104(1). The Board's decision on a wetland's designation must be consistent with the FWA's policy. *Id.* See *Policy, supra* note 3.

79. *Wedinger*, 71 N.Y.2d at 441, 522 N.E.2d at 30, 527 N.Y.S.2d at 185.

80. *Id.* at 439, 522 N.E.2d at 29, 527 N.Y.S.2d at 184.

81. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *cert. denied*, 429 U.S. 990 (1976). In *French*, a zoning ordinance converted a private park into public domain. The ordinance was declared unconstitutional since it rendered the property unsuitable for producing reasonable income or any other private use. The *French* decision holding that regulatory takings are not compensable has been effectively overruled by *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

82. *Wedinger*, 71 N.Y.2d at 439, 522 N.E.2d at 29, 527 N.Y.S.2d at 184.

83. *Id.*

84. *Id.*

tled to any relief on this 'taking' issue."<sup>85</sup>

The court also addressed the petitioners' claim that the DEC's application of the FWA effected a temporary regulatory taking under the rationale of *First English Evangelical Lutheran Church v. County of Los Angeles*.<sup>86</sup> In *First English*, a church alleged that an ordinance operated to prevent all use of its retreat center. The Supreme Court held that the landowner was entitled to compensation for the time period during which the ordinance effected a taking.<sup>87</sup> In response, the court of appeals reaffirmed that a taking can be established only if a permit has been sought and denied.<sup>88</sup> The owner must demonstrate that "under no permissible use would the parcel as a whole be capable of producing a reasonable return or be adaptable to other suitable private use."<sup>89</sup>

#### IV. Analysis

The New York Court of Appeals' decision in *Wedinger* affirmed the DEC's interpretation of the FWA and supports the preservation of freshwater wetlands.<sup>90</sup> The court of appeals refused to entertain a temporary regulatory taking claim in the presence of available administrative remedies, and available procedures for establishing a taking claim.<sup>91</sup> The supreme court, appellate division, and the court of appeals, consistently agreed that the petitioners must be denied a permit before a taking can be established.<sup>92</sup>

##### A. Jurisdiction

The *Wedinger* decision clarified the DEC's jurisdiction to regulate all freshwater wetlands from the effective date of the

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85. *Id.*

86. 482 U.S. 304 (1987).

87. *Id.* at 321.

88. *Wedinger*, 71 N.Y.2d at 439, 522 N.E.2d at 29, 527 N.Y.S.2d at 184.

89. *Id.* at 439, 440, 522 N.E.2d at 29, 527 N.Y.S.2d at 184 (quoting *Spears v. Berle*, 48 N.Y.2d 254, 263, 397 N.E.2d 1304, 1308, 422 N.Y.S.2d 636, 640 (1979)).

90. *Id.* at 438, 522 N.E.2d at 28, 527 N.Y.S.2d at 183.

91. *Id.* at 439-40, 522 N.E.2d at 28, 527 N.Y.S.2d at 183.

92. *See supra* note 65.

FWA until the promulgation of a final map.<sup>93</sup> After the DEC promulgates its final freshwater wetlands map, any freshwater wetlands less than 12.4 acres and not of local importance are subject to the jurisdiction of local governments.<sup>94</sup>

The court of appeals' analysis of the DEC's jurisdiction sets forth a judicial policy which favored deference to the administrative agency in charge of regulating freshwater wetlands. In *Wedinger*, the DEC chose to preserve unmapped wetlands by issuing a second tentative map;<sup>95</sup> an action the court of appeals noted, which was not supported by section 24-0301.<sup>96</sup> While the second tentative map may have been an anomaly under the FWA, the DEC's interpretation of the FWA was still entitled to support. The appellate division upheld the DEC's interpretation of its jurisdiction over freshwater wetlands stating that "the construction given statutes by the agency responsible for their administration is entitled to great deference and shall be upheld if not irrational or unreasonable."<sup>97</sup>

The preparation and promulgation of the second tentative freshwater wetlands map was justified. The second map increased the wetlands inventory in Staten Island. Failure to identify those wetlands would have deprived the people of Staten Island of vital natural resources.<sup>98</sup> In promulgating the second map, the DEC preserved freshwater wetlands and provided landowners with the opportunity to conduct permitted activities on the wetlands. The DEC's action was consistent with the FWA's policy to "protect and conserve freshwater wetlands . . . consistent with the general welfare and beneficial economic . . . development of the state."<sup>99</sup> Furthermore, as the court of appeals stated, the DEC had a "legislative

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93. *Wedinger*, 71 N.Y.2d at 438, 522 N.E.2d at 28, 527 N.Y.S.2d at 183.

94. *Id.* See N.Y. ENVTL. CONSERV. LAW § 24-0301(1).

95. *Wedinger*, 71 N.Y.2d at 436, 522 N.E.2d at 27, 527 N.Y.S.2d at 182.

96. *Id.* at 441, 522 N.E.2d at 30, 527 N.Y.S.2d at 185.

97. *Wedinger*, 129 A.D.2d at 715, 514 N.Y.S.2d at 477. See also *Bisignano v. Department of Envtl. Conserv.*, 132 Misc. 2d 850, 852, 505 N.Y.S.2d 555, 557 (Sup. Ct. Richmond Co. 1986).

98. See N.Y. ENVTL. CONSERV. LAW § 24-0105.

99. *Policy*, *supra* note 3.

mandate, to preserve freshwater wetlands on Staten Island."<sup>100</sup>

### B. *Taking Analysis*

The critical problem in *Wedinger* was the DEC's failure to identify and map a significant portion of the wetlands.<sup>101</sup> The petitioners claimed that the tentative designation of their property as freshwater wetlands amounted to a deprivation of property without just compensation.<sup>102</sup> The court of appeals properly rejected the petitioners' claim since they failed to exhaust available administrative remedies, a prerequisite to establishing that a taking had occurred.<sup>103</sup> *Wedinger* is significant due to the court of appeals' treatment of the petitioners' temporary regulatory taking claim.

The presence of administrative remedies justified the court's rejection of the petitioners' taking claim. The FWA regulates the uses of freshwater wetlands through the issuance of permits and allows the DEC to effectuate the Act's policy.<sup>104</sup> The court of appeals' requirement that the petitioners obtain a permit does not effect a taking of property.<sup>105</sup> In the absence of a permit application,<sup>106</sup> the property interests af-

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100. *Wedinger*, 71 N.Y.2d at 435, 522 N.E.2d at 26, 527 N.Y.S.2d at 181.

101. The trial court was highly critical of the DEC's activities in Staten Island noting that the "DEC has operated on a piecemeal basis, preparing tentative maps and inventorying freshwater wetlands of this state in phlegmatic fashion." *Wedinger*, 131 Misc. 2d at 116, 499 N.Y.S.2d at 605. The appellate division stated that "the DEC should move with all possible haste to promulgate the final map." *Wedinger*, 129 A.D.2d at 717, 514 N.Y.S.2d at 478. The court of appeals responded that "the length of time it has taken DEC to fulfill its mandate, however unfortunate, does not determine or diminish the jurisdiction delegated to it by the Legislature." *Wedinger*, 71 N.Y.2d at 438, 522 N.E.2d at 28, 527 N.Y.S.2d at 183.

102. *Wedinger*, 71 N.Y.2d at 439, 522 N.E.2d at 29, 527 N.Y.S.2d at 184. See U.S. CONST. amends. V & XIV; N.Y. CONST. art. 1 § 7.

103. *Wedinger*, 71 N.Y.2d at 439, 440, 522 N.E.2d at 29, 527 N.Y.S.2d at 184.

104. *Spears v. Berle*, 48 N.Y.2d 254, 260, 397 N.E.2d 1304, 1306, 422 N.Y.S.2d 636, 638 (1979).

105. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985).

106. The New York Court of Appeals in *Wedinger* required at a minimum that landowners apply for a permit to establish a taking, although *Spears* would require a permit denial. *Wedinger*, 71 N.Y.2d at 439, 440, 522 N.E.2d at 29, 527 N.Y.S.2d at 184.

fectured by a regulation cannot be evaluated, the legislative design of the FWA is thwarted, and a takings claim is premature.<sup>107</sup> A permit denial allows a court to evaluate a takings claim under section 24-0705(7) of the FWA.<sup>108</sup> A court applying section 24-0705(7) may set aside a permit denial unsupported by substantial evidence or may find a taking.<sup>109</sup>

The court of appeals primarily relied on *Spears v. Berle*<sup>110</sup> to dismiss the petitioners' taking claim.<sup>111</sup> In *Spears*, the court required that a permit be sought and denied before it would consider whether a taking had occurred.<sup>112</sup> The landowner must then demonstrate that the parcel would be incapable of producing a reasonable return or could not "be adaptable to other suitable private use."<sup>113</sup> In *Wedinger*, the petitioners failed to apply for a permit. The petitioners erred in immediately seeking judicial relief in response to the DEC's intervention concerning their property. In the absence of an actual physical entry, the economic impact, and the extent to which a regulation interferes with distinct investment backed expectations are relevant considerations in a taking analysis.<sup>114</sup> The court of appeals properly denied relief in the absence of a permit denial establishing an economic impact and in light of the broad public benefits which freshwater wetlands serve.<sup>115</sup>

The petitioners attempted to rely upon *First English Ev-*

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107. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (property owner must seek compensation using the state's procedures before a taking claim is ripe for review).

108. N.Y. ENVTL. CONSERV. LAW § 24-0705(7). Section 24-0705(7) allows a court to set aside permit denials not supported by substantial evidence. *Id.*

109. *Spears v. Berle*, 48 N.Y.2d 254, 261, 397 N.E.2d 1304, 1306, 422 N.Y.S.2d 636, 638 (1979).

110. 48 N.Y.2d 254, 397 N.E.2d 1304, 422 N.Y.S.2d 636 (1979).

111. *Wedinger*, 71 N.Y.2d at 440, 522 N.E.2d at 29, 527 N.Y.S.2d at 184.

112. *Spears*, 48 N.Y.2d at 261, 397 N.E.2d at 1306, 422 N.Y.S.2d at 638.

113. *Id.* at 263, 397 N.E.2d at 1308, 422 N.Y.S.2d at 640.

114. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). The landowners in *Penn Central* claimed that the application of a landmarks preservation law to their property effected a taking. *Id.*

115. *Wedinger*, 71 N.Y.2d at 440, 522 N.E.2d at 29, 527 N.Y.S.2d at 184. See *supra* note 19.

*angelical Lutheran Church v. County of Los Angeles*<sup>116</sup> to claim that their failure to seek a permit was not fatal to their takings claim. In *First English*, a land ordinance prohibited the construction or reconstruction of any building or structure in an interim flood protection area.<sup>117</sup> The petitioners in *First English* alleged that they were denied all use of their property.<sup>118</sup> In holding that the government has a duty to provide compensation for a temporary taking,<sup>119</sup> the Supreme Court assumed that the allegations of the landowner's complaint were true.<sup>120</sup> Unlike *First English*, the petitioners in *Wedinger* could apply for an interim permit and could use their property for non-permitted activities.<sup>121</sup>

The *First English* decision does not alter the *Spears* takings requirement that the petitioners demonstrate a permit denial, and establish that the parcel would not be capable of producing a reasonable economic return or adapted to another use.<sup>122</sup> The economic impact of a temporary or permanent freshwater wetlands regulation can never be established under the FWA in the absence of a permit denial. The court of appeals' decision in *Wedinger*, which rejected the petitioners' temporary regulatory takings claim, is consistent with its prior takings analysis in *Spears*. Presently, a landowner continues to have a heavy burden of proof in order to establish a taking.<sup>123</sup> Crude attempts to circumvent the state's procedures for establishing a taking should never prevail when vital public interests are at stake.

## V. Conclusion

In *Wedinger*, the New York Court of Appeals declared

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116. 482 U.S. 304 (1987).

117. *Id.* at 307.

118. *Id.* at 308.

119. *Id.* at 321.

120. *Id.* at 319. The complaint alleged that the ordinance denied the owner all use of the property. *Id.*

121. *Wedinger v. Goldberger*, 71 N.Y.2d 428, 436, 522 N.E.2d 25, 27, 527 N.Y.S.2d 180, 182, *cert. denied*, 488 U.S. 850 (1988).

122. *Wedinger*, 71 N.Y.2d at 440, 522 N.E.2d at 29, 527 N.Y.S.2d at 184.

123. *Id.* at 439, 522 N.E.2d at 29, 527 N.Y.S.2d at 184.

that the Department of Environmental Conservation had jurisdiction over all freshwater wetlands until a final freshwater wetlands map was issued.<sup>124</sup> The court's decision expressly favored the preservation of freshwater wetlands over the protection of landowners' property interests.

In *Wedinger*, the court of appeals also rejected the petitioners' claim that the Freshwater Wetlands Act effected a taking without due process of law. The court reaffirmed that a takings claim can be established only if a permit has been sought and denied, and if the owner can demonstrate that his parcel cannot produce a reasonable economic return on his investment or be adapted to another suitable use.

The FWA is designed to preserve freshwater wetlands in a manner "consistent with the general welfare and beneficial economic, social and agricultural development of the state."<sup>125</sup> The temporary administrative irregularity highlighted in *Wedinger* is not an excuse for the permanent destruction of a freshwater wetland. Freshwater wetlands will continue to provide innumerable benefits in the future. The DEC's preservation of freshwater wetlands in Staten Island is a victory for the people of the State of New York.

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124. *Wedinger v. Goldberger*, 71 N.Y.2d 428, 439, 522 N.E.2d 25, 28, 527 N.Y.S.2d 180, 183, *cert. denied*, 488 U.S. 850 (1988).

125. N.Y. ENVTL. CONSERV. LAW § 24-0103.