Pace Environmental Law Review

Volume 9
Issue 2 *Spring 1992*

Article 10

April 1992

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PACE ENVIRONMENTAL LAW REVIEW

Volume 9 Spring 1992 · Number 2

COMMENT

The United States Claims Court: A Safe "Harbor" from Government Regulation of Privately Owned Wetlands

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Efforts to protect wetlands under the Federal Clean Water Act and State Environmental Laws have led to an increasing number of actions in the U.S. Court of Claims brought by landowners for just compensation due to a taking of their property through governmental action. Landowners have turned to the Court of Claims because it is seen as a "safe harbor" from government regulation in which their claims are more likely to prevail. This comment examines Loveladies Harbor, the pivotal Court of Claims case where a denial of a permit to fill a wetland was found to be a taking. The focus of this comment is the conflict between individual property rights and the public interest in wetlands conservation. The author argues that courts should recognize and give value to the public interest in the ecological and environmental benefits of wetlands.

I. Introduction

The Fifth Amendment of the United States Constitution[1] states: "no person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[2] The final clause of this amendment,[3] which requires compensation for taking private property for public use, is entitled the takings clause and it is the portion of the Fifth Amendment which provides the issues for this Note. The takings clause is meant to protect a private landowner's property rights from unwarranted intrusions by the government. It is meant to prevent the government from "taking" a private citizen's property without some legitimate purpose and without compensating the owner of the property for the loss. Of course this simple explanation of the takings clause begs the question which is the impetus of this paper, specifically: when does a government action which affects private property constitute a "taking" within the meaning of the Fifth Amendment.

This issue has been important in the area of land use and environmental regulations. A Fifth Amendment takings claim has been an especially popular argument for challenging wetlands regulations. It is this conflict between wetlands protection and the takings clause which this Note emphasizes. Particular attention is given to a claims court decision which found in favor of a land developer in a takings claim against the Army Corps of Engineers and the Environmental Protection Agency.

In *Loveladies Harbor v. United States*,[4] the authority of the Army Corps of Engineers ("the Corps") to regulate wetlands[5] conflicted with the takings clause of the United States Constitution.[6] The United States Claims Court held that the

1. U.S. CONST. amend. V.
2. *Id.*
3. U.S. CONST. amend. V, cl. 4.
4. 21 Cl. Ct. 153 (1990) [hereinafter *Loveladies IV*].
5. Clean Water Act (CWA) § 404, 33 U.S.C. § 1344 (1988). Section 404 of the Clean Water Act is the statutory provision which gives authority to the Army Corps of Engineers to regulate dredge and fill activity in wetlands. *See infra* note 76.
6. *Loveladies IV*, 21 Cl. Ct. at 161.

Corps' denial of a section 404 dredge and fill permit under the Clean Water Act (CWA)[7] was a governmental taking of private property which required just compensation. Prior to the *Loveladies Harbor* decision, at least one other court previously found a section 404 permit denial to also be a taking.[8] However, in that case, the court's remedy required the Corps to invalidate the denial and to allow the dredge and fill activity to occur.[9] The remedy in *Loveladies Harbor*, unlike any other previous case, required the government to pay just compensation -- specifically $2,658,000.[10] This decision is important because it was the first of its kind in which a 404 permit denial constituted a compensatory taking, and the claims court's taking analysis is likely to affect future wetlands regulation.

Part II of this Note will provide a synopsis of the Fifth Amendment takings cases through 1990. This synopsis will illustrate the development of takings jurisprudence in the Supreme Court as it relates to regulation of the Nation's privately owned wetlands. Part III will describe the procedural history of the *Loveladies Harbor* controversy, and report the court's three pronged analysis for takings claims. In order to fully understand the claims court's reasoning, Part III will also recount the claims court's 1988 opinions[11] dealing with the preliminary cross-motions for summary judgment entered

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7. CWA § 404, 33 U.S.C. § 1344 (1988).

8. 1902 Atlantic Ltd. v. Hudson, 574 F. Supp. 1381 (E.D. Va. 1983).

9. *Id.* at 1407. This is the first case which held a section 404 permit denial to be a taking. However, this case is not important to the takings issue because the court also found the permit denial to be arbitrary and capricious, and the court invalidated the denial without ever deciding the issue of compensation. *Id.*

10. *Loveladies IV*, 21 Cl. Ct. at 161. Florida Rock Indus. v. United States, 21 Cl. Ct. 161 (1990), was decided on the same day as *Loveladies Harbor*. This case also held that a permit denial under section 404 of the Clean Water Act amounted to a Fifth Amendment taking and ordered compensation to the property owner. *See infra* notes 109, 125 and accompanying text. *Florida Rock* contains issues important to this Note and will receive due consideration, but the facts and issues in *Loveladies Harbor* better represent the possible problems of the claims court's position on the regulation of wetlands.

11. Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 375 (1988) [hereinafter *Loveladies IIIa*]; Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381 (1988) [hereinafter *Loveladies IIIb*].

by both parties in conjunction with the court's final opinions rendered in July 1990.[12] Finally, Part IV will critique the court's analysis. This final part is meant to provide a general framework which any court could work from in analyzing a takings claim.

II. The Fifth Amendment Takings Issue

A. *Pennsylvania Coal v. Mahon*: The Roots of Regulatory Takings

Prior to 1922, a takings claim only occurred if the government physically occupied the property in order to put it to a legitimate public use. In 1922 the Supreme Court decided *Pennsylvania Coal v. Mahon*,[13] where for the first time the Court declared that regulating the use of private property, without actual physical invasion, could constitute a taking of that property.[14] *Pennsylvania Coal* involved a Pennsylvania state statute which required coal mining operations to leave a certain amount of coal in the ground to provide support to surface property. These pillars of coal were left intact to prevent subsidence[15] of the surface property. The mining companies challenged the regulation as a violation of the Fifth Amendment Takings Clause.[16]

Justice Holmes wrote for the majority: "While property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking."[17] In reaching his final decision, Holmes balanced the public interest in preventing subsidence of the surface property against the detriment to

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12. *Loveladies IV*, 21 Cl. Ct. 153.

13. 260 U.S. 393 (1922).

14. *Id.* at 414. This case established for the first time what is now termed a "regulatory taking." When a government entity regulates private property, severely restricting the use of the property, the courts may find the government has effectively "taken" the property from its owner without ever physically entering the property. *Id.*

15. Subsidence is defined as the collapsing of the surface property above the mine shafts due to lack of support from below. THE AMERICAN HERITAGE DICTIONARY 1213 (2d College ed. 1976).

16. *Pennsylvania Coal*, 260 U.S. at 412.

17. *Id.* at 415.

the coal mining companies' interest in utilizing the subsurface property.[18] Holmes concluded that the economic loss to the private interest of the coal miners out-weighed the public benefit.[19] The Court therefore invalidated the statute as unconstitutional under the Fifth Amendment.

While the majority decision in *Pennsylvania Coal* has had a significant influence on the formation of the present takings doctrine, equally important is Justice Brandeis' famous dissent in the same case. Brandeis explained that the Court should consider whether the government regulation challenged in a takings claim is a regulation meant to prevent a public harm or whether such regulation is meant to promote a public benefit.[20] For example, if a regulation prevents a public harm, such as the dumping of hazardous waste on property in a populated area, then Brandeis concluded that such a regulation should be allowed to stand.[21] A regulation of this type is a valid exercise of the state's police power. However, if the regulation is meant to promote a public good, such as building a post office, then the Court should find that there has been a taking.[22] The public should pay for a government action which

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18. In actuality, Holmes questioned the degree of protection to the public interest. His opinion seemed to conclude that there was only a slight public interest to balance against the private interest. Holmes believed the statute only protected a number of individuals' private interests in preventing subsidence of the surface property which these individuals owned. *Id.* at 413-14.

19. *Id.* at 416.

The heart of Holmes' decision is as follows:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution [in value of the property]. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends on the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

Id. at 413.

20. *Id.* at 417 (Brandeis, J. dissenting).

21. *Id.* at 417.

22. *Id.* at 417-18.

provides benefits beyond what is necessary to protect the health, safety and welfare of the general public.

In Brandeis' opinion, the Pennsylvania statute was a statute that prevented a noxious use of property and therefore prevented a public harm. Thus, he concluded the regulation was a valid exercise of the police power and did not constitute a taking.[23]

B. Modern Takings Cases

Both Justice Holmes' majority opinion and Brandeis' dissent in *Pennsylvania Coal* have historical significance. The concepts pronounced by each of these Justices have evolved and been absorbed into modern takings analysis. The Holmes' emphasis on economic impact is still a strong consideration, but it rarely ever stands alone to find a regulatory taking. The harm/benefit analysis espoused by Brandeis has also made its way into modern takings opinions as part of the majority rule. However, it was not until sometime later that the Supreme Court considered the regulatory takings issue again.

1. *Penn Central*

It was in *Penn Central Transportation Co. v. New York City*,[24] that the Supreme Court confronted the takings issue for the first time in over fifty years. *Penn Central* involved a plaintiff who wanted to sell the air space over its train station to a buyer that wanted to construct a high-rise office building above the station.[25] Because the property had been designated a "landmark," Penn Central Transportation Company applied to the Landmark Preservation Commission for permission to build an office building above the terminal. The Commission denied the application for aesthetic reasons.[26] The city's denial effectively kept the plaintiff from selling the air-space above the station. The plaintiff claimed this denial placed too

23. *Id.*
24. 438 U.S. 104 (1978).
25. *Id.* at 116.
26. *Id.* at 117.

severe of a burden on them and therefore constituted a taking.[27]

In deciding *Penn Central*, the Court considered some important concepts which have an important effect on wetlands takings claims. One such concept was a three factor test the Court developed for finding a regulatory taking. The first factor is the character of the government action. For example, a physical invasion of property by government is more likely to be found a taking than a regulation of the property which adjusts the "burdens of economic life to promote the public good."[28] The character of the government action is much more intrusive on inherent property rights when there is an actual physical occupation. The second factor recognized the importance of the economic impact of the government action on the affected property owner.[29] This factor considers how much value will be lost in the property due to the government regulation of its possible uses. If the diminution in value is extensive enough, the government may be guilty of a taking. The third factor considered the extent to which the government action interfered with investment backed expectations.[30] In Penn Central's case the Court found that the city had a legitimate interest in protecting the landmark, and there was no substantial loss to the plaintiff's investment.[31] Penn Central still had the use of its original investment — a train station.[32]

Besides the idea of a three factor test, the Court also discussed the important notion of what comprises the "parcel as a whole."[33] The "parcel as a whole" concept becomes important if the property owner has in his possession extensive land holdings, but the government is alleged to have interfered with only one portion of these holdings. The court must de-

27. *Id.* at 119.

28. *Id.* at 124.

29. *Id.* at 125-28.

30. *Id.* at 125. For a more detailed look at the issue of investment-backed expectations, *see* Lynn Ackerman, *Comment: Searching for a Standard for Regulatory Takings Based on Investment-Backed Expectations: A Survey of State Court Decisions in the Vested Rights and Zoning Estoppel Areas*, 36 EMORY L.J. 1219 (1987).

31. *Penn Central*, 438 U.S. at 132-38.

32. *Id.*

33. *Id.* at 130.

cide how much of the total property should be considered the whole parcel for a takings determination. If the landowner still has use of a significant portion of the property, even though the government prevents use of other portions, the Court will not find a taking.[34] What constitutes the "parcel as a whole" is important in wetlands regulation because often only part of the original parcel will be wetlands subject to section 404 dredge and fill permit requirements.

The weakness in this "parcel as a whole" concept is that it does not offer a specific method of determining how much of the total holdings should be considered.[35] Should the court consider past holdings which were recently disposed of, or should it only consider that parcel which is specifically within the controversy before the court? As will be noted later in this paper, these become pivotal issues in the *Loveladies Harbor* case.

2. *Kaiser Aetna*

One year after *Penn Central*, the Supreme Court heard *Kaiser Aetna v. United States*,[36] a landmark decision for wetland takings claims. The plaintiff in *Kaiser Aetna* constructed a canal connecting its coastal pond with the open ocean in order to establish private access to and from the ocean. The Corps wanted to require the owner to allow public access to the marina within the coastal pond.[37] The Supreme Court held that such a requirement interfered with an inherent property right of the owner, specifically, the right to exclude others. This was a vital property right which cannot be interfered with by the government without just compensation.[38]

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34. *Id.* at 130-31. Writing for the majority, Justice Brennan stated that takings determinations "[do] not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been abrogated." *Id.*

35. *See Loveladies IIIb*, 15 Cl. Ct. at 391-93.

36. 444 U.S. 164 (1979). *See* 1 WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 10.03 (1989)(looks at the effect of this decision).

37. *Kaiser Aetna*, 444 U.S. at 167-68.

38. *Id.* at 179-80. This case is cited as an example of a taking that has occurred when a regulation abrogates the fundamental property right to exclude others. *See Loveladies IIIb*, 15 Cl. Ct. at 391.

The significance of this decision to wetland takings jurisprudence is its effect on the navigable servitude.[39] Prior to *Kaiser Aetna*, the courts gave an excessive amount of deference to the government's control over navigable waters and the right of the public to have access to such waters.[40] It is now apparent that where owners have a right to exclude others from navigable waters on their property, interference with their right to exclude might constitute a compensatory taking.[41] Because wetlands are within the definition of navigable waters under the Clean Water Act,[42] it would be a logical argument for owners of wetland property that they have a right to compensation when the government interferes with any of the fundamental rights attached to that property.

3. *Agins v. City of Tiburon*

The next case of consequence to the wetland takings issue is *Agins v. City of Tiburon*.[43] *Agins* provides a clear rendition of the factors which courts should consider in basic takings jurisprudence. First, courts should make sure the government action advances a legitimate state interest.[44] Secondly, courts should determine if property owners in similar situations share in the benefits and burdens of the regulation. This second factor also requires the Court to consider the diminution in value of the effected property.[45] The third factor is the effect on investment-backed expectations.[46] The *Agins* holding

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39. Navigational servitude is a doctrine which supports the idea of not paying compensation when the federal government interferes with property rights incident to riparian ownership. *See*: Martha G. Haber, Note, *The Navigational Servitude and the Fifth Amendment*, 26 WAYNE L. REV. 1505 (1980)(navigational servitude is a power invoked under the commerce clause used to protect the public right of navigation). For a brief explanation of the navigable servitude, see WANT, *supra* note 36, at § 10.03 [2].

40. *See* United States v. Twin Power, 350 U.S. 222, 227 (1956); United States v. Chandler-Dunbar, 229 U.S. 53 (1913).

41. *See* WANT, *supra* note 36, at § 10.03 [3].

42. CWA § 502(7), 33 U.S.C. § 1362(7) (1988); 40 C.F.R. § 230.3(s) (1991).

43. 447 U.S. 255 (1980).

44. *Id.* at 260-62.

45. *Id.* at 262.

46. *Id.* at 262-63.

has been condensed into a two part test:[47] application of a government regulation to a particular piece of property is a taking only if (1) the regulation does not substantially advance a legitimate state interest, or (2) the regulation denies the owner the economically viable use of that property.[48]

The two part *Agins* test has become a permanent part of the takings analysis. However, the courts still have not been able to develop a strict rule for takings determinations. It has been especially difficult to do develop concrete and uniform rules because each takings claim involves a completely different set of facts to which broad rules have been applied.[49] However, the Supreme Court, in the 1985-87 terms, decided several cases which have helped to further establish the takings doctrine as applied in *Loveladies Harbor*.[50]

4. 1985-1987: Three Years of Significant Supreme Court Takings Jurisprudence

From 1985 through 1987 the Supreme Court decided several significant takings cases. The first of these cases opened the door to finding that a permit denial under section 404 of the CWA could be considered a taking. In *United States v. Riverside Bayview Homes*,[51] the plaintiff had begun to fill in its wetland property when the Army Corps of Engineers filed suit in the district court to enjoin such filling activity. The district court found the property in question was within the jurisdiction of the Corps, and held that the land owner's activ-

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47. United States v. Riverside Bayview Homes, 474 U.S. 121, 126 (1985).

48. *Id.*

49. *See* Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

50. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); and Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470 (1986). While these are important cases, the specific facts and holdings are not pertinent to the issue of wetlands takings, the focus of this Note. *See also* John P. O'Connor, Jr., Casenote, *Extortion Loses a Synonym Thanks to Court Ordered Accountability in Land Use Exaction Programs:* Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987), 57 U. CIN. L. REV. 397 (1988); and Susan J. Krueger, Comment, Keystone Bituminous Coal Association v. DeBenedictus: *Toward Redefining Takings Law*, 64 N.Y.U. L. REV. 877 (1989).

51. 474 U.S. 121, 124 (1985).

ity was subject to the Corps' permit authority.[52] The Court of Appeals disagreed, stating that the jurisdiction of the Corps in this matter should be narrowly construed to avoid a taking.[53] The Supreme Court reversed.[54]

The Supreme Court stated that a section 404 permit denial in and of itself does not necessarily constitute a taking, and if the situation were such that a taking does occur, the Tucker Act[55] allows for compensation.[56] The Court would not deny the Corps jurisdiction simply because exercising such jurisdiction may create a taking of private property. The significance of this holding was the recognition that a section 404 permit denial could constitute a compensatory taking.[57] When this opinion is read in light of *Kaiser Aetna*'s destruction of the navigable servitude,[58] it is apparent that wetland taking claims could be successful.

While *Riverside Bayview* hinted at allowing compensation for a regulatory taking, the Supreme Court's *First English Evangelical Lutheran Church v. County of Los Angeles*[59] decision settled the issue. It held for the first time that a temporary regulatory taking may also be a compensatory taking.[60]

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52. *Id.* at 125.

53. *Id.*

54. *Id.*

55. 28 U.S.C. § 1491 (1988). There is a presumption that this statute allows for compensation for any taking which occurs through application of a federal statute. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1017 (1984).

56. *Riverside Bayview Homes*, 474 U.S. at 123-29.

57. *Id.* at 127. The Court stated: "Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *Id.*

58. *See supra* notes 36-42 and accompanying text.

59. 482 U.S. 304 (1987).

60. *Id.* at 304-05. While this case is not specifically cited by the *Loveladies IV* court as its authority for requiring compensation for a regulatory taking, the Supreme Court's decision in *First English* settled any argument that such compensation would be inappropriate for a regulatory taking. Therefore in *Loveladies Harbor IV* if a taking was found, compensation could be had. *First English*, however, is still an important case to be aware of when considering the takings issue.

For more on this important Supreme Court decision, see Carlton E. Johnson, First English Evangelical Lutheran Church v. County of Los Angeles: *Compensation of Landowners for Temporary Regulatory Takings*, 21 GA. L. REV. 1169 (1987); and Alfred R. Gould, Jr., Note, First English Evangelical Lutheran Church v. County of Los Angeles: *Compensation for Temporary Takings*, 48 LA. L. REV. 947 (1988).

In *First English*, the Court considered only a temporary regulatory taking by the local government,[61] nevertheless, the Court's decision has been understood to apply to permanent takings claims under section 404 regulation, at least with regard to requiring compensation.[62]

Also decided during the 1985-1987 period was *Connolly v. Pension Benefit Guaranty Corp.*[63] This opinion did not necessarily consider facts or issues directly on point with a section 404 permit denial, but it did elaborate on the *Agins* three factor test.[64] First the *Connolly* Court requires looking at the nature of the government action. For example, was the action a physical invasion or permanent in nature;[65] or did the government action interfere with property rights to adjust the benefits and burdens of economic life for the promotion of the common good?[66] Secondly, the *Connolly* Court considered the economic impact of the government action on the landowner: does the government action require severe economic losses to the landowner without any provisions to mitigate such losses?[67] Lastly the Court inquired into whether there has been significant interference with investment-backed expectations.[68] Such an inquiry determines whether the government action unreasonably interferes with expected gains from an investment.[69]

As the cases above show, while the takings analysis has evolved a great deal since *Pennsylvania Coal*, there still remains a considerable amount of grey area as to what are the proper considerations in takings jurisprudence. The guidelines

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61. 482 U.S. at 304-05.

62. *See* Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. OF COLO. L. REV. 695, 757 (1989) (the Supreme Court may have ensured an increase in cases alleging takings due to section 404 permit denials by approving money damages for temporary regulatory takings).

63. 475 U.S. 211 (1985).

64. *Id.* at 224-25.

65. *Id.* at 225.

66. *Id.*

67. *Id.* at 225-26.

68. *Id.* at 226.

69. *Id.* at 226-27.

provided by the Supreme Court are so broad in scope that they really do not give potential parties to a taking claim any idea of what to expect from the courts which may hear the claim. *Loveladies Harbor* is a claims court case which exemplifies how this lingering grey area can effect important issues such as the preservation of our Nation's wetlands. The remainder of this Note is dedicated to the *Loveladies Harbor* decision and how the grey areas of the takings doctrine allowed for a decision which appears to ignore the Nation's sentiment to preserve and protect our environment; an environment in which wetlands perform a vital function. The *Loveladies Harbor* case should not be considered in isolation, however. It should serve as an example of why more concrete and specific rules regarding takings issues should be formulated — especially when an important resource such as the Nation's wetlands are the subject of the inquiry.

III. Procedural History of *Loveladies Harbor*

A. The Facts

In 1955, Loveladies Harbor, Inc., [hereinafter Plaintiff] purchased 250 acres of undeveloped land for $300,000.[70] Significant portions of this land were wetlands.[71] Plaintiff proceeded to develop 199 of the 250 acres before 1972, and planned to develop the remaining fifty-one soon after.[72] However, by 1972, the federal Clean Water Act (CWA)[73] and the New Jersey Wetlands Act[74] were passed. Both of these statutes contained provisions for regulating the development of wetland property. Because the remaining fifty-one acres of the property were mostly wetlands, Plaintiff was required to comply with both the CWA and the New Jersey law before developing the rest of the property.[75] Both statutes compel a per-

70. *Loveladies IIIb*, 15 Cl. Ct. at 383.

71. *Id.*

72. *Id.*

73. Federal Water Pollution Control Act §§ 101-607, 33 U.S.C. §§ 1251-1387 (1988).

74. N.J. STAT. ANN. §§ 13:9A-1 to -10 (West 1990).

75. *Loveladies IIIb*, 15 Cl. Ct. at 383.

son who wishes to develop on wetlands to obtain a dredge and fill permit from the appropriate federal[76] and state agencies.[77]

In 1973, Plaintiff made concurrent applications to obtain dredge and fill permits from both the Army Corps of Engineers (the Corps) and the New Jersey Department of Environmental Protection (NJDEP).[78] Twice Plaintiff attempted to acquire a permit from the NJDEP to fill the remaining fifty-one acres, but the NJDEP denied both applications.[79] Subsequently, Plaintiff sought an administrative appeal chal-

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76. CWA § 404, 33 U.S.C. § 1334. Under section 404 of the CWA, the Corps is the appropriate federal permitting agency. It is well settled law that the Corps has broad jurisdiction to apply the CWA permitting requirements in order to preserve and protect the Nation's wetlands. *See* United States v. Riverside Bayview Homes, 474 U.S. 121 (1985); Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897 (5th Cir. 1983).

While the U.S. Attorney General announced that the EPA is the final authority when construing section 404, 43 Op. Att'y Gen. 15 (1979), the Corps and the EPA entered into a Memorandum of Agreement giving the Corps general authority to determine jurisdictional wetlands. Section 404 gives the Corps the authority to issue permits to dredge and fill such jurisdictional wetlands. CWA § 404, 33 U.S.C. § 1334. Title 33 of the Code of Federal Regulations, Parts 320-328, outline the Corps' regulations for implementing the permitting process. 33 C.F.R. §§ 320-328 (1991). Part 328.3(b) defines 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." 33 C.F.R. § 328.3(b).

The Corps' general procedure for permit applications is outlined in the regulations. 33 C.F.R. § 325. The regulations also explain which types of discharges require permits and which situations do not. 33 C.F.R. § 323.3, 323.4. The Corps considers general policies when making a decision on a permit application, such as: the public interest in the proposed projects, the effect on the wetlands, the possible detriment to fish and wildlife, the effect on water quality, plus many other general considerations. 33 C.F.R. § 320.4.

See Andrew H. Ernst & Wade W. Herring II, *Water, Water Everywhere, Better Call the Corps: Section 404 Regulation of Wetlands*, 41 MERCER L. REV. 843 (1990) (giving a detailed explanation of the section 404 permitting process).

77. New Jersey's Wetland's Act of 1970 gives the state permitting authority to the New Jersey Department of Environmental Protection (NJDEP). N.J. STAT. ANN. § 13:9A-1. The authority of the NJDEP is not of concern for the purposes of this Note and will not be discussed in any further detail. For a closer look at where this authority comes from, see, *Id.* 13:9A-4(b) & (c).

78. *Loveladies IIIb*, 15 Cl. Ct. at 384.

79. *Loveladies Harbor IIIb*, 15 Cl. Ct. at 384. The NJDEP denied the first permit application without prejudice in 1973 because of insufficient information in the application. The second application was denied on the merits in 1977. *Id.*

lenging the validity of the denial,[80] but before the appeal was heard, the NJDEP extended a settlement offer to allow Plaintiff a dredge and fill permit for 12.5 acres instead of the fifty acres.[81] Plaintiff, however, rejected the offer and pursued the appeal.[82] The NJDEP administrator upheld the denial as valid. Plaintiff then resubmitted an application for the 12.5 acres, and the NJDEP granted it.[83]

Based on the NJDEP's first two permit application denials, the Corps also rejected the first two applications Plaintiff submitted for dredge and fill permits.[84] Plaintiff then submitted a third application to the Corps to develop the same 12.5 acres for which the NJDEP approved a permit. Despite the NJDEP's approval, the Corps denied this third application.[85]

Loveladies initially challenged the validity of the Corps denial, stating it was an arbitrary and capricious decision, but the district court held the denial was valid.[86] Plaintiff then filed a Fifth Amendment takings claim in the United States Claims Court seeking compensation for the entire 12.5 acres because the permit denial had rendered the entire property useless for Plaintiff's purposes.[87] This section discusses and analyzes the Claims Court's opinion on this matter.

The first part of this section will examine the court's delineation of what constitutes the "parcel as a whole."[88] The

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80. *In re* Loveladies Harbor, Inc., 422 A.2d 107, 108, *cert. den.*, 427 A.2d 588 (1981).

81. *Loveladies IIIb*, 15 Cl. Ct. at 384.

82. *Id.*

83. In 1981, the NJDEP accepted the plaintiff's application for a permit to dredge and fill the 12.5 acres mentioned in the settlement offer. The NJDEP granted the permit, even though it believed that Loveladies' proposed project failed to meet the requirements of the New Jersey Wetlands Protection Act of 1970, because it felt compelled to follow through with its previous settlement offer. *Id. See* Loveladies Harbor v. Baldwin, 20 ERC 1897, 1898 (D.C.N.J. 1984)(quoting the NJDEP).

84. *Loveladies IIIb*, 15 Cl. Ct. at 384.

85. While the plaintiff's original application sought a permit to fill 12.5 acres, one of the 12.5 acres was found to be uplands and not within the Corps jurisdiction. The plaintiff modified the application to include only the 11.5 acres of wetlands, but the Corps still denied the application. *Id.*

86. Loveladies Harbor v. Baldwin, 20 ERC at 1902.

87. *Loveladies IIIb*, 15 Cl. Ct. at 384.

88. *Loveladies IIIb*, 15 Cl. Ct. at 390-93.

second section will report the court's handling of the first part of the *Agins* test;[89] this test is referred to by the *Loveladies* court as the "substantial advancement test."[90] The third and final portion of this section addresses the heart of the court's decision, the "economic viability test."[91]

B. The Parcel as a Whole

"In deciding whether a particular governmental action has affected a taking, [the *Loveladies* court] focuses on the . . . interference with the rights [of the property owner] in the parcel as whole."[92] The government argued that the original 250 acres purchased in 1955 make up the whole parcel for the takings decision.[93] The Claims Court did not accept this position and concluded the whole parcel to be the 12.5 acres considered in the dredge and fill permit.[94]

The only binding precedent[95] on the Claims Court was *Deltona v. United States*.[96] In Deltona, the developer alleged a taking because of a section 404 permit denial.[97] The Claims Court decided that there was no taking because the developer was able to use a substantial portion of the property in question, notwithstanding the areas which were denied permits.[98]

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89. *See supra* notes 43-50 and accompanying text. The first part of the test was whether or not there is a legitimate government interest in the permit denial to Loveladies Harbor, Inc.

90. *Loveladies IIIb*, 15 Cl. Ct. at 388-90.

91. *Id.* at 390-91.

92. *Id.* at 391. (quoting *Penn Central Transportation Co. v. New York*, 434 U.S. 104, 130-31 (1978)); *see supra* notes 33-35 and accompanying text (discussing the *Penn Central* antisegmentation rule).

93. *Loveladies IIIb*, 15 Cl. Ct. at 392.

94. *Id.*

95. *Id.* at 388.

96. 657 F.2d 1184 (1981).

97. *Id.* at 1189.

98. *Id.* The plaintiff in Deltona originally purchased 10,000 acres in Southwest Florida and divided the acreage into five sections. Before applying for a permit the plaintiff had already filled in, developed, and sold two of the five sections. It was seeking to fill and develop the remaining three sections. The Corps denied permits for two of the three sections, leaving one section and 111 acres of upland property available to develop. The Deltona court was unimpressed by the plaintiff's claim that it had already contracted to sell 90% of the two areas where permits were denied. *Id.* at 1188-89.

In reaching its conclusion the *Deltona* court did compare the total acreage from the original purchase to the amount of acreage subject to the permit denials.[99]

However, the *Loveladies* court labeled this comparison as the "first of 'a few statistics' "[100] considered by the *Deltona* court. The court refused to accept "a rigid rule that the parcel as a whole must include all [the] land originally owned by [Loveladies Harbor]."[101] The *Loveladies* court determined that the *Deltona* court's consideration of another statistic which considered what was left to develop *after* the permit denial was more significant.

After rejecting *Deltona* as helpful, the Claims Court cited *Keystone Bituminous Coal Assn. v. DeBenedictus*[102] to aid in the determination of what constitutes the whole parcel. In *Keystone Bituminous*, the Court considered more than the property subjected to the government regulation, but the Court did not take into account the total property[103] purchased prior to the regulation. The Supreme Court looked to "the value that remain[ed] in the property' when the taking is said to have occurred."[104] The *Loveladies* court adopted the same position.[105] By adopting this rule, the Claims Court excluded consideration of the entire 250 acres in the original purchase. This left for consideration the fifty-one acres still in Plaintiff's possession at the time of the alleged taking.[106]

The *Loveladies* court, however, quickly narrowed the scope of the whole parcel to the 12.5 acres using the reasoning from the Federal Circuit's opinion in *Florida Rock*.[107] The

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99. *Id.* at 1192.

100. *Loveladies IIIb*, 15 Cl. Ct. at 392.

101. *Id.*

102. 480 U.S. 470 (1987).

103. *Id.* at 497-506. The total property includes the entire property originally purchased by the plaintiff in *Keystone* some seventy years before the plaintiff brought the action. *Id.* at 505 n.32. The original purchase was actually series of purchases in the early twentieth century. *Id.*

104. *Loveladies IIIb*, 15 Cl. Ct. at 392 (citing *Keystone Bituminous*, 480 U.S. 470).

105. *Id.*

106. *Id.*

107. Florida Rock Indus. v. United States, 791 F.2d 893 (Fed.Cir. 1986). In *Flor-*

Loveladies court found that 38.5 acres not considered in the last application were already denied the necessary permits in the previous two applications submitted by Plaintiff.[108] The court decided it would be a fruitless effort to seek any further permits: "there is no possibility one might put a pot of water on the hot stove and have it freeze in this instance."[109]

C. The Substantial Advancement Test

The 1988 Claims Court briefly analyzed the *Loveladies Harbor* facts under the first part of the *Agins* test;[110] specifically, the court determined whether there was a substantial advancement of a legitimate state interest.[111] In applying this test to the facts of the case, the *Loveladies* court recognized that the regulation involved in this matter[112] provided the Corps with permitting authority in order to protect wetlands and preserve the biological, chemical, and physical integrity of

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ida Rock the plaintiff purchased 1560 acres of wetlands for the purpose of mining the property for limestone. However, the Corps refused to consider a dredge and fill application for more acreage than was necessary to supply the plaintiff with limestone for more than three years. The plaintiff, therefore, submitted a permit application for 98 of the 1560 acres. The Corps determined that such mining operation would be too detrimental to the wetlands and rejected the application. The Federal Circuit heard the government's appeal from the lower court's ruling that there was a taking after the permit denial. The Federal Circuit had to consider the issue as to what constitutes the parcel as a whole. It concluded that because of the permit denial for the 98 acres, it was unlikely that the plaintiff would ever receive permission to dredge and fill the remaining 1462 acres. It was therefore inappropriate to deem the entire 1560 acres as the whole parcel for the takings determination. *Id.*

The *Loveladies* court quotes the Federal Circuit's statement: "[the court does] not think that the mere possibility one might put a pot of water on a hot stove and have it freeze, is a reality requiring . . . [the Court] to deem that viewing the entire 1560 acres . . . as a whole." *Loveladies IIIb*, 15 Cl. Ct. at 393, (quoting Florida Rock Industries v. United States, 791 F.2d 893, 904 (Fed.Cir. 1986)). In *Loveladies Harbor*, both the state and the federal government had already stated that it would not allow filling of the entire 51 acres. Based on the *Florida Rock* court's reasoning, the *Loveladies* court determined that it was equally inappropriate to consider anything but the 12.5 acres in the permit application.

108. *Loveladies IIIb*, 15 Cl. Ct. at 393.

109. *Id.*

110. *See supra* notes 43-50 and accompanying text for a brief description of the *Agins* test.

111. *Loveladies IIIb*, 15 Cl. Ct. at 388.

112. 33 C.F.R. §323 (1991).

the nation's waters.[113] In light of this purpose, the court concluded that the Corps sought to advance a legitimate state interest with the permit denial.[114]

However, in order to complete the first part of the *Agins* test, the Claims Court applied a harm/benefit analysis.[115] This involved a determination of whether the permit denial prevented a public harm or promoted a public benefit.[116] It was the court's belief that the permit denial promoted a public benefit.[117] This made the rest of the Court's analysis very simple. The Court merely had to balance the interest in protecting wetlands against the loss in value to the property.[118] In striking this balance, the Claims Court disregarded as nonbinding, those cases which have concluded that the protection of wetlands constitutes a prevention of harm which outweighs the damage to the individual.[119] The *Loveladies* court even went as far to set aside one of its own decisions where it stated that the preservation of wetlands was a prevention of a public harm.[120] The court instead turned to a decision handed down from the Federal Circuit in *Florida Rock Industries v. United States*.[121] The *Florida Rock* court had found that preservation of the wetlands was merely for the public benefit and the cost of such a benefit should be borne by the public itself.[122] The *Loveladies Harbor* court accepted this as the binding general rule and, in balancing the benefits and bur-

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113. *Loveladies IIIb*, 15 Cl. Ct. at 388.

114. The phrase "state interest" is meant to include the federal interest as well.

115. *Loveladies IIIb*, 15 Cl. Ct. at 388.

116. *Id.*

117. *Id.*

118. *Id.*

119. Smithwick v. Alexander, 17 ERC 2126 (E.D.N.C. 1982); American Dredging Co. v. Department of Envtl. Protection, 391 A.2d 1265, 1270, *aff'd*, 404 A.2d 42 (N.J. Super. Ct. App. Div. 1979); Just v. Marinette County, 201 N.W.2d 761, 767-68 (Wis. 1972)(the Wisconsin Supreme Court found that restricting the use of wetlands property for recreational use was not to secure a public benefit, but rather it was to prevent a public harm of changing the natural character of the property); *see also* Sibson v. State, 336 A.2d 239 (N.H. 1975).

120. *Loveladies Harbor.*, 15 Cl. Ct. at 388 (the court found *Deltona* to be no longer binding after the Federal Circuit's decision in *Florida Rock*).

121. 791 F.2d 893 (Fed. Cir. 1986).

122. *Id.*

dens caused by the permit denial, the court concluded that the public should pay for that benefit.[123]

However, the *Loveladies Harbor* court did not want to base its decision on this balancing test alone. It recognized the problems with the harm/benefit distinction[124] and decided further analysis was necessary to solve the problem.

D. The Economic Viability Test

The economic viability test was the heart of the court's decision in *Loveladies IV* as well as *Loveladies IIIb*. The *Loveladies IV* court's basic consideration was whether there is remaining commercial or economic use in the 12.5 acres after the permit denial. The court's approach to this issue was to consider the three factors from *Connolly v. Pension Benefit Guaranty Corp*:[125] "(1) 'the character of the government action'; (2) 'the economic impact of the regulation on the claimant'; and (3) 'the extent to which the regulation has interfered with distinct investment-backed expectations'."[126] While the *Loveladies Harbor* court disposed of the first factor, the character of the government action, in its 1988 opinion,[127] the court considered the second and third factors more closely in its 1990 opinion.

The *Loveladies IV* court's analysis began with establishing the value before the denial.[128] The court notes that the valuations of property prior to the government action in an eminent domain proceeding may reflect either the fair market

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123. *Loveladies Harbor*, 15 Cl. Ct. at 388 (citing *Florida Rock* 791 F.2d 893 at 904) (when the Federal Circuit balanced the governmental interest in preserving the wetlands against the loss of value to the landowner's property, the Federal Circuit found that the balance fell in favor of the landowner).

124. The court stated that one man's prevention of harm is another man's promotion of a benefit. The court also recognized that no court has ever determined a taking based on the fact that a legitimate state interest was not found. Every decision has had to include a discussion of the economically viable uses in the property before and after the government action. *Loveladies Harbor*, 15 Cl. Ct. at 389-90.

125. 475 U.S. 211, 224-27. *See supra* notes 65-69 and accompanying text.

126. Loveladies Harbor Inc. v. United States, 21 Cl. Ct. 153, 155 (1990) (citing *Connolly*, 475 U.S. 211, 224-25 (1986)(citations omitted)).

127. 15 Cl. Ct. at 391.

128. *Loveladies IV*, 21 Cl. Ct. at 156-57.

value or some other value reflecting a use to which the property may be readily converted.[129] Plaintiff contended that it should be compensated for the highest and best use to which the land could be readily converted, a forty-lot residential development.[130] The court agreed with Plaintiff and found this use to be a physically and financially possible conversion.[131] Thus, the court accepted the fair market value of a forty-lot residential development as the value of the 12.5 acres before the government action.[132] After that determination, the court accepted that the value of the property to be $2,658,000 before the permit denial.[133]

Prior to entering a discussion of the value after the government action, the *Loveladies IV* court first entered a discussion of who bears the burden of proof.[134] The government claimed that Plaintiff failed to show that certain alternative uses were impossible. The court rejected that contention.[135]

The government's series of proposed alternatives — hunting, fishing, aquaculture, a mitigation site, or a marina — were found to be unsupported by any reasonable amount of evidence.[136] The court ascertained that these uses were put forth on the reliance that a plaintiff in a takings claim has the burden to disprove that such uses were not possible,[137] but this is not a burden for the plaintiff to bear. The only use accepted by the court for after-denial valuation was that put forth by the plaintiff: conservation and recreation.[138] This use gave the property a value of approximately $1,000.00 per acre for a total value of $12,500 for the entire 12.5 acres.[139]

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129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 157-58. The court establishes the plaintiff's burden as one of persuasion. It is the plaintiff's responsibility to persuade the court that it is more likely than not that there remains no economically viable use in its property. *Id.*
135. *Id.* at 159.
136. *Id.*
137. *Id.* at 158.
138. *Id.*
139. *Id.*

The court closes the case by stating that with the simple application of logic and good judgment to the matter, it is obvious that a substantial reduction from $2,658,000 to $12,500 forms a proper basis for finding that there has been a taking.[140]

IV. Analysis

The *Loveladies Harbor* decision is a takings decision which skirts important issues in favor of clinging inflexibly to concepts of a generic takings analysis. The Claims Court takes a severe stance in this case in favor of the landowner. Each issue in *Loveladies Harbor* was supported by case law favoring the government's position.[141] However, the court went out of its way to avoid these cases and the arguments they espoused.

A. Parcel as a Whole

The fact that the plaintiff loses considerable value in 12.5 acres of land is only significant if one ignores the fact that the plaintiff has made substantial profits from selling every other segment of the original purchase. The 12.5 acres was a part of the original 250 acre parcel purchased by the plaintiff. It was not a separate purchase and was not distinct from the original 250 acres. This 12.5 acres was not a separate piece of land, but a part of a whole.

When deciding what constitutes the parcel as a whole, the Claims Court sets aside its own decision[142] in *Deltona Corp. v. United States*,[143] which looked at the original parcel and compared it to the value of what was left after the government action.[144] This comparison was made despite the fact that the developer, Deltona Corp., already sold a large portion of the original parcel. While it is true that the Deltona court's comparison of the original purchase to what was left after the gov-

140. *Id.* at 160(citing Andrus v. Allard, 444 U.S. 51, 65 (1979)).
141. *See supra* note 119 and accompanying text.
142. *Loveladies IIIb*, 15 Cl. Ct. at 388.
143. 657 F.2d 1184 (1981).
144. *Id.* at 1192.

ernment action was one of a few considerations,[145] it was a consideration nonetheless. The *Loveladies Harbor* court backed its decision to ignore *Deltona* by claiming it does not want to be tied to a rigid rule requiring it to consider the original purchase.[146] It then turns around and adopts a more rigid rule, which considers only the value of the property which is left after the government action.[147] The court failed to recognize that the *Deltona* decision did not choose one factor over another, but rather considered all of them together.[148]

The *Loveladies Harbor* court cited *Keystone Bituminous Coal Ass'n v. DeBenedictus*[149] in order for the court to infer that the extent and the use of the original purchase is not a consideration. In *Keystone* the Supreme Court looked only at the value of the property which was still in the hands of the claimant at the time of the alleged taking. Using this decision to bolster its conclusion to disregard the original purchase ignores the fact that it was unnecessary for the *Keystone* court to even consider the value of the original parcel or the benefits already derived from the original purchase. The *Keystone* court found that sufficient value was left in the property after the alleged taking and dismissed the plaintiff's claim. Because the *Keystone* court found that there was sufficient use remaining in the property, the purchase price was not an issue. Besides being unnecessary, the facts in *Keystone* made consideration of the entire purchase price too difficult.[150] How-

145. *Id.* at 1192-94.

146. *Loveladies IIIb*, 15 Cl. Ct. at 392.

147. *Id.*

148. *Deltona* at 1192-94. The irony of this decision to ignore the property which had already been developed is the Claims Court decision in *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991), where the Claims Court puts into the "parcel-as-a-whole" equation "not only those areas as to which dredge and fill permits were denied, but also those areas that had been successfully developed earlier." *Ciampitti*, 22 Cl. Ct. at 320. The *Ciampitti* court specifically adopts the *Deltona* decision in making this consideration. *Id.* at 319-20.

149. 480 U.S. 470, 471 (1986).

150. *Keystone* dealt with a statute that affected huge underground tracts of coal which were purchased, not all at one time, but on many separate occasions over a period of thirty years, from 1890 to 1920. 480 U.S. at 470. It would be a difficult and cumbersome task to find out exactly what profits were obtained in the years prior to the government action when there is no specific starting point as to the original

ever, in a situation where there has been a purchase of an easily definable piece of property, and the entire property is meant to be used for one purpose — to improve, develop, and sell — the court should not be so quick to ignore the fact that 80% of the original purchase has been used to fulfill that purpose.

If the *Penn Central* anti-segmentation rule[151] is applied to the facts in *Loveladies Harbor*, there is then another possible inference. While the anti-segmentation rule requires the courts to avoid dividing a single parcel into discrete segments in order to determine if the rights in one such segment have been abrogated, fairness should require preventing the landowner from doing the same segmentation prior to bringing an action. An illustration may make the point a little clearer:

A developer purchases a large parcel of land which contains within its boundaries a certain amount of environmentally sensitive wetlands. The developer proceeds to improve and sell those segments which are not part of the wetlands, leaving only the segment of the original purchase which is wetlands. In such a case, the developer itself has divided a single parcel into discrete segments and now awaits for either the Corps or the courts to determine the developer's rights in the one segment that consists of wetlands. Under the *Loveladies Harbor* decision, none of these facts would be considered and the government would be forced to either allow the wetlands to be filled or pay full market value as if it were purchasing developed property.[152]

The hypothetical above is not meant to assume any kind of devious planning on the part of developers. What it is meant to point out is that many land owners who find themselves in possession of wetlands which impede development plans will no longer be required to sell the land if the wetlands are important enough to preserve. These wetland owners can now get the government to purchase the land and still realize a profit without making the improvements; none of

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purchase.

151. *See supra* text accompanying notes 33-35.

152. *Loveladies IV*, 21 Cl. Ct. 153 (1990).

this interfering with the profits derived from the other segments of the original purchase.

B. Economic Viability

As the *Loveladies Harbor* court noted, eminent domain proceedings allow the property to be valued for its present use or for that use for which the property is readily convertible. The court adopted the latter valuation.[153] While it appears that the court had the discretion to choose its valuation method, it is a choice which ignores the fact that the government has not attempted to interfere with any of the fundamental rights in the property. The government action is only meant to restrict certain uses, and it does not interfere with the fundamental rights to possess, dispose of, and exclude others from the property.[154] By choosing the "readily convertible" method of valuation, the Claims Court has recognized the "right to develop" as a fundamental right in property. The court has weighed investment-backed expectations to develop the wetland heavily in favor of the plaintiff. Once the court decided to put that much emphasis on what Plaintiff wanted to use the land for, it was just a matter of simple math for the court to find that the economic impact was severe enough to find a taking had occurred.[155]

Looking to the *Penn Central* case, the Supreme Court used the approach which considers the current use at the time of the alleged taking, as opposed to the readily convertible use. The *Loveladies Harbor* court should have adopted this approach and recognized the current use of the property which is its natural use as a wetland. By recognizing the current use instead of the potential use, the permit denial does not interfere with any inherent rights which come with such a use.[156] There is case law which supports such a position.[157]

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153. *See supra* note 131 and accompanying text.

154. The Claims Court conceded that all or most of the fundamental rights in property were left intact. 15 Cl. Ct. at 391.

155. *See supra* notes 130-142 and accompanying text.

156. *See* David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest In Environmentally Critical Resources,*

The purpose of compensation for taking property should be to replace what has been taken away, or at least provide some functional equivalent to what has been taken. By choosing a form of compensation which provides a functional equivalent (in this case, money) to the fair market value of a forty-lot residential development, the court is in effect stating that the government has taken the forty-lot development away from the plaintiff when in fact there is no forty-lot development present on the property. By using this approach, the court appears to further establish a fundamental right to develop.

Even Justice Holmes recognized that there is no reason to give the purchaser greater rights than he bought.[158] The plaintiff in this case bought no more than the rights to possess, dispose of, and exclude others from 12.5 acres of wetland.[159] Its goal of improving and developing the property was just that, a goal; it is not a right.[160]

Even accepting that the property was purchased with the expectation that it could be developed, it does not follow that the purchaser should be compensated for the expectation. An investment-backed expectation might be a proper consideration for determining takings, however it should not be a valuation tool, especially if the expectation is one that may cause significant harm to a resource vital to the public health, safety, and welfare. This demonstrates one of the major problems with *Loveladies Harbor*; the court fails to recognize

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12 HARV. ENVTL. L. R. 311, 329 (1988).

157. Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975) (owner has no absolute and unlimited right to change the essential character of his land so as to use it for a purpose for which it is unsuited in its natural state); *see also* Just v. Marinette County, 56 Wis.2d 7, 291 N.W.2d 761 (1972).

158. Pennsylvania Coal v. Mahon, 260 U.S. 393, 416 (1922)("[W]e cannot see that the fact their risk has become a danger warrants the giving to them greater rights than they bought"). *Id.*

159. The court refutes this argument by once again clinging to the Federal Circuit decision in *Florida Rock*. In *Florida Rock* the court considered laughable the government's proposal that the best possible use in the land was as a wetland and should be evaluated as such before the permit denial. Florida Rock Industries v. United States, 791 F.2d 893 (Fed. Ct. 1986).

160. See *supra* note 156.

the importance of wetlands to the health, safety, and welfare of the public, which is due, in large part, to decision in *Florida Rock Industries v. United States*.[161]

C. Character of the Government Action

A significant problem with the *Loveladies Harbor* court is its adherence to a "wooden" rule adopted from the *Florida Rock* decision.[162] *Florida Rock* purports that protection of a wetland is a promotion of a public benefit as opposed to a prevention of a serious harm. The Claims Court recognized that some may consider the protection of a wetland also prevention of a harm, but the court likened the fact situation in *Loveladies Harbor* to that of *Florida Rock* and therefore adopted *Florida Rock*'s position that the permit denial promotes a public good for which the public should bear the burden. The *Loveladies Harbor* court failed to recognize the significant factual differences between *Florida Rock* and *Loveladies Harbor*.

The plaintiff in *Florida Rock* purchased property in order to mine the limestone. While this activity is intrusive, it is only temporary. Upon using all the minable limestone, the plaintiff would discontinue the operation. The pro forma pollution caused by this mining activity would be abated after a three year period.[163] The development plans of the plaintiff in *Loveladies Harbor* are not temporary in nature; the plaintiff wants to permanently fill 12.5 acres of wetlands in order put in residential housing.[164] It may be assumed that the increased traffic and pollution from such a development will put added permanent stress on the surrounding wetlands, not to mention the fact that 12.5 acres would be permanently lost.

The permanency of the situation should be a significant factual difference when determining whether the activity prevented poses a public threat which should be prevented through a permit denial without having to compensate the

161. 791 F.2d 893 (Fed. Cir. 1986).
162. *See* Blumm & Zaleha, note 62, at 756.
163. *Florida Rock*, 791 F.2d at 896.
164. *See supra* notes 78-83 and accompanying text.

owner. A temporary disturbance on significant wetland property may not be a significant public harm which requires government action in order to prevent it. However, when the activity on the wetland is permanent and severe, the government should be allowed to prevent such activity without having to compensate the actor.

Another significant difference between *Florida Rock* and *Loveladies Harbor* is the fact that of the original purchases made in both cases, Loveladies Harbor was able to make use of 80% of its purchase, while Florida Rock Industries is not able to use one of the 1,560 acres purchased for their original purpose.[165] However, the *Loveladies Harbor* court will not recognize this difference because it will not consider the original property in its taking determination.[166]

The root problem with the outcome of *Loveladies Harbor*, and *Florida Rock* for that matter, is the failure of the Claims Court to recognize the importance of wetlands to the prevention of serious harm to the environment. It is necessary for the courts to recognize that protection of the environment is a prevention of serious harm.[167] This is especially true with unique resources such as coastal and fresh water wetlands. The *Loveladies Harbor* court ignores widespread recognition that wetlands prevent many serious public harms such as

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165. *See supra* notes 102-09 and accompanying text.

166. *See supra* notes 107-09 and accompanying text.

167. The issue of whether environmental protection can be a prevention of public harm has faced scrutiny by the Supreme Court. Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992). *Lucas* involved the application of South Carolina's Beach Front Management Act (S.C. Code Ann. § 48-39-10 et seq. (Supp. 1990)) to a landowner who wanted to develop on a beach/dune system. As applied to the landowner, the Act prevented any construction of permanent structures on the beach front property. The Supreme Court deferred judgment on the issue and remanded *Lucas* to the South Carolina Supreme Court to determine if the purposes of the Act were consistent with the State Common Law for Public Nuisances. *Id.* Previously, the South Carolina Supreme Court had recognized the importance of the dune system in preventing the destruction of life and property by serving as a storm barrier, as well as the importance of the dunes as a habitat to numerous species of plants and animals. Lucas v. South Carolina Coastal Council, 304 S.C. 376, 404 S.E.2d 895 (1991). The court decided that preventing destruction of this unique resource was a valid exercise of the state's power to prevent serious public harm, and therefore did not constitute a taking. *Id.*

flooding, increased shoreline erosion, and diminished groundwater recharge.[168] The court takes a shortcut by simply stating that the facts are similar to *Florida Rock* and therefore the same conclusion is appropriate. Notwithstanding the suspect conclusions in the *Florida Rock* case, it should not be deemed appropriate to skirt any issue as important as the protection of a unique natural resource in such a cursory manner when each takings case rests upon its own ad hoc factual determinations.[169]

V. Conclusion

Loveladies Harbor must be recognized because it demonstrates that wetlands regulation will continue to clash with private land rights in the wake of increasing pressure to do more to protect the environment. The Claims Court has established precedent for itself in wetlands takings issue which appears to favor the individual property owner.[170] Because the Claims Court has jurisdiction over claims against the federal government which exceed $10,000,[171] and because most takings claims against the federal government concerning real property will exceed $10,000, the Claims Court is likely to hear most takings claims similar to that of Loveladies Harbor, Inc.[172] It is therefore reasonable to assume that *Loveladies Harbor* will have a significant effect on the regulation of wetlands in the future.

In order to come to a more rational rule for wetland takings claims, the courts must recognize the importance of the

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168. *See* Blumm & Zaleha, note 62, at 757.

169. *See generally Penn Central*, 438 U.S. 104, 124-28 (1978)(the court identified a few factors against what it termed an "ad hoc factual inquiry").

170. Judge Smith uses the Federal Circuit's opinion in *Florida Rock* to tip the balance in favor of the private landowner against the government interest in protecting wetlands. *Loveladies IIIb*, 15 Cl. Ct. at 394.

171. 28 U.S.C. §§ 1346 and 1491 (1988).

172. While it is true that district courts as well as the Claims Court have heard wetlands takings cases, some jurisdictions have stated that any claim above $10,000 must be heard in the Claims Court. *See* WANT, *supra* note 36 at § 10.06. It is likely that even though some district courts would hear takings claims above $10,000 potential claimants will file in the Claims Court where a landowner can be sure of a more sympathetic court.

environment and wetland ecology to the public at large and include it more extensively in a takings determination. Courts must also recognize that wetlands are not the same as other forms of real property.[173] A wetland is a unique resource which has significant impacts on the health, safety and welfare of the general public.

This does not mean that courts should ignore the individual land owner's rights. Courts, government regulators and environmentalists must reconcile the importance of wetland ecosystems with the fact that 80% of wetlands are privately owned. If the Corps is concerned about multimillion dollar lawsuits every time it seeks to exert its permitting authority to protect the wetlands, the economic and environmental costs will be excessive. However, private landowners and their investment of time and money cannot be overlooked, because their economic losses are not insignificant.

173. *See* Hunter, *supra* note 156 at 337 (different ecotypes of land deserve different treatment under the laws).