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Can Government Afford to Protect Our Nation's Wetlands: An Analysis of the Decisions in Loveladies and Florida Rock, 25 J. Marshall L. Rev. 837 (1992)

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CAN GOVERNMENT AFFORD TO PROTECT OUR NATION'S WETLANDS?: AN ANALYSIS OF THE DECISIONS IN *LOVELADIES* AND *FLORIDA ROCK*

INTRODUCTION

Government protection of a natural resource is no different than government regulation of any other area; a conflict is inherent. The conflict centers upon the government's power to regulate versus an individual's property rights. Ideally, a balance is struck, and the resource is allocated between public and private interests.[1] Yet, there are certain cases where the natural resource is so depleted that the need to regulate tilts the balance and infringes upon the individual's property rights.[2] When this happens, the courts require the government to pay "just compensation."[3]

Such is the case with the protection of our nation's wetlands. Wetlands are areas saturated by surface or ground water which generally include swamps, marshes, and bogs.[4] For years, wetlands were seen only as worthless land that was ripe for development.[5] This attitude led to the loss of over half of our nation's 215 million

1. *See* FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY at xxiii (1983) (discussing the evolution of environmental law).

2. *See* Robert Meltz, *Federal Regulation of the Environment and the Takings Issue*, 37 FED. B. NEWS & J. 95, 95 (1991) (discussing the taking issue moving to the forefront as the growth of industry and the regulation of the environment meet); *see also* Lynda L. Butler, *State Environmental Programs: A Study In Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 839 (1990) (discussing private landowners' expectation of freedom to do what they want with their land free of government regulation).

3. U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation").

4. The Corps of Engineers 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. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b) (1991).

5. *See generally* Kevin O'Hagan, *Pumping With the Intent to Kill: Evading Wetlands Jurisdiction Under Section 404 of the Clean Water Act Through Draining*, 40 DEPAUL L. REV. 1059 (1991) (discussing the Swamp Wetlands Act of 1850 which granted sixty-five million acres of wetlands to the states for reclamation).

acres of wetlands.[6] Following a period of growing environmental awareness,[7] wetlands are now recognized and regulated as valuable natural resources.[8] Yet, as the wetlands are more strictly regulated, the apparent loss of property rights becomes more prevalent. In turn, more property owners seek protection, looking to the courts for just compensation under the Takings Clause of the Fifth Amendment.[9]

In 1990, two decisions in the United States Claims Court awarded just compensation for the regulatory taking of wetlands.[10]

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6. Bhavani Prasad V. Nerikar, *This Wetland Is Your Land, This Wetland Is My Land: Section 404 of the Clean Water Act and Its Impact on the Private Development of Wetlands*, 4 ADMIN. L.J. 197, 198 (1990) (citing U.S. FISH AND WILDLIFE SERVICE, WETLANDS TRENDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 3 (1984)). According to one commentator, only 99 million acres of wetlands remain in the continental United States. *Id.* Additionally, wetlands in the United States are lost at a rate of 300,000 to 500,000 acres a year. Jan Goldman-Carter, *Clean Water Act Section 404: A Critical Link in Protecting Our Nation's Waters*, 5 NAT. RESOURCES & ENV'T 10 (1991). The following is a list of the ten states with the most wetlands (in millions of acres): Alaska 170; Florida 11; Louisiana 6.8; Minnesota 8.7; Texas 7.6; North Carolina 5.7; Michigan 5.6; Wisconsin 5.3; Georgia 5.3; and Maine 5.2. Jean Seligman, *What on Earth Is a Wetland?*, NEWSWEEK, Aug. 26, 1991, at 48.

7. *See* Nerikar, *supra* note 6, at 197.

8. "Most wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest." 33 C.F.R. § 320.4(b) (1991).

"Wetlands are one of the most environmentally and commercially valuable ecosystems in the world." O'Hagan, *supra* note 5, at 1063. Wetlands play a vital role in flood control by absorbing overflow and helping curb erosion of stream banks and shores. *Id.* Wetlands also help play a large role in maintaining our overall water quality as they filter both organic and inorganic materials. Nerikar, *supra* note 6, at 207. The overall health of a wetland is an indication of water quality in a particular area. *Id*

Wetlands also play a vital role in the survival of wildlife. The Office of Technology Assessment stated:

> Wetlands provide food and habitat for many game and non-game animals. For some species, wetlands are essential for survival. For instance, many species of waterfowl and saltwater fish require wetlands for breeding or nesting. Approximately 20 percent of all plant and animal species listed by the Federal Government as threatened or endangered depend heavily on wetlands.

OFFICE OF TECHNOLOGY ASSESSMENT, WETLANDS THEIR: USE AND REGULATIONS 6 (1984).

Many species of plants are also unique to the wetland environment. O'Hagan, *supra* note 5, at 1063. For a discussion of the importance of wetlands, see generally U.S. FISH & WILDLIFE SERVICE, WETLANDS OF THE UNITED STATES, CURRENT STATUS AND RECENT DEVELOPMENTS 13-25 (1984).

9. U.S. CONST. amend. V. For a discussion and the full text of the Fifth Amendment, see *infra* note 37 and accompanying text.

10. A "regulatory taking," also known as "inverse condemnation," occurs when a regulation restricting the use of property goes too far in restricting use and in effect, takes the property from the landowner. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 638 (1981).

The decisions in *Loveladies Harbor, Inc. v. United States*[11] and *Florida Rock Industries v. United States*[12] have given private landowners hope that favorable decisions and expensive judgments will lead to an easing in the enforcement of wetlands regulations.[13] On the other hand, environmentalists are worried that these decisions will lead to an increase in takings litigation and the demise of our nation's dwindling wetlands.[14] Both cases are currently on appeal in the United States Court of Appeals for the Federal Circuit.[15] The outcome of these two cases will have a profound impact on the protection of wetlands in the United States.

This Note will analyze the decisions in *Loveladies* and *Florida Rock* and discuss the flaws in the Claims Court's application of the takings analysis, which should lead to their reversal on appeal. Part I will first discuss the permit process under section 404 of the Clean Water Act. Part I will then present an overview of the Takings Clause of the United States Constitution and the factors which the Supreme Court has relied on in regulatory takings cases. Part II will first introduce the factual and procedural backgrounds of *Loveladies* and *Florida Rock* and will then analyze the decisions and implications of the two cases. Part III will conclude by discussing how the takings analysis applied by the Claims Court reflects a trend toward the decrease in regulation of wetlands on private property and, in turn, the loss of millions of acres of wetlands.

I. SECTION 404 AND THE TAKINGS CLAUSE

In order to analyze the decisions in *Loveladies* and *Florida Rock* it is necessary to have an understanding of the regulatory source of wetlands takings challenges and the constitutional considerations which form the framework for these cases. This section

11. 21 Cl. Ct. 153 (1990), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991).

12. 21 Cl. Ct. 161 (1990), *appeal docketed*, No. 91-5156 (Fed. Cir. Sept. 30, 1991).

13. *See The Cost of Clean Water: Florida Rock v. United States*, BUS. WEEK, July 22, 1985, at 106 (discussing how the government may find it more expensive than expected to keep U.S. waters pollution-free following the decision in *Florida Rock*); *Government Must Pay If Law Takes Land's Value*, ENG'G NEWS REC., June 20, 1985, at 43 (discussing how the federal government could face some unexpected costs in enforcing the Clean Water Act because of successful takings claims).

14. *See Court Backs Developer In Wetlands "Taking"*, ENG'G NEWS REC., August 9, 1990, at 23 (suggesting that the ruling in *Loveladies* could open the "floodgates" for many more suits against the Corps).

15. The government appealed the decisions in both *Loveladies* and *Florida Rock* to the United States Circuit Court of Appeals. In *Loveladies*, the government filed its appeal on February 15, 1991 (No. 91-5050) and the circuit court heard oral arguments on October 9, 1991. In *Florida Rock*, the government filed its appeal on September 30, 1991 (No. 91-5156) and the circuit court heard oral arguments on May 8, 1992.

will discuss how a takings case is brought under section 404 of the Clean Water Act.[16] It will also discuss rulings by the United States Supreme Court that have addressed the Takings Clause of the Fifth Amendment.

A. Section 404 of the Clean Water Act

The passage of the National Environmental Policy Act[17] ("NEPA") in 1969 is seen as the beginning of environmental law.[18] NEPA was also the impetus behind the passage, in 1970, of the Federal Water Pollution Control Act,[19] more often referred to as the Clean Water Act[20] ("CWA"). The main goal of the CWA was "to restore and maintain the chemical, physical and biological integrity of the Nation's water."[21] In 1972, the Act was amended to include section 404,[22] which established a permit program for the discharge

16. 33 U.S.C. § 1344 (1988).

17. 42 U.S.C. §§ 4331-91 (1988).

18. Michael F. Reilly, *Transformation At Work: The Effect of Environmental Law On Land Use Control*, 24 REAL PROP., PROB. AND TR. J. 33, 33 n.1 (1989).

19. *Id.* at 33 n.2 (citing Peter M. Detwiler, *Environmental Analysis After a Decade: "If Prophecy is Impossible, Then Go For Understanding,"* 41 PUB. ADMIN. REV. 93 (1981). Congress passed a broad range of statutes aimed at environmental concerns in the wake of NEPA, in areas such as endangered species, clean air, mining, drinking water, pesticides, occupational safety, resource recovery, federal land management, and toxins. *Id.*

20. 33 U.S.C. §§ 1251-1376 (1988).

21. 33 U.S.C. § 1251 (1988). The CWA lists the following as its goals and policies:

> In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter-
>
> (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
>
> (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
>
> (3) it is the national policy that the discharge of pollutants in toxic amounts be prohibited;
>
> (4) it is the national policy that the Federal financial assistance be provided to construct publicly owned waste treatment works;
>
> (5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;
>
> (6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and
>
> (7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

33 U.S.C. § 1251 (1988).

22. 33 U.S.C. § 1344(f)(2) (1988). Section 404 states in part:

of dredged or fill[23] materials onto wetlands. Today, section 404 of the Clean Water Act is the main vehicle for wetlands protection.[24] Section 404 is also the source of more takings claims than any other regulatory program.[25]

Congress gave the Army Corps of Engineers ("Corps") the role of administering section 404's permit program.[26] Over the years, the Corps' jurisdiction over wetlands has significantly increased.[27]

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(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced, shall be required to have a permit under this section.

Id.

23. *See* 33 C.F.R. § 323.2(c) (1991). The Corps and the EPA define "dredged material" as material dredged or excavated from waters of the United States. *Id. See also* 40 C.F.R § 231.2(g) (1991).

However, the EPA and the Corps differ in their definition of "fill material." The Corps' defines it as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. § 323.2(e) (1991). The EPA has replaced the "primary purpose" requirement of the Corps definition with broader language. Its definition is "any material having the effect of replacing an aquatic area with dry land or of changing the bottom elevation of a body of water." 40 C.F.R. § 122.2 (1991). *See generally* LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE, § 4.03[3][b] (1991) (discussing the Corps' and EPA's definitions of dredged and fill materials).

Included in the activities the Corps lists as "discharge of fill material" are the following:

> [P]lacement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fill, dams and dikes; artificial islands; property protection and/or reclamation devices such as rip-rap, groins, seawalls, breakwaters, and revetments. . . .

33 C.F.R § 323.2(f) (1991).

24. *See* Nerikar, *supra* note 6, at 200. The Section 404 program was not designed as a program for wetlands protection, and thus has problems. In 1984, Congress' Office of Technology Assessment identified the following problems in the program: (1) section 404 does not regulate activities harmful to wetlands, such as excavating, draining, and cleaning; (2) limited resources lead to a lack of regulatory control; and (3) the program has administrative problems such as, the lack of coordination between the agencies involved in the program, limited monitoring and enforcement of the regulations and inadequate public awareness. MALONE, *supra* note 23, § 4.11.

25. Meltz, *supra* note 2, 97.

26. 33 C.F.R. § 320.1(a)(6) (1991). *See also* Garrett Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 VA. L. REV. 503 (1977) (discussing the logic behind putting the Corps, whose main duty is to construct or excavate, in charge of an environmentally sensitive program).

27. The Corps' jurisdiction over wetlands was originally limited to "navigable waters" under section 10 of the River and Harbors Act of 1899. *See* 33 U.S.C. §§ 401-13 (1991). The Act required approval from the Corps for any excavation or construction in "navigable waters" which until 1968 were construed to be waters that were used for commerce. *See* The Daniel Ball, 77 U.S. 557 (1870).

Under section 404, a private landowner seeking to discharge dredge or fill materials onto wetlands must apply to the Army Corps of Engineers for a permit.[28]

The permit process begins with the application to the Corps for permission to discharge dredged or fill materials onto the applicant's property.[29] The Corps then makes a determination of whether the subject parcel of land is a "wetland."[30] If the Corps determines land is a wetland, the Corps next determines whether a permit to discharge dredged or fill materials will be granted.[31]

The Environmental Protection Agency ("EPA") has final veto authority[32] over any permit approval or denial.[33] If the permit is

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In 1968, the Corps defined navigable waters as "[t]hose that are subject to the ebb and tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (1991).

The Corps redefined its jurisdiction in 1975 to encompass most of the nation's wetlands. *See* 40 Fed. Reg. 31320 (1975). Therefore, the role of the Rivers and Harbors Act was diminished by the broader scope of section 404. *See* Reilly, *supra* note 18, at 66. The Supreme Court in *United States v. Riverside Bayview Homes, Inc.*, upheld the expanded scope of section 404. 474 U.S. 121 (1985). The Court ruled that freshwater wetlands adjacent to open bodies of water fell within the scope of section 404 and within a reasonable interpretation of the Corps' jurisdiction under section 404. *Id.* at 139. *See generally* MALONE, *supra* note 23, § 4.03[2] (discussing the Corps' jurisdiction under the CWA).

28. *See* 33 U.S.C. § 1344(a) (1988).

29. 33 U.S.C § 1344(a) (1988). The statute states:

> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

Id.

30. For the regulatory definition of a wetland see *supra* note 4 and accompanying text. The definition of a wetland is currently the source of great debate. *See, e.g.*, 137 CONG. REC. E923 (daily ed. March 13, 1991) (statement of Rep. Tauzin), and the subject of pending bills on Capitol Hill. *See*, e.g., H.R. 1330, 102nd Cong., 1st Sess. § 3 (1991). *See generally* FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS (1989) (stating the technical criteria for delineating a wetland for regulatory purposes).

31. *See* 40 C.F.R. § 230.10(a)-(d) (1991). The statute lists the following criteria which must be met before the Corps will issue a permit: "(1) there is no practicable alternative; (2) there will be no significant adverse impacts on aquatic resources; (3) all reasonable mitigation is employed; and (4) there will be no statutory violations by the proposed activity." MALONE, *supra* note 23, § 4.03[3][e]. *See generally* O'Hagan, *supra* note 5, at 1069-70 (discussing the Corps' criteria used in the section 404 permit process).

32. *See* 33 U.S.C. § 1344(c) (1988). The regulation states:

> The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (includ-

denied, the landowner may claim that the denial of the permit[34] effects a taking of property, so as to require just compensation under the Constitution. Claims filed against the federal government[35] must be filed in the United States Claims Court under the Tucker Act.[36]

B. The Takings Clause and the Supreme Court

1. The Takings Clause

The Fifth Amendment of the United States Constitution states, "[n]or shall private property be taken for public use, without just compensation."[37] This language requires that the government pay

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ing spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

Id. See also Ted Griswold, *Wetland Protection Under Section 404 of the Clean Water Act: An Enforcement Paradox*, 27 SAN DIEGO L. REV. 139, 149 n.63 (1990) (discussing EPA's unlimited use of its veto authority under § 404(c)).

During the summer of 1992, while this Note was being published an interesting challenge to the EPA's veto authority took place. A United States District Judge issued an injunction against William Reilly, the head of the EPA, for overruling the veto of a permit approval by his own regional office.

The Michigan Department of Natural Resources (MDNR) approved a permit for the development of a golf course on wetlands in the Sleepy Bear Dunes National Lakeshore. Michigan is the only state in the nation with power to grant a § 404 permit. Approval of the permit was vetoed by the EPA regional office in Chicago. The director of the EPA withdrew the veto. The district Court Judge enjoined the director's action. At the date of publication, an appeal was under consideration. *See Judge Rules Against Homestead Golf Course*, MICHIGAN OUT-OF-DOORS, August 1992, at 9; Eric Sharp, *Don't Leave Environment in Hands of Politicians*, DET. FREE PRESS, June 12, 1992, at 10D; Dawson Bell, *Judge Blocks Golf Course*, DET. FREE PRESS, June 9, 1992 at 1A; Casey Bukro, *EPA Staff Overruled in Wetlands-Resort Case*, CHI. TRIB., May 9, 1992, at 1.

33. *See* 40 C.F.R. § 231.2(a) (1991). " 'Withdrawal specification' means to remove from designation any area already specified as a disposal site by the U.S. Army Corps of Engineers or by a state which has assumed the section 404 program, or any portion of such area." *Id.*

34. A takings claim is not ripe until the regulatory agency makes its final decision regarding the regulation of the property in question. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985). *See also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985) (the denial of a permit is a prerequisite for a takings claim).

35. Takings claims may be filed against state and local agencies as well as the federal government. *See, e.g.*, Sibson v. State, 336 A.2d 239 (N.H. 1975); Marinette County v. Just, 201 N.W.2d 761 (Wis. 1972).

36. 28 U.S.C. § 1491 (1988). The Tucker Act grants exclusive jurisdiction to the Claims Court over suits against the federal government for money damages in excess of $10,000. *Id.*

37. U.S. CONST. amend V. The Fifth Amendment states:

No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of

the landowner a fair price for private property taken by the government for public use. Takings can occur in two ways: eminent domain or inverse condemnation. Eminent domain is the legal proceeding whereby government uses its authority to condemn private property for public use.[38] The majority of claims based on the Fifth Amendment have been cases involving eminent domain.[39]

However, with the increased regulation of land, inverse condemnation or "regulatory takings" claims have also increased.[40] With inverse condemnation, the landowner also seeks the value of the property from the government, however there is no physical taking involved. Instead, the "taking" results from a regulation[41] on the use of the land. A regulatory taking occurs when government regulation so restricts the use of a landowner's property that in effect, the property has been taken from the landowner so as to require just compensation.[42] Thus, regulatory takings are much harder to resolve.[43] The determination is whether the public, rather than a private landowner, should bear the cost of an exercise of state power.[44] While only one Supreme Court case has ruled on a takings claim under section 404 of the CWA,[45] the Court's rulings in other regulatory takings cases provide guidance in takings challenges under section 404.

2. *The Balancing Test*

The Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*[46] was the launching pad for regulatory takings claims.[47] It was the first case to articulate the factors for the balancing of inter-

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War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Id.

38. Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980); *see also* BLACK'S LAW DICTIONARY 523 (6th ed. 1990) (defining eminent domain as the "power to take private property for public use by the state, municipalities and private persons or corporations authorized to exercise functions of public character").

39. Meltz, *supra* note 2, at 95.

40. *Id.*

41. BLACK'S LAW DICTIONARY 424 (6th ed. 1990).

42. *See* William W. Want, *The Taking Defense To Wetlands Regulation*, 14 ENVTL. L. REP. 10169 (1984).

43. *Id.*

44. Agins v. City of Tiburon, 447 U.S. 255, 260 (1979).

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

46. 260 U.S. 393 (1922). In *Mahon*, the Pennsylvania Coal Company sold surface rights to the Mahons for property in which the coal company retained mineral rights to mine coal. *Id.* at 412. The Mahons lived on the property and sought an injunction against Pennsylvania Coal from mining the property based on the provisions of the Kohler Act. *Id.* The Act required the excavator of coal

ests used to determine when regulation ends and takings begin.[48] In *Mahon*, Justice Holmes acknowledged that government could not exist if it had to pay for every change in the law, but also recognized that there were limits to the amount of regulation that can be imposed without cost to the government.[49] Holmes did not want to set up a "general proposition."[50] Instead, he analyzed the particular facts of the case, weighing public and private interests to decide who should bear the costs of the regulation.[51] In doing so, the Court ruled that the regulation in *Mahon* extended too far, and destroyed existing property rights.[52]

Not until 1978, with its decision in *Penn Central Transportation Co. v. New York City*,[53] did the Court attempt to further de-

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to leave supports under any homes in order to prevent subsistence of the land. *Id.* at 412-413.

Pennsylvania Coal argued that the regulation did not protect the general public but rather a "particular class," and because the company's use of the land was restricted it constituted "as much of a taking as if the land itself had been appropriated." *Id.* at 395. The State of Pennsylvania argued that the Kohler Act was the only way to protect the health and welfare of the public from unsafe mining. *Id.* The State further argued that the Act did not "take" the property because under the act Pennsylvania Coal was not prohibited from mining coal, but only had to provide (or could not take away) supports. *Id.* at 411.

47. *See* Charles H. Clarke, *Constitutional Property Rights and the Taking of the Police Power: The Aftermath of* Nollan *and* First English, 20 SW. U. L. REV. 1, 2-3 (1991).

48. *Mahon*, 260 U.S. at 415. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*

49. *Mahon*, 260 U.S. at 413. Justice Holmes made the following statement in regard to balancing the interests:

> 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 police power. But obviously the implied limitation must have its limits.

Id.

50. *Mahon*, 260 U.S. at 416. However, Holmes singled out the extent of the diminution in the value of the land as a result of the regulation as one factor which was important in the takings analysis. *Id.* at 413.

51. *Mahon*, 260 U.S. at 413-414. In weighing the facts, Holmes determined that the diminution was too great and therefore, compensation was required to offset the taking. *Id.* at 414-415.

52. *Mahon*, 260 U.S. at 416.

53. 438 U.S. 104 (1978). *Penn Central* has been described by the Court itself as containing "one of the most complete discussions of the Takings Clause." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982).

In *Penn Central*, the plaintiff Penn Central owned Grand Central Station in New York City and brought suit over the denial of its plans to build a fifty-story tower on top of the station. *Penn Central*, 438 U.S. at 115-18. Penn Central claimed the Landmark Preservation Law restricted the use of their property by denying, and in effect, taking the use of their air rights without compensation. *Id.* at 130. The Supreme Court affirmed the New York lower court ruling that the regulation had not been so restrictive as to create a taking. *Id.* at 122.

velop the factors enunciated in *Mahon*. In *Penn Central*, the Court again focused on the balancing of public and private interests under the Takings Clause. However, the Court developed further factors significant to the takings analysis.[54]

The Court acknowledged that it was unable to come up with any set formula for determining when a taking has occurred.[55] The Court did, however, propose three factors which should "have particular significance"[56] in the outcome of takings cases. The factors were: 1) the character of the government action, 2) the economic impact of the regulation, and 3) the extent of the interference with investment-backed expectations.[57] The Court suggested that the lower courts apply the facts to each of these factors to determine when a regulation had gone so far that the public should bear the cost instead of the individual.[58]

One year later, the Court in *Agins v. Tiburon*[59] proposed a variation to the factors announced in *Penn Central*. The analysis continued to weigh public versus private interests,[60] but in doing so, the Court set forth a two-pronged approach, of which either prong could be used to determine when a government action constituted a taking.[61] The Court stated that a taking occurs if the government regulation does not "substantially advance legitimate state interests" or if the regulation "denies an owner economically viable use of his land."[62]

Since *Agins*, courts balance the public and private interests in order to determine who should bear the costs of the regulation by applying the *Agins* two-pronged test.[63] If it is proven that the regulation substantially advances "legitimate state interests,"[64] then the court will consider whether the regulation left the landowner with

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54. *Id.* at 124.

55. *Id.* The Court stated that lower courts should conduct an ad hoc factual analysis of each case. *Id.*

56. *Penn Central*, 438 U.S. at 124.

57. *Id.* at 124.

58. *Id.* at 123 (*citing* Armstrong v. United States, 364 U.S. 40, 49 (1960)).

59. 447 U.S. 255 (1980). In *Agins*, the Court denied plaintiff's claim that a local land use ordinance had taken plaintiff's property because it destroyed the value of the land by limiting development. *Id.* at 259.

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

61. *See* Meltz, *supra* note 2, at 95-96.

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

63. *Id.* at 260-261.

64. The first prong of the *Agins* analysis is usually not given much scrutiny in takings claims challenging section 404 and the courts have accepted that the Clean Water Act and section 404 substantially advance the legitimate state interest of preserving our nation's wetlands. *See* Florida Rock Industries v. United States, 791 F.2d 893, 899 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *on remand*, 21 Cl. Ct. 161 (1990), *appeal docketed*, No. 91-5156 (Fed. Cir. Sept. 30, 1991). *See also* Meltz, *supra* note 2, at 96 (suggesting that the Supreme Court's decision in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987),

any economically viable use in the land. In applying the second prong of *Agins*, courts analyze the *Penn Central* factors by considering the character of the government action,[65] the economic impact,[66] and interference with investment-backed expectations.[67] If it is determined that no economically viable use remains, then a taking has occurred and the court will grant just compensation.[68]

3. *The "Nuisance Exception"*

Some regulations promote the public good to such an extent that the courts find them immune to takings challenges.[69] This idea was most prominently stated as early as 1887 in *Mugler v. Kansas*.[70] In *Mugler*, the Court ruled that a regulation that prohibited the sale of liquor, effectively shutting down the plaintiff's brewery, was not a taking because it avoided a nuisance.[71] The "nuisance exception" applies when a regulation seriously impairs the rights of a landowner, but is exempt from a takings challenge because it

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will encourage closer scrutiny into whether a regulation substantially advances a legitimate state interest).

65. The Court has provided some insight into the character of the government action in question. *See* Meltz, *supra* note 2, at 95. The Court stated that an action would be more readily ruled a taking if a physical invasion occurred as opposed to a regulation aimed at promoting the public good. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). This idea was taken a step further in Loretto v. Teleprompter Manhattan CATV Co., 458 U.S. 419 (1982), where the Court stated that government actions which caused a physical occupation of the land constituted a taking "per se." *Id.* at 434-35. Under this formula, no matter how small the occupation, it would constitute a taking requiring just compensation and consideration of the other factors would be unnecessary. *Id.* at 435. A per se formula would not apply to a regulation, such as section 404, because the government regulation does not constitute a physical occupation of the land.

66. The economic impact is determined by analyzing the "parcel as a whole," Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-131 (1978), in order to compare the fair market value before and after the regulation to determine the diminution in value caused by the regulation. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

67. "A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" Ruckleshaus v. Monsanto, 467 U.S. 986, 1005 (1984) (*quoting* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)). *See also* Ciampitti v. United States, 22 Cl. Ct. 310, 317 (1991) (ruling that landowner did not have a reasonable investment-backed expectations because of knowledge that land was undevelopable).

68. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

69. *See* Meltz, *supra* note 2, at 96.

70. 123 U.S 623 (1887).

71. *Mugler*, 123 U.S. at 669. The Court stated:

> All property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.... A prohibition simply on the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any sense, be deemed a taking or an appropriation for the public benefit.

Id. at 668-69.

abates a use that is harmful to the public's health and welfare.[72]

A century later,[73] the Court embraced the nuisance exception in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[74] The Court stated that it was hesitant "to find a taking when the State merely restrains uses of property that are tantamount to public nuisances."[75] Through its thorough discussion of the nuisance exception, the Court reestablished the argument that when the government regulates to ensure the "health, morals and safety of the community"[76] it should be exempt from paying just compensation. However, it is unclear whether the nuisance exception will be extended to environmental regulations such as section 404 of the Clean Water Act.[77]

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72. *See* Meltz, *supra* note 2, at 96 (discussing the Court's "flirtation" with an absolute immunity from takings claims); *see also* Jan G. Laitos, *Section 404 and Water Rights Takings*, 60 U. COLO. REV. 901, 921 (1989) (discussing the application of the nuisance exception to section 404 because it prevents harm to water quality).

73. In 1987, the Supreme Court handed down three decisions that have become known as "The Trilogy." *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). Although these cases have been extensively written about, it is still unclear what their effect will be on takings claims brought under section 404.

The decisions in *Loveladies* and *Florida Rock* relied only upon *Keystone* regarding the analysis of the nuisance exception. The claims courts did not rely on *Nollan* or *First English*, at least in any overt way, in coming to their decisions. For that reason and because of the vast amount of material written about *Nollan* and *First English*, they will not be discussed in this Note. For a sampling of the discussions regarding "The Trilogy," *see generally*, William A. Fischel, *Introduction: Utilitarian Balancing and Formalism In Takings*, 88 COLUM. L. REV. 1581 (1988); Charles H. Clarke, *Constitutional Property Rights and the Taking of the Police Power: The Aftermath of* Nollan *and* First English, 20 SW. U. L. REV. 1 (1990); Frank Michelman, *Takings 1987*, 88 COLUM. L. REV. 1600 (1988); Robert Duncan, *On the Status of Robbing Peter to Pay Paul: The 1987 Takings Cases in the Supreme Court*, 67 NEB. L. REV. 318 (1988).

74. 480 U.S. 470 (1987). In *Keystone*, the Supreme Court ruled that the regulation of coal mining did not constitute a taking. *Id.* at 506. The Court did not, however, rely upon the nuisance exception for its decision because the plaintiff also failed to show a sufficient diminution in value. *Id.* at 492-93.

75. *Keystone*, 480 U.S. at 491. The Court further stated:

> Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.

Id.

76. Mugler v. Kansas, 123 U.S. 623, 668 (1887).

77. *See infra* notes 102-08 and 158-63 and accompanying text for a discussion of the nuisance exception in *Florida Rock* and *Loveladies*.

On June 29, 1992, while this Note was being published, the United States Supreme Court rejected the Supreme Court of South Carolina's use of the "nuisance exception" to avoid a regulatory taking. *See* Lucas v. South Carolina Coastal Council, No. 91-453, 1992 WL 142517 (U.S.S.C. June 29, 1992). In *Lucas*, the Court appears to have effectively cut off the use of the "nuisance exception" to justify regulation and protection of natural resources.

II. ANALYSIS OF *FLORIDA ROCK* AND *LOVELADIES*

A. Factual and Procedural History of Loveladies *and* Florida Rock

1. Florida Rock Industries v. United States[78]

Florida Rock Industries ("Florida Rock") was in the business of mining and converting limestone into aggregate for use in concrete products.[79] In 1972, Florida Rock purchased 1,560 acres of land in West Dade County, Florida for $2,964,000.[80] The land was part of the Everglades ecosystem and acted as a natural filter for the Biscayne aquifer, Miami's main source of drinking water.[81] At the time of the purchase, the land was zoned for mining.[82] Due to a slowdown in Florida's construction industry, Florida Rock did not mine the land until 1978.[83] In 1978, Florida Rock started mining limestone from the land[84] and continued until the Corps ordered them to cease and desist for lack of a section 404 permit.[85] Subsequent to the date of purchase, the Clean Water Act had been amended to include section 404, requiring a permit for the discharge of dredged or fill materials into waters under the jurisdiction of the CWA.[86]

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78. Florida Rock Indus. v. United States, 8 Cl. Ct. 160 (1985), *aff'd in part and vacated in part*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 497 U.S. 1053 (1987), *on remand*, 21 Cl. Ct. 161 (1990), *appeal docketed*, No. 91-5156 (Fed. Cir. Sept. 30, 1991).

79. *Florida Rock*, 791 F.2d at 895. Limestone is extracted and converted into aggregate, which is the basic material used for concrete products in the construction industry. *Id.*

80. *Id.* The land is located just west of Miami, Florida in the path of development moving toward the west. *Id.* Because of the general increase in development in the southern part of Florida during the 1970s and 1980s, the rich limestone deposits in that area became difficult to acquire. *Id.*

81. *Id. See also* Defendant's Post-Trial Memorandum of Law and Proposed Findings of Fact and Conclusions of Law at 3, Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161 (1990) (No. 266-82L), *appeal docketed*, No. 91-5156 (Fed. Cir. Sept. 30, 1991) [hereinafter Defendant's Proposed Findings and Conclusions] (describing the land as consisting mainly of sawgrass marsh).

82. *Florida Rock*, 791 F.2d at 895. The tract of land was locally zoned for mining without consent from the federal government. *Id.*

83. *Id.*

84. The CWA was amended to include section 404 in 1972. *See* 33 U.S.C. § 1344 (1988). For further discussion of section 404 and the CWA, see *supra* notes 17-36 and accompanying text.

85. *See Florida Rock*, 791 F.2d at 895-96. Florida Rock employed a method of mining limestone, known as "drag lining," which included the discharge of dredged materials. *Id.* at 895. The process entailed the use of a "drag line" which sat on solid ground and removed muck and vegetation, exposing the limestone underneath for extraction. *Id.* The muck and vegetation was then either discharged as fill to form a base for the dragline or discharged into the open area now devoid of limestone. *Id.* The process is repeated until the limestone is gone, leaving the land with filled areas and a newly formed lake. *Id.*

86. Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 164 (1990) *appeal docketed*, No. 91-5156 (Fed. Cir. Sept. 30, 1991). While the Corps was not

On October 1, 1978, Florida Rock applied for a section 404 permit for 98 of the 1,560 acres of wetlands.[87] After reviewing the relevant criteria,[88] the Corps denied the application, stating that it was not in the public interest to grant the permit.[89] Florida Rock opted not to appeal the Corps' decision, but rather, filed a takings claim in the United States Claims Court seeking just compensation.[90] As is the practice in the Claims Court, the suit was divided into separate trials for liability and damages.[91]

At the trial regarding liability, Florida Rock argued that it purchased the property with the sole intention of mining limes-

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sure Florida Rock's land was within the jurisdiction of the section 404 permit program, it issued a cease and desist order based upon a belief that it was within the jurisdiction. *Id. See also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 124 (1985) (regarding a parcel of low-lying land, which the Corps believed was within its jurisdiction under the CWA).

87. *Florida Rock*, 791 F.2d at 895. For reasons the decision does not state, the Corps refused to consider an application for the entire 1,560 acres even though Florida Rock eventually intended to mine the entire parcel. *Id.* Thus, Florida Rock applied for a permit for enough land to yield three years of production which they estimated to be 98 acres. *Id. See also* Defendant's Proposed Findings and Conclusions, *supra* note 81, at 5 (of the 98 acres, Florida Rock proposed to fill 45 acres and excavate 53 acres).

88. *See supra* note 31 and accompanying text regarding the Corps criteria. *See also Florida Rock*, 791 F.2d at 895 (stating that the EPA, National Park Service, Fish and Wildlife Service, State of Florida and Dade County all objected to the permit denial based on the loss of wetlands and pollution caused by the mining).

89. *Florida Rock*, 21 Cl. Ct. at 168. *See also* Brief for the Appellant at 8, Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 497 U.S. 1053 (1987), *on remand*, 21 Cl. Ct. 161 (1990), *appeal docketed*, No. 91-5156 (Fed. Cir. Sept. 30, 1991) (Nos. 85-2588, 85-2609) [hereinafter Brief for the Appellant]. The Corps' ultimate findings on the application are listed as follows:

> The proposed discharge is a significant environmental impact on important wetlands with associated valuable fish and wildlife resources of the United States. Our review indicated it will cause a permanent unacceptable disruption to the beneficial water quality uses of the aquatic ecosystem. It is not dependent on being located in a wetland area. The site is not the least environmentally damaging site available, and we find the private benefits of the proposed activities do not outweigh the negative impacts on wetlands of the United States necessary to realize those benefits. In view of the above analysis, we have determined that not issuing this permit is in compliance with the 404(b) guidelines and with the Corps' wetland policies. . . . We have reviewed all the information available in the administrative permit files, have analyzed the impact of the project, and carefully considered the implication of the denial of this permit. This review, together with our knowledge of the area, indicates that it is not in the public interest to issue this permit at this time.

Id.

90. Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160, 164 (1985), *aff'd in part and vacated in part*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 497 U.S. 1053 (1987), *on remand*, 21 Cl. Ct. 161 (1990), *appeal docketed*, No. 91-5156 (Fed. Cir. Sept. 30, 1991).

91. *Florida Rock*, 791 F.2d at 896.

tone,[92] and, therefore, the value of the land as used for limestone mining should be the measure of the land's "highest and best use."[93] Because the Corps' denial of the permit prevented the highest and best use of the land, Florida Rock argued that it was left without any economically viable use of the land.[94] Therefore, because the regulation made the land valueless, Florida Rock concluded that just compensation was due for the entire 1,560 acres.[95] The government disagreed, arguing that denial of *one* possible use of the land did not render the land valueless.[96] The government further argued that a market existed for the land in question[97] and that the highest and best use was not mining, but the purchasing of the property for investment purposes.[98]

The Claims Court ruled that the denial of the section 404 permit constituted a taking and therefore, just compensation was due Florida Rock for the 98-acre tract for which the Corps denied a permit.[99] The court stated that the government's theory of fair market

92. *Id. See also* Brief for the Appellant, *supra* note 89, at 9 (stating that the president of Florida Rock stated at trial that the only reason Florida Rock bought the property in question was to mine limestone from it).

93. *Florida Rock*, 21 Cl. Ct. at 171. According to the American Institute of Real Estate Appraisers, the "highest and best use" is defined as "[t]he reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value." *Id.* (*citing* THE APPRAISAL OF REAL ESTATE 19 (9th ed. 1987)).

94. *Florida Rock*, 8 Cl. Ct. at 164. Florida Rock's value theory focused on the loss due to the inability to use the property for mining rather than on a fair market analysis. *Id. See also Florida Rock*, 791 F.2d at 896 (vacating the Court of Claims' decision because it relied on immediate use rather than fair market value and wrongly embraced the theory that the permit denial left no value in the land because it could not be used for mining).

95. *See Florida Rock*, 8 Cl. Ct. at 164. Florida Rock originally sought compensation for the entire 1,560 acres based on a theory that the permit denial of the 98 acres represented a taking of the entire parcel. *See* Florida Rock Indus. v. United States, 21 Cl. Ct. 161, 164 n.2 (1990). They argued that the entire parcel was similar in its composition as wetlands and therefore, if the 98 acre tract was denied a permit, the rest of the property would also be denied a permit. *Id.* The Claims Court disagreed with Florida Rock and ruled that 98 acres was the proper unit to be considered. *Id.*

96. *Florida Rock*, 8 Cl. Ct. at 165. The government argued that Florida Rock still retained valuable rights as owners of the property such as the right to sell, to lease, to restrict or permit others on the property and the right to use the land in its condition as a wetland. *Id.*

97. *Florida Rock*, 791 F.2d at 896. The government presented evidence of an offer to buy the property for $4,000 per acre which Florida Rock rejected. *Id.* Further, real estate experts presented evidence of a fair market value of $5,466,000 for the entire 1,560 acre parcel. *Id. See* Brief for the Appellant, *supra* note 89, at 9-16.

98. *Florida Rock*, 21 Cl. Ct. at 170. The government argued that a fair market existed of people who would buy the property and hold onto it in hopes of the regulations changing or the value of the land appreciating. *Florida Rock*, 8 Cl. Ct. at 167.

99. *Florida Rock*, 8 Cl. Ct. at 179.

value was too speculative.[100] Instead, the court accepted Florida Rock's argument that the denial of the permit eliminated the only available use of the 98-acre tract of land.[101]

Alternatively, the government argued that the "nuisance exception"[102] should apply to this case because Florida Rock's mining activities would pollute the area and be harmful to the public health and welfare.[103] Thus, the government reasoned that the abatement of the mining through regulation was in the public interest, and therefore, exempt from a takings claim.[104] The Claims Court also dismissed this argument, ruling that mining would not have adverse effects on the environment.[105] The Claims Court stated that the theory of a "nuisance exception" was losing favor in the courts and that the holding in *Mugler v. Kansas* should be applied narrowly.[106] The Claims Court stated, "[g]overnment may not circumvent the takings clause by defining an activity as pollution."[107] Therefore, the Claims Court rejected the nuisance theory and ruled that a taking had occurred on October 2, 1980, the day of the permit denial.[108] The court also ruled that Florida Rock was entitled to just compensation,[109] which it determined to be $1,029,000 at the damage trial.[110]

The government appealed the Claims Court's decision to the United States Court of Appeals for the Federal Circuit.[111] The cir-

100. *Id.* at 167. The Claims Court stated, "[t]he existence of a market for plaintiff's property, despite what the court has found to be its uselessness for all productive activity, is based upon speculators' expectations that they will be able to pass the property on to hapless investors . . ." *Id.*

101. *Id.*

102. *See supra* notes 69-77 and accompanying text for a discussion of the nuisance exception.

103. *Florida Rock*, 8 Cl. Ct. at 171.

104. *Id.* at 169-76. The government argued that Florida Rock could not argue that its mining would not cause pollution because the mining required a section 404 permit under the CWA, which administers the discharge of pollutants in our nation's waters. *See id.* at 171-72. The government then argued that the pollution would reach a level which would contaminate the water supply. *Id.* at 172. Finally, the government argued that the destruction of wetlands would lead to the loss of " 'valuable habitat and food chain resources.' " *Id.* at 175. *See supra* notes 69-77 and accompanying text for a discussion of the nuisance exception.

105. *Florida Rock*, 8 Cl. Ct. at 171. The court stated that the government failed to show that Florida Rock's proposed activities had "serious adverse physical effects upon the health, welfare or property of others." *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 179.

109. *Id.*

110. *Id.* at 897. On May 6, 1985, at the trial regarding damages, the Claims Court awarded Florida Rock $1,029,000 for the 98 acre tract ($10,500 per acre). *Id.*

111. *Florida Rock*, 791 F.2d at 894. In addition, Florida Rock cross appealed, arguing that the entire 1,560 had been taken, but the circuit court denied the cross appeal. *Id.* at 895.

cuit court vacated much of the trial court's findings and remanded the case to the Claims Court for further deliberation.[112] In its opinion, the Federal Circuit first addressed the issue of whether Florida Rock's use of the land was a use which could be abated under the nuisance exception theory to avoid a taking.[113] While the Circuit Court acknowledged the possibility of a "nuisance exception,"[114] it ruled that in this case the amount of pollution resulting from the mining was insufficient to raise it to a level of nuisance.[115]

The Federal Circuit next determined that the Claims Court incorrectly applied an "immediate use analysis" instead of determining the fair market value of the property.[116] The Federal Circuit further stated that the denial of the best and highest use of land is not determinative of a taking.[117] The Federal Circuit instructed the Claims Court on remand to consider Florida Rock's investment in the property, together with a comparison of the fair market values of the land before and after the permit denial, to determine the severity of the economic impact caused by the regulation.[118]

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112. *Id.* at 905-06.

113. *Id.* at 900.

114. *Id.* The circuit court stated: "While the court below deemed *Mugler*'s precedential value much abated, we may concede as a hypothetical, if Florida Rock produced on its tract a fluid as septic as Kansas then considered beer to be, and proposed to drain it into the Miami drinking water, this could be stopped without compensation." *Id.*

115. *Id.* at 904. The circuit court stated that "[t]he pollution of the water, though the necessary hook for jurisdiction of the Army engineers, is not claimed in the district engineer's decision to be by itself very serious." *Id.*

The circuit court also weighed the public interest in abatement of the potential harm caused by Florida Rock's mining against the expense of maintaining a public benefit in preserving the wetlands and decided that Florida Rock's interest was much more deserving. *Id. See also* Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 389 (1988) (discussing the harm/benefit distinction being difficult to differentiate between the situation where the government is acting to preserve benefits from when it acts to prevent harm).

116. *Florida Rock*, 791 F.2d at 902. The "immediate use" analysis was based on Florida Rock's inability to mine the property after the permit denial, regardless of whether a fair market value existed. *Id.* at 901. *See also* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (stating that evidence of a diminution in fair market value is necessary for a taking to be found).

117. *Florida Rock*, 791 F.2d at 901. *See also* Deltona Corp. v. United States, 657 F.2d 1184, 1194 (1981), *cert. denied*, 455 U.S. 1017 (1982) (rejecting plaintiff's argument that denial of highest and best use constituted a taking); Jentgen v. United States, 657 F.2d 1210, 1213 (1981), (denial of highest and best use, by itself, does not constitute a taking) *cert. denied*, 455 U.S. 1017 (1982).

118. *Florida Rock*, 791 F.2d at 905. The Federal Circuit made the following comment regarding the market value:

> Indeed, if there is found to exist a solid and adequate fair market value (for the 98 acres) which Florida Rock could have obtained from others for that property, that would be a sufficient remaining use of the property to forestall a determination that a taking had occurred or that any just compensation had to be paid by the government.

Id. at 903.

On remand, the Claims Court allowed the parties to submit evidence to determine issues surrounding the government's "nuisance exception" argument and whether any economically viable use of the 98 acres existed after the permit denial.[119] With the support of the recently decided Supreme Court case, *Keystone Bituminous Coal Assn. v. DeBenedictis*,[120] the government revived its "nuisance exception" defense. The government argued that Florida Rock's mining activities would not only threaten the water quality of the Biscayne aquifer, but would also destroy valuable wetlands through the discharge of fill material.[121] Therefore, the government argued that the regulation of such a harmful activity was in the public interest and immune from an award of just compensation.[122] On remand the Claims Court again disagreed with the government and ruled that Florida Rock's mining would produce only moderate pollution, not reaching the level of a nuisance which would exempt the government from a takings claim.[123]

The Claims Court next considered arguments from the government and Florida Rock regarding the denial of all economically viable use of the 98 acres.[124] In doing so, the court focused on the traditional factors enunciated in *Penn Central Transportation Co. v. New York City*:[125] the character of the government action,[126] the interference with investment-backed expectations[127] and the de-

119. Florida Rock Indus. v. United States, 21 Cl. Ct. 161, 165 (1990) *appeal docketed*, No. 91-5156 (Fed. Cir. Sept. 30, 1991).

120. 480 U.S. 470 (1987). See *infra* notes 240-41 and accompanying text for a discussion of *Keystone*.

121. *Florida Rock*, 21 Cl. Ct. at 166.

122. *Id.* The government argued that Congress enacted the CWA to monitor activities which were potentially against public interests. *Id.* Therefore, because Florida Rock's proposed mining was an activity which Congress has chosen to have monitored, the Corps' decision should be exempt from a takings claim because it is in the public interest. *Id.*

123. *Id.* at 167. The claims court stated: "[r]ock mining of the type at issue here is not considered a nuisance in this area." *Id.*

124. *Florida Rock*, 8 Cl. Ct at 165-69.

125. *Id.* at 166-171.

126. *See Florida Rock*, 21 Cl. Ct. at 168-169. Although neither side raised the issue, the claims court discussed the character of the government action. *Id.* at 168. The court stated that the balance of public and private interest was tilted in favor of Florida Rock because it could have begun mining when it bought the property in 1972 instead of waiting until 1978 and been grandfathered in under the section 404 permit program (established in 1972 after Florida Rock purchased the property). *Id.*

127. *Florida Rock*, 21 Cl. Ct. at 176. The court recognized that diminution in value alone is not a basis for a taking. *Id.* at 175-76 (citing *Penn Central*, 438 U.S. at 131). Therefore, the court discussed the interference with investment-backed expectations and ruled that Florida Rock had invested in the property for the sole purpose of mining and because of the permit denial was unable to pursue the profits associated with it. *Id.* at 176.

gree of the economic impact.[128]

The court focused on the comparison of the fair market value of the 98 acres before the section 404 permit denial with the fair market value after the denial.[129] The Claims Court ruled that the purchase price of the land was determinative of the fair market value before the permit was denied.[130] Therefore, the court determined the fair market of the land value before the permit denial was $10,500 per acre, the adjusted price Florida Rock originally paid for the land.[131]

The court then considered the fair market value after the denial of the section 404 permit.[132] The government argued that a fair market existed, made up of real and knowledgeable investors, who were aware of the restrictions on the property.[133] The government argued that the property was worth $4,000 per acre,[134] citing three offers to purchase the property which were rejected by Florida Rock.[135] Florida Rock, on the other hand, argued that the highest and best use of the property after the permit denial was "future recreational/water management" use, valued at $500 an acre.[136]

The Claims Court agreed with Florida Rock and ruled that the

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128. The Claims Court focused the most attention on the degree of economic impact as manifested by the diminution in value of the land after the permit denial. *Id.* at 169-75.

129. *Id.* at 169.

130. *Id.* at 169. The Claims Court made the following comments:

> The Court agrees with defendant that acquisition cost is rarely a basis for establishing the value of land prior to an alleged regulatory taking. . . . Further, the court is convinced that although this method may not be the ideal one chosen by appraisal experts, it does provide an adequate basis for determining the fair market value prior to the government action.

Id.

131. *Florida Rock*, 21 Cl. Ct. at 169. In 1972, Florida Rock paid $1,250 per acre for the property. *Id.* at 176. After adjusting for the "changing value of money and realty over time," Florida Rock convinced the court that the acquisition cost was now equivalent to $10,500 per acre. *Id.* at 169 n.5.

132. *Id.* at 170.

133. *Id.*

134. *Id.* at 172. The government based its estimate on using the land for investment purposes as the highest and best use of the land. *Id. See also* Defendant's Proposed Findings and Conclusions, *supra* note 81, at 11 (citing evidence from Florida Rock's expert regarding the sales of 200 parcels of land around or near the property during 1970-1988 for $4,000 to $8,000 per acre).

135. *Florida Rock*, 21 Cl. Ct. at 170 n.7. The government offered evidence of a real estate broker from Arizona offering 3.5 million dollars for the 1,560 acres and another offer of 5 million dollars. *Id. See also* Brief for the Appellant, *supra* note 89, at 9 (citing Florida Rock's president testifying that he turned down an offer to purchase the land for $4,000 per acre).

136. *Florida Rock*, 21 Cl. Ct. at 172. Florida Rock's expert conducted a statistical analysis of property in the area and surveyed the owners in order to determine their knowledge of restrictions on the land and their motivation for buying the property. *Id.*

fair market value after the permit denial was $500 per acre.[137] This value, when compared to the fair market value before the denial, represented a 95% a diminution in the value of the land.[138] Therefore, the Claims Court determined that the government had denied Florida Rock all economically viable use of the land by denying the section 404 permit and had, in effect, taken the land.[139] Thus, consistent with the Fifth Amendment, the Claims Court awarded Florida Rock "just compensation" in the amount of $1,029,000, $10,500 per acre.[140]

2. Loveladies Harbor, Inc. v. United States[141]

In 1955, Loveladies Harbor, Inc. ("Loveladies") purchased 250 acres of vacant land on Long Beach Island in Ocean County, New Jersey for $300,000.[142] Much of the property was low-lying marsh which needed to be filled before it could be developed.[143] By 1972, Loveladies had filled and developed 199 acres of the parcel and constructed 375 houses on the property.[144]

In the early 1970s, 51 acres remained to be developed.[145] However, by that date the land fell under state[146] and federal[147] jurisdic-

137. *Id.* at 175.

138. *Id.*

139. *Id.* at 176.

140. *Id.* The proper measure of just compensation in a Fifth Amendment claim is the fair market value before the taking. Yuba Natural Resources v. United States, 904 F.2d 1577, 1580 (Fed. Cir. 1990). The Claims Court determined the taking to have occurred on the date the permit was denied. *Florida Rock*, 21 Cl. Ct. at 176. Therefore, interest was awarded for the period beginning the October 2, 1980 and ending on the date of the judgment, July 23, 1990. *Id.*

141. Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, (1988), *summary judgment denied*, 21 Cl. Ct. 153 (1990), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991).

142. Plaintiff's Post-Trial Memorandum at 4, Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990) (No. 243-83L), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991) [hereinafter Plaintiff's Post-Trial Memorandum].

143. Plaintiff's Post-Trial Memorandum, *supra* note 142, at 4.

144. Defendant's Post-Trail Memorandum at 5, Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990) (No. 243-83L), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991) [hereinafter Defendant's Post-Trial Memorandum].

145. Defendant's Post-Trial Memorandum, *supra* note 144, at 5.

146. *See* Plaintiff's Post-Trial Memorandum, *supra* note 142, at 3. The State of New Jersey required owners of wetlands to obtain a permit from the New Jersey Department of Environmental Protection in order to fill wetlands. *Id. See also* New Jersey Wetlands Act of 1970, N.J. STAT. ANN., § 13:9A-1 (West 1990).

147. *See* 33 U.S.C. § 1344 (1988). Because the land was classified as wetlands, Loveladies was required to obtain a section 404 permit in accordance with the Clean Water Act from the Corps of Engineers. *See id.*

tion as wetlands which required permits in order to be filled.[148] Following a struggle through the state permit process, Loveladies obtained a fill permit for 11.5 acres of the 51-acre tract.[149] At the same time, Loveladies applied for federal permits under section 404 of the Clean Water Act.[150] In both 1975 and 1977, the Corps denied Loveladies' application for a permit for the entire 55 acres.[151] Loveladies then applied for a third time, in 1981, for only 11.5 acres.[152] Despite some attempts to mitigate by Loveladies, the Corps denied the application on May 5, 1982.[153] The Corps' District Engineer stated a concern that the discharge of fill material into the property would have an adverse effect on flood control, water quality, and coastal wildlife and fisheries.[154]

Loveladies filed a takings claim[155] in the United States Claims Court seeking just compensation for 12.5 acres on April 14, 1983.[156] Prior to the Claims Court trial, both the government and Loveladies filed motions for summary judgment.[157] In its motion, the government first argued that the denial of the section 404 permit promoted the goals of the Clean Water Act[158] by preventing degra-

148. Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 383 (1988), *summary judgment denied*, 21 Cl. Ct. 153 (1990), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991).

149. *Loveladies*, 15 Cl. Ct. at 384. In 1977, Loveladies applied for a state permit under the New Jersey Wetlands Act of 1970 and was denied. *Id.* Upon reapplication, the permit was denied again by the New Jersey Department of Environmental Protection ("NJDEP"). *Id.* Instead of modifying the application, Loveladies refused an offer by the NJDEP to modify the application to 12.5 acres, and appealed the decision, claiming a taking under the fifth amendment. *Id.* Loveladies lost the appeal and reapplied for a permit covering only the 12.5 acres of which one acre was already filled. *Id.* Honoring its earlier settlement offer, the NJDEP granted a permit for the remaining 11.5 acres. *Id.* *See also* In re Loveladies Harbor, Inc., 422 A.2d 107 (N.J. Super. 1980), *cert. denied*, 427 A.2d 588 (N.J. Super. 1981).

150. *Loveladies*, 15 Cl. Ct. at 384.

151. Plaintiff's Post-Trial Memorandum, *supra* note 142, at 3.

152. *Loveladies*, 15 Cl. Ct. at 384.

153. *Id.*

154. *See* Defendant's Post-Trial Memorandum, *supra* note 144, at 8.

155. Prior to filing a takings claim, Loveladies unsuccessfully challenged the validity of the permit denial in a federal district court. Loveladies Harbor, Inc. v. Baldwin, 20 ERC 1897 (D.N.J. 1984) *aff'd without opinion*, 15 ENVTL. L. REP. 20,088 (1984). Loveladies appealed to the United States Court of Appeals for the Third Circuit, where the Corps' decision was upheld. *Id.*

156. Defendant's Post-Trial Memorandum, *supra* note 144, at 10. Loveladies sought compensation for all 12.5 acres, arguing that even though one acre didn't require a permit, it would be adversely affected as part of the development plan if the permit for the other 11.5 acres was denied. *Loveladies*, 15 Cl. Ct. at 384.

157. *See generally* Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 383 (1988), *summary judgment denied*, 21 Cl. Ct. 153 (1990), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991).

158. *Id.* at 388; see *also supra* note 21 and accompanying text for a discussion of the goals of the CWA.

dation of the water quality and the destruction of wetlands.[159] Therefore, the government argued its action should be exempt from a takings claim.[160] The court disagreed, citing the 1986 Claims Court decision in *Florida Rock* for the proposition that the anticipated pollution would not reach the level of a nuisance.[161] The court reasoned that because the pollution resulting from the filling of the wetlands in this case was even less than that in *Florida Rock*, it could not be considered a nuisance.[162] Thus, the court dismissed the government's "nuisance exception" argument prior to trial.[163]

The government's second argument was that the original 250-acre parcel should be considered as a whole to determine the economic impact of the permit denial.[164] The court again disagreed with the government's theory and ruled that the property unit to be considered was the 12.5 acres.[165] The court then analyzed the 12.5-acre parcel in light of the traditional *Penn Central*[166] factors in order to determine if any economically viable use remained after the permit denial.[167] The court determined the economic impact of the denial by comparing the fair market value before the permit denial ($3,790,000)[168] to the stipulated fair market value after the permit denial ($13,725),[169] which represented a diminution in value of 98%.[170] The diminution in value together with the character of the

159. *Loveladies*, 15 Cl. Ct. at 388.

160. *Id.*

161. *See* Florida Rock Indus. v. United States, 8 Cl. Ct. 160, 175 (1985), *aff'd in part and vacated in part*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 497 U.S. 1053 (1987), *on remand*, 21 Cl. Ct. 161 (1990), *appeal docketed*, No. 91-5156 (Fed. Cir. Sept. 30, 1991).

162. *Loveladies*, 15 Cl. Ct. at 388.

163. *Id.* at 389.

164. *Loveladies*, 15 Cl. Ct. at 392. The government's rationale was that the large profits made from developing the approximately 200 acres would create a minor diminution in value compared to the diminution if the 12.5 acres were considered separately. *Id.*

165. *Id.* The government also argued that the one acre of upland should not be considered for compensation because it did not fall under the Corps jurisdiction. *Id.* at 396. The court disagreed and ruled that the one acre should be included because it was cut-off by wetlands. *Id.*

166. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). See *supra* note 53 and accompanying text for a discussion of *Penn Central*.

167. See *Loveladies*, 15 Cl. Ct. at 396.

168. *Id.* at 394. The fair market value before the permit denial for the 12.5 acres was valued at $3,790,000 based on residential development use. *Id.*

169. *Id.* at 394. The Ard Appraisal Company valued the 12.5 acres at $13,725.50 based on its possible use for a private or public sector conservation area. *Id.*

170. *Id.* at 394. *See also* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (90% diminution in value was insufficient to establish a taking); Village of Euclid v. Amber Realty Co., 272 U.S. 365, 384 (1926) (95% diminution in value was insufficient to establish a taking); Q. C. Constr. Co. v. Gallo, 649 F. Supp. 1331 (D.R.I. 1986) (90% diminution in value was sufficient to establish a taking), *aff'd with-*

government action[171] and the interference with investment-backed income,[172] led the court to deny the government's motion for summary judgment.[173] The court stated that it was "hard to imagine a takings claim more deserving of compensation."[174]

Loveladies filed its own motion for summary judgment based on the argument that the undisputed values of the land before and after the permit denial left Loveladies without any economically viable use of the land, and therefore as a matter of law a taking occurred.[175] But the government, in defending against the motion, offered a new theory of a viable use for the property. The government argued that the fair market value after the denial of the permit was $68,000 instead of $13,725 because of the existence of one acre of undeveloped upland.[176] Because the government's theory represented a factual dispute, the Claims Court sent the case to trial.[177] Only one issue remained for trial, whether Loveladies could prove that the government's refusal to grant the section 404 permit denied all economically viable use of the land.[178]

Its two main arguments having been defeated at the summary judgment stage, the government argued at trial that Loveladies failed to explore all of the economically viable uses of the 12.5 acres.[179] The government proposed that the land could be used as a hunting area, a mitigation site, a marina, a salt hay farm, or a vacant

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out opinion, 836 F.2d 1340 (1st Cir. 1987); Florida Rock Indus. v. United States, 21 Cl. Ct. 161 (1990) (95% diminution in value was sufficient to establish a taking), *appeal docketed*, No. 91-5156 (Fed. Cir. Sept. 30, 1991).

171. *Loveladies*, 15 Cl. Ct. at 391. The court did not place much emphasis on the character of the government action because the denial of the section 404 permit did not reach the level of physical intrusion common in eminent domain cases. *Id.*

172. *Id.* at 391. The court stated that Loveladies' investment-backed expectations were frustrated because they purchased the land for development or resale and the denial of this permit drastically affected those expectations. *Id.*

173. *Id.* at 396.

174. *Id.*

175. *Id.* at 397. Loveladies argued the only use that remained after the denial of the section 404 permit was as a wildlife preserve. *Id.*

176. *Loveladies*, 15 Cl. Ct. at 397. The government agreed to the fair market value after the permit denial ($13,725.50) on its motion for summary judgment but changed its position prior to oral argument on Loveladies' cross motion. *Id.* at 397 n.14. The government based its new value on the one acre of upland which, the government argued, could be accessed through the wetlands. *Id.* at 397 n.15.

177. *Id.* at 399.

178. *Id.* The Claims Court stated that "if the plaintiffs are able to prove that the land must remain an empty lot, plaintiffs will prevail at trial. On the other hand, if plaintiffs cannot prove that the land is without significant remaining commercial or recreational use, plaintiff's claim will have to be denied." *Id.*

179. *See* Defendant's Post-Trial Memorandum, *supra* note 144, at 13-17. *See also* Lee R. Epstein, *Takings and Wetlands in the Claims Courts: Florida Rock and Loveladies Harbor*, 20 ENVTL. L. REP. 10517 (1990) (analyzing the government's arguments in both *Loveladies* and *Florida Rock*).

lot to insure neighboring property owners unobstructed views.[180] The Claims Court dismissed the proposed uses as "unsupported contentions," which did not establish a market for any of the particular uses.[181] Loveladies convinced the court that the only use of the land after the denial of the permit was for conservation or recreational purposes with a value of $1,000 per acre.[182] Based on this, the court compared the fair market value before[183] and after[184] the permit denial and determined that a 99% diminution in value resulted.[185] Thus, the Claims Court ruled that the Corps' rejection of the section 404 permit denied Loveladies all economically viable use of the 12.5 acres,[186] and therefore awarded Loveladies just compensation in the amount of $2,658,000 or $212,552 per acre.[187]

B. Analysis of the Decisions in Florida Rock *and* Loveladies

The problems with the decisions in *Loveladies* and *Florida Rock* are rooted in the Claims Court's analysis of whether the permit denial denied the plaintiffs all "economically viable use" of their land.[188] The traditional takings analysis focuses on the following factors: the economic impact of the regulation, the character

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180. Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 158-59 (1990) *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991). *See also* Defendant's Post-Trial Memorandum, *supra* note 144, at 15.

181. *Loveladies*, 21 Cl. Ct. at 159. The court gave several reasons why the government's proposed uses were not feasible. First, farming salt hay was not feasible because the lot was too small and inaccessible. *Id.* at 158-59. Second, the proposed marina would cause problems with water quality and the dwindling shellfish community in the area. *Id.* at 158. Third, a mitigation site was not a common possibility at the time of the permit denial. *Id.* at 159. Lastly, the neighbors were not likely to buy the lot to preserve their view when the government had already done so through its denial of Loveladies' permit. *Id. See also* Plaintiff's Post-Trial Memorandum, *supra* note 142, at 10-14 (describing potential uses for the land).

182. *Loveladies*, 21 Cl. Ct. at 158.

183. *Id.* at 157. The court agreed with Loveladies' real estate experts and found that the fair market value before the permit denial was $3,720,000 less $900,500 for preparing the 12.5 acres for development and approximately $161,500 to acquire a mitigation site as conditioned by the state permit. *Id.* at 156.

184. *See id.* at 158.

185. *Id.* at 160.

186. *Id.* at 161.

187. *Loveladies*, 21 Cl. Ct. at 162. *See supra* notes 141-186 and accompanying text for an explanation of *Loveladies*.

188. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). In *Agins*, the Court stated that a regulation effects a taking if the regulation "does not substantially advance legitimate states interests . . . or denies an owner economically viable use of his land." *Id.*

In both *Loveladies* and *Florida Rock*, the Claims Court stated that the first part of the *Agins* test is not at issue in these cases. *See* Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 388 (1988), *summary judgment denied*, 21 Cl. Ct. 153 (1990), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991); *See also* Florida Rock Indus. v. United States, 791 F.2d 893, 899 (Fed. Cir. 1986), *cert. denied*,

of the government action, and the interference with investment-backed expectations.[189] The Claims Court in both cases analyzed the effect of the economic impact and the character of government action in ways that are sure to encourage the filing of takings claims and increase the likelihood of their success. Therefore, the decisions in both *Loveladies* and *Florida Rock* should be reversed by the Federal Circuit Court of Appeals.

The first factor, the economic impact of the regulation, focuses on the property unit in question, comparing the unit's fair market value before and after the permit denial to determine its diminution in value.[190] In both *Loveladies* and *Florida Rock*, the Claims Court's determination of the regulation's economic impact was problematic, and in turn, led to inflated diminutions in value. The problem in *Loveladies* was the Claims Court's definition of the property unit. In *Florida Rock*, the flaw was in the court's fair market value analysis.

The battle over what constitutes the property unit is of critical importance to both sides in a takings claim and is often determinative of the outcome.[191] From a plaintiff's perspective, the most desirable property unit is one which consists solely of land which is valuable only if a permit is granted. Therefore, if a permit is denied, the plaintiff can easily show a large diminution in value because the land has little use without the permit. The government wants the court to include that any developable "upland" in the property unit would retain a high market value even after premit denial, which would reduce the diminution in value and be evidence of the existence of an economically viable use of the land after the permit was denied.[192]

In *Loveladies*, the government argued that the proper unit of land to be considered in the court's analysis was the 250-acre parcel that Loveladies originally purchased.[193] The government's theory was that Loveladies made millions of dollars developing and selling nearly 200 acres of the parcel. Therefore, if included in the property unit, the high value of the 200 acres before and after the permit

497 U.S. 1053 (1987), *on remand*, 21 Cl. Ct. 161 (1990), *appeal docketed*, No. 91-5156 (Fed. Cir. Sept. 30, 1991).

189. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). For a discussion of *Penn Central*, see *supra* note 53 and accompanying text.

190. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987).

191. *Keystone*, 480 U.S. at 497. "Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property." *Id. See also* Ciampitti v. United States, 22 Cl. Ct. 310, 318-319 (1991).

192. *See* MALONE, *supra* note 23, § 14.03[2].

193. *Loveladies*, 15 Cl. Ct. at 392.

denial would lead to only a minor diminution in value of the property unit.[194] The government offered into evidence development plans that showed that the 12.5 acres for which the permit was denied were included with the 250 acres as one planned development.[195] The government argued that, at the very least, the 12.5 acres was a part of the approximately 50 acres which remained unsold at the time of the permit denial.[196]

Loveladies, on the other hand, argued that the 200 acres were developed prior to regulation and that the 12.5 acres were a separate parcel at the time they were subject to regulation under section 404.[197] The Claims Court agreed with Loveladies and ruled that the proper unit of property for the takings analysis was 12.5 acres.[198]

While the Claims Court ruled for Loveladies in determining the property unit to be 12.5 acres, there is support in the Supreme Court's decisions for the government's position.[199] In *Penn Central*, the Supreme Court addressed the issue of determining the property unit in a takings case, stating that a parcel of land is not divided into separate parcels but rather viewed as a whole.[200] In 1987, the Court reiterated this idea in *Keystone*, ruling that the Subsistence Act in Pennsylvania did not constitute a taking of the plaintiff's coal mine.[201] In *Keystone*, the Court cited *Penn Central* and ruled that in determining the scope of the property unit, 27 million tons of coal that was not affected by the regulation had to be considered along with the coal which was affected by the regulation.[202] The Court stated that the land could not be separated into parcels for the purpose of a takings claim.[203] Similarly in *Loveladies*, the 200 acres not

194. Defendant's Post-Trial Memorandum, *supra* note 144, at 19.

195. *Id.*

196. *Loveladies*, 15 Cl. Ct. at 392-93.

197. *See* Second Supplemental Brief in Further Support of Plaintiff's Cross-Motion for Summary Judgment—Issue Raised in *Keystone Bituminous Coal Ass'n v. DeBenedictis* at 12, Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 383 (1988) (No. 243-83L), *summary judgment denied*, 21 Cl. Ct. 153 (1990), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991).

198. *Loveladies*, 15 Cl. Ct. at 393.

199. *See* Penn Central Transp. Corp. v. New York City, 438 U.S. 104 (1978). *See also* Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987).

200. *Penn Central*, 438 U.S. at 130-31. Support for the government's position comes from the following quote from *Penn Central*:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses on the character of the action and on the nature of the interference with rights in the parcel as a whole.

Id. at 130-31.

201. *Keystone*, 480 U.S. at 506.

202. *Id.* at 498.

203. *Id.*

affected by the regulation, but part of the original parcel, should have been considered as a whole with the 12.5 acres affected by the regulation.[204]

Other Claims Court cases also support the government's position in *Loveladies*. In *Deltona Corporation v. United States*,[205] Deltona purchased 10,000 acres on Marco Island, Florida.[206] The property was divided into five tracts which were all part of a "master plan" for residential development.[207] Two of the tracts of land received dredge and fill permits under the Rivers and Harbors Act.[208] The permits for the remaining three tracts of land fell under the then newly adopted section 404.[209] The Corps denied two of the permits.[210] Deltona then filed suit seeking compensation, claiming that the Corps had taken the land by denying it section 404 permits.[211] The Claims Court ruled that when taken as a whole, the two tracts of land contained only 20% of the 10,000 acres purchased and only 33% of the lots that could be developed.[212] Therefore, the court ruled that the 10,000-acre parcel of land was worth a substantial amount regardless of the permit denial on a portion of the overall development.[213]

Similarly, in *Loveladies*, the 12.5 acres should have been considered as a part of the 250-acre unit for the Claims Court's determination of the market value after the permit denial. As in *Deltona*, the acreage applied for in the section 404 permit application was part of a larger parcel of land purchased at one time and part of an overall development plan encompassing the entire parcel of land.[214] If the 250 acres had been viewed as a whole by the Claims Court, the diminution in value of the 12.5 acres would have been negligible in the overall property value and a taking would not have occurred. Therefore, according to Supreme Court and Claims Court precedents, the court in *Loveladies* did not determine the proper unit of

204. *See* Defendant's Supplemental Brief on the Supreme Court's Decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis* at 9, Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 383 (1988) (No. 243-83L), *summary judgment denied*, 21 Cl. Ct. 153 (1990), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991) [hereinafter Government's Supplemental Brief].

205. 657 F.2d 1184 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982).

206. *Id.* at 1188.

207. *Id.*

208. *Id.*

209. *Deltona*, 657 F.2d at 1188-89.

210. *Id.* at 1189.

211. *Id.*

212. *Id.* at 1192.

213. *Deltona*, 657 F.2d at 1192. *See also* Jentgen v. United States, 657 F.2d 1210, 1213 (Fed. Cir. 1981) (ruling that denial of a permit for 60 acres of a 120 acre tract was not a taking when the value of the land as a whole was taken into account), *cert. denied*, 455 U.S. 1017 (1982).

214. Defendant's Post-Trial Memorandum, *supra* note 144, at 19.

land for the takings analysis. This error led to the finding of an exaggerated diminution in value and the Claims Court wrongly awarded the developer over two million dollars as "just compensation."

The Claims Court's analysis of the property unit in *Loveladies* poses various problems for the section 404 program. After *Loveladies*, a developer is now encouraged to divide his property into parcels and file a permit application for a parcel of land consisting entirely of wetlands. Thus, absent valuable uplands to raise the market value, it would be easy to prove a large diminution in value in the event of a permit denial and in anticipation of a claim for just compensation. In addition, a developer may find it advantageous to wait until the later stages of a development project before applying for a fill permit for the wetlands acreage. Thereby, the already developed parcels could be sold off prior to the permit denial. According to *Loveladies*, the high value of the developed land would not be figured into the diminution in value because the developed land would not be considered part of the property unit. As seen in the decisions in *Loveladies* and *Florida Rock*, a large diminution in value may make a takings claim successful. Thus, the Claims Court's ruling in *Loveladies* regarding what acreage was to be considered as part of the property unit is not only inconsistent with past decisions but encourages manipulation of the property unit in future takings claims.

In *Florida Rock*, the Claims Court promoted more problems with its decision regarding determination of whether any economically viable use remained in the land after the section 404 permit denial. The problems stem from the court's determination of fair market value after the permit denial. The Claims Court wrongly applied the issue of speculation as a limiting factor on the government's presentation of evidence regarding the existence of a post denial fair market value.

The Claims Court's original decision in *Florida Rock* was vacated on appeal by the Court of Appeals for the Federal Circuit because the Claims Court misapplied the fair market analysis.[215] The Claims Court focused on the requirement that potential buyers must be knowledgeable in the determination of fair market value.[216] The court excluded evidence presented by the government regarding the existence of a post-denial fair market made up

215. Florida Rock Indus. v. United States, 791 F.2d 893, 905 (Fed. Cir. 1986), *cert. denied*, 497 U.S. 1053 (1987), *on remand*, 21 Cl. Ct. 161 (1990), *appeal docketed*, No. 91-5156 (Fed. Cir. Sept. 30, 1991).

216. *See* Florida Rock Indus. v. United States, 8 Cl. Ct. 160, 167 (1985), *aff'd in part and vacated in part*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 497 U.S. 1053 (1987). *See also* Florida Rock Indus. v. United States, 21 Cl. Ct. 161, 170-172 (1990), *appeal docketed*, No. 91-5156 (Fed. Cir. Sept. 30, 1991).

of knowledgeable buyers.[217] The Claims Court reasoned that there will always be speculators who will gamble on the potential appreciation of property, but this may only reflect those who have been deceived by unscrupulous promoters.[218] This type of speculation, the Claims Court stated, is not dispositive of the existence of a fair market made up of knowledgeable buyers.[219]

The Federal Circuit stated that the Claims Court was clearly wrong in excluding evidence regarding the existence of those willing to buy the property and hold onto it in hopes that the regulation would change.[220] The Federal Circuit stated that these buyers may be called speculators, but that does not mean they are not knowledgeable.[221] Further, the Federal Circuit cited people who buy property, gambling on the existence of finding mineral deposits on the property as an example of knowledgeable buyers.[222] The appellate court remanded the case, stating that the evidence of the existence of a fair market value based on speculation should be heard.[223]

On remand, the Claims Court allowed the government's testimony regarding the existence of a fair market value after the permit denial, but the court applied the same logic it had in its earlier decision to discount the credibility of the evidence.[224] The court stated that "fair market values are premised on transactions between knowledgeable parties . . . and . . . defendant's failure to provide evidence of the purchaser's knowledge renders its testimony unpersuasive."[225] The court admitted that in arms-length transactions, knowledge of all restrictions is usually presumed.[226] But the court again stated that the government's evidence of fair market value was based on speculation as its highest and best use and this use did not overcome the requirement that the market value must be based on a market made up of knowledgeable buyers.[227]

In *Florida Rock*, the government presented a real estate expert's testimony that a fair market value of at least $4,000 per acre existed for the property after the permit was denied.[228] The president of Florida Rock even testified that he refused offers from real

217. *See Florida Rock*, 21 Cl. Ct. at 174.
218. *Florida Rock*, 8 Cl. Ct. at 167.
219. *Id.* The Claims Court expressed a concern for naive investors being deceived in the fast-paced Florida real estate market. *Id.*
220. *Florida Rock*, 791 F.2d at 903.
221. *Id.*
222. *Id.*
223. *Id.*
224. *See Florida Rock*, 21 Cl. Ct. at 170-74.
225. *Id.*
226. *Id.*
227. *Id.* at 173.
228. *Id.* at 172; *see also* Defendant's Proposed Findings and Conclusions, *supra* note 81, at 18.

estate investors interested in buying the property after the permit denial.[229] The Federal Circuit found this convincing evidence of the existence of knowledgeable buyers, especially because the property was not listed on the market.[230] The company president further testified that "he considered the property to be worth in excess of $10,000 per acre, even after the Corps denied a permit on the property."[231]

Despite this extensive evidence of a fair market value of at least $4,000 per acre after the permit denial, the Claims Court refused to consider the evidence.[232] Even with the Federal Circuit's guidance, the Claims Court did not grasp the idea that knowledgeable buyers could be aware of the regulations involved and still speculate. Knowledgeable investors speculate every day on land which is restricted in its use, either gambling on receiving approval or hoping someday that a regulation will change. If the Claims Court's view prevails, plaintiffs will have to do little more than attack the government's valuations on the grounds that no one who was knowledgeable would invest in property which was subject to regulation.

While the Claims Court in *Loveladies* and *Florida Rock* had different problems in determining the effect of the economic impact of the regulation, the courts in both cases agreed that the character of the government action was such that the "nuisance exception" should not be extended to these cases. In both *Florida Rock* and *Loveladies* the government argued for the extension of the nuisance exception on two related fronts. First, the government argued that the pollution caused by the proposed activities in each case should be abated, consistent with the goals of the CWA to prevent harm to water quality.[233] Second, the government argued that section 404 protection of wetlands should be exempt from takings claims because it protected valuable public resources.[234]

In both decisions, the Claims Court expressed a dislike for the concept of the nuisance exception. On remand in *Florida Rock*, the Claims Court blamed the government for obscuring the real question in the case by using the nuisance exception argument.[235] Furthermore, in the first Claims Court decision in *Florida Rock*, the court reflected its disapproval for the theory by stating that "[t]he compensation clause of the [F]ifth [A]mendment would be read out

229. Defendant's Proposed Findings and Conclusions, *supra* note 81, at 19.
230. *Florida Rock*, 791 F.2d at 903.
231. Defendant's Proposed Findings and Conclusions, *supra* note 81, at 12.
232. *Florida Rock*, 21 Cl. Ct. at 175.
233. See *supra* note 21 and accompanying text for a discussion of the goals of the CWA.
234. *See* Government's Supplemental Brief, *supra* note 204, at 7.
235. *Florida Rock*, 21 Cl. Ct. at 167.

of existence if government could define away private property rights by pronouncing their exercise as contrary to the public welfare."[236]

The plaintiffs in both cases successfully argued that the Claims Court should review the level of pollution in terms of classic nuisance analysis. In both *Florida Rock* and *Loveladies*, the Claims Court stated that the pollution caused by the activities did not reach the level of a nuisance necessary to be exempt from a claim for just compensation.[237]

Alternatively, the government argued that protection of a natural resource as valuable as wetlands was a government action which should be afforded protection from takings claims.[238] The Claims Court failed to even address the issue in the final decisions, instead dismissing the nuisance exception argument based on the level of pollution.[239] However, the government was correct in relying on the nuisance exception and had support in *Keystone*. In *Keystone*, the Court considered a regulation on coal mining exempt from a takings claim because it was in the public interest,[240] even though coal mining was not considered a public nuisance by the state.[241]

The protection of wetlands is in the public interest.[242] Wetlands are recognized as an extremely valuable natural resource which have benefits beyond aesthetics, including flood control, improved water quality, and the protection of wildlife.[243] Wetlands are being lost at an alarming rate[244] and regulation is the key to

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236. *Florida Rock*, 8 Cl. Ct. at 170.

237. *See Florida Rock*, 21 Cl. Ct. at 167; Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 154 (1990) *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991).

238. *See* Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 388-89 (1988), *summary judgment denied*, 21 Cl. Ct. 153 (1990), *appeal docketed*, No. 91-5050 (Fed. Cir. Feb. 15, 1991); *Florida Rock*, 21 Cl. Ct. at 166-67.

239. In *Florida Rock*, the Claims Court failed to discuss the destruction of wetlands in its 1990 decision. *Flroida Rock*, 21 Cl. Ct. at 166-67. In the first decision the court denied the nuisance exception for the protection of wetlands and stated that "[c]ontrary to defendant's assertion, courts do not view the public's interest in environmental and aesthetic values as a servitude upon all private property, but as a public benefit that is widely shared and therefore must be paid for by all." *Florida Rock*, 8 Cl. Ct. at 176.

In *Loveladies*, the first Claims Court decision acknowledged the government's interest in preserving wetlands but applied the balancing test and determined the plaintiff's private interest outweighed the public interest. *Loveladies*, 15 Cl. Ct. at 388-89.

240. *Keystone*, 480 U.S. at 492.

241. *See* MALONE, *supra* note 23, § 14.03[3][a].

242. 33 C.F.R. § 320.4(b) (1991).

243. See *supra* note 8 for an explanation of the importance of wetlands.

244. See *supra* note 6 for a breakdown of the states with the most acres of wetlands and the potential loss rate per year.

protecting the wetlands.

Denying a nuisance exception theory and allowing takings claims by owners of wetlands undermines the necessary regulations because the money paid to the property owners becomes unavailable for conservation. Additionally, recoveries under takings claims encourage investors to buy and develop wetlands which are being destroyed at a record pace. Thus, section 404 regulation should be protected from takings claims because the large awards of just compensation will eventually undermine the effectiveness of the regulation. Section 404 of the CWA is a mandate from Congress that the protection of wetlands is within the public interest.[245] The Claims Court ignored this Congressional mandate in its decisions. In the future, the Claims Court should reevaluate the nuisance exception and extend it to protect the future of section 404 and the wetlands.

III. CONCLUSION

In *Florida Rock* and *Loveladies*, the decisions handed down by the United States Claims Court have serious problems in their analysis of the takings issue. In both cases, the problems were determinative and led to findings that a taking had occurred which required the government to pay millions of dollars in just compensation. The decisions were flawed in their determination of what constitutes a property unit, and what is the fair market value. These decisions should be reversed on appeal.

However, if upheld by the United States Court of Appeals for the Federal Circuit, the rulings in *Loveladies* and *Florida Rock* will reflect a disturbing trend to those who see section 404 as the savior of our nation's dwindling wetlands.[246] The approaches taken by the Claims Court in these cases have increased the likelihood of takings challenges, and based on their success and size of their judgments, have possibly dealt a final blow to section 404 in its present form.[247]

The takings analysis represents the struggle between property rights and government's ability to regulate them. These cases appear to be representative of the growing trend that has surfaced in the Supreme Court,[248] the White House,[249] and in Congress,[250] that

245. 33 C.F.R. § 320.4(b) (1991).

246. *See* Jan Goldman Carter, *Clean Water Act Section 404: A Critical link in Protecting Our Nation's Waters*, 5 NAT. RESOURCES & ENV'T 10 (1991).

247. See *infra* note 250 for the proposed amendments to section 404 of the Clean Water Act.

248. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). These cases have been written about at length and some believe that the Supreme Court in following these decisions,

> . . . seems ready to take constitutional law of property rights forward into the past. If this were to happen, constitutional property rights would take

property rights are again gaining strength at the expense of the government. Along with this trend could go the remainder of a valuable natural resource, our dwindling wetlands.

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away the police power on an unprecedented scale, and the nation would end up with a new constitutional regime of laissez faire. This potential development might be what the regulatory takings is all about.

Charles H. Clarke, *Constitutional Property Rights and the Taking of the Police Power: the Aftermath of Nollan and First English*, 20 SW. U. L. REV. 1, 39 (1991).

249. "The President believes we must look beyond regulation to encourage wetlands protection. We must enhance public understanding of the value of wetlands as well as support non-regulatory programs that encourage private, state and local actions to conserve wetlands." *The White House Office of the Press Secretary Fact Sheet Protecting America's Wetlands*, FED. NEWS SERVICE, August 9, 1991, at 1.

On August 9, 1991, President Bush announced his new wetlands plan. James Gerstenzang, *Bush Offers New Wetlands Policy; Critics Assail It*, L.A. TIMES, August 10, 1991, at 6. The plan would expose 10-40 million acres to development. *Id.* The Chairman of the Sierra Club, Jerry Paulson, stated: " 'To take this meat-ax approach to a scientific issue is to totally gut the wetlands protection provision of the Clean Water Act.' " Stevenson Swanson, *Wetlands Debate Has Old Battle Lines, but New Ground Rules*, CHI. TRIB., August 18, 1991, at 3.

250. Congress has proposed three bills aimed at amending section 404. *See* H.R. 2400, 102d Cong., 1st Sess. (1991); H.R. 1330, 102d Cong., 1st Sess. (1991); S. 1463, 102d Cong., 1st Sess. (1991). Of particular note is a provision contained in H.R. 1330 which would provide that a taking occurs whenever if a landowner's parcel is delineated as a Type A wetland. This provision could result in millions of dollars being paid out in just compensation. *See* H.R. 1330, 102d Cong., 1st Sess. § 3(d) (1991).