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Is There a Better Approach to Regulatory Takings
Claims Caused by Wetlands Regulation?

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I. INTRODUCTION

In 1972, Congress amended the Federal Water Pollution Control Act¹ and created Section 404 in order to protect America's wetlands by prohibiting dredging and filling in waters of the United States without a permit from the United States Army Corps of Engineers ("the Corps").² Since that time, the Corps has protected wetlands through the permit process by forcing citizens to restrict or modify development of their privately owned wetlands and, in some cases, by prohibiting such development. Federal programs protecting wetlands have been the focus of "considerable controversy in recent years."³ Much of that controversy involves the Fifth Amendment to the Constitution of the United States.⁴ It states that property shall not be taken for public use without just compensation. The government and portions of the regulated community fundamentally disagree as to whether the restriction or prohibition of development of privately owned wetlands constitutes a taking under the Fifth Amendment.⁵ As it is estimated that 75 percent of the remaining wetlands in the continental United States are located on private property,⁶ this conflict will only increase as government efforts to save the remaining wetlands continue.

In applying the principles of the Fifth Amendment to the issue of "uncompensated regulatory takings," that is, the power of government to restrict or even to prohibit a use of property by regulation without compensating the landowner,

¹ Pub. L. No. 92-500, 86 Stat. 896 (1972)[hereinafter also referred to as "the Clean Water Act," "CWA" and "FWPCA"].

² 33 U.S.C. § 1344 (1972).

³ WHITE HOUSE OFFICE ON ENVIRONMENTAL POLICY, PROTECTING AMERICA'S WETLANDS: A FAIR, FLEXIBLE AND EFFECTIVE APPROACH 1 (1993) [hereinafter PROTECTING AMERICA'S WETLANDS].

⁴ U.S. CONST. amend. V.

⁵ *Id.* at 18.

⁶ *Id.* at 2.

the courts have employed an *ad hoc*, fact specific analysis.⁷ This methodology has led to complaints, especially by advocates of private property rights, that the modern takings jurisprudence is unpredictable in its application and unfair to property owners in its results.⁸

Some members the 104th Congress responded to that sentiment by introducing various proposals for "compensation legislation," to force the government to compensate landowners for the diminution in value of their property caused by environmental regulations, including wetlands regulation. The Senate considered passing the Omnibus Property Rights Act of 1995,⁹ which combined the ideas of several previous proposals. The House of Representatives considered a major rewrite of the FWPCA, which included an entirely new Section 404.¹⁰ The Clinton White House introduced its own initiative in 1993 with the Administration's Wetlands Plan that purportedly reduces the regulatory burden on citizens caused by the wetlands permit process.¹¹

Though the 104th Congress has not yet as of this writing passed any major environmental legislation, it was not for want of trying. As we have the same political makeup in the 105th Congress, with perhaps a more conservative Senate, we can expect this debate to continue in the new Congress. Therefore, it is instructive to examine the different bills and ideas for reform before the 104th Congress. This paper examines the proposed legislative solutions to the takings problem as well as the

⁷ Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992).

⁸ See comments by Roger Marzulla, *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253 (1995). He states that in his view, the modern takings jurisprudence is "vague and uncertain" and "inadequate." Additionally, he states that the courts' current case-by-case methodology is so time consuming and expensive that it "weeds out, before they are even filed, most takings claims." *Id.* at 269.

⁹ 141 Cong. Rec. S 4492-01, Senate Bill 605, sponsored by Senator Robert Dole ("the Property Rights Act" or "the Act"), amended by Senate Report No. 104-239, March 1, 1996, 104th Congress, 2nd Session, 1996, 1996 WL 116804 (Leg. Hist.).

¹⁰ H.R. REP. NO. 112, 104th Cong., 1st Session (1995).

¹¹ PROTECTING AMERICA'S WETLANDS 1.

Administration's plan. In doing so, it examines the way in which the proposed alternative methodologies deal with claims of takings caused by wetlands regulation and whether any one of the methodologies is better than the modern takings jurisprudence.

II. REGULATION OF WETLANDS

A. The Wetlands Resource

"Wetlands are the link between water and land."¹² Wetlands are areas that are inundated or saturated by surface or ground water that support vegetation typically found in saturated soil conditions.¹³ These areas generally include swamps, marshes, bogs and similar areas¹⁴ that can be found in flat vegetated areas, in depressions in the earth and along creeks, rivers, ponds, lakes and coastlines.¹⁵ Wetlands are incredibly diverse, containing areas of forests, shrubs, rivers, estuaries, deepwater ocean habitat, shoreline and coral reefs.¹⁶ Some wetlands may only have water on their surface for a few days during an entire year and some wetlands may have no surface water at all, but consist only of saturated soil.¹⁷

Wetlands are vitally important in filtering pollutants, sediment and nutrients out of the nations' water before it enters our rivers, oceans and drinking water supplies.¹⁸ Additionally, wetlands "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic species."¹⁹ Wetlands have recently gained recognition as critical elements in flood control. By "absorbing rain, snow melt, and floodwaters

¹² EPA 843-F-95-001a (February, 1995), *reprinted in* EPA, WETLANDS FACT SHEETS (1995)

¹³ 33 C.F.R. § 323.2(c)(1978), the Corps' regulatory definition of wetlands.

¹⁴ *Id.*

¹⁵ EPA 843-F-95-001a (February 1995).

¹⁶ See THOMAS E. DAHL & CRAIG E. JOHNSON, U.S. DEP'T OF INTERIOR, STATUS AND TRENDS OF WETLANDS IN THE COTERMINOUS UNITED STATES: MID-1970s TO MID-1980s (1991).

¹⁷ See EPA 843-F-95-001a (February 1995).

¹⁸ See the discussion in the Corps' regulations at 33 C.F.R. § 320.4(b)(2)(iv), (v) (1985).

¹⁹ 33 C.F.R. § 320.4(b)(2)(i) (1985).

and releasing it slowly," wetlands "reduc[e] the severity of downstream flooding."²⁰ Commercial fisheries and businesses that provide recreational services rely on wetlands for their economic livelihood.²¹

B. The Loss of Wetlands

Although recognized as extremely important components of the planet's ecosystem, wetlands have been disappearing at an alarming rate. More than one-half of the wetlands that originally existed in the continental United States prior to settlement by the Europeans have been destroyed by dredging or filling.²² Past government practices and policies contributed to and in some cases encouraged the destruction of wetlands, by favoring development.²³ Indeed, the government and many Americans considered most wetlands to be no more than smelly swamps, nuisances and breeding grounds for disease carrying pests and vermin and sought to destroy them by draining and filling them for development or agriculture.²⁴ The government has changed its policies and under the auspices of the Clean Water Act prohibits most development of wetlands without a pre-approved permit. Still, the losses of wetlands continues in the amount of 300,000 - 500,000 acres each year, according to some estimates.²⁵ Approximately 100 million acres of wetlands remain in the continental United States²⁶ and approximately 175 million acres remain in Alaska.²⁷

²⁰ PROTECTING AMERICA'S WETLANDS 19.

²¹ *Id.* at 2.

²² GENERAL ACCOUNTING OFFICE, WETLANDS OVERVIEW, 11-12 (1991), *citing* THOMAS E. DAHL & CRAIG E. JOHNSON, U.S. FISH AND WILDLIFE SERVICE, WETLAND LOSSES IN THE UNITED STATES: 1780s to 1980s (1990).

²³ PROTECTING AMERICA'S WETLANDS 13.

²⁴ *See* Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 902 (Fed. Cir. 1986), 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied* 115 S.Ct. 898 (1995).

²⁵ THE CONSERVATION FOUNDATION, PROTECTING AMERICA'S WETLANDS: AN ACTION AGENDA, 8 - 12 (1988).

²⁶ THOMAS E. DAHL & CRAIG E. JOHNSON, U.S. FISH AND WILDLIFE SERVICE, STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES (1989).

²⁷ EPA 843-F-95-001a (February 1995), *reprinted in* EPA, WETLANDS FACT SHEETS (1995).

The loss of wetlands adversely affects mankind not only indirectly, through the loss of species, but directly as well. Lost or degraded wetlands result in increased flooding.²⁸ A study by the Corps determined that the loss of 8,422 acres of wetlands in the Charles River Basin near Boston would have resulted in flood damage of more than \$17 million annually.²⁹ Some researchers believe that 13 million acres of marshy wetlands could have prevented the disastrous flooding of the Mississippi river in 1993³⁰ that resulted in the loss of many lives and caused billions of dollars of damage to property and agricultural products.³¹

Loss of wetlands also affects the quality of human life by lowering the water quality of surface and underground water. Forested wetlands absorb nutrients from the water.³² A large nutrient load in a lake can cause an algae bloom which, when it decomposes, consumes large amounts of oxygen thereby denying it to fish and aquatic plants.³³ The destruction of wetlands also affects mankind indirectly by adversely impacting many species of animals and plants that rely on wetlands for survival.³⁴ For example, the mallard and northern pintail duck populations precipitously declined when their wetlands habitat was destroyed. Some believe that the Ivory-Billed Woodpecker was made extinct due to overlogging in its forest wetland habitat.³⁵

C. The Statutory Basis for Wetlands Regulation

Congress enacted the Clean Water Act, 33 U.S.C. 1251 *et seq.*, to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.³⁶ It

²⁸ EPA 843-F-95-001c (February 1995), *reprinted in* EPA, WETLANDS FACT SHEETS (1995).

²⁹ *Id.*

³⁰ William K. Stevens, *Restored Wetlands Could Ease Threat of Mississippi Floods*, N.Y. TIMES, August 8, 1995 [hereinafter *Restored Wetlands*] at C1.

³¹ PROTECTING AMERICA'S WETLANDS 19.

³² EPA 843-F-95-001c (February 1995).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Federal Water Pollution Control (Clean Water) Act, § 101, 33 U.S.C. § 1251 (1948).

prohibits the discharge of pollutants into the navigable waters without a permit under the national pollutant discharge elimination system.³⁷ Section 404 of the Clean Water Act prohibits the discharge of dredge and fill material into the navigable waters of the United States without a permit approved by the U.S. Army Corps of Engineers, following guidelines of the Environmental Protection Agency.³⁸ These permits are popularly known as "404 permits" or "wetlands permits."³⁹

D. The Permit System

A landowner seeking to develop wetlands must apply to the Corps and meet the requirements established in the Corps' regulations in order to be issued a Section 404 permit. The regulations prohibit a discharge of dredged or fill material into wetlands if a practical alternative with a less adverse impact on the aquatic ecosystem exists.⁴⁰ Even if the Corps evaluation process⁴¹ shows that no practical alternatives exist, the applicant is required to take appropriate and practicable steps to minimize potential adverse impacts of the discharge on the aquatic ecosystem.⁴² The Corps will not permit any discharge into wetlands if it would cause a violation of a state's water quality standards, violates applicable toxic effluent standards under CWA Section 307, jeopardizes the continued existence of endangered or threatened species under the Endangered Species Act, harms marine sanctuaries protected under the marine Protection, Research and Sanctuaries Act or causes or contributes to significant degradation of the waters of the United States.⁴³

³⁷ *Id.* § 402.

³⁸ *Id.* § 404b.

³⁹ This is true even though the Clean Water Act does not use the term "wetlands."

⁴⁰ 40 C.F.R. § 230.10(a) (1994).

⁴¹ *Id.* § 230.10(a)(3). There is a presumption that alternatives exist to projects that are not water dependent, such as docks, and the applicant bears the burden to rebut that presumption.

⁴² *Id.* § 230.10(d).

⁴³ *Id.* § 230.10(c).

Permit applications are published in the Federal Register and distributed to other agencies,⁴⁴ thereby presenting an opportunity for concerned citizens or representatives of federal agencies to comment upon or object to the permit. The Corps must comply with the National Environmental Policy Act, which might require the agency to prepare an Environmental Impact Statement or Environmental Assessment,⁴⁵ possibly causing considerable delay in the project and inviting yet more public and agency comment. The Corps reviews the application in accordance with its own Section 404(b)(1) Guidelines.⁴⁶ The Corps then must perform a Public Interest Review of the application.⁴⁷

After the Corps completes its processes, the Environmental Protection Agency may veto the Corps' permit if it finds an "unacceptable adverse effect" on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.⁴⁸ Though used sparingly, the threat of a veto adds considerable weight to an Environmental Protection Agency opinion regarding the issuance of Section 404 permit.⁴⁹ An applicant may find that after complying with the Corps' conditions, he or she must then begin negotiating with the Environmental Protection Agency regarding its conditions for permit issuance.

E. Violations of Section 404

Modifying wetlands without a Section 404 permit or violating the terms of a Section 404 permit can result in administrative, civil and criminal action.⁵⁰ Corps officials are authorized to issue a compliance order directing a violator to comply

⁴⁴ 33 C.F.R. § 325.3 (1994).

⁴⁵ 44 C.F.R. §366.1(b)(6)(1988).

⁴⁶ 33 U.S.C. § 1344(b) (1988); 40 C.F.R. § 231.1(a) (1979).

⁴⁷ 33 C.F.R. § 320.4 (1994).

⁴⁸ 33 U.S.C. § 1344(c) (1988).

⁴⁹ Mark Chertok, Federal Regulation of Wetlands, American Law Institute-American Bar Association Continuing Legal Education, C127 ALI-ABA 1131, 1161 (1995).

⁵⁰ 33 U.S.C. § 1344(s).

with permit terms and conditions.⁵¹ The Corps may sue a violator in civil court for appropriate relief, including a permanent or temporary injunction.⁵² Any person violating any condition or limitation in a permit or any order issued by the Secretary is subject to a civil penalty not to exceed \$25,000 per day for each violation⁵³ and criminal penalties not to exceed a fine of \$250,000 or imprisonment of not more than 15 years, or both.⁵⁴

F. Mitigation

The Section 404 permit system, though it seeks to protect wetlands, does allow development. The Corps' regulations require developers to take "appropriate and practicable steps" to minimize potential adverse impacts upon the wetland by the development.⁵⁵ The regulations primarily favor avoidance of adverse impacts.⁵⁶ They then recommend, in order: minimizing, rectifying, reducing, or compensating for resource losses. The regulations are designed to force developers to consider wetlands impacts at the early stages of the permitting process and to avoid them to the greatest extent possible.⁵⁷ Developers and homeowners must compensate for significant resource losses that are identifiable, likely to occur due to their actions and important to the human or aquatic environment.⁵⁸ Developers may make compensation either by setting aside land or paying for a replacement wetlands to be created.⁵⁹ This system creates an incentive to avoid developing in wetlands but if one does so, to minimize the acreage adversely affected.

G. Wetlands Takings Claims

⁵¹ *Id.* ¶ (1).

⁵² *Id.* ¶ (3).

⁵³ *Id.* ¶ (4).

⁵⁴ 33 U.S.C. § 1319(c)(3).

⁵⁵ 40 C.F.R. §230.10(d).

⁵⁶ 33 C.F.R. §320.4(r)(1).

⁵⁷ *Id.* at §320.4 (r)(1)(i).

⁵⁸ 33 C.F.R. at §320.4 (r)(2).

⁵⁹ PROTECTING AMERICA'S WETLANDS 16.

Some landowners complain that the current regulatory process, in particular the 404 permit system, is "unfair, inflexible, inconsistent and confusing."⁶⁰ Landowners also feel that the system is too lengthy and time-consuming.⁶¹ Some believe that conditions placed on their permit or a permit denial infringe upon what they believe is a fundamental right to do whatever they may wish with their property. The issues they raise under the Fifth Amendment include whether regulation that deprives a landowner of some portion of the value of his property can constitute a taking and how much of a deprivation is required before compensation is due. The courts have striven to answer these questions but, as discussed below, have not arrived at a predictable formula with which a landowner can plan the development of his wetland property.

III. TAKINGS JURISPRUDENCE

A. The Fifth Amendment Right

The Fifth Amendment states that no private property shall be taken for public use without just compensation.⁶² The Fifth Amendment allows the government to take property when it deems necessary, and only limits (not prohibits) that power by requiring that the former landowner be compensated by the government.⁶³ The individual's right is the right to compensation, not the right to halt government possession of his or her property.⁶⁴ When the government condemns property using the power of eminent domain⁶⁵ the Fifth Amendment requires that the former private

⁶⁰ PROTECTING AMERICA'S WETLANDS 2.

⁶¹ PROTECTING AMERICA'S WETLANDS 5.

⁶² U.S. CONST. amend. V.

⁶³ *First English Evangelical Lutheran Church of Glendale v. Country of Los Angeles*, 482 U.S. 304, 314 (1987).

⁶⁴ *Id.* at 315.

⁶⁵ In *United States v. Gettysburg Elec. RR. Co.*, 160 U.S. 668 (1896), the Supreme Court held that the United States may condemn property when it is in the national interest. Though the Constitution did not specifically enumerate a condemnation power, the Court found it was inferred from several powers granted the federal government in the Constitution. Federal authorities also may rely on the General Condemnation Act of 1888, 40 U.S.C. § 257, which grants them the authority to use judicial condemnation proceedings whenever it is necessary or advantageous to do so.

landowner receive just compensation. This is a fairly straightforward application of the principle. However, the application of the Fifth Amendment principle has been "a problem of considerable difficulty"⁶⁶ in the area of uncompensated *regulatory* takings.

B. Regulatory Takings

1. The Supreme Court Acknowledges the Doctrine

Justice Holmes' opinion in *Pennsylvania Coal v. Mahon*⁶⁷ recognized that government regulation of property could result in a Fifth Amendment taking. In his opinion, he analyzed the tension between private property rights and the power of the community or government to regulate behavior and land use. "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," he said.⁶⁸ "As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."⁶⁹

The power of the government, said Justice Holmes, was not absolute because "...obviously the implied limitation must have its limits, or the contract and due process clauses are gone."⁷⁰ One limit to the police power is the Fifth Amendment, which allows the government to take a landowner's property, but requires the government to compensate the landowner. Justice Holmes recognized that since governments may successfully avoid the requirement to compensate by invoking their police power, "human nature" would cause them to do so in every case "until at last private property disappears."⁷¹ He stated that this could not happen because the Fifth Amendment is a powerful limitation on the police power to regulate property. "The general rule," he stated, is "that while property may be regulated to a certain extent, if

⁶⁶ *Pennsylvania Central Transportation Co. v. New York*, 438 U.S. 104 (1978).

⁶⁷ *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

⁶⁸ *Id.* at 413.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 415.

regulation goes too far it will be recognized as a taking."⁷² For seventy years after *Pennsylvania Coal*, the Supreme Court "eschewed any set formula" for determining when a regulation went "too far."⁷³ Instead, the Court looked at each set of circumstances in "*ad hoc*, factual inquiries."⁷⁴

2. The *Lucas* Decision

In *Lucas v. South Carolina Coastal Council*,⁷⁵ Justice Scalia addressed the question of whether the State of South Carolina could use its police power to prevent beachfront erosion by prohibiting a landowner from building two houses on beachfront property he purchased before the statute was enacted. The Court found that South Carolina did indeed have the authority under its police power to prevent further construction in order to control erosion, a valid public purpose for regulation, but not without compensating Lucas. The court found that if a government eliminates "all economically productive or beneficial use of the land," then it must compensate the landowner unless the prohibited use was inherent in the title to the property at the time the landowner acquired it.⁷⁶ The Court stated that to find the "inherent limitation," courts should look to the pre-existing law such as state nuisance law, common law and property law.⁷⁷

C. Analyzing Regulatory Takings Under the Modern Jurisprudence

Justice Scalia's opinion in *Lucas* serves as the basis for a 3-part framework for analyzing regulatory takings issues. The analysis is as follows: (1) determine whether the landowner possessed compensable property; (2) if so, determine if a categorical taking occurred or (3) if there was no categorical taking, balance the relevant factors using the *Penn Central* test. This framework is examined below.

⁷² *Id.*

⁷³ *Lucas*, 112 S. Ct. at 2893.

⁷⁴ *Penn Central*, 438 U.S. at 124.

⁷⁵ 112 S. Ct. 2886 (1992).

⁷⁶ *Id.* at 2900.

⁷⁷ *Id.* at 2901-2.

1. What is Compensable Property?

(a) The Logically Antecedent Question

"The existence of a cognizable property right is a prerequisite to finding a government taking."⁷⁸ In *Lucas*, Justice Scalia stated that, when analyzing an allegation of regulatory taking, the court must first perform the "logically antecedent inquiry into the nature of the owner's estate[.]"⁷⁹ In other words, is the property that the landowner alleges was taken the type of property for which compensation is due under the Fifth Amendment? The logically antecedent analysis is a recognition that society necessarily must place some limits on a landowner's rights to use his or her property in order for society to function.⁸⁰ Justice Scalia believed that inherent limits on property, objectively manifested in the state and local statutes and common law nuisance doctrines, were inherent and part of the "historical compact."⁸¹

(b) The Law Protects Rights, not Real Estate

The Supreme Court's decisions reflect the inherent proposition that the "property" right protected by the Fifth Amendment is not one of unlimited nature. In deciding whether trade secrets were the type of property protected by the Fifth Amendment, the Supreme Court in *Ruckelshaus v. Monsanto Co.*,⁸² rejected the contention that the Fifth Amendment protected "property" in its "vulgar and untechnical sense" as a "physical thing with respect to which the citizen exercises rights recognized by law."⁸³ Rather, the Court said, the Fifth Amendment used the term to "denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it."⁸⁴ The Fifth Amendment protects

⁷⁸ *M&J Coal Co. v. United States*, 30 Fed.Cl. 360 (1994), 47 F.3d 1148, cert. denied 116 S. Ct. 53 (1995).

⁷⁹ *Lucas*, 112 S.Ct. at 2899.

⁸⁰ See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413, in which Justice Holmes stated that "government could hardly go on" if it could not diminish values incident to property to some extent.

⁸¹ *Lucas*, 112 S. Ct. at 2900.

⁸² *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1983).

⁸³ *Id.* at 1003.

⁸⁴ *Id.*

the rights inherent in the property when the property owner obtains title. Those rights are limited by the strictures of society when it creates the right to property and are not absolute rights. The Takings Clause protects landowners from government regulation that has adverse impact only on inherent interests that they possessed before the government regulation.

(c) Defining the Scope of a Property Right

The scope of rights inherent in property is not defined in the Constitution. In *Ruckelshaus*, Justice Blackmun confirmed the basic axiom that "[p]roperty interests...are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law."⁸⁵ In order to determine the scope of rights inherent in the plaintiff's trademark in that case, the Court analyzed the Restatement of Torts and the treatment of other intangible property by state law, as well as to the legislative history of the 1978 amendments to Federal Insecticide, Fungicide, and Rodenticide Act,⁸⁶ and concluded that trade secrets could be compensable property.⁸⁷

In *Lucas* the Court clarified the definition of compensable property and the concept of inherent rights in property. Justice Scalia stated that a landowner purchases a piece of property with a "bundle of rights," and if the government subsequently wishes to prohibit a formerly lawful use in that bundle and said prohibition would result in a deprivation of economically beneficial use of the property, the regulation constitutes a Fifth Amendment taking.⁸⁸ Justice Scalia's opinion stated that "formerly lawful" uses of property are those that were allowed

⁸⁵ *Id.* at 986, citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

⁸⁶ 7 U.S.C. §§ 136 - 136y.

⁸⁷ *Ruckelshaus*, 467 U.S. at 1001 - 1003.

⁸⁸ *Lucas*, 112 S. Ct. at 2899.

when the landowner took title to the property in question.⁸⁹ The rights inherent in the title are defined according to individual understanding created necessarily and objectively by pre-existing federal and state statutory and regulatory law⁹⁰, common law nuisance⁹¹ and other independent sources of law.

In *M&J Coal Co. v. United States*,⁹² the United States Court of Federal Claims rejected the plaintiff's claim of a property right to mine coal at a 15 degree slope, because plaintiffs did not base their belief that they could do so on any "state or federal law, regulation, permit or practice that gave them such a right."⁹³ The Court said that "[s]ubjective evaluations of what the law requires, such as those held by plaintiffs, cannot form the basis for a legally cognizable right in a takings analysis."⁹⁴ Because the plaintiffs did not have the right to mine a 15 degree angle when they purchased their property, they could not "recover for deprivation of a right they never had."⁹⁵ The court also found that even though the plaintiffs had purchased the right to subside homes from owners of those homes, at the time they obtained title, federal law "forbade any coal operator from engaging in mining practices that endanger public health and safety."⁹⁶ The court held that "a title to property does not include rights forbidden by the law at the time title transfers."⁹⁷ Federal actions limiting plaintiff's right to mine, despite its contracts with surface owners, was proper regulation, the authority for which was inherent in the title itself.⁹⁸

⁸⁹ *Id.* at 2901. His opinion limited the reach of the doctrine of nuisance, a traditional government defense to a claim of a taking, by holding that if a certain use was allowed by state statute or common law nuisance doctrine at the time of possession of title to the property, then that use was a property right protected by the Fifth Amendment. *Id.* If the government subsequently declared that use as a nuisance, it would be required by the Fifth Amendment to compensate the landowner for the effects of that regulation. *Id.*

⁹⁰ See *Ruckelshaus*, 467 U.S. at 1001.

⁹¹ *Lucas*, 112 S. Ct. at 2901.

⁹² *M&J Coal*, 30 Fed. Cl. at n. 56.

⁹³ *Id.* at 368.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 369.

⁹⁷ *Id.*

⁹⁸ *Id.*

(d) Section 404 May Limit the Scope of Property Rights

In *United States v. Riverside Bayview Homes, Inc.*,⁹⁹ the Supreme Court held that the Section 404 permit system was constitutionally valid.¹⁰⁰ Though the Court did not speak in terms of "compensable property," its holding necessarily implied that the plaintiff's property interests were held subject to the limitations imposed by Section 404. In analyzing property interests, the modern jurisprudence limits claims of takings to property rights inherent in the title at the time it was transferred to the landowner, and examines objective manifestations such as law, titles and contracts to determine the lawful uses or property rights existing at that time. The Section 404 wetlands program is one of those pre-existing laws the limits of which inhere in the title itself.¹⁰¹ Therefore, property interests in wetlands are inherently subject to limitation by the Section 404 permit program.¹⁰²

2. Categorical Takings

Even where plaintiffs establish that they possess compensable property, courts must still determine if the government improperly took it. The first step in this segment of the analysis is to determine if the alleged taking was what Justice Scalia termed a "categorical taking," that is, either one of two situations in which "regulatory action is compensable without case-specific inquiry into the public interest advanced in support of the restraint."¹⁰³ The two circumstances are (1) regulations that compel the property owner to suffer a physical "invasion"¹⁰⁴ of the property¹⁰⁵ and (2)

⁹⁹ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)

¹⁰⁰ *Id.* at 139.

¹⁰¹ Logically, the inherent limitations in the title could not arise until after the wetlands statutory restrictions were passed into law in 1972 in Public Law No. 92-500.

¹⁰² *See gen.* *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) and *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993).

¹⁰³ *Lucas*, 112 S.Ct. 2893.

¹⁰⁴ In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court ruled that a New York law that forced landlords to allow cable TV companies to place equipment in their buildings, thus giving up control over discrete pieces of their property, was a "physical occupation" and constituted a Fifth Amendment taking.

¹⁰⁵ *Lucas*, 112 S. Ct. at 2893.

regulations that deny all "economically beneficial or productive use of land."¹⁰⁶ If a property owner can establish such a categorical taking, no balancing test is required and the government must pay compensation. In the wetlands area, the plaintiff must establish that the permit denial or modification demanded by the Corps deprived it of economic viability. As discussed below, the modern jurisprudence has interpreted this requirement so as to place a significant burden of proof upon plaintiff to establish such a loss.

3. The *Penn Central* Balancing Analysis

If the plaintiff proves that he or she possessed compensable property but no categorical taking can be established, then the court must resort to an analysis of the specific facts of the case.¹⁰⁷ Justice Holmes stated in *Pennsylvania Coal v. Mahon*¹⁰⁸ that government regulations could amount to a Fifth Amendment taking. However, he did not devise a rule of general applicability to distinguish the difference between allowable regulation and unallowable regulation. He stated that each case must be examined on an *ad hoc* basis and that, after that examination, "if the regulation goes too far it will be recognized as a taking."¹⁰⁹ The obvious question that arose from Justice Holmes' opinion was "when does the regulation go too far?"

The Court provided an analytical framework for its *ad hoc* definition of an improper taking in *Penn Central Transportation Co. v. New York City*.¹¹⁰ In *Penn Central*, the plaintiffs alleged that New York City's landmark preservation law constituted a Fifth Amendment taking of their property after the Landmarks Preservation Commission denied them permission to build a multistory office building on top of Grand Central Terminal. In the process of holding that no taking

¹⁰⁶ *Id.*

¹⁰⁷ *Tabb Lakes, Inc., v. United States*, 26 Cl. Ct. 1334, 1351 (1992) ("In the absence of a categorical take, the Court reaffirmed the necessity for a traditional factual inquiry...").

¹⁰⁸ 260 U.S. at n. 45.

¹⁰⁹ *Id.* at 415.

¹¹⁰ 438 U.S. 104 (1978).

occurred the Court developed a three part test in order to determine when a regulation takes compensable property by going "too far."¹¹¹ The significant factors include (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations and (3) the character of the governmental regulation.¹¹² The *Penn Central* analysis can be viewed as the compilation of the factors the Supreme Court used previously in various cases utilizing the *ad hoc* methodology discussed above.

In analyzing cases of alleged takings caused by denial of Section 404 permits using the *Penn Central* analysis, the courts have established that the wetlands program is a legitimate government regulation.¹¹³ A plaintiff asserting an alleged taking must show that the permit action interfered with her reasonable expectations and prove it denied her economically viable use of the land.¹¹⁴

4. Economic Viability

(a) Parcel As A Whole Analysis

In order to analyze a regulatory taking it is necessary to define economic viability.¹¹⁵ The first step in doing so under the modern takings jurisprudence is to determine the scope of the property to be analyzed for economic impacts - the parcel as a whole analysis. In *Penn Central*, the Court stated that the proper analysis focuses on the effect of the regulation on the "parcel as a whole," not on a "discrete segment."¹¹⁶ The Court also stated that its prior rulings "uniformly reject[ed] the proposition that diminution in property value, standing alone, can establish a

¹¹¹ *Id.* at 124.

¹¹² *Id.*

¹¹³ *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (1981), in which the court took it as a given that the regulatory program based on Section 404 "substantially advance[s] legitimate and important federal interests."

¹¹⁴ *Id.* at 1191.

¹¹⁵ Both the categorical take and the balancing analysis include the economic effect of the regulation. If a regulation denies a landowner all economically beneficial or productive use of the land, then it has categorically taken the property under *Lucas*. The first factor in the *Penn Central* analysis is to determine the economic impact of the regulation.

¹¹⁶ 438 U.S. at 130.

"taking."¹¹⁷ In other words, compensation is not due if just the wetlands portion of a parcel is rendered economically worthless if the remainder to the property may earn an income or profit for the owner. The Court applied its rule and analyzed the economic effect of the regulation on the plaintiff's entire property and found that no taking occurred.¹¹⁸ Part of the Court's analysis concerned the fact that Penn Central could still earn a "reasonable return" from the property as a whole and it was granted valuable "transferable development rights" that could also earn it an economic return.¹¹⁹

In *Ciampitti v. United States*,¹²⁰ the landowner alleged that the Corps took his property by denying him a Section 404 permit to fill wetlands on his property.¹²¹ The court examined the economic effect of the permit denial by first analyzing Ciampitti's claim of total economic loss by examining the "extent to which the whole parcel could be developed."¹²² "In the case of a landowner who owns both wetlands and adjacent uplands, it would clearly be unrealistic to focus exclusively on the wetlands, and ignore whatever rights might remain in the uplands."¹²³ Ciampitti claimed that only those parcels for which a permit was sought constitute the parcel as a whole, but the court looked at Ciampitti's behavior to see how he treated the lots in question.¹²⁴ Ciampitti purchased the wetlands only because they were part of the nonnegotiable deal arranged by the seller and he had the option to buy "nothing or everything."¹²⁵ The court concluded that Ciampitti viewed the wetlands and the remainder of the

¹¹⁷ *Id.* at 131.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 129.

¹²⁰ *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991).

¹²¹ *Id.* at 316. The court supported its holding that no taking occurred by defining the property interest and analyzing the economic impact. The court found that at the time Ciampitti purchased the property in question, he was "fully informed of the likelihood that the Corps would assert jurisdiction over" the property he subsequently purchased and that he therefore knew it was "encumbered by a likelihood it could not be developed." *Id.* at 321. The court found no compensable property interest. *Id.*

¹²² *Id.* at 318.

¹²³ *Id.* at 318.

¹²⁴ *Id.* at 319.

¹²⁵ *Id.*

parcel as one single parcel.¹²⁶ Viewing the property in this way, the court found that it was appraised at the time of the permit denial as having a value of \$14 million, thus precluding a finding of a taking.¹²⁷

The court in *Tabb Lakes, Inc. v. United States*,¹²⁸ analyzed the parcel as a whole in terms of two alternative scenarios, one of which included all the lots in the property owner's proposed development and one which included only the lots that contained the wetlands for which permits were denied.¹²⁹ The court did not decide which scenario was more appropriate.¹³⁰

Under the modern jurisprudence, the owner of wetland property may have to prove a loss of economic viability on the entire property. This being true, it is axiomatic that the smaller the proportion of the wetland area to the size of the property as a whole, the greater the burden becomes to prove a loss of economic viability. The Supreme Court has not given any merit to the arguments of property rights advocates who claim that if the government deprives a citizen of economic viability on any portion of their property, a taking has occurred. The Supreme Court's view had consistently been that government may adversely affect a portion of a citizen's "bundle" of property rights for justifiable reasons to make society work.

(b) Economic Impact Analysis

The next step in defining economic viability, according to the court in *Tabb Lakes*, is to determine the economic impact of the regulation on the parcel as a whole. That court did so "...in the context of returns from sales and development activity of the property as a whole prior to the denial of a permit."¹³¹ The plaintiff in that case was denied a Section 404 permit to develop wetlands portions of large tracts of

¹²⁶ *Id.*

¹²⁷ *Id.* at 320.

¹²⁸ 26 Cl. Ct. 1334.

¹²⁹ *Id.* at 1346.

¹³⁰ *Id.* The court did not decide this question because it held that the property owner made sufficient profit under either scenario to establish that it maintained economic viability.

¹³¹ *Id.* at 1346.

land.¹³² The court analyzed the financial history of the development and concluded that plaintiff could not prove loss of economic viability because "plaintiff had substantial economically beneficial use of the property [as] total receipts...were \$1,898,350.00."¹³³

Other courts have analyzed economic viability in wetlands cases by focusing on the amount of the investment in the property and comparing that to the value of the property after its regulation. The court in *Florida Rock*,¹³⁴ determined the economic impact on an undeveloped property by comparing the landowner's "investment or basis with the market value subject to the regulation."¹³⁵ The court in *Deltona Corp.*¹³⁶ used a similar approach when it considered an alleged taking caused by denial of a 404 permit needed by a landowner to complete development of a project.¹³⁷ Using the *Penn Central* balancing test, the court determined that the Corps' then-recently announced wetlands policy advanced legitimate government interests and "substantially frustrated" the plaintiff's reasonable investment backed expectations.¹³⁸ The court held nevertheless that no taking occurred because the impact of the permit denial did not "prevent[] Deltona from deriving many other economically viable uses from it parcel- however delineated. Indeed, the residual economic value of the land is enormous, both proportionately and absolutely."¹³⁹

The *Deltona Corp.* court examined the "cost basis" of the plaintiff's investment in deciding how much loss was acceptable or, conversely, how much profit was sufficient. It found Deltona purchased the lots containing the wetlands for

¹³² *Id.* at 1337.

¹³³ *Id.* at 1352.

¹³⁴ 791 F.2d 893.

¹³⁵ 791 F.2d 901. In other words, the court compared the price the owner paid for the property with the price for which he could sell it after wetlands regulations restricted its development.

¹³⁶ 657 F.2d. 1184.

¹³⁷ *Id.* at 1185-86.

¹³⁸ *Id.* at 1191-92.

¹³⁹ *Id.* at 1192.

which permits were denied for \$1.2 million.¹⁴⁰ Even after the impact of the regulation, the value of the uplands portion of the lots in question was approximately \$2.5 million.¹⁴¹ The court stated Deltona retained economically viable uses of its property because its "remaining land uses [were] plentiful and its residual economic position very great."¹⁴² After examining the potential profit that Deltona could make even after the permit was denied, the court found the case to be one of "mere diminution" of value, for which no compensation is due.¹⁴³ The use of "cost basis" analysis will necessarily deny compensation for a permit denial to a wetlands owner if he or she can profit on the remainder of the property.

The economic viability test requires that the courts examine the financial evidence proffered by the plaintiff and the government, including the cost of the parcel, the proposed use and the economic value of the parcel after the regulation. Though it looks to objective factors, the court ultimately must make a subjective decision as to how much potential profit after the implementation of the regulation is enough to make the taking non-compensable.

In some cases, the courts might consider the remaining uses of the property to be economically viable even if development is prohibited. This position was expressed by Justice Blackmun in his dissent in *Lucas*, in which he stated that even after Lucas was denied the right to build homes on his property, he was not denied economic viability because he could still "picnic, swim, camp in a tent or live in a movable trailer" on his \$1 million property.¹⁴⁴ The concept that the state could prohibit an owner from developing and limit him to merely picnicking on his own property, without compensating him, was rejected by the majority. However, the Court did not establish a "picnics do not equal economic viability" rule, and it

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 1193.

¹⁴⁴ 112 S. Ct. at 2908.

remains possible for judges in other cases to hold that non-developmental uses for wetlands are economically viable.

In determining economic viability, though the courts look to objective factors, there yet remains an element of subjectivity which may work to the detriment of the wetlands owner and creates unpredictability for the landowner pondering the proper response to a Section 404 permit denial. The modern jurisprudence does not see merit in arguments by property rights advocates that any government action that devalues a portion of a parcel of real estate is, in and of itself, compensable under the Fifth Amendment.

5. Partial Takings

The Federal Circuit Court stated in *Loveladies Harbor, Inc. v. United States*,¹⁴⁵ that there remains an open issue before the courts as to "whether loss of a substantial part, but not all, of the economic use may constitute a compensable partial taking. The earlier cases sometimes use language that suggests that was so, and sometimes did not."¹⁴⁶ The court emphasized that the *Lucas* decision "itself contains a discussion that acknowledges both viewpoints."¹⁴⁷ The court limited the application of the Supreme Court's "rejection" of the idea that "mere diminution in value" alone could establish a taking¹⁴⁸ by declaring that it only applies to "certain types of land use controls, those in which the property owner has in a sense been compensated by the public program."¹⁴⁹

It remains to be seen whether other courts will adopt this approach and how the Supreme Court will rule on the Federal Circuit Court's "re-interpretation" of its parcel as a whole language. If the partial takings doctrine is accepted, it is tantamount

¹⁴⁵ *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

¹⁴⁶ *Id.* at 1179.

¹⁴⁷ *Id.* at 1180, *citing Lucas*, 112 S. Ct. at 2895, n. 8.

¹⁴⁸ *Penn Central*, 438 U.S. at 131.

¹⁴⁹ *Loveladies*, 28 F.3d at 1180.

to acceptance of the “affected portion” doctrine which property rights advocates have sought. The affected portion doctrine states that economic value will be determined by analyzing the effects of wetlands regulation only on the wetlands itself, and not by considering the economic effect on the parcel as a whole. By holding that compensation could be due for economic loss to just the wetlands property, the partial takings doctrine could possibly force the government to compensate for lost value of every wetlands subject to a Section 404 permit restriction or denial. The possible economic burden could effectively halt wetlands regulation.

D. Analysis

1. No Useful Definition of Private Property Under Federal Law

In *Ruckelshaus*, Justice Blackmun stated the Court's decision that property rights are defined under state law and other independent sources of law. There is no definition of property in the Constitution. Some property rights advocates assert an unlimited right to use their property in any way they wish, conditioned only upon state nuisance statutes. This definition of property has never been part of the American tradition. As pointed out by Justice Scalia in *Lucas*, in the early history of the colonies the government often took property without any compensation.

2. Conflicting Views of Property

The legal vacuum created by the lack of a federal definition of property resulted in various groups of citizens creating their own definitions in order to support their particular interests, freedom to exercise property rights and desire to enforce preservation through land use restrictions. Both sides delve into history and philosophy in order to support their view of what is the true definition of property. Property rights advocates often invoke the spirit of John Locke and argue that citizens only join a society in order to protect their property rights and when a government seeks to restrict or take those property rights, the government may be labeled a

tyranny.¹⁵⁰ James Madison believed that possession of property reflects the ability of a person to earn it and creates one's place in society.¹⁵¹ The position of some property rights advocates is that property is the basis of all other Constitutional rights. Some environmentalists espouse what Professor Joseph Sax calls an "ecological view of property" which is a belief that the land belongs to everyone and a property owner not only lacks complete dominion over the property but has an affirmative duty to preserve the property for society as a whole.¹⁵² This conflict cannot be solved by the modern jurisprudence, as it defines property in terms relative to existing laws and regulations without reaching a deeper meaning. However, any methodology which replaces it might be well advised to adopt the courts' position, as it avoids taking a stand on what is a fundamental issue perhaps best addressed in the realm of philosophers or religious leaders.

3. Requirement for Near-Total Economic Loss

The modern jurisprudence requires a near total loss before compensation is due under the Fifth Amendment. Though a partial takings doctrine is developing in the Federal Circuit, it runs counter to the plain language of several earlier Supreme Court cases and it is questionable whether it will survive review. As a result of this requirement, only a few plaintiffs have recovered compensation for regulation of their property which in some cases prohibited the industrial use in which the property owner was engaged, *i.e.* mining. Though some commentators complain that the current system is unpredictable, the requirement for near-total economic loss actually makes the system very predictable - most property owners will lose their claims for compensation. The modern jurisprudence takes an inherent position that if a landowner has received enough profit from a parcel of land, the owner is entitled to

¹⁵⁰ JOHN LOCKE, TWO TREATISES ON GOVERNMENT § 124 (Laslett 1988).

¹⁵¹ THE FEDERALIST No. 10 (James Madison).

¹⁵² Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1442-43 (1993).

no compensation if a small part is rendered untouchable by developmental restrictions imposed by wetlands protections. This position may become unacceptable to an increasing number of citizens as wetlands protections affect more private property owners in the future.

IV. PROPOSED LEGISLATIVE SOLUTIONS

The modern regulatory takings jurisprudence is not based on a predictable, clear-cut general rule. Instead, it requires a legal inquiry into the state of the law when a landowner obtained title to his or her property and a fact specific analysis of the economic value of the property after some desired development has been restricted or prohibited.¹⁵³ This status quo has produced some frustration on the part of some property owners and their political allies, resulting in "...a major political movement on the part of property rights proponents who believe that present law does not adequately protect them against the intrusions of the regulatory state."¹⁵⁴ The movement is a response to what one commentator called "a judicial property rights revolution" in which the Supreme Court "...legitimized the concept of regulatory takings as a judicial check on land-use and environmental regulation."¹⁵⁵

What is clear from these views is that the extreme viewpoints represented by the most vocal advocates from each side conflict too greatly for any compromise. What we are left with then is a situation in which we cannot rely on a "new" definition of property to solve the conflict. We must devise some methodology which

¹⁵³ See *Lucas, supra* at 2899 and this paper's discussion in Section III.C.

¹⁵⁴ *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253, 254 (1995).

will acknowledge the values of each side of the conflict but create a workable process somewhere between them. We now explore existing methodologies and examine each to determine if one or more might lead to future regulation absent the current intense conflict.

A. The Omnibus Property Rights Act of 1995

1. Background

The 104th Congress responded to the property rights movement by considering various formulations of "compensation legislation," designed to "put justice back in the Just Compensation Clause."¹⁵⁶ One popular idea that surfaced in a number of proposed bills was a "bright line test"¹⁵⁷ that compensated landowners if their property's market value was diminished by a specific, statutorily set amount by certain types of regulation.¹⁵⁸ "This automatic trigger completely eliminates any examination of the facts surrounding a particular claim..."¹⁵⁹ thereby purportedly establishing certainty and predictability into the analysis of takings claims and speeding up the process of administering a takings claim. This paper will examine two of the many bills that were proposed by the 104th Congress.

2. The Methodology of Senate Bill 605

¹⁵⁵ *The End of Environmental Law? Libertarian Property, Natural Law and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 171 (1995).

¹⁵⁶ 9 ADMIN. L.J. AM. U. at 272, comments by Mr. Roger Marzulla.

¹⁵⁷ *Id.* at 254, comments by Professor Thomas O. Sargentich..

¹⁵⁸ John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327, 336 (1994).

¹⁵⁹ Michelle K. Walsh, *Achieving the Proper Balance Between the Public and Private Property Interests: Closely Tailored Legislation As a Remedy*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 317 (1995).

The Senate's version of compensation legislation, the Omnibus Property Rights Act of 1995, is pending.¹⁶⁰ In introducing the Bill, Senator Robert Dole remarked that "private property rights are the rights to enjoy the fruits of our labor and our ideas and thus enjoy a special place in the U.S. Constitution."¹⁶¹ He believed, however, that private property rights had lost their special place under the law in our "regulatory state...[that] has provided the means for a sustained assault on private property rights in America."¹⁶² In its Findings, the Bill attacked the courts' process of analyzing regulatory takings, declaring that:

[T]he incremental, fact-specific approach that courts now are required to employ in the absence of adequate statutory language to vindicate property rights under the fifth amendment [sic] of the United States Constitution has been ineffective and costly and there is a need for Congress to *clarify the law and provide an effective remedy*.¹⁶³

One of the purposes of the Bill is to "establish a clear, uniform and efficient judicial process whereby aggrieved property owners can obtain vindication" of their property rights.¹⁶⁴ In order to determine if the Bill's takings analysis is better than the modern takings doctrine, this paper will analyze its (a) definition of compensable property and (b) its determination of what compensation is due for total and partial takings.

¹⁶⁰ § 605, 104th Cong., 1st Sess. (1995); *reprinted in* 53 CONG.Q.WKLY.REP. 1003 (Apr. 8, 1995), as amended by S. REP. 104-239, 104th Cong., 2nd Sess., 1996, which was favorably reported thereon by the Senate Committee on the Judiciary on March 1, 1996, with a recommendation that the bill as amended do pass. The House Bill 925, § 3(a), H.R. 925, 104th Cong., 1st Sess. (1995), provides that if a portion of a person's property is diminished in value by an amount equal to or greater than twenty percent of its value, the person is entitled to compensation from the government. The bill contains some exceptions to its applicability for actions whose primary purpose is to prevent identifiable damages to specific properties or an identifiable hazard to public health or safety. The House bill differs from the Senate version in several respects but those differences will not be addressed here.

¹⁶¹ Cong. Rec. S4492-01, S4497.

¹⁶² *Id.*

¹⁶³ Cong. Rec. § 4492-01, § 4498 (emphasis added).

(a) What is Compensable Property Under Senate Bill 605?

(i) Two Defined Values

The Bill defines "property" in applicable part as "land,"¹⁶⁵ and "any interest in land."¹⁶⁶ It defines "just compensation" as compensation equal to the full extent of a property owner's loss, including the fair market value.¹⁶⁷ "Compensable property" is not defined under the Bill, but one may determine the value of compensable property by the application of one of two compensation provisions in the Bill. The trigger that determines which provision applies is the amount of loss of value in the property.¹⁶⁸ Because the value of compensable property is calculated differently under each provision, the result is two different definitions of "compensable property" under the Bill.¹⁶⁹

(ii) Loss of All or Substantially All Use

If the affected property loses all or substantially all of its economically beneficial or productive use, then the market value calculation must take account of wetlands regulations that limit development and thus the value of the property.¹⁷⁰ This definition of compensable property in the bill is identical to the definition used in modern takings doctrine.¹⁷¹

¹⁶⁴ *Id.* at § 202.

¹⁶⁵ S. REP. 104-239, § 502(5)(A).

¹⁶⁶ *Id.* at § 502(5)(B). Also included in the definition are fee and life estates, inchoate interests in real property, easements, leaseholds, rents, issues and natural resource rights such as timber and coal. It also includes any interest understood to be property based on custom, usage, common law or other law.

¹⁶⁷ S. REP. 104-239, § 203(3)(A). Just compensation also includes compounded interest from the date of the taking.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ S. REP. 104-239, § 204(a)(2)(C).

¹⁷¹ Lucas, *supra* at 2901-02, as discussed in the previous Chapter.

(iii) Partial Loss

The bill departs from the courts' takings doctrine in the second compensation provision. It is triggered by a loss of 33% or more in the fair market value of the property.¹⁷² In this situation, the property value is determined immediately prior to the agency action.¹⁷³ This provision requires the government to compensate the landowner for a hypothetical price that would exist if no wetlands regulation applied.

(iv) Critique of Dual Compensable Property Formulations

By creating two different formulas for determining compensable property, the Bill creates more confusion rather than less, for it fails to provide a reason for creating two definitions of compensable property. There is no logical reason for a landowner who suffers a total economic loss to have his title limited by the effect of wetlands regulations and for a landowner with a lesser loss to suffer no such limitation.¹⁷⁴ Additionally, the value determination in Subsection 204(a)(2)(D) ignores any potential discount in the purchase price due to the effects of wetlands regulation. This creates a situation in which a landowner may receive unjust enrichments by claiming for value in excess of what he could have realistically expected to when he purchased the property with existing regulatory restrictions on its development.

(b) What Compensation is Due for a Total or Partial Taking?

(i) Compensation for a Total Taking

¹⁷² S. REP. 104-239, § 204(a)(2)(D).

¹⁷³ *Id.*

¹⁷⁴ Furthermore, there is no mechanism to force a landowner to choose one provision over the other. A foreseeable result is that only landowners with lesser quality legal counsel would choose to file a claim under subparagraph 204(a)(2)(c).

The Supreme Court has stated that compensation is always due when a landowner suffers a total loss of economic value.¹⁷⁵ Under Subsection 204(a)(2)(C), a landowner suffering a total loss will be entitled to the same compensation as he would be under current judicial holdings, that is, the value of his property including the economic effect of the regulatory restrictions on development.¹⁷⁶ Therefore, this compensation provision neither clarifies nor simplifies the current judicial system - it merely duplicates it.

(ii) Compensation for a Partial Taking

One of the most seemingly illogical aspects of the current judicial takings system occurs when a landowner suffers an economically devastating loss in the value in his property but is denied compensation because his loss is not a “total loss.”¹⁷⁷ Indeed, it is still an open question as to whether a landowner who suffers a partial loss of value is entitled to any compensation at all.¹⁷⁸ The Bill seeks to remedy this situation by defining a partial taking as a loss of 33% or more of fair market value and requiring the government to pay compensation for that loss.¹⁷⁹ This “bright line” test

¹⁷⁵ Lucas, *supra* at 2901-02. In that situation, the landowner is entitled to compensation for the price of the property less the value of any inherent limitations in the title, including those caused by the government regulation which caused the loss of economic value.

¹⁷⁶ S. REP. 104-239, § 204(a)(2)(C).

¹⁷⁷ See *gen. Lucas, supra*, and Justice Rehnquist’s discussion of partial takings doctrine. If a landowner loses 75% to 90% of the value of his property, he would still not qualify under pre-*Lucas* holdings for any compensation whatsoever.

¹⁷⁸ See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994), wherein the court discussed the uncertain state of the partial takings doctrine. There is an inherent tension between what property rights advocates call a partial take and what the government calls a noncompensable mere diminution of property. Until the Supreme Court’s discussion in *Lucas, supra* at 112 S.Ct. 2895, the position of many courts and the government was that less than total losses were noncompensable.

¹⁷⁹ S. REP. 104-239, § 204(a)(2)(D). In Title VI of the Bill, Mr. Hatch remarked that this provision draws the distinction “between a noncompensable mere diminution of value of property and a compensable partial taking.” 141 CONG. REC. 45, 503. As discussed in Chapter III, Section C.5. above, it remains an open issue in the courts as to whether a partial taking is compensable at all. Therefore,

meets the drafters' goals of clarifying the law and making the process more efficient by codifying the partial loss doctrine and establishing a statutorily created floor above which compensation would be due. This provision would give relief to those landowners who suffer a large but less than total economic loss.

(c) Discussion of Compensation Provisions

(i) Why Two Different Values for Compensable Property?

There are two major criticisms of the compensation processes of this Bill. Because the two compensation provisions contain different definitions of compensable property, landowners will face a situation in which their losses can be calculated under two different methodologies resulting in disparate amounts of awards.¹⁸⁰ The Bill gives no explanation for providing more compensation to landowners who merely suffer a 33% or greater loss as compared to those who suffer total economic deprivation and no logical explanation is readily apparent. Indeed, the lack of comment would lead the cynical to conclude that the dual compensation scheme was an unintended oversight. In any event, the result is that those suffering a total economic loss are entitled to less compensation under the Bill than those

the Bill, if passed, would surge ahead of the courts and make the partial takings doctrine a statutory reality. As also discussed in Section C.5., the effect of such a law could be that every diminution in value over 33% would be compensable, possibly making the wetlands program too costly for the government to administer.

¹⁸⁰ As discussed above, those landowners claiming a total economic loss would only be able to recover the market value of their land taking into consideration the limitations on development created by the wetlands regulations. Landowners claiming a partial loss could obtain compensation for the full market value as if their property were not regulated. In addition to lacking a logical basis, this situation could work to the detriment of the property owners the Bill's drafters seek to protect. When facing a claim of a partial taking in court, the government may find its best defense is to argue to the court that the property suffered a total economic loss rather than a partial loss. This would limit the extent of the government's liability to the actual value of the property, rather than an "ideal" market value which did not acknowledge regulatory restrictions on development.

suffering lesser losses. This flaw detracts from the Bill's noteworthy achievement of creating a mechanism to pay landowners for a partial taking of their property.

(ii) Bright-Line Trigger is Simple But Potentially Expensive

The Bill's bright-line trigger process for partial takings claims creates a simple, clear cut threshold that will benefit landowners. However, it could possibly create an enormous liability for the Corps. The Bill requires that compensation be paid out of the administering agency's funds.¹⁸¹ Some commenters have stated that the true purpose of the Bill is to reduce wetlands regulation by the Corps by forcing it to pay the costs of compensation out of its own budget.¹⁸² The Bill does create a nuisance exception in order to limit government liability to uses that are not nuisances.¹⁸³ However, nuisance law varies from state to state and it is not only a poor vehicle for the protection of the human environment but would not serve to greatly limit the Corps' liability for compensation to any great degree.¹⁸⁴ An unacceptable result of this aspect of the Bill would be that the stranglehold put on the Corps' budget could compromise projects necessary to save human lives, such as flood control. Surely the drafters of the Bill never intended such a result and need to rethink the effects of their budgetary maneuvers.

¹⁸¹ S. REP., 104-239, at § 204(f).

¹⁸² See comments by Prof. Sax, 9 ADMIN. L.J. AM. U. 253, 265, *supra*, in which he states the "...point is that there will be little litigation and little cost because there will be fewer regulations..."

¹⁸³ S. REP., 104-239, at § 204(d)(1). Compensation is not required if the owner's use or proposed use of the property is a "nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the State in which the property is situated." *Id.* The burden of proof is put on the government to demonstrate that the proposed use is a nuisance. *Id.*

¹⁸⁴ See comments by Prof. Sax, 9 ADMIN. L.J. AM. U. 253, 265, *supra*, and cases cited therein, in which he stated that nuisance law is filled with "technical limitations" and gave an example of a State wherein a neighbor contaminating another's drinking water did not commit a nuisance. His point was that the government would have to litigate each time it raised the defense of nuisance and that many of

(d) Affected Parcel

Today's takings law focuses its analysis of economic impact on the parcel as a whole.¹⁸⁵ The proposed compensation laws would allow compensation for loss of all or substantially all economic viability in "the property or that part of the property affected by the action."¹⁸⁶ Likewise, compensation is due for a diminution of 33 percent in market value for "the property or the affected portion of the property which is the subject of the action."¹⁸⁷ The terms "portion of property" and "affected portion" are not further defined.¹⁸⁸ The Act seemingly does not require a parcel as a whole analysis, but instead allows compensation, if appropriate, for economic impact solely on the wetlands.

The Act's focus on the affected parcel would lead to results similar that in *Loveladies Harbor*.¹⁸⁹ In that case, the court analyzed the economic impact upon a 12.5 acre wetlands parcel for which a 404 permit was denied. The court rejected the government's position that the economic effect on the entire 250 acres (of which the wetland was a part) should be considered the parcel as a whole.¹⁹⁰ The court only considered the portion of the property for which a permit was required.¹⁹¹ However, the court declined to adopt a general rule and instead considered several fact specific factors before deciding to assess the impact only on the affected portion, *i.e.*, the

the environmentally detrimental uses it attempted to stop may not be nuisances under some States' laws.

¹⁸⁵ See ¶ III.B.4.i.

¹⁸⁶ S. REP., 104-239, at § 204(a)(2)(C).

¹⁸⁷ *Id.* at § 204(a)(2)(D).

¹⁸⁸ *Id.* at § 502, Definitions.

¹⁸⁹ *Supra* at 28 F.3d 1171.

¹⁹⁰ *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 155 (1990).

¹⁹¹ *Id.*

wetland.¹⁹² The factors were the fact that the property was not regulated until after 80 percent of it had been developed, that Loveladies promised a preservation area to the State in return for permission to develop and that permission had been granted by the State to fill the wetland.¹⁹³ After the court decided to analyze the economic impact on the wetland only, it found that the wetland parcel at issue was worth \$2,658,000.00. After the permit denial, the court found the fair market value was only \$12,500.00. This resulted in lost market value of \$2,645,500 which the court held was sufficient to constitute a taking.¹⁹⁴

Senate Bill 605 establishes the general rule that the court did not adopt in *Loveladies Harbor* by applying the economic impact analysis to only the wetlands portion of property in a parcel. This is a tremendous advantage to property owners. For example, note the difference in the result between the *Tabb Lakes* and *Loveladies Harbor* cases. In the former, the landowner was denied compensation although it was forced to leave its wetland undeveloped. In the latter, the landowner received an award for over \$2.5 million. If the Act's definition of the affected parcel is subsequently construed to be defined as the wetland itself, then the government could find itself purchasing wetlands from developers if it prohibits their development. In addition, if the property owner planned a development project the fair market value of which is potentially large, the government could find itself purchasing undeveloped wetlands property for the price of fully and fruitfully developed land. It is doubtful any wetlands could fully be preserved except when purchased by the Government.

¹⁹² 28 F.3d at 1181.

¹⁹³ *Id.*

Further, the Government would be at the mercy of any wetlands owner to either grant a permit or buy the property.

This provision protects the wetlands owner from any loss of his expectations of business profits. Under the modern law, if the landowner experiences a severe drop in fair market value to the wetlands portion of his property, the loss can be offset by the profit earned on the remainder of the property unless the profit is so minuscule that the regulation results in a loss of all or substantially all economic viability.

Under the Bill, the property owner would be entitled to compensation for a less severe loss in market value, if it exceeds the threshold amount of 33 percent. By focusing on the market value of the wetland, the Bill's procedure may enable a landowner to obtain compensation for a wetland upon which development is prohibited even if the owner earns a handsome profit on the remaining land.¹⁹⁵

The government should still be protected to some extent by the fair market value analysis. The burden is on the landowner to establish a drop in market value.¹⁹⁶ The government's appraisers will have the opportunity to attack any fraudulent claims of proposed development for the wetlands. However, because "compensable property" in this provision does not include the restrictions inherent in the title, the government would be forced to calculate market value as if no regulation limited development of the wetlands parcel at issue.¹⁹⁷

3. Discussion of the Senate Bill 605

¹⁹⁴ *Loveladies Harbor*, 21 Cl. Ct. at 159.

¹⁹⁵ *See gen. Deltona and Tabb Lakes*, both *supra*.

¹⁹⁶ S. REP. 104-239, at § 204(c)(2).

¹⁹⁷ S. REP. 104-239, at § 204(a)(2)(D). This issue is discussed fully above.

The Omnibus Property Rights Act may not result in “quicker and cleaner” resolutions of takings claims for quite some time. Many of its key terms lack clear definitions and the results of the claims process under the Act depends on those definition. Litigation by both sides of the debate can be anticipated as each seeks to gain favorable judicial interpretations of the unclearly defined terms. Therefore, the sought after predictability may not be realized for some time.

Section 204(a)(2)(C)¹⁹⁸ of the Bill analyzes claims for loss of all or substantially all economic viability similarly to courts using the current law. Therefore, current issues that engender intense litigation, such as what limitations are inherent in the title and whether the loss suffered equals a total loss of economic viability, will remain under this provision. However, the Bill adopts a specific definition of “affected parcel” and therefore should eliminate litigation over that issue and simplify the calculation of the loss of market value.

Section 204(a)(2)(D)¹⁹⁹ of the Bill, the bright-line trigger for compensation of partial takings, seems to hold the promise of some major differences with the modern jurisprudence. The Bill calculates fair market value immediately before the permit denial, giving claimants the opportunity to obtain compensation for loss of market value caused by denial of a Section 404 permit and the lost opportunity to develop the property. As this system provides compensation for reasonable business expectations and plans, it is actually more fair than the modern jurisprudence, which purportedly recognizes such value but ultimately rarely provides compensation for its loss. This separate claims system should add a more predictable and satisfying venue for

¹⁹⁸ S. REP. 104-239, at § 204(a)(2)(C).

¹⁹⁹ S. REP. 104-239, at § 204(a)(2)(D).

property owners stymied by denial of a 404 permit. At the same time, it may drastically reduce wetlands regulation if the government cannot afford to pay for the claims resulting from regulation.

B. The Clean Water Amendments of 1995

1. Introduction

On May 3, 1995, the House of Representatives' Committee on Transportation and Infrastructure issued its Report on House Bill 961, entitled the Clean Water Amendments of 1995.²⁰⁰ Among the many changes to the CWA made by this bill, it replaces the existing Section 404²⁰¹ with Title VIII, entitled the "Comprehensive Wetlands Conservation and Management Act of 1995."²⁰² Title VIII is described as a "new, comprehensive program to regulate discharges of dredged or fill material into waters of the United States (including wetlands) and drainage, channelization and excavation activities in wetlands."²⁰³

In its "Findings and Statement of Purpose," House Bill 961 again restates the importance of wetlands by finding that wetlands "play an integral role in maintaining the quality of life through material contribution to our national economy, food supply, water supply and quality, flood control, and fish, wildlife, and plant resources."²⁰⁴ Furthermore, it finds that wetlands "contribute to the health, safety, recreation and economic well-being of citizens throughout the nation."²⁰⁵

The bill also acknowledges the current situation by finding that 75 percent of the nation's remaining wetlands in the continental United States are located on privately held land and that most of the population of the country lives adjacent to or

²⁰⁰ H.R. REP. NO. 112, 104th Cong., 1st Session (1995).

²⁰¹ 33 U.S.C. 1341 *et seq.*

²⁰² H.R. 961, at § 803, Wetlands Conservation and Management, would strike the existing Section 404 and insert the Bill's replacement Section 404.

²⁰³ *Id.*

²⁰⁴ H.R. 961, at § 802(a)(1).

²⁰⁵ *Id.*

nearby wetlands areas.²⁰⁶ The drafters state that due to these two factors, an "effective wetlands conservation program" must balance conservation and enhancement of "important wetlands values and functions while observing private property rights."²⁰⁷ Furthermore, wetlands conservation efforts must recognize the necessity of essential public infrastructure²⁰⁸ and provide the "opportunity for sustained economic growth."²⁰⁹ One of the purposes of the bill is to ensure that wetlands conservation actions do not "limit the use of privately owned property so as to diminish its value."²¹⁰

This language and the concerns it addresses are completely new to the Clean Water Act. House Bill 961 is directed specifically towards wetlands areas, where prior Section 404 language was not so specific. In fact, the 1972 amendments that established the wetlands program did not even mention the word "wetlands." Additionally, in the statement of goals and policy in the 1972 amendments, no mention was made of a need to balance cleanup and prevention efforts under the Act with private property rights, essential infrastructure or economic growth.²¹¹ In the current Section 404, dredging and filling is prohibited without a permit but no criteria are stated upon which the Corps may grant a permit.²¹² Criteria are to be chosen by the Environmental Protection Agency and the Corps.

House Bill 961 creates an entirely new analytical framework, calling for preservation of wetlands to be balanced with social and economic factors. Many of the procedures, definition of terms and other provisions in House Bill 961 alter the

²⁰⁶ § 802(a)(5), H.R. 961 65.

²⁰⁷ *Id.*

²⁰⁸ *Id.* Examples of "essential public infrastructure" given are highways, ports, airports, pipelines, sewer systems, and public water supply systems.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ 33 U.S.C. 1251(a)(1) - (7).

²¹² 33 U.S.C. 1344. There were exceptions to the permit requirements, to be sure, contained largely in § 404(f) (33 U.S.C. 1344 (f)). However, the exceptions applied to specifically protected industries (such as agriculture, silviculture, ranching and mining) and necessary infrastructure (such as roads, other transportation structures and dams).

existing laws and regulations so that current restrictions upon development of wetlands will be lessened under its regime. Reduced frequency and intrusiveness of wetlands regulation should concomitantly reduce the number of claims of takings. It is therefore necessary to look at more than just the takings provisions of the bill in order to understand how it addresses the takings problem.

2. Classifying Wetlands

An "essential element of the reforms" of House Bill 961, according to its drafters, is a classification of wetlands "according to the relative functions they perform."²¹³ The Report's Section-By-Section Analysis states that existing law applies restrictions on wetlands development equally, regardless of the relative value or lack thereof of a particular wetlands.²¹⁴ The drafters give an example of an isolated, degraded wetland in the middle of a built-up industrial area that is treated as the equivalent of a pristine wooded swamp under current regulatory practices.²¹⁵ The bill "reflects the reality" that "all wetlands are not the same."²¹⁶ Proposed section 404(c)²¹⁷ creates a three tiered wetlands classification system. The most valuable wetlands are classified as Type A and are granted the greatest degree of protection. Less valuable wetlands are classified as Type B and receive lesser protection. Type C wetlands are not protected by the federal system at all, though the states may grant such protections as they deem appropriate. The classification system acts to screen out wetlands that do not qualify under the system for protection. This decreases the number of wetlands currently protected by wetlands regulations.

(a) Type A Wetlands

(i) Definition

²¹³ H.R. 961 171.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ § 803 of H.R. 961 further amends the CWA by striking the existing § 404 and substituting a wholly new § 404. The Discussion section of H.R. 961 refers to its sections as the "new section 404(x)." However, this paper will refer to the provisions of the Bill as "proposed section 404 (x).

Type A wetlands are those which are of "critical significance" to the long-term conservation of the aquatic environment of which such wetlands are a part, if they meet four prerequisites:²¹⁸

(1) the wetlands must serve critical wetlands functions, including providing critical habitat for a concentration of avian, aquatic or other wildlife which is wetland dependent;

(2) it must consist or be a portion of a wetland which is at least 10 contiguous acres and have an inlet or outlet for relief of water flow, except that this requirement does not apply to prairie potholes, playa lakes or vernal pools that can be otherwise classified as Type A wetlands;

(3) the watershed or aquatic environment in which the wetland is contained must have a scarcity of the functions served by the wetlands such that development would seriously jeopardize the function; and

(4) there is unlikely to be an overriding public interest in using the wetland for anything other than conserving it.²¹⁹

The bill limits the amount of Type A wetlands by proclaiming that no more than 20 percent of a county, parish or borough can be classified as Type A wetlands. Federal and State Type A property containing wetlands lying in a county, borough or parish, including those contained in lands in the National Wildlife Refuge System, the National Park System and lands in conservation easements, are included in the calculation of the 20 percent maximum.²²⁰

(ii) Regulation of Type A Wetlands

The Secretary may grant a permit to develop a Type A wetlands after following a "sequential analysis" that seeks, to the maximum extent practicable, to "(i) avoid adverse impact on the wetland; (ii) minimize such adverse impact on wetlands functions that cannot be avoided; and (iii) compensate for any loss of

²¹⁸ H.R. 961 at § 404(c).

²¹⁹ *Id.* at proposed § 404(c)(3)(A)(i) - (iv).

²²⁰ *Id.* at proposed § 404(g)(2).

wetlands functions that cannot be avoided or minimized.²²¹ The permit may require mitigation appropriate to prevent the unacceptable loss or degradation of the Type A wetlands.²²² The bill states that the Secretary must accept as sufficient mitigation any reclamation carried out by mining companies in accordance with a State-approved reclamation plan or permit that requires revegetation and recontouring.²²³

(iii) Discussion

Type A wetlands are given the greatest amount of protection under House Bill 961, but the extent of that protection is inherently limited by the 20% cap on the wetlands that may be classified as Type A within a geographic region. Areas with vast wetlands resources, such as exist in Louisiana and Alaska, could find many acres unprotected by the Type A provisions. The number of acres of wetlands that may classify as Type A is also limited by the strict criteria used. For example, the wetlands must support a concentration of wildlife. This term is undefined and possibly could leave unprotected habitat critical to feeding or breeding of a species that does not otherwise live in the wetlands. Many prairie potholes only support wildlife for a few months out of the year but are critical to the survival of the animals that utilize them. It is unclear if this situation meets the definition of a "concentration."

Perhaps the most curious criteria is the requirement that the wetlands function be in scarce supply in the area containing the wetlands. This criteria provides that until a wetlands function has been destroyed or degraded in a sufficient amount to become scarce, it cannot be granted Type A protections, the highest protections of the bill. Rather, these abundant high-value wetlands resources will be protected by the much less stringent Type B or Type C guidelines. This is a significant reduction of the protections existing under the current regulatory regime. Whereas now all

²²¹ *Id.* at proposed § 404(e)(2)(A)(i) - (iii).

²²² *Id.* at proposed § 404(e)(2)(B).

²²³ *Id.*

wetlands, including high-value wetlands, are protected by the full force of current development restrictions, House Bill 961 actually prevents stringent protection of the nation's highest value wetlands until enough have been destroyed in a given area to make them scarce.

Additionally, no wetlands may be granted Type A protections if there is an overriding public interest in using the wetlands for any purpose other than for conservation. This allows public interest to veto a Type A classification by the Secretary, no matter how valuable the wetlands might be. This "public interest" doctrine is in direct conflict with the current Section 404, which prohibits all discharge of all dredged and fill material in wetlands without a permit. Public interest is not relevant to determining whether a wetlands qualifies for protection under the current Section 404.²²⁴ House Bill 961 incorporates public interest in the initial step of determining whether a parcel is a wetlands and if so, whether it is of "high value." As stated in the Dissenting Views of the Bill's Report," a wetland is of critical significance if it is of critical significance. It is not of less significance because there may one day be a public interest in destroying the wetland."²²⁵ As also stated by the Dissenters, the bill intertwines policy into a decision-making process that should be based on scientific facts and data.²²⁶

House Bill 961 therefore provides that a high quality wetland of "critical significance" may not receive the most stringent protection if either there is a public interest in developing it or if it has not yet been significantly destroyed. Additionally, there is no requirement that mitigation be accomplished, rather, it is within the discretion of the Secretary.²²⁷ High value wetlands may be destroyed under a Type A permit and not replaced on-site or off-site nor might any new wetlands be created to

²²⁴ The current law allows for public interest to be considered when determining whether to grant a permit or to condition it upon minimization or mitigation requirements.

²²⁵ H.R. 961 proposed § 415.

²²⁶ *Id.*

²²⁷ H.R. 961 at proposed § 404(e)(2)(B).

replace the wetlands functions that are defined as *critically important*. The lack of mandatory mitigation in the bill is internally inconsistent with its finding that there is a need for effective programs to limit the loss of ecologically significant wetlands.²²⁸

In summary, the Type A provisions reduce the protections for high value wetlands afforded under current regulations. Under its guidance, the Corps must give its highest degree of protection to a drastically reduced subset of wetlands. As a result, there may be less permit restrictions or denials under House Bill 961. This in turn could reduce the number of claims of unconstitutional takings of wetlands. This result, were it to occur, would fulfill one of the bill's purposes, that of observing private property rights.²²⁹

(b) Type B Wetlands

(i) Definition

Type B wetlands are those that provide habitat for a significant population of wildlife that is dependent on wetlands for survival.²³⁰ Wetlands that significantly enhance or protect water quality or significant natural flood control can also be Type B. The drafters envision that Type B will be the most common form of wetlands.

(ii) Regulation of Type B Wetlands

The Secretary must balance the reasonably foreseeable benefits and detriments resulting from the issuance of the permit and if it is in the public interest, he may issue a permit.²³¹ The Secretary may condition permission upon terms he feels are necessary to prevent a significant loss of wetlands functions.²³² The bill declares that the Secretary must consider the following seven factors in the decision on whether to issue the permit and/or include restrictive terms:

²²⁸ *Id.* at § 802(a)(3).

²²⁹ H.R. 961 at § 802(a)(5).

²³⁰ *Id.* at proposed § 404(c)(3)(B).

²³¹ *Id.* at proposed § 404(e)(3)(A).

²³² *Id.*

- (1) the quality and quantity of significant wetlands functions served by the parcel;²³³
- (2) the opportunities to reduce impacts through cost effective design to minimize use of wetlands parcels;²³⁴
- (3) the costs of mitigation requirements and the social, recreational and economic benefits associated with the proposed, including local, regional or national needs for improved or expanded infrastructure, minerals, energy, food production or recreation;²³⁵
- (4) the ability of the permittee to mitigate wetlands loss or degradation as measured by wetlands functions;²³⁶
- (5) the environmental benefit, measured by wetlands functions, that may occur through mitigation efforts, including restoring, preserving, enhancing, or creating wetlands values and functions;²³⁷
- (6) the marginal impact of the proposed activity on the watershed of which such wetlands are a part;²³⁸ and
- (7) whether the impact on the wetlands is temporary or permanent.²³⁹

The bill creates a rebuttable presumption that the applicant's description of the purpose of the proposed activity shall bind the Secretary in his decision making process.²⁴⁰ The statement of a public agency regarding the purpose of a project is binding upon the Secretary, but he may impose mitigation requirements including redesign of the project.²⁴¹

(iii) Mitigation Requirements

The Secretary shall require mitigation of permanent and non-incidental impacts of projects on Type B wetlands.²⁴² The bill requires that the Secretary consider in each individual application the character of the impact on wetlands

²³³ *Id.* at proposed § 404(e)(3)(A)(i).

²³⁴ *Id.* at proposed § 404(e)(3)(A)(ii).

²³⁵ *Id.* at proposed § 404(e)(3)(A)(iii).

²³⁶ *Id.* at proposed § 404(e)(3)(A)(iv).

²³⁷ *Id.* at proposed § 404(e)(3)(A)(v).

²³⁸ *Id.* at proposed § 404(e)(3)(A)(vi).

²³⁹ *Id.* at proposed § 404(e)(3)(A)(vii).

²⁴⁰ *Id.* at proposed § 404(e)(3)(B).

²⁴¹ *Id.*

²⁴² *Id.* at proposed § 404(e)(3)(C).

functions and the cost effectiveness of the mitigation considered.²⁴³ The Secretary is required to minimize mitigation costs for each applicant.²⁴⁴ The Secretary is also directed to issue rules governing mitigation that in part allow for minimization of impacts through project redesign, preservation or donation of Type A or B wetlands as mitigation, enhancement, restoration and creation of wetlands, contributions to mitigation banks, off-site compensation and other types of mitigation.²⁴⁵

House Bill 961 also specifies six instances in which the Secretary may determine not to require compensatory mitigation.²⁴⁶ The exemptions may apply when: (1) the adverse impacts of a permitted activity are limited; (2) wetlands functions may be retained without mitigation; (3) there is no practicable and reasonable means of mitigation; (4) wetlands functions similar to those in issue are abundant in the area containing the affected wetland and will serve the functions lost or degraded as a result of the permitted activity, taking into account the impacts of the proposed activity in combination with cumulative impacts of other activity; (5) the temporary effects may be sufficiently minimized making compensation unnecessary; or (6) a waiver of mitigation requirements is necessary to prevent special hardship.

The exemptions nearly swallow the mitigation requirements whole. Unlike the current regulations which presume that mitigation will be accomplished, House Bill 961 gives the Secretary enough discretion to enable him to avoid mitigation in almost any circumstance he might choose. Mitigation would not be required in instances where the impacted wetlands values are not scarce. In other words, adverse impacts are allowed with no mitigation until the situation becomes critical in the watershed. At that point, the impacts are allowed to continue but mitigation is required. By definition, the Bill gives the Secretary discretion to allow wetlands

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at proposed § 404(c)(3)(D).

²⁴⁶ H.R. 961 at proposed § 404(e)(3)(E)(i) - (vi).

functions to deteriorate to dangerously low levels before he requires mitigation action. By that time, the wetlands functions in the watershed may be so severely impacted upon by that time that mitigation of future projects will make little improvement. Another exemption allows the Secretary to condition the requirement for mitigation upon the complexity in achieving it and upon its practicability. Under these provisions of the House Bill, the severity of the impacts becomes a secondary factor behind the importance of the technical and economic ability of the permittee to implement a mitigation project. The House Bill shifts the focus from what is best for the environment to whether compensation is too difficult or expensive for the permittee.

(iv) Mitigation Banks²⁴⁷

House Bill 961 requires the Secretary issue regulations to establish, govern the use of, maintain and oversight mitigation banks within six months of the date of its enactment.²⁴⁸ The bill directs the Secretary to include in his rules a requirement that each mitigation bank must provide for the chemical, physical and biological functions of wetlands or waters of the United States.²⁴⁹ The mitigation bank should, to the extent practicable and environmentally desirable, provide in-kind replacement and be located in or near the affected wetland or waters of the United States.²⁵⁰ The mitigation bank must be ecologically and economically sound over the long term, employ scientifically sound methods to determine debits from adverse impacts and credits for the wetlands functions at the site of the mitigation bank and employ a

²⁴⁷ The mitigation bank provision of House Bill 961 is discussed in more depth in Section VI below.

²⁴⁸ *Id.* at proposed § 404(c)(4)(A).

²⁴⁹ *Id.* at proposed § 404(c)(4)(B)(i).

²⁵⁰ *Id.* at proposed § 404(c)(4)(B)(ii). "In-kind replacement" refers to replacing the same wetlands functions lost due to the permitted activity, as opposed to replacing them with a different function. For example, out of kind mitigation would be replacing an isolated, desert wetland with a coastal zone area.

bonding mechanism for transfer of debits and credits and be subject to public comment and notice.²⁵¹

The bill's mitigation bank system functions by allowing an applicant for a Section 404 permit to either create or enhance an area of wetlands to compensate for the loss of wetlands functions in the area in which the permitted activity will occur. Off-site mitigation banks allow an applicant to pay an amount of money to an owner of a mitigation bank to procure or maintain an area in the off-site mitigation bank.²⁵²

(v) Discussion

The report to House Bill 961 states it is designed so that most wetlands will be classified Type B.²⁵³ The decision-making process as to whether to grant a permit in for a project in a Type B wetlands involves consideration not only of the value of the wetlands functions but general social and economic criteria. The value of the wetlands function is balanced against the applicant's and the public's interests in the development, the local, regional and national interest in the type of development proposed. All this is weighed against the value of preservation. Additionally, in determining whether and how much mitigation measures will be required, the Secretary cannot simply require that the lost wetlands functions be replaced. Under new section 404(e), the Secretary must consider the permittee's ability to pay for the mitigation and the ecological benefits of the mitigation. Mitigation may not be required, and the lost wetlands functions not replaced under this process.

Additionally, the bill exempts many circumstances from the mitigation requirement. The bill requires no mitigation when the Secretary of the Army determines it is impracticable and unreasonable or when he grants a hardship waiver. The bill denies protection to abundant wetlands by exempting them from any mitigation requirement, reasoning that until they are threatened with total destruction

²⁵¹ *Id.* at proposed §404(c)(4)(B)(iii) - (vi).

²⁵² *See Restored Wetlands* at C4.

²⁵³ H.R. 961, Discussion and Section-By-Section Analysis, Title VIII, at 172.

they are not valuable and need not be replaced. Though the House Bill creates a system for mitigation banking, it is possible that so few permittees will be required to accomplish mitigation that the banking system will lack enough participation to make it worthwhile.²⁵⁴

Type B wetlands are acknowledged to be valuable and worth protecting under House Bill 961, but the protection is severely limited by the criteria upon which a decision is made to grant or deny a permit or to condition it upon development restrictions. Under the current system, all wetlands are treated equally. Under House Bill 961, more development of these types of wetlands will be allowed and perhaps less mitigation measures will be required. This should enable property owners to dredge, fill and drain more acres of wetlands than they can now, thereby presumably reducing the number of permit denials and restrictions and in turn takings claims.

(c) Type C Wetlands

(i) Definition

Type C wetlands are wetlands that serve limited wetlands functions. Also included in this category are wetlands that serve marginal wetlands functions but exist in sufficient quantity that there is no need to protect them. Type C also includes wetlands that were previously converted to agricultural land, are fastlands²⁵⁵ or are within developed areas such as industrial, commercial or residential areas and because of their location do not serve significant wetlands functions.²⁵⁶

²⁵⁴ As discussed above, the House Bill gives the Secretary enormous discretion to find that mitigation is inappropriate. Mitigation banking relies on a pool of participants so that permittees being forced to mitigate can "buy" credits from another landowner in order to avoid the requirement to mitigate. The system was created as a result of the regulatory pressure to accomplish complex and expensive mitigation projects. Under the House Bill and its large number of exemptions to the requirement for mitigation, the pressure to mitigate may ease to the point that the need for a mitigation banking system evaporates.

²⁵⁵ "Fastlands" are defined as lands located behind legally constituted manmade structures or natural formations, such as levees constructed and maintained to permit the utilization of such lands for commercial, industrial, or residential purposes consistent with local land use planning requirements. See H.B. 961, § 804, proposed § 502 (6)(Definitions)(28).

²⁵⁶ *Id.* at proposed § 404(c)(3)(C).

(ii) Regulation of Type C Wetlands

Type C wetlands are not regulated by the federal permit system, but states are free to impose their own requirements.²⁵⁷

(iii) Discussion

Type C wetlands would only be protected by state regulation. However, the fact that the federal government does not regulate these type of wetlands could result in pressure on state authorities to refrain from regulation. Under the current regime, as is the case with Type A and B wetlands, Type C wetlands presumptively receive full protection.

(d) Comment on the Classification System

(i) The Proposed System Would Lead to Less Protection

Under the current regime, all wetlands are presumptively entitled to the same protection. However, in practice, a wetland with lesser wetland functions has fewer minimization and mitigation requirements built into the development permit. The current Section 404 process allows for a case-by-case analysis so that each individual permit can require the protections that are necessary for that individual wetland and the watershed it is in. This case-by-case approach takes time and often requires a second effort by an applicant to meet the terms imposed by the Corps.

Under House Bill 961, however, the Secretary would no longer make these individual determinations. The classification as either Type A, B, or C wetlands controls the type of protection a wetlands will receive, thereby eliminating the need or possibility for carefully tailored findings and a site specific program. This system promises speedier processing of permit applications. The Corps will still retain some site-specific decision-making capability when determining into which category a wetlands will fall. The Secretary will also have discretion to require mitigation in

²⁵⁷ *Id.* at proposed § 404(c)(6).

some circumstances. However, because so many wetlands will be denied Type A protection, the end result will be less protection for wetlands.

(ii) The Proposed Definition of a Wetland is Narrow

The proposed definition of a wetland in House Bill 961 would act to initially "screen" wetlands, granting federal protection to some wetlands and denying it to others. The definition states that wetlands that are not underwater for 21 consecutive days during the growing season do not qualify for protection under the proposed new federal program.²⁵⁸ Robert Perciasepe, Assistant Administrator for Water in the Environmental Protection Agency, testified before the Senate regarding Senate Bill 851, which contains the same definition.²⁵⁹ He testified that based on the 21 day rule, "a staggering 60 to 75 percent of wetlands now protected by the Clean Water Act would not be covered by the wetlands definition."²⁶⁰ Excluded from definition as wetlands would be most prairie potholes, vernal pools, playa lakes, and other seasonal, isolated wetlands in addition to riparian wetlands.²⁶¹ He said that this redefinition of wetlands would "abandon protection of the vast majority of the Nation's wetlands."²⁶²

The science behind the Congressional redefinition of wetlands was criticized in a study by the National Academy of Sciences that specifically rejected the contention that a wetlands must be covered by water 21 consecutive days during the growing season.²⁶³ Some Members of the House of Representatives noted that the 21 day requirement is not based on good science but is actually a policy decision.²⁶⁴ The

²⁵⁸ H.R. 961 at proposed § 404(g)(1)(B)(iv).

²⁵⁹ *Wetlands Regulatory Reform Act of 1995: Hearings Before the Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety of the Committee on Environment and Public Works*, 104th Congress, 1st Session 31 (1995) (statement of Robert Perciasepe). He represented the EPA, the Corps and the Dept.s of Agriculture, Interior and Commerce.

²⁶⁰ *Id.* His statement was based on a study conducted by the EPA, Corps, FWS and the Natural Resources Conservation Service in cooperation with the States and included field tests. *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ H.R. 961, Dissenting Views, at 414.

Dissent to the Report commented that "soil scientists [say] that it is not necessary for water to be at the surface for 21 days for hydric soils to form."²⁶⁵ They also cited the opinions of botanists that hydrophytic vegetation can form even when there is no water at the surface for 21 days. The more accurate criteria, they say, is whether anaerobic conditions have been formed and whether plants which cannot live in saturated soil are not present.²⁶⁶ The proposed definition of wetlands in House Bill 961 may exclude more than one half of the Nation's remaining wetlands based on questionable science.

3. The Compensation Provision

(a) Fair Market Value Trigger

House Bill 961 contains its own compensation provision entitled the "Right to Compensation."²⁶⁷ It requires the Federal Government to compensate an owner of wetlands property if, as a result of a permit denial or imposition of restrictions upon development, the fair market value of the portion of property affected by the agency action is diminished by 20 percent or more.²⁶⁸ The government must compensate the owner in the amount of the reduction from the fair market value.²⁶⁹ If the agency action diminishes the fair market value by 50 percent or more, then the owner may require the government to purchase the property for its fair market value.

As a result of accepting payment, the owner of the property is prohibited from engaging in the activity that was the subject of the permit.²⁷⁰ For example, if the government compensates a landowner because his permit to build a dock on his lakeside property was denied, then the owner may not subsequently build the dock. This remains true even if sometime in the future, the regulatory stance changes and

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ H.R. 961, at proposed § 404(d).

²⁶⁸ H.R. 961, at proposed § 404(d)(1).

²⁶⁹ *Id.*

²⁷⁰ H.R. 961, at proposed § 404(d)(2).

docks are permitted on that lake. However, in that circumstance, the owner may voluntarily refund the compensation paid and then apply for a permit to build the dock, which would be granted.²⁷¹

This compensation system reimburses the property owner for revenue that might have been earned if development were not restricted by wetlands regulations. Like the market value provision in Senate Bill 605, landowners would be rewarded if they could establish that their business expectations for the wetlands portion of their property were thwarted by regulatory restrictions. There is no discussion of evaluating pre-existing restrictions on development of the property in determining market value under House Bill 961.²⁷² From the plain language of the Bill, one must conclude that the value of the “compensable property” is quite simply the market value of the wetlands portion of the property. The only issue for the landowner would be to meet the burden of proof to establish the fair market value prior to the regulatory restriction and the 20 percent or more diminution in that fair market value.

(b) Affected Portion

As stated above, the 20 percent trigger applies to losses of fair market value of the affected portion of property.²⁷³ In other words, the portion of the owner's total lot (for which he or she applied for a Section 404 development permit) is the portion of property for which loss of fair market value will be measured.²⁷⁴ This rule would

²⁷¹ *Id.* The Bill does not address whether or not the owner's actions would bind a future owner. However, one might postulate that if the government was forced to “buy” a restriction on a particular use of a parcel, then subsequent buyers of that parcel would receive a discounted price to reflect that restriction and would be bound by it.

²⁷² *Id.* The term “market value” is not defined elsewhere in the Bill. Nor is there any discussion of pre-existing restrictions or limitations inherent in the title in the Bill.

²⁷³ H.R. 961, at proposed § 404(d)(1).

²⁷⁴ *Id.* The provision states that the “Federal Government shall compensate an owner of property whose use of any portion of that property has been limited by an agency action under this section that diminishes the fair market value of that portion by 20 percent or more. The amount of compensation shall equal the diminution in value that resulted from the agency action.”

allow a property owner to develop most of his property at a profit and still receive compensation if denied permission to develop the wetlands portions.²⁷⁵

(c) Agency Action for Which No Compensation is Necessary

The bill does not require compensation for every instance of a permit denial or restriction of a sought-after use of wetlands property. If a specific use of property is regarded as a nuisance under state law or is already prohibited under a local zoning ordinance, then a property owner may not be compensated for a loss in fair market value caused by a denial or restriction of that use by the section 404 permit process.²⁷⁶ There are also exceptions to the compensation requirement.²⁷⁷ Action taken by the Corps in order to prevent an identifiable (1) hazard to public health or safety or (2) damage to specific property other than the applicant's is not compensable.²⁷⁸ Agency actions taken to preserve or utilize the Federal navigational servitude are also not compensable unless the navigational servitude is interpreted by the courts of the United States to apply to wetlands.²⁷⁹

(d) Claims Process

An important feature of the bill also creates an administrative procedure through which compensation may be claimed.²⁸⁰ An owner must claim compensation within 180 days after receiving notice of the agency action.²⁸¹ The agency and the owner may negotiate the price of compensation and if agreement is reached, the agency will promptly pay the agreed to amount.²⁸² If no agreement is reached, the

²⁷⁵ This is the directly opposite result of that reached under modern takings law in cases such as *Deltona Corp.*, *supra*, discussed in Section III.C.4.(a) above. In that case, in effect denied compensation for a restriction in future development of a wetlands portion of the owner's property because the court believed he made sufficient profit from the remainder of the property. Under this Bill, compensation would not be conditioned upon the amount of profit the owner earned on the non-wetlands portion of the property.

²⁷⁶ H.R. 961, at proposed § 404(d)(3).

²⁷⁷ H.R. 961, at proposed § 404(d)(4).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ H.R. 961, at proposed § 404(d)(5).

²⁸¹ H.R. 961, at proposed § 404(d)(A).

²⁸² H.R. 961, at proposed § 404(d)(d)(B).

owner may choose to settle the matter either through binding arbitration or in an action in civil court.²⁸³

(e) The Dissenting Views

(i) What is the True Purpose of the Compensation Provision?

The Committee drafters of House Bill 961 did not state a purpose for the compensation provision other than that apparent from its language - to compensate landowners for loss of market value caused by wetlands regulation.²⁸⁴ However, the Representatives who expressed their opinion in the Dissenting Views (published with the Committee Report) perceived at least two hidden purposes built into the compensation provision.²⁸⁵ They viewed it as a government entitlement intended to benefit a small group of property owners²⁸⁶ and as a subterfuge to end government regulation of wetlands.²⁸⁷

(ii) A Government Giveaway?

The authors of the Dissenting Views called the compensation provision an "ill-advised" idea from the Contract With America that is a "gross and unwarranted expansion of the rights of a small group of property owners at the potentially great expense of taxpayers generally."²⁸⁸ They support this opinion with two arguments. First, in their view, the 20 percent threshold is "simply too low" and would compensate property owners for losses which are equal to those caused by customary market forces.²⁸⁹ The second and more important argument, they said, is that the

²⁸³ H.R. 961, at proposed § 404(d)(5)(C).

²⁸⁴ H.R. 961 at 173. The drafters also state that the provisions are consistent with those contained in H.R. 925, passed by the House of Representatives on March 3, 1995.

²⁸⁵ Report of the Committee on Transportation and Infrastructure on H.R. 961, together with Additional, Supplemental and Dissenting Views, at 384. The following thirteen Representatives signed the Dissenting Views: James L. Oberstar, Robert A. Borski, Jerrold Nadler, James E. Clyburn, Barbara-Rose Collins, Eleanor H. Norton, Peter A. DeFazio, Norman Y. Mineta, Nick Rahall, Bob Wise, William O. Lipinski, Robert Menendez and Corrine Brown.

²⁸⁶ *Id.* at 417.

²⁸⁷ *Id.* at 412.

²⁸⁸ *Id.* at 417.

²⁸⁹ *Id.* The authors stated that simple market conditions and appraisals could cause a 20% change in market value, apparently implying that a 20% loss in market value is normal and acceptable and does

reduction in market value applies to the affected portion of the property, rather than the parcel as a whole.²⁹⁰ An example is given in which a 200 acre parcel is subdivided into 400 one half acre lots, and one lot of those 400 is a wetland. Even if wetlands regulation caused a 100 percent drop in the market value of that wetland lot, the loss would be only 0.25 percent.²⁹¹ Nevertheless, under this scheme, the government would be forced to pay the market value or purchase the property.²⁹²

(iii) Shutting Down the Regulators

The dissenters also stated that the requirement that compensation be paid out of the operating budgets of the agencies involved is "clear[ly] intend[ed]...to discourage agencies from taking any actions which would diminish property values,"²⁹³ They also say it would devastate the programs of the Corps and the Department of Defense, of which the Corps is a component.²⁹⁴ The Corps might be forced to pay for compensation claims by reducing its other activities, such as flood control and navigation projects. At the least, this requirement would force regulators to consider their budgets and possible claims for compensation before they deny a Section 404

not deserve compensation. This position ignores the difference between market forces, which are presumably uncontrolled and arbitrary, and a specific regulatory program, which is deliberate and directed toward specific targets. The position of the property rights advocates is that the latter is a government action which, in a democracy, they have a right to argue against and seek relief from through legislation.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² The Dissenters do not state why they think this result is unfair. Their position appears to be that the economic loss suffered by the hypothetical property owner is not severe enough, compared to the profit made on the remaining 399 lots, to entitle him to compensation by the government. This position reflects that of the modern jurisprudence, which denies compensation except for total or near total loss of economic value of the entire parcel.

²⁹³ *Id.* at 418.

²⁹⁴ *Id.* The Dissent states that "[c]arried to its extreme, the bill could even require the Department of Defense to divert funds from its basic defense mission to the payment of what are arguably unfounded claims of takings." *Id.* It is arguable that under federal fiscal law, funds cannot be diverted to pay for claims or any expenditure for which they were not appropriated. The Dissent perhaps could have better stated its point by stating that in a future of declining defense budgets, Congress may not appropriate extra funds to the U.S. Army to pay for takings claims against the Corps. Takings claims would be an additional expense out of a finite budget that would not enhance mission accomplishment or contribute to the Nation's security.

permit or condition it upon specific restrictions. The chilling effect could deter them from their primary mission to protect the environment.

(f) Discussion

The compensation provision in House Bill 961 adopts the position of property rights advocates while totally disregarding the views of those who favor conservation of wetlands. The 20 percent trigger may be low enough to enable property owners to make claims for nearly any permit denial or even a moderate limitation on their right to develop a wetlands. The claims process created would enable them to seek compensation without the lengthy and expensive judicial process they currently are forced to undergo. The changes in the law shift the burden to the government by creating a presumption that a loss in market value is an event for which compensation should be paid. In this way, the compensation provision is a faster system with better results for individual aggrieved property owners who, under the judicial system, rarely receive any compensation under the Fifth Amendment jurisprudence.

However, whatever public interest exists in maintaining wetlands will be severely set back by the requirements of the compensation provision. The requirement that regulatory agencies pay the compensation out of their own operating budget will mostly affect the Corps, which could find itself liable for millions of dollars of claims immediately upon passage of the bill. If passed into law, this provision will have a profound chilling effect on wetlands regulation.

V. THE CLINTON ADMINISTRATION'S WETLANDS PLAN

A. Introduction

A third possible solution to the takings controversy over wetlands regulations might lie in the Wetlands Plan of President William Clinton, announced on August

24, 1993, by the former White House Office on Environmental Policy.²⁹⁵ It contained 40 reform initiatives in a proposal its drafters claimed “contains a balanced, common sense, workable set of improvements that will make the program simpler, fairer, better coordinated with state and local efforts and more effective at protecting wetlands.”²⁹⁶ The policy was developed by the Interagency Working Group on Federal Wetlands Policy formed in June of 1993.²⁹⁷ Headed by the White House Office on Environmental Policy, the group sought input from many sources: politicians, developers, environmentalists, agricultural interests, scientists and many others. The group established five principles to serve as guidelines for the Administration’s Plan:

- (1) an interim goal of no overall net loss of wetlands and a long term goal of increasing wetlands;
- (2) a requirement that regulatory programs must be fair, flexible and predictable and minimize effects on private property while effectively protecting wetlands;
- (3) encouragement of non-regulatory programs such as wetlands restoration, inventory, research and other efforts to reduce the reliance on regulatory programs;
- (4) the Federal government should increase partnerships between itself and State, Tribal and local governments and private organizations and approach wetlands protection in the context of ecosystem and watershed planning;
- (5) Federal wetlands policy should be based on the best scientific information available.²⁹⁸

These principles serve as the stated purpose behind the initiatives examined below.

B. Dealing With Takings

²⁹⁵ THE WHITE OFFICE OF ENVIRONMENTAL POLICY, NEW FEDERAL WETLANDS POLICY OFFERS FAIR, FLEXIBLE APPROACH ENDS AGENCY INFIGHTING AND GRIDLOCK WITH STRONG AGREEMENT (August 24, 1993)(hereinafter “OEP Press Release”).

²⁹⁶ PROTECTING AMERICA’S WETLANDS, *supra* at 2.

²⁹⁷ *Id.* at 3.

²⁹⁸ *Id.* at 4.

At the outset it is important to note what the Clinton Wetlands Plan²⁹⁹ does not do regarding takings. It does not propose a new solution to the controversy. Rather, it endorses the modern jurisprudence. The Administration position is that “restrictions on the actions of ...property owners...are called for in order to protect the property rights, safety, environmental or economic interests of other individuals or the community at large.”³⁰⁰ It states that “[d]ue to the unique nature of each situation, these issues must be considered on a case-by-case basis” and that “courts are available to review” the cases of claims for compensation.³⁰¹ The Administration rejected a “legislative approach” to change the current system.³⁰²

Why then is the Wetlands Plan included in a discussion of possible solutions to the controversy created by the courts’ treatment of Fifth Amendment claims resulting from wetlands regulation if it proposes no changes to the modern jurisprudence? It is vital to discuss the Wetlands plan for two reasons. First, it is an administrative action which is largely in place and operational and is currently affecting wetlands regulation. Secondly, it administratively exempts the building of a new home from the requirement to obtain an individual wetlands permit, thereby reducing the universe of regulated persons and thereby reducing the number of potential takings claims.

There may be strong political considerations behind the Wetlands Plan. It could drastically alter the support for compensation legislation by reducing the potential number of upset property owners. However, the drafters do not acknowledge nor hint at a desire for any political tinkering. The reasoning given for the relief is to promote a “fair, flexible” and predictable approach, reflecting the five principles enunciated above. Nevertheless, the Wetlands Plan can be interpreted as a

²⁹⁹ Hereinafter “Wetlands Plan” or “the Wetlands Plan.”

³⁰⁰ *Id.* at 25.

³⁰¹ *Id.* at 25.

³⁰² *Id.*

way to remove private homeowners from the equation in the wetlands taking controversy by exempting most of the construction required to build a comfortable home. This eliminates the most sympathetic “victims” of wetlands regulation, small homeowners, who are engaged in a publicly supported activity, building a home in which to live. Under the Wetlands Plan, those left to be regulated are developers who want to develop large tracts of property for subdivisions, businesses and corporations building facilities for business and farmers wishing to fill wetlands for agricultural purposes. These entities are much less sympathetic than the private homeowner who is not allowed to build a home on the lakeside.

This strategy by the Administration may relieve the pressure on the Section 404 program and perhaps derail some of the popular support behind the 104th Congress’ initiatives to weaken the Clean Water Act. But does the Wetlands Plan sacrifice effective protection for wetlands habitat in order to save the Section 404 program? Whether or not the Wetlands Plan adequately protects the environment is a crucial question that must be answered in evaluating the worthiness of the Plan.

C. Addressing Landowner Concerns

The Wetlands Plan acknowledges criticisms that the current system is too “slow, unpredictable and unfair.”³⁰³ The Administration position is that the regulatory program is necessary, but that government has a responsibility to conduct the regulatory process in an “efficient, responsive and fair” manner.³⁰⁴ The Wetlands Plan supports reforms to make it so, including establishing deadlines for agencies to reply to requests for permits.³⁰⁵

³⁰³ *Id.* at 6.

³⁰⁴ *Id.*

³⁰⁵ *Id.* The regulations called for by the Wetlands Plan will require the Corps to make a final decision on a permit application within 90 days from the date of issuance of public notice of the permit application. The 90 day requirement may be extended in order to comply with other laws, such as the National Environmental Policy Act. The Administration gave its support for increased funding and personnel in order to meet the deadlines.

Predating a similar provision in the Clean Water Amendments, the Wetlands Plan calls for the Corps to develop an administrative appeals process under the Section 404 process. A landowner will be able to appeal decisions by the Corps establishing regulatory jurisdiction over a certain parcel of property, denying permits and imposing administrative penalties.³⁰⁶ Utilization of this process will be a prerequisite before judicial action may be initiated. The Wetlands Plan also will standardize training and criteria for all Federal personnel who participate in the delineation of wetlands in order to make that process consistent and predictable.³⁰⁷

These provisions are well thought out and should smooth the administrative process. The only controversial aspect of these provisions is that it is doubtful, given the fiscal and political realities of the current political climate, that the Corps will truly receive additional funding and personnel in order to meet the quicker deadlines it must face. The lack of either funding or personnel could result in sloppy, hurried approval of applications and a degradation of environmental safeguards.

D. The Corps' Initiatives

In accordance with the Wetlands Plan, the Corps developed administrative initiatives in order to reduce the regulatory burdens of the Section 404 permit system imposed upon property owners.³⁰⁸ The three initiatives are designed to make the program more fair, flexible and effective. The first initiative is "a new nationwide permit to allow landowners to affect up to one half acre of wetlands to construct a single-family home and attendant features such as a garage and driveway." The second initiative was issuance by the Environmental Protection Agency and the Corps of a "clarifying statement" which established that landowners seeking to construct or expand homes, farm buildings or small businesses, the impact of which would be less

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ The Corps announced these three initiatives in U.S. Army Corps of Engineers, News Release, No. 95-04 (March 6, 1995).

than two acres, would not have to consider developmental alternatives off-site. Finally, the Corps, in conjunction with other federal agencies, issued comprehensive guidelines on the establishment and use of mitigation banks.³⁰⁹ All three are designed to streamline the regulatory process. The first two initiatives do so by reducing the stringency of the Corps' review of selected types of projects and may also result in less claims of regulatory takings. We now examine each in turn.³¹⁰

E. Exempting Single-Family Homes

1. Introduction

The Corps issued Nationwide Permit 29 (NWP 29) on July 27, 1995, after prior notice and public comment.³¹¹ The Corps' NWP 29 authorizes discharges of dredged or fill material into non-tidal wetlands for the construction or expansion of a single-family home without an individual Section 404 permit.³¹² Homeowners may also build "attendant features," such as garages, driveways, storage sheds and/or septic fields. However, NWP 29 only applies if the impacts upon wetlands are confined to an area of one half acre or less.³¹³ Homeowners are required to give the Corps' District Engineer pre-construction notification of the project. There is a requirement for minimization of impacts upon wetlands caused by construction projects undertaken according to NWP 29.³¹⁴ The exemption allowed by NWP 29 may only be used once per a parcel of land and must be for a single-family home for a personal residence.³¹⁵

The Corps also included provisions designed to prevent abuse of this program by developers and corporations. The discharges allowed under NWP 29 must be part

³⁰⁹ *Id.*

³¹⁰ The mitigation guidance will be examined in a separate Section below.

³¹¹ Issuance of Nationwide Permit for Single-Family Housing, 60 Fed. Reg. 38,650 (1995) (Notices).

³¹² 60 Fed. Reg. 38,662 at ¶ A.

³¹³ *Id.* at ¶ A.a.

³¹⁴ *Id.* at ¶ A.c.

³¹⁵ *Id.* at ¶ A.f. The exemption does not apply to structures built for business.

of a single and complete project.³¹⁶ In any subdivision created on or after November 22, 1991, the total impacted area affected by discharges authorized under NWP 29 may not exceed one half acre total for the entire subdivision.³¹⁷ This general permit only applies to individuals, which is defined as a person or married couple but not as a corporation or partnership.³¹⁸ These provisions restrict the nation-wide permit to the intended recipients - homeowners.³¹⁹

2. Definition of a Parcel

For the purposes of NWP 29, a "parcel" is defined as "the entire contiguous quantity of land in possession of, recorded as property of, or owned (in any form of ownership, including land owned as a partner, corporation, joint tenant, etc.) by the same individual (and/or his or her spouse)."³²⁰ The parcel includes not only the wetlands area sought to be filled, but also adjacent land owned by the landowner.³²¹ Any previously filled wetlands area and any area that will be adversely affected by flooding, excavation or drainage is included in the calculation of the affected area.³²²

The one half acre figure was based on political and practical concerns, not a scientific analysis of how much damage was environmentally acceptable. In its Discussion of Public Comments and Changes, the Corps stated that it based its decision in part on a review of statistical data from the U.S. Department of Commerce and the U.S. Department of Housing and Urban Development.³²³ The Corps stated

³¹⁶ *Id.* at ¶ A.d.

³¹⁷ For example, if a developer buys a parcel, he may not fill a one-half acre parcel, sell it, and then fill other wetlands in the same parcel.

³¹⁸ *Id.* at ¶ A.

³¹⁹ 60 Fed. Reg. 38,650. The Introduction to the Notice mentions a couple seeking to build a retirement home on wetlands property they own as an example of they intended beneficiaries of the NWP 29.

³²⁰ 60 Fed. Reg. 38,662 at ¶ A.

³²¹ *Id.* The adjacent parcel and the previously filled wetlands areas referred to must of course be owned by the same owner of the parcel in issue.

³²² *Id.*

³²³ 60 Fed. Reg. 38,651 at ¶ 1. The Corps also considered the Corps "district survey performed to determine need for the permit, and our experience and judgment concerning the potential for adverse effects on the environment associated with the various alternatives." U.S. CORPS OF ENGINEERS, DECISION DOCUMENT FOR NATIONWIDE PERMIT FOR SINGLE-FAMILY HOUSING at 4. The Decision

that the data showed that approximately 90 percent of American landowners owned lots of one half acre or less and that approximately 60 percent own parcels of one quarter acre or less.³²⁴ Based on these figures, the Corps calculated that allowing impacts on up to one half acre would allow the vast majority of American property owners to build up to the maximum size possible on their lot.³²⁵ The Corps made a policy³²⁶ decision that using the one quarter acre size would exclude some 30 percent of landowners from NWP 29 eligibility, depriving too many people of its benefits.

Based upon the discussion in the Notice, one may logically conclude that the selection of the one half acre limitation was designed to include as many homeowners as possible within the NWP 29 exemptions. By so doing, the Corps eliminates the necessity to apply for an individual Section 404 permit for 90% of American homeowners with wetlands on their property. This streamlines the processing for a large number of people. It may also reduce claims of regulatory takings. As will be seen below, NWP 29 will greatly reduce the degree of scrutiny an applicant may receive and may therefore reduce or eliminate regulatory restrictions on wetlands development for many homeowners. Since the program is designed to include 90% of homeowners with wetlands parcels, a large portion of the population may be removed from the ranks of potential regulatory taking claimants.

3. Internal Environmental Protections

Document constitutes the Environmental Assessment (EA), Section 404 (b)(1) Compliance Review and Statement of Findings for NWP 29. The Corps' did not cite any scientific study in the Decision Document to support its "experienced opinion" that minimal damage will occur as a result of NWP 29.

³²⁴ *Id.* The Corps apparently based this figure on data from the Dept.s of Commerce and HUD. The Corps did not cite a more specific source. Those two departments jointly issue the American Housing Survey for the United States. Table 2-1 of the Survey lists the total number of housing units in the United States as 94,724,000. The figures in Table 2-3 indicates that approximately 40.62% (28,414,000 of 69,934,000) of *occupied* American housing units are on one-half acre or less. Table 3-3 indicates that 50.4% (1539 out of 3057) of new single-family homes built in 1993 were constructed on lots of one half acre or less. The 1993 Survey is the most recent available.

³²⁵ 60 Fed. Reg. 38,651.

³²⁶ *Id.*

The potential damage to wetlands due to construction of single family homes is supposed to be offset by several requirements in NWP 29. All projects must follow the general conditions in order to be authorized.³²⁷ Applicants must also comply with conditions specifically designed to protect wetlands.³²⁸ Additionally, NWP 29 requires all permittees to take “all practicable actions to minimize the on-site and off-site impacts of the discharge.”³²⁹ For example, the Corps’ Notice states that a landowner might have to redesign a home construction plan by moving the home to a different location on the parcel in order to avoid flooding adjacent land.³³⁰ Permittees must include their minimization efforts in their pre-construction notification to the Corps. During the review of the pre-construction notification, the Corps will ensure that the permittee minimizes impacts and that the resulting impacts are minimal.³³¹ Additionally, the District Engineer may add regional conditions to the NWP 29 permit in order to protect sensitive areas, and may even go so far as to require individual permits or mitigation measures.³³²

The effectiveness of the minimization requirement may be limited by the time constraints built into the NWP 29 process. The office of the District Engineer has only 30 days after receipt of the pre-construction notice to review the application.³³³ After 30 days has expired, the permittee may proceed with the project and the Corps

³²⁷ The conditions include not interfering with navigation, aquatic life movements, wild and scenic rivers, Tribal rights, State water quality restrictions, coastal zone management restrictions and historic properties, as well as maintaining the project and implementing soil and erosion controls. 60 Fed. Reg. 38,662, Nationwide Permit and Conditions, ¶ B.

³²⁸ 60 Fed. Reg. 38,663, Section 404 Only Conditions. These conditions include non-interference with water supply intake valves, shellfish production, spawning areas, high flows and waterfowl breeding areas. *Id.* Also, permittees must use suitable fill material, minimize impacts on-site unless the DE has approved a compensatory mitigation plan for the specific regulated activity, minimize impacts of water impoundments and remove any temporary fills created in order to construct the project. *Id.*

³²⁹ 60 Fed. Reg. 38,662.

³³⁰ *Id.*

³³¹ 60 Fed. Reg. 38,652.

³³² 60 Fed. Reg. 38,651.

³³³ 60 Fed. Reg. 38,663 at ¶ 13(a)(3).

must follow certain procedures before being able to intervene at that point.³³⁴ If the Corps wishes to conduct an on-site inspection, it must do so within the thirty day deadline. Finally, the quality of the review will be determined in large measure on the quality of the information on the application.³³⁵ The permittees filling out the applications will most likely lack the technical and scientific expertise necessary to judge the short and long term effects of their construction projects on a wetlands habitat, vegetation and wildlife. Therefore, adverse effects may go undetected by the Corps reviewers and wetlands may be unknowingly degraded or destroyed.

4. Environmental Protections External to NWP 29

There are several effective environmental protections that may supplement the minimization requirement and provide true protection for wetlands. Furthermore, applicants for permits under NWP 29 must comply with other environmental laws, such as the Endangered Species Act.³³⁶ No activity under NWP 29 can take place in a Wild and Scenic River or a study area nor may it affect properties on or eligible for the National Register of Historic Places.³³⁷ Finally, even after obtaining a NWP 29 permit, homeowners must comply with State environmental laws. Importantly, the

³³⁴ *Id.* In order to modify, suspend or revoke the permittee's right to proceed under NWP 29 the Corps must comply with the procedures set forth in 33 C.F.R. 330.5(d)(2). The District Engineer (DE) must first hold informal discussions with the homeowner and attempt to reach an agreement. If the DE is not satisfied, he may give the homeowner written notice that authorization for the project under NWP 29 is suspended. The homeowner has ten days after notice to request a formal hearing. Afterwards, the DE may reinstate, modify or revoke authorization under NWP 29 by written notice to the homeowner. There is no appeal from the DE's decision.

³³⁵ The Pre-Construction Notification (PCN) must include the applicant's name, address, telephone number, location of the proposed project, a brief description of the project, whether or not the NWP has been used in the past and a statement that the use is for residential purposes only. *Id.* at ¶ 13(b). The applicant is also required to give the legal description of the property and any other property owned within a one mile radius of the parcel in issue. *Id.* The lack of technical expertise could become problematic when the applicant describes "direct and indirect adverse environmental effects" of the project. There is no requirement that an applicant hire an environmental engineer or biologist to catalogue the possible adverse effects to wetlands vegetation or wildlife, hydrology, flood control or water quality. Therefore, the DE Office will more than likely have to predict the adverse effects simply by using its own knowledge of the habitat, wildlife and hydrology of the region. This lack of case-by-case analysis of each project is an inherent aspect of the Corps' nation-wide permit program.

³³⁶ *Id.*

³³⁷ *Id.*

nationwide permit for homeowners would not supersede maximum acreage limitations under state law, some of which are less than one-half acre. In those circumstances, the more stringent law would apply and the applicant would not be able to adversely affect up to one half acre. Water quality restrictions will also apply and may restrict activities in wetlands that may harm the quality of the waters in a watershed.

Some commenters to the Corps' Notice of Proposed NWP³³⁸ felt that because NWP 29 allows fills up to one-half acre, it will create pressure on the States to increase the maximum acreage allowance to match the one-half acre Federal law. The Monroe County Conservation District in Pennsylvania felt that the one half acre allowance would "undermine local government efforts to steer growth away from sensitive areas such as wetlands."³³⁹ The Chesapeake Bay Foundation stated that the Proposed NWP would "thwart efforts to avoid and minimize" housing developments in wetlands areas.³⁴⁰ The New England Field Office of the Fish and Wildlife Service commented that because the federal permit allowed non-water dependent projects in wetlands, the permittee would "expect (and demand) the same treatment from the states" and thus NWP 29 would place "an unfair burden on many...state permit [systems]."³⁴¹ The reduced level of wetlands protections in NWP 29 may be offset by

³³⁸ 60 Fed. Reg. 15440 (1995). The Public Comments received by the Corps on the Proposed Nationwide Permit for Single Family Housing are filed with the Corps at 20 Massachusetts Ave., Room 6225, Washington D.C. The Comments are consecutively numbered beginning with page B1.

³³⁹ Public Comments, *supra* at B118. In Pennsylvania the maximum allowable fill in an exceptional value wetlands is 1,000 square feet and 4,000 square feet in other wetlands. In its comments, the District stated that due to its regulation, developers routinely avoid developing in wetlands as a normal business decision. The District felt that the federal proposed permit would have the effect of the federal regulators telling the regulated community that the local officials were "just kidding" about strict land use planning.

³⁴⁰ *Id.* at B310. The Chesapeake Bay Foundation (CBF) also commented that local jurisdictions in the Chesapeake Bay jurisdiction had made great progress in creating land use planning procedures to prevent developers from creating subdivisions in wetlands. The State of Maryland only allows impacts upon 5,000 square feet of wetlands. (One half acre is roughly equivalent to 20,000 square feet). The NWP, it said, would send a conflicting message to the regulated community in Maryland that greater impacts are allowed under the federal program. *Id.* at B307.

³⁴¹ Public Comments, *supra* at B110.

state and local law, but it is possible that support for those laws and regulations may be weakened by NWP 29.

5. Septic Fields

Nationwide Permit 29 allows septic fields to be built in wetlands if the total area impacted is less than one half acre.³⁴² The Corps stated that a septic system is an integral part of a home (if not connected to a sewer line) and for that reason it was a logical attendant feature of a home and permissible under the permit. In its response to Public Comments, the Corps stated that “properly designed, constructed and operated septic systems can be placed on fill in many wetlands.”³⁴³ NWP 29 relies on state and local laws and regulations, enforced through state and local permits, to protect the environment from damage by leaking septic tanks.³⁴⁴ State water quality guidelines should also serve to protect the environment.

Many commenters believed that allowing a homeowner to build a septic system in a wetlands area was dangerous because of the extremely toxic effects the system might have on wetlands habitat. The Chesapeake Bay Foundation cited a study by the Environmental Protection Agency that found that “at least four feet of unsaturated soil below the ponded liquid in a soil absorption field is necessary” for a septic system.³⁴⁵ This unsaturated soil is required in order to reduce levels of bacteria and viruses to a safe level and to “remove most organics and phosphorus and nitrify” a sufficient amount of the ammonia.³⁴⁶ Since wetlands are wetlands because they are composed of saturated soil, these areas are not appropriate for septic systems.³⁴⁷

³⁴² 60 Fed. Reg. 38,662.

³⁴³ 60 Fed. Reg. 38,657.

³⁴⁴ *Id.* The Corps states that septic systems must be approved by the appropriate state or local agency.

³⁴⁵ Public Comments, *supra* at B308.

³⁴⁶ *Id.*

³⁴⁷ *Id.* The CBF stated that many jurisdictions prohibit the building of septic systems if tests indicate the soil is inappropriate for such use. The CBF again indicated that the prohibitions, enacted through sanitation laws, would be undermined by a contrary federal permit that allows septic systems in wetlands. *Id.*

Other commenters agreed. The National Wildlife Foundation also commented that septic systems should be prohibited in wetlands areas.³⁴⁸ The Monroe County Conservation District commented that Pennsylvania requires “a 50 foot isolation distance between wetlands and the septic absorption area” which could extend to a total area of one half acre.³⁴⁹ If this calculation is correct, then a septic system could impact the entire allowable acreage under NWP 29. The Corps’ decision to allow septic systems in wetlands under NWP 29 seems to state that the Corps will accept the adverse effects to wetlands that may occur from septic systems and force state regulators to protect their citizens and environment from the possible toxic effects.

6. Cumulative Impacts

NWP 29 does not establish a maximum number of nationwide permits that may be granted on a specific watershed. It contains no mechanism for determining the effect of cumulative impacts on the wetlands. For example, one home, yard and septic tank might not damage a wetlands lakefront. But twenty more houses might. The National Audubon Society commented that “one or more [wetlands functions] can be impaired by activities of seeming insignificant geographic scope, causing a functional loss of much greater significance.”³⁵⁰ The pre-construction notification will not include information regarding the environmental effects of other homes on the same wetlands or watershed. There is no inherent way for the Corps to measure the probable health of the waterbody from the application.³⁵¹

³⁴⁸ Public Comments, *supra* at B406. The National Wildlife Foundation added that a Pennsylvania township was forced to spend over \$3 million to provide sewage system service to over 650 homes with septic systems that failed because of the effects of wetlands. *Id.*

³⁴⁹ *Id.* at B116 - 17.

³⁵⁰ Public Comments, *supra* at B272. The AS also commented that “[s]mall individual actions can fragment a wetland, destroying some wetland values while not destroying others. For example, subdividing a wetland by a series of roads that individually or cumulatively cause the loss of less than one half acre of wetland may substantially impair the entire wetland’s flood absorption or habitat functions. Our concern is not so much each and every half acre permit, but rather the cumulative destruction of wetlands.” *Id.*

³⁵¹ The application requirements are found at 60 Fed. Reg. 38,663. Even if a permittee accurately describes the adverse effects his individual project will have on an affected waterbody, he is not required to describe the environmental health of the waterbody. Again, the Office of the DE will have

The Corps envisions that cumulative impacts will be controlled by the District Engineer's office.³⁵² The Corps states that the District Engineer will review the pre-construction notification, analyze its impacts in relation to existing impacts on the waterbody and determine if the application entails more than minimal impacts. The District Engineer is also authorized to revoke or modify the application of the nationwide permit in a specific geographic area to reduce cumulative impacts in the particular watershed.³⁵³

7. No Net Loss?

The Administration's Wetlands Policy is based upon the goal of no net loss of wetlands.³⁵⁴ Nationwide Permit 29 does not seem designed to help meet that goal. Several nationwide permits already are granted by the Corps. They include nationwide permits for utility lines (12), road crossings (14), minor fills (18), fills in headwater areas (26) and fills for temporary construction and access to construction sites (33).³⁵⁵ Estimates indicate that the Corps authorizes 70,000 activities in wetlands through nationwide permits each year.³⁵⁶ The National Wildlife Federation estimates that over 16,300 wetlands acres are lost each year solely due to authorizations under NWP 26.³⁵⁷ The effect of these nationwide permits combined

to use its own knowledge of the region to assess the health of the affected wetland or other waterbody affected by the project.

³⁵² 60 Fed. Reg. 38,659.

³⁵³ *Id.*

³⁵⁴ PROTECTING AMERICA'S WETLANDS, *supra* at 3, the first principle of Federal Wetlands Policy is no net loss.

³⁵⁵ *Id.* at B109. Comments by the United States Department of the Interior, Fish and Wildlife Service, New England Field Office, submitted in accordance with the Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.* The FWS office supports the New England Division's proposal to revoke NWP 29 in Main, Massachusetts and New Hampshire upon its issuance. *Id.*

³⁵⁶ Public Comments, *supra* at B402 (National Wildlife Federation).

³⁵⁷ *Id.* at B404. As of the time of final editing of this paper, the Corps reissued nationwide permit 26 (along with all other existing NWPs) with an effective date of February 11, 1997. 61 Fed. Reg. 65,874. The Corps noted that because of concerns expressed about the adverse impacts caused by NWP 26, it made substantial changes. *Id.* Most notably, NWP 26 was reissued for only two years on an interim basis. *Id.* At 65,875. During the next two years, the Corps will meet with interested parties to develop activity-specific permits to replace NWP 26. *Id.* This action is being taken, according to the Corps, in order to ensure that only minimal individual and cumulative adverse effects will result from authorizations under NWP 26. *Id.* At 65,874. Additionally, the Corps lowered the threshold to

with individual permits and illegal activity contribute to a loss of approximately one third to one half million acres each year since the no net loss policy came into effect.³⁵⁸

Compounding the potential loss is the lack of a requirement for mitigation in NWP 29. Knowing that they will have to pay to replace each square foot of wetlands they destroy motivates landowners to plan around wetlands areas. With no mitigation required, the motivation evaporates. Furthermore, NWP 29 in effect says that impacts up to one half acre are acceptable, possibly creating a motivation to use all of that allowance possible. This additional nationwide permit will predictably increase the loss of wetlands in the nation, rather than supporting the no net loss policy.

8. Reducing Potential Takings Claimants

The Corps believes that the vast majority of landowners that require individual permits would be eligible for the general permit.³⁵⁹ Therefore, a large segment of the population will no longer have to obtain a Section 404 permit in order to build a residence or add to it. Some of the most sympathetic “victims” of wetlands regulatory restrictions in the eyes of property rights advocates are simple property owners deprived of the right to build a home. These potential “victims” will receive less scrutiny and a requirement to minimize impacts, rather than a case-by-case review and a requirement to avoid or mitigate adverse impacts. Under either current law or one of the 104th Congress’ legislative “fixes” to the takings problem, the Clinton Administration’s NWP 29 promises to reduce the number of property owners

one-third acre, above which PCN will be required. *Id.* At 65,891. The maximum allowable fill under NWP 26 will be 3 acres. *Id.* The Corps also encouraged DEs to consider whether NWP 26 should be modified or revoked based on regional conditions. *Id.* NWP 26 is widely used by developers, and their opposition can be expected, according to a press release by the Environment News Service, posted to the World Wide Web on Nov. 19, 1996 (a service of EnviroLink Network). The 105th Congress may get involved to “fix” the new NWP 26. *Id.* If such an attempt occurs, the wetlands and takings reform bills may once again be at the center of Congressional debate.

³⁵⁸ THE CONSERVATION FOUNDATION, PROTECTING AMERICA'S WETLANDS: AN ACTION AGENDA, 8 - 12 (1988).

³⁵⁹ 60 Fed. Reg. 38,660.

who may claim that their property has been taken by wetlands restrictions. Wetlands will receive less protection under NWP 29 mostly due to the less mitigation being required compared to Section 404.

F. Individual Permit Flexibility for Small Landowners

1. Focusing on the Applicant's Land

The second initiative under the Wetlands Plan was the issuance of a guidance memorandum by the Corps and the Environmental Protection Agency.³⁶⁰ The memorandum announced a new policy that "clarified" the Section 404(b)(1) guidelines.³⁶¹ The new policy applies to discharges of dredged or fill material impacting a maximum of two acres of non-tidal wetlands for the construction or expansion of a home or farm building or expansion of a small business. In those instances, it is presumed that it is not practicable under Section 404(b)(1) Guidelines for the homeowner to consider relocation of the project on property owned by other persons. The requirements in the Guidelines for minimization of impacts and compensation for lost wetlands acreage still apply.³⁶²

The goal of the policy is to allow small landowners to construct or expand a single family home with attendant features (similar to those allowed by NWP 29), and the construction or expansion of buildings used for business purposes, such as barns, other farm buildings and facilities and buildings housing small businesses.³⁶³ Under the previous interpretation of the Guidelines, individuals were required to consider siting their projects in other parcels of land, even if they did not own that land. The analysis was a mandatory part of the individual Section 404 permit application required before any discharge of dredged or fill material was permitted in the wetlands.³⁶⁴ If the individual could reasonably obtain the alternative parcel, *i.e.*,

³⁶⁰ Joint Memorandum For the Field, issued by EPA and the Corps, dated March 6, 1995.

³⁶¹ *Id.* at 1.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.* at 2.

purchase it, then the individual was required to consider it and negotiate with the Corps as to whether the purchase would actually occur. The Corps evaluated this interpretation and, based on “[c]ost, availability, and logistical and capability considerations inherent in the determination of practicability” it concluded that the new policy was more appropriate.³⁶⁵

2. Not Rulemaking

Unlike NWP 29, which followed rulemaking procedures, the new policy was not issued after notice and comment procedures. According to the provisions of 40 C.F.R. 230.2(c), changes to the Guidelines must be made pursuant to rulemaking procedures under the Administrative Procedures Act.³⁶⁶ The Corps did not comply, possibly engendering future litigation. The National Wildlife Federation commented that under current rules, developers must consider alternate sites early in their planning process and are forced to avoid wetlands impact.³⁶⁷ The new policy would eliminate the incentive to look for non-wetlands sites and to reduce impacts beyond the two acre limitation. Surprisingly, the Federation also commented that in their opinion this change would actually increase the pressure to severely weaken the Section 404 program. It stated that the new policy would add to the public’s confusion regarding the many different rules and regulations that apply to wetlands.³⁶⁸

3. No Real Effect on Takings Law

From a preservationist’s point of view, this policy change does nothing to increase protection of wetlands and actually allows damage to more acreage than does NWP 29. Property rights advocates would see this as a step forward in that it relieves

³⁶⁵ *Id.*

³⁶⁶ Letter from Mary Marra, Acting Vice President, Resources Conservation Department, National Wildlife Federation, to Mr. Robert Perciasepe, Assistant Administrator for Water, EPA, and Mr. Zirschky, Acting Assistant Secretary of the Army (Civil Works), US Army (April 3, 1995) (on file with the Corps in its Pennsylvania Avenue office) at 1.

³⁶⁷ *Id.* at 3.

³⁶⁸ *Id.* at 3. The Federation claims that confusion arises over the many different nationwide permits already in existence, the new (at that time proposed) NWP 29 and the differing maximum limits on impacts, prerequisites and mitigation.

property owners of the burden of examining alternatives on land they do not even own. However, it still retains the requirement for mitigation, which NWP 29 does not. Regarding its effect on the takings issue, the new policy relieves small landowners from one more requirement, in certain circumstances, that previously stood between them and their permit. Small landowners that may not have been financially capable of purchasing another parcel of land nearby their wetlands property are relieved of the obligation to do so. The example of the retired couple who own a lot near a lake springs to mind. People in that situation may be unable to purchase additional lots of property. This new interpretation may enable those types of landowners to build their homes rather than being forced to retain their property in its natural state. This may reduce claims of takings from this subset of owners.

VI. MITIGATION BANKING

A. Introduction

Mitigation banking is a system that assigns value to a wetlands that may be transferred to a landowner who is required to mitigate the effects of his development on another wetland. House Bill 961 contains a mitigation banking provision.³⁶⁹ Additionally, the third initiative in the Clinton Wetlands Plan was issuance of proposed guidance on the establishment and use of mitigation banks.³⁷⁰ After public notice and comment, the final policy guidance was issued on November 28, 1995.³⁷¹ The Mitigation Banking Guidance is designed to streamline the regulatory process and provide more cost-effective and environmentally beneficial mitigation for authorized impacts.³⁷² The guidance defines mitigation banking as the “restoration, creation, enhancement and, in exceptional circumstances, preservation of wetlands”

³⁶⁹

³⁷⁰ Corps News Release, *supra* at 2.

³⁷¹ 60 Fed. Reg. 58,605 (1995)(Notices). The guidance was issued jointly by the EPA, the Corps and the Dept.s of Interior, Commerce and Agriculture and is hereinafter referred to as “Mitigation Banking Guidance.”

³⁷² *Id.* at § 1.A.

for the express purpose of providing “compensatory mitigation in advance of authorized impacts to similar resources.”³⁷³

The wetlands functions established in the mitigation bank are assigned certain “credits” which are then available to compensate for adverse wetlands impacts or “debits.” The credits may be used by the sponsor of the mitigation bank or sold to others. Typically, a wetlands owner who cannot avoid impacting his or her own wetlands will purchase sufficient credits to compensate for the debits assigned for the project’s impact on wetlands. The Corps then will grant a permit to develop the project. The ability to sell credits to other wetlands owners is the unique feature of mitigation banking that is not permitted under other mitigation techniques.

Mitigation banking is a popular subject in the literature.³⁷⁴ There are many controversial issues regarding mitigation banking, including whether to allow more conservation of existing wetlands, whether use of mitigation banks off-site is proper and whether to grant credit for different kinds of wetlands functions than those impacted upon (the in-kind issue). We need only concern ourselves with the features of mitigation banking that may impact upon the regulatory taking controversy and provide an alternative to or support for the modern takings jurisprudence.

B. The Memorandum of Agreement

In a 1990 Memorandum of Agreement between the Corps and the Environmental Protection Agency, a framework was laid out that guides the use of mitigation banks.³⁷⁵ That guidance is still in effect³⁷⁶ and it states that, as discussed

³⁷³ *Id.* at § 1.B.

³⁷⁴ The topic is discussed in Mark A. Chertok, *supra* at 158; Stephen M. Johnson, *Avoid, Minimize, Mitigate: The Continuing Constitutionality of Wetlands Mitigation After Dolan v. City of Tigard*, 6 FORDHAM ENVTL. L.J. 689 (1995); Charles H. Ratner, *Should Preservation Be Used As Mitigation In Wetland Mitigation Banking Programs?: A Florida Perspective*, 48 U. MIAMI L. REV. 1133 (1994)(hereinafter “A Florida Perspective”); William Sapp, *Mitigation Banking: Panacea or Poison For Wetlands Protection?*, 1 ENVTL. L. 99 (1994)(hereinafter “Sapp”).

³⁷⁵ Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 55 Fed. Reg. 9210 (1990)[hereinafter “the Memorandum”].

³⁷⁶ 60 Fed. Reg. 58,611.

above, under mitigation sequencing a permittee must avoid impacting wetlands and then minimize the impacts that cannot be avoided. Impacts that cannot be avoided or minimized must be compensated for in order for the Corps to grant a permit.³⁷⁷ The Memorandum also established preferences for different types of compensatory mitigation. Restoration of damaged wetlands is the preferred method under the guidance.³⁷⁸ Other forms of compensatory mitigation acceptable under the Memorandum are enhancement and creation of wetlands. It is generally accepted that created wetlands have a high failure rate.³⁷⁹ The Memorandum also favors “on-site” compensatory mitigation, a project that occurs near to the area impacted by the permitted activity.³⁸⁰ There is also a preference for “in-kind” compensation, that is, the compensatory wetland should contain the same wetland functions and values as the wetland impacted upon.³⁸¹ The Memorandum supports the no net loss policy by requiring at least one acre of compensatory wetland for every one acre of impacted wetland. One commentator remarked that though the Memorandum preferred on-site mitigation, it was the first administrative statement that off-site mitigation would be allowed.³⁸² The allowance of off-site mitigation is a fundamental requirement for a mitigation banking system to work.

C. Mitigation Banking and Regulatory Takings

Mitigation banking may serve as a bridge between the two sides in the regulatory takings controversy. Mitigation bank credits may give value to a landowner whose land has been rendered bereft of economic viability. For example, let us return to the case of the landowner with a 200 acre parcel that is subdivided into 400 one half acre lots. For the sake of illustration, one of those lots contains wetlands

³⁷⁷ *Id.* at ¶ II.D.1.

³⁷⁸ 55 Fed. Reg. 9212.

³⁷⁹ ENVIRONMENTAL LAW INSTITUTE, WETLAND MITIGATION BANKING 33-34 (1993). Sapp called the study “the most comprehensive study of mitigation banks.” *Supra* at 64.

³⁸⁰ 55 Fed. Reg. 9212.

³⁸¹ *Id.*

³⁸² A Florida Perspective, *supra* at 1147.

and the impact on the lot may not be avoided or minimized. The landowner must obtain a permit before he may discharge any dredge or fill material into the wetlands. If the Corps determines that compensatory mitigation is not sufficient to replace the impacted wetland's functions, it must deny the development permit, rendering the lot worthless for development. This is the classic takings scenario. But if the landowner is given a certain amount of mitigation bank credits for leaving that land undeveloped, then he has received some value in compensation. The land has not lost all economic worth, for those credits may be used in another development either by the property owner or may be sold to another developer.³⁸³

The fundamental concept behind mitigation banking of transferable credits is not new. It is similar to the concept behind the "transferable development rights" program. This program was considered by the Supreme Court in *Penn Central*. The Court endorsed the program in the takings context by stating that the transferable development rights were a true economic value.³⁸⁴ The Court considered the transferable development rights granted to the plaintiff in determining the worth remaining in Grand Central Terminal after historic preservation regulations halted development of a multi-story skyscraper on its roof.³⁸⁵ Mitigation bank credits perform the identical function that transferable development rights do - allow one entity that cannot develop a property to sell the credit to another who would be allowed to do what the seller could not.

The possibility of assigning mitigation banking credits to applicants whose permits have been denied could possibly enable the government to avoid claims for compensation under the current law and even under the proposed Clean Water

³⁸³ The Mitigation Banking Guidance states that a property owner may only purchase credits when "adverse impacts are unavoidable." Mitigation Banking Guidance, ¶ B.

³⁸⁴ *Penn Central*, *supra* at 129.

³⁸⁵ *Id.* The Court included the value of the TDRs in its calculation that the plaintiffs could still earn a "reasonable return" on the property. *Id.*

Amendments of 1995³⁸⁶ and the Omnibus Property Rights Act of 1995.³⁸⁷ Both those proposed bills involve automatic triggers of a diminution of fair market value below a certain percentage. However, if the affected portion were to be assigned mitigation banking credits, its fair market value may not drop below the 20 or 33 percent trigger.³⁸⁸ The Corps would merely substitute one form of compensation (credit) for another (cash).

Mitigation banking thus fits into the lexicon of the modern jurisprudence by being a form of economic value which must be calculated to determine the economic impact of the regulation on the property affected. It does not replace the modern jurisprudence but is, as seen in *Penn Central*, a concept that works within the economic viability doctrine of takings jurisprudence. Widespread use of mitigation banking would not end regulatory control of private property. However, it would serve as a mechanism to compensate property owners for the burden they would bear in order to protect their wetland for the whole of society.

D. Obstacles

One major obstacle to widespread use of mitigation banking is the position of many that preserved³⁸⁹ wetlands should not be awarded any credit under a mitigation banking system. The common view of environmentalists is that preservation violates the no net loss policy because it does not replace wetlands functions that are being

³⁸⁶ H.R. 961, *supra*.

³⁸⁷ S. 605, *supra*.

³⁸⁸ For example, let us imagine a property owners who is denied a Section 404 permit to develop his 1 acre of wetland. Under House Bill 961, if the market value of the 1 acre wetland is diminished more than 20%, compensation is due. However, the government could assert a defense that under a mitigation banking system, the property owner was being assigned a \$60,000 credit for his wetland if he agrees to enter into an environmental or conservation easement. If the \$60,000 was worth more than 80% of the fair market value of the wetland, then the landowner would have no claim under the compensation provision (proposed Section 404, ¶ (d)).

³⁸⁹ "Preserved" wetlands are simply wetlands that an owner decides not to develop. The thinking behind this position is that because no wetlands are supposed to be lost under current regulatory protections, merely preserving already existing wetlands would be giving the owner credit for nothing. The term "conserved wetlands" is also used interchangeably with preserved wetlands.

destroyed.³⁹⁰ This bias is built into the Mitigation Banking Guidance in its provision that preservation is only to be solely allowed to generate credit in mitigation banks in “exceptional circumstances.”³⁹¹ It also provides that in order for a mitigation bank to generate credits solely for preservation, two factors must be considered: (1) whether the wetlands functions are important to the region in which the wetlands is located and (2) whether the functions are “under demonstrable threat of loss or substantial degradation due to human activities that might not otherwise be expected to be restricted.”³⁹² In a major blow to expanded use of mitigation banking, the Mitigation Banking Guidance provides that the demonstrable threat cannot be “the consequence of actions under the control of the bank sponsor.”³⁹³

The anti-preservation bias has an unfortunate result for those searching for a compromise methodology in the takings controversy. To illustrate, let us return yet again to our property owner with the 400 lots, one of which is a wetlands that cannot be developed. As discussed above, granting mitigation bank credits to the owner could resolve the takings issue to the satisfaction of both the owner and the government. But the position expressed in the Memorandum would not allow the owner to establish a wetlands bank on his one lot of wetlands, because it would not be threatened except for his actions. The end result of this policy is that property owners who decide to preserve portions of their property rather than developing them cannot be granted mitigation bank credits.

This short-sighted position impedes the application of mitigation banking to resolving regulatory takings conflicts in the scenario where a property owner is most

³⁹⁰ Ratner, *supra* at 1152.

³⁹¹ Mitigation Banking Guidance at ¶ II.B.4.

³⁹² *Id.*

³⁹³ Mitigation Banking Guidance at ¶ II.B.4. “Bank sponsor” is defined as any public or private entity responsible for establishing and, in most circumstances, operating a mitigation bank. *Id.* at ¶ III.B. Therefore, an owner of land cannot preserve that land with a conservation easement and be awarded mitigation bank credits by a regulator because any “threat” of development would have to be with the consent of the owner.

likely want to cooperate. It far more palatable to set aside a portion of one's land for mitigation banking credits than to be forced to purchase someone else's land to gain credits to apply to one's own land. This circular process is antithetical to streamlining the system.

The bias also can be viewed as overly idealistic or, more harshly, ignorant of reality. To deny mitigation banking credit to property owners who choose not to develop their own property in the guise of no net loss is folly. The no net loss policy has existed since President Bush adopted it in 1989.³⁹⁴ Since that time, conservative estimates are that up to 300,000 acres of wetlands have been lost every year.³⁹⁵ No net loss is not working. Furthermore, conserved wetlands have the greatest chance of long-term sustainability, since their hydrological "roots" will not be destroyed. How much more valuable is a conserved wetland than a created wetland that may never have an integrity of wetland functions and may fail in the near future? Additionally, wildlife and vegetation is more protected if preserved rather than damaged or destroyed before attempts are made to "bring them back" to a restored, enhanced or created wetland. The no net loss bias in the mitigation banking guidelines is detrimental to both the administrative system and to the physical habitat.

VI. A PROPOSED SOLUTION

A. No Truly Better Solution Has Been Proposed

Conflicts over wetlands regulation can only increase in the future. The "no-net loss" policy³⁹⁶ will not allow the Corps to relax its regulation over wetlands. As most wetlands are now owned by private citizens, the number of permit applications and possible number of denials should increase in the future as population increases force further development. Resolving individual claims in court under the current law is costly, time-consuming and unpredictable due to its *ad hoc* nature.

³⁹⁴ Ratner, *supra* at 1139.

³⁹⁵ PROTECTING AMERICA'S WETLANDS, *supra*.

³⁹⁶ PROTECTING AMERICA'S WETLANDS, *supra* at 2.

Another major cause of the criticism of the Section 404 program, in the opinion of the National Wildlife Federation, “is a direct result of the program’s complexity which is due, in large part, to the fact that the program is governed by a piecemeal set of regulations, guidance documents and memoranda of agreements.”³⁹⁷ The many different regulatory processes and programs “create uncertainty and inconsistencies in the federal wetlands permitting process which angers and frustrates permit applicants.”³⁹⁸

These and similar criticisms have evoked several proposed solutions. The compensation legislation represented by the Omnibus Property Rights Act of 1995 seeks to clarify and simplify, but fails to do so because it adopts many of the principles and much of the language of the modern jurisprudence. Even the clear cut “trigger mechanism” is less than clear due to a failure to adequately define fair market value and take into account pre-existing rules and regulations that limit one’s use of property. The Clean Water Amendments of 1995 drastically reduce the wetlands that may be protected by federal law, and make protections of wetlands secondary to social and economic concerns. Neither bill constitutes a true solution to the controversy because both adopt the property rights advocates’ positions, thus ensuring further conflict as the preservationist side “fights back.” Nor is either bill drafted clearly enough to eliminate future litigation over the meaning of terms and definitions. Thus neither legislative solution to the takings problem is substantially superior to the modern jurisprudence.

The Clinton Administration’s Wetlands Plan sought to “...reform[] [wetlands] programs but not roll[] back the protection of our Nation’s valuable wetland resources.”³⁹⁹ This plan will exempt 90% of homeowners with wetlands in their

³⁹⁷ Letter from Mary Marra, *supra* at 3.

³⁹⁸ *Id.*

³⁹⁹ Corps News Release, *supra* at 2. Quote from Robert Perciasepe, Assistant Administrator for Water, Environmental Protection Agency.

property from having to apply for a Section 404 permit and consequently eliminate a great number of them from the pool of potential regulatory taking claimants.

However, it does so by utilizing yet another nationwide permit that may allow cumulative impacts upon watersheds to progress to the point that the degradation becomes sufficiently great for the Corps District Engineer to become aware of it and stop it.

B. Expanded Mitigation Banking

All three of the proposed solutions could reduce the level of protection afforded to the environment under current wetlands regulatory rules. None of the three seek to resolve the philosophical differences between the opposing sides in the controversy. The most promising solution is a more widespread use of mitigation banking, yet that cannot occur until the Administration modifies the program to allow compensation to property owners who choose to preserve their wetlands. It is the most promising of the solutions evaluated because it recognizes merit in the position of both sides of the debate and creates a predictable process that may placate both sides. The mitigation banking plan detailed in the Mitigation Banking Guidance can serve as the foundation for an expanded mitigation banking system. It can be improved by the following provisions:⁴⁰⁰

1. Put the Corps in Charge of the Process

The Mitigation Banking Guidance sets out guidelines for potential creditors (bank sponsors) to follow in order to establish a mitigation bank.⁴⁰¹ It requires a bank sponsor to draft a prospectus to include objectives for the bank and how it will be established and operated.⁴⁰² Then the agency would evaluate it and work with the bank sponsor to confirm the bank's technical feasibility.⁴⁰³ The Mitigation Banking

⁴⁰⁰ Some of the ideas repeated herein have been shared and discussed so frequently that, by accident, I may cite to a secondary source. I apologize to the original authors in advance.

⁴⁰¹ Mitigation Banking Guidance at ¶ II.C.1 -.6.

⁴⁰² *Id.* at ¶ II.C.1.

⁴⁰³ *Id.*

Guidance also establishes the Bank Instrument that sets out the operating rules for the bank and will require agency approval and signature of the bank sponsor.⁴⁰⁴ Public comment on any mitigation banking system is required.⁴⁰⁵

Those procedures set out in the Mitigation Banking Guidance should be retained. However, under the guidance, the Corps shares approval authority with the Environmental Protection Agency, the Fish and Wildlife Service and the National Marine Fisheries Service if their participation is “appropriate.”⁴⁰⁶ As one commenter put it, the need for a consensus decision between all the appropriate agencies makes the approval process “more uncertain” and as a result “[o]nly a few investors will perhaps take that risk.”⁴⁰⁷

2. Give Credit For Preservation

The biggest change needed to make the Administration’s system work has already been discussed - the need to recognize preservation as appropriate and award mitigation banking credits for conservation of wetlands. The argument against this proposal is that under the current wetlands system, no wetlands should be lost and giving credit for preservation “is money for nothing.”⁴⁰⁸ One counter-argument is based on simple mathematics - “no net loss” is not working. Even the EPA has acknowledged that as much as 300,000 acres of wetlands have been lost per year⁴⁰⁹ at

⁴⁰⁴ *Id.* at ¶ II.C.2. The Bank Instrument would require the following information: the bank goals and objectives, ownership of bank lands, size and classification of wetlands in the bank, description of baseline conditions at the bank site, methods for determining credits and debits, accounting procedures, performance standards, reporting protocols and monitoring plan, contingency and remedial actions and responsibilities, financial assurances, compensation ratios and provisions for long-term management and maintenance.

⁴⁰⁵ *Id.* at ¶ II.C.5.

⁴⁰⁶ *Id.* at ¶ II.C.3. This is in contrast to the Section 404 permit process, in which the Corps serves as the sole approval authority for permits, subject to a veto by the EPA. 33 C.F.R. 320.2(f).

⁴⁰⁷ Royal C. Gardner, *Federal Wetland Mitigation Banking Guidance: Missed Opportunities*, ENVTL. L. REP., NEWS AND ANALYSIS, Vol. 26, No. 2 at 10075, 10078 (February, 1996).

⁴⁰⁸ See Sapp, *supra* at 1 ENVTL. L. 131 for a discussion of some of the opponents to credit for preservation. He states that “the major reason” this side of the argument adopted their position is “their belief that preservation contravenes the Clinton Administration’s policy of “no net loss.” By allowing preservation, they believe the government is sanctioning net losses of wetland acreage.” *Id.*

⁴⁰⁹ OEP Press Release, quoted from Carol M. Browner, Administrator of the EPA.

a time when the no net loss policy was in effect. There is no sense in denying viability to mitigation banking in order to perpetuate the myth of no net loss.

Another reason why preservation should be given legitimacy is that preserved wetlands are guaranteed to succeed as replacements for wetlands values lost in the developed wetland. Other types of compensatory mitigation, such as creation of new wetlands, are much less reliable.⁴¹⁰ A preserved wetland may be preferable over a restored wetland because there is no temporary loss of wetlands functions. For example, it may take decades for a forested wetland to recover its wetlands functions after it has been destroyed,⁴¹¹ but there is no such loss of functions if the forest is simply preserved.

Yet another advantage that preserved wetlands have is that they can serve as incentive for participation. A bank sponsor can obtain immediate credit for a fully functioning wetland from a regulator and immediately begin selling its credits to debtors required to perform compensatory mitigation. Potential participants may be discouraged if they are forced to wait to receive credits until they can prove their created or restored wetland will be viable. Time is money to a business person and delay is a disincentive to participate. Providing credits for a preserved wetland can get a bank up and running immediately and provide a more certain return on an investment.

3. Assign Predictable Value to Wetlands

In order to encourage participation in the mitigation banking work system, it will be necessary to make the system as predictable as possible so that business

⁴¹⁰ An oft-cited study commissioned by the Florida legislature and reported in Fla. Dep't of Env'tl. Reg., Report on the Effectiveness of Permitted Mitigation, Florida Department of Environmental Regulation 2 (March 5, 1991), studied over 1200 permits. It found that compensatory mitigation projects that were allowed to use created wetlands had a high rate of noncompliance (only 4 out of 63 were in compliance) with the goal of creating self-sustaining wetland systems. *Id.* at Executive Summary. The study also showed that mitigation projects only had a 27% success rate. Sapp, *supra* at 1 ENVTL. L. 116.

⁴¹¹ Sapp, *supra* at 1 ENVTL. L. 121.

people can calculate expenses and predict income and profit. One requirement is to devise a system to rank wetlands according to some pre-determined formula so that potential bank sponsors may calculate the number of credits that will be awarded for a certain wetland. The classification system of House Bill 961⁴¹² is an example of a ranking system. However, the system should be based as much as possible on purely scientific grounds. The Clinton Administration has advocated “[a]ppropriate functional assessment techniques” to distinguish between “highly functional and ecologically significant wetlands” and those with more limited functions, with correspondingly different degrees of protection.⁴¹³

4. Affect on Takings Claims

An expanded mitigation banking system could drastically reduce regulatory takings as an issue in wetlands regulation. Property that is “deemed undevelopable because of wetland contained thereon” would be assigned “the value of mitigation credit that can be used to satisfy permitting requirements for other projects.”⁴¹⁴ If value is assigned as a result of developmental restrictions, then property owners would in effect be compensated for value lost simultaneously with a permit denial or restriction. If it is true that seventy-five percent of the remaining wetlands in the continental United States is owned by private landowners,⁴¹⁵ then it may be possible

⁴¹² H.R. 961, at proposed § 404(c).

⁴¹³ PROTECTING AMERICA'S WETLANDS, *supra* at 10. The Wetlands Plan calls for regional assessment of values rather than a national ranking system. It refers to a functional assessment tool known as the Hydrogeomorphic Classification system to make timely and accurate assessments of wetlands functions. *Id.* A ranking system may be based on the quality of habitat supported, water quality functions served, biodiversity of species present, hydrological functions or a combination of these and other factors. Devising a ranking system would be predictably controversial and complex, yet some sort of agreement must be reached on valuing wetlands in order for a mitigation banking system to function. If nothing else, value could be awarded on a per acre basis, *i.e.*, one credit awarded per each acre of a delineated wetland created, restored, enhanced or preserved.

⁴¹⁴ Jonathan Silverstein, *Taking Wetlands to the Bank: The Role of Wetland Mitigation Banking In A Comprehensive Approach to Wetlands Protection*, 22 B.C. ENVTL. AFF. L. REV. 129, 139 (1994).

⁴¹⁵ PROTECTING AMERICA'S WETLANDS, *supra* at 2, estimates that private citizens own 75% of the wetlands remaining in the lower 48 states.

to regulate and preserve many of those acres of wetlands without creating a large number of claims of a regulatory taking through use of a mitigation banking system.

VII. CONCLUSION

The incentive to preserve created by mitigation banking is a compromise that recognizes that a private property owner purchased the right to use his property with the title and the reality that if wetlands are not preserved, society as a whole and each individual will be the poorer for it. Use of an improved mitigation banking system could streamline the permit process while reducing some of the acrimonious divisiveness that has developed between the government and the regulated community. An expanded mitigation banking system may not be the ideal solution, but it is a major step in the right direction.