Fordham Environmental Law Review

Volume 2, *Number* 2 2011 *Article* 2

It's Not Easy Being Green: The Judicial View of Government Takings of Private Wetlands

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IT'S NOT EASY BEING GREEN: THE JUDICIAL VIEW OF GOVERNMENT TAKINGS OF PRIVATE WETLANDS

I am the Lorax, I speak for the trees. I speak for the trees, for the trees have no tongues.

Dr. Seuss

In the make-believe world of Dr. Seuss, the Lorax warned against the destruction of the environment. Unfortunately, the basis of the warning can be found in today's real world. As this nation becomes more aware of the fragility of its environment, there will be growing conflicts between the different interests that concern us as a society.[1] People today are beginning to realize that commonly held values need to be reevaluated in light of new and emerging concerns and that the danger to the environment is no longer something that can be ignored. One such issue is that of wetlands[2] protection.

As the government seeks to protect this nation's wetlands, private owners of those lands demand compensation for loss of the economic viability of those lands. The conflict is simply a question of whether the government action is a valid exercise of police power or whether it is an impermissible interference with the enjoyment of private property rights.[3] The answer is far from clear. On the one hand, there is an inherent sense of fairness that would seem to dictate compensation for economic loss caused by government regulation.[4] On the other hand, there is a strong argument that the government must not be hindered in its ability to protect the wetlands.[5]

This Note discusses the problems that arise in the creation of a judicial standard to resolve this conflict. Part I examines the history of the wetlands and the origin of the primary federal legislation created to protect them. Part II discusses the current judicial trends in deciding whether

1. It is really within the last 30 years that public awareness has grown to be more sensitive to environmental issues. The result has been an increase of legislation aimed at our environment. Recent legislation included standards for maintaining clean air and water, restrictions on the dumping of wastes and the establishment of liability for individuals responsible for the contamination of land or water. For a broad overview of the types of legislation that have been enacted, see Sweeney, *Protection of the Environment in the United States*, 1 FORDHAM ENVTL. L. REP. 3 (1989).

2. "Wetlands possess three essential characteristics: (1) hydrophytic vegetation, (2) hydric soils, and (3) wetland hydrology, which is the driving force creating all wetlands. The three technical criteria specified are mandatory and must all be met for an area to be identified as wetland. Therefore, areas that meet these criteria are wetlands." FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS, 5 (An Interagency Cooperative Publication) Fish and Wildlife Service, Environmental Protection Agency, Department of the Army, January 1989.

3. *See, e.g.*, Nat'l L. J., July 23, 1990, at 24.

4. *See, e.g.*, Siemon, *Of Regulatory Takings and Other Myths*, 1 J. LAND USE & ENVTL. L. 105, 105 (1985).

5. Tripp & Hertz, *Wetland Preservation and Restoration: Changing Federal Priorities*, 7 VA. J. NAT. RESOURCE L. 221, 223 (1988).

wetlands regulations constitute a taking. Finally, Part III points out the different paths that are open to the judiciary to follow in resolving the issue. This Note concludes by arguing that the courts must look beyond economic considerations as the single determinant in deciding whether compensation must be given. Rather, courts should expand their view to include an ecological perspective.

I. REGULATION OF WETLANDS

There is no question that we have seriously depleted our wetlands in the United States. Well over half the wetlands in this country have been destroyed.[6] In the time between the first settlements on this continent and the 1980's, approximately 215 million acres of wetlands have been reduced to 95 million.[7]

This unrestrained destruction resulted from a lack of understanding of the wetlands' importance. When settlers first came to this country, they saw wetlands as unprofitable land to which no good use could be made. As both our technology and population grew, it became apparent that these wetlands tracts would be profitable if they were developed and sold.[8] The policy of developing the wetlands has resulted in a staggering amount of destruction to them in the latter part of this century.[9]

Only recently has the rapid disappearance of the wetlands begun to alarm people. As the importance of the role wetlands play in our chain of ecology as well as in our economic projections became more apparent, calls for curtailing their continuing destruction became more vocal.[10]

Wetlands perform many extremely important functions including the prevention of flooding, the maintenance of ground water supplies and the provision of fish and wildlife habitats.[11] Through these functions, "wetlands furnish spawning and nursery areas for commercial and sport fishing, act as natural cleaners of airborne and waterborne pollutants, provide recharge areas for water supplies, afford natural protection from hazardous floods, . . . and serve as high yield food sources for aquatic animals."[12] It could be argued that any one of these functions would

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6. *Id.* at 221.

7. *Id.*

8. Klock & Cook, *The Condemning of America: Regulatory "Takings" and the Purchase By the United States of America's Wetlands*, 18 SETON HALL L. REV. 330, 331 (1988).

9. In the 20 year period from the mid 1950's to the mid 1970's the annual loss rate of the lower 48 states alone was 458,000 acres. *See supra* note 5, at 221.

10. *See generally* Lovely, *Protecting Wetlands: Consideration of Secondary Social and Economic Effects by the United States Army Corps of Engineers in its Wetlands Permitting Process*, 17 ENVTL. AFF. 647 (1990); Klock & Cook, *supra* note 8, at 332; Smallwood, Alderman & Dix, *The Warren S. Henderson Wetlands Protection Act of 1984: A Primer*, 1 J. LAND USE & ENVTL. LAW 211, 211 (1985) and Comment, *Wetland Litigation in the Gulf Coast States*, 58 MISS. L.J. 123, 123-24 (1988).

11. Tripp & Hertz, *supra* note 5, at 221-22.

12. Blumm, *Wetlands Protection and Coastal Planning: Avoiding the Perils of Positive Consistency*, 5 COLUM. J. ENVTL. L. 69, 69-70 (1978).

warrant strong regulation.[13] Taken as a whole, it cannot be disputed that preservation of wetlands is one of our society's most important goals. They play far more than merely an aesthetic role in our ecosystem; they are vital to maintaining a healthy and stable ecology.[14]

In response to the alarming disintegration of the ecologically sensitive land, Congress passed the Clean Water Act (CWA).[15] Section 404 of the CWA makes unlawful the discharge of dredged or fill material into the waters of the United States as well as removal of materials without a permit issued from the Secretary of the Army.[16] The implementation of the statute is delegated to the United States Army Corps of Engineers (Corps).[17] The Corps evaluates permit requests to ensure compliance with Corps and Environmental Protection Agency (EPA) regulations.[18]

The Corps makes determinations as to the granting of the permitting process in which developers seek to gain fill permits.[19] Although the CWA never mentions the term "wetlands," over time both the Corps and EPA have established regulations which deal with these lands.[20] The

13. One problem, documented by many biologists including Paul and Anne Ehrlich, which has been caused by the destruction of the wetlands is that it endangers the different species of animals which live there. The problem of species extinction is one of tremendous proportions. Aside from the general notions that the loss of any species is aesthetically and ethically repugnant, there are far reaching effects that are not as apparent. Different, seemingly insignificant species are helpful in research including, anti-cancer agents, antibiotics and anti-venoms. Additionally, protecting species is a paramount goal because of the important contribution that they make in maintaining a healthy environment. When species are lost, ecosystems are disrupted and, as a result, nature's ability to provide a moderate climate, cleanse air and water, protect crops, and replenish soil is destroyed. The wetlands also are important to future generations. Many of the species which habituate in these lands are essential to gene research. Without protection for diverse species we face incalculable catastrophe. *See* Note, *Regulated Taking of Threatened Species Under the Endangered Species Act*, 39 HASTINGS L.J. 399, 406-08 (1988).

14. *See generally* McCurdy, *Public Trust Protection for Wetlands*, 19 ENVTL. L. 683 (1989).

15. The CWA was part of the sweeping amendments to the Federal Water Pollution Control Act (FWPCA) (codified at 33 U.S.C. §§ 1251-1376 (1982)). The act was passed in an effort to gain better enforcement of the statutory prohibitions. Note, *The Supreme Court Upholds the Corps' "Wetland Jurisdiction,"* 2 J. LAND USE & ENVTL. L. 65, 70 (1986).

16. 33 U.S.C. § 1344 (1982).

17. 33 U.S.C. § 1344 (1982).

18. *See infra* note 19 and accompanying text.

19. The authorization to issue regulations for the wetland permitting process is found in section 404 of the CWA. (33 U.S.C. § 1343(c)). The established guidelines are set out in 403(b). This section establishes the standards for ocean dumping permits. The Corps is required to consider pollutant disposal effects on aesthetic, recreation and economic values (§ 1343(c)(i)(C)). The CWA defines pollutants very broadly and includes virtually any fill material (§ 1362(6)). As a result, the Corps has very broad powers to grant or deny permits.

20. In delegating authority to the Corps under CWA § 404, Congress defined "navigable waters" as the protected entity. The question of what exactly constituted navigable waters proved problematic. Although it made no specific designation, Congress clearly intended to expand protection beyond traditionally navigable waters. The result was to expand jurisdiction of the Corps over non-adjacent wetlands which affect interstate com-

Corps' authority was ultimately defined by the Supreme Court in *United States v. Riverside*.[21] The issue before the Court was whether the Corps had statutory and constitutional authority to require a permit for filling wetlands adjacent to navigable waters.[22]

In unanimously reversing the Sixth Circuit, the Court held that by finding the determining factor to be frequent flooding of an area the lower court had misconstrued the Corps' definition of lands covered under the CWA. The Supreme Court determined that saturation by either surface or ground water was sufficient to trigger the Corps' authority as long as the saturation supports wetland vegetation.[23] The Court based its view that the jurisdictional extension was proper on the language, policies and legislative history of the CWA.[24] Despite the fact that wetlands are not specifically mentioned in the CWA, the *Riverside* opinion makes the Corps' authority to regulate permits over the wetlands clear. *Riverside* left open the possibility of government regulation amounting to a taking, but did not clearly define such circumstances.[25] While the Court noted that the claimants here might have a ripe taking claim, that issue was not before the Court.[26] The possibility mentioned by the Court presents an opening for additional takings claims for other plaintiffs.

Congress realized the importance of the wetlands when it enacted the CWA amendment.[27] The *Riverside* opinion settled any confusion as to the Corps' jurisdiction to regulate wetlands under the statute. Now that the smoke has cleared on the Corps' ability to grant permits, a new problem has appeared on the horizon: to what extent does the Corps' denial of a permit constitute a regulatory taking? To fully analyze this issue it is necessary to examine the evolution of the takings doctrine.

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merce. Since most wetlands are home to fish and migratory birds, interstate commerce (e.g., the fishing industry) is easily affected by the vast majority of wetlands. This expansion of jurisdiction was met with much resistance until the Supreme Court finally laid the issue to rest. *See infra* note 21 and accompanying text. For an in-depth look at the expansion of the Corps' jurisdiction, *see* Geltman, *Regulation of Non-Adjacent Wetlands Under Section 404 of the Clean Water Act*, 23 NEW ENG. L. REV. 615 (1988-89).

21. 474 U.S. 121 (1985).

22. *Id.* at 123.

23. *Id.* at 129.

24. *Id.* at 132-35.

25. *Id.* at 128.

26. *Id.* at 129 n.6.

27. The congressional intent of the FWPCA can be seen when considering the National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. §§ 4321-70 (1982 & Supp. V 1987). It is this regulation which set the statutory framework for the more specific FWPCA. Congress enacted NEPA to ensure that governmental agencies consider environmental factors whenever a proposed federal action could significantly affect the human environment. Written broadly, NEPA sets no substantive standards. Rather, NEPA is designed to ensure that humans and nature coexist in productive harmony, while promoting fulfillment of human social and economic requirements both now and in the future. Lovely, *Protecting Wetlands: Consideration of Secondary Social and Economic Effects by the United States Army Corps of Engineers in its Wetlands Permitting Process*, 17 ENVTL. AFF. 647, 651 (1990).

II. THE TAKINGS DOCTRINE

The fifth amendment of the Constitution provides for compensation to be given when government takes private land for public use.[28] While a seemingly simple concept, the application of takings law has been extremely confusing.[29] The creation of a definitive standard is very difficult. One hotly debated issue is the question of when an exercise of the police power of government[30] so infringes on individual property rights that it makes the regulation invalid, requiring that compensation must be paid.[31] One way the judiciary strikes this balance is through employing an economic theory.[32] This approach is generally used by the Supreme Court in deciding takings cases.[33] It is necessary to explain the economic theory to some extent.

While there is no doubt that the government may establish restrictions regarding land use, at some point those regulations may become so inhibitive that they will constitute a taking of the property by the government.[34] The Supreme Court has held that land use regulation may amount to a taking if the regulation does not advance a legitimate state interest or denies an owner economically viable use of their land.[35] As

28. U.S. CONST. amend V., states in pertinent part: "nor shall property be taken for public use without just compensation."

29. In fact, commentators have noted, "[t]he incoherence of takings law is legend." Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 ST. JOHNS L. REV. 433, 434 (1989). The Court has been attacked for creating "chaos" and displaying a "sorry performance" in its land use takings cases, creating "a welter of confusing and apparently incompatible results." Bowden & Feldman, *Take It or Leave It: Uncertain Regulatory Taking Standards and Remedies Threaten California's Open Space Planning*, 15 U.C. DAVIS L. REV. 371 (1981); Epstein, *Not Deference but Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351, 353; Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964).

30. In making a determination of justifiable police power the judiciary is often very deferential to the legislature. A measure that is designed to protect health, welfare and safety often need only be reasonable. *See, e.g.*, Lawton v. Steele, 152 U.S. 133 (1894); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (the definition of reasonableness depends on the balance between what needs to be protected against and the means by which the government chooses to protect). When reasonableness is challenged, it is generally incumbent on the challenger to prove unreasonableness. *See, e.g., Goldblatt*, 369 U.S. at 596; Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959).

31. The general idea of just compensation is beyond the scope of this Note. For an overview, see generally B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

32. An economic approach is a determination of whether the economic value of the land will become so eviscerated that the land owner has been left with valueless property. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 342 (1988).

33. The basis of a regulatory taking economic theory stems from Justice Holmes' decision in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In that case, the Supreme Court first recognized that a restrictive zoning and land-use regulation that "goes too far" can constitute a taking if it takes away the value of the land. *Id.* at 415.

34. *Pennsylvania Coal*, 260 U.S. at 415.

35. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). The first part of the test is

noted in *Pennsylvania Coal*,[36] a takings determination is "a question of degree and therefore cannot be disposed of by general proposition."[37] The degree mentioned by Justice Holmes deals with the infringement on the profit value of the land by the government regulation. The Court has utilized several factors in making this economic determination. These factors have been articulated in *Connolly v. Pension Benefit Guaranty Corp.*,[38] where the Court observed, "we have identified three factors which have particular significance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; (3) the character of the government action."[39] In making a determination of a taking, the dominant factor that is relied on by the Court is how much profit will be lost for the owner of the property.[40]

Given the substantial sums of money real estate investors stand to make by developing wetlands, the amount of interest in takings cases concerning wetlands is not surprising.[41] If investors are not able to get the value they expect for the land as a result of government regulations, they will most likely seek to get compensation from the government.

The relevant inquiry has been whether all possible alternative uses for the land have been foreclosed.[42] In *Agins v. City of Tiburon*,[43] the claimants held an unimproved five acre tract of land. The city adopted an ordinance which restricted development on the claimants land to a one

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a due process inquiry to determine the legitimacy of the regulation itself. The second part, dealing with economics, determines the loss of profit viability to the owner of the land. Thus, under this test, if the regulation is valid on its face, the determination of the compensation issue rests upon the economics of the regulation.

36. 260 U.S. 393 (1922).

37. *Id.* at 413.

38. 475 U.S. 211 (1986).

39. *Id.* at 224. In looking at the investment-backed expectation factor, the Court has traditionally stated that the expectation must be reasonable. Thus, a land owner cannot pick any amount of profit, but must be prepared to demonstrate the likelihood of obtaining that amount or near that amount. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 (1980).

40. There are some examples of cases in which the Supreme Court has not used economics as the primary factor. *See, e.g.*, Andrus v. Allard, 444 U.S. 51 (1979). In this case, a prohibition on the sale of eagles or their parts rendered commercially valueless the plaintiff's eagle feathers. The Court nonetheless upheld the regulation stating that: "[a]t any rate, loss of future profits — unaccompanied by any physical property restriction — provides a slender reed upon which to rest a takings claim." *Id.* at 66. For other examples of a non-economic approach, *see infra*, notes 106-12. It is important to note that in *Andrus*, the Court qualified its statement implying that there was a greater interest in lost profits when a regulation contains a physical property restriction. That would be the case concerning a permit denial under § 404. It has been further noted that these cases represent the exception to the rule and "are not widely followed." *See* Hunter, *supra* note 32, at 331.

41. Hunter, *supra* note 32, at 342.

42. *See id.* at 262-63; Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 136-37, *reh'g denied* 439 U.S. 883 (1978).

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

family dwelling, accessory buildings and open-space uses.[44] The Supreme Court has stated that a fifth amendment takings claim does not exist when other uses of the land are permitted despite the regulation.[45] The Court wrote that "although the ordinances limit development, they neither prevent the best use of the land, nor extinguish a fundamental attribute of ownership."[46] The issue becomes what constitutes the "best use" of the land. This decision is important because an applicant's assertion of a takings claim may not be valid if it is only the highest yielding plan for the land that is foreclosed by the regulation. Owners will undoubtably argue that the best use is being denied and therefore the regulation constitutes a taking. Thus, if a permit is denied for the filling of a wetlands parcel, this standard for takings applies if the economic viability is removed by virtue of the denial.[47]

If the law or the regulation fails to advance a legitimate state interest, the Supreme Court will likely determine that a taking exists.[48] Although the Court has never explicitly defined what constitutes a "legitimate state interest," language has been extended that can serve as a guideline.[49]

Even if there are some alternative uses for the land, a land-owner may still have a takings claim. If the owner of property has invested time and money into the land, that owner may have an "investment backed expectation" argument against the government regulation.[50] The Supreme Court in *Ruckelshaus v. Monsanto Co.*[51] held that a valid takings claim

44. Agins v. City of Tiburon, 447 U.S. at 257.

45. *Id.* at 262-63.

46. *Id.*

47. Klock & Cook, *supra* note 8, at 346.

48. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). For an in-depth discussion of this case, see *infra* note 49 and accompanying text.

49. *See, e.g.*, Village of Euclid v. Ambler Realty 272 U.S. 365 (1926) (that power required to be exercised in order to effectually discharge within the scope of the constitutional limitations [a state's] paramount obligation to promote and protect the public health, safety, morals, comfort, and general welfare of the people). *Id.* at 387. General welfare has been construed in many different ways to justify regulations. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 30-32 (1954) (spiritual and spacial relationships); Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 265, 69 N.W.2d 217, 220 (preserve property values), *cert. denied*, 350 U.S. 841 (1955); Warren v. Municipal Officers, 431 A.2d 624, 627 (Me. 1981) (ordinance was a legitimate state interest because it was related to general welfare).

50. This theory has been defined as, "showing that [appellants] have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130 *reh'g denied*, 439 U.S. 883 (1978).

51. 467 U.S. 986 (1984). In this case, the Supreme Court decided that Monsanto had a property right in its data developed by the company. That data was turned over to the EPA pursuant to regulations which mandated that all pesticides must be registered with EPA prior to sale. The EPA disclosed the data. Monsanto argued that the public disclosure of data products on which considerable time and money had been expended constituted a taking of property. Part of the claim was dismissed because the submission of data was held to be voluntary (in order to gain a benefit), and because notice was given that data submitted after 1978 may be disclosed. The Court found, however, that a valid takings claim existed during the period between 1972 and 1978 because the government

may be made if a property owner who has invested time and money is subsequently denied use of the land or is required to conduct extensive mitigation to compensate for the loss of the expected return.[52]

By utilizing the *Monsanto* decision, the requirements for a takings claim were further delineated in *Nollan v. California Coastal Commission*.[53] The Court noted that the right to build on one's own property is not a benefit bestowed by the government but rather is one of the rights inherent in land ownership. Thus, the voluntary exchange found in *Monsanto*, is not applicable in the *Nollan* case.[54] The Court stated, "[s]o long as the commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."[55] Thus, the full property rights of an owner of property do not diminish simply because the current owner is not the original purchaser of the land. In a wetlands takings context, this becomes important because the fact that an individual is a secondary owner does not diminish their rights if a takings claim is set forward.

Since challenges to the jurisdiction of the Corps of Engineers have failed,[56] an owner of wetlands may try to make a takings claim against the government. The theory of investment backed expectation lends support to the notion that a property owner who is denied a wetlands fill permit under section 404 of the Clean Water Act, may have a valid takings claim on that basis.[57] For example, if a prior owner had the right to a permit, a subsequent owner who obtains the property with the expectation of obtaining such a permit may be able to collect compensation. The *Nollan* decision supports this idea.[58] Thus, the conveyance of a wetlands parcel from one private owner to another will not itself allow the Corps to deny a fill permit to the new owner.

Under the takings doctrine which the judiciary currently utilizes, the United States government must refrain from permit denial or be required to pay a substantial amount of money in compensation to wetlands own-

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has explicitly guaranteed confidentiality during that time. Thus the disclosure of information in that time frame without just compensation constituted a taking. *Id.* at 1016.

52. *Id.*

53. 483 U.S. 825 (1987). The California Coastal Commission granted a permit to appellants in this case, for a new house on the condition that they allow a public easement through their beach in order to get to the public beach. The Court ruled that the imposition by the Commission could not be treated as an exercise of land use regulation since the purpose of the condition is not related to the permit requirement. The state could not compel coastal residents alone to contribute to the goal of achieving public benefit through the allowance of access to the beach without paying just compensation. *Id.* at 838-42.

54. *Id.* at 833 n.2.

55. *Id.*

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

57. Klock & Cook, *supra* note 8 at 354.

58. *Id.*

ers.[59] The recent "takings trilogy" cases[60] demonstrate that the Court is no longer utilizing restraint in takings cases and is limiting the government's police power.[61] The trend in the courts of generally validating claims for takings threatens the traditional use of police power.[62] Without the inclusion of an environmental perspective in the judicial system, the continued loss of wetlands in the United States remains a serious threat.

III. INCLUSION OF AN ENVIRONMENTAL ETHIC

The basic premise behind an environmental ethic is that all land is not the same, and therefore, cannot be treated in the same way.[63] There are three basic goals of an environmental ethic: (1) to maintain particularly ecologically sensitive lands; (2) to preserve the legislative intent to maintain these lands; and (3) to protect the public's right to an environmentally sound earth.[64] The fundamental difference between this ethic and a purely economic determination is that the land value is determined by more than a profit analysis. Using an environmental approach, the ecological value of the land is included in the decision of the court to determine whether compensation must be paid. Failure to incorporate information concerning the ecology of the land means an important attribute of the land and the role that it plays in our society will not be taken into account.[65]

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59. *Id.* at 355. As the risk of costs grow, regulatory bodies may become unwilling to enact a regulation and risk the financial burden that may be imposed upon them if a taking is found. *See* Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 203-04 (1984).

60. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (In a dispute over an ordinance that prohibited construction in a flood area, the Court ruled that the church which owned the property had a valid taking claim. The decision allowed a claimant to recover damages even for a temporary taking.); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (the Court upheld a statute that required mining companies to leave in the ground an amount of coal necessary to provide adequate support for various surface activities). This trilogy of cases all decided in 1987, signified the Supreme Court's more active role in deciding land use cases.

61. It has been noted, "[t]he Rehnquist Court's recent series of cases represent a departure from the United States Supreme Court's long-standing position of restraint in takings cases." Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 CATH. U.L. REV. 847, 848 (1989).

62. *Id.* at 847.

63. *See* Hunter, *supra* note 32, at 312. For example, if the land in question is wetlands, there are far more ecological concerns than if it were a parking lot. As such, the courts would be circumventing the very reason that Congress established wetlands protection legislation.

64. *Id.* at 313.

65. As one commentator wrote:

> The problem with viewing regulatory takings problems in economic terms is that the language of economics does not adequately embrace the land's ecological role. Discussions of dollars and development leave little room to consider biological pyramids and ecological integrity. In sum, an economic view of land

It has been noted that the economic approach to the takings clause embodied in the fifth amendment of the United States Constitution has created a major obstacle to "effective environmental land-use regulation."[66] The question is to what extent courts should adopt an ecological perspective. There must exist a proper balance between legitimate property rights and concern for the environment. Before this balance can be analyzed, it is important to determine what is meant by an environmental ethic. The principles behind an environmental perspective stem from the premise that all living things exist in interrelated systems. Therefore, nothing can be viewed in isolation.[67] The inclusion of an environmental ethic expands the usual economic considerations of the court.[68] The environmental ethic recognizes public rights in ecologically important lands.[69]

It is not unheard of for courts to look at factors beyond financial concerns.[70] In a zoning context, the Supreme Court requires the governing entity to (1) demonstrate that the land use ordinance has some basis in health, safety, morals, or general welfare;[71] (2) decide what constitutes a valid assumption of power only after considering the circumstances.[72] Decisions by the Supreme Court have extended the concept of "general welfare" beyond its plain meaning.[73] In a wetlands context, therefore, a

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> fails to value, and thus to protect, the land's function as the base of the ecological pyramid on which human beings depend.

Hunter, *supra* note 32, at 336.

66. Comment, *Developments in the Law-Zoning*, 91 HARV. L. REV. 1427, 1620 (1978).

67. *See, e.g.*, W. Berry, THE UNSETTLING OF AMERICA: CULTURE & AGRICULTURE 22 (1977); Naess, *The Shallow and the Deep, Long-Range Ecology Movement: A Summary*, 16 INQUIRY 95 (1973).

68. Hunter, *supra* note 32, at 336.

69. In some states, the adoption of the "public trust doctrine" has allowed the state government to avoid a takings claim concerning a land use restriction. The basic theory behind the doctrine is that a transfer of property is still subject to the public's interest in its natural resources. Thus, property may be privately owned, however owners would not be free to do as they pleased with the land. The government would be empowered to protect the public's interest in the resources by prohibiting certain actions by an owner. For example, a government prohibition on the filling of wetlands could be sustained under this doctrine if the government demonstrated that the restriction was for the protection of the drinking water depended on by the community. For an extensive discussion of the public trust doctrine, see generally, Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); McCurdy, *supra* note 14.

70. *See infra* notes 99-102.

71. *See generally* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (police power is that power required to be exercised to effectually discharge a state's obligation to uphold public health, safety and welfare); Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82 (1946) (the Court upheld certain portions of New York's multiple dwelling law because it promoted safety).

72. "The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions." *Euclid*, 272 U.S. at 387.

73. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33 (1954) (Legislators could consider aesthetic values as a consideration in the establishment of regulations. Courts have used

court could find that environmental concerns are included in the general welfare category. The inclusion of an environmental ethic would simply allow the judiciary to look to factors beyond an owner's loss and to determine the impact to ecologically sensitive land when determining whether a regulation was a valid exercise of police power or if compensation was constitutionally required.

While it is possible, the Supreme Court has not yet explicitly used environmental concerns as a standard for finding a taking of an environmentally important area. The lower federal courts and the state courts, however, have not been quite as reticent.[74]

The establishment of a workable environmental ethic in the wetlands takings arena may get some help from the doctrines used in other types of wetlands litigation. For example, in cases where the plaintiffs are not the owners of property, but challenge the issuance of permits, courts have used an ecological standard to make their determinations.[75]

In *Sierra Club v. Froehlke*,[76] the district court listed factors that were considered vital to the establishment of an adequate environmental impact statement.[77] Included were a detailed statement as to "all possible significant effects on the environment and a sincere discussion of alternatives which may reduce or avoid some or all adverse effects."[78] Although the injunction in this case was ultimately vacated, the reasoning of the district court was not questioned.[79]

The use of this standard demonstrates that courts seriously consider environmental concerns in other aspects of wetlands litigation.[80] In *Sierra Club v. Sigler*,[81] the court stated that, "[a]ll factors which may be

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this dictum to uphold zoning regulations based solely on aesthetic values.); Penn Central Transp. v. City of New York, 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978) (The Court found a land use restriction proper because its purpose was to preserve natural landmarks. Although economic value of the land was greatly diminished by the regulation set forth by the city, the Court did not find it to constitute a taking.).

74. *See infra* notes 96-97 and accompanying text.

75. *See infra* notes 96-99 and accompanying text.

76. 359 F. Supp. 1289 (S.D. Tex. 1973), *rev'd sub nom.* Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974), *inj. vacated,* Sierra Club v. Froehlke, 816 F.2d 205 (5th Cir. 1987). In this case an environmental group brought suit to enjoin construction on a lake project in Texas. The plaintiffs argued that the Environmental Impact Statement (EIS) was inadequate. The district court agreed and issued the injunction. On appeal, the Fifth Circuit found the EIS to be adequate but left the injunction in place pending the preparation of a supplemental statement. Thereafter, the Corps redrafted the project significantly and issued an entirely new EIS. The Fifth Circuit then vacated the injunction.

77. *Froehlke*, 359 F. Supp. at 1382-84.

78. *Id.* at 1342 (quoting Corps Reg. § 11b, 37 Fed. Reg. 2525 (1972)).

79. It was after the Corps submitted a new EIS statement for the modified project that the injunction was vacated. For a discussion of the case, see *supra* note 76.

80. *See, e.g.*, Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983). In this case, the court determined that the EIS was not adequate to allow the issuance of a permit. The court held that the failure of the Corps to offer an analysis of the results of an oil spill on the wildlife habitats that existed in the harbor was inconsistent with the legislative mandate that the Corps examine all reasonable effects of issuing a dredge and fill permit.

81. *Id.*

relevant to the proposal must be considered."[82] This decision supports a court considering factors beyond economic ramifications when it determines the validity of a land use regulation.

Generally though, the deciding factor of a takings claim, even those involving wetlands, is economics.[83] Although in some cases a court may find a regulation valid thus denying the takings claim, this is decided without any consideration of environmental concerns.[84] Circuit courts, however, at times have utilized environmental concerns when making a determination on a takings claim under section 404.[85]

As early as 1970, the Fifth Circuit expressed the importance of factoring in environmental impact when determining a taking under federal regulatory statutes.[86] In *Zabel v. Tabb*, the Corps denied a permit under section 10 of the Rivers and Harbors Act.[87] The Fifth Circuit reversed the district court's restrictive view of the Corps' power to deny permits only to uses that interfered with navigation, flood control, or the production of power.[88] The Fifth Circuit stated that, "nothing in the statutory structure compel[s] the Secretary to close his eyes to all that others see. . . . The [government] was entitled, if not required to consider ecological factors . . . ."[89] In making its ruling, the court looked to the congressional intent of enacting protective legislation to preserve the ecology.[90] In *Zabel*, a takings claim was raised but denied by the court, which stated, "the waters and underlying land are subject to the paramount servitude" of the federal government.[91] This underlies the difference between the economic and environmental approach. Under a purely economic analysis, factors such as the importance of the ecology would not be considered. Instead, the court would focus solely on the lost profits claimed by the owner.

In 1972, the Wisconsin Supreme Court became one of the first courts to utilize an environmental ethic. The court in *Just v. Marinette County,*[92] the court viewed the case as a "conflict between the public interest in stopping the despoliation of natural resources, which our citi-

82. *Id.* at 982.

83. *See* Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied* 455 U.S. 1017 (1982) (a taking can be established if the regulation in question extinguishes all economic value from the land).

84. *Id.* at 1192. While the court noted that there was a loss of value in expectation for the land in question, the claim was denied because the present value of underdeveloped areas exempt from permits was twice the purchase price of the entire tract.

85. Comment, *Wetlands Litigation in the Gulf Coast States*, 58 MISS. L.J. 123, 153 (1988).

86. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

87. Rivers and Harbors Act, ch. 425, 30 Stat. 1121 (1899) (codified as amended at 33 U.S.C. §§ 401-13 (Supp. 1986)).

88. *Zabel*, 430 F.2d at 201.

89. *Id.*

90. *Id.* at 213.

91. *Id.* at 215.

92. 56 Wis. 2d 7, 201 N.W.2d 761 (1972). In this case the owners bought a parcel of land that was defined as wetlands. Six years later, Wisconsin passed an ordinance that

zens until recently have taken as inevitable and for granted" and the owner's claim that they have a right to be compensated for the lost productivity of the land.[93] The Supreme Court of Wisconsin determined that the natural character of the land must be considered when making a takings determination.[94] The decision represented a remarkable break from the traditional economic theory employed. Instead of focusing solely on the question of lost profits for the owner of the land, the court factored into the analysis concern for the ecological value of the land and the public's right to a healthy ecology.

Much attention focused on the *Just* decision as a new approach to viewing land use regulation.[95] While there can be no doubt that the *Just* case represents an important move toward an environmental ethic, the court's attempt to reconcile the decision with the more traditional takings doctrines effectively obscures the meaning of the decision in environmental terms.[96] Rather than establish a new ethic, the court used the same economic standard that other courts chose. The difference between the tests are the factors the *Just* court decided to include. The case, however, has been useful to other courts as a starting point in establishing an environmental ethic.[97]

The decision in *Sibson v. State of New Hampshire*[98] represents the beginning of a strong natural use doctrine. In that case, the court denied the takings claim raised by the plaintiff, basing its decision upon a land ethic.[99] Although the court may have been able to utilize an economic

required a permit for general development. Without seeking such a permit, the owners began filling wetlands in violation of the statute.

93. *Id.* at 14-15, 201 N.W.2d at 767.

94. "The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses." *Id.* at 17, N.W.2d at 768.

95. *See, e.g.*, Savage and Sierchio, *The Adirondack Park Agency Act: A Regional Land Use Plan Confronts "The Taking Issue,"* 40 ALB. L. REV. 447, 475-76 (1976); Comment, *Developments in the Law-Zoning*, 91 HARV. L. REV. 1427, 1620-21 (1978).

96. The Justs argue their property has been severely depreciated in value. This depreciation of value is not based on the use of the land in its natural state, but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling. *Just*, 56 Wis. 2d at 23, 201 N.W.2d at 771. This justification premised upon the old takings theories led some commentators to conclude that the practical effect of the case is nil. *See, e.g.*, Bryden, *A Phantom Doctrine: The Origins and Effects of* Just v. Marinette County, 1978 AM. B. FOUND. RES. J. 397.

97. *See, e.g.*, Graham v. Estuary Properties, 399 So.2d 1374, 1382, *cert. denied sub nom.*, Taylor v. Graham, 454 U.S. 1083 (1981); Carter v. South Carolina Coastal Council, 281 S.C. 201, 205, 314 S.E.2d 327, 329 (1984); Claridge v. New Hampshire Wetlands Bd., 125 N.H. 745, 750, 485 A.2d 287, 290 (1984).

98. 115 N.H. 124, 336 A.2d 239 (1975), *rev'd on other grounds sub nom.*, Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981).

99. The plaintiffs had purchased six acres of salt marsh and built on part of it. They sought to fill the remaining acres later but an amendment to the New Hampshire statute required that a permit be obtained before further filling would be legal. The plaintiff

approach,[100] it chose instead to apply weight to the ecological aspects of the land.[101] The court held that the denial of a building permit was "not an appropriation of the property to a public use, but the restraint of an injurious private use,"[102] thus applying weight to the ecological aspects of the land.

The decision attempted to harmonize the many aspects of taking law into one holistic standard.[103] The court's analysis was summed up with a reference to the *Just* decision. It stated that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."[104] In this way the court viewed the takings analysis as more than just a private dispute between an owner of land and the government, but also recognized the far reaching effect that the dispute had on the general population. The court recognized the right held by the community to be free from ecological damage. Thus, *Sibson* represents an attempt by at least one court to utilize all relevant factors concerning the land and not to rely solely on economic factors at the exclusion of all others.

Recent cases indicate that, despite an initial withdrawal, support exists for the standard articulated in *Sibson*.[105] For example, in *State of New Hampshire Wetlands Board v. Marshall*,[106] the court affirmed the ideas set forth in *Sibson* and made a clear distinction between general land use

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argued that the unfilled portion of the land was without value and thus a takings claim existed. *Id.* at 126, 336 A.2d at 240-241.

100. Some cases have upheld permit denials when the restricted wetlands are only part of the entire parcel. *See, e.g.*, Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982). Using this rationale, the New Hampshire court could have reached the same conclusion, reasoning that the plaintiffs received a reasonable return on their investments because they sold the two acres that had been filled. The court did not do this: instead, it focused on the four unfilled acres in question.

101. *Sibson*, 115 N.H. at 127-28, 336 A.2d at 241-42.

102. *Id.* at 128, 336 A.2d at 242, quoting Commonwealth v. Alger, 61 Mass. (7 Cush) 53, 85-86 (1851).

103. The court wrote:

> Moreover the rights of the plaintiffs in this case do not have the substantive character of a current use. The denial of the permit by the board did not depreciate the value of the marshlands or cause it to become of practically no pecuniary value. Its value was the same after the denial of the permit as before and it remained as it had been for millenniums. The referee correctly found that the action of the board denied plaintiffs none of the normal traditional uses of the marshland including wildlife observation, hunting, haying of marshgrass, clam and shellfish harvesting, and aesthetic purposes. The board has not denied plaintiffs' current uses of their marsh but prevented a major change in the marsh that plaintiffs seek to make for speculative profit.

Id. at 129, 336 A.2d at 243.

104. *Id.* (quoting Just v. Marinette County, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972)).

105. Initially courts rejected the environmental ethic in takings claims. *See, e.g.*, Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981).

106. 127 N.H. 240, 500 A.2d 685 (1981).

regulations and those involving wetlands.[107] Included in the opinion was a recognition that many rights are involved when discussing the destruction of wetlands. The court wrote, "[i]n *Sibson*, we recognized the environmental uniqueness of wetlands and its importance to the public health and welfare. Unlike many other property regulation situations, the filling of wetlands alters the property itself and changes its basic character, to the detriment of the public good."[108]

Following suit with the *Just* decision, the question for the Supreme Court, if it decides to rule on the issue, is not what standard should be applied, but rather, whether an environmental standard should be used. The traditional view dictates that property should be viewed in purely economic terms.[109] There are strong arguments, however, in favor of using other factors. Wetlands preservation has become a major priority of Congress over the last twenty years.[110] In addition, the Supreme Court itself has deviated from a pure economic analysis in cases concerning zoning restrictions dealing with general welfare,[111] societal disapproval,[112] historical landmarks,[113] and even the amorphous concept of aesthetics.[114] In fact, some of the aesthetics theories that have been used to uphold land use regulations are far more controversial than environmental concerns.[115]

The use of the economic standard by the courts in determining takings claims is by far the norm, but it is not absolute. When other factors are weighed, such as, the legislative intent behind the CWA,[116] deviations by the Supreme Court from the economic theory,[117] and decisions from the

107. *Id.* at 247-48, 500 A.2d at 689.

108. *Id.* Recognition of the special nature of wetlands is not unique to the New Hampshire court, nor is it a brand new concept to the judiciary. *See* Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970). This case involved a restriction that left land owners with wetlands of no economic value. The court carefully distinguished this situation by pointing out that the legislature, in establishing the restrictions sought to specifically preserve the existing character of the bay. It is interesting to note that the legislative intent mentioned in Candlestick Properties is very similar to the intent of Congress in establishing CWA section 404. Thus, the adoption by the federal courts of a land-use ethic concerning wetlands would not be a wholly new endeavor.

109. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

110. *See* Tripp & Hertz, *supra* note 5, at 222.

111. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

112. Mugler v. Kansas, 123 U.S. 623 (1887) (breweries could not be built near cities); Hadacheck v. Los Angeles, 239 U.S. 394 (1915) (prohibition against cement companies near cities).

113. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978).

114. Berman v. Parker, 348 U.S. 26 (1954).

115. *See, e.g.*, Note, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 FORDHAM L. REV. 1013 (1990) (an attack on land use restrictions that are based solely upon aesthetics). If government will deviate on this issue, it makes sense to consider the extremely important issue of the environmental protection. *See supra* notes 12-14.

116. *See supra* notes 15-20 and accompanying text.

117. *See supra* notes 100-02 and accompanying text.

Court stating that even when the economic approach is being used it is not absolute,[118] the use of an environmental ethic can be seen as proper. Strict adherence to an economic theory when dealing with environmentally sensitive land undercuts the very essence of ecological protection intended by Congress when passing the Clean Water Act.[119]

Although under an ecological theory all land is connected to the ecosystem, not all lands would be exempt from development under an ecological ethic.[120] Nor would the establishment of an environmental ethic necessarily increase the burden on the courts. Only in cases where it was determined that the land in question is ecologically sensitive would the court go beyond an economic analysis and add in the factor of ecological effects to the land.[121]

In fact, an additional benefit beyond conserving natural resources would be created. That benefit would be a greater consistency in takings litigation concerning ecologically important land. It has been noted that takings law is very inconsistent, even using the economic theory by itself.[122] The use of an environmental ethic will bring an element of consistency to takings law since "[d]ecisions in individual cases will be more predictable, because factual determinations will turn on objective scientific data."[123]

In sum, the inclusion of an environmental ethic in takings law makes sense when the denial of a permit prevents the filling of land which would have caused "irreparable damage to an already dangerously diminished and irreplaceable natural asset."[124] The economic theory which most courts apply to takings cases fails to recognize other factors that may be relevant to the proceedings. Ignoring important valid concerns about the environment articulated by Congress serves no valid purpose.

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118. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (the Court uses economics as one factor to be used in making land use determinations).

119. *See supra* note 27 and accompanying text.

120. Lands that are not considered to be ecologically sound would not receive special treatment under a natural use theory. Similarly, lands that are determined to be ecologically important . . . could be developed if development would not destroy their ecological function. Only when denial of a permit is based on the state's legitimate regulatory interest in protecting the ecological role of the land would a takings claim fail.

Hunter, *supra* note 32 at 358-59.

121. *See id.* at 359.

122. Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 ST. JOHN'S L. REV. 433, 434 (1988).

123. Hunter, *supra* note 32, at 359. The question is whether such data is available. For purposes of identifying ecologically critical wetlands, the federal government publishes manuals specifically intended to define the different types of wetlands in the United States. *See* FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS, *supra* note 2.

124. Sibson v. State of New Hampshire, 115 N.H. 124, 126, 336 A.2d at 239, 240 (1975), *rev'd on other grounds sub nom.*, Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1984).

CONCLUSION

The Lorax did leave one word of advice to those interested in avoiding an environmental disaster. That word was *unless.* There is no dispute that we are rapidly depleting our wetlands. The current judicial position is to ignore concerns beyond pure economics. In doing so, the courts are making it increasingly difficult for the government to preserve the wetlands of this country. Adopting an environmental ethic would allow the court to give deference to the legislative decisions designed to protect sensitive environmental lands. By relying on a solely economic approach the judiciary is continuing to make decisions that have a been based upon a short term analysis but which have a long term effect. There is evidence that when the outside concerns are great enough the court system will carve out an exception to the economic rule. The peril faced by the wetlands in today's society is a great enough concern.

Unless the judiciary becomes willing to include an environmental ethic in takings determinations, the ecological concerns of the Congress and the public will go unheeded. We will expose our world to further destruction of wetlands. If this is allowed, ecological devastation will not be limited to the make-believe world of Dr. Seuss.

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