Fordham Environmental Law Review

Volume 6, *Number* 3 2011 *Article* 8

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AVOID, MINIMIZE, MITIGATE: THE CONTINUING CONSTITUTIONALITY OF WETLANDS MITIGATION AFTER *DOLAN V. CITY OF TIGARD*

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INTRODUCTION

In 1991, Florence Dolan applied to the City Planning Commission of the City of Tigard, Oregon ("City") for a permit to expand her retail electric and plumbing supply business.[1] As a condition of the development permit, the Commission required Dolan to dedicate to the City, without compensation, ten percent of her property to be used for a greenway and a pedestrian/bicycle path.[2] Consequently, Dolan challenged the dedication requirement as a taking of her property without just compensation in violation of the Fifth Amendment to the Constitution, appealing her case all the way to the United States Supreme Court.[3]

This past term, in *Dolan v. City of Tigard*,[4] the Supreme Court held that the dedication requirement imposed by the City would constitute an unconstitutional taking of Dolan's property unless (1) there was an "essential nexus" between the "legitimate state interest" for the dedication requirement and the dedication requirement itself,[5] and (2) the nature and degree of the dedication requirement was "roughly proportional" to the projected impacts of the proposed development of the landowner's property.[6] With regard to the second requirement, the Court imposed a burden on the City to make "some sort of individualized determination that the [condition] is related both in nature and extent to the impact of the proposed development."[7]

The most significant aspect of the *Dolan* decision is that it shifts the burden to the government to justify the constitutionality of particular conditions imposed in a permit authorizing development of a landowner's property, rather than placing the burden on the claimant to

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1. Dolan v. City of Tigard, 114 S. Ct. 2309, 2313 (1994).
2. *Id.* at 2314.
3. *Id.* at 2315-16.
4. 114 S. Ct. 2309 (1994).
5. *Id.* at 2317.
6. *Id.* at 2319-20.
7. *Id.*

demonstrate that the conditions are unconstitutional. Property rights advocates have argued that the decision has broad implications, and that the *Dolan* analysis and its burden shift apply not only to permit conditions involving dedications of property, but also to a wide range of permit conditions, including nonpossessory land-use restrictions, such as conservation easements and mitigation requirements imposed by federal and state wetland and endangered species programs.[8]

In response to those assertions, this Article explores the potential impact of the *Dolan* decision on the wetlands permitting program under the Federal Water Pollution Control Act ("Clean Water Act").[9] Part I provides an overview to the values and functions of wetlands, the wetlands permitting process under the Clean Water Act, and the concepts of compensatory mitigation[10] and mitigation banking. Part II discusses the traditional takings analysis that would apply to review of mitigation conditions in wetlands development permits if *Dolan* did not apply to such conditions. Part III examines the *Dolan* decision and its predecessor, *Nollan v. California Coastal Commission*.[11] Part IV explains why the *Dolan* decision should be limited to cases involving permit conditions on dedications of property to the government (or other actions that constitute "per se" takings) and should not be extended to cases involving nonpossessory land-use restriction permit conditions, such as wetlands mitigation requirements.[12] Lastly, Part V assumes, arguendo, that the *Dolan* burden shift will be applied to wetlands mitigation conditions and explores whether the shift will have any discernible impact on the ability of the government to impose mitigation requirements on wetlands developers or to accept mitigation banking proposals as an appropriate form of mitigation.

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8. Paul D. Kamenar, *Nollan, Dolan, and Beyond*, THE RECORDER, Sept. 15, 1994, at 7.

9. 33 U.S.C. §§ 1251-1387 (1988).

10. When the federal government issues a permit that authorizes a landowner to destroy wetlands in the course of his or her development, the permit often includes conditions requiring the developer to "mitigate" the damage to the wetlands caused by the development by creating, restoring, or enhancing other wetlands. *See* discussion *infra* notes 39-41 and accompanying text.

11. 483 U.S. 825 (1987).

12. Part IV also examines several other questions that were not resolved by the Court. Specifically, Part IV explores whether it is significant, for purposes of takings analysis, that the permit condition challenged in *Dolan* was imposed through adjudication and whether wetland mitigation requirements could be made more constitutionally defensible if they were imposed pursuant to regulations that described the type and amount of mitigation required for development of wetlands. Part IV also notes that the *Dolan* Court did not clearly articulate whether the burden shift imposed by the Court is a shift in the burden of production, a shift in the burden of persuasion, or both.

I. WETLANDS AND THE CLEAN WATER ACT

A. *Wetland Values and Functions*

Regardless of whether one considers the question from an economic perspective or an ecological perspective, the reasons for protecting and preserving our nation's wetlands are overwhelming.[13] Wetlands play a crucial role in improving water quality by removing excess nutrients, sediments, and pollutants from the water flowing through them.[14] In light of their ability to filter a variety of pollutants, wetlands have even been used in processes to neutralize acid mine drainage and to treat municipal sewage.[15]

Wetlands also aid in the prevention of flooding by temporarily storing flood waters, thus slowing the velocity of the flood waters and lowering flood crests.[16] In addition, wetlands reduce soil erosion[17] and provide critical habitat for countless species of migratory waterfowl and endangered and threatened species.[18] Although wetlands comprise less than five percent of the nation's land,[19] they provide critical habitat for one-third of the nation's endangered species.[20]

Therefore, wetlands clearly serve a vital ecological purpose. Moreover, wetlands serve a more tangible economic function because they can produce enormous quantities of natural products, such as timber, cranberries, blueberries, wild rice, fish, shellfish, and peat.[21] Finally, wetlands provide less tangible, but irreplaceable, recreational, educational, and aesthetic benefits.[22]

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13. For a general discussion of the functions and values provided by wetlands, see Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 ENVTL. L. 1, 2-3 (1993).

14. *Id.*

15. *See* James Gusek, *Constructed Wetlands—Passive Treatment of Mine Drainage*, MINING J., Feb. 22, 1991, at 6 (discussing projects using wetlands to treat acid mine drainage at seven sites operated by the Tennessee Valley Authority and at a "Big 5" Tunnel experimental constructed wetland project in Idaho Springs, Colorado); Lynn MacDonald, *Water Pollution Solution: Build a Marsh*, AM. FORESTS, July 1994, at 26 (discussing the use of constructed wetlands for sewage treatment in Arcata, California, Orlando, Florida, and Hillsboro, North Dakota, and indicating that as many as 300 municipalities in the U.S. may be using "natural" sewage treatment systems).

16. Johnson, *supra* note 13, at 3 n.9.

17. *Id.* at 3.

18. *Id.* at 3 n.11.

19. OFFICE OF TECHNOLOGY ASSESSMENT, WETLANDS: THEIR USE AND REGULATION 1 (1984) (wetlands "comprise about 5 percent of the contiguous United States and about 60 percent of Alaska").

20. William L. Want, *Federal Wetlands Law: The Cases and the Problems*, 8 HARV. ENVTL. L. REV. 1, 3 (1984) (citing *Hearings on S. 777 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environmental and Public Works*, 97th Cong., 2d Sess., app. on Wetlands Values, at 4 (1982) (Hair, J., testimony on behalf of 12 environmental groups)).

21. Johnson, *supra* note 13, at 3 n.12.

22. *Id.* at 3.

Even wetlands that were degraded and restored,[23] and artificially created wetlands,[24] have exhibited a variety of these "functional values."[25] Obviously, not every wetland provides all of these values since no two wetlands are exactly the same. The values provided by a particular wetland are tied closely to its location within a watershed.[26] For instance, a prairie pothole in North Dakota may provide habitat support for migratory birds because it is in their flyway, but may provide little flood prevention value because it is isolated from other surface water. Comparing the values of different wetlands is complicated by the difficulty of quantifying functional values,[27] such as erosion prevention and habitat protection.[28]

B. *Protection of Wetlands Under the Clean Water Act*

Although wetlands provide a vast array of economic and environmental benefits, those benefits have often been ignored in the interest of the short-term economic gains provided by the housing developments and shopping malls built in their place. More than one-half of the wetlands that once existed in the contiguous forty-eight states are gone,[29] and current losses are estimated at 350,000 to 500,000 acres per year.[30]

While the Clean Water Act does not explicitly establish a wetlands protection program, its provisions have been employed to slow the further destruction of wetlands. The Act establishes a comprehensive program of water pollution research and control to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[31] To achieve those goals, the Act prohibits the discharge of

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23. *See* John Walter, *What Value Wetlands?*, SUCCESSFUL FARMING, Sept. 1992, at 25 (discussing the efficiency of restored wetlands in removing nitrates, sediments, and pesticides from water in farming).

24. *See supra* note 15. EPA has provided funding for construction of seventeen wetland wastewater treatment systems in ten states. MacDonald, *supra* note 15, at 26.

25. "Functional value" is the term used by regulators, scientists, and planners to refer to the roles that wetlands perform. Michael G. Le Desma, Note, *A Sound of Thunder: Problems and Prospects in Wetland Mitigation Banking*, 19 COLUM. J. ENVTL. L. 497 (1994).

26. James M. McElfish, Jr., *Wetlands Mitigation Banking*, 1994 A.B.A. SEC. NAT. RES. ENERGY & ENVTL. L., 9TH ANNUAL CONFERENCE ON WETLANDS LAW AND REGULATION L-14.

27. Le Desma, *supra* note 25, at 502.

28. McElfish, *supra* note 26, at L-9 to L-14. There are, however, some scientifically accepted techniques for assessing "functional values" of wetlands. Currently, the techniques that are generally recognized by experts in the field are the Habitat Evaluation Procedure ("HEP") and the Wetlands Evaluation Technique ("WET"). WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 6.10[3] at 6-33 (1989).

29. GENERAL ACCOUNTING OFFICE, WETLANDS OVERVIEW 11-12 (1991) (citing THOMAS E. DAHL, U.S. FISH & WILDLIFE SERV., WETLANDS LOSSES IN THE UNITED STATES: 1780s TO 1980s (1990)).

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

31. 33 U.S.C. § 1251(a) (1988).

dredged or fill materials[32] into "navigable waters," which has been interpreted to include wetlands,[33] without a permit.[34]

Section 404 of the Act establishes the wetlands permit program, which is jointly administered by the United States Army Corps of Engineers ("Corps") and the United States Environmental Protection Agency ("EPA").[35] Although the Corps has the primary authority to issue § 404 permits under the Act,[36] it must apply § 404(b)(1) guidelines developed by the EPA to determine whether to issue a permit.[37]

The § 404(b)(1) guidelines place several important limits on the Corps' authority to issue permits authorizing development in wetlands.[38] First, no discharge of dredged or fill material is allowed under the guidelines if there is a "practicable alternative to the discharge which would have less adverse impact on the aquatic ecosystem."[39] In other words, if a proposed development project can be completed without destroying wetlands, the Corps cannot issue a permit that would allow the destruction of wetlands. When a permit applicant proposes to discharge dredged or fill material into wetlands and the proposed project is not water-dependent (e.g., a dock), the guidelines create a presumption that "practicable alternatives" to the discharge are available, and the burden is on the applicant to rebut that presumption.[40] The analysis that the Corps conducts pursuant to this limitation is referred to as an "alternatives analysis."

Moreover, the guidelines provide that "no discharge of dredged or fill material shall be permitted unless appropriate and practicable

32. "Dredged material" is "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c) (1994). The "discharge of dredged material means any addition of dredged material into . . . the waters of the United States." *Id.* § 323.2(d). "Fill material" includes "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." *Id.* § 323.2(e). The "discharge of fill material means the addition of fill material into waters of the United States." *Id.* § 323.2(f).

33. *See id.* § 328.3(a); 40 C.F.R. § 230.3(s) (1994).

34. 33 U.S.C. §§ 1311(a), 1344(a) (1988).

35. *Id.* § 1344.

36. The EPA is, however, authorized to "veto" the issuance of a § 404 permit in certain circumstances. *Id.* § 1344(c).

37. *Id.* § 1344(b). The Corps cannot issue a permit authorizing a discharge of dredged or fill material into navigable waters unless the discharge complies with the § 404(b)(1) guidelines. 40 C.F.R. § 230.12 (1994). In addition to EPA's guidelines, the Corps evaluates § 404 permit applications under a "public interest" analysis established by Corps regulations, which involves an "evaluation of the probable impacts . . . of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a) (1994).

38. The guidelines provide information on unacceptable adverse impacts on aquatic ecosystems and are developed by the EPA after consideration of the effect of discharges on human health and welfare, marine life, aesthetic, recreation, and economic values. 33 U.S.C. § 1344(b)(1) (1994).

39. 40 C.F.R. § 230.10(a) (1994).

40. *Id.* § 230.10(a)(3). The presumption applies to discharges into wetlands and other "special aquatic sites." *Id.*

steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem."[41] For instance, if it is appropriate and practicable for a developer to treat the materials that will be discharged into wetlands to reduce their toxicity before discharge, or to use machinery or techniques designed to reduce damage to surrounding wetlands in the discharge, a § 404 permit should not be issued unless the developer takes such steps to minimize the impacts of the discharge.[42]

The guidelines recognize that one way to minimize the impact of a proposed discharge of dredged or fill material on wetlands or other aquatic ecosystems is to restore or construct wetlands in another location to replace the wetlands that will be impacted by the discharge, thus "mitigating" the impacts of the discharge.[43] This approach is referred to as "compensatory mitigation."

Prior to 1989, the Corps and EPA disagreed about the role that compensatory mitigation played in the review of § 404 permit applications under the § 404(b)(1) guidelines. Some districts of the Corps concluded that compensatory mitigation proposals of a permit applicant could be considered during the alternatives analysis to compensate entirely for any adverse impacts of the proposed discharge and, thus, reduce the impacts of a discharge to zero.[44] Since the discharge would not have any net adverse impacts on the aquatic ecosystem, the

41. *Id.* § 230.10(d). The guidelines also provide that a proposed discharge will not be permitted if it causes or contributes to a violation of a state's water quality standards, violates applicable toxic effluent standards or prohibitions under § 307 of the Clean Water Act, jeopardizes the continued existence of endangered or threatened species under the Endangered Species Act, violates requirements imposed to protect marine sanctuaries designated under the Marine Protection, Research, and Sanctuaries Act, or if it "cause[s] or contribute[s] to significant degradation of the waters of the United States." *Id.* § 230.10(c).

42. Subpart H of the guidelines includes a non-exhaustive list of examples of actions that can be taken to minimize the potential adverse impact of a discharge on the aquatic ecosystem. They are organized according to "actions concerning the location of the discharge," 40 C.F.R. § 230.70, "actions concerning the material to be discharged," *Id.* § 230.71, "actions controlling the material after discharge," *Id.* § 230.72, "actions affecting the method of dispersion," *Id.* § 230.73, "actions related to technology," *Id.* § 230.74, "actions affecting plant and animal population," *Id.* § 230.75, "actions affecting human use," *Id.* § 230.76, and "other actions," *Id.* § 230.77.

43. The guidelines provide that "[m]inimization of adverse effects on populations of plants and animals can be achieved by . . . [u]sing planning and construction practices to institute habitat development and restoration to produce a new or modified environmental state of higher ecological value by displacement of some or all of the existing environmental characteristics. Habitat development and restoration techniques can be used to minimize adverse impacts and to compensate for destroyed habitat." *Id.*. § 230.75(d).

The Corps also considers mitigation proposals pursuant to its regulations as part of the "public interest" review that applies to all permits issued by the Corps. 33 C.F.R. § 320.4 (1994).

44. Royal C. Gardner, *The Army-EPA Mitigation Agreement: No Retreat From Wetlands Protection*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,337, 10,339-40 (Aug. 1990). Those Corps districts interpreted the guidelines to allow a permit applicant to "buy

permit applicant could easily demonstrate that there were no alternatives to its proposal that would have a less adverse effect on the aquatic ecosystem.[45] Not surprisingly, the EPA interpreted the guidelines differently.

The Corps and the EPA resolved their disagreement through a memorandum of agreement on mitigation that "clarified" the requirements of the § 404(b)(1) guidelines and explicitly rejected the Corps' interpretation of the guidelines.[46] In particular, the memorandum clarified that the guidelines establish a "sequence" of mitigation[47] requirements that proceeds from avoidance to minimization to compensation.[48] Pursuant to the guidelines, adverse impacts to wetlands *must* be avoided to the extent that practicable alternatives are available that result in less adverse impacts.[49] The memorandum explicitly provides that compensatory mitigation proposals will not be considered in determining the impact of a proposed discharge for purposes of ascertaining whether practicable alternatives exist that will have a less adverse impact on the aquatic ecosystem.[50] If adverse impacts from a discharge cannot be avoided, they must be minimized.[51] Finally, "compensatory mitigation" is required for all adverse impacts of the discharge that cannot be avoided or minimized.[52] "Compensatory

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down" the adverse impacts of a proposed discharge through compensatory mitigation. *Id.*

45. *Id.* Under that interpretation of the § 404(b)(1) guidelines, if a proposed discharge would adversely impact 10 acres of wetlands, and the permit applicant agreed to restore 10 acres of wetlands in another area, the Corps could issue the permit authorizing the discharge even though it might have been practicable for the permittee to reconfigure its development proposal so that the development would not have impacted any wetlands. *Id.*

46. 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 MOA]. For useful discussions of the MOA, see Gardner, *supra* note 44; William L. Want, *The Army-EPA Agreement on Wetlands Mitigation*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,209 (June 1990); Oliver A. Houck, *More Net Loss of Wetlands: The Army-EPA Memorandum of Agreement on Mitigation Under the § 404 Program*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,212 (June 1990).

The MOA applies to review of standard permits only, and not to general permits, regional permits, programmatic permits or letters of permission. MOA at 9211 n.1.

47. MOA, *supra* note 46, at 9211-12. The MOA uses the term "mitigation" to refer to avoidance of adverse impacts, minimization of adverse impacts, *and* compensation for adverse impacts. *Id.* at 9211. "Compensatory mitigation" is merely one type of mitigation. *Id.*

48. *Id.* at 9211-12. Deviations from sequencing are allowed when "EPA and the Corps agree the proposed discharge is necessary to avoid environmental harm . . . , or EPA and the Corps agree that the proposed discharge can reasonably be expected to result in environmental gain or insignificant environmental losses." *Id.* at 9212.

49. *Id.* at 9212.

50. *Id.*

51. *Id.*

52. *Id.* Compensatory mitigation will, therefore, ordinarily be a component of any permitted action. Gardner, *supra* note 44, at 10,341.

mitigation" requirements are imposed by the Corps as conditions on the issuance of a § 404 permit.

Pursuant to the memorandum, the quantity and type of compensatory mitigation required as a condition of a § 404 permit is to be "based solely on the values and functions of the [wetlands] that will be impacted" by the discharge that is subject to the permit,[53] and the scope of compensatory mitigation that is required should be appropriate to the scope and degree of those impacts.[54] According to the memorandum, in framing compensatory mitigation requirements, the Corps "strive[s] to achieve a goal of no overall net loss of values and functions [of wetlands]."[55] By their nature, compensatory mitigation requirements should replace wetlands functions and values that would otherwise be lost due to the impacts of a proposed discharge remaining after avoidance and minimization options have been exhausted.[56]

C. *Types of Compensatory Mitigation and Preferences*

Compensatory mitigation generally involves either creation of artificial wetlands, restoration of wetlands,[57] or enhancement of wetlands[58] to compensate for the unavoidable, nonminimized adverse impacts of the discharge of dredged or fill material into wetlands that

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53. MOA, *supra* note 46, at 9211.

54. *Id.* at 9212. Similarly, the Corps' regulations provide that "all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable." 33 C.F.R. § 320.4(r)(2) (1994).

55. MOA, *supra* note 46, at 9211. The memorandum recognizes that the goal of "no net loss" may not be met in each and every permit action, and stresses that the goal does not prohibit the issuance of a permit that results in the net loss of wetlands values and functions. *Id.*

The "no net loss" goal was first announced in 1988 by the Conservation Foundation, and adopted by President Bush. NATIONAL RESEARCH COUNCIL, RESTORATION OF AQUATIC ECOSYSTEMS 262 (1988). The Clinton Administration has adopted an "interim goal" of no overall net loss of the nation's remaining wetlands, and a "long-term goal" of increasing the quality and quantity of the nation's wetlands resource base. *See* WHITE HOUSE OFFICE OF ENVTL. POLICY, CLINTON ADMINISTRATION PROPOSAL ON PROTECTION OF U.S. WETLANDS § IV. 1, *reprinted in* Env't. Rep. (BNA) 793, 794 (Aug. 27, 1993) [hereinafter AGENDA].

56. Mitigation requirements are imposed to ensure that the Clean Water Act's goal of maintaining and restoring the nation's aquatic resources is met. MOA, *supra* note 46, at 9211.

57. Restoration of a wetland refers to construction of a wetland where one formerly existed. MARK S. DENNISON & JAMES F. BERRY, WETLANDS: GUIDE TO SCIENCE, LAW AND TECHNOLOGY 292 (1993).

58. "Enhancement" of wetlands refers to improvement of existing wetlands. *Id.* The MOA does not specifically refer to enhancement of wetlands as a separate type of compensatory mitigation, but it is an acceptable form of compensatory mitigation. *See* AGENDA, *supra* note 55, at 799. "Enhancement" of an existing wetland does not, however, clearly improve the functional value of a degraded wetland to the degree that a healthy wetland loses functional value through development, so it is generally not a preferred method of compensatory mitigation. Le Desma, *supra* note 25, at 512.

will be authorized by a § 404 permit.[59] Preservation of existing wetlands is rarely accepted as compensatory mitigation.[60]

Of the three most generally accepted types of compensatory mitigation, restoration is often the preferred method because it has the greatest likelihood of success.[61] Attempts to create artificial wetlands where none existed previously have generally not fared well.[62] For a variety of reasons, regardless of whether it takes the form of restoration, enhancement, or creation, compensatory mitigation, in general, rarely provides wetlands functions and values that are equal to those that are lost as a result of the discharges authorized by § 404 permits.[63]

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59. Gardner, *supra* note 44, at 10,339. Under some state wetlands programs, a developer may be allowed to pay a fee to be used for future mitigation projects in lieu of creating, enhancing, or restoring wetlands themselves. McElfish, *supra* note 26, at L-2. After *Dolan*, it will be more difficult for the government to justify such fees unless the fees will be applied to a specific project that can be evaluated to determine whether the fee requirement is roughly proportional to the impacts of the proposed discharge.

60. The EPA/Corps MOA on mitigation provides that "[s]imple purchase or 'preservation' of existing wetlands resources may in only exceptional circumstances be accepted as compensatory mitigation." MOA, *supra* note 46, at 9212. As noted above, the goal of compensatory mitigation is to replace the values and functions of wetlands that are degraded by impacts from a discharge that are unavoidable and cannot be minimized further. Preserving wetlands that are already fully functioning and that can be protected from development by the Corps under the Clean Water Act does not replace any values or functions of wetlands that are lost due to a proposed discharge. The result of trading preservation of wetlands for destruction of wetlands is a net loss of wetlands values and functions.

61. *Id.*

62. A 1990 study conducted by the Florida Department of Environmental Regulation concluded that one-third of wetlands creation projects in the state were never implemented, only 12% of nontidal wetlands creation projects were successful, and only 45% of tidal wetlands creation projects were successful. FLORIDA DEP'T OF ENVTL. REGULATION, REPORT ON THE EFFECTIVENESS OF PERMITTED MITIGATION, EXECUTIVE SUMMARY 1 (1990).

Similarly, a study conducted by the University of Massachusetts at Amherst's Environmental Institute found that "50% of the attempts to create wetlands [reviewed in the study] . . . failed to even grow wetlands vegetation." David Salvesen, *Banking on Wetlands*, URBAN LAND, June 1993, at 36, 37.

63. In a 1988 review of mitigation projects in tidelands in the San Francisco Bay area, the San Francisco Bay Conservation and Development Commission determined that only 43% of wetland mitigation projects created or enhanced "resources that were comparable to the resources found in similar, natural relatively undisturbed Bay tidelands." Le Desma, *supra* note 25, at 517.

The reasons that compensatory mitigation projects fail include inadequate design of the project, poor site selection, and failure to implement the mitigation plan that was required as a condition of the permit that authorized the original discharge into wetlands. Salvesen, *supra* note 62, at 37. Almost all of the failures in the San Francisco Bay study were attributed to the failure of the mitigation developer to perform the mitigation requirements included in the permit. Le Desma, *supra* note 25, at 517.

Certain types of wetlands systems can be replaced or restored more quickly and easily than others. In a 1992 report on restoration of aquatic ecosystems, the National Research Council identified riparian wetlands, depressional (isolated) wetlands, agri-

To ensure that the wetlands that are created, restored, or enhanced as compensatory mitigation are not destroyed in the future, the Corps requires the permittee, as a condition of the § 404 permit, to grant a conservation easement[64] over the mitigation property to a conservation organization,[65] or to record a restrictive covenant[66] on the mitiga-

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cultural wetlands, coastal wetlands, and freshwater wetlands as wetlands systems that showed the greatest promise for restoration. McElfish, *supra* note 26, at L-18.

For an interesting discussion on constructing a successful mitigation project, see Susan D. Bitter & Keith J. Bowers, *Wetland Mitigation and Stream Restoration,* PUBLIC WORKS, Oct. 1993, at 50.

64. An easement is a right of use granted by the owner of property to a third party. BLACK'S LAW DICTIONARY 509 (6th ed. 1990). More specifically, the Uniform Conservation Easement Act defines a "conservation easement" as a "nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property." UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 70 (West Supp. 1994).

Many federal laws explicitly authorize the government to acquire conservation easements. *See, e.g.*, Migratory Bird Conservation Act of 1929, 16 U.S.C. §§ 715a, 715d (1988), and the Wetlands Reserve Program created by 16 U.S.C. §§ 3837-3837f (Supp. V 1993). However, the Clean Water Act is silent regarding the use of conservation easements as a means of enforcing compensatory mitigation requirements under the Act. State laws, therefore, govern questions such as who can hold a conservation easement and for what duration a conservation easement can be granted. Ideally, a conservation easement would be an easement in perpetuity.

In many states, however, common law rules impose strict limits on conservation easements. Conservation easements are considered "negative easements" because they convey a negative restriction on the landowner granting the easement. Karen A. Jordan, *Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs*, 43 CASE W. RES. L. REV. 401, 406-07 (1993). "Negative easements" were disfavored at common law because they unduly burdened free alienation. *Id.* at 407. In recognition of the importance and value of "conservation easements," and to overturn the common law precedent that limits their use, many states have enacted statutes that protect "land use restriction easements." *Id.* at 408 (citing sources listing states that have adopted such statutes). However, these statutes vary widely from state to state. *Id.* at 409. These laws may or may not authorize conservation easements in perpetuity. *Id.* at 405. They may also limit the purposes for which conservation easement can be granted and the persons to whom conservation easements can be granted. *Id.*

65. As of 1990, almost 900 organizations existed that were dedicated to conserving and protecting land, compared to 53 in 1950. Jordan, *supra* note 64, at 411. Among the largest are the Nature Conservancy, the National Trust for Historic Preservation, the American Farmland Trust, the Trust for Public Land, and the Conservation Fund, which protect almost seven million acres of land among them. *Id.*

66. A restrictive covenant is a "[p]rovision in a deed limiting the use of the property and prohibiting certain uses." BLACK'S LAW DICTIONARY 1315 (6th ed. 1990). It is recorded by the owner of the property with the deed (although it can be recorded subsequent to the recording of the deed) and runs with the land to limit future uses of the land.

In the context of wetlands mitigation, the Corps usually requires a permittee to record a restrictive covenant on the mitigation property, which provides that the owner will maintain and preserve the property as wetlands. *See* W. Brooks Stilwell, *A Case Study of the W.E.T., Inc. Mitigation Bank, Millhaven Plantation, Screven County,*

tion property, or both. In either case, the owner of the mitigation property agrees to carry out the actions necessary to create, restore, or enhance the wetlands on the mitigation property and to preserve the wetlands after they have been restored, created, or enhanced.[67] Although the property owner agrees to limit the uses to which he or she will put the wetlands on his or her property, he or she retains all other rights of ownership over the property, including the right to exclude others.[68] Conservation easements and restrictive covenants are far less restrictive than a requirement that the landowner dedicate the mitigation property to a conservation organization or the government.

The Corps/EPA memorandum on mitigation establishes preferences for certain types and amounts of mitigation, despite the fact that the type and amount of compensatory mitigation required as a condition of a § 404 permit varies from case to case, depending on the extent to which the permitted discharge adversely affects wetlands.[69] First, the memorandum establishes a preference for compensatory mitigation occurring adjacent or contiguous to the site of the permitted discharge ("on-site compensatory mitigation"), or at least within the same watershed.[70] Second, the memorandum clarifies that the wetlands that

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Georgia, in I.C.L.E. IN GEORGIA, ENVIRONMENTAL LAW PROGRAM MATERIALS at 06-019, 06-046 (1993) [hereinafter *WET permit*] (restrictive covenant attached to permit, providing that the "[o]wner hereby covenants that neither it nor its successors, assigns, agents, employees or servants . . . shall not [sic] in any way alter the soils or hydrology of the property by action or actions taken within or without the boundaries of the Property except as necessary to comply with the terms of the Permit. The intent of Owner in placing these restrictions upon the use of the Property is that the Property shall remain a wetland in perpetuity, for the purpose of conservation and the protection of public health and the environment.").

The Corps normally requires the landowner to grant the Corps the authority to enforce the provisions of the covenant. *Id.* at 06-047.

67. The landowner may also be able to claim a charitable tax deduction for conservation easements that are granted in perpetuity and used exclusively for conservation purposes. I.R.C. § 170(f)(3) (1988); Treas. Reg. § 1.170A-14(b)(1) (as amended in 1994); *see also* Stanley Works v. Commissioner, 87 T.C. 389 (1986).

68. *See WET permit, supra* note 66, at 06-047 (restrictive covenant attached to permit, providing that the "[o]wner, its successors and assigns, shall retain all other customary rights of ownership, including but not limited to the exclusive possession of the Property, the right to use the Property in any manner not prohibited by this Covenant, and the right to transfer or assign interest in the Property, subject to the conditions of this covenant."); *id.* at 06-043 (conservation easement attached to permit, providing that "[a]lthough this Conservation Easement in gross will benefit the public in the ways recited above, nothing herein shall be construed to convey a right to the public or access or use of the property and the Grantor, his heirs and assigns shall retain exclusive right to such access and use, subject only to the provisions herein recited.").

As a condition of the conservation easement, the property owner usually grants the easement holder a limited right of access to the property to ensure that the property owner is complying with the terms of the easement. However, the right of access is limited, since easements, by definition, are non-possessory interests in land. RESTATEMENT (FIRST) OF PROPERTY 450 (1944).

69. MOA, *supra* note 46, at 9212.

70. *Id.* The memorandum provides that compensatory mitigation

are being enhanced, restored, or created as compensatory mitigation should normally be of the same type as the wetlands adversely affected by the permitted discharge ("in kind compensatory mitigation").[71] Finally, the memorandum recommends that at least one acre of wetlands should be restored, enhanced, or created for every acre of wetlands adversely affected by the permitted discharge.[72] The ratio is often greater than 1:1 when the compensatory mitigation that will be provided involves creation of wetlands because it is quite likely that the mitigation effort will not be completely successful.[73]

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should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site (on-site compensatory mitigation). If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area if practicable (i.e., in close physical proximity and, to the extent possible, the same watershed).

Id.

The Corps and EPA prefer on-site mitigation because it is more likely that on-site mitigation, rather than off-site mitigation, will replace the functions and values that were provided by the wetlands impacted by the permitted discharge. *See* McElfish, *supra* note 26, at L-14; Salvesen, *supra* note 62, at 37. For instance, if wetlands adversely affected by a permitted discharge provided habitat support for various animal species, it is more likely that wetlands that are restored, enhanced, or created adjacent or contiguous to the destroyed wetlands will provide replacement habitat than off-site wetlands.

The other practical reason for the preference is that the permittee would have better access to the property contiguous or adjacent to the wetlands impacted by the discharge and be able to undertake mitigation on that property than at an off-site location. McElfish, *supra* note 26, at L-14.

71. The U.S. Fish and Wildlife Service classifies wetlands in five different systems: (1) marine (deepwater); (2) estuarine (coastal or tidal); (3) riverine (river and stream channels); (4) lacustrine (deepwater); and (5) palustrine (inland). U.S. FISH AND WILDLIFE SERV., WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 5 (1984). Estuarine and palustrine wetland systems are the most abundant and include the following types of wetlands: (a) estuarine emergent; (b) estuarine intertidal flats; (c) estuarine scrub-shrub; (d) palustrine emergent; (e) palustrine scrub-shrub; and (f) palustrine forested. *Id.* at 5-11.

"Out-of-kind" compensatory mitigation involves creating, restoring, or enhancing wetlands of a different type than the wetlands that are adversely impacted by the discharge that is permitted by a § 404 permit.

72. The memorandum stresses that compensatory mitigation should provide one-for-one replacement of the "values and functions" adversely affected by the permitted discharge. However, the memorandum notes that "[i]n the absence of more definitive information on the functions and values of specific wetlands sites, a minimum of 1 to 1 acreage replacement may be used as a reasonable surrogate for no net loss of functions and values." MOA, *supra* note 46, at 9213.

It recognizes, however, that the replacement ratio may be higher when the functional values of the replacement wetlands are lower than when the values of the wetlands affected by the permitted discharge or the likelihood of success of the mitigation project is low. *Id.* It also notes that the replacement ratio may be lower than 1:1 when the functional values of the replacement wetlands are higher than the values of the wetlands affected by their permitted discharge and when the likelihood of success of the mitigation project is high. *Id.*

73. The MOA cautions agency personnel that "[t]here is continued uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success." *Id.* at 9212. The likelihood of

D. *Mitigation Banking*

In recent years, the Corps has begun to allow developers to provide compensatory mitigation for § 404 permits by purchasing compensatory mitigation "credits" from "mitigation banks."[74] Mitigation banks are created pursuant to a permit from the Corps or through a memorandum of agreement between the Corps and the mitigation bank developer.[75] The process begins when the mitigation "banker," which

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success of mitigation is a factor that the agency considers in determining the ratio of compensatory mitigation to wetlands impacted by a permitted discharge. *Id.* at 9212-13.

74. Although there is no explicit statutory or regulatory authority for mitigation banking, the Corps/EPA MOA on mitigation approves mitigation banking as an acceptable form of compensatory mitigation in some circumstances. *Id.* at 9212. Specifically, the MOA provides that

> [m]itigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank. Where a mitigation bank has been approved by EPA and the Corps for purposes of providing compensatory mitigation for specific identified projects, use of that mitigation bank for those particular projects is considered as meeting the objectives of Section II.C.3 of this MOA [compensatory mitigation], regardless of practicability of other forms of compensatory mitigation. Additional guidance on mitigation banking will be provided.

Id.

EPA has provided some further guidance on mitigation banking at the regional level. *See* U.S. EPA Region IX, Mitigation Banking Guidance.

The Clinton Administration has also indicated its support for the use of mitigation baking in "appropriate circumstances." AGENDA, *supra* note 55, 799.

Several states have adopted statutes that specifically authorize the creation of mitigation banks for state wetlands programs. *See, e.g.*, CAL. PUB. RES. CODE § 30233 (West 1986); CAL. FISH & GAME CODE §§ 1775-1793 (West 1986 & Supp. 1995); COLO. REV. STAT. §§ 37-85.5-101 to -111 (Supp. 1994); FLA. STAT. ANN. § 373.4135 (Supp. 1995); LA. REV. STAT. ANN. § 49-214.41 (Supp. 1995); MD. CODE ANN., NAT. RES. § 8-1209.1 (Supp. 1994); N.J. STAT. ANN. §§ 13.913-13 to -151991 (West 1991 & Supp. 1994); N.D. CENT. CODE § 61-32-05 (Supp. 1993); OR. REV. STAT. §§ 196.600 to .665 (1991 & Supp. 3 1994); WYO. STAT. §§ 35-11-310 to -311 (1994).

75. In some cases, the restoration or creation of wetlands to establish a mitigation bank will involve a "discharge" into wetlands that is subject to § 404. In those cases, the mitigation bank will be established through a § 404 permit that authorizes the discharge. McElfish, *supra* note 26, at L-25. In other cases, a mitigation bank can be created when a developer creates or restores more wetlands than are necessary to serve as compensatory mitigation for a discharge subject to a § 404 permit. In those cases, the bank will also be established through the § 404 permit. *Id.* Alternatively, mitigation banks may be established through a memorandum of agreement. *Id.*

Guidance from the Corps provides that

> [e]stablishment of each mitigation bank should be accompanied by the development of a formal written agreement (e.g., memorandum of agreement) among the Cops, EPA, other relevant resource agencies, and those parties who will own, develop, operate, or otherwise participate in the bank. The purpose of the agreement is to establish clear guidelines for establishment and use of the mitigation bank. A wetlands mitigation bank may also be established through issuance of a Section 404 permit where establishing the proposed bank involves a discharge of dredged or fill material into waters of the United States.

U.S. ARMY CORPS OF ENGINEERS, REGULATORY GUIDANCE LETTER 93-2, Guidance on Flexibility of the 404(b)(1) Guidelines and Mitigation Banking, *reprinted in* 58 Fed.

may be a government agency, private corporation, or an individual, enters into an agreement with the Corps to create or restore wetlands that the banker owns or intends to purchase.[76] The values of the wetlands created or restored by the banker are quantified, and the banker is assigned credits.[77] The banker can then use those credits in the future to satisfy mitigation requirements for development projects it undertakes involving discharges into wetlands, or it can sell the credits to other persons to satisfy mitigation requirements for development projects that they undertake.[78]

In accordance with the Corps/EPA memorandum of agreement on mitigation, there are important limits on the use of mitigation banks to provide compensatory mitigation for individual section 404 permits. Since the compensatory mitigation provided by a mitigation bank is normally "off-site" mitigation, and is often "out-of-kind" mitigation, it is generally not a preferred form of mitigation.[79] In general, permittees will only be allowed to satisfy compensatory mitigation requirements through a mitigation bank when the bank is in the same watershed as the wetlands being adversely affected by the permitted discharge.[80]

Reg. 47,719, 47,721-22 (1993) [hereinafter RGL 93-2] (The Corps notes that "RGL's are used . . . as a means to transmit guidance on the permit program (33 C.F.R. parts 320-330) to its division and district engineers. The Corps of Engineers publishes RGL's in the Federal Register upon issuance as a means of informing the public of Corps guidance."). *Id.* at 47,719.

76. Salvesen, *supra* note 62, at 38.

77. *Id.*

78. Mitigation banks can be established to provide credits for a single user (public or private) that may undertake several projects that adversely impact wetlands, such as a state Department of Transportation or a private mall developer. *Id.*

Mitigation banks can also be established by government or private parties to provide "credits" to the general public. *Id.* There are very few private entrepreneurial mitigation banks in existence today. *Id.* A 1992 study by the Environmental Law Institute identified 46 existing mitigation banks and 60 proposed banks. McElfish, *supra* note 26, at L-2. Almost 75% of the existing banks were single-user public banks. *Id.*

79. It is, however, authorized in certain circumstances. Guidance from the Corps provides that

> [t]he agencies' preference for on-site, in-kind compensatory mitigation does not preclude the use of wetland mitigation banks where it has been determined by the Corps, or other appropriate permitting agency, in coordination with the Federal resource agencies through the standard permit evaluation process, that the use of a particular mitigation bank as compensation for proposed wetland impacts would be appropriate for offsetting impacts to the aquatic ecosystem. In making such a determination, careful consideration must be given to wetland functions, landscape position, and affected species populations at both the impact and mitigation bank sites.

RGL 93-2, *supra* note 75, at 47,721.

80. *Id. See also* WET permit, *supra* note 66, at 06-024 (condition 14 of the permit limits the use of credits from the bank to "Chatham County, Georgia and the Savannah River basin north to the limits of the Coastal Plain").

The purpose of the limitation is to increase the likelihood that the mitigation will replace the same functions and values that are impacted by the permitted discharge.

Despite those limits, mitigation banking is becoming more popular because it provides several environmental and economic benefits. Mitigation banks may offer greater prospects for successful mitigation than individual compensatory mitigation projects because mitigation banks: (1) attempt to create or restore a larger area of wetlands than individual compensatory mitigation projects,[81] (2) are easier to monitor than several smaller individual projects,[82] and (3) allow the developer more freedom in choosing sites with hydrology and soils that are favorable to the restoration or creation of wetlands.[83] In addition, in

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For instance, restoration of a coastal wetland will probably not produce the same functions and values that are lost as a result of development of a prairie pothole wetland.

81. Guidance from the Corps and EPA suggests that "[i]t may be more ecologically advantageous for maintaining the integrity of the aquatic ecosystem to consolidate compensatory mitigation for impacts to many smaller, isolated or fragmented habitats into a single large parcel or contiguous parcels." RGL 93-2, *supra* note 75, at 47,721; *See also* Le Desma, *supra* note 25, at 503.

Larger wetland systems are usually more self-sustaining than smaller systems, in that they can provide

> habitat for more types of species, a longer and more self-sustaining food chain, more habitat niches, and a wider variety of habitat types—which, in turn, can better accommodate ecosystem succession, migration and change . . . . They may better protect species from inbreeding effects due to the isolation of small populations, and may be more resilient to natural disasters because of their larger size, larger seed banks, and more varied habitat.

McElfish, *supra* note 26, at L-16.

82. One of the major reasons that many compensatory mitigation projects fail is because the government lacks the resources and time to adequately monitor the projects to ensure that the mitigation requirements are being carried out. Salvesen, *supra* note 62, at 37; Leonard Shabman et al., *Expanding Opportunities for Successful Wetland Mitigation: The Private Credit Market Alternative: Executive Summary*, 1994 A.B.A. SEC. NAT. RES. & ENVTL. L., 9TH ANNUAL CONFERENCE ON WETLANDS LAW AND REGULATION J-3.

It is much easier for the government to monitor mitigation at one large site than several smaller, isolated sites. Salvesen, *supra* note 62, at 37.

83. McElfish, *supra* note 26, at L-1. Although the Corps/EPA MOA establishes a preference for on-site mitigation, in many cases, development at the site of the discharge may make it difficult to create or restore viable wetlands on the site. As one commentator has noted:

> In many cases, developments in wetlands do not leave an ecologically viable remnant wetland [on-site]. . . . Adjacent impacts from the new development may degrade what natural wetlands do remain as well as the onsite mitigation wetland; this is the case with many "patch" wetlands and onsite mitigation projects surrounded by housing developments or shopping centers. Indeed, onsite mitigation has a dismal record, as revealed in several studies conducted for the Florida DER and for EPA.

Id. at L-15.

In addition, the preference for on-site mitigation may lead the Corps to require creation of wetlands on uplands that are adjacent to the wetlands impacted by the permitted discharge. *Id.* Creation of wetlands in uplands is less likely to be successful than restoration of wetlands or creation of wetlands in areas with appropriate hydrology.

Another advantage of locating a mitigation bank off-site is that it can be sited in an area where it can achieve larger ecological goals on an ecosystem basis. *Id.* at 16. However, to the extent that it is purposefully sited to create functions and values that

contrast to individual compensatory mitigation projects, the restoration or creation of wetlands in a mitigation bank can be completed and functioning before mitigation credits are granted by the bank.[84] Thus, the use of mitigation banks can prevent any temporal loss of values and functions of wetlands caused by a permitted discharge.[85] Mitigation banks also provide economic benefits for developers, in that economies of scale provided by the bank usually result in lower costs for mitigation obtained from the bank than for individual mitigation projects.[86]

On the other hand, mitigation banking may encourage more development in wetlands by making it easier to satisfy compensatory mitigation requirements.[87] Furthermore, while mitigation banks may create or restore wetlands that provide a variety of functions and values, those functions and values may be different from the functions and values impacted by permitted discharges into wetlands.[88]

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are different than those impacted by the development for which the bank will be providing compensation, it may be less defensible under the *Dolan* test described *infra*.

Moreover, in many instances, a mitigation bank will be more likely to succeed than individual compensatory mitigation projects because the mitigation bank developer has expertise in managing and monitoring the mitigation that the individual compensatory mitigation manager lacks. Salvesen, *supra* note 62, at 37; *see also* RGL 93-2, *supra* note 75, at 47,721.

84. However, the Corps can authorize a mitigation bank to issue credits from the bank before the mitigation project is successfully completed. RGL 93-2, *supra* note 75, at 47,721. This is important because the average maturation period for a successful mitigation project ranges from eight to ten years. Le Desma, *supra* note 25, at 515. When the Corps authorizes the issuance of credits from a mitigation bank before the mitigation has been successfully completed, the Corps may adjust the value of the credits to reflect the fact that the mitigation has not been successfully completed. *Id.* For instance, instead of allowing a § 404 permittee whose discharge impacts 10 acres of wetlands to satisfy the compensatory mitigation requirements for its permit by purchasing credits for 10 acres of wetlands from the mitigation bank, the Corps may require the permittee to purchase credits for 20 acres.

The developer of a mitigation bank will often want to issue credits before the wetlands restoration or creation undertaken by the mitigation bank is successfully completed to distribute the costs and risks of establishing the bank to a greater number of parties. Shabman, *supra* note 82, at J-4.

85. RGL 93-2, *supra* note 75, at 47,721; Le Desma, *supra* note 25, at 503. In short, the Corps can be assured that the values and functions destroyed by a permitted activity will be replaced by mitigation because the mitigation has already been completed.

86. Le Desma, *supra* note 25, at 508; Salvesen, *supra* note 62, at 39. RGL 93-2 provides that "[d]evelopment of a wetland mitigation bank can bring together financial resources and planning and scientific expertise not practicable to many individual mitigation proposals." *See* RGL 93-2, *supra* note 75, at 47,721.

87. In light of the statistics regarding the failure rate of compensatory mitigation projects, the Corps should tread gently when taking actions that encourage developers to trade flourishing wetland ecosystems for future restoration or creation of wetlands.

88. However, even in the context of mitigation banking, the goal of the Corps in imposing a "compensatory mitigation" requirement as a condition in a § 404 permit is to replace the functions and values of wetlands that are adversely affected by the permitted discharge after all appropriate and practicable steps to avoid or minimize

As is evident from the aforementioned description of compensatory mitigation, when the Corps, as a condition of a § 404 permit, requires a landowner to undertake an individual compensatory mitigation project on its property, the condition limits the uses to which the landowner can put his or her property. The remainder of this Article explores the "takings" implications of individual compensatory mitigation conditions in § 404 permits, and of conditions that authorize a landowner to satisfy mitigation requirements by purchasing credits from a mitigation bank.

II. THE TRADITIONAL REGULATORY TAKINGS ANALYSIS

Almost three-quarters of a century ago, the Supreme Court held that, in certain extreme circumstances, government regulation could constitute a taking of private property requiring just compensation under the Fifth Amendment to the Constitution.[89] Since then, the Court has clarified that government regulation can constitute a taking in either of two situations: (1) the regulation does not substantially advance legitimate state interests;[90] or (2) the regulation deprives a

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the impacts have been taken. *See supra* notes 44-56 and accompanying text. Thus, before the Corps authorizes a permittee to satisfy the compensatory mitigation requirements of its permit through purchase of credits from a mitigation bank, the Corps should ensure that the wetlands created or restored by the mitigation bank replace the values and functions that are adversely affected by the permitted discharge.

89. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

90. In determining whether government regulation "substantially advances a legitimate state interest," courts balance the government's interests and public interest against the landowner's interest to determine whether the regulation forces the landowner to bear a burden that the public, as a whole, should bear. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987); Agins v. Tiburon, 447 U.S. 255, 261 (1980); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

To make that determination, the court examines all of the benefits that the landowner receives from the regulation and the impacts of the landowner's actions on the public as well as the burdens that the regulation places on the landowner. For instance, in reviewing the constitutionality of a zoning ordinance in *Agins*, the court held that

> [t]here is no indication that the appellants' five-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.

447 U.S. at 262.

Similarly, in reviewing legislation that limited the amount of coal that the challengers in *Keystone* could mine from their property, the Court held that

> [t]he Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of 'reciprocity of advantage' that Justice Holmes referred to in Pennsylvania Coal. Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such

landowner of all economically viable use of his or her property.[91]

Essentially, most recent Supreme Court regulatory takings decisions have attempted to clarify either how to determine when a regulation deprives property of all economically viable use[92] or whether a regulation depriving property of all economically viable use effects a taking, regardless of whether it substantially advances legitimate state interests.[93] However, *Dolan v. City of Tigard*[94] and its predecessor, *Nollan v. California Coastal Commission*,[95] focused on the "legitimate state interests" prong of the *Agins* test. Specifically, *Dolan* and *Nollan* focused on how to determine whether a requirement that a landowner dedicate a portion of his or her property to the government, as a condition for a permit to develop his or her property, substantially advances a legitimate state interest.[96]

In cases in which the government has not required landowners to dedicate part of their property as a condition for obtaining a permit to develop the rest, the "legitimate state interests" requirement of the *Agins* test has not imposed much of a limit on the government's regulatory authority.

Traditionally, the Court has placed the burden on the claimant challenging the governmental regulation to demonstrate that the regulation does not substantially advance legitimate state interests.[97] The

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restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.

480 U.S. at 491.

91. Agins v. Tiburon, 447 U.S. 255, 260-61 (1980). In addition, when government regulation compels landowners to suffer permanent physical invasions of their property, the Court has generally held that the regulation constitutes a taking, regardless of its purpose. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

92. *See, e.g.*, Ruckelshaus v. Monsanto, 467 U.S. 986 (1984); Andrus v. Allard, 444 U.S. 51 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

93. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). Similarly, under the *Agins* test, a regulation that does not substantially advance a legitimate state interest can effect a taking regardless of whether it deprives a landowner of all economically viable use of its property. 447 U.S. at 260-61 (1980). However, as the U.S. Claims Court recognized in Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 390 (1988), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994), prior to Dolan v. City of Tigard, 114 S. Ct. 2309 (1994), there were no reported decisions in which federal courts held that a regulation constituted a taking solely because it failed to substantially advance a legitimate state interest, without also finding that the regulation deprived the landowner of all economically viable use of their property.

94. 114 S. Ct. 2309 (1994). The *Dolan* Court explicitly noted that the dedication requirement at issue did not deprive the landowner of all economically viable use of her property. *Id.* at 2316 n.6.

95. 483 U.S. 825 (1987).

96. *See infra* notes 104-49 and accompanying text.

97. United States v. Sperry Corp., 493 U.S. 52, 60 (1989); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987); Goldblatt v. Hempstead, 369 U.S. 590, 594-596 (1962); Nectow v. Cambridge, 277 U.S. 183 (1928). In *Goldblatt*, for instance, the Court noted that there is a presumption that the government acts constitutionally when acting pursuant to its police power, 369 U.S. at 594, and held that

challenger can meet that burden either by showing that there is not a legitimate state interest for the regulation or by showing that the regulation does not "substantially advance" that interest.

In practice, however, the judiciary has often been deferential to governmental entities facing regulatory takings claims. One must be cognizant that the Court has upheld a broad range of governmental purposes as "legitimate state interests."[98] In addition, when the government is acting pursuant to its police power to prevent a nuisance, courts generally find that as long as the government's actions are rationally related to the legitimate police power objective, the government's actions "substantially advance legitimate state objectives" under the *Agins* test.[99]

"[o]ur past cases leave no doubt that [the challengers] had the burden on 'reasonableness.' " *Id.* at 596.

Prior to *Dolan*, there were no reported cases in which the Court imposed a burden on the government to justify its actions as constitutional in the face of a takings challenge.

See infra notes 165-73 and accompanying text for a discussion of whether the presumption discussed in *Goldblatt* only applies to challenges to legislative actions by the government.

98. *Nollan*, 483 U.S. at 834-35.

99. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962) (township's prohibition on mining and excavation on the petitioner's property upheld as reasonably necessary to achieve a legitimate objective); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (government prohibition on the operation of a brickyard on the petitioner's property upheld as reasonably related to a legitimate government objective).

The rational relationship test used by the Court in those cases is not a difficult test to satisfy. As the Court stressed in *Keystone*, courts are not supposed to "undertake 'least restrictive alternative' analysis in deciding whether a state regulatory scheme is designed to remedy a public harm or is instead intended to provide private benefits. That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it." 480 U.S. at 487 n.16.

The analysis that the Court used in those cases and in similar cases involving government regulation to prevent a nuisance arguably still has vitality despite the Supreme Court's recent decision in Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992). *Lucas* merely held that a regulation that deprives property of all economically viable use effects a taking even though the regulation may have been enacted to prevent a nuisance or though the regulation otherwise "substantially advances a legitimate state objective." *Id.* at 2893-94. *Lucas* did not hold that the analysis used by the *Hadacheck* and *Goldblatt* courts was inappropriate to determine whether government regulation "substantially advanced legitimate state interests." On the contrary, the *Lucas* Court held that the analysis used in cases such as *Hadacheck* and *Goldblatt* was "the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests." ' " *Id.* at 2897.

At one point, the *Lucas* Court noted that the distinction between regulation that prevents harmful use and regulation that confers benefits is difficult, if not impossible, to discern on an objective-free basis, and that "noxious use logic cannot serve as a touchstone to distinguish regulatory takings . . . from regulatory deprivations that do not require compensation." *Id.* at 2899. However, in that passage, the *Lucas* Court was merely explaining why, as a practical matter, the Court could not authorize a "nuisance exception" to the categorical rule that a regulation that deprives property of all economically beneficial use effects a taking, without creating an exception that would swallow up the rule. The *Lucas* Court was not holding that such an analysis

Under the traditional analysis, to successfully challenge compensatory mitigation conditions[100] in a § 404 permit as a taking, a permittee would have the burden of demonstrating that the mitigation requirement did not substantially advance a legitimate state objective.[101] That burden could be difficult for the claimant to overcome because: (1) the Corps has a legitimate interest in requiring compensatory mitigation as a condition of a § 404 permit to preserve and enhance water quality,[102] and (2) the Corps imposes the mitigation requirements to prevent the nuisance that would be caused by destruction of the wetlands if a § 404 permit were granted.[103] To prevail, the claimant would have to demonstrate that the Corps' mitigation requirements were not rationally related to its legitimate objectives.

III. *NOLLAN* AND *DOLAN*

However, the Supreme Court modified the "legitimate state interests" analysis in two recent cases in which government entities required landowners to dedicate a portion of their property to the government as a condition of a permit to develop the property. In

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would be inappropriate in situations in which regulation has not deprived property of all economically viable use.

Specifically, the Court noted:

> A fortiori the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. . . . Our cases provide no support for this: None of them that employed the logic of 'harmful use' prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land.

Id.

100. The analysis discussed in the text applies to challenges to conditions requiring individual compensatory mitigation projects or conditions authorizing mitigation banking as compensatory mitigation.

101. *See supra* note 97 and accompanying text.

102. The Clean Water Act establishes a comprehensive program to maintain and enhance the physical, chemical or biological integrity of the nation's waters. 33 U.S.C. § 1251. Many lower court decisions have held that the denial of a § 404 permit promotes a valid public interest in protecting and enhancing water quality. *See, e.g.*, Florida Rock Indus. v. United States, 791 F.2d 893, 904 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987); Formanek v. United States, 26 Cl. Ct. 332, 334 (1992); Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 388 (1988), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994). Mitigation conditions serve the same valid purpose as permit denial.

103. If the Corps has imposed compensatory mitigation conditions in a permit, the Corps has determined that the permitted discharge would destroy valuable wetlands functions, such as flood prevention, erosion prevention, or habitat support. *See supra* notes 44-56 and accompanying text. The conditions are imposed to prevent the nuisance that is caused by destruction of those functions.

In determining whether the Corps is imposing burdens on the developer that the public as a whole should bear, a court is likely to weigh very heavily the fact that the Corps would not impose *any* burden on the developer if the developer were not destroying wetlands that provide benefits not only for the developer, but for the general public as well. In addition, the court will consider the benefits that the developer will directly receive as a result of the mitigation requirements.

Nollan v. California Coastal Commission,[104] the Supreme Court held that when the government requires a landowner to dedicate a portion of his or her property to the government as a condition of a development permit, there must be an "essential nexus" between the dedication requirement and the legitimate objective for the requirement.[105] Subsequently, in *Dolan v. City of Tigard*,[106] the Court went further and held that, in such cases, the burden is on the government to demonstrate that the dedication requirement is "roughly proportional" to the nature and extent of the impacts of the development subject to the permit.[107]

Nevertheless, it is not clear how broadly *Nollan* and *Dolan* should be read. Is the *Dolan* application of the "legitimate state interests" test limited to situations in which the government requires a landowner to dedicate property to the government as a condition of a development permit?[108] Does the *Dolan* analysis apply more broadly to any condition in a permit?[109] If *Dolan* applies to all permit conditions, what impact, if any, will this have on the Corps' ability to impose compensatory mitigation requirements as conditions of § 404 permits?

A. Nollan v. California Coastal Commission

The Supreme Court made its first significant modification of the traditional "legitimate state interests" test in *Nollan v. California Coastal Commission*.[110] In 1982, James and Marilyn Nollan applied to the California Coastal Commission ("Commission") for a permit to demolish a bungalow on their oceanfront property and to replace it with a three-bedroom house.[111] The Commission granted the Nollans' permit application on the condition that they grant an easement that would allow the public to pass across their property to access the adjacent public beach.[112] The Nollans challenged the imposition of the permit condition as an unconstitutional taking of their property.[113]

104. 483 U.S. 825 (1987).
105. *Id.* at 837.
106. 114 S. Ct. 2309 (1994).
107. *Id.* at 2319-20.
108. It is also possible that the analysis is limited to the imposition of permit conditions that require landowners to dedicate property interests, such as easements, to the government when the dedication extinguishes the landowners right to exclude the public from the property.
109. It is unlikely that *Nollan* and *Dolan* apply outside the arena of permit conditions to fundamentally change the nature of the "substantially advances legitimate state interests" test by imposing the burden on the government in all cases to justify its action against takings challenges. Even under its broadest reading, *Dolan* would probably be limited to takings challenges to government decisions made through adjudication. *See infra* notes 166-73 and accompanying text.
110. 483 U.S. 825 (1987).
111. *Id.* at 828.
112. *Id.*
113. *Id.* at 829.

Since the Nollans did not claim that the permit condition deprived their property of all economically viable use, the constitutional question that the Supreme Court had to resolve was whether the permit condition "substantially advance[d a] legitimate state interest[ ]."[114]

The *Nollan* Court assumed that the purposes for the access condition, "protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion of public beaches," were legitimate state interests, and noted that "unquestionably," the Commission could have denied the Nollans' permit application outright if their development proposal would have "substantially impede[d]" those purposes.[115] If the Commission's denial of the Nollans' permit application would not constitute a taking of their property, the Court reasoned, issuance of the permit with conditions designed to serve the same objectives as permit denial should not constitute a taking either.[116] More specifically, the Court held that the dedication requirement imposed by the Commission could be upheld against a taking challenge if there was an "essential nexus" between the condition and the legitimate state interests for the condition.[117] However, the Court did not explain the degree of relationship between the dedication requirement and the purposes for the requirement that would constitute an "essential nexus."[118]

B. Dolan v. City of Tigard

This past term, the Supreme Court clarified the requirements of the "essential nexus" test in *Dolan v. City of Tigard*.[119] Florence Dolan owned a retail electric and plumbing supply store in the central business district ("CBD") of the City of Tigard, Oregon adjacent to Fanno

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114. *Id.* at 834 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

115. *Id.* at 835-36.

116. *Id.* at 836. The Court held that "[i]f a prohibition designed to accomplish [a legitimate state objective] would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not." *Id.* at 836-37.

In fact, the Court held that it would even be appropriate for the government to impose a condition on a permit that would constitute a per se taking if the condition were imposed outside of the context of the permit, as long as the condition was sufficiently related to the legitimate state objectives for the condition. *Id.*

117. *Id.* at 837. As the Court held, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Id.*

118. The Commission argued that the condition could be upheld as long as it was "reasonably related" to the purposes for the condition. *Id.* at 838. Although the Court did not adopt the "reasonably related" test, it held, for purposes of argument, that the dedication requirement imposed by the Commission would be unconstitutional even under that test, since it was not reasonably related to the purposes for the condition. *Id.* at 838-39.

119. 114 S. Ct. 2309 (1994).

Creek.[120] In 1991, Dolan applied to the City Planning Commission for a permit to double the size of her store, pave her gravel parking lot, and build another structure on the property for additional businesses.[121]

The Community Development Code ("CDC"), a comprehensive land-use plan enacted by the City to comply with State law,[122] imposed several limits on further development in Tigard's congested CBD.[123] Pursuant to the CDC, new development in the CBD must facilitate a plan that the City adopted for a pedestrian/bicycle pathway by dedicating land to the City for pathways where provided for in the plan.[124] The CDC also provided that when development is allowed within or adjacent to the 100-year floodplain, "the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain."[125] The greenway dedication requirement was adopted after the City adopted a Master Drainage Plan, which concluded that flooding occurred in several areas along Fanno Creek, and that development in the CBD would increase impervious surfaces and exacerbate the flooding problems.[126]

In accordance with CDC requirements, the City Planning Commission granted Dolan her redevelopment permit subject to two conditions. First, Dolan was required to dedicate the portion of her property located in the floodplain to the City as greenway for improvement of a storm drainage system along Fanno Creek. Secondly, she had to dedicate a fifteen-foot strip of land adjacent to the floodplain to the City for the pedestrian/bicycle path.[127] The Commission made factual findings that, without these conditions, the proposed redevelopment could increase flooding in the Fanno Creek drainage basin and would increase traffic congestion in the CBD.[128]

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120. *Id.* at 2313.

121. *Id.* at 2313-14.

122. ORE. REV. STAT. §§ 197.005-197.860 (1991).

123. *Dolan*, 114 S. Ct. at 2313.

124. *Id.*

125. *Id.* at 2314.

126. *Id.* at 2313.

127. *Id.* at 2314.

128. *Id.* at 2314-15. In support of the greenway dedication requirement, the Commission found that Fanno Creek and its drainage basin were already strained by storm water flows and that the anticipated increase that would be caused by the redevelopment could "only add to the public need to manage the stream channel and floodplain for drainage purposes." *Id.* at 2315.

In support of the pedestrian/bicycle pathway dedication requirement, the Commission found that the site plan for the redevelopment provided for a bicycle rack in front of the proposed building and concluded that it was "reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway." *Id.* In addition, the Commission determined that creation of the bike path "could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion." *Id.*

Dolan appealed the permit conditions to the Land Use Board of Appeals ("Board") on the ground that the conditions constituted a taking of her property.[129] Based on the Commission's factual findings, the Board determined that the greenway dedication and pedestrian/bicycle pathway dedication permit conditions were "reasonably related" to the City's legitimate objectives for imposing the conditions.[130] Dolan appealed the Board's findings to the Oregon Court of Appeals,[131] the Oregon Supreme Court,[132] and the United States Supreme Court.

Initially, the United States Supreme Court determined that if the Commission had simply required Dolan to dedicate a portion of her property to the City, rather than conditioning Dolan's redevelopment permit on the dedication, the dedication requirement would have constituted a taking "without question."[133] The question presented to the Court, therefore, was whether (and under what circumstances) a land-use restriction that, by itself, constitutes a taking is constitutional when it is imposed as a condition for a development permit.

The Court recognized that it had consistently held, in a line of cases including *Agins v. Tiburon*[134] and *Pennsylvania Coal Co. v. Mahon*,[135] that land-use regulation will not constitute a taking if it substantially advances legitimate state interests and does not deny a landowner economically viable use of his or her land.[136] However, the Court distinguished *Dolan* from the *Agins* and *Pennsylvania Coal* line of cases by noting that (1) the government actions challenged in those cases involved legislative determinations as opposed to the adjudicative determination at issue in *Dolan*, and (2) the government actions challenged in the prior cases were mere limitations on the use of landowners' property, as opposed to the dedication requirement in *Dolan*.[137] The Court suggested that the analysis that applied in the case at bar de-

129. *Id.* at 2315.

130. The City Planning Commission, and the state administrative and judicial tribunals that reviewed the Commission's decision, assumed that Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), held that permit conditions that are "reasonably related" to legitimate state objectives that would justify a permit denial satisfy the "essential nexus" requirement of *Nollan* and therefore, do not constitute a taking because they "substantially advance legitimate state interests." *Dolan*, 114 S. Ct. at 2315-16.

131. Dolan v. City of Tigard, 832 P.2d 853 (Or. Ct. App. 1992).

132. Dolan v. City of Tigard, 854 P.2d 437 (Or. 1993).

133. 114 S. Ct. at 2316. The Court held that "such public access would deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " *Id.* (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

134. 447 U.S. 255, 260 (1980).

135. 260 U.S. 393, 413 (1922).

136. *Dolan*, 114 S. Ct. at 2316. As previously noted, Dolan did not claim that the dedication requirement deprived her property of all economically viable use. *Id.* at 2316 n.6.

137. *Id.*

rived not only from the Fifth and Fourteenth Amendments *but* from the doctrine of "unconstitutional conditions," which provides that "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit."[138]

In Part III of the *Dolan* opinion, the Court established a two-part test, based on *Nollan*, to determine whether the permit condition that imposed the dedication requirement "substantially advanced legitimate state interests." Under the test, the Court examines whether there is an "essential nexus" between the legitimate state interest for the permit condition and the permit condition itself.[139] If the Court determines that there is an essential nexus, the Court must then ascertain whether the nature and extent of the permit condition are "roughly proportional" to the impacts[140] of the proposed development authorized by the permit.[141] Although the "rough proportionality" test is essentially a reasonable relationship test,[142] it differs significantly from the analysis that the Court has traditionally used to determine whether government regulation "substantially advances

138. *Id.* at 2316-17.

139. *Id.* at 2317.

140. The "impacts" of the proposed development presumably refers to the impacts of the development on the government's ability to achieve the legitimate purposes that are the basis for the condition.

141. The Court noted that it did not have to define the required degree of connection between the permit condition and the impacts of the proposed development in *Nollan* because the permit condition in that case would not have been sufficiently related to the impacts of the proposed development even under the loosest standard suggested to the Court. *Dolan*, 114 S. Ct. at 2317.

However, the *Dolan* Court held that the posture of the case at bar required the Court to determine what degree of relationship between the permit condition and the impacts of the proposed development was necessary to pass constitutional muster. *Id.* at 2318. The court reviewed a variety of standards used by different state courts, and concluded that a "rough proportionality" test was the appropriate test. *Id.* at 2318-19.

In dissent, Justice Souter quite accurately noted that, under *Nollan*, the *Dolan* Court should have been asking the questions that it was asking in the second part of the *Dolan* test in the first part to determine whether there was an "essential nexus" between the permit conditions and the legitimate purpose for the conditions. *Id.* at 2330. *Nollan* suggested that the degree of relationship between the permit condition and the impacts of the proposed development was relevant to the determination of whether there was an essential nexus between the permit condition and the legitimate state objectives for the permit condition. 483 U.S. at 837. Therefore, if the *Dolan* court was answering the question that it claimed the *Nollan* court left unresolved, it should have answered it in the context in which it was raised in *Nollan* and held that there is an "essential nexus" between a permit condition and the impacts of a proposed development when the nature and extent of the permit condition are roughly proportional to the impacts of the development.

142. 114 S. Ct. at 2319. The Court used the term "rough proportionality" to avoid confusion with the "rational basis" test used by federal courts in equal protection analysis. *Id.* Without the burden shift, therefore, *Dolan* would not represent a very significant shift from the traditional "substantially advances legitimate state interests" test.

legitimate state interests," because the *Dolan* Court imposed the burden on the government to demonstrate that the "rough proportionality" test has been met.[143] The Court stressed that "[n]o precise mathematical calculation is required, but the [government] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[144]

Applying the first part of the analysis, the *Dolan* Court determined that there was an essential nexus between the imposition of limits on development in the 100-year floodplain and the City's legitimate goal of preventing flooding along Fanno Creek.[145] The Court also held that there was an essential nexus between the provision of a pedestrian/bicycle path in the CBD and the City's legitimate goal of reducing traffic congestion in the CBD.[146] However, in considering the second part of the analysis, the Court determined that the City failed to make an individualized "rough proportionality" determination to support either the greenway or the bicycle path dedication requirements.[147] In particular, the Court held that the City failed to make any individualized determination that dedication of the land in the floodplain for the greenway, as opposed to some less intrusive restriction on the use of that property, was reasonably related to the City's goal of flood prevention in Fanno Creek.[148] Likewise, the Court concluded that the City failed to make any determination that the bike

143. 114 S. Ct. at 2319-20. Justice Souter noted that the majority's holding conflicted with the traditional presumption of constitutionality that the court applied when reviewing government actions pursuant to the police power. *Id.* at 2331 n.* (Souter, J., dissenting). Justice Rehnquist, for the majority, acknowledged that "in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." *Id.* at 2320 n.8. However, Justice Rehnquist argued that the presumption should not apply to the case at bar because it involved a challenge to a decision made through adjudication, as opposed to a legislative decision. *Id.* Even if the majority were correct in holding that a different rule applies to review of adjudicative determinations than to legislative determinations, Justice Souter pointed out that the permit conditions at issue in *Dolan* were imposed pursuant to a legislative act—the City of Tigard Community Development Code. *Id.* at 2331 n.* (Souter, J., dissenting).

144. 114 S. Ct. at 2319-20.

145. *Id.* at 2318. The Court recognized that Dolan's plans to double the size of her business and to pave a gravel parking lot would expand the impervious surface on the property and increase the amount of stormwater runoff into Fanno Creek. *Id.*

146. *Id.*

147. *Id.* at 2320-22.

148. *Id.* at 2320. The Court intimated that a restriction on Dolan's ability to develop the property in the floodplain would have been a reasonable way to prevent flooding of Fanno Creek that might be caused by the impacts of Dolan's proposed redevelopment. *Id.* However, the City went beyond limiting Dolan's ability to develop their property in the floodplain, and required them to dedicate the property as a public greenway. The Court was troubled by that, noting that "[t]he city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control." *Id.*

path dedication requirement was reasonably related to the City's goal of reducing traffic congestion in the CBD.[149]

IV. REIGNING IN *DOLAN*

Unquestionably, the most significant modification that *Dolan* made to the traditional "legitimate state interests" analysis was to shift the claimant's burden to rebut a presumption of constitutionality for government regulatory actions taken pursuant to police power, to the government to make an individualized determination that the nature and extent of a permit condition is "roughly proportional" to the impacts of the development authorized by the permit.[150]

One may argue, however, that the *Dolan* analysis only applies to permit conditions imposing dedication requirements on landowners that extinguish the landowners' right to exclude others, not to less restrictive permit conditions, such as those involving nonpossessory conservation easements or restrictive covenants.[151] Similarly, it can be argued that the *Dolan* analysis only applies to review of permit conditions that are formulated through adjudication, not to permit conditions required by legislative action.[152]

A. *Limiting* Dolan *to Permit Conditions Involving Dedications*

There are several justifications for limiting *Dolan* to review of permit conditions involving dedications of property that extinguish a landowner's right to exclude others. The *Dolan* Court explicitly held that one of the major reasons that it was departing from the traditional *Agins* analysis was because the case at bar involved a require-

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The Court did not rule out the possibility that a greenway dedication requirement could be constitutional in some circumstances, though. For instance, the Court stated that "[i]f petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere." *Id.* at 2321.

149. The Court accepted the Commission's findings that the redevelopment would increase traffic on the streets of the CBD. 114 S. Ct. at 2321. However, since the Commission found that the proposed bike path *could* offset some of the additional traffic demand, instead of finding that the bicycle path *would* offset some of that demand, the Court held that the Commission failed to make an individualized determination that the dedication requirement was reasonably related to the impacts of Dolan's redevelopment. *Id.* at 2321-22.

150. Apart from the burden shift, the "reasonable relationship" test that is the basis of the "rough proportionality" test is functionally the same as the reasonableness test traditionally used by the Court to determine whether government regulation "substantially advanced" a legitimate state interest.

151. While a permit condition could, in some instances, require dedication of a conservation easement, the dedication requirement would only minimally affect the landowners' right to exclude others.

In the absence of the *Dolan* analysis, the traditional "substantially advances legitimate state interests" test, see *supra* notes 97-103 and accompanying text, would apply.

152. Legislative action refers to legislation or legislative rulemaking by an agency.

ment that a landowner dedicate property to the government.[153] Significantly, because the Court assumed that if the government "simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication," it would have constituted a taking per se because it would have completely deprived the petitioner of her right to exclude others from the property.[154] The right to exclude others, the Court explained, is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[155]

Thus, the *Dolan* Court did not endeavor to determine whether government regulation, in general, "substantially advance[s] legitimate state interests," in accordance with *Agins*.[156] Instead, the Court focused on whether government regulation that would otherwise constitute an unconstitutional taking is rendered constitutional when it is imposed as a permit condition in exchange for a right to develop property. Where the government imposes a permit condition on a landowner that would constitute a per se taking outside of the permit process, the *Dolan* Court's more stringent test for justification against a takings challenge may be appropriate. When the permit condition would not constitute a taking by itself, however, the government should not be held to a more stringent standard.

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153. *Dolan*, 114 S. Ct. at 2316. The other reason, explored in the next section of this article, was because the case involved a permit condition imposed through adjudication, rather than a challenge to a legislative act. *Id.*

154. *Id.* at 2316-17. The Court has traditionally held government regulatory action that results in a "permanent physical occupation" of property constitutes a taking per se, regardless of the purpose for the requirement. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

In *Nollan*, the Court held that the requirement that a landowner dedicate an easement of permanent access across their property to the public constituted a "permanent physical occupation" of property, for purposes of the per se rule of *Loretto*. *Nollan*, 483 U.S. at 831-32.

The greenway and bicycle path dedication requirements in *Dolan* resulted in a "permanent physical occupation" of the landowners' property even more clearly than in *Nollan*.

Justice Stevens, in his dissent in *Dolan*, is troubled by the Court's focus on the effect of the permit condition on the landowners' "right to exclude others," rather than on its effect on the whole parcel of land. *Dolan*, 114 S. Ct. at 2324. At first blush, cases such as *Nollan*, *Dolan*, and Kaiser Aetna v. United States, 444 U.S. 164 (1979), seem to depart from the traditional "parcel as a whole" analysis that the Court uses to define the relevant property interest for takings challenges, see Stephen M. Johnson, *Defining the Property Interest: A Vital Issue in Takings Analysis after Lucas*, 14 J. ENERGY NAT. RESOURCES & ENVTL. L. 41 (1994), in that they seem to suggest that the "right to exclude others" is a separate property interest that is subject to a taking claim. However, upon closer reading, it is evident that, in each of those cases, the Court did not treat the "right to exclude others" as a separate property interest. Instead, the Court merely held that the *impact* of government regulation on the landowners' right to exclude others in those cases was *dispositive* in determining whether the challenged government regulation effected a taking of the "parcel as a whole" at issue in each case. *See, e.g., Kaiser Aetna*, 444 U.S. at 179-80.

155. *Dolan*, 114 S. Ct. at 2316 (quoting *Kaiser Aetna*, 444 U.S. at 176).

156. *Id.*

Similarly, to the extent that the *Dolan* Court shifted the burden to the government to justify regulatory action as constitutional because of the "doctrine of unconstitutional conditions,"[157] the burden shift should only apply in cases where the government is requiring a landowner to surrender a constitutional right in exchange for a discretionary benefit.[158] If the government includes conditions in a permit that do not constitute per se takings, the government is not requiring the landowner to surrender a constitutional right to compensation for a taking in exchange for the permit; therefore, the *Dolan* burden shift should not apply.

Further evidence that the burden shift in *Dolan* should be limited to cases involving dedication requirements that extinguish a landowner's right to exclude others from his or her property can be found by examining the cases that the Court reviewed in determining that a "rough proportionality" test was appropriate.[159] Each of the cases cited by the Court in *Dolan* involved state or local laws that imposed a dedication requirement on landowners.[160]

Since the *Dolan* burden shift is limited to cases involving permit conditions that require landowners to dedicate property interests to the government and deprive them of their right to exclude others, the burden shift will not apply to most cases involving compensatory miti-

157. According to the doctrine, the government may not require a person to give up a constitutional right in exchange for a discretionary benefit when the property sought has little or no relationship to the benefit. *Id.* at 2317.

158. One can argue, however, that the burden shift imposed by the court is not mandated by the doctrine of unconstitutional conditions, and, therefore, that the burden shift should not be limited to cases when the doctrine would apply.

159. *Dolan*, 114 S. Ct. at 2318-19.

160. *See, e.g.*, Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964) (statutory requirement that land must be dedicated to the public for park and playground purposes as a condition for approval of a subdivision); Jenad, Inc. v. Scarsdale, 218 N.E.2d 673 (N.Y. 1966) (village planning board requirement that a developer dedicate land to the village for parks or pay a fee in lieu of dedication as a condition for approval of subdivision plats showing new streets or highways); Pioneer Trust & Sav. Bank v. Mount Prospect, 176 N.E.2d 799 (Ill. 1961) (ordinance required dedication of a portion of the land in proposed subdivisions for public use as a condition for subdivision approval); Simpson v. North Platte, 292 N.W.2d 297 (Neb. 1980) (city ordinance required property owners to dedicate property to the city for use as streets as a condition of acquiring a building permit); Jordan v. Menominee Falls, 137 N.W.2d 442 (Wis. 1965) (ordinance required dedication of land for school, park or recreational sites, or payment of an in lieu fee, as a condition for approval of subdivision plats); Collis v. Bloomington, 246 N.W.2d 19 (Minn. 1976) (statute authorized municipalities to require dedication of land for parks or playgrounds, or payment of in lieu fees, as a condition of subdivision approval); College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984) (ordinance required parkland dedication or payment of in lieu fees as a condition for subdivision plat approval); Call v. West Jordan, 606 P.2d 217 (Utah 1979) (ordinance required dedication of seven percent of the land of a proposed subdivision for flood control, parks and recreational facilities, or payment of an in lieu fee, as a condition of subdivision approval); Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) (city refused to vacate platted streets unless developer dedicated land to the city containing various geothermal wells).

gation conditions in § 404 wetlands development permits. As previously noted, the compensatory mitigation requirements imposed by the Corps on landowners generally take the form of nonpossessory conservation easements or restrictive covenants that merely limit the uses to which the landowner can put his or her property.[161] Landowners retain the right to exclude the public from their property and the right to use their land in any way that is not prohibited by the covenant.[162]

Such nonpossessory conservation easements and restrictive covenants are fundamentally different in character from the easement of permanent access in *Nollan*,[163] and do not constitute "permanent physical occupations" of the landowner's property. Since the permit conditions would not alone constitute a taking, the burden should not be shifted to the Corps to make an "individualized," "rough proportionality" determination to support the imposition of the conditions on the permit.[164] Instead, the traditional burden should be placed on the landowner to demonstrate that the challenged permit conditions do not substantially advance a legitimate state interest.

B. *Limiting* Dolan *to Permit Conditions Developed Through Adjudication*

Even if the *Dolan* burden shift applies to review of all permit conditions imposed by the government, rather than simply to permit conditions requiring dedication of property or some other per se taking, its applicability may be limited to conditions that are developed through adjudication.

As noted above, the *Dolan* majority conceded that, in cases such as *Agins*[165] and *Pennsylvania Coal*,[166] the Court traditionally placed the burden on challengers to demonstrate that government regulatory actions were unconstitutional.[167] However, the Court distinguished *Do-*

161. *See supra* notes 64-68 and accompanying text.

If the Corps required a landowner, as a condition of a § 404 permit, to dedicate a portion of its property to the government or to a conservation group for a wildlife refuge or other conservation purposes, the *Dolan* burden shift would likely apply. However, the Corps does not usually require dedication of property as a condition for a § 404 permit.

162. Conservation easements may allow some limited access to the property by the easement holder or the Corps to ensure that the landowner is complying with the terms of the easement.

163. The most obvious and significant difference is that conservation easements and restrictive covenants do not extinguish the landowners' right to exclude others from the property.

164. An argument could be made, however, that a permit condition that denies a landowner economically viable use of his or her land constitutes a per se taking in a manner similar to a condition that results in a permanent physical occupation of land, and that the *Dolan* burden shift should apply in those situations as well.

165. Agins v. Tiburon, 447 U.S. 255 (1980).

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

167. *See supra* notes 96-99 and accompanying text.

lan from *Agins* and the related cases by noting that the earlier cases involved challenges to legislative determinations, while *Dolan* involved an adjudicative determination.[168] Arguably, therefore, the *Dolan* burden shift is limited to review of adjudicatory determinations.

The *Dolan* majority was correct in noting that most of the cases that established the presumption of constitutionality involved takings challenges to legislative actions by the government.[169] However, none of those cases held that the fact that the challenged government action was a legislative act is a determining factor, and the *Dolan* Court did not explain *why* the traditional presumption of constitutionality established in those cases should not apply to decisions made in the course of adjudication. When the judiciary reviews non-constitutional challenges to an agency action, the court accords the same level of deference to the agency's decision regardless of whether the decision is made through an adjudication or a rulemaking.[170] Therefore, it is not clear why the level of deference accorded to the agency on constitutional questions should vary depending on whether the agency acted pursuant to its legislative or adjudicative authority.

Nevertheless, two things are relatively clear from the *Dolan* Court's discussion of the presumption of constitutionality and the burden shift

168. Dolan v. City of Tigard, 114 S. Ct. 2309, 2320 n.8 (1994).

169. *See, e.g.*, United States v. Sperry Corp., 493 U.S. 52 (1989) (challenge to the constitutionality of a statutory provision that assessed persons who litigated claims before an international tribunal a fee to cover the cost of the tribunal to the United States); Agins v. Tiburon, 447 U.S. 255 (1980) (challenge to the facial constitutionality of a zoning ordinance); Goldblatt v. Hempstead, 369 U.S. 590 (1962) (challenge to the constitutionality of a city ordinance that prohibited excavation below the water table); Nectow v. Cambridge, 277 U.S. 183 (1928) (challenge to the designation of property as a residential use district in a zoning ordinance).

170. For instance, when a court reviews an agency's legal interpretations of a statute the agency administers, the court accords the same level of deference to the agency regardless of whether the agency's decision is made in the context of adjudication or rulemaking. The analysis in Chevron v. NRDC, 467 U.S. 837 (1984), applies to review of all statutory interpretation by agencies, BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 10.35 (3d ed. 1991), and, when a statute does not clearly resolve a legal question, but delegates authority to the agency to do so, a court will accord the same level of deference to the agency's legal interpretation when it is developed through adjudication as when it is developed through rulemaking. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 42-44, 47-48 (1990).

Similarly, the standard for judicial review of agency factual determinations under the Administrative Procedure Act ("APA") is the same for factual determinations made through rulemaking or adjudication. *See* 5 U.S.C. § 706 (1988). Although the standard of review of factual determinations varies depending on whether decisions are made through formal processes, 5 U.S.C. § 706(2)(F), or informal processes, 5 U.S.C. § 706(2)(A), it does not vary depending on whether the facts are found through adjudication or rulemaking.

In addition, to the extent that the APA addresses the issue of burden of proof, it provides that, in the context of formal hearings, "the proponent of a rule *or* order has the burden of proof." 5 U.S.C. § 556(d). Once again, the burden of proof for decisions made in adjudications is the same as for decisions made through rulemaking.

in the context of rulemaking and adjudication. First, to the extent that the burden shift applies to takings challenges against permit conditions, it applies to challenges against permit conditions that are developed through adjudication.[171] Second, the burden shift might not apply to takings challenges that are raised against permit conditions that are imposed pursuant to legislative requirements.[172]

As previously discussed, the determination of the nature and extent of compensatory mitigation required as a condition for a section 404 permit is intimately tied to the functions and values of wetlands that will be impacted by the development subject to the section 404 permit. Neither the EPA nor the Corps has promulgated legislative regulations requiring a permittee to provide specific amounts or types of compensatory mitigation. By their nature, it is preferable that compensatory mitigation conditions are developed through adjudication.[173] Thus, to the extent that the *Dolan* burden shift applies to all

171. More precisely, it applies to takings challenges against permit conditions imposing dedication requirements that are developed through adjudication.

172. However, although the *Dolan* Court characterized the action it was reviewing as "adjudicatory," the conditions were, as Justice Souter pointed out, imposed pursuant to legislative requirements, *Dolan*, 114 S. Ct. at 2331 n.* (Souter, J., dissenting). The City of Tigard's CDC, a legislative enactment, required dedication of open land for a greenway adjoining and within the floodplain when development is allowed in the floodplain. *Id.* at 2314. The CDC also required dedication of land for the pedestrian/bicycle path where provided for in the pedestrian/bicycle path plan whenever development in the Central Business District was allowed. *Id.* at 2313. Arguably, therefore, the *Dolan* court applied its burden shift to review takings challenges to permit conditions established by legislative action, rather than developed through adjudication.

On the other hand, though, the precise language of the CDC only requires the dedication of "sufficient open space" for a greenway when development is allowed within the floodplain. *Id.* at 2314. Since the City determines the amount and precise location of the land that must be dedicated to the City in an adjudicative context when it issues the permit, perhaps the majority was correct in holding that the permit conditions that were challenged in the case were developed through adjudication, rather than legislatively. However, the constitutional infirmity that the Court found with the greenway dedication requirement did not relate to the amount or location of land that the City required Dolan to dedicate, but rather that the City required Dolan to dedicate any land to the City at all. *Id.* at 2320-21. Although the City determined the amount and location of land to be dedicated by Dolan through adjudication, the requirement that Dolan dedicate property to the City for the greenway was established legislatively. If the burden shift does not apply to permit conditions that are developed legislatively, as the *Dolan* Court suggests, the Court should not have applied the burden shift to review the nature of the dedication requirement.

173. The Corps or the EPA could, in theory, promulgate mitigation regulations that provided that specific amounts and types of wetlands had to be created, restored, or enhanced in specific ratios to compensate for specific adverse impacts to functional values of wetlands. However, there are far too many variables that must be considered in evaluating the adequacy of compensatory mitigation that make it impossible for the Corps or the EPA to develop regulations that address the full range of mitigation circumstances that may arise. For instance, the EPA or the Corps should be reluctant to provide, through regulation, that a 2:1 mitigation ratio (or some higher ratio) is required whenever mitigation proposals involve creation of wetlands, as opposed to enhancement of wetlands. Depending on the likelihood of success of a par-

permit conditions imposed by government, rather than merely to conditions imposing dedication requirements, the burden shift will generally apply to takings challenges raised against the Corps' imposition of compensatory mitigation requirements as permit conditions in section 404 permits.

C. *Shift of the Burden of Production or Persuasion?*

Perhaps the most significant ambiguity in the Court's *Dolan* decision concerns the nature of the burden that the Court placed on the government to justify the constitutionality of its actions.[174] It is not clear whether the Court merely shifted the burden of producing evidence[175] to support the permit conditions to the government, or whether it shifted the burden of production *and* persuasion.[176]

On its face, the "plain language" of the Court's opinion seems to limit the government's obligation to producing evidence to support its decision,[177] and Justice Souter, in dissent, characterized the shift imposed by the Court as a mere shift in the burden of production of evidence.[178] However, it is possible that the Court shifted the burden of persuasion as well because the Court abandoned the presumption of constitutionality for review of government actions pursuant to its police power and shifted *that* burden, as Justice Stevens argued in dissent[179] and the majority suggested in a footnote.[180]

An analysis of the Court's application of the burden shift to review of the greenway and the bicycle path dedication requirements does not resolve the issue, either. In both instances, the Court essentially determined that the government did not produce evidence to support a prima facie case for its defense.[181] Either of two conclusions could

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ticular wetlands creation proposal, and depending on the functional values provided by the wetlands that are being created, as compared to the functional values of the wetlands that were lost to development, a 2:1 ratio may be too small, or too large. Thus, any regulations promulgated by the Corps or the EPA would have to be specifically general to allow consideration of that range of variables (i.e., regulations could provide that "mitigation should ensure a 1:1 replacement of wetlands functions and values"). Such regulations would, however, leave so much discretion to the Corps that the compensatory mitigation conditions would, in essence, be developed through adjudication at the time of permit issuance.

174. "Burden of proof" encompasses both a burden of producing evidence and a burden of persuasion. JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 24.01 (1994).

175. The "burden of production" refers to the burden of going forward with evidence to support a prima facie case. *Id.* at 24-9, 24-10.

176. The "burden of persuasion" is the burden of providing a specific quantum of proof to persuade the trier of fact of the validity of a claim or defense. *Id.* at 24-5.

177. The Court merely requires the government to make "some sort of individualized determination" to support its decision. *Dolan*, 114 S. Ct. at 2319-20.

178. *Id.* at 2331.

179. *Id.* at 2323, 2326.

180. *Id.* at 2320 n.8.

181. With regard to the greenway dedication requirement, the Court held that "[t]he city has never said why a public greenway, as opposed to a private one, was

be drawn from those findings. First, one could conclude that the Court only shifted the burden of production to the government and that the government could not meet that burden. Alternatively, one could conclude that the Court shifted both the burden of production and the burden of persuasion to the government and, since the government could not satisfy the burden of production, the Court did not have to address the government's failure to satisfy the burden of persuasion.

Clearly, a shift in the burden of production alone will be less onerous for the government than a shift in the burden of production and persuasion. However, even a mere shift in the burden of production could diminish the government's ability to justify the imposition of certain conditions in permits if the shift is applied as rigidly as the *Dolan* Court applied it to review the bicycle path dedication requirement.[182]

V. IMPACT OF *DOLAN* ON COMPENSATORY MITIGATION CONDITIONS

Even if *Dolan* applies across the board to all permit conditions imposed by the government, *Dolan* will probably have minimal effect on the Corps' ability to impose compensatory mitigation conditions on § 404 permits in a manner that does not constitute a taking. Although *Dolan* would shift the burden to the Corps to demonstrate the constitutionality of the conditions, it would merely require the Corps to

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required in the interest of flood control." *Id.* at 2320. Accordingly, the City did not meet its burden of producing evidence that the *nature* of the permit condition was roughly proportional to the impacts of the proposed development. Perhaps if the City had produced some evidence to support its determination that dedication of the greenway was required, the Court might have imposed the burden of persuasion on Dolan to demonstrate that the dedication requirement was not roughly proportional to the impacts of the redevelopment proposal.

Similarly, with regard to the bicycle path dedication requirement, the Court held that the City did not produce any evidence that the bicycle path would reduce traffic congestion that might be caused by the redeveloped proposal. *Id.* at 2321-22. Perhaps if the City had produced some evidence to that effect, the Court might have imposed the burden on Dolan to persuade the Court that the dedication requirement was unconstitutional.

182. Even though the Court held that "no precise mathematical calculation is required" to support the government's "individualized determination," it held that the City did not meet its burden when it made the following findings, which the Court accepted as true, to support the bicycle path dedication requirement: (1) Dolan's proposed redevelopment would increase traffic on the streets of the Central Business District by generating roughly 435 additional trips per day; (2) "Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid congestion from a proposed property use;" and (3) Creation of the bicycle path "could offset some of the traffic demand . . . and lessen the increase in traffic congestion." *Id.* at 2321-22.

The *Dolan* Court held that the City failed to satisfy its burden because it said that the bicycle path *could* offset traffic demand, instead of saying that it *would* offset traffic demand. *Id.*

demonstrate that the nature and extent of the mitigation requirements were reasonably related to the impacts of the proposed development subject to the § 404 permit.

That burden should not be a difficult one for the Corps to bear because the Corps' goal in framing mitigation conditions, pursuant to the Clean Water Act, its regulations, and the MOA with the EPA, is to require the developer to replace the functions and values of wetlands that are adversely affected by the development that is subject to the permit.[183] Pursuant to regulations and agency policy, the mitigation requirements are "based solely on the values and functions" of wetlands impacted by the permitted activity, and the scope and degree of compensatory mitigation must be appropriate to the scope and degree of those impacts.[184] Thus, the nature and extent of the Corps' compensatory mitigation requirements are intimately tied to the impacts of the development.[185] Consequently, it should not be difficult for the Corps to demonstrate that the nature or extent of a compensatory mitigation permit condition is reasonably related to the impacts of the development authorized by a § 404 permit.

Importantly, the *Dolan* Court explicitly sanctioned permit conditions similar to compensatory mitigation conditions in section 404 permits when asserting that "[i]f petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere."[186]

Yet the actual impact of *Dolan* on compensatory mitigation permit conditions cannot be assessed until the Court clarifies the nature of the burden imposed on the government to justify its actions as constitutional. If *Dolan* imposes the burden of persuasion on the government, or imposes the burden of production on the government as forcefully as it did in *Dolan* with regard to the bicycle path dedication

183. *See supra* notes 44-56 and accompanying text. More specifically, mitigation strives to achieve a goal of no net loss of wetlands values and functions by replacing the values and functions of the wetlands that are adversely affected by the permitted activity after all appropriate efforts to avoid or minimize the impacts have been exhausted.

184. MOA, *supra* note 46, at 9211-12; 33 C.F.R. § 320.4(r)(2) (1994).

185. In contrast to the *Dolan* Court's suggestions, it is more likely that the compensatory mitigation conditions developed by the Corps through case-by-case adjudication will be reasonably related to the impacts of the development subject to a § 404 permit than conditions created legislatively. Since a legislature, or an agency promulgating legislative regulations, would not be able to anticipate every situation in which mitigation conditions might be imposed, it would likely craft rules that, in specific situations, were overbroad, requiring more mitigation than is necessary in light of the impacts of the permitted activity.

Since the Corps develops the conditions through adjudication, however, it can tailor the nature and extent of the mitigation requirements to the impacts of the permitted activity.

186. *Dolan*, 114 S. Ct. at 2321.

requirement, it might be more difficult for the Corps to defend certain types of compensatory mitigation conditions described below. In the long run, however, this would work against developers because it would decrease a developer's compensatory mitigation options and increase the likelihood that the § 404 permit would be denied.[187]

The identification and quantification of wetlands' functional values is not an exact science.[188] Different types of wetlands provide different levels of functions and values. Even identical types of wetlands may provide different levels of functions and values.[189] Many of the functions and values provided by wetlands are tied to their location, and the same functions and values cannot be provided by wetlands in a different location.[190] Comparison of the values and functions provided by different types of wetlands in different locations is, therefore, inexact.[191] For instance, is a wetland that provides flood prevention in a heavily populated area, but does not provide habitat to any endangered species, more or less valuable than a wetland that provides habitat to endangered species in an area where there is little or no human population? Similarly, are the recreational values provided by one wetland more or less important than the harvesting opportunities provided by another? Since the identification and quantification of functional values, and the comparison of different types of functional values, are inexact sciences, if *Dolan* imposes a burden of persuasion

187. As explained below, to the extent that *Dolan* will impact any compensatory mitigation permit conditions, it will probably only impact conditions that require off-site, out-of-kind mitigation, or mitigation at replacement ratios greater than 1:1. Since the Corps/EPA MOA establishes a preference for on-site, in-kind compensatory mitigation, if the Corps is requiring off-site, out-of-kind mitigation as a permit condition, it is probably because on-site, in-kind mitigation is not available, or because the developer suggested the off-site mitigation. In either case, striking down the permit condition eliminates a way for the permit applicant to satisfy the mitigation requirements of the Clean Water Act and to obtain a permit to develop his property. If on-site mitigation is not feasible, and off-site mitigation is foreclosed, the obvious alternative for the Corps is to deny the landowner's permit application.

188. *See supra* notes 22-28 and accompanying text. Courts would probably defer to the Corps' determination of the functions and values provided by particular wetlands instead of identifying them on their own.

189. McElfish, *supra* note 26, at L-9.

190. *See supra* note 25 and accompanying text.

191. President Clinton's wetlands agenda identifies the lack of a scientific basis for ranking functionally distinct and diverse wetland types as a fundamental impediment to a nationwide classification system for wetlands. AGENDA, *supra* note 55, at 797-98.

Several bills that were proposed during the last session of Congress would have established a nationwide classification system for wetlands. *See, e.g.*, The Comprehensive Wetlands Conservation and Management Act of 1993, H.R. 1330, 103d Cong., 1st Sess. (1993); The Wetlands Regulatory Reform Act of 1995, S. 2506, 103d Cong., 2d Sess. (1994).

The Clinton Administration opposed those bills because of the lack of a scientifically valid basis for comparison among wetland types, but also because the Administration estimated that it would cost more than $500 million to classify and map all of the remaining wetlands in the contiguous 48 states alone. AGENDA, *supra* note 55, at 797-98.

or a strict burden of production on the government, *Dolan* could make it more difficult for the Corps to justify off-site, out-of-kind mitigation conditions, or mitigation conditions that require a replacement ratio that is greater than 1:1.[192]

If the Corps, as a § 404 permit condition, requires a developer to create, restore, or enhance the same amount of the same type of wetlands that are being destroyed, on the same site where the wetlands are being destroyed, it should be fairly simple for the Corps to demonstrate that the nature and extent of the permit condition is "roughly proportional" to the impacts of the permitted activity, even under the most stringent application of the burden. In such a case, the reasonableness of the requirement is apparent on its face. Since the Corps/EPA MOA expresses a preference for on-site, in-kind mitigation,[193] many mitigation conditions should be similarly easy to justify.

However, there are also instances in which the Corps imposes conditions on § 404 permits that require creation, enhancement, or restoration of off-site, out-of-kind wetlands as compensatory mitigation, or require compensatory mitigation in replacement ratios greater than 1:1. There are several reasons for this. First, the Corps might require off-site compensatory mitigation when on-site mitigation is not feasible or practicable.[194] Off-site or out-of-kind compensatory mitigation might also be required because it may be environmentally preferable to on-site mitigation in some cases.[195] Finally, the Corps may require a permittee to create, restore, or enhance more acres of wetlands than are impacted by a permitted discharge either because the functional values of the compensatory wetlands are less than the functional val-

192. Wetlands created, enhanced, or restored as a condition of mitigation will inevitably provide some different functions and values than the wetlands impacted by the permitted discharge since no two wetlands are exactly alike. Whether a court concludes that the difference in functions and values is significant enough to render the condition unconstitutional will depend to some degree on how much deference the court gives to the Corps' identification, quantification and comparison of wetlands values and functions. If the Court imposes a burden of persuasion or a strict burden of production on the government, the Court may be less likely to accept the Corps' findings regarding the identification, quantification, and comparison of wetlands values and functions.

193. MOA, *supra* note 46, at 9212.

194. *Id.* For instance, the discharge site may lack any remaining land with appropriate hydrology to support wetlands creation, restoration, or enhancement.

195. *See supra* note 81. "Out-of-kind" mitigation may also provide a variety of environmental benefits. For instance, it may "restore a locally rarer wetland or provide more of a particularly needed function like flood control. It may enable regulators to replace the historic assemblage of wetlands in an area, or to 'trade up' . . . to achieve broader watershed enhancement or wildlife management goals." McElfish, *supra* note 26, at L-14.

However, to the extent that the Corps purposefully imposes mitigation requirements that it knows will provide a net gain in wetlands values and functions, it runs the risk that a court might find that the nature and extent of such conditions is not "reasonably related" to the impacts of the permitted discharge upon which the conditions are imposed.

ues of the wetlands impacted by the permitted discharge,[196] or because there is a likelihood that the creation, enhancement, or restoration of the compensatory wetlands will not succeed.[197]

In each of these situations, however, it will be more difficult for the Corps to prove that the nature and extent of the compensatory mitigation requirement is reasonably related to the impacts of the permitted discharge than it is to justify an on-site, in-kind, 1:1 compensatory mitigation permit condition. For instance, "off-site" wetlands will not provide precisely the same functions and values as wetlands created, restored, or enhanced on the site of a discharge.[198] "Out-of-kind" wetlands will also provide some different functions and values than the wetlands they are replacing.[199] Proof that the nature and extent of the compensatory mitigation requirement is reasonably related to the impact of the permitted discharge in those situations will entail identification and quantification of the wetlands functions and values, and comparisons among different values and functions. The degree of success that the Corps has in defending those conditions will depend, to some extent, on the degree to which a court accepts the Corps' comparison of the value of different functions and values.

Compensatory mitigation conditions that require creation, enhancement, or restoration of wetlands at ratios greater than 1:1 are the most likely targets for takings challenges under *Dolan*. The argument is rather straightforward. If a permitted discharge adversely impacts a variety of values and functions provided by ten acres of wetlands, and the Corps requires a permittee to create, enhance, or restore twenty acres of wetlands, the permittee might argue that the "extent" of the permit condition is not reasonably related to the impacts of the permitted discharge. On its face, the permittee's argument has appeal.

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196. Salvesen, *supra* note 62, at 40.

197. *Id.* For instance, if there is a 50% chance that the wetlands created, restored, or enhanced as compensatory mitigation will fail, the Corps might require the permittee to create, restore, or enhance wetlands at a 2:1 replacement ratio.

198. Off-site wetlands will never provide exactly the same functions and values. For instance, wetlands that are created, restored or enhanced along the flyway of certain migratory birds will not provide the same habitat support values as wetlands that were degraded in another location, which may have been located in the flyway of the same or different birds.

To some extent, due to the Corps' requirement that off-site mitigation must be located within the same watershed as the wetlands impacted by the permitted discharge, it is more likely that the off-site mitigation will provide similar functions and values as the degraded wetlands.

199. As one commentator has noted:

> There is great variability among wetland types. Isolated prairie potholes of the upper midwest bear little resemblance to the lush grasses of the Everglades or the intertidal zones of the Atlantic coast. . . . And the functions wetlands perform are diverse and dissimilar. . . . A wetland that provides erosion control or flood storage may have little significance for habitat or groundwater recharge, for example. These differences make comparisons (and compensation tradeoffs) among different wetland types quite difficult.

McElfish, *supra* note 26, at L-9.

However, replacement ratios that are greater than 1:1 can often be justified because of the difference in values and functions provided by the compensatory wetlands and the degraded wetlands, or by the likelihood that restoration, creation, or enhancement of the compensatory wetlands will not succeed. Once again, however, the proof that the Corps can provide to support the mitigation condition will often involve comparisons among different values and functions of wetlands, and the degree of success that the Corps has in defending those conditions will depend, to some extent, on the degree to which a court accepts the Corps' comparison of the value of different functions and values.

If *Dolan* were to make it more difficult for the Corps to defend permit conditions that require off-site, out-of-kind compensatory mitigation, or mitigation at replacement ratios greater than 1:1, mitigation banking proposals might become less attractive. Since mitigation banks are used to compensate for the impacts of several different development projects, usually in different locations, it is impossible to locate them on the site of each project.[200] By its nature, therefore, mitigation banking usually involves off-site mitigation. Similarly, because mitigation banks may be designed before the wetlands for which it is compensating are identified, in many cases, the mitigation banked wetlands will be a different type (out-of-kind) than the wetlands degraded by a § 404 permitted activity.[201] Finally, to provide economic stability to a bank, the Corps may often authorize the bank to grant credits before it can determine whether the wetlands in the bank will be successfully created or restored. To ensure that mitigation ultimately results in a 1:1 replacement of functions and values, and in light of the uncertainty of the success of those banks, the Corps may often require acreage replacement ratios greater than 1:1 from those banks.

In light of the environmental and economic benefits that mitigation banking provides, it would be unfortunate if *Dolan* were applied by the judiciary in a manner that limited the viability of such banks. As a practical matter, however, it is unlikely that takings challenges will be raised against mitigation banking permit conditions. Since the Corps/EPA MOA on mitigation expresses a preference for on-site, in-kind compensatory mitigation, the Corps will generally only authorize a permittee to satisfy compensatory mitigation requirements through

200. Mitigation banking is made more defensible by the fact that the area over which mitigation credits can be used is limited by the Corps, and mitigation credits usually cannot be used outside of the watershed of the bank.

201. However, in some instances, the permit or memorandum that creates a bank may limit the types of wetlands for which the mitigation banked wetlands can serve as compensation. Even if it does not, in determining whether a mitigation bank can provide appropriate compensatory mitigation, the Corps is still guided by the MOA, which establishes a preference for in-kind compensatory mitigation. MOA, *supra* note 46, at 9211-12.

mitigation banking when the permittee proposes to do so, and the Corps determines that it is appropriate to accept mitigation banked wetlands as compensatory wetlands. The permittee receives economic benefits from satisfying compensatory mitigation requirements through mitigation banking, and the permittee is spared the responsibility of maintaining and monitoring the mitigation efforts. It is unlikely, therefore, that a permittee who has convinced the Corps that it is appropriate to include a permit condition that essentially requires the creation, restoration, or enhancement of off-site, out-of-kind wetlands, will subsequently turn around and argue that the permit condition is not reasonably related to the impacts of the permitted discharge because the compensatory mitigation is not on-site and in-kind.[202]

CONCLUSION

Although property rights advocates have hailed *Dolan v. City of Tigard* as a "landmark" takings decision, the true impact of the case will probably be much more limited. Even after *Dolan*, governmental regulation will constitute a taking only if it does not substantially advance a legitimate state interest or denies a landowner all economically viable use of his or her land. *Dolan* did not narrow the interests that qualify as "legitimate state interests," nor did *Dolan* reject the "reasonableness" test traditionally used by the Court to determine whether regulation "substantially advances" a legitimate state interest. Although *Dolan* shifted the burden to the government to demonstrate that a particular type of government regulation "substantially advances legitimate state interests," it may have merely shifted the burden of producing evidence to the government. The ultimate burden of persuasion may remain, as it has traditionally been, with the claimant.

Moreover, the reach of *Dolan* is also in question. A strong argument can be made that the *Dolan* burden shift only applies to judicial review of permit conditions, developed through adjudication, that impose dedication requirements depriving landowners of their right to exclude the public from their property or impose other requirements that constitute per se takings.

Even if *Dolan* applies to all permit conditions developed through adjudication, it should have little impact on the Corps' imposition of compensatory mitigation conditions in § 404 permits. Pursuant to regulations and agency policy, the nature and extent of the Corps' com-

202. The permittee might challenge the amount of mitigation banked wetlands required as compensation if the replacement ratio exceeds 1:1. However, to the extent that a permit includes a condition that requires the permittee to satisfy mitigation requirements by purchasing credits from a mitigation bank, the condition will only be included in the permit if the Corps and the permittee have agreed on the condition. That should decrease the likelihood that the permittee will challenge the condition.

pensatory mitigation permit conditions are intimately tied to the impacts of the discharge authorized by a § 404 permit. Thus, in almost all cases, the conditions should satisfy the *Dolan* requirement that the nature and extent of permit conditions must be "roughly proportional" (i.e., reasonably related) to the impacts of the development authorized by a permit. The Corps' compensatory mitigation analysis is a far cry from the "regulatory extortion" that has been consistently condemned by the Court. Compensatory mitigation requirements do not impose a burden on landowners that the public as a whole should bear. Instead, such requirements impose an obligation on landowners to limit the damage that their actions will cause the public. In light of the traditional takings analysis, and pursuant to *Dolan*, they are clearly constitutional.