

A DEVELOPER'S DREAM: THE UNITED STATES CLAIMS COURT'S NEW ANALYSIS OF SECTION 404 TAKINGS CHALLENGES

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I. INTRODUCTION

Consider the following scenario: a development company purchases a 100-acre parcel of waterfront property on which it plans to build a residential community. Five acres of this parcel are wetlands that are interconnected with the local water supply. The company successfully develops and sells fifty of its dry acres, enjoying a substantial return on its original investment. The company then transfers title to the forty-five unsold dry acres, leaving in its own name only the five wetland acres. Years later, the company applies to the federal government, as required under section 404 of the Clean Water Act (CWA),¹ for a permit to fill the remaining five acres of wetlands. The company was fully aware of the section 404 permit requirement when it acquired the property.

If the government denies the company a fill permit, must the government compensate the company for the profits that it expected to realize by developing the wetlands? A decade ago, probably not. Today, however, the government likely would be forced to pay the developer, despite the harm that would have resulted from the wetlands destruction, despite the substantial profits the company already has reaped from its initial investment and the profits the forty-

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¹ 33 U.S.C. §§ 1251-1376 (1988); see *infra* notes 23-51 and accompanying text.

five separately held acres likely will yield upon development, and despite the permit denial's foreseeability when the company first acquired its property. Why this result? The answer lies with the United States Claims Court and its new approach to section 404 takings challenges.

CWA section 404 prohibits the discharge of dredged or fill material into waters of the United States without a permit.² The goal of the section 404 program is that of the CWA itself: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."³ The fundamental policy underlying section 404 is to prevent the ecological harm that results from water pollution and environmental despoilment.⁴

Land developers frequently challenge section 404 under the Fifth Amendment's prohibition against governmental taking of private property without just compensation.⁵ Typically, developers allege that the government's⁶ denial of a section 404 dredge and fill permit constitutes a taking of their property, because the regulation prevents the developers from obtaining any practical use or value from their land.⁷

² 33 U.S.C. § 1311(a) (1988). The Army Corps of Engineers regulations define "dredged material" as any "material that is excavated or dredged from the waters of the United States." 33 C.F.R. § 323.2(c) (1990). "Fill material" means "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).

³ 33 U.S.C. § 1251(a) (1988).

⁴ See *infra* notes 29–41 and accompanying text.

⁵ The so-called "takings," or just compensation, clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V; see *infra* notes 68–125 and accompanying text.

⁶ The Army Corps of Engineers is the governmental agency responsible for issuing § 404 permits. See *infra* note 42 and accompanying text.

⁷ See, e.g., *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 154 (1990); *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161, 164 (1990); *Formanek v. United States*, 18 Cl. Ct. 785, 787 (1989); *Ciampetti v. United States*, 18 Cl. Ct. 548, 550 (1989); *Laney v. United States*, 661 F.2d 145, 147 (Ct. Cl. 1981); *Jentgen v. United States*, 657 F.2d 1210, 1212 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Deltona Corp. v. United States*, 657 F.2d 1184, 1189 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

The United States Claims Court⁸ is usually the forum for section 404 takings challenges.⁹ In determining whether a section 404 permit denial amounts to a taking, the Claims Court balances the public interest in preserving the wetlands at issue against the regulation's economic impact on the private property owner.¹⁰ Traditionally, the public interest weighed heavily in the court's analysis; the court assumed that section 404 substantially advanced the government's legitimate interest in protecting the environment.¹¹ In addition, the court considered a section 404 permit denial's economic impact on the claimant in light of the claimant's original property investment.¹² Finally, the court intimated that claimants would not win their takings claims if they were on notice of the section 404 permit requirement when they purchased their property.¹³ Landowners could succeed in their regulatory takings claims only in extreme circumstances.¹⁴

Recently, however, the Claims Court has adopted a new approach to section 404 takings claims.¹⁵ In examining section 404's purpose, the court no longer assumes that the regulation advances important federal interests.¹⁶ Moreover, in determining section 404's economic

⁸ The United States Claims Court originally was known as the United States Court of Claims. Act of Feb. 24, 1855, ch. 22, 10 Stat. 612. In 1982, Congress reorganized the court under the Federal Courts Improvement Act. 28 U.S.C. §§ 171-177, 1491 (1988). The 1982 Amendments substituted the name "United States Claims Court" for "Court of Claims." *Id.* This Comment refers to both the United States Court of Claims and the United States Claims Court as the "Claims Court."

The Claims Court has jurisdiction to render judgment upon "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." *Id.* § 1491(a)(1). See generally WILSON COWEN ET. AL., *THE UNITED STATES COURT OF CLAIMS, A HISTORY, PART II, ORIGIN—DEVELOPMENT—JURISDICTION, 1855-1978* (Committee on the Bicentennial of Independence and the Constitution of the Judicial Conference of the United States) (1976) reprinted in 216 Ct. Cl. 1 (1978); Philip R. Miller, *The New United States Claims Court*, 32 CLEV. ST. L. REV. 7 (1983-84); Harold C. Petrowitz, *Federal Court Reform: The Federal Courts Improvement Act of 1982—and Beyond*, 32 AM. U. L. REV. 543 (1983).

⁹ See *infra* notes 55-67 and accompanying text.

¹⁰ See *infra* text accompanying notes 144-249.

¹¹ See *infra* text accompanying notes 146-71.

¹² See *infra* text accompanying note 151.

¹³ See *infra* text accompanying notes 158-62.

¹⁴ See *Deltona v. United States*, 657 F.2d 1184, 1194 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982) (in takings cases involving governmental regulations that substantially advance legitimate public interests, plaintiffs face a "very difficult prospect" of establishing takings).

¹⁵ See *infra* text accompanying notes 173-249.

¹⁶ See *infra* text accompanying notes 221-25.

impact upon a claimant's property, the court has limited its analysis solely to the contiguous property held by the claimant when the government denied the section 404 permit.¹⁷ Finally, in considering section 404's interference with the claimant's reasonable investment-backed expectations,¹⁸ the court has suggested that it may find a taking even in the absence of such expectations.¹⁹

This Comment argues that the Claims Court's new takings analysis is flawed for three reasons. First, in refusing to consider the environmental harm caused by destroying wetlands, the court has lost sight of Congress's intent in promulgating section 404. Second, the Claims Court has misinterpreted the United States Supreme Court's decision in *Keystone Bituminous Coal Association v. DeBenedictis*²⁰ by restricting the property considered in its economic impact analysis. The court's limited focus has enabled developers to manipulate their property holdings so as virtually to ensure that, if their section 404 permit application is denied, a taking will be found. Third, the court has contradicted its own holdings and those of the Supreme Court by suggesting that it may find a taking absent a claimant's reasonable investment-backed expectations.

This Comment does not suggest a precise formula for determining where a section 404 regulation ends and a constitutional taking begins.²¹ Rather, it advocates that the Claims Court should use the Supreme Court's current regulatory takings analysis, which balances the public and private interests involved in a governmental regulation.²² In performing this analysis, the Claims Court should readopt the traditional assumptions it made in its early section 404 takings decisions. Specifically, in examining section 404's purpose, the Claims Court should presume that a section 404 permit denial substantially advances legitimate public interests in preventing environmental harm, and should accord significant weight to these interests in its analysis. In determining a permit denial's economic impact upon a claimant's property, the court should broaden its analysis to consider the uses derived from the unregulated portions of the claimant's original property investment. Finally, in considering the claimant's investment-backed expectations, the court should not compensate claimants who were on notice of the section 404 permit requirement

¹⁷ See *infra* text accompanying notes 232-35.

¹⁸ See *infra* text accompanying notes 119-35.

¹⁹ See *infra* text accompanying notes 248-49.

²⁰ 480 U.S. 470 (1987).

²¹ See *infra* note 76 and accompanying text.

²² See *infra* notes 82-125 and accompanying text.

when they acquired the property that the regulation allegedly has taken.

Section II of this Comment provides a brief overview of the section 404 program. Section III explains the basis of the Claims Court's jurisdiction to hear section 404 takings cases. Section IV introduces the traditional analyses that courts have used in deciding regulatory takings claims, and explains the Supreme Court's current approach to the regulatory takings problem. Section V examines the Claims Court's original and present approaches to section 404 takings claims. Finally, Section VI argues why the Claims Court's current section 404 takings analysis is flawed, and proposes an approach that the court should use in deciding section 404 takings claims.

II. THE SECTION 404 PROGRAM: A BRIEF OVERVIEW

A. *Section 404's Purpose*

In 1972, Congress enacted the Federal Water Pollution Control Act Amendments²³ to protect the chemical, physical, and biological integrity of the nation's waters.²⁴ The amendments, now known as the Clean Water Act,²⁵ established a national goal of eliminating the discharge of pollutants into navigable waters.²⁶ To combat such pollution, Congress instituted CWA section 404 to regulate the discharge of dredged and fill material into waters of the United States.²⁷ The CWA makes it unlawful to discharge dredged or fill material into the nation's waters without the permit that section 404 requires.²⁸

²³ 33 U.S.C. §§ 1251-1376 (1988). Congress passed the original Federal Water Pollution Control Act (FWPCA) in 1948. Act of June 30, 1948, ch. 758, 62 Stat. 1155. The 1948 FWPCA left the states primary responsibility in controlling water pollution. *Id.* Although Congress amended FWPCA eleven times before 1972, no amendment proved effective in solving water pollution problems, prompting Congress to enact the 1972 amendments. S. REP. NO. 414, 92nd Cong., 2nd Sess. 97 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3669-77. The 1972 FWPCA's purpose was to "enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution." 1972 U.S.C.C.A.N. 3668, 3678.

²⁴ 33 U.S.C. § 1251(a) (1988).

²⁵ Congress amended FWPCA again in 1977. Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified as amended at 33 U.S.C. §§ 1251-1376 (1988)). The 1977 Amendments stated that the entire Act may be referred to as the Clean Water Act. 91 Stat. 1566, 1566 (1977).

²⁶ 33 U.S.C. § 1251(a)(1) (1988).

²⁷ *Id.* § 1344. The Act applies to all of the nation's "navigable waters," which the Act defines as "waters of the United States, including the territorial seas." *Id.* § 1362(7); see *infra* note 42 discussing the expansion of the Corps's § 404 jurisdiction.

²⁸ 33 U.S.C. § 1311(a) (1988).

The primary objectives of section 404 are those of the CWA itself: to eliminate water pollution and to provide water quality sufficient to protect wildlife, marine organisms,²⁹ and human health.³⁰ Land-owners cannot obtain a section 404 permit if discharge from their proposed activities will degrade water quality enough to harm the environment.³¹

In addition, several federal agencies and special interest groups consider section 404 a legislative mechanism to protect wetlands.³² Wetlands are valuable both for their intrinsic qualities³³ and their ecological functions.³⁴ Wetlands are an endangered natural resource, disappearing at a rate of over 300 acres every year.³⁵ Section 404 is one means by which the government can limit wetland destruction.

At the time of section 404's enactment, Congress was chiefly concerned with reducing pollution in navigable waters.³⁶ In defining "navigable waters" as "waters of the United States,"³⁷ Congress intended to give the CWA the broadest possible scope over all the nation's waters, including wetlands.³⁸ When Congress passed the 1977 amendments to the CWA, many legislators acknowledged sec-

²⁹ *Id.* § 1251(a)(1) (1988).

³⁰ 40 C.F.R. § 230.10(c)(1) (1990).

³¹ *See id.*

³² OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESSIONAL BOARD OF THE 98TH CONGRESS, WETLANDS: THEIR USE AND REGULATION 10 (1984) [hereinafter OTA REPORT]. Federal agencies and special interest groups once were divided on their interpretation of § 404's intent regarding wetlands. *Id.* The Corps viewed § 404 as a means solely to protect water quality. *Id.* The Environmental Protection Agency, the Fish and Wildlife Service, the National Marine Fisheries Service, and various environmental groups, however, consider § 404 a legislative mechanism to preserve wetlands for their habitat and aesthetic values as well as for their water purification utility. *Id.*

³³ Intrinsic qualities of wetlands include their historical, aesthetic, and recreational values. *Id.* at 37.

³⁴ *Id.* The ecological services wetlands provide include pollution abatement, flood reduction, ground water recharge, water quality improvement, food chain support, fish and wildlife habitat, and shoreline stabilization. *Id.*; see also COUNCIL ON ENVIRONMENTAL QUALITY, OUR NATION'S WETLANDS 19-21 (1978).

³⁵ OTA REPORT, *supra* note 32, at 11. Over 50% of the nation's wetland areas have been destroyed in the last two centuries. NAT'L WETLANDS INVENTORY, FISH AND WILDLIFE SERVICE, U.S. DEPT OF INTERIOR, WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 2 (1984).

³⁶ H.R. CONF. REP. No. 1465, 92nd Cong., 2nd Sess. 138 (1972) (§ 404 to apply to freshwater lakes and streams).

³⁷ 33 U.S.C. § 1362(7) (1988).

³⁸ S. REP. No. 1236, 92nd Cong., 2nd Sess. 144 (1972), reprinted in 1972 U.S.C.C.A.N. 3776, 3822; H.R. REP. No. 911, 92nd Cong., 2nd Sess. 131 (1972); see also Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975) (the term "navigable waters" as used in CWA not limited to the Corps's traditional navigability tests).

tion 404 as a wetlands protection mechanism.³⁹ Controversy continues as to whether the government should use section 404 to preserve wetlands as well as to prevent water pollution.⁴⁰ Both purposes, however, advance the public's interest in preventing environmental harm.⁴¹

B. The Section 404 Permit Process

The CWA gives the Army Corps of Engineers (Corps) responsibility for conducting reviews of section 404 permit applications.⁴² The Corps's permit review process follows guidelines developed by the Secretary of the Army,⁴³ the Environmental Protection Agency,⁴⁴ the Fish and Wildlife Service,⁴⁵ the National Marine Fisheries Service,⁴⁶ and the interstate water pollution control agency with jurisdiction over the waters where the discharge will occur.⁴⁷

The Corps's final decision regarding whether to issue a section 404 permit results from a balancing of the project's potential benefits and detriments.⁴⁸ In a detailed, extensive evaluation process known as the "public interest review,"⁴⁹ the Corps considers a variety of

³⁹ See, e.g., 123 CONG. REC. 26,697 (1977) (Senator Edmund Muskie commenting that "[t]he unregulated destruction of [wetland] areas is a matter which needs to be corrected and which implementation of § 404 has attempted to achieve"); *Oversight Hearings on Section 404 of the Clean Water Act Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 1 (1985) (Senator John Chafee commenting that "[t]he Section 404 Dredge and Fill Program is the most important regulatory tool the Federal Government has to stem the loss of wetlands").

For further commentary on § 404's role as a necessary wetlands protection mechanism, see Charles D. Ablard and Brian B. O'Neill, *Wetland Protection and Section 404 of the Federal Water Pollution Control Act Amendments of 1972: A Corps of Engineers Renaissance*, 1 VT. L. REV. 51 (1976); Michael C. Blumm, *Wetlands Preservation, Fish and Wildlife Protection, and 404 Regulation: A Response*, 18 LAND & WATER L. REV. 469 (1983).

⁴⁰ See *supra* note 39.

⁴¹ See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981) *cert. denied* 455 U.S. 1017 (1982).

⁴² 33 U.S.C. § 1344(a)(d) (1988). Prior to the CWA, the Corps had administered a permit program under the Rivers and Harbors Act of 1899. Rivers & Harbors Act, ch. 425, 30 Stat. 1121 (1899) (codified as amended at 33 U.S.C. §§ 401-416 (1988)). Because of the Corps's experience with this permit system, Congress gave the Corps responsibility over the § 404 program. See STAFF OF SENATE COMM. ON PUBLIC WORKS, 93rd Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 177 (Comm. Print 1973).

⁴³ 33 U.S.C. § 1344(b) (1988).

⁴⁴ *Id.*; see also 40 C.F.R. § 230 (1990).

⁴⁵ See 33 C.F.R. § 320.3(e) (1990).

⁴⁶ *Id.* § 320.3(i).

⁴⁷ 33 U.S.C. § 1341(a) (1988).

⁴⁸ 33 C.F.R. § 320.4(a) (1990).

⁴⁹ *Id.*

factors related to public welfare and necessity, including natural resource conservation, human health and safety, land use, and property ownership.⁵⁰ If the Corps determines that the proposed project will affect the public interest adversely, it must deny the applicant a section 404 permit.⁵¹

III. CHALLENGING A SECTION 404 PERMIT DENIAL IN THE CLAIMS COURT

There are two primary challenges that section 404 permit applicants may raise against a permit denial. First, applicants may contest the validity of the Corps's decision to withhold a section 404 permit under the Administrative Procedure Act (APA) in a United States district court.⁵² If the applicant's proposed activities will not cause water pollution, then the Corps has no statutory authority to act.⁵³ In such a case, the district court would invalidate the permit denial.⁵⁴

Second, applicants may argue that, by denying a section 404 permit to develop their property, the government has taken their property without just compensation in violation of the Fifth Amendment.⁵⁵ Under the Tucker Act, applicants raising this claim may sue the government for payment in the United States Claims Court.⁵⁶

The Tucker Act vests the Claims Court with exclusive jurisdiction to hear all claims founded upon the Constitution for which plaintiffs seek judgment against the United States in excess of \$10,000.⁵⁷

⁵⁰ *Id.* The Corps considers the following factors in its public interest review: conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

Id. § 320.4(a)(1).

⁵¹ *Id.* Of the approximately 11,000 project applications that the Corps reviews each year, it denies slightly less than 3%, significantly modifies about 33%, and approves about 50% without modification; about 14% are withdrawn by applicants. OTA REPORT, *supra* note 32, at 11.

⁵² See 5 U.S.C. §§ 701-706 (1988); e.g., *Deltona Corp. v. Alexander*, 504 F. Supp. 1280, 1284 (M.D. Fla. 1981), *aff'd*, 682 F.2d 888 (11th Cir. 1982).

⁵³ *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 898 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *aff'd on remand*, 21 Cl. Ct. 161 (1990).

⁵⁴ *Id.*

⁵⁵ See *supra* note 7.

⁵⁶ 28 U.S.C. § 1491 (1988). See also *supra* note 8.

⁵⁷ See *supra* note 56.

When the government takes private property, the property owner may file an action in the Claims Court under the Tucker Act, even though the government has not proceeded by condemnation.⁵⁸ The property owner's right of action is founded on the Fifth Amendment and needs no other express statutory authority.⁵⁹ A Tucker Act suit, however, is not available to plaintiffs seeking to recover damages for unauthorized government acts.⁶⁰ Thus, by electing to bring a suit under the Tucker Act, a plaintiff in a section 404 permit denial action concedes the permit denial's validity, even without a prior validity test under the APA.⁶¹

District courts usually have deferred to the Claims Court in deciding section 404 takings challenges. In *American Dredging Co. v. Dutchyshyn*,⁶² for example, the District Court for the Eastern District of Pennsylvania declined to determine whether a section 404 permit modification amounted to a taking.⁶³ Although the plaintiff sought only injunctive relief from the section 404 restrictions, the court concluded that the actual thrust of the plaintiff's claim was that the permit modification was a taking without just compensation. Because monetary damages appeared to be involved, the court determined that the plaintiff's claim was a matter for the Claims Court.⁶⁴

Parties may appeal Claims Court decisions to the United States Court of Appeals for the Federal Circuit (Federal Circuit).⁶⁵ The Federal Circuit has exclusive jurisdiction to hear appeals from final Claims Court decisions,⁶⁶ and Federal Circuit decisions are binding upon the Claims Court.⁶⁷ Because the Claims Court hears most

⁵⁸ See, e.g., *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 154 (1990); *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161, 164 (1990); *Formanek v. United States*, 18 Cl. Ct. 785, 787 (1989); *Ciampetti v. United States*, 18 Cl. Ct. 548, 550 (1989); *Laney v. United States*, 661 F.2d 145, 147 (Ct. Cl. 1981); *Jentgen v. United States*, 657 F.2d 1210, 1212 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Deltona Corp. v. United States*, 657 F.2d 1184, 1189 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

⁵⁹ *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 898 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *aff'd on remand*, 21 Cl. Ct. 161 (1990).

⁶⁰ *Id.*

⁶¹ *Id.* at 899.

⁶² 480 F. Supp. 957 (E.D. Pa. 1979).

⁶³ *Id.* at 962.

⁶⁴ *Id.*

⁶⁵ 28 U.S.C. § 1295(a)(3) (1988). The Federal Courts Improvement Act of 1982 created the Federal Circuit. *Id.* § 1295. Prior to the Act's passage, the Claims Court operated on both a trial and appellate level. *Id.* § 792 (repealed 1982). The Act delegated the Claims Court's appellate functions to the new Federal Circuit. *Id.* § 1295(a)(3).

⁶⁶ *Id.*

⁶⁷ See *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 388 (1988).

section 404 takings claims, its section 404 decisions, together with those of the Federal Circuit, are the focus of this Comment. Until the Supreme Court considers a section 404 takings claim or provides a universal formula for regulatory takings analyses, the Claims Court and the Federal Circuit will continue to be the pivotal forums in which the section 404 program's immediate fate may be decided.

IV. THE REGULATORY TAKINGS CLAIM: EARLY AND MODERN APPROACHES

The Fifth Amendment's due process and just compensation clauses limit government regulation of land use.⁶⁸ The due process clause provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."⁶⁹ The just compensation, or takings, clause provides that "private property [shall not] be taken for public use, without just compensation."⁷⁰

Courts originally analyzed federal government regulations under the due process clause.⁷¹ To be valid, governmental actions had to bear a substantial relation to proper governmental purposes.⁷² Courts nullified regulations that failed to meet these substantive due process requirements.⁷³

Eventually courts adopted the notion that a governmental agency's exercise of regulatory power also can take property in violation of the Fifth Amendment's just compensation clause. Whereas most early jurists recognized that the government could "take" property

⁶⁸ See *infra* notes 86-125 and accompanying text.

⁶⁹ U.S. CONST. amend. V. The Fifth Amendment limits the exercise of powers delegated to the federal government. The exercise of powers reserved to the states, known as "police powers," is limited by state constitutional provisions and by the Fourteenth Amendment to the United States Constitution, which provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* amend. XIV.

⁷⁰ *Id.* amend V.

⁷¹ See *infra* notes 72-73.

⁷² See *Mugler v. Kansas*, 123 U.S. 623, 662 (1887); see also *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Lawton v. Steele*, 152 U.S. 133, 137 (1894); *infra* notes 86-90 and accompanying text.

⁷³ See, e.g., *Lawton*, 152 U.S. at 137. In *Lawton*, the Supreme Court made what scholars long have considered the classic statement of what due process requires when it explained that a purported police power exercise does not violate the due process clause if it appears, "first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Id.*

only by formal condemnation⁷⁴ or physical invasion,⁷⁵ later courts acknowledged that, if a governmental regulation so severely interfered with property interests as to have the same effect as a physical appropriation, the regulation would be a taking.⁷⁶ Under the takings clause, the remedy for excessive governmental regulation is not invalidation of the regulation, but compensation.⁷⁷

In resolving land use regulation problems under the takings clause, most courts have integrated both traditional substantive due process principles and takings principles into their analyses.⁷⁸ The result has been a balancing test that requires a comparison of a regulation's purpose with its impact upon the claimant's property.⁷⁹ If a court concludes that the net social gains from the regulation outweigh the economic loss to the individual landowner, the court will not consider the regulation to have "taken" that claimant's prop-

⁷⁴ Pursuant to its eminent domain power, the government formally can condemn a landowner's property and obtain a fee simple interest in the property. *See, e.g.,* *United States v. Clarke*, 445 U.S. 253, 255 (1980); *see also* PHILIP NICHOLS, *EMINENT DOMAIN* § 25.41 (3d rev. ed. 1972).

Some early jurists did recognize that a taking could occur without acquisition of a property interest. *See, e.g.,* *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1871) (Miller, J., dissenting). The majority of early courts, however, found that takings occurred only when the government physically appropriated the property at issue for state use. *See, e.g.,* *Fitchburg R.R. v. Boston & Maine R.R.*, 57 Mass. 58, 90 (1849); *Canal Appraisers v. People*, 17 Wend. 571, 628 (N.Y. Sup. Ct. 1836).

⁷⁵ In the absence of formal condemnation proceedings, the government may interfere so substantially with property interests as to have the same effect as an appropriation by eminent domain. *See* DONALD G. HAGMAN & JULIAN C. JUERGENSMAYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 320-21 (1975). In such a case, the landowner may bring an "inverse condemnation" action against the government to recover compensation for the taken property. *Clarke*, 445 U.S. at 257; *see also* *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979); *United States v. Causby*, 328 U.S. 256, 259 (1946); *Pumpelly*, 80 U.S. at 171.

⁷⁶ *See, e.g.,* *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 322 (1987); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978); *United States v. Dickinson*, 331 U.S. 745, 748 (1947); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The idea that excessive regulation can constitute a "taking" under the just compensation clause is based largely on *Pennsylvania Coal*. *See* 260 U.S. at 415. Writing for the majority, Justice Holmes stated the following: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* The rationale, as Justice Brennan later stated it in *San Diego Gas & Electric Co. v. San Diego*, is that "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." 450 U.S. 621, 652 (1981) (Brennan, J., dissenting).

⁷⁷ U.S. CONST. amend. V.

⁷⁸ *See, e.g.,* *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

⁷⁹ *See id.*

erty.⁸⁰ If the private economic loss outweighs the social gains, the court will find a taking for which the government must compensate the landowner.⁸¹

To date, there is no set formula for determining where a regulation ends and a taking begins.⁸² Instead, for all its imprecision, the balancing test has endured as the primary means by which courts resolve takings questions.⁸³ As the Supreme Court itself has explained, the question of whether a governmental action effects a taking necessarily requires a weighing of public and private interests.⁸⁴ In its regulatory takings analysis, the Supreme Court focuses both on whether the regulation substantially advances legitimate public interests and on whether the regulation denies property owners economically viable use of their land.⁸⁵

In *Mugler v. Kansas*,⁸⁶ the Supreme Court used the due process clause to analyze a state law prohibiting the manufacture and sale of alcoholic beverages.⁸⁷ The Court focused both on the legitimacy of the regulation's purpose and the regulation's efficacy in accomplishing that purpose.⁸⁸ It recognized that laws bearing "no real or substantial relation" to their proper objectives violated the due process clause.⁸⁹ Although the Court did not define exactly what purposes are proper, it affirmed the legitimacy of legislation for the protection of public health, safety, morals, and general welfare.⁹⁰

In examining a regulation's purpose under the takings clause, the Court continues to make what amounts to a *Mugler*-style due process

⁸⁰ See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 506 (1987); *Agins*, 447 U.S. at 262; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926).

⁸¹ See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

⁸² This familiar language comes from Justice Clark, writing for the majority in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); see also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Kaiser Aetna*, 444 U.S. at 175.

⁸³ See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still A Muddle*, 57 S. CAL. L. REV. 561, 566-69 (1984); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 60 (1964); see generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

⁸⁴ *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980).

⁸⁵ *Id.* at 260.

⁸⁶ 123 U.S. 623 (1887).

⁸⁷ See *id.* at 655.

⁸⁸ *Id.* at 661.

⁸⁹ *Id.* The *Mugler* Court was determining whether the regulation at issue violated the due process clause of the Fourteenth Amendment of the United States Constitution. *Id.* at 657. Federal statutes are analyzed under the Fifth Amendment. U.S. CONST. amend. V.

⁹⁰ *Id.* at 661.

analysis. In *Nollan v. California Coastal Commission*,⁹¹ the Court mandated that there be a "nexus" between a regulation and its purported goal.⁹² Regarding the purpose itself, the Court acknowledged a broad range of permissible ends, from classic objectives such as environmental protection⁹³ and public safety,⁹⁴ to contemporary purposes including landmark preservation⁹⁵ and residential zoning.⁹⁶ In the Court's view, if a regulation failed to substantially advance a legitimate governmental interest, it would violate the takings clause.⁹⁷

While the Court has been quick to find that regulations serving no legitimate purpose violate the takings clause,⁹⁸ it repeatedly has upheld regulations that advance legitimate and compelling public interests, even where these regulations destroyed or adversely affected real property interests.⁹⁹ In *Keystone Bituminous Coal Association v. DeBenedictis*,¹⁰⁰ the Court emphasized that the nature of the government's interest in the regulation is a critical factor in determining whether a taking has occurred.¹⁰¹ The *Keystone* case involved a state statute that restricted the claimant's coal mining operations in order to prevent subsidence damage to public buildings and homes.¹⁰² Despite the claimant's economic loss, the Court refused to find a taking where the state merely restrains uses of property that are tantamount to public nuisances.¹⁰³ The Court maintained that, while a regulation's economic impact is important to a regulatory takings analysis, it is not conclusive;¹⁰⁴ the regulation's legiti-

⁹¹ 483 U.S. 825 (1987).

⁹² *Id.* at 837.

⁹³ *Id.* at 835 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

⁹⁴ *See Mugler*, 123 U.S. at 661.

⁹⁵ *Nollan*, 483 U.S. at 835 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 109 (1978)).

⁹⁶ *Id.* (citing *Euclid*, 272 U.S. at 379).

⁹⁷ *Id.* at 837.

⁹⁸ *See id.* at 843-44.

⁹⁹ *E.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 n.18 (1987); *see also Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227-28 (1986); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978); *Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 679 (1976); *Goldblatt v. Hempstead*, 369 U.S. 590, 598 (1962); *Gorieb v. Fox*, 274 U.S. 603, 610 (1927); *Euclid*, 272 U.S. at 397; *Welch v. Swasey*, 214 U.S. 91, 108 (1909).

¹⁰⁰ 480 U.S. 470 (1987).

¹⁰¹ *Id.* at 488.

¹⁰² *Id.* at 474-76.

¹⁰³ *Id.* at 491. The Court explained that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. . . ." *Id.* at 491-92 (citing *Mugler v. Kansas*, 123 U.S. 623, 665 (1887)).

¹⁰⁴ *Id.* at 490 (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)); *see also Village of*

mate public purpose must weigh heavily in the balance against any private interests that the regulation affects.¹⁰⁵

In considering a regulation's effect on property's economic viability, the Supreme Court has identified three factors significant to its analysis: the character of the governmental action, the regulation's economic impact on the claimant, and the extent to which the regulation has interfered with reasonable investment-backed expectations.¹⁰⁶ In examining a regulation's character, the Court determines whether the regulation affects property interests in the same way as an act of eminent domain.¹⁰⁷ If the regulation prevents landowners from enjoying any substantial rights they hold in the property, including the right to possess, use, dispose of,¹⁰⁸ and exclude others from the property,¹⁰⁹ the Court likely will find that the regulation has taken that property.¹¹⁰

In evaluating the regulation's economic impact upon the claimant, the Court compares the property's value before and after the regulation's interference.¹¹¹ The Court has not attempted to define, however, either how much decline in property value is necessary before a taking occurs or what portion of the property courts should consider in determining the property's diminution in value.¹¹² Instead, the Court has chosen to conduct ad hoc, factual inquiries with respect to both the extent of the regulation's impact and the specific property to be considered in the valuation.¹¹³

The Court undertook such an inquiry in *Keystone*.¹¹⁴ In considering the relevant mass of property to be valued, the Court refused to limit its analysis to the regulated parcel.¹¹⁵ It explained that, by focusing on such a distinct segment of property, it almost certainly would find that the regulation had diminished the property's value completely.¹¹⁶ Although the Court explicitly refused to focus solely

Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (75% diminution in value not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394, 414 (1915) (87.5% diminution in value not a taking).

¹⁰⁵ See *Keystone*, 480 U.S. at 488-90.

¹⁰⁶ *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986).

¹⁰⁷ See *supra* note 74.

¹⁰⁸ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (citing *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)).

¹⁰⁹ *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979).

¹¹⁰ See, e.g., *Loretto*, 458 U.S. at 441; *Kaiser*, 444 U.S. at 181.

¹¹¹ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987).

¹¹² See *id.*

¹¹³ *Kaiser Aetna*, 444 U.S. at 175; see also *Keystone*, 480 U.S. at 495.

¹¹⁴ *Keystone*, 480 U.S. at 495.

¹¹⁵ *Id.* at 498-99.

¹¹⁶ See *id.* at 498.

on the regulated parcel, it refrained from defining exactly what area to consider. Instead, it viewed the affected property as part of the claimant's total mining operations and investment expectations.¹¹⁷ Since *Keystone*, the Supreme Court has remained flexible in its economic impact analysis, allowing lower courts to make their own case-by-case determinations of a regulation's affect on the economic viability of a claimant's property.¹¹⁸

Recently, the Court has found particular significance in the third factor of its regulatory taking analysis, the extent to which the regulation has interfered with the claimant's reasonable investment-backed expectations.¹¹⁹ In *Ruckelshaus v. Monsanto Co.*,¹²⁰ the Court focused at length on the foreseeability of existing statutory limitations in determining whether such limitations had interfered with the claimant's expectations.¹²¹ The reasonableness of the claimant's investment-backed expectations was so important to the *Monsanto* Court that it decided the takings question based on this factor alone.¹²²

In *Monsanto*, a pesticide producer, Monsanto Company, submitted confidential data regarding its products to the Environmental Pro-

¹¹⁷ *Id.* at 499. Writing for the majority, Justice Brennan explained that, in considering a regulation's economic impact upon the claimant's property, courts should not divide a single parcel into discrete segments and determine whether rights in a particular segment have been abrogated. *Id.* at 497. Rather, according to Justice Brennan, courts should focus on the regulation's interference with rights in the "parcel as a whole." *Id.* (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978)). In his dissenting opinion, Justice Rehnquist argued that courts should focus upon the property segment that a regulation affects in determining the extent to which the regulation interferes with property interests. *Id.* at 518 (Rehnquist, J., dissenting).

In *Pennsylvania Coal Co. v. Mahon*, Justice Holmes and Justice Brandeis also diverged in their definitions of the parcel to be considered in a taking analysis. 260 U.S. 393, 414-20 (1922). Writing for the majority, Justice Holmes focused his analysis solely on the regulated parcel. *Id.* at 414-15. Justice Brandeis compared the restricted segment to the value of the whole property. *Id.* at 419 (Brandeis, J., dissenting).

The "parcel as a whole" issue remains widely debated by courts and commentators alike. See Michelman, *supra* note 83, at 1190-93; Rose, *supra* note 83, at 566-69; Sax, *supra* note 83, at 60-61.

¹¹⁸ See, e.g., *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986).

¹¹⁹ See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). The reasonable investment-backed expectation inquiry represents the equitable prong of the Court's regulatory taking analysis. See Michelman, *supra* note 83, at 1172. The role of equity traditionally has been to seek justice through fairness rather than through strictly formulated common law rules. *Id.* Thus, in determining whether a regulation effects a taking, courts ask not only how severely the regulation harmed a claimant, but also whether the claimant had good reason to expect compensation for what the government allegedly took. *Id.*

¹²⁰ 467 U.S. 986 (1984).

¹²¹ *Id.* at 1005-15.

¹²² *Id.* at 1005.

tection Agency (EPA) in order to obtain a registration to market the products.¹²³ At the time Monsanto submitted its data, a federal statute authorizing public disclosure of such data was in effect. When the EPA eventually did reveal Monsanto's data publicly, pursuant to the statute, Monsanto argued that the agency had taken its trade secrets, which are property interests under the Fifth Amendment. The Court determined that, because the federal statute existed at the time Monsanto submitted its data, the company could not have had a reasonable investment-backed expectation that the agency would keep the data confidential.¹²⁴ Presuming that Monsanto was on notice of the statute, the Court held that Monsanto could not argue that its reasonable investment-backed expectations were disturbed when the government agency acted to use or disclose Monsanto's data in a manner authorized by law at the time Monsanto submitted the data. In the absence of any reasonable investment-backed expectations, Monsanto's property could not be taken by the regulation's implementation.¹²⁵

The Claims Court reached this same conclusion in two of its own decisions, *Eastport Steamship Corp. v. United States*¹²⁶ and *Allied-General Nuclear Services v. United States*.¹²⁷ In *Eastport*, decided before *Monsanto*, the Eastport Steamship Corporation purchased a ship from the United States Maritime Commission.¹²⁸ At the time of sale, the Commission stipulated that Eastport would need to obtain a license from the Commission if it later wished to sell the vessel to a foreign market. The Commission offered no assurance that it would grant the necessary license. Eastport eventually did try to sell the vessel, and when the Commission failed to grant it a license before the sale deadline, Eastport lost the sale and argued that the government had taken its property.¹²⁹ The Claims Court held that the Commission's failure to grant Eastport a license could not amount to a compensable taking of Eastport's property, because the licensing process was pre-existing and known to Eastport when it initially purchased the property.¹³⁰

In *Allied-General*, the Claims Court relied on the Supreme Court's standard enunciated in *Monsanto*, holding that a regulatory action

¹²³ *Id.* at 998.

¹²⁴ *Id.* at 1006-07.

¹²⁵ *Id.* at 1007.

¹²⁶ 372 F.2d 1002 (Ct. Cl. 1967).

¹²⁷ 12 Cl. Ct. 372 (1987).

¹²⁸ *Eastport*, 372 F.2d at 1005.

¹²⁹ *Id.* at 1005-11.

¹³⁰ *Id.* at 1011.

involved considerations so foreseeable that the plaintiff, rather than the public, should bear the burden of the plaintiff's loss.¹³¹ Allied-General Nuclear Services built a nuclear fuel reprocessing plant with hopes of profiting from future fuel sales.¹³² At the time Allied-General purchased the property, federal statutes provided that the government would not license Allied-General's facility if the facility threatened public health or safety.¹³³ When the government eventually refused to consider Allied-General's application for an operating permit for public safety reasons, Allied-General sued the government for taking its property without just compensation.¹³⁴ The court held that the government had not taken Allied-General's property, and emphasized that it was aware of no case in which a court had found that the implementation of a regulatory scheme existing at the time a property interest was acquired effected a taking of the property interest.¹³⁵

Rather than formulating a universal theory of the takings clause, courts instead have remained flexible in their approaches to regulatory takings claims. As the Supreme Court has explained, however, a balancing of private and public interests must occur in order to determine whether a regulation effects a taking.¹³⁶ If a regulation fails to advance a legitimate public purpose, a court should find a taking.¹³⁷ If compelling public interests are present, however, a court should be reluctant to find a taking.¹³⁸ Finally, if a claimant lacks reasonable investment-backed expectations, a court should not find a taking.¹³⁹

V. SECTION 404 CASES IN THE CLAIMS COURT

A. *Early Cases*

The Claims Court first considered a section 404 takings challenge in *Deltona Corp. v. United States*.¹⁴⁰ In 1964, the Deltona Corporation purchased a 10,000-acre parcel for \$7.5 million, intending to

¹³¹ *Allied-General*, 12 Cl. Ct. at 381.

¹³² *Id.* at 374.

¹³³ *Id.* at 381.

¹³⁴ *Id.* at 375.

¹³⁵ *Id.* at 381.

¹³⁶ *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980).

¹³⁷ *Id.* at 260.

¹³⁸ *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987).

¹³⁹ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006-07 (1984).

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

develop a waterside residential community.¹⁴¹ Deltona divided its land into five parcels, which it planned to develop consecutively. The company was able to fill and develop the first two parcels by 1969, before Congress added the section 404 permit requirement to the CWA. In 1973, after the section 404 program became law, Deltona applied to the Corps for section 404 permits to fill its remaining three parcels. The Corps granted only one permit. Deltona sued the government in the Claims Court, arguing that by denying the company a section 404 permit, the government had taken its property without compensation.¹⁴² Deltona explained to the court that it had entered into contracts of sale for approximately ninety percent of the lots in the two parcels for which the Corps denied fill permits. Without the permits, Deltona argued, it could not consummate its plans. The court disagreed, holding that the permit denials did not take Deltona's property.¹⁴³

The *Deltona* court based its analysis on a two-part takings test that the Supreme Court used in *Agins v. Tiburon*, a 1980 land use case.¹⁴⁴ The court explained that an ordinance would amount to a taking if it did not substantially advance legitimate state interests, or if it denied property owners any economically viable use of their land.¹⁴⁵

In applying this two-step approach, the *Deltona* court first examined section 404's legislative purpose. The court's conclusion was simple. It took "as given" that section 404, along with the rest of the CWA, substantially advanced legitimate and important federal interests.¹⁴⁶

The court then considered the permit denial's impact on Deltona's property rights, examining the diminution in property value, the fairness of the regulation, and the reasonableness of Deltona's investment-backed expectations.¹⁴⁷ Quoting the Supreme Court's decision in *Penn Central Transportation Co. v. New York City*,¹⁴⁸ the Claims Court explained that takings jurisprudence must focus on a regulation's interference with rights in "the parcel as a whole . . ."¹⁴⁹

¹⁴¹ *Id.* at 1188.

¹⁴² *Id.* at 1189.

¹⁴³ *Id.* at 1194.

¹⁴⁴ *Id.* at 1191 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1192.

¹⁴⁷ *Id.* at 1191-93.

¹⁴⁸ 438 U.S. 104 (1978).

¹⁴⁹ *Deltona*, 657 F.2d at 1192 (quoting *Penn Cent.*, 438 U.S. at 130-31) (emphasis in original).

Although the definition of the "whole parcel" a court should consider in its takings analysis has been debated widely,¹⁵⁰ the *Deltona* court chose to compare the regulated portion of Deltona's parcel to the total acreage of Deltona's original purchase in 1964.¹⁵¹ In doing so, the court found that the permit denial prevented Deltona from filling only twenty percent of its original purchase.¹⁵² The court decided that mere diminution in property value alone was insufficient to establish a taking.¹⁵³ It concluded that the section 404 permit denial neither extinguished any fundamental attribute of ownership¹⁵⁴ nor prevented Deltona from deriving other economically viable uses from the unregulated portions of its original parcel.¹⁵⁵

In assessing the fairness of the regulation, the *Deltona* court emphasized that the Corps had been enforcing the section 404 permit program on a uniform basis nationwide.¹⁵⁶ Deltona therefore would share with other landowners both the benefits and the burdens of the section 404 program. These benefits were to be balanced against any diminution in market value that Deltona's property might suffer.¹⁵⁷

Finally, the court questioned the reasonableness of Deltona's original development expectations.¹⁵⁸ When Deltona acquired its property, it knew that it could not develop the land without the necessary permits from the Corps.¹⁵⁹ The court noted that Deltona must have been aware that the standards and conditions governing the issuance

¹⁵⁰ See *supra* note 117.

¹⁵¹ See *Deltona*, 657 F.2d at 1192.

¹⁵² *Id.*

¹⁵³ *Id.* at 1193 (citing *Penn Cent.*, 438 U.S. at 131).

¹⁵⁴ *Id.* at 1192 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980)). The government argued that the property retained valuable incidents of ownership, including the right to use land in its current condition, the right to restrict or permit others' access to it, and the right to sell, lease, or give it away, in whole or in part. *Id.*

¹⁵⁵ See *id.* Seventy-seven percent of Deltona's developable lots were outside of the regulated parcel, including 111 acres of uplands whose total market value was approximately \$2.5 million. *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*; see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987).

¹⁵⁸ *Deltona*, 657 F.2d at 1193. The consideration of the claimant's development expectations became an important factor in the Supreme Court's takings analysis in *Connolly v. Pension Benefit Guar. Corp.* See 475 U.S. 211, 225 (1986); see also *supra* notes 106, 119-35 and accompanying text.

¹⁵⁹ *Deltona*, 657 F.2d at 1193. The Corps initially had jurisdiction over Deltona's proposed dredge and fill activities through the Rivers and Harbors Act, because the activities affected "navigable waters of the United States" as defined in that Act. *Id.* at 1188 (citing 33 C.F.R. § 322.2(a) (1980)). Because Deltona's proposed project also would take place in "navigable waters" as defined in FWPCA, Deltona was required after 1972 to obtain a § 404 permit from the Corps under that scheme as well. *Id.*

of permits could change.¹⁶⁰ Deltona only hoped to receive a permit; it was never assured of receiving one.¹⁶¹ The court suggested that, because Deltona entered into its land sale contracts without reasonable investment-backed expectations, the public should not have to bear responsibility for Deltona's losses resulting from the permit denial.¹⁶²

The *Deltona* court concluded that the public interests that the section 404 permit denial advanced outweighed the private economic losses that Deltona suffered.¹⁶³ Because the permit denial prevented significant environmental harm, because the permit denial did not deprive Deltona of all uses of its property, and because Deltona lacked reasonable investment-backed expectations, the court found that no taking occurred.¹⁶⁴

The Claims Court also rejected a plaintiff's section 404 takings challenge in *Jentgen v. United States*,¹⁶⁵ decided on the same day as *Deltona*. The plaintiff, Jentgen, had purchased a 101.8-acre lakeside tract and, like Deltona, had planned to develop a water-oriented residential community.¹⁶⁶ The Corps denied Jentgen a permit to develop sixty of its eighty acres falling within the Corps's section 404 jurisdiction.¹⁶⁷

In deciding Jentgen's takings claim, the court applied the same two-step test it used in *Deltona*, considering both whether the section 404 regulation substantially advanced legitimate state interests and whether the regulation denied the plaintiff economically viable use of the land.¹⁶⁸ As in *Deltona*, the court assumed that the permit denial advanced legitimate public interests, and proceeded directly to the economic impact analysis.¹⁶⁹ Considering the regulation's effect on the parcel as a whole, the court compared the regulated sixty-acre portion of the parcel to the 101.8-acre parcel that Jentgen

¹⁶⁰ *Id.* at 1193.

¹⁶¹ *Id.* The court explained that "Deltona had no assurance that the permits would issue, but only any expectation." *Id.*

¹⁶² *Id.* at 1194. As the *Deltona* court explained, "[the plaintiff] certainly bears a great deal of responsibility for its current plight," having been warned of the possibility of future permit requirements. *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1193-94.

¹⁶⁵ 657 F.2d 1210 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

¹⁶⁶ *See id.* at 1212.

¹⁶⁷ *Id.* The remaining 20 acres were unregulated uplands and consequently needed no Corps authorization to be filled. *Id.*

¹⁶⁸ *Id.* at 1213.

¹⁶⁹ *See id.* at 1213-14.

originally purchased.¹⁷⁰ The unregulated portion retained a post-denial market value of between \$80,000 and \$150,000; Jentgen had paid \$150,000 for the property in 1971. The court found that enough economically viable uses remained for the unregulated portions of Jentgen's whole parcel to deny the takings claim.¹⁷¹

Thus, land developers originally had great difficulty succeeding in their section 404 takings claims. In deciding its early section 404 takings cases, such as *Deltona* and *Jentgen*, the Claims Court acknowledged that CWA section 404 substantially advances the public's interest in protecting the environment; this interest weighed heavily in the court's analysis. Additionally, the court evaluated a permit denial's economic impact on a claimant in light of the claimant's original property investment. Finally, the court reasoned that the government should not be forced to compensate claimants lacking reasonable investment expectations.

B. Florida Rock, Loveladies Harbor, and Beyond

In 1982, during the Reagan Administration, Congress reorganized the Claims Court under the Federal Courts Improvement Act.¹⁷² Three years later, the Claims Court heard its first major section 404 takings challenge since *Deltona* in *Florida Rock Industries, Inc. v. United States*.¹⁷³ Like the plaintiffs in *Deltona*, Florida Rock Industries challenged a section 404 permit denial as a taking, arguing that the regulation left its property with no economically viable uses.¹⁷⁴ The Claims Court's newly appointed chief judge¹⁷⁵ decided the *Florida Rock* case, and under his analysis, the court found a taking.¹⁷⁶

Florida Rock had purchased a 1560-acre tract of unimproved wetlands in 1972 for the sole purpose of extracting the parcel's limestone deposits.¹⁷⁷ In 1979,¹⁷⁸ Florida Rock applied to the Corps for a section

¹⁷⁰ See *id.* at 1213.

¹⁷¹ *Id.* at 1213-14.

¹⁷² See *infra* note 8.

¹⁷³ 8 Cl. Ct. 160 (1985), *aff'd in part, vacated in part and remanded*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *aff'd on remand*, 21 Cl. Ct. 161 (1990).

¹⁷⁴ *Florida Rock*, 8 Cl. Ct. at 164.

¹⁷⁵ Chief Judge Alex Kozinski. In the fall of 1982, President Reagan appointed Judge Kozinski chief judge of the newly created Claims Court for a 15-year term. See generally Mary Billard, *Revitalizing a Judicial Backwater*, THE AM. LAW., Jan. 1984, at 60, 61.

¹⁷⁶ *Florida Rock*, 8 Cl. Ct. at 179.

¹⁷⁷ *Id.* at 162.

¹⁷⁸ Due to a serious downturn in the southern Florida building industry in the mid-1970s, Florida Rock did not begin mining until 1978. *Id.* at 163.

404 permit to mine ninety-eight acres of its tract.¹⁷⁹ Florida Rock's proposed mining operation involved excavating the limestone rock at the bottom of its marshlands and placing the rock on the adjacent wetlands. The Corps denied the permit, finding that both the dumping of the dredged rock and the excavation of the aquifer¹⁸⁰ would pollute the water supply beneath Florida Rock's land.¹⁸¹ Florida Rock argued that the permit denial amounted to a taking of its property, and the Claims Court agreed.¹⁸² In an elaborate opinion, the court explained that not only had the regulation rendered Florida Rock's land commercially valueless, but also that the Corps's anticipation that pollution would occur was unfounded.¹⁸³

The Claims Court first examined Florida Rock's residual rights remaining in the property after the regulation.¹⁸⁴ While the *Deltona* court had determined that a section 404 permit denial did not extinguish fundamental attributes of ownership,¹⁸⁵ the *Florida Rock* court considered such remaining ownership rights meaningless.¹⁸⁶ Examining next the regulated parcel's residual market value, the court attempted to distinguish earlier cases, including *Deltona*, noting that the property affected by the government's action in those cases continued to be available for productive economic activity.¹⁸⁷ In contrast, the court explained, the regulated portion of Florida Rock's parcel had no economically viable uses other than rock mining.¹⁸⁸

¹⁷⁹ *Id.* Florida Rock intended to excavate limestone from all 1560 acres of its property. *Id.* The Corps, however, had advised prospective § 404 permit applicants that it would not consider applications that covered more than approximately three years of excavation. *Id.*

¹⁸⁰ *Id.* at 172. The limestone Florida Rock intended to mine was part of the Biscayne Aquifer, a vast deposit of porous rock underlying southern Florida and having the capacity to store a vast amount of fresh water within its pores. *Id.* A peat layer above the aquifer protected this water by filtering out contaminants seeping down from the atmosphere. *Id.* The mining operation would have removed this peat layer, exposing the aquifer to contamination. *Id.*

¹⁸¹ *Id.* at 171-74. This pollution was the sole basis for the Corps's jurisdiction over the plaintiff's wetlands. *See id.* at 163. The excavated rock fell under § 404's definition of "dredged and fill" material, and its deposit on the wetlands constituted pollution under the CWA. *Id.* at 171-72. Absent this pollution, "the preservation or destruction of the instant wetlands would [have been] a state or local issue only." *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 898 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *aff'd on remand*, 21 Cl. Ct. 161 (1990); *see supra* note 42 and accompanying text discussing the Corps's scope of authority to regulate wetlands.

¹⁸² *Florida Rock*, 8 Cl. Ct. at 164, 179.

¹⁸³ *Id.* at 171-75.

¹⁸⁴ *Id.* at 165-66.

¹⁸⁵ *See supra* note 154.

¹⁸⁶ *Florida Rock*, 8 Cl. Ct. at 166. The court considered rock mining the property's only economically viable use. *Id.* Other permissible uses, such as hunting and fishing, "would not yield sufficient income to cover even real estate taxes." *Id.* at 164.

¹⁸⁷ *Id.* at 167.

¹⁸⁸ *Id.* at 166.

Finally, the Claims Court questioned the legitimacy of the Corps's permit denial.¹⁸⁹ The government argued that it had denied the section 404 permit because Florida Rock's proposed mining would cause pollution.¹⁹⁰ The government contended that it could prohibit such "noxious" property use without paying compensation.¹⁹¹ The Claims Court conceded that the government could prohibit any viable economic uses of the property without paying compensation, if such uses would cause pollution.¹⁹² After extensive examination of testimony from a Corps expert, however, the court found insufficient evidence to conclude that the proposed mining operation would pollute the adjacent water supply.¹⁹³ Therefore, the court concluded that the government's only purpose in denying Florida Rock a section 404 permit was to preserve wetlands for their environmental and aesthetic values.¹⁹⁴ The court maintained that the public's interest in environmental and aesthetic values should be viewed as a public benefit that is widely shared and therefore must be publicly financed.¹⁹⁵ Accordingly, the court held that the Corps's permit denial had taken Florida Rock's property in violation of the Fifth Amendment.¹⁹⁶

Florida Rock was the first case in which the Claims Court found a taking resulting from a section 404 permit denial, and the first section 404 takings case to go to the Federal Circuit on appeal.¹⁹⁷ The Federal Circuit reviewed the Claims Court's investigation of the project's potential pollution and the court's economic impact analysis.¹⁹⁸ The Federal Circuit agreed that a section 404 permit denial may amount to a taking, but vacated the Claims Court's finding that Florida Rock's mining activity would not pollute the waters surrounding its property.¹⁹⁹ The Federal Circuit admonished

¹⁸⁹ *Id.* at 171-75.

¹⁹⁰ *Id.* at 169.

¹⁹¹ *Id.* at 170 (citing *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887)).

¹⁹² *Id.* at 171.

¹⁹³ *Id.* at 171-75.

¹⁹⁴ *Id.* at 176.

¹⁹⁵ *Id.* (citing *Maine v. Johnson*, 265 A.2d 711, 716 (Me. 1970)).

¹⁹⁶ *Id.* at 179.

¹⁹⁷ See *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *aff'd on remand*, 21 Cl. Ct. 161 (1990); see *supra* notes 65-67 and accompanying text discussing Claims Court appeals to the Federal Circuit.

¹⁹⁸ *Florida Rock*, 791 F.2d at 898-905.

¹⁹⁹ *Id.* at 905. The court held that Florida Rock's election to bring a Tucker Act action amounted to a concession that the Corps had jurisdiction and the proposed activity would cause water pollution; that a valid regulation may amount to a taking; that in determining whether there had been a diminution in market value that amounted to a taking, the Claims Court should have considered the property's fair market value based on potential sales to

the Claims Court for questioning the Corps's premises for denying Florida Rock a section 404 permit.²⁰⁰ Because Florida Rock elected to sue for compensation in the Claims Court, it effectively had conceded that the permit denial itself was a valid regulatory action.²⁰¹ Thus, the Claims Court should have relied on the Corps's belief that pollution would occur.²⁰²

Although it acknowledged that Florida Rock's mining operation would pollute the water supply, the Federal Circuit rejected the government's contention that this pollution would harm the public.²⁰³ Relying on the Army district engineer's failure to establish that the potential pollution was very serious, the Federal Circuit dismissed the pollution incident to Florida Rock's mining as harmless. Using what amounted to a harm/benefit analysis,²⁰⁴ the Federal Circuit ultimately reached the same conclusion as the Claims Court regarding the regulation's purpose: that the Corps's reason for denying Florida Rock a section 404 permit was not to prevent harm to the environment, but to provide a benefit to the public by preserving wetlands for their aesthetic and recreational values.²⁰⁵ According to the court, because the public would benefit from the wetlands, the public should share the expense of maintaining them.²⁰⁶

those who would be willing to speculate; and that the Claims Court properly refused to determine that a permit denial for 98 acres also took land in excess of those 98 acres. *See id.*

²⁰⁰ *Id.* at 897. The Corps only may deny a § 404 permit upon finding that the applicant's proposed activity will impact the environment adversely. 33 U.S.C. § 1344(c) (1988). The Federal Circuit recognized the flaw in the Claims Court's logic in validating the permit denial: "[The Claims Court] had previously determined that the denial was 'a proper exercise of statutory and regulatory authority' which it could hardly have been if the engineers had not reasonably anticipated that some pollution would occur. . . ." *Florida Rock*, 791 F.2d at 897.

²⁰¹ *Id.* at 899.

²⁰² *See id.* at 897.

²⁰³ *Id.* at 904.

²⁰⁴ *See id.* Although the Federal Circuit did not say so explicitly, it used a harm/benefit analysis in determining § 404's legitimacy. *See id.* Under this approach, a court examines the nature of the use that the government regulation adversely affects to determine whether it is noxious, wrongful, harmful, or prejudicial to the health, safety, or morals of the public. *See, e.g., Mugler v. Kansas*, 123 U.S. 623, 661 (1887). If the use to which persons intend to put their property is harmful, then the government validly may regulate that use and thereby decrease the property's value without compensating the property owners. If, however, the intended property use will not harm the public, but rather the regulation itself will benefit the public, then the government must compensate the party adversely affected by the regulation. Stated another way, "the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful to the public." ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 546-47 (1904).

²⁰⁵ *Florida Rock*, 791 F.2d at 904.

²⁰⁶ *Id.*

The Federal Circuit remanded *Florida Rock* to the Claims Court to determine the exact diminution in value of Florida Rock's parcel and decide whether this diminution was severe enough to effect a taking.²⁰⁷ The Claims Court determined the regulation's economic impact by comparing the property's fair market value before the permit denial with its value after the denial.²⁰⁸ The court focused solely on the ninety-eight acres that the section 404 regulation affected; it did not consider the unregulated portion of Florida Rock's total 1560-acre parcel.²⁰⁹ As a result, the court found that the permit denial diminished the ninety-eight acre parcel's value by ninety-five percent, and concluded that a taking had occurred.²¹⁰ The Claims Court ordered the government to pay Florida Rock \$1,029,000 for the ninety-eight acres of wetlands.²¹¹

While the Federal Circuit never actually decided the takings question in *Florida Rock*, the Claims Court used principles from the Federal Circuit's opinion as binding precedent to justify its decision in *Loveladies Harbor, Inc. v. United States*.²¹² In *Loveladies*, the government moved for summary judgment, and the claimant cross-moved for partial summary judgment, on the issue of whether the Corps's refusal to grant a section 404 permit was a taking.²¹³ The court indicated that the permit denial was a taking, but concluded that it could not resolve the issue on summary judgment and ordered a trial on the merits.²¹⁴

In 1956, Loveladies Harbor, Inc. had purchased for \$300,000 approximately 250 acres of vacant land for the construction of residential homes.²¹⁵ Much of this property was wetlands that Loveladies had to fill before developing. By 1972, Loveladies had filled and developed 199 acres, and by 1982, it had sold most of these acres to the public. In 1981, Loveladies applied for a section 404 permit to

²⁰⁷ *Id.* at 905.

²⁰⁸ See *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161, 171-74 (1990).

²⁰⁹ See *id.* at 175.

²¹⁰ *Id.* at 175-76. The court determined that the property's value before the permit denial was \$10,500 per acre; the value after the permit denial was \$500 per acre. *Id.* at 176.

²¹¹ *Id.*

²¹² 15 Cl. Ct. 381 (1988). The *Loveladies* court explained that "[t]he Federal Circuit's balancing of governmental and private interests in *Florida Rock* . . . should not be ignored but instead should be created as one of those binding 'right principles' enunciated by the court." *Id.* at 389.

²¹³ *Id.*

²¹⁴ *Id.* at 399.

²¹⁵ *Id.* at 383.

fill 11.5²¹⁶ of its remaining fifty-one acres subject to the section 404 regulation.²¹⁷ After the Corps denied the permit application, Loveladies sought to have the permit denial overturned in the federal district and appellate courts.²¹⁸ When neither court would invalidate the Corps's decision, Loveladies sued for compensation in the Claims Court.²¹⁹

The Claims Court began its analysis with the "substantial advancement test" used in prior decisions.²²⁰ Balancing the governmental interest in preserving wetlands under section 404 against the interference with Loveladies' property rights, the court rejected the *Deltona* court's finding that the section 404 regulation substantially advances legitimate federal interests.²²¹ The court looked instead to the Federal Circuit's *Florida Rock* decision, which found the balance in favor of the landowner, because, in the Federal Circuit's opinion, section 404 was not enacted to prevent environmental harm, but rather to maintain a public benefit.²²² Although the *Loveladies* court rejected the *Florida Rock* harm/benefit distinction as a useful method for determining a takings issue,²²³ it did accept the Federal Circuit's conclusion that a section 404 permit denial can fail to advance legitimate public interests.²²⁴ The court intimated that it could find a taking based solely on the lack of legitimate governmental interests, though it ultimately considered this as only one factor in its determination.²²⁵

The *Loveladies* court then analyzed whether the permit denial deprived Loveladies of all economically viable use of its property.²²⁶

²¹⁶ *Id.* at 384. By obtaining a § 404 permit to fill 11.5 acres, Loveladies would have been able to develop both the 11.5 acres of wetlands and one acre of adjacent unregulated uplands. *Id.*

²¹⁷ *Id.* Loveladies had difficulty developing its remaining 51 acres as a result of both § 404 and a state wetlands regulation, both which were enacted in the early 1970s. *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 384.

²²⁰ *Id.* at 388. See *Florida Rock Indus., Inc. v. United States*, 8 Cl. Ct. 160, 165 (1985), *aff'd in part, vacated in part and remanded*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *aff'd on remand*, 21 Cl. Ct. 161 (1990); *Jentgen v. United States*, 657 F.2d 1210, 1213 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Deltona Corp. v. United States*, 657 F.2d 1184, 1191 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

²²¹ *Loveladies*, 15 Cl. Ct. at 388, 390.

²²² See *id.* at 389 (citing *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *aff'd on remand*, 21 Cl. Ct. 161 (1990)).

²²³ *Id.* at 389-90. The *Loveladies* court explained that "[t]he problem with the harm/benefit distinction is that it is often difficult to differentiate between the situation where the government is acting to preserve benefits from [sic] the situation where the government is acting to prevent harm." *Id.* at 389.

²²⁴ *Id.* at 390.

²²⁵ *Id.*

²²⁶ *Id.* at 390-93. The factors that the *Loveladies* court considered were those that the

Central to the dispute in this case was what portion of the property the court should consider as the "whole parcel"²²⁷ for purposes of measuring the severity of the regulation's impact and the frustration of the landowner's investment-backed expectations.²²⁸ The government argued that Loveladies' original purchase should comprise the "parcel as a whole," as the *Deltona* court had held.²²⁹ Thus, the government urged, the court should compare the value remaining in the 11.5 regulated acres with the value derived from the unregulated portions of Loveladies' original 250-acre purchase.²³⁰

While the *Deltona* court had used the government's suggested approach, the *Loveladies* court instead focused solely on the 11.5 contiguous acres and one acre of uplands affected by the regulation.²³¹ Based on its interpretation of the Supreme Court's recent decision in *Keystone*, the *Loveladies* court began by restricting its analysis to the 57.4 acres that the plaintiff owned when the taking occurred.²³² The court then went beyond *Keystone* by arguing that not all properties held at the time of the taking always can be considered as part of the parcel as a whole.²³³ Subsequently, the court refused to consider 38.5 of these 57.4 acres because the Corps almost certainly would deny a permit to develop those areas.²³⁴ Finally, the court excluded 6.4 of the remaining 18.9 acres from

Federal Circuit used in *Florida Rock*: the character of the governmental action, the regulation's economic impact on the claimant, and the extent to which the regulation interfered with the claimant's reasonable investment-backed expectations. *Florida Rock*, 791 F.2d at 901 (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986)).

²²⁷ See *supra* notes 112-17 and accompanying text discussing the problems with defining the "parcel as a whole."

²²⁸ *Loveladies*, 15 Cl. Ct. at 391.

²²⁹ *Id.* at 392.

²³⁰ *Id.*

²³¹ See 15 Cl. Ct at 392. While the Corps denied permits for only 11.5 acres of the Loveladies' land, Loveladies argued that the government also had taken one acre of filled upland outside the Corps's jurisdiction, because the restriction imposed on the surrounding wetlands cut off all access routes to the upland property. *Id.* at 384.

²³² *Id.* In defining the parcel as a whole, the Claims Court concluded that, on the basis of *Keystone*, this court cannot include the value of all of the property originally purchased as the parcel as a whole. Instead, this court must limit its focus upon the value of that property which the plaintiffs held when the taking was said to have occurred. This property amounted to 57.4 acres out of the original 250 acre parcel.

Id. at 392.

²³³ *Id.* at 392-93.

²³⁴ *Id.* at 393. The court noted that the Federal Circuit in *Florida Rock* excluded from its analysis 1462 acres of Florida Rock's total 1560 acres, because Florida Rock almost certainly would be unable to obtain the permits it needed to use the 1462 acres. *Id.* at 392 (citing *Florida Rock Indus., Inc. v. United States*, 721 F.2d 893, 904-05 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *aff'd on remand*, 21 Cl. Ct. 161 (1990)).

consideration, because these 6.4 acres were no longer contiguous with the 12.5 acres at issue.²³⁵

The Claims Court did not decide the takings question in *Loveladies* until it tried the case in 1990.²³⁶ At this trial, the court focused solely on the 12.5 acres that the permit denial affected.²³⁷ The court found that the Corps's permit denial had diminished the value of this 12.5 acre parcel by ninety-nine percent, and held that this diminution was a taking.²³⁸ The court ordered the government to pay Loveladies almost \$2.6 million for the 11.5-acre parcel.²³⁹

The Claims Court again questioned the legitimacy of section 404 in *Ciampetti v. United States*.²⁴⁰ Through a series of purchases beginning in 1980, the plaintiff had acquired a tract of property for development of an oceanside community.²⁴¹ In 1986, the Corps denied the plaintiff a permit to fill a portion of this tract that fell within section 404 jurisdiction.²⁴² The court proceeded to analyze the plaintiff's takings claim as it had in *Florida Rock* and *Loveladies*, considering the character of the governmental activity, the extent of the property value's diminution, and the frustration of the plaintiff's investment-backed expectations.²⁴³ Lacking sufficient information about the property purchases, the court declined to define the parcel relevant to the economic impact analysis, and deferred the decision on the takings question for a later trial.²⁴⁴

The court, however, was able to rule on the government's summary judgment motion by considering the first two factors of its takings analysis.²⁴⁵ Examining the character of the section 404 reg-

²³⁵ *Id.* at 393 (citing *American Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364, 369 (9th Cir. 1981) (courts should not consider physically non-adjacent property as part of single parcel as whole just because plaintiff formerly owned property at one time)).

²³⁶ See *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990). When the Claims Court first heard this case, it only ruled on the government's motion for summary judgment and the property owner's cross-motion for partial summary judgment. The court denied both motions. *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 399 (1988).

²³⁷ *Loveladies*, 21 Cl. Ct. at 154.

²³⁸ *Id.* at 160-61.

²³⁹ *Id.* at 161. The court also ordered the government to pay interest from the time of the taking. *Id.*

²⁴⁰ 18 Cl. Ct. 548 (1989). The lead plaintiff's name is misspelled as "Ciampetti" in the caption of the Claims Court's opinion. *Id.* All other opinions in this case's prior history use the correct spelling, "Ciampitti." *E.g.*, *United States v. Ciampitti*, 669 F. Supp. 684 (D.N.J. 1987); *United States v. Ciampitti*, 583 F. Supp. 483 (D.N.J. 1984).

²⁴¹ *Ciampetti*, 18 Cl. Ct. at 550.

²⁴² *Id.* at 552.

²⁴³ *Id.* at 556-59.

²⁴⁴ *Id.* at 559.

²⁴⁵ *Id.* at 556-59.

ulation, the court rejected the government's argument that the serious health effects associated with the plaintiff's proposed project brought it within the "nuisance exception" to the Fifth Amendment takings clause.²⁴⁶ Citing both *Florida Rock* and *Loveladies*, the court considered the public interests advanced by the section 404 regulation insubstantial compared to the private interests that the permit denial affected.²⁴⁷

The government also argued that, because the plaintiff was fully aware of the federal permit requirements when he purchased his land in 1980, he could not have reasonably expected to develop his property without first obtaining the requisite permits.²⁴⁸ The court declined to find for the government on this basis alone, intimating that if the permit denial's economic impact on the plaintiff's property was severe enough, the fact that the plaintiff should have foreseen the permit denial when he purchased his property would not prevent the court from finding a taking.²⁴⁹

Since it heard its first section 404 case in 1981,²⁵⁰ the Claims Court has changed its analysis of section 404 takings challenges dramatically. Where the court once presumed that the section 404 program substantially advanced legitimate public interests in preventing environmental harm,²⁵¹ it now finds that section 404 permit denials "lack" such interests.²⁵² Where the court once considered a permit denial's economic impact upon claimants in light of the uses the claimants derived from unregulated portions of their original property interests,²⁵³ the court now limits its economic impact analysis solely to the claimants' contiguous property held when the Corps denied the claimants a section 404 permit.²⁵⁴ Finally, where the court once maintained that the public should not have to bear responsibility for the claimants' loss when the claimants lacked reasonable investment-backed expectations,²⁵⁵ the court now suggests that it may find

²⁴⁶ *Id.* at 556-57.

²⁴⁷ *Id.* at 557 n.14.

²⁴⁸ *Id.* at 557.

²⁴⁹ *Id.* at 558. According to the court, "*Keystone* suggests that the reasonable investment-backed expectations analysis is but one of three relevant inquiries. While knowledge about permitting difficulties may indeed weigh against plaintiffs in this case, that is certainly not the only factor to consider in the constitutional balance." *Id.*

²⁵⁰ See *Deltona Corp. v. United States*, 657 F.2d 1184 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982).

²⁵¹ *Id.* at 1192.

²⁵² See *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 390 (1988).

²⁵³ See *Deltona*, 657 F.2d at 1192.

²⁵⁴ See *Loveladies*, 15 Cl. Ct. at 392.

²⁵⁵ *Deltona*, 657 F.2d at 1194.

a taking even where the claimants foresaw the possibility of a future section 404 permit denial when they purchased their property.²⁵⁶

VI. THE CLAIMS COURT'S CURRENT 404 TAKINGS ANALYSIS: WHY IT IS FLAWED AND HOW IT SHOULD CHANGE

While there is no one "right" formula for determining when a regulation effects a taking, the Claims Court's new section 404 takings analysis is flawed for three reasons. First, the court has lost sight of section 404's original purpose. The court appears to regard section 404 only as a means by which the government can preserve wetlands for their aesthetic and recreational benefits. This interpretation is incorrect. Congress enacted section 404 to prevent water pollution and environmental harm. By refusing to consider this goal adequately, the Claims Court has found the legitimate federal interests advanced by the section 404 program to be lacking, when in fact these interests are both present and compelling.

Second, in analyzing a section 404 permit denial's economic impact upon a plaintiff's property, the Claims Court has misread the Supreme Court's *Keystone* opinion regarding what constitutes the "whole parcel" that courts should consider in takings cases. The Claims Court has limited its analysis to the regulated parcel itself. The *Keystone* Court specifically stated, however, that courts should not so severely restrict their takings analyses.²⁵⁷

Finally, the Claims Court is unreasonable in suggesting that it still may find a compensable taking even absent a claimant's rational investment-backed expectations. If the court were to find a taking under such circumstances, it would promote a poor policy and would contradict both its own holdings and Supreme Court precedent.

A. *Section 404 Substantially Advances Legitimate Public Interests*

Over the past decade, the Claims Court virtually has reversed its opinion of the section 404 program. In *Deltona*, the Claims Court acknowledged the CWA's goal of eliminating water pollution²⁵⁸ and recognized section 404 as a valuable means of realizing this legislative goal.²⁵⁹ The court presumed that section 404 permit denials advanced

²⁵⁶ *Ciampetti v. United States*, 18 Cl. Ct. 548, 558 (1989).

²⁵⁷ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498-99 (1987).

²⁵⁸ *Deltona*, 657 F.2d at 1187.

²⁵⁹ *See id.* at 1192.

the public interest by preventing activities that degraded water quality and harmed the ecosystem.²⁶⁰ In *Florida Rock*, the Claims Court abandoned this presumption.²⁶¹ Instead, the court extensively questioned the Corps about the potential pollution its permit denial would prevent, and ultimately concluded—incorrectly, according to the Federal Circuit²⁶²—that *Florida Rock*'s proposed rock mining operation would not pollute the water supply.²⁶³ In *Loveladies*, the Claims Court did not even venture to ask the Corps about its findings regarding the potential environmental harm that the plaintiff's proposed activity would cause.²⁶⁴ Rather, the court simply assumed that, if *Florida Rock*'s excavation of its wetlands would not cause severe pollution, then *Loveladies*' mere filling of its wetlands should cause even less pollution.²⁶⁵ The Claims Court now apparently presumes that the section 404 permit program simply does not promote legitimate federal interests.²⁶⁶

Based on past court decisions, however, section 404 does substantially advance legitimate public interests.²⁶⁷ The objectives of the section 404 program are those of the CWA itself: to eliminate water pollution and protect the ecosystem.²⁶⁸ The fundamental policy underlying the section 404 permit guidelines is to prevent the environmental despoilment that results from water pollution.²⁶⁹ The Supreme Court, federal courts, and state courts long have recognized such governmental purposes as legitimate.²⁷⁰

The Federal Circuit's own reasoning in *Florida Rock* shows that a section 404 permit denial does substantially advance section 404's purpose of preventing environmental harm. The Federal Circuit held

²⁶⁰ See *id.*

²⁶¹ See *Florida Rock Indus., Inc. v. United States*, 8 Cl. Ct. 160, 173 (1985), *aff'd in part, vacated in part and remanded*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *aff'd on remand*, 21 Cl. Ct. 161 (1990).

²⁶² See *Florida Rock*, 791 F.2d at 897.

²⁶³ *Florida Rock*, 8 Cl. Ct. at 175.

²⁶⁴ See *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 389 (1988).

²⁶⁵ *Id.*

²⁶⁶ See *id.* at 390.

²⁶⁷ See, e.g., *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982).

²⁶⁸ See *supra* notes 29–41 and accompanying text.

²⁶⁹ 40 C.F.R. §§ 1500–1508 (1990) (interpreting the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (1988)).

²⁷⁰ See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 (1987); *Miller v. Schoene*, 276 U.S. 272, 280 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 373 (1926); *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887); *American Dredging v. Dutchyshyn*, 480 F. Supp. 957, 960–61 (E.D. Pa. 1979); *Smithwick v. Alexander*, 17 Env't Rep. Cas. (BNA) 2127, 2131 (E.D.N.C. 1981), *aff'd*, 17 Env't Rep. Cas. (BNA) 2131 (4th Cir. 1981).

that a claimant's choice to sue in the Claims Court amounts to a concession that the Corps's permit denial is valid.²⁷¹ If the claimant's proposed activities would not cause water pollution, the Corps would have no statutory authority to act.²⁷² In other words, as the *Deltona* court originally recognized, the Claims Court must accept that, in the section 404 takings cases it hears, permit denials *do* advance legitimate governmental interests. If these permit denials were not reasonably related to the accomplishment of section 404's purported goal, the claimant would not sue for compensation in the Claims Court; rather, the claimant would bring an action in a federal district court to have the permit denial itself invalidated.²⁷³

The Claims Court's failure to accord significant weight to the public interests that the section 404 program advances ignores both its own precedent and the line of Supreme Court decisions reaffirming the important role the public interest plays in the Court's own takings analysis.²⁷⁴ In failing to recognize the governmental interests involved in the section 404 program, the Claims Court has skewed the balance of public and private interests unfairly in favor of private development.

B. In Deciding Section 404 Takings Cases, the Claims Court Must Not Restrict Its Economic Impact Analysis Too Narrowly

The Claims Court also has shown an undue bias towards landowners in its consideration of a section 404 permit denial's economic impact upon a plaintiff's property. Specifically, the court has confined its takings analysis to the regulated parcel and the adjoining property that the plaintiff held when the Corps denied the section 404 permit. By so restricting its analysis, the court has enabled landowners to manipulate their property holdings virtually in order to ensure that the court will find a taking.

The *Loveladies* court concluded that the *Keystone* decision required it to compare the post-regulation value of the regulated parcel

²⁷¹ *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 899 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *aff'd on remand*, 21 Cl. Ct. 161 (1990).

²⁷² See *supra* notes 52-54 and accompanying text.

²⁷³ See, e.g., *1902 Atlantic Ltd. v. Hudson*, 574 F. Supp. 1381, 1406 (E.D. Va. 1983) (court found Corps's permit denial arbitrary and capricious); see also notes 52-54 and accompanying text.

²⁷⁴ See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 (1987); *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982).

with the value of the property that the plaintiff owned when the alleged taking occurred, not with the value of the parcel that the plaintiff originally purchased.²⁷⁵ In fact, *Keystone* does not support that reasoning. The *Keystone* Court never stated that the economic viability test always involves a consideration of the property value at the time of an alleged taking.²⁷⁶ Rather, the Court specifically declined to define the relevant mass of property that a court should consider in analyzing a regulation's economic impact. The Court emphasized that a court must consider the regulated property in the light of the plaintiffs' total operations, and suggested that a flexible, case-by-case analysis was necessary.²⁷⁷

In *Loveladies*, the plaintiff's original purchase was relevant to the economic impact analysis. Loveladies purchased a 250-acre parcel and successfully developed and sold 199 of these acres.²⁷⁸ The Corps's permit denial prevented Loveladies from developing twelve acres—five percent of its original purchase.²⁷⁹ If the court had considered the return that Loveladies received on its original investment, it probably would not have found that the Corps's permit denial severely thwarted Loveladies' profit expectations.

Moreover, by so limiting its analysis, the Claims Court allows savvy developers to manipulate their property holdings to isolate the regulated parcel. According to the *Loveladies* decision, as long as the property included in the permit application falls entirely within the Corps's jurisdiction, and as long as the applicant owns no other adjacent property at the time of the Corps's decision, the court almost certainly will find a taking if the Corps denies the applicant a section 404 permit.²⁸⁰ Thus, before applying for a section 404 permit, developers simply can transfer title to any of their unregulated property, leaving only the regulated parcel in their own name. If the Claims Court adheres to its limited definition of the "whole parcel," it will focus solely on the regulated parcel. As the *Keystone* Court warned, by so restricting its focus, a court will surely find a near-100% property value diminution resulting from the regulation.²⁸¹

²⁷⁵ *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 392 (1988).

²⁷⁶ *See Keystone*, 480 U.S. at 470–506.

²⁷⁷ *Id.* at 499.

²⁷⁸ *Loveladies*, 15 Cl. Ct. at 383.

²⁷⁹ *Loveladies*, 21 Cl. Ct. at 161.

²⁸⁰ *Id.*

²⁸¹ *See Keystone*, 480 U.S. at 499.

*C. Plaintiffs Who Lack Reasonable Investment-Backed
Expectations Should Not Succeed in Their Section 404 Takings
Claims*

In *Ciampetti*, the Claims Court explained that it may find a taking even if, upon acquiring his property, the claimant foresaw the possibility of a future section 404 permit denial.²⁸² Such a finding would set a poor policy precedent and would be inconsistent with recent holdings of both the Supreme Court and the Claims Court.

Compensating plaintiffs such as the developer in *Ciampetti* rewards them for their unreasonable expectations. Should the Claims Court find a taking when it tries the *Ciampetti* case, its decision would enable developers to buy foreseeably regulated land and yet still win a takings claim. Rather than risking an inadequate return on their investment by actually marketing the property themselves, developers instead simply can wait for the Corps to deny them a section 404 permit, and then sue the government for compensation. If the developers win their takings claims, they could earn a profit without ever having to touch their land—all courtesy of the public fisc.

Moreover, both the Supreme Court in *Monsanto* and the Claims Court in *Eastport* and *Allied-General* held that, in the absence of reasonable investment-backed expectations, a claimant cannot argue that the government has taken its property.²⁸³ If the Claims Court now finds a taking where the claimant purchased its property while on notice of section 404, the ruling would contradict both the Supreme Court's precedent established in *Monsanto* and the Claims Court's own decisions in *Eastport* and *Allied-General*.

D. A Proper Section 404 Takings Analysis

There is no universal analysis that courts apply to regulatory takings claims.²⁸⁴ As the Supreme Court has admitted, the question necessarily involves a balancing of public and private interests.²⁸⁵ In considering the public interest involved, the Court examines whether the interest itself is "legitimate," and if so, whether the regulation "substantially advances" this interest.²⁸⁶ In determining the regulation's effect on a property's economic viability, the Court

²⁸² *Ciampetti v. United States*, 18 Cl. Ct. 548, 558 (1989).

²⁸³ See *supra* notes 119-35 and accompanying text.

²⁸⁴ See note 83 discussing takings jurisprudence.

²⁸⁵ *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980).

²⁸⁶ *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987).

has identified three factors as significant to a regulatory takings analysis: the character of the governmental regulation, the regulation's economic impact upon the claimant, and the extent to which the regulation has interfered with the claimant's reasonable investment-backed expectations.²⁸⁷

In analyzing a section 404 takings challenge, the Claims Court should consider these factors while making certain assumptions. As a threshold issue, the court should determine whether, at the time the claimant purchased the property in question, the section 404 regulation was reasonably foreseeable. If the claimant purchased the property after section 404's 1972 enactment,²⁸⁸ the court should presume that the claimant had notice of the section 404 regulation and the possibility of a permit denial. If the claimant acquired the property before section 404's enactment, the government should have the burden of proving that the claimant was on notice of the forthcoming regulations. If the court establishes that the claimant was on notice of section 404, such notice then would render unreasonable the claimant's expectations of developing its property without a permit. Following the Supreme Court's precedent in *Monsanto*, and its own precedent in *Allied-General*, the Claims Court should deny compensation to any claimant that lacks reasonable investment-backed expectations.

If the court finds the claimant did have reasonable investment-backed expectations, it should proceed to balance the public and private interests involved. The court should presume, as it did in *Deltona*, that section 404 substantially advances legitimate and important public interests in preventing environmental harm. This presumption would properly reflect the goals of the section 404 program and significantly counterbalance the private claimant's interest in profiting from its regulated property. The court then should evaluate the losses the claimant has suffered from the regulated portion of its property in light of the uses the claimant has derived from the unregulated portions of its original property investment. By following this analysis, the court better can determine the extent to which the claimant's initial investment expectations have been frustrated.

This approach to resolving section 404 takings claims has several benefits. First, it is less partial than the Claims Court's current approach. It acknowledges the strength and importance of the com-

²⁸⁷ See *supra* note 106 and accompanying text.

²⁸⁸ Congress enacted the CWA, including § 404, on October 18, 1972. 33 U.S.C. §§ 1251-1376 (1988).

peting interests involved in a section 404 takings claim—both the private landowner's interest and the public interest. Additionally, by recognizing the compelling public interest in preventing the harms that water pollution causes, this approach is consistent with the goals of the section 404 program. Finally, this approach will send potential claimants the message that ignorance of the law will not be rewarded. Developers investing in heavily-regulated wetlands do so at their own risk; when foreseeable restrictions thwart their investment-backed expectations, they alone—not the public—should pay.

VII. CONCLUSION

In deciding section 404 takings challenges, the United States Claims Court has skewed its analysis unduly in favor of the private developer in three ways. First, the court has considered section 404 a means of preserving wetlands merely for their aesthetic values and has concluded that such a regulation does not advance any legitimate federal interest. Thus, at the outset of a section 404 takings case, the court assumes that there is no legitimate public interest to be balanced against the private interest at stake. Second, the Claims Court further has biased its approach towards the private landowner by focusing its economic impact analysis solely on the contiguous property that claimants owned when the Corps denied them a section 404 permit. Third, the court has suggested that it would compensate even those claimants who had no reasonable investment-backed expectations whatsoever.

The Claims Court's current takings analysis is flawed. The court has failed to recognize the legitimate federal interests that the section 404 program advances. Congress enacted section 404 to help prevent water pollution and environmental harm, not merely to provide aesthetic benefits to the public. Thus, while section 404's legitimate public purpose should weigh heavily in the Claims Court's analysis, the court instead has undervalued the public interest at stake in section 404 takings cases. Additionally, the court has misread the Supreme Court's decision in *Keystone* and violated its own precedent by limiting too narrowly the property it considers in its economic impact analysis. In doing so, the Claims Court has provided a takings test that any shrewd developer easily can pass. Finally, the court has contradicted its own holdings and Supreme Court precedent by suggesting that it would find a taking even absent a claimant's reasonable investment-backed expectations.

Justice Holmes viewed the takings problem as a manifestation of social conflict.²⁸⁹ As Holmes saw it, the law's job is to assure that the war of competing interests is waged fairly and equally.²⁹⁰ The Claims Court's current approach to section 404 takings claims is neither fair nor equitable. By refusing to consider the important environmental interests that the section 404 program advances, by unduly restricting its economic impact analysis, and by disregarding even unreasonable investment-backed expectations in its analysis, the Claims Court has not even allowed the public interest onto the battlefield.

²⁸⁹ See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

²⁹⁰ OLIVER W. HOLMES, *The Law*, in COLLECTED LEGAL PAPERS 25, 27 (1920).