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**Association of State Wetland Managers, Inc.**

**STATUS AND TRENDS;  
AVOIDING LEGAL PROBLEMS:**

**STATE AND LOCAL  
WETLAND REGULATIONS  
in the  
COURTS**

**By Jon A. Kusler, Esq.**

November 1, 2004

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*By:*

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## **PREFACE**

The following paper has been written for lawyers, regulators, planners and others implementing state and local wetland regulations. It describes legal issues and judicial reactions to state and local wetland regulations. It provides recommendations for avoiding legal problems.

We hope that you will find the paper useful and interesting.

Jon Kusler

## ACKNOWLEDGEMENTS

The paper is based, in part, upon a 2003 survey undertaken by the author and a law student, Todd Mathes, of state and local wetland regulatory cases. It is also based upon the author's science/policy research with wetland, floodplain, and other regulations over a period of years. See, e.g., Jon Kusler, **Wetland Assessment in the Courts**, Association of State Wetland Managers (2003); Jon Kusler, **The Lucas Decision, Avoiding "Taking" Problems With Wetland and Floodplain Regulations**, 4 Md. J. Contemp. Legal Issues 73 (1993); Jon Kusler, **Public Liability and Natural Hazards**, Technical Report funded by the National Science Foundation (1993); Jon Kusler, **Regulating Sensitive Lands**, Ballinger Publishers (1985); Jon Kusler, et al. **Our National Wetland Heritage**, The Environmental Law Institute (1985); Jon Kusler and Rudd Platt, R. **The Law of Floodplains and Wetlands: Cases and Materials**, American Bar Association, Special Committee on Housing and Urban Development Law (1982); Jon Kusler, et. al. **Regulation of Flood Hazard Areas to Reduce Flood Losses**, U.S. Water Resources Council, U.S. Government Printing Office (Vol. 1, 2, 3) (1972, 1973, 1975) Jon Kusler, **Open Space Zoning: Valid Regulation or Invalid Taking?**, 57 Minn. L. Rev. 1 (1972); Jon Kusler, **Water Quality Protection for Inland Lakes in Wisconsin: A Comprehensive Approach to Water Pollution**, Wis. L. Rev. 35 (1970).

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## PART 1: INTRODUCTION

### 1.1 Importance of State and Local Regulations

The legal validity of wetland regulations at the state and local levels has become increasingly important as the U.S. Supreme Court and lower federal courts have narrowed the scope of the federal Section 404 regulatory program. In January 2001, the U.S. Supreme Court held that Section 404 program did not apply to isolated waters based solely upon their use by migratory birds. See **Solid Waste Agency v. United States Army Corps of Eng'rs**, 121 S. Ct. 675 (S.Ct., 2001) hereafter referred to as SWANCC. Earlier, lower court decisions have also limited the scope of activities regulated by the Section 404 program. See **National Mining Ass'n v. Corps of Eng'rs**, 145 F.3d 1399 (D.C. Cir. 1998).

The SWANCC decision created a significant “gap” in federal regulations for isolated wetlands and waters although the full extent of this gap is still not clear. See, e.g., J. Kusler, **The SWANCC Decision; State Regulation of Wetlands to Fill the Gap**, ASWM, 2004 at [www.aswm.org](http://www.aswm.org). State and local government regulations are important as a means to fill this gap. They are also important, in their own right, to serve a broad range of state and local land and water management objectives. See J. Kusler, **Wetlands and Watershed Management: A Guidebook for Local Governments**. ASWM, 2003 at [www.aswm.org](http://www.aswm.org).

Some state and local wetland regulations predate the Clean Water Act which was adopted in 1972. For example, Massachusetts adopted the first state wetland protection law in 1963. Many communities in Wisconsin and Minnesota adopted wetland regulations as part of shoreland zoning in the 1966-1972 period.

All coastal states have adopted some regulations for coastal wetlands and waters although the scope of these regulations varies greatly. Approximately one half of the states regulate some freshwater wetlands pursuant to specific wetland regulatory statutes or broader shoreland zoning, public water, critical area or other programs. Other states regulate some activities in wetlands such as construction of dams, erection of structures in floodplains or floodways, or removal of materials from the beds of public waters. In addition, an estimated 5,000-6,000 local governments have adopted regulations for some or all wetlands. However, these regulations are highly varied as well. They include special wetland protection ordinances, wetland zones and zone restrictions included in zoning ordinances, special wetland provisions in some floodplain regulations, and open space or critical area zoning in zoning ordinances. Many communities also limit subdivision in wetland and floodplain areas and control the use of septic tank/soil absorption systems in areas of high ground water.

In general state and local regulatory programs resemble the federal Section 404 program in that individual permits are required for activities in wetlands. The regulatory agency evaluates the impact of proposed activities on wetlands on a case-by-case basis in

terms of regulatory goals and permitting criteria (e.g., no net loss of wetland functions and acreage). Most states and local governments require the mapping of wetlands prior to regulation. The federal Section 404 program does not.

In lieu to these permitting programs, many local governments have adopted open space zones or similar tightly restricted “conservancy” zones for wetlands which prohibit most activities unless a landowner can show that the regulations prohibit all economic use of lands. A variance or special exception permit may then be issued.

Two states have adopted new legislation to fill the gaps created by SWANCC—Wisconsin and Ohio. In addition, bills have been introduced to fill the gap in Connecticut, Michigan, Nebraska, and South Carolina. Indiana and North Carolina have administratively broadened the scope of their water quality programs to include wetlands and this has been sustained by the courts. See **Indiana Department of Environmental Management v. Twin Eagle**, 2003 Ind. LEXIS 794; **N.C. Home Builders Ass’n v. Env’tl Mgmt. Comm’n**, 573 S.E.2d 732 (N.C. 2002).

## **1.2 Status and Trends in State and Local Court Decisions**

How, then, have state and local wetland regulations fared in the courts over the last two decades? What have been the major legal issues? How can states and local governments avoid or reduce constitutional problems with regulations? The following report addresses these issues.

Wetland regulations raise the same constitutional issues faced by broader planning and regulatory programs, but with several special features. Wetland regulations are often more restrictive than other zoning and subdivision controls except for open space zoning, floodway regulations, and some other critical areas regulations (e.g., beach and sand dune regulations, steep slope regulations.) Takings challenges are, therefore, more common. Public rights and interests in waters are also involved with wetland regulations but not upland areas. These interests reduce, to some extent, successful takings challenges. Scientific determinations more commonly form the basis for restrictions than for upland areas. Courts generally refer to expert agencies in fact-finding and this reduces the number of successful challenges to wetland regulations as “unreasonable”.

Over the last two decades, the number of challenges to state and local wetland has increased. The author identified over 300 state lower court or appellate court decisions since 1990 alone as part of this study. The greatest number of decisions were from Connecticut, Massachusetts, Florida, New York, Maine, New Hampshire, Rhode Island, New Jersey, Maryland, Wisconsin, Minnesota, California, Oregon, and Vermont with a few from Indiana, Illinois, Virginia, and other states. Approximately 40 have involved successful challenges to the issuance or denial of specific permits (not the basic regulations). Successful challenges were of three principal types—regulatory agencies had not followed statutory procedures, denial of permits was not based upon an adequate factual base, or that regulations were held to have “taken” private property without payment of just compensation. For the “taking” cases, all have involved situations in which wetland regulations prevented all economic use of whole properties.

In the last two decades, the U.S. Supreme Court has issued ten decisions with special relevance to wetland and floodplain regulations. One of these decisions—**Palazzolo**—involved Rhode Island state level wetland regulations. Other decisions such as Nolan, Lucas, First Lutheran and Tigert involved coastal beach and floodplain regulations. See list and description of these decisions below and discussion in the text which follows.

The reaction of state courts to state and local wetland regulations is important from several perspectives. State courts hear almost all of the constitutional challenges to state and local regulations. For example, takings claims for state and local regulations must typically be litigated in state courts although certain cases may be brought in federal court and state Supreme Court decisions may be appealed on certiorari to the U.S. Supreme Court. State courts apply state concepts of private property and public trust in deciding what “interest” a landowner has in land.

**U.S. Supreme Court Decisions  
With Special Relevance to Wetland Regulations**

The following ten U.S. Supreme Court decisions in the last two decades have special relevance to wetland regulations. Four of these (Tahoe, Dolan, First English, and Keystone) dealt with hazard-related regulations; three with beach regulations (Lucas, Nolan, Monterey) and three with wetlands (Riverside Bayview Homes, Phillips, Palazzolo).

--**Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency**, 122 S.Ct. 1465 (2002) (Court upheld Tahoe Regional Planning Agency temporary ordinances which had applied for 32 months to “high hazard” (steep slope) zones near Lake Tahoe against a claim that they were a taking of private property. The Court applied a “whole parcel” analysis to duration of regulation to decide that no taking had occurred.)

--**Palazzolo v. Rhode Island**, 121 S.Ct. 2448 (2001) (Court held that purchase of wetland subject to restrictions was not bar to a suit for taking of private property against the state of Rhode Island but the test for taking was the value of the entire parcel and not simply the wetland portion. The case was remanded for further proceedings. )

--**City of Monterey v. Del Monte Dunes at Monterey, Ltd**, 119 S.Ct. 1624 (1999). (Court held that a dune regulation was a taking. It held that rough proportionality test with regard to regulatory burdens was limited to exactions of interests in land for public use. See also Dolan below.)

--**Dolan v. City of Tigard**, 114 S.Ct. 2309 (1994) (Court held that city regulations for the 100 year floodplain which required a property owner to donate a 15 foot bike path along the stream were not reasonably related to the goals of the regulation and were therefore a taking. The Court stated that the municipality had to establish that the dedication requirement had “rough proportionality” to the burden on the public created by the proposed development.)

--**Lucas v. South Carolina Coastal Council**, 112 S.Ct. 2886 (1992) (Court held that state beach statute prohibiting building of homes which prevented “any reasonable use of lots” was a “categorical” taking unless the state could identify background principles of nuisance and property law which would prohibit the owner from developing the property. The case was remanded for further determinations by the South Carolina court. )

--**Phillips Petroleum Co. v. Mississippi**, 484 U.S. 469 (1988) (Court held that private landowners who believed that they owned estuarine wetlands in Mississippi subject to the ebb and flow of the tide and who had paid taxes on such lands for more than 100 years did not in fact, own such lands and could not claim a taking when the state leased the lands to someone else).

--**Nollan v. California Coastal Commission**, 107 S.Ct. 3141 (1987) (Court held that the California Coastal Council’s conditioning of a building permit for a beach front lot upon granting public access to the beach lacked an “essential nexus” between the regulatory requirement and the regulatory goals and was a taking. The Court held that the access requirement “utterly fail(ed) to advance the stated public purpose of providing views of the beach, reducing psychological barriers to using public beaches, and reducing beach congestion.”)

--**First English Evangelical Church of Glendale v. County of Los Angeles**, 482 U.S. 304 (1987). (Court held that a temporary restriction by a flood hazard reduction ordinance which prevented the rebuilding of a church property was (potentially) a taking. The court remanded the decision to the lower California court to redetermine whether a taking had occurred. The lower court held again that no taking had occurred. There was no further appeal of this decision. )

--**Keystone Bituminous Coal Association v. De Benedictis**, 107 S. Ct. 1232 (1987) (Court held that public safety regulations which restricted the mining of all of the coal to prevent subsidence were not a taking because the impact of regulations upon an entire property, not simply the areas where coal could not be removed, should be considered.)

--**United States v. Riverside Bayview Homes, Inc.**, 474 U.S. 121 (1985). (Court held that federal Section 404 regulations were not on their face a taking and that regulations validly applied to wetlands adjacent to navigable waters.)

### 1.3 Approaches to Determination of Constitutionally

Courts have held that state and local regulations, like federal regulations, enjoy a strong presumption of constitutionality and the burden of proving unconstitutionality is upon the attacking party. See, e.g., **Spiegle v. Borough of Beach Haven**, 46 N.J. 479, 218 A.2d 129 (N.J. 1966), cert. denied, 385 U.S. 831 (1966). In determining constitutionality, courts first look to the general validity of regulations and then to their validity as applied to particular lands. Courts in many states have considered the general validity of wetland regulations. All have endorsed the general validity of such regulations. For general support for federal wetland regulations see the U.S. Supreme Court decision in **United States v. Riverside Bayview Homes, Inc.**, 474 U.S. 121 (1985). The Court provided broad general support for federal wetland regulations against a takings challenge although the Court warned that general support did not mean that regulations were valid as applied to all individual properties.

Virtually all state and local attacks upon wetland regulations are upon the application of regulations to particular properties. This “pinpoint” approach to the determination of constitutionality originated with two United States Supreme Court decisions in the 1920’s.

In the first of these cases, **Euclid v. Village of Ambler**, 272 U.S. 365 (1926) the Court upheld the basic concept of zoning—the division of a community into districts and the application of differing land use standards to each district. Two years later, the Court in **Nectow v. City of Cambridge**, 277 U.S. 183 (1928), faced a dilemma when it considered the validity of a zoning ordinance that made sense as applied to community lands as a whole but was unreasonable as applied to a particular parcel. To have struck down the ordinance as a whole would have left the community without zoning and would have invalidated the good elements of zoning. Taking a compromise position, the Court held that the zoning regulations were valid in general, but invalid as applied to the particular property.

This pinpoint approach to determination of constitutionality has been almost always followed by state courts in evaluating the constitutionality of wetland regulations. In other words, a landowner may concede the general validity of a wetlands or floodplain regulation but argue its unconstitutionality as applied to specific property. A court decision invalidating regulations as applied to that property does not invalidate regulations as applied to other lands. Understandably, this case-by-case approach has led to a fair amount of litigation.

Despite some early adverse decisions, courts have sustained wetlands regulations as applied to particular lands in a broad range of contexts. See the many cases cited below.

### 1.4 Overview of Constitutional Challenges

Landowners may make several simultaneous challenges to regulations. These challenges will be briefly described and then discussed in greater depth.

Landowners may argue that:

1. **The state agency or local unit does not possess the power to adopt regulations.** Courts hold that agencies and local units of government may exercise only those land use powers specifically delegated to them by state legislatures or derived from home rule statutes or constitutional provisions. Regulations that exceed this authority are invalid. However, courts have broadly found adequate authority for adoption of wetland regulations in general zoning or subdivision controls, wetland statutes, coastal zone or other critical area statutes, or home rule powers. This has not been a successful challenge to wetland regulations in recent years.
2. **The regulatory agency has failed to comply with statutory procedures.** Courts require that state agencies and local units follow statutory procedures established in enabling statutes. These procedures may pertain to the scope of regulations, wetland definition, mapping, notice and hearing, voting, publication of regulations, issuance of special permits, amendment, penalties, and other matters. Regulations that are not in compliance with statutory procedures are almost always held invalid as exceeding the scope of statutory authority. This has been a successful challenge in a number of cases in recent years.
3. **The regulations do not establish insufficiently specific standards for issuance of permits if regulations delegate responsibility for issuance of permits of a regulatory board.** Courts require that legislative bodies establish relatively specific policies for delegating policy-making powers to non-legislative boards and officials. This challenge has not succeeded in recent years.
4. **The regulations do not serve valid police power objectives.** Courts require that regulations meet valid public goals such as protection of public safety or prevention of nuisances. This challenge to wetland regulations has succeeded in only a few old cases where regulations were adopted to hold land in an open condition until acquisition was possible.
5. **The regulations are unreasonable and lack a sufficient nexus to regulatory goals.** Courts require that there be a reasonable “nexus” between the regulations and regulatory goals. This challenge has succeeded in a few cases where, for example, special permits or variances were denied for wetlands without sufficient factual base for such denial.
6. **The regulations do not afford equal treatment to similarly situated landowners.** Courts require that regulations not discriminate between similarly situated properties. This challenge has succeeded in only a few early cases where, for example, some wetlands have been zoned for open space uses to provide flood detention for the benefit of other lands.

7. **The regulations take private property without payment of just compensation.** This challenge has succeeded in a small number of recent cases where wetland regulations denied all economic use of entire properties.

The challenges will now be discussed individually.

## PART 2: CHALLENGES

### 2.1 Sufficiency of Enabling Authority

State agencies and local governments must be authorized to adopt wetland regulations either through specific enabling statutes or more general grants of powers (home rule statutes or constitutional provisions). No court has apparently invalidated state wetland regulations because of insufficient enabling authority. In some instances landowners have challenged state wetland regulations adopted pursuant to water pollution control statutes. In **Indiana Department of Environmental Management v. Twin Eagle**, 798 N.E.2d 839 (Ind. 2003) the Indiana supreme court broadly held that the Indiana Department of Environmental Management was authorized to require NPDES permits for the discharge of fill material into waters of the state including discharges into private ponds and wetlands in some circumstances. See also **N.C. Home Builders Ass'n v. Env'tl Mgmt. Comm'n**, 573 S.E.2d 732 (N.C. 2002), in which the court held that the Environmental Management Commission had sufficiently broad powers to adopt wetland rules and that the definition of "water" contained in a pollution control statute was sufficiently broad to include wetlands.

Arguments are sometimes made that local zoning, subdivision control, building code, and other zoning, subdivision control, building code, and other land use control enabling statutes do not authorize adoption of wetland regulations as a whole or specific regulations, since only a portion of state statutes specifically authorize local regulations for wetland protection. Most of the challenges on this basis were during the 1970's and early 1980's although a few have continued into recent years. See, e.g., **Drum v. Minn. Board of Water and Soil Conservation et. al**, 574 N.W.2d 71 (Minn. 1998) in which the court upheld the authority of a local Board of Water and Soil Conservation to adopt wetland rules. However, the Connecticut Supreme Court in **Avalon Bay Communities, Inc. v. Town of Orange Inland Wetlands Commission**, No. CV 980492260 (Ct., 2003) held that a wetlands and watercourses commission could not regulate spotted salamander habitat some distance from a wetland where the property owner was not proposing any activity in the wetland or buffer area and directly harming the wetland. See also **Thoma v. Planning & Zoning Comm'n**, 626 A.2d 809 (Conn., 1993) in which the court held that an inland wetland agency did not have statutory authority to prohibit subdivision of lands. See **Coto v. Renfrow**, 616 So.2d 467 (Fla. App. 1993) in which the court held that inland mangroves were not regulated pursuant to county code which regulated only "coastal" wetlands.

Authorization for adoption of wetland regulations may be found in the broad language of state zoning enabling acts which authorize cities, towns, villages, and, in many instances, counties to regulate lands to "promote health" and the "public welfare." Most zoning enabling acts also authorize regulations to encourage the "most appropriate use of land throughout such municipality." See Department of Commerce, **Standard State Zoning Enabling Act** (1926).

The Massachusetts Supreme Court in **Turnpike Realty Co. v. Town of Dedham**, 284 N.E.2d 891 (Mass. 1972) cert. denied, 409 U.S. 1108 (1973) observed that the broad zoning enabling language similar to that in most states authorized the adoption of

floodplain regulations which are analogous to wetland regulations. The court noted that the legislature had expressly amended the general zoning enabling act to authorize floodplain zoning, but that such an amendment was unnecessary. The court held:

Even before the last sentence (pertaining to floods) became part of the enabling act, we believe that a municipality could validly have enacted a floodplain zoning by-law under the general grant of authority in G.L. c.40A, 32 (to promote the “health, safety, convenience, morals or welfare”) and for the reasons set forth in G.L. c.40A S3 (“to secure safety from fire, panic, and other dangers”).

Although most zoning and subdivision control enabling acts do not specifically mention wetlands, virtually all states’ zoning and subdivision enabling acts authorize local flood hazard regulations. This explicit flood language may also serve as the basis for wetland regulation. For example, a Massachusetts court in **MacGibbon v. Board of Appeals of Duxbury**, 255 N.E.2d 347 (Mass. 1970), upheld a town ordinance adopted “for the purpose of protecting and preserving from dispoilation the natural features and resources of the town, such as salt marshes, wetlands, brooks and ponds,” having been authorized under an amendment to the general zoning enabling act which stated that zoning “may provide that lands deemed subject to seasonal or periodic flooding shall not be used for residence or other purposes in such a manner as to endanger the health or safety of the occupants thereof.”

In many States, local units of government need not rely upon general land use control enabling authority or home rule powers. State wetland acts in Massachusetts, New York, Connecticut, Michigan and Virginia specifically authorize local wetland controls. In addition, coastal zone or shoreland zoning acts of many States authorize special local ordinances for coastal, lake, and stream shore areas which may include wetlands. Some of the better known programs include those of California, Washington, Minnesota, Wisconsin, Michigan, Vermont, Maine, and North Carolina. Finally, statutory or constitutional home rule provisions for municipalities or counties in thirty five States provide a possible additional source of wetland powers. The Massachusetts Supreme Court in **Lovequist v. Conservation Commission**, 393 N.E.2d 858 (Mass. 1979) held that town wetland regulations could be adopted pursuant to home rule powers in that state.

Although most communities possess sufficient general power to adopt wetland regulations, these powers may be limited by exemptions. The zoning enabling acts of many states exempt agricultural uses and existing uses.

The preemption of local enabling authority has also been an issue in some states that authorize direct state regulation of wetland areas. Courts in Connecticut and New York have held that acts authorizing direct state regulation of coastal wetland areas preempt local regulation under certain circumstances. **Lauricella v. Planning and Zoning Bd. of Appeals**, 342 A.2d 374 (Conn. 1974); **People of Smithtown v. Poveromo**, 336 N.Y.S.2d 764 (N.Y. 1972), rev’d on other grounds, 359 N.Y.S.2d 848 (N.Y. 1973). This is not a problem in most states with state wetland controls since statutes typically authorize local as well as state control or provide that more restrictive local regulations apply to an area. See, e.g., **Del. Code**, Title 7, Section 6604 (1974).

Cases from Massachusetts, New York, and Rhode Island have upheld local regulation of inland wetlands where a state agency was also authorized to regulate such wetland areas. **Golden v. Board of Selectmen of Falmouth**, 265 N.E.2d 573 (Mass. 1970); **Gordon v. Reid**, 250 N.Y.S.2d 603 (N.Y. 1964); **J.M. Mills, Inc. v. Murphy**, 352 A.2d 661 (R.I. 1976).

## 2.2 Compliance with Statutory Procedures

Courts require that states and local governments follow statutory procedures for adoption, administration and amendment of regulations to afford due process and there have been a modest number of successful challenges to wetland regulations on this basis. In **Crafttech Indus. v. Jorling**, 630 N.Y.S.2d 425 (N.Y., 1995) the court held that certain wetlands were not regulated when an ordinance defined regulated wetlands as those on a town wetland map and the wetlands had not been mapped. See also **Plotkin v. Washington County**, 997 P.2d 226 (Or. 2000) in which the court held that Oregon board of appeals could not deny subdivision approval for two wetland areas which had not been inventoried pursuant to state administrative rules and identified in county plan documents. In a somewhat similar vein, in **State v. McCarthy**, 379 A.2d 1251 (N.H. 1977), the New Hampshire Supreme Court held that land was not subject to a wetland permit although it was adjacent to tidal water and within 3 1/2 feet of a mean high tide because wetland vegetation did not grow there. The statute defined wetlands in terms of vegetation and the court held that the state had not proved an “essential element of jurisdiction” by proving that some of the specified vegetation grow or are capable of growing there. Similarly, the Maryland Supreme Court held that State coastal wetland maps were invalid as applied to a specific property because statutory procedures for filing the maps in the local recorder’s office had not been met.

Failure to comply with statutory procedures and criteria including failure to regulate certain activities where regulation is required continues to be a quite common basis for successful challenge today. See, e.g., New **Jersey Chapter of Nat’l Ass’n of Industrial and Office Parks v. New Jersey Dep’t of Environmental Protection**, 574 A.2d 514 (N.J. 1990) in which the court held that that a regulation which exempted certain plans from the requirements of a freshwater wetland permit were invalid because the statute provided no such exemptions.

Courts sometimes permit minor irregularities in statutory procedures and may make exemptions in emergencies. For example, in **Zaccaro v. Cahill**, 748 N.Y.S.2d 426 (N.Y., 2002) a New York court held that failure of the Department of Environmental Conservation to provide written notice of wetland mapping to a landowner prior to public hearing as required by statute did not render the regulation invalid because the failure was due to error in the county tax maps which were used to identify landowners. In **Ramsey v. Stevens**, 283 N.W.2d 918 (Minn. 1979) the Minnesota Supreme Court sustained floodplain regulations adopted by the City of Lilydale in order to qualify the city despite the failure of the city to provide public notice of the regulations as required by State zoning laws. The regulations had been adopted pursuant to a court order from a lower court directing adoption within 72 hours due to an impending flood. Courts have ignored other minor omissions that do not seriously prejudice landowners. See e.g., **Walker v. Board of County Commissioners**, 116 A.2d 393 (Md. 1955), cert.denied 350 U.S. 902

(1955). They have also refused, in some instances, to enforce vague or ambiguous statutory requirements found in many local zoning enabling acts. For example, courts have often found comprehensive plans within the regulations themselves when statutes require that regulations be in compliance with a comprehensive plan. See, e.g., **Kozesnik v. Montgomery Township**, 131 A.2d 1 (N.J. 1957); **De Meo v. Zoning Commission**, 167 A.2d 454 (Ct. 1961); **Cleaver v. Board of Adjustment**, 200 A.2d 408 (Pa. 1964). No court has apparently invalidated floodplain or wetland regulations for failure to prepare a prior comprehensive plan, although only a portion of the present regulatory efforts are preceded by such planning. A Maine court upheld resource protection district shoreland zoning regulations adopted without adoption of a prior comprehensive plan because the court found that the legislature did not intend to require prior comprehensive planning. See **Enos v. Town of Stetson**, 665 A.2d 678 (Me. 1995).

### **2.3 Sufficiency of Standards in Delegating Discretionary Powers to Regulatory Boards**

The sufficiency of statutory or ordinance standards delegating discretionary power to state agencies, conservation commissions or zoning boards of adjustment to evaluate permits for proposed wetland uses is sometimes at issue although challenges to regulations on this ground are increasingly rare. Most state administrative regulations and local wetland ordinances authorize a regulatory board to issue permits for a wide range of uses, providing the uses are consistent with ordinance goals or meet unquantified wetland protection standards. See generally **Irwin v. Planning and Zoning Commission of the Town of Litchfield**, 711 A.2d 675 (Conn. 1998) in which a court held that a planning and zoning commission had broad discretion in issuing special use permits. Regulations and ordinances often list factors that are to be considered in evaluating permit applications.

In broader zoning contexts, courts have sometimes held invalid general standards such as requirements that regulatory boards determine whether permits are in the “public welfare” without more specific guidelines. See generally cases cited in **Annot.**, 58 A.L.R. 1083 (1958). Broad standards are not a problem for wetland regulations with more specific determinations. Wetland regulations often contain “nuisance” and “public safety” standards that have been endorsed by courts. See cases cited in D. Mandelker, **“Delegation of Power and Function in Zoning,”** 1963 Wash. U.L.Q. 60. Nuisance or public safety standards require that regulatory boards determine whether permits will have nuisance impact upon adjacent uses, threaten public safety, or threaten water quality.

The sufficiency of standards for issuance of wetland permits was considered in **J.M. Mills, Inc. v. Murphy**, 352 A.2d 661 (R.I. 1976). Here the Rhode Island Supreme Court upheld a statute that authorized the director of the Rhode Island Department of Natural Resources to deny permits for inland wetlands “if in the opinion of the director granting of such approval would not be the best public interest” or “if the city council or town council within whose borders the project lies has disapproved the project.” The court held that the section of the statute that detailed wetland functions and the need for protection sufficiently defined the “public interest” to justify delegating regulatory powers to the director and establishing a policy for evaluation of permits by local units of

government. Similarly in **MacGibbon v. Board of Appeals of Duxbury**, 255 N.E.2d 347 (Mass. 1970) the Massachusetts court upheld the delegation of powers to a zoning board of adjustment to issue special exceptions in harmony with the “general purposes and intent” of the ordinance. Although the ordinance did not contain very specific standards, the court noted that “(t)he manifest objects and purposes of the enabling act and the by-law furnish a large measure of guidance for the board.” The Massachusetts court also upheld broad standards for local issuance of special exceptions in **Turnpike Realty Company v. Town of Dedham**, 284 N.E.2d 891 (Mass. 1972), cert.denied, 409 U.S. 1108 (1973). See also **Daddario v. Cape Cod Commission** 780 N.E.2d 124 (Mass. 2002), upholding broad standards for issuance of permits by the Cape Cod Commission,. An expert agency may exercises particularly broad discretion in permitting. See, e.g., **Utica v. Water Pollution Control Bd.**, 156 N.E. 2d 301 (N.Y. 1959).

Although agency discretionary powers are broad, they are not unlimited. Agencies must also base decisions upon fact-finding and criteria set forth in regulatory goals and statutes. For example, a Massachusetts court in **Fafard v. Conservation Comm’n of Reading**, 672 N.E.2d 21 (Mass. App. 1996) held that municipal denial of a permit near a wetland was arbitrary where it was not based upon a violation of a specific bylaw provision. rev’d and remanded 711 A.2d 675 (1998).

## 2.4 Validity of Regulatory Objectives

Courts afford legislatures broad discretion in the selection of regulatory objectives. See, e.g., **Berman v. Parker**, 348 U.S. 26 (1954). Courts have broadly endorsed wetland regulations as serving valid goals such as flood reduction and pollution control. See, e.g., **Moskow v. Comm’r of Dept. of Env’tl. Mgmt.**, 427 N.E.2d 750 (Mass. 1981) and many cases cited below. Nevertheless, in traditional zoning or wetland regulations contexts, courts have often held invalid as a taking, attempts to zone lands to hold them in an open condition until public purchase is possible. See, e.g., **Long v. City of Highland Park**, 45 N.W.2d 10 (Mich. 1950); **City of Miami v. Romer**, 73 So. 2d 285 (Fla. 1954); **Galt v. Cook County**, 91 N.E.2d 395 (1950); **San Antonio River Auth. v. Garrett Bros.**, 528 S.W.2d 266 (Tex. 1975). But official mapping to preserve sites for future roadways until purchase is possible has been sustained in some cases. See, e.g., **Headley v. City of Rochester**, 5 N.E.2d 198 (N.Y. 1936); **State ex rel. Miller v. Manders**, 86 N.W.2d 469 (Wis. 1957). In addition, the California court in **Turner v. County of Del Norte**, 24 Cal. App. 3d 311 (Calif. 1972) upheld a highly restrictive floodplain regulation for an area subject to extreme flood hazards that the public contemplated for future purchase. Plans for long-term public purchase of property should not undermine the validity of present regulations based upon valid objectives such as protection of floodway conveyance capacity.

Courts have strongly endorsed other wetland protection objectives:

1. Protection of health and safety. Without exception, courts have upheld regulations to protect public health and safety and have strongly endorsed this objective. See also discussion below concerning takings. As stated by the U.S. Supreme Court in **Queenside Hills Realty Co. v. Saxl**, 328 U.S. 80, 83 (1946), when threats to human life are involved, a legislature may adopt “the most conservative course which science and

engineering offer.” Regulations to protect health and safety have been sustained even where they tightly regulate existing uses or prevent new ones. See, e.g., **Cleaners Guild v. City of Chicago**, 37 N.E.2d 857 (Ill. 1941); **Denver & Rio Grande R.R. Co. v. City and County of Denver**, 250 U.S. 241 (1919). Courts have often supported stringent regulation of the use of septic tanks and soil absorption fields near wetlands including large setbacks. See, e.g., **Tortorella v. Board of Health of Bourne**, 655 N.E.2d 633 (Mass, 1995). They have sustained establishment of water quality standards including designation of Central Pine Barrens as a “critical area” for sewerage purposes. See **New Jersey Builders Association v. Department of Environmental Protection**, 404 A.2d 320 (N.J., 1979)

2. Prevention of nuisances. Courts have also strongly endorsed regulations to prevent nuisances or control uses with nuisance characteristics such as commercial or industrial uses in residential areas. See, e.g., **Hadacheck v. City of Los Angeles**, 239 U.S. 394 (1915); **Reinman v. City of Little Rock**, 237 U.S. 171 (1915); **Pierce Oil Corp. v. City of Hope**, 248 U.S. 498 (1919). See also discussion below concerning takings and many cases cited. Courts have sustained prohibition of nuisance-like activities even where such prohibition denies all economic use of lands. For example, the California Supreme Court in **Consolidated Rock Products Company v. City of Los Angeles**, 370 P.2d 342 (Cal. 1962), appeal dismissed, 371 U.S. 36 (1962) sustained an ordinance prohibiting sand and gravel operations in a dry stream bed where no other economic use could be made of the land because nearby residential areas would be affected by the dust and noise of the mining operation. The court observed that the primary purpose of zoning was to prevent land uses that would threaten other landowners or the public.

Applying a similar analysis, the Minnesota Supreme Court in **Filister v. City of Minneapolis**, 133 N.W. 2d 500 (1964), cert. denied, 382 U.S. 14 (1965), sustained a single family residential classification for a swampy area surrounded by residences in part because proposed apartments would have been nuisance-like in the low density surroundings. See many additional cases cited below. See also **Kaeser v. Conservation Com. of Easton**, 567 A.2d 383 (Conn. 1989) in which the court upheld a conservation commission’s decision denying a permit to deposit fill and build a house near a wetland and river because the fill could exacerbate flooding.

3. Prevention of fraud. Courts have endorsed regulations for lands subject to flooding and other hazards to prevent their sale to innocent purchasers. For cases generally supporting the regulation of land to protect purchasers, see **Coffman v. James**, 177 So.2d 25 (Fla. 1965); **In re Sidebottom**, 85 P.2d 453 (Cal. 1938), cert. denied, 307 U.S. 634 (1939). For cases upholding subdivision regulations for flood areas, see **Brown v. City of Joliet**, 247 N.E.2d 47 (Ill. 1969); and **Ardolino v. Board of Adjustment of Borough of Florham Park**, 130 A.2d 847 (N.J. 1957).

In **America Land Company v. Keene**, 41 F.2d 484 (1st Cir. 1930) a Federal court sustained an ordinance that prohibited construction or residences in a flood-prone area. A dissenting judge who agreed with the validity of the ordinance but disagreed with other aspects of the case, noted that:

It (a zoning ordinance) furnished a legal prohibition to selling the land, for a purpose which it was not in fact fit. This was an eminently proper exercise of the city's police powers in order to protect possible purchasers from being victimized....

4. Protection of wildlife and fisheries. Many wetland cases have given strong support to the protection of wildlife and fisheries. For example, the Indiana court of appeals in **Natural Resources Commission v Porter County Drainage Board**, 555 N.E.2d 1387 (Ind. 1990), vacated 576 N.E.2d 587 (1991), held that the drainage board was required to obtain a permit for its dredging and clearing project in the floodway of a stream because the stream was "important to ecological balance of the State's fisherys" The court noted that NRC had asserted that the stream was a "vital segment of the Lake Michigan tributaries necessary to maintain salmon and steelhead trout populations." The Maryland Supreme Court in **Potomac Sand & Gravel Co. v. Governor of Maryland**, 293 A.2d 241 (Md. 1972), cert. denied, 409 U.S. 1040 (1972) endorsed a statute prohibiting dredging of tidal waters or marshlands of Charles County because of the impact upon fisheries and wildlife. The language of the court is of special note:

It has already been noted that the sites in question support such species of fish as herring, American shad, hickory shad, striped bass, white perch and eel perch, among others. These fish are sources for commercial fishing and sport fishing throughout Maryland. The testimony is undisputed that dredging would irreparably destroy the immediate marsh habitat, converting it into a deep-water habitat. Consequently, those anadromous fish which spawn in shallow waters and which instinctively return each year to the same spawning areas would be deprived of such spawning areas with a concomitant loss of the benefits of their reproductive process. There was testimony that rare native vegetation at Mattawoman Creek would be destroyed by these particular dredging operations. Dredging increases the water's turbidity. Turbidity is the suspension of dirt particles in the water. A high turbidity reduces the amount of sunlight which reaches aquatic plants, which, through photosynthesis, produce oxygen for fish. The plants themselves are a food source for fish which would be reduced both due to the failure of plants to reproduce and by the smothering of plants by dirt particles.

Testimony also showed the Mattawoman Creek supports declining but still substantial wildlife which would be frightened away by dredging noises as well as driven away by a loss of an accessible food supply. At Craney Island the diving ducks would be unable to readily retrieve their food fifty feet below the surface....

Chapter 792 has an ecological purpose. As has been shown, the protection of exhaustible natural resources is a valid exercise of the police powers. The prohibition of anyone from dredging sand, gravel or other aggregates or minerals in the wetlands of Charles County is a rational regulation in light of the potential and real harm caused by dredging as testified to by experts for both parties.

Support for protection of fish and wildlife may also be found, in cases from such states as Massachusetts, New Hampshire, and Wisconsin. See **Commissioner of Natural**

**Resources v. S. Volpe & Co., Inc.**, 206 N.E.2d 666 (Mass. 1965); **Sibson v. State**, 282 A.2d 664 (N.H. 1971); **Just v. Marinette County**, 201 N.W. 2d 761 (1972).

The Fifth Circuit Court of Appeals in **Zabel v. Tab**, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971), upheld the denial by the U.S. Army Corps of Engineers of a permit to fill in Boca Ciega Bay in St. Petersburg-Tampa, Florida. In its opinion, the court strongly emphasized protection of fish and wildlife.

In this time of awakening to the reality that we cannot continue to despoil our environment and yet exist, the nation knows, if the Courts do not, that the destruction of fish and wildlife in our estuaries water does have a substantial, and in some areas a devastating effect on interstate commerce. Landholders do not contend otherwise. Nor is it challenged that dredge and fill projects are activities which may tend to destroy the ecological balance and thereby affect commerce substantially.

5. Prevention of flood damages. Many cases have endorsed regulations prohibiting structures and fills in coastal and inland areas that would be subject to flood damage or would block flood flows, thereby increasing flood damages on other lands. For example, a North Carolina Court in **Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Ashville**, 302 S.E.2d 204 (N.C. 1983) upheld flood loss reduction regulations against takings and equal protection challenges. A California court in **Turner v. County of Del Norte**, 24 Cal. App. 3d 311 (Calif. 1972) endorsed a county zoning ordinance that limited an area of extreme flooding to parks, recreation, and agricultural uses. Similarly, the Massachusetts Supreme Court in **Turnpike Realty Co. v. Town of Dedham**, 284 N.E.2d 891 (Mass. 1972), cert. denied, 409 U.S. 1108 (1973) endorsed local floodplain zoning and observed that the “general necessity of floodplain zoning to reduce the damage to life and property caused by flooding is unquestionable.”

In **Subaru of New England, Inc. v. Board of Appeals of Canton**, 395 N.E.2d 880 (Mass. 1979) a Massachusetts Court of Appeals upheld the denial of a permit to fill a wetland area where there was testimony that filling would deprive the town of 23.8 acre feet of water storage or 7.77 million gallons. Although there was testimony that this loss would have resulted in a small increase in flood heights (perhaps ½ of an inch) the court held that seriousness of the problem was for the local regulatory board not the court to determine. In **Kaeser v. Conservation Com. Of Easton**, 567 A.2d 383 (Conn. 1989) a court sustained a conservation commission’s denial of an application to build a home within 200 feet of a wetland at a site which was subject to flooding and with possible adverse affect on the floodplain.

6. Control of water pollution. Courts have strongly endorsed regulations to prevent water pollution. See, e.g., **Machipongo Land and Coal Company v. Department of Environmental Protection**, 799 A.2d 751 (Penn., 2001). Several wetland cases strongly link the regulation of wetland areas to the maintenance of water quality. In one case, **Reuter v. Department of Natural Resources**, 168 N.W.2d 860 (Wis. 1969) the Wisconsin Supreme Court specifically required the Wisconsin Department of Natural Resources to evaluate the impact on water quality of a proposed project to dredge a two acre floating bog along the margin of a lake. In a second

Wisconsin case, **Just v. Marinette County**, 201 N.W.2d 761, 768 (Wis. 1972) the court emphasized the interrelationships between wetlands and water quality in sustaining wetland regulations:

We start with the premise that lakes and Rivers in their natural state are unpolluted and the pollution which now exists is manmade. The State of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. This is not, in a legal sense, a gain or a securing of a benefit by the maintaining of the natural status quo of the environment. What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature.

Cases from other states have also noted the relationship between regulation of wetlands uses and control of pollution. See, e.g., **Gordon v. Reid**, 250 N.Y.S.2d 603 (Sup. Ct. 1964); **Harbor Farms, Inc. v. Nassau County Planning Commission**, 334 N.Y.S.2d 412 (N.Y. )

7. Protection of public rights in navigable waters and adjacent lands. Courts have in many cases sustained wetland regulations to protect public rights in navigable waters. (See the discussion of the taking issue below.)

8. “No net loss” of wetlands. A number of courts have sustained regulations to prevent no net loss of wetlands. See, e.g., **Drum v. Minn. Board of Water and Soil Conservation et. al**, 574 N.W.2d 71 (Minn. 1998) in which a court held that rules of a local board of water and soil conservation including its definition of wetland were consistent with state “no net loss” goal. See also, **Hentges et. al. v. Minnesota Board of Water and Soil Resources et. al**, 634 N.W.2d 441 (Minn. 2002); See also **Kirkorowicz v. California Coastal Commission**, 100 Cal Rptr. 2d 124 (Cal. 2000) in which the court upheld a decision of the California Coastal Commission denying a permit for horse stables and boarding facilities for a wetland area. The commission was applying a “no net loss of wetland acreage or resource value” policy. The court observed that “the failure to preserve and protect degraded or disturbed wetlands buffering adjacent higher quality wetlands will inevitably jeopardize, compromise and eventually erode the latter.” See **Nat’l Ass’n of Industrial & Office Parks v. New Jersey Dep’t of Environmental Protection**, 574 A.2d 514 (N.J. 1990) in which the court upheld fixed compensation ratios (7:1) for implementation of a no net loss goal.

9. Protection of the natural suitability of the land. The Wisconsin Supreme Court in the landmark wetland protection case, **Just v. Marinette County**, 201 N.W.2d 761

(1972) upheld highly restrictive county wetland regulations adopted as part of a State supervised shoreland zoning program. The court emphasized the importance of wetlands to public waters and held that the landowner had no right to destroy the natural suitability of the wetland where such destruction harmed public interest. This language was endorsed by the New Hampshire Supreme Court in **Sibson v. State**, 336 A.2d 239 (N.H. 1975) and by the Florida Supreme Court in **Graham v. Estuary Properties**, 399 So. 2d 1374 (Fla. 1981).

10. Protection of waters used for water supply. A number of cases have upheld regulations designed to control water or watershed activities that would affect public water supplies. See, e.g., **State v. Heller**, 196 A. 337 (Conn. 1937). The U.S. Supreme Court in **Perley v. North Carolina**, 249 U.S. 510 (1919), upheld a state statute regulating private forestry operations within 400 feet of watersheds held by cities or towns for water supply purposes. A New York court in **Nicholas Geiben et al. v. Town of Pomfret Zoning Board of Appeals**, 688 N.Y.S.2d 303 (N.Y. 1999) held that conditional approval of a special use permit for a single family dwelling near a reservoir which required relocation of the structure was valid. The Massachusetts Supreme Court in **Lovequist v. Conservation Commission of the Town of Dennis**, 393 N.E.2d 858 (Mass. 1979) upheld wetland regulations adopted, in part, to protect groundwater supplies. It held that proposed excavation of 6,000 cubic yards of peat for a road and its replacement by 9,000 to 12,000 cubic yards of sand and gravel might have significant impact on local groundwater supplies; the permit was validly denied. The court observed:

All parties agreed that the water source on the plaintiff's property is part of a much larger and important groundwater supply located in underground reservoirs throughout the adjoining area. Thus, the effect of the excavation could be aptly analogized as one of the witnesses before the Commission so stated, to "taking the plug out of the bathtub." Having held that the protection of groundwater is a valid public interest. **Turnpike Realty Co. v. Dedham**, 362 Mass. 221,227-229, 284 N.E. 2d 891 (1972), we think the commission did not act improperly in denying the plaintiffs permission for the proposed road construction.

## 2.5 Discrimination

Courts have held, as a general principle, that regulations must afford equal treatment to "similarly situated" landowners to comply with prohibitions against discrimination and guarantees of due process found in the 14<sup>th</sup> Amendment of the U.S. Constitution. But questions arise in specific contexts whether landowners are "similarly situated". In broader land use control contexts, courts have recognized that lands with identical or similar natural resource characteristics need not be treated alike in all circumstances, since planning differences often exist with regard to existing uses, location, traffic, adjacent districts, and other factors. See, e.g., **Kozesnik V. Montgomery Township**, 131 A.2d 1 (N.J. 1957). A New Jersey court in **Gardner v. New Jersey Pinelands Com'n**, 593 A.2d 251 (N.J. 1989) rejected equal protection arguments for an area in the New Jersey Pinelands with the observation that "Pinelands farms are uniquely ecologically sensitive, and that measures fairly designed to bar unsuitably intensive development are therefore justified. And such measures can treat Pinelands farms more

restrictively than other farms not having the unique characteristics of Pinelands farms.” Courts have also held that regulations need not apply equally to new and existing uses. **Zahn V. Board of Public Works**, 234 P. 388 (Calif. 1925), *aff’d*, 274 U.S. 325 (1927). They have not generally demanded that all areas (e.g., all wetlands in a municipality) be regulated at the same time. E.g., **Scarborough v. Mayor & Council**, 303 A.2d 701 (Del. Ch. 1973); **Ann Arundel County v. Ward**, 46 A.2d 684 (Mary. 1946); **Town of Marblehead v. Rosenthal**, 55 N.E.2d 13 (Mass. 1944); *In Re Sports Complex in Hackensack Meadowland*, 300 A.2d 337 (N.J. 1973) *cert. denied*, 414 U.S. 989 (1973).

Courts have held that to succeed on an equal protection claim “(a)llegations of clear and intentional discrimination are required.” See **Daddario v. Cape Cod Commission**, 780 N.E.2d 124 (Mass. 2002), quoting from an earlier federal court decision. The court further observed (quoting from one of its own decisions) that the “allegation that others similarly situated obtained permits is not, without more, a denial of equal protection of the laws”.

A number of wetland cases have involved regulations contested on the grounds of discrimination. In **Re Central Baptist Theological Seminary**, 370 N.W.2d 642 (Minn. App. 1985), a Minnesota court upheld a statute which set forth different standards for protection of urban and rural wetlands. In another case, the New Jersey Supreme Court upheld the establishment of Hackensack Meadowlands Special Protection District despite claims that this statute singled out some wetlands in the Hackensack area for special treatment. In **Re Sports Complex in Hackensack Meadowland**, 300 A.2d 337 (N.J. 1973) *cert. denied*, 414 U.S. 989 (1973). In a second New Jersey case, **Sands Point Harbor, Inc. v. Sullivan**, 346 A.2d 612 (N.J. 1975) the court held that the Wetland Act of 1970, applying to some coastal wetland areas but excluding areas characterized by heavy industrial, commercial and residential development, was not discriminatory since differing conditions afforded “reasonable grounds for the differing treatment of lands.”

In a Maryland case, **Potomac Sand and Gravel Co. v. Governor of Maryland**, 293 A.2d 241 (Md. 1972), *cert. denied*, 409 U.S. 1040 (1972), the court upheld prohibition of dredging of sand, gravel, or their aggregates or minerals in the coastal area of Charles County. The Sand and Gravel Company claimed that the law was discriminatory because it did not regulate inland areas. The court observed that coastal wetlands were particularly important as fish spawning areas and as sites of rare native vegetation and held that the distinction between coastal and inland wetlands was valid.

In **J.M. Mills, Inc. v. Murphy**, 352 A.2d 661 (R.I. 1976), the Rhode Island Supreme Court upheld an inland wetland protection statute despite somewhat similar arguments. The plaintiff charged that the inland wetland law failed to provide public hearings on permits like a similar coastal wetland law and that the inland law made no provision for payment of compensation like the coastal act. The court held that the legislature had a logical basis for applying different approaches to inland and coastal wetlands and that there was no discrimination.

Finally, a New Jersey court rejected arguments that the New Jersey Department of Environmental Protection was discriminatory in mapping and regulating some floodplains and not others in **American Cyanamid Co. v. Department of Environmental Protection**, 555 A.2d 684 (N.J., 1989). The court held that DEP’s

policy of delineating streams having the greatest velocity and “thus posing the highest corresponding risk” was logical.

However, courts have considered a small number of floodplain and wetland regulations discriminatory in older cases. In **City of Welch v. Mitchell**, 121 S.E. 165 (1924), a West Virginia court suggested that a local floodplain regulation that regulated one side of a stream and not the other was discriminatory. The New Jersey Supreme Court in **Morris County Land Improvement Co. v. Parsippany-Troy Hills Township**, 193 A.2d 232 (N.J. 1963) held that a conservancy zone designed to preserve wetlands and flood storage was invalid in part because it discriminated between upstream and downstream landowners. This could be avoided with an even-handed, no net loss approach for all wetlands.

## 2.6 Unreasonableness

Courts require that regulations (the means) be reasonably related to the regulatory objectives (the ends) to satisfy due process requirements. See, e.g., **Nectow v. City of Cambridge**, 277 U.S. 183 (1928). This requirement applies to both basic regulations and the application of regulations to case by case permitting. The courts are now examining the nexus between regulatory goals and regulatory standards for regulations including conditions with increasing care in light of two U.S. Supreme Court decisions in the last two decades. In the first decision, **Nollan v. California Coastal Comm’n**, 483 U.S. 825 (1987), the Court held that requiring dedication of a beach access easement was not reasonably related to regulatory goals. In the second, **Dolan v. City of Tigard**, 512 U.S. 374 (1994), the Court held that requiring dedication of a floodplain easement was not justified as roughly proportional to the impact of the proposed activity. More specifically, the Court stated: “No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Id.* at 391. However, the Court later in **City of Monterey v. Del Monte Dunes at Monterey, Ltd**, 119 S.Ct. 1624 (1999) held that the required rough proportionality test was limited to exactions of interests in land for public use.

Wetland regulations have not generally been contested as unreasonable, although reasonableness is a quite common issue for broader land and water use controls. Courts have held that legislative and agency fact-finding and agency decisions on individual permits bear a strong presumption of correctness and the burden of proof is upon landowners to show incorrectness. See, for example, **Matter of Stone Creek Channel Improvements**, 424 N.W.2d 894 (N.D. 1988); **FIC Homes of Blackstone, Inc. v. Conservation Comm’n of Blackstone**, 673 N.E.2d 61 (Mass. 1996); **Busse v. City of Madison**, 503 N.W.2d 340 (Wis. 1993).

However, courts do, on occasion, find that agency permitting decisions are unreasonable because they are not based upon substantial evidence. See, e.g., **Ogburn-Mathews v. Loblolly Partners**, 505 S.E.2d 598 (S.C., 1998), overruled by **Brown v. South Carolina Dep’t of Health and Environmental Control**, 560 S.E.2d 410 (S.C. 2000) (overruling limited to a function of South Carolina’s Administrative Procedures Act), in which the court held that a coastal “consistency” determination by the South

Carolina coastal program for the filling of .38 acres of wetland was not based upon substantial evidence that this was an isolated wetland. See also **Forsell v. Conservation Comm'n**, 682 A.2d 595 (Conn., 1996) in which the court held that there was no evidence that land contained a marsh, bog, swamp or other watercourse as the terms were defined in the regulations and there was no evidence of significant impact on watercourses or wetlands.

Courts demand a particularly strong relationship between ends and means where regulations restrict private uses, reducing property values. A Connecticut court in **Strain v. Mims**, 193 A. 754 (Conn. 1937) observed:

(W)here the value of property of an individual is seriously affected by a zoning regulation especially applicable to it, this fact imposes an obligation to consider carefully the questions whether the regulation does in fact tend to serve the public welfare and the recognized purposes of zoning.

A number of questions commonly arise concerning the reasonableness of wetland regulations.

### **1. Is some degree of inaccuracy acceptable in wetland maps?**

The type and accuracy of data used in wetland and other types of resource maps has been litigated in some wetland and floodplain cases. States and communities need not map wetlands if mapping is not required by statute. See, e.g., **Drexler v. New Castle**, 465 N.E.2d 836 (N.Y., 1984). As one would expect, regulations based upon maps that have no relationship to wetland or flooding conditions have been held invalid. See, e.g., **Sturdy Homes, Inc. v. Town of Redford**, 186 N.W.2d 43 (Mich. 1971).

Total inaccuracy would invalidate regulations, but some inaccuracy is tolerable. For example, in **Turnpike Realty Co. v. Town of Dedham**, 284 N.E.2d 891 (Mass. 1972), *cert. denied*, 409 U.S. 1108 (1973), the Massachusetts Supreme Court upheld the sufficiency of the Town of Dedham floodplain zoning map which incorrectly included two knolls of 3.2 acres and .2 acres in the floodplain. However, there was substantial evidence of flooding for other areas, including photographs and exhibits of flooding from 1954 and 1967 and testimony of an expert hydrologist. Flood levels had been reached in 1936, 1938, 1955 and 1968. The court held that although inclusion of the knolls was “inadvertent”, the ordinance was valid and the owner might seek a special permit for such areas under provisions of the ordinance that allowed a landowner to demonstrate that a particular area is not subject to flooding.

Courts have sustained wetland maps and case-by-case assessments in other contexts as well despite some uncertainties and inaccuracies. For example, in **Fogelman v. Town of Chatham**, 446 N.E.2d 1112 (Mass. App. 1983), a Massachusetts court upheld a wetland setback requirement for a wetland not included on the local government’s “conservancy zone” ordinance against claims of “vagueness”. The court observed: “A law is not unconstitutionally vague simply because it presents some questions as to its application in particular circumstances. Courts and administrative boards draw lines and resolve ambiguities every day.”

In **City of Newark v. Natural Resource Council**, 414 A.2d 1304 (N.J. 1980) a New Jersey court upheld public land ownership maps for Hackensack Meadowlands based upon “analysis of color infrared photographs of the meadows.” Responding to testimony contesting the validity of the maps, the Court observed that “the evidence adduced indicates only a difference of opinion between ...experts.” The court concluded that “(w)here a subject is debatable, the agency determination must be upheld because a court would usurp the legislative body if it attempted to determine the results of the debate.”

Although courts have broadly sustained mapping efforts against claims of unreasonableness, at least one floodplain case suggests that maps may need to be updated as new data becomes available. In **A.H. Smith Sand & Gravel Co. v. Department of Water Resources**, 313 A.2d 820 (Md. 1974), a Maryland court upheld a state statute requiring permits for activities in the 50-year floodplain, but held that maps defining the floodplain had been too broadly drawn. The court held that it was necessary to revise earlier maps in light of the flood experience of Hurricane Agnes.

The quality of data initially used as the basis for wetland mapping and assessment and as the initial basis for regulation may be less important if administrative procedures are available during administrative phases of a regulatory program to refine data as individual permit applications are received. In **Just v. Marinette County**, 201 N.W.2d 761 (Wis. 1972), the Wisconsin Supreme Court also upheld a procedure for remedying map inaccuracies through field inspections and the application of written criteria. Relatively inaccurate U.S. Geological Survey maps had been used for wetland mapping combined with a written definition for wetland areas: “(A)reas where groundwater is at or near the surface most the year or where any segment of plant cover is deemed an aquatic according to N.C. Fassett’s ‘Manual of Aquatic Plants’.” See also **Thompson v. Dept. of Envir. Conservation**, 495 N.Y.S.2d 107 (N.Y., 1985) in which the court held that tidal wetland maps are validly subject to review prompted by specific permit applications. A landowner contesting the regulations argued, in part, that the wetland maps were not sufficiently specific and that his land was not a wetland. The Court did not specifically discuss the validity of the maps, but sustained the regulations, noting that the land was clearly wetland by the written test.

## 2. Is proposed “mitigation” relevant to assessment of impacts?

Courts have held that proposed mitigation is relevant to determination of impacts. For example, a Connecticut court upheld the issuance of a local permit on the condition that mitigation be worked out in the future. See **Red Hill Coalition, Inc. v. Conservation Comm’n of Glastonbury**, 563 A.2d 1339, 1341 (Conn. 1989) (Court upheld issuance of local permit issued on the condition that the applicant provide “reasonable compensation for wetland development or enhancement.” More specifically, compensation was “to be determined...by a subcommittee of the wetlands agency working directly with the applicant and other parties...”). See also **Nat’l Ass’n of Industrial & Office Parks v. New Jersey Dep’t of Environmental Protection**, 574 A.2d 514 (N.J. 1990) in which the court upheld fixed compensation ratios (7:1) for implementation of a no net loss goal. However, a Connecticut court held that monetary

and in-kind contributions for unspecified projects in the future were not adequate mitigation. See **Brasnhaven Plaza v. Inland Wetlands Comm'n of Branford**, 740 A.2d 847 (Conn., 1999). A Massachusetts court rejected a developer's offer to substitute wetlands for others in exchange for subdivision approval with the observation that "replacement wetlands have not fared well over the years." See **Quest Enterprises, Inc. v. Town of Westford**, 2002 Mass. Super. LEXIS 294 (Mass. 2002). See also **Bosla Chica Land Trust**, 83 Cal. Rpt. 2d 850 (Cal. 1999) in which the court held that "relocation" of habitat was not permissible.

For some federal court decisions dealing with mitigation in the Section 404 program, see, for example, **Northwest Env'tl Defense Ctr. v. Wood**, 947 F.Supp. 1371, affirmed, 97 F.3d 1460 (D.Or. 1996) (Corps could consider proposed mitigation in determining impact). See also **Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Eng'rs**, 87 F.3d 1242 (11th Cir. 1996); **Virgin Islands Tree Boa v. Witt**, 918 F.Supp. 879, affirmed, 82 F.3d 408 (D.V.I 1996) (No impact statement required if mitigation eliminates all significant impacts).

However, several federal courts have held that the possible failure of mitigation measures is relevant as well to the adequacy of proposed mitigation. See e.g., **Bersani v. Robichaud**, 850 F.2d 36 (2d Cir. 1988), a federal court of appeals endorsed the findings of EPA, which concluded on the facts that alternatives were available to the proposed project and "that the mitigation proposal did not make the project preferable to other alternatives because of the scientific uncertainty of success."

Courts have demanded that regulatory agencies do more than simply "consider mitigation". **In Citizens for Quality Growth v. City of Mount Shasta**, 243 Cal.Rptr. 727 (Cal. App. 1988), a California court held that the City of Mount Shasta had failed to comply with California Environmental Quality Act by failing to make findings adopting or rejecting mitigation measures and properly evaluating alternatives as part of rezoning a 35 acre parcel with wetlands. See also **Virgin Islands Conservation Soc'y, Inc. v. Board of Land Use Appeals**, 857 F.Supp. 1112 (D.V.I. 1994), in which a Virgin Islands district court held that a coastal zone management committee could not grant a coastal zone permit by simply requiring mitigation plans and impact studies as part of the permit, but that up-front studies were also needed.

### **3. Do states and communities need to assess the functions and values of each wetland?**

Many thousands of local governments have adopted "conservancy zone" approaches to wetlands, steep slopes, floodplains and other sensitive areas based upon overall natural hazards, functions and values, the costs of public services, and other factors relevant to the general "suitability" and "appropriateness" of land uses throughout a municipality. These regulations have not been based upon the evaluation of wetland functions/values of each wetland.

Such multiobjective regulations have been broadly sustained against “takings” challenges where variance procedures or special exception procedures are available to allow permits where landowners can demonstrate that no economic use of whole properties is otherwise possible. See listing of open space zoning cases in Chapter 5 below.

No court has apparently struck down wetland regulations for failing to distinguish between the ecological value of various types of wetlands. Failure to distinguish has been challenged in a few cases. For example, the New Hampshire Supreme Court, in **Rowe v. Town of North Hampton**, 553 A.2d 1331(N.H. 1989), sustained the denial of variance to construct a house and septic system in a wetland against a takings challenge and rejected arguments that regulations should distinguish wetlands which have great ecological value from those which do not. The court observed, in so holding, that:

We find no error in the trial court’s decision that no taking has occurred in this case. We hold that the wetlands ordinance is neither unreasonable by itself nor unreasonable as applied to plaintiff’s land. The plaintiff’s argument that the town’s regulations are arbitrary, because they allegedly do not distinguish wetlands which have great ecological value from those that do not, is without merit...(T)he plaintiff’s real complaint is that the town’s definition of wetlands should be changed. We see nothing unreasonable or arbitrary about the town’s use of the terms “poorly drained” and “very poorly drained” soils to determine what constitutes a wetland...nor does the plaintiff offer any authority for her proposition that the ordinance, to be constitutional, must grade wetlands according to their ecological value. Any changes in definitions contained in the town’s ordinances should be sought through proper local channels, not in this court....

On the other hand, where a case-by-case permitting approach is used, regulatory agencies cannot, as a practical matter, determine the adequacy of impact reduction and compensation measures without evaluating loss of specific wetland functions and values. A variety of wetland assessment models have been developed over the last several decades to help evaluate the function and values of specific wetlands, although most lack accuracy and none have been extensively used. But see **City Nat’l Bank of Miami v. United States**, 33 Fed. Cl. 224 (1995) (HEP method used). A Californial court recognized the need to protect even degraded wetlands. See, e.g., **Kirkorowicz v. California Coastal Commission**, 100 Cal Rptr. 2d 124 (Cal. 2000) in which the court upheld a decision of the California Coastal Commission denying a permit for horse stables and boarding facilities for a wetland area. The Commission was applying a “no net loss of wetland acreage or resource value” policy. The court observed that “the failure to preserve and protect degraded or disturbed wetlands buffering adjacent higher quality wetlands will inevitably jeopardize, compromise and eventually erode the latter.”

#### **4. Are consideration of “alternatives” requirements valid?**

Courts have also sanctioned the requirement that “alternatives” be considered in regulatory permitting. See, e.g., **Milam v. Department of Natural Resources**, 599 N.W.2d 665 (Wis. 1999) in which the court held that the DNR properly denied a request for water quality certification because the landowner failed to demonstrate practical

alternatives to filling the wetland. Federal Section 404 regulations (40 C.F.R. 230.10(a)) provide, in part, that “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.” An alternative is considered “practical” if it is “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” See **Fund for Animals, Inc. v. Rice**, 85 F.3d 535 (11th Cir. 1996); **Friends of the Payette v. Horseshoe Bend Hydroelectric Co.**, 988 F.2d 989 (9th Cir. 1993).

## 5. May an agency attach conditions to development permits?

Agencies may attach conditions to development permission to reduce and compensate for project impacts, but these conditions must be reasonable. See, **Hentges et. al. v. Minnesota Board of Water and Soil Resources et. al**, 634 N.W.2d 441 (Minn. 2002) (Regulatory agency may attach restoration conditions to achieve wetland no net loss.); **Lund v. Town of Yorktown**, 641 N.Y.S.2d 438 (A.D. 1996) (Planning board may impose reasonable conditions on site plan approval); **Red Hill Coalition, Inc. v. Conservation Comm’n of Glastonbury**, 563 A.2d 1339 (Conn. 1989) (Town conservation commission could require offsite mitigation as reasonable compensation for wetland development or enhancement as a condition to approval of a wetlands permit); **T.D.J. Development Corp. v. Conservation Comm’n of North Andover**, 629 N.E.2d 328 (Mass. App. 1994) (Conservation commission’s approval of highway project subject to 46 conditions to protect wetlands was reasonable); **San Mateo County Coastal Landowners’ Ass’n v. County of San Mateo**, 45 Cal. Rptr.2d 117 (Cal. App. 1995) (Agricultural open space easements requirements as a condition to development not facially invalid); **Grogan v. Zoning Bd. of Appeals Town of East Hampton**, 633 N.Y.S.2d 809 (A.D. 1995) (Zoning board of appeals conditioning permit for construction of a home upon grant of scenic and conservation easements barring development on wetland part of lot not arbitrary and capricious, rough proportionality found); **Jefferson County v. Washington Dep’t of Ecology**, 511 U.S. 700 (1994) (U.S. Supreme Court held that state could impose minimum stream flow requirements as part of Section 401 certification requirements under the Clean Water Act for permitting hydroelectric power plant); **F.L.D. Construction Corp., v. Williams**, 504 N.Y.S.2d 726 (A.D. 1986) (Issuance of tidal wetland permit subject to conditions including creation of a 50 to 75 foot buffer zone and ultimate removal of sewage treatment plant from wetland adjacent area was proper). However in **Dolan v. City of Tigard**, 512 U.S. 374 (1994), the U.S. Supreme Court held that a city’s attempt to require a landowner to dedicate a portion of her property in a flood plain as a public greenway and bike path was not reasonably related to regulatory goals and was not reasonably related to additional vehicle and bicycle traffic which would be generated by the development. See also **Goss v. City of Little Rock**, 90 F.3d 306 (8th Cir. 1996) (Burden on zoning board to show reasonableness and rough proportionately although burden on landowner otherwise). See also **Group v. Clackamas County**, 922 P.2d 1227 (Or. App. 1996) (Rough proportionality needed between impacts and conditions). However, the U.S. Supreme Court later in **City of Monterey v. Del Monte Dunes at Monterey, Ltd**, 119 S.Ct. 1624 (1999) held that rough proportionality test was limited to exactions of interests in land for public use.

## 6. Will prior community-wide information gathering and comprehensive planning help meet legal challenges?

State wetland regulatory statutes and administrative regulations do not require prior, area wide comprehensive information gathering or planning prior to adoption of wetland regulations. However, many state zoning enabling statutes require that zoning regulations be in accordance with a comprehensive plan. And, local wetland conservation zoning is often adopted pursuant to such broader statutes. Courts have, in broader zoning contexts, often found such a comprehensive plan contained within the zoning regulations but this is changing as state legislatures mandate independent planning in some states. However, no court has apparently held invalid state or local wetland zoning regulations for failure to be in accordance with a comprehensive plan. See, e.g., **Enos v. Town of Stetson**, 665 A.2d 678 (Me. 1995) in which the court upheld a town shoreland ordinance adopted, in part, to protect wetlands without a prior comprehensive plan.

But, courts have also held that comprehensive land and water information gathering and planning can help support regulations in court. See, for example, **Wilson v. County of McHenry**, 416 N.E.2d 426 (Ill. 1981) in which the court held that “(t)he adoption of a comprehensive plan which incorporates valid zoning goals increases the likelihood that the zoning of a particular parcel in conformity therewith is not arbitrary or unrelated to the public interest.” *Id.* at 431. See also **Harvard State Bank v. County of McHenry**, 620 N.E.2d 1360 (Ill. App. 1993); **McCarthy v. City of Manhattan Beach**, 264 P.2d 932 (Cal. 1954):

(A) zoning ordinance enacted pursuant to a comprehensive plan of community development, “when reasonable in object and not arbitrary in operation,” will be sustained as a proper exercise of the policy power, every intendment is in favor of its validity; and a court will not, “except in a clear case of oppressive and arbitrary limitation,” interfere with legislative discretion.

See also, **Harvard State Bank v. County of McHenry**, 620 N.E.2d 1360, 1362 (Ill. App. 1993) (Court held that factors relevant to reasonableness of regulations included “the care with which the community has undertaken the planning of its development...”; **Consolidated Rock Products Co. v. City of Los Angeles**, 370 P.2d 342, appeal dismissed, 371 U.S. 36 (1962) (Court upheld very tight regulations based upon overall planning.); **Reahard v. Lee County**, 30 F.3d 1412 (11th Cir. 1994) (Resource conservation district upheld); **City of Riveria Beach v. Shillingburg**, 659 So.2d 1174 (Fla. App. 1995) (Comprehensive plan with wetland provisions not a regulatory taking of submerged lands); **City Nat’l Bank of Miami v. United States**, 33 Fed. Cl. 224 (1995) (Local comprehensive planning relevant to “value” of property in deciding whether taking has occurred); **City Nat’l Bank of Miami v. United States**, 33 Fed. Cl. 759 (1995); **Krahl v. Nine Mile Creek Watershed Dist.**, 283 N.W.2d 538 (Minn. 1979) (Watershed district’s floodplain encroachment regulations based upon watershed district plan and tightly controlling development on 2/3 of 11 acre tract were not an unconstitutional taking).

Courts, over the period of years, have also provided strong support for state resource management regulatory approaches based upon regionally-based land and water assessments and planning approaches. See generally, **North Shore Unitarian Soc’y, Inc. v. Village of Upper Brookville**, 493 N.Y.S.2d 564 (A.D. 1985); **Island Properties, Inc., v. Martha’s Vineyard Comm’n**, 361 N.E.2d 385 (Mass. 1977) (Regional planning and regulation for Martha’s Vineyard); **New Jersey Builders v. Department of Env’tl. Protection**, 404 A.2d 320 (N.J. App. 1979) (Court upheld regionally-based actions of Department of Environmental Protection in establishing water quality standards for the Central Pine Barrens and designating such lands as “critical area” for sewerage purposes).

## **7. Should regulators take into account the cumulative impact of uses?**

Courts in some cases have held that regulators must take into account cumulative impacts in regulating wetland development. For example, a court in **Conservancy, Inc. v. Vernon Allen Builder, Inc.**, 580 So.2d 772 (Fla. 1991) held that a hearing officer failed to consider cumulative impacts of 75 estate homes in evaluating a proposed dredge and fill permit. See also **Uliano v. Maine Department of Environmental Protection**, Me. Super LEXIS 46 (Me. 2003) in which the court upheld a “cumulative impacts” standard in a wetland statute as not unconstitutionally vague. Cases have upheld regulations that consider the cumulative impact of fills or other uses upon navigable waters. For example, in **Hixon v. Public Service Commission**, 146 N.W.2d 577 (Wis. 1966) the Supreme Court of Wisconsin affirmed a denial of a permit to maintain a breakwater on the grounds that the breakwater was an unnecessary obstruction to navigation, did not allow for free flow of water, and was detrimental to the public interest. The court observed:

There are over 9,000 navigable lakes in Wisconsin covering an area of over 54,000 square miles. A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once gone, they disappear forever.

Similarly, the California Supreme Court sustained regulations controlling filling within San Francisco Bay based in part upon arguments of cumulative impact. See **Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission**, 11 Cal. App. 3d 557 (Calif. 1970).

A Federal district court in **Corsa v. Tawes**, 149 F. Supp. 771 (D. Md. 1957), aff’d., 355 U.S. 37 (1957) sustained a Maryland law prohibiting the use of certain nets for fishing in tidal waters. While not a wetland case, the analysis of the court is interesting in terms of future impacts:

We think...that the protective hand of the State may be extended before danger is unmistakably imminent. Conditions may go unnoticed so long that when the threat is demonstrated it is too late to avert the harm. One witness for the plaintiffs testified that no matter how much a supply may be reduced by over-

fishing, provided that the stock is not completely annihilated, it may in time replenish itself. We need not quarrel with this statement of scientific opinion, but in the practical management of its resources, the State may conclude that the time for action is long before the destruction has gone that far. The State is interested not merely in the preservation of specimens for museums but in conserving and perpetuating a constant supply.

## PART 3: THE TAKING ISSUE

### 3.1 Introduction

The “taking” issue continues to be the most volatile and controversial issue in wetland regulation. The Fifth and Fourteenth Amendments of the Federal Constitution and similar provisions in state constitutions prohibit the “taking” of private property without payment of just compensation. Wetland regulations which permanently restrict fills, dredging and other development have been attacked as a taking and some decisions have invalidated regulations on this basis although successful challenges are quite rare. As discussed above, landowners may challenge wetland regulations as a “taking” in two ways: (1) a general “facial” challenge to regulations claiming that regulations are, in their entirety, a taking, and (2) a site-specific challenge, claiming that regulations may be valid in general but invalid and a taking as applied to specific property.

Courts have broadly upheld wetland regulations against general, facial challenges that they are a taking. For example, the U.S. Supreme Court unanimously held that the permitting requirements of Section 404 program were not, on their face, a taking in **United States v. Riverside Bayview Homes, Inc.**, 474 U.S. 121 (1985). Facial or general challenges to wetland regulations have succeeded in only a few early wetland and floodplain cases where regulations have, on their face, prevented all economic use of entire properties. See, e.g., **Morris County Land Imp. Co. v. Township of Parsippany-Troy Hills**, 193 A.2d 232 (N.J. 1963).

However, the U.S. Supreme Court has addressed the taking issue in a number of floodplain, beach, and wetland cases described in table 1 and discussed below. These decisions have resulted in an increase in lower federal, state and local court challenges to wetland regulations on “takings” grounds in recent years. See, for example, **Lopes v. City of Peabody**, 718 N.E.2d 846 (Mass., 1999); **Stanley Friedenburg v. New York Dept. of Envir. Conserv.**, 240 A.D.2d 407 (N.Y. 2003); **K&K Constr. Inc. v. Department of Natural Resources**, 551 N.W.2d 413 (Mich. App. 1996) (reversed on appeal); **Bowles v. United States**, 31 Fed. Cl. 37 (1994). However the number of lawsuits appears to be tapering off as courts continue to broadly support wetland, floodplain, and similar resource protection regulations.

Although successful suits are uncommon, regulatory agencies must do more to support the rationality of their decision-making and to meet potential takings challenges than a decade ago and the denial of all economic use test discussed below has become more “categorical”. See **Lucas v. South Carolina Coastal Council**, 505 U.S. 1003 (1992) in which the Supreme Court adopted a “categorical” rule for taking that holds that regulations which deny all economic use of property are a taking unless proposed activities would not be allowed under the principles of state property law.

Courts have broadly agreed that some reduction in property values is not a taking. For example in **Deltona Corporation v. The United States**, 657 F.2d 1184 (Ct. Cl 1981), the U.S. Court of Claims held that the Corp’s denial of a permit for filling mangroves in Florida was not a taking. It concluded that:

(W)e have rejected plaintiff’s argument that the denial of highest and best use can constitute a taking. We have found that subsequent to Deltona’s purchase of the land in question, a significant change occurred in the Statutes and regulations affecting its land use, and this development did have a significant impact upon the values incident to Deltona’s Marco Island property. However, in view of the many remaining economically viable uses for plaintiff’s property, and the substantial public benefits which the new statutes and regulations serve to bring about, we have concluded that no taking occurred.

Courts apply three general tests to determine whether wetland regulations take private property. First, they decide whether regulations have sufficient nexus to regulatory goals. See, e.g., **Nollan v. California Coastal Commission**, 107 S.Ct. 3141 (1987). Apparently no court has held wetland regulations to be taking based upon inadequate nexus to regulatory goals alone. Second, they apply the “categorical” test indicated above to determine whether regulations prevent all economic use of private lands. See **Lucas v. South Carolina Coastal Council**, 112 S.Ct. 2886 (1992). If all economic uses are denied, courts generally find a taking, subject to a variety of important qualifications which will be discussed shortly. Third, courts then balance public rights and private interests to decide whether a taking has occurred, taking into account a broad range of factors which will also be discussed below. See, e.g., example, **R & Y, Inc. v. Municipality of Anchorage**, 34 P.3d 289 (Alaska, 2001). Courts have very rarely held wetland regulations to be a taking based upon a balancing analysis but there are exceptions. See, e.g., Stanley **Friedenburg v. New York Dept. of Envir. Conserv.**, 240 A.D.2d 407 (N.Y. 2003).

Courts have sometimes characterized this balancing test in terms of a prevention of harm versus conferring a benefit query. Courts ask the question: “Do regulations prevent landowners from harming the public or require landowners to confer an uncompensated public benefit? A “taking” will be found if the regulations require landowners to confer an uncompensated benefit on the public. See, e.g., **Commissioner of Natural Resources v. S. Volpe & Co., Inc.**, 349 Mass. 104, 206 N.E.2d 666 (1965); **Morris County Land Improvement Co. v. Parsippany-Troy Hills Township**, 40 N.J. 539, 193 A.2d 232 (1963). For example, a taking may be found if regulations require that private land be used as a public park. A taking will not be found if regulations merely prevent a public harm. See, e.g., **Sibson v. State**, 336 A.2d 239 (N.H. 1975).

A variety of more specific factors are considered by the courts in applying these tests to determine whether regulations take property. A determination of taking is often closely related to determinations concerning the reasonableness of regulations and compliance with other constitutional requirements. Regulations that lack sufficient factual basis may be considered both unreasonable and a taking since unreasonable restrictions, however slight, are unjustified. Similarly, regulations that do not serve valid police power objectives impose an undue restraint on private property. Finally, regulations that discriminate may be held a taking, based on the rationale that tight restrictions are acceptable if they affect all in like circumstances but unacceptable if they single out a few. See more discussion of these factors below.

As already indicated, almost all cases invalidating regulations have involved regulations that prevented all economic use of a whole parcel and the activities proposed for the parcel did not pose health or nuisance threats. As discussed below, less restrictive regulations have been broadly and almost universally sustained. Very tight regulations have been sustained for severe hazard areas and where all practical uses for lands were nuisance-like. In addition, a number of important cases have sustained very tight wetland regulations in special circumstances despite lack of hazards or nuisance impact.

In applying the various tests for taking, state courts typically examine three major sets of factors:

- (1) The nature of the landowner's property interest,
- (2) The nature of the government action, and
- (3) The impact of the regulation upon the landowner's property interest.

These sets of overlapping factors will now be examined individually.

### **3.2 What is the Nature of the Landowner's Property Interest?**

In conducting a wetlands takings analysis, a court usually first begins by determining whether the landowner has a "protected" property interest. See **Outdoor Graphics, Inc. v. City of Burlington**, 103 F.3d 690 (8th Cir. 1996); **Wisconsin Retired Teachers Ass'n v. Employee Trust Funds Bd.**, 558 N.W.2d 83 (Wis. 1997) (State common law defines protected "property"; the U.S. Constitution protects property); **Washington Legal Foundation v. Texas Equal Access to Justice Foundation**, 94 F.3d 996 (5th Cir. 1996).

Courts determine whether a constitutionally protected property interest exists by examining a number of more specific factors which may be stated as questions:

**--Does the individual challenging the regulations "own" the wetland or a valid interest in the wetland? If so, what is the nature of this ownership?**

Many wetlands are at least partially in public ownership, particularly wetlands below the mean high water mark. Sometimes landowners do not own wetlands even if they think they do. See, e.g., **Phillips Petroleum Co. v. Mississippi**, 484 U.S. 469 (1988) in which the Supreme Court held that private landowners who believed that they owned estuarine wetlands in Mississippi subject to the ebb and flow of the tide and who had paid taxes on such lands for more than 100 years did not in fact, own such lands and could not claim a taking when the state leased the lands to someone else. See also **Bubis v. Kassin**, 733 A.2d 1232 (N.J. 1999) in which the court held that a private property owner's easement over a beach and bluff areas was extinguished between the beach and bluff areas which were entirely below the mean high water mark.

If a wetland is in public ownership, “taking” of private property does not occur by denial of a permit for activities. Determination of public/private land boundaries is, therefore, important in addressing and avoiding taking problems since most wetlands adjacent to major lakes, estuaries, and the oceans and many wetlands along major rivers are at least partially owned by the public.

Even if a wetland is owned by a private landowner, the landowner does not own the water. And the owner’s interest is limited by not only the riparian rights of other landowners but the rights of the public. See **Application of Cent. Baptist Theo. Seminary**, 370 N.W.2d 642 (Minn., 1985)

### --What are the landowner’s expectations?

A court typically asks: “Does the landowner have “reasonable, investment back expectations?” This query is relevant to both a landowner’s interest and the impact of regulations upon this interest (see discussion below). Unfortunately, this test is not so easy to apply. It is often difficult to determine what a landowner’s expectations were at the time he or she acquired land. It is also difficult to decide whether they are “reasonable” (a lot depends upon the assumptions made about reasonableness), and whether they are “investment-backed” (what does investment-backed really mean?).

State courts have often held that when a landowner purchases land with knowledge of restrictions he or she is in a weakened position to claim a taking although a takings claim may not be estopped. For example, in **Chokecherry Hills Estates, Inc. v. Deuel County**, 294 N.W.2d 654 (S.D. 1980), the South Dakota Supreme Court upheld a highly restrictive “natural resource district” as applied to a 13 acre parcel along a small, muddy lake. The Natural Resource District allowed for the following:

- A. Permitted Uses
  - 1. Wildlife production areas;
  - 2. Game refuges;
  - 3. Historic sites and/or monuments;
  - 4. Designated natural prairies;
  - 5. Public hunting and fishing access areas;
  
- B. Uses Permitted by Special Permit if Deemed Not Detrimental to District
  - 1. Transportation and utility easements and rights of way;
  - 2. Utility substations;
  - 3. Public parks and/or playgrounds;
  - 4. Horticulture uses and livestock grazing.

Chokecherry Estates had purchased the land “knowing that the land was zoned a Natural Resource District...” Id. The court held that the town’s refusal to rezone for single family dwellings was justified and that there was no taking. The court noted that the purchase price reflected farmland value and stated he had been using the land for agricultural purposes at the time of this lawsuit. The court concluded that, “On the whole, the

evidence paints a picture of Mr. Kalthoff taking a gamble that he could succeed in changing the existing zoning law so that he could realize a higher profit.”. The court observed:

In **Just v. Marinette County**, the Supreme Court of Wisconsin stated that the police power was properly exercised in preventing a public harm by protecting the natural environment of shorelands. No taking was found and no compensation given in **Just**, despite the fact that the landowners had purchased the land before it was restrictively zoned for natural uses. Appellant in the instant case is in a weaker position than the landowner in **Just**, due to the lack of evidence to counter the reasons set forth by the commission and the fact that he purchased the land with full knowledge of the zoning restrictions.

Similarly, in **Graham v. Estuary Properties**, 399 So.2d 1374 (Fla. 1981) the Florida Supreme Court in upholding the denial of a permit to dredge mangroves, stated that “Estuary purchased the property in question from a private property owner with full knowledge that part of it was totally unsuitable for development.”

**--Is the property subject to public trust and/or navigable servitude?**

Even if a wetland is privately owned, it may be subject to the “public trust” or a “navigable servitude”. Both of these doctrines act as a limitation upon private property interests, particularly if the wetland or portion of the wetland lies below the high water mark and is adjacent to a lake, river, or stream or to an ocean or estuary. In general, courts hold that private property rights are subject to paramount public trust and navigable servitude. Therefore, courts are less likely to hold that a highly restrictive regulation for lands subject to such trust are a taking where the regulations are in furtherance of this trust. See, e.g., **McQueen v. S.C. Coastal Council**, 580 S.E.2d 116 (2003); **Weeks v. North Carolina Dep’t of Natural Resources and Community Dev.** 388 S.E.2d 228 (N.C. 1990); **ABKA v. Wisconsin Department of Natural Resources**, 635 N.W.2d 168 (Wis., 2001); **Just v. Marinette County**, 201 N.W.2d 761 (Wis. 1972); **Marks v. United States**, 34 Fed. Cl. 387 (1995); Slade, D. et al., Putting the Public Trust Doctrine to Work, Coastal States Organization Washington D.C. (1990) and many cases cited therein.

The Wisconsin Supreme Court in **Just v. Marinette County**, 201 N.W. 761 (Wis. 1972) strongly and broadly endorsed the trust doctrine in holding that wetland regulations were not a taking. The court concluded: “An owner of land has no absolute and unlimited right to change the essential character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.” *Id.* at 768. The New Hampshire Supreme Court in **Sibson v. State** noted that:

Rights of littoral landowners on public waters are always subject to the paramount right of the State to control them reasonably in the interests of navigation, fishing, and other public purposes.

Similarly, the Michigan Court of Appeals in **Township of Grosse Isle v. Dunbar & Sullivan Dredging County**, N.W.2d 311 (Mich. 1969) enjoined dike and fill operations in the Detroit River on the theory that the operations impaired the public trust in navigable waters and public rights of navigation, fishing, duck hunting, and so forth. A New York court in **People of Town of Smithtown v. Poveromo**, 336 N.Y.S.2d 764 (N.Y. 1972), rev'd on other grounds, 359 N.Y.S.2d 848 (N.Y. 1973) strongly endorsed the trust concept and the superiority of public rights in trust lands, although the court invalidated the local ordinance in question for different reasons. However, see **Purdie v. Attorney General**, 732 A.2d 442 (N.H. 1999) in which the court held that legislative efforts to extend the public trust rights on coastal waters to the high water mark was a taking.

Public trust is a state doctrine and applies to most wetlands adjacent to public waters. The navigable servitude is a federal doctrine and applies to lands adjacent to federally navigable waters. Courts have held that the federal government is not required to pay for economic loss resulting from exercise of navigable servitude pursuant to its power to regulate navigable waters. The navigable servitude, like the trust doctrine, applies to the high water mark. See **United States v. 30.54 Acres of Land Situated in Green County**, 90 F.3d 790 (3d Cir. 1996). See also **Zabel v. Tabb**, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971) in which a federal court of appeals sustained a denial of a U.S. Army Corps of Engineers permit to fill 11 acres of tide land in Boca Ciega Bay in Florida against claims of taking. This decision was based, in part, upon a holding that “waters and underlying land are subject to the paramount servitude of the Federal government....”

Documentation of lands subject to public trust and navigable servitude (usually below the high water mark) is, therefore, also a priority in avoiding and addressing taking challenges.

#### **--Does the proposed activity threaten public safety?**

Courts have broadly held that landowners have no right to threaten public safety and have afforded what amounts to a special presumption in favor of regulations to protect health and safety even where regulations have an impact on private landowners. Cases upholding regulations that protect the public from threats to safety or nuisances reason that landowners do not have a right to activities causing such problems, even though no practical use remains for the land. This reasoning was applied by the U.S. Supreme Court in **Muglar v. Kansas**, 123 U.S. 623 (1887) in upholding a statute that prohibited the manufacture of alcoholic beverages (then considered a nuisance). While not a wetland case, the language of the Court is applicable:

The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

Courts give legislative bodies and administrative agencies broad discretion in protecting public safety. For example, the Supreme Court in **Queenside Hills Realty Co. v. Saxl**, 328 U.S. 80 (1946) observed that “(t)he legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer.” *Id.* at 83. See also **Hamel v. Board of Health of Edgartown**, 664 N.E.2d 1199 (Mass. App. 1996) (Strong presumption of validity for Board of Health regulations); **Erb v. Maryland Dep’t of Env’t**, 676 A.2d 1017 (Md. App. 1996) (Regulation of sewage consistent with the state law of nuisance even if no economic use remains for lands); **Christianson v. Snohomish Health Dist.**, 917 P.2d 1093 (Wash. App. 1996) (Public health resolution for substandard septic tank systems valid); **Nicholas Geiben et al. v. Town of Pomfret Zoning Board of Appeals**, 688 N.Y.S.2d 303 (N.Y. 1999) (Condition approval of special use permit for a single family dwelling near a reservoir which required relocation of the structure was valid).

Therefore, documentation of pollution, toxic waste, adequate onsite waste disposal and other hazards posed by a proposed activity is of considerable importance in meeting potential takings challenges.

**--Does the proposed activity have potential flood, erosion, subsidence or other “nuisance” or “trespass” impacts to other lands? Would the proposed activity be “unreasonable” or an act of negligence?**

At common law, landowners have both rights and duties. They have a duty to use their lands in a manner that does not threaten adjacent landowners and society, i.e., cause “nuisances”, “trespasses”, or constitute “negligence”. See Box 2 and cases cited below. Courts hold that prevention of activities that may constitute a nuisance are not a taking because no landowner has a right to make a “nuisance” of himself or herself. See, e.g., **Goldblatt v. Hempstead**, 369 U.S. 590 (1962); **Keystone Bituminous Coal Ass’n v. DeBenedictis**, 480 U.S. 470 (1987).

Courts in a number of significant cases have held that filling or drainage of a wetland with resulting increase in flooding on other lands constitutes a trespass, nuisance, or negligence. See, e.g., **Hendrickson v. Wagners, Inc.** 598 N.W.2d 507 (S.D., 1999) (Injunction granted by the court to require landowner who drained wetlands with resulting flooding of servient estate to fill in drainage ditches.); **Boren v. City of Olympia**, 112 Wash. App. 359, 53 P.3d 1020 (Wash. 2002) (City was possibly negligent for increasing discharge of water to a wetland which damaged a landowner.); **Snohomish County v. Postema**, 978 P.2d 1101 (Wash. 1998) (Lower landowner had potential trespass action against upper landowner who cleared and drained wetland.); **Lang et al v. Wonnenberg et al**, 455 N.W.2d 832 (N.D., 1990) (Court upheld award of damages when one landowner drained a wetland resulting in periodic flooding of neighboring property.)

Quite often regulatory agencies are faced with the prospect of “denying all economic uses” if they deny permits for industrial, commercial, sand and gravel operations or other activities offering a relatively high rate of return in areas with high land values, high taxes, small lots, and few economic “open space” uses such as agriculture or forestry.

However, as discussed above, courts have often sustained regulations that prohibit activities which threaten public safety or cause nuisances even if such activities are the only economic uses for lands if the impacts of the proposed activities fall within the “nuisance” exception stated by Justice Scalia in **Lucas** and discussed below. For these reasons, documenting potential nuisance impacts for proposed activities is very important, particularly where denial of a permit may result in no or few economic uses for entire lands.

For cases sustaining regulations prohibiting specific activities with nuisance impacts where no or few economic uses remain for lands, see, for example: **Goldblatt v. Town of Hempstead**, 369 U.S. 590 (1962) (Supreme Court upheld ordinance which prohibited extraction of gravel below the groundwater level against taking claim due, in part, to the possible safety hazards posed by such open water pits. The ordinance effectively prevented economic use of land); **Foreman v. State Department of Natural Resources**, 387 N.E.2d 455 (Ind. 1979) (Court sustained an injunction prohibiting defendants from making deposits on a floodway and requiring removal of deposits previously made as not a taking of property); **Young Plumbing and Heating Co., v. Iowa Natural Resources Council**, 276 N.W.2d 377 (Iowa 1979) (Court sustained denial of a state permit for a condominium in a floodway where such a structure would have raised the level of flood waters on property on other side of the creek. The concept of “equal degree of encroachment” was strongly endorsed, as well as efforts to anticipate watershed conditions); **Usdin v. State Dep’t of Env’tl. Protection**, 414 A.2d 280 (N.J. Super. 1980) (Court upheld state floodway regulations prohibiting structures for human occupancy, storage of materials, and depositing solid wastes because of threats to occupants of floodway lands and to occupants of other lands); **Consolidated Rock Products Co. v. City of Los Angeles**, 370 P.2d 342, appeal dismissed, 371 U.S. 36 (Calif. 1962) (Court held that regulations which prevented the extraction of sand and gravel in floodplain were not a taking despite the fact that extraction was the only economic use for the land because extraction of sand and gravel would have had nuisance impacts upon sufferers of respiratory ailments who lived nearby).

**Table 2**  
**Nuisance and Other Common Law Legal Theories**  
**Limiting Landowner Rights**

--**Nuisance.** At common law, no landowner (public or private) has a right to use his or her land in a manner that substantially interferes, in a physical sense, with the use of adjacent lands. See, e.g., **Sandifer Motor, Inc. v. City of Rodland Park**, 628 P.2d 239 (Kan., 1981) (Flooding due to city dumping debris into ravine which blocked sewer system was a nuisance.) "Reasonable" conduct is usually no defense against a nuisance suit although reasonableness is relevant to a determination of nuisance in some contexts and the type of relief available.

Principal activities which may increase natural hazard losses on lands adjacent to wetlands and which may be subject to nuisance suits include: dikes, dams, levees, grading, construction of roads and other land alterations which increase flood heights and velocities on other lands; erosion control structures such as groins and seawalls which increase erosion and/or flooding on other lands; and mud slide, landslide, and other ground failure structures.

--**Trespass.** At common law, landowners may also bring trespass actions for certain types of public and private actions which result in physical invasion of private property such as flooding or drainage. See **Hadfield v. Oakleim County Drain Com'r**, 422 N.W.2d 205 (Mich., 1988). There are several different types of "trespass" (trespass and "trespass on the case"). An extensive discussion of the law of trespass with all of its nuances is beyond the scope of this paper.

--**Violation of Riparian Rights.** At common law, riparian landowners enjoy a variety of special rights incidental to the ownership of riparian lands. These rights or "privileges" include fishing, swimming, and construction of piers. Riparian rights must be exercised "reasonably" in relationship to the reciprocal riparian rights or other riparians. Courts in some instances have held that construction of levees, dams, etc. by one riparian which increase flood damages on other lands are a violation of the riparian rights of other riparians. See **Lawden v. Bosler**, 163 P.2d 957 (Okla., 1945).

--**Violation of the Law of Surface Water.** Under the rule of "reasonable use" (or some variation of it) in most states landowners cannot, at common law, substantially damage other landowners by blocking the flow of diffused surface waters, increase that flow, or channeling that flow to a point other than the point of natural discharge. Courts have applied these rules to governmental units as well as private landowners and have, in some instances, applied even more stringent standards to governmental units. See, for example, **Wilson v. Ramacher**, 352 N.W.2d 389 (Minn., 1984).

--**Strict Liability.** Courts, in a fair number of states, have held that landowners and governments are "strictly liable" for the collapse of dams because impoundment of water, following an early English ruling, has often been held an "ultrahazardous" activity. Private and public landowners are liable for damages from ultrahazardous activities even when no negligence is involved.

--**Negligence.** At common law, all individuals (including public employees) have

a duty to other members of society to act "reasonably" in a manner not to cause damage to other members of society. "Actionable negligence results from the creation of an unreasonable risk of injury to others...In determining whether a risk is unreasonable, not only the seriousness of the harm that may be caused is relevant, but also the likelihood that harm may be caused." The standard of conduct is that of a "reasonable man" in the circumstances. Negligence is the primary legal basis for public liability for improper design of hazard reduction measures such as flood control structures, improperly prepared and issued warnings, inadequate processing of permits, inadequate inspections, etc. See, e.g., **Kunz v. Utah Power and Light Company**, 526 F.2d 500 (9th Cir., 1975).

--**Denial of Lateral Support.** At common law, the owner of land has a duty to provide "lateral support" to adjacent lands and any digging, trenching, grading, or other activity which removes naturally occurring lateral support is done so at one's peril. Government construction of roads, bridges, buildings, and other public works may deny lateral support to adjacent lands causing land failures (landslides, mudslides, erosion, building collapse). See, e.g., **Blake Construction Co. v. United States**, 585 F.2d 998 (Ct. Cl., 1978) (U.S. government liable for subsidence due to excavation next to existing buildings.)

--**Statutory Liability.** Some states have adopted statutes which create separate statutory grounds for legal action. For example, the Texas Water Code, section 11.086 makes it unlawful for any person to divert the natural flow of waters or to impound surface waters in a manner that damages the property of others. See **Miller v. Letzerich**, **49 S.W.2d 404** (Tex., 1932).

Courts have sustained regulations in some cases where few or no economic uses remain for lands and there were few nuisance impacts if the only practical uses were subject to natural hazards. See, for example, **McCarthy v. City of Manhattan Beach**, 264 P.2d 932 (1953), cert. denied, 348 U.S. 817 (1954), in which the California Supreme Court sustained a zoning ordinance restricting ocean-front property to beach recreation purposes, although there was little evidence that open space uses were practical. The court attached significance to the erosion and wave damage and the "safety of the proposed construction of houses thereon was 'a question upon which reasonable minds might differ.'"

See also **Filister v. City of Minneapolis**, 133 N.W.2d 500 (Minn. 1964), cert. denied, 382 U.S. 14 (1965) in which the Minnesota Supreme Court refused to invalidate as a taking a residential classification for a wetland area because proposed apartment buildings would have been incompatible with residences in the residence zone. In holding there was no taking, the court observed that "(I)t was not only incumbent on the plaintiffs to show that the ordinance was not confiscatory, but they have the burden of proving by clear and convincing evidence that the relief they sought would not result in detriment to neighboring property improved in reliance on the validity of the ordinance". Id. at 505. See also **Hamer v. Town of Ross**, 382 P.2d 375 (Cal. 1963); **Hodge v. Luckett**, 357 S.W.2d 303 (Ky. 1962).

A similar result was reached in **Consolidated Rock Products Co. v. City of Los Angeles**, 370 P.2d 342 (Cal. 1962), appeal dismissed, 371 U.S. 36 (1962). The California Supreme Court upheld restrictive regulations that prevented sand and gravel extraction - the only practical use for the land - in a floodplain area because the operations would threaten nearby residential areas. The court found no taking of property and observed:

The primary purpose of comprehensive zoning is to protect others, and the general public, from uses of property which will, if permitted, prove injurious to them.

It is therefore important for regulators to document possible offsite impacts of proposed activities in wetlands including the role of wetlands in flood conveyance, flood storage, erosion control, wave attenuation, and water pollution control and the impact of activities on these functions.

**--Are the private property owners' interest in land limited by other principles of state law?**

Courts have recognized a variety of state law limitations upon the rights of private landowners to make unrestricted use of their properties. For example:

The doctrine of custom. See **Stevens v. City of Cannon Beach**, 854 P.2d 449 (Ore. 1993) where the doctrine of "custom" as to public use of dry sand areas was applied by court to defeat a takings claim for a beach ordinance.

Beach access and recreational use easement (common law and codified by statute). See **Hirtz v. State of Texas**, 773 F. Supp. 6 (Tex. 1991), vacated on sovereign immunity of the state by 974 F.2d 663 (Tex. 1992), in which the court held that owners of property affected by hurricane which caused the vegetation line to move landward approximately 150 feet could not construct because the property was subject to a beach easement which had moved landward with movement of the vegetation line. There was no taking for imposition of an injunction against building.

Prescriptive easements. See e.g., **Concerned Citizens of Brunswick County Taxpayers Ass'n v. State ex rel. Rhodes**, 404 S.E.2d 677 (N.C. 1991) in which the North Carolina court recognized a possible prescriptive easement in favor of the public for use of beach areas due to continued and adverse use. See also other cases cited therein.

Limitations upon use of land by rights of other landowners. See **Lowcountry Open Land Trust v. State of South Carolina**, 552 S.E.2d 778 (S.C. 2001) (Court held that land owner needed the permission of land trust which held the littoral right of access was required for a landowner to build a dock although the landowner had deeded the littoral right to the land trust.)

Deed restrictions on use of land. See **Marianne Connaughton v Douglas Payne**, 779 N.E.2d 683 (Mass. 2002) (Landowner could not use land inconsistent with deed restrictions.)

Native Hawaii rights claim. See, e.g., **Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n**, 903 P.2d 1246 (Ha., 1995) in which the court held that private lands in Hawaii were subject to some Native Hawaiian rights claims. But, see **State of Hawaii v. Alapai Hanapi**, 970 P.2d 485 (Hawaii 1998).

### 3.3 What is the nature of the government's actions?

Having decided that a permit applicant has a valid property interest, a court will then focus upon the "nature of the government action" in deciding whether a taking has occurred. In examining the nature of the government action, a court often asks a number of more specific questions which have been discussed above but are also relevant to the takings inquiry:

**--Have the regulations been adopted to serve valid goals?** As observed above, courts have afforded legislative bodies broad discretion in determining regulatory goals. See **Berman v. Parker**, 348 U.S. 26 (1954). The U.S. Supreme Court in **United States v. Riverside Bayview Homes, Inc.**, 474 U.S. 121 (1985) strongly endorsed federal Section 404 wetland regulatory goals. State courts have similarly endorsed wetland/water protection goals.

However, courts have held invalid at least one regulatory goal for zoning--holding down land costs prior to acquisition. See, e.g., **Burrows v. City of Keene**, 432 A.2d 15 (N.H. 1981) (Court held that attempts to lower land values prior to acquisition through adoption of a conservation zone was a taking); **Hermanson v. Board of County Comm'rs**, 595 P.2d 694 (Colo.App. 1979) (Court held that county regulations to hold down property values for a dam were a taking). But see **Ramsey v. Stevens**, 283 N.W.2d 918 (Minn. 1979) (Court held that floodway restrictions which incidentally reduced land values prior to acquisition of a floodplain for park use were not a taking).

Courts have afforded valid regulatory objectives somewhat different weights in balancing public and private interests. Courts have particularly sustained regulations designed to protect public health and safety in part because landowners have no right to threaten public health and safety. For example, an Illinois court in **Cleaners Guild v. Chicago**, 37 N.E.2d 857 (Ill. 1941) stated (quoting an earlier case):

When the city council considers some occupation or thing dangerous to the health of the community, and in the exercise of its discretion passes an ordinance to prevent such a danger it is the policy of law to favor such legislation. Municipalities are allowed a greater degree of liberty of legislation in this direction than any other... The most important of the police powers is that of caring for the safety and health of the community.

Courts have consistently sustained regulations to protect safety or prevent nuisances. See generally, **Lindquist v. Omaha Realty, Inc.** 247 N.W.2d 684 (S.D. 1976) (Court held that resolution of Rapid City South Dakota Council prohibiting issuance of building permits for one block on each side of Rapid Creek after a devastating flood until a study was completed by a planning commission was a valid exercise of police powers and not a taking); **Foreman v. State Dep't of Natural Resources**, 387 N.E.2d 455 (Ind.

App. 1979) (Court sustained an injunction prohibiting defendants from making deposits on a floodway as not a taking of property and requiring removal of deposits previously made); **Zisk v. City of Roseville**, 127 Cal. Rptr. 896 (Cal.App. 1976) (Court held that no taking occurred when Roseville adopted a “park and streambed element” to its general plan recommending acquisition of selected floodplain areas and subsequently adopted a flood ordinance controlling this area); **Spiegle v. Beach Haven**, 218 A.2d 129 (N.J. 1966) (Court upheld, against facial challenge building setbacks and fence ordinances for a coastal area which had been badly damaged by the Ash Wednesday storm of March 1962 against claims that the regulations were a taking of private property); **McCarthy v. City of Manhattan Beach**, 264 P.2d 932 (Cal. 1953) (Court upheld beach zoning district which limited the beach to open space recreational uses based, in part, upon potential for storm damage to structures if constructed in the beach area); **Fallen Leaf Protection Ass’n. v. South Tahoe Public Util. Dist.**, 120 Cal. Rptr. 538 (Cal. 1975) (Court held that sections of Water Code providing that the use of cesspools or septic tanks in Lake Tahoe watershed is a public nuisance are valid); **Town of Indialantic v. McNulty**, 400 So.2d 1227 (Fla. App. 1981) (Beach setback line designed, in part, to reduce flooding and erosion damage, was constitutional); **Hall v. Board of Env’tl. Protection**, 498 A.2d 260 (Me. 1985) (Court upheld regulations prohibiting construction in sand dune area but remanded for evidence on taking claim); **Kopetzke v. County of San Mateo**, 396 F.Supp 1004 (N.D. Cal. 1975) (County regulations requiring a geologic report concerning soil stability not a taking); **Usdin v. State Dep’t of Env’tl. Protection**, 414 A.2d 280 (N.J. 1980) (Court upheld state floodway regulations prohibiting structures for human occupancy, storage of materials, and depositing solid wastes because of threats to occupants of floodway lands and to occupants of other lands); **Young Plumbing and Heating Co. v. Iowa Natural Resources Council**, 276 N.W.2d 377 (Iowa 1979) (Court sustained denial of a state permit for a condominium in a floodway where such a structure would have raised the level of flood waters on property on other side of the creek. The concept of “equal degree of encroachment” was endorsed as well as efforts to anticipate watershed conditions); **Maple Leaf Investors, Inc. v. State Dep’t of Ecology**, 565 P.2d 1162 (Wash. 1977) (Court upheld denial of a permit for houses in floodway of the Cedar River because there was danger to persons living in a floodway and to property downstream); **Beverly Bank v. Illinois Dep’t of Transp.**, 579 N.E.2d 815 (Ill. 1991) (Court upheld statute prohibiting residences in 100 year floodway in part to protect flood storage).

Prevention of pollution has been afforded substantial weight. See, for example, **Biggs v. Town of Sandwich**, 470 A.2d 928 (N.H. 1984) in which the Supreme Court of New Hampshire upheld zoning board of adjustment’s denial of a variance for a septic tank permit because the proposed septic tank would have been within a 125 foot setback area from a wetland. See also **Claridge v. New Hampshire Wetlands Bd.**, 485 A.2d 287 (N.H. 1984); **Saturley v. Hollis Zoning Bd. of Adjustment**, 533 A.2d 29 (N.H. 1987).

Evidence of inadequate soils for septic tanks/soil absorption fields and possible resulting pollution has also been given great weight by courts. See, e.g., **Saturley v. Town of Hollis**, 533 A.2d 29 (N.H. 1987), in which the New Hampshire Supreme Court held that denial of a variance for a septic tank in a wetland was reasonable based upon pollution concerns; **Santini v. Lyons**, 448 A.2d 124 (R.I. 1982) (Denial of permit for fill and septic tank in salt marsh upheld, in part, due to pollution concerns); **Milardo v.**

**Coastal Resources Mgmt. Council**, 434 A.2d 266 (R.I. 1981) (Denial of a permit for construction of sewage disposal system in a marsh upheld).

Efforts to prevent flood damage and prevent significant changes in hydrology have also been broadly endorsed. See, e.g., **Michelson v. Warshavsky**, 653 N.Y.S.2d 622 (A.D. 1997) (Denial of permit to subdivide valid based upon threat of flooding); **Eastbrook Construction Co., Inc. v. Armstrong**, 205 A.D.2d 971 (N.Y. 1994). (Town planning boards' rejection of permit application for alteration of wetland was validly based upon findings that proposed construction would lower water table and possibly eliminate wetland).

Courts have also endorsed protection of ecological values but have traditionally afforded them somewhat less weight than protection of safety and prevention of nuisances (which go to the "heart" of property rights). Courts have, in a number of cases, held that severe restrictions which deny all economic use of lands based primarily upon ecological considerations are a taking. See **Annicelli v. Town of South Kingston**, 463 A.2d 133 (R.I. 1983) (Court held regulations which prevented building on barrier island were a taking); **Morris County Land Improvement Co. v. Parsipanny Troy Hills Township**, 193 A.2d 232 (N.J. 1963) (Court invalidated in total a wetland conservancy district which permitted no economic uses where the district was primarily designed to preserve wildlife and flood storage). However in the cases following **Just v. Marinette County**, 201 N.W.2d 761 (Wis. 1972), quoted above, the Wisconsin Supreme Court held that private property was subject to public trust values. See discussion above.

**--Are the regulatory standards and conditions reasonably related to the goals?**

To meet takings as well as due process challenges, regulatory standards must have a reasonable tendency to achieve or help in the achievement of the goals of the regulation as discussed above. See **Nollan v. California Coastal Comm'n**, 483 U.S. 825 (1987). As the U.S. Supreme Court in **Lucas v. South Carolina Coastal Council**, 505 U.S. 1003 (1992) observed: "(T)he Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests....'"

If a landowner claims that regulations violate substantive due process because they lack adequate relationship to regulatory goals, the landowner's burden to overcome the presumption of validity is particularly great if a legislative act or expert agency action are involved. Courts have held that with regard to local zoning adopted by a local legislative body "(I)n order to support his constitutional claims the plaintiff is required to prove that the defendant's actions were clearly arbitrary, unreasonable, and discriminatory and bore no substantial relation to the health, safety, convenience and welfare of the community." **Burns v. City of Des Peres**, 534 F.2d 103, 108 (8th Cir. 1976), cert. denied, 429 U.S. 861 (1976). Courts have held that if the issue is "fairly debatable" a legislative act must be upheld. See **Shelton v. City of College Station**, 780 F.2d 475 (5th Cir. 1986), cert. denied, 477 U.S. 905 (1986).

**--Are the regulations discriminatory?** As observed above, courts are much more likely to hold that regulations are a taking where the regulations are also discriminatory. See **Parsipanny Troy Hills**...

### 3.4 What is the Impact of the Regulation Upon The Private Property Owner?

Having determined that a permit applicant has a “valid property interest” and that the government action is, overall, valid, courts then typically examine the impact of the regulation on the landowner. See generally, **Bickerstaff Clay Products Co., Inc. v. Harris County**, 89 F.3d 1481 (11th Cir. 1996). As noted above, courts more closely examine regulations that impose severe burdens on private property owners than those which impose lesser burdens. See **Strain v. Mims**, 193 A. 754 (Conn. 1937)

This means that a regulatory agency needs to undertake particularly detailed and accurate information gathering where regulations or denial of a permit may have severe impact on property owners, particularly where regulations may prevent all economic use of an entire property.

Courts consider a variety of factors in examining the impact of regulations on private property owners:

#### **--Is there a physical invasion of private property?**

Courts almost always hold that public entry and use of private property is a taking. For example, the U.S. Supreme Court in **Pumpelly v. Green Bay Company**, 80 U.S. 166 (1871) held that a taking occurred when the Federal government constructed a dam which flooded private property. Similarly, the New Jersey Supreme Court held invalid as a taking the construction of a large sand dune by the Army Corps of Engineers on private property to protect the surrounding area against hurricane damage. See **Lorio v. Sea Isle City**, 212 A.2d 802 (1965). The test of physical invasion has limited application to wetland regulations since regulations do not require the physical use of private property for public purposes. Borderline situations exist, however, such as a zoning of private beaches for public recreational uses and regulations which require the dedication of lands to public use.

#### **--Are special exceptions and variances potentially available?**

Regulations are not held to be a taking on their face where special permits, special exceptions or variances are available for structures, fills or other practical uses and a landowner has not submitted and had rejected meaningful applications. For example, the Connecticut Supreme Court in **Vartelas v. Water Resources Commission**, 153 A.2d 822 (Conn. 1959) upheld the denial of a permit under a state floodway protection law. The court observed that the denial of a permit for one proposed use was not equivalent to denial of all possible uses. The applicant could submit another application. Similarly, the Wisconsin court in **Just v. Marinette County**, 201 N.W.2d 761 (Wis. 1972) upheld tight wetland regulations against a claim of taking, noting that special exceptions were authorized by the ordinance. The potential for special permits was also considered significant by the Massachusetts Supreme Court in upholding floodplain regulations in **Turnpike Realty Co. v. Town of Dedham**, 284 N.E.2d 891 (Mass. 1972), cert. denied, 409 U.S. 1108 (1973).

Despite these holdings, the New Jersey court in an early case, **Morris County Land Improvement Co. v. Parsippany-Troy Hills Township**, 193 A.2d 232 (N.J. 1963) held that very restrictive wetland “conservancy” regulations were invalid as a taking despite the inclusion of special exception procedures. The court concluded that the standards for the special exceptions were so restrictive that no practical use was possible under the special exception procedure.

**--What is the duration of the restriction?**

Courts have upheld delays in processing of wetland permits as not a taking. See, e.g., **Griffith v. State**, 775 A.2d 54 (N.J., 2003). Courts have also upheld highly restrictive, interim regulations which do not permanently prevent all private economic uses for both inland and tidal wetlands. See also **New York Housing Authority v. Commissioner of Environmental Conservation**, 372 N.Y.S.2d 146 (1975) in which a New York court upheld a moratorium on alteration of tidal wetlands in New York. Similarly, a New Jersey court sustained a moratorium on construction in the Hackensack Meadowlands in **Meadowland Regional Development Agency v. Hackensack Meadowlands Development Commission**, 293 A.2d 192 (1972). Whether the taking has occurred is a more difficult issue for permanent, highly restrictive regulations. See **Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency**, 122 S.Ct. 1465 (2002) (Court upheld temporary ordinances which had applied for 32 months to “high hazard” (steep slope) zones near Lake Tahoe against a claim that they were a taking of private property.) The Court applied a “whole parcel” analysis to duration of regulation to decide that no taking had occurred.

**--Is the wetland area needed to meet the open space, recreation or other needs of a proposed subdivision?**

Subdividers may be required in some circumstances to dedicate wetland areas as open space or for storm water management. However, the U.S. Supreme Court has applied increasingly strict requirements to the regulations which require dedication of private lands to public uses. See **Nollan v. California Coastal Commission**, 107 S.Ct. 3141 (1987) in which the Court held that the California Coastal Council’s conditioning of a building permit for a beach front lot upon granting public access to the beach lacked an “essential nexus” between the regulatory requirement and the regulatory goals and was a taking. The Court held that the access requirement “utterly fail(ed) to advance the stated public purpose of providing views of the beach, reducing psychological barriers to using public beaches, and reducing beach congestion. See also, **Dolan v. City of Tigard**, 114 S.Ct. 2309 (1994) in which the Court held that city regulations for the 100 year floodplain which required a property owner to donate a 15 foot bike path along the stream were not reasonably related to the goals of the regulation and were therefore a taking. The Court stated that the municipality had to establish that the dedication requirement had “rough proportionality” to the burden on the public created by the proposed development.

However, the Court later in **City of Monterey v. Del Monte Dunes at Monterey, Ltd**, 119 S.Ct. 1624 (1999) held that rough proportionality test was limited to exactions of interests in land for public use. See **Lincoln City Chamber of Commerce et. al. v. City of Lincoln City**, 991 P.2d 1080 (Ore. 1999) which held that an ordinance was constitutional which required a permit applicant who was required by the ordinance to provide easements or other improvements to prepare a “rough proportionality” report if the applicant intends to assert that such easements or improvements cannot be constitutionally required.

State courts have upheld subdivision regulations requiring that subdividers provide open space and recreation areas to meet the needs of subdivision residents. See, generally, e.g., **City of Annapolis v. Waterman**, 745 A.2d 1000 (Mary. 2000) (Open space); **In re Denio**, 608 A.2d 1166 (Vt., 1992) (Aesthetic, open space requirements); Several courts have specifically upheld wetland protection requirements to meet open space needs. In **Patende v. Town of Meredith**, 392 A.2d 582 (N.H. 1978), the New Hampshire Supreme Court held that the Meredith, New Hampshire Planning Board acted within its authority in denying a sub-division plan for a 20 acre wetland area and a shore parcel along Lake Winnepesaukee. There was evidence that the soil type in the area was “unsuitable” for development,” the area was “wildlife habitat,” and that the parcel’s development would have been inconsistent with the town’s comprehensive plan “which called for preservation of natural features and maintenance of wildlife areas.” The court concluded that there was no taking of property in part because the area was needed by the subdivision residents as a recreation area and “the limitation in use is necessitated by the subdivision itself....”

Similarly in **Manor Development Corp., v. Conservation Commission of Town of Simsbury**, 433 A.2d 999 (Conn. 1980), the Connecticut Supreme Court held that town denial of a permit to fill and develop seven lots in a wetland area was proper. Denial had been based on several factors including potential health problems, destruction of natural habitat and because the area “may also serve as a significant aquifer recharge area and a means of sustaining stream flow.”<sup>182</sup> The court noted that the town had approved permission for development of other lots in the subdivision and concluded that there was no taking of property although the total value of the property had been reduced somewhat.

### **--What is the diminution in value of the property due to the regulations?**

The classic “diminution in value” test for taking was formulated by Supreme Court Justice Holmes in **Pennsylvania Coal Co. v. Mahon**, 260 U.S. 393 (1922), when he stated that in determining the limits of police power:

One fact for consideration...is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

In another case, the Supreme Court has held that “(t)here is no formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant...it is by no means conclusive.” **Goldblatt v. Town of Hempstead**, 369 U.S. 590 (1962). The diminution in value test has been cited in wetland cases but not widely applied as a final measure of taking.

Under the Lucas categorical rule and more traditional takings analyses, mere diminution in value of an entire parcel is not ordinarily enough to constitute a taking. See, e.g., **McElwain v. County of Flathead**, 811 P.2d 1267 (Mont. 1991) (Court upheld 100 foot set back between septic tank field and floodplain against claim of taking although the regulation reduced property values from \$75,000 to \$25,000 because the property owner was still able to utilize the property although not as near the river); **Mock v. Department of Env'tl. Resources**, 623 A.2d 940 (Penn. 1993) (Denial of permit to fill wetland to construct an auto repair shop not a taking either under Lucas analysis or traditional analysis).

However, the degree of diminution in value is relevant in deciding both whether there has been a denial of all economic use or a broader taking analysis using the balancing test. Other factors relevant to this determination include the size and shape of the parcel, existing uses, whether there are buildable areas on the parcel, taxes, purchase price, costs of public improvements, costs of reclamation and other factors. Justice Scalia in **Lucas v. South Carolina Coastal Council**, 505 U.S. 1003 (1992), stated that:

[T]he total taking inquiry we require...will ordinarily entail...analysis of, among other things, the degree of harm to public and land resources, or adjacent private property..., the social value of the claimant's activities and their suitability to the locality in question..., and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent landowners) alike...

Courts have very broadly held that regulations may validly reduce land values if practical uses remain for the land. For example, the **New Jersey court in Sands Point v. Sullivan**, 346 A.2d 612 (Super. Ct. App. Div. 1975), upheld a state coastal wetland protection order that prohibited dumping of solid wastes, discharging of sewage, and the storage or application of pesticides in an area. The court observed that the order did not prevent other practical uses. Similarly, the Maryland Supreme Court in **Potomac Sand and Gravel Co v. Governor of Maryland**, 293 A.2d 241 (Md. 1972), cert. denied, 409 U.S. 1040 (1972) upheld complete prohibition of dredging sand, gravel, or other aggregates or minerals in State wetlands in Charles County but did not prohibit other uses.

**--What is the impact of the regulations upon investment backed expectations?**

As already discussed above, courts also examine landowner expectations of landowners to determine whether a taking has occurred. See generally **Penn Central Transp. Co. v. City of New York**, 438 U.S. 104 (1978) in which the Supreme Court indicated that factors relevant to determination of a taking included “the character of the

government action”, “the economic impact of the regulation on the claimant,” and “the extent to which the regulation has interfered with distinct investment-backed expectations.” *Id.* at 124. So, documentation of the regulations in effect at the time that the property was purchased is also important.

State courts have usually held that purchase of land with knowledge of wetland regulations is no bar to a takings challenge but knowledge of the regulations is relevant to takings determination. This is the position of the U.S. Supreme Court as well. See **Palazzolo** and O’Connor’s concurrent opinion. **Palazzolo v. Rhode Island**, 121 S.Ct. 2448 (2001). See also **Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency**, 122 S.Ct. 1465 (2002).

State courts have often given considerable weight to knowledge of restriction at the time of purchase of property, particularly if the purchase price reflected the restrictions. See also **Gazza v. New York State Dep’t of Env’tl. Conservation**, 634 N.Y.S.2d 740 (N.Y., 1995) in which the court held that purchase of wetland property with knowledge of restrictions at a price reflecting those restrictions was not a taking. See also, **Amco Dev. Inc. v. Zoning Bd of Appeals**, 586 N.Y.S.2d 50 (N.Y., 1992) in which the court held that the purchaser of a lot from a vendor who divided a property into four parcels and sold one to the purchaser which was two-thirds wetland could not claim a taking for denial of a variance because the market value of the four parcels and not the single, wetland parcel was relevant to whether a taking had occurred. The court held that the right to a variance had to be based on the vendor’s not the purchasers rights.

#### **--Is there a reciprocity of benefit?**

Courts are particularly likely not to hold a regulation a taking if they find a reciprocity of benefits to the landowners. For example, the Supreme Court of Alaska in **R & Y, Inc. v. Municipality of Anchorage**, 34 P.3d 289 (Alaska, 2001) held that a 100 foot setback requirement for wetlands was not a taking where the regulations benefited all landowners. The court observed that “The passage of the CWA as well as of the state ACMP and the municipal AWMP all speak to the legitimacy of the governmental action.” The Court further observed that Federal courts have rejected the landowners’ “any economic loss is compensable” position.... These decisions aspire to allocate economic burdens and benefits fairly and will find an allocation fair when the disputed regulation: (1) applies broadly to many landowners; (2) directly benefits those that it burdens; and (3) permits burdened landowners to engage in viable alternative economic uses of their land. (Footnote numbers omitted.)

See also **Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Ashville**, 302 S.E.2d 204 (N.C. 1983) in which the court upheld a floodplain ordinance against challenges that it was a taking and denial of due process. The court noted that the landowner was “benefited because of the enactment of the regulation.” The court observed:

Besides the protection from flood damage which the land-use regulations provide, plaintiffs also are helped in a less direct way by the ordinance: they are eligible for federal flood insurance and federal financial assistance for acquisition and construction purposes only if the ordinance is enacted.

**--Has the landowner protested a restriction in a timely manner?**

Courts in some cases have held that landowners have failed to pursue takings claims within the state statute of limitation time period and may not, therefore, challenge regulations. See cases cited in Part 4 below. Even without statutes of limitations, courts in several cases have upheld tight restrictions which prevented all practical use of lands where landowners failed to contest restrictions in a timely manner and proposed activities would have harmed adjacent landowners. In **Hodge v. Lockett**, 357 S.W.2d 303 (Ky. 1962), a Kentucky court upheld residential zoning restrictions for an area 50 to 80 % low and marshy, noting that the time for an owner to protest restrictions is when a zoning ordinance is first adopted and not after others, in reliance on the restriction, have invested in neighboring property. The court stated:

True, his property ought not to be forever consigned to oblivion, but if he has remained silent when he should have spoken, it is no injustice to impose the condition that in order to justify a reclassification he show by clear and convincing proof that there will be no substantial resulting detriment to others.

This rationale was endorsed by the Minnesota Supreme Court in **Filister v. City of Minneapolis**, 133 N.W.2d 500 (Minn. 1964), cert. denied, 382 U.S. 14 (1965) which upheld a low density residential zoning classification for 8.43 acres, most of which was a marshland, despite claims by a purchaser that the restrictions prevented all practical uses. The court held that proposed apartment uses were inconsistent with surrounding residential uses and that the landowner had failed to meet the double burden of proof required to prove the regulations invalid. To establish invalidity the landowner would need to have shown that the regulations were both confiscatory and “that the relief...sought would not result in any substantial detriment to the neighboring property improved in reliance on the validity of the ordinance.”

**-- Is all practical use prevented by the regulations?**

Denial of all economic use of land is the bottom line test for wetland regulations in most instances. The burden is upon the landowner to establish that property has been deprived of any economic use. Economic uses may include not only new uses but existing uses such as residences. See **Genter v. Blair County Convention and Sports Facilities Authority**, 805 A.2d 51 (Penn. 2003).

The denial of all economic use test for taking is not new. It has been applied by state courts for many years. See Jon Kusler, Open Space Zoning: Valid Regulation or Invalid Taking? 57 Minn. L. Rev. 1 (1972). But, in **Lucas v. South Carolina Coastal Council**, 505 U.S. 1003, 1027 (1992), Justice Scalia stated the test as a categorical rule (with an exception) for application at all levels of government. Justice Scalia observed “(w)here the State seeks to sustain regulation that deprives land of all economically

beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of this title to begin with....” He offered the following guidance in applying this exception:

Any limitation (upon the owner's estate) so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts by adjacent landowners (or other uniquely affected persons) under the State' law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise. On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfill operation that would have the effect of flooding other's land. Nor the corporate owner of a nuclear generating plant, when its directed to remove to remove all improvements for its land upon discovery that the plant sits astride an earthquake fault.

See, for example, **Lopes v. City of Peabody**, 629 N.E.2d 1312 (Mass. 1994) applying the Lucas categorical rule.

#### --Are the proposed uses “reasonable”?

Some courts have held that there must be not only a denial of all practical uses for a taking to occur but a showing that the proposed uses are also reasonable. The test for taking in terms of “reasonable use” was stated by the Maryland court in **Walker v. Board of County Commissioners**, 116 A.2d 393 (1955), cert. denied, 350 U.S. 902 (1955), where the court observed:

To sustain an attack upon the validity of the ordinance, an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions upon his property preclude its use for any purpose to which it is reasonably adapted.

A distinction between denial of all “practical” use versus all practical and “reasonable” use may be important. For example, the only practical (economic) use for urban wetland may be drainage or fill and residential construction. But fills may create nuisances or threaten public safety by blocking flood flows, increasing flood and erosion damage on other lands, or causing water pollution. Denial of these activities might be a denial of all economic or practical uses but might not be a taking because these uses would not be reasonable. For example, in **Spiegle v. Borough of Beach Haven**, 218 A.2d 129 (1966), cert. denied, 385 U.S. 831 (1966), the New Jersey Supreme Court sustained an ordinance establishing a beach setback line for structures in a coastal area subject to extreme flooding. Conceding that no buildings could be constructed on some lots, the court noted that since the burden of demonstrating undue restriction on beneficial use was upon the plaintiffs, an essential element of any plaintiff's case was the existence of “some present or potential beneficial use of which he has been deprived.” The court observed:

Plaintiffs failed to adduce proof of any economic use to which the property could be put. The borough, on the other hand, adduced un rebutted proof that it would be unsafe to construct houses oceanward of the building line (apparently the only use to which lands similarly located in defendant municipality have been put), because of the possibility that they would be destroyed during a severe storm—a result which occurred during the storm of March 1962. Additionally, defendant submitted proof that there was great peril to life and health arising through the likely destruction of streets, sewer, water and gas mains, and electric power lines in the proscribed area in an ordinary storm. The gist of this testimony was that such regulation prescribed only such conduct as good husbandry would dictate that plaintiffs should themselves impose on the use of their own lands. Consequently, we find that plaintiffs did not sustain the burden of proving that the ordinance resulted in a taking of any beneficial economic use of their lands.

### **--What is the impact on the entire parcel?**

Courts have with little exception looked at entire private parcels in deciding whether regulations deny all practical, reasonable use of lands. For Supreme Court decisions see generally, **Gorieb v. Fox**, 274 U.S. 603 (1927) (Court sustained street setback of approximately 35 feet against taking claim); **Keystone Bituminous Coal Association. v. De Benedictis**, 480 U.S. 470 (1987) (Supreme Court considered the impact of regulations restricting the mining of coal upon the entire property not simply a portion); See also **Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency**, 122 S.Ct. 1465 (2002) (Court upheld temporary ordinances which had applied for 32 months to “high hazard” (steep slope) zones near Lake Tahoe against a claim that they were a taking of private property. The Court applied a “whole parcel” analysis to duration of regulation to decide that no taking had occurred.); **Palazzolo v. Rhode Island**, 121 S.Ct. 2448 (2001) (Court held that purchase of wetland subject to restrictions was not bar to a suit for taking of private property but the test for taking was the value of the entire parcel and not simply the wetland portion. The case was remanded for further proceedings. )

In more traditional land use control contexts, courts have often sustained highly restrictive regulations for only part of a property—such as building setback lines and official mapping of roads—where practical uses may be made of other portions. E.g., **Gorieb v. Fox**, 274 U.S. 603 (1927); **State ex rel. McKusick v. Houghton**, 213 N.W. 907 (Minn. 1927); **Sierra Construction Co. v. Board of Appeals**, 187 N.E.2d 123, 236 N.Y.S.2d 53 (N.Y. 1962); **Headley v. Rochester**, 5 N.E.2d 198 (N.Y. 1936); **State ex rel. Miller v. Manders**, 86 N.W.2d 469 (Wisconsin 1957).

This approach to the taking issue was endorsed by the U.S. Supreme Court in the important 1978 decision of **Penn Central Transp. Co. v. City of New York**, 438 U.S. 104 (1978) and has been widely followed in wetland cases since then. In this case the Supreme Court upheld denial of air rights over Grand Central Station as not a taking and looked at the impact of the regulations on the entire property. The Court stated:

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

For examples of state and local wetland and floodplain cases in which the court looked at the entire parcel see, for example, **K & K Construction, Inc. et al v. Depart. of Natural Resources**, 575 N.W.2d 531 (Mich. 1998); **Zealy v. City of Waukesha**, 548 N.W.2d 528 (Wis. 1996) (Court held that contiguous parcels of undeveloped property had to be considered as a whole, rather than as discrete segments, in determining whether regulatory taking arose from wetland conservancy rezoning); **Moskow v. Department of Env'tl. Mgmt.**, 427 N.E.2d 750 (Mass. 1981) (Court must look at the effect of a restriction upon an entire parcel and not just the wetland portion in determining whether a taking has occurred); **Krahl v. Nine Mile Creek Watershed Dist.**, 283 N.W.2d 538 (Minn. 1979) (Court held that watershed district's floodplain encroachment regulations tightly controlling development on 2/3 of 11 acre tract were not an unconstitutional taking).

See also **Volkema v. Department of Natural Resources**, 542 N.W.2d 282 (Mich. App. 1995) (Entire parcel available for development must be considered in determining extent of loss of six acre portion as protected wetlands); **Manor Development Corp. v. Conservation Comm'n of Town of Simsbury**, 433 A.2d 999 (Conn. 1980) (Entire parcel and not impact on seven lots in wetland should be considered); **American Dredging Co. v. State Dep't of Env'tl. Protection**, 404 A.2d 42 (N.J.App. 1979) (2500 acre tract is to be viewed in its entirety in determining whether restriction on 80 acres prevented all practical use of property); **Smith v. Williams**, 560 N.Y.S.2d 816 (A.D. 1990) (No taking, landowner failed to produce any evidence of value of entire property and Department produced evidence showing that if property were subdivided it would have market value exceeding \$230,000); **Deltona Corp. v. United States**, 657 F.2d 1184 (Cl. Ct. 1984) (U.S. Court of Claims held that denial of a permit by the Corps of Engineers to dredge and fill a mangrove wetland in Florida did not take property because denial of the permit would affect the usefulness of only a portion of the property); **MacLeod v. County of Santa Clara**, 749 F.2d 541 (9th Cir. 1984), cert. denied, 472 U.S. 1009 (1985) (Denial of a permit for a timber operation on a parcel not a taking).

But see **Nollan v. California Coastal Comm'n**, 483 U.S. 825 (1987) (Dedication requirements for a portion of a property a taking; however, dedication requirements were also held not reasonably related to regulatory goals).

Because state and federal courts have, with some limited exceptions, examined the impact of regulations upon entire parcels in deciding whether regulations deny all economic use of land, lot sizes become important. A regulatory agency carrying out a wetland assessment should therefore determine, early on, lot size as well as other factors discussed above. Lot size becomes significant in determining whether regulations prevent all practical use of the entire properties. Courts have sustained large lot sizes for lands with flooding or wetland problems. See **Frericks v. Highland Twp.** 579 N.W.2d 441

(Mich. 1998) in which the court upheld a natural hazard regulation which required 3 acre lot sizes which included wetlands. A New York court in **Gignoux v. Kings Point**, 99 N.Y.S.2d 280 (N.Y. 1950)<sup>170</sup> noted that the “best possible use...(of a marshy area) would be in connection with its absorption into plots of larger dimensions.” See **Harris v. Zoning Commission of the Town of New Milford**, 788 A.2d 1239 (Conn. 2002) in which the court upheld a byelaw which excluded wetlands, watercourses, and steep slopes in calculating minimum lot sizes.

Courts in some cases have recognized that properties may have a valid market value when used in conjunction with adjacent properties. See, e.g., **William W. Wyer v. Board of Environmental Protection**, 747 A.2d 192 (Me., 2000) in which the court held that denial of a variance under state sand dune laws was not a taking because the property could be used for parking, picnics, barbecues, and other recreation uses.

### **--Are Development Rights Credits Available?**

In some instances states and communities have provided “development” right credits which provide economic use for property even if development of the property is tightly controlled or prohibited. See, for example, **Toussic v. Central Pine Barrens Joint Planning and Policy Com’n**, 700 N.Y.S. 2d 358 (N.Y. 1999) in which a court held that an award of development rights credits worth \$23,100 to a property owner who paid \$14,000 for a number of parcels was not arbitrary, unreasonable, or confiscatory. See also **Williams v. Town of Hilton Head Is**, 429 S.E.2d 802 (S.C. 1993)

## **PART 4. AVOIDING LEGAL PROBLEMS; DEFENDING REGULATIONS IN COURT**

### **4.1 Avoiding Legal Problems**

Courts will, no doubt, be called upon many times in the next decade to determine whether wetland regulations are legally sound as applied to specific properties. States and communities should adopt strategies which minimize potential suits because they are expensive and time consuming. They should also position themselves to win if legal challenges do occur.

Suggestions for staying out of legal trouble include the following:

--**Carefully follow statutory procedures.** To stay out of legal trouble, governments and regulatory agencies need to follow statutory, regulatory, and ordinance procedures. See, **Vito v. Department of Env'tl. Management**, 589 A.2d 809 (R.I., 1991) (Regulatory agency had failed to conduct public hearing as required by statute.) **Prestige Builders v. Inland Wetlands Comm'n fo Ansonia**, 831 A.2d 290 (Conn., 2003) (Regulatory agency had failed to adopt regulations necessary to regulate upland review areas.) However regulatory agencies have discretion in how they carry out required procedures. See **Lizotte v. Conservation Com. of Somers**, 579 A.2d 1044 (Conn., 1990) (Agency authority to enact regulations is vested with large measure of discretion.) See also cases cited in Section 2.2 above.

--**Provide written documentation of facts and conclusions for denial or issuance of permits.** The failure by a regulatory agency to set forth supporting facts in issuing or denying a permit is quite a common basis for successful legal challenge. See, e.g., **KCI Management, Inc. v. Board of Appeal of Boston**, 764 N.E.2d 377 (Mass. 2002) in which the court held that a Greenbelt Protection Overlay District regulatory scheme was valid but held that city zoning appeals board had not set forth reasons in its decision denying a permit why the permit application was deficient and as to the manner in which compliance with various standards could be achieved. See also **Miss. Sierra Club, Inc. v. Miss. Dep't of Env'tl. Quality**, 819 So. 2d 515 (Miss. 2002) in which the court held that a Mississippi Commission on Environmental Quality's order certifying that a project complied with the Mississippi Air and Water Pollution Control Law was inadequate because it did not contain factual findings and articulated analysis concerning mitigation measures. See also cases cited in Section 2.4.

--**Adopt an overall standard or goal in regulations such as no net loss of acreage and function and apply it fairly and evenly.** Application of a "no net loss" goal equally to all landowners can reduce charges of discrimination. Courts are less likely to hold regulations a taking where they are fairly and evenly applied to all similarly situated properties. See "no net loss" cases in discussion of regulatory objectives above.

**--Do not zone or otherwise regulate lands for the primary goal of reducing future acquisition costs or allocating private lands to “public” uses.** See, e.g., **Burrows v. City of Keene**, 432 A.2d 15 (N.H. 1981) (Court held that attempts to lower land values prior to acquisition through adoption of a conservation zone was a taking); **Hermanson v. Board of County Comm’rs**, 595 P.2d 694 (Colo.App. 1979) (Court held that county regulations to hold down property values for a dam were a taking). But see **Ramsey v. Stevens**, 283 N.W.2d 918 (Minn. 1979) (Court held that floodway restrictions which incidentally reduced land values prior to acquisition of a floodplain for park use were not a taking).

**--Insure that conditions attached to issuance of permits are reasonably related to the overall goals of regulations.** See e.g., **Nicholas Geiben et al. v. Town of Pomfret Zoning Board of Appeals**, 688 N.Y.S.2d 303 (N.Y. 1999) (Condition approval of special use permit for a single family dwelling near a reservoir which required relocation of the structure was valid.) See cases cited in Section 2.6.

**--Approach dedication requirements for public use with care.** Insure that the regulations which require dedication of wetlands to public or quasi public uses impose only “roughly proportional” burdens on the subdivider and future landowners. For example, a requirement that a subdivider create or restore wetlands to store stormwaters must be reasonably related to the amount of stormwater generated in the subdivision. However, communities may be able to shift the burden to the landowner to show rough proportionality. See **Lincoln City Chamber of Commerce et. al. v. City of Lincoln City**, 991 P.2d 1080 (Ore. 1999) which held that an ordinance was constitutional which required a permit applicant who was required by the ordinance to provide easements or other improvements to prepare a “rough proportionality” report if the applicant intends to assert that such easements or improvements cannot be constitutionally required.

**--Provide variance and special exception procedures to provide an escape value for potential takings challenges.** See discussion of variances and special exceptions in Section 3.4 above.

**--Provide case-by-case procedures for resolving boundary disputes and other factual disputes.** Case-by-case procedures can help deal with inaccuracies in mapping and resolve other factual issues. See cases discussed above in the context of reasonableness in Section 2.2 above.

**--Anticipate takings challenges.** Communities should anticipate possible takings challenges when permit applications are submitted. A successful takings challenge is particularly likely where a landowner may be denied all economic and reasonable use of an entire parcel of privately owned land above the high water mark. This is especially true for an urban wetland purchased by a property owner before regulations were adopted for an area, where there are high land values, and where a wetland is being taxed at development potential. If a community decides that a taking challenge is possible or likely (see list of more specific questions below) the community can then undertake particularly careful fact-finding for the permit application and can provide the landowner with options for economic uses. See discussion below.

**--Provide the landowner with options for some economic uses when he or she applies for a permit.** See, for example, **King et al. v. State of North Carolina et. al.**, 481 S.E.2d 330 (N.C. 1997) in which the court held that landowner could not establish a taking because the state came forward with practical alternatives to the landowner's proposed construction plan.

**--Document hazards and nuisance impacts from proposed activities where there is a potential takings challenge.** The hazards which may result from wetland destruction such as increased flood flows should be documented with particular care where regulations may prevent all economic uses since courts are particularly willing to support regulations preventing threats to safety or nuisances. See cases cited in Section above. See cases cited in Section 2.6 above.

**--Tie in wetland regulations with local comprehensive land use planning.** Courts have held that adoption of a comprehensive plan that incorporates valid zoning goals increases the likelihood that zoning of a particular parcel is valid. See, e.g., **Northern Trust Bank/ Lake Forest, NA v. County of Lake**, 723 N.E.2d 1269 (Ill. 2000) and cases cited above.

**--Be prepared to buy some wetlands where all economic and reasonable use of whole parcels will be prevented by regulations.** Acquisition and regulatory efforts should be coordinated and used to complement one another. Acquisition is also particularly needed where public access to lands is needed.

**--Coordinate special assessments and real estate tax policies and regulations to reduce the financial burden of regulations on private landowners.** Courts are particularly sensitive to takings challenges when lands are being taxed or are being subjected to special assessments as if developable. See Dooley case

**--Where appropriate, adopt innovative regulations such as cluster subdivision regulations and transfer of development rights ordinances to reduce the burden on landowners while achieving wetland protection goals.** See cases cited in Section 3.4 above.

## **4.2 Defending Regulations Against Takings Challenges**

Once a law suit is threatened, how does a community decide whether it should settle or fight? What questions should be asked?

If regulations are challenged in court, a community or state will need to convince a judge that the regulations are fair, reasonable, and nondiscriminatory. The regulatory agency will need to convince a judge that the burdens on private landowners are justified taking into account private rights and public interests.

Some questions in evaluating and preparing for a potential takings case include:

1. When were the regulations adopted and when did the landowner commence his or her suit? Has the statute of limitations for an inverse condemnation or other type of suit run? This is an increasingly important defense for wetland regulations as each year goes by after adoption of regulations. See, e.g. **Millison v. Wilzack**, 551 A.2d 899 (Mary. 1989) (Three year statute of limitations for inverse condemnation action claim for damages due to regulations.); **McCuskey v. Canyon County Comm'rs**, 912 P.2d 100 (Ida. 1996) (Four year statute of limitations applied to inverse condemnation claim as date of construction was halted due to county's issuance of stop-work order and property owner's claim against county.) **Scott et. al v. City of Sioux City**, 432 N.W.2d 144 (Ia. 1988) (Five year statute of limitation statute applies to inverse condemnation action for regulatory taking.) **Flood Control Dist. V. Gaines**, 43 P.3d 196 (Ariz. 2002) (One year statute of limitations applies to inverse condemnation action) **Hensler v. City of Glendale**, 876 P.2d 1043 (Cal., 1994) (Three year statute of limitations on inverse condemnation action applied to city's restrictions on a building permit.)? Or 90 subdivision act? **City of Pompano Beach v. Yardarm Restaurant**, 641 So.2d 1377 (Fla. 1994) (Taking claim for regulation time barred.) **Dujmich v. New York State Freshwater Wetland Appeals Bd.**, 659 N.Y.S.2d 310 (N.Y.,1997) (Four moth statute of limitations applies to determination of New York Freshwater Wetland Appeals Board.) **Wilson v. Garcia**, 105 S.Ct. 1938 (S.Ct., 1985) (Three year limit for 1983 actions.) **Suess Builders Co. v. Beaverton**, 656 P.2d 306 (Or. 1982) (Six year limit for regulatory inverse condemnation actions.) **Ranch 57 v. City of Yuma**, 731 P.2d 113 (Ariz. App. 1986) (Four year statute of limitation applies to regulatory taking.)

2. Did the landowner purchase the property with knowledge of the restrictions? Purchase with knowledge of restrictions will not prevent a legal challenge but it is relevant to the taking issue. See discussion and cases cited in Section 3.2 and 3.4 above. More specifically, did the purchase price reflect the regulations? A landowner is in a particularly weakened position if the purchase price reflected the wetland regulations. Courts have held that purchase of property with knowledge of restrictions at a price reflecting those restrictions was not a taking. See **Gazza v. New York State Dep't of Env'tl. Conservation**, 634 N.Y.S.2d 740 (N.Y., 1995).

3. Where is the public/private land boundary relative to the proposed activities? Where is the high water mark? If lands are subject to public trust or navigable servitude, courts will generally hold that there is no taking. See, e.g., **McQueen v. S.C. Coastal Council**, 580 S.E.2d 116 (2003). Usually the lands below the high water mark on lakes and along the coasts are owned by the public. River lands below the high water mark may be subject to public trust or navigable servitude. See, e.g., **Sierra v. Maryland Department of the Environment**, 758 A.2d 1057 (Mary. 2000). Landowner had no right to build a boathouse over state wetlands. See also **Stewart v. H. James Hoover et al.**, 815 So. 2d 1157 (Miss., 2002) Court held that state owned tidelands despite a failure to show areas on public trust tidelands maps. See also cases cited in Section 3.2 above.

4. Are there other restrictions applying to landowners land such as restrictive covenants, easements, or customary use? If so, this may help defeat a takings claim.. See cases cited Section 3.2 above.

5. What is the entire parcel of landowner's land? Does he or she own adjacent lots? What is the history of ownership? In general, there will be no taking if the landowner can make economic use of his or her entire parcel. See cases cited in 3.4 above.

6. What are the existing uses of the property? Landowners are usually held to have no right to drain or fill a wetland for new use if there are existing economic uses for the property. Is there a residence on the entire property? Courts have often held that even a single residence on a parcel is an economic use and that a landowner cannot, therefore, claim a taking. See **Genter v. Blair County Convention and Sports Facilities Authority**, 805 A.2d 51 (Penn. 2003) in which the court held that existing residential use of property surrounded by wetlands barred a takings claim. Other existing activities including open space uses such as forestry, agriculture and recreation uses may also be reasonable, see, e.g., **Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck**, et al, 94 N.Y.2d 96 (N.Y., 1999) in which the court upheld recreation zoning for a private golf course against takings claims.

7. Has the property owner been fairly and consistently treated? In deciding whether to settle or fight, the community should decide whether the landowner is likely to be viewed sympathetically in a jury's eyes. Courts are likely to hold that regulations are invalid or a taking if a landowner has been jerked around, if a permit has been denied for this landowner but granted for others in a similar situation, or if the factual basis for the regulation is shaky. Has the community repeatedly changed what it says and does over a period of years? Courts are also particularly sensitive to situations where a community keeps changing its positions. See **City of Monterey v. Del Monte Dunes at Monterey, Ltd**, 119 S.Ct. 1624 (1999). See cases cited in Sections 2.5 and 2.6.

8. Is this wetland important? Courts are particularly likely to uphold regulations where a state or community can make a case that this wetland needs particularly to be protected because it is a rare wetland type, the habitat for endangered species, flooding of adjacent properties will occur, or the wetland is otherwise of special significance. See e.g., **Application of Cent. Baptist Theo. Seminary**, 370 N.W.2d 642 (Minn., 1985) in which the court held that "evidence indicates that urban wetlands are very important because of their scarcity and Jones Lake is an important wildlife habitat for waterfowl in Ramsey County." The court further observed that "Wetlands provide a unique natural ecosystem because they are capable of supporting a greater diversity of life than other habitats." **In re Freshwater Wetlands Port. Act Rules**, 798 A.2d 634 (N.J., 2002); **Richard Littauer v. The Inland Wetland Commission of the Town of Barkhamsted**, 2002 Conn. Super. LEXIS 2836 (Conn., 2002) (Court upheld denial of a permit to construct a farm pond for a wetland area with Spagnum wetland which was not tolerant of much disturbance in sediments or flow and was unique type of site.) However courts have given protection to wetlands even when they have been altered or not highly productive. See **Harrison et. al. v. New York Dep't of Environmental Conservation**, 733 N.Y.S.2d 85 (N.Y. 2001). Court held that permit had been validly denied for a tidal wetland that was functioning and productive although not highly productive.

9. Is there multilevel support for the wetland regulation? Courts have been particularly favorable to regulations adopted consistent with a larger, state or federal program. For example, the Supreme Court of Alaska in **R & Y, Inc. v. Municipality of Anchorage**, 34 P.3d 289 (Alaska, 2001) held that a 100 foot setback requirement for wetlands was not a taking. The court observed that “The passage of the CWA as well as of the state ACMP and the municipal AWMP all speak to the legitimacy of the governmental action.” In interpreting a wetland regulatory statute, a Michigan Court in **Huggett v. Department of Natural Resources**, 590 N.W.2d 747 noted that the according to Senate and House Bill analysis, the act creating the regulation was “intended to enable the state to assume authority to administer the federal Clean Water Act to Michigan’s wetlands.” The Court observed that to do so, the state regulations “must be enforced in accordance with, and be just as or more stringent than, its federal counterpart.” To be just as stringent, the Michigan farming exemption was held to apply only to established uses. In **Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Ashville**, 302 S.E.2d 204 (N.C. 1983) a North Carolina court strongly upheld the city of Ashville’s floodplain regulations adopted, in part, to qualify the city for flood insurance pursuant to the National Flood Insurance Program. See also **Adoph v. Federal Emergency Management Agency**, 854 F.2d 732 (5<sup>th</sup> Cir. 1988) (Floodplain ordinances passed by parish council in Louisiana in order to participate in the National Flood Insurance Program were not a taking.)

10. Has the landowner applied for a permit (if permits are allowed)? If so, how many permit applications has the landowner submitted? Usually courts do not hold that a landowner can challenge regulations as a taking until he or she has been denied a permit. See **Presbytery of Seattle v. King County**, 787 P.2d 907 (Wash., 1990); **United Savings Bank v. Department of Environmental Protection**, 823 A.2d 873 (N.J., 2003). However, denial of even four permit applications may not give rise to a taking if all of the applications are not reasonable. The Connecticut Supreme Court in **Gil v. Inland Wetlands & Watercourse Agency**, 593 A.2d 1368 (Conn, 1991) held that there had been no taking when the Agency denied a landowner’s forth application for a building permit. The court reasoned that the Agency might have rejected a more “modest” proposal if one had been offered by the landowner. See also **Leto et. al v. State of Florida Department of Environmental Protection**, 824 So.2d 283 (Fla. 2002) in which the court held that denial of a joint application of two adjacent property owners to build a duplex was not a taking were the property owners might build single family residences. See also cases cited in Section 3.4.

11. Has the landowner applied for a variance? Usually a landowner cannot challenge a regulation as a taking unless he or she has been denied both permit applications and variances and has exhausted other administrative appeals. See, e.g., **MacDonald, Sommer & Frates v. Yolo County**, 477 U.S. 340, 106 S. Ct. 2561 (1986); **Williamson Planning Comm’n v. Hamilton Bank**, 473 U.S. 172, 105 S. Ct. 3108 (1985); **Bong v. County of Madison**, 573 N.W.2d 448 (Neb. 1998);

12. What diminution in value will occur due to the restriction? Courts are unlikely to hold that there is a taking unless the diminution is very large (e.g., 80%-90% or more). See cases cited in Section 3.4

13. Might a special permit or variance permit some economic use of the land? Courts will not hold that there has been a taking if a special permit or a variance is available to permit some economic use for lands. See cases cited in Section 3.4 above.

14. Will the proposed activities be nuisance-like in their settings? Will they threaten public safety? Will they be “reasonable” in terms of adjacent activities? See cases cited in 3.2 above. For common law cases finding that one landowner who drains a wetland and increases flooding on another landowner is liable see, for example, the following and cases **Hendrickson v. Wagners, Inc.** 598 N.W.2d 507 (S.D., 1999) (Injunction granted by the court to require landowner who drained wetlands with resulting flooding of servient estate to fill in drainage ditches.); **Boren v. City of Olympia**, 112 Wash. App. 359, 53 P.3d 1020 (Wash. 2002) (City was possibly negligent for increasing discharge of water to a wetland which damaged a landowner.); **Snohomish County v. Postema**, 978 P.2d 1101 (Wash. 1998) (Lower landowner had potential trespass action against upper landowner who cleared and drained wetland.); **Lang et al v. Wonnenberg et al**, 455 N.W.2d 832 (N.D., 1990) (Court upheld award of damages when one landowner drained a wetland resulting in periodic flooding of neighboring property.)