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THE WETLANDS CONTROVERSY: A COASTAL CONCERN WASHES INLAND

I. Introduction

The mid-1960's and early 1970's have evidenced increasing legislative recognition of the importance of coastal wetlands as natural resources.¹ A concurrent development has been a judicial concern that this recognition may be affecting traditional constitutional safeguards against government appropriation of private property. These legislative and judicial developments may provide sufficient indicia of the probable success that interior states will have in formulating and implementing wetlands regulatory statutes.

The term “wetlands” has a broad definitional base which includes not only the salt marshes and tidal flats of the northeastern coastal states, but also the mangrove swamps of the southeastern states, and the lake and riverine marshes, bogs and regularly inundated lowlands of the interior states.² Previously, such wetlands had been regarded as wasteland; however, it is now recognized that they provide a number of valuable benefits. Marine food production and flood abatement are among the most prominent economic benefits of coastal wetlands. An estimated two-thirds of commercial fish and shellfish depend on these wetlands for nutrition and shelter during various phases of their life cycles.³ Tidal wetlands also serve as effective buffer zones to reduce flooding and hurricane damage to coastal communities.⁴

Interior wetlands have the capacity to absorb runoff, to store surface water and to release it slowly—a process that augments flood control and abatement.⁵ In areas where soil moisture directly affects crop yield, interior wetlands also play an important role in maintaining groundwater levels.⁶ Both coastal and interior wetlands serve as natural pollution abatement systems by disposing of water pollutants through oxidation.⁷ In addition to these direct and indirect economic benefits, wetlands are important for recreational purposes and provide necessary wildlife habitat.⁸

³ J. Teal & M. Teal, Life and Death of the Salt Marsh 207 (1969). Important commercial species include the shellfish—clams, oysters, crabs—as well as menhaden, mullet, striped bass, flounder, bluefish and shrimp. Id. at 205.
⁵ Clawson, Held & Stoddard, Land for the Future 435 (1960).
⁸ See Binder, Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands, 25 U. Fla. L. Rev. 18-25 (1972) for a more complete accounting of the value of wetlands.
The values of wetlands have been legislatively recognized by many coastal states impressed with the need to conserve an important but dwindling resource. Because of the increasing demand for coastal residences, developers are rapidly depleting available ocean-front property, including tidal wetlands. For example, since colonial times, Massachusetts has lost approximately twenty percent of its tidal marshes to housing developments, roads, and dumps. Connecticut's tidal wetlands have been depleted by two-thirds since the turn of the century; over a corresponding period its shellfish production dropped from a $48 million to a $2 million industry.

State legislation now actively protects a substantial portion of these coastal wetlands. However, statutes to protect interior wetlands have not been as widely enacted. This situation exists despite the fact that seven-eighths of the nation's wetlands are located in the interior, and that these wetlands possess comparable values and perform many ecological functions similar to those of coastal wetlands. Additionally, interior wetlands continue to be decimated by drainage programs and are now receiving increased pressure from lakefront developments.

That statutory protection is needed to prevent further reduction of valuable wetlands resources is not widely contested. However, the effect of such statutes has often been to deprive owners of all practical or productive uses of their wetlands property. This has raised the complex question of whether restrictions imposed under a state's police power amount to a governmental "taking" or confiscation of the property in contravention of state and federal constitutional provisions. If the state has exceeded the lawful bounds of its power to regulate for the public good, it may be required to compensate the landowner for the loss of his property through an eminent domain proceeding. The enactment of effective legislation for the inland states therefore, involves a series of questions: (1) who should control the interior wetlands, and (2) how can this control be economically and constitutionally manifested?

II. Wetlands Inventory: Problems in Identification and Implementation

A. Who Controls the Wetlands?

In some areas a hierarchy of authorities exists to regulate wetlands. Developers intending to fill privately owned wetlands may be required to obtain

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10 J. Teal & M. Teal supra note 3, at 247.
12 See note 1 supra.
14 Clawson, Held & Stoddard supra note 5, at 433 (1960).
16 Clawson, Held & Stoddard supra note 5, at 433 (1960).
17 The fifth amendment to the Constitution provides that persons shall not be deprived of property without due process of law, nor property taken for public use without compensation. State constitutions have similar provisions.
permission from federal,\textsuperscript{18} state\textsuperscript{19} and local\textsuperscript{20} governmental agencies. This series of hurdles greatly circumscribes freedom in the development of marsh properties and by itself probably discourages permit applications. It is unclear, however, to what extent the authority of various agencies supersedes or overlaps one another.

The authority of the U.S. Army Corps of Engineers to regulate activities in the coastal zone traditionally has emanated from its responsibility to prevent obstructions to navigation and enhance the flow of interstate commerce.\textsuperscript{21} Initially, the Corps was concerned with the regulation of dredge and fill operations only in navigable waters. Primarily through judicial fiat, the Corps became responsible: (a) for activities in waters not navigable in fact,\textsuperscript{22} and (b) for considering factors other than navigation in its regulation of dredge and fill operations.\textsuperscript{23} Recently, federal legislation has given the Corps unprecedented powers over "waters of the United States."\textsuperscript{24} This expansion places the Corps in the position of regulating interior wetlands never before within its jurisdiction. The Corps' regulatory authority now covers approximately 60\% of the nation's wetlands.\textsuperscript{25}

The Corps' increased authority however, has not gone unchallenged. Congressional debate continues over the wisdom and feasibility of undertaking an expansion of this magnitude. Indeed, several bills have been introduced which would contract the Corps' jurisdiction back to the navigable waters criterion.\textsuperscript{26} Further, the Corps' role in promoting the ecologically unsound stream "improvement" (channelization) programs,\textsuperscript{27} and their reluctance to abandon costly and controversial structural flood control programs (dams and levees) in favor of non-structural alternatives (floodplain zoning) has severely undermined the confidence of environmentalists in the Corps' sensitivity to ecological concerns. The stream channelization programs in particular have resulted in the destruction of substantial areas of wetlands.\textsuperscript{28} Still, the Corps is the only agency at the federal level with authority to regulate wetlands on a broad scale.

The states' authority over lands lying under tidal waters evolved from the public trust doctrine.\textsuperscript{29} This doctrine originated in England where the King was
deemed the owner of tidal lands—those seaward of the ordinary high water mark. The King’s ownership was manifested through two conceptual property interests: (1) his ownership as a private individual (jus privatum) which was alienable; and (2) the interest he held in trust for the public benefit (jus publicum) which was inalienable. These rights were vested in the individual states upon their admission to the Union.

Since America is a country of vast inland lakes, it was considered vital for states to protect public rights in those lakes capable of supporting commercial navigation. Accordingly, the basis of the states’ sovereign powers was modified from the British “tidal criterion” in favor of a “navigability in fact” test extending to freshwater lakes. Some states have broadened the navigability test to include any water body that receives substantial public use.

State control over wetlands seemingly is preferable to federal control for several reasons. First, the state’s authority to manage and preserve its own natural resources is well-recognized. Second, state control reduces the bureaucracy inherent with supervision at the federal level to more manageable units. Third, since each state varies in the nature and extent of its wetlands, states are uniquely qualified to fashion classification criteria specifically designed to meet their individual needs. Fourth, regulation programs should seek and incorporate local input (e.g., through public hearings); this is a more difficult task to coordinate at the federal level. Fifth, the growing success of on-going programs within several coastal states bespeaks the practicability of dealing with the wetlands’ problem at the state level of government.

While statutory legislation may establish uniform criteria for statewide application, the rights of many county, township or municipal governments to implement more rigorous requirements than those applied by the state have not been precluded. The Massachusetts Supreme Judicial Court has interpreted its wetlands act as establishing only minimum standards for statewide use; local governments have the power to formulate more stringent regulations subject only to constitutional safeguards. Thus, the state has not denied municipalities the right to deal more forcefully with local problems if the need arises. In several states local governments are directly involved in the evaluation of permit applications filed at the state level. Despite the obvious usefulness and desirability of this participation, it is clear that to date the primary mechanism for protecting wetland resources has been statutory regulation at the state level.

B. Statutory Definition: Scope and Legal Sufficiency

Inventorying wetlands necessarily involves the problem of developing a

31 See note 29, supra.
32 152 U.S. at 26.
33 152 U.S. at 26.
35 152 U.S. at 43.
36 See, e.g., Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893).
37 See text accompanying notes 54 and 75 supra.
consistent and meaningful definition to accurately describe a complex and changing natural resource. Several northeastern states have formulated definitions which utilize both the vegetative species which inhabit tidal marshes and the landforms characteristic of the coastal environment. While this composite appears to have worked satisfactorily within the coastal environment, the definitional problem is more acute in the interior states.

Interior wetlands often occur in infinite gradations which tend to defy systematic categorization and development of legal definitions that can be superimposed on the natural environment in a meaningful, repeatable and non-arbitrary manner. First, zones of vegetation, which tend to occur with sharper boundaries in coastal areas, are often blurred or indistinct in interior wetlands.

Second, a wider variety of plant species may inhabit interior, freshwater marshes complicating those wetlands inventories dependent on species identification. Moreover, interior states may be hindered by laws that cannot be implemented by reference to biological (vegetation) factors. These factors, when combined with state budget considerations, substantially increase the difficulty in conducting wetlands inventories in the interior states. To fully appreciate the disadvantages this creates in wetlands protection and enforcement, it is advisable to first examine those benefits that flow from a statewide inventory program.

C. Wetlands Inventory

Many protective statutes at the state level require that wetlands be mapped and inventoried. The New York Tidal Wetlands Act for example requires the preparation of maps which identify six categories of coastal wetlands. The State will use the maps as one source of information in drafting regulations to...

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39 N.Y. ENVIR. CONSERV. LAW § 25-0103(1) (McKinney Supp. 1974): "'Tidal wetlands' shall mean and include the following: (a) those areas which border on or lie beneath tidal waters, such as, but not limited to, banks, bogs, salt marsh, swamps, meadows, flats or other low lands subject to tidal action, including those areas now or formerly connected to tidal waters; (b) all banks, bogs, meadows, flats and tidal marsh subject to such tides, and upon which grow or may grow some or any of the following: salt hay (Spartina patens and Distichlis spicata), black grass (Juncus Gerardi), saltworts (Salicornia sp.), sea lavender (Limonium carolinianum), tall cordgrass (Spartina pectinata and Spartina cynosuroides), hightide bush (Iva frutescens), cattails (Typha angustifolia and Typha latifolia), groundsel (Baccharis halimifolia), marsh mallow (Hybiscus palustris) and the intertidal zone including low marsh cordgrass (Spartina alterniflora)."

40 Areas of salt marsh, for example, may contrast sharply in appearance with the upland vegetation inhabiting the slightly higher ground landward of the marsh.

41 Personal communication with Daniel Deely, Biologist, Environmental Protection Agency, Wash., D.C. (May 1975).


43 Personal communication with Daniel Deely, Biologist, Environmental Protection Agency, Wash., D.C. (May 1975).


identify those uses permitted for each wetlands category, and in the evaluation of subsequent permit applications.

A number of states have selected aerial photomaps as a useful and cost effective means of rapidly identifying and classifying wetlands. Aerial photographs "freeze" ground conditions at the instant of exposure, providing a permanent record of the extent and condition of the wetlands at the time of the overflight. Such overflights may be timed to coincide with the enforcement of a legislative act or the initiation of a moratorium on development. Traditional ground surveys, or the extensive use of tidal gauging as alternate methods may be prohibitively expensive and require such lengthy completion times that many wetlands would be lost before the protective legislation could be implemented. Additionally, these traditional methods provide no readily accessible record of the wetlands' condition at the time the law became effective; no reference base would exist against which possible infractions could be later checked and verified.

The aerial photographic method can be employed using two separate approaches. First, black-and-white infrared (BWIR) aerial photographs can be acquired at the "instant" of mean high water as indicated by tide gauges positioned on the ground. Because of the unique imaging properties of BWIR photography, the land/water interface will be sharply demarcated on the photographs as a light/dark boundary at mean high tide. However, the effectiveness of the technique is limited by the fact that the time at which mean high water occurs may be substantially different over relatively short geographic expanses of marsh. Moreover, the substantial effort involved in coordinating the air/ground data acquisition may generate prohibitive cost.

Because of these limitations, many coastal states have opted for a biological approach to aerial wetlands inventory. With this approach, aerial photographs are acquired over the coastal zone and enlarged to produce photomaps. Skilled analysts interpret vegetative information from the photographs to delineate the extent (i.e., where the wetland/upland boundary occurs) and type of wetland on the photomaps. The State of New York for example has used aerial photographs to prepare more than 700 maps of its tidal wetlands using the biological approach.

The inventory of interior wetlands poses significant problems not encountered in the coastal zone. For example, large expanses of marsh tend to

48 E.g., New Jersey, New York and Maryland.
49 Photomaps are prepared by enlarging the original aerial photograph and superimposing map grid coordinates and other features on the enlargement for ease of reference.
50 Martin, Brown & Garofalo, supra note 46.
52 Black-and-white infrared photographs are sensitive to visible as well as near-infrared radiation. Water will appear black on a BWIR photo while healthy green vegetation will be rendered in very light tones.
53 Along the barrier islands of southern Long Island, for example, high tide might occur on the ocean beach of a narrow island hours before it would occur on the island's bay side only a few hundred feet away. Personal communication with William Seestrom, Vice-President, Mark Hurd Aerial Surveys, Minneapolis, Minn. (Sept. 1974).
54 Martin, Brown & Garofalo, supra note 46.
occur around the shores of lakes, on the floodplains of rivers, or in low-lying woodlands. Frequently, these marshes are not continuous in occurrence, but are highly scattered or localized. Inventorying through aerial photographic methods therefore, may be more costly and time consuming. Also, the speciation in freshwater interior marshes is more complex than in saline coastal marshes requiring more time for accurate identification of vegetation types. These factors have led some states to forego comprehensive, and perhaps, economically prohibitive statewide inventories in favor of stop-gap measures more in line with the state's budget.

The stop-gap approach selectively uses limited resources to achieve maximum wetlands protection in those areas most seriously in need. However, the fundamental question of whether a particular area is a state-protected wetland may continue to be ripe for litigation long after a statute has been enacted. Because of the variations in wetlands species composition, useful precedents for determining whether an area will qualify as a statutory wetland may not result from individual court actions. Thus, this approach suffers from the fact that wetlands questions must be litigated, or otherwise decided, without the benefit of a uniform mapping approach consistently applied throughout the state.

Further, the laws of some states were not designed to be implemented through a wetlands mapping program. For example, Indiana's attempts to conserve wetlands are still constrained by the provisions of a law designed to be implemented using engineering techniques. The law specifically prohibits shoreline alteration on public freshwater lakes, but gives the state authority over only those wetlands occurring at or below the legally established level of the lake. Marshes lying above the established lake level are beyond the protection of the state. As a further obstacle, determining whether a marsh occurs at or below the established lake level may be nearly impossible even using engineering methods. Areas of "floating" marsh vegetation combine with the more conventional problems of surveying in uneven and unstable terrain to make the required accuracy virtually unobtainable. Responding to this situation, Indiana is now attempting to draft a wetlands protection act that would define and protect wetlands by reference to vegetation rather than engineering criteria.

**D. Determination of the Mean High Water Line**

While vegetation criteria are increasingly being used to inventory wetlands, one coastal state has taken the additional step of using vegetative differences to establish the location of its "ordinary" or "mean high water" line. Lands lying seaward of the line would thus be established as state-owned; property landward of the line would be privately owned. The use of vegetative criteria signals a break from the physical mensuration of the mean high water line through tide gauges, the court accepted method at the federal level. The federally ap-

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55 Aerial photographs are more economically acquired over long, continuous flightlines than over scattered, irregular or intermittent targets.
59 See Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10 (1935).
proved method requires a compilation and analysis of recorded tidal observations over an 18.6 year period⁶⁰ to establish "the average height of all the high waters at that place..."⁶¹

While the tide gauge method is sufficiently accurate to locate the mean high water line, its inherent disadvantages make its widespread use impractical.⁶² The New York state courts have adopted an alternative method for ascertaining the location of the mean high water line which they refer to as the "line of vegetation" test.⁶³ In *Dolphin Lane Associates, Ltd. v. Town of Southampton*,⁶⁴ the New York Court of Appeals rejected the tide gauge method approved by the Supreme Court⁶⁵ and a third method introduced by plaintiffs in favor of the line of vegetation test.⁶⁶ In so doing, the *Dolphin* court placed greater importance on the adherence to traditional property lines than on the increased accuracy that would be attainable through the new techniques. The court strongly emphasized the desirability of conforming to the landowners' expectations. In divining these expectations, the court relied on testimony that the long accepted policy of surveyors had been to fix the shore boundary by referring to the "line of vegetation."⁶⁷

The *Dolphin* method continued to be applied by the New York courts in *Town of Southampton v. Heilner*,⁶⁸ despite an assertion by the plaintiffs that the mean high water mark should be determined by reference to yet another test. Plaintiffs contended that because *Spartina alterniflora* (salt marsh cordgrass) requires daily inundation to achieve vigorous growth, the presence of this species could be used in locating the mean high water mark.⁶⁹ The *Heilner* court conceded that this new method had an unmistakable appeal, but denounced it as not

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⁶⁰ Id. There is a cyclic variation in the rise of water above sea level which has a period of 18.6 years. Id. at 27.
⁶¹ Id. at 26.
⁶² See e.g., Luttes v. State, 159 Tex. 500, 324 S.W.2d 167 (1958). "[T]he number of tide gauges along the hundreds of miles of Texas coast... is relatively insignificant, while the number which has been operated as much as a year is smaller still." Id. at 521, 324 S.W.2d at 180. Using ground investigations, Massachusetts had recorded protective orders for only 18,000 acres of its approximately 60,000 acres of coastal wetlands as of 1971, despite the fact that the protective legislation was enacted in 1965. However, orders were pending on another 25,000 acres. *Boesselman & Callies, The Quiet Revolution in Land Use Control* 205 (1971). See also text accompanying note 51 supra.
⁶³ This test refers to the method of locating the mean high water mark at the seaward edge of the marsh grasses and principally *Spartina alterniflora* (salt marsh cordgrass).
⁶⁵ "No legal significance attaches to the exact identification [of a line through the use of refined hydrographic data]." 37 N.Y.2d at 295-96, 333 N.E.2d at 359, 372 N.Y.S.2d at 55.
⁶⁶ The third method, the "type of grasses" test, is based on distinguishing between *Spartina alterniflora* (salt marsh cordgrass) which requires daily inundation to achieve high vigor growth and *Spartina patens* (salt meadow grass) which grows predominantly in areas less frequently inundated. *See* Dolphin Lane Assoc. v. Town of Southampton, 72 Misc.2d 868, 885, 339 N.Y.S.2d 966, 984 (1971).
⁶⁷ Apparently, the court considered this practice to have been so universal and long-standing as to have "ripened into a rule of property," which should not be altered even if scientific evidence established that the traditional boundary was in error. 37 N.Y.2d at 297, 333 N.E.2d at 360, 372 N.Y.S.2d at 55. One commentator reports that the court's method will place the high water mark so far into the bay that at high tide, it will be completely submerged. Humbach & Gale, *Tidal Title and the Boundaries of the Bay: The Case of the Submerged "High Water" Mark*, 4 FORDHAM URBAN L.J. 91, 108 (1975).
⁶⁸ 84 Misc.2d 318, 375 N.Y.S.2d 761 (Sup. Ct. 1975).
⁶⁹ The *Spartina alterniflora* test would really be only an extension of the "type of grasses" test. Primary reliance would be placed on using the presence and location of the grass *Spartina alterniflora* to indicate the most inward extent of ordinary (mean high) tidal flow.
making "societal sense."\textsuperscript{77} Again opting for custom over accuracy, this court utilized the "line of vegetation" (or "driftwood line" where there was no vegetation) to establish the mean high water mark. Significantly, the court noted that applying the method suggested by the plaintiffs might substantially change property boundaries and act to deprive private landowners of property they had held for years.

The Heilner opinion highlights the recurrent problem of translating scientific methodology into judicially acceptable formulae. For example, the court notes "several inherent inaccuracies"\textsuperscript{72} with the \textit{Spartina alterniflora} method, including the dilemma of where to place the mean high water line when the \textit{Spartina alterniflora} occurs in a broad band. By questioning whether the mark should be properly placed at the landward edge, the seaward edge or in the middle of the band of vegetation, the court reveals a lack of understanding in the significance of the proposed test. Since this species requires daily tidal flow to achieve a high vigor form, the mean high water mark could only occur at the landward edge of the \textit{Spartina alterniflora} band.\textsuperscript{72} Further, the court seems surprised by the proposition that the \textit{Spartina alterniflora} line would not describe a tidal plane,\textsuperscript{72} apparently not appreciating that elevation differences in tidal inundation may occur over relatively small areas due to differences in bottom depth, slope and configuration.\textsuperscript{74}

New Jersey has applied the \textit{Spartina alterniflora} vegetative test in its wetlands mapping program to locate the coastal mean high water line.\textsuperscript{75} The test is dependent on the fact that the high vigor form of \textit{Spartina alterniflora} thrives with daily inundation; the depauperate, or low vigor forms, do not receive sufficient nutrients to achieve vigorous growth because they are not daily inundated.\textsuperscript{76} Thus, the boundary between the two vigor types approximates the mean high water line.\textsuperscript{77}

The practical effect of determining mean high water through the use of vegetative criteria has been to assert state ownership over land\textsuperscript{78} which private landowners have held and paid taxes on—the problem anticipated by the

\textsuperscript{70} In reaching this conclusion, the court assumed that the settlers of the area were unaware of the significance of the location and growth of this predominant tidal wetlands species. 84 Misc.2d at 331, 375 N.Y.S.2d at 774.
\textsuperscript{71} 84 Misc.2d at 333, 375 N.Y.S.2d at 775.
\textsuperscript{72} The landward-most edge of the \textit{Spartina alterniflora} would indicate that point above which mean high tidal flow would generally not reach. See note 69 supra.
\textsuperscript{73} 84 Misc. 2d at 333, 375 N.Y.S.2d at 775. But see Note, The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping 53 N.C.L. Rev. 185 (1974). "A mean high tide level . . . is not actually a uniform level [but] an undulating line that varies from point to point. As a result, the intersection of a mean high tide with the land connects points of differing elevation and forms vertically undulating line." Id. at 246.
\textsuperscript{74} See Comment, Fluctuating Shorelines and Tidal Boundaries: An Unresolved Problem, 6 SAN DIEGO L. REV. 447, 450 (1969).
\textsuperscript{75} This test was based on studies conducted by Dr. R. R. Anderson, Associate Professor of Biology, American University.
\textsuperscript{77} \textit{Id}. Where the low vigor form was not present, the delineation of the mean high water line would be accomplished by separating the high vigor form of \textit{Spartina alterniflora} from other salt marsh species such as \textit{Spartina patens} (salt meadow grass or salt hay) or \textit{Distichlis spicata} (spike grass) which generally thrive at elevations above those flooded by daily tides.
\textsuperscript{78} The state claims ownership of all wetlands occupied by the high vigor form of \textit{Spartina alterniflora}. \textit{Id}. at 353.
Heilner court. The New Jersey approach nevertheless represents a bold and timely attempt to assert tight control over a rapidly depleting state and national resource. The approach used in New Jersey and the regulatory statutes passed by other states illustrate the competing concerns of the landowner’s right to use his property versus the asserted right of a state to regulate and protect its resources. Litigation arising within a number of states demonstrates that some regulatory controls have been unable to withstand judicial scrutiny and have been held to violate constitutional prohibitions against government appropriation of private property without due process of law.

III. Conflicting Interests:

State Police Power v. Private Ownership Rights

A. The Lawful Extent of the Police Power

The need for regulation of wetlands is evidenced by the rapid depletion of wetlands acreages. Regulatory control, however, must be exercised within the scope of constitutional guarantees. The constitutionality of wetlands legislation has been challenged on the grounds that: (1) the statute itself is inherently unconstitutional or, (2) the application of the statute achieves an unconstitutional result. Assertions that a statute is inherently unconstitutional are usually struck down in part because of the strong presumption of constitutionality that attaches to a statute.\(^79\) In evaluating a statute’s constitutionality, courts generally consider: (1) whether the interests of the public require such regulation,\(^80\) (2) whether the regulation is excessive for effectuating its own purpose,\(^81\) (3) whether the regulation acts in a discriminatory, or arbitrary manner,\(^82\) or (4) whether the regulation is unduly oppressive to the individual.\(^83\)

The question of whether a regulatory statute dictates an unconstitutional result frequently revolves around whether a “taking” has occurred. The Constitution proclaims: “No person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use without just compensation.”\(^84\) Nevertheless, states have a recognized right to regulate the use of private property through the exercise of their police power.\(^85\) The police power is validly employed to prohibit uses that would be injurious to the rights and welfare of the community. Nonetheless, if the power is exercised in a manner that is unreasonable or overly restrictive, courts may hold that its application is unconstitutional. For instance, if the property uses permitted by a statute

\(^{79}\) Petitioner’s burden in rebutting the presumption is substantial; the statute will be upheld if “any state of facts either known or which could reasonably be assumed affords support for it.” Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (1962) quoting United States v. Carolene Prod. Co., 304 U.S. 144, 154 (1938). See also, Orno-Veczie Water Dist. v. Penobscot City Water Co., 348 A.2d 249 (Me. 1975). “[Fact of unconstitutionality] must be established to such a degree of certainty as to leave no room for reasonable doubt.” Id. at 253. 80 Id. at 595.


82 369 U.S. at 595.

83 The due process requirement appears in the fifth amendment. The compensation provision is applicable to the states because it has been deemed to have been incorporated in the fourteenth amendment. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 235-41 (1897).

have been too severely restricted, the property may be judged to have been con-
structively taken. When the police power reaches this magnitude, the state must
exercise the power of eminent domain and compensate the landowner for his
loss.\textsuperscript{86}

Although an overextended use of the police power may raise the need to
exercise eminent domain, the underlying purposes of these two powers vary:

The police power regulates use of property because uncontrolled use would
be harmful to the public interest. Eminent domain, on the other hand, takes private property because it is useful to the public.\textsuperscript{87}

Thus, the distinction is between creating a public benefit rather than preventing
a public harm.\textsuperscript{88} Before considering whether wetlands regulation more validly
involves a use of the police power (prevents a harm), or of eminent domain
(creates a benefit), it is useful to trace the development of judicial criteria used
to delineate the boundaries of the two powers.

Initially, a "physical invasion" or appropriation of privately held property
was requisite to the determination that a taking had occurred.\textsuperscript{89} The physical
appropriation of land by the government represents a clear example of an un-
constitutional taking, however this criterion has proven inadequate to fully
evaluate the reach of statutory restrictions,\textsuperscript{90} especially in the area of wetlands
protection.

In \textit{Pennsylvania Coal Company v. Mahon},\textsuperscript{91} the Supreme Court applied a
"diminution in value" test to assist in detecting statutory actions that did not
involve a physical invasion, but nevertheless constituted a taking. The \textit{Penn-
sylvania Coal} statute prohibited all deep coal mining operations that would
create surface subsidence. The statute effectively nullified a contract which the
coc company had entered into with the owner of the surface property rights.
The contract would have permitted the company to exploit its subsurface mining
rights regardless of the effect on surface conditions. The Court's opinion rein-
forced the importance of the constitutional prescription against governmental
appropriation:

The protection of private property in the Fifth Amendment presupposes
that it is wanted for public use, but provides that it shall not be taken for
such use without compensation.

... We are in danger of forgetting that a strong public desire to improve the
public condition is not enough to warrant achieving the desire by a shorter
cut than the constitutional way of paying for the change.\textsuperscript{92}

In dissenting, Justice Brandeis struck a chord that has been echoed by several
recent cases:  \textsuperscript{93}

\begin{flushleft}
\textsuperscript{86} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
\textsuperscript{88} Just v. Marinette County, 201 N.W.2d 761, 767 (Wis. 1972), quoting 1 RATHKOFF,
\textsuperscript{89} See, e.g., Pumpelly v. Green Bay Co., 80 U.S. 166 (1871).
\textsuperscript{90} Washington Market Enterprises, Inc. v. City of Trenton, 68 N.J. 107, 117, 343 A.2d
408, 413 (1975).
\textsuperscript{91} 260 U.S. 393.
\textsuperscript{92} Id. at 415-16.
\textsuperscript{93} See text accompanying notes 119 and 127 \textit{supra}. 
\end{flushleft}
The right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Wetlands development is one such activity that formerly was acceptable and desirable in the eyes of the public, but which now may be considered a threat to the public welfare.

Although the Pennsylvania Coal decision has been widely cited in floodplain zoning and wetlands cases, there is some indication that the Supreme Court has moved toward allowing the states greater latitude in the use of the police power. In Goldblatt v. Town of Hempstead, the Court again explored the outer perimeter of the lawful use of police power. Goldblatt concerned an amended town ordinance that prohibited a gravel pit owner from excavating below the water table and required that the present excavation be filled. In upholding the constitutionality of the ordinance, the Court quoted approvingly from a pre-Pennsylvania Coal holding that uses injurious to the health, or safety of the community can be properly restricted because “[s]uch legislation does not disturb the owner in the . . . use of his property for lawful purposes . . . .” The Court also cited another of its pre-Pennsylvania Coal decisions where a 94% reduction in property value was not considered to be an unconstitutional taking. By reapproving this extreme example, the Court seemed to be moving the “diminution in value” test out of the spotlight and into the background. Many courts however, continue to apply the test as one element to be seriously considered in resolving the “taking” question.

B. Challenges to the Constitutionality of Wetlands Regulatory Statutes

In early decisions, courts tended to view wetlands regulations as being too restrictive because the wetlands owner was deprived of virtually all productive uses of his property. These decisions seemed to be particularly sensitive to discovering attempts by the government to take property under the guise of regulation. Morris County Land Improvement Company v. Township of Parsippany-Troy Hills is one widely cited early wetlands decision in which the constitutionality of a township zoning ordinance restricting the use of privately

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94 260 U.S. 393, 417 (Brandeis J., dissenting).
95 369 U.S. 590.
96 123 U.S. 623, 669 (1887) (emphasis added).
97 Hadacheck v. Sebastian, 239 U.S. 394 (1915). Petitioner’s property was diminished in value from $800,000 to $60,000.
98 These courts may have recognized Goldblatt as involving strong elements of public nuisance. The suggestion of a public nuisance rationale is one possible explanation for the Court’s return to the pre-Pennsylvania Coal evaluation criteria.
99 Dooley v. Town Plan & Zoning Comm’n, 151 Conn. 304, 197 A.2d 770 (1964) (The permitted floodplain uses provided the owner with no means of obtaining an economic return for his property). Accord Bartlett v. Zoning Comm’n, 161 Conn. 24, 282 A.2d 907 (1971). “Other than public boat landings and ditches, neither of which would appear to be a private activity, the plaintiff’s use of his property is practically nonexistent unless he happens to own a boat . . . .” Id. at 31, 282 A.2d at 910.
owned interior wetlands was examined. The New Jersey Supreme Court unanimously concluded that the prime object of the zoning regulations was to preserve the land in its natural state:

It is . . . legally of the highest significance, that the main purpose of enacting regulations with the practical effect of retaining the meadows in their natural state was for a public benefit.¹⁰³

Perceiving that the regulations were enacted to provide protection from flooding and to preserve open space, the court determined that the situation clearly manifested a governmental appropriation of private property for the benefit of the public. Thus, the statute was struck down as unconstitutional. Nevertheless, it should be noted that important dicta from a recent decision of the New Jersey Supreme Court appears to signal a deliberate move away from the Morris County decision.¹⁰⁴

At the state level, Maine was one of the first states to grapple with the constitutional problems evolving from the statutory protection of coastal marshes. In State v. Johnson¹⁰⁵ the Supreme Judicial Court of Maine examined the denial of a permit which had requested permission to fill a privately owned wetland. The court viewed the issue as one requiring the balancing of:

[The public interest in braking and eventually stopping the insidious despoliation of our natural resources . . . and the protection of appellants’ property rights. . . .]¹⁰⁶

This balancing test led the court to conclude that the appellants would bear more than their share of the conservation program costs; the compensation they would receive from the program’s benefits would be disproportionate to the deprivation of their reasonable use of the property.¹⁰⁷

The “reasonable” and “practical use” criteria were continued by the Supreme Judicial Court of Massachusetts in MacGibbon v. Board of Appeals of Duxbury.¹⁰⁸ The MacGibbon plaintiff originally applied in 1962 for a wetlands development permit. The application conformed with the requirements of a by-law enacted to protect and preserve the town’s natural resources. A pattern of denial, appeal, and remand then occurred until in 1976 the Supreme Judicial

¹⁰² A selected list of the uses permitted under the new regulations included: “agricultural uses . . . raising of aquatic plants, fish and fish food . . . conservation uses . . . hunting and fishing preserves. . . .” Id. at 545, 193 A.2d at 236.
¹⁰³ Id. at 553, 193 A.2d at 242.
¹⁰⁴ The New Jersey Supreme Court went out of its way to proffer the following commentary in AMG Assoc. v. Township of Springfield, 65 N.J. 101, 319 A.2d 705 (1974):

“The approach to the taking problem, and the result, may be different where vital ecological and environmental considerations of recent cognizance have brought about rather drastic land use restriction in furtherance of a policy designed to protect important public interests wide in scope and territory, as for example, the coastal wetlands act, N.J.S.A. 13:9A-1 et. seq., and various kinds of flood plain use regulation. Cases arising in such a context may properly call for a reexamination of some of the statements 10 years ago in the largely locally limited Morris County Land case, supra (40 N.J. 539, 193 A.2d 232).” Id. at 112, 319 A.2d at 711 n.4.
¹⁰⁵ 265 A.2d 711 (Me. 1970).
¹⁰⁶ Id. at 716.
¹⁰⁷ If this rationale were to be extended, it would seem that everyone should bear a commensurate share of the burden necessary to secure public good—a concept closely aligned with the principle underlying the power of eminent domain.
Court ruled that the permit should be granted. Essentially, the court’s primary concern was that no practical use of the property remained for the plaintiff.\textsuperscript{109} Although permitted uses included recreation and agriculture,\textsuperscript{110} the court found these, and a list of uses suggested during the proceedings in the lower court to be lacking in practicality:

[B]ird watching, hiking . . . looking at the water . . . just simple pride of ownership. . . . flying model airplanes or kites, growing marsh hays . . . to protect the view, to provide a view . . . conservation. . . .\textsuperscript{111}

Several significant factors emerge from the aforementioned cases. First, the courts have adhered to the concept that a private landowner’s rights cannot be sacrificed merely because a greater and broader public interest is at stake. Second, the courts recognize the landowner’s right to use his property in a practical\textsuperscript{112} or productive\textsuperscript{112} manner, i.e., to gain monetarily from his possession. However, here the two objectives of wetlands preservation and protection of individual property rights collide; what the courts may not have appreciated is that there are few, or no, productive uses that wetlands may serve without undergoing severe modification and losing their basic qualities. Therefore, the question is whether the state must purchase such wetlands to preserve them or, whether the public policy considerations override the long-standing right of the property owner to benefit from the use or sale of his property.

A judicial turn in support of floodplain and wetlands regulations was apparently signaled by the Massachusetts Supreme Judicial Court in \textit{Turnpike Realty Company, Inc. v. Town of Dedham}.\textsuperscript{114} Although cited in support of wetlands legislation, \textit{Turnpike Realty} was actually a flood hazard zoning decision in which the constitutionality of regulations preventing plaintiff from developing his property was examined. Concluding that the flood hazard regulation was not tantamount to a governmental appropriation, the court indicated that its effect:

(1) protected the upstream and downstream property owners from the increased flooding that would have resulted had plaintiff received permission to fill,\textsuperscript{115} and

(2) reduced the public’s burden in funding flood disaster relief. Although the uses\textsuperscript{116} permitted by the regulation were essentially those found to be impractical in \textit{MacGibbon}, the court asserted that the plaintiff had not been deprived of every beneficial use of his property.\textsuperscript{117} In fact the court seemed to rely principally on a balancing test: in deciding whether an appropriation had occurred, the severity of the restrictions would be balanced against the potential harm to the community resulting from overdevelopment of a floodplain.\textsuperscript{118}

\begin{thebibliography}{9}
\bibitem{109} The court also noted that plaintiff's property had a fair market value of $5300, but a potential value of $14,000 if single family residences could be built.
\bibitem{110} Apparently, the reference to agricultural use pertains to the harvesting of salt hay (\textit{Spartina patens}) for fodder.
\bibitem{111} 340 N.E.2d at 491.
\bibitem{112} \textit{Id.}
\bibitem{113} Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 558, 193 A.2d 232, 243 (1963).
\bibitem{114} 362 Mass. 221, 284 N.E.2d 891 (1972).
\bibitem{115} \textit{Id.} at 234, 284 N.E.2d at 899 n.5.
\bibitem{116} The \textit{Turnpike Realty} bylaw permitted woodland, grassland, wetland, agricultural, horticultural or recreational uses not requiring filling. \textit{Id.} at 224, 284 N.E.2d at 894.
\bibitem{117} The discussion of practical uses remaining to the landowner seemed to be almost incidental to the main thrust of the holding. The court also accorded little importance to the “diminution in value” test even though there was some evidence of an 88\% reduction in value.
\end{thebibliography}
The Turnpike Realty holding may be distinguished from wetlands cases because of at least one important factor. Wetlands protection statutes have been primarily concerned with the loss of benefit, or the public harm that results from despoliation of these resources. The harm resulting from flooding however, both in terms of monetary damage and loss of human life, is more direct and dramatic than the slow depletion of a valuable resource. Indeed, whether the wetlands regulation issue can be framed persuasively as one involving a cognizable, definite and direct harm to the public interest may well have a critical impact on the trend of future holdings.

A decision from the Supreme Court of New Hampshire, Sibson v. State, apparently demonstrates that the wetlands restriction issue can be so framed. The Sibson plaintiff appealed from a denial of permission to fill four acres of salt marsh. A judicial referee found that plaintiff's proposed activity would irreparably damage an already endangered and diminishing natural resource. In upholding the permit denial the Sibson court rejected the "diminution in value" test as being "imprecise and unsuited to the problems involved in the preservation of wetlands." Rather, the court ruled that no taking occurs if the state makes a valid use of its police power to proscribe activities that could be harmful to the public. The court then quoted approvingly from one of its recent decisions where a more liberal measure of the valid extent of the police power had been advanced: "[T]here is no public taking unless the prohibition deprives the owner of the only use of his land."

The Sibson court in part based its holding on the premise that since a substantial public interest had been shown, the restriction on the individual property owner would not be unreasonable. Moreover, the court asserted that: (1) plaintiff had not been deprived of current uses of the marsh, and (2) the permit denial had not depreciated the value of the marshland, apparently because its value as regulated property that could not be developed was nominal both before and after the permit denial. Following this reasoning, a marked depreciation in the property's value must have occurred with the enactment of the regulatory statute and not when the permit was denied. Since it is unlikely that plaintiffs would have had greater success in challenging the constitutionality of the statute itself, the court's reasoning deprives them of any basis for recovering on the depreciation question regardless of the merit of the claim.

118 Id. at 235, 284 N.E.2d at 900.
120 Id. at 241.
121 Id. at 242 (emphasis added), quoting Flanagan v. Town of Hollis, 112 N.H. 222, 223, 293 A.2d 328, 329 (1972).
122 Id. at 243 (emphasis added).
123 In sustaining the denial of the permit application the judicial referee found that "[t]he unfilled portion of the marsh is of practically no pecuniary value to the plaintiffs." Id. at 240.
124 Plaintiffs purchased a six-acre parcel in 1968 for $18,500. In 1972 plaintiffs filled two acres, constructed a house, and sold the house ($50,000) and the two acres of land ($25,000) for $75,000. The remaining property, therefore, had more than a "nominal" value before the statute restricting property use was enacted.
125 If this rationale were to be given free rein, the "diminution in value" test would seemingly be rendered non-functional in wetlands cases. Since the fair market value of the wetlands parcel will plummet with the statute's enactment, permit denials in effect would have no impact on property values. The value of the undeveloped wetland would be the same both before and after the permit denial.
While the coastal states have been struggling with the "taking" question, inland states until recently have not experienced a large amount of wetlands litigation. This reflects the lack of stringent regulations to curb wetlands development and the heretofore lower development pressures associated with many lakefront as contrasted with oceanfront properties.\(^\text{126}\)

A decision from Wisconsin may have pioneered the way for inland states to enact and enforce stringent wetlands preservation statutes. \textit{Just v. Marinette County}\(^\text{127}\) involved a county ordinance regulating land use around the shores of county lakes to promote water quality and protect the public's rights in the navigable lake waters.\(^\text{128}\) The ordinance indirectly served to protect wetlands adjacent to the lakes as a prerequisite to the maintenance of water quality.\(^\text{129}\)

Prior to the passage of the county ordinance, the Justs purchased land along a navigable lake shoreline. Subsequently, they commenced to fill this property in violation of the ordinance. The Wisconsin Supreme Court perceived the basic issue as "a conflict between the public interest in stopping the despoliation of natural resources . . . , and an owner's asserted right to use his property as he wishes."\(^\text{130}\) The issue was thus framed in a strikingly similar manner to \textit{State v. Johnson}.\(^\text{131}\) The Just court, however, diverged from the Johnson rationale in its resolution of the issue. First, the court interpreted the ordinance as restricting the use of property "not to secure a benefit for the public, but to prevent a harm. . . ."\(^\text{132}\) The court then stated that police power is not confiscatory if the use to be restricted would harm the general public. Allowing wetlands development would cause a harm to the general public because of the loss of a valuable state resource. The purpose of the regulation therefore, was not to acquire something for the public good but to prevent activity harmful to the public.

Significant also is the court's assertion that an owner may not have the right to alter land significantly from its natural state:

An owner of land has no absolute . . . right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.\(^\text{133}\)

The court's approach seems heavily laden with recent doctrine from land use planning and conservancy ethics, and represents a major departure from

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126 Developmental pressures are now increasing because of population migration to non-urban areas and the impact of the "second home" cultural phenomenon.
127 56 Wis.2d 7, 201 N.W.2d 761.
128 The ordinance was authorized by Wisconsin's Water Quality Act of 1965 and enacted in conformance with state-developed regulations.
129 The Marinette County ordinance required the issuance of a permit to engage in filling, draining or dredging of wetlands. Uses that did not require a permit included: harvesting of wild crops, sustained yield forestry, hunting, fishing, hiking trails, etc. 201 N.W.2d at 765-66 n.4.
130 201 N.W.2d at 767.
131 See text accompanying note 105 supra.
132 201 N.W.2d at 767.
133 This rationale sounds of a return to public nuisance theory. One commentator reports that while courts can prohibit actions of a private property owner which represent nuisances, prior warning of what is or is not a nuisance is essential. Michelman, \textit{Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law}, 80 \textit{Harv. L. Rev.} 1165 (1967).
most previous wetlands holdings. The rights of a landowner to use his property in a socially acceptable way have traditionally been closely guarded; the Wisconsin court appears to have subordinated this right in the face of a somewhat amorphous concept of public harm.

The court does not attempt to balance the magnitude of environmental harm against the owner's rights but rests instead on the general knowledge that some harm will result. However, any change in the natural character of the land or land cover will cause some public harm: tilling the land for agricultural uses likely will cause increased erosion and eventually result in siltation of navigable water bodies, while clearing timber from natural woodland areas may have a similar effect. Thus, the court's reasoning that the landowner's traditional rights must be subordinated because modification of the land will cause public harm, seems to be fluid and without definite boundaries. Moreover, the property's physical makeup, under the court's logic, may exert a controlling influence over the landowner's prerogatives.

The *Just* holding relies on the proposition that the objective of the ordinance is avoidance of public harm rather than public improvement. This assertion, if successfully attacked, could lessen the effect of the court's holding in future litigation. One of the purposes underlying the ordinance was to "prevent and control water pollution." The recognized capacity of wetlands to ameliorate water pollution strongly suggests that the preservation of wetlands should provide a significant public benefit—abatement of existing and future water pollution. Following this argument, the restriction appears to be targeted towards improving the public health, contrary to the court's conclusion. Also, the court's statement that the preservation of nature does not improve the public condition but merely maintains the environmental status quo seems questionable. Would the court also contend that the government's acquisition of vast acreages of pristine wilderness does not improve the public condition or serve the public interest?

Despite these criticisms, the court's far-sighted views certainly seem more conducive to necessary environmental protection than the more narrow, case-by-case approach of *MacGibbon*. The development of wetlands parcels may not represent a significant enough public harm to be judicially recognized on an individual basis, but such an incremental approach can only serve to defeat the very purpose for which protective legislation was enacted.

If meaningful environmental protection is to result from wetlands regula-

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134 In upholding the validity of the ordinance, the court thinly distinguished *Dooley, Morris County, State v. Johnson* and *MacGibbon*. The court then embraced the *Turnpike Realty* decision as analogous to the *Just* facts even though that decision was concerned with flood plain and not wetlands zoning.

135 "[W]e think it is not an unreasonable exercise of [the police] power to prevent harm to public rights by limiting the use of private property to its natural uses." 201 N.W.2d at 768 (emphasis added).

136 "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." 201 N.W.2d at 768.

137 201 N.W.2d at 765 n.1.

138 See text accompanying note 7 supra.

139 The court states that: "Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters." 201 N.W.2d at 768 (emphasis added). The court later maintains however, that the ordinance doesn't "improve the public condition but only preserves nature. . . ." 201 N.W.2d at 771.
tions, it appears that courts must either take a broader view of what are “practical” uses of the wetlands, or must embrace the concept that public good may sometimes outweigh the wetland owner’s right to the productive use of his property—essentially the theory underlying the Just and Sibson decisions. Whether the courts of the interior states adopt the Just-Sibson approaches, or whether they follow the more conservative Morris County-MacGibbon line of decisions may well depend on the safeguards incorporated into interior wetlands protection statutes.

C. Wetlands Statutes for the Interior States

The above decisions illustrate the constitutional “taking” question which emerged from the challenge of regulatory statutes. Sands Point Harbor, Inc. v. Sullivan\(^{140}\) discusses an important statutory safeguard used to parry constitutional challenges. In Sands Point Harbor the Superior Court of New Jersey, Appellate Division, rejected the plaintiff’s contention that the Wetlands Act of 1970 was unconstitutional because it severely restricted those uses permissible in wetlands areas. The fact that the statutory regulations were implemented through a flexible permit application system was important to the holding. In evidence of this flexibility, the court observed that only a very limited number of uses were absolutely prohibited.\(^{141}\) Significantly, the court noted that although permits were required for a series of regulated activities, the permit system had been successfully used by several applicants.\(^{142}\) This demonstrated that the system was a functioning mechanism and not a shell intended to convey merely the impression of constitutionality. Moreover, the Wetlands Act also provided a means for challenging permit denials through commencement of an action in the Superior Court.\(^{143}\)

The permit method was apparently designed in part to avoid the Morris County type of problem that resulted from overly rigid and inflexible regulations. Many statutes also incorporate public hearings to review permit applications,\(^{144}\) a process that tends to satisfy procedural due process requirements.\(^{145}\)

Statutes or proposed statutes to regulate interior wetlands however, may not include such safeguards. For example, Indiana’s proposed wetlands act does not provide for public hearings.\(^{146}\) While this might give rise to constitutional challenges, the proposed act would at least adopt the more practical and modern biological approach to wetlands regulation. Indeed, the proposed act makes no

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141 Absolutely prohibited were dumping of solid wastes, the discharging of sewage and the storage or application of pesticides. Id. at 441, 346 A.2d at 614.
142 Id.
144 See, e.g., ME. REV. STAT. ANN. tit. 12, §§ 4701, 4707 (1974).
145 Prior to holding such public hearings, notice is given through newspapers in the county of the affected situs. N.Y. ENVIR. CONSERV. LAW § 25-0402(2) (McKinney Supp. 1974). Typically, fines are imposed for refusal to comply with these regulations; N.Y. ENVIR. CONSERV. LAW § 25-0501 (McKinney Supp. 1974); one state at least has followed the lead of surface mining laws by requiring the equivalent of a performance (or more appropriately here, conformance) bond. MD. ANN. CODE art. 66C, § 727 (Supp. 1970). See Note, State Land Use Regulation—A Survey of Recent Legislative Approaches, 36 Minn. L. Rev. 869 (1972) for an excellent overview of this area.
mention of engineering specifications, but defines wetlands by the presence of wetlands vegetation.\textsuperscript{147} Descriptions of what comprises wetlands vegetation, i.e., applicable wetlands species, however, were not included. Seemingly, a more specific definition was not provided because the draftsmen intended to build a large amount of flexibility into the act. Thus, criteria used to identify wetlands could be shaped to fit the exigencies of any wetlands environment subject, of course, to operating within the overall purpose of the legislation.\textsuperscript{148}

Although the advantages to the state from this type of approach are clear, the disadvantages to private landowners are no less noteworthy. For example, no universally accepted definition of "wetlands vegetation" exists, nor does the proposed act supply a list of exemplary species. Therefore, the private landowner must determine at his own risk whether his property conforms with the definition and risk proceeding in land development projects subject to state inspection and penalty. This type of broad definitional approach raises the possibility of constitutional attack on the grounds that the act would not be sufficiently definite to provide fair notice of what would constitute unlawful conduct.\textsuperscript{149}

Finally, interior statutes will also be subjected to attack on the "taking" question. Several coastal states have fitted their wetlands legislation with provisions enabling the property owner to challenge the propriety of permit denials by bringing an action in the local courts.\textsuperscript{150} Other statutes go further by granting to the state the right to purchase land titles or easements in the event the court upholds the plaintiff's challenge.\textsuperscript{151} Thus, the state may still exercise its right to eminent domain even if the denial of a permit application is held to be unconstitutionally confiscatory.

IV. Alternatives

The solid split in decisions involving wetlands regulation indicates that the central issue of whether wetland owners have been deprived of property without just compensation almost certainly has not been resolved, nor has a reliable trend been established. If the asserted use of broad police powers to protect dwindling resources is held to be excessive, it may be necessary to examine other alternatives for preserving wetlands.

At the federal level, the Water Bank Act of 1970 offers the prospect of agreements between the U.S. Dept. of Agriculture and wetlands property own-

\textsuperscript{147} "Wetland" is defined as "land where the water table is at, near, or above the land surface with such frequency as to be normally characterized by a prevalence of wetland vegetation. Wetland vegetation means those various plant species adapted for growth and reproduction in water or in saturated soils," H.B. 2074, Indiana General Assembly (1977).

\textsuperscript{148} Detractors stated that the bill gave the Dept. of Natural Resources excessive latitude in the creation and enforcement of wetlands regulations. Goshen News, Feb. 21, 1977, at 2, col. 1. The bill has since been withdrawn.

\textsuperscript{149} See Potomac Sand & Gravel Co. v. Governor of Md., 266 Md. 358, 293 A.2d 241 (1972), cert. denied, 409 U.S. 1040 (1972), where the fair notice argument was unsuccessfully raised against a more definitive statute.


\textsuperscript{151} N.Y. ENVIR. CONSERV. LAW § 25-0404 (McKinney Supp. 1974): "In the event that the court may find that the determination of the commissioner constitutes the equivalent of a taking without just compensation, . . . it may, at the election of the commissioner, either set aside the order or require the commissioner to acquire the tidal wetlands . . . , proceeding under the power of eminent domain."
ers. As with farm subsidies, wetlands property owners would receive government payments in return for maintaining wetlands in a natural condition. The payments are limited to the preservation of interior wetlands, and represent a legislative attempt to assure the existence of sufficient nesting sites for migratory wildfowl. This Act, while limited in its own scope, suggests an approach that may be utilized by state or local governments to preserve what they deem to be critical resources.

A similar type of program could be implemented through the use of eminent domain, or the purchasing of easements or development rights. Some state agencies are reluctant to employ eminent domain since it mandates the forfeiture of all the private landowner's rights in his property at the behest of the government. The private citizenry may tend to regard this activity as government "strong-arming." The purchasing of development rights on the other hand at least offers the potential for a mutually satisfactory settlement between citizen and government. The payment of a nominal amount in many cases may leave the citizen with the valid impression that he is assisting in resource preservation while receiving a benefit for his contribution.

As one additional source of funding, many states are taking advantage of federal grants available through the Coastal Zone Management Act. Annual grants are available to support those states which develop coastal zone management programs. Although the grants are only available to coastal states, a surprisingly large number of states qualify, principally because the Great Lakes are considered coastal water bodies for the purpose of the act.

Another approach that could be implemented at the state, or more probably the local level, is the use of government subsidies in conjunction with tax reductions. If the government usurps all productive use of a property, it seems equitable that it should desist from levying taxes on that property.

In perspective, the principal uses and values of wetlands—pollution abatement, flood control, commercial and sport fishing, open space, wildlife habitat, etc.—are primarily public in nature. Since the benefits are public, the burden of conservation would seem to be more properly borne by the public rather than the individual landowner. For the long term, perhaps the most equitable solution lies in the on-going wetlands acquisition programs initiated by a number of states. Because these programs are funded through the tax dollar, the public is effectively paying for the benefits it receives from the preservation of wetlands. Such programs may not be able to function rapidly enough, however to significantly halt accelerating wetlands depletion. Therefore, it is likely that wetlands protection statutes at the state level will continue to be one of the most widely used tools to preserve this dwindling natural resource.

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