THE FRESHWATER WETLANDS PROTECTION ACT: GIVE AND "TAKE" IN NEW JERSEY

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I. Introduction

Four years of controversy and debate ended in the summer of 1987 with the enactment of a new wetlands law in New Jersey[1] known as the Freshwater Wetlands Protection Act[2] (hereinafter Act). The Act was passed as a response to an Executive Order by Governor Thomas Kean which declared an immediate moratorium on state processing of permits authorizing development in freshwater wetlands.[3] The Act became effective on July 1, 1988, with the so-called "transition area" provisions taking effect one year later.[4] The Act not only reflects a compromise between environmentalists and developers, but is also expected to direct one of the largest regulatory initiatives assumed by the New Jersey Department of Environmental Protection (hereinafter DEP) in recent years.[5] This delicate compromise was jeopardized when the New Jersey Conservation Foundation and the New Jersey Audubon Society filed suit against the DEP alleging that a loophole in the regulations could encourage rapid destruction of critical

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1 Wolf & Goldshore, *Navigation Through the Wetlands Act*, 120 N.J.L.J. 645 (1987).

2 N.J. STAT. ANN. §§ 13:9B-1 to -30 (West Supp. 1988).

3 Exec. Order No. 175 (June 8, 1987).

4 N.J. STAT. ANN. §§ 13:9B-1, -16 (West Supp. 1988); *see also* N.J. ADMIN. CODE tit. 7, §§ 7A-6, -7 (1988).

5 Johnson, *DEP Realignment May Give Rise to Division on Land Use Management*, The Star-Ledger (Newark, N.J.), Sept. 25, 1987, at 28, col. 1.

transition areas around freshwater wetlands.[6]

For almost two decades, New Jersey's legislature and judicial system have been grappling with how and where to strike the balance between environmental regulation and private land use development. The debate still rages in our courts, statehouses, and newspapers. "The use of wetlands by environmentalists and municipalities as a tool to stop development is both shortsighted and potentially injurious to the overall proper development of these areas" asserts a recent *New York Times* editorial.[7] However, the editorialist notes that "even the most hardnosed developer wants to assure that his children and grandchildren will see the proper evolution of the eco-chain."[8]

In a development-oriented state such as New Jersey, government-imposed limitations on property rights have been regarded by many with a fair degree of suspicion and resistance. In 1977, a poll showed residents evenly divided between pro-economic growth and pro-environment positions.[9] Pro-development forces cite James Madison for the proposition that "property as well as personal rights is an essential object of the laws."[10]

A later poll, however, indicates a clear shift among New Jersey residents toward more environmental regulation.[11] Fifty-three percent of the respondents believe New Jersey has experienced too much development in recent years.[12] Proponents of a no-growth option for New Jersey look to Thomas Jefferson who wrote that "the earth is given as a common stock for man to labour and live on" and "legislators cannot invent too many devices" for regulating property.[13] More recently, a *New York Times* editorialist stated that "[a]lthough new places to live are a necessity, construction does not have to pave over additional wetlands

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6 Narus, *The Environment*, N.Y. Times, Aug. 14, 1988, (N.J. Sec.), at 3, col. 1.

7 Geiger, *Development and the Environment*, N.Y. Times, Nov. 22, 1987, (N.J. Sec.), at 34, col. 1.

8 *Id.*

9 Sullivan, *Environment Gains as a Political Factor*, N.Y. Times, Mar. 13, 1988, § 12, at 1, col. 3.

10 J. MADISON, A. HAMILTON & J. JAY, THE FEDERALIST PAPERS 55 (I. Kramnick ed. 1987).

11 Remington, *More Jerseyans Feel Squeezed by Growth*, The Star-Ledger (Newark, N.J.), Mar. 2, 1988, at 1, col. 2.

12 *Id.*

13 Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 586-87 (1981).

and other critical resource areas."[14]

New Jersey has long been a battleground for environmentalists and developers.[15] Generally, state courts have looked favorably upon land use regulations.

> The public welfare is of prime importance; and the correlative restrictions upon individual rights—either of person or property—are incidents of the social order, considered a negligible loss compared with the resultant advantages to the community as a whole. . . . The genius of organized government is the subordination of individual personal and property rights to the collective interest.[16]

Until recently, the United States Supreme Court has encouraged the states to experiment with far-reaching environmental laws.[17] However, in the view of many scholars, planners, public officials, and real estate investors, recent Court opinions "have made government attempts to regulate and direct development an entirely new ball game, with the rules still imperfectly defined."[18]

This article will discuss the regulatory scope of the New Jersey Freshwater Protection Act.[19] It will also focus upon the primary constitutional taking issues which the Act presents, as well as examine the legislative framework which addresses these issues.

II. Freshwater Wetlands Protection in New Jersey

The New Jersey Freshwater Wetlands Protection Act requires strict regulation of activities in freshwater wetlands and establishes elaborate permit requirements.[20] The Act also provides for the state takeover of the Federal 404 program within one year.[21] The 404 program regulates the discharge of dredged

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14 Moore, *Wetlands Are Not Just Another Picturesque Place*, N.Y. Times, Dec. 6, 1987, (N.J. Sec.), at 42, col. 1.

15 Goldshore, *A Flood of Environmental Legislation: An Analysis of the New Jersey Experience, 1970-1975*, 1 SETON HALL LEGIS. J. 1 (1976).

16 *See* Mansfield & Swelt, Inc. v. Township of West Orange, 120 N.J.L. 145, 150-51, 198 A. 225, 229 (1938).

17 *See generally* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

18 Peterson, *Builders Battle 'Takings' of Property*, N.Y. Times, Feb. 28, 1988, § 8, at 1, col. 1.

19 N.J. STAT. ANN. §§ 13:9B-1 to -30 (West Supp. 1988).

20 *Id.*

21 *Id.* § 13:9B-27.

or fill material into wetlands.[22] Heretofore, the responsibility for implementing the 404 program has been delegated to the United States Army Corps of Engineers [hereinafter Army Corps] and the Environmental Protection Agency [hereinafter EPA] pursuant to section 404[23] of the federal Clean Water Act.[24] The Clean Water Act does not preclude a state from regulating its freshwater wetlands, provided that it does not adopt less stringent standards.[25] Additionally, the Clean Water Act was not intended to preempt remedies available to the states prior to its passage.[26]

The freshwater wetlands permit program regulates a large variety of activities which are deemed destructive of wetlands, including placement of fill, removal of vegetation, and alteration of drainage patterns.[27] By consolidating state and federal regulations, the rules[28] affect approximately 300,000 acres of freshwater wetlands in New Jersey.[29]

Prior to the Act, the authority to regulate the use and preservation of freshwater wetlands (excluding the Meadowlands and Pinelands) rested with local authorities pursuant to the Municipal Land Use Law.[30] The Municipal Land Use Law gives each municipality permission to develop a master plan.[31] The master plan guides the use of land consistent with the Land Use Law.[32] Each plan is based upon several broad elements, including housing, utility service, transportation, recreation, economic impact, and conservation.[33] The plan is to include a "conservation element providing for the preservation, conservation, and utilization of natural resources, including, to the extent appropriate, energy, open space, water supply, forests, soil marshes, *wetlands*, harbors, rivers, and other waters, fisheries, endangered or threatened wildlife and which *systematically analyzes the impact . . . on the present*

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22 33 C.F.R. § 323.1 (1987).
23 33 U.S.C.A. § 1344 (West 1986).
24 *Id.* §§ 1251-1387 (West 1986 & Supp. 1988).
25 *Id.* § 1344(t).
26 *Id.*
27 N.J. ADMIN. CODE tit. 7, § 7A-2.3 (1988).
28 *Id.* §§ 7A-1.1 to -15.11.
29 *See supra* note 1.
30 N.J. STAT. ANN. §§ 40:55D-1 to -112 (West Supp. 1988).
31 *Id.* § 40:55D-28.
32 *Id.*
33 *Id.*

and future preservation. . . ."[34] (Emphasis added).

However, the Act has a preemption clause which states that "no municipality, county, or political subdivision thereof, shall enact, subsequent to [July 1, 1988], any law, ordinance, or rules or regulations regulating freshwater wetlands, and further, this act . . . shall supersede any law or ordinance regulating freshwater wetlands enacted prior to [July 1, 1988]."[35] Presumably, the Act supersedes any local law passed pursuant to the Municipal Land Use Law that directly or indirectly regulates the use of freshwater wetlands.[36] In contrast, the regulations do not preempt pre-existing state regulatory requirements which may affect regulated activities in freshwater wetlands.[37] Therefore, the state stream encroachment program, flood control program, and other state requirements still apply.

The regulations were issued by the DEP in June, 1988.[38] The principal feature of these rules is the establishment of two new permit programs, strictly curtailing activities in freshwater wetlands, and regulating the discharge of dredged or fill material into open waters of the state.[39] Responsibility for administering these programs rests with the Division of Coastal Resources in the DEP.[40] The Division already was responsible for reviewing waterfront development, through the Coastal Area Facilities Review Act (CAFRA),[41] while its issuance of permits and coastal wetlands permits are authorized by the Wetlands Act of 1970.[42] Basically, the Division is becoming the land use management section of the DEP.[43]

The regulations define "freshwater wetland" as "an area that is inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typi-

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34 *Id.* § 40:55D-28(b)(8).

35 *Id.* § 13:9B-30.

36 *Id. See also* N.J. ADMIN. CODE tit. 7, § 7A-1.6(b) (1988).

37 N.J. ADMIN. CODE tit. 7, § 7A-1.6(d) (1988).

38 *Id.* §§ 7A-1.1 to -15.11.

39 19 N.J. Reg. 2330 (1987).

40 N.J. ADMIN. CODE tit. 7, §§ 7A-1.3, -2.1(d), -2.1(e), -5.2(a), -5.2(b) (1988).

41 N.J. STAT. ANN. §§ 13:19-1 to -21 (West 1979 & Supp. 1988).

42 *Id.* §§ 13:9A-1 to -10.

43 *See supra* note 5.

cally adapted for life in saturated soil conditions."[44] In identifying a wetland, the DEP uses a three-parameter approach—hydrology, soils, and vegetation.[45] Scientists generally recognize three types of freshwater wetland systems—lacustrine, riverine, and palustrine.[46] Lacustrine wetlands are associated with lakes; riverine wetlands are found along rivers and streams.[47] The word palustrine means marshy and wetland areas. This category includes marshes, swamps, and bogs—terms commonly used to designate distinct wetland types.[48] Freshwater wetlands account for ninety percent of the nation's wetlands.[49] They represent two-thirds of New Jersey's wetlands, half of which are regulated by the Pinelands Protection Act.[50]

Wetlands are considered by experts to have exceptional natural resource value.[51] "Wetlands are areas of great natural productivity, hydrological utility, and environmental diversity, providing natural flood control, improved water quality, recharge of aquifers, flow stabilization of streams and rivers, and habitat for fish and wildlife resources."[52] Wetlands are also natural pollution-treatment facilities.[53] Swamps, marshes, and bogs use up nitrogen and phosphates.[54] They also trap silt and other pollutants in water.[55] Additionally, evidence suggests that wetlands may help to prevent humans from being burned by the sun by regulating the ozone layer, which provides protection from ultraviolet radiation.[56] With the passage of the Act, the policy of New Jersey has become the preservation of the "purity and integrity of freshwater wetlands from random, unnecessary or undesirable alteration or disturbance."[57]

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44 N.J. ADMIN. CODE tit. 7, § 7A-1.4 (1988).
45 *Id.*
46 *See generally* W. NIERING, WETLANDS (1985) (Audubon Society Nature Guide).
47 *Id.*
48 *Id.*
49 *Id.*
50 N.J. STAT. ANN. §§.13:18A-1 to -49 (West Supp. 1988).
51 *See supra* note 46.
52 Exec. Order No. 11,990 (May 24, 1977) and accompanying statement.
53 *See supra* note 14.
54 *Id.*
55 *Id.*
56 *See supra* note 44.
57 N.J. STAT. ANN. § 13:9B-2 (West Supp. 1988).

A. *Federal 404 Program*

As indicated, New Jersey will be assuming the wetlands permit jurisdiction previously exercised by the Army Corps[58] pursuant to section 404 of the Clean Water Act.[59] A recent report by the National Wetlands Policy Forum has called for a national approach to protect wetlands and has recommended that the federal government delegate regulatory authority to the states.[60] The regulations provide for the systematic review of activities in and around freshwater wetlands.[61] The review standards, as required by the Act, are more stringent than under the prior federal law.[62] The effective result is that the rules will most likely have a negative impact upon land development.[63]

United States v. Cumberland Farms of Connecticut, Inc.,[64] a federal court of appeals decision, demonstrated the profound impact that the Clean Water Act can have on private land use development. In *Cumberland Farms*, the land consisted of 2,000 acres of the Great Cedar Swamp in southeastern Massachusetts, the largest freshwater wetland in that state.[65] In 1972, the land was purchased and leased to Cumberland Farms, a Connecticut corporation.[66] From 1972 through 1985, Cumberland Farms converted existing swampland into farmland by using dredge and fill techniques.[67] In 1977, the Clean Water Act was amended to include freshwater wetlands under its jurisdiction.[68] Prior to 1977, only "navigable" wetlands fell within its jurisdiction.[69]

The Army Corps was alerted to the activities of Cumberland Farms in 1983 by a private individual.[70] The Army Corps brought suit in federal district court alleging a violation of sec-

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58 *Id.*

59 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1988).

60 Shabecoff, *Coalition Urges Action to Save U.S. Wetlands*, N.Y. Times, Nov. 16, 1988, at A18, col. 1.

61 19 N.J. Reg. 2331 (1987).

62 *Id.*

63 *Id.* at 2331-32.

64 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, — U.S. —, 108 S. Ct. 1016 (1988).

65 *Id.* at 1153.

66 *Id.*

67 *Id.*

68 *See* 33 U.S.C.A. § 1344 (West 1986).

69 *Id.*

70 826 F.2d at 1154.

tion 404 of the Clean Water Act.[71] Cumberland Farms asserted that it was exempt from this Act because it was engaging in agricultural activities.[72]

The district court found that the farmland was created illegally by filling protected wetlands.[73] The court ordered Cumberland Farms to restore all 2,000 acres to its 1977 swampland state.[74] The court also imposed a civil fine of $540,000, of which $390,000 was to be remitted to Cumberland if it satisfactorily restored the wetlands.[75]

In affirming the opinion, the First Circuit upheld the court order.[76] The court reasoned that Cumberland Farms could have avoided the harsh consequences if it had obtained a proper permit.[77] "Had Cumberland complied with the Clean Water Act when the Act first became applicable in 1977, no such burdensome order revising the many years of illegal activity would have been necessary."[78]

Although the consequences of violating section 404 can be burdensome, the EPA has discretion in deciding whether to pursue an investigation and take enforcement action.[79] There is no mandatory duty on the EPA to enforce the Act.[80] However, the decision whether land falls within the jurisdiction of the Clean Water Act must not be arbitrary or capricious.[81] Both the EPA and the Army Corps have the duty to gather sufficient information to assess environmental impacts.[82]

Additionally, the EPA can review the approval of a permit granted under the Clean Water Act. In *Bersani v. Deland*,[83] a shopping mall developer claimed that the EPA's delay in issuing recommendations regarding the Army Corps' approval, stopped

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71 *Id.* at 1155.
72 *Id.*
73 *Id.*
74 *Id.* at 1153, 1155-56.
75 *Id.* at 1153.
76 *Id.* at 1165.
77 *Id.*
78 *Id.*
79 *See* Dubois v. Thomas, 820 F.2d 943, 945 (8th Cir. 1987).
80 *Id.*
81 National Wildlife Fed'n v. Hanson, 623 F. Supp. 1539, 1548 (E.D.N.C. 1985).
82 *Id.* at 1546-47.
83 640 F. Supp. 716, 717 (D. Mass. 1986).

the EPA from exercising its veto power over the approval.[84] The District Court of Massachusetts found otherwise, holding that Congress did not intend "to elevate timeliness over the objectives of the Act with a consequent bar to its enforcement."[85] In short, the EPA veto over the Army Corps' approval of the permit was held valid, even though the EPA acted in an unexpeditious manner.[86]

In a related case, *Bersani v. EPA*,[87] the EPA veto was upheld on the ground that its determination regarding practical alternatives was reasonable. Even if the EPA's decision was arbitrary, and the court held it was not, the veto had to be upheld because it was based on a rational, independent finding that construction of the shopping mall would have significant adverse effects on wildlife.[88]

If the Army Corps denies a wetlands permit, or the EPA vetoes the Army Corps' approval of a permit, a developer has two litigation options. First, the developer can bring an action under the Administrative Procedure Act (APA), claiming that the agency determination is arbitrary and capricious.[89] Second, the developer can bring an action for damages under a taking theory.[90] These options are not mutually exclusive; however, the developer has a difficult burden of proof in either case.[91]

These cases may give developers in New Jersey some indication of the regulatory scope of the Freshwater Wetlands Protection Act regulations. The federal guidelines presume that practical alternatives are available to the developer.[92] This presumption can be rebutted only with meticulous documentation and evidence and, even then, the burden is heavy for the developer.[93] This burden is heavier still under the Act's regulations.[94]

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84 *Id.*

85 *Id.* at 719.

86 *Id.*

87 674 F. Supp. 405, 415 (N.D.N.Y. 1987).

88 *Id.* at 419.

89 5 U.S.C.A. § 706 (West 1977).

90 U.S. CONST. amend. V.

91 Seltzer & Steinberg, *Wetlands and Private Development*, 12 COLUM. J. ENVTL. L. 159, 181-82 (1987).

92 *Id.* at 197.

93 *Id.*

94 N.J. ADMIN. CODE tit. 7, §§ 7A-3.1 to -3.5 (1988).

Under New Jersey rules, a developer who proposes nonwater dependent activities upon freshwater wetlands is obligated to take reasonable steps to obtain other land that could meet the basic purpose of those activities.[95] Additionally, if a freshwater wetland of exceptional resource value[96] is involved, a developer must also demonstrate either that there is a compelling public need for the proposed activity that cannot be met by essentially similar projects in the region,[97] or that denial of the permit would impose an extraordinary hardship on the developer due to circumstances peculiar to that wetland.[98]

B. *Federal-State Partnership*

Under the Act, the DEP makes the initial determination of whether to grant or to deny a permit, thereby assuming the responsibility once exercised by the Army Corps.[99] The EPA retains veto power over the state's initial determination, as it did over the Army Corps.[100] It is unclear how this experiment in federal-state administration will operate, and what impact this partnership will have upon individual legal remedies.

It is noteworthy that between 1985 and 1987, the Army Corps did not issue a wetlands permit in New Jersey for an area greater than one acre, except for state highway purposes.[101] In early 1988, a permit was issued to the Prudential Insurance Company to fill 16.7 acres of wetlands in order to build a 2.25 million square foot office complex in Morris County.[102] More recently, the EPA vetoed the Army Corps' approval of a landfill permit to allow the building of a warehouse complex in the Hackensack Meadowlands.[103] This was the first time the EPA had exercised its veto power in New Jersey.[104]

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95 *Id.* § 7A-3.2.

96 *Id.* § 7A-2.5(b).

97 *Id.* § 7A-3.3(a)(1).

98 *Id.* § 7A-3.3(a)(2).

99 N.J. STAT. ANN. §§ 13:9B-2, -5(b) (West Supp. 1988).

100 Interview with Christopher Daggett, Director of Region II EPA (1988).

101 *Id.*

102 Coughlin, *Final Hurdle: PRU gets Lee Meadows Project Go-Ahead*, The Star-Ledger (Newark, N.J.), Feb. 10, 1988, at 1, col. 4.

103 Rozansky, *EPA Overrules Army Corps, Rejects Permit for Meadows Warehouses*, The Star-Ledger (Newark, N.J.), Mar. 23, 1988, at 13, col. 1.

104 Narus, *The Environment*, N.Y. Times, Apr. 10, 1988, (N.J. Sec.), at 3, col. 1. The EPA's final determination concerned a 57.5 acre wetlands in Carl-

There is the distinct possibility that developers will have to contend concurrently with federal and state permit requirements for some time, because the Act provides for state takeover by July 1, 1989.[105] This extended period of overlap is primarily due to the complex delegation process.[106] Such was the case in Michigan, where it took well over a year after the effective date of its freshwater wetlands law for full delegation to occur.[107] This overlap will almost certainly cause widespread confusion and duplication, as developers and their advisors attempt to negotiate the maze of requirements, procedures, and restrictions.

III. The Constitutional "Taking" Issue

A. *Environmental Protection and the Police Power*

Blackstone commented that "so great is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."[108] However, today all property in the United States is held subject to regulations, restrictions, and burdens under the sovereigns' police power.

The United States Supreme Court most clearly identified and recognized the concept of the police power in *Charles River Bridge v. Proprietors of Warren Bridge*.[109] In this foundation case, the Charles River Bridge had been chartered by the state to operate a toll bridge.[110] Subsequently, the state authorized another company to construct and operate a free bridge over the Charles

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stadt, New Jersey located in the Hackensack Meadowlands. The Army Corps recommended approval of a 404 wetlands permit to complete a warehouse complex, based primarily on the developers mitigation plan to enhance nearby wetlands and to preserve an additional 23 acres of wetlands in the Passaic River Basin. In exercising its veto power, the EPA found that the proposed development would have unacceptable adverse effects upon the wetlands, including wildlife. The mitigation plan was deemed inadequate since it was generally unspecified and did not address the site's specific or cumulative impacts upon the wetlands. Additionally, the EPA found that wetland preservation, without enhancement or restoration does not represent a gain of wildlife habitat values.

105 *See* N.J. STAT. ANN. § 13:9B-27 (West Supp. 1988).

106 *See generally* 33 U.S.C. §§ 1344(g)-(h) (1977).

107 *See generally* N.J. STAT. ANN. § 13:9B-27 (West Supp. 1988).

108 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 139 (1969).

109 36 U.S. 420 (1837).

110 *Id.* at 427.

River in close proximity to the plaintiffs' bridge.[111] Although the plaintiffs' charter did not contain an exclusive grant, it was argued that the state had impaired the charter.[112] Chief Justice Taney, in denying the claim, stated:

> [T]he legislature in the very law extending the charter, asserts its rights to authorize improvements over Charles River which would take off a portion of the travel from this bridge and diminish its profits. . . . Can the legislature be presumed to have taken upon themselves an implied obligation, contrary to its own acts and declarations contained in the same law? . . . Indeed, the practice and usage of almost every state in the Union, old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for in the part of the plaintiffs.[113]

The New Jersey Constitution provides that "private property shall not be taken for public use without just compensation."[114] These provisions in the New Jersey Constitution have been interpreted as substantially encompassing rights guaranteed under the Constitution of the United States.[115] The compensation clause of the fifth amendment states in unequivocal terms that no property shall be taken for public use without "just compensation."[116] When the government exercises its power of eminent domain to condemn private property, there is no question that the fifth amendment requires that compensation be paid.[117] Additionally, the due process and equal protection clauses may require compensation.[118] The New Jersey Constitution also has been interpreted to provide greater protections than those existing under analogous federal provisions regarding eminent domain.[119] The more difficult issue, however, is whether a government agency must pay just compensation when a regulation restricts the use of private property.[120]

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111 *Id.* at 427-28.
112 *Id.* at 429.
113 *Id.* at 551.
114 N.J. CONST. of 1947, art. I, para. 20; art. 4, § 6, para. 3.
115 *See* Township of Montville v. Block 69, Lot 10, 74 N.J. 1, 7, 376 A.2d 909, 912 (1977).
116 U.S. CONST. amend. V.
117 *See* United States v. Dow, 357 U.S. 17, 21 (1958).
118 *See* Sheer v. Eyesham, 184 N.J. Super. 10, 57, 445 A.2d 46, 70 (Law Div. 1982).
119 *See* 74 N.J. at 18, 376 A.2d at 917.
120 *See supra* note 91, at 185.

The relationship between the police power of the state, which is the power to regulate for the health, safety, morals, and general welfare of the public, and the constitutional prohibition against "taking" private property without just compensation, presents the primary problem in understanding the limits of governmental power to regulate the use of land. The New Jersey Legislature clearly invoked the state's police power when it declared that

> to advance the public interest . . . the rights of persons who own or possess real property affected by [the Freshwater Wetlands Protection] Act must be fairly recognized and balanced with environmental interests; and that the public benefits arising from the natural functions of freshwater wetlands, and the public harm from freshwater losses, are distinct from and may exceed the private value of wetland areas.[121]

Under the common law "public trust doctrine" and the constitutionally preserved "police power," a sovereign has the right, indeed the duty, to regulate property to advance the welfare of its citizens. In *Pennsylvania Coal Co. v. Mahan*,[122] Justice Holmes, writing for a majority of the United States Supreme Court, recognized the need to create a balance between the regulatory power of the state and the private interest of the individual.[123] He stated that "the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as taking."[124]

Justice Holmes' concise general rule masks a complex and vexing judicial problem. Illustrative of this problem are three New Jersey cases, *Sands Point Harbor, Inc. v. Sullivan*,[125] *In re Loveladies Harbor, Inc.*,[126] and *American Dredging Co. v. DEP*.[127] These cases challenged the constitutionality of the Wetlands Act of 1970.[128] In each case, the court struggled with how and where to draw the line between valid regulatory authority and invalid taking without compensation.

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121 N.J. STAT. ANN. § 13:9B-2 (West Supp. 1988).
122 260 U.S. 393 (1922).
123 *Id.* at 413-16.
124 *Id.* at 415.
125 136 N.J. Super. 436, 346 A.2d 612 (App. Div. 1975).
126 176 N.J. Super. 99, 422 A.2d 107 (App. Div. 1980).
127 161 N.J. Super. 504, 391 A.2d 1265 (Ch. Div. 1978), *aff'd*, 168 N.J. Super. 18, 404 A.2d 42 (App. Div. 1979).
128 N.J. STAT. ANN. §§ 13:9A-1 to -10 (West 1979 & Supp. 1988).

The Wetlands Act of 1970[129] and the Act have many similarities. The former was enacted to preserve all coastal wetlands situated in the Raritan Basin, south along the Atlantic Ocean and north along the Delaware Bay and River.[130] It defines "wetlands" in exactly the same manner as does the Act.[131] Because its legislative purpose and policy are similar to the Act, it represents an excellent vehicle for examining the Act's constitutional dimensions.

The first challenge to the Wetlands Act of 1970 came during 1972, in *Sands Point Harbor, Inc. v. Sullivan*, wherein a developer claimed that the DEP had no regulatory authority to prohibit or condition development.[132] The court was compelled to balance the interest between state and citizen. The court upheld the validity of the Wetlands Act of 1970 by stating that the "regulation of the use of marshes and wetlands, having environmental and ecological importance to the continued existence of a species of wildlife and to mankind is a valid exercise of governmental power."[133] The court so held in deference to a legislative finding.[134]

Having validated the Wetlands Act of 1970 as a reasonable exercise of state regulatory power, the court in *Sands Point* next addressed the constitutionality of the implementing regulations.[135] The developer complained that the DEP had designated approximately 140 acres of his property as wetlands and claimed that this designation constituted an unlawful taking.[136] The developer relied principally upon *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*.[137] In that case, the court struck down a municipal zoning ordinance which greatly restricted the use of swampland.[138] The purpose of the ordinance was to restrict the use of the land by limiting it to hunting, fishing or a wildlife sanctuary.[139] The court in *Sands Point*, however, distinguished the zoning ordinance in *Morris County Land* from the Wetlands Act of 1970 by holding that the Wet-

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129 *Id.*
130 N.J. ADMIN. CODE tit. 7, § 7E-3.25(a) (1986).
131 *Compare id. with* N.J. STAT. ANN. § 13:9B-3 (West Supp. 1988).
132 136 N.J. Super. at 438-39, 346 A.2d at 613.
133 *Id.* at 439, 346 A.2d at 613.
134 *Id.* at 440, 346 A.2d at 613.
135 *Id.* at 440-41, 346 A.2d at 614.
136 *Id.* at 438, 346 A.2d at 613.
137 40 N.J. 539, 193 A.2d 232 (1963).
138 *Id.* at 559, 193 A.2d at 243.
139 *Id.* at 545, 193 A.2d at 236.

lands Act does not impose the "all-encompassing restrictions"[140] found to exist in the municipal zoning ordinance contested in *Morris County Land*. The *Sands Point* court noted that "[t]he only activities which are absolutely prohibited are dumping of solid wastes, the discharging of sewage and the storage or application of pesticides."[141] The plaintiffs in *Sands Point* did not seek to conduct any of these activities and, as such, *Morris County Land* bears no relevance to *Sands Point*.[142]

Five years later, the constitutionality of the Wetlands Act of 1970 was once again challenged in *In re Loveladies Harbor, Inc.*, wherein a developer filed for a permit to fill and dredge approximately fifty-one acres of land for the development of 108 shore and lagoon front homes.[143] Of the fifty-one acres, approximately thirty-six were designated as wetlands by the DEP.[144] The DEP denied the permit, but suggested a possible alternate plan for development of an approximately 12.5 acre portion of the property with thirty-five single-family houses on separate lots.[145] The court held that the existence of this alternative use precluded the developer's claim of an unconstitutional taking.[146]

A second alternative suggested in *Loveladies Harbor* by the DEP was to allow approximately seventy duplex units.[147] The developer asserted that this plan was a less profitable form of development.[148] However, the court concluded that "the denial of the permits . . . does not preclude [developers] from submitting an alternate plan for the property."[149] Additionally, as long as property is not physically taken from its owners, the DEP can propose alternate plans that reflect building and density requirements that are consistent with the Wetlands Act, even if the alternative plans are less profitable.[150]

Finally, in *American Dredging Co. v. DEP*, an order by the DEP

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140 136 N.J. Super. at 441, 346 A.2d at 614.
141 *Id.*
142 *Id.*
143 176 N.J. Super. at 71, 422 A.2d at 108.
144 *Id.*
145 *Id.* at 73, 422 A.2d at 109.
146 *Id.*
147 *Id.* at 75, 422 A.2d at 110.
148 *Id.*
149 *Id.*
150 *Id.* at 73, 422 A.2d at 109.

pursuant to the Wetlands Act of 1970 that prohibited the use of eighty acres of wetlands within a tract of 2,500 acres for the deposit of dredge soil was held to be reasonable and not a taking of land without compensation.[151] Expanding upon its reasoning in *Lovelades Harbor*, the court held that the mere diminution in value of land caused by government restriction does not constitute a taking.[152]

Running throughout these three cases is Holmes' view that the difference between regulation and taking is a difference of degree not kind.[153] Perhaps one of the clearest reflections of this view was set out by the Supreme Court of Wisconsin in *Just v. Marinette County*.[154] The court stated:

> The protection of public rights may be accomplished by the exercise of the police power unless the damage to the property owner is too great and amounts to a confiscation. The securing or taking of a benefit not presently enjoyed by the public for its use is obtained by the government through its power of eminent domain. The distinction between the exercise of the police power and condemnation has been said to be a matter of degree of damage to the property owner. *In the valid exercise of the police power reasonably restricting the use of property, the damage suffered by the owner is said to be incidental. However, where the restriction is so great the landowner ought not to bear such a burden for the public good, the restriction has been held to be a constructive taking even though the actual use or forbidden use has not been transferred to the government so as to be a taking in the traditional sense.*[155] (Emphasis added).

Critics claim that this approach to the exercise of the police power is too broad to be defended in analytical terms.[156] They claim that Holmes' approach is tantamount to asserting that the state action is legitimate because it is lawful.[157] As such, the Holmes view functions, at best, as a convenient mask for serious inquiry, without defining a set of permissible ends of government action.[158]

Apparently, the United States Supreme Court has not yet

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151 161 N.J. Super. at 504, 391 A.2d at 1265.
152 *Id.* at 508, 391 A.2d at 1267.
153 *See supra* note 17, at 108-09.
154 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
155 *Id.* at 12, 201 N.W.2d at 767.
156 *See supra* note 17, at 109.
157 *Id.*
158 *Id.*

adopted the view of the critics. In fact, many have perceived *Keystone Bituminous Coal Ass'n v. DeBenedictes*[159] as a reprise of *Pennsylvania Coal*. In *Keystone*, the Court held that the Pennsylvania Subsidence Act, requiring that fifty percent of the coal beneath certain structures be kept in place to provide surface support, had a valid public purpose and did not work an unconstitutional taking on its face.[160] In rejecting petitioners' facial challenge to the statute, the Court asserted that a land use regulation can affect a taking only if it does not substantially advance legitimate state interests or denies an owner economically viable use of his land.[161]

Based upon the above state and federal decisions, it is likely that the New Jersey Freshwater Wetlands Protection Act will be held constitutional on its face, if challenged. The Act is a clear expression of the state's police powers. Therefore, it may be the particular application of the regulations that could be most vulnerable to constitutional attack.

B. *Further Constitutional Challenge*

The Act expressly authorizes any person having a recorded interest in land affected by the issuance, modification or denial of a freshwater wetlands permit to file an action to determine if the actions of the DEP represent an unconstitutional taking of property without just compensation.[162] In the event the court determines that the DEP's action constitutes a taking, remedies include compensation, condemnation or modification of the DEP action.[163] Thus, citizens will have automatic standing and predictable remedies. Clearly, legislators have foreseen a constitutional challenge to a future DEP action.

Generally, a restriction on the use of land may not be invalidated simply because a developer cannot make a profit. *Albano v. Township of Washington*[164] dealt with a local zoning ordinance which changed from one acre to three acres the property required for each residential unit.[165] The purpose of the ordinance

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159 480 U.S. 470 (1987).
160 *Id.* at 471-72.
161 *Id.*
162 N.J. STAT. ANN. § 13:9B-22(a) (West Supp. 1988).
163 *Id.* § 13:9B-22(b).
164 194 N.J. Super. 265, 277, 476 A.2d 852, 858 (App. Div. 1984).
165 *Id.* at 265, 476 A.2d at 852.

was to protect environmentally sensitive land adjacent to four streams. These streams met to form the sole feeder of a lake located near the property.[166] In effect, the ordinance protected freshwater wetlands.[167] The court validated the ordinance, reasoning that the land would still be suitable for building.[168] The developer argued that he would not be able to sell the three-acre lots.[169] The court, however, concluded that all causative factors must be considered when profits are lost, such as poor investment or inadequate planning.[170]

On the other hand, the New Jersey Supreme Court has declared that "while the issue of regulations as against taking is always a matter of degree, there can be no question but that the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property."[171] A private owner must retain some worthwhile rights or benefits on the land. Under what circumstances will a property owner be deprived of worthwhile rights and benefits under the Act?

When unconstitutional taking was held to occur, most courts have usually concluded that the only available remedy was to declare the state regulation invalid.[172] However, the United States Supreme Court has recently taken a new direction. In *Nollan v. California Coastal Comm'n*[173] and *First English Evangelical Lutheran Church v. Los Angeles County*,[174] the Court mandated actual compensation to the aggrieved parties.[175] The two rulings have already made state and local officials take a hard look at some popular laws.[176] Even President Reagan cited these two cases as he urged the courts to "restore the constitutional right of a citizen to receive just compensation when government at any level takes private property through regulation."[177]

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166 *Id.* at 265-66, 476 A.2d at 852.
167 *See generally supra* note 46.
168 194 N.J. Super. at 277, 476 A.2d at 858.
169 *Id.* at 272, 476 A.2d 855.
170 *Id.* at 277, 476 A.2d at 858.
171 40 N.J. at 555, 193 A.2d at 241.
172 D. MANDELKER, LAND USE LAW 16 (1982).
173 — U.S. —, 107 S. Ct. 3141 (1987).
174 — U.S. —, 107 S. Ct. 2378 (1987).
175 *See* 107 S. Ct. at 3141; 107 S. Ct. at 2389.
176 *See supra* note 14.
177 1988 Legislative and Administrative Message: A Union of Individuals, 24 WEEKLY COMP. PRES. DOC. 91, 113 (Jan. 25, 1988). On March 5, 1988, an Execu-

In *Nollan*, the California Coastal Commission refused to give the plaintiffs permission to rebuild their beachfront house unless they signed a deed giving public access to use part of their beach.[178] Justice Scalia, writing for the majority, reasoned that the condition placed upon the permit was unrelated to the rebuilding of a private home.[179] To meet constitutional muster, there must be a nexus between the condition imposed upon the development and the burden alleviated or the need met by the condition.[180] Consequently, the Commission was taking a portion of the beach without compensation.[181] Extending this reasoning to a future New Jersey case, it is possible that burdensome conditions placed upon a freshwater wetlands permit may be challenged on the grounds that there is no direct connection between the imposed condition and the impact of the development. For example, in *Mall Properties, Inc. v. Marsh*,[182] a federal court limited the permissible scope of review by the Army Corps under section 404. The court held that the Army Corps could *not* legally consider the economic impact of a proposed development, where the economic impact did not bear a rational relationship to the changes in the physical environment caused by the development.[183] It is certain that this liability will make regulators think twice before proposing new rules to restrict private land use.

In *First English Evangelical*, the United States Supreme Court set out a remarkably straightforward and simple rule of law: compensation is required when a regulation is held to have affected a taking.[184] Invalidation of the ordinance, the sole California remedy, was held to be a constitutionally insufficient remedy for the loss of total property value caused by a regulatory action.[185] *First*

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tive Order was issued "reaffirming the fundamental protection of private property rights . . . and . . . assessing the nature of governmental actions that have an impact on constitutionally protected property rights. . . ." Exec. Order No. 12,630, 53 Fed. Reg. 8,859 (1988).

178 107 S. Ct. at 3142.

179 *Id.* at 3149.

180 *Id.* at 3148.

181 *Id.* at 3150.

182 672 F. Supp. 561 (D. Mass. 1987), *appeal dismissed*, 841 F.2d 440 (1st Cir. 1988), *cert. denied sub nom.* City of New Haven v. Marsh, — U.S. —, 109 S. Ct. 128 (1988).

183 *Id.* at 575.

184 107 S. Ct. at 2386.

185 *Id.* at 2381.

English Evangelical is thus more a "compensation" than a "taking" case. The Court never addressed whether the flood control ordinance at issue actually affected a taking, and stated instead:

> Here we must assume that the Los Angeles County ordinances have denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy.[186]

One indication of how influential these cases may be is a recent New Jersey opinion, *Catanzaro v. HMDC*,[187] which apparently did not distinguish between compensation and taking, but nevertheless cited *First English Evangelical*. The court in *Catanzaro* held that a temporary regulation promulgated by the Hackensack Meadowlands Development Commission, restricting all uses of property except for supporting billboards, constituted an inverse condemnation that reached the threshold of an unconstitutional taking.[188] Generally, developers in New Jersey are encouraged by both recent United States Supreme Court opinions.[189] Meanwhile, landowners in the New Jersey Pine Barrens are researching whether the opinions could provide a basis for suing the state for payments for severely limiting development.[190] However, opinions in New Jersey still hold that the mere diminution in value of land caused by government restrictions does not constitute a taking.[191] After all, in *First English Evangelical*, the church proved that the county's building moratorium rendered the land 100% unusable.[192]

IV. Conclusion

Perhaps hard-pressed developers and property owners have over-estimated the impact of recent United States Supreme Court opinions. Most likely, an unconstitutional taking will be held to occur when the regulation in question does not substan-

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186 *Id.* at 2389.

187 No. L-087586-85 PW at 5 (Law Div. 1987) (transcript of decision available in Bergen County Courthouse, Hackensack, N.J.).

188 *Id.* at 7.

189 *See supra* note 18.

190 *Id.*

191 *See* 176 N.J. Super. 99, 422 A.2d 107; 161 N.J. Super. 504, 391 A.2d 1265.

192 107 S. Ct. at 2389.

tially advance legitimate state interests or when it completely denies an owner economically viable use of his land. Although *First English Evangelical* and *Nollan* may restrict government's ability to regulate land use, there is still room for continued planning and regulation if it is done carefully. The New Jersey Legislature was fully aware of these cases when the Act was being formulated. Lobbyists for development interests mailed advance sheets of both opinions to every member of the legislature. Most likely, the DEP will exercise a higher degree of flexibility than the legislature, particularly where low and medium priced housing is concerned.[193] Further, clustered housing developments will be encouraged. Developers may have little choice in what many perceive to be an over-developed state. Perhaps urban centers will finally receive the private investment that is needed.

In conclusion, the Freshwater Wetlands Protection Act and the regulations present areas of concern and confusion for private landowners. By necessity, the legislative process is a balancing act. Appropriate land use policies are a desirable outcome. Placing Draconian burdens upon developers are not. Reasonable benefits and burdens will result from continuous debate, the reassessing of priorities, and the continuing dynamic of the democratic process. Particularly in New Jersey, where the pressures for commercial and residential development define the pace and pattern of land use, the legislative debate will continue to be molded by administrative and judicial challenges. The regulations will surely open an area of contention regarding present and future development within the State of New Jersey.

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193 *See generally* Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I), 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975).