



# 18 What About Takings?

**The Issue:** When does a government action affecting private property amount to a "taking," and what are the takings implications of wetland regulation?

## Legal Background

The concept of takings comes from the Fifth Amendment (see box below), which prohibits the taking of private property by the government for a public use without payment of just compensation. This fact sheet briefly explores the issue of takings as it relates to wetlands regulation.

The Supreme Court and lower courts have established a body of law used to determine when government actions affecting use of private property amount to a "taking" of the property by the government. When private property is "taken" by the government, the property owner must be fairly compensated.

Initially, the courts recognized takings claims based on government actions that resulted in a physical seizure or occupation of private property. The courts subsequently ruled that, in certain limited circumstances, government regulation affecting private property also may amount to a taking.

In reviewing these "regulatory" takings cases, the courts generally apply a balancing test; they examine the character of the government's action

and its effect on the property's economic value. Government actions for the purpose of protecting public health and safety, including many types of actions for environmental protection, generally will not constitute takings. The courts also look at the extent to which the government's action interferes with the reasonable, investment-backed expectations of the property owner.

In *Lucas v. South Carolina Coastal Council* (1992), the U.S. Supreme Court ruled that a State regulation that deprives a property owner of all economically beneficial use of that property can be a taking. The court further clarified, however, that a regulation is not a taking if it is consistent with "restrictions that background principles of the State's law of property and nuisance already placed upon ownership." As an example of "background principles," the court referred to the right of government to prevent flooding of others' property.

*Dolan v. City of Tigard* (1994), a more recent Supreme Court takings case, involved a requirement by the City of Tigard in Oregon that, to prevent flooding and traffic congestion, a business owner seeking to expand substantially onto property adjacent to a floodplain create a public greenway and bike path from private land. The

Supreme Court ruled that the City's requirement would be a taking if the City did not show that there was a "reasonable relationship" between the creation of the greenway and bike path and the impact of the development. As compared to the facts in *Dolan*, the Clean Water Act Section 404 program generally does not require property owners to provide public access across or along their property.

## Current Status

The presence of wetlands does not mean that a property owner cannot undertake any activity on the property. In fact, wetlands regulation under Section 404 does not necessarily even result in restricting the use of a site. Many activities are either not regulated at all, explicitly exempted from regulation, or authorized under general permits.

Moreover, in situations where individual permits are required, the Federal agencies can work with permit applicants to design projects that meet the requirements of the law and protect the environment and public safety, while accomplishing the legitimate individual objectives and protecting the property rights of the applicant. Overall, more than 95% of all projects receive Section 404 authorization.

### The Fifth Amendment to the Constitution of the United States of America

*No person shall...be deprived of...property without due process of law, nor shall private property be taken for public use, without just compensation.*

For more information, contact the EPA Wetlands Information Hotline at 1-800-832-7828 (contractor operated).



U.S. Environmental Protection Agency  
Region 5, Library (PL-12J)  
77 West Jackson Boulevard, 12th Floor  
Chicago, IL 60604-3590