

# A New Green Government Weapon: Shooting Down Regulatory Takings with Estoppel

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## I. INTRODUCTION

*One who buys with knowledge of a restraint assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a “taking” would confer a windfall.<sup>1</sup>*

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1. *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994).

The widespread destruction of wetlands in the United States and the gradual realization of the folly of that course of conduct has led to increasing efforts to preserve the nation's remaining wetlands. Regulations to protect wetlands, however, conflict with landowners' expectations for using and developing their property. The result has been the proliferation of takings claims against government when regulation stymies development. Landowners seek reimbursement from the government for the value lost to them when land contains wetland areas that cannot be developed the way the owner wishes and regulations reduce or eliminate the value of the property for non-wetland uses.

Purchasers can avoid such problems by buying land that does not contain wetland areas, but a few states, such as Louisiana, have millions of acres of wetlands whose location is not always known.<sup>2</sup> The broad definition of wetlands includes areas that are not necessarily wet at all times, so their elusive nature compounds the identification problem. Louisiana has not mapped all of its wetlands, and has no requirement that sellers disclose the existence or the extent of wetlands on their property to potential buyers. Are there valid reasons to add yet another regulation to wetlands law requiring sellers to provide actual notice of the possibility that their property may contain wetlands? Will such a requirement provide benefits not attained through private solutions to the problem, or reduce negative consequences resulting from the lack of actual notice to buyers?

Although the many permutations of wetlands law, regulatory takings, and disclosure requirements are beyond the scope of this Comment, Part II provides a broad outline of these areas of the law and a foundation for interrelating aspects of them through my proposal. Part III will demonstrate that an actual notice requirement is timely given changes in wetland regulations. It will show that actual notice will prevent disputes, provide certainty to landowners at minimal cost, and eliminate wetland-related regulatory takings by using estoppel while protecting our national wetlands resource. Finally, this Comment will assert that actual notice will benefit both the state and federal governments by reducing regulatory takings litigation and its concomitant expense to landowners, government, and taxpayers. Part IV will conclude that applying both the traditional and modern concepts of property law to the problem of wetlands loss in Louisiana militates for a new requirement that sellers of land in

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2. See J.M. HEFNER ET AL., U.S. DEP'T OF THE INTERIOR, FISH AND WILDLIFE SERVICE, SOUTHEAST WETLANDS; STATUS AND TRENDS, MID-1970S TO MID-1980S 18 (1994).

Louisiana provide actual notice to buyers of the possible existence of wetlands on properties offered for sale.

## II. TAKINGS, WETLANDS, AND NOTICE LAW

### A. *Concepts of Property Law*

Historically, the common law has favored three social policies underlying the rules of property ownership.<sup>3</sup> First, certainty of ownership gives people confidence and security because they know what they own and what rights they have without having to seek determinations in court.<sup>4</sup> Second, social peace results from clear rules that prevent disputes.<sup>5</sup> Finally, property law favors putting resources to productive use.<sup>6</sup>

In the United States, concern with ownership and control of property manifested itself in the Constitution's Fifth Amendment clause, "nor shall private property be taken for public use, without just compensation."<sup>7</sup> The mandate historically applied only to government eminent domain "takings" of property for public purposes such as roads.<sup>8</sup> A landmark 1922 Supreme Court case introduced a new application of the clause by declaring that if *regulation* of a person's property "goes too far" it too becomes a taking for which government must pay compensation.<sup>9</sup>

Modern property law has evolved to emphasize free alienability while reinforcing certainty and social peace through land use controls such as zoning.<sup>10</sup> Society has recognized that protection of agricultural and ecologically sensitive land may preserve land's most "productive" use.<sup>11</sup> Mechanisms such as development controls, urban growth boundaries, and retirement of sensitive land for conservation purposes attest to these new views.<sup>12</sup>

Economic theory has affected the way in which courts resolve property disputes. In 1960 Professor Ronald Coase proposed that regardless of which party held a particular property right, in the

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3. See *Pierson v. Post*, 3 Cai. R. 175 (Sup. Ct. N.Y. 1805), available in 1805 WL 781; see also *Keeble v. Hickeringill*, 103 Eng. Rep. 1127 (K.B. 1707).

4. See *Pierson*, 3 Cai. R. 175; *Keeble*, 103 Eng. Rep. 1127.

5. See *Pierson*, 3 Cai. R. 175; *Keeble*, 103 Eng. Rep. 1127.

6. See *Pierson*, 3 Cai. R. 175; *Keeble*, 103 Eng. Rep. 1127.

7. U.S. CONST. amend. V.

8. See DAVID L. CALLIES ET AL., *CASES AND MATERIALS ON LAND USE* 4-5 (3d ed. 1999).

9. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

10. See CALLIES ET AL., *supra* note 8, at 2-3.

11. See *id.* at 653-58, 722-23, 749-53. Swamps, marshes, and estuaries are the most biologically productive areas on the earth. See G. TYLER MILLER, JR., *LIVING IN THE ENVIRONMENT* 94 (8th ed. 1994).

12. See generally CALLIES ET AL., *supra* note 8, Ch. 7-9.

absence of transaction costs, parties to a transaction would achieve the same efficient solution to a dispute.<sup>13</sup> Implicit in Coase's theory is that the parties bear the full costs and receive all the benefits of the transaction; thus, the transaction places no positive or negative externalities upon society.<sup>14</sup> As applied by law and economics scholars, the Coase theorem would have a court's judgment reflect the agreement the informed parties would have reached were they bargaining with low transaction costs.<sup>15</sup> Other areas of law follow this idea of economic efficiency by assigning the risk of loss to the party best prepared to prevent it.<sup>16</sup>

### B. Takings Law

In the United States, takings of property under government's eminent domain power and regulation under the police power were areas of law that existed in separate realms until Justice Holmes formally wed them in *Pennsylvania Coal v. Mahon*.<sup>17</sup> Fifty-six years later, in *Penn Central Transportation Co. v. New York City*, the Supreme Court announced two factors by which it would evaluate takings claims: the character of the government action and its economic impact.<sup>18</sup> As part of the economic impact analysis, the Court would consider the frustration of the owner's investment-backed expectations for the property.<sup>19</sup>

A basic idea behind takings law is that individuals should not bear the burden of providing private property for public use. Instead, the public should compensate the individual for the property taken.<sup>20</sup> While the Supreme Court in *Mahon* had decided to focus on reasonable expectations, it was not willing to extend takings law to cover property interests that the owner had believed were available, but which the government had thwarted.<sup>21</sup>

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13. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 5-7 (1960).

14. See *id.* at 5-7; see also Harold Demsetz, *Some Aspects of Property Rights*, J.L. & ECON. 61, 62-63 (1966).

15. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.6 at 52-54, § 3.8 at 62-63, § 3.11 at 76-78 (4th ed. 1992). For a Coasean court decision, see *Spur Indus., Inc. v. Del Webb Dev. Co.*, 494 P.2d 700, 708 (Ariz. 1972) (party who brought development to a public nuisance pays costs for the nuisance to move away).

16. See POSNER, *supra* note 12, § 6.1 at 164; Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-33 (1972).

17. 260 U.S. 393, 415 (1922).

18. 438 U.S. 104, 124 (1978).

19. See *id.*; see also *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (reiterating these factors).

20. See *Penn Cent.*, 438 U.S. at 123.

21. See *id.* at 125, 127.

Over the years of takings jurisprudence, the Court has distilled a three-factor takings test.<sup>22</sup> First, courts must examine the character of the government action; for example, whether the action involved a physical occupation or was intended to prevent a nuisance.<sup>23</sup> Second, courts must consider the economic impact of the action, such as a reduction in the value of the property.<sup>24</sup> Third, courts must determine the extent to which the action interferes with the property owner's reasonable investment-backed expectations.<sup>25</sup> The foundation for assessing investment-backed expectations at the time of purchase is the amount of information buyers have about the property, which in turn affects the price paid.<sup>26</sup> Evidence that the landowner should have or could have reasonably expected a regulation to affect the property makes it unlikely that a court will find a taking.<sup>27</sup> For example, some courts have considered the buyer's having paid a reduced price for property as an indicator of awareness of existing or potential regulation.<sup>28</sup> Taking a snapshot of the buyer's investment-backed expectations at the time of purchase has been an equitable way to analyze later takings claims arising from the effects of regulation.<sup>29</sup>

A crucial development in modern takings jurisprudence occurred in *Lucas v. South Carolina Coastal Council*.<sup>30</sup> In *Lucas*, the Supreme Court held that a state statute prohibiting development on beachfront property deprived the owner of all economically beneficial use of his land and was therefore a total taking.<sup>31</sup> The Court declared that the government must pay compensation for such takings unless the regulation was designed to prevent nuisances or was part of the state's real property law, and thus a part of the deed, when the buyer acquired the property.<sup>32</sup> In other words, the Court would not compensate a total taking if the owner had constructive notice of existing property law principles and therefore his expectations for the property were

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22. See CONGRESSIONAL BUDGET OFFICE, REGULATORY TAKINGS AND PROPOSALS FOR CHANGE 14, 14 n.6 (1998) (collecting cases) [hereinafter CBO].

23. See *id.* at 14-16, 25-33.

24. See *id.*

25. See *id.*

26. See *id.*

27. See *id.*

28. See *id.*; *infra* Part III.

29. See Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 119, 129 (David L. Callies ed., 1996).

30. 505 U.S. 1003 (1992).

31. See *id.* at 1032.

32. See *id.* at 1027-28.

unreasonable.<sup>33</sup> The South Carolina statute rendering Lucas' property a total taking was passed *after* Lucas purchased the property.<sup>34</sup> The Court allowed that, once in possession of property, the owner could naturally expect that the government might pass new regulations curtailing certain uses of land, but that those would not warrant compensation unless they constituted taking of all economic use and did not fall within the exceptions noted above.<sup>35</sup>

Just as Lucas had constructive notice of state property law principles when he purchased his lots, the federal prohibition against dredging and filling wetlands under section 404 of the Clean Water Act (CWA)<sup>36</sup> puts all U.S. property owners on constructive notice that development of wetlands may not be permitted and that they must adjust their reasonable investment-backed expectations accordingly.<sup>37</sup> Likewise, compensation for regulatory takings will not result from frustrated efforts to develop wetlands unless regulation displaces all economic use *and* the use was not already prohibited under state law.<sup>38</sup> This is an unlikely scenario. Still, the *Lucas* Court signaled that landowners' investment-backed expectations at the time of purchase will be one of the most important factors for assessing takings claims in the future.<sup>39</sup>

Jurisdiction for takings claims against the federal government lies in the Court of Federal Claims when the remedy sought is a judgment exceeding ten thousand dollars.<sup>40</sup> Claims for less than that amount, or in which the suitor seeks an injunction, also may be heard in a district court.<sup>41</sup> Louisiana's constitution contains a takings clause and Louisiana law provides for a process to assess takings and to provide compensation to property owners when government action

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33. *See id.* at 1027-29.

34. *See id.* at 1007-08.

35. *See id.* at 1027-29.

36. Federal Water Pollution Control Act §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994) (commonly known as the Clean Water Act). Section 404 provides for a regulatory program that requires permits for the discharge of dredge or fill material into water. The EPA and the Army Corps of Engineers administer the program. *See id.* § 1344(a)-(c).

37. *See supra* text accompanying notes 32-33.

38. Some wetlands cases have resulted in decisions awarding total compensation. *See, e.g., Bowles v. United States*, 31 Fed. Cl. 37, 53 (1994) (holding to be a total taking the denial of a section 404 CWA permit to place fill to build a septic system, which prevented construction of a home on the property).

39. *See Lucas*, 505 U.S. at 1027-30.

40. *See The Tucker Act*, 28 U.S.C. § 1491(a)(1) (1994).

41. *See William L. Want*, 8 Law of Wetlands Regulation § 10.06, 10-17 (1997); 28 U.S.C. § 1346(a)(2).

diminishes the value of their property.<sup>42</sup> Exceptions include eminent domain actions; legislative amendments, enactment of statutes, or adoption of resolutions; and actions taken to comply with federal laws and regulations.<sup>43</sup>

### C. *Wetlands Law*

Wetlands<sup>44</sup> first received federal protection in 1972 under section 404 of the CWA.<sup>45</sup> The section 404 program applies to the “waters of the United States,” which encompass most water bodies in the country.<sup>46</sup> These waters include not only navigable waters, but also streams, tributaries, wetlands adjacent to other water bodies, interstate wetlands, and isolated wetlands that are not adjacent to other bodies of water—if their degradation could affect interstate commerce.<sup>47</sup> Wetlands may be separated from nearby water bodies by substantial barriers yet still be classified as adjacent.<sup>48</sup> Even artificially created wetlands and seasonal wetlands that are dry during parts of the year are subject to CWA jurisdiction.<sup>49</sup> The Supreme Court has confirmed

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42. See LA. CONST. art. 1, § 4 (right to property); LA. REV. STAT. ANN. §§ 3:3601-:3602, 3:3609-:3622.1 (West 1987 & Supp. 2000) (takings procedure); *id.* §§ 9:3176-:3191 (West 1997) (expropriation); *id.* §§ 19:1-:201 (West 1979 & Supp. 2000) (expropriation); *id.* §§ 47:2321-2323 (West 1990) (determining fair market value); *id.* §§ 48:441-:460 (West 1984 & Supp. 2000) (quick-taking procedure).

43. See LA. REV. STAT. ANN. § 3:3602(12)(a),(b),(g) (West Supp. 2000).

44. The Army Corps of Engineers defines wetlands as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” 33 C.F.R. § 328.3(b) (1999); see also 40 C.F.R. §§ 230.3(t), 232.2(r) (1999).

45. Clean Water Act § 404(a)-(c), 33 U.S.C. § 1344(a)-(c) (1994). The Corps had been considering environmental factors in its permitting decisions for several years prior to passage of the CWA. See *Deltona Corp. v. United States*, 657 F.2d 1184, 1187 (Ct. Cl. 1981).

46. See 33 C.F.R. § 328.3(a) (1999); 40 C.F.R. § 230.3(s) (1999).

47. See *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 686 (D.C. 1975); 33 C.F.R. § 328.3(a)(2),(3),(7) (1999). In *Wilson v. United States*, the Fourth Circuit held invalid the definition of waters of the United States as those waters “the degradation or destruction of which could affect interstate or foreign commerce.” *Wilson v. United States*, 133 F.3d 251, 257 (4th Cir. 1997); see also 33 C.F.R. § 328.3(a)(3) (1999). The definition expanded the meaning of U.S. waters beyond the scope of the Corps’ authority to regulate under the commerce clause. See *Wilson*, 133 F.3d at 257.

48. See 33 C.F.R. § 328.3(c) (1999); see also *Hough v. Marsh*, 557 F. Supp. 74, 80 n.4 (D. Mass. 1982).

49. See *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 191 F.3d 845, 847 (7th Cir. 1999) (upholding Corps jurisdiction over wetlands created by abandoned mining operation); *Leslie Salt Co. v. United States*, 896 F.2d 354, 360-61 (9th Cir. 1990) (affirming jurisdiction over seasonal wetlands formed as result of government activity); *United States v. DeFelice*, 641 F.2d 1169, 1175 (5th Cir. 1981) (upholding jurisdiction over waters created by unauthorized third parties); *Track Twelve, Inc. v. District Eng’r*, 618 F. Supp.

the broad scope of regulatory power over many types of wetlands, even those not hydrologically connected to neighboring bodies of water.<sup>50</sup> Landowners, then, may safely assume that property containing any type of wetland may be subject to regulation.

The Army Corps of Engineers (Corps) administers the CWA section 404 permitting program and makes most jurisdictional determinations.<sup>51</sup> The Environmental Protection Agency (EPA) retains ultimate authority for CWA jurisdiction decisions<sup>52</sup> and may veto Corps permits.<sup>53</sup> The section 404 program puts responsibility on the wetlands owner for the initial determination as to whether particular wetlands fall under CWA jurisdiction.<sup>54</sup> The applicant for an individual permit bears the burden of delineating the extent of the wetlands on the property the applicant seeks to develop.<sup>55</sup> The applicant must collect and provide information supporting the delineation to enable the Corps to make the official decision.<sup>56</sup> Determinations must be made based on a site-by-site evaluation and can present considerable difficulty even for experts.<sup>57</sup> The Corps and the EPA are authorized but not *required* to make wetlands delineations.<sup>58</sup> Therefore, property owners often seek the services of private consultants to conduct the delineations, thus avoiding the likely delay and uncertainties of obtaining them from the district Corps engineer.<sup>59</sup>

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448, 449 (D. Minn. 1985) (affirming jurisdiction over water body created by highway construction).

50. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 130-31 (1985).

51. Clean Water Act § 404(a), 33 U.S.C. § 1344(a) (1994).

52. See Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act 2 (Jan. 19, 1989), reprinted in MARGARET N. STRAND, *WETLANDS DESKBOOK*, 463-68 (2d ed. 1997).

53. 33 U.S.C. § 1344(c).

54. See 33 C.F.R. § 325.1(b) (1999). Wetland determinations identify the existence of wetlands, and delineations indicate their extent on the property. See Margaret N. Strand, *Avoiding the Swamp Monster*, in ENVIRONMENTAL ASPECTS OF REAL ESTATE TRANSACTIONS 603, 608-09 (James B. Witkin ed., 1995) [hereinafter *Swamp*].

55. See 33 C.F.R. § 325.1(b) (1999); *Swamp*, *supra* note 54, at 608-09.

56. See *Swamp*, *supra* note 54, at 608-09.

57. See *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132 (1985); see also *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 907 (5th Cir. 1983) (delineating as a wetland an area with vegetation tolerating but not *requiring* inundation or saturation); *Swamp*, *supra* note 54, at 603.

58. See 33 C.F.R. § 325.9 (1999).

59. See *Want*, *supra* note 41, § 4.02 at 4-3 to 4-4.



A wetland owner faces strict liability under section 404 for dredging and filling wetlands without a permit.<sup>60</sup> The CWA lists several kinds of exemptions, primarily for farming, forestry, and ranching.<sup>61</sup> General or nationwide permits cover other activities in wetlands and do not require individual applications, but in some cases require the landowner to notify the Corps before beginning activities.<sup>62</sup> Distinguishing between activities requiring individual, general, or nationwide permits can be difficult. For example, landowners can clear wetland trees and vegetation without individual permits, but the CWA regulates the activity if the landowner redeposits the removed material.<sup>63</sup>

The Corps approves most section 404 permit applications, requiring at most, minor changes or added conditions on some permits.<sup>64</sup> Individual permits are more difficult to obtain, and a significant number of applicants do not follow through to receive them.<sup>65</sup> Rather, they simply drop out of the process.<sup>66</sup> Collected data does not reveal the details of each case, such as how many proceed without a permit, or how many adjust their projects to avoid having to apply for permits.<sup>67</sup> The Corps does not issue permits to fill wetlands if there are practicable alternative sites that would have fewer negative impacts on wetlands.<sup>68</sup> For example, in *Bersani v. EPA*, a developer sought to build a shopping mall on a site containing nearly fifty acres of wetlands.<sup>69</sup> The EPA vetoed the permit because a nonwetland site was available at the time the buyer purchased the property.<sup>70</sup>

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60. See *id.* § 9.08 at 9-16.

61. See *id.* § 5.01 at 5-2 to 5-3; Clean Water Act § 404(f), 33 U.S.C. § 1344(f) (1994).

62. See *Want*, *supra* note 41, § 5.03 at 5-7 to 5-12; see also *STRAND*, *supra* note 52, at 31-49, 125-38.

63. See *Save our Wetlands, Inc. v. Sands*, 711 F.2d 634, 647 (5th Cir. 1983); see also *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (removing forest growth from wetland with subsequent redeposit, burning, and discing to convert wetland to agricultural use deemed unlawful discharge of pollutant under CWA).

64. See ROBERT E. STEINBERG, *WETLANDS AND REAL ESTATE DEVELOPMENT HANDBOOK* VI-10 to -11 (2d ed., 1991); *STRAND*, *supra* note 52, at 43, 131; *CBO*, *supra* note 22, at 4-6, (noting that eighty-six percent of all permit applications are for general permits, of which the Corps approves over ninety percent, but that a majority of individual permit applications are withdrawn before the Corps' decision can be made).

65. See *CBO*, *supra* note 22, at 6.

66. See *id.*

67. See *id.* at 6, 18-19.

68. See Clean Water Act § 404(b)(1), 33 U.S.C. § 1344(b)(1) (1994); 40 C.F.R. § 230.10(a) (1999). The Corps is extremely unlikely to permit activities on wetland sites that are not water-dependent. See 40 C.F.R. § 230.10(a)(2),(3) (1999).

69. 850 F.2d 36, 41 (2d Cir. 1988).

70. See *id.* at 42-43.

Takings claims for wetlands stem from government protections and programs that limit activities in wetlands and thus force property owners to provide the “public goods” wetlands offer—such as improved water quality, drainage, flood storage, recreation, and wildlife values—at private expense.<sup>71</sup> The number of takings claims for wetlands exceeds that of any other type of federal taking claim.<sup>72</sup> From 1992 to 1997, federal takings suits netted almost \$350 million for claimants.<sup>73</sup> Wetland takings claims most often arise when the Corps denies a landowner’s application for a permit and frustrates his or her development expectations.<sup>74</sup> State regulations, sometimes enacted pursuant to a federal requirement, may result in takings claims as well.<sup>75</sup> The government has created no uniform national system to provide compensation for people suffering declines in property value due to wetland regulations.<sup>76</sup>

In the conterminous United States, Louisiana is second only to Florida in wetland acreage, with 8.8 million acres.<sup>77</sup> Louisiana law contains various provisions mandating protection of its wetlands, and requires coastal use permits under the state coastal management program.<sup>78</sup> Both state and federal wetlands programs abound: no less than thirty-six federal agencies have functions related to protecting the nation’s remaining 103 million acres of wetlands.<sup>79</sup> These

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71. See CBO, *supra* note 22, at 3; LOUISIANA DEPT. OF NATURAL RESOURCES, LOUISIANA COASTAL WETLANDS CONSERVATION PLAN 2-4 (1997)[hereinafter COASTAL PLAN]; DAVID W. PEARCE & R. KERRY TURNER, *ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT* 321-41 (1990).

72. See CBO, *supra* note 22, at 7.

73. See *id.*

74. See *id.*

75. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1007-08 (1992).

76. See UNITED STATES GENERAL ACCOUNTING OFFICE, *WETLANDS OVERVIEW* 6 (GAO/RCED-98-150, July 1998) [hereinafter OVERVIEW].

77. See THOMAS E. DAHL, *WETLANDS LOSSES IN THE UNITED STATES 1780S TO 1980S* 6 (1990). Louisiana contains forty percent of the nation’s saltwater wetlands and fifteen percent of its freshwater wetlands. See John McQuaid, *Environmental Backlash: The Land War Series: Special Report*, *TIMES-PICAYUNE* (New Orleans), July 3, 1994, at A1.

78. See LA. CONST. art. IX, §§ 1, 3; LA. REV. STAT. ANN. § 41:1702 (West 1990); Louisiana Coastal Wetlands Conservation, Restoration, and Management, LA. REV. STAT. ANN. §§ 49:213.1-:214.41 (West 1987 & Supp. 2000); LA. ADMIN. CODE tit. 43 §§ 700-729 (1996) (This legislation was enacted pursuant to the federal Coastal Wetlands Planning, Protection, and Restoration Act of 1990, 16 U.S.C. §§ 3951-3956 (1994 & Supp. III 1997)); see also Want, *supra* note 41, § 13.02 at 13-43 to 13-46.2 (describing Louisiana wetland regulations). See generally Marc C. Hebert, *Coastal Restoration Under CWPPRA and Property Rights Issues*, 57 LA. L. REV. 1165, 1165-1211 (1997) (discussing law and policy governing coastal restoration).

79. See OVERVIEW, *supra* note 76, at 6; HEFNER, *supra* note 2, at 5; Keith D. Wiebe et al., *Property Rights, Partial Interests, and the Evolving Federal Role in Wetlands Conversion and Conservation*, 50 J. SOIL & WATER CONSERV’N 627, 628-29 (1995). See generally Coastal Plan,

programs have not yet stopped the decline in national wetland acreage.<sup>80</sup> In response, the EPA recently terminated a popular nationwide permit that was widely criticized for allowing too much wetland destruction.<sup>81</sup> The Corps has restructured the nationwide permit program to restrict the sizes and types of wetlands that people may disturb.<sup>82</sup> The nationwide permits are due for renewal in 2001, and even further restrictions are expected.<sup>83</sup> Consequences will include more required mitigation and increased permit denials.<sup>84</sup> Some percentage of those permit denials will likely trigger takings claims.

For purposes of this Comment, “developing wetlands” means filling areas of wetlands to the extent that the developer must seek an individual, rather than a nationwide permit. Therefore, “development” is synonymous with the Corps-permitted discharge of a pollutant (fill material) from a point source into waters of the United States, and destruction or conversion to dry land of wetlands falling under CWA jurisdiction.<sup>85</sup>

#### D. Notice Law

The notice element in takings law appeared in 1984. In *Ruckelshaus v. Monsanto Co.*, the Supreme Court considered whether a taking occurred when a federal statute permitted the EPA to disclose trade-secret information about a Monsanto product.<sup>86</sup> The takings clause, the Court held, protected the company’s property right to the information.<sup>87</sup> The federal statute, however, put Monsanto on notice that the government would reveal trade-secret information.<sup>88</sup> Therefore, the Court held that the company could not have reasonable investment-backed expectations when it was aware that the government would disclose the information.<sup>89</sup>

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*supra* note 71; LOUISIANA DEPARTMENT OF NATURAL RESOURCES, COAST 2050: TOWARD A SUSTAINABLE COASTAL LOUISIANA (1998) [hereinafter COAST 2050].

80. See CBO, *supra* note 22, at 5; Wiebe, *supra* note 79, at 629; HEFNER, *supra* note 2, at 22.

81. See Margaret N. Strand & Lawrence R. Liebesman, *The Section 404 Nationwide Permit: An Endangered Species?*, NAT. RESOURCES & ENV’T 29, 32-34 (Summer 1999) [hereinafter *Nationwide*]; see also Want, *supra* note 41, § 5.03 at 5-14 to 5-17.

82. See *Nationwide*, *supra* note 81, at 34.

83. See *id.*

84. See *id.*

85. See Clean Water Act § 301, 33 U.S.C. § 1311 (1994).

86. 467 U.S. 986, 1012-13 (1984).

87. See *id.* at 1003-04.

88. See *id.* at 1012-13.

89. See *id.*

Although *Monsanto* is not a land use case, its holding is important to takings law because it signaled that notice of a government regulation can frustrate takings claims by minimizing the weight of investment-backed expectations, which are arguably the most important takings factor in landowner claims.<sup>90</sup> The *Lucas* court followed in the *Monsanto* tradition when Justice Scalia applied the “negative” notice rule to real property: in the absence of government regulation prohibiting development, a property owner’s reasonable expectations for developing property are “taken” by later-enacted laws for which the landowner had no constructive or actual notice.<sup>91</sup>

State courts, too, have applied the notice rule to reject landowner takings claims.<sup>92</sup> For example, in a New York case the court denied compensation when a developer had notice, prior to a land purchase, of government plans to reduce the maximum building density allowed on a parcel.<sup>93</sup> The court deemed his investment-backed expectations unreasonable.<sup>94</sup>

All property buyers have had constructive notice of the federal statute protecting wetlands since its enactment in 1972.<sup>95</sup> They have constructive notice of state statutes regulating wetlands as well. Louisiana has what could be termed a *de facto* inquiry notice requirement for purchasers of property containing wetlands.<sup>96</sup> That is, buyers bear the burden to investigate the existence and extent of wetlands on property under consideration for purchase because Louisiana has no requirement that sellers notify potential buyers.

In Louisiana, the remedy of redhibition (rescission) of the purchase is available for fraudulent concealment of the existence of wetlands on property.<sup>97</sup> A successful claim for redhibition requires the

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90. 467 U.S. 986 (1984).

91. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1007-08 (1992); *supra* text accompanying notes 30-35.

92. See, e.g., *State Dep’t of Health v. The Mill*, 887 P.2d 993, 1000-02 (Colo. 1994) (pre-existing state and federal laws prevented regulatory takings compensation for owner of sixty-one acre mine tailings site rendered valueless); *Dodd v. Hood River County*, 855 P.2d 608, 616 (Or. 1993) (landowner had constructive notice of existing zoning restrictions before purchase so could not have expectations to build house in forest zone); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1274-76 (Mass. 1992) (denying taking claim because regulation was in effect when property was purchased and buyer paid price that reflected the effect of the regulation on the land’s value).

93. See *Orange Lake Assocs., Inc. v. Kirkpatrick*, 21 F.3d 1214, 1224-25 (2d Cir. 1994).

94. See *id.*

95. See Clean Water Act, §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994).

96. For a description of Louisiana wetland regulations see *Want*, *supra* note 41, § 13.02 at 13-43 to 13-46.2; see also *supra* note 78.

97. Fraud is an intentional misrepresentation or suppression of the truth, including silence or inaction, and includes representations by the seller “that the thing has a quality that he knows it

buyer to prove three elements: a sale, a defect, and the nature of the defect as one that would have caused the buyer to avoid the sale had the buyer known of the defect.<sup>98</sup> Louisiana law holds buyers only to a reasonably prudent buyer standard, yet the average person may have difficulty recognizing certain conditions as wetlands.<sup>99</sup>

The dearth of past redhibition case law for Louisiana property containing wetlands is probably attributable to several factors. Most wetlands in Louisiana are not likely to be of types that are difficult to recognize.<sup>100</sup> In addition, not all wetlands create problems for those who may wish to convert them to other uses.<sup>101</sup> Reasonably prudent land buyers in Louisiana are likely to be aware of the potential difficulties associated with buying wetlands and choose not to buy property containing wetlands if they intend to develop the property.<sup>102</sup>

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does not have.” The buyer is entitled to rescission of the purchase. LA. CIV. CODE ANN. art. 1953, 2545 (West 2000). Redhibition is the avoidance of a sale due to a serious defect that “renders the thing useless, or its use so inconvenient” that the buyer would not have purchased it. The buyer has a right to obtain rescission of the sale. Defects that reduce value to such an extent that a buyer would only buy for a reduced price entitle the buyer to that lower price. *Id.* art. 2520.

98. See *Cimmaron Homeowners Ass’n v. Cimmaron, Inc.*, 533 So.2d 1018, 1020 (La. App. 1st Cir. 1988).

99. See LA. CIV. CODE ANN. art. 2521 (West 2000); *supra* note 54-59 and accompanying text.

100. It is unclear exactly how many acres of each type of wetland exist in the United States due to various factors, including differing definitions of what constitutes a wetland, and limitations of mapping techniques. Aerial mapping efforts focus on wetlands that are identifiable because they are inundated, but even wetland delineations may not involve site visits that reveal exactly how many acres of each type of wetland exist on a given site. Widely cited government reports do not even estimate the acreage of hard-to-detect wetland types. In Louisiana, saltwater wetlands total 1.9 million acres and freshwater wetlands total 6.9 million acres. While the influence of tides should make saltwater wetlands easier to identify, no concrete data exist on the percentage of freshwater wetlands that are not continuously inundated and therefore are more difficult to recognize. See OVERVIEW, *supra* note 76, at 9; Jon Kusler, *Wetlands Delineation: An Issue of Science or Politics?* ENV’T, Mar. 1992, at 10, 29-31; HEFNER, *supra* note 2, at 10, 18, 20, 27, 31; THOMAS E. DAHL ET AL., STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES, MID-1970S TO MID 1980S iii, 1, 3, 7-12, 23 (1991); DAHL, *supra* note 77, at 3-5, 8-9.

101. For example, most conversions of Louisiana wetlands are for agriculture, which is exempt from regulation under the CWA. More recent data reveal that nationally, losses of wetlands for development are twice the amount of losses for agriculture, indicating that regulation is probably not significantly impeding development. See Clean Water Act § 404(f), 33 U.S.C. § 1344(f) (1994); HEFNER, *supra* note 2, at 18; CBO, *supra* note 22, at 71; OVERVIEW, *supra* note 76, at 10.

102. Forty percent of the coastal wetlands of the continental United States are located in the Louisiana coastal zone, and roughly three-fourths of Louisiana’s population lives within fifty miles of the coast. That population is intimately aware of its substantial connections to Louisiana’s wetlands. Federal regulation of wetlands has blossomed since it began in the 1970s to include at least twenty-five federal statutes and at least thirty-six federal agencies; Louisiana residents have felt the impact not only through regulation, but through coastal zone restoration efforts. See COASTAL PLAN, *supra* note 71, at 2-4; OVERVIEW, *supra* note 76, at 6; Hebert, *supra*

Many potential takings suits need not be filed because landowners modify their plans in order to secure permits or to avoid the need for a permit.<sup>103</sup> Finally, no precedent exists for considering wetlands to be a *defect* warranting redhibition.<sup>104</sup>

*E. Private Strategies to Protect Property Buyers*

Given the lack of notice requirements to warn prospective buyers, private strategies have evolved to provide certainty and avoid surprise when buying land that may or does contain wetlands.<sup>105</sup> Buyers or investors may insert requirements for wetlands certifications into private land purchase contracts.<sup>106</sup> Buyers may conduct environmental assessments, also called environmental audits, environmental due diligence, or Phase I environmental site assessments.<sup>107</sup> All of these labels apply to the process of investigating the potential liabilities attached to a piece of property, typically by virtue of its history of environmental contamination.<sup>108</sup> Audits are a useful tool of knowledgeable buyers to protect themselves from responsibility for contamination of property by prior owners, but they may also reveal conditions such as wetlands that could become obstacles to full use of the property.<sup>109</sup> Sellers may request environmental audits to accommodate buyers or investors requiring certification of the environmental condition of property.<sup>110</sup>

Another technique to protect buyers is for third parties, such as lenders or mortgage companies, to demand environmental audits before making loans to buy or invest in property.<sup>111</sup> State and federal authorities or private parties may use environmental impact statements (EIS) or environmental assessments under the National

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note 78, at 1167-71; COAST 2050, *supra* note 79, at 51-67; *supra* notes 78-79 and accompanying text.

103. See *supra* notes 64-70 and accompanying text.

104. A search of case law reveals no suits in redhibition for Louisiana wetlands.

105. See STEINBERG, *supra* note 64, at XIV-1 to -12.

106. See Gerard A. Caron, *Structuring the Transaction to Allocate Environmental Liability*, in ENVIRONMENTAL ASPECTS OF REAL ESTATE TRANSACTIONS 243, 243-57 (James B. Witkin ed., 1995).

107. See Carol R. Boman, *The Due Diligence Dilemma: How Much Is Enough?* in ENVIRONMENTAL ASPECTS OF REAL ESTATE TRANSACTIONS 175, 180-91 (James B. Witkin ed., 1995); STEINBERG, *supra* note 64, at XIV-2 to -12.

108. See Boman, *supra* note 107, at 180-91; see also *Swamp*, *supra* note 54, at 626.

109. See ELIZABETH GLASS GELTMAN, A COMPLETE GUIDE TO ENVIRONMENTAL AUDITS 3, 28, 54-55 (1997).

110. See *id.* at 5.

111. See *id.* at 3, n.5.

Environmental Policy Act (NEPA) or equivalent state NEPA laws.<sup>112</sup> The EIS process requires the party undertaking an action to collect information and analyze the environmental impacts of the action.<sup>113</sup> The potential effects on wetlands would be important to such an analysis, and the Corps may require preparation of an EIS before approving a section 404 permit.<sup>114</sup> Private actions can thus become subject to NEPA if, for example, the project has substantial federal funding or requires federal wetland permits.<sup>115</sup> Clearly, then, a party contemplating developing a tract might desire to perform the EIS prior to purchase.

Finally, the EPA has an advance wetland identification program sometimes used in certain areas prior to project proposals.<sup>116</sup> Federal, local, or private parties may request this advance identification to determine which wetland areas may be suitable for development.<sup>117</sup> However, the developer must still undertake the process for individual project approval.<sup>118</sup> Individuals may also apply for Corps section 404 permits prior to purchase of property to evaluate its suitability for development, or sellers may obtain permits and transfer them to subsequent owners.<sup>119</sup>

#### F. *The Actual Notice Mechanism*

Ideally, actual notice will be as simple as an insertion in the deed or a form setting forth the Louisiana statutory obligation requiring sellers of real property to inform buyers that: (1) the property may contain wetlands; (2) if wetlands are present, they may be subject to state or federal regulation; (3) the federal and state definitions of wetlands include areas that may or may not be inundated at all times; (4) a Corps or private professional delineation is the best way to determine the location and extent of wetlands; (5) sellers need not provide delineations; (6) notice estops regulatory takings claims for decreases in property value if the property contains wetlands, under law or regulations in effect at the time of purchase *or* those enacted later, and (7) credits, compensation, or other incentives to preserve wetlands may be available to wetland owners from state or federal

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112. See National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1994 & Supp. III 1997). The EIS requirements are set out in section 4332. See *id.* § 4332.

113. See 42 U.S.C. § 4332.

114. See STEINBERG, *supra* note 64, at VIII-1 to -8.

115. See *id.*; 42 U.S.C. § 4332.

116. See 40 C.F.R. § 230.80 (1999).

117. See *id.* § 230.80(a)(2); see also *Swamp*, *supra* note 54, at 609-11.

118. See 40 C.F.R. § 230.80(a)(2) (1999).

119. See 33 C.F.R. app. A 325 (1999).

programs.<sup>120</sup> Exemptions from the notice requirement would track those wetlands that are jurisdictionally exempt from CWA and state regulation under existing law.

The rationale for the notice requirement has two prongs.<sup>121</sup> First, actual notice places the burden on the buyer to determine whether wetlands exist on the property, or to take the risk of surprise after purchase, when recovery via a takings claim would be estopped. Clearly, the wary buyer will investigate before buying, and indeed, has great incentive to become informed.<sup>122</sup> If a potential buyer locates wetlands on the property and chooses to walk away, he or she obviously loses no property value by having made no purchase, and therefore has no basis for a takings claim. Actual notice provides the impetus for even the unwary buyer to seek information, and assigns the risk of loss to the buyer if he or she chooses to waive the opportunity to do so. The second prong of the notice requirement estops takings claims from buyers who receive actual notice that property may contain wetlands. Actual notice affirmatively places the burden on buyers to investigate the wetland status of property and to adjust investment-backed expectations accordingly. Under *Lucas*, the existence of wetland regulations in state law, and by analogy under federal law, removes the foundation for takings claims based on unreasonable expectations.<sup>123</sup> Buyers on notice bear the disparity between unreasonable expectations and the market value of property containing regulated wetlands, and actual notice estops a takings claim.<sup>124</sup>

Under the second prong, any pre-existing takings claim the seller might have had would be based on the market value of the property containing regulated wetlands.<sup>125</sup> If the seller obtains a high price as a result of unreasonable investment-backed expectations on the part of the buyer, then the amount of the seller's takings claim will decline or the claim will disappear because his losses will be reduced.<sup>126</sup> Under

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120. See *infra* Part III.

121. See *infra* text accompanying notes 134-136.

122. See generally Want, *supra* note 41, chs. 4-5 (discussing problems associated with purchasing wetlands).

123. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-29 (1992).

124. See CBO, *supra* note 22, at xiii.

125. Both state and federal governments pay takings claims based on fair market value. See *Florida Rock Indus. v. United States*, 45 Fed. Cl. 21, 32 (1999); *Vela v. Plaquemines Parish Gov't*, 729 So.2d 178, 183-84 (1999); *supra* note 42. See also CBO, *supra* note 22, *passim* (analyzing the complicated issue of determining the value of property for regulatory takings claims).

126. See *Florida Rock*, 45 Fed. Cl. at 30-44; CBO, *supra* note 22, *passim*, for extensive analysis of the economics of regulatory takings claims.



the first prong of the notice requirement, the seller's position remains unchanged.<sup>127</sup> A lost sale represents no loss exceeding any pre-existing regulatory takings claim he or she might have had, because no further decline in property value occurs.<sup>128</sup> If regulations to protect the wetland have lowered the market value of the property, then that lower value should be reflected in the selling price and will form the basis of the seller's pre-existing takings claim.<sup>129</sup> On the other hand, if the seller conceals the nature of the property's value and obtains a higher price, he or she opens the door to suit by the buyer in redhibition or for fraud.<sup>130</sup> The seller would then bear any disparity between the market value and the selling price because the buyer could recover that difference at minimum, up to the full price paid upon a judgment in redhibition.<sup>131</sup> Again, any pre-existing taking claim the seller might have will be based on the market value.<sup>132</sup>

An analogy to an existing actual notice requirement highlights the advantages of such a requirement for property with wetlands. Louisiana law requires sellers to place notice on the public record, in the chain of title, or in the deed if a property was used for managing hazardous waste.<sup>133</sup> The requirement originated in the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>134</sup> One result of the notice requirement is to make the responsible parties liable for hazardous waste cleanup costs instead of subsequent owners, the government, or the taxpayers.<sup>135</sup>

The desirability of actual notice for property with environmental contamination is analogous to such notice for property with wetlands. Both conditions can be difficult for even sophisticated but nonexpert buyers to detect. Both represent potential financial losses or liabilities

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127. See *supra* note 125.

128. See *id.*

129. See *id.*

130. See LA. CIV. CODE ANN. arts. 1953, 2520, 2545 (West 2000) (redhibition and fraud).

131. See *id.*

132. See *supra* note 125 and accompanying text.

133. See LA. REV. STAT. ANN. § 30:2039 (West Supp. 2000) (notice must be placed in the parish mortgage and conveyance records if the seller has actual or constructive knowledge that the property was used for hazardous or solid waste disposal and has been identified as an inactive or abandoned disposal site); LA. ADMIN. CODE tit. 33 § 3525 (1999) (notice must be placed in the public record or chain of title).

134. 42 U.S.C. §§ 9601-9675 (1994). The notification provision is located at 42 U.S.C. § 9620(h)(3) (1994 & Supp. III 1997).

135. See Laurence S. Kirsch & Geraldine E. Edens, *Federal Environmental Liability, in ENVIRONMENTAL ASPECTS OF REAL ESTATE TRANSACTIONS* 3, 5 (James B. Witkin ed., 1995); see also Comment, *CERCLA's Innocent Landowner Defense: The Rising Standard of Environmental Due Diligence for Real Estate Transactions*, 38 BUFFALO L. REV. 827 (1990); Note, *Beyond Caveat Emptor: Disclosure to Buyers of Contaminated Land*, 10 STAN. ENV'T L.J. 169 (1991).

for purchasers. Both conditions are heavily regulated at the state and federal level. Informed buyers of either type of property reap benefits from actual notice because they can form reasonable expectations and pay prices reflecting their awareness of property conditions. With notice, parties to the transaction bear the costs of cleanup of contamination, and the costs of takings losses and litigation, instead of government or taxpayers. The notice requirement will place little burden on sellers, and sellers' underlying liabilities and responsibilities will not change.

G. *The Law Converges: Notice to Landowners in Wetland Takings Cases*

Courts consider far more than the link between constructive or actual notice and investment-backed expectations when deciding takings cases, but notice has elevated the role of expectations in both state and federal cases in determining whether regulatory takings occur.<sup>136</sup> For example, in 1964 Deltona Corp. purchased ten thousand oceanfront acres in Florida to build a residential development.<sup>137</sup> Navigable waters restrictions were in place at the time and the developer had to obtain Corps permits to proceed.<sup>138</sup> Environmental regulations, however, had become more restrictive, and the CWA was enacted before Deltona had obtained all necessary permits to complete the development.<sup>139</sup> The court held that the developer purchased the land with full awareness that permit conditions might become more restrictive.<sup>140</sup> The wetland area that Deltona could not develop constituted twenty percent of its total acreage, but the court found that Deltona's investment-backed expectations were not seriously damaged and found no taking for the diminution in value.<sup>141</sup>

Subsequent to *Deltona*, the *Monsanto* case cemented the notice rule in takings jurisprudence.<sup>142</sup> The next major wetlands case to apply the notice rule was *Ciampitti v. United States*.<sup>143</sup> Ciampitti, a developer, was aware of state and federal wetland restrictions on fourteen of forty-five acres when he purchased them for

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136. See generally CBO, *supra* note 22, at 13-16.

137. See *Deltona Corp. v. United States*, 657 F.2d 1184, 1188 (Ct. Cl. 1981).

138. See *id.* at 1188-89.

139. See *id.*

140. See *id.* at 1193.

141. See *id.* at 1192-94.

142. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *supra* text accompanying notes 86-91.

143. 22 Cl. Ct. 310 (1991).

development.<sup>144</sup> The court found that he could have had no reasonable development expectations and, without difficulty, denied the takings claim.<sup>145</sup>

A landowner in *Formanek v. United States* bought property containing ninety-nine acres of wetlands and twelve acres of uplands in 1966, with the intent to use the property for industrial development.<sup>146</sup> Over twenty years later the Corps denied a permit to develop some of the wetlands, and the court awarded the pre-regulation fair market value of the land.<sup>147</sup> Restrictions on the land had come into effect long after purchase so the court was sympathetic to the owner's disappointed expectations and the takings claim.<sup>148</sup>

As these cases demonstrate, government action cannot take value from property for which landowners, through actual or constructive notice, paid prices reflecting existing or expected regulations. Conversely, the courts may be sympathetic to property owners who suffer losses resulting from regulations whose enactment is unforeseeable. Lack of actual notice was pivotal in *Bowles v. United States*, a Court of Federal Claims case in which a property owner had no notice of Corps jurisdiction over a subdivision lot for which the only economic use was as a residence site.<sup>149</sup> The Corps denied a section 404 permit for the owner to install a septic tank.<sup>150</sup> The subdivision, however, required the tank in order for the owner to construct a residence, and the court found a total taking.<sup>151</sup> The court decided that the existence of Corps jurisdiction over the purchaser's property was not foreseeable by a reasonable person.<sup>152</sup> Had the landowner received actual rather than constructive notice, the court signaled that it would have ruled differently.<sup>153</sup>

Actual notice would estop takings claims even when regulations enacted after purchase reduce land values. For example, a developer in *Loveladies Harbor, Inc. v. United States* purchased a 250-acre parcel and had sold most of it before the CWA came into effect.<sup>154</sup> The Corps denied a section 404 permit for only twelve acres, but the

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144. *See id.* at 313.

145. *See id.* at 322.

146. 26 Cl. Ct. 332, 333 (1992).

147. *See id.* at 340-41.

148. *See id.* at 336-37.

149. *See Bowles v. United States*, 31 Fed. Cl. 37, 46 (1994).

150. *See id.* at 43.

151. *See id.* at 53.

152. *See id.* at 51.

153. *See id.*

154. 28 F.3d 1171, 1174 (Fed. Cir. 1994).

court held that the developer's investment-backed expectations had been thwarted.<sup>155</sup> The developer had no notice of the regulations yet to be enacted, and the court affirmed the \$2.5 million award for the taking.<sup>156</sup>

In *Loveladies*, the state had granted a building permit and the Corps denied the section 404 permit, placing responsibility for the taking on the Corps.<sup>157</sup> Had the state denied the initial permit, takings liability might well have rested with the state. Louisiana courts have not yet reached this issue of liability in a wetlands context. It is important to note that the state enacted the regulation in *Lucas* pursuant to federal coastal management legislation, yet the state, not the federal government, was responsible for the judgment.<sup>158</sup>

State and federal case law amply supports the conclusion that most courts have not hesitated to use the weapon of estoppel to shoot down takings claims. The Court of Federal Claims has used federal section 404 law as constructive notice to estop such claims, despite Justice Scalia's specific statements in *Lucas* that background principles of *state* law inhering in the title could function to estop total takings claims.<sup>159</sup> Justice Scalia discussed and did not rule out *federal* restrictions that might inhere in the title when land is sold.<sup>160</sup> The Federal Circuit in a recent nonwetland takings case, however, citing *Lucas*, invoked a federal statute in effect long before the company acquired its mineral interest to estop a takings claim.<sup>161</sup> In *M & J Coal Co. v. United States*, the government forced a mining company to leave coal pillars in the ground to prevent subsidence.<sup>162</sup> The Federal Circuit decided that the company had no reasonable expectation to exploit its mineral interest at the cost of public safety because the company was aware of federal statutory restrictions at the time it acquired its mineral interest.<sup>163</sup>

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155. *See id.*

156. *See id.* at 1178-79, 1183.

157. *See id.* at 1174.

158. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1007-08 (1992).

159. *See id.* at 1028-29.

160. *See id.*

161. *See M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995).

162. *See id.* at 1151.

163. *See id.* at 1154. In a recent wetland case, the Court of Federal Claims held that canceling a contract to purchase land containing wetlands was not a taking. The prospective buyer canceled when the Corps found wetlands on the property. The Corps designation as wetlands, however, did not preclude selling or developing the property. The court declared that frustrated expectations for a contract to sell property could not be a taking particularly because the Corps did not cause the cancellation—the parties did. *See Robbins v. United States*, 40 Fed. Cl. 381, 388-89 (1998), *aff'd without opinion*, 178 F.3d 1310 (Fed. Cir. 1998).

Two years later, the Court of Federal Claims in *Forest Properties, Inc. v. United States* disagreed.<sup>164</sup> The court stated that a section 404 permit denial was irrelevant to the takings analysis because state law allowed dredging and filling a lake bottom.<sup>165</sup> The federal permit could be granted or denied, so the existence of the section 404 program itself did not defeat the developer's property interest.<sup>166</sup> Instead, the court focused on the owner's unreasonable investment-backed expectations, given knowledge of the CWA regulation, to deny the taking.<sup>167</sup>

During the same year, the court in *Florida Rock Industries, Inc. v. United States* found a taking when the Corps denied the landowner a section 404 permit to extract limestone from 98 of 1,560 acres of wetlands.<sup>168</sup> As in *Loveladies*, the owner purchased the property prior to enactment of the CWA.<sup>169</sup> The court held that when Florida Rock purchased the land it had the right to develop or mine the property and fully expected to do so under existing law, so its investment-backed expectations had been frustrated.<sup>170</sup>

The nearly unbroken pattern that has emerged reveals courts favoring takings claims from landowners surprised by regulations enacted after they purchased property. Likewise, when federal or state regulations are in place at time of purchase courts tend to deny takings claims because development expectations are unreasonable. Recently, the Court of Federal Claims decided a significant wetland takings case that exemplifies the role of actual notice and estoppel in protecting the environment.<sup>171</sup> In *Good v. United States*, a developer in 1973 purchased a forty-acre parcel in the Florida Keys that contained thirty-two acres of wetlands.<sup>172</sup> The contract for the sale provided actual notice that development might be problematic: "The Buyers recognize that certain of the lands covered by this contract may be below the mean high tide line and that as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations."<sup>173</sup>

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164. 39 Fed. Cl. 56, 70-71 (1997), *aff'd* 177 F.3d 1360 (Fed. Cir. 1999).

165. *See id.* at 71.

166. *See id.* at 71-72.

167. *See id.* at 77-80.

168. 45 Fed. Cl. 21, 23 (1999).

169. *See id.*; *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1174 (Fed. Cir. 1994).

170. *See Florida Rock*, 45 Fed. Cl. at 39-40.

171. *See Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999).

172. *See id.* at 1356.

173. *See id.* at 1357.

Environmental regulations tightened over the years after the purchase.<sup>174</sup> Good first applied for a Corps permit in 1981 and sought approval from county and state authorities to obtain additional necessary permits.<sup>175</sup> Years of ever more complex restrictions, revised plans, and attempts to comply with multiple regulations followed, culminating in a fourth Corps permit denial in 1990.<sup>176</sup> Good then filed a takings suit in the Court of Federal Claims.<sup>177</sup> He lost on summary judgment because the property retained value and because Good lacked reasonable development expectations due to the regulations in place, and his actual notice, at the time of purchase.<sup>178</sup>

The Federal Circuit decided Good's appeal in 1999, and he again lost on summary judgment.<sup>179</sup> The court focused its analysis exclusively on Good's unreasonable investment-backed expectations, including his actual and constructive notice of the regulatory climate at the time he purchased the property.<sup>180</sup> The actual notice in the contract of sale gave the court a ready peg on which to hang estoppel of the claim.<sup>181</sup> Had Good not received actual notice, the court could have based its decision on the claimant's constructive notice of regulations in effect when he purchased the property. However, the *Good* case clearly demonstrates how takings claims approach mootness when claimants have actual notice of restrictions at the time of purchase.

Since the *Penn Central* decision, then, federal courts generally have held land buyers responsible for their unreasonable expectations when they were on notice of government regulations when purchasing property.<sup>182</sup> Many courts impliedly hold developers to a higher

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174. See *id.* at 1357-59.

175. See *id.*

176. See *id.* at 1357-59. The final denial was based on the threat to endangered species on the property. See *id.*

177. See *id.* at 1359-60.

178. See *id.*

179. See *id.* at 1363.

180. See *id.* at 1360-63.

181. See *id.*

182. See, e.g., *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 418-19 (Va. 1998) (denying takings claim for development on sand dune property because land was purchased after a protection ordinance was enacted); *Claridge v. N.H. Wetlands Bd.*, 485 A.2d 287, 290-91 (N.H. 1984) (denying takings claim because buyers had at least constructive knowledge that land was subject to state wetland regulations when buyers acquired the property); *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1382 (Fla. 1981) (upholding permit denial for large development in coastal wetlands that would destroy 1800 acres of black mangroves because owner's investment-backed expectations for the development were not reasonable); *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 611-12 (M.D. Fla. 1989) (denying taking when ordinance restricting development in coastal dunes passed after purchase of property, but buyer paid low price on speculation and was aware dunes were heavily regulated and restrictions could change).

standard of awareness of restrictions than they do individuals buying property to construct single residences.<sup>183</sup> Not all courts have been sympathetic to such buyers.<sup>184</sup> For example, in *Rowe v. Town of North Hampton* the property owners acquired a two-acre parcel in 1968.<sup>185</sup> The town passed wetland regulations in 1979 that prevented the owner from building on the lot.<sup>186</sup> The owner was unable to obtain a variance and sued for a taking, but the court was unsympathetic, declaring that the owner knew of zoning restrictions in place at the time of purchase.<sup>187</sup> She was generally aware of increasing concerns about wetlands and knew the law could become even more restrictive, so the court found her expectation to build on the lot was unreasonable.<sup>188</sup>

On the other hand, in *Vatalaro v. Department of Environmental Regulation*, the elderly buyer purchased wetland property without awareness of a state restriction despite her son's diligent inquiry into county regulations.<sup>189</sup> The buyer's constructive notice of the state regulation did not prevent the court from finding a total taking.<sup>190</sup> The state interest in preserving the wetland site precluded virtually any use, and the frustration of the buyer's intent to construct a residence rather than a commercial development appeared to influence the decision.<sup>191</sup>

The equities in another case favored the buyer less than in *Vatalaro*, but the court ruled for the buyer and found a taking.<sup>192</sup> In *Gil v. Inland Wetlands and Watercourses Agency* the owner purchased a lot consisting of nearly all wetlands but which was zoned residential and located in the midst of single family residences.<sup>193</sup> The Connecticut Supreme Court found the buyer's expectations for development reasonable and upheld the taking claim following building permit denial by the wetland agency.<sup>194</sup> The buyer had paid a

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183. See *supra* text accompanying notes 137-141, 144-145, 149-152, 164-167, 172-180; *supra* note 182.

184. See *infra* text accompanying notes 185-188; *Gazza v. N.Y. State Dep't of Env'tl. Conservation*, 679 N.E.2d 1035, 1042-43 (N.Y. 1997); *Claridge v. N.H. Wetlands Bd.*, 485 A.2d 287, 290-92 (N.H. 1984) (denying takings partly because owners purchased property with knowledge of wetland restrictions).

185. 553 A.2d 1331, 1332 (N.H. 1989).

186. See *id.* at 1332.

187. See *id.* at 1336.

188. See *id.*

189. 601 So.2d 1223, 1224-25 (Fla. Dist. Ct. App. 1992).

190. See *id.* at 1229.

191. See *id.* at 1228-29.

192. See *Gil v. Inland Wetlands and Watercourses Agency*, 593 A.2d 1368 (Conn. 1991).

193. See *id.* at 1370.

194. See *id.* at 1373-75.

discounted price for the parcel, but the court focused on his expectations even in the face of the speculative nature of the purchase.<sup>195</sup>

A Pennsylvania environmental board denied a couple a permit to fill wetland property to construct a business in *Mock v. Department of Environmental Resources*.<sup>196</sup> The landowners did not present evidence of what their expectations were at the time of purchase in 1963, and the court noted that the property was not only wetlands, but also riparian and located in the one hundred year floodplain.<sup>197</sup> Therefore, the land had been subject to regulation under the common law for “centuries.”<sup>198</sup>

The council in *Grant v. South Carolina Coastal Council* held that restrictions on tidelands forming part of the background principles of state law at the time of purchase yielded no taking when the owner filled the property without a permit.<sup>199</sup> In three recent New York wetland cases, the state’s high court decided there were no takings.<sup>200</sup> In all three cases, the court concluded that restrictions inhering in the title to property when purchased served as constructive notice and estopped the takings claims.<sup>201</sup> In *Gazza*, the court also noted that the reduced purchase price reflected the buyer’s awareness of wetland regulations.<sup>202</sup>

### III. ANALYSIS

Given that all citizens have been on constructive notice about wetland regulations since enactment of the CWA decades ago, the number of takings claims should theoretically be small. The losses represented by claims that reach the courts as well as those uncounted silent losses that will never be known testify to the failure of constructive notice. It is fair to give actual notice to a land buyer of potentially restrictive government regulations on wetlands before the purchase takes place.

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195. *See id.*

196. 623 A.2d 940, 943 (Pa. Commw. Ct. 1993), *aff’d* 667 A.2d 212 (Pa. 1995).

197. *See id.* at 949.

198. *See id.*

199. 461 S.E.2d 388, 389-91 (S.C. 1995).

200. *See Gazza v. N.Y. State Dep’t of Env’tl. Conservation*, 679 N.E.2d 1035, 1042-43 (N.Y. 1997); *see also Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870, 873-74 (N.Y. 1997) (upholding ordinance restricting development on steep slopes and enforcing restrictions in the title because the price paid reflects the restrictions and compensation would be a windfall); *Kim v. City of New York*, 681 N.E.2d 312, 319 (N.Y. 1997) (holding that constitutional, statutory, and common law restrictions inhere in the title; here the common law right of lateral support).

201. *See Gazza*, 679 N.E.2d at 1043; *Anello*, 678 N.E.2d at 872; *Kim*, 681 N.E.2d at 316.

202. *See Gazza*, 679 N.E.2d at 1042.



The ultimate objective of the actual notice requirement is to protect wetlands. Many other benefits will result from the requirement, however, and those benefits will indirectly work to preserve wetlands as well. Complicated and fact-dependent wetlands problems have few solutions that result in no adverse impacts, but the notice requirement produces remarkably few negative consequences.

The actual notice requirement will be effective prospectively. Courts using traditional takings analysis for prior claims can apply estoppel and dismiss claims that some buyers will undoubtedly attempt to pursue despite having had actual or constructive notice.

*A. Actual Notice Will Protect Wetlands*

The actual notice requirement will promote the national goal of preserving wetlands.<sup>203</sup> An actual notice requirement is timely given changes in federal regulations to protect wetlands.<sup>204</sup> If enacted now, the requirement would proactively estop the imminent fallout of increased takings claims resulting from new restrictions in the nationwide permit program.<sup>205</sup> Under the revised permit program, more land—and smaller parcels—will be subject to more demanding section 404 regulation. For example, a single-family dwelling could more easily fit on the buildable portion of a one-acre lot that is fifty percent wetland than on a half-acre lot with the same percentage of wetland. Consequently, tightened permit conditions will trigger more permit denials. Those denials represent wetlands that will not be filled.

The actual notice requirement will protect wetlands in other ways as well. Informed buyers who have actual notice to investigate the wetland status of properties they buy will tend to have reasonable expectations regarding development of those wetlands. Those who understand that the Corps will scrutinize the availability of alternative sites at the time of purchase before approving permits will be more selective.<sup>206</sup> Arguments from potential wetland developers who have had actual notice are unlikely to convince the Corps decisionmaker that the developer had no alternative when he or she could have

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203. See WHITE HOUSE OFFICE ON ENVIRONMENTAL POLICY, PROTECTING AMERICA'S WETLANDS: A FAIR, FLEXIBLE AND EFFECTIVE APPROACH 2 (Aug. 24, 1993), reprinted in STRAND, *supra* note 52, at 621-51; Executive Order 11,990: Protection of Wetlands, § 1(a), 3 C.F.R. § 121 (1978) as amended by Exec. Order No. 12,608, 3 C.F.R. § 245 (1988).

204. See *Nationwide*, *supra* note 81, at 34.

205. See Clean Water Act § 404(e), 33 U.S.C. § 1344(e) (1994); 40 C.F.R. § 330 (1999); *supra* text accompanying notes 81-83.

206. See *Bersani v. EPA*, 850 F.2d 36, 42-44 (2d Cir. 1988).

purchased property without wetlands.<sup>207</sup> Under this programmatic scheme, potential buyers are likely to be more careful when purchasing property with wetlands, and will have more reasonable expectations about what they can do with the property. Fewer permits would be sought so fewer will be issued, and more wetlands will remain undisturbed.

The actual notice requirement would increase demand for means other than takings suits to compensate wetland owners for declines in property value. The federal government may step in to create a compensation system, but state, local, or private action might be more effective. Such action could operate in tandem with or as a supplement to national efforts to provide compensation. Until an adequate system materializes, however, more wetland owners will be motivated to try alternatives already tested, such as selling conservation easements or participating in mitigation banks. Programs issuing and trading transferable development rights or conservation credits are likely to become more popular among wetlands owners.<sup>208</sup>

*B. Actual Notice Will Prevent Disputes and Provide Certainty to Landowners*

An actual notice requirement would not only protect purchasers from surprise, but would also protect sellers from claims of fraud based on nondisclosure. The notice requirement would avert costly litigation by affirmatively shifting to buyers the burdens of informing themselves about wetland regulations and obtaining determinations and delineations.<sup>209</sup> Actual notice would likely prevent disappointment and frustrated expectations by catalyzing the process of self-information on the part of buyers. Sellers would remain vulnerable to suit in redhibition for fraud for actively concealing the presence of wetlands, but that would be the case absent a notice requirement.

*C. Actual Notice Will Promote Economic Efficiency*

An actual notice requirement would eliminate externalities currently borne by society. Under the Coase theorem, knowledgeable sellers and buyers perform transactions in which all burdens and

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207. *See id.*

208. *See* Wiebe, *supra* note 79, at 628-29.

209. *See* CBO, *supra* note 22, at xiv, 2, 13, 18-19.

benefits accrue to the parties.<sup>210</sup> Thus, when uninformed buyers purchase property containing wetlands and buyers' expectations become frustrated, society bears costs even when takings claims do not result. The price in excess of the true market value of property represents losses to buyers and windfalls to sellers. The losses to buyers are not available for investment in buyers' development projects. The social and economic benefits of that development decrease or disappear. The benefits to society of existing wetlands may decline as well when landowners attempt to recoup losses by draining or otherwise damaging wetlands in ways that are not within Corps jurisdiction.<sup>211</sup>

The market for land generally places burdens on buyers under the maxim *caveat emptor*. Actual notice adjusts the burden on buyers from one of potentially huge losses after uninformed transactions to smaller information costs expended *before* purchase that result in wiser purchases. Courts may attempt to reach equitable and efficient decisions in takings suits, but such suits themselves represent vast inefficiencies. Buyers' plans must wait as the suits progress through the courts, and may never come to fruition. Lawsuits demand limited judicial resources. Funds allocated to development shift to pay for legal representation.<sup>212</sup> If, as Coase suggested, judges should reach decisions that represent the agreement the parties would have reached, then judges can never make such decisions because in an efficient market takings suits would not exist.

The analogy to government disclosure requirements for hazardous waste sites points out the efficiency and equity of the actual notice requirement. Environmental contamination and the presence of wetlands are conditions that buyers may not recognize and sellers have incentives to hide. Notifying potential buyers of the condition of the property gives them the opportunity to investigate further and to assess the risks and costs attached to the property weighed against its advantages. Knowledge protects buyers but it also protects society from externalities such as lawsuits and cleanup costs that could shift from the parties.<sup>213</sup>

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210. See *supra* text accompanying notes 13-15.

211. See PEARCE, *supra* note 71, at 321-41.

212. See CBO, *supra* note 22, at xiv, 2, 13.

213. See John Webster Kilborn, Note, *Purchaser Liability for the Restoration of Illegally Filled Wetlands Under Section 404 of the Clean Water Act*, 18 B.C. ENV'T L.AFF. L. REV. 319, 336-53 (1991).

D. *Actual Notice Will Benefit State and Federal Government and the Taxpayers*

The *Lucas* decision allows for successful takings claims when the government passes regulations that prohibit economic use of land.<sup>214</sup> Regulation rarely results in the loss of the total value of land, but partial losses are likely when state and federal regulations preempt certain land uses.<sup>215</sup> As *Lucas* demonstrates, even state regulations in the public interest may not ward off substantial awards to successful claimants, presenting potentially large state financial burdens.

State wetland takings claims may be few in number now, but increased regulation and other factors should trigger a greater number of such suits in the future. Takings claims directed against the state have been largely unsuccessful to date. The number of cases brought to conclusion in the courts is not an accurate reflection of the real number of disputes, nor does it represent actual losses.<sup>216</sup> Increasing pressures brought on by growing population, sprawl, and heightened federal efforts to protect wetlands promise more conflicts between the state and wetlands owners.<sup>217</sup> Takings claims against states that are brought in federal courts are usually unsuccessful, but may become more common and more likely to succeed.<sup>218</sup>

Federal restrictions such as those in the National Flood Insurance Program will operate to decrease the supply of land available for development.<sup>219</sup> Developers will divide land into smaller parcels and convert more land while the supply of raw land continues to shrink. State efforts to protect wetlands, including regulation pursuant to federal laws and assumption of the section 404 permitting program,

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214. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-31 (1992).

215. See CBO, *supra* note 22, at 16.

216. See, e.g., McQuaid, *supra* note 77, at A1; Mark Schleifstein & Mary Swerczek, *Wetlands Penalty Costs Developers \$620,000*, TIMES-PICAYUNE (New Orleans), River Parishes ed., Nov. 19, 1999, at A1 (describing consent decree for \$620,000 fine and 373-acre conservation easement penalties for developer who destroyed forty-five acres of south Louisiana wetlands to build a subdivision); *The Right to Own Property: Hearings on S. 605 Before the Senate Committee on the Judiciary*, 104th Cong. 93, 93-97 (1995) (testimony of John J. Chaconas) (describing purchase of home on Louisiana wetland site illegally filled by prior owner, and subsequent problems when land began reverting to wetland).

217. See *Nationwide*, *supra* note 81, at 34; Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, in 1998 ZONING AND PLANNING LAW HANDBOOK § 9.01 at 3, 4 (Christine Carpenter ed., 1998); COAST 2050, *supra* note 79, at 53 (describing majority of population growth in coastal areas where wetlands are concentrated).

218. See CBO, *supra* note 22, at 39-40.

219. See Michael J. Smith, *Down the Drain*, TIMES-PICAYUNE (New Orleans), July 29, 1998, at A1; *Flood Area Buyouts Recommended*, TIMES-PICAYUNE (New Orleans), July 19, 1998, at F-3, (articles discussing initiatives to buy repeatedly flooded properties for reversion to a natural state).

may not preclude state takings liability.<sup>220</sup> Tightened federal regulations and federal pressure on states to protect wetlands, as well as state efforts to attract and keep federally funded coastal restoration projects, promise ever-increasing takings claims.<sup>221</sup>

An actual notice requirement will estop state takings claims in two ways. First, actual notice would prevent more buyers from unknowingly purchasing land containing wetlands. Therefore, they would not be entitled to the “innocent purchaser” defense. Without this defense, buyers will be estopped from collecting for takings when denied permission to develop their land as they wish. If buyers choose to ignore the notice and fail to investigate before buying, estoppel will prevent them from recovering their losses from the government. Second, by giving actual notice that state regulations exist and that further regulation is possible, wetlands owners will be estopped from recovering for reductions in land value resulting from regulations enacted after purchase of land. Lucas’ takings recovery resulted from just such an enactment of coastal building restrictions after he had purchased his lots.<sup>222</sup>

The importance of actual notice in saving land buyers from unanticipated losses could be dramatic. The notice requirement is likely to make the most difference to the group least protected under the status quo: individuals buying land on which to build single family homes. These are buyers who in many cases are unable or unwilling to initiate legal action. Many potential takings claims are never made because the landowners lack the resources to pursue them.<sup>223</sup> With actual notice, these silent losses can be avoided. Therefore, the effect of a notice requirement may be modest within the legal system but substantial outside of it.

During the 1990s, ongoing takings claims against the U.S. government numbered between 150 and 300 per year, with wetlands cases representing one fourth of the total.<sup>224</sup> Takings claims involve the costs of litigation and judgments paid by the government, and these are costs that all taxpayers, including those in Louisiana, stand to save by reducing takings claims.

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220. See *supra* text accompanying notes 157-158.

221. See *supra* note 78.

222. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1007-09 (1992).

223. See CBO, *supra* note 22, at xiv, 2, 13, 18-19; McQuaid, *supra* note 77, at A1.

224. See *supra* text accompanying notes 72-74.

*E. Actual Notice Will Achieve Better Results than do Private Strategies to Protect Buyers*

Environmental assessments mainly protect knowledgeable business purchasers, but often ignore wetlands issues.<sup>225</sup> Contract clauses also protect sophisticated buyers or buyers fortunate enough to have knowledgeable lenders who insist on wetlands certifications as prerequisites to loaning money for land purchases.<sup>226</sup> Wetlands, however, may not be included in the environmental disclosure requirements of contracts.<sup>227</sup> As demonstrated by the *Bersani* case, even sophisticated buyers may be unwary.<sup>228</sup> Furthermore, federal NEPA requirements or comparable state requirements to perform environmental studies apply only to relatively few major actions with significant government ties. Seeking section 404 permits before purchase may be unworkable in many cases due to time constraints brought on by the lengthy and complicated permit process.<sup>229</sup>

The actual notice requirement does not preclude use of private strategies to protect buyers, and in fact the requirement will create more demand for these information tools by buyers, lenders, and investors. Business interests and other sophisticated parties nearly always will be positioned to protect themselves and their clients better than can the average person. Actual notice will help level the playing field for all buyers. Simple strategies can protect them virtually without cost. For example, buyers may apply for Corps permits or consult with Corps engineers before purchasing land.

*F. Actual Notice Will Impose Burdens upon Sellers*

Most existing legal obligations for sellers will be unaffected by a notice requirement. The redhibition remedy is available to buyers defrauded by sellers and will be available regardless of a notice requirement. Sellers' responsibilities for illegally filling wetlands under section 404 strict liability will likewise remain intact. The burden of notice will be equal for all sellers with non-exempt

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225. See *Swamp*, *supra* note 54, at 626.

226. See Caron, *supra* note 106, at 243-61; STEINBERG, *supra* note 64, at XIV-2 to -12.

227. See Caron, *supra* note 106, at 243-61.

228. See *Bersani v. EPA*, 850 F.2d 36, 47 (2d Cir. 1988). A very recent case points out the possibility that even sophisticated buyers may become ensnared in wetland regulations. A group of Illinois municipalities purchased over five hundred acres of land on which to dispose of municipal waste. The property contained isolated wetlands left from a strip mining operation abandoned fifty years before. The court upheld Corps jurisdiction and the Corps' denial of a section 404 permit to fill the wetlands. See *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 191 F.3d 845, 847 (7th Cir. 1999).

229. See *Swamp*, *supra* note 54, at 614-18.

property, regardless of the size, value, or other characteristics of the property.

The notice requirement will have minor consequences for most sellers. First, many sellers will be exempt from the requirement because their property falls outside state and federal wetland jurisdiction. For example, Louisiana generally does not regulate wetlands located in fastlands (within levee systems).<sup>230</sup> Second, sellers will have no duty to provide determinations or delineations. Those sellers unsure of the wetland status of their property will be under no new legal obligation to expend resources to investigate.

Wetlands that have lower value because they are under federal jurisdiction probably suffer little incremental decline in value due to state regulation. Some quantity of further incremental decline due to the actual notice requirement is likely to result. The actual notice requirement will affect property values indirectly by steering more buyers away from wetlands. While that result is ideal from the environmentalists' perspective, it is not a happy consequence for sellers. As the population expands and more land is developed, the demand for wetlands for mitigation banking is likely to increase. That market stimulation could help to offset lowered property values.

Delays in obtaining wetland determinations or delineations will be almost certain. Demand for them will increase as will the burden on government and private providers. Those delays will sometimes mean frustrated or delayed land transfers. Land buyers without concerns about wetlands will seize the opportunity to purchase certain parcels as other buyers wait for delineators to complete work. Parties to transactions will devise ways to obtain certainty, however, as they have already devised ways to protect themselves in land purchases. For example, parties will use strategies such as contract provisions and pre-listing delineations.

### *G. Actual Notice Will Not Compensate Wetland Owners*

The *Bowles* court succinctly summarized the case for actual notice and pointed out the problem it cannot solve:

When the land owner has actual knowledge of the government regulation prior to purchase, the "notice" defense makes economic sense. A rational buyer who has actual notice of government land-use regulations prior to purchase will consider the risk that use may be restricted when deciding how much to pay. That is, the rational buyer is compensated for this risk

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230. See LA. REV. STAT. ANN. § 49:214.34 (West 1987 & Supp. 2000).

up front by purchasing the property at a discount. Though, of course, the seller may have a valid taking claim.<sup>231</sup>

The actual notice requirement is a way to remove takings claims from the courts, but for all that an actual notice requirement can do, it will leave unsolved the question that has plagued wetland regulation since the CWA took effect. Regulations on wetlands lower the value of property by reducing its uses and development potential. Actual notice will estop regulatory takings claims, but eliminating takings claims will remove one of the few ways wetlands owners can obtain compensation for losses in property value. When the environment wins at the expense of property owners who suffer uncompensated losses, the victory is hollow because the environment becomes the enemy. Therefore, the legislative creation of an equitable and efficient system to reimburse those who own wetlands for the very real losses they suffer must take top priority.<sup>232</sup> The takings clause of the Constitution demands no less.<sup>233</sup> Society owes it to both wetland owners and the environment to take up the tool of the law and fashion a remedy.

Compensation is what takings suits are about, but takings suits are a highly inefficient way to compensate landowners. They impose the costs of litigation and the resulting awards on society, but the landowner's recovery bears no relationship to protection of the wetlands over which the suit was initiated. Only those who bring successful takings suits obtain recoveries. Those who do not prevail or who do not bring suit because they lack the necessary resources, or because their losses are too small to justify the costs of suit, go uncompensated.<sup>234</sup> The societal interest in preserving wetlands should place the burden of protecting wetlands on society as a whole, not on the individuals who fortuitously own property containing wetlands.

Compensating wetland owners for declines in property values resulting from regulatory takings does not address the problem of funding wetland preservation. The compensation issue is bound to the problem of shifting the cost of wetland preservation to society as a whole, because the costs of both compensating wetland owners and preserving their wetlands rightfully belong to all members of society. Wetlands are unevenly distributed among the states yet their benefits accrue to all citizens.<sup>235</sup> Consequently, forcing states such as

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231. *Bowles v. United States*, 31 Fed. Cl. 37, 51 (1994).

232. *See id.* at 39-40 (noting need for legislative policy solution to the takings problem).

233. U.S. CONST. amend. V.

234. *See supra* notes 212, 216 and accompanying text.

235. *See CBO, supra* note 22, at 3.



Louisiana to compensate all wetland owners within state boundaries would place an unfair burden on those states with plentiful wetland areas.<sup>236</sup> Federal programs currently in place to fund wetland preservation may be adequate to the task, but they must be properly funded and must encompass all wetlands.

*H. How Will the Future Look with an Actual Notice Requirement in Place?*

The future with an actual notice requirement in place is a future without regulatory takings suits over wetlands. The adversarial relationship of wetland owners to the government will disappear. Wetland owners will no longer perceive their wetlands as burdens.

The weapon of estoppel will be the instrument of its own demise. Takings suits eventually will become obsolete as land continues to change hands to informed buyers. These buyers will know the wetland status of property and the regulations that apply to it at the time of purchase, and they will have factored into the price they pay the potential for those regulations to change. The discrepancy between market value and price paid for land will approach zero as investment-backed expectations adjust according to the land's wetland status.<sup>237</sup> Government regulatory actions will "take" nothing from buyers who have reasonable expectations.

Closing the courthouse door to wetland takings claims will force state and federal governments to create better legislative solutions to compensate wetland owners.<sup>238</sup> Those solutions will provide compensation not only to those with the resources to complain loudly, but to those who have silently suffered losses in property value with few prospects for relief. Government will spend its resources more efficiently providing fair compensation to many than on expensive litigation with the few.<sup>239</sup> Case law shows that courts already apply estoppel at the end of the long legal road that takings claimants must follow; actual notice will save them the journey.<sup>240</sup>

Compensation may take any of several forms, including transferable development rights or conservation or mitigation credits. Some landowners will sell the rights or credits immediately, and some will let them accrue to the property to enhance its attractiveness to buyers. Subsequent purchasers will be aware, as part of the notice

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236. *See id.*

237. *See id.* at xiii.

238. *See id.* at 2.

239. *See id.* at xiv, 2, 13, 18-19, 30.

240. The majority of takings claims take longer than one year to litigate. *See id.* at 6.

requirement, of the availability of these benefits and they will adjust their expectations and the prices they pay accordingly.

Most important to environmentalists, fewer wetlands will be destroyed. First, as land continues to change hands, more sellers and buyers will request delineations. Sellers will find that obtaining delineations before placing property on the market will catalyze sales. Sellers' efforts to provide this information is entirely consistent with the actual notice model of increasing information for buyers. The increased number of delineations will provide a more complete and precise picture of the location of wetland areas in the state. Ideally, the Corps will incorporate this data into existing maps that identify not only the location of wetlands, but also their value for preservation. Government and private programs to protect wetlands will allocate resources more efficiently by focusing on high quality wetlands for priority protection.<sup>241</sup>

Second, informed buyers will not purchase land containing wetlands if they desire to develop the property. Alternatively, informed buyers who do purchase land containing wetlands will do so with reasonable expectations for the nature of the development that regulations will allow. In both cases, wetlands will be spared. Buyers with incomplete information about wetlands and unreasonable expectations for development will be phenomena of the past.

Positive spillover effects for the environment will result. Informed buyers will tend to pay attention not only to wetland conditions, but will be more aware of conditions such as floodplain location. Sensitive ecosystems will remain intact. Wetland-dependent plants and wildlife will flourish. Water quality will improve.

#### IV. CONCLUSION

The national objective of protecting against further loss of our nation's wetlands can be quietly drained of its vitality parcel by parcel, permit by permit. Instilling the power in Louisiana law to preserve the centerpiece of America's wetland wealth should be our economic objective, as it must be our moral duty. Louisiana can both protect itself by estopping takings claims *and* preventing such claims from arising, while fostering the social goals of peace, certainty, and protection of wetland resources.

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241. The Fish and Wildlife Service currently maintains a Priority Protection List of wetlands desirable for acquisition. *See id.* at 67.

Two questions have not been addressed satisfactorily and will remain unanswered even assuming passage of an actual notice requirement. First, how can society compensate the landowner whose property declines in value due to regulations on wetlands? Second, how can society ensure protection of existing wetlands in perpetuity? Society is slowly finding ways to solve these problems, but the solutions must be economically efficient and fair to both wetland owners and society. Uncompensated losses and takings litigation are neither. Actual notice must be viewed as one step in the evolution of an equitable wetland policy under which both people and the environment can win. Louisiana should arm itself with this new weapon to shoot down the *potential* for wetland takings claims to arise. We all have a stake in the equitable green future this new law promises.