

COMMON LEGAL QUESTIONS:
**WETLAND REGULATIONS:
AVOIDING LEGAL
PROBLEMS; WINNING
LEGAL CHALLENGES**



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PREFACE

The following guide addresses frequently asked questions with regard to avoiding legal problems or winning in court if wetland regulations are challenged. The guide has been prepared primarily for municipal and state lawyers but may be of interest to governmental officials, the staff of land trusts and watershed councils, consultants and landowners.

The guide is based, in part, upon a review of state and local government wetland decisions which have been issued in the last fifteen years. This review was conducted in 2003 and 2004. Research was carried out by the author and by Todd Mathes, a law student at the Albany Law School. For other legal publications of the author on related subjects see, e.g., Kusler, J. 2004. Wetland Assessment in the Courts. Association of State Wetland Managers, Inc. <http://www.aswm.org/pub/courts.pdf>; Kusler, J. 1993. The Lucas Decision, Avoiding "Taking" Problems With Wetland and Floodplain Regulations, 4 Md. J. Contemp. Legal Issues 73 (1993); and Kusler, J. Public Liability and Natural Hazards, Technical Report funded by the National Science Foundation (1993).

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COMMON QUESTIONS

WETLAND REGULATIONS: AVOIDING LEGAL PROBLEMS; WINNING LEGAL CHALLENGES

The following guide addresses five topics. The guide first outlines strategies to help communities and states reduce legal challenges through incorporating certain types of provisions in their regulations. The guide then discusses community and state administrative practices in implementing regulations which may also reduce the legal challenges. Next it considers questions which a community should ask in deciding whether to fight or settle a legal challenge. Then, it considers “procedural” strategies for winning challenges. Finally, it examines “on the merits” strategies for winning challenges.

These materials have been written broadly addressing the legislative and case law in the U.S. Anyone wishing more specific guidance should contact an attorney in their jurisdiction.

May communities avoid legal challenges to regulations all together?

A. No, not altogether. They can reduce legal challenges through careful drafting of regulations and fair and reasonable administration of the regulations. They also have a variety of defenses (discussed below) if their regulations are challenged. However, challenges to regulations may occur no matter how carefully regulations have been drafted, administered and enforced. Communities, therefore, also need to position themselves to win legal challenges if they do occur.

Can communities reduce potential legal challenges by including certain types of provisions in regulations?

A. Yes. Landowners are less likely to challenge regulations if they incorporate the following sorts of provisions in regulations:

- **Include pre-application procedures in regulations which encourage landowners to submit permit applications early-on before their plans are fixed and landowners have spent large sums of money on engineering surveys or planning.** Many communities have adopted pre-application procedures for wetland permits which encourage early discussion between the landowner and regulators. Often potential wetland impacts may be avoided or greatly reduced at the early, pre-design stage of a project. Landowners are also less likely to challenge regulations.
- **Allow, as “permitted” or special exception uses a variety of activities which may permit some economic uses of private wetlands such as shell fishing, recreational uses of beaches and wetlands, forestry, hunting, use of wetland areas to meet open space requirements in subdivisions, and harvesting of natural crops.** Landowners are less likely to challenge regulations if they have economic uses for their lands. Courts are likely to uphold regulations if there are some economic uses (existing or potential). See discussion below.

“...challenges to regulations may occur no matter how carefully regulations have been drafted, administered and enforced.”

- **Adopt large lot zoning for wetland areas and adjacent lands.** Large lot zoning (e.g., five acre minimum lot size for residential uses) for a mixed wetland/upland area can help provide “buildable” upland space on most wetland lots. This can reduce the chances of a successful “takings” challenge although large lot sizes in some instances bring challenges as well (depending upon the sizes and the impacts on landowners). Lot size becomes significant in determining whether regulations prevent all practical use of the entire properties. Courts have sustained large lot sizes for lands with flooding or wetland problems. See **Frericks v. Highland Twp.** 579 N.W.2d 441 (Mich. 1998) in which the court upheld a natural hazard regulation which required three acre lot sizes which included wetlands. A New York court in **Gignoux v. Kings Point**, 99 N.Y.S.2d 280 (N.Y. 1950) noted that the “best possible use (of a marshy area) would be in connection with its absorption into plots of larger dimensions.” See also **Harris v. Zoning Commission of the Town of New Milford**, 788 A.2d 1239 (Conn. 2002) in which the court upheld a byelaw which excluded wetlands, watercourses, and steep slopes in calculating minimum lot sizes. Courts in some cases have recognized that properties may have a valid market value when used in conjunction with adjacent properties. See, e.g., **William W. Wyer v. Board of Environmental Protection**, 747 A.2d 192 (Me., 2000) in which the court held that denial of a variance under state sand dune laws was not a taking because the property could be used for parking, picnics, barbecues, and other recreation uses. See also discussion of whole parcels below.

- **Provide variance and special exception procedures to allow some potential economic use of entire properties where wetlands regulations may otherwise deny all economic use of whole properties.** Variance and special exception procedures can act as “safety valves” by both providing some flexibility in regulations and reducing landowner “taking” challenges. See, e.g., **Turnpike Reality Co. Town of Dedham**, 284 N.E.2d 891 (Mass. 1972), cert. denied, 409 U.S. 1108 (1973).

- **Tie in wetland regulations with local comprehensive land use planning.** Regulations adopted as part of a broader planning and regulatory efforts are likely to be perceived as more reasonable by landowners. Courts are also more likely to uphold regulations which implement a comprehensive plan. See, e.g., **Northern Trust Bank/ Lake Forest, NA v. County of Lake**, 723 N.E.2d 1269 (Ill. 2000).

- **Adopt wetland buffer or setback requirements (e.g., 50, 100, 150 feet) for buildings roads, septic tanks, etc.** Buffer requirements make good sense

“Adopt an overall standard or goal in regulations such as “no net loss” of acreage and function and apply it evenly and fairly.”

scientifically and may reduce landowner challenges to wetland maps since the precise wetland boundary often becomes less important when there are buffers. In addition, buffers combined with special exception requirements may provide some room for negotiation between the community and a landowner as to the location and other specifics of permitted activities without directly impacting wetlands.

- **Provide case-by-case on the ground procedures for resolving boundary disputes and other factual disputes.** Case-by-case procedures can help deal with inaccuracies in mapping and resolve other factual issues with landowners. See generally **Turnpike Reality** (above) and **Just v. Marinette County**, 201 N.W.2d 761 (Wis., 1972).

- **Adopt an overall standard or goal in regulations such as “no net loss” of acreage and function and apply it evenly and fairly.** Application of overall standard to all landowners can reduce charges of discrimination and unfairness in regulations. Courts are also less likely to hold regulations a taking where they are fairly and evenly applied to all similarly situated properties. See discussion below.
- **Do not zone or otherwise regulate lands for the primary goal of reducing future acquisition costs or allocating private lands to “public” uses.** Landowners are sensitive to “public” use of their lands and efforts to reduce land values prior to public acquisition. Courts have held that attempts to lower land values prior to acquisition through adoption of a conservation zone was a taking. See, e.g., **Burrows v. City of Keene**, 432 A.2d 15 (N.H. 1981); **Hermanson v. Board of County Comm’rs**, 595 P.2d 694 (Colo.App. 1979) (Court held that county regulations to hold down property values for a dam were a taking). However, communities may validly regulate to achieve other primary objectives such as flood loss reduction even though this may incidentally lower land acquisition costs. See **Ramsey v. Stevens**, 283 N.W.2d 918 (Minn. 1979) (Court held that floodway restrictions which incidentally reduced land values prior to acquisition of a floodplain for park use were not a taking).
- **Where appropriate, adopt innovative regulations such as cluster subdivision regulations and transfer of development rights ordinances to reduce the burden on landowners while achieving wetland protection goals.** These measures may allow a community to achieve a considerable degree of protection for wetland and related ecosystems while permitting some landowner economic use of lands. In some instances, states and communities have provided “development” right credits which provide economic use for property even if development of the property is tightly controlled or prohibited. See, for example, **Toussic v. Central Pine Barrens Joint Planning and Policy Com’n**, 700 N.Y.S. 2d 358 (N.Y. 1999) in which a court held that an award of development rights credits worth \$23,100 to a property owner who paid \$14,000 for a number of parcels was not arbitrary, unreasonable, or confiscatory. See also **Williams v. Town of Hilton Head Is**, 429 S.E.2d 802 (S.C. 1993).
- **Make sure that overall content of the regulations is easily understood, and the regulatory standards are clearly related to regulatory goals.** Landowners are less likely to challenge regulations which they can understand and perceive as reasonable.
- **Avoid repeated changes in regulations and “jerking” landowners around.** Landowners are more likely to challenge regulations if they think they are unfairly treated. See **City of Monterey v. Del Monte Dunes at Monterey, Ltd.**, 119 S. Ct. 1624 (1999) in which the U.S. Supreme Court held that a dune protection regulation was a taking where there regulations had been repeatedly changed.



Work with landowners

May communities reduce legal challenges through regulatory administrative strategies?

A. Yes. Communities can reduce legal challenges through a number of administration and enforcement strategies. Examples include:

- **Insure that regulations are fairly and reasonably administered.** As suggested above, landowners are less likely to challenge regulations when similarly situated properties are treated similarly. Issuance of permit in one context and denial in a similar context often brings not only complaints but legal challenges.
- **Educate landowners with regard to the content of regulations, nature of maps, permitting procedures and other relevant topics.** Legal trouble may be avoided if landowners are educated with regard to wetland maps and the content of regulations. Some communities have formed citizen teams and visited wetland landowners to discuss wetland regulations with them. Others have held hearings on regulations and/or maps. Still others have held Wetland Festivals to help educate children and adults. Local land trusts are also playing increasingly important roles by educating landowners with regard to wetland tax breaks for conservation easements or donation of wetlands.
- **Carefully follow statutory procedures in implementing regulations.** To stay out of legal trouble, legislative bodies and regulatory agencies need to follow statutory, administrative code, and ordinance procedures. Courts have often found that legislative bodies or agencies deny “Due Process” when they fail to follow procedures set forth in regulations. See, **Vito v. Department of Env’tl. Management**, 589 A.2d 809 (R.I., 1991) (Regulatory agency had failed to conduct public hearing as required by statute). **Prestige Builders v. Inland Wetlands Comm’n of Ansonia**, 831 A.2d 290 (Conn., 2003) (Regulatory agency had failed to adopt regulations necessary to regulate upland review areas). However regulatory agencies have discretion in how they carry out required procedures. See **Lizotte v. Conservation Com. of Somers**, 579 A.2d 1044 (Conn., 1990) (Agency authority to enact regulations is vested with large measure of discretion).
- **Provide written documentation of facts and conclusions for denial or issuance of permits.** The failure by a regulatory agency to set forth supporting facts in issuing or denying a permit is quite a common basis for successful legal challenge. See, e.g., **KCI Management, Inc. v. Board of Appeal of Boston**, 764 N.E.2d 377 (Mass. 2002) in which the court held that a Greenbelt Protection Overlay District regulatory scheme was valid but held that city zoning appeals board had not set forth reasons in its decision denying a permit why the permit application was deficient and as to the manner in which compliance with various standards could be achieved. See also **Miss. Sierra Club, Inc. v. Miss. Dep’t of Env’tl. Quality**, 819 So. 2d 515 (Miss. 2002) in which the court held that a Mississippi Commission on Environmental Quality’s order certifying that a project complied with the Mississippi Air and Water Pollution Control Law was inadequate because it did not contain factual findings and analysis concerning mitigation measures.

- **Insure that conditions attached to issuance of permits are reasonably related to the overall goals of regulations.** Conditions attached to permits need to make sense. Even stringent conditions have been upheld if they are reasonably related to regulatory goals. See e.g., **Nicholas Geiben et al. v. Town of Pomfret Zoning Board of Appeals**, 688 N.Y.S.2d 303 (N.Y. 1999) (Conditional approval of special use permit for a single family dwelling near a reservoir which required relocation of the structure was valid).
- **Approach dedication requirements for wetlands with particular care.** Insure that the subdivision, zoning or other regulations which require dedication of wetlands to public or quasi public uses impose only “roughly proportional” burdens on the subdivider, developer, or other landowners. For example, a requirement that a subdivider create or restore wetlands to store stormwaters must be reasonably related to the amount of stormwater generated in the subdivision. However, communities may be able to shift the burden to the landowner to show rough proportionality. See **Lincoln City Chamber of Commerce et. al. v. City of Lincoln City**, 991 P.2d 1080 (Ore. 1999) which held that an ordinance was constitutional which required a permit applicant who was required by the ordinance to provide easements or other improvements to prepare a “rough proportionality” report if the applicant intends to assert that such easements or improvements cannot be constitutionally required.
- **Anticipate takings and other legal challenges.** Communities should, in some situations, anticipate possible takings challenges when permit applications are submitted. A successful taking challenge is particularly likely where a landowner may be denied all economic use of an entire parcel of privately owned land. This is especially true for an urban wetland purchased by a property owner before regulations were adopted for an area, where there are high land values, and where a wetland is being taxed at development potential. If a community decides that a taking challenge is possible or likely, the community can then undertake particularly careful fact-finding for the permit application emphasizing health, safety and nuisance considerations and can, in some instances, provide the landowner with options for economic uses. See discussion below.
- **Suggest to landowners options for some economic uses for wetlands and adjacent uplands when he or she applies for a permit.** For example, some regulatory agencies send out planners to determine whether there are existing or alternative future economic uses for a wetland parcels when there may be a takings challenge. See **King et al. v. State of North Carolina et. al.**, 481 S.E.2d 330 (N.C. 1997) in which the court held that a landowner could not establish a taking because the state came forward with practical alternatives to the landowner’s proposed construction plan.
- **Document hazards and nuisance impacts from proposed activities with particular care where there is a potential takings challenge.** Increased hazards which may result from wetland destruction such as increased flood flows for down stream property due to proposed drainage should be documented with particular care where regulations may prevent all economic uses since courts are particularly willing to support regulations preventing threats to safety or nuisances. See discussion below.

- **Be prepared to buy easement or fee interest in some wetlands where all economic and reasonable use of whole parcels will be prevented by regulations.** Acquisition and regulatory efforts should be coordinated and used to complement one another. Acquisition is needed where public access to lands is desired for bird-watching, hiking, hunting or other activities.
- **Coordinate special assessments, and regulations to reduce the financial burden of regulations on private landowners.** Courts are particularly sensitive to takings challenges when lands are being subjected to special assessments as if developable.
- **Provide real estate tax benefits to reduce the financial burden of regulations on private landowners.** Courts are also particularly sensitive to takings challenges when lands are being taxed at development value.
- **Negotiate with landowners.** In many instances landowners are willing to undertake a variety of mitigation measures to comply with no net loss or other goal. They may agree to a wide range of conditions such as providing onsite or offsite wetland restoration, creation or enhancement to compensate for damage or losses, providing they feel these conditions are reasonable and do not put them at a competitive disadvantage in terms of how other developers and landowners are treated.

Once a lawsuit is threatened, what factors should a community consider in deciding whether to fight or settle?

A. In many instances landowners or developers file lawsuits challenging regulations with the hope that the suits will generate enough political pressure to gain the desired permits without the suit going to trial. Courts have overwhelmingly upheld state and local wetland regulations. A community with a consistent and reasonable wetland regulatory program should, therefore, have confidence that they will win in court. They should resist such pressures. Winning sends a message to others who may challenge regulations.

However, in some instances negotiation and settlement is good strategy where the community's case is weak. A trial can be costly and time consuming for both the landowner and government entity. A community's case may be weak because there is inadequate factual basis to support a permit denial or condition or for another reason. Some relevant factors to consider in deciding whether to fight or settle include the following:

- **Courts have broadly upheld wetland regulations.** A community should understand that they are likely to win if their regulations are soundly conceived and they do not deny all non-nuisance, economic uses of whole parcels. For example, the U.S. Supreme Court unanimously held that the permitting requirements of Section 404 program were not, on their face, a taking in **United States v. Riverside Bayview Homes, Inc.**, 474 U.S. 121 (1985). See also many cases cited below. Wetland regulations, like other land use controls, enjoy a presumption of constitutionality and a landowner challenging the regulations has a strong burden to show their unconstitutionality. Courts have broadly upheld wetland and related floodplain regulations against general, facial challenges that they are a taking. See, e.g., **Spiegle v. Borough of Beach Haven**, 218 A.2d 129 (1966), cert. denied, 385 U.S. 831 (1966) and cases cited below.

- **Courts have broadly upheld wetland regulations where some economic use (existing or proposed) is possible for entire properties.** A community may wish to fight if economic uses are possible. Landowners have, in general, only succeeded in challenging regulations which deny all economic use of entire properties (not just the wetlands). See discussion below.
- **Courts give particularly strong support for control of activities in areas subject to public trust or navigable servitude.** Communities may wish to fight if the areas lie below the high water mark or are otherwise subject to public trust or navigable servitude. Courts almost never strike down wetland regulations for areas below the high water mark and subject to public trust or navigable servitude even if few if any economic uses are possible for the property because private rights are subject to public trust and navigable servitude. See discussion below.
- **Courts give particularly strong support for control of activities which may have nuisance impacts or threaten public safety.** Communities may wish to fight where a landowner proposes an activity which may threaten public safety or cause a nuisance. Courts have uniformly upheld regulations or denial of permits for nuisance activities or activities which threaten public safety because no landowner has a right to make a nuisance of himself or herself. See discussion below.
- **On the other hand, courts have been particularly critical of wetland regulations designed primarily to reduce condemnation costs, regulations with poor factual basis, and permits issued or denied without a clear fact-finding record.** A community may wish to settle rather than fight or take other remedial actions if any of these factors are present.
- **Courts are sensitive to gross inequities.** A community may also wish to settle if a landowner has not over time been fairly treated. As noted above, courts are also particularly sensitive to situations where a community keeps changing its positions. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd*, 119 S.Ct. 1624 (1999).

Does a community have procedural defenses if wetland regulations are challenged?

A. Often, yes. Examples of procedural defenses include:

- **The statute of limitations has run for an inverse condemnation or other type of suit.** This is an increasingly important defense for wetland regulations as each year goes by after adoption of regulations. See, e.g. *Millison v. Wilzack*, 551 A.2d 899 (Mary. 1989) (Three year statute of limitations for inverse condemnation action claim for damages due to regulations.); *McCuskey v. Canyon County Comm'rs*, 912 P.2d 100 (Ida. 1996) (Four year statute of limitations applied to inverse condemnation claim as date of construction was halted due to county's issuance of stop-work order and property owner's claim against county.); *Scott et. al v. City of Sioux City*, 432 N.W.2d 144 (Ia. 1988) (Five year statute of limitation statute applies to inverse condemnation action for regulatory taking.); *Flood Control Dist. V. Gaines*, 43 P.3d 196 (Ariz. 2002) (One year statute of limitations applies to inverse condemnation action); *Hensler v. City of Glendale*, 876 P.2d 1043 (Cal., 1994) (Three year statute of limitations on inverse condemnation action applied to city's restrictions on a building permit.); *City of Pompano Beach v. Yardarm Restaurant*, 641 So.2d 1377 (Fla. 1994) (Taking claim for regulation time barred.); *Dujmich v. New York State Freshwater Wetland Appeals*

Bd., 659 N.Y.S.2d 310 (N.Y., 1997) (Four month statute of limitations applies to determination of New York Freshwater Wetland Appeals Board.); **Wilson v. Garcia**, 105 S.Ct. 1938 (S.Ct., 1985) (Three year limit for 1983 actions.); **Suess Builders Co. v. Beaverton**, 656 P.2d 306 (Or. 1982) (Six year limit for regulatory inverse condemnation actions.); **Ranch 57 v. City of Yuma**, 731 P.2d 113 (Ariz. App. 1986) (Four year statute of limitation applies to regulatory taking.).

- **The landowner does not own the land or does not have sufficient property interest to challenge the regulations.** Quite often landowners believe they own wetlands when they do not. Many wetlands are at least partially in public ownership, particularly wetlands below the mean high water mark. Landowners cannot challenge wetland regulations as a taking if they do not own or have a defensible legal interest in lands. Coastal and estuarine wetlands and wetlands in the beds of lakes below the high water mark are typically in public ownership. See, e.g., **Phillips Petroleum Co. v.**



Many wetlands are in public ownership

Mississippi, 484 U.S. 469 (1988) in which the Supreme Court held that private landowners who believed that they owned estuarine wetlands in Mississippi subject to the ebb and flow of the tide and who had paid taxes on such lands for more than 100 years did not in fact, own such lands and could not claim a taking when the state leased the lands to someone else. See also **Bubis v. Kassin**, 733 A.2d 1232 (N.J. 1999) in which the court held that a private property owner's easement over a beach and bluff areas was extinguished between the beach and bluff areas which were entirely below the mean high water. Even where landowners do in fact own wetlands, their interests may be subject to public trust. See discussion below of public trust and navigable servitude which are also defenses on the merits.

- **The landowner has not applied for a permit.** Except where regulations prohibit all economic uses outright or are procedurally defective, courts generally hold that a landowner cannot challenge regulations as a taking, unreasonable, or discriminatory until he or she has been denied a permit. See **Presbytery of Seattle v. King County**, 787 P.2d 907 (Wash., 1990); **United Savings Bank v. Department of Environmental Protection**, 823 A.2d 873 (N.J., 2003). However, denial of even four permit applications may not give rise to a taking if all of the applications are unreasonable. The Connecticut Supreme Court in **Gil v. Inland Wetlands & Watercourse Agency**, 593 A.2d 1368 (Conn., 1991) held that there had been no taking when the Agency denied a landowner's forth application for a building permit. The court reasoned that the Agency might have rejected a more "modest" proposal if one had been offered by the landowner. See also **Leto et. al v. State of Florida Department of Environmental Protection**, 824 So.2d 283 (Fla. 2002) in which the court held that denial of a joint application of two adjacent property owners to build a duplex was not a taking were the property owners might build single family residences.

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

Does a community have defenses based on the “merits” and the facts of the case?

A. Often, yes. Examples of defenses that go to the merits (and not simply the procedures) include:

- **The land is partly or wholly public land or subject to public trust or navigable servitude.** Even if a wetland is privately owned, it may be subject to the “public trust” or a “navigable servitude”. Both of these doctrines act as a limitation upon private property interests and help defend a “takings” challenge, particularly if the wetland or portion of the wetland lies below the high water mark and is adjacent to a lake, river, or stream or to an ocean or estuary. In general, courts hold that private property rights are subject to paramount public trust and navigable servitude. Therefore, courts are less likely to hold that a highly restrictive regulation for lands subject to such trust are a taking where the regulations are in furtherance of this trust. See, e.g., **McQueen v. S.C. Coastal Council**, 580 S.E.2d 116 (2003); **Weeks v. North Carolina Dep’t of Natural Resources and Community Dev.** 388 S.E.2d 228 (N.C. 1990); **ABKA v. Wisconsin Department of Natural Resources**, 635 N.W.2d 168 (Wis., 2001); **Marks v. United States**, 34 Fed. Cl. 387 (1995); Slade, D. et al., Putting the Public Trust Doctrine to Work, Coastal States Organization Washington D.C. (1990) and many cases cited therein. Usually the lands below the high water mark on lakes and along the coasts are owned by the public. River lands below the high water mark may be subject to public trust or navigable servitude. See, e.g., **Sierra v. Maryland Department of the Environment**, 758 A.2d 1057 (Mary. 2000) in which the court held that landowner had no right to build a boathouse over state wetlands. See also **Stewart v. H. James Hoover et al.**, 815 So. 2d 1157 (Miss., 2002) Court held that state owned tidelands despite a failure to show areas on public trust tidelands maps.



Wetland subject to public trust

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

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

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

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

- **There are other restrictions applying to landowner’s land such as restrictive covenants, easements, or customary use and the landowner has no right to a particular, proposed activity.** If so, this may help defeat a takings claim. Courts have recognized a variety of state law limitations upon the rights of private landowners to make unrestricted use of their properties. See, for example, see **Stevens v. City of Cannon Beach**, 854 P.2d 449 (Ore. 1993) where the court applied the doctrine of “custom” as to public use of dry sand areas to defeat a takings claim for a beach. See **Hirtz v. State of Texas**, 773 F. Supp. 6 (Tex. 1991), vacated on sovereign immunity of the state by 974 F.2d 663 (Tex. 1992), in which the court held that owners of property affected by hurricane which caused the vegetation line to move landward approximately 150 feet could not construct because the property was subject to a beach easement which had moved landward with movement of the vegetation line. See **Concerned Citizens of Brunswick County Taxpayers Ass’n v. State ex rel. Rhodes**, 404 S.E.2d 677 (N.C. 1991) in which the North Carolina court recognized a possible prescriptive easement in favor of the public for use of beach areas due to continued and adverse use. See **Lowcountry Open Land Trust v. State of South Carolina**, 552 S.E.2d 778 (S.C. 2001) (Court held that to build a dock a landowner needed the permission of land trust which held the littoral right of access for landowner’s property. The landowner had deeded the littoral right to the land trust.). See also **Marianne Connaughton v Douglas Payne**, 779 N.E.2d 683 (Mass. 2002) in which the court held that a landowner could not use land inconsistent with deed restrictions.).

- **The landowner purchased the property with knowledge of the restrictions.** Purchase with knowledge of restrictions will not prevent a legal challenge but it is relevant to the taking issue. State courts have usually held that purchase of land with knowledge of wetland regulations is no bar to a takings challenge but knowledge of the regulations is relevant to a takings determination. This is the position of the U.S. Supreme Court as well. See **Palazzolo v. Rhode Island**, 121 S.Ct. 2448 (2001). See also **Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency**, 122 S.Ct. 1465 (2002).

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

- **The restriction does not apply to the entire parcel and a landowner can make some economic use of a part of the entire parcel.** What is the entire parcel of landowner's land? Does he or she own adjacent lots? What is the history of ownership? In general, a court will find no taking if the landowner can make economic use of his or her entire parcel. For examples of state and local wetland and floodplain cases in which the court looked at the entire parcel see, for example, **K & K Construction, Inc. et al v. Depart. of Natural Resources**, 575 N.W.2d 531 (Mich. 1998); **Zealy v. City of Waukesha**, 548 N.W.2d 528 (Wis. 1996) (Court held that contiguous parcels of undeveloped property had to be considered as a whole, rather than as discrete segments, in determining whether regulatory taking arose from wetland conservancy rezoning); **Moskow v. Department of Env'tl. Mgmt.**, 427 N.E.2d 750 (Mass. 1981) (Court must look at the effect of a restriction upon an entire parcel and not just the wetland portion in determining whether a taking has occurred); **Krahl v. Nine Mile Creek Watershed Dist.**, 283 N.W.2d 538 (Minn. 1979) (Court held that watershed district's floodplain encroachment regulations tightly controlling development on 2/3 of 11 acre tract were not an unconstitutional taking); **Volkema v. Department of Natural Resources**, 542 N.W.2d 282 (Mich. App. 1995) (Entire parcel available for development must be considered in determining extent of loss of six acre portion as protected wetlands); **Manor Development Corp. v. Conservation Comm'n of Town of Simsbury**, 433 A.2d 999 (Conn. 1980) (Entire parcel and not impact on seven lots in wetland should be considered); **American Dredging Co. v. State Dep't of Env'tl. Protection**, 404 A.2d



42 (N.J. App. 1979) (2500 acre tract is to be viewed in its entirety in determining whether restriction on 80 acres prevented all practical use of property); **Smith v. Williams**, 560 N.Y.S.2d 816 (A.D. 1990) (No taking, landowner failed to produce any evidence of value of entire property and Department produced evidence showing that if property were subdivided it would have market value exceeding \$230,000); **Deltona Corp. v. United States**, 657 F.2d 1184 (Cl. Ct. 1984) (U.S. Court of Claims held that denial of a permit by the Corps of Engineers to dredge and fill a mangrove wetland in Florida did not take property because denial of the permit would affect the usefulness of only a portion of the property).

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

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

- **This wetland is particularly important.** Courts are particularly likely to uphold regulations where a state or community can make a case that this wetland needs particularly to be protected because it is a rare wetland type, the habitat for endangered species, flooding of adjacent properties will occur, or the wetland is otherwise of special significance. See e.g., **Application of Cent. Baptist Theo. Seminary**, 370 N.W.2d 642 (Minn., 1985) in which the court held that “evidence indicates that urban wetlands are very important because of their scarcity and Jones Lake is an important wildlife habitat for waterfowl in Ramsey County.” The court further observed in upholding regulations that “Wetlands provide a unique natural ecosystem because they are capable of supporting a greater diversity of life than other habitats.” See also, **In re Freshwater Wetlands Port. Act Rules**, 798 A.2d 634 (N.J., 2002); **Richard Littauer v. The Inland Wetland Commission of the Town of Barkhamsted**, 2002 Conn. Super. LEXIS 2836 (Conn., 2002) (Court upheld denial of a permit to

construct a farm pond for a wetland area with Spagnum wetland which was not tolerant of much disturbance in sediments or flow and was unique type of site.). However courts have also given protection to wetlands even when they have been altered or area not highly productive. See **Harrison et. al. v. New York Dep't of Environmental Conservation**, 733 N.Y.S.2d 85 (N.Y. 2001). Court held that permit had been validly denied for a tidal wetland that was functioning although not highly productive.

- **There is multilevel support for the wetland regulation.** Courts have been particularly favorable to regulations adopted consistent with a larger, state or federal program. For example, the Supreme Court of Alaska in **R & Y, Inc. v. Municipality of Anchorage**, 34 P.3d 289 (Alaska, 2001) held that a 100 foot setback requirement for wetlands was not a taking. The court observed that “The passage of the Clean Water Act (CWA) as well as of the state ACMP and the municipal AWMP all speak to the legitimacy of the governmental action.” In interpreting a wetland regulatory statute, a Michigan Court in **Huggett v. Department of Natural Resources**, 590 N.W.2d 747 noted that according to Senate and House Bill analysis, the act creating the regulation was “intended to enable the state to assume authority to administer the federal CWA to Michigan’s wetlands.” The Court observed that to do so, the state regulations “must be enforced in accordance with, and be just as or more stringent than, its federal counterpart.” To be just as stringent, the Michigan farming exemption was held to apply only to established uses. In

Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Ashville, 302 S.E.2d 204 (N.C. 1983) a North Carolina court strongly upheld the city of Ashville’s floodplain regulations adopted, in part, to qualify the city for flood insurance pursuant to the National Flood Insurance Program. See also **Adoph v. Federal Emergency Management Agency**, 854 F.2d 732 (5th Cir. 1988) (Floodplain ordinances passed by parish council in Louisiana in order to participate in the National Flood Insurance Program were not a taking.).



Multi levels of support for hazard regulations

- **The diminution in value due to the restriction is reasonable.** Courts are likely to uphold large diminutions in value if the regulations have a strong relationship to regulatory goals but there may also be limits to the diminution. See, e.g., **McElwain v. County of Flathead**, 811 P.2d 1267 (Mont. 1991) (Court upheld 100 foot set back between septic tank field and floodplain against claim of taking although the regulation reduced property values from \$75,000 to \$25,000 because the property owner was still able to utilize the property although not as near the river); **Mock v. Department of Envntl. Resources**, 623 A.2d 940 (Penn. 1993) (Denial of permit to fill wetland to construct an auto repair shop not a taking). Courts have very broadly held that regulations may validly reduce land values if practical uses remain for the land. See, for example, the **New Jersey court in Sands Point v. Sullivan**, 346 A.2d 612 (Super. Ct. App. Div. 1975), upheld a state coastal wetland protection order that prohibited dumping of solid wastes, discharging of sewage, and the storage or application of pesticides in an area. The court observed that the order did not prevent other practical uses. Similarly, the Maryland Supreme Court in **Potomac Sand and Gravel Co v. Governor of Maryland**, 293 A.2d 241 (Md.

1972), cert. denied, 409 U.S. 1040 (1972) upheld complete prohibition of dredging sand, gravel, or other aggregates or minerals in State wetlands in Charles County but did not prohibit other uses. But see, e.g., **Stanley Friedenborg v. New York Dept. of Envir. Conserv.**, 240 A.D.2d 407 (N.Y. 2003).

- **The proposed activity will threaten public health or safety.** Courts have held that landowners have no right to threaten public safety. Therefore, prohibitions of activities which threaten safety are upheld as not a taking. Courts have consistently sustained regulations to protect safety. See **Spiegle v. Beach Haven**, 218 A.2d 129 (N.J. 1966) (Court upheld, against facial challenge building setbacks and fence ordinances for a coastal area which had been badly damaged by the Ash Wednesday storm of March 1962 against claims that the regulations were a taking of private property); **McCarthy v. City of Manhattan Beach**, 264 P.2d 932 (Cal. 1953) (Court upheld beach zoning district which limited the beach to open space recreational uses based, in part, upon potential for storm damage to structures if constructed in the beach area); **Fallen Leaf Protection Ass'n. v. South Tahoe Public Util. Dist.**, 120 Cal. Rptr. 538 (Cal. 1975) (Court held that sections of Water Code providing that the use of cesspools or septic tanks in Lake Tahoe watershed is a public nuisance are valid); **Town of Indialantic v. McNulty**, 400 So.2d 1227 (Fla. App. 1981) (Beach setback line designed, in part, to reduce flooding and erosion damage, was constitutional); **Hall v. Board of Envtl. Protection**, 498 A.2d 260 (Me. 1985) (Court upheld regulations prohibiting construction in sand dune area but remanded for evidence on taking claim); **Kopetzke v. County of San Mateo**, 396 F.Supp 1004 (N.D. Cal. 1975) (County regulations requiring a geologic report concerning soil stability not a taking); **Usdin v. State Dep't of Envtl. Protection**, 414 A.2d 280 (N.J. 1980) (Court upheld state floodway regulations prohibiting structures for human occupancy, storage of materials, and depositing solid wastes because of threats to occupants of floodway lands and to occupants of other lands); **Young Plumbing and Heating Co. v. Iowa Natural**



Aspenglen campground flooded near Estes Park

Resources Council, 276 N.W.2d 377 (Iowa 1979) (Court sustained denial of a state permit for a condominium in a floodway where such a structure would have raised the level of flood waters on property on other side of the creek. The concept of “equal degree of encroachment” was endorsed as well as efforts to anticipate watershed conditions); **Maple Leaf Investors, Inc. v. State Dep't of Ecology**, 565 P.2d 1162 (Wash. 1977) (Court upheld denial of a permit for houses in floodway of the Cedar River because there was danger to persons living in a floodway and to property downstream); **Beverly Bank v. Illinois Dep't of Transp.**, 579 N.E.2d 815 (Ill. 1991) (Court upheld statute prohibiting residences in 100 year floodway in part to protect flood storage).

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

Evidence of inadequate soils for septic tanks/soil absorption fields and possible resulting pollution has also been given great weight by courts. See, e.g., **Saturley v. Town of Hollis**, 533 A.2d 29 (N.H. 1987), in which the New Hampshire Supreme Court held that denial of a variance for a septic tank in a wetland was reasonable based upon pollution concerns; **Santini v. Lyons**, 448 A.2d 124 (R.I. 1982) (Denial of permit for fill and septic tank in salt marsh upheld, in part, due to pollution concerns); **Milardo v. Coastal Resources Mgmt. Council**, 434 A.2d 266 (R.I. 1981) (Denial of a permit for construction of sewage disposal system in a marsh upheld).

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

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

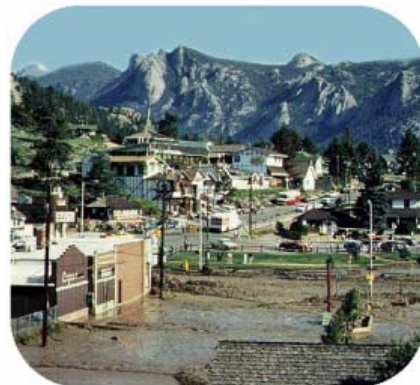
Courts in a number of significant cases have held that filling or drainage of a wetland with resulting increase in flooding on other lands constitutes a trespass, nuisance, or negligence. See, e.g., **Hendrickson v. Wagners, Inc.**, 598 N.W.2d 507 (S.D., 1999) (Injunction granted by the court to require landowner who drained wetlands with resulting flooding of servient estate to fill in drainage ditches.); **Boren v. City of Olympia**, 112 Wash. App. 359, 53 P.3d 1020 (Wash. 2002) (City was possibly negligent for increasing discharge of water to a wetland which damaged a landowner.); **Snohomish County v. Postema**, 978 P.2d 1101 (Wash. 1998) (Lower landowner had potential trespass action against upper landowner who cleared and drained wetland.); **Lang et al v. Wonenberg et al**, 455 N.W.2d 832 (N.D., 1990) (Court upheld award of damages when one landowner drained a wetland resulting in periodic flooding of neighboring property.); **Cook v. Sullivan**, 829 A.2d 1059 (N.H. 2003) (Court held that landowner who had been damaged by filling of a wetland was entitled to damages and injunctive relief.).

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

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

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

Courts have sustained regulations in some cases where few or no economic uses remain for lands and there were few nuisance impacts if the only practical uses were subject to natural hazards. See, for example, **McCarthy v. City of Manhattan Beach**, 264 P.2d 932 (1953), cert. denied, 348 U.S. 817 (1954), in which the California Supreme Court sustained a zoning ordinance restricting ocean-front property to beach recreation purposes, although there was little evidence that open space uses were practical. The court attached significance to the erosion and wave damage and the “safety of the proposed construction of houses thereon was ‘a question upon which reasonable minds might differ.’” See also **Filister v. City of Minneapolis**, 133 N.W.2d 500 (Minn. 1964), cert. denied, 382 U.S. 14 (1965) in which the Minnesota Supreme Court refused to invalidate as a taking a residential classification for a wetland area because proposed apartment buildings could have been incompatible with residences in the residence zone. In holding there was no taking, the court observed that “(I)t was not only incumbent on the plaintiffs to show that the ordinance was not confiscatory, but they have the burden of proving by clear and convincing evidence that the relief they sought would not result in detriment to neighboring property improved in reliance on the validity of the ordinance”. Id. at 505. See also **Hamer v. Town of Ross**, 382 P.2d 375 (Cal. 1963); **Hodge v. Lockett**, 357 S.W.2d 303 (Ky. 1962).



Courts have consistently sustained regulations for hazard areas like these

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

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

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

SUGGESTED READINGS

Annot., "Local Use Zoning of Wetlands or Flood Plain as Taking Without Compensation", 19 A.L.R. 4th 756 (1983)

Annot., "Validity and Construction of Statute or Ordinance Requiring Land Developer to Dedicate Portion of Land for Recreational Purposes, or Make payment in Lieu Thereof", 43 A.L.R.3d 862 (1972)

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<http://cnie.org/NLE/CRSreports/Wetlands/wet-6.cfm>

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www.aswm.org

Association of State Wetland Managers, Inc.

<http://www.epa.gov/epahome/cfr40.htm>

U.S. Environmental Protection Agency. Laws & Regulations.
CFR Title 40: Protection of Environment.

<http://www2.eli.org/index.cfm>

Environmental Law Institute. Many interesting links.

www.findlaw.com

FindLaw. Many legal fields covered, free site.

<http://stu.findlaw.com/journals/general.html>

FindLaw for Students. List of law review (hot buttons) with many accessible for free online.

www.hq.org/torts.html

HierosGamos. Tort Law. Comprehensive law and government portal.

www.lawguru.com/ilawlib/1.htm

Internet Law Library. See many sub-references.

www.lawguru.com/ilawlib/4.htm

Internet Law Library. Code of Federal Regulations.

www.lawguru.com/ilawlib/101.htm

Internet Law Library. Environmental, Natural Resource and Energy Law.

www.usace.army.mil/inet/functions/cw/cecwo/reg

U.S. Army Corps of Engineers. Regulatory Program. Searchable.

www.statelocalgov.net/index.cfm

State and Local Government on the Net. Many, many free sites listed state-by-state.

www.usace.army.mil/inet/functions/cw/cecwo/reg/sadmin3.htm

U.S. Army Corps of Engineers. Statutory, Administrative & Judicial Materials. Wetland regulations with many links to full text of regulations.

<http://www.aswm.org/propub/courts.pdf>

Kusler, J. 2004. *Wetland Assessment in the Courts.* Association of State Wetland Managers, Inc., Berne, N.Y. Quite detailed examination of case law.

www.epa.gov/owow/wetlands/

U.S. Environmental Protection Agency. Wetlands. Much descriptive information and many links.

www.epa.gov/owow/wetlands/laws

U.S. Environmental Protection Agency. Wetlands. Laws. Summary of federal laws pertaining to wetlands (contains many links to the actual texts of laws).



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