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Penn Central to *Palazzolo*: Regulatory Takings Decisions and Their Implications for the Future of Environmental Regulation

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"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[1]

I INTRODUCTION

A. *The Takings Clause*

The Fifth Amendment to the United States Constitution prohibits the federal government from taking private property for public use without just compensation.[2] This provision, known as the Takings Clause, has generated an enormous amount of controversy in an effort to interpret what types of government actions constitute a taking.[3] The lack of precise standards has generated much legal scholarship, case law, and political analysis.[4] Despite the uncertainty of the takings clause's scope, this provision nonetheless operates as a check on the government's police power to regulate property.[5]

The Fifth Amendment takings provision applies to individual states through the Fourteenth Amendment.[6] The courts automatically find a taking when the government makes a physical occupation of a private property, regardless of the severity of the occupation and the importance of the government interest, and compensation must be paid to the landowner.[7] However, if the state is merely regulating property in a manner consistent with its police power, no compensation is required.[8] In this circumstance, even if an individual's use of his property or its value has been substantially diminished, compensation need not be paid.[9] Thus, in order for a property owner to recover compensation, it becomes important to distinguish between a "taking" and a "regulation."

The United States Supreme Court has attempted to give meaning to this distinction.[10] In an early landmark regulatory takings decision, Supreme Court Justice Oliver Wendell Holmes warned that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[11] Similarly, the Court in *Pennsylvania Coal* recognized that regulation, although not physically intruding on a property, can be so burdensome that it constitutes a legal

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taking of the property.[12] This diminution of value approach looked at the impact of the regulation on the landowner in order to determine whether or not a taking had occurred.[13] Justice Holmes, however, did not go so far as to articulate a general test for when a regulation goes "too far."[14] In declining to do so, Justice Holmes recognized that the government "hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[15] Justice Holmes also acknowledged that denial of compensation for any regulation could result in over-regulation to the point where the concept of private property would disappear.[16] His solution was thus to leave regulatory takings claims to be decided on a case-by-case basis.[17]

Pennsylvania Coal represented a shift in takings doctrine. Prior to this case, takings were largely limited to physical acquisitions of property by the government.[18] The case set the tone for regulatory takings jurisprudence; many courts would go on to apply Justice Holmes' opinion as a diminution in value standard.[19] The Supreme Court, however, would do little to elaborate on the concept of regulatory takings for the next fifty-five years.[20] During that time, the United States would see a dramatic increase in the promulgation of federal and state regulations that would have regulatory effects on both public and private lands.[21] This increase in government regulation led to what eventually became known as the "property rights movement."[22]

B. Environmental Land Use and the Property Rights Movement

Property rights advocates have declared that the property rights movement is to the 1990s what the civil rights movement was to the 1960s.[23] In 1964, the Department of the Interior announced a moratorium on the use of desert land for agricultural purposes.[24] Although such a declaration had little impact outside the American West, in states like Nevada, where roughly eighty-seven percent of the land is federally controlled, the moratorium led to outrage.[25] In an attempt to force the agency to end the moratorium, Nevada's then-attorney general, Robert List, brought suit against the Department of the Interior.[26] Dubbed by the media as the "Sagebrush Rebellion," the controversy stemmed from the notion that the federal government had a trust obligation to turn over public lands.[27] Nevada citizens felt that such a dominant federal presence lessened their state's sovereignty.[28] United States District Court of Nevada Judge Ed Reed rejected the notion that the federal government was a trustee of public lands.[29] Reed declared that Nevada had lost control over its public domain when it achieved statehood.[30] Although unsuccessful in Nevada, the Rebellion found supporters in other western states where frustrations were growing as environmental regulations continued to limit resource development in the region.[31]

Environmental protection policies burgeoned in the 1970s.[32] Following the first Earth Day, April 22, 1970, Congress passed a series of environmental statutes regulating many aspects of property use, in particular on lands deemed environmentally sensitive such as wetlands, coastal zones, flood plains, and endangered species' habitats.[33] Prior to this environmental renaissance, land was, for the most part, considered to be out of the reach of governmental control.[34] Over the past three decades, those thoughts have changed with the attention environmental laws have received.[35]

In addition to federal environmental protection laws, state and local governments have earned a place in the forefront of land use planning by enacting environmentally friendly regulations and ordinances.[36] Most of the federal environmental regulations passed set minimums for environmental standards and gave individual states discretion on how to obtain those minimums or, alternatively, the option to set more stringent standards.[37] Many states opted to create their own versions of the federal environmental protection laws.[38]

Not surprising, with the rise in both federal and state regulations, came a rise in costs.[39] A study by Thomas D. Hopkins of the Rochester Institute of Technology showed that environmental regulation costs rose from $41 billion annually in 1973, to $126 billion in 1993.[40] This increase in regulation, without compensation, provoked the property rights movement.[41] Landowners who felt they were bearing the burden of environmental policy attacked these regulations as an infringement of their constitutional rights.[42]

While they acknowledged the benefits of environmental protection, they felt the burden for such public interest fell unjustly on them.[43] Pitted against environmentalists who supported the regulations in an effort to curtail increasing environmental degradation, the scene was set for a property rights backlash.[44]

II. Development of the Regulatory Takings Concept

A. *The* Penn Central *Balancing Test*

Since Justice Holmes established the basic rule for regulatory takings in *Pennsylvania Coal*, courts have struggled to determine when governmental actions go "too far."[45] The Court in *Penn Central Transportation Co. v. New York City* furthered Justice Holmes' "diminution in value" concept by offering a three-factor test in making a takings determination.[46] The *Penn Central* Court, in determining that the City of New York could prevent the owners of Grand Central Station from erecting a tower over the terminal by designating it a historical landmark, set forth three criteria: (1) the regulation's economic impact on the claimant, (2) the regulation's interference with distinct investment-backed expectations, and (3) the character of the governmental action.[47] The Court held that as long as the preservation of the landmark was part of a comprehensive preservation scheme, the City could prevent development of individual landmarks without triggering a taking.[48] The Court emphasized that the three factors were not standards that absolutely defined a taking, but rather they were criteria to consider when evaluating a particular case.[49] In determining that no taking had occurred, the Court considered that New York City granted the owners "transferable development rights" (TDRs), which could be used to develop other, nonlandmark buildings that the owners held.[50] These TDRs, the court reasoned, held economic value, thus decreasing the adverse economic impact on the owner.[51]

In his dissent, Justice William Rehnquist proposed an additional factor.[52] Rehnquist considered whether the government action singled out individuals or applied broadly to a class of owners.[53] "[A] taking does not take place if the prohibition applies over a broad cross section of land and thereby 'secure[s] an average reciprocity of advantage.'"[54] In other words, Justice Rehnquist considered whether the burden was equitably dispersed.[55]

B. *Substantially Advancing a Legitimate State Interest:* Agins v. Tiburon

It is not enough for a state or local government to declare something a "regulation" in order to avoid takings liability.[56] Additionally, the public benefit must be weighed against the private loss.[57] In 1980, the Supreme Court recognized that two requirements must be met in order for a regulation to avoid being a taking.[58] In *Agins v. City of Tiburon*, the Court declared that a regulation must (1) substantially advance a legitimate state interest and (2) not deny an owner economically viable use of his land.[59] A victory for environmental advocates, the *Agins* Court upheld an ordinance that discouraged the conversion of open space to urban development in order to protect citizens from the negative impacts of urbanization.[60] *Agins* demonstrated that public purposes, such as protecting environmentally sensitive areas, may be so important and beneficial that regulations supporting them will be upheld despite the economic damage they may cause private individuals.[61] The Court had validated a city's right to protect its environment for the public benefit.[62]

C. *The 1987 Anti-Environment Trilogy*

While *Agins* seemingly legitimized environmental regulations, later decisions would hinder governmental authority to protect natural resources.[63] A series of three decisions handed down under the Reagan Administration attempted to develop further the framework guiding regulatory takings analysis.[64] Not surprising, under a President who ran on a campaign theme of "Get government off our backs! and out of our pockets," the Supreme Court, in 1987, handed down several decisions favoring property owners.[65] Environmentalists have described these decisions as the "pit bull at the throat" of good conservation efforts and land use planning.[66] Since then, the trend has been to tighten the limits on governmental entities responsible for development authority.[67] The following decisions have had major implications for lo-

cal planning authorities.

First, in *Keystone Bituminous Coal Association v. DeBenedictis*,[68] the Court, by a five-to-four vote, upheld a Pennsylvania statute similar to the one struck down in *Pennsylvania Coal*.[69] The statute stipulated that fifty percent of the coal beneath public structures must be left in place to provide surface support and prevent unnecessary environmental degradation.[70] Like *Pennsylvania Coal*, the issue in *Keystone* was whether the environmental regulation was so onerous that it deprived an owner of all reasonable use of his land.[71] Using the *Penn Central* factors, the Court upheld the regulation, emphasizing that a taking will not be found when the government seeks to prevent uses that are "injurious to the community."[72] The *Keystone* Court distinguished *Pennsylvania Coal*, noting that in *Pennsylvania Coal*, the statute was struck down because it protected the property of private landowners and lacked a public purpose.[73] In *Keystone*, Justice Stevens recognized that the regulation's purpose was "to protect the public interest in health, the environment, and the fiscal integrity of the area."[74]

Keystone is consistent with the principle the *Agins* Court set forth.[75] Justice Stevens stressed the importance of restricting dangerous land uses to protect the public interest.[76] He observed that "[w]hile each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."[77] But the Court did not stop there. It went on to examine the diminution in value and the investment-backed expectations.[78] Although the decision outwardly appeared to be an environmental victory, the Court went on to recognize that the more drastic the reduction in property value, the more likely a taking will have occurred.[79] Suddenly, environmental protection interests were not enough to cross the threshold into the regulatory takings safety zone.

If the *Keystone* decision did not cause panic amongst state and local planners, the next two decisions surely did. The second case, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, held that merely invalidating a regulation that has gone "too far" is not a sufficient remedy for a taking.[80] Money damages are required to restore the plaintiff for a temporary taking.[81] The Court held that the county of Los Angeles must compensate a church for a prohibition on reconstructing buildings destroyed by a flood, if the prohibition was found to be a taking.[82] Justice Rehnquist held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[83] Prior to *First English*, governmental authorities could eliminate a "temporary taking" by repealing the challenged regulation.[84] After this decision, local governments were now forced to deal with much higher stakes in their land use decisions, namely financial considerations.[85]

The third, and most important, land use decision handed down in 1987, *Nollan v. California Coastal Commission*, established a heightened level of scrutiny and a new constitutional standard for regulatory takings.[86] This was the first time since *Agins* that the Court elaborated on the "substantially advances" factor.[87] In another close five-to-four vote, the Court held that the Commission's requirement that plaintiffs grant an easement to the public across their beachfront property before they could obtain permission to rebuild a house was a taking because the means chosen did not "substantially advance" the governmental objective being pursued.[88] There must be an "essential nexus" between the proposed development and the condition imposed by the permit.[89] The Commission's exaction sought to protect coastal views. The Court did not believe there was such a nexus between the dedication and the governmental purpose.[90] There was no reason to believe that the easement would limit obstacles to coastal viewing since the easement would only help those already on beaches to the north and south of plaintiff's property.[91] As such, they required that the state pay just compensation in order for the transaction to occur.[92]

Nollan placed on local governments a "standard of precision for exercise of the police power that has been discredited for the better part of the century."[93] No longer would local planning measures be given the benefit of the doubt.[94] What was once a simple environmental protection measure was now a potential takings clause trigger. To summarize, the trilogy of 1987 decisions had three ma-

jor implications for environmental regulation. First, if the regulation drastically reduces property value, it will trigger a taking (although the Court has declined to give a precise value).[95] Second, a regulatory taking requires monetary compensation. A mere repeal of the restriction is insufficient.[96] And third, the dedication or exaction must have an essential nexus to the government purpose.[97] With these new obstacles in place, environmental regulation would only become more burdened with limitations in the 1990s.

III. Recent Decisions: Impacts and Analysis

A. Dolan's "Rough Proportionality" Requirement

The environmental protection movement did not fare any better in the early 1990s. In a 1994 case, the Supreme Court established that the mere existence of a nexus between the condition imposed and the land use sought is not enough to avoid a taking.[98] In an even more rigorous standard of review, the Court in *Dolan v. City of Tigard* extended the *Nollan* doctrine by yet another close five-to-four vote.[99] The City of Tigard granted plaintiff a permit to expand her hardware store on the condition that she dedicate a portion of her land for a bike path and improve a storage drainage system.[100] The Court held that this mandated trade-off was an unconstitutional taking of plaintiff's property.[101] The *Dolan* Court required "rough proportionality" between the degree of the exactions demanded and the impact of the proposed development.[102] Here, the City failed to show how the alleged increase of traffic caused by the hardware store expansion would be offset by the proposed bikeway.[103] The pathway dedication could potentially reduce traffic congestion, but without more certainty, the rough proportionality test was not met.[104] In a major blow to governmental planning agencies, the *Dolan* decision placed the burden of establishing the essential nexus and rough proportionality on the regulating localities.[105] The *Dolan* decision illustrated the Supreme Court's leanings towards protecting the rights of property owners.[106] The property rights movement was winning the land use war.

Legal scholars suspect that in cases like *Nollan* and *Dolan*, the Supreme Court's conservatives are attempting to limit the land use regulation exception to the takings clause.[107] Together, *Nollan* and *Dolan* establish a two-prong test in determining the validity of an exaction required by a permit.[108] It must (1) bear an essential nexus to the impact of the development and (2) be roughly proportional to the harm that the development may cause.[109] While these two decisions sought to limit the expansive land use regulation exception, more recent cases would narrow the scope of the applications of the *Nollan* and *Dolan* rules.[110]

B. Crossing the "Diminution in Value" Threshold: Lucas v. South Carolina Coastal Council

The property rights movement gained a huge victory in the Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Council*.[111] David Lucas had purchased two beachfront lots for residential development.[112] However, he was later told he could not develop the property because of the enactment of the Beachfront Management Act, which barred owners from building on lots that were in designated "critical areas."[113] The law was enacted after Lucas's property purchase.[114] In a major shift backwards for environmental advocates, the *Lucas* Court held that regulations that deprived owners of all economically beneficial or productive use of their property constituted a taking despite the importance of the governmental interest.[115] *Lucas* demonstrated that a taking can exist even when a state is looking to protect environmental interests.[116] Suddenly, the "substantially advances" test was not enough. It could be trumped by a single economic factor.[117] Developing a new categorical taking, the *Lucas* decision made regulatory takings that deprive owners of all beneficial or productive use or their land the equivalent of a permanent physical occupation.[118]

After *Lucas*, regulatory authorities were not able to introduce countervailing evidence to legitimize the regulation as furthering a substantial interest.[119] This was the decision that environmental groups had feared.[120] Because they were now being subjected to potential takings compensation, regulatory localities would have reduced abilities to protect the environment from the actions of private property owners.[121]

The *Lucas* decision, however, is not without a silver lining for environmentalists.

Lucas also suggested a revival in nuisance law.[122] The Court went on to say that when a state could show that the plaintiff's actions would be prohibited under nuisance laws, no compensation payments were necessary.[123] This is what is known as the "nuisance exception."[124] Adding to the *Penn Central* factors, *Lucas* introduced the consideration of the regulation's extent relative to nuisance law limitations.[125] The nuisance exception offers some hope to environmentalists seeking to prohibit noxious uses of property.[126]

In addition to the nuisance exception, ambiguities in the *Lucas* decision do offer some hope for proponents of environmental protection.[127] First, as Justice Blackmun notes in his dissent, the Court neglected to describe criteria for evaluating loss of property value.[128] Will a ninety percent loss in use of property be a mere diminution in value or will it require compensation?[129] The *Lucas* decision asks these questions but offers no answers. Second, how will courts decide when an owner has been deprived of all economically beneficial uses of his property?[130] Who determines what an economically beneficial use is? Could ecotourism be a use? *Lucas* leaves this possibility open.[131] And finally, to reiterate the nuisance exception, even if a regulation strips the property owner of all economically viable use, if a court decides that the proscribed use was not part of the title in the first place, no compensation is necessary.[132]

C. *Changes in the Notice Rule: The* Palazzolo *Setback*

Instead of getting clearer, another takings opinion handed down by the Supreme Court in 2001 left environmental regulatory takings even more nebulous. *Palazzolo v. Rhode Island* involved a landowner's acquisition of title to property after the enactment of legislation that limited his development rights.[133] A divided Supreme Court held that prior legislation did not bar a takings claim against the state.[134] While the decision significantly expanded the scope of takings claims, the Court again refused to provide a specific formula for determining whether a taking has occurred.[135]

In 1971, the State of Rhode Island enacted legislation creating the Coastal Resources Management Council whose primary duty was to promulgate regulations to protect coastal wetlands.[136] Petitioner Anthony Palazzolo applied for development permits following the creation of the Management Council but was denied on the basis that his plan would have "significant impacts" upon the wetlands.[137] After the state denied additional permit requests, Palazzolo filed an inverse condemnation action[138] in state court, alleging that the State's wetlands regulations had deprived him of "all economically beneficial use" of his property and therefore required just compensation.[139] Reversing the State Court's ruling on ripeness, the Supreme Court upheld petitioner's ability to challenge regulations that were in place prior to his individual ownership.[140] The Court reasoned that barring such a claim would essentially be putting an expiration date on the takings clause.[141] A state's right to place restrictions on land is subject to a reasonable standard.[142] If the Court were to accept the reasoning that successive titleholders are barred from claiming a taking, landowners would have no way to challenge land use restrictions that are arguably unreasonable or extreme.[143] The Court further held that no regulatory taking had occurred because petitioner was not deprived of *all* economically beneficial uses of his land.[144] The regulation in place still allowed petitioner to build a substantial residence on an upland portion of his property.[145] He was not, as the Court in *Lucas* required, left "economically idle."[146]

Although Anthony Palazzolo did not recover takings compensation, proponents of property rights are hailing the decision a victory.[147] Not only does *Palazzolo* make it easier for plaintiffs to challenge environmental regulations, it also allows property purchasers to assert takings claims based on regulations set in place prior to their property purchase.[148] Even though Palazzolo did not succeed in showing that he had been deprived of all economic use of his property, the Court made it clear that governments have a duty to control regulations and pay property owners when there has been a taking.[149]

IV. Analysis: The Future of Environmental Regulation

A. *Where Are We Now?*

It is still too soon to tell if the *Palazzolo* decision repre-

sents a revival in economic liberties, but the opinion does suggest that the Court is willing to expand judicial protection of private real estate interests.[150] Property rights groups view *Palazzolo* as a victory in their efforts to limit government encroachment on private lands. The decision, however, could have detrimental effects on environmental protections.[151] Environmental activists are concerned that landowners, seeking to develop their properties, will flood the courts with litigation and expose state and local governments to millions of dollars in potential takings compensation liabilities.[152] This exposure may have a chilling effect on government efforts to promulgate environmental regulations and limit environmental protections on fragile ecosystems.[153]

As state and local governments become hesitant to impose land use restrictions, we need to look for other ways to limit development on our coastal lands and other fragile ecosystems. Successful management practices will be those that limit economic harm to property owners. Environmental advocates argue that regulations seeking to eliminate the deterioration of important natural resources such as air and water are not likely to eliminate all reasonable uses of one's property.[154] Moreover, because of the nuisance exception discussed in *Lucas*, local governments may have a shield in takings compensation claims.[155]

While it is still early to determine what the effects of the *Palazzolo* decision will be, one survey suggests that the *Lucas* decision is already causing states to exercise more caution when choosing environmental policy.[156] A survey was sent out to all fifty states' environmental agencies and governors' offices.[157] The results indicated that more emphasis is being placed on measuring economic impacts of new regulations.[158] The survey results and the new heightened caution suggest that a new cost-benefit movement could be on its way.[159] Local governments will have to scrutinize more closely the economic impacts of their planning options. We might see a movement away from environmentally sound planning practices if such options are deemed too financially onerous.

Another survey of planners in a majority of California cities and counties revealed that a number of communities have reviewed their exaction policies, following recent major takings decisions, and have found that an essential nexus and rough proportionality actually support an increase in fees imposed on development.[160] Decisions such as *Nollan* and *Dolan* have led communities towards more systematic and comprehensive planning through studies and reports aimed at justifying the rationale for exacting land or money from developers.[161] The survey results also point to a trend towards imposing fees upon developers and a shift away from demanding exactions.[162] Although initial reactions were negative, an overwhelming number of California planners now view the decisions as establishing sound planning practices, and not as a hindrance on their discretion.[163] The ultimate conclusions from the study reveal that developing communities engaging in systematic planning can impose higher fees, whereas fairly developed communities may find that the takings decisions further restrict their ability to impose exactions on developers.[164]

B. Where Are We Going?

Several new policy and planning options offer some relief to the threat of stifled environmental regulations. Below are four viable options for achieving balance between property rights protection and environmental protection.

1. State Legislation

Land use regulations on private property are primarily a function of state and local governments.[165] Recently, states have expanded their power to regulate land use by developing programs to protect historic landmarks, farmland, parks, and preserves.[166] Although property rights groups have not yet successfully enacted legislation requiring the federal government to pay landowners compensation for regulations that limit property value, many states have adopted such "takings" legislation.[167] In what appears to be a growing trend, nearly half of the states have adopted legislation that allows for some form of compensation.[168]

State property rights legislation can take on two forms: planning bills and compensation bills.[169] Planning bills require states to carefully scrutinize actions, which may generate unconstitutional takings claims.[170] In 1992, Delaware became the first state to pass a "stand alone" property rights law that establishes a proce-

dure for determining whether a proposed state rule or regulation will result in a private property taking action.[171] Shortly thereafter, Arizona followed with a planning bill similar to Delaware's.[172] Environmentalists dubbed Arizona's law as "the worst anti-environmental law ever passed in the United States" and successfully lobbied to have a referendum repeal the law.[173] Indiana has a regulation requiring the state attorney general to warn the governor of any proposed rules that might trigger takings liability.[174]

A "compensation bill" identifies a numerical percentage of diminution in value that triggers compensation.[175] Compensation bills do what the Supreme Court has refused to do. This type of bill actually defines a taking. The bill picks a percentage, for example fifty percent, to become the threshold for when a taking has occurred and compensation is required.[176] These bills provide landowners with automatic compensation if owners can establish the requisite decrease in property value.[177] This threshold approach seeks to deal with the inefficiencies associated with both full and no compensation.[178] Partial compensation can improve upon both extremes.[179] While full compensa-tion may stifle environmental protection efforts, no compensation can lead to an excessive regulation problem.[180]

State property rights legislation is not without its criticisms from both property rights and environmental advocates. Environmentalists argue that such legislation threatens environmental protection because it imposes higher costs on state and local agencies.[181] If state governments must to pay every individual who has been negatively affected because of an environmental regulation, the future of environmental protection looks dismal at the state and local level.[182] State and local governments cannot afford to compensate every landowner in every land use decision.[183] Property rights advocates also raise objections to compensation bills.[184] Their concern is that compensation bills will set the threshold for recovery so high that some landowner "victims" will be denied their right to compensation.[185] Compensation bill proponents argue that these types of bills do not preclude claims for compensation for lesser takings, they just establish a minimum, that when met, mandates the government to compensate landowners.[186] Compensation bills take the guesswork out of policy making. Local governments will know exactly where they stand on the takings issue. They can therefore mitigate takings liability by avoiding the threshold. This can be accomplished by granting variances to landowners who may be overly burdened by a regulation.

2 Smart Growth

As indicated by the growing number of state environmental protection laws, states are now, more than ever, exercising greater control over natural resource management.[187] The smart growth movement supports a trend towards inclusive public policy to deal with the conflicting social and legal interests associated with urban development.[188] This planning strategy evaluates state and local policy making concerns, specifically the competing interests of economic development, environmental protection, growth management, and social welfare growth.[189] The public policy of smart growth calls for an equitable balance among these varying interests.[190] The smart growth planning process uses new technology and public policy, as well as old land use.[191] Because smart growth involves land use restrictions, programs designed to fit the needs of a particular community must survive constitutional scrutiny.[192] Smart growth programs have the potential for broad restrictions and controls and may adversely affect the economic interests of landowners and developers.[193] This makes such programs susceptible to takings claims.

What are the implications for smart growth programs after recent takings decisions? While *Nollan* and *Dolan* do not apply to zoning and other land use decisions, both courts were silent on whether they applied broadly to exactions.[194] These decisions may have consequences for smart growth programs that use impact exactions and other types of conditional demands.[195] Courts can use smart growth to narrow takings issues for resolution. To avoid takings liability, smart growth programs may need to establish a direct relationship between land dedications and their public purposes.[196] This can be achieved by making site-specific or development specific (rather than generally applying single-purpose) ex-

actions that benefit the entire community.[197] Some challenges, however, should be expected when landowners believe that interference with their reasonable investment-backed expectations is too burdensome.[198]

Smart growth programs can also be effective by offering economic incentives to landowners such as transferable development rights, tax incentives, acquisitions, publicly assisted financing, and variances.[199] These types of incentives will decrease the likelihood of successful takings challenges.[200] Though one smart growth program will not fit every community, those that will be most effective will have the ability to create compromises between the competing interests of economic markets, natural resource management, and social welfare.[201]

3 Temporary Moratoria: *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[202]

A moratorium is "an authorized delay in the provision of governmental services or development approval."[203] In *First English*, the Supreme Court made clear that even though a land use restriction may be temporary, compensation is not necessarily precluded.[204] If the temporary moratorium proves so restrictive that it denies the landowner of all use of his property, then it is no "different in kind from permanent takings, for which the Constitution clearly requires compensation."[205] A recent Supreme Court decision declined to adopt a categorical rule that moratoria constitute per se taking, instead holding such interim development controls be evaluated in a *Penn Central* style balancing test.[206]

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Ninth Circuit held that a thirty-two month development moratorium did not deprive private property owners of "all economically beneficial or productive use" of their land.[207] Lake Tahoe is a large alpine lake in the northern Sierra Nevada Mountains known for its size, depth, and remarkable clarity.[208] Rapid development in the latter part of the century caused dramatic increases in the Lake's nutrient levels.[209] This excess nutrient loading, known as eutrophication, caused increases in algal growth and consequentially destroyed the lake's visual beauty and also depleted its oxygen supply, threatening lake-dwelling animal life.[210] Formed in 1969 to address environmental problems associated with Lake Tahoe's growing population and tourism, Tahoe Regional Planning Association (TRPA) initiated a land use plan that sought to curtail the eutrophication process by severely limiting the development of "high hazard lands."[211] Since its inception, the TRPA has been battling with private property owners over a series of regulations that prevented lot owners from building private homes.[212] Both Nevada and California heavily scrutinized TRPA's initial regulatory scheme.[213] As a consequence, TRPA revised its regional plan to reflect amended environmental carrying capacities.[214] In 1983, as part of the plan's implementation, TRPA enacted a measure that temporarily suspended all permitting activities on lands with high susceptibility to environmental hazards until a regional plan could be developed.[215] A revised regional plan was not developed until some thirty-two months later.[216] As a result of the moratorium, 450 private property owners filed suit claiming the moratorium constituted a compensable taking under the Fifth Amendment.[217] While petitioners argued that *First English* and *Lucas* compelled the court to find a taking of their temporal interests, the Ninth Circuit rejected their interpretation, and the Supreme Court affirmed.[218]

Petitioners sought to have to categorical rule in *Lucas* (that compensation is required when a regulation deprives an owner of 'all economically beneficial uses' of his land) applied to the Lake Tahoe moratorium.[219] They argued that the thirty-two-month segment could be severed from each landowner's fee simple estate in order for the Court to find that the property had been taken in its entirety.[220] Declining to adopt such a rationale, the Court quelled the idea of temporal severence.[221] Such a view ignores the *Penn Central* admonition that a parcel must be examined as a whole.[222] examining the owner's interest in its entirety, the Court reasoned that "a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[223]

The Court clarified that the *Lucas* categorical rule was meant for an "extraordinary

case" where a property is *permanently* deprived of all value.[224] Such a rule applied to any deprivation of economic use, despite its brevity, would encourage hasty policy decisions and add to the expense of routine government processes.[225] The Court warned that a categorical rule would lead to numerous changes in currently permissible police practices.[226] We would see takings challenges brought for normal delays such as building permit application processes, zoning ordinance changes, orders restricting access to crime scenes, and the like.[227] What's more is that if communities must abandon moratoria use, landowners will have incentives to hastily develop their property to avoid possible planning restrictions that may be enacted.[228] The Court therefore concluded that the interest of "fairness and justice" would best be served by adopting a *Penn Central* approach to such circumstances.[229]

The significance of the Court declining to adopt a categorical rule in *Tahoe-Sierra* is that the Court is validating moratoria as a viable development tool.[230] They are "an essential tool of successful development" and will encourage more environmentally sound planning by recognizing large-scale community planning efforts.[231] Taking the time to develop a regulatory scheme can lead to more prudent planning decisions because cities would be allowed time to evaluate different planning options and fully consider their environmental effects.[232]

The Supreme Court opinion should serve as a caution to state and local planning authorities.[233] The Court did *not* hold that a temporary development moratorium could *never* constitute a taking.[234] The Court explained that the answer to the question "whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case."[235] This seems to be a resurgence of Justice Holmes' "too far" rationale.[236] While a moratorium may be an effective tool in curtailing environmental degradation in the short term, planning authorities should be cautioned not to go too far. The best way to avoid this is to have a definitive time period in which the moratorium would take place. Giving landowners notice of when the moratorium will begin and end can help avoid interfering with reasonable investment-backed expectations.

4 TDR Programs and other Economic Incentives

TDR programs are growth management tools that seek to transfer development potential from environmentally sensitive lands to nonsensitive lands by way of private market transactions.[237] Under TDR programs, the right to develop is severable and can be transferred to other persons or lots.[238] TDRs are useful growth management tools because they allow planning bodies to separate the need to protect a sensitive land parcel with the right of landowners to develop.[239] TDRs can be powerful mitigation tools for local communities seeking to avoid takings liability while simultaneously trying to protect precious natural resources.[240] Several courts recognize TDRs as valid economic incentives.[241] The Supreme Court in *Penn Central* asserted that the TDR offered to plaintiff offset the economic impact of the landmark law and helped avoid takings liability.[242]

The idea behind a TDR is to separate the development interest in a land parcel from the actual land and transfer that potential to another parcel that is better suited for development.[243] This is done by defining "sending" and "receiving" sites.[244] A sending site is usually the environmentally sensitive land from which development potential is going to be exported.[245] Landowners in these sending areas receive development rights proportional to the fair market value of their land.[246] These rights can then be sold to landowners in nonrestricted land areas.[247] Once landowners in these receiving zones have obtained sufficient TDRs, they are permitted to develop their land in excess of any zoning restrictions.[248] To achieve parity in the TDR market, these receiving sites must be areas of growing demand for development.[249] However, if these areas are already "over-zoned," further increases in development will have little economic value to add to the TDR, and the market will fail.[250] If used effectively, TDR programs can successfully avoid the constitutional taking of private property.[251] It is an economically efficient way to balance the need for protection of environmentally sensitive areas and preserving individual property rights.

V. Conclusion

There are no easy answers to the environmental regulatory takings debate. The Supreme Court has declined to establish a bright line rule defining when a land use regulation becomes a taking. Further, because it is largely a state and local government responsibility, a federal regulatory scheme will probably not solve the land use problem.[252]

The ultimate questions for state and local governments thus become: Can private property rights and environmental protection be reconciled? Are they mutually exclusive goals? Who will pay the cost? If left to fall on the shoulders of private landowners, regulatory laws could spiral out of control and be so numerous that the concept of private land is essentially eliminated.

Alternatively, if left to state and local governments, environmental protection could be compromised. If localities are unable to determine the potential scope of their takings liability, they will cease to promulgate such protective laws and ordinances. Interested parties must reach a middle ground whereby all parties create realistic expectations. Through a system of carefully defined takings definitions and prudent planning methods, fairness can prevail in the land use war.

1. Armstrong v. United States, 364 U.S. 40, 49 (1960).

2. U.S. Const. amend. V. The clause reads, "[N]or shall private property be taken for public use, without just compensation."

3. *See generally* Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304 (1984); Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978); Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

4. *See, e.g.*, Thomas J. Miceli & Kathleen Segerson, Compensation for Regulatory Takings: An Economic Analysis with Application 3 (Nicholas Mercuro ed., 1996).

5. *See* Robert K. Best, *Regulatory Takings: A Brief History*, SF64 ALI-ABA 1 (2001).

6. Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239-40 (1897).

7. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (holding that a New York law requiring a landlord to allow the installation of a cable company's facilities in the landlord's building was a taking).

8. *See Pa. Coal*, 260 U.S. at 415.

9. *See generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022-23 (1992).

10. *See e.g.*, *Pa. Coal*, 260 U.S. at 415.

11. *See id.* Refusing to establish general propositions, Justice Holmes opined that the extent to which regulations go too far is a question of degree. *Id.* at 416.

12. *See id.* at 393.

13. *Id.* at 413.

14. *See id.* at 415-16.

15. *Id.* at 413.

16. *Id.* at 415.

17. *Id.* at 416.

18. *See* Miceli & Segerson, *supra* note \h 4, at 14.

19. *See id.*

20. *See* Nancy G. Marzulla, *The Property Rights Movements: How It Began and Where It Is Headed*, *in* Land Rights: The 1990s Property Rights Rebellion 1, 15 (Bruce Yandle ed., 1995).

21. Beginning in the 1970s, the federal government enacted a series of environmental statutes that limited the exercise of private property rights and served as models for state and local regulations. *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1533-1544 (1988); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 (1988); Clean Water Act, 33 U.S.C. §§ 401-426p (1988); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4345 (1994); Resource Conservation and Recovery Act, *id.* §§ 6901-6991i (1988); Clean Air Act *id.* §§ 7401-7671q (1988 & Supp. 1991); Comprehensive Environmental Response, Compensation and Liability Act, *id.* §§ 9601-9675 (1994).

22. *See generally* Marzulla, *supra* note \h 20.

23. *Id.* at 8-11, 24.

24. *Id.* at 3.

25. *See id.*

26. *See id.*

27. *Id.* at 3-4.

28. *Id.*

29. *Id.* at 4.

30. *Id.*

31. *Id.* at 4-5.

32. *Id.*

33. *See* Nancy G. Marzulla, *State Private Property*

Rights Initiatives as a Response to "Environmental Takings", *in* REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 87, 91 (Roger Clegg ed., 1994).

34. Marzulla, *supra* note \h 20, at 7-13.

35. *Id.* at 5.

36. *See* James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life Under the Takings and Other Provisions*, 9 DICK. J. ENVTL. L. & POL'Y 421, 435 (2001).

37. *See* Marzulla, *supra* note \h 20, at 94.

38. *Id.* States such as New York and California have developed stringent air pollution regulations to manage their growing populations and different climatic conditions.

39. *See, e.g.,* THOMAS D. HOPKINS, COST OF REGULATION (Rochester Institute of Technology ed., 1991).

40. *See id.* tbl. 5A.

41. *See* Marzulla, *supra* note \h 20, at 13.

42. *See id.*

43. *See id.*

44. *See id.* at 13-14.

45. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 425 (1922).

46. 438 U.S. 104, 124 (1978).

47. *Id.*

48. *See id.* at 132.

49. *See id.* at 124.

50. *See id.* at 114.

51. *See id.*

52. *See id.* at 138-39.

53. *Id.*

54. *Id.* at 147 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

55. *Id.*

56. *See* RICHARD J. RODDEWIG & CHRISTOPHER J. DUERKSEN, RESPONDING TO THE TAKINGS CHALLENGE: A GUIDE FOR OFFICIALS AND PLANNERS 3 (Am. Planning Ass'n ed., 1989).

57. *See id.*

58. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

59. *Id.*

60. *Id.* at 262. The court reasoned that such a zoning requirement would assure careful development and therefore appellants would be sharing, with other owners, both the benefits and burdens of the city's exercise of its police power.

61. *See id.*

62. *Id.* at 261.

63. *See* Hodel v. Irving, 481 U.S. 704 (1987); First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304 (1987); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). Under the Reagan Administration, a number of Westerners held key cabinet positions such as James Watt of Wyoming as Secretary of the Interior. Watt was the former director of the Mountain States Legal Foundation, a leader in property rights law.

64. *Id.*

65. *Id.*

66. *See* RODDEWIG & DUERKSEN, *supra* note \h 56, at iii.

67. *See* Anne E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 109-10 (2001).

68. *Keystone*, 480 U.S. at 506.

69. Pa. Coal Co. v. Mahon, 260 U.S. 393, 394 (1922).

70. *See Keystone*, 480 U.S. at 479.

71. *See id.* at 492-93.

72. *See id.* at 492 (quoting Mayler v. Kansas, 123 U.S. 623, 655 (1887)).

73. *See id.* at 485-86.

74. *See id.* at 488.

75. *See id.* at 491.

76. *Id.*

77. *Id.*

78. *Id.* at 493-506.

79. *Id.* at 493.

80. 482 U.S. 304, 321 (1987).

81. *Id.* at 321-22.

82. *Id.* at 307, 321.

83. *Id.* at 321.

84. *See id.*

85. *See id.*

86. 483 U.S. 825 (1987).

87. *See id.*

88. *Id.* at 838-39. The Court reasoned that unless a restrictive permit serves the purpose of furthering the public interest, its limitations are nothing more than "an out-and-out plan of extortion." *Id.* at 837 (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 15 (1981)).

89. *Id.* at 837.

90. *Id.*

91. *Id.*

92. *Id.* at 842.

93. *Id.*

94. *See* RODDEWIG & DUERKSEN, *supra* note \h 56, at 7.

95. *See generally* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

96. *See generally* First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304 (1987).

97. *See generally* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

98. *See generally* Dolan v. City of Tigard, 512 U.S. 374 (1994).

99. *See id.*

100. *Id.* at 94-96.
101. *Id.* at 391.
102. *Id.*
103. *Id.*
104. *Id.* at 395.
105. *See id.*
106. *See id.* at 374.
107. *See* Roger Clegg, *Reclaiming the Text of the Takings Clause*, *in* REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 31 (Roger Clegg ed., 1994).
108. *See Nollan*, 483 U.S. 825.
109. *See Dolan*, 512 U.S. 374.
110. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 718 (1999) (holding that the rough proportionality standard does not apply to localities decisions to deny development outright).
111. 505 U.S. 1003 (1992).
112. *Id.* at 1006-07.
113. *Id.* at 1008-09.
114. *Id.* at 1008.
115. *Id.* at 1030-31.
116. *Id.* at 1031.
117. *See id.*
118. *See* Best, *supra* note \h 5, at 6.
119. *See* Marzulla, *supra* note \h 20, at 16.
120. *See* MICELI & SEGERSON, *supra* note \h 4, at 17.
121. *Id.*
122. Erin O'Hara, *Property Rights and the Police Powers of the State: Regulatory Takings: An Oxymoron?*, *in* LAND RIGHTS: THE 1990S' PROPERTY RIGHTS REBELLION 45 (Bruce Yandle ed., 1995).
123. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022-23 (1992).
124. *See* MICELI & SEGERSON, *supra* note \h 4, at 17; *see also Lucas*, 505 U.S. at 1022-28.
125. *See* O'Hara, *supra* note \h 122, **{at ???}**.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 47.
131. *See id.*
132. *Id.* at 49.
133. *See* Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2454-57 (2001).
134. *Id.* at 2459-60. The decision was divided in a 5-4 vote. Three dissenting opinions were filed from Justices Stevens (concurring in part), Ginsburg, and Breyer.
135. *See id.* at 2462-65.
136. *Id.* at 2456.
137. *Id.*
138. The Supreme Court defines "inverse condemnation" as "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." United States v. Clarke, 445 U.S. 253, 257 (1980) (quoting D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971)).
139. *Palazzolo*, 121 S. Ct. at 2456.
140. *Id.* at 2457.
141. *Id.* at 2462-63.
142. *Id.*
143. *Id.*
144. *Id.* at 2464-65.
145. *Id.*
146. *Id.* at 2465 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).
147. Eric Pianin, *Landowners Given New Rights on Environmental Curbs*, WASH. POST, June 29, 2001, at A18.
148. Erwin Chemerinsky, *Expanding the Protections of the Takings Clause*, 2001 SUP. CT. REV. 70, 70.
149. Pianin, *supra* note \h 147, at A18.
150. Chemerinsky, *supra* note \h 148, at 72.
151. *Id.*
152. *Id.*
153. *Id.*
154. *See* Keith W. Bricklemyer & David Smolker, *Inverse Condemnation*, *in* CURRENT CONDEMNATION LAW: TAKINGS, COMPENSATION & BENEFITS 64 (Alan T. Ackerman ed., 1994).
155. *Id.*
156. *See* James R. Rinehart & Jeffrey J. Pompe, *The Lucas Case and the Conflict over Property Rights*, *in* LAND RIGHTS: THE 1990S' PROPERTY RIGHTS REBELLION 84-85 (Bruce Yandle ed., 1995).
157. *Id.*
158. *See* Rinehart & Pompe, *supra* note \h 156, at 84-85.
159. *Id.* at 85.
160. *See* Carlson & Pollak, *supra* note \h 67, at 105. The authors' study involved sending extensive surveys to the planning director of every city and county in the State of California. The survey attempted to gauge the planners' knowledge of takings jurisprudence and its impact on land use planning and use of exactions and fees.
161. *Id.*
162. *Id.* at 107.
163. *Id.* at 105.
164. *Id.* at 156.
165. *See* Marzulla, *supra* note \h 20, at 12. The federal government has developed incursion programs to regulate wetlands, but land use restrictions are typically the domain of state and local governments.
166. *Id.*
167. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION LAW, SCIENCE, AND

POLICY 821 (3d ed. 2000).

168. *Id.*

169. Marzulla, *supra* note \h 33, at 106.

170. *See id.*

171. *Id.*; DEL. CODE ANN. tit. 29, § 605 (1991).

172. Marzulla, *supra* note \h 33, at 106.

173. *Id.* (citing Marianne Lawell, The *"Property Rights" Revolt*, NAT'L L.J., May 10, 1993, at 1).

174. *See* Marzulla, *supra* note \h 33, at 107; IND. CODE § 4-22-2-32 (1993).

175. *See* Marzulla, *supra* note \h 33, at 107.

176. *Id.*

177. *Id.*

178. *See* MICELI & SEGERSON, *supra* note \h 4, at 213-14.

179. Marzulla, *supra* note \h 33, at 109-10.

180. MICELI & SEGERSON, *supra* note \h 4, at 213.

181. Marzulla, *supra* note \h 33, at 108 (citing Nancy G. Marzulla, *Who Benefits from State Private Property Regulation? You, the Taxpayer and Citizen*, LAND RTS. LETTER, June 1993, at 4).

182. *See id.* at 108-09.

183. *See id.* (paraphrasing Terry J. Harris, *in* CHESAPEAKE (Sierra Club, Potomac, MD)).

184. *Id.* at 109.

185. *Id.*

186. *Id.*

187. *See* Holloway & Guy, *supra* note \h 36, at 435.

188. *See id.*

189. *See id.* at 424-25.

190. *Id.* at 440.

191. *Id.* at 439.

192. *Id.* at 453.

193. *Id.*

194. *Id.* at 452.

195. *Id.*

196. *Id.*

197. *Id.* at 452-53.

198. *Id.* at 457.

199. *Id.* at 461.

200. *Id.*

201. *Id.* at 470.

202. 2002 WL 654431 (U.S. Apr. 23, 2002).

203. ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 266 (1999).

204. *See* First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 318 (1987).

205. *Id.*

206. *See* Tahoe-Sierra at *19.

207. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 780 (9th Cir. 2000).

208. *Id.* at 766.

209. *Id.* at 767.

210. *Id.* at 766-67.

211. *Id.* at 767.

212. *Id.* at 767-68.

213. *Id.* at 768-69.

214. *Id.*

215. *Id.* at 768.

216. *Id.*

217. *Id.* at 768-69.

218. *See* ***Tahoe-Sierra*, 2002 WL 654431, at *13**; *Tahoe-Sierra*, 216 F.3d at 777.

219. *See* ***Tahoe-Sierra*, 2002 WL 654431, at *14**.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at *15.

224. *Id.*

225. *Id.* at *17.

226. *Id.*

227. *Id.*

228. *Id.* at *18.

229. *Id.* at *19.

230. *See id.*

231. *Id.*; Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 777 (9th Cir. 2000).

232. *See Tahoe-Sierra*, 216 F.3d at 777.

233. *See* ***Tahoe-Sierra*, 2002 WL 654431, at *10.**

234. *Id.* at *18.

235. *Id.* at *10.

236. *Id.* at *12.

237. *See, e.g.*, John M. Armentano, *Preserving Environmentally Sensitive Land*, 25 REAL EST. L.J. 197, 200-01 (1996).

238. *See* FRANKLIN J. JAMES & DENNIS E. GALE, ZONING FOR SALE: A CRITICAL ANALYSIS OF TRANSFERABLE DEVELOPMENT RIGHTS PROGRAMS 3 (1977).

239. *See* Armentano, *supra* note \h 237, at 198.

240. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 747-49 (1997).

241. *See id.*

242. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978).

243. *See* RICHARD J. RODDEWIG & CHERYL A. INGHRAM, TRANSFERABLE DEVELOPMENT RIGHTS PROGRAMS: TDRS AND THE REAL ESTATE MARKETPLACE 2 (1987).

244. Richard D. Himberger, *Transferable Development Rights*, ADVOCATE, Jan. 2000, at 8.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. Joseph D. Stinson, Note and Comment, *Transferring Development Rights: Purpose, Problems, and Prospects in New York*, 17 PACE L. REV. 319, 329-30 (1996).

250. *Id.*

251. Himberger, *supra* note \h 244, at 8; *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978).

252. *See* James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV., 1279, 1287 (1998).

Latest Chapter in Shintech Story: Addis Site Selection Survives IT Analysis

by: Tad Bartlett

In the Matter of Shintech, Inc., 814 So. 2d 20, No. 2000 CA 1984, La. App. 1st Cir. 2/15/02, *writ denied*, 2002 La. LEXIS 1596, No. 2002-0742, La. 05/10/02 (writ denial decision without published opinion).

Recently resolved on appeal was whether the Louisiana Department of Environmental Quality ("DEQ") acted properly in granting an operating permit to Shintech, Inc., for its polyvinyl chloride ("PVC") facility near Addis. The citizens challenging the permit sought resolution of, *inter alia*, whether Shintech's site selection was impermissibly geographically limited to sites near The Dow Chemical Company's vinyl chloride monomer ("VCM") facility in Plaquemine, and whether the DEQ erred in permitting the facility to emit volatile organic compounds ("VOCs") in a location within the state's ozone non-attainment area.

The Court of Appeal simply adopted the discussion of the issues from the trial court's reasons for judgment, and found that, "[a]fter reviewing the record, and upon considering the arguments advanced by the parties, . . . [the citizens challenging the permit] failed to demonstrate that DEQ acted arbitrarily or failed to give sufficient weight to environmental concerns in balancing the costs and benefits of the Shintech facility." Similarly, the trial court's reasons for judgment had only reiterated the parties' arguments and found that, based on those arguments, "the [DEQ] did not abuse its discretion . . . in granting the Part 70 permit to Shintech." While no new test has been created by the appeal court's opinion, practitioners can certainly use Shintech's Addis facility as an example of what is necessary to pass muster under the IT analysis. Accordingly, the substantive legal lessons to be learned from the upholding of Shintech's permit may be found in the arguments and facts supporting that result.

Shintech's site selection process for the Addis PVC-only plant began with the search for a site to build a vertically integrated complex for manufacturing chlor-alkali, VCM, and PVC; VCM is a necessary feedstock for the PVC production process. In searching for a site for a new manufacturing facility to supplement its only existing U.S. facility (in Freeport, Texas), Shintech sought to expand its PVC production capacity beyond the optimized capacity at its one plant, geographically diversify its operations, and provide a closer manufacturing plant to its customers in the eastern U.S. Shintech had two options: either build a vertically integrated facility that would manufacture the VCM required in the PVC manufacturing process, or build a PVC-only plant near a third-party VCM supplier.

Shintech first conducted a wide-ranging site selection for a site suitable to build a vertically integrated facility, evaluating sites in several Gulf Coast states on the bases of

- proximity to an existing supply of raw materials (ethylene for the VCM unit and salt brine for the chlor-alkali unit);
- tract size to accommodate the plant, any future expansions, and an internal buffer zone, on land suitable for industrial use, but not in a traffic-congested area;
- absence of environmentally sensitive features such as wetlands;
- ready access to utilities and existing industrial transportation infrastructure;
- availability of an industrial service infrastructure, such as machine shops, construction contractors, and the like;
- availability of an industrial workforce with a good work ethic; and
- state and local community support.

Following this process, Shintech selected a site in St. James Parish. However, controversy surrounding the permitting of the facility in that parish caused Shintech to examine and pursue its second alternative: building a PVC-only plant.

In addition to the criteria used in selecting a site for a vertically integrated facility, the PVC-only plant had its own requirements, including the need to be proximal to a steady supply of VCM. Shintech found that the only supplier of VCM that could guarantee a long-term supply in the amount required for its proposed PVC output was Dow, and that the only Dow VCM facility outside of Freeport, Texas, thus able to satisfy the needs for geo-

graphic diversification and proximity to its eastern customer base, was in Plaquemine. Accordingly, in the final stage of Shintech's long site selection process for a new PVC facility, it examined eight possible sites in the proximity of Dow's Plaquemine facility, choosing the Addis site as the site that best met all of its selection criteria.

Hence, the Addis site had been the result of a search process that began with the Gulf Coast-wide search that preceded the initial proposal to build a vertically integrated site in St. James Parish, and had not been geographically limited to just the area near Dow's Plaquemine plant. Moreover, Shintech and DEQ argued successfully to the Court of Appeal that, as long as at least some alternative sites are suitable for a proposed facility and the nature of a project supports geographically limiting the area, it is permissible to limit the geographic area for an alternative sites analysis, citing *Blackett v. DEQ*, 506 So. 2d 749 (La. App. 1st Cir. 1987).

The site selection and permitting process also surmounted the second hurdle presented by the citizens challenging the permit – that a permit to emit VOCs should not be granted for a new facility in the state's ozone nonattainment area – because the proposed facility would be permitted to emit 47.8 tons per year ("tpy") of VOCs, less than the 50 tpy required to classify it as a "major source" of VOC emissions. DEQ argued successfully that it was not required to mandate VOC offsets since Shintech's facility would not be a major source of VOCs, and that accepting Dow's offer of voluntary VOC reductions as offsets was therefore not an abuse of discretion. Allowing the reductions only meant that the community would not experience any net increase in VOC emissions and that there would be no adverse environmental impact on the community resulting from the new facility; *i.e.*, the offsetting reductions served as a mitigating measure, rather than as a requirement for permitting.

Together with the recent decision of *North Baton Rouge Environmental Association v. LDEQ*, 805 So. 2d 255, 2000 CA 1878, La. App. 1st Cir. Nov. 14, 2001, which upheld an operating permit for a modification to a facility that would result in a major source of VOCs in the ozone nonattainment area, the court's *Shintech* opinion indicates a trend of allowing new source permitting in nonattainment areas when accompanied by offsetting emission reductions.

Inside DEQ

RULE-MAKING UPDATE

Air Quality

AQ212 - Revision of Minimum Offset Ratios (LAC 33:III.504) (*La. Register,* v.27, #12, 12/20/01)**.** Revises the minimum offset ratios in LAC 33:III.504 Table1 Major Stationary Source/Major Modification Emission Thresholds. For a nonattainment area with a classification of serious for ozone, the minimum offset ratio for volatile organic compounds (VOC) will be 1.20 to 1 with LAER (Lowest Achievable Emission Rate) or 1.40 to 1 internal without LAER. For a nonattainment area with a classification of severe for ozone, the minimum offset ratio for VOC will be 1.30 to 1. This rule also adds a minimum offset ratio for nitrogen oxides (NOx). For a nonattainment area with a classification of serious for the pollutant, ozone, the minimum offset ratio for NOx will be 1.20 to 1 with LAER or 1.40 to 1 internal without LAER. For a nonattainment area with a classification of severe for ozone, the minimum offset ratio for NOx will be 1.30 to 1. During the summer of 2000, Louisiana experienced many days of elevated ozone levels, especially in the Baton Rouge area, as a number of the monitored readings exceeded the one-hour standard. In addition, the 5-parish Baton Rouge ozone nonattainment area, which includes the parishes of Ascension, East Baton Rouge, Iberville, Livingston, and West Baton Rouge, did not meet the 1999 statutory deadline to comply with the one-hour ozone National Ambient Air Quality Standard (NAAQS). Therefore, identification and promulgation of regulations to implement emission reduction controls are necessary. Urban Airshed Modeling (UAM) indicates that a reduction in NOx emissions and further reduction in VOC

emissions are required in at least the 5-parish area to lower ozone levels. LDEQ is preparing a revision to the State Implementation Plan (SIP) that will specify emission reduction control strategies so that Louisiana can comply with the ozone NAAQS. This revision to the minimum offset ratios is only one measure identified to reduce emissions.

AQ218 - Permit Procedures for New Emissions Sources and Major Modifications in Specified Parishes (LAC 33:III.509 and 510) (*La. Register,* v.27, #12, 12/20/01). Establishes a control technology requirement for NOx and VOC emissions at new emissions units located at new and existing major stationary sources, as well as mandates an offset requirement for major modifications as defined in LAC 33:III.509. This rule applies to sources located in parishes where emissions must be regulated to such an extent as to maintain the attainment status of that parish, or expedite or maintain the attainment status of an adjacent or nearby parish. Namely, these parishes are Beauregard, Cameron, Calcasieu, and Jefferson Davis. Calcasieu Parish experienced six ozone exceedance days during the years 1998, 1999, and 2000. Four or more exceedances during any consecutive 3-year period constitute a violation of the ozone National Ambient Air Quality Standard (NAAQS). In accordance with contingency measures established in the approved air quality Maintenance Plan for Calcasieu Parish, a control strategy must be developed and appropriate control measures implemented in an effort to maintain Calcasieu's current attainment designation and to protect air quality in the area.

AQ211E - Revision to Emission Reduction Credits Banking Regulations (emergency rule) (LAC 33:III.Chapter 6) and AQ215E - Control of Nitrogen Oxides Emissions (emergency rule) (LAC 33:III.Chapter 22) (*La. Register,* v.27, #12, 12/20/01). The State of Louisiana has requested an extension of the attainment date imposed by the 1990 amendments to the Clean Air Act, pursuant to EPA's transport policy. The state has committed to the EPA to submit the necessary documentation to demonstrate transport and revisions to the State Implementation Plan (SIP) by December 31, 2001. The EPA has provided notice in the Federal Register of its intent to review and possibly grant such extension request when submitted or in the alternative to reclassify the Baton Rouge nonattainment area. Failure to submit the transport demonstration and revisions to the SIP would result in the Baton Rouge nonattainment area being reclassified from "serious" to "severe." DEQ concluded that a reclassification would have detrimental effects on the operations of the department, the local economy, and the citizens of the area without any significant benefit, including improved air quality.

The proposed SIP revision involves the adoption of certain new rules, including the adoption of air pollution control standards for emissions of oxides of nitrogen (NOx) and revisions to the existing emission reduction credits banking regulations. These rules were proposed in accordance with regular rulemaking procedures on July 20, 2001, as AQ211 (LAC 33:III.Chapter 6 Banking) and on August 20, 2001, as AQ215 (LAC 33:III.Chapter 22 NOx). During the comment period for the proposed rules the Department received significant public comment and, as a result, proposed substantive changes to these rules, as AQ211S and AQ215S.

In order that the transport demonstration and revisions to the SIP may be submitted to the EPA in accordance with the commitment previously made, DEQ adopted emergency rules AQ211E and AQ215E. These emergency rules include the proposed rule language that has been modified to include substantive amendments. The emergency rules shall be effective for 120 days or until promulgation of final rules AQ211S and AQ215S, whichever occurs first.

AQ211 - Revision to Emission Reduction Credits Banking Regulations (LAC 33:III.Chapter 6) (*La. Register,* v.28, #2, 2/20/02)**.** Revises LAC 33:III.Chapter 6, adopted in August 1994 and amended in December 1998 and September 1999. This revision involves four actions. First, language requiring that emission reduction credits (ERC) must be "surplus when used" will be added. This revision is required in order to achieve consistency with EPA's interpretation of the Clean Air Act and current policy/guidance regarding Nonattainment New Source Review (NNSR) procedures. Second, all references to the ERC bank being a contingency

measure for Louisiana's 15% VOC Reasonable Further Progress (RFP) Plan will be removed. Next, provisions that mandate that emissions reductions be banked as ERCs in order to use them to "net out" in a nonattainment area will be eliminated. Finally, the mobile emission reduction credits (MERCs) provisions under LAC 33:III.611 will be deleted, since this program was never implemented.

AQ215 - Control of Nitrogen Oxides Emissions (LAC 33:III.Chapter 22) (*La. Register,* v.28, #2, 2/20/02)**.** Establishes requirements for reducing emissions of nitrogen oxides (NOx) to allow the Baton Rouge nonattainment area to come into compliance with the National Ambient Air Quality Standard for ozone by May of 2005. Five parishes are defined by EPA as nonattainment. They are the parishes of Ascension, East Baton Rouge, Iberville, Livingston, and West Baton Rouge. Livingston is included even though it has no NOx emissions sources greater than 50 tons per year (tpy). Modeling has demonstrated that the nonattainment area cannot be brought into attainment without including certain outlying parishes. Therefore, the parishes of East Feliciana, Pointe Coupee, St. Helena, and West Feliciana also have been included in the rule. The rule establishes emission factors for reducing emissions from boilers, heaters, furnaces, turbines, and internal combustion engines at affected facilities. The rule also establishes requirements for permits, compliance, recordkeeping and reporting. During the summer of 2000, Louisiana experienced many days of elevated ozone levels, especially in the Baton Rouge area, as a number of the monitored readings exceeded the one-hour standard. In addition, the 5-parish Baton Rouge ozone nonattainment area did not meet the 1999 statutory deadline to comply with the one-hour ozone National Ambient Air Quality Standard (NAAQS). Urban Airshed Modeling (UAM) indicates that a reduction in NOx emissions and further reduction in VOC emissions are required to lower ozone levels. Therefore, it is necessary to identify and promulgate regulations to implement emission reduction controls. LDEQ is preparing a revision to the State Implementation Plan (SIP) that will specify emission reduction control strategies so that Louisiana can comply with the NAAQS. This rule to control emissions of NOx is only one measure identified to reduce emissions.

DEQ has stated that any permits previously issued in accordance with state and EPA-approved rules in effect at the time of issuance remain valid. The department has no intention to reopen any permits for cause due to changes in applied policies.

AQ223 - Chemical Accident Prevention, Incorporation by Reference of 40 CFR Part 68 (LAC 33:III.5901) This proposed rule incorporates by reference into LAC 33:III.5901 the corresponding federal regulations in 40 CFR part 68, July 1, 2000. In order that Louisiana can maintain equivalency with the U.S. Environmental Protection Agency (EPA) for this Part, new federal regulations, along with current federal regulations, must be updated and adopted into the LAC. This rulemaking satisfies that requirement.

Laboratory Accreditation

OS039E - Commercial Laboratories Pending Accreditation (emergency rule) (LAC 33:I.4501 and 4719) (*La. Register,* v.27, #12, 12/20/01; renewed *La. Register,* v.28, #3, 3/20/02). DEQ relies on analytical data submitted both directly and indirectly to the Department to determine compliance with both state and federal regulations. As a result of deadlines established in current Louisiana regulations, the Department is prohibited from accepting data from commercial laboratories that have not received DEQ accreditation. This rule will allow the Department to accept data from unaccredited laboratories that have submitted complete applications and supporting documents, have submitted documentation verifying certification/accreditation by a department-approved accreditation program or supporting documentation showing the quality assurance and quality control program used to generate analytical data by the laboratory, and have paid all appropriate fees. A finding of imminent peril to public health, safety, and welfare is based on the inability to accept and review analytical data. Furthermore, the environmental analytical laboratory industry could suffer a loss of jobs.

DEQ is adding an exemption for personnel monitoring services and those activities specifically licensed in accordance with LAC 33:XV.Chapter 3.Subchapter B, equivalent

agreement state regulations, and the Nuclear Regulatory Commission regulations, Title 10 Code of Federal Regulations, due to the fact that they are licensed under other department regulations and to prevent an additional economic burden and duplication of effort by the department.

Radiation Protection

RP028 - Locking of Sources of Radiation (LAC 33:XV.541) (*La. Register,* v.28, #2, 2/20/02). Describes procedures for the locking of sources of radiation when not in use to prevent unauthorized or accidental production of radiation or removal or exposure of a sealed source. LAC 33:XV.541 is required for Nuclear Regulatory Commission (NRC)-state compatibility purposes. In final rule RP027, published in the August 20, 2001, Louisiana Register, this Section was inadvertently removed and replaced with the incorrect federal language. This proposed rule reinstates the correct language.

Sewage Sludge Management

WP034 - Standards for the Use or Disposal of Sewage Sludge (LAC 33:VII.301 and LAC 33:IX.Chapter 23.Subchapter X)(*La. Register,* v.28, #4, 4/20/02). Establishes standards for the final use or disposal of sewage sludge generated during the treatment of domestic sewage in a treatment works and of domestic septage. Standards are included for sewage sludge, a material derived from sewage sludge, or domestic septage that is applied to the land, and sewage sludge fired in a sewage sludge incinerator. Also included are pathogen and alternative vector attraction reduction requirements for sewage sludge, a material derived from sewage sludge, and domestic septage applied to the land. Siting, operation, and financial assurance requirements are included for commercial blenders, composters, and mixers of sewage sludge or a material derived from sewage sludge. The rule includes the frequency of monitoring, recordkeeping requirements, and reporting requirements for Class I sludge management facilities and requirements for the person who prepares sewage sludge that is disposed in a Municipal Solid Waste Landfill. The adoption of this regulation will prepare the Department for future assumption of the Sewage Sludge Management Program currently administered by the US EPA. A benefit of assumption of the Sewage Sludge Management Program is that facilities will not be required to obtain both an EPA permit and a separate state permit for the use and disposal of sewage sludge. Upon assumption of the program, sewage sludge requirements will be a part of the LPDES permit or as a separate single LPDES general permit or, in the case of a sewage sludge incinerator, as a single air permit.

Underground Storage Tanks

UT009 - UST Registration Requirements Revisions (LAC 33:XI.301 and 303) (*La. Register,* v.28, #3, 3/20/02). Revises the current regulations to require all owners of new underground storage tanks (UST) systems to register such tanks on the Underground Storage Tanks Registration Form (UST-REG-01) at least 30 days prior to bringing such tanks into use. The certification of installation form, UST Registration of Technical Requirements (UST-REG-02) will no longer be required to be submitted at the same time as the registration form. This rule requires that this form be submitted within 60 days after the introduction of a regulated substance. (Note that the form names have changed.) This rule amends the Underground Storage Tanks Regulations to correct the existing problem with registration of new UST systems. The current regulations prohibit the placing of a regulated substance into an unregistered UST. The regulations currently require that in order to register a new UST, both the Registration of Underground Storage Tanks (UST-REG-01) form and the Registration of Technical Requirements for USTs (UST-REG-02) form be submitted within 30 days of bringing the tanks into use. This has caused a problem since the Registration of Technical Requirements for USTs form cannot be completed until a tank tightness test has been performed, which requires that the tank be filled with fuel. Therefore, the regulations are being revised to allow registration of a UST by completing the UST-REG-01 form 30 days before bringing a UST into use. This would be followed by submission of the UST-REG-02 form 60 days after fuel has been dropped in the UST and the tank can be certified as tight.

Waste Tires

SW032 - Waste Tire Fee Collection Methodology (LAC 33:VII.10505, 10507, 10519,

10525, 10533, and 10535) (*La. Register,* v.27, #12, 12/20/01). Modifies the current waste tire fee schedule to reduce the number of categories from 22 to three: $2 per passenger/light truck tire; $5 per medium truck tire; and $10 per off-road tire. Appendix C.Waste Tire Fee Collection Schedule of Chapter 105 is being deleted in its entirety. These changes comply with Act 623 of the 2001 Regular Legislative Session.

Water Quality

WP041 - Louisiana Pollutant Discharge Elimination System Phase II Streamlining Regulations (LAC 33:IX.Chapter 23) (*La. Register,* v.28, #3, 3/20/02)**.** Streamlines the LPDES program in the state regulations in accordance with the streamlining efforts of the EPA. This rule will eliminate redundant regulatory language, provide clarification, and remove or streamline unnecessary procedures that do not provide any environmental benefits.

WQ042 - Revised Dissolved Oxygen Criteria for Beaucoup Creek, Middle Fork Bayou D'Arbonne, Bayou Cocodrie, and Cocodrie Lake (LAC 33:IX.1123.C.3.Table 3) (*La. Register,* v.28, #3, 3/20/02)**.** Revises the numerical dissolved oxygen criteria for two Water Quality Management Subsegments in the Ouachita Basin (Beaucoup Creek, 081503, and Middle Fork Bayou D'Arbonne, 080610) and two subsegments in the Vermillion-Teche Basin (Bayou Cocodrie, 060201, and Cocodrie Lake, 060102). Use Attainability Analyses of these subsegments have determined that naturally dystrophic critical periods for dissolved oxygen occur during parts of each year. While these water bodies exhibit naturally-occurring seasonal variations in dissolved oxygen, no changes in designated uses are proposed. As part of the Louisiana Water Quality Management Plan, the State publishes a list of priority water bodies biennially under the Clean Water Act section 305(b). In accordance with the Clean Water Act section 303(d), water bodies are placed on a list of priority water bodies when assessment indicates that they do not meet applicable water quality standards. After further review and assessment, some of these water bodies may be prioritized for fieldwork, Use Attainability Analyses, and Total Maximum Daily Load development. Until a Use Attainability Analysis is conducted to determine attainable uses and criteria, a Total Maximum Daily Load based upon national criteria may be inappropriate for many water bodies. Beaucoup Creek (081503), Middle Fork Bayou D'Arbonne (080610), Bayou Cocodrie (060201), and Cocodrie Lake (060102) have been classified as the highest priority on Louisiana's 303(d) list. Use Attainability Analyses have been conducted for these water bodies to determine the appropriate dissolved oxygen criteria. The Use Attainability Analyses present the required information for site-specific dissolved oxygen water quality standards revisions in accordance with state and federal water quality regulations, policies, and guidance.

Various Programs

OS040 - Incorporation by Reference of Federal Regulations (LAC 33:I.3931; 33:III.507, 1432, 3003, 5116, 5122, and 5311; 33:V.Chapter 30.Appendices A-M; 33:IX.2301, 2531, 2533, and 2709; 33:XI.1111; and 33:XV.1517)
Updates the incorporation by reference of federal regulations, to maintain equivalency, as follows:

- LAC 33:I.3931 — Reportable Quantities of hazardous substances pursuant to Section 311 of the Clean Water Act: 40 CFR 117.3;
- 33:III.507 — Part 70 operating permits: 40 CFR 70.6(a);
- LAC 33:III.1432 — Conformity to state or federal implementation plans of transportation plans: 40 CFR part 93, subpart A;
- LAC 33:III.3003 — Standards of Performance for New Stationary Sources, emission guidelines and compliance times for municipal solid waste landfills: 40 CFR part 60 subpart Cc;
- LAC 33:III.5116 — National emission standards for hazardous air pollutants: 40 CFR Part 61;
- LAC 33:III.5122 — National standards for hazardous air pollutants for source categories, major sources: 40 CFR Part 63;
- LAC 33:III.5311 — National standards for hazardous air pollutants for source categories, area

sources: 40 CFR Part 63;

- LAC 33:V.Chapter 30.Appendices A-M — Hazardous waste burned in boilers and industrial furnaces: 40 CFR 266, appendices I-XIII;
- LAC 33:IX.2301 — LPDES general conditions: 40 CFR 122.29;
- LAC 33:IX. 2531– LPDES test procedures for analysis of pollutants: 40 CFR part 136
- LAC 33:IX. 2533 – LPDES effluent guidelines and standards: 40 CFR Chapter 1, subchapter N
- LAC 33:IX. 2709– National pretreatment standards: prohibited discharges: 40 CFR 268.40.
- LAC 33:XI.1111– Underground storage tanks, financial test of self-insurance: 40 CFR 144.63
- LAC 33:XV.1517 – Radiation Protection, transportation of radioactive material: 10 CFR 71 appendix A. . This rulemaking is necessary to maintain delegation, authorization, etc., granted to Louisiana by EPA. This incorporation by reference package is being proposed to keep Louisiana's regulations current with their federal counterparts. The basis and rationale for this proposed rule are to mirror the federal regulations in order to maintain equivalency.

Proposed Rules:
AQ225 - Stage II Vapor Recovery Systems (LAC 33:III.2132)
HW081 - Corrective Action Management Units (LAC 33:V.109, 2601, 2602, 2603, 2605, and 2607)

RECENT CASE DECISIONS

PVC Producer Prevails on Permit. ***In the Matter of Shintech, Inc.***, 2000 CA 1984, La. App. 1 Cir. 2/15/02 (__ So.2d __). The First Circuit Court of Appeal has affirmed a district court decision upholding an air permit issued by DEQ to Shintech, Inc. In a judicial review proceeding filed by six individual residents of Iberville and West Baton Rouge Parishes, appellants sought the revocation of a preconstruction/ Part 70 operating air permit issued by DEQ to Shintech, Inc., for the construction and operation of a new polyvinyl chloride manufacturing facility near Addis, Louisiana. Shintech applied for permits for the Addis project after its efforts to obtain permits for a much larger plant near Convent, Louisiana were delayed, amid controversy over "environmental justice" complaints.

Appellants in the current proceeding argued that Shintech and DEQ had failed to adequately consider alternative sites for the Addis project, as required by *Save Ourselves,Inc. v. Louisiana Environmental Control Commission*, 452 So.2d 1152 (La. 1984), and its progeny. Specifically, Appellants argued that it was improper for the analysis to be limited to 8 sites in the immediate vicinity of the Dow Chemical Co.'s Plaquemine facility. Shintech and DEQ countered that the new plant would be entirely dependent on the Dow facility for feedstock vinyl chloride monomer, since the Dow faciity was the only merchant supplier of VCM with adequate capacity to supply the new Shintech plant. Furthermore, they argued, locating the new plant close to Dow would allow transportation of VCM by pipeline, which would be both safer and cheaper than transportation by rail, truck or barge. Thus, they argued, limiting the analysis to the area near Dow was justified and allowed under *Blackett v. La. Dept. of Environmental Quality*, 506 So.2d 749 (La. App. 1 Cir. 1987).

Appellants also argued that the project would not avoid adverse environmental effects to the maximum extent possible, as required by *Save Ourselves* and its progeny, because the new plant would emit volatile organic compounds ("VOCs") in an area that is currently failing to attain ambient air standards for ozone. Shintech and DEQ responded by pointing out that there would be no net increase of VOC emissions due to the Shintech plant, because Dow will voluntarily reduce its own VOC emissions by an amount sufficient to offset the new emissions by Shintech. The appellees also argued that new development in ozone non-attainment areas is both expected and allowed by the Clean Air Act.

Appellants third line of attack focused on DEQ's conclusion that the social and economic benefits of the project will outweigh the environmental impact costs. Appellants argued that DEQ failed to consider, or gave inadequate weight to, several alleged

adverse environmental and economic factors. Shintech and DEQ responded with arguments that the record and the DEQ's "Basis for Decision" document showed proper consideration of all factors.

Without making any specific findings of fact, or indicating which arguments it accepted or rejected, the District Court ruled that DEQ "did not abuse its discretion, act contrary to law, nor was it arbitrary and capricious in granting the Part 70 permit to Shintech."

, No. 466, 616 Div. N, 19th J.D.C. (6/19/00) (Welch, Judge). The Court found that "there is a rational basis, supported by the findings of fact in the record, for the ultimate decision by DEQ" to grant the permit.

The First Circuit Court of Appeal first denied motions by Appellants to supplement the record with purported evidence of events that occurred subsequent to the district court judgment, and granted Appellees' motions to strike references to such evidence from Appellants' brief. The Court then affirmed the district court decision, adopting the lower court's discussion of the arguments as its own.

Save Our Wetlands, Inc. v. Department of Environmental Quality, 2000 CA 2809, La. App. 1st Cir. 2/15/02 (___ So.2d ___). Appellant filed an appeal with the 19th JDC of a water quality certification issued by DEQ for the proposed deposition of fill material in a wetland, in preparation for the construction of a new golf course in Westwego, La. The petition for review was filed with the district court 57 days after notice of the DEQ action was given. The district court dismissed the action as untimely, under La. R.S. 30:2050.21(A), which requires a petition for review to be filed within 30 days of the giving of notice of the action being appealed. On appeal from that judgment, Appellant argued that no time limitation could be applied to its petition for review, which Appellant characterized in its brief as an "action for absolute nullity," under La. CCP Art. 2002. The Court of Appeal rejected that argument, holding that an action of nullity is available only in a court, to modify a judgment of a court. Since Appellant was attempting instead to have a court nullify a final permit action of the DEQ, a department of the executive branch, any authority for such action must be found in La. R.S. 30:2001 *et seq*. Those statutes allow judicial review only when the petition is filed within 30 days. The judgment dismissing the suit was affirmed.

Science for Lawyers: Clean Water Act Case Allows Generation of Heat and Sheds Light on Permit Shield

by Alex Sheffield, P.E.
ARCADIS

A decision in *Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland, No. 00-1283 (4th Cir., Oct. 10, 2001)* (Piney Run) by a Federal Appeals Court reversed a $400,000 civil penalty against a municipal POTW for discharging heated water. The case centered on the extent of the so-called "Permit Shield" provided under the Clean Water Act (CWA) permitting program. The Preservation Association claimed that the POTW was not authorized to discharge heat from its outfall because the pollutant was not expressly mentioned in the permit. The permit contained the prohibition of the discharge of any pollutants that were not expressly listed in the permit. In response, the Carroll County Commissioners claimed that the Permit Shield bars suit against a permit holder for the discharge of pollutants not expressly listed in the permit. The District Court ruled that although the permit generally allowed the discharge of heat, the CWA prohibits the discharge of pollutants not expressly listed in the permit. The Federal Appeals Court found otherwise. This article reviews the historical background of the Permit Shield as it pertains to discharge authorizations and gives a technical perspective of the Permit Shield in light of the Federal Appeals Court ruling in favor of the Carroll County Commissioners.

HISTORICAL BACKGROUND

Section 402(k) of the CWA contains the so-called Permit Shield provision, which defines compliance with a discharge permit as compliance with other pertinent sections of the CWA for the purposes of enforcement. In *Atlantic States Legal Foundation v. Eastman Kodak Co., 12th F.3d 353, 357-58 (2d Cir. 1993)*, the Legal Foundation charged that the CWA prohibited absolutely the discharge of any pollutant not specifically authorized under Kodak's permit. A Federal Appeals Court ruled that the discharge of unlisted pollutants per se is not unlawful under the CWA. The Court viewed the regulatory scheme of a permit as limiting the most harmful pollutants and leaving the control of the remaining numerous pollutants to disclosure requirements. Otherwise, the Court reasoned, the permit would have to identify and limit every one of the thousands of chemicals potentially present. The Legal Foundation could not provide a reason for not considering water as a pollutant requiring a permit limit under their position because "water" is a chemical. Although not directly pertinent to the Permit Shield, this case is also interesting in that the Federal Appeals Court ruled that a federal citizen suit under the CWA may not be brought to enforce state environmental regulations.

Following the Kodak case, EPA issued its *"Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits" (7-1-94)*. The policy states that a Permit Shield is provided to certain pollutants, including:

- "Pollutants specifically limited in the permit or pollutants which the permit, fact sheet, or administrative record explicitly identify as controlled through indicator parameters;
- "Pollutants for which the permit authority has not established limits or other permit conditions, but which are specifically identified as present in facility discharges during the permit application process;
- "Pollutants not identified as present but which are constituents of waste streams, operations or processes that were clearly identified during the permit application process."

This policy was revised April 11, 1995 to clarify that the shield covers pollutants specifically identified in writing and contained in the publicly available administrative record documenting the permit development. In addition the permittee must comply with the report notification requirements contained in 40 CFR 122.41(l) and 122.42 for the permit shield to cover pollutants not limited in the permit.

Therefore the pollutants covered by the Permit Shield must be clearly identified (either as specific pollutants present in the discharge or, as noted above, as constituents of waste streams, operations or processes) in writing and must be part of the permitting administrative record. In *In re Ketchikan Pulp Co., 7 E.A.D. 605 (EPA 1998), 1998 W.L. 284964 (EPA)*, Ketchikan appealed a civil penalty for violations regarding three discharges, including water treatment plant flocculants, aeration basin sludge, and a spill of magnesium bisulfite associated with a process digester. Ketchikan argued these discharges were associated with its permitted operations and therefore authorized by the permit, but the EPA Appeals Board ruled that Ketchikan did not make adequate disclosures regarding the discharges during the permit application process.

The permit shield is also limited as it does not necessarily provide protection against state or local laws and regulations. 40 CFR 122.5(c) states, "The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations." In *People v. General Motors Corporation (1996) 44 Cal.App.4th 282, 51 Cal.Rptr.2d 651*, the defendant claimed that a release of cooling water to a concrete storm water drainage system was shielded from California Fish and Game Code regulations because the discharge was compliant with the facility NPDES permit. The State Appeals Court disagreed and affirmed the conviction.

Piney Run Ruling

The Federal Appeals Court in the Piney Run case overruled the District Court's ruling that the Carroll County Commissioners were liable under the CWA for the discharge of pollutants not expressly authorized by the permit. The Appeals Court ruled that the commissioners did not violate the CWA because "…they complied with the discharge limitations and reporting requirements of the permit, and the discharges were within the reasonable contemplation of the permitting authority at the time the permit was issued." The Appeals Court disagreed however with the commissioners that the Permit Shield barred suit against a permit holder for such pollutants not listed in a permit. The U.S. Supreme Court refused a request by a landowner on May 20, 2002 to review the Fourth Circuit Court of Appeal decision, leaving the decision as good law within the Fourth Circuit.

Relevance to Permittees

The Piney Run decision indicates the CWA Permit Shield may protect permittees when they fully disclose and describe their operations, processes, and discharges in writing during the permit application process and fulfill reporting requirements under the permit. Lack of quantitative analytical data and/or stating "believed absent" for pollutants likely means the permittee is not authorized to discharge that pollutant. Providing representative analytical data for pollutants believed to be present (even where not detected at the minimum quantification level [MQL]) allows the permittee to typically discharge the pollutant up to five times the MQL without further notification, and under the Permit Shield concept, may still be authorized under the permit with proper reporting.

If you would like more information on the references provided, or about the CWA Permit Shield, contact Alex Sheffield, P.E. at (225) 292-1004.

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