No. _____

In The

Supreme Court of the United States

MIKE MEHAFFY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS J. WARD
DEVALA A. JANARDAN
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th St., N.W.
Washington, D.C. 20005
(202) 266-8200

WILLIAM A. WADDELL, JR.
Counsel of Record
BRUCE B. TIDWELL
FRIDAY, ELDREDGE &
CLARK, LLP
400 West Capitol Ave.
Suite 2000
Little Rock, AR 72201
waddell@fridayfirm.com
(501) 370-1510

June 3, 2013

QUESTIONS PRESENTED

In 1970, the U.S. Army Corps of Engineers ("Corps") entered into an agreement that gave the Petitioner's predecessor in interest, Nomikano, Inc., the right to fill certain wetlands on its property. In exchange, the government obtained a flowage easement over a portion of the property. Petitioner was Secretary-Treasurer of Nomikano and involved in those negotiations. In 2000, Petitioner obtained the property. Subsequently, in 2006, he sought a permit from the Corps to fill certain wetlands in accordance with the agreement. The Corps denied his permit.

The U.S. Court of Appeals for the Federal Circuit held that Petitioner had zero reasonable investment-backed expectations simply because he purchased the property after the enactment of the Clean Water Act. 33 U.S.C. § 1521 *et seq*. The Federal Circuit then concluded that this, by itself, constituted a sufficient regulatory takings analysis, and affirmed the district court's dismissal of Petitioner's claims.

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court uniformly rejected the categorical rule that "postenactment purchasers cannot challenge a regulation under the Takings Clause." *Id.* at 626.

The questions presented are:

1. Can lower courts bypass *Palazzolo* and insert a new categorical rule to the Takings Clause

that regulations existing prior to acquisition of land solely and entirely negate the reasonable investment-backed expectations of a landowner; and

2. Can lower courts, in the land use regulatory takings context, ignore the holistic, multi-factored balancing inquiry demanded in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), and decide a case on a single factor?

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page*(s)*

Cases

TABLE OF AUTHORITIES *(cont.)*

Page*(s)*

TABLE OF AUTHORITIES *(cont.)*

Page*(s)*

TABLE OF AUTHORITIES *(cont.)*

Page*(s)*

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

OTHER

TABLE OF AUTHORITIES *(cont.)*

Page*(s)*

PETITION FOR WRIT OF CERTIORARI

Petitioner[1] respectfully seeks a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the U.S. Court of Appeals for the Federal Circuit affirming the lower court is reported at *Mehaffy v. U.S.*, 499 Fed. App'x. 18 (2012), and is reproduced in Petitioner's Appendix at App. 2a. The Federal Circuit's Order denying rehearing and rehearing en banc was issued March 7, 2013 and is reproduced in Petitioner's Appendix at App. 46a. The U.S. Court of Federal Claims Opinion and Order granting the government's motion for summary judgment is reported at *Mehaffy v. U.S.*, 102 Fed.Cl. 755 (2012) and is reproduced in Petitioner's Appendix at App. 12a.

JURISDICTION

The Federal Circuit entered its judgment on December 10, 2012 and entered an order denying a petition for rehearing and rehearing en banc on March 7, 2013. App. 46a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

---

[1] Pursuant to S.Ct. Rule 29.6, there are no corporate parties involved in the matter.

CONSTITUTIONAL PROVISION INVOLVED

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

STATEMENT OF THE CASE

Petitioner Mike Mehaffy is a resident of Pulaski County, Arkansas, and the owner of approximately seventy-three (73) acres of land located on the Arkansas River in North Little Rock, Arkansas ("Property"). The Property is bordered by the Arkansas River. App. 3a.

Mr. Mehaffy's chain of title to the Property traces to Nomikano, Inc. ("Nomikano") which purchased the Property in 1965. Nomikano was an Arkansas corporation that held assets for the benefit of the Mehaffy family. Nomikano's business was primarily conducted by Mr. Mehaffy's father; however, numerous family members served as officers. Petitioner served as Secretary-Treasurer for Nomikano and was active in the company's business. App. 9a.

On March 7, 1968, a representative of the U.S. Army Corps of Engineers ("Corps") contacted Petitioner seeking to acquire a flowage easement over approximately forty-nine (49) acres of the Property ("Easement"). At that time, Mr. Mehaffy advised the Corps representative that he intended to fill the proposed Easement area above an elevation of 252 feet and that he would not object to granting the proposed Easement provided that he was permitted to fill the area at a later date. In response, the Corps representative advised Mr. Mehaffy that his request for the right to fill above 252 feet at a later date could not be granted. Mr. Mehaffy continued to negotiate with the Corps

representative with the right to fill the elevated area being an integral part of the continued negotiations.

Ultimately, the Corps agreed to purchase a flowage easement from Nomikano that was subject to the right to Nomikano and its successors and assigns to fill above 252 feet.

Conveyance of the Easement along with the reservation of the right to fill was accomplished by an Easement Deed ("Easement Deed"), dated March 2, 1970. The Easement Deed, which was drafted by the Corps, provided the United States with a perpetual right:

> . . . to permanently overflow, flood and submerge the land lying below elevation 249, [mean sea level], and to occasionally overflow, flood, and submerge the land lying above elevation 249, m.s.l., in connection with the operation and maintenance of Lock and Dam No. 7, Arkansas River project.

See App. 4a.

Further, the Easement was specifically subject to the following reservation:

> [h]owever, to the landowner, its successors and assigns, all such rights and privileges as may be used and enjoyed without interfering with [the use of the [Arkansas River] project for the purposes authorized by Congress or abridging the rights and easement

> hereby conveyed.] Included among those rights specifically reserved to the landowner, its successors and assigns, is the right to place fill in the area of said tract and to place structures on said fill above elevation 252 feet, m.s.l. Notwithstanding, the above exception does not permit the placing of structures for human habitation thereon.

See App. 4a.

Subsequent to execution, delivery, and filing of the Easement Deed, the Clean Water Act was passed in 1972 and amended in 1977. Under Section 404 of the Clean Water Act, Congress provided the Corps with authority to issue permits to discharge dredge or fill material into water under its jurisdiction. 33 U.S.C. § 1344; App. 48a.

On October 10, 1980, Mr. Mehaffy received a letter from the Corps stating that a 404 Permit would be required in order to fill any wetlands on the Property. The letter also noted that the Easement Deed "is not sufficient to authorize work requiring authorization under" Section 404 and the applicable regulations. However, the letter advised Mr. Mehaffy as follows regarding the actions that would need to be taken to fill any wetlands portion of the Property:

> [I]f you should propose to dispose of or place any dredged or fill material into wetlands anywhere on this property or into the

> Arkansas River or to do any type of work in or over the Arkansas River you should contact this office well in advance of any such work for a determination of the exact permit requirements.

App. 48a.

Nomikano was dissolved on February 18, 1987. As a part of the dissolution of Nomikano, the Property was sold to Mehaffy Construction Company, Inc. ("MCC") for $75,000. Nomikano's sale of the Property to MCC was a negotiated, arms-length transaction for fair market value. MCC subsequently transferred the Property to Mr. Mehaffy for tax purposes on May 9, 2000. App. 5a.

On September 5, 2006, Mr. Mehaffy submitted an application seeking a Section 404 permit to fill approximately 48 acres of wetlands on the Property. The description of the requested project included in the application was to "[f]ill in property above elevation 252 m.s.l." App. 18a.

On August 30, 2007, the Corps denied Mr. Mehaffy's application. He timely appealed the denial through the Corps' administrative appeal process. By letter dated April 15, 2008, the Corps issued its final decision denying the appeal. App. 25a. Pursuant to 28 U.S.C § 1491, Mr. Mehaffy filed a takings claim with the U.S. Court of Federal Claims on December 14, 2009. App. 25a.

The Court of Federal Claims granted summary judgment to the government on January 11, 2012 finding that Mr. Mehaffy did not have a reasonable investment-backed expectation in the Property. *Mehaffy v. U.S.*, 102 Fed.Cl. 755 (2012); App.12a. Mr. Mehaffy timely filed his notice of appeal with the U.S. Court of Appeals for the Federal Circuit on March 1, 2012.

On December 10, 2012, the Federal Circuit issued its opinion affirming the decision of the Court of Federal Claims. *Mehaffy v. U.S.*, 499 Fed. App'x. 18 (2012). App. 2a. In making its decision, the Federal Circuit analyzed only the investment-backed expectations of Mr. Mehaffy, and ruled that because he "had both constructive and actual knowledge that federal regulations could ultimately prevent him from exercising [his] right reserved in the easement," that he had zero reasonable, investment-backed expectations. App. 10a. A Petition for Rehearing was timely submitted by Petitioner, but was denied by the Federal Circuit on March 7, 2013. App. 46a-47a.

REASONS FOR GRANTING THE WRIT

With few exceptions, this Court has consistently rejected categorical rules in the takings context:

> "True, we have drawn some bright lines . . . [but] most takings claims turn on situation-specific factual inquiries."

Arkansas Game and Fish Comm'n v. United States, 133 S.Ct. 511, 518 (2012) (citations omitted).

Yet, a categorical rule is precisely what the Federal Circuit created when it ruled that Mr. Mehaffy did not have a reasonable investment-backed expectation that he could develop his property because he "had both constructive and actual knowledge that federal regulations could ultimately prevent him from exercising the right reserved in the easement to fill certain land." App. at 10a. This simply replaces the categorical rule that was rejected in *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001) with a new categorical rule that landowners *never* have a reasonable investment-backed expectation when they have notice of federal regulations.

Unfortunately, the Federal Circuit did not stop there. It also failed to holistically consider, at minimum, all three *Penn Central* regulatory takings factors, and rejected Mr. Mehaffy's claim by considering only his investment-backed expectations. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

First, this Court should grant certiorari to overturn the Federal Circuit's creation of a new categorical exemption under the Takings Clause. As we explain, *Palazzolo* confirms that knowledge of a regulation does not vitiate a landowner's reasonable investment-backed expectation. In relation, this Court should recognize that a permit process, as opposed to a regulatory ban, adds to a landowner's reasonable investment-backed expectation.

Second, this Court should reaffirm and emphasize *Penn Central's* three-part balancing inquiry to ensure that courts conduct fair and just regulatory takings analysis.

I. KNOWLEDGE OF A PERMITTING PROCESS DOES NOT NEGATE A LANDOWNER'S REASONABLE INVESTMENT-BACKED EXPECTATIONS.

A. The Federal Circuit's Decision Contradicts this Court's Holding in *Palazzolo v. Rhode Island*.

The Federal Circuit's decision institutes a new categorical exemption from the Taking Clause: If a regulation predates a landowner's acquisition of property, and he has knowledge of it, then the landowner's reasonable investment-backed expectation is zero. This effectively prevents any meaningful chance for success under a *Penn Central* regulatory takings claim. This defies common sense, but more importantly it violates this Court's decision in *Palazzolo* (and affirmed in later Court decisions) which clearly rejected the proposition that "postenactment purchasers cannot challenge a regulation under the Takings Clause." *Id.* at 626. We explain.

In *Palazzolo*, a state-created agency repeatedly denied the petitioner the ability to fill marshland due to restrictions in place at the time the property title passed to petitioner. The petitioner brought an inverse condemnation suit, claiming the regulations

resulted in a total taking requiring compensation under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The Rhode Island Supreme Court held, in part, that petitioner could not recover under *Penn Central* because he had "no reasonable investment-backed expectations that were affected by [the] regulation" because the regulation predated his ownership. *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 717 (R.I. 2000).

This Court reversed and rejected the categorical "notice rule" that "[a] purchaser or a successive title holder . . . is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Palazzolo*, 533 U.S. 606, 626. There are wise and astute reasons as to why the *Palazzolo* Court rejected the notice rule. Certainly principles of fairness come into play:

> [T]o accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Id. at 627.

The Court further acknowledged that because the process of ripening a claim can take years, a successor to property could not continue any claims

based on a prior existing regulation brought by the expiring landowner if a categorical notice rule existed. Similarly stated, "[i]t would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken . . . by a previous owner. *Id.* at 628. In short, "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle." *Id.* at 627.

The Federal Circuit's rationale in this case at hand, while misguided, is simple to explain. It interprets *Palazzolo* as standing for the narrow premise that this Court simply rejected a categorical rule that subsequent purchasers or successive title holders are deemed to have notice of an earlier-enacted restriction and are thus barred from even presenting a takings claim. In its place, however, the Federal Circuit institutes a new categorical rule—when a landowner has knowledge of a regulation that predates his acquisition, he has no reasonable investment backed expectations. If allowed to stand, this dooms any chance of success under *Penn Central.* *S*tated simply, the rule rejected in *Palazzolo* and the rule created by the Federal Circuit are two sides of the same coin.

The Federal Circuit incorrectly employed Justice O'Connor's concurrence in *Palazzolo* for the proposition that Petitioner had no reasonable investment-backed expectations because the Clean Water Act was enacted before the property transferred to his name. App. at 10a. Justice O'Connor initially explained that one's expectations

are "measured at the time the claimant acquires the property." *Palazzolo* at 633 (O'Connor, J., concurring). The Federal Circuit, however, took that statement too far. Actually, Justice O'Connor clearly explained that the Rhode Island Supreme Court had improperly adopted "the sweeping rule that the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim based on that use restriction." *Palazzolo*, 533 U.S. at 632. Justice O'Connor accurately predicted this exact case by stating:

> **. . .** the state of regulatory affairs at the time of acquisition is *not the only factor* that may determine the extent of investment-backed expectations. For example, *the nature and extent of permitted development* under the regulatory regime vis-a-vis the development sought by the claimant may also shape legitimate expectations without vesting any kind of development right in the property owner . . . . Courts instead must attend to those circumstances which are probative of what fairness requires in a given case.

Palazzolo, 533 U.S. 606, 634-35 (2001) (internal citations omitted) (emphasis added).

In short, Justice O'Connor's concurrence states that the temporal relationship between regulatory enactment and title acquisition plays a *non-exclusive role* as part of a holistic *Penn Central* analysis. *Id.* at 633 ("[I]nterference with investment-backed expectations is *one of a number of factors* that a court *must* examine" and that the "the regulatory

regime in place . . . *helps to shape* the reasonableness of those expectations.") (emphasis added). Unfortunately, the Federal Circuit below misinterpreted Justice O'Connor's *Palazzolo* concurrence to support its decision that Petitioner could not have any reasonable investment-backed expectation solely because he acquired his property after Congress adopted the Section 404 permitting program.

Justices Scalia and Stevens wrote concurrences in *Palazzolo*, both of which conflict with the Federal Circuit's theory. Justice Scalia flatly stated: "[T]he fact that a restriction existed at the time the purchaser took title . . . *should have no bearing* upon the determination of whether the restriction is so substantial as to constitute a taking." *Palazzolo* at 637 (emphasis added). Similarly, Justice Stevens aptly cited back to the majority opinion to state that "[I] have no doubt that [plaintiff] has standing to challenge the restriction's validity whether she acquired title to the property before or after the regulation was adopted . . . even future generations have a right to challenge unreasonable limitations on the use and value of land." *Id.* at 638 (internal citations omitted).

Thus, *Palazzolo* clearly refutes the notion that solely because Petitioner had knowledge of the Section 404 permitting program he could not have a reasonable expectation to use his property. The Federal Circuit's decision directly conflicts this Court's holding in *Palazzolo,* and the Court should grant certiorari to overturn it.

B. The Federal Circuit Contradicts this Court's Decision in *United States v. Riverside Bayview Homes.*

A corollary issue to the existence of a regulation, discussed above, is the nature of the regulation. With regards to a landowner's reasonable investment-backed expectation, a regulatory prohibition contrasts significantly from the nature of a permit process. The Section 404 process, as opposed to an outright ban, allows for development. The Federal Circuit failed to take this into account in holding that Mr. Mehaffy had no reasonable investment-backed expectations, and in the process, defied this Court's decision in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

In *Riverside Bayview*, a landowner attempted to fill wetlands without applying for a Section 404 permit. Stating that the "mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking", this Court added that "[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: *after all, the very existence of a permit system implies that permission may be granted*, leaving the landowner free to use the property as desired." *Riverside Bayview*, 474 U.S. at 126-127 (1985) (emphasis added). The Court also recognized that a *denial* of a Section 404 permit could be the basis for a takings claims, noting that "[b]ecause the Corps has now denied respondent a permit to fill its property, respondent *may well have a ripe claim that*

a taking has occurred." *Riverside Bayview* at 129 fn. 6 (emphasis added). It would be puzzling if the very permit process that ripens a takings claim simultaneously operates to preclude the claim by negating any reasonable expectations of the landowner.

A reading of Section 404(a) of the Clean Water Act also contemplates that a permit may be issued: "The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). As the panel properly noted, Section 404 "establishes *a program* for the regulation of fill activities involving waters of the United States." App. 5a, (quoting *Norman v. U.S.*, 429 F.3d 1081, 1086 n.1 (Fed. Cir. 2005) (emphasis added)). Thus, Section 404 does not

act as a prohibition but instead allows landowners to make use of their property after obtaining a permit.[2]

In contrast to *Riverside Bayview*, the Federal Circuit ruled that Mr. Mehaffy did not have a reasonable investment-backed expectation that he could develop his land because the Section 404 program "*could* ultimately prevent" him from filling the wetlands on his property. App. 10a. This creates a paradigm where there is no difference in investment-backed expectations for a landowner challenging a regulatory prohibition as opposed to the landowner whose project is governed by a permitting process. The Federal Circuit would have been wise to heed Justice O'Connor's advice when she emphasized that "the nature and extent of permitted development under the regulatory regime"

---

[2] Research shows that the issuance of a Section 404 permit is hardly theoretical; in practice, permits are routinely distributed to landowners. A study looking at Section 404 applications shows that in fiscal year 1994, there were over 48,000 applications. David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 76 (2002). "Eighty-two percent of these applications were authorized through general permits." *Id.* In 1999, a sample study was conducted of 103 individual and nationwide permit applications and ninety percent of these applications were approved, consistent with national figures. *Id.* at 73; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-93-26, WETLANDS PROTECTION: THE SCOPE OF THE SECTION 404 PROGRAM REMAINS UNCERTAIN 12 (1993) (providing that the Corps only denies approximately three percent of the individual permit applications it receives).

must be taken into account in a regulatory takings context. *Palazzolo* at 634-35 (2001). Instead, the Federal Circuit instituted a blanket rule that the Section 404 process itself destroys the reasonable investment-backed expectations of a landowner. This categorically buries the constitutional protection of the Takings Clause.

The Court should grant certiorari to reiterate that the existence of a permit process does not negate a landowner's expectation that she will be able to develop her property.

C. The Federal Circuit Decision Confirms the Conflict Among the Courts of Appeals.

In *Philip Morris, Inc. v. Reilly,* 312 F.3d 24 (1st Cir. 2002), the First Circuit interpreted *Palazzolo* contrary to the Federal Circuit's decision here. *Philip Morris* dealt with a challenge to a Massachusetts state law that required the full disclosure by tobacco manufacturers of the ingredients in tobacco products. Certain tobacco companies filed suit, claiming that the required disclosure of trade secrets constituted an unconstitutional taking. In examining the reasonable investment-backed expectations of the tobacco manufacturers as part of its *Penn Central* analysis, the First Circuit stated:

> . . . [t]he fact that the [state disclosure statute] has been enacted is not dispositive because . . . Massachusetts cannot simply redefine property rights without regard to

> previously existing protections. *See Webb's Fabulous Pharmacies, Inc.,* 449 U.S. at 164; *cf. Palazzolo*, 533 U.S. at 627 (holding that enactment of a regulation inhibiting development before a purchaser acquire[d] his property does not alone negate the purchaser's reasonable investment-backed expectations because otherwise '[a] State would be allowed, in effect, to put an expiration date on the Takings Clause.'). I must examine the tobacco companies' reasonable investment-backed expectations 'in light of the whole of our legal tradition,' *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring), not just in light of the provisions of the [state disclosure statute].

Philip Morris, Inc., 312 F.3d at 39.

The Federal Circuit has contradicted itself in the *Palazzolo* context on a number of occasions. In *Appolo Fuels, Inc. v. U.S.*, 381 F.3d 1338 (Fed. Cir. 2004), the Federal Circuit faced the issue of whether a takings claim could be successful when a mining permit was denied by the government. Despite the fact that the regulation at issue was enacted before Appolo Fuels acquired the mining rights, the Federal Circuit rejected the proposition that "a person who purchases property after the date of the regulation may *never* challenge the regulation." *Appolo* at 1349, *citing Rith Energy, Inc. v. U.S.,* 270 F.3d 1347 (Fed. Cir. 2001). In fact, the *Appolo* court shared Justice O'Connor's holistic view that, among other factors, "the regulatory regime in place at the time the claimant acquires the property at issue *helps* to

shape the reasonableness of those expectations."[3] *Appolo* at 1348; s*ee also Rith Energy* at 1350 (Fed. Cir. 2001) (explaining that in *Palazzolo* the "Court rejected the argument that when governmental action regulates the use of property, a person who purchases property after the date of the regulation may never challenge the regulation under the Takings Clause.").

Similarly, in *Schooner Harbor Ventures, Inc. v. U.S.,* 569 F.3d 1359 (Fed. Cir. 2009), a landowner claimed a taking because the U.S. Fish and Wildlife Service required the landowner to purchase additional off-site property in order to mitigate an environmental impact. The trial court determined that, because the regulation at issue was enacted in 1977, and the property was not purchased by the landowner until 2000, that it "stretches the credulity of the court that plaintiff . . . did not do due diligence and was not aware of the protected status of the land at issue." *Schooner Harbor Ventures, Inc. v. U.S.*, 81 Fed. Cl. 404, 414 (Fed. Cl. 2008). The Federal Circuit, however, disagreed. Citing *Palazzolo* it

---

[3] Interestingly, the Federal Circuit has created a multi-factored test of its own to determine a party's reasonable expectations: (1) whether the plaintiff operated in a "highly regulated industry;" (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have "reasonably anticipated" the possibility of such regulation in light of the "regulatory environment" at the time of purchase. *Appolo* at 1349, *citing Commonwealth Edison Co. v. U.S.*, 271 F.3d 1327, 1328 (Fed. Cir. 2001).

stated: "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what it is taken." *Schooner Harbor* at 1366.

It is puzzling as to why the Federal Circuit, after *Schooner Harbor*, *Appolo Fuels*, and *Rith*, would contradict itself and *Palazzolo* by holding that Petitioner had no reasonable investment-backed expectation because "[he] had both constructive and actual knowledge that federal regulations could ultimately prevent him from exercising the right reserved in the easement to fill certain land." App. at 10a.

Additionally, the Ninth Circuit, while reaching a similar outcome as the Federal Circuit in Petitioner's case, relied on a wholly separate (and not entirely decipherable) rationale for reaching its conclusion. In *Guggenheim v. City of Goleta*, the plaintiffs bought a mobile home park after a rent control ordinance went into effect. 638 F.3d 1111 (9th Cir. 2010), *cert. denied* 131 S.Ct. 2455 (2011). The Guggenheims sued the City, claiming that the ordinance itself constituted a taking. A Ninth Circuit panel held in favor of the Guggenheims, but an *en banc* panel of the Ninth Circuit reversed, holding that there was no taking. Curiously, the Ninth Circuit limited *Palazzolo* to as-applied challenges, holding "that an owner who acquires title to property during the period required for an as applied regulatory taking to ripen (in that case during proceedings on application to build on wetlands) is

not necessarily barred from bringing the action when it ripens even though he did not own the property when the regulation first started to be applied to the property." *Guggenheim* at 1119.

In short, the Federal Circuit's decision directly contradicts this Court in *Palazzolo* and *Riverside Bayview*, the First Circuit's decision in *Philip Morris,* the Federal Circuit's own decisions in *Schooner Harbor*, *Appolo Fuels* and *Rith*.

Thus, the court should grant certiorari to resolve this split among the circuits and explain that the mere existence of a permit requirement does not vitiate a landowner's reasonable investment-backed expectations.

II. THE FEDERAL CIRCUIT'S DECISION DEPARTS FROM THE REGULATORY TAKINGS ANALYSIS DEMANDED BY THIS COURT IN *PENN CENTRAL TRANSP. CO. V. NEW YORK CITY.*

A. *Penn Central,* and Subsequent Cases, Require the Balancing of at Least Three Specific Factors.

This Court steadfastly holds that, in the regulatory taking context, the "polestar [ ] remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings." *Palazzolo* at 633 (2001); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) ("regulatory takings challenges are governed by the standards set forth in

[*Penn Central*].”); *Arkansas Game and Fish Com’n v. U.S.*, 133 S.Ct. 511, 518 (2012) (*citing Penn Central*) (“…[M]ost takings claims turn on situation-specific factual inquiries.”).

Given that *Penn Central* continues to guide regulatory takings jurisprudence, it is imperative for this Court to clarify the parameters and methods of *Penn Central’s* application. To wit, this Court should make clear that cursory consideration of a single *Penn Central* factor does not meet the minimum standard for a constitutional regulatory takings analysis.

Penn Central, at minimum, requires the following: a consideration of all three factors listed in *Penn Central*, plus any other ad hoc factors that would be relevant as part of the fact-specific inquiry for each case. A plain reading of *Penn Central* confirms:

> Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that] case . . . . In engaging these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of

> course, relevant considerations. So, too, is the character of the governmental action.

Penn Central at 124. (internal citations omitted).

The multi-faceted nature of *Penn Central* has, time and time again, been echoed in subsequent decisions by this Court: *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("Ordinarily, the Court must engage in essentially ad hoc, factual inquiries. But the inquiry is not standardless. The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance. So, too, is the character of the governmental action.") (internal quotations omitted); *Palazzolo* at 648 ("If a regulation does not leave the property economically idle, to establish the alleged taking the landowner may pursue the multifactor inquiry set out in *Penn Central*) (internal quotations omitted); *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538-539 (2005) ("The *Penn Central* factors-though each has given rise to vexing subsidiary questions– have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules."); *Yee v. City of Escondido,* 503 U.S. 519, 523 (1992) ("The first category of [*per se]* cases requires courts to apply a clear rule; the second [regulatory takings] necessarily entails complex factual assessments of the purposes and economic effects of government actions."); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) ("Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by

"essentially ad hoc, factual inquiries," designed to allow "careful examination and weighing of all the relevant circumstances.") (internal citations omitted); *Kaiser Aetna v. U.S.*, 444 U.S. at 175 ("[The Supreme Court] has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors–such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and [that] character of the governmental action–that have particular significance.").

This Court does not shy away from sounding the alarm as to why a focus on a single factor is dangerous:

> If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost. . . . The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.

Palazzolo at 635-36.

There are certainly examples of the careful analytical balancing act that courts must perform under *Penn Central*, and the error that results if factors are excluded. In *Hodel v. Irving*, this Court addressed a takings challenge to an escheat law that transferred land from individual Indian fractional landholders back to the tribe without just compensation. 481 U.S. 704 (1987). The Court wholly considered all three *Penn Central* factors. The Court first considered the economic impact and the reasonable investment-backed expectations and admitted, "[i]f we were to stop our analysis at this point, we might well find [the statute] constitutional." *Id.* at 716. However, by including the third *Penn Central* factor, the character of the government action, this Court found that the statute did constitute a taking. *Hodel* at 715-716. Clearly, this is exactly the scenario Justice O'Connor alluded to in *Palazzolo*: "Investment-backed expectations, though important, are not talismanic under *Penn Central*. Evaluation of the degree of interference with investment-backed expectations instead is one factor that points toward the answer to the question whether the application of a particular regulation to particular property goes too far." *Palazzolo* at 634. (quotations omitted).

Ignoring the panoply of precedent stating that regulatory takings must employ the three part *Penn Central* test followed by consideration of other relevant factors, the Federal Circuit below concluded that it could dispose of Mr. Mehaffy's taking claim by analyzing only his reasonable investment-backed expectations. The court quoted *Ruckelshaus v.*

Monsanto Co., 467 U.S. 986 (1984), stating that "it is possible for a single factor to have such force that it disposes of the whole takings claim." App. 8a (quoting *Monsanto* at 1005). Not a land use case, *Monsanto* dealt with a challenge under the Takings Clause to data-consideration and data-disclosure provisions in a federal statute. In short, Monsanto claimed that general, public disclosure of certain data submitted by Monsanto resulted in the disclosure of trade secrets, thereby affecting a taking. In finding that a taking did not occur, the Supreme Court disposed of the taking question by focusing on a single factor. *Monsanto* at 1005.

The Federal Circuit's reliance on *Monsanto* is particularly misplaced since the Court clarified and limited its reach in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987). Justice Scalia's majority opinion stated:

> [The dissent] also suggests that the Commission's public announcement of its intention to condition the rebuilding of houses on the transfer of easements of access caused the Nollans to have "no reasonable claim to any expectation of being able to exclude members of the public" from walking across their beach. He cites our opinion in *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986 (1984), as support for the peculiar proposition that a unilateral claim of entitlement by the government can alter property rights. In *Monsanto,* however, we found merely that the Takings Clause was not violated by

> giving effect to the Government's announcement that application for "*the right to [the] valuable Government benefit,*" of obtaining registration of an insecticide would confer upon the Government a license to use and disclose the trade secrets contained in the application. But the right to build on one's own property-even though its exercise can be subjected to legitimate permitting requirements-cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange," that we found to have occurred in *Monsanto.* Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Nollan at 833 n.2 (1987).

Therefore, the Court in *Nollan* held that the reasoning in *Monsanto,* a case dealing with "governmental benefit[s]," does not bear its weight against the more sacred "right to build on one's own property."

Thus, in the land use context, the balancing, multi-factored approach of *Penn Central* must still stand true and the Court should grant certiorari to keep the lower courts from narrowing that analysis.

B. Lower Courts are Unable to Uniformly Interpret *Penn Central*, Thereby Creating a Circuit Split.

The danger of letting *Penn Central* settle in muddy waters enables lower courts to mold *Penn Central* in such a way that can justify any result. Lower court decisions are filled with varying application of *Penn Central,* between circuits as well as inconsistent application within circuits. Below is a cutout sample of the problems caused by varying standards for applying the case.

Some cases have held that *Penn Central* requires analysis of all three factors. See *Philip Morris v. Reilly*, 312 F.3d 24, 33 (1st Cir. 2002) ("For the most part, courts apply a three part ad hoc, factual inquiry to evaluate whether a regulatory taking has occurred…") (quotations omitted); *Cienega Gardens v. U.S.*, 331 F.3d 1319, 1337 (Fed. Cir. 2003)(specifically applying all three *Penn Central* factors); *Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003) (abrogated on other grounds by *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Pace Res., Inc. v. Shrewsbury Tp*, 808 F.2d 1023 (3d Cir. 1987) ("…there are several factors that have proven relevant: the type of governmental interference; the diminution in property value; and

the extent of interference with reasonable, distinct, investment-backed expectations.") (quotations omitted); *Tennessee Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 455-458 (6th Cir. 2009); *Outdoor Graphics, Inc. v. City of Burlington, Iowa,* 103 F.3d 690, 695 (8th Cir. 1996); *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1188-1191 (9th Cir. 2012) (specifically applying all three *Penn Central* factors)

Similar to the Federal Circuit's analysis, some other cases have curiously omitted one or more factors, creating a circuit split. *See Nat'l Adver. Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991) (omitting the character of the government action); *Texas Manufactured Hous. Ass'n, Inc. v. City of Nederland,* 101 F.3d 1095, 1105 (5th Cir. 1996) ("[Takings analysis] is necessarily a fact-intensive, case-by-case inquiry that takes account of such relevant factors as the extent to which the regulation frustrates distinct investment-backed expectations and whether it completely denies all beneficial use of some portion of the property."); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir, 2010*), cert. denied* 131 S.Ct. 2455 (2011) (holding that the case solely turns on the "primary factor" of investment backed expectations); *Good v. U.S.*, 189 F.3d 1355, 1360 (Fed. Cir. 1999) ("Because we find the expectations factor dispositive, we will not further discuss the character of the government action or the economic impact of the regulation.").

The danger of inconsistent application of *Penn Central* is evident in these cases and the result is

simple: it weakens both predictability in the application of this Court's precedents and erodes confidence in our legal system. Our closely-held values of fairness and justice require more. This Court should grant certiorari to emphasize that *Penn Central*, at minimum, requires consideration of the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with district investment-backed expectations, and the character of the governmental action.

CONCLUSION

Petitioner respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

THOMAS J. WARD
DEVALA A. JANARDAN
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th St., N.W.
Washington, D.C. 20005
(202) 266-8200

WILLIAM A. WADDELL, JR.
Counsel of Record
BRUCE B. TIDWELL
FRIDAY, ELDREDGE &
CLARK, LLP
400 West Capitol Ave.
Suite 2000
Little Rock, AR 72201
waddell@fridayfirm.com
(501) 370-1510

TABLE OF APPENDICES

APPENDIX A

NOTE: This disposition is non-precedential.

United States Court of Appeals
for the Federal Circuit

MIKE MEHAFFY,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

2012-5069

Appeal from the United States Court of Federal Claims in Case No. 09-CV-860, Judge Christine O.C. Miller.

Decided: December 10, 2012

BRUCE B. TIDWELL, Fediay, Eldredge & Clark, LLP, of Little Rock, Arkansas, for plaintiff-appellant.

MATTHEW LITTLETON, Attorney, Appellate Section, Environment & Natural Resources Division, United States Department of Justice, of Washington, DC, for defendant-appellee. With him on the brief

---

was IGNACIA S. MORENO, Assistant Attorney General.

Before RADER, *Chief Judge,* LOURIE and WALLACH, *Circuit Judges.*

RADER, *Chief Judge.*

In this case, Appellant Mike Mehaffy seeks compensation from the government, claiming a taking of his real property in violation of the Fifth Amendment to the United States Constitution. Mr. Mehaffy's claim arises from a decision by the United States Army Corps of Engineers (the "Corps") denying Mr. Mehaffy's fill permit application under section 404 of the Clean Water Act, 33 U.S.C. § 1344. The United States Court of Federal Claims granted summary judgment for the government on the ground that Mr. Mehaffy had not met the requirements for a regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) ("*Penn Central*"). This court affirms the decision of the trial court.

I.

The land subject to this litigation is a seventy-three acre parcel bordering the Arkansas River in North Little Rock, Arkansas. In 1970, the property was owned by Nomikano, Inc. ("Nomikano"), an Arkansas corporation holding assets for the benefit of the Mehaffy family and whose business was conducted by Mr. Mehaffy's father, the Honorable Pat Mehaffy.

On March 2, 1970, the United States purchased a flowage easement ("the easement") from Nomikano that covered roughly forty-nine acres of the subject

property. The easement was purchased as part of a congressionally authorized effort to construct locks and dams along the Arkansas River. It gave the government the right to, among other things, "permanently overflow, flood and submerge the land lying below elevation 249, [mean sea level], and to occasionally overflow, flood, and submerge the land lying above elevation 249, m.s.l., in connection with the operation and maintenance of Lock and Dam No. 7, Arkansas River project." *Mehaffy v. United States*, 102 Fed. Cl. 755, 757 (2012).

However, the easement also contained a reservation of certain rights. According to the easement deed, Nomikano reserved for itself, its successors, and assigns,

> all such rights and privileges as may be used and enjoyed without interfering with [the government's purpose in obtaining the easement]. Included among those rights specifically reserved to the landowner, its successors and assigns, is the right to place fill in the area of said tract and to place structures on said fill above elevation 252 feet, m.s.l. Notwithstanding, the above exception does not permit the placing of structures for human habitation thereon.

Id. This reservation of rights was included in the easement deed at the request of Mr. Mehaffy's father.

After the government purchased the easement, Congress enacted the Clean Water Act of 1972, Pub. L. No. 95-217, 91 Stat. 15656 (as amended at 33 U.S.C. §§ 1251–1387 (2006)) (the "CWA"). Section

404 of the CWA, codified at 33 U.S.C. § 1344, "establishes a program for the regulation of fill activities involving waters of the United States. The basic premise of the program is that no discharge of dredged or fill material into waters of the United States is permitted if a practicable alternative exists that is less damaging to the environment." *Norman v. United States,* 429 F.3d 1081, 1086 n.1 (Fed. Cir. 2005) (internal quotations omitted). On October 10, 1980, the Corps notified Nomikano and its officers (including Mr. Mehaffy), that the property and the easement were subject to the terms of the CWA. The letter specifically stated the easement, by itself, "is not sufficient to authorize work requiring authorization under [the CWA]," and thus a section 404 permit would be required should Nomikano desire to place fill material in any of the wetlands located on the property. *Mehaffy*, 102 Fed. Cl. at 758.

In 1987, Nomikano was dissolved, its assets liquidated, and the property sold to Mehaffy Construction Company Inc. ("MCC"). While Mr. Mehaffy was the main executive for MCC at that time, the sale was a "negotiated, arm's-length transaction for $75,000" which was then the fair market value of the land. *Id.* In May 2000, the property was sold a second time. Mr. Mehaffy had relinquished managerial control of MCC by that time, and MCC sold the property to him for $10.00.

In 2004, the Mehaffys began to develop the property. The Corps identified wetland-delineated areas on the subject property, and MCC cleared and leveled approximately nine to ten acres of the uplands portion of the subject property. The

Mehaffys then used this cleared land as a storage yard for their construction business.

In September 2006, Mr. Mehaffy filed an application for a section 404 permit to fill approximately forty-eight acres of wetlands on the subject property. The application stated the purpose of the permit was to exercise the right granted in the 1970 easement. After several months of communication between the Corps and Mr. Mehaffy, a period of public comment, and input from several federal and state governmental agencies, the Corps denied Mr. Mehaffy's permit application. The Corps emphasized that Mr. Mehaffy had failed to demonstrate that his proposed placement of 230,000 cubic yards of fill within a designated floodway and wetland "did not have any practicable alternatives which would have less adverse environmental impacts." *Id.* at 761.

The Corps informed Mr. Mehaffy of his agency appeal options, and he subsequently appealed the permit denial through the Corps' administrative appeals process. The Corps ultimately denied his appeal, and, as the trial court found, this denial represented the final Corps decision regarding Mr. Mehaffy's section 404 permit application. *Id.*

Mr. Mehaffy then filed suit in the United States Court of Federal Claims. He claimed the Corps' refusal to provide him with a permit to fill the property "in accordance with the reservation contained in the Easement Deed" constituted a compensable partial regulatory taking of Mehaffy's land. App. 32. Following a period of discovery and an unsuccessful motion to dismiss, the government

moved for summary judgment based on the parties' Joint Stipulation of Facts.

The trial court granted the government's motion. It analyzed the facts using the Penn Central framework and concluded that Mr. Mehaffy could not show he had a reasonable investment-backed expectation to fill the property, nor that the government action was retroactive or targeted against him specifically. [JA 14] Mr. Mehaffy appealed, and this court has jurisdiction under 28 U.S.C. § 1295(a).

II.

This court reviews the Court of Federal Claims' grant of summary judgment without deference. *Schooner Harbor Ventures, Inc. v. United States,* 569 F.3d 1359, 1362 (Fed. Cir. 2009). "Summary judgment is appropriate when, making all reasonable inferences in favor of the non-moving party, there exists no genuine issue of material fact for trial." *Id.* (citing Ct. Fed. Cl. R. 56(c)(1); *Am. Pelagic Fishing Co. v. United States,* 379 F.3d 1363, 1370–71 (Fed. Cir. 2004)).

According to the Fifth Amendment, private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. For years, courts have distinguished between government action that physically takes control or ownership of private property and statutory and regulatory regimes that impose limits on an owner's ability to use his property. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323–24 (2002) (noting the rules for determining a physical taking are different than the rules for

determining a regulatory taking). Here, Mr. Mehaffy claims the Corps' refusal to grant him a fill permit is a compensable partial regulatory taking of his land. App. 32.

There is no question that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922). When determining whether a particular regulation has gone too far, this court considers "(1) the character of the government action, (2) the extent to which the regulation interferes with distinct, investment-backed expectations, and (3) the economic impact of the regulation." *Good v. United States*, 189 F.3d 1355, 1360 (Fed. Cir. 1999) (citing *Penn Central*, 438 U.S. at 124–25). While evaluation of the Penn Central factors "is essentially an 'ad hoc, factual' inquiry," it is possible for a single factor to have such force that it disposes of the whole takings claim. *Ruckelshaus v. Monsanto Co.* 467 U.S. 986, 1005 (1984) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)); *see also Norman v. United States,* 429 F.3d 1081, 1094 (Fed. Cir. 2005) (noting that the absence of a single *Penn Central* factor can be dispositive); *Good*, 189 F.3d at 1360 (affirming a grant of summary judgment for the government solely on the lack of reasonable investment-backed expectations); *Golden Pac. Bankcorp v. United States,* 15 F.3d 1066, 1074 (Fed. Cir. 1994) (concluding the absence of reasonable investment-backed expectations disposed of the takings claim).

Turning to the reasonable investment-backed expectations prong of the *Penn Central* analysis, the first task is determining the relevant date for

assessing Mr. Mehaffy's expectations. Mr. Mehaffy asserts the relevant date is prior to the passage of the CWA. He notes that he was the Secretary-Treasurer of Nomikano during the negotiation of the easement with the Corps, that he was involved in the negotiations of the easement, and that he signed the easement deed in his capacity as an officer of Nomikano. He concludes these facts show he had an expectation for future development of the property before enactment of the CWA.

However, reasonable investment-backed expectations are measured at the time the claimant acquires the property. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348–49 (Fed. Cir. 2004); *Good*, 189 F.3d at 1361–62. Mr. Mehaffy was not the owner of the property at the time the easement was negotiated. Nor was he the owner of the property before the CWA was passed. Rather, he purchased the property twenty-eight years after the passage of the CWA and thirteen years after the property had been sold to MCC in an intervening arms-length transaction. Thus, Mr. Mehaffy's reasonable investment-backed expectations must be considered in light of the regulatory climate that existed when he purchased the property. *Appolo Fuels, Inc.,* 381 F.3d at 1349; *Good,* 189 F.3d at 1361.

In legal terms, the property owner who buys land with knowledge of a regulatory restraint "could be said to have no reliance interest, or to have assumed the risk of any economic loss." *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171, 1179 (Fed. Cir. 1994). Here, section 404 permitting requirements

were in place and well known at the time Mr. Mehaffy purchased the land. Mr. Mehaffy admits that due to his work in the construction field, he was aware of the need to obtain a section 404 permit when filling wetlands. App. 103. Additionally, Mr. Mehaffy knew as early as 1980 the Corps intended to apply this requirement to the property. Before he purchased the property, Mr. Mehaffy had both constructive and actual knowledge that federal regulations could ultimately prevent him from exercising the right reserved in the easement to fill certain land. Therefore, he did not have a reasonable, investment-backed expectation that he could develop the property without being subject to the permitting requirements of the CWA.

The language of the easement does not change this analysis. When the easement was granted in 1970, it did not give Nomikano any new property rights. Rather, the easement reserved a right which Nomikano shared with all other similarly situated land owners—the ability to fill one's land without asking the government's permission. The CWA altered the expectation of this right for all landowners. When Mr. Mehaffy purchased the land 30 years later, the easement could not give him a new expectation of rights. Mr. Mehaffy is in the same position as other property owners and has no expectation to fill his wetlands without first obtaining a permit under the CWA.

III.

Because this court finds the reasonable expectations factor dispositive, it affirms the trial court's grant of summary judgment and will not further discuss the character of the government action or the economic impact of the regulation.

AFFIRMED

APPENDIX B

In the United States Court of Federal Claims

No. 09-860L

(Filed January 10, 2012)

* * * * * * * * * * * * * * * *	
MIKE MEHAFFY,	Takings; regulatory taking; summary judgment; denial of application for fill permit pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344 (2006); determination of whether defendant has established under RCFC 56 that plaintiff can show no regulatory taking based on Penn Central analysis.
Plaintiff,	
v.	
THE UNITED STATES,	
Defendant.	
* * * * * * * * * * * * * * * *	

Bruce B. Tidwell, Little Rock, AR, for plaintiff.

E. Barrett Atwood, San Francisco, CA, with whom was Assistant Attorney General Ignacia S. Moreno, for defendant. Clay Weisenberger, Jennifer Dalton, and Tamar Gerhart, U.S. Army Corps of Engineers, Little Rock, AR, of counsel.

MEMORANDUM OPINION AND ORDER

MILLER, Judge.

This case is before the court after argument on defendant's motion for summary judgment. This is the second opinion issued by the court on Thomas

Michael Mehaffy's ("plaintiff") claim for compensation as mandated by the U.S. Constitution based on a taking by the U.S. Army Corps of Engineers (the "Corps") of his riparian property by denying his fill permit application under section 404 of the Clean Water Act, 33 U.S.C. § 1344 (2006). See Mehaffy v. United States, 98 Fed. Cl. 604 (2011) (denying ripeness challenge to claim and finding that agency decision was final and prohibited plaintiff from commercial development on the subject wetlands).

FACTS

The following facts are taken from the parties' Joint Stipulation of Facts filed on September 2, 2011, and from those facts agreed to by plaintiff in Mehaffy's Response to Proposed Findings of Uncontroverted Fact filed October 6, 2011. [1/] Plaintiff is a resident of Pulaski County, Arkansas, and the owner of seventy-three acres of riparian land on the Arkansas River in North Little Rock ("the subject property"). Joint Stipl. ¶¶ 1, 2. Crystal Hill Road borders the north end of the subject property,

[1/] This court's first opinion presented a factual summary that was compiled from the parties' initial filings and briefs, and that recitation contained citations to particular documents submitted by the parties. Because that opinion was issued before the parties filed their Joint Stipulation of Facts, the court deems it prudent to restate the factual background to the present action relying on the formulation of the facts now agreed upon by the parties. Regarding those stipulated facts based on documents and exhibits, this court cites to the appropriate paragraph in the Joint Stipulation.

and the Arkansas River borders its south end; two parcels of land border the subject property to the east and west. Id. ¶ 2. In 1970 the subject property was owned by Nomikano, Inc. ("Nomikano"), an Arkansas corporation holding assets for the benefit of the Mehaffy family and whose business was primarily conducted by the Honorable Pat Mehaffy, plaintiff's father. See id. ¶¶ 3, 4. Other family members—including plaintiff—and at least one non-family member—Harry W. Parkin—served as officers of the corporation. See id. ¶ 4.

On March 2, 1970, the United States purchased a flowage easement ("the easement") from Nomikano that, at the time the easement was granted, covered roughly forty-nine acres of the subject property. Id. ¶¶ 3, 9. The Government purchased the easement as part of the McClellan-Kerr Arkansas River Navigation System ("the Arkansas River project"), see id. ¶ 5, an effort to construct a series of locks and dams along the Arkansas River. The easement was necessary to the project because the subject property bordered Lock and Dam No. 7. Id. Negotiated by the Hon. Pat Mehaffy, the Easement Deed granted to the United States the

> "perpetual right . . . to permanently overflow, flood and submerge the land lying below elevation 249, [mean sea level ("m.s.l.")], and to occasionally overflow, flood, and submerge the land lying above elevation 249, m.s.l., in connection with the operation and maintenance of Lock and Dam No. 7, Arkansas River project."

Id. ¶ 6 (quoting Easement Deed, dated Mar. 2, 1970, at 1 (conveying the easement from Nomikano to the United States (the "Easement Deed"))). The Easement Deed also provided that

> "no structures for human habitation shall be constructed or maintained on the land; [and] that no other structures shall be constructed or maintained on the land except as may be approved in writing by the representative of the United States in charge of the [Arkansas River] project and that no alterations to the contour of the land shall be made without such approval."

Id. ¶ 7 (alteration in original) (quoting Easement Deed at 1).

Judge Pat Mehaffy, however, did negotiate a reservation of certain rights. According to the Easement Deed, reserved to Nomikano

> "its successors and assigns, [are] all such rights and privileges as may be used and enjoyed without interfering with the use of the [Arkansas River] project for the purposes authorized by Congress or abridging the rights and easement hereby conveyed. Included among rights specifically reserved to the landowner, its successors and assigns, is the right to place fill in the area of said tract and to place structures on said fill above elevation 252 feet, m.s.l. Notwithstanding, the above exception does not permit the placing of structures for human habitation thereon."

Id. ¶ 8 (alteration in original) (quoting Easement Deed at 1-2). This reservation of the right to place

fill on those areas of the subject property burdened by the easement above 249 feet m.s.l. was specifically—and insistently—negotiated by Judge Mehaffy. Id.

Subsequent to the conveyance of the Easement Deed, Congress enacted the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (as amended at 33 U.S.C. §§ 1251-1387 (2006)) (the "CWA"). Id. ¶ 10. On October 10, 1980, plaintiff, [2]/ via a letter addressed to Nomikano from the Corps, was notified that the subject property and Easement Deed were subject to the CWA. Id. ¶ 11. The Corps's letter informed plaintiff that a section 404 permit—a wetlands regulatory instrument created by the CWA—would be required should Nomikano desire to place fill material in any of the wetlands located on the subject property. Id. Prescinding a conflict such as the one currently before the court, the letter further informed plaintiff that the reservation in the Easement Deed, by itself, "'is not sufficient to authorize work requiring authorization under [the CWA].'" Id. (quoting October 10, 1980 letter from

---

[2]/ Nomikano was plaintiff's predecessor in title, although the parties stipulated that "plaintiff" received notice. Joint Stipl. ¶ 11. Plaintiff has taken the position that, as a member of the Mehaffy family, the negotiation of the Easement Deed was for his benefit and that, therefore, his investment-backed expectations cannot be severed from the original Easement Deed. See Pl.'s Br. filed Oct. 6, 2011, at 21 (citing Negotiations Report, dated Feb. 24, 1970, at App. Tab 3). However, as discussed *infra*, plaintiff stipulated as to the chain of ownership, the sale from Nomikano to the Mehaffy Construction Co. ("MCC") at fair market value, and the sale from MCC plaintiff for a nominal sum.

Col. Dale K. Randels, P.E., Corps of Engineers District Engineer, to Thomas M. Mehaffy).

On February 18, 1987, Nomikano was dissolved and its assets were liquidated. Id. ¶ 12. During this process the subject property was sold to Mehaffy Construction Company, Inc. ("MCC"), in a negotiated, arm's-length transaction for $75,000.00—the fair market value at the time of the sale. Id. ¶ 13. MCC, as well as two other corporations, were formed by plaintiff to conduct his construction business. Id. ¶ 14. Plaintiff was the main executive of the construction corporations until passing control of day-to-day operations to his son, Pat Mehaffy. Id. ¶ 15. Subsequent to this turnover of managerial control, on May 9, 2000, MCC sold the subject property to plaintiff for $10.00 for tax purposes. Id. ¶ 16. Shortly thereafter, in 2001, the Corps conducted a wetlands delineation of the subject property, and it identified approximately forty-three acres as constituting wetlands. Id. ¶ 17. Most of the uplands of the subject property—land that is not identified as wetlands—is located on the northern end along the Crystal Hill Road frontage. Some of the uplands are located on the southern end of the subject property, interspersed between areas of delineated wetlands. Id.

In 2004 the Mehaffys coordinated with the Corps to undertake a project to clear and level a section of the uplands on the subject property. Id. ¶ 18. Presumably in an attempt to avoid the areas, Pat Mehaffy requested the Corps to identify the wetlands-delineated area on the subject property. Id. After the Corps's compliance with this request, the Mehaffys' construction companies cleared and

leveled approximately nine to ten acres (roughly half) of the uplands portion of the subject property. Id. The Mehaffys then began to use this portion of cleared land as a storage yard for their construction business. Id.

On September 5, 2006, plaintiff submitted a section 404 permit application to the Corps. [3/] Id. ¶ 19. By way of the permit application, plaintiff sought to obtain a section 404 permit to fill approximately forty-eight acres of wetlands on the subject property. Id. However, the details provided in the permit application were sparse. As a description of the requested project, plaintiff simply stated, "'[to] [f]ill in property above elevation 252 m.s.l.'"; and for the purpose of the project, plaintiff provided only "'[r]ight granted [to] us in 1970 Easement [Deed].'" Id. (alterations in original). By letter of September 25, 2006, the Corps responded to plaintiff's permit application and requested additional information from plaintiff that the Corps considered "'necessary prior to processing your request.'" Id. ¶ 20. The Corps requested that plaintiff provide the following: (1) a narrative of the purpose of the project, (2) a location map and any plan or profile drawings for the proposed development, and (3) any potential alternative sites or project designs that could avoid or minimize any wetlands impact. Id. The Corps emphasized this third item, stressing the importance of demonstrating that no practicable, less environmentally damaging alternatives existed to the proposed project. Id.

[3/] Plaintiff has not sought any permits relating to the development of the subject property other than the section 404 permit application. Id. ¶ 36.

Plaintiff responded to the Corps's request for additional information on November 28, 2006. Id. ¶ 21. Plaintiff's response letter included a location map and information on the amount of fill that would be used to complete the project. Id. Plaintiff also included a brief narrative of the proposed purpose of the project; however, aside from the explanation that some of the filled property would be used to store construction equipment, the narrative merely reiterated that the purpose of the project was to fill the property pursuant to the Easement Deed. Id. Plaintiff further represented that it was his intention to fill the property with a slope from 260 feet m.s.l. to 253 feet m.s.l. Id. Noticeably absent from plaintiff's response was any information concerning alternative sites for the project. Id.

After receipt of plaintiff's letter, the Corps determined that the permit application had sufficient information to be deemed complete and began preparing a public notice in accordance with 33 C.F.R. § 325.1(d)(9) (1997). Id. ¶ 22. Public notice was published on December 21, 2006, and the comment period ended on January 31, 2007. Id. ¶ 23. Various federal, state, and local agencies—including, inter alia, the United States Environmental Protection Agency (the "EPA"), the United States Fish and Wildlife Service (the "USF&WS"), the United States Federal Emergency Management Agency ("FEMA"), the City of North Little Rock and Pulaski County floodplain manager (the "Floodplain Manager"), and the Arkansas Department of Environmental Quality—responded and expressed concerns about the impact that plaintiff's project would have on the wetlands, the water quality of the

Arkansas River, wildlife, and fisheries. See id. ¶ 24. For example, the EPA stated that the "'proposed project must be consistent with the [404(b)(1)] Guidelines, which require that a sequence of planning steps be demonstrated that involves avoidance, minimization, and compensation for wetland loss,'" but noted "'that there is insufficient information in the public notice [drawn from plaintiff's application] on the site configuration . . . to determine compliance with the Guidelines.'" Id. (first alteration in original). [4/]

The USF&WS also focused on the lack of development details provided by plaintiff, and it made several recommendations on steps that plaintiff could take to minimize environmental impact. Id. It requested that plaintiff incorporate "'effective and appropriate erosion control before, during, and after any wetland and/or stream work.'" and recommended a riparian buffer along the Arkansas River "'to reduce sediment input, maintain riparian habitat, and to ensure bank stability.'" Id. To alleviate its concern, the USF&WS requested that a flood study and hydrologic assessment be completed before a permit was awarded to determine whether there would be any additional, indirect, or cumulative effects on water storage and wetland functions to adjacent areas, and it even recommended that the subject property be sold as a conservation area. Id. Further, both FEMA and the

---

[4/] The Arkansas Department of Environmental Quality, based on its comments, was also of the opinion that "'there is insufficient information to evaluate impacts, if any, to the water quality of the Arkansas River . . . .'" that would result from plaintiff's project. Id. ¶24.

Floodplain Manager "'expressed concerns of increased flooding as a result of the development project,'" and the Floodplain Manager noted that the project would also "'require a floodplain development permit from the City of North Little Rock'" and "'certification by a professional engineer that no increase in flood heights would result'" from placing fill in the wetlands of the subject property. Id.

On February 15, 2007, the Corps provided plaintiff with summaries of the comments received and notified plaintiff that he was being "'given the opportunity to review these letters and submit [his] views and rebuttals,'" but "'[i]f [the Corps] receive[d] no response, [it would] proceed with a decision on [plaintiff's] request.'" Id. ¶ 23 (second alteration in original). The Corps did not inform plaintiff that it was a requirement that he respond to the public comments. Id. Also included in the Corps's letter were its specific concerns about the project [5/] and several additional requests for information from plaintiff. See id. ¶ 25. The Corps again notified plaintiff of the section 404(b)(1) Guidelines' requirement to demonstrate that there are no

---

[5/] The Corps expressed concerns in four areas, as noted in its summary:

> "1) the potential for project alternatives that could avoid or minimize wetland impacts; 2) the loss of high quality forested wetlands and both wildlife and fisheries habitat and the need for adequate compensation; 3) [t]he cumulative impacts regarding the loss of wetlands, waterfowl and fisheries habitat and flood storage along the Arkansas River drainage basin; and 4) the loss of flood storage and the potential for flood damage." Id. ¶ 26 (citation omitted).

Id. ¶ 26 (citation omitted).

practicable alternatives to the project that are less harmful to the environment. Id. Accordingly, the Corps requested "'additional information regarding practicable alternatives to the placement of the fill material in wetlands.'" Id. The Corps additionally informed plaintiff that his proposed project involved placing fill material in a designated floodway and requested that plaintiff "'determine and quantify his impacts to the 1% annual flood event, as well as lesser flood events, and verify that the proposed project does not increase flood heights.'" Id. The Corps suggested that plaintiff hire a consultant to complete a hydraulic [6]/ study to alleviate these and other concerns about the effects on river flow. Id.

The Corps requested that plaintiff respond to the comments within thirty days. Id. ¶ 26. On February 21, 2007, plaintiff responded in writing to the Corps. Id. ¶ 27. Despite the requests for information and the invitation to respond to the public comments,

---

[6]/ According to the parties' Joint Stipulation, the Corps recommended that plaintiff hire a professional to complete a "hydraulic" study. Id. ¶ 25. This court is unsure whether the parties intended to convey that the Corps requested that plaintiff perform a "hydrologic" study on the potential effects of the fill material on the flow on the Arkansas river. The reason for the court's uncertainty is that "hydraulic" is used to mean "denoting, relating to, or operated by a liquid moving in a confined space under pressure," whereas "hydrology"—the adjectival form being "hydrologic," which was used by the USF&WS—means "the branch of science concerned with the properties of the earth's water, esp. its movement in relation to land." *New Oxford American Dictionary* 853-54 (3d ed. 2010). Although the court understands from the record that the Corps requested that plaintiff perform a hydrologic study, the court will use the terminology employed in the parties' Joint Stipulation.

plaintiff's letter contained only a reiteration of his asserted right to fill the subject property as granted by the Easement Deed. Id. Plaintiff declined to conduct a hydraulic study on the impact that filling the subject property would have on the flow of the Arkansas River. Id. ¶ 30. In fact, plaintiff did not conduct any studies to support his plan to develop the subject property. Id. Nor did plaintiff consider any alternatives for developing the subject property, investigate the possibility of using the subject property as a mitigation bank, or consider any alternatives to his development plan. Id. ¶¶ 30, 31. Plaintiff steadfastly adhered to his belief that none of the foregoing actions were necessary, given the "right" to fill the property reserved in the Easement Deed. Id. ¶ 31. On February 23, 2007, after receiving plaintiff's letter, Tim Scott, a Senior Project Manager in the Corps's Little Rock District, telephoned plaintiff regarding the processing of his 404 permit application. Id. ¶ 28. During that conversation Mr. Scott informed plaintiff that he "'was just checking if [plaintiff] had any more response[s] before [he] made a final decision.'" Id. Mr. Scott further stated that he "'needed additional information but could go on with what [he] had'" if plaintiff chose not to provide anything else. Id. Plaintiff, however, was not informed that his permit application would be withdrawn based on his not providing information. Id. ¶ 29.

On August 30, 2007, the Corps denied plaintiff's permit application, having determined that "'[i]nadaquate information was provided by [plaintiff] to thoroughly evaluate his project'"; thus, the Corps concluded that "'the fill activity does not

comply with the Environmental Protection Agency's . . . Section 404[](b)(1) Guidelines.'" Id. ¶ 32 (first alteration in original). The Corps placed particular emphasis on the fact that plaintiff had refused to provide any support for his project by means of a hydraulic study or proposed alternatives. The Corps reasoned that the "'placement of 230,000 cubic yards of fill within a designated floodway of a major navigable river, and within a high quality forested wetland, requires detailed information in order for the Corps to adequately evaluate the project.'" Id. However, plaintiff did not make "'any attempt to demonstrate that the project may or may not have any practicable alternatives which would have less adverse environmental impacts,'" and "'[n]o efforts [were] made by [plaintiff] to minimize or avoid impacts by reducing the project scope or building in adjacent uplands.'" Id. The Corps also commented on plaintiff's failure to provide any information regarding the project's effect on the floodplain, as required by FEMA and the City of North Little Rock. Id. Noting that plaintiff owned roughly "'30 acres of upland' which were 'available and practicable for heavy equipment storage,'" the Corps concluded that the project was not water-dependent and that plaintiff had not demonstrated any need for the project to be developed in the wetlands area of the subject property. [7]/ Id.

Along with notification of the denial of the permit application, the Corps informed plaintiff that he had "'the opportunity to appeal this permit decision by

---

[7]/ The Corps's denial of the permit application did nothing to prevent plaintiff from developing the northern uplands portion of the subject property, should he choose to do so. Id. ¶ 41.

filing a Request for Appeal (RFA) as described in the NAP [Notification of Appeals Process].'" Id. ¶ 33. Plaintiff elected to exercise this option and appealed the permit denial through the Corps's administrative appeal process. Id. ¶ 34. On April 15, 2008, the Corps informed plaintiff by letter that it had denied his appeal. Id. This denial represented the final Corps decision regarding plaintiff's 404 permit application, and, as a result of the issuance of the letter informing plaintiff that his appeal had been denied, the Corps deemed that plaintiff had exhausted all administrative remedies. Id. ¶ 35; see also Mehaffy, 98 Fed. Cl. at 624.

On December 14, 2009, plaintiff filed his complaint. [8]/ Defendant answered on February 26, 2010, and this court entered a scheduling order on April 19, 2010. After several unopposed motions to extend discovery, defendant unsuccessfully moved to dismiss for lack of ripeness. See Mehaffy, 98 Fed. Cl. 604 (denying defendant's motion to dismiss, finding that final agency action on permit application had taken place and, thus, that Corps's decision was ripe for judicial review). On September 2, 2011, the

---

[8]/ Subsequent to the filing of the complaint, both parties retained experts to survey and value the land both pre- and post the plaintiff's envisioned project. See id. ¶¶ 37-52. Both plaintiff's and defendant's appraisers agreed that the "highest and best use" of the subject property would be commercial development allowed under "C-3" zoning. See Mehaffy's Response to Proposed Findings of Uncontroverted Fact, filed Oct. 6, 2011, Nos. 1-2. Otherwise, the valuations arrived at by the two experts were at odds. See Joint Stipl. ¶¶ 37-52. Ruling on defendant's motion for summary judgment does not require the court to make findings on the parties' differing assumptions, valuations, or methodologies.

parties filed a Joint Stipulation of Facts, and on the same date, defendant moved for summary judgment. Briefing was completed on October 24, 2011, followed by argument.

DISCUSSION

I. Standards

1. Summary judgment in takings cases

Courts have the power to resolve legal issues in a case on summary judgment. See Long Island Sav. Bank, FSB v. United States, 503 F.3d 1234, 1243-44 (Fed. Cir. 2007). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). In takings cases generally, "[w]hether or not a taking has occurred is a question of law based on factual underpinnings." Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001). Given the ad hoc nature of takings inquiries, the relevant issues normally are fact issues that must be determined either on the entirety of a complete record or at trial. See Whitney Benefits, Inc. v. United States, 752 F.2d 1554, 1560 (Fed. Cir. 1985). For this reason courts should avoid "precipitous grants of summary judgment." Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 887 (Fed. Cir. 1983). However, that this is a "takings case does not affect the availability of summary judgment when appropriate to the circumstances," Avenal v. United States, 100 F.3d 933, 936 (Fed. Cir. 1996), because "[t]here . . . [are] just compensation cases in which the United States as the moving party is 'entitled to

judgment as a matter of law, and where it is quite clear what the truth is . . . ,'" Yuba, 723 F.2d at 887 (quoting Sartor v. Ark. Natural Gas Corp., 321 U.S. 620, 627 (1944)).

2. *Penn Central* regulatory takings claim framework

The Fifth Amendment provides, in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. In addition to taking property by physical occupation or invasion, a taking may occur where the Government regulates private property. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). [9/] Although the Government certainly may regulate property without giving rise to a compensable taking, "if regulation goes 'too far' it will constitute a compensable taking." M & J Coal Co. v. United States, 47 F.3d 1148, 1153 (Fed. Cir. 1995) (quoting Pa. Coal, 260 U.S. at 415). Limits are placed on the Government's regulation of private property based on the recognition that, if "subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'" Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1014 (1992) (alterations in original) (quoting Pa. Coal, 260 U.S. at 415).

Given that this court already ruled that plaintiff's claim is ripe for judicial review, the court now must

---

[9/] Plaintiff alleges a regulatory—rather than a physical—taking based on the Corps's denial of his section 404 permit application. See Compl. ¶ 23.

determine if the regulation goes "too far." This issue requires a "'two-tiered' inquiry into the government act alleged to have constituted a taking." Chancellor Manor v. United States, 331 F.3d 891, 901 (Fed. Cir. 2003). First, the court must consider "the nature of the interest allegedly taken to determine whether a compensable property interest exists." Id.; see also M & J Coal, 47 F.3d at 1154 (analyzing whether "interest was a 'stick in the bundle of property rights' acquired by the owner"). According to the United States Supreme Court, "property" is not simply a physical object, but "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." United States v. Gen. Motors Corp., 323 U.S. 373, 377-78 (1945); accord Conti v. United States, 291 F.3d 1334, 1340 (Fed. Cir. 2002). By way of explanation, the Federal Circuit has stated that

> [w]e determine whether an asserted right is one of the rights in the bundle of sticks of property rights that inheres in a res by looking to "existing rules or understandings" and "background principles" derived from an independent source such as state, federal, or common law. These rights define the dimensions of the requisite property interest for purposes of establishing a takings claim.

Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1376-77 (Fed. Cir. 2004) (citations omitted). If a claimant is unable to prove that it held a protected property interest, the takings claim will fail. Wyatt, 271 F.3d at 1096 (holding that "only persons with a valid property interest at the time of the taking are entitled to compensation").

After a plaintiff succeeds in meeting the first element, the court proceeds to the second prong of the inquiry and determines whether the Government's action "constitutes a compensable taking of that interest for a public purpose." Chancellor Manor, 331 F.3d at 902 (citations omitted); see also M & J Coal, 47 F.3d at 1154. This determination involves an analysis based on the factors that the Supreme Court established in the seminal case on regulatory takings, Penn Central Transportation Company v. City of New York, 438 U.S. 104, 124 (1978) ("Penn Central"), which include "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and] the character of the governmental action." As interpreted by the Federal Circuit, this evaluation requires

> that the court balance several pragmatic considerations in making its regulatory takings determination. These considerations include: [1] the economic impact of the regulation on the claimant, [2] the extent to which the regulation interferes with the investment-backed expectations, and [3] the character of the Government action.

Fla. Rock Indus., Inc. v. U.S., 18 F.3d 1560, 1564 (Fed. Cir. 1994) (applying the Penn Central analysis in determining if denial of mining permit was compensable taking). Penn Central tasks the court to engage in an ad hoc fact-specific inquiry into the particular circumstances of each case. See Penn Central, 438 U.S. at 124. The Supreme Court has held that at least the second prong of the Penn

Central analysis can be dispositive on the issue of whether or not there is a compensable taking. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-06 (1984) (resolving portion of regulatory takings claim by finding no compensable taking solely under reasonable investment-backed expectations element of Penn Central framework); see also Norman v. United States, 429 F.3d 1081, 1092-94 (Fed. Cir. 2005); Good v. United States, 189 F.3d 1355, 1363 (Fed. Cir. 1999).

II. Whether plaintiff has a compensable property interest

Defendant has advanced three arguments in support of its position that plaintiff lacks a compensable property interest. See Def.'s Br. filed Sept. 2, 2011, at 13-17. First, defendant contends that plaintiff is limited in his right to fill his property by the express restrictions located in the Easement Deed. See id. at 14-15. Because the language of the Easement Deed requires plaintiff to obtain the written approval of the Corps before filling the property, the denial of the permit application constitutes a valid exercise of Corps authority. Second, defendant denies that plaintiff has a compensable property interest in this case because plaintiff's project is prohibited by local law due to his failure to comply with local ordinances governing the placement of fill in the Arkansas River. See id. at 15. Having chosen not to comply with the applicable local law, plaintiff cannot claim a compensable property interest based on a federal taking when the envisioned project was simultaneously blocked by local law. Third, defendant argues that any property interest held by

plaintiff in the subject property is limited by the United States' navigational servitude. See id. at 16-17. The Government's special rights in the navigable waters of the United States curtail the scope of takings claims that can be asserted against the United States in cases such as this.

Plaintiff devotes considerable time attempting to counter these arguments. In his response brief, plaintiff attempts to deflect these arguments point by point. See Pl.'s Br. filed Oct. 6, 2011, at 7-18. First, plaintiff argues that—while the Easement Deed contains restricting language that limits the right to fill the subject property—this language does not comprehend the restraints of the CWA, which were enacted subsequent to the conveyance of the Easement Deed and therefore are not binding on the reservation in the deed. See id. at 7-11. Next, plaintiff contends that the relevant local law was passed subsequent to the fill reservation in the Easement Deed and thus is inapplicable to this case. See id. at 11. Further, plaintiff contends that a question of fact exists concerning whether or not the local ordinance even applies to plaintiff's proposed project, thereby rendering the issue inappropriate for resolution on summary judgment. See id. at 11-13. Plaintiff finally counters that the question of whether considerations of the United States' navigational servitude are triggered in this case is again premature, as these involve disputed contentions of fact that the court should resolve by trial, not on summary judgement. See id. at 14-17.

Without commenting on the merits of the parties' arguments, and despite the effort spent by the parties in briefing these issues, an inquiry into a

compensable property interest is not an analytical prerequisite to ruling on defendant's motion. Given that the facts of this case implicate denial of a section 404 permit, applicable precedent instructs that the court evaluate the claim under the Penn Central factors. In Norman the United States Court of Appeals for the Federal Circuit stated that, "[i]n general, this court has analyzed takings claims arising from section 404 permit issues using the regulatory takings analysis set forth in Penn Central" unless there has been either a physical or categorical taking. 429 F.3d at 1088. This guidance means that in section 404 permit cases—in which the issue is almost always one of a regulatory taking—courts should proceed directly to the Penn Central factor analysis unless there has been a physical taking or a categorical (regulatory) taking such as that present in Lucas, 505 U.S. at 1006. See, e.g., Preseault v. United States, 100 F.3d 1525, 1540 (Fed. Cir. 1996) (finding that the "two quite different situations" of physical taking and regulatory taking "call for quite different analyses").

Neither party has put forward an argument that a physical taking is implicated, so that exception has not been triggered in this case. Nor has there been any allegation of a categorical taking. A categorical taking is "a regulatory taking in which government action deprives the landowner of all beneficial use of his property, such that the government action is the functional equivalent of a physical invasion." Norman, 429 F.3d at 1090. Plaintiff has never alleged that the Government has deprived him of all beneficial use of his property. Therefore, based on

the controlling precedent of Norman, this court proceeds to the analysis of the Penn Central factors.

III. *Penn Central* analysis

Moving to the three-prong analysis laid out in Penn Central that serves as the core analytical framework for regulatory takings claims, the court determines whether defendant has established its entitlement to summary judgment. As a preliminary matter, in response to plaintiff's overarching argument that summary judgment is not appropriate because of the fact-intensive nature of the Penn Central analysis, see Pl.'s Br. filed Oct. 6, 2011, at 18, controlling precedent establishes that summary judgment can be granted in regulatory takings cases. Despite the fact that the Penn Central framework requires factual inquiries, the Federal Circuit has held that summary judgment is an appropriate disposition on a regulatory takings claim when no genuine issue of material fact is present and the plaintiff has failed to meet one of the three prongs of the Penn Central analysis. See Good, 189 F.3d at 1363 (affirming grant of summary judgment for Government on plaintiff's regulatory takings claim on ground that, as a matter of law, plaintiff lacked reasonable investment-backed expectations). Moreover, defendant need not satisfy all three prongs of the Penn Central test in order to prevail on a motion for summary judgment; indeed, a strong showing that plaintiff lacked reasonable investment-backed expectations is sufficient by itself for a determination that no taking has occurred. See id. at 1360 ("Because we find the expectations factor dispositive, we will not further discuss the character

of the government action or the economic impact of the regulation.").

Based on the following analysis, this court concludes that plaintiff is unable to establish the Penn Central factors in its favor as a matter of law.

1. Economic impact of the regulation

The first inquiry under the Penn Central framework requires an examination of the economic impact of the relevant regulation. This factor of the test is "intended to ensure that not every restraint imposed by government to adjust the competing demands of private owners would result in a takings claim." Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1176 (Fed. Cir. 1994). Unfortunately for courts, this factor, at best, contemplates an imprecise analysis. While the Supreme Court has stated that in applying this factor the court should "compare the value that has been taken from the property with the value that remains in the property," Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987), courts have not yet reached a consensus as to a particular, universally applicable percentage of diminution in value that establishes a taking.

Neither party disputes that the "highest and best use" of the subject property would be commercial development allowed under "C-3" zoning. See Mehaffy's Response to Proposed Findings of Uncontroverted Fact, filed Oct. 6, 2011, Nos. 1-2. However, the parties' valuations of the property are considerably divergent, and both parties have disputed what values are appropriate to include in their valuation methodologies. See Joint Stipl. ¶¶

37-52. Given the genuine dispute on the value of the property, resolution of this prong is not appropriate for summary judgment.

2. Reasonable investment-backed expectations

The court next examines whether or not plaintiff had reasonable investment-backed expectations to fill the property. This factor has been held to be crucially important in regulatory takings cases because it is "a way of limiting takings recoveries to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." Loveladies Harbor, 28 F.3d at 1177. The logic behind this idea is straightforward: "One who buys with knowledge of a restraint assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a 'taking' would confer a windfall." Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994) (citations omitted). For this reason, "although a takings claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction, it is particularly difficult to establish a reasonable investment-backed expectation" in those situations where the party had constructive or actual knowledge of the restriction. Norman, 429 F.3d at 1092-93 (citations omitted) (internal quotation marks omitted). Consequently, the court should consider a party's expectations "both at the time he purchased [the property] and at the time he began to develop it." Good, 189 F.3d at 1360. "[T]o hold otherwise would turn the Government into an involuntary guarantor of the property owner's gamble that he could develop the

land as he wished despite the existing regulatory structure." Forest Props., Inc. v. United States, 39 Fed. Cl. 56, 76-77 (1997) (citation omitted).

When analyzing this factor, the court must consider what a party's reasonable objective expectations were in the property; the party's subjective expectations for the property should not be considered. See Chancellor Manor, 331 F.3d at 904 ("The subjective expectations of the [plaintiff] are irrelevant. The critical question is what a reasonable owner in the [plaintiff's] position should have anticipated." (citations omitted)). It is well settled that "a reasonable investment-backed expectation must be more than a unilateral expectation or an abstract need." Monsanto, 467 U.S. at 1005-06 (citation omitted) (internal quotation marks omitted). Indeed, property owners may not "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." Penn Central, 438 U.S. at 130.

The court turns to the arguments presented by the parties in their respective briefs. Defendant lays out a host of factors weighing in its favor. See Def.'s Br. filed Sept. 2, 2011, at 25; Def.'s Br. filed Oct. 24, 2011, at 12-13. Beginning with the date on which plaintiff individually acquired possession of the subject property—May 9, 2000—defendant contends: (1) the regulatory regime at issue, the CWA, was not a new or unexpected legislative development, but had been in force for over twenty years; (2) plaintiff had received actual notice that the subject property and the reservation of the right to fill the property

preserved in the Easement Deed were subject to the CWA and that a 404 permit would be required should he wish to fill the property, Joint Stipl. ¶ 11; (3) plaintiff had independent knowledge by way of his experience in the construction industry that a 404 permit was required in order to place fill material in wetlands, Mehaffy's Response to Proposed Findings of Uncontroverted Fact, filed on Oct. 6, 2011, No. 7; (4) plaintiff made no subsequent investments in order to develop the subject property such as seeking other required government permits, see Joint Stipl. ¶ 36; and (5) local law places several requirements on plaintiff that must be satisfied before the property can be filled, and plaintiff has not attempted to comply with any of them. Taken together, these arguments establish that plaintiff was indeed on notice of the regulatory framework at issue when he took possession of the subject property, and, as noted in Norman, they sharpen plaintiff's challenge to establish that he had reasonable objective expectations of developing the property without being subjected to the CWA provisions.

Plaintiff's arguments in opposition primarily seek to readjust the relevant time period that should be considered in evaluating his arguments. Plaintiff urges that the reasonableness of his expectations should be assessed at the time Judge Mehaffy negotiated the reservation of the right to place fill material on the subject property, rather than beginning with the date on which plaintiff took possession of the property. See Pl.'s Br. filed Oct 6, 2011, at 21-22. Essentially, plaintiff argues as follows: Judge Mehaffy, the principal controller of

Nomikano, intended to preserve the right to fill the subject property so that one day plaintiff could develop it to use in his construction business. To this end Judge Mehaffy negotiated a reservation of the right to fill the property above 252 feet m.s.l. in the Easement Deed granted to the Government. Because this transaction was completed before the CWA was passed, the only written permission required from the Corps was that the fill would not disturb the Arkansas River project. Because Judge Mehaffy at that time might have had a reasonable investment-backed expectation in developing the subject property consistent with the right to fill, this expectation, as it stood when the Easement Deed was created, has been transferred along the chain of title to plaintiff—current holder of the subject property—who thus reasonably believed he had the right to fill the property. In light of controlling precedent, the court finds this reasoning unpersuasive.

First, as in Norman, plaintiff has failed to proffer a factual or legal justification to refer back to the 1960s for determining whether or not plaintiff had a reasonable investment-backed expectation in the mid-2000s. Simply put, plaintiff "could not have had any investment-backed expectation in property in which [plaintiff] had not yet invested." Norman, 429 F.3d at 1092. Thus, this court deems irrelevant the expectations Nomikano—the title holder of the subject property when the Easement Deed was negotiated—may have had and considers only the expectations that a reasonable person in plaintiff's position would have had upon acquiring the subject property in May 2000.

The implications of plaintiff's argument that property rights are frozen as of the date on which they were introduced into the title chain are startling. If every property owner were allowed to rely on the date of a particular right's genesis in establishing whether or not federal or state regulations applied to the interest, takings jurisprudence would be limited to ascertaining that date and not to analyzing the impact of subsequent statutes or regulations on the property rights. This position cannot be sustained. Rights such as the one reserved in the Easement Deed are not immune from being subjected to more recent regulation—a fact that plaintiff himself does not dispute. Pl.'s Br. filed Oct. 6, 2011, at 23.

Second, as per the guidance of the Federal Circuit in Good, this court is tasked with looking at what the reasonable expectations were both at the time the property was acquired and at the time the plaintiff began to develop it. See Good, 189 F.3d at 1360; see also id. at 1363 ("While [plaintiff's] prolonged inaction does not bar his takings claim, it reduces his ability to fairly claim surprise when his permit application was denied."). Even if plaintiff had acquired whatever right might have been created in 1970, this court would still evaluate his reasonable expectations when he applied for the permit in 2006; and, at the time that plaintiff actually applied for the permit, he had full knowledge of the requirements of the CWA. Therefore, the unexpected regulatory change that usually characterizes a regulatory taking is absent. This case would seem to be the prototypical non-takings case. When plaintiff purchased the subject property in May 2000, he paid

only $10.00. Joint Stipl. ¶ 16. If the court accepts as true that the price paid for the property includes the risk of being unable to develop the property as desired, then a compensation award in this case would result in a tremendous windfall to plaintiff. As noted above, the Government is not, and should not be, "an involuntary guarantor of a property owner's gamble that he could develop the land as he wished despite the existing regulatory structure." Forest Props., 39 Fed. Cl. at 76-77. In sum, it does not appear that, given the regulatory regime that existed at the time plaintiff applied for his 404 permit—a regime that had existed for more than twenty years—plaintiff has had anything taken from him unjustly.

Third, plaintiff's attempts to argue around the inconvenient fact that he had knowledge of the regulatory scheme of the CWA are unpersuasive. Plaintiff has admitted that he had both actual and constructive knowledge not only of the permitting requirements under the CWA, but also of the application of those requirements to the subject property. Pl.'s Br. filed Oct. 6, 2011, at 22-23. This fact itself indicates that plaintiff "could not have [purchased the subject property] in reliance on a 'state of affairs' that did not include those restrictions." Norman, 429 F.3d at 1093. Attempting to recharacterize what has occurred, plaintiff seeks to avoid the ineluctable conclusion that a reasonable person would have appreciated that the CWA permitting requirements applied to any plans to develop the subject property. In his opposition brief, plaintiff states that "[t]he 1980 letter does not advise Mehaffy that he no longer has the right to place any

fill on his property . . . ." Pl.'s Br. filed Oct. 6, 2011, at 22. This statement is correct because—ignoring any issues of compliance with state or local law—the 1980 letter only informed plaintiff that his right to place fill on the subject property was subject to the regulations under the CWA. In the next line of his brief, plaintiff argues that, although he knew of the permitting requirements and their application to the subject property, "he still reasonably thought he possessed the reserved right to fill and that the permit requirement was nothing more than 'some red tape to clear.'" Id. at 23.

Plaintiff's argument ignores the fact that objective expectations govern, not whatever subjective ones that plaintiff may have had. As the Supreme Court in Penn Central crystalized, property owners may not "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available . . . ." 438 U.S. at 130. Whether plaintiff considered that his position was deserving of more leniency in making a permit determination than that of another similarly situated person is irrelevant. A reasonable, objective person who knew that the requirements of section 404 applied to his property could be expected to assume that the law would be applied to him in the same manner as to any other.

This hyperbole that all development rights have been extinguished by the Corps via the denial of plaintiff's section 404 permit application glosses over the facts of the case at bar. While plaintiff may have expected the permitting process to be nothing more than "some red tape," it was his responsibility to

take the permitting process seriously. He did not. The record demonstrates that plaintiff was, at best, uncooperative with the Corps, and to this day has not taken the steps of explaining why the wetlands portion of the subject property needs to be filled to effectuate his development plan or commissioning a survey to demonstrate the effects of this action. See Mehaffy, 98 Fed. Cl. at 609-10. Given this obdurate behavior in the face of repeated requests for information, the Corps denied the fill permit. This denial does not forever foreclose plaintiff from developing his property, nor does it effectuate the categorical taking that plaintiff implicitly argues. Plaintiff is free to reapply for the permit with the additional information requested by the Corps, and it is possible for him to change the outcome of the process through his own willingness to cooperate with regulatory authority that he himself acknowledges as serving a public purpose. See Pl.'s Br. filed Oct. 6, 2011, at 23. This is not a case where plaintiff has done everything possible in attempting to proceed with his development plan. Other than making declarations that he is deserving, plaintiff has done little to advance his own cause. Objectively speaking, given the knowledge of the regulatory regime at issue, plaintiff's reasonable investment-backed expectation was that the Corps would provide his permit application a fair hearing. Of that, plaintiff was not deprived.

3. Character of the government action

Finally, the court looks to the third Penn Central factor—the character of the government action. This factor "requires a court to consider the purpose and importance of the public interest underlying a

regulatory imposition . . . ." Maritrans Inc. v. United States, 342 F.3d 1344, 1356 (Fed. Cir. 2003). According to the Supreme Court, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Central, 438 U.S. at 124 (citation omitted). The Supreme Court has stated that, "while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of the advantage of living and doing business in a civilized community, some are so substantial and unforeseeable . . . that justice and fairness require that they be borne by the public . . . ." Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984) (internal quotation marks omitted). Extrapolating from the Supreme Court's analysis in Eastern Enterprises v. Apfel, 524 U.S. 498, 537 (1998), the Court of Federal Claims has considered two factors in particular as being relevant: "(i) the extent to which the action is retroactive; and (ii) whether the action targets a particular individual." Brace v. United States, 72 Fed. Cl. 337, 356 (2006).

This case involves the denial of a section 404 permit—a regulatory mechanism under the CWA that is designed to protect and preserve the nation's wetlands. Plaintiff expressly states that he is "not contending that the Corps lacks any rights to regulate wetlands . . . [nor] that preservation of wetlands is not a valid public purpose." Pl.'s Br. filed Oct. 6, 2011, at 23. In addition to there being an

evident public benefit that plaintiff shares by being a member of the public, the facts at bar indicate that this permitting requirement did not operate retroactively. In acquiring the subject property in May 2000, plaintiff had both constructive and actual notice of the permitting requirements of the CWA and knew that those requirements applied to the subject property. Further, the court does not find that the Corps's actions in this case were particularly directed at plaintiff. As previously stated by the Court of Federal Claims, "the CWA and the wetlands regulations issued thereunder are generally applicable to all similarly situated property owners and can in no way be viewed as being directed at plaintiff[]." Brace, 72 Fed. Cl. at 356. Based on the facts presented, this court finds that this regulation does not go "too far" and specifically impose on plaintiff an unfair burden.

CONCLUSION

Accordingly, based on the foregoing,

IT IS ORDERED, as follows:

1. Defendant has shown as a matter of fact and law that it is entitled to summary judgment in its favor pursuant to RCFC 56(a), and its motion is granted. The Clerk of the Court shall enter judgment for defendant.

2. Paragraphs 3-6 of the scheduling order entered on May 23, 2011, are vacated.

No costs.

/s/ Christine O.C. Miller

Christine Odell Cook Miller
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2012-5069

MIKE MEHAFFY,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in case no. 09-CV-860, Judge Christine O.C. Miller.

O R D E R

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

O R D E R

A combined petition for panel rehearing and for rehearing en bane having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en bane having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en bane be, and the same hereby is, DENIED.

The mandate of the court will issue on March 14, 2013.

FOR THE COURT
/s/ Jan Horbaly
JanHorbaly
Clerk

Dated: 03/07/2013
cc: Bruce B. Tidwell
Matthew Littleton
MEHAFFY V US, 2012-5069
(CFC - 09-CV -860)

APPENDIX D

SWLCO-FW

10 OCT 1980

Mr. Thomas M. Mehaffy
c/o Nomikano Corporation
P.O.Box 339
North Little Rock, Arkansas 72115

Dear Mr. Mehaffy:

This is in reference to an Easement Deed to Tract No. 134E, Lock and Dam No. 7, Arkansas River, dated 2 March 1970 (copy inclosed). This deed was signed by you on that date.

Some of the rights reserved to you as the title owner of the subject property are subject to Federal legislation enacted subsequent to 1970 known as the Clean Water Act. A provision found on page 2 of the Easement Deed has to do with the right reserved to you as owner to place fill on the property. Please be advised that Section 404 of the Federal Water Pollution Control Act of 1972 as amended by the same Section of the Clean Water Act of 1977 (33 U.S.C. 1344), and implementing Federal regulations (33 CFR 323), proscribes a Department f the Army permit as the necessary authorization for the disposal of dredged or fill material into waters of the United States, which includes certain wetlands.

The definition of wetlands as found in 33 CFR 323 is: "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar area". We have observed that there are portions of the property covered by the subject Easement Deed which fit this definition of wetlands.

Please be advised that the subject Easement Deed for Tract No. 134E is not sufficient to authorize work requiring authorization under the previously mentioned laws and regulation. Therefore, if you should propose to dispose of or place any dredged or fill material into wetlands anywhere on this property or into the Arkansas River or to do any type of work in or over the Arkansas River you should contact this office well in advance of any such work for a determination of the exact permit requirements. You should also be aware that certain operations connected with removal of vegetation from land, if it involves significant movement of soil in a wetland, require authorization under Section 404. We will be happy to delineate the boundaries of the wetlands on this property if you so desire.

If you should have any questions please contact Mr. Lou Cockmon or Mr. Benny Swafford of our Permits Branch at 378-5296 or Mr. R. E. Rogers, Acting District Counsel at 378-5555.

Sincerely,

DALE K. RANDELS, P.E.
Colonel, Corps of Engineers
District Engineer

1 Incl
As stated

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Copies furnished:
Res Engr, Dardanelle
Ch, RE Div
Paul Nelson, P. O. Box 943, El Cajon, CA 92022
Robert Holloway, 1350 Woodlane Dr., Maumelle, AR 72118
Paul Nelson Fils

APPENDIX E
CONSTITUTIONAL AND STATUTORY PROVISIONS

- ***United States Constitution, Amendment V.***

  No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- ***33 U.S.C. § 1344. Permits for dredged or fill material***

  (a) Discharge into navigable waters at specified disposal sites

  "The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under

this subsection, the Secretary shall publish the notice required by this subsection."