ENVIRONMENTAL LAW INSTITUTE

STATE CONSTRAINTS

State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act

An ELI 50-State Study
May 2013

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State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act

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EXECUTIVE SUMMARY

Twice in the last 12 years, the U.S. Supreme Court has issued decisions limiting the reach of the federal Clean Water Act: *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, in 2001, and *Rapanos v. United States*, in 2006. The result has been confusion among judges, regulators, the regulated community, and environmentalists over which waters are "in" for purposes of the federal Clean Water Act, and which waters are "out"—with serious consequences for environmental protection, development planning, and enforcement. Absent comprehensive federal regulation for particular surface waters, it falls to the states to decide whether or not to protect these waters under state law.

State *legislatures* can, without question, enact or amend laws to protect state water resources that have lost federal protection, or whose coverage by federal law is now clouded by legal uncertainty. A few states have done so, with respect to some waters. But *state environmental agencies*, and some local governments, may also seek to use their existing legal authorities to address water resources that are vulnerable and merit additional protection in the face of a newly limited Clean Water Act. This 50-state study examines limitations imposed by state law that could constrain the ability of state agencies (and, to a lesser extent, localities) to do this.

Findings. Over two-thirds of U.S. states, 36 in all, have laws that could restrict the authority of state agencies or localities to regulate waters left unprotected by the federal Clean Water Act. These restrictions take the form of absolute or qualified prohibitions that require state law to be "no more stringent than" federal law; property rights limitations; or a combination of the two. Such provisions constrain, and in some instances eliminate, the authority of state or local regulators to protect aquatic resources whose Clean Water Act coverage has disappeared or been rendered uncertain as a result of the *SWANCC* and *Rapanos* decisions. In 14 states and the District of Columbia, there are no such state-law impediments.

"No more stringent than" laws. Twenty-eight states have laws that could operate to either prohibit state agencies from regulating waters more stringently than the federal Clean Water Act, or limit their authority to do so. The Clean Water Act establishes national minimum standards—essentially, a stringency "floor"—beneath which states are not allowed to fall in their protection of water quality. States may, however, protect their waters *more* rigorously. A "no more stringent than" prohibition, found in 13 states, ensures that the federal program floor also will be a state "ceiling" with respect to whatever subject matter the stringency provision covers. A "qualified" stringency provision, found in 23 states, makes it more difficult for states to regulate more stringently than the federal programs do, but stops short of creating a bar to state agency action.

Private property rights laws. Twenty-two states have adopted legal protections, often contained in state private property rights acts, for the benefit of landowners whose property values may be affected by government regulation. These statutes rarely reference water quality or water pollution directly, but they are likely implicated by any new state regulation that affects the uses to which property may be put. State laws containing what this study calls "compensation/prohibition provisions" can bar or impede new environmental regulation, as agencies generally cannot afford to pay compensation to have their regulations enforced. In other instances, state law requires agencies to perform property impact assessments or take other steps

that serve as a disincentive for an agency to regulate in any manner that arguably affects property rights. Finally, a handful of states have established a property rights ombudsman/advocate, or set up a private property dispute resolution program, which facilitate property owners' ability to challenge state regulations.

Ability of states to regulate non-CWA waters given these limitations. Half of the states—25 in all—have in place state regulatory protections that cover at least *some waters* that are either no longer subject to federal coverage following *SWANCC* and *Rapanos*, or whose federal coverage has been rendered uncertain. The list of states that attempt to afford these additional state protections intersects with the list of states identified by this study as having relevant limitations, as follows:

- Eight states—including all EPA Region 1 states except Maine, as well as New York, Illinois, and California—*have no relevant stringency or property-based limitations provisions* and regulate waters more broadly than is required by the Clean Water Act.
- Seven jurisdictions (including the District of Columbia) *have no relevant limitations provisions*, but also do not regulate waters more broadly than is required by the Clean Water Act.
- Seventeen states *have relevant limitations provisions* but also regulate waters more broadly than is required by the Clean Water Act.
- Nineteen states *have relevant limitations provisions* and do not regulate waters more broadly than is required by the Clean Water Act. This category includes all EPA Region 8 states, and all Region 6 states but New Mexico. These states thus have an identifiable "gap" in the coverage of their waters following *SWANCC* and *Rapanos*, but are constrained (to varying degrees) in regulating to fill that gap under existing state laws.

These findings are summarized in the table below.

State-by-State Breakdown: Presence of Relevant Limitations Provisions Versus Whether State Waters Are Regulated More Broadly than Required by Federal CWA		
	States that **regulate waters more broadly** than required by the CWA	States that **do not** regulate waters more broadly than required by the CWA
States **with** relevant limitations provisions	FL, IN, ME, MD, MI, MN, NE, NJ, NC, OH, OR, PA, TN, VA, WV, WA, WI [17 states]	AZ, AR, CO, DE, ID, IA, KS, KY, LA, MS, MO, MT, NV, ND, OK, SD, TX, UT, WY [19 states]
States **without** relevant limitations provisions	CA, CT, IL, MA, NH, NY, RI, VT [8 states]	AL, AK, DC, GA, HI, NM, SC [6 states and DC]

Conclusion. State laws imposing limitations on the authority of state agencies (and to some extent, municipalities) to protect aquatic resources are commonplace. Although these laws vary significantly in their scope and application, they can constrain, and in some cases eliminate, the ability of state regulators to protect waters no longer covered by the federal Clean Water Act, or whose federal protection has become uncertain. Since these laws are statutory, they do not affect the ability of state legislatures to alter them or to enact additional water protections. However, the prevalence of these state constraints across the country, together with the reality that only half of all states already protect waters more broadly than is required by federal law, suggest that states are not currently "filling the gap" left by U.S. Supreme Court rulings limiting the Clean Water Act, and face significant obstacles to doing so.

INTRODUCTION AND BACKGROUND

The protections of the federal Clean Water Act, enacted in 1972, apply to "navigable waters."[1] This jurisdictional term—on which all of the Act's programs stand—is defined under the Act to mean "waters of the United States,"[2] a phrase that the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) have further clarified by regulation.[3] A water body—be it a river, a wetland, an ephemeral stream, a "prairie pothole," an oxbow lake, or any other kind of surface water—is covered by a Clean Water Act program only if it is a water of the United States. A water deemed *not* to be a water of the United States lies outside the scope of the federal Act. Protections for these waters, if any, must come from the law of the state where it is found. If no state law covers that water or the activity affecting it, a property owner is typically free to dredge, fill, discharge pollutants to, or otherwise alter that water at will, for development or any other reason.

As a result of two U.S. Supreme Court decisions over the last twelve years, the issue of state regulation of waters that lie outside of federal Clean Water Act jurisdiction has assumed heightened importance. In 2001, the U.S. Supreme Court decided *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[4] commonly known as the *SWANCC* case. In a five-to-four ruling, the Court concluded that Congress did not intend the federal Clean Water Act to reach "isolated ponds, some only seasonal" that were located wholly within one state, where the lone asserted basis for federal jurisdiction was their use as habitat by migratory birds. After *SWANCC*, waters deemed to be "isolated" have been vulnerable to losing their Clean Water Act protection, and no intrastate, non-navigable, isolated waters have been found to be jurisdictional.

In 2006, the Supreme Court again addressed the jurisdictional scope of the Clean Water Act, this time in *Rapanos v. United States*.[5] This badly divided decision lacked a majority opinion and stands as the Court's latest word on the reach of the Clean Water Act. *Rapanos* established

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[1] *E.g.*, 33 U.S.C. § 1251(a), CWA § 101(a) (referencing national clean water goals and policies in the context of navigable waters); 33 U.S.C. § 1313(c)(2)(a), CWA § 303(c)(2)(a) (discussing requirement of water quality standards for navigable waters); 33 U.S.C. § 1342(a), CWA § 402(a) (discussing permits for discharge of pollutants into navigable waters); 33 U.S.C. § 1344(a), CWA § 404(a) (providing for issuance of permits for the discharge of dredged or fill material into navigable waters); 33 U.S.C. § 1362(12), CWA § 502(12) (defining "discharge of a pollutant" as an addition of any pollutant to navigable waters).

[2] 33 U.S.C. § 1362(7), CWA § 502(7).

[3] 33 C.F.R. § 328.3 (Corps); 40 C.F.R. § 230.3(s) (EPA). The two agencies also have issued various joint guidance documents on the scope of the term "waters of the United States." *See* "U.S. Army Corps of Engineers/Environmental Protection Agency, The Scope of Clean Water Act Jurisdiction after *SWANCC*," Jan. 15, 2003. *See also* U.S. Army Corps of Engineers/Environmental Protection Agency, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*," Dec. 2, 2008 (currently in effect), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf; and U.S. Army Corps of Engineers/U.S. Environmental Protection Agency, "Draft Guidance on Identifying Waters Protected by the Clean Water Act," May 2, 2011 (still under review and not in effect), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf.

[4] 531 U.S. 159 (2001).

[5] 547 U.S. 715 (2006).

two different rules for determining whether wetlands (and, perhaps, other waters) are jurisdictional under the federal Act. Justice Scalia's plurality opinion would find Clean Water Act coverage for a wetland where the wetland has a *continuous surface connection* with a *relatively permanent* body of water that is connected to traditional interstate navigable waters.[6] Justice Kennedy's concurring opinion in *Rapanos* would find coverage for wetlands where there is a *significant nexus* between the wetlands and downstream waters—*i.e.*, where the wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[7]

Rapanos has generated federal litigation arising out of more than two thirds of all U.S. states. Now almost seven years since the case was decided, the courts of appeals still differ as to which *Rapanos* opinion, or opinions, provide the proper test for Clean Water Act jurisdiction. Three U.S. circuit courts of appeals have ruled that Clean Water Act jurisdiction exists if a water meets *either* the Kennedy significant nexus test *or* the Scalia plurality test.[8] This is also the position taken by EPA, the Corps, and the Justice Department.[9] Three other circuits have approved the use of the Kennedy significant nexus test to find jurisdiction—without necessarily foreclosing the possibility that the Scalia plurality test could be used in future cases.[10] One circuit has held that Kennedy's significant nexus test alone provides the rule of *Rapanos*.[11] Finally, two circuits have each considered a post-*Rapanos* case presenting questions of Clean Water Act jurisdiction but declined to decide on a controlling legal standard.[12] The remaining federal circuit courts have

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[6] *Id.* at 742 (Scalia, J., plurality). In other words, the wetland must be linked to downstream waters by a "water of the United States." *Id.* However, the plurality would "not necessarily exclude" from the category of "relatively permanent waters" rivers or streams that are seasonal or that dry up under extraordinary circumstances. *Id.* at 733 n.5.

[7] *Id.* at 780 (Kennedy, J., concurring).

[8] *See United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009). In *Rapanos*, Justice Stevens foresaw the confusion that was likely to arise from the Court's divided ruling and proposed precisely this approach for interpreting the decision. *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting) ("Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if either of those tests is met.") (emphasis in original).

[9] *See supra* note 3, Corps/EPA 2008 guidance at 3, and Corps/EPA 2011 proposed draft guidance at 2. *See also* "Interpreting the Effect of the U.S. Supreme Court's Recent Decision in the Joint Cases of *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers* on 'The Waters of the United States,'" Hearing Before the Subcomm. on Fish, Wildlife, and Water of the S. Comm. on Environment and Public Works, 109th Cong. 16 (2006) (statement of John C. Cruden, then-Deputy Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice) (reporting that the Department has argued to courts that a wetland is jurisdictional under the Clean Water Act if either the *Rapanos* Scalia plurality test or Justice Kennedy's significant nexus test is met in a particular fact situation).

[10] *See Precon Development Corp., Inc. v. U.S. Army Corps of Engineers*, 633 F.3d 278 (4th Cir. 2011); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006) (per curiam); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), *withdrawing and superseding on denial of reh'g*, 457 F.3d 1023 (9th Cir. 2006); *Northern California River Watch v. Wilcox*, 633 F.3d 766 (9th Cir. 2011), *amending and superseding earlier opinion at* 620 F.3d 1075 (9th Cir. 2010).

[11] *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007).

[12] *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008); *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009), *affirming* 480 F. Supp. 2d 940 (W.D. Ky. 2007).

not addressed the issue. No appeals court has ruled that the Scalia plurality test alone provides the rule of *Rapanos*. Essentially, the courts agree only that if a water satisfies the Kennedy significant nexus test, that water is jurisdictional. However, unless and until new federal regulations are issued by EPA and the Corps, the significant nexus test must be applied on a case-by-case basis, rather than to categories of waters.[13]

The legacy of *SWANCC* and *Rapanos* has been to sow confusion among judges, regulators, the regulated community, and environmentalists over which waters are "in" and which waters are "out" for purposes of the federal Clean Water Act—with very real consequences both for protecting and using America's water resources[14] and for ensuring sound federal enforcement.[15] The resulting post-*SWANCC/Rapanos* "gap" in federal Clean Water Act coverage has focused renewed attention on the states. They, of course, remain free to protect or otherwise regulate *under state law* any waters that lie beyond the reach of the Clean Water Act, or waters whose coverage under the federal Act has been rendered uncertain by the two Supreme Court decisions. State legislatures can adopt new legal protections as they like, and several states have responded legislatively to the change in federal law. But enacting state legislation is a slow and difficult endeavor, given competing political priorities at the state capital. It is state agencies—and typically the state department of environmental protection—that usually possess the expertise (as well as a legislative mandate) to address water protection issues through regulatory and permitting processes that target the waters of greatest concern. Additionally, cities and counties, which are often more knowledgeable about local conditions and needs than distant state legislators, may have the greatest incentive to protect their water resources.

So the question becomes, in the wake of *SWANCC* and *Rapanos*, *can* state agencies and localities readily and effectively "fill the gap" in federal protection for state surface waters, relying on existing state legal authorities under water pollution control laws, dredge-and-fill laws, or other state statutes?[16] The results of this study indicate that, in many instances, the practical answer is "no"—or only at substantial expense and with potential difficulty. The explanation lies

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[13] *See Rapanos*, 547 U.S. at 782 (Kennedy, J. concurring). For more on the significant nexus test, and for a detailed treatment of the current science and law of Clean Water Act jurisdiction—including summaries of all post-*Rapanos* court rulings nationwide—see Environmental Law Institute, *Clean Water Act Jurisdictional Handbook, Second Edition* (May 2012), available at http://www.elistore.org/reports_detail.asp?ID=11425.

[14] *See*, *e.g.*, Environmental Law Institute, *America's Vulnerable Waters: Assessing the Nation's Portfolio of Vulnerable Aquatic Resources Since* Rapanos v. United States (Aug. 2011) (identifying a range of aquatic resource types that the U.S. Army Corps of Engineers often determines are not protected by the CWA), available at http://www.elistore.org/reports_detail.asp?ID=11416.

[15] *See*, *e.g.*, Charles Duhigg and Janet Roberts, "Rulings Restrict Clean Water Act, Foiling E.P.A.," *New York Times*, Feb. 28, 2010, at A1 ("Thousands of the nation's largest water polluters are outside the Clean Water Act's reach because the Supreme Court has left uncertain which waterways are protected by that law, according to interviews with regulators."). *See also* Memorandum from Granta Y. Nakayama, EPA Ass't Administrator for Enforcement & Compliance Assurance, to Benjamin Grumbles, EPA Ass't Administrator for Water, Re: Clean Water Act Enforcement, Post-*Rapanos* (Mar. 4, 2008) (discussing negative effect of *Rapanos* on hundreds of enforcement cases).

[16] Although this report focuses mainly on regulation by state agencies, localities, too, can act to protect their local water resources—including so-called "isolated" surface waters. For example, Lake County, Illinois has an ordinance that expressly protects isolated wetlands and intermittent streams that are not subject to Clean Water Act jurisdiction. *See* Lake County Stormwater Management Commission, Watershed Development Ordinance at 72-73 (eff. Nov. 18, 2008) (defining "isolated waters of Lake County").

in two kinds of state laws: those that bar or limit the adoption of regulations that are "more stringent" than corresponding federal laws or rules, and those that constrain government action in service of protecting private property rights. Past articles and reports have addressed the subject of so-called "no more stringent than" laws. In 1995, articles published in the *Environmental Law Reporter* and the *Maryland Law Review* were among the first to explore the application of these state laws in the field of environmental protection.[17] The former State Environmental Resource Center also undertook work in this area.[18] A 2004 law student article expanded the discussion of state-imposed regulatory limitations by examining the role of state private property rights acts—and explored what state stringency and property rights laws meant for wetlands protection, post-*SWANCC*.[19] Other writings also have highlighted the rise of state private property rights laws.[20]

This study builds on and updates these earlier efforts, in the context of how state legal limitations could constrain the ability of state agencies and localities to regulate waters that lie outside of the scope of the Clean Water Act, as it is interpreted post-*SWANCC* and post-*Rapanos*.[21] This report presents an overview, discussion, and synthesis of the study's findings and their implications. Appendix 2 contains a detailed profile for every state, including a discussion of and citations to that state's stringency prohibitions and property-based limitations. Each state profile concludes with a snapshot of how that state's existing legal framework may (or may not) already provide legal protections for waters that are subject to a loss of protection under federal law.

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[17] *See* James M. McElfish, Jr., "Minimal Stringency: Abdication of State Innovation," 25 Environmental Law Reporter 10003 (1995) (hereinafter "Minimal Stringency"); Jerome M. Organ, "Limitations on State Agency Authority to Adopt Environmental Standards More Stringent than Federal Standards: Policy Considerations and Interpretive Problems," 54 Md. L. Rev. 1373 (1995) (hereinafter "Limitations on State Agency Authority"). *See also* Environmental Law Institute, *Enforceable State Mechanisms for the Control of Nonpoint Source Water Pollution*, Appendix: State "No More Stringent" Laws (Oct. 1997) (collecting state stringency statutes applicable to regulation of non-point source pollutants), reproduced by U.S. EPA at http://water.epa.gov/polwaste/nps/appendix.cfm.

[18] *See* State Environmental Resource Center (SERC), "Issue: 'No More Stringent Laws" (2004), available at http://www.serconline.org/noMoreStringent.html. In 2004, SERC became the Wisconsin office of Defenders of Wildlife.

[19] Andrew Hecht, "Obstacles to the Devolution of Environmental Protection: States' Self-Imposed Limitations on Rulemaking," 15 Duke Envtl. L. & Pol'y F. 105 (2004) (student note) (hereinafter "Obstacles to Devolution"). *But see* R. Benjamin Lingle, "The Constitutionality and Economic Impacts of Federal Jurisdiction of Wetlands: The Clean Water Restoration Act of 2009," 62 Fla. L. Rev. 1091, 1112-14 (Sept. 2010) (student note) (arguing that because state legislatures that wish to expand state protection of waters are free to disable state stringency limitations that stand in the way, any prohibition on states created by such rules is, "at least in part, illusory").

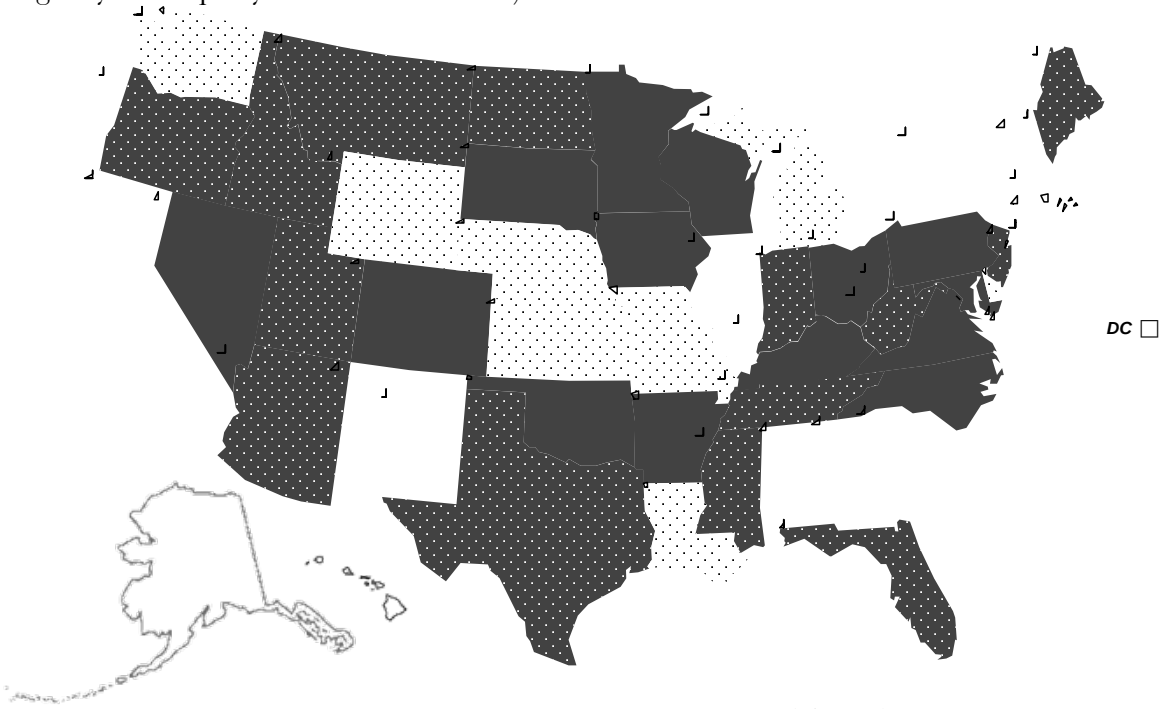
[20] *See*, *e.g.*, Georgetown Environmental Law and Policy Institute, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories* (2008), republished at 28 Stan. Envtl. L.J. 439 (2009) (hereinafter *Track Record*) (examining passage and application of state laws that contain takings "compensation" measures, with particular emphasis on the experiences of Florida and Oregon). *See also* John D. Echeverria, "The Politics of Property Rights," 50 Okla. L. Rev. 351 (1997) (critically analyzing property rights as a political issue; John R. Nolon, "Takings and Property Rights Legislation," Envtl. Outlook, v. 2, no. 2 (winter 1996) (examining trends in state regulatory takings legislation).

[21] This study does *not* consider the following environmental subject matter areas where state "no more stringent than" laws have proliferated over the years: surface mining regulation, hazardous waste disposal, regulation of underground storage tanks, and clean air rulemaking. For discussions of the state stringency statutes that cover these areas, see generally "Minimal Stringency" and "Limitations on State Agency Authority," *supra* note 17, and "Obstacles to Devolution," *supra* note 19.

It is also important to note, as discussed at page 35, that some states that *do have* stringency or property rights limitations nevertheless regulate waters more broadly than is required under the Clean Water Act.

NATIONAL CHARACTERIZATION OF LIMITATIONS CONTAINED IN STATE LAWS

More than two-thirds of U.S. states—**36 in all**—have on the books legal restrictions that impose relevant stringency prohibitions, private property-based limitations, or a combination of the two, on state agencies (and in some instances, localities).[22] These provisions can act to constrain, and in certain instances eliminate, the authority of regulators to protect aquatic resources that are no longer covered by the federal Clean Water Act, or whose coverage has been made uncertain, as a result of the *SWANCC* and *Rapanos* decisions. (See Map 1: States with Stringency or Property-Based Limitations.)



Map 1: States with Stringency or Property-Based Limitations

- Stringency Limitation(s)
- Property-Based Limitation(s)
- Stringency *and* Property-Based Limitations

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Table 1, which appears on pages 8 to 9, summarizes the findings of this study, by EPA Region and state. These results indicate whether each state has adopted: (1) one or more types of stringency limitation (*i.e.*, a "prohibition" provision or a "qualified prohibition" provision); (2) one or more types of property-based limitation (*i.e.*, a "compensation/prohibition" provision, an "assessment" provision, or one of the provisions characterized as "other"); and (3) any provisions that regulate at least some waters that are no longer subject to coverage under the federal Clean Water Act, or whose coverage under the Act in now uncertain.

[22] This is the number of states with such provisions as of the end of 2012. As noted in the state profiles contained in Appendix 2, new stringency and private property rights provisions continue to be introduced in state legislatures.

Table 1: Summary of Findings for 50 States & DC
(by EPA Region)

State (EPA Region)	Stringency Prohibition	Qualified Stringency Prohibition	Property-Based Compensation/ Prohibition Provision	Property-Based Assessment Provision	Property-Based Provision: Other	State Coverage of Non-CWA Waters
EPA REGION 1						
CT	No	No	No	No	No	**Partial**
ME	No	**Yes**	**Yes**	**Yes**	**Yes**	**Partial**
MA	No	No	No	No	No	**Partial**
NH	No	No	No	No	No	**Partial**
RI	No	No	No	No	No	**Partial**
VT	No	No	No	No	No	**Partial**
EPA REGION 2						
NJ	No	**Yes**	**Yes**	No	No	**Partial**
NY	No	No	No	No	No	**Partial**
EPA REGION 3						
DE	No	No	No	**Yes**	No	No
DC	No	No	No	No	No	No
MD	No	**Yes**	No	No	No	**Partial**
PA	No	**Yes**	No	No	No	**Partial**
VA	**Yes/Narrow**	**Yes**	No	No	No	**Partial**
WV	No	**Yes**	No	**Yes**	No	**Case-by-Case**
EPA REGION 4						
AL	No	No	No	No	No	No
FL	No	**Yes**	**Yes**	No	**Yes**	**Partial**
GA	No	No	No	No	No	No
KY	**Yes/Broad**	**Yes**	No	No	No	No
MS	**Yes/Broad**	No	**Yes**	No	No	No
NC	**Yes/Broad**	No	No	No	No	**Partial ***
SC	No	No	No	No	No	No
TN	No	**Yes**	No	**Yes**	No	**Partial**
EPA REGION 5						
IL	No	No	No	No	No	**State-Funded Projects**
IN	No	**Yes**	No	**Yes**	No	**Partial ***
MI	No	No	No	**Yes**	No	**Partial**
MN	**Yes/Narrow**	**Yes**	No	No	No	**Partial**
OH	No	**Yes**	No	No	No	**Partial ***
WI	**Yes/Broad**	**Yes**	No	No	No	**Partial ***
EPA REGION 6						
AR	No	**Yes**	No	No	No	No
LA	No	No	**Yes**	**Yes**	No	No
NM	No	No	No	No	No	No
OK	No	**Yes**	No	No	No	No
TX	**Yes/Narrow**	No	**Yes**	**Yes**	No	No
EPA REGION 7						
IA	**Yes/Narrow**	**Yes**	No	No	No	No
KS	No	No	No	**Yes**	No	No
MO	No	No	No	**Yes**	No	No
NE	No	No	No	**Yes**	No	**Case-by-Case**

State (EPA Region)	Stringency Prohibition	Qualified Stringency Prohibition	Property-Based Compensation/ Prohibition Provision	Property-Based Assessment Provision	Property-Based Provision: Other	State Coverage of Non-CWA Waters
EPA REGION 8						
CO	**Yes/Narrow**	**Yes**	No	No	No	No
MT	No	**Yes**	No	**Yes**	No	No
ND	No	**Yes**	No	**Yes**	No	No
SD	**Yes/Broad**	No	No	No	No	No
UT	No	**Yes**	No	**Yes**	**Yes**	No
WY	No	No	No	**Yes**	No	No
EPA REGION 9						
AZ	**Yes/Broad**	No	**Yes**	No	No	No
CA	No	No	No	No	No	**Partial**
HI	No	No	No	No	No	No
NV	No	**Yes**	No	No	No	No
EPA REGION 10						
AK	No	No	No	No	No	No
ID	**Yes/Broad**	**Yes**	No	**Yes**	No	No
OR	**Yes/Narrow**	**Yes**	**Yes**	No	**Yes**	**Partial**
WA	No	No	No	**Yes**	No	**Partial ***
Subtotal	**13 states**	**23 states**	**8 states**	**17 states**	**4 states**	
Subtotal	**28 states (one or both types of stringency limitation)**		**22 states (one or more types of property-based limitation)**			
TOTAL	**36 states (stringency limitation(s) or property-based limitation(s), or both)**					**25 states (some coverage)**

Table 1 Notes

Note 1: Rows that are shaded designate states that have adopted relevant stringency or property-based limitations and that do not now regulate waters more broadly than the federal Clean Water Act.

Note 2: An asterisk (*) appears in the final column ("State Coverage of Non-CWA Waters") for states that adopted laws or regulations in response to a Supreme Court decision altering federal Clean Water Act coverage.

Note 3: Even for states where the word "No" appears in the final column ("State Coverage of Non-CWA Waters"), the state may still provide protection in coastal areas that could be construed as regulating waters more broadly than the federal Clean Water Act. Where this is the case, it is so noted in that state's profile in Appendix 2.

This report describes each of these categories of state self-limitation, providing examples of typical provisions and highlighting outliers. Part I examines state stringency provisions, and Part II considers state property-based provisions. The last section of each Part discusses what these provisions can mean for state agencies (and, to some extent, localities) that seek to protect classes of waters no longer subject to Clean Water Act coverage, or whose coverage has been left in doubt. Part III compares the research findings to the list of states that already do afford state

regulatory protection to at least some waters that lie outside the scope of the federal Clean Water Act.[23]

Appendix 1 describes the research methodology for this project.

Appendix 2 contains detailed, state-specific profiles that: (1) identify relevant state stringency and property-based provisions; (2) summarize each provision's contents; and (3) set forth citations and operative language, as well as information on the history and application of certain key provisions. Each profile also (4) provides an overview of that state's laws, if any, that may afford regulatory coverage to waters outside the scope of the federal Clean Water Act.

[23] It bears noting that state agencies face multiple obstacles—beyond the stringency and private property rights provisions discussed in this report—to the issuance of new regulations. These include agency resource limitations, public and political scrutiny, and, in many instances, legal requirements aimed at limiting regulation and shielding small business from the effects of regulation. *See*, *e.g.*, Pa. Stats. 71 P.S. Code ch. 6 (Regulatory Review Act, as amended by Pa. Act 76 of 2012, H.B. No. 349) ("This act is intended to improve State rulemaking by creating procedures to analyze the availability of more flexible regulatory approaches for small businesses....").

PART I
STATES WITH STRINGENCY LIMITATIONS

Nationwide, **28 states** have adopted laws or policies that limit the authority of state agencies to protect waters more stringently than would otherwise be required under the federal Clean Water Act. (See Map 2: States with Stringency Limitations.) These "no more stringent than" provisions can act to constrain—either wholly or in part—the ability of state agencies to regulate in a manner that is more stringent, or strict, than what is required by federal law.[24] The federal Clean Water Act establishes national minimum standards—essentially, a stringency "floor"—beneath which states are not allowed to fall in their protection of water quality.[25] States are then free to protect their waters *more* rigorously if they so choose. But a "no more stringent than" provision changes this equation, making the federal regulatory floor equally a state regulatory "ceiling."

State law provisions containing stringency limitations fall roughly into two categories: a **prohibition** on the ability of the state regulator to adopt a more-stringent-than-federal regulation, or a **qualified prohibition** that allows the state to regulate more stringently, but

[24] The term "no more stringent than" is used here as shorthand. As described later in this Part, state stringency statutes can vary significantly in terminology and meaning.

[25] *See* 33 U.S.C. § 1370, CWA § 510 (state authority).

only if certain criteria are satisfied. These two categories are described in greater detail in Sections I.A and I.B, below. The state profiles contained in Appendix 2 classify state stringency provisions by this distinction.

Beyond the question of whether a given state stringency limitation is a prohibition or a qualified prohibition, state stringency provisions vary in at least three important ways that are relevant to state protection of waters. These variables include:

- *Application: who and what does the provision cover?* (*i.e.*, does the provision apply only to actions by particular agencies? does the provision apply only to specified subjects? Or to all environmental rulemaking, or even all state rulemaking?);
- *What is meant by "stringency" in the context of jurisdiction over waters* (*i.e.*, if a state law covers *more types of waters* that a corresponding federal requirement, is the state law more stringent?);
- *The nature of the federal "trigger"* (*i.e.*, does the provision govern state agency activities only when there is an existing federal regulation on the particular issue? what is the implication of federal silence on the issue?).

How these variables combine in any given state provision will dictate how the provision applies to a state agency seeking to protect additional waters, post-*SWANCC* and post-*Rapanos*. The effect of these variables is considered in Section I.C, below.

A. STRINGENCY PROHIBITIONS

Thirteen states have in place prohibitions that constrain the ability of state agencies to regulate aquatic resources in a manner more stringent than corresponding federal regulations.[26] (See Map 2, above.) Seven of these states—Arizona, Idaho, Kentucky, Mississippi, North Carolina, South Dakota, and Wisconsin—have broadly applicable stringency prohibition provisions. The other six states have provisions that are much narrower in application, focusing on particular activities or programs.[27]

South Dakota's stringency prohibition provision is arguably the most sweeping in the nation.[28] The statutory language applies across multiple titles of the South Dakota legislative code and prohibits state agencies from enacting rules more stringent than the corresponding federal requirements in a range of areas bearing on aquatic resources protection. The provision applies to, among other areas of state regulation: water pollution control; livestock discharge control; water supply and treatment system operators; and the appropriation, use, and management of water resources, including groundwater and irrigation water. Under this provision, the state regulatory ceiling is fixed by "any corresponding federal law, rule, or regulation governing an essentially similar subject or issue." It is difficult to envision how a South Dakota state agency could afford regulatory coverage to geographically isolated wetlands—or other waters beyond

[26] Only rarely do these provisions apply to localities. *See*, *e.g.*, Ariz. Rev. Stat. Ann. § 49-371(B) (applying to local stormwater management programs developed and implemented by counties).

[27] The states with stringency provisions that apply narrowly include: Colorado (agricultural irrigation flows and animal waste); Iowa (effluent standards; manure control); Minnesota (state permitting under federal CWA § 404, should Minnesota assume permitting authority); Oregon (effluent limitations on non-point source pollutants from forest operations on forest land); Texas (memoranda of agreement with respect to water pollution control permitting); and Virginia (level of treatment in sewage treatment works).

[28] S.D. Codified Laws § 1-40-4.1.

the scope of the federal Clean Water Act, post-*SWANCC* and post-*Rapanos*—without running afoul of this stringency prohibition.

All of the stringency prohibition provisions identified by ELI's research were legislatively enacted. The dates of passage varied considerably, spread throughout the 1970s, 1980s, 1990s, and 2000s—with North Carolina enacting a broad prohibition in 2011. Although there is no evidence of a uniform rationale having been articulated in support of these laws, it seems likely that the basic arguments made in support of Arizona stringency legislation enacted in the last decade have proven persuasive to legislators in other states, as well: *i.e.*, that businesses need consistency and, in particular, should be spared having to comply with "competing" federal and state standards.[29] Other possible explanations for the enactment of state stringency laws that bind environmental agencies include: the desire of state legislators to restrict the ability of environmental agencies to adopt regulations that could further impact state budgets; a legislative aim to protect local business from compliance costs, particularly given the current difficult economy and a concern with losing business to other states; and a legislative preference to externalize environmental costs. Certainly one could expect state lobbyists to press these arguments with legislators.[30] Another explanation is political: legislators who are concerned with perceived agency overreach, or otherwise wish to hold environmental regulation in check, have an incentive to afford state environmental agencies only the authority required to administer delegated federal environmental programs—and no more.[31]

B. Qualified Stringency Prohibitions

Nearly half of the states—**23 in all**—have qualified prohibitions that constrain the ability of state agencies to protect aquatic resources in a manner more stringent than corresponding federal regulations.[32] (See Map 2, above.) These prohibitions are "qualified" in the sense that a state agency may, upon satisfying certain requirements, promulgate a state regulation that is more stringent than its federal counterpart.

Qualified stringency prohibitions typically mandate that a state agency proposing to regulate in a manner that is more stringent than federal law do one or more of the following:

- Identify the more-stringent aspects of the regulation—and, in some cases, identify the less-stringent counterpart federal language; and provide specific public notice of the more stringent aspects of the regulation and take public comment on those aspects;
- Prepare a written report on the more-stringent state regulatory provision that sets forth the agency's reasoning and includes items such as: a justification of the need for the provision; likely environmental benefits; a discussion of the scientific studies or other information that support the agency's determination; an evaluation of its likely economic

[29] See discussion at pages 43-48, *infra*, and accompanying footnotes (state profile for Arizona).

[30] These rationales are discussed in detail in "Limitations on State Agency Authority," *supra* note 17, at 1387-90.

[31] *See id.*

[32] These states are Arkansas, Colorado, Florida, Idaho, Indiana, Iowa, Kentucky, Maine, Maryland, Minnesota, Montana, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Virginia, West Virginia, and Wisconsin.

effect (including, in some instances, the requirement of a cost-benefit analysis); and a review of any less-stringent alternatives;
- Make findings regarding the need to address the particular issue or problem more stringently in the state; and
- Submit the proposed regulation to identified committees of the legislature, or to the governor.

Qualified stringency provisions tend to fall along a spectrum. At one end are laws simply requiring an agency proposing a more-stringent-than-federal state regulation to indicate its intent to do so.[33] At the other end of the spectrum are laws with more rigorous requirements, like those contained in a Utah statute.[34] The Utah Water Quality Board is prohibited from enacting a rule to administer any program under the federal Clean Water Act that is more stringent than the corresponding federal rule, except where specific conditions are satisfied. To enact a more stringent state rule, the Board must: (1) take public comment and hold a hearing; (2) make a written finding based on record evidence that the federal regulations are inadequate to protect public health and the environment in Utah; and (3) issue an accompanying opinion that cites and evaluates the public health and environmental information and studies in the record that form the basis for the Board's conclusion. It will presumably be difficult in most instances for the Board to show that existing federal regulations are "inadequate" to protect Utah's environment and public health. And, indeed, one commenter discussing this and similar statutory stringency provisions applicable to other state agencies noted that "[t]he boards have rarely made the required showing or adopted more stringent regulations."[35]

Most qualified stringency provisions place a greater burden on state agencies to justify their actions when they are proposing regulatory action that is more stringent than corresponding federal requirements. These provisions may also establish grounds for a legal challenge to a rule that is adopted without following the proper procedures. However, the qualified stringency provisions themselves rarely provide recourse to, or otherwise create rights or claims in favor of, third parties. For example, an Ohio statute expressly provides that "[t]he insufficiency, incompleteness, or inadequacy" of the required stringency analysis and supporting documentation "shall not be grounds for invalidation" of a rule.[36]

North Dakota, however, provides a detailed procedural remedy in its qualified stringency provision.[37] Under this statute, a person affected by a rule issued by the Department of Health to administer the federal Clean Water Act may petition the Department suggesting that the rule is more stringent than the federal program. If the Department then determines that the rule is more stringent than federal regulations, or is a rule for which there are no corresponding federal

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[33] *E.g.*, Minn. Stat. Ann. § 115.03(9)(4). And under a Maine qualified stringency provision, the Department of Environmental Protection need comply with the stringency requirement only "when feasible." Me. Rev. Stat. Ann. tit. 38, § 341-H(3).

[34] Utah Code Ann. § 19-5-105.

[35] *See* C.G. Galli, *Highlights of Utah Environmental Law*, Parsons Behle & Latimer (2003), available at http://library.findlaw.com/2003/Apr/21/132703.html.

[36] Ohio Rev. Code Ann. § 121.39(F).

[37] N.D. Cent. Code § 23-01-04.1(1)-(3), (5).

regulations, the Department has nine months to "review and revise" its rule to comply with the state qualified stringency provision (*i.e.*, under the law the Department must make written findings after public comment and hearing). Similarly, if a person is issued a notice of violation (or denied a permit) by the Department based on a more-stringent state rule, and the rule was not issued in compliance with the state's qualified stringency requirements, that person may assert a partial defense (or a partial challenge) insofar as the Department's rule failed to comply. Montana's qualified stringency provisions allow for a person to petition the Board of Environmental Review for a rule review when the Board has adopted a rule in an area in which no federal regulations or guidelines previously existed, and the federal government subsequently establishes comparable regulations or guidelines that are less stringent than the previously adopted Board rule. In this case, the Board must either conform the state rule to federal requirements or comply with the statutory requirement to prepare a written finding.[38]

While none of the qualified stringency provisions identified by this study presents an absolute bar to adopting regulations—so long as the state agency satisfies the required conditions—these provisions create significant, real-world obstacles for state regulators. First, these provisions impose additional costs on cash-strapped state agencies over and above the usual costs of rulemaking, in terms of staff time, money, and available expertise. Second, these provisions tend to single out for further scrutiny—by executive branch overseers, lawmakers, and the public—proposed regulations that are more stringent than the federal baseline. Although state rulemaking is always a public process, the presumption that seems to underlie qualified stringency provisions is that a more-stringent state regulation is unnecessary or unjustified until proven otherwise. Third, these provisions can, expressly or impliedly, place an agency in the difficult position of arguing that the federal rule is insufficient to protect the people of the state—rather than simply explaining why the proposed more-stringent regulation is *more* protective. Together, these considerations create a disincentive for state agencies to pursue more-stringent regulations. And even when agencies decide to proceed in the face of qualified stringency requirements, they must bear opportunity costs in terms of other regulatory initiatives that will receive correspondingly fewer agency resources.

Nineteen of the states that have qualified stringency prohibitions identified by this study adopted these limitations by way of legislation. Three states—Maryland, New Jersey, and Pennsylvania—have imposed such restrictions by executive order of the governor, which presumably could be repealed by subsequent executive order. One state, Wisconsin, does so by way of administrative regulation—which means that this restriction can be changed by agency action.[39] Although dates of adoption for the qualified stringency prohibitions identified by this study range from the 1980s to the 2000s, over half of these provisions were adopted in the mid-to-late 1990s, roughly around the high-water mark of the property rights movement.

C. *Three Key Aspects of a State Stringency Provision*

Regardless of whether a state stringency limitation results in a compete prohibition on agency rulemaking or only a qualified prohibition, three aspects of the state provision determine

[38] Mont. Code Ann. §§ 75-5-203, 75-6-116.

[39] Virginia imposes various qualified stringency prohibitions both by way of statute and administrative regulation.

its reach and effect with respect to an agency's ability to regulate waters beyond the scope of the federal Clean Water Act.

1. Application of the state provision—who and what does it cover? First, there is the matter of who and what the stringency provision applies to, which can vary significantly by state and provision. For example, stringency provisions can apply broadly to all state agency rulemaking;[40] to all environmental rulemaking;[41] to the actions of specified state agencies or actors;[42] or with respect to a broad subject matter area, such as state regulation of surface water quality.[43] Or, these provisions can apply more narrowly to a specific area of rulemaking authority, such as setting effluent standards.[44]

Each stringency limitation identified by this study has the potential to constrain state agency rulemaking to protect state waters that lie outside of federal Clean Water Act protection. The broadest state stringency prohibitions almost certainly bar a state agency from regulating, for example, geographically isolated wetlands or ephemeral streams under the state water pollution control law, the state's Clean Water Act § 401 program, or, in all likelihood, even under an independent state freshwater wetlands law. But even a much narrower state stringency provision still has a prohibitive effect—albeit limited to the provision's stated application. For example, a narrower form of stringency limitation may prohibit a state from regulating surface runoff from forestry operations to geographically remote wetlands or ephemeral streams.[45]

2. Meaning of "stringency" in the context of jurisdiction over waters. A second consideration in examining any stringency limitation is determining how the concept of stringency operates when the question is not one of more rigorous state standards, but of broader state coverage of waters. At the heart of most stringency limitations is the instruction that state agencies not adopt a rule that is more stringent than corresponding federal requirements. So it seems clear that, under typical stringency language, the state agency cannot establish a more rigorous standard for a water than any corresponding federal standard for that water. But does a stringency prohibition bar the state agency from regulating waters that are not regulated under federal law?

ELI's research did not identify any state law definitions of the term "stringent" or "strict" that provide meaningful guidance in interpreting these provisions. In its common usage, "stringent" means "marked by rigor, strictness, or severity[,] especially with regard to [a] rule or standard."[46] A common-sense reading of the term suggests that a state regulation applying permitting requirements to, for example, activities that pollute or otherwise disturb a geographically isolated wetland, is more "stringent" than corresponding federal regulation under Clean Water Act §§ 402 and 404, federal provisions that afford no protection to this type of

[40] *E.g.*, Md. Exec. Order No. 01.01.1996.03 (1996) (qualified stringency provision).

[41] *E.g.*, Ohio Rev. Code Ann. § 121.39 (qualified stringency prohibition).

[42] *E.g.*, Okla. Stat. tit. 27A, § 1-1-206 (qualified stringency prohibition).

[43] *E.g.*, Idaho Code Ann. § 39-3601 (stringency prohibition).

[44] *E.g.*, Iowa Code § 455B.173 (stringency prohibition).

[45] *E.g.*, Or. Rev. Stat. § 468B.110(2) (stringency prohibition).

[46] *Merriam-Webster Online Dictionary* (2013).

water. In other words, the more plausible interpretation of a routine state stringency limitation is that state regulation of activities in classes of waters that lie beyond the scope of the federal Clean Water Act is, indeed, "more stringent" than the corresponding federal regulation.

Notwithstanding the ambiguity surrounding the meaning of the term "stringent" in most state provisions, the occasional state provision is quite clear on this point. For example, an Idaho qualified stringency provision applies to portions of proposed state environmental rules that are *either* "broader in scope" *or* "more stringent" than federal law or regulations.[47] And an Arkansas qualified stringency provision expressly covers rules and regulations of the Pollution Control and Ecology Commission involving "classification of the waters of the state."[48] Drawing upon these interpretive nuances, some commentators have parsed state stringency provisions with regard to whether they speak to the circumstances of a state agency seeking to regulate a source that lies beyond federal jurisdiction—in the post-*SWANCC/Rapanos* context, or otherwise.[49] Nevertheless, in his 1995 treatment of the subject, Professor Jerome Organ concluded that the basic state stringency formulation "creates a problematic ambiguity and offers the affected agency, the regulated community, concerned citizens and the courts little insight in the actual extent of the state agency's authority."[50]

We agree. ELI's research identified no means of excluding, with confidence, the *possibility* that most state stringency limitations *could* reasonably be applied to block state agency efforts to protect additional waters beyond the scope of the federal Clean Water Act. The definitive meaning—and reach—of the word "stringent" with respect to additional categories of waters is ultimately one that has to be determined in each instance under state law, and probably by state courts. In the meantime, most state agencies weighing the merits of protecting new classes of waters—faced with political pressure and budgetary constraints—seem unlikely to gamble that a state court will eventually interpret a potentially applicable statutory stringency limitation in the agency's favor.

3. Federal trigger for the provision. Third, the question arises as to what kind of federal action triggers a state stringency limitation. Implicit in the language of most state stringency provisions is that in the absence of any corresponding federal regulation, the state prohibition is not triggered. This is occasionally made explicit, as is this case with qualified stringency prohibitions in West Virginia and Wisconsin.[51] But some state stringency provisions apply to qualify, limit, or prohibit state regulation even where the federal government is silent or has not regulated—

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[47] Idaho Code Ann. § 39-107D.

[48] Ark. Code Ann. § 8-4-201(b).

[49] *See*, *e.g.*, "Obstacles to Devolution," *supra* note 19, at 118-19; "Limitations on State Agency Authority," *supra* note 17, at 1412-19.

[50] "Limitations on State Agency Authority," *supra* note 17, at 1433. He added: "... [S]tate legislatures that have enacted such simplistically drafted statutory constraints on state agency authority have overlooked significant problems arising from the intersection of such spare language and the complexity of federal environmental law."

[51] W. Va. Code § 22-1-3a (absent existence of a federal rule, adoption of a state rule shall not be construed as more stringent than a federal rule); Wisc. Admin. Code [NR] § 1.52(3) (state environmental quality standard is not considered more restrictive than a federal standard in the absence of federal law or regulation establishing a corresponding standard).

including qualified stringency provisions in Idaho,[52] Indiana,[53] and North Dakota.[54] Some state provisions spell out the exact nature of the federal triggering requirement. For example, Colorado's qualified stringency provision applies only if the relevant federal requirement is "enforceable," which presumably covers laws and promulgated regulations and excludes federal policy statements and agency guidance.[55] A Montana qualified stringency provision is broader in that it operates with respect to "comparable federal regulations or guidelines that address the same circumstances."[56]

Regarding Clean Water Act jurisdiction, it is unclear whether the status quo at the federal level is better characterized as an *absence of federal regulation with respect to certain waters*, or instead as *federal regulation that excludes certain waters* (as such regulation has been construed by the Supreme Court).[57] The former could be interpreted as federal "silence;" the latter would more likely serve as a corresponding limit on state regulation under a stringency provision. Lawyers litigating the reach of a stringency provision before a state court could make the argument for either position.

D. IMPLICATIONS FOR PROTECTING ADDITIONAL STATE WATERS

Each stringency provision identified by this study acts as a brake, to a greater or lesser extent, on state agency efforts to take action in the wake of *SWANCC* and *Rapanos*. With more than half of all states having these restrictions on the books, it is unlikely that the nation will fully reclaim protection on a state-by-state basis over the waters excluded from federal jurisdiction by *SWANCC* and *Rapanos*. As has already been discussed, the mere existence of state stringency prohibitions inhibits state regulators, even if they believe that they can overcome a stringency prohibition in part, or comply with a qualified stringency prohibition in full. A rational state agency may well determine that finite funding, staff resources, and political capital are better deployed in areas that present fewer obstacles to success.

For the determined state agency facing a stringency limitation, however, there may be several avenues by which it can properly square the protection of waters with application of the state provision. First, it matters *how* the state agency proposes to bring additional waters under state regulation. An agency may, by regulation, seek to build on its Clean Water Act § 402 or 401 (or, rarely, 404) program based on an interpretation of the state water pollution control law or water quality law used to implement the federal Act. Or, the agency may rely chiefly on a separate state law that operates independently of the federal Clean Water Act (*e.g.*, a state freshwater wetlands law). Some state stringency provisions would appear to limit the reach of

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[52] Idaho Code Ann. § 39-107D (provision applies where state proposes to "regulate an activity not regulated by the federal government").

[53] Ind. Code §§ 13-14-9-3, 13-14-9-4 (provisions reach subject matter areas in which "federal law does not impose restrictions or requirements").

[54] N.D. Cent. Code § 23-01-04.1(2)-(3), (5) (provision applies "where there are no corresponding federal regulations").

[55] Colo. Rev. Stat. § 25-8-202(8).

[56] Mont. Code Ann. § 75-5-203.

[57] 33 C.F.R. § 328.3 (Corps); 40 C.F.R. § 230.3(s) (EPA).

state agencies under either approach. For example, in Arizona, the Department of Environmental Quality must ensure that all of its rules are "adopted and construed to be consistent with and no more stringent than the corresponding federal law that *addresses the same subject matter*."[58] This requirement seems to require even water protection rules promulgated under an independent state law to conform to federal water quality requirements that, of course, "address the same subject matter." But other state stringency provisions—like an Iowa qualified stringency prohibition that applies only where the state agency adopts rules "to implement a specific federal environmental program,"[59] or a Utah qualified stringency provision that applies only to rules issued "for the purpose of the state administering a program under the federal Clean Water Act,"[60]—probably do not reach state efforts that are sufficiently untethered from the federal Act. Thus, state agencies may enjoy more leeway under their state's stringency laws where the state law being interpreted was not adopted to administer a federal Clean Water Act program.

Additionally, the current murky state of federal Clean Water Act jurisdiction—coupled with the potentially broad reach of Justice Kennedy's "significant nexus" test from the *Rapanos* decision—could actually present state agencies with an opportunity to protect more waters. To date, there is no uniform agreement as to which waters are subject to coverage by the federal Act and which are not. Regardless, geographically isolated wetlands, absent a showing of their relationship to traditional navigable waters, are normally found to lie beyond federal jurisdiction.[61] Under a typical state stringency requirement, then, state agencies would probably be unable to protect these wetlands by regulation. But if a significant nexus is found to exist, a geographically remote wetland *is* subject to federal jurisdiction. As a result, even in a state that has a rigorous stringency requirement, an agency regulation that covers wetlands or other waters categorically, based on their connections to downstream waters, would arguably be consistent with—and therefore not more stringent than—federal law as articulated in *Rapanos*.[62] If a state agency subject to a stringency limitation were to adopt regulations to protect new classes of waters—and provide expert agency findings that identify how these waters are connected chemically, physically, or biologically to downstream waters—this would quite possibly comply with the federal significant nexus test and, therefore, with any state stringency requirement. This categorical approach would have the added benefit of eliminating the cumbersome, case-by-case analysis usually needed to ascertain federal jurisdiction under the significant nexus test. While far from an ideal way for a state to protect its waters, and one that could still be subject to legal challenge, this approach suggests at least one way in which a state agency could pursue broad state-level regulation while complying with a state stringency prohibition.

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[58] Ariz. Rev. Stat. Ann. § 49-104(A)(17) (emphasis supplied).

[59] Iowa Code § 455B.105.

[60] Utah Code Ann. § 19-5-105.

[61] *See* discussion of *SWANCC* and *Rapanos* at pages 3-5, *supra*, and accompanying notes.

[62] The basis for such an approach can be found in Justice Kennedy's concurring opinion in *Rapanos*. He writes: "[t]hrough regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow ..., their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Rapanos*, 547 U.S. at 780-81 (Kennedy, J., concurring).

PART II
STATES WITH PROPERTY-BASED LIMITATIONS

State efforts to protect classes of waters that are no longer covered by the federal Clean Water Act, or whose federal coverage is uncertain, will almost always implicate the use of privately owned property. **Twenty-two states** have adopted legal protections, often in the form of "private property rights acts," for the benefit of property owners whose rights are affected by state government action—often including local government action. (See Map 3A: States with Property-Based "Compensation/Prohibition" Limitations; Map 3B: States with Property-Based "Assessment" Limitations; and Map 3C: States with Other Property-Based Limitations.) While these laws rarely contain direct references to water quality or water pollution, it would be difficult for state agencies to protect additional classes of waters located on private property *without* implicating these laws.

The state property-based limitations identified in this study are an outgrowth of "takings" law. Federal takings claims are based on the Takings Clause of the Fifth Amendment of the U.S. Constitution. According to the Supreme Court, the Takings Clause is designed to prevent the government from making certain people shoulder public burdens that "in all fairness and justice, should be borne by the public as a whole."[63] Takings claims fall into two general categories: "physical" takings and "regulatory" takings. A physical taking occurs when the government effects a direct appropriation, or physical invasion, of private property—in which case "just compensation" must be paid to the property owner.[64] A regulatory taking occurs where a court determines that a government regulation so burdens a property owner's use and enjoyment of land that, even though title to the property has not changed hands, the owner has suffered an injury akin to a physical taking.[65] Regulatory takings claims based on federal law, or on a comparable takings provision in state constitutions, have come to be a frequently used tool for challenging the reach and application of environmental regulations. However, most regulation does not meet the threshold constitutional standards that would require compensation under principles of takings law.

The 1990s saw waves of state laws that granted additional rights to property rights owners, above and beyond traditional state and federal takings law, while simultaneously restricting the authority and reach of state agency regulation and local ordinances.[66] Some of

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[63] *E.g.*, *Arkansas Game and Fish Commission v. United States*, 133 S.Ct. 511, 518, 522 (2012) (citations omitted) (ruling that government-induced flooding temporary in duration is not automatically exempt from Takings Clause analysis).

[64] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

[65] *See*, *e.g.*, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (establishing balancing test for determining whether or not a regulatory taking has occurred); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (discussing total regulatory takings).

[66] *See* Carl P. Marellino, "The Evolution of State Takings Legislation and the Proposals Considered During the 1997-98 Legislative Session," 2 N.Y.U. J. Legis. & Pub. Pol'y 143, 149-60 (winter 1998) (student note) (characterizing and discussing various waves of state takings legislation). *See also*, *e.g.*, Glenn P. Sugameli, "Takings Bills Threaten Private Property, People, and the Environment," 8 Fordham Envtl. L.J. 521, 525-50 (1997) (discussing origin of federal takings legislation, and citing to earliest examples). An in-depth discussion of takings law is beyond the scope of this study.

these state private property laws establish a mechanism to compensate a property owner who can demonstrate that a regulation lowered the value of his or her property beyond some threshold amount established by statute. As a practical matter, these **compensation/prohibition** provisions (see Map 3A, below) limit some forms of new environmental regulation, as state agencies cannot afford to pay owners as a condition of having their regulations enforced. Other state laws impose **assessment** requirements that create additional processes for an agency to follow when a proposed regulation is likely to affect private property rights. (See Map 3B, below.) Finally, some states have taken **other** steps (such as establishing a property rights ombudsman or advocate, or creating dispute resolution programs for landowners) that enhance property owners' ability to contest state regulation affecting their property. (See Map 3C, below.) State agencies or localities subject to any of these provisions must take them into account in considering whether to seek regulatory coverage for additional waters, post-*SWANCC/Rapanos*. These three categories of property-based limitations are discussed below in Sections II.A, II.B, and II.C, respectively, and they are used to characterize the property-based provisions identified in the state profiles contained in Appendix 2.

A. COMPENSATION/ PROHIBITION PROVISIONS

Eight states have enacted private property rights legislation that requires state agencies to pay certain private property owners who successfully claim that government regulation has resulted in a devaluation of their property. Typically, the state can avoid payment by waiving application of the regulation to the complaining property owner. These states are Arizona, Florida, Louisiana, Maine, Mississippi, New Jersey, Oregon, and Texas. (See Map 3A, below.) The legislation in these states varies in scope and effect.

Some of these states establish a diminution-in-value threshold for compensation for property owners that is substantially lower than has been traditionally fixed by state or federal regulatory takings law.[67] In these states, it will be difficult for state or local regulators to adopt protections for new classes of waters without triggering claims by property owners. For example, in Arizona, a claim may be brought by a property owner when a state or local "land use law" reduces both the owner's rights in the property *and* the property's fair market value.[68] Florida's expansive Bert Harris Act provides for compensation to a property owner where a state or local government action can be shown to "inordinately burden" an existing use of private property.[69] Oregon's present-day "Measure 49" regime, which to some extent rolled back the more-far-reaching "Measure 37" scheme adopted by voters in 2004, enables property owners to be compensated when a "land use regulation" enacted by a state or local entity both restricts the residential use of property, or a farming or forest practice, and reduces the property's fair market

[67] A regulatory taking occurs under federal law where regulation deprives an owner of all economically beneficial use of property, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992), or where a balancing of various factual inquiries so dictates. This balancing includes a consideration of the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct, investment-backed expectations. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

[68] Ariz. Rev. Stat. Ann. § 12-1134.

[69] Fla. Stat. Ann. § 70.001. Also, Florida has additional property rights protections that pre-date the Bert Harris Act. *See* discussion at pages 69-71, *infra*, and accompanying footnotes (state profile for Florida).

value. Oregon's property rights protections expressly cover laws governing wetlands development and management of water quality on agricultural lands.[70] The Texas law, which applies to "a groundwater or surface water right of any kind," provides for compensation where governmental action restricts or limits the owner's right to use his or her property, so long as the action causes a reduction of at least twenty-five percent in the property's market value. Actions by municipalities are generally excluded.[71]

Map 3A: States with Property-Based "Compensation/Prohibition" Limitations

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Other state compensation legislation is narrower in scope and effect. In Louisiana, for example, the law applies exclusively to state and local governmental actions impacting private agricultural property or forest land; claims for compensation may be brought where there is a diminution in fair market value of the property of at least twenty percent.[72] Mississippi's law, too, covers only state and local actions that diminish the fair market value of agricultural or forest land—though the diminution in value required to trigger the law is set higher, at forty percent.[73] Maine's legislation works simply as a prohibition, without a compensation mechanism, but its requirement is pegged to traditional takings law: the Maine Administrative Procedure Act

[70] Or. Rev. Stat. §§ 195.300, 195.305, 195.310.

[71] Tex. Gov't Code Ann. §§ 2007.002 to 2007.003.

[72] La. Rev. Stat. Ann. §§ 3:3610, 3:3602, 2:3623, 3:3622.

[73] Miss. Code Ann. §§ 49-33-9, 49-33-7.

prohibits the attorney general from approving any new agency rule that is "reasonably expected" to result in a taking of private property.[74]

New Jersey has a property rights provision specific to wetlands. The law does not establish new thresholds or standards for compensation but does provide that a property owner affected by a freshwater wetlands permitting decision made by the Department of Environmental Protection under the state's freshwater wetlands law may bring suit to determine whether the action constitutes a taking of property without just compensation. Note that the New Jersey provision does not apply to the adoption of regulations, but only to permit decisions—it is included in the "compensation/prohibition" category because it articulates a specific remedy and because it includes a pay-or-waive provision.[75]

A feature that has become known as "pay or waive" is common to all of these property rights laws, with the exception of Maine's. This means that a state agency or locality whose action is successfully challenged by a claim for compensation by a property owner may, instead of paying, waive application or enforcement of the legal requirement as to that property owner. As a practical matter, no state or local regulator has a budget from which to pay property owners to comply with the law. Thus, successful claims under pay-or-waive systems nearly always result in waiver.[76]

Each of these state laws contains exceptions, and most include some version of an exception for government action taken to ensure "public health and safety." This is true in Arizona, Louisiana, Mississippi, Oregon, and Texas. Whether actions by state agencies or localities to protect additional classes of waters would be subject to this exception remains unknown—though one could easily imagine a state court limiting application of such an exception to routine and well-established kinds of government activities directed to public protection, such as zoning requirements, fire codes, and health regulations.[77]

Five states with compensation regimes allow successful claimants to recover their attorney fees.[78] This is a further disincentive for a state agency to pursue a regulation that could generate these types of claims.

The eight states identified by this study that have property-based compensation/prohibition provisions adopted these limitations by statute. Most of these states—Florida, Louisiana, Maine, Mississippi, and Texas—adopted their private property rights acts in

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[74] Me. Rev. Stat. Ann. tit. 5, § 8056(6).

[75] N.J. Stat. Ann. § 13:9B-22. Nor does it necessarily follow that New Jersey, one of only two states to have assumed administration of the federal CWA § 404 program, has been influenced in its permitting decisions by the existence of this provision.

[76] *See Track Record*, *supra* note 20, at 48-49.

[77] *But see* Oregon's public health and safety exception, which expressly includes "pollution control regulations." Or. Rev. Stat. § 195.300(21). This provision provides a textual basis from which an agency could argue that regulation of additional classes of waters is necessary to ensure public health and safety. Again, however, ultimate resolution of the scope of the exception lies with the state courts.

[78] These states are Arizona, Florida, Louisiana, Mississippi, and Texas.

the mid-1990s. The expansive Arizona and Oregon laws came in the mid-2000s, by way of voter ballot initiative.

B. ASSESSMENT PROVISIONS

One third of all jurisdictions considered by this study—**17 states**—have private property rights provisions that require state government officials to assess their actions for potential constitutional takings implications, or for other impacts on private property rights.[79] (See Map 3B, below.) These assessment provisions, like their "qualified stringency" cousins discussed above in Section I.B, impose a burden on state (and in some instances, local) governments whose regulatory actions are likely to affect private property.

Most of these state laws—14 of them—mandate that a state agency (and, under some laws, also a locality) conduct a *self-assessment.* Typically, the agency must do this when a proposed rule or other governmental action may result in a taking of private property without just compensation.[80] This takings impact assessment is usually guided both by the law and by a related set of guidelines, often including a checklist for the agency, that has been prepared by the attorney general or that the agency itself has been required to produce. Wyoming's law is typical.[81] It requires a state agency to evaluate proposed regulations or other administrative actions that have "constitutional implications"—meaning that the action could result in an unconstitutional taking of private property. The statute covers proposed rules that may limit the use of private property, as well as dedications and exactions. The Wyoming attorney general has developed guidelines and a checklist to assist agencies in identifying and evaluating actions subject to the statute. Pursuant to the guidelines and checklist, among the issues to be considered by an agency are whether its action requires a property owner to dedicate a portion of property, whether the action has a "significant impact" on the owner's economic interest, and whether the problem that necessitated the government action could be addressed in a less restrictive manner.

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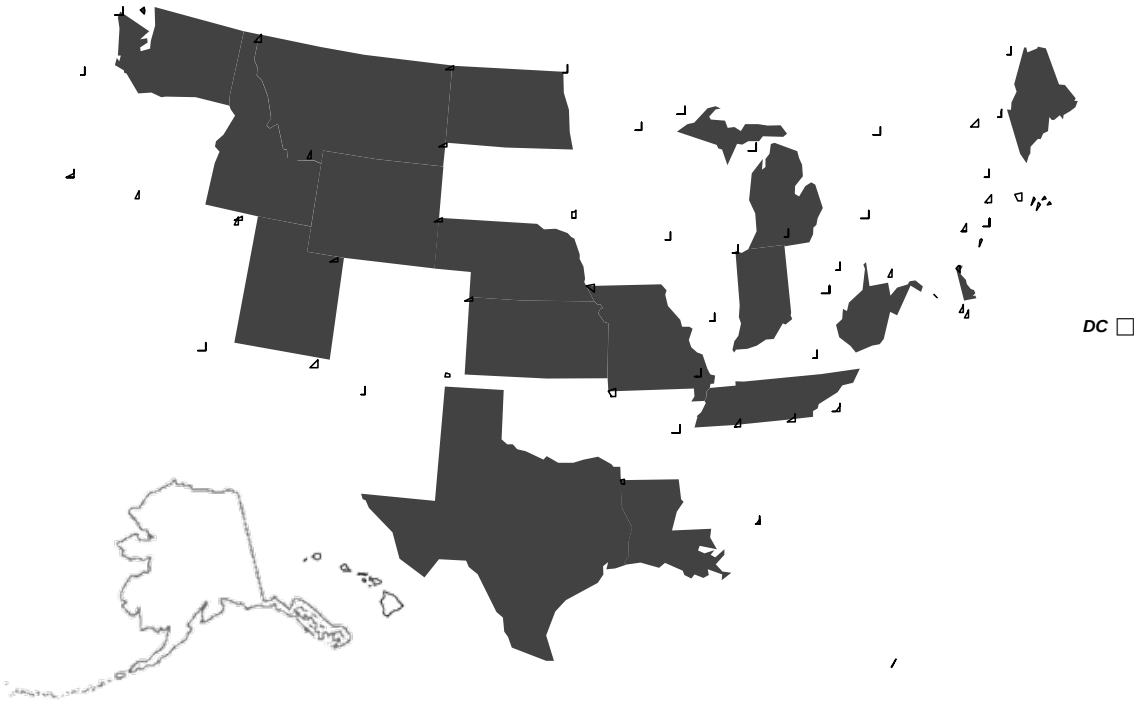
[79] These states are Delaware, Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Missouri, Montana, Nebraska, North Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming.

[80] Although most state assessment provisions are framed in terms of federal and state takings law, some state laws formulate the required assessment of government action in other than constitutional terms. *See*, *e.g.*, La. Rev. Stat. Ann. §§ 3:3609, 3:3622.1 (actions that will likely result in twenty percent diminution in value of agricultural property or forest land); Mo. Rev. Stat. § 536.017 (actions that limit or affect the use of real property require constitutional takings analysis); Neb. Exec. Order No. 95-9 (1995) (actions that may require a private property owner to dedicate a portion of property or grant an easement, that may result in depriving a private property owner of all economically viable use of property, or that may result in a taking); N.D. Cent. Code § 28-32-09 (proposed rule that may limit the use of private real property must be assessed for constitutional takings implications, and for purposes of the agency's assessment, a regulatory taking occurs where there is a diminution in value of more than fifty percent); Tex. Gov't Code Ann. § 2007.043 (action that restricts or limits the owner's right to use his or her property and causes a diminution in value of at least twenty-five percent). Some states also have laws requiring agencies to consider the impacts of regulation on small business. *See*, *e.g.*, 71 Pa. Cons. Stat. § 745.5(a)(10.1), (12.1) (2012 Pennsylvania law requiring small business economic impact analysis and related regulatory flexibility analysis). A discussion of small business impact assessment laws is beyond the scope of this study.

[81] Wyo. Stat. Ann. §§ 9-5-301 to 9-5-305 (Wyoming Regulatory Takings Act).



Map 3B: States with Property-Based "Assessment" Limitations

Eight of the self-assessment states, including Wyoming, require the promulgation of guidelines by the attorney general to guide this assessment process.[82] The other six states required to conduct self-assessments with respect to actions that implicate takings concerns must do so without the benefit of a process created by the attorney general.[83] Various assessment laws—including those in Kansas,[84] Missouri,[85] Montana,[86] Nebraska,[87] and Utah,[88]—require an agency or other regulatory body to submit its takings assessment to the governor or some other high-level government entity, or otherwise to certify that the required assessment has been carried out.

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[82] In addition to Wyoming, these states are Idaho, Kansas, Michigan, Montana, Tennessee, Texas, and Washington. The attorney general guidelines tend to be very similar from one state to the next, and they often do little more than focus the reviewing agency's attention on the reach and limitations of state and federal takings law.

[83] These states include Louisiana, Missouri, Nebraska, North Dakota, Utah, and West Virginia.

[84] Kan. Stat. Ann. §§ 77-701 to 77-711 (report to be submitted to governor and attorney general).

[85] Mo. Rev. Stat. § 536.017 (agency must certify to the secretary of state that a takings analysis has occurred for a proposed rule, or rule will not be published).

[86] Mont. Code Ann. §§ 2-10-101 to 2-10-112 (takings impact assessment to be provided to governor).

[87] Neb. Exec. Order No. 95-9 (1995) (agencies must notify Governor's Policy Research Office in writing when proposed rule or action has certain takings implications and explain the need and justification for the proposed action and describe the potential fiscal impact on the state).

[88] Utah Code Ann. §§ 63L-3-101 to 63L-3-202 (assessment to be submitted to governor and legislative management committee).

Three states—Delaware, Indiana, and Maine—are *external assessment* states with respect to property-based assessment limitations. In Delaware, no agency rule or regulation takes effect until the attorney general reviews it and informs the issuing agency of its potential to result in a taking of private property.[89] Similarly, in Indiana, as part of the legal review process for agency rules, the attorney general must consider whether an adopted rule may constitute a taking of property without just compensation to the owner. If so, the attorney general must advise the governor and the head of the agency.[90] Finally, in Maine, all major substantive agency rules are reviewed by a legislative committee to determine whether they can reasonably be expected to result in a significant reduction in property values.[91]

Aside from whether state property-based assessment provisions mandate an agency self-assessment process or an external assessment process, these provisions vary in other ways. These include whether the provisions apply to actions by local governments as well as state agencies, and whether the required assessment must be made in writing. There are additional wrinkles. In Idaho, for example, a state agency or local government generally needs to prepare a takings analysis only at the request of a property owner. The government action is voidable if no written taking analysis is prepared following a proper request, and the property owner may seek a judicial determination of the validity of the governmental action by initiating court proceedings.[92] Similarly, in Texas, a governmental action requiring a takings impact assessment is void if one has not been prepared. When this happens, an affected property owner may bring suit for a declaration of invalidity of the action.[93] In North Dakota, the threshold question for an agency assessing takings implications is whether the proposed rule may result in a "regulatory taking"—defined as a reduction in value of a property by more than fifty percent. Additionally, a private landowner affected by a state agency rule that limits the owner's use of the property may request in writing that the agency reconsider the application or need for the rule. The agency must consider the request and inform the landowner in writing whether it intends to maintain, modify, or repeal the rule.[94] Under the West Virginia law, when a property owner brings a successful state or federal takings claim or nuisance claim in response to an action by the Department of Environmental Protection, the owner is entitled to attorney fees and costs if the Department either failed to perform a required takings assessment, or performed an assessment but failed to conclude that its action was reasonably likely to require the payment of compensation.[95] Louisiana's law covers only state and local government actions that affect private agricultural land or forest land.[96] Additionally, under Montana's "Little NEPA"—which requires

[89] Del. Code Ann. tit. 29, § 605.

[90] Ind. Code § 4-22-2-32(a)-(b), (f).

[91] Me. Rev. Stat. Ann. tit. 5, §§ 8071(2)-(3), 8072(1), (4), (7), (11), & 8074.

[92] Idaho Code Ann. §§ 67-8001 to 67-8004 (Idaho Regulatory Takings Act). *But see also* Idaho Code Ann. § 67-6508 (local comprehensive planning and zoning efforts to include analyses that take into account property rights pursuant to Idaho Regulatory Takings Act).

[93] Tex. Gov't Code §§ 2007.001 to 2007.045 (Texas Private Real Property Rights Preservation Act). Montana added a similar provision in 2011. Mont. Code Ann. § 2-10-112 (part of the Montana Private Property Assessment Act).

[94] N.D. Cent. Code § 28-32-09.

[95] W. Va. Code §§ 22-1A-1 to 22-1A-6 (Private Real Property Protection Act—applicable only to programs administered by the Department of Environmental Protection).

[96] La. Rev. Stat. Ann. §§ 3:3609, 3:3622.1

environmental impact statements for major state actions significantly affecting the quality of the human environment—agencies are required to consider any regulatory impacts of a proposed action on private property rights.[97]

The assessment frameworks in two states—Montana and Texas—feature particularly broad public notice provisions. Under the Montana Private Property Assessment Act, a state agency, upon completing a required impact assessment, must provide public notice of its intent to engage in the proposed action. The agency must do this through email or U.S. mail to interested persons, and also via the agency website. The agency must provide a summary of the impact assessment and a link to a source for the complete impact assessment. Action may not be taken until the public notice requirement is satisfied.[98] In Texas, prior to engaging in a governmental action covered by the Private Real Property Rights Protection Act that "may result in a taking," a governmental entity is similarly required to give public notice. The notice must include a summary of the takings impact assessment prepared in connection with the action. A political subdivision must give notice by way of a newspaper of general circulation in the county where affected private property is located. A state agency must give notice through the Texas Register and by following any other agency notice requirements required by law.[99]

The assessment regimes in five states authorize an award of attorney fees to property owners in various instances. These include situations where the claimant prevails in a lawsuit: to invalidate a governmental action due to failure of a state agency to comply with assessment requirements;[100] to prove a taking in a situation where the agency failed to comply with assessment requirements;[101] or, simply, to prove a taking.[102]

All but one of the state property-based assessment provisions identified by this study was adopted by statute. Nebraska's requirements were enacted through executive order.[103] Nearly all of these provisions were adopted, or amended in substantial portion, in the early-to-mid 1990s—again, at the zenith of the property rights movement.

C. OTHER PROVISIONS

Four states that have one or both types of property-based limitation discussed above (*i.e.*, either "compensation/prohibition" provisions or "assessment" provisions) also have additional property-based provisions that are characterized for purposes of this study simply as "other."[104] (See Map 3C, below.) None of these provisions bars a state agency or locality from

[97] Mont. Code Ann. § 75-1-201.

[98] Mont. Code Ann. § 2-10-111.

[99] Tex. Gov't Code Ann. § 2007.042.

[100] Montana and Texas.

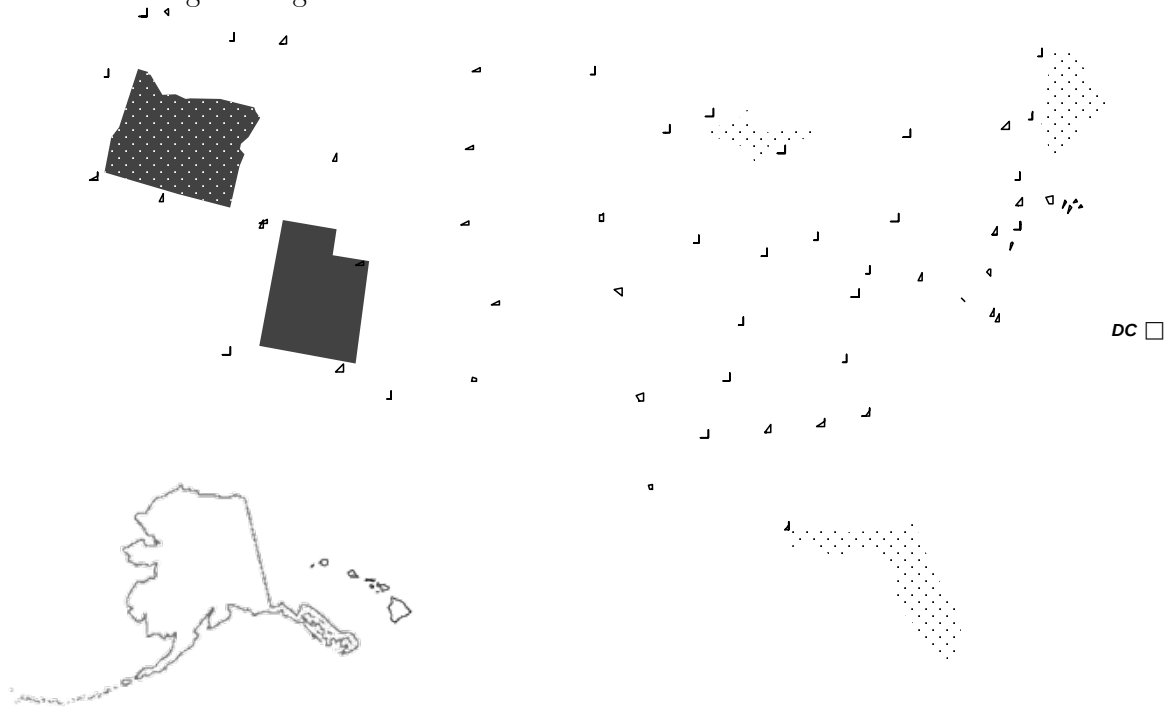
[101] West Virginia.

[102] Kansas and Tennessee.

[103] Neb. Exec. Order No. 95-9 (1995).

[104] These states are Florida, Maine, Oregon, and Utah.

regulating additional classes of waters. But each is potentially a constraint on state regulatory action insofar as it affords private property owners with additional, state-subsidized tools that can facilitate challenges to regulations and ordinances.



Map 3C: States with Other Property-Based Limitations

Property Rights Ombudsman/Advocate

Property Dispute Resolution Program

Note: Oregon has provisions of both types.

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Two states, Utah and Oregon, have established a state-level position of property rights ombudsman/advocate.[105] Utah's property rights ombudsman, the first in the nation, assists state agencies to develop the takings guidelines required by Utah law and may further assist them in analyzing actions with potential takings implications. The office may also advise real property owners who have a legitimate takings claim or questions about takings, and educate stakeholders about their rights and responsibilities under property law. The office, upon request, may arrange for mediation or arbitration between private property owners and government entities pertaining to takings issues.[106] The Oregon ombudsman must review proposed land use regulation claims for completeness, if asked to do so by a claimant under the state property rights law. At the request of either the claimant or a public entity, the ombudsman may facilitate resolution of issues involving a claim.[107]

[105] Similar programs previously established by statute in Arizona and Connecticut have been shuttered.

[106] Utah Code Ann. §§ 13-43-101 to 13-43-206.

[107] Or. Rev. Stat. §§ 195.320, 195.322.

Florida, Maine, and Oregon have established dispute resolution services that cover property rights claims against state agencies. Under Florida's elaborate Land Use and Environmental Dispute Resolution Act, property owners may seek relief when a development order or enforcement action "is unreasonable or unfairly burdens the use of" real property. The filing of a request for relief with the government entity triggers an informal public hearing before a special magistrate, whose first role is to act as a facilitator or mediator between the parties. If no mediated resolution is reached, the special magistrate makes a determination on the unreasonable/unfair burden question and issues a written recommendation. Once the government acts on the recommendation, the property owner may sue in court.[108] Maine's Land Use Mediation Program affords a low-cost mediation option for landowners. The program applies to landowners who have "suffered significant harm as a result of a governmental action regulating land use." The law covers municipal and state governmental land use actions, and the purpose of the mediation is "to facilitate, within existing land use laws, ordinances and regulations, a mutually acceptable solution to a conflict between a landowner and a governmental entity regulating land use."[109] Oregon requires any state agency participating in Oregon Plan programs and activities to, on request, provide written information about the agency's dispute resolution services to any person who believes his property rights may be adversely affected by the Oregon Plan. The Oregon Plan is a comprehensive program for the protection and recovery of species and for the restoration of watersheds throughout the state. The agency must report all requested dispute resolution services, and their outcome, to the appropriate legislative committee.[110]

Each of these "other" property-based laws was adopted by statute, and with the exception of the 2007 Oregon ombudsman provisions, all of them are 1990s-era laws.

D. IMPLICATIONS FOR PROTECTING ADDITIONAL STATE WATERS

Nearly half of all states have in place one or more property-based limitations that a state agency or locality must take into account prior to seeking to regulate additional classes of waters, post-*SWANCC/Rapanos*. Particularly in states with far-reaching private property rights acts, such as Arizona, Florida, Oregon, and Texas, administrative efforts to protect additional waters can be expected to generate claims from property owners that will, at a minimum, absorb significant agency time and resources. Such regulation may well fail altogether, and at the very least it seems likely to result in waivers for complaining property owners. These realities are a disincentive to regulation.

The majority of states with property-based limitations rely principally on assessment provisions. Most of these provisions would likely apply to regulation of new classes of waters on private property. Regulators in these states looking to bring additional waters under legal protection must expend more staff resources than is otherwise required to promulgate regulations. In states that require written takings impact assessments—and especially in jurisdictions where these assessments must be presented to other entities, such as the governor's

[108] Fla. Stat. Ann. § 70.51.

[109] Me. Rev. Stat. Ann. tit. 5, § 3341.

[110] Or. Rev. Stat. § 541.916.

office or a legislative committee—an agency can reasonably expect additional political scrutiny that could call into dispute the agency's scientific judgments. While the issuance of regulations should always be an open, public process, here (as with the qualified stringency provisions discussed above), state law effectively sets up a series of hurdles that may amount to a presumption *against* certain kinds of regulation.

Property-based assessment limitations do not bar agencies or municipalities from seeking to protect additional aquatic resources. But in an era of state and local belt-tightening and sharp political divisions, assessment limitations are a significant barrier to action and seem likely to dissuade many government entities from undertaking the additional cost, time, and risk of failure that these provisions impose on the rulemaking process.

PART III
SYNTHESIS: COMPARING STATES THAT REGULATE BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT TO STATES THAT SELF-LIMIT

Thirty-six states have legal constraints in the form of stringency or property-based limitations, or both, that could affect the ability of state agencies to protect waters not covered by the Clean Water Act, or whose coverage is uncertain. But not every state has chosen to self-limit with respect to the regulation of aquatic resources, or environmental protection more generally: no relevant limitations were identified in 14 states or the District of Columbia. (See Map 4: States with Neither Stringency Nor Property-Based Limitations.)[111] This Part briefly considers how these findings align with our understanding of which states currently regulate a broader scope of waters than the federal Clean Water Act requires.

Map 4: States with Neither Stringency Nor Property-Based Limitations

It is vexing to try to determine with precision which states presently protect waters that are no longer subject to federal regulation (or whose regulation under the federal Clean Water Act has become uncertain), and what those categories of waters are. The Environmental Law

[111] The present study focuses only on state limitation provisions relevant to the protection of additional aquatic resources by state agencies and localities, post-*SWANCC/Rapanos*. To be sure, many, if not all, of these states have *other* sorts of stringency limitations and regulatory review processes that bear on environmental protection.

Institute and others have considered the question,[112] though coming up with a definitive, water-by-water answer has proven elusive for various reasons.

The first is the enormous variation among the states themselves. States have many different kinds of waters,[113] and they protect these waters through different regulatory mechanisms and to different degrees—through delegated Clean Water Act programs, through independent state wetlands legislation, through laws that govern only certain kinds of impacts (*e.g.*, state-sponsored projects), or by way of the federally required Section 401 program. The nature of each state program and its implementation is a state-specific matter that may require not only reading laws and regulations, but also talking to the regulators who implement it.

Second, articulating the post-*SWANCC/Rapanos* coverage problem in terms of a "gap" in federal regulation suggests that what is of primary importance is ascertaining which states have "filled the gap" in the wake of these legal rulings. But this temporal view tends to ignore that some states already had broad water protections on the books prior to *SWANCC*. Third, because *SWANCC* and (especially) *Rapanos* provide little clarity as to which waters are definitively "out" in terms of federal coverage, it is difficult to say with precision what the resulting "gap" in coverage even looks like. For example, although *SWANCC* is often described as holding that "isolated wetlands" are not subject to federal protection under the Clean Water Act, the reality is much more complicated. *SWANCC* was decided on the basis of rejecting the Corps' so-called "Migratory Bird Rule," leaving open the possibility that such "isolated" waters (indeed, the water body considered in *SWANCC* was not even a wetland) could be jurisdictional under other legal theories. And Justice Kennedy's concurring opinion in *Rapanos* provides a rationale for demonstrating that wetlands that are not hydrologically connected to downstream waters can nevertheless be jurisdictional.[114] Similarly, the *Rapanos* opinions leave uncertainty surrounding how federal jurisdiction is to be demonstrated for tributaries that are not perennial.[115]

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[112] *See*, *e.g.*, *America's Vulnerable Waters* (characterizing vulnerable aquatic resources in light of current federal and state law), *supra* note 14; Jon Kessler and Jeanne Christie, Association of State Wetland Managers, "Common Questions: The *SWANCC* Decision; Role of the States in Filling the Gap" (2006), available at http://aswm.org/pdf_lib/CQ_swancc_6_26_06.pdf (describing state efforts to "fill the gap" created by *SWANCC*); Jeanne Christie and Scott Hausmann, "Various State Reactions to the *SWANCC* Decision," 23 Wetlands 653 (Sept. 2003) (hereinafter "Various State Reactions") (summarizing state responses to *SWANCC*). *See also* Association of State Wetland Managers, "State Summaries: State Wetland Program Summaries" (identifying states with wetland regulatory programs), available at http://www.aswm.org/state-summaries). Also relevant to these questions is ELI's multi-year study on the core elements of wetlands programs in the 50 states, published by way of four state-specific reports and a final summary report (2005-08). These documents are available at http://www.eli.org/Program_Areas/state_wetlands.cfm.

[113] *See*, *e.g.*, "Vulnerable Wetland Types Listed by EPA Region and State" (compiling vulnerable wetland types, nationwide) (on file with the authors).

[114] "Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system. *Rapanos*, 547 U.S. at 786. (Kennedy, J., concurring).

[115] *See*, *e.g.*, *San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 707 (9th Cir. 2007) (explaining that in *Rapanos*, "[n]o Justice, even in dictum, addressed the question whether all waterbodies with a significant nexus to navigable waters are covered by the Act"). *See also Rapanos*, 547 U.S. at 733 n.5 (Scalia, J., plurality) ("[w]e have no occasion in this litigation to decide exactly when the drying up of a streambed is continuous and frequent enough to disqualify the channel as a 'wate[r] of the United States'").

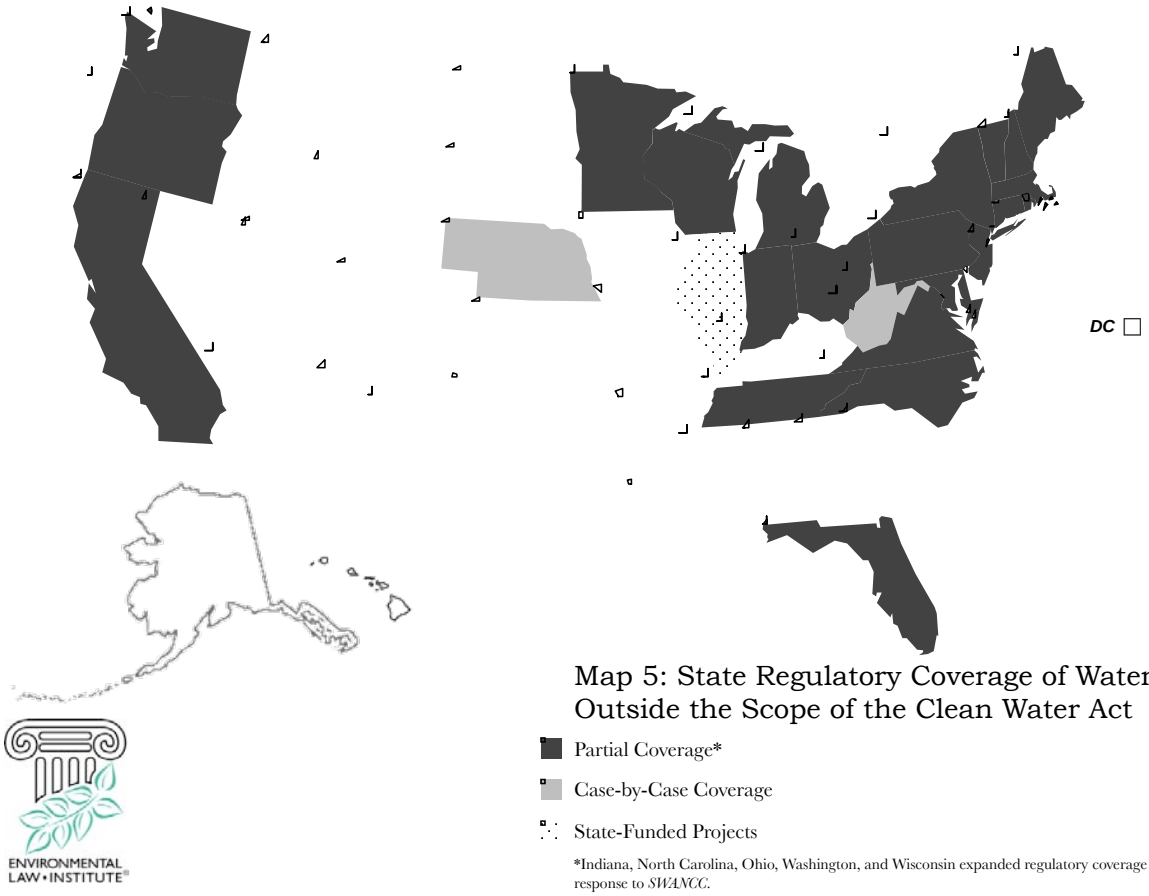
Fourth, a state program may have "filled the gap" with respect to one type of water, but not another—or it may have filled the gap only to a certain degree (*e.g.*, state coverage for wetlands above a certain acreage only; state coverage for some but not all "geographically isolated wetlands"). Taken together, these variables suggest why it is so difficult to answer the seemingly simple question of which states have "filled the gap" in federal coverage for waters like geographically isolated wetlands and non-perennial streams.

Nevertheless, it *is* possible to say with confidence that certain states protect at least *some waters* that are no longer subject to federal regulation (or whose federal coverage has been rendered uncertain) following *SWANCC* and *Rapanos*. Half of all states—25 of them—fall into this category.[116] (See Map 5: State Regulatory Coverage of Waters Outside the Scope of the Clean Water Act.) Twenty-two states afford at least **partial regulatory coverage** to waters whose federal coverage was left in doubt by *SWANCC* and *Rapanos*.[117] Two states, Nebraska and West Virginia, take what can be characterized as a **case-by-case** approach to such waters; and one state, Illinois, applies the additional protection only to state-funded projects. Snapshots of the relevant regulatory provisions for each state appear in the final portion of the state profiles contained in Appendix 2.[118]

[116] At least five of these states—Indiana, North Carolina, Ohio, Washington, and Wisconsin—adopted protections in response to *SWANCC*. There also have been unsuccessful state legislative attempts to respond to the loss of federal jurisdiction. In 2003, for example, the Illinois House passed the Wetlands Protection Act in response to *SWANCC*, but the legislation (H.B. No. 422) subsequently died in the Senate Environment and Energy Committee. For more on this effort, see John Handley, "What is a wetland? As land supply dries up, isolated tracts become a building battleground," *Chicago Tribune*, June 15, 2003, available at http://articles.chicagotribune.com/2003-06-15/business/0306150022_1_mitigation-northern-cook-county-wetlands-plants; Editorial, "Protecting Illinois' wetlands," *Chicago Tribune*, April 1, 2004, available at http://articles.chicagotribune.com/2004-04-01/news/0404010230_1_wetlands-stringent-rules-protect; "Environmental victory and loss in state senate," Progressive Advocacy Blog, post dated May 14, 2004 (citing Illinois Environmental Council newsletter). *See also*, *e.g.*, "Various State Reactions," *supra* note 112, at 656-58 (surveying unsuccessful legislative efforts in California, Delaware, Nebraska, and South Carolina).

[117] The term "partial" is used here because the coverage of most state programs is subject to thresholds (*e.g.*, based on the type or size of the water) and various exceptions. Generally speaking, the nuances of individual state programs and their implementation, combined with the present ambiguity as to which waters are no longer subject to federal Clean Water Act coverage, make it speculative to assert that any state covers *all* waters to the extent they would have been subject to federal law, pre-*SWANCC/Rapanos*.

[118] These state-specific snapshots of relevant state laws and programs focus on regulation of dredge-and-fill activities, particularly with respect to non-tidal wetlands (though tidal and coastal programs are also noted). Voluntary programs are omitted from the state profiles, as neither *SWANCC* nor *Rapanos* implicates voluntary efforts to protect state waters—nor do state stringency or property-based limitations stand in the way of voluntary initiatives.



Map 5: State Regulatory Coverage of Waters Outside the Scope of the Clean Water Act

Partial Coverage*

Case-by-Case Coverage

State-Funded Projects

*Indiana, North Carolina, Ohio, Washington, and Wisconsin expanded regulatory coverage in response to *SWANCC*.

Comparing the research findings of this study with respect to state stringency and property-based limitations against the current list of states that protect their waters more broadly than is required by federal law leads to the following observations:

*States **without** stringency or property-based limitations.* First, there is a correlation between states where no limitations were identified and states that regulate waters more broadly than is required by the federal Clean Water Act. The following eight states, identified by geography and EPA Region, fall into this category (*i.e.*, they have no relevant limitations provisions and regulate waters more broadly than is required by the federal Clean Water Act):

- Northeast: Connecticut, Massachusetts, New Hampshire, Rhode Island, and Vermont (R.1); New York (R.2)[119]
- Midwest: Illinois (R.5)[120]
- West: California (R.9)

Conversely, seven jurisdictions (including the District of Columbia) in which no relevant stringency or property-based limitations were identified have not chosen to regulate more

[119] New York leaves many wetlands unregulated under state law, however, as its freshwater wetlands law generally protects only those wetlands that are 12.4 acres or more in size. *See* N.Y. Envtl. Conserv. Law § 24-0301(1).

[120] Illinois regulates state-funded activities affecting non-CWA waters; but it leaves many of these waters unregulated if affected only by private activities. *See* 20 Ill. Comp. Stat. §§ 830/1-1 to 830/4-1.

broadly than the federal Clean Water Act with respect to waters that have lost federal coverage, or for which coverage may be in doubt. These jurisdictions are:

- Mid-Atlantic: District of Columbia (R.3)
- South: Alabama, Georgia, South Carolina (R.4)
- Southwest: New Mexico (R.6)
- Pacific: Hawaii (R.9), Alaska (R.10)

This observation highlights the fact that stringency and property-based limitations are not the only constraints faced by state agencies and municipalities with respect to protection of aquatic resources. Regulators in states with neither type of limitation must still have legislative authorization to act (*e.g.*, under the terms of a delegated Clean Water Act program or an independent state law, such as a freshwater wetlands permitting law). They also must still navigate the budgetary and political shoals that faced by regulators in every state. And, of course, affording these protections must be an agency or local priority. Thus, the absence of a relevant stringency or property-based limitation is no guarantee of additional state water protections above the federal floor.

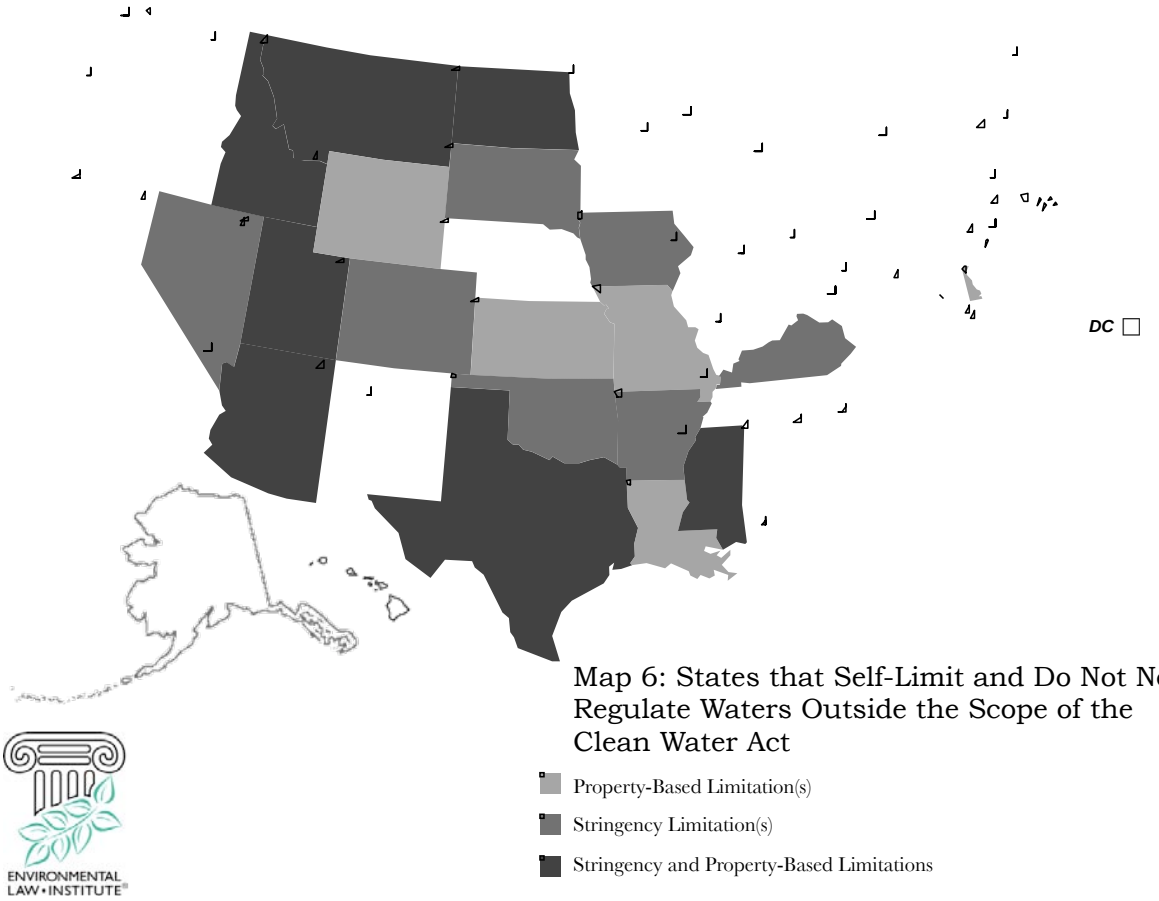
*States **with** stringency or property-based limitations*. The next observation is that 17 of the 36 states that do have stringency or property-based limitations on the books nevertheless have regulated waters beyond the scope of the federal Clean Water Act. These states are:

- Northeast: Maine (R.1), New Jersey (R.2)
- Mid-Atlantic: Maryland, Pennsylvania, Virginia, West Virginia (R.3)
- South: Florida, North Carolina, Tennessee (R.4)
- Midwest: Indiana, Michigan, Minnesota, Ohio, Wisconsin (R.5)
- Central: Nebraska (R.7)
- Northwest: Oregon, Washington (R.10)

There are various explanations for this seeming contradiction. First, the limitation provisions examined by this study rarely seek to bind the state legislature—rather, they constrain environmental agencies (and, in many instances, localities). Thus new state legislation is not subject to these provisions—and in some instances, state legislatures have exempted new water protection rulemaking from existing stringency and property-based limitations. Second, many state water protections pre-date the limitation provisions, which are rarely retroactive. Third, many of the state limitations identified are not total prohibitions (*e.g.*, where the stringency provisions are qualified or the property-based provisions are limited to assessment procedure, they can be overcome). Fourth, state prohibitions are often partial—or, in the case of some property-based provisions, they may not be triggered until claims are brought.

Finally, 19 states with stringency or property-based limitations do not regulate additional waters beyond the federal Clean Water Act. (See Map 6: States that Self-Limit and Do Not Now Regulate Waters Outside the Scope of the Clean Water Act.) These states are:

- Mid-Atlantic: Delaware (R.3)
- South: Kentucky, Mississippi (R.4)
- South-Central: Arkansas, Louisiana, Oklahoma, Texas (R.6)
- Central: Iowa, Kansas, Missouri (R.7)
- Mountain/North-Central: Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming (R.8)
- West: Arizona, Nevada (R.9)
- Northwest: Idaho (R.10)



One would expect to find that many of the states that self-limit do not protect more waters than required by the federal floor—and, indeed, this is the case. All EPA Region 8 states are in this category, as are all Region 6 states except New Mexico. Further research involving interviews with state officials would be necessary to determine the extent to which state legal limitations—rather than other reasons—explain the absence in these states of agency and local regulatory action to protect additional waters.

CONCLUSION

Two thirds of all states have laws that constrain, in one or more ways, the authority of their state and local government officials to adopt aquatic resource protections. They do this by way of stringency limitations, property-based limitations, or a combination of the two. In some instances, these state provisions establish a complete or partial bar to regulatory action; in far more instances, the provisions erect procedural hurdles to agency (or local) action that can add to staff time and expense and may increase the overall likelihood of the proposed regulation or local action succumbing to political objections. Most of these restrictions can be lifted or changed only by the state legislature—or, in the case of executive orders, by the governor.

Understanding how any particular state limitation will affect the ability of a state agency to protect additional waters that lie outside the scope of the Clean Water Act requires a careful

reading of the provision, in light of what the proposed state action aims to achieve. These provisions are so prevalent nationwide, and many of them are of such breadth, that it is unrealistic to expect state agencies or localities to comprehensively protect surface waters left outside of federal Clean Water Act coverage in the wake of the U.S. Supreme Court's decisions in *SWANCC* and *Rapanos*.

APPENDIX 1
RESEARCH METHODOLOGY

On a 50-state basis, ELI staff conducted detailed research on state "no more stringent than" limitations and state property-based limitations, insofar as those provisions could bear on the authority of state agencies or localities to regulate classes of waters not subject to federal jurisdiction under the Clean Water Act, or whose coverage by the federal Act has been rendered uncertain. To ensure a uniform evaluation of state limitations, ELI developed a methodology and format for gathering and organizing information on the relevant provisions for each state. This methodology allowed the data collected from each state to be as comparable as possible—while recognizing that some degree of state-to-state variation is inevitable.

The work began with a compilation and review of relevant secondary sources (including published reports, journal articles, internet resources, and ELI in-house files) that address aspects of the subject. These materials are cited in the footnotes to the summary report. Relevant references from these sources to state laws, regulations, and executive orders were organized on a state-by-state basis.

After cataloguing state law citations from secondary sources, ELI staff conducted independent research for all states and D.C., using tailored searches of subscription-based Westlaw electronic databases, as well as other free online databases. This component of ELI's research was used to identify legal provisions that had been added or amended subsequent to publication of the relevant secondary sources, as well as to pick up any citations that the earlier works may have overlooked. Multiple, overlapping keyword searches were employed in Westlaw's databases for each state to maximize the possibility of identifying state stringency and property-based provisions that might rely on uncommon formulations of the key state provisions. ELI's secondary-source research served as a backstop to this process, in that after primary research was completed for each state, these results were compared with the research from secondary sources to ensure that the methodology had not omitted significant results already known to exist. When relevant state statutory provisions were identified, by way of either primary or secondary research, staff then reviewed states' corresponding administrative codes through additional electronic searches to determine whether any regulations implementing these statutes could be located. Additionally, staff conducted keyword searches of state constitutions and executive orders for every jurisdiction.

The results of ELI's state research from primary and secondary sources provided the basis for developing an initial draft of each state's "profile," which contained for each relevant provision a summary, a legal citation, and excerpts of operative language. The initial profile drafts were used by additional ELI staff as a basis for: researching the legislative history of the identified provisions; searching online for articles and other commentary on relevant provisions; and, in some instances, identifying relevant decisional law interpreting state law provisions. Where a state provision required that guidelines or checklists be developed by the attorney general or a state agency, and these resources could not be located online, ELI staff communicated directly with state personnel (*e.g.*, in the relevant attorney general's office, state environmental agency, property rights ombudsman's office, or state legislative library) by email or telephone to obtain further relevant, publicly available materials. ELI senior staff reviewed

and revised each state profile, following up as necessary with spot research and clarifying questions for staff researchers.

Finally, for each state, ELI staff prepared for the profile an "in brief" summary indicating whether, and if so how, each state regulates waters that lie outside of federal jurisdiction under the Clean Water Act following the *SWANCC* and *Rapanos* decisions, or whose federal coverage has been rendered uncertain. These state summaries were guided principally by ELI's earlier, comprehensive, multi-year research effort (2005-2008) to examine the core elements of every state's wetlands programs. Using the contents of this earlier work as a baseline, ELI staff supplemented it by: reviewing published secondary resources that discuss state "gap filling," carrying out targeted research of state legislation and regulations, and visiting state agency websites for current information on relevant programs. Note that the "in brief" summaries of state law at the end of each state profile are intended only to provide a snapshot of state waters regulation to lend context to the discussion of stringency and property-based limitations; these summaries are not meant to be comprehensive.

The principal research supporting this study was completed in early 2011. ELI staff subsequently undertook further updating research to bring the document up to date through 2012. This study does not address any state legislation introduced or acted upon in 2013, nor is it intended to reflect other relevant developments occurring later than December 2012.

Appendix 2
State Profiles

ALABAMA

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Alabama does not have a regulatory program under state law addressing dredge and fill activities in its nontidal waters and wetlands. It relies on Clean Water Act § 401. Alabama has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

ALASKA

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

None identified.

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IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Alaska does not have a regulatory program under state law addressing dredge and fill activities in its nontidal waters and wetlands. It relies on Clean Water Act § 401. Alaska has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

ARIZONA

Arizona law imposes *stringency prohibitions* and *property-based limitations*.

STRINGENCY LIMITATIONS

1) Prohibitions

Arizona agencies must submit their proposed rules to the Governor's Regulatory Review Council for review.[121] The Council is prohibited from approving a state rule that is more stringent than a "corresponding federal law," unless there is statutory authority to exceed the requirements of that federal law.

The Arizona Department of Environmental Quality (DEQ) also must ensure that *all* state laws, rules, standards, permits, variances, and orders are adopted and construed to be consistent with and no more stringent than "the corresponding federal law that addresses the same subject matter." The requirement applies unless the state legislature specifically authorizes otherwise.

Further, DEQ is specifically prohibited from adopting any requirement that is more stringent than the point source permitting requirements under the federal Clean Water Act.[122] Counties are prohibited from implementing a stormwater program more stringent than a requirement of the federal Clean Water Act.

Legal Authority:

- Ariz. Rev. Stat. Ann. § 41-1052(D)(9) (council review and approval)

"D. The [governor's regulatory review council] shall not approve [a proposed agency] rule unless: ...

9. The rule is not more stringent than a corresponding federal law unless there is statutory authority to exceed the requirements of that federal law...."

- Ariz. Rev. Stat. Ann. § 49-104(A)(17) (powers and duties of the department and director)

"A. The [Arizona Department of Environmental Quality] shall ...

[121] Ariz. Rev. Stat. Ann. § 41-1052(A). The term "agency" is broadly defined to cover state boards, departments, commissions, and similar administrative units, though it does not include political subdivisions of the state. Ariz. Rev. Stat. Ann. § 41-1001(1). For more on the Governor's Regulatory Review Council, see the Council's website: http://www.grrc.state.az.us/.

[122] Although these DEQ prohibitions are in statutory sections dealing with point source regulation, there is statutory language ("The director shall not adopt any requirement that is more stringent than or conflicts with any requirement of the clean water act") that may support an argument that the limitation is not confined to the point source program.

17. Unless specifically authorized by the legislature, ensure that state laws, rules, standards, permits, variances and orders are adopted and construed to be consistent with and no more stringent than the corresponding federal law that addresses the same subject matter...."

- Ariz. Rev. Stat. Ann. § 49-203(A)(2) (powers and duties of the director and department)

  "A. The director [of Arizona DEQ] shall: ... 2. Adopt, by rule, a permit program that is consistent with but no more stringent than the requirements of the clean water act for the point source discharge of any pollutant or combination of pollutants into navigable waters...."

- Ariz. Rev. Stat. Ann. § 49-255.01(B) (Arizona pollutant discharge elimination system)

  "The director [of Arizona DEQ] shall adopt rules to establish an AZPDES permit program consistent with the requirements of §§ 402(b) and 402(p) of the clean water act. This program shall include requirements to ensure compliance with § 307 and requirements for the control of discharges consistent with §§ 318 and 405(a) of the clean water act. The director shall not adopt any requirement that is more stringent than or conflicts with any requirement of the clean water act. The director may adopt federal rules pursuant to § 41-1028 [incorporation by reference] or may adopt rules to reflect local environmental conditions to the extent that the rules are consistent with and no more stringent than the clean water act and this article."

- Ariz. Rev. Stat. Ann. § 49-371(B) (local stormwater quality programs)

  "An ordinance, rule or regulation adopted pursuant to this section, or a stormwater management program developed and implemented by a county pursuant to this section, shall not be more stringent than or conflict with any requirement of the clean water act."

  History: The current relevant text of § 41-1052 was enacted in 2010.[123] These amendments to existing law followed a series of executive orders imposing moratoria on regulatory rulemaking in Arizona.[124]

  The current relevant text of § 49-104 was enacted in 2010.[125]

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[123] Law of May 10, 2010, ch. 287, § 10, 2010 Ariz. Legis. Serv. Ch. 287 (West) (enacting H.B. No. 2260; renumbered by H.B. No. 2617).

[124] *E.g.*, Executive Order No. 2010-13, Continuation of the Moratorium on Regulatory Rule Making, Gov. Janice Brewer, June 30, 2010. Arizona's rulemaking review and moratorium process has been repeatedly extended and is now effective through Dec. 31, 2014. Executive Order No. 2012-03, State Regulatory Review, Moratorium and Streamlining to Promote Job Creation and Retention," Gov. Janice Brewer, June 26, 2012.

[125] Law of May 11, 2010, ch. 309, § 14, 2010 Ariz. Legis. Serv. Ch. 309 (West) (enacting H.B. No. 2617).

The current relevant text of § 49-203 and § 49-255.01 was enacted in 2001.[126] During the committee hearings, a representative of the Arizona Chamber of Commerce stated that the "consistency requirement" (that Arizona regulating entities should not regulate more stringently than their federal counterparts) was essential to protect businesses that had become accustomed to EPA's federal floor over the past thirty years.[127]

Section 49-371(B) was enacted in 2008.[128] During the committee hearings, a representative from Maricopa County argued that state authority to promulgate more stringent regulations would create two competing standards that would ultimately compromise compliance practices within the regulated community.[129]

In 2012, a bill was introduced (but not enacted) that would authorize the director of Arizona DEQ to adopt by rule a state program to assume permitting authority under CWA § 404 that is "consistent with but no more stringent than the requirements of the clean water act for the discharge of dredged or fill material into navigable waters."[130]

2) Qualified Prohibitions

None identified.

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

The Arizona Private Property Rights Protection Act (Ariz. Rev. Stat. Ann. §§ 12-1131 to 12-1138) affords private property owners the right to be compensated when any state or local "land use law" enacted after the owner's acquisition of the property reduces both the owner's rights in his or her property and the fair market value of the property.[131] In the face of a claim, the state may respond by paying, or by waiving enforcement against the claimant. If the government entity does not grant relief, the owner may bring suit. The statute exempts land use laws that limit property use "for the protection of the public's health and safety," including rules and regulations

[126] Law of May 7, 2001, ch. 357, §§ 2, 5, 2001 Ariz. Sess. Laws 1999, 2002-03, 2007 (enacting H.B. No. 2426).

[127] Arizona Committee Minutes, April 10, 2001: Hearing on H.B. 2426 Before the S. Comm. on Appropriations, 45th Leg., 1st Sess. (Ariz. 2001) (statement of David Kimball, Environment Committee Chairman of the Arizona Chamber of Commerce and the Greater Phoenix Chamber of Commerce).

[128] Law of May 12, 2008, ch. 192, § 2, 2008 Ariz. Sess. Laws 835, 843 (enacting S.B. No. 1288; amended 2009).

[129] Arizona Committee Minutes, April 9, 2008: Hearing on S.B. 1288 Before the H. Comm. on Environment, 48th Leg., 2d Sess. (Ariz. 2008).

[130] S.B. No. 1418 § 1, 50th Leg. 2nd Reg. Session, 2012, introduced by Sen. Griffin, available at http://www.azleg.gov/legtext/50leg/2r/bills/sb1418p.pdf.

[131] The Act also applies where a land use law simply expands on a pre-existing restriction that predated the Act. *Sedona Grand, LLC v. City of Sedona*, 270 P.3d 864, 865 (Ariz. App. 2012).

relating to "pollution control." For the public health and safety exception to apply, this must have been the principal purpose for enacting the law.[132] Courts have yet to determine the extent to which state water protection regulations are covered by this statutory definition of "land use laws"—and if so, whether they are subject to the public health and safety/pollution control exception.[133]

Legal Authority:

- Ariz. Rev. Stat. Ann. § 12-1134 (diminution in value; just compensation)

"A. If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any *land use law* enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.

[Note: "Land use law" means "any statute, rule, ordinance, resolution or law enacted by this state or a political subdivision of this state that regulates the use or division of land or any interest in land or that regulates accepted farming or forestry practices." Ariz. Rev. Stat. Ann. § 12-1136.]

B. This section does not apply to land use laws that:

1. Limit or prohibit a use or division of real property for the protection of the public's health and safety, including rules and regulations relating to fire and building codes, health and sanitation, transportation or traffic control, solid or hazardous waste, and pollution control;
2. Limit or prohibit the use or division of real property commonly and historically recognized as a public nuisance under common law; ...
6. Do not directly regulate an owner's land; or
7. Were enacted before the effective date of this section.

C. This state or the political subdivision of this state that enacted the land use law has the burden of demonstrating that the land use law is exempt pursuant to subsection B.

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[132] *Sedona Grand, LLC*, 270 P.3d at 869.

[133] *See generally* Shaun McKinnon, "Prop. 207 May Stall Water Regulation," *Ariz. Republic*, Nov. 4, 2006, at B4; Jeffrey L. Sparks, "Land Use Regulation in Arizona after the Private Property Rights Protection Act (Note)," 51 Ariz. L. Rev. 211, 219 (2009) (discussing whether law might hinder regulation of water resources). *But see* 2008 Ariz. Op. Atty. Gen., No. I08-011 (R08-017) (attorney general opinion determining that ordinances or other laws implementing two state air pollution control statutes would be covered by § 12-1134 exception for public health and safety/pollution control).

Another Arizona law affords to property owners an express right to appeal a county's adoption or amendment of a zoning regulation that results in a taking. Ariz. Rev. Stat. Ann. § 11-832. *See* AZ Legis. 244 (2010), 2010 Ariz. Legis. Serv. Ch. 244 (S.B. No. 1206). This requirement is grounded in traditional takings law.

D. The owner shall not be required to first submit a land use application to remove, modify, vary or otherwise alter the application of the land use law to the owner's property as a prerequisite to demanding or receiving just compensation pursuant to this section.

E. If a land use law continues to apply to private real property more than ninety days after the owner of the property makes a written demand in a specific amount for just compensation to this state or the political subdivision of this state that enacted the land use law, the owner has a cause of action for just compensation in a court in the county in which the property is located, unless this state or political subdivision of this state and the owner reach an agreement on the amount of just compensation to be paid, or unless this state or political subdivision of this state amends, repeals, or issues to the landowner a binding waiver of enforcement of the land use law on the owner's specific parcel.

F. Any demand for landowner relief or any waiver that is granted in lieu of compensation runs with the land...."

- Ariz. Rev. Stat. Ann. § 12-1135 (attorney fees and costs)

"A. A property owner is not liable to this state or any political subdivision of this state for attorney fees or costs in ... any action for diminution in value....

D. A prevailing plaintiff in an action for just compensation that is based on diminution in value pursuant to § 12-1134 may be awarded costs, expenses and reasonable attorney fees."

History: The Arizona Private Property Rights Protection Act became law by virtue of voter approval of Proposition 207 in November 2006, with nearly sixty-five percent in favor.[134]

2) Assessment

None identified.

3) Other

None identified.[135]

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[134] *E.g.*, Linley S. Wilson, "Lessons from Oregon: Arizona's Approach to Land Use Regulation," Arizona State Law Journal 505, 516 (2009).

[135] There was previously within the office of the Arizona legislative council a state-level advocate position to represent and advocate for the interests of private property owners in proceedings involving governmental action. Ariz. Rev. Stat. Ann. § 41-1312 (repealed). It was created in 1994 and modified by legislative action in 2000. 2000 Ariz. Legis. Serv. Ch. 272 (H.B. No. 2384), approved April 17, 2000 (West). However, the position has been vacant and without appropriated funding since the early 2000s, and it appears to have now expired under Arizona agency sunsetting requirements. *See* Minutes of Interim Meeting of the Arizona State Leg. (49th leg., 1st reg. session), Senate

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Arizona does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. Arizona has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

Government Institutions and House of Representatives Government Committee of Reference for the Sunset Review of Various Bodies (Including the Ombudsman for Private Property Rights), Oct. 8, 2009.

ARKANSAS

Arkansas law imposes *qualified stringency prohibitions*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.

2) Qualified Prohibitions

The Arkansas Pollution Control and Ecology Commission is subject to stringency requirements with respect to: (1) rulemaking to implement the substantive statutes administered by the Arkansas Department of Environmental Quality; and (2) more specifically, promulgating water quality standards, classifying the waters of the state, and issuing moratoria or suspensions on the processing of permits.

Prior to promulgating any such rule or regulation that is more stringent than "federal requirements," the Commission must consider its economic impact on and environmental benefit for the people of Arkansas, including the entities that will be subject to the regulation. The Commission is required to implement rules to define the extent of the analysis required; the requirements must include preparation of a written report that is available for public review during the public comment period for the proposed rule or regulation.[136] After the public comment period closes, the Commission must compile a rulemaking record or response to comments demonstrating "a reasoned evaluation of the relative impact and benefits of the more stringent regulation."[137]

Legal Authority:

- Ark. Code Ann. § 8-1-203(b) (pollution control and ecology commission's authority)

"(b) The [Arkansas Pollution Control and Ecology Commission's] powers and duties shall be as follows:

(1)(A) Promulgation of rules and regulations implementing the substantive statutes charged to the Arkansas Department of Environmental Quality for administration.

[136] Research revealed no rules promulgated by the Commission to implement the stringency analysis provisions.

[137] Arkansas has another water-related provision that is *arguably* a qualified stringency prohibition in that it authorizes the state water pollution control agency "to require conditions in permits ... regarding the achievement of effluent limitations based upon the application of such levels of treatment technology and processes as are required under the federal act or any more stringent effluent limitations necessary to meet water quality criteria or toxic standards established pursuant to any state or federal law or regulation." Ark. Code Ann. § 8-4-207(1)(A). However, this provision appears to allow such a degree of flexibility as to pose little or no obstacle to more-rigorous state regulation.

(B) In promulgation of such rules and regulations, prior to the submittal to public comment and review of any rule, regulation, or change to any rule or regulation that is more stringent than the federal requirements, the commission shall duly consider the economic impact and the environmental benefit of such rule or regulation on the people of the State of Arkansas, including those entities that will be subject to the regulation.

(C) The commission shall promptly initiate rulemaking proceedings to further implement the analysis required under subdivision (b)(1)(B) of this section.

(D) The extent of the analysis required under subdivision (b)(1)(B) of this section shall be defined in the commission's rulemaking required under subdivision (b)(1)(C) of this section. It will include a written report which shall be available for public review along with the proposed rule in the public comment period.

(E) Upon completion of the public comment period, the commission shall compile a rulemaking record or response to comments demonstrating a reasoned evaluation of the relative impact and benefits of the more stringent regulation...."

- Ark. Code Ann. § 8-4-201(b) (powers and duties)

"(b) The Arkansas Pollution Control and Ecology Commission is given and charged with the following powers and duties:

(1)(A) Promulgation of rules and regulations, including water quality standards and the classification of the waters of the state and moratoriums or suspensions of the processing of types or categories of permits, implementing the substantive statutes charged to the department for administration.

(B) In promulgation of such rules and regulations, prior to the submittal to public comment and review of any rule, regulation, or change to any rule or regulation that is more stringent than federal requirements, the commission shall duly consider the economic impact and the environmental benefit of such rule or regulation on the people of the State of Arkansas, including those entities that will be subject to the regulation.

(C) The commission shall promptly initiate rulemaking proceedings to further implement the analysis required under subdivision (b)(1)(B) of this section.

(D) The extent of the analysis required under subdivision (b)(1)(B) of this section shall be defined in the commission's rulemaking required under subdivision (b)(1)(C) of this section. It will include a written report that shall be available for public review along with the proposed rule in the public comment period.

(E) Upon completion of the public comment period, the commission shall compile a rulemaking record or response to comments demonstrating a reasoned evaluation of the relative impact and benefits of the more stringent regulation...."

History: The relevant language in § 8-1-203 was enacted in 1993.[138] The relevant language in § 8-4-201 was enacted in 1997.[139]

[138] Act of April 20, 1993, Act 1264, § 2, 1993 Ark. Acts 4144, 4144–45 (enacting H.B. No. 1988). H.B. No. 1988 was introduced by Rep. Thurman. *See* 79th Gen. Assemb., Reg. Sess. (Ark. 1993; amended 1995).

[139] Act of April 8, 1997, Act 1219, § 5, 1997 Ark. Acts 6859, 6863 (enacting H.B. No 2229). H.B. No. 2229 was introduced by Rep. Malone. *See* 81st Gen. Assemb., Reg. Sess. (Ark. 1997; amended 1999).

PROPERTY-BASED LIMITATIONS

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Arkansas does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. Arkansas has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

CALIFORNIA

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

None identified.[140]

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: California's Porter-Cologne Water Quality Control Act protects all waters of the state, implicitly including wetlands.[141] In the wake of the *SWANCC* decision, the State Water Resources Control Board issued a guidance document re-affirming the state's protection of "isolated" waters.[142] Pursuant to the guidance, the dredging, filling, or excavation of isolated waters constitutes a discharge of waste to the waters of the state, and prospective dischargers are required to submit a report of waste discharge to the regional water quality control board and otherwise comply with Porter-Cologne.

In early 2013, the State Water Resources Control Board re-issued its new draft Water Quality Control Policy for Wetland Area Protection and Dredged or Fill Permitting.[143] The proposed new policy is intended, among other things, to "clarify the California Water Board's authority over wetlands in order to fully protect these aquatic resources" in the wake of the *SWANCC* and *Rapanos* rulings.[144] The objectives include establishing a

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[140] In June 2008, California voters rejected Proposition 98, which would have amended the California constitution and, according to some observers, could have invalidated or required the state to pay compensation to owners to comply with various state and local environmental regulations. *E.g.*, California Center for Environmental Law & Policy, *California's Ballot Propositions 98 and 99: Legal and Conservation Risks* (2008).

[141] Cal. Water Code § 13050(e).

[142] Memorandum from Celeste Cantu, Executive Director, California Environmental Protection Agency to Regional Board Executive Officers (Jun. 2, 2004) (citing 2001 legal opinion from SWRCB confirming state jurisdiction over isolated wetlands), available at http://www.swrcb.ca.gov/water_issues/programs/cwa401/docs/isol_waters_guid.pdf.

[143] State Water Resources Control Board, "Water Quality Control Policy for Wetland Area Protection and Dredged or Fill Permitting" (preliminary draft version 6.5), Jan. 28, 2013, available at http://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/wrapp/policy_draft.pdf. This supersedes version 1.0 of the preliminary draft policy, which had been released on March 9, 2012.

[144] *Id.* at 3. The proposed new policy follows up on State Water Board Resolution No. 2008-0026, "Development of a Policy to Protect Wetlands and Riparian Areas in Order to Restore and Maintain the Water Quality and Beneficial Uses of the Waters of the State" (Apr. 15, 2008) (citing state's continued loss of functional wetlands and calling for greater wetland protections), available at http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2008/rs2008_0026.pdf.

new statewide definition of a wetland and adjusting the existing regulatory program for wetlands to increase consistency across the state's Water Boards.[145]

Pursuant to the Land and Streambed Alteration Program, landowners and developers must notify the Department of Fish and Game of the proposed activity where construction projects would impact wetlands associated with rivers, streams, or lakes. If the Department determines that the activity may substantially adversely affect fish and wildlife resources, a Lake or Streambed Alteration Agreement (which includes reasonable conditions necessary to protect the resources) is prepared.[146]

The McAteer-Petris Act[147] established the San Francisco Bay Conservation and Development Commission and regulates tidal wetlands and waters of the San Francisco Bay through a permitting system.[148] The Commission's jurisdiction extends to all tidal areas of the Bay, including sloughs, marshlands, and submerged lands, the shoreline of the Bay up to 100 feet inland, salt ponds, managed wetlands, as well as areas subject to tidal action.[149]

The California Coastal Act (CCA)[150] imposes requirements with regard to coastal zone management and wetlands protection.[151] It limits dredge and fill activities in coastal wetlands to low-impact uses, such as restoration or research.[152] The CCA also prohibits "coastal-dependent development" in wetlands.[153]

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[145] California Water Boards, "Wetlands: Frequently Asked Questions" (May 8, 2012), available at http://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/wrapp/wetlands_faq2012.pdf.

[146] Cal. Fish & Game Code § 1602.

[147] Cal. Gov't Code §§ 66600 to 66694; Cal. Code Regs. tit. 14, §§ 10110 to 11990.

[148] Cal. Gov't Code §§ 66601, 66632(a).

[149] Cal. Gov't Code § 66610.

[150] Cal. Pub. Res. Code §§ 30000 to 30900.

[151] Cal. Pub. Res. Code §§ 30600(a), 30106.

[152] Cal. Pub. Res. Code § 30233.

[153] Cal. Pub. Res. Code § 30255. For more on California law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase III*, Appendix: California, at 45 (Mar. 2007).

COLORADO

Colorado law imposes *stringency prohibitions* and *qualified stringency prohibitions*.

STRINGENCY LIMITATIONS

1) Prohibitions

The Colorado Department of Public Health and Environment is prohibited from requiring permits for irrigation flows (or return flows), or permits for various kinds of agricultural waste, except as required by the federal Clean Water Act. Where permits are required, their provisions cannot be more stringent than what is required by the federal Clean Water Act. This narrow stringency prohibition expressly covers monitoring and reporting requirements.

Legal Authority:

- Colo. Rev. Stat. § 25-8-504(1)-(2)(a) (agricultural wastes)
(see also 5 Colo. Code Regs. § 1002-61.3(1)(b)-(c) (Colorado Discharge Permit System Regulations—Applicability))

"(1) Neither the [Water Quality Control Commission in the Department of Public Health and Environment] nor the [Division of Administration] shall require any permit for any flow or return flow of irrigation water into state waters except as may be required by the federal act or regulations. The provisions of any permit that are so required shall not be any more stringent than, and shall not contain any condition for monitoring or reporting in excess of, the minimum required by the federal act or regulations.

(2)(a) Neither the commission nor the division shall require any permit for animal or agricultural waste on farms, ranches, and horticultural or floricultural operations, except as may be required by the federal act or regulations. The provisions of any permit that are so required shall not be any more stringent than, and shall not contain any condition for monitoring or reporting in excess of, the minimum required by the federal act or regulations...."

The regulation tracks the statutory language.

History: The relevant statutory language was enacted in 1981.[154]

[154] Colorado Water Quality Control Act, ch. 324, § 1, 1981 Colo. Sess. Laws 1310, 1332 (enacting S.B. No. 10; amended 2005).

2) Qualified Prohibitions

Rulemaking by the Colorado Water Quality Control Commission is subject to both procedural and substantive limitations. Should the Commission wish to adopt a rule more stringent than the corresponding enforceable federal requirement, it must find—and demonstrate at a public hearing—that the more stringent requirement is "necessary" to protect public health, the beneficial use of water, or the environment. The Commission must explain its determination in writing, including a discussion of the relevant information and studies forming the basis for its conclusion.

This provision has broad application, in light of the Commission's authority to "develop and maintain a comprehensive and effective program for prevention, control, and abatement of water pollution and for water quality protection throughout the entire state and, to ensure provision of continuously safe drinking water by public water system...."[155] This includes establishing permit requirements for the discharge of pollutants.

Legal Authority:

- Colo. Rev. Stat. § 25-8-202(8) (duties of commission—rules)

"(a) The [Water Quality Control Commission] may adopt rules more stringent than corresponding enforceable federal requirements only if it is demonstrated at a public hearing, and the commission finds, based on sound scientific or technical evidence in the record, that state rules more stringent than the corresponding federal requirements are necessary to protect the public health, beneficial use of water, or the environment of the state. Those findings shall be accompanied by a statement of basis and purpose referring to and evaluating the public health and environmental information and studies contained in the record which form the basis for the commission's conclusion.

(b) The existing policies, rules, and regulations of the commission and [Division of Administration of the Department of Public Health and Environment] shall be applied in conformance with section 25-8-104 [interpretation and construction of water quality provisions] and this section."

History: The relevant statutory language was introduced in 1989.[156]

PROPERTY-BASED LIMITATIONS

None identified.

[155] Colo. Rev. Stat. § 25-8-202(1).

[156] Act of June 8, 1989, ch. 239, § 2, 1989 Colo. Sess. Laws 1171, 1172-74 (enacting S.B. No. 181; amended 2008).

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Colorado does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. Colorado has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

CONNECTICUT

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

None identified.[157]

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Connecticut provides regulation for some waters that may be subject to a loss of protection under *SWANCC* and *Rapanos*.

Connecticut defines "waters" for purposes of its water pollution control law as "all tidal waters, harbors, estuaries, rivers, brooks, watercourses, waterways, wells, springs, lakes, ponds, marshes, drainage systems and all other surface or underground streams, bodies or accumulations of water, natural or artificial, public or private, which are contained within, flow through or border upon this state or any portion thereof."[158]

The Inland Wetlands and Watercourses Act regulates activities in freshwater wetlands at the municipal level.[159] Municipal Inland Wetland Agencies use enforcement mechanisms, such as written orders to cease detrimental activities and fines for noncompliance.[160] This statute also authorizes inland wetland mitigation.[161] The Inland Wetlands and Watercourses Act requires all municipal authorities to report permit and enforcement actions to the Commissioner of the Department of Environmental Protection for entry into a database.[162]

The Department of Environmental Protection's Office of Long Island Sound Programs administers Connecticut's Tidal Wetlands Act and Coastal Management Act.[163] The

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[157] In 2006, the Connecticut General Assembly established an Ombudsman for Property Rights to perform various tasks related to the use of eminent domain in the state. *See* Conn. Gen. Stat. §§ 48-50 to 48-57. The office was closed due to budget constraints, effective September 2009. *See*, *e.g.*, Robert H. Thomas, "Connecticut Property Rights Ombudsman Falls to Budget Axe," Blog Post, Sept. 9, 2009, available at http://www.inversecondemnation.com/inversecondemnation/2009/09/connecticut-property-rights-ombudsman-falls-to-budget-axe.html.

[158] Conn. Gen. Stat. § 22a-423.

[159] Conn. Gen. Stat. § 22a-36 to 22a-45.

[160] Conn. Gen. Stat. §§ 22a-42g, 22a-44.

[161] Conn. Gen. Stat. §§ 22a-41, 22a-42a.

[162] Conn. Gen. Stat. § 22a-39(m).

[163] Conn. Gen. Stat. §§ 22a-28 to 22a-35a; Conn. Gen. Stat. §§ 22a-90 to 22a-111.

"Structures, Dredging and Fill Statutes" also offer protections to Connecticut's wetlands.[164] Activities conducted in tidal wetlands require a coastal permit.[165]

[164] Conn. Gen. Stat. §§ 22a-359 to 22a-363f.

[165] Conn. Gen. Stat. §§ 22a-361. For more on Connecticut law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase III,* Appendix: Connecticut, at 71 (Mar. 2007).

DELAWARE

Delaware law imposes a *property-based limitation*.

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

None identified.

2) Assessment

No Delaware agency rule or regulation takes effect until the attorney general reviews it and informs the issuing agency of its potential to result in a taking of private property. The term "taking" for purposes of this provision refers to an activity where private property is taken such that compensation is required under the federal constitution or any other "similar or applicable" Delaware law.

Legal Authority:

- Del. Code Ann. tit. 29, § 605 (promulgation of rules and regulations by state agencies—review by attorney general to determine effect on private property right)

"(a) No rule or regulation promulgated by any state agency shall become effective until the Attorney General has reviewed the rule or regulation and has informed the issuing agency in writing as to the potential of the rule or regulation to result in a taking of private property.

(b) Judicial review of actions taken pursuant to this section shall be limited to whether the Attorney General has reviewed the rule or regulation and has informed the issuing agency in writing.

(c) The term "taking of private property" as used under this section shall mean an activity wherein private property is taken such that compensation to the owner of that property is required by the [federal constitution] or any other similar or applicable law of this State.

(d) Nothing in this section shall affect any otherwise available judicial review of agency action."

History: The statutory language was enacted in 1992.[166]

3) Other

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Delaware does not have a regulatory program under state law addressing dredge and fill activities in most of its nontidal waters and wetlands (see below). It relies primarily on Clean Water Act § 401. Delaware has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

The Wetlands Act establishes a permitting program for tidal wetlands (and certain contiguous non-tidal wetlands greater than 400 acres in size).[167] Permits are required for activities in delineated wetlands, including dredging, filling, bulkheading, and plowing or construction.[168] The Subaqueous Lands Act establishes a permitting program to regulate submerged lands and tidelands, which include "lands lying below the plane of the ordinary high water mark of nontidal rivers, streams, lakes, ponds, bays and inlets,"[169] which could include some waters not subject to federal regulation. Activities such as the deposit or extraction of materials, construction, and repair of structures require a permit.[170]

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[166] Law of Jan. 24, 1992, ch. 191, § 1, 2 Del. Laws 730, 730 (1992) (enacting S.B. No. 130, as amended by House Amendment No. 1).

[167] Del. Code Ann. tit. 7, §§ 6601 to 6620. Coverage for non-tidal wetlands is limited to "those lands not currently used for agricultural purposes containing 400 acres or more of contiguous nontidal swamp, bog, muck or marsh exclusive of narrow stream valleys where fresh water stands most, if not all, of the time due to high water table, which contribute significantly to ground water recharge, and which would require intensive artificial drainage using equipment such as pumping stations, drain fields or ditches for the production of agricultural crops." Del. Code Ann. tit. 7, § 6603(h).

[168] Del. Code Ann. tit. 7, § 6604.

[169] Del. Code Ann. tit. 7, §§ 7201 to 7217.

[170] Del. Code Ann. tit. 7, § 7205. For more on Delaware law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase IV*, Appendix: Delaware, at 27 (Oct. 2007).

DISTRICT OF COLUMBIA

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

None identified.

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IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: the District of Columbia does not have a regulatory program addressing dredge and fill activities in its nontidal waters and wetlands. It relies on Clean Water Act § 401. The District has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

FLORIDA

Florida law imposes *qualified stringency prohibitions* and *property-based limitations*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.

2) Qualified Prohibitions

The Florida Department of Environmental Protection is authorized to adopt rules to control and prohibit water pollution, but it may not adopt standards that are more stringent than required by federal regulations unless additional requirements are satisfied. The Department must first undertake an "economic and environmental impact" study, setting forth the benefits and costs to the public of a proposed standard that is stricter than one set by federal agencies under federal law or regulation. The Department must submit the study to the Environmental Regulation Commission,[171] which initially adopts the standard. Final action lies with the governor and cabinet, who must accept, reject, modify, or remand the standard within 60 days of submission.

A Florida court has ruled that "[f]or a Florida standard to be 'a stricter or more stringent standard than one which has been set by federal agencies pursuant to federal law or regulation,' the federal standard must be in *counterpoise* to the state standard." The court noted that "in many instances federal standards interlock with, but do not necessarily correspond with, state standards."[172]

Legal Authority:

- Fla. Stat. Ann. § 403.061(7), (31) (department; powers and duties)

"The [Department of Environmental Protection] shall have the power and the duty to control and prohibit pollution of air and water in accordance with the law and rules adopted and promulgated by it and, for this purpose, to: ...

(7) Adopt rules pursuant to ss. 120.536(1) [rulemaking authority; repeal; challenge] and 120.54 [rulemaking] to implement the provisions of this act [Florida Air and Water Pollution Control Act]. Any rule adopted pursuant to this act shall be consistent with the provisions of federal law, if any, relating to ... effluent limitations, pretreatment requirements, or standards of performance.... Rules adopted pursuant to this act shall not require dischargers of waste into waters of the state to improve

[171] For more on the Commission, see http://www.dep.state.fl.us/legal/ERC/default.htm.

[172] *Florida Elec. Power Coordinating Group, Inc. v. Askew*, 366 So.2d 1186, 1188 (Fla. Dist. Ct. App., 1st Dist. 1978).

natural background conditions.... The department may not adopt standards more stringent than federal regulations, except as provided in s. 403.804....

(31) Adopt rules necessary to obtain approval from the [U.S. EPA] to administer the Federal [NPDES] permitting program in Florida under ss. 318, 402, and 405 of the Federal Clean Water Act, Pub. L. No. 92-500, as amended. This authority shall be implemented consistent with the provisions of part II, which shall be applicable to facilities certified thereunder. The department shall establish all rules, standards, and requirements that regulate the discharge of pollutants into waters of the United States as defined by and in a manner consistent with federal regulations; provided, however, that the department may adopt a standard that is stricter or more stringent than one set by the [U.S. EPA] if approved by the Governor and Cabinet in accordance with the procedures of s. 403.804(2)."

- Fla. Stat. Ann. § 403.804(2) (Environmental Regulation Commission; powers and duties)

"(2) The [Department of Environmental Protection] shall have a study conducted of the economic and environmental impact which sets forth the benefits and costs to the public of any proposed standard that would be stricter or more stringent than one which has been set by federal agencies pursuant to federal law or regulation. Such study as is provided for in this subsection shall be submitted to the [Environmental Regulation Commission], which shall initially adopt the standard. Final action shall be by the Governor and Cabinet, who shall accept, reject, modify, or remand for further proceedings the standard within 60 days from the submission. Such review shall be appellate in nature. Hearings shall be in accordance with the provisions of chapter 120 [Administrative Procedure Act]."

History: The relevant language of § 403.804(2) was enacted in 1975.[173] Section 403.061(7) was added in 1982;[174] and the relevant language in § 403.061(31) was added in 1988.[175]

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

Under Florida's Bert J. Harris, Jr., Private Property Rights Protection Act (Fla. Stat. Ann. § 70.001), a property owner is entitled to relief when his or her existing use of (or vested right to use) real property has been "inordinately burdened" by a state or local government action. This occurs when the government action has directly restricted or

[173] Florida Environmental Reorganization Act of 1975, ch. 75-22, § 6, 1975 Fla. Laws 42, 46 (enacting S.B. No. 123; amended 2002).

[174] Law of March 17, 1982, ch. 82-27, § 5, 1982 Fla. Laws 61, 68 (enacting H.B. No. 16; amended 2010).

[175] An Act Relating to Pollution Control, ch. 88-393, § 22, 1988 Fla. Laws 2224, 2242 (enacting H.B. No. 1671; amended 2010).

limited the property owner's use such that the owner is either: (1) permanently unable to attain the "reasonable, investment-backed expectation" for use of the property, or (2) left with uses that are "unreasonable," in that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large. Compensation may include actual loss to the fair market value of the property. The Act expressly creates a cause of action for governmental actions that may not rise to the level of a taking under state or federal law.

Prior to bringing suit, the property owner must submit a claim to the government entity, supported by a bona fide, valid appraisal that demonstrates the loss in fair market value. The government must respond with a written settlement offer and, if the offer is not accepted, a statement of allowable uses to which the property may be put. If the government settles the claim in a way that would "contravene the application of a statute," the parties are required to file a joint action in circuit court and seek judicial approval of the settlement. If no settlement is reached and the property owner brings suit, the judge determines whether the property owner had a use that was inordinately burdened by the government entity. A jury then decides on the amount of compensation to be paid, together with an award of reasonable prejudgment interest. The prevailing party is, under certain circumstances, entitled to an award of reasonable costs and fees.

There is a one-year statute of limitations.

In 2006, a Florida state appeals court upheld the Bert Harris Act against various constitutional challenges. This decision came in the context of a commercial developer's claim that the use of his property had been inordinately burdened by the application of the Brevard County Wetlands Protection Act, which would have required changes to the developer's plan to build a shopping plaza and restaurant. This ruling did not end the litigation, as the appeals court returned the case to the lower court to make certain mandatory findings under the Act.[176] However, this case makes clear that the Act applies to wetlands protections.

A 2008 study of state private property rights acts concluded that Florida property rights legislation, and particularly the Bert Harris Act, has "made it virtually impossible for government to adopt and enforce new land use or environmental regulations."[177]

The law may be invoked only by way of an "as applied" challenge, and not through a "facial" challenge. It is not triggered by the "mere enactment of a general police power ordinance or regulation."[178]

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[176] *Brevard County v. Stack*, 932 So.2d 1258, 1261–62 (Fla. Dist. Ct. App. 2006), *rev. denied*, 949 So.2d 197 (Fla. 2007).

[177] Georgetown Environmental Law and Policy Institute, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, at 14, 14-24 (2008) (discussing claims data, litigation activity, regulatory chill, and regulatory rollbacks).

[178] *M&H Profit, Inc. v. City of Panama City*, 28 So.3d 71, 77 (Fla. App. 2009).

Legal Authority:

- Fla. Stat. Ann. § 70.001 (private property rights protection) (Bert J. Harris, Jr., Private Property Rights Protection Act)

"(1) ... The Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore, it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

(2) When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.

(3) For purposes of this section: ...

(b) The term "existing use" means 1. an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use; or 2. Activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.

(c) The term "governmental entity" includes an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority. The term does not include the United States or any of its agencies, or an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority, when exercising the powers of the United States or any of its agencies through a formal delegation of federal authority.

(d) The term "action of a governmental entity" means a specific action of a governmental entity which affects real property, including action on an application or permit.

(e) The terms "inordinate burden" and "inordinately burdened": 1. Mean that an action of one or more governmental entities has *directly restricted or limited the use of real property* such that the property owner is *permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole,* or that the property

owner is *left with existing or vested uses that are unreasonable* such that the property owner *bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large*. 2. Do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section. However, a temporary impact on development, as defined in s. 380.04, that is in effect for longer than 1 year may, depending upon the circumstances, constitute an "inordinate burden" as provided in this paragraph.

In determining whether reasonable, investment-backed expectations are inordinately burdened, consideration may be given to the factual circumstances leading to the time elapsed between enactment of the law or regulation and its first application to the subject property.

(4) (a) Not less than 150 days prior to filing an action under this section against a governmental entity [90 days for agricultural property], a property owner who seeks compensation under this section must present the claim in writing to the head of the governmental entity.... The property owner must submit, along with the claim, a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property....

(c) During the 90-day-notice period or the 150-day-notice period, unless extended by agreement of the parties, the governmental entity shall make a written settlement offer to effectuate:

1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.
2. Increases or modifications in the density, intensity, or use of areas of development.
3. The transfer of developmental rights.
4. Land swaps or exchanges.
5. Mitigation, including payments in lieu of onsite mitigation.
6. Location on the least sensitive portion of the property.
7. Conditioning the amount of development or use permitted.
8. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.
9. Issuance of the development order, a variance, special exception, or other extraordinary relief.
10. Purchase of the real property, or an interest therein, by an appropriate governmental entity....

If the property owner accepts the settlement offer, the governmental entity may implement the settlement offer by appropriate development agreement; by issuing a variance, special exception, or other extraordinary relief; or by other appropriate method, subject to paragraph (d).

(d) 1.Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property, the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

2. Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property, the governmental entity and the property owner shall jointly file an action in the circuit court where the real property is located for approval of the settlement agreement by the court to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

(5) (a) During the 90-day-notice period or the 150-day-notice period, unless a settlement offer is accepted by the property owner, each of the governmental entities provided notice pursuant to paragraph (4)(a) shall issue a written statement of allowable uses identifying the allowable uses to which the subject property may be put. The failure of the governmental entity to issue a statement of allowable uses during the applicable 90-day-notice period or 150-day-notice period shall be deemed a denial for purposes of allowing a property owner to file an action in the circuit court under this section. If a written statement of allowable uses is issued, it constitutes the last prerequisite to judicial review for the purposes of the judicial proceeding created by this section, notwithstanding the availability of other administrative remedies.

(b) If the property owner rejects the settlement offer and the statement of allowable uses of the governmental entity or entities, the property owner may file a claim for compensation in the circuit court....

(6) (a) The circuit court shall determine whether an existing use of the real property or a vested right to a specific use of the real property existed and, if so, whether, considering the settlement offer and statement of allowable uses, the governmental entity or entities have inordinately burdened the real property....

(b) Following its determination of the percentage of responsibility of each governmental entity, and following the resolution of any interlocutory appeal, the court shall impanel a jury to determine the total amount of compensation to the property owner for the loss in value due to the inordinate burden to the real property. The award of compensation shall be determined by calculating the difference in the fair market value of the real property, as it existed at the time of the governmental action at issue, as though the owner had the ability to attain the reasonable investment-backed expectation or was not left with uses that are unreasonable, whichever the case may be, and the fair market value of the real property, as it existed at the time of the governmental action at issue, as inordinately burdened, considering the settlement offer together with the statement of allowable uses, of the governmental entity or entities. In determining

the award of compensation, consideration may not be given to business damages relative to any development, activity, or use that the action of the governmental entity or entities, considering the settlement offer together with the statement of allowable uses has restricted, limited, or prohibited. The award of compensation shall include a reasonable award of prejudgment interest....

(c) 1. In any action filed pursuant to this section, the property owner is entitled to recover reasonable costs and attorney fees incurred by the property owner, from the governmental entity or entities, according to their proportionate share as determined by the court, from the date of the filing of the circuit court action, if the property owner prevails in the action and the court determines that the settlement offer, including the statement of allowable uses, of the governmental entity or entities did not constitute a bona fide offer to the property owner which reasonably would have resolved the claim, based upon the knowledge available to the governmental entity or entities and the property owner during the 90-day-notice period or the 150-day-notice period.

2. In any action filed pursuant to this section, the governmental entity or entities are entitled to recover reasonable costs and attorney fees incurred by the governmental entity or entities from the date of the filing of the circuit court action, if the governmental entity or entities prevail in the action and the court determines that the property owner did not accept a bona fide settlement offer, including the statement of allowable uses, which reasonably would have resolved the claim fairly to the property owner if the settlement offer had been accepted by the property owner, based upon the knowledge available to the governmental entity or entities and the property owner during the 90-day-notice period or the 150-day-notice period....

(9) This section provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution. This section may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking. The provisions of this section are cumulative, and do not abrogate any other remedy lawfully available, including any remedy lawfully available for governmental actions that rise to the level of a taking. However, a governmental entity shall not be liable for compensation for an action of a governmental entity applicable to, or for the loss in value to, a subject real property more than once....

(11) A cause of action may not be commenced under this section if the claim is presented more than 1 year after a law or regulation is first applied by the governmental entity to the property at issue....

(12) No cause of action exists under this section as to the application of any law enacted on or before May 11, 1995, or as to the application of any rule, regulation, or ordinance adopted, or formally noticed for adoption, on or before that date. A subsequent amendment to any such law, rule, regulation, or ordinance gives rise to a cause of action under this section only to the extent that the application of the amendatory language imposes an inordinate burden apart from the law, rule, regulation, or ordinance being amended."

History: The Bert Harris Act became law in 1995,[179] part of what has been described as "arguably the most far-reaching property rights legislation in the country."[180] It was enacted at the height of the national private property rights movement.[181] An earlier version of the legislation was characterized at the time as "mischievous," a "silver bullet that would gut Florida's Growth Management Act," and a threat to environmental protection laws.[182] One critic contended that the Act would "unravel the safety net of public protection by exacting a price the public would find unacceptable."[183]

* * *

Florida imposes other property-based limitations in addition to those contained in the Bert Harris Act.

The state provides a statutory mechanism for affected persons to challenge final agency determinations on the issuance of permits and licenses across various subject matter areas relevant to the protection of aquatic resources, including: water resources (Fla. Stat. Ann. § 373.617); beach and shore preservation (Fla. Stat. Ann. § 161.212); state lands (Fla. Stat. Ann. § 253.763); land and water management (Fla. Stat. Ann. § 380.085); and environmental control (Fla. Stat. Ann. § 403.90). These provisions establish a fast-track process for affected persons to seek a judicial determination of whether an agency permitting decision is an *unreasonable exercise of the state's police power constituting a taking without just compensation.* If the court finds for the plaintiff, it sends the matter back to the agency to (1) issue the permit; (2) agree to pay damages; or (3) modify its decision to avoid the problem. The court is required to award reasonable fees and costs to the prevailing party.

Finally, Florida's State Comprehensive Plan, adopted at Fla. Stat. Ann. § 187.201, sets forth legislative goals and policies on a range of subjects, including "property rights." To satisfy the goal of protecting private property rights, state policy is to provide compensation to a landowner for any government action that is "an unreasonable exercise of the state's police power so as to constitute a taking"—and to determine compensation judicially, rather than administratively. Government actors are encouraged to purchase property outright where regulation would "severely limit practical use of real property."

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[179] Bert J. Harris, Jr., Private Property Rights Protection Act, ch. 95-181, § 1, 1995 Fla. Laws 1651, 1652 (enacting H.B. No. 863; amended 2006, 2011, 2012).

[180] Georgetown Environmental Law and Policy Institute, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, at 4 (2008).

[181] *Id.* at 5.

[182] Editorial, "The 'me first' manifesto," *Gainesville Sun*, Mar. 3, 1993, available at http://news.google.com/newspapers?id=EpEpAAAAIBAJ&sjid=auoDAAAAIBAJ&pg=6119,588123&dq=florida+private+property+rights&hl=en.

[183] Editorial, "The Property Appeasers," *St. Petersburg Times*, July 9, 1995.

Legal Authority:

- Fla. Stat. Ann. § 373.617 (water resources—judicial review relating to permits and licenses)
- Fla. Stat. Ann. § 161.212 (beach and shore preservation—judicial review relating to permits and licenses)
- Fla. Stat. Ann. § 253.763 (state lands—judicial review relating to permits and licenses)
- Fla. Stat. Ann. § 380.085 (land and water management—judicial review relating to permits and licenses)
- Fla. Stat. Ann. § 403.90 (environmental control—judicial review relating to permits and licenses)

[Note: the relevant statutory language is identical or substantially similar across these provisions.]

"(1) As used in this section, unless the context otherwise requires:

(a) "Agency" means any official, officer, commission, authority, council, committee, department, division, bureau, board, section, or other unit or entity of state government.

(b) "Permit" means any permit or license required by this chapter.

(2) Any person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in which the affected property is located; however, circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation. Review of final agency action for the purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence shall proceed in accordance with [the Florida Administrative Procedure Act].

(3) If the court determines the decision reviewed is an unreasonable exercise of the state's police power constituting a taking without just compensation, the court shall remand the matter to the agency which shall, within a reasonable time:

(a) Agree to issue the permit;

(b) Agree to pay appropriate monetary damages; however, in determining the amount of compensation to be paid, consideration shall be given by the court to any enhancement to the value of the land attributable to governmental action; or

(c) Agree to modify its decision to avoid an unreasonable exercise of police power.

(4) The agency shall submit a statement of its agreed-upon action to the court in the form of a proposed order. If the action is a reasonable exercise of police power, the court shall enter its final order approving the proposed order. If the agency fails to submit a proposed order within a reasonable time not to exceed 90 days which specifies an action that is a reasonable exercise of police power, the court may order the agency to perform any of the alternatives specified in subsection (3).

(5) The court shall award reasonable attorney's fees and court costs to the agency or substantially affected person, whichever prevails...."

- Fla. Stat. Ann. § 187.201(14) (State Comprehensive Plan adopted)

"The Legislature hereby adopts as the State Comprehensive Plan the following specific goals and policies: ...
(14) Property rights.—
(a) *Goal.*—Florida shall protect private property rights and recognize the existence of legitimate and often competing public and private interests in land use regulations and other government action.
(b) *Policies.*—
1. Provide compensation, or other appropriate relief as provided by law, to a landowner for any governmental action that is determined to be an unreasonable exercise of the state's police power so as to constitute a taking.
2. Determine compensation or other relief by judicial proceeding rather than by administrative proceeding.
3. Encourage acquisition of lands by state or local government in cases where regulation will severely limit practical use of real property."

History: Fla. Stat. Ann. §§ 373.617, 161.212, 253.763, 380.085, and 403.90 were enacted in 1978.[184] The relevant language of § 187.201 was enacted in 1985.[185]

2) Assessment

None identified.

3) Other

Under the Florida Land Use and Environmental Dispute Resolution Act, property owners may seek relief when a state or local development order or enforcement action "is unreasonable or unfairly burdens the use of" real property. The property owner files a request for relief with the government entity, which triggers an informal, public hearing before a special magistrate within 45 days. The first role of the special magistrate is to act as a facilitator or mediator between the parties to effect a solution. If no mediated resolution is reached, the special magistrate considers the facts and circumstances and makes a determination as to unreasonable/unfair burden. The special magistrate must issue a written recommendation, which the government has to accept, modify, or reject. Once the government acts on the recommendation, the property owner may sue in court. The entire procedure must be concluded within 165 days.

[184] Ch. 78-85, §§ 1 to 6, 1978 Fla. Laws 124.

[185] An Act Relating to the State Comprehensive Plan, ch. 85-57, § 2, 1985 Fla. Laws 295, 314 (enacting H.B. No. 1338; amended 2008).

The Florida legislature has expressly stated that the Land Use and Environmental Dispute Resolution Act and the Bert J. Harris, Jr., Private Property Rights Protection Act (discussed above) have "separate and distinct bases, objectives, applications, and processes." As such, they are not to be construed together, as part of one process.[186]

Legal Authority:

- Fla. Stat. Ann. § 70.51 (land use and environmental dispute resolution)

"... (2) As used in this section, the term:

(a) "Development order" means any order, or notice of proposed state or regional governmental agency action, which is or will have the effect of granting, denying, or granting with conditions an application for a development permit, and includes the rezoning of a specific parcel. Actions by the state or a local government on comprehensive plan amendments are not development orders.

(b) "Development permit" means any building permit, zoning permit, subdivision approval, certification, special exception, variance, or any other similar action of local government, as well as any permit authorized to be issued under state law by state, regional, or local government which has the effect of authorizing the development of real property....

(f) "Governmental entity" includes an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority....

(3) Any owner who believes that a development order, either separately or in conjunction with other development orders, or an enforcement action of a governmental entity, is unreasonable or unfairly burdens the use of the owner's real property, may apply within 30 days after receipt of the order or notice of the governmental action for relief under this section.

(4) To initiate a proceeding under this section, an owner must file a request for relief with the elected or appointed head of the governmental entity that issued the development order or orders, or that initiated the enforcement action. The head of the governmental entity ... must forward the request for relief to the special magistrate who is mutually agreed upon by the owner and the governmental entity within 10 days after receipt of the request....

(6) The request for relief must contain:

(a) A brief statement of the owner's proposed use of the property.

(b) A summary of the development order or description of the enforcement action....

(c) A brief statement of the impact of the development order or enforcement action on the ability of the owner to achieve the proposed use of the property....

[186] Fla. Stat. Ann. § 70.80 (construction of ss. 70.001 and 70.51).

(15)(a) The special magistrate shall hold a hearing within 45 days after his or her receipt of the request for relief unless a different date is agreed to by all the parties....

(16)(a) Fifteen days following the filing of a request for relief, the governmental entity that issued the development order or that is taking the enforcement action shall file a response to the request for relief with the special magistrate together with a copy to the owner. The response must set forth in reasonable detail the position of the governmental entity regarding the matters alleged by the owner. The response must include a brief statement explaining the public purpose of the regulations on which the development order or enforcement action is based....

(17) In all respects, the hearing must be informal and open to the public and does not require the use of an attorney. The hearing must operate at the direction and under the supervision of the special magistrate. The object of the hearing is to focus attention on the impact of the governmental action giving rise to the request for relief and to explore alternatives to the development order or enforcement action and other regulatory efforts by the governmental entities in order to recommend relief, when appropriate, to the owner.

(a) The first responsibility of the special magistrate is to facilitate a resolution of the conflict between the owner and governmental entities to the end that some modification of the owner's proposed use of the property or adjustment in the development order or enforcement action or regulatory efforts by one or more of the governmental parties may be reached. Accordingly, the special magistrate shall act as a facilitator or mediator between the parties in an effort to effect a mutually acceptable solution....

(b) If an acceptable solution is not reached by the parties after the special magistrate's attempt at mediation, the special magistrate shall consider the facts and circumstances set forth in the request for relief and any responses and any other information produced at the hearing in order to determine whether the action by the governmental entity or entities is unreasonable or unfairly burdens the real property....

(18) The circumstances to be examined in determining whether the development order or enforcement action, or the development order or enforcement action in conjunction with regulatory efforts of other governmental parties, is unreasonable or unfairly burdens use of the property may include, but are not limited to:

(a) The history of the real property, including when it was purchased, how much was purchased, where it is located, the nature of the title, the composition of the property, and how it was initially used.

(b) The history or development and use of the real property, including what was developed on the property and by whom, if it was subdivided and how and to whom it was sold, whether plats were filed or recorded, and whether infrastructure and other public services or improvements may have been dedicated to the public.

(c) The history of environmental protection and land use controls and other regulations, including how and when the land was classified, how use was proscribed, and what changes in classifications occurred.

(d) The present nature and extent of the real property, including its natural and altered characteristics.

(e) The reasonable expectations of the owner at the time of acquisition, or immediately prior to the implementation of the regulation at issue, whichever is later, under the regulations then in effect and under common law.

(f) The public purpose sought to be achieved by the development order or enforcement action, including the nature and magnitude of the problem addressed by the underlying regulations on which the development order or enforcement action is based; whether the development order or enforcement action is necessary to the achievement of the public purpose; and whether there are alternative development orders or enforcement action conditions that would achieve the public purpose and allow for reduced restrictions on the use of the property.

(g) Uses authorized for and restrictions placed on similar property....

(19) Within 14 days after the conclusion of the hearing, the special magistrate shall prepare and file with all parties a written recommendation.

(a) If the special magistrate finds that the development order at issue, or the development order or enforcement action in combination with the actions or regulations of other governmental entities, is not unreasonable or does not unfairly burden the use of the owner's property, the special magistrate must recommend that the development order or enforcement action remain undisturbed and the proceeding shall end, subject to the owner's retention of all other available remedies.

(b) If the special magistrate finds that the development order or enforcement action, or the development order or enforcement action in combination with the actions or regulations of other governmental entities, is unreasonable or unfairly burdens use of the owner's property, the special magistrate, with the owner's consent to proceed, may recommend one or more alternatives that protect the public interest served by the development order or enforcement action and regulations at issue but allow for reduced restraints on the use of the owner's real property, including, but not limited to:

1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.

2. Increases or modifications in the density, intensity, or use of areas of development.

3. The transfer of development rights.

4. Land swaps or exchanges.

5. Mitigation, including payments in lieu of onsite mitigation.

6. Location on the least sensitive portion of the property.

7. Conditioning the amount of development or use permitted.

8. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.

9. Issuance of the development order, a variance, special exception, or other extraordinary relief, including withdrawal of the enforcement action.
10. Purchase of the real property, or an interest therein, by an appropriate governmental entity....

(21) Within 45 days after receipt of the special magistrate's recommendation, the governmental entity responsible for the development order or enforcement action and other governmental entities participating in the proceeding must consult among themselves and each governmental entity must:

(a) Accept the recommendation of the special magistrate as submitted and proceed to implement it ... ;

(b) Modify the recommendation as submitted by the special magistrate and proceed to implement it ... ; or

(c) Reject the recommendation as submitted by the special magistrate....

(22) If a governmental entity accepts the special magistrate's recommendation or modifies it and the owner rejects the acceptance or modification, or if a governmental entity rejects the special magistrate's recommendation, the governmental entity must issue a written decision within 30 days that describes as specifically as possible the use or uses available to the subject real property.

(23) The procedure established by this section may not continue longer than 165 days, unless the period is extended by agreement of the parties....

(24) The procedure created by this section is not itself, nor does it create, a judicial cause of action. Once the governmental entity acts on the special magistrate's recommendation, the owner may elect to file suit in a court of competent jurisdiction....

(25) [A] recommendation that the development order or enforcement action ... is unreasonable or unfairly burdens use of the owner's real property may serve as an indication of sufficient hardship to support modification, variances, or special exceptions to the application of statutes, rules, regulations, or ordinances to the subject property....

(27) The special magistrate shall send a copy of the recommendation in each case to the Department of Legal Affairs. Each governmental entity, within 15 days after its action on the special magistrate's recommendation, shall notify the Department of Legal Affairs in writing as to what action the governmental entity took on the special magistrate's recommendation....

(29) This section shall be liberally construed to effect fully its obvious purposes and intent, and governmental entities shall direct all available resources and authorities to effect fully the obvious purposes and intent of this section in resolving disputes. Governmental entities are encouraged to expedite notice and time-related provisions to implement resolution of disputes under this section...."

History: The relevant statutory language was enacted in 1995 concurrently with the Bert J. Harris, Jr., Private Property Rights Protection Act.[187]

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Florida provides legal protections for some waters and wetlands that may be subject to a loss of protection under *SWANCC* and *Rapanos*.

Florida defines "water" or "waters in the state" under its water resources law as "any and all water on or beneath the surface of the ground or in the atmosphere, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground, as well as all coastal waters within the jurisdiction of the state."[188] Wetlands are separately defined.[189]

Florida regulates wetlands through its environmental resource permit (ERP) program,[190] authorized under the Florida Environmental Reorganization Act of 1993.[191] The ERP Program regulates construction or alteration of any "stormwater management system, dam, impoundment, reservoir, appurtenant work, or works," and activities in all wetlands and other surface waters (whether connected or isolated), including dredging and filling.[192] With respect to wetlands, a permit applicant must provide reasonable assurance that state water quality standards will not be violated and reasonable that such activity in, on, or over surface waters or wetlands is not contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by DEP rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest. A balancing test is used to determine whether or not an activity is contrary to the public interest or clearly in the public interest.[193]

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[187] Florida Land Use and Environmental Dispute Resolution Act, ch. 95-181, § 2, 1995 Fla. Laws 1651, 1657–64 (enacting H.B. No. 863; amended 2004, 2011).

[188] Fla. Stat. Ann. § 373.019(22).

[189] Fla. Stat. Ann. § 373.019(27).

[190] *See* Fla. Stat. Ann. §§ 373.413 (permits for construction or alteration), 373.414 (additional criteria for activities in surface waters and wetlands).

[191] 1993, Fla. Laws ch. 93-213 (codified in various parts of Fla. Stat. chs. 252, 253, 259, 367, 370, 373, 403 (1993)). The comprehensive ERP Program now covers waters in the Florida panhandle that were previously excluded and that were until November 1, 2010 subject instead to the Wetland Resource Permitting (WRP) Program—which excluded isolated wetlands. *See* Florida Department of Environmental Protection, "Environmental Resource Permitting (ERP) Program," available at http://www.dep.state.fl.us/water/wetlands/erp/.

[192] *See* Fla. Stat. Ann. §§ 373.413(1), 373.414(11)(a).

[193] Fla. Stat. Ann. § 373.414. The balancing test takes into account adverse impacts to public health, property of others, conservation of fish or wildlife and their habitats, navigation or the flow of water, marine productivity, recreation, and historical or archeological resources, as well as the "relative value of functions being performed by areas affected by the proposed activity." Fla. Stat. Ann. § 373.414(1)(a).

In 2012, under a mandate from the state legislature, Florida DEP proposed a new statewide ERP rule, which is currently in draft form.[194] The legislature appears to have exempted the new rules from coverage under the Bert Harris Act, discussed above.[195]

The Beach and Shore Preservation Act provides protection to wetlands through a regulated review of coastal construction activities.[196] Under this law, the processing of coastal construction permits, ERPs, and state-owned submerged lands authorizations is consolidated by way of one joint coastal permit (JCP).[197] A JCP is required for activities that: (1) are located on Florida's natural sandy beaches facing the Atlantic Ocean, the Gulf of Mexico, the Straits of Florida or associated inlets; (2) extend seaward of the mean high water line; (3) extend into sovereign submerged lands; and (4) are likely to affect the distribution of sand along the beach."[198] The Florida Coastal Management Act provides further protections for the state's coastal wetlands.[199]

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[194] *See* Fla. Stat. Ann. § 373.4131 (Statewide environmental resource permitting rules); (Draft) Statewide ERP Rule, Chapter 62-330, F.A.C., Feb. 11, 2013, available at http://www.dep.state.fl.us/water/wetlands/swerp/drafts.htm.

[195] *See* Fla. Stat. Ann. § 373.4131(1)(d), which provides that "the application of the [new] rules shall continue to be governed by the first sentence of § 70.001(12)." That sentence reads: "[n]o cause of action exists under this section as to the application of any law enacted on or before May 11, 1995, or as to the application of any rule, regulation, or ordinance adopted, or formally noticed for adoption, on or before that date."

[196] Fla. Stat. Ann. §§ 161.011 to 161.45; Fla. Admin. Code §§ 62B-41, 62B-33, 62B-49.

[197] Fla. Stat. Ann. § 161.055.

[198] *See*, *e.g.*, URS Corporation, *Summary Document: Chapter 161 Florida Statutes for the Florida Beaches Habitat Conservation Plan (HCP),* prepared for Florida DEP, Bureau of Beaches and Coastal Systems, and Florida Fish & Wildlife Conservation Commission 3-2 (Apr. 2009), available at http://www.flbeacheshcp.com/eDocDisplay.aspx?ID=2.

[199] Fla. Stat. Ann. §§ 380.20 to 380.27. For more on Florida law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase II*, Appendix: Florida, at 29 (June 2006).

GEORGIA

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

None identified.[200]

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Georgia does not have a regulatory program under state law addressing dredge and fill activities in its nontidal waters and wetlands. It relies on Clean Water Act § 401. Georgia has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

Regulation of tidal wetlands is provided by the state's Coastal Marshlands Protection Act.[201] This statute prohibits dredging, draining, or altering marshlands unless a permit is first obtained from the Coastal Marshlands Protection Committee.[202] Permits are generally denied if an alternative non-wetland site is available or if the use of a public facility may satisfy the project's purpose.[203] If a proposed project involves construction on state-owned tidal wetlands, a revocable license must be obtained before the activity may proceed.[204]

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[200] In 2006, an amendment to the Georgia constitution was proposed to allow the general assembly to pass a law to provide for new methods of payment of compensation with respect to a taking of private property resulting from "unreasonably burdensome governmental actions." S.R. No. 1040 (2006), text available at http://www.legis.ga.gov/Legislation/20052006/58328.pdf. It did not become law.

[201] Ga. Code Ann. §§ 12-5-280 to 12-5-297.

[202] Ga. Code Ann. § 12-5-286.

[203] Ga. Code Ann. § 12-5-286(h).

[204] *See* Ga. Code Ann. § 12-5-287. For more on Georgia law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase I*, Appendix: Georgia, at 47 (Jan. 2005).

HAWAII

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

None identified.

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IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Hawaii does not have a regulatory program under state law addressing dredge and fill activities in its nontidal waters and wetlands. It relies on Clean Water Act § 401. Hawaii has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

IDAHO

Idaho law imposes *stringency prohibitions*, *qualified stringency prohibitions*, and *property-based limitations*.

STRINGENCY LIMITATIONS

1) Prohibitions

In meeting the goals of the federal Clean Water Act, and otherwise ensuring surface water quality in Idaho, the Department of Environmental Quality (DEQ) is prohibited from enacting rules that impose requirements "beyond those" of the federal Act.

Legal Authority:

- Idaho Code Ann. § 39-3601 (declaration of policy and statement of legislative intent)

"The legislature, recognizing that surface water is one of the state's most valuable natural resources, has approved the adoption of water quality standards and authorized the director of the department of environmental quality in accordance with the provisions of this chapter [covering water quality], to implement these standards. In order to maintain and achieve existing and designated beneficial uses and to conform to the expressed intent of congress to control pollution of navigable waters of the United States, the legislature declares that it is the purpose of this chapter to enhance and preserve the quality and value of the navigable waters of the United States within the state of Idaho, and to define the responsibilities of public agencies in the control, and monitoring of water pollution, and, through implementation of this chapter, enhance the state's economic well-being. In consequence of the benefits resulting to the public health, welfare and economy, it is hereby declared to be the policy of the state of Idaho to protect this natural resource by monitoring and controlling water pollution; to support and aid technical and planning research leading to the control of water pollution, and to provide financial and technical assistance to municipalities, soil conservation districts and other agencies in the control of water pollution. The director, in cooperation with such other agencies as may be appropriate, shall administer this chapter. It is the intent of the legislature that the state of Idaho fully meet the goals and requirements of the federal clean water act and that the rules promulgated under this chapter not impose requirements beyond those of the federal clean water act."

History: The relevant language of § 39-3601 was enacted in 1995.[205] A 2001 amendment clarified that the provision encompasses the entire water quality chapter

[205] Law of March 22, 1995, ch. 352, § 1, 1995 Idaho Sess. Laws 1165, 1166–67 (enacting S.B. No. 1284; amended 2001, 2011).

of the state code; a 2011 amendment replaced references to streams, lakes, and other surface waters with references to navigable waters of the United States.[206]

2) Qualified Prohibitions

When DEQ recommends to the Board of Environmental Quality issuance of a rule that is "broader in scope or more stringent than federal law or regulations, or proposes to regulate an activity not regulated by the federal government," the rule is subject to an additional statutory requirement. The agency must clearly specify that the proposed rule, or portions of it, are broader in scope or more stringent than federal law or regulations, or regulate an activity not regulated by the federal government, and delineate *which* portions of the proposed rule trigger this provision.

When a standing committee of the legislature reviews a rule subject to this provision, the Board is required to notify the committee of the relevant portions of the rule.

Legal Authority:

- Idaho Code Ann. § 39-107D (rules of department or board)

"(1) The legislature directs that any rule formulated and recommended by the [Department of Environmental Quality] to the [Board of Environmental Quality] which is broader in scope or more stringent than federal law or regulations, or proposes to regulate an activity not regulated by the federal government, is subject to the following additional requirements: the notice of proposed rulemaking and rulemaking record requirements under [the Idaho Administrative Procedure Act], must clearly specify that the proposed rule, or portions of the proposed rule, are broader in scope or more stringent than federal law or regulations, or regulate an activity not regulated by the federal government, and delineate which portions of the proposed rule are broader in scope or more stringent than federal law or regulations, or regulate an activity not regulated by the federal government.

(2) To the degree that a department action is based on science, in proposing any rule or portions of any rule subject to this section, the department shall utilize:

(a) The best available peer reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; and

(b) Data collected by accepted methods or best available methods if the reliability of the method and the nature of the decision justify use of the data. ...

(5) Any rule promulgated or adopted by the board which is broader in scope or more stringent than federal law or regulations, or which regulates an activity not regulated by the federal government, submitted to the standing committee of the legislature pursuant to section 67-5291, Idaho Code [providing that standing committees may review administrative rules], shall include a notice by the board identifying the

[206] *See* Law of March 22, 2001, ch. 103, § 30, 2001 Idaho Sess. Laws 253, 274 (enacting H.B. No. 164); Law of March 22, 2011, ch. 116, § 1, 2011 Idaho Sess. Laws 319, 320 (enacting H.B. No. 153).

portions of the adopted rule that are broader in scope or more stringent than federal law or rules, or which regulate an activity not regulated by the federal government.

(6) Nothing provided herein is intended to alter the scope or effect of sections 39-105(3)(g)(v) [solid waste facilities], 39-118B [air pollution], 39-3601 [water quality—discussed above], 39-4404 [hazardous waste management], 39-7210 [land remediation] and 39-7404 [solid waste disposal], Idaho Code, or any other provision of state law which limits or prohibits agency action or rulemaking that is broader in scope or more stringent than federal law or regulations."

History: This statutory language was enacted in 2002.[207]

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

None identified.[208]

2) Assessment

Pursuant to the Idaho Regulatory Takings Act (Idaho Code Ann. §§ 67-8001 to 67-8004), the attorney general is required to establish "an orderly, consistent process, including a checklist," to better enable state agencies and local government to evaluate proposed regulatory or administrative actions to assure that their actions do not result in an unconstitutional taking of private property. The attorney general must review and update the process annually, and all agencies and local governments must follow the guidelines.

At the written request of a property owner subject to a covered action, made within 28 days of the action, the state agency or local government must prepare a "written taking analysis" concerning the action—using the attorney general's checklist. The agency or local government entity must provide the analysis to the property owner within 42 days. The government action is voidable if no written taking analysis is prepared following a proper request. The property owner may seek a judicial

[207] Law of March 20, 2002, ch. 144, § 1, 2002 Idaho Sess. Laws 405, 405 (enacting H.B. No. 658; amended 2007).

[208] In 2006, Idaho voters overwhelmingly rejected Proposition 2, a ballot measure on regulatory takings. *See*, *e.g.*, Shea Andersen, "The Props Go Down: Idahoans Ponder the Initiative Process After Elections," *Boise Weekly*, Nov. 8, 2006, available at http://www.boiseweekly.com/boise/the-props-go-down/Content?oid=930110. If enacted, the law would have provided "just compensation" to property owners whose "ability to use, possess, sell, or divide" their property was "limited or prohibited by the enactment or enforcement of any land use law ... in a manner that reduces the fair market value of the property." Unlike other similar laws around the country, this one contained no option for an agency to waive application or enforcement of a challenged provision in the face of a challenge. Idaho Secretary of State, 2006 Proposed Ballot Initiatives, Proposition 2, available at http://www.sos.idaho.gov/elect/inits/06init08.htm. For an analysis of the defeat of Proposition 2, see generally Clark Williams-Derry, "What's the Matter with Idaho?" Sightline Daily: Northwest News that Matters, Nov. 9, 2006, available at http://daily.sightline.org/daily_score/archive/2006/11/09/what-s-the-matter-with-idaho.

determination of the validity of the governmental action by initiating court proceedings.

The Idaho attorney general has issued guidelines and a checklist pursuant to the Act.[209] Among the issues to be considered by the agency or local government are whether the action: requires a property owner to dedicate a portion of property or to grant an easement; deprives the owner of all economically viable uses of the property; has a significant impact on the landowner's economic interest; denies a fundamental attribute of ownership; or both (a) serves the same purpose that would be served by directly prohibiting the use or action, and (b) substantially advances that purpose.

A separately enacted provision applies these assessment requirements to the zoning and planning process, to "ensure that land use policies, restrictions, conditions and fees do not violate private property rights, adversely impact property values or create unnecessary technical limitations on the use of property."

Legal Authority:

- Idaho Code Ann. § 67-8001 (declaration of purpose)

  "The purpose of this chapter is to establish an orderly, consistent review process that better enables state agencies and local governments to evaluate whether proposed regulatory or administrative actions may result in a taking of private property without due process of law. It is not the purpose of this chapter to expand or reduce the scope of private property protections provided in the state and federal constitutions."

- Idaho Code Ann. § 67-8002 (definitions)

  "(1) "Local government" means any city, county, taxing district or other political subdivision of state government with a governing body. ...

  (3) "State agency" means the state of Idaho and any officer, agency, board, commission, department or similar body of the executive branch of the state government.

  (4) "Regulatory taking" means a regulatory or administrative action resulting in deprivation of private property that is the subject of such action, whether such deprivation is total or partial, permanent or temporary, in violation of the state or federal constitution."

[209] Office of the Attorney General, Idaho Regulatory Takings Act Guidelines (Sept. 2012), available at http://www.ag.idaho.gov/publications/legalManuals/RegulatoryTakings.pdf. The guidelines do not represent a formal attorney general opinion. *Id.*

- Idaho Code Ann. § 67-8003 (protection of private property)

  "(1) The attorney general shall establish ... an orderly, consistent process, including a checklist, that better enables a state agency or local government to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. The attorney general shall review and update the process at least on an annual basis to maintain consistency with changes in law. All state agencies and local governments shall follow the guidelines of the attorney general.

  (2) Upon the written request of an owner of real property that is the subject of such action, such request being filed with the clerk or the agency or entity undertaking the regulatory or administrative action not more than twenty-eight (28) days after the final decision concerning the matter at issue, a state agency or local governmental entity shall prepare a written taking analysis concerning the action. Any regulatory taking analysis prepared hereto shall comply with the process set forth in this chapter, including use of the checklist developed by the attorney general pursuant to subsection (1) of this section and shall be provided to the real property owner no longer than forty-two (42) days after the date of filing the request with the clerk or secretary of the agency whose action is questioned. A regulatory taking analysis prepared pursuant to this section shall be considered public information.

  (3) A governmental action is voidable if a written taking analysis is not prepared after a request has been made pursuant to this chapter. A private real property owner, whose property is the subject of governmental action, affected by a governmental action without the preparation of a requested taking analysis as required by this section may seek judicial determination of the validity of the governmental action by initiating a declaratory judgment action or other appropriate legal procedure. ...

  (4) During the preparation of the taking analysis, any time limitation relevant to the regulatory or administrative actions shall be tolled. Such tolling shall cease when the taking analysis has been provided to the property owner. Both the request for a taking analysis and the taking analysis shall be part of the official record regarding the regulatory or administrative action."

- Idaho Code Ann. § 67-6508 (planning duties)

  "It shall be the duty of the planning or planning and zoning commission to conduct a comprehensive planning process designed to prepare, implement, and review and update a comprehensive plan .... The plan shall include all land within the jurisdiction of the governing board. The plan shall consider previous and existing conditions, trends, compatibility of land uses, desirable goals and objectives, or desirable future situations for each planning component. The plan with maps, charts, and reports shall be based on the following components as they may apply to land use regulations and actions unless the plan specifies reasons why a particular component is unneeded.

(a) Property Rights—An analysis of provisions which may be necessary to ensure that land use policies, restrictions, conditions and fees do not violate private property rights, adversely impact property values or create unnecessary technical limitations on the use of property and analysis as prescribed under the declarations of purpose in chapter 80, title 67, Idaho Code [discussed above]. ..."

History: The relevant statutory language of § 67-8001 of the Idaho Code was enacted in 1994.[210] The following year an amendment expanded the scope of this statute to include local governments.[211] The relevant portion of § 67-6508 also was enacted in 1995.[212] The relevant statutory language of § 67-8003 was enacted in 2003 to allow private property owners to request a regulatory takings analysis.[213]

In 1993, an Idaho editorial page blasted a pre-enactment version of the Idaho Regulatory Takings Act as a "deceptive attempt to prevent state and local government from properly regulating polluters."[214]

3) Other

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Idaho does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. Idaho has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

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[210] Law of March 21, 1994, ch. 116, § 1, 1994 Idaho Sess. Laws 265, 265 (enacting H.B. No. 659; amended 1995).

[211] *See* Law of March 16, 1995, ch. 182, § 1, 1995 Idaho Sess. Laws 668, 668 (enacting H.B. No. 290).

[212] Law of March 16, 1995, ch. 181, § 4, 1995 Idaho Sess. Laws 664, 665 (enacting H.B. No. 212, amended 2011).

[213] Law of March 27, 2003, ch. 141, § 1, 2003 Idaho Sess. Laws 409, 410 (enacting H.B. No. 256, as amended).

[214] J. Robb Brady, "It may get more costly to protect your environment, health," Editorial, *Idaho Falls Post Register*, Mar. 18, 1993, at A5. This editorial references H.B. No. 322, an earlier version of the law.

ILLINOIS

STRINGENCY LIMITATIONS

None identified.

However, Illinois does have a "fast-track" procedure by which certain federally mandated environmental rules may bypass Illinois' regular rulemaking process and be adopted in their entirety by the state Pollution Control Board. These so-called "identical in substance" provisions refer to "State regulations which require the same actions with respect to protection of the environment, by the same group of affected persons, as would federal regulations if USEPA administered the subject program in Illinois."[215] This rulemaking procedure applies only to a handful of environmental programs, including those under §§ 307(b)-(d), 402(b)(8), and 402(b)(9) of the federal Clean Water Act. Despite the stringency language, the process appears to be a tool for allowing the Board to move quickly—rather than a means of limiting the Board's ability to adopt regulations that are more stringent than their federal counterparts.

PROPERTY-BASED LIMITATIONS

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage: Illinois does not have a regulatory program under state law addressing dredge and fill activities throughout its nontidal waters and wetlands. However, the Interagency Wetland Policy Act of 1989 regulates *state-funded projects and activities affecting such wetlands*.[216] The Rivers, Lakes, and Streams Act regulates certain construction activities in floodplains.[217] Otherwise, Illinois relies on § 401.[218]

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[215] 415 Ill. Comp. Stat. 5/7.2(a) (identical in substance rulemakings); 2 Ill. Code R. 2175.535 (rules identical-in-substance to federal regulations); 415 Ill. Comp. Stat. 5/13.3 (regulations; implementation of Federal Water Pollution Control Act).

[216] 20 Ill. Comp. Stat. §§ 830/1-1 to 830/4-1.

[217] *See* 615 Ill. Comp. Stat. §§ 5/4.9 to 5/35.

[218] For more on Illinois law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase III*, Appendix: Illinois, at 89 (Mar. 2007).

INDIANA

Indiana law imposes *qualified stringency prohibitions* and a *property-based limitation*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.[219]

2) Qualified Prohibitions

Under Indiana's rulemaking process, the Department of Environmental Management (DEM) and the Water Pollution Control Board must provide notice of a proposed rule in the Indiana Register for each of two required public comment periods.

The notice for the first public comment period must describe the subject matter and basic purpose of the proposed rule, including a list all alternatives under consideration. For each alternative, the description must: (1) state whether the alternative creates "a restriction or requirement more stringent than a restriction or requirement imposed under federal law," or "a restriction or requirement in a subject area in which federal law does not impose restrictions or requirements"—and, for each alternative that creates such a restriction or requirement, include any information known to DEM or the Board about the potential fiscal impact of that alternative; (2) state the extent to which the alternative differs from federal law; and (3) set forth the basis for the alternative. (In what appears to have been a one-time exception, these provisions expressly exempt rulemakings undertaken by the Water Pollution Control Board by Feb. 1, 2005, with respect to classification of certain isolated wetlands and the establishment of permitting programs for activities in isolated wetlands regulated by the state.)

The notice for the second public comment period must identify each element of the proposed rule that imposes a restriction or requirement that is "more stringent than a restriction or requirement imposed under federal law," or that applies "in a subject area in which federal law does not impose a restriction or requirement." For each such element, the notice must identify: (1) the environmental circumstance or hazard that dictates the imposition of the proposed restriction or requirement to protect human health and the environment; (2) "examples" of how federal law is inadequate to provide the necessary protection; and (3) the estimated fiscal impact and expected benefits, insofar as the proposed rule is more stringent than federal law or federal law is silent. Finally, for each such element, the notice must describe the availability for

[219] According to press reports, in 2005, an environmental bill was stripped of a provision that would have barred the Indiana Water Pollution Control Board from adopting pollution control rules or standards stricter than federal regulations or standards. *See* Rick Callahan, "Pollution provision removed from bill: state can still be stricter than U.S." *Louisville Courier-Journal*, Apr. 26, 2005 (discussing dispute among state senators that resulted in provision being removed from bill).

public inspection of all materials relied on by DEM or the Board to develop the proposed rule (including, *e.g.*, analytical methods, economic impact data, and environmental assessment data).

Legal Authority:

- Ind. Code § 13-14-9-3 (Department of Environmental Management and Boards' rulemaking procedures—first public comment period; notice)

"(a) Except as provided in subsection (b), the [Department of Environmental Management] shall provide notice in the Indiana Register of the first public comment period [of the two required for rulemaking]. A notice provided under this section must do the following: ...

(2) Describe the subject matter and the basic purpose of the proposed rule. The description required by this subdivision must:

(A) list all alternatives being considered by the department at the time of the notice;

(B) state whether each alternative listed under clause (A) creates:

(i) a restriction or requirement more stringent than a restriction or requirement imposed under federal law; or

(ii) a restriction or requirement in a subject area in which federal law does not impose restrictions or requirements;

(C) state the extent to which each alternative listed under clause (A) differs from federal law;

(D) include any information known to the department about the potential fiscal impact of each alternative under clause (A) that creates:

(i) a restriction or requirement more stringent than a restriction or requirement imposed under federal law; or

(ii) a restriction or requirement in a subject area in which federal law does not impose restrictions or requirements; and

(E) set forth the basis for each alternative listed under clause (A)....

(b) This section does not apply to rules adopted under IC 13-18-22-2 [wetland rules; improving classification of isolated wetland], IC 13-18-22-3 [individual permits for wetland activity; adoption of rules], or IC 13-18-22-4 [general permits for wetland activities; adoption of rules]...."[220]

[220] Pursuant to the wetland provisions referenced here, the Water Pollution Control Board had until February 1, 2005, to adopt rules governing the classification of certain isolated wetlands, as well as rules establishing and implementing permitting programs for activities in isolated wetlands regulated by the state. These rules are codified at Indiana Admin. Code art. 17 (wetland activity permits).

- Ind. Code § 13-14-9-4 (Department of Environmental Management and Boards' rulemaking procedures—second public comment period; notice)

"(a) ... [DEM] shall provide notice in the Indiana Register of the second public comment period [of the two required for a rulemaking]. A notice provided under this section must do the following: ...

(5) Identify each element of the proposed rule that imposes a restriction or requirement on persons to whom the proposed rule applies that:

(A) is more stringent than a restriction or requirement imposed under federal law; or

(B) applies in a subject area in which federal law does not impose a restriction or requirement.

(6) With respect to each element identified under subdivision (5), identify:

(A) the environmental circumstance or hazard that dictates the imposition of the proposed restriction or requirement to protect human health and the environment;

(B) examples in which federal law is inadequate to provide the protection referred to in clause (A); and

(C) the:

(i) estimated fiscal impact; and

(ii) expected benefits;

based on the extent to which the proposed rule is more stringent than the restrictions or requirements of federal law, or on the creation of restrictions or requirements in a subject area in which federal law does not impose restrictions or requirements.

(7) For any element of the proposed rule that imposes a restriction or requirement that is more stringent than a restriction or requirement imposed under federal law or that applies in a subject area in which federal law does not impose restrictions or requirements, describe the availability for public inspection of all materials relied upon by the department in the development of the proposed rule, including, if applicable:

(A) health criteria;

(B) analytical methods;

(C) treatment technology;

(D) economic impact data;

(E) environmental assessment data;

(F) analyses of methods to effectively implement the proposed rule; and

(G) other background data...."

History: The language in § 13-14-9-3, subsections (a)(2)(A) and (a)(2)(E) was enacted as part of the original act in 1996.[221] The language in subsections (a)(2)(B)(ii), (a)(2)(C), and (a)(2)(D)(ii) was enacted in 2003,[222] and the stringency language in subsections

[221] *See* Act of Mar. 14, 1996, Pub. L. No. 1–1996, § 4, 1996 Ind. Acts 1, 99–100 (enacting S.B. No. 56; amended 2006).

[222] *See* Act of May 8, 2003, Pub. L. No. 240–2003, § 4, 2003 Ind. Acts 2394, 2397–98 (enacting H.B. No. 1671; amended 2006).

(a)(2)(B)(i) and (a)(2)(D)(i) was enacted in 2006.[223] The language in subsection (b) was enacted in 2004.[224]

Similarly, the language contained in § 13-14-9-4(a)(5)-(7) was enacted in 2003,[225] with the exception of the "more stringent" language, which was added to these subsections in 2006.[226]

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

None identified.

2) Assessment

The attorney general is required to perform a legal review of state agency rules. As part of the review, the attorney general must consider whether the adopted rule "may" constitute a taking of property without just compensation to the owner. If so, the attorney general must advise the governor and the head of the agency (with the communication subject to attorney-client privilege).

Legal Authority:

- Ind. Code § 4-22-2-32(a)-(b), (f) (review of rule by attorney general; approval or disapproval)

"(a) The attorney general shall review each rule submitted [by an agency] for legality.

(b) ... In the review, the attorney general shall consider whether the adopted rule may constitute the taking of property without just compensation to an owner....

(f) If the attorney general determines in the course of the review conducted under subsection (b) that a rule may constitute a taking of property, the attorney general shall advise the following:
(1) The governor.
(2) The agency head....
Advice given under this subsection shall be regarded as confidential attorney-client communication...."

[223] *See* Act of Mar. 20, 2006, Pub. L. No. 1–2006, § 200, 2006 Ind. Acts 1829, 1837-38 (enacting S.B. No. 234; amended 2006).

[224] Act effective Jan. 27, 2004, Pub. L. No. 282–2003, § 35, 2004 Ind. Acts 5, 23-24 (enacting H.B. No. 1798 over veto; amended 2006).

[225] Act of May 8, 2003, at 2398-99.

[226] Act of Mar. 20, 2006, at 1838-39.

[Note: Pursuant to Ind. Code § 4-22-2-3(a), the term "agency" means "any officer, board, commission, department, division, bureau, committee, or other governmental entity exercising any of the executive (including the administrative) powers of state government. The term does not include the judicial or legislative departments of state government or a political subdivision [such as a municipal corporation]."]

History: The relevant language in § 4-22-2-32(a) was enacted in 1985.[227] The relevant part of subsection (b) and the entirety of subsection (f) were enacted in 1993.[228]

3) Other

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Indiana enacted legislation to "fill the gap" in federal Clean Water Act coverage created by *SWANCC* with respect to certain geographically isolated wetlands.

The Department of Environmental Management administers a state permitting program for activities in freshwater wetlands, including geographically isolated wetlands that are not otherwise exempt.[229] The purpose of this program is to "promote a net gain in high quality isolated wetlands; and ... assure that compensatory mitigation will offset the loss of isolated wetlands allowed by the permitting program."[230] Isolated wetlands are subdivided into three subclasses, ranging from disturbed/minimal habitat and hydrologic function, to undisturbed/more than minimal level of habitat and hydrologic function.[231] Under the program, impacts to isolated wetlands outside of federal Clean Water Act § 404 coverage require a State Isolated Wetlands Permit.[232]

Indiana defines "waters" for purposes of its water pollution control laws and environmental management laws as "the accumulations of water, surface and underground, natural and artificial, public and private, [or] a part of the accumulations

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[227] Act of Apr. 14, 1985, Pub. L. No. 31–1985, § 21, 1985 Ind. Acts 295, 302–03 (enacting H.B. No. 1161; amended 2006).

[228] Act of May 7, 1993, Pub. L. No. 34–1993, § 4, 1993 Ind. Acts 2246, 2249–51 (enacting H.B. No. 1646; amended 2006).

[229] Ind. Code §§ 13-18-22-1 to 13-18-22-11; 327 Ind. Admin. Code 17-1-1. "Exempt isolated wetlands" are defined at Ind. Code § 13-11-2-74.5 and 327 Ind. Admin. Code 17-1-3(7).

[230] Ind. Code § 13-18-22-1.

[231] Ind. Code § 13-11-2-25.8 (definitions of class I, class II, and class III wetlands).

[232] Indiana DEM maintains a website for the state's Isolated Wetlands Program: http://www.in.gov/idem/5849.htm.

of water; that are wholly or partially within, flow through, or border upon Indiana." The term includes, but is not limited to, all "waters of the United States," as defined in the Clean Water Act.[233]

Indiana's Department of Natural Resources administers the Lake Preservation Act, which protects freshwater lakes, including those wetlands legally within the lakes' shorelines.[234]

[233] Ind. Code § 13-11-2-265.

[234] *See* Ind. Code §§ 14-26-2-1 to 14-26-2-25 (lake preservation). For more on Indiana law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase IV*, Appendix: Indiana, at 39 (Oct. 2007).

IOWA

Iowa law imposes *stringency prohibitions* and a *qualified stringency prohibition*.

STRINGENCY LIMITATIONS

1) Prohibitions

The Iowa Environmental Protection Commission may not establish an effluent standard for a source that is more stringent than a federal effluent standard under the Clean Water Act for such source. However, the Commission may establish a more restrictive effluent limitation for a point source if doing so is necessary to meet water quality standards and the federal government has not established an effluent standard for that source or class of sources.

Except as required by federal law or regulation, the Commission is prohibited from adopting an effluent standard more stringent with respect to any pollutant than is necessary to reduce the concentration of that pollutant in the effluent to the level due to natural causes in the water to which the effluent is discharged.

The Commission may establish effluent standards that maintain the existing quality of waters of the state that are also "navigable waters" for purposes of the federal Clean Water Act, where the quality of these waters exceeds the requirements of water quality standards.

Additionally, NPDES rules adopted by the Commission with respect to CAFOs can be no more stringent than requirements under the federal Clean Water Act.

Legal Authority:

- Iowa Code § 455B.173 (duties)

"The [Environmental Protection Commission] shall:

1. Develop comprehensive plans and programs for the prevention, control and abatement of water pollution.

2. Establish, modify, or repeal water quality standards, pretreatment standards and effluent standards, in accordance with the provisions of this chapter [jurisdiction of the Department of Natural Resources].

a. The effluent standards may provide for maintaining the existing quality of the water of the state that is a navigable water of the United States under the federal [Clean Water Act] where the quality thereof exceeds the requirements of the water quality standards.

b. If the federal environmental protection agency has promulgated an effluent standard or pretreatment standard pursuant to section 301, 306, or 307 of the

federal [Clean Water Act], a pretreatment or effluent standard adopted pursuant to this section shall not be more stringent than the federal effluent or pretreatment standard for such source. This section may not preclude the establishment of a more restrictive effluent limitation in the permit for a particular point source if the more restrictive effluent limitation is necessary to meet water quality standards, the establishment of an effluent standard for a source or class of sources for which the federal environmental protection agency has not promulgated standards pursuant to section 301, 306, or 307 of the federal [Clean Water Act]. Except as required by federal law or regulation, the commission shall not adopt an effluent standard more stringent with respect to any pollutant than is necessary to reduce the concentration of that pollutant in the effluent to the level due to natural causes, including the mineral and chemical characteristics of the land, existing in the water of the state to which the effluent is discharged. Notwithstanding any other provision of this part of this division [water quality] or chapter 459, subchapter III [animal feeding operations—water quality], any new source, the construction of which was commenced after October 18, 1972, and which was constructed as to meet all applicable standards of performance for the new source or any more stringent effluent limitation required to meet water quality standards, shall not be subject to any more stringent effluent limitations during a ten-year period beginning on the date of completion of construction or during the period of depreciation or amortization of the pollution control equipment for the facility for the purposes of section 167 or 169 or both sections of the Internal Revenue Code, whichever period ends first."

- Iowa Code § 459.311(2) (minimum requirements for manure control)

  "2. ... [A] confinement feeding operation that is a concentrated animal feeding operation as defined in 40 C.F.R. § 122.23(b) shall comply with applicable national pollutant discharge elimination system permit requirements as provided in the federal [Clean Water Act], as amended, and 40 C.F.R. pts. 122 [NPDES] and 412 [CAFOs], pursuant to rules that shall be adopted by the commission. Any rules adopted pursuant to this subsection shall be no more stringent than requirements under the federal [Clean Water Act], as amended, and 40 C.F.R. pts. 122 and 412."

  History: The stringency language in § 455B.173 dates to the 1970s. A 2006 amendment to the law added the "navigable water of the United States" limitation in Subsection 2.[235] The senate passed the bill 48-0; the house, 98-0.[236]

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[235] Act of May 31, 2006, ch. 1145, § 1, 2006 Iowa Acts 381, 381 (enacting S.F. No. 2363). The underlying statutory language on stringency was introduced in 1976. Act of June 23, 1976, ch. 1204, §§ 6–8, 1976 Iowa Acts 442, 444–45 (enacting H.F. No. 1477, amended 2006, 2011). A failed 2003 amendment would have added a new subsection providing that the Commission shall: "[a]dopt rules consistent with those adopted by [U.S. EPA] pursuant to the federal [CWA]. Such rules shall be no more stringent, restrictive, or inclusive than those of [U.S. EPA]." 2003 Senate Study Bill (SSB) No. 3122.

[236] Iowa Legislature, Bill History for S.F. No. 2363, available at http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&var=SF&key=0899B&GA=81.

The stringency language in § 459.311(2) was added in 2010.[237]

2) Qualified Prohibitions

When the Environmental Protection Commission proposes or adopts rules to implement a "specific federal environmental program," and the rules are more restrictive than the federal program requires, the Commission must: (1) identify in its notice of intended action or adopted rule preamble each rule that is more restrictive than the federal program requires; (2) state the reasons for proposing or adopting the more restrictive requirement; and (3) include with its reasoning a "financial impact statement" detailing the general impact of the rules on affected parties.

Legal Authority:

- Iowa Code § 455B.105 (powers and duties of the commission)

"The [Environmental Protection Commission] shall: ...

3. Adopt, modify, or repeal rules necessary to implement this chapter [jurisdiction of the Department of Natural Resources], chapter 459 [animal agriculture compliance act], chapter 459A [animal agriculture compliance act for open feedlot operations], and chapter 459B [dry bedded confinement feeding operations], and the rules deemed necessary for the effective administration of the department. When the commission proposes or adopts rules to implement a specific federal environmental program and the rules impose requirements more restrictive than the federal program being implemented requires, the commission shall identify in its notice of intended action or adopted rule preamble each rule that is more restrictive than the federal program requires and shall state the reasons for proposing or adopting the more restrictive requirement. In addition, the commission shall include with its reasoning a financial impact statement detailing the general impact upon the affected parties. ..."

History: The requirement in § 455B.105 that notice be given when more restrictive rules are promulgated was enacted in 1983.[238] Prior to this amendment, more stringent rules required approval by the state general assembly.[239] As such, the current provision is less prohibitive than its predecessor.

PROPERTY-BASED LIMITATIONS

None identified.

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[237] Act of May 31, 2006, ch. 1145, § 1, 2006 Iowa Acts 381, 381 (enacting S.F. No. 2363).

[238] Act of March 8, 2010, ch. 1029, § 2, 2010 Iowa Acts (enacting S.F. No. 2248).

[239] *See id.* (deleting "[a] rule adopted under this chapter to carry out a federal regulation shall not become effective if the rule is more restrictive than required by the federal regulation unless the rule is approved by enactment of the general assembly" in favor of the current language).

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Iowa does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. Iowa has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

KANSAS

Kansas law imposes *property-based limitations*.

STRINGENCY LIMITATIONS

None identified.[240]

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

None identified.

2) Assessment

The Kansas Private Property Protection Act (Kan. Stat. Ann. §§ 77-701 to 77-711) was enacted to reduce the risk of "undue or inadvertent burdens on private property rights" resulting from certain lawful governmental actions. Under the Act, a state agency must prepare and make available to the public a written report prior to initiating a governmental action that "may" constitute a taking—that is, a situation where private property is taken or its use is restricted or limited such that compensation to the owner of the property is required under the state or federal constitutions. The statute covers proposed legislation, rules and regulations, and guidelines and procedures concerning the issuance of licenses or permits. The attorney general is required to establish, and annually update, guidelines to assist agencies in evaluating proposed governmental actions subject to the statute.

The Kansas attorney general has issued guidelines and a checklist pursuant to the Act.[241] Among the factors to be considered by an agency are whether its action denies or abrogates a fundamental property right; whether the government action deprives an owner of all economically viable use of a property; whether the action substantially furthers a legitimate state interest; and whether the proscribed use is part of a preexisting limitation on the owner's title.

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[240] *Cf.* Kan. Stat. Ann. § 65-1,177(a)(2) (commission on surface water quality standards; duties; report; revision or reinstatement of 1994 standards) This provision established a special commission to conduct an evaluation of the state's 1994 surface water quality standards and evaluate, among other things, whether they were "more stringent than are required by federal law and those of other Midwestern and plains states." The special commission completed its work in 1998. *Final Report of the Kansas Special Commission on Water Quality Standards*, June 30, 1998 (not available online; provided to ELI staff upon request and on file with the authors).

[241] Kansas Attorney General, Notice of Takings Guidelines, 14 Kan. Reg. 1690, 1690-92 (Dec. 21, 1995). The guidelines do not represent a formal attorney general opinion. *Id.* at 1690. The attorney general's office has updated the guidelines and checklist annually to include new judicial decisions through 2012 (the latest version is dated Jan. 16, 2013). These updates are collected at http://ag.ks.gov/about-the-office/document-center/annual-reports.

The agency's written report must adhere to the attorney general guidelines and must: (1) identify the public health, safety, or welfare risk created by the use of the private property; (2) describe how the proposed action will substantially advance the purpose of protecting public health, safety, or welfare against the risk; (3) set forth the facts relied upon by the agency to establish and justify the need for the restrictions or limitations; (4) analyze the likelihood that the governmental action may result in a taking; (5) identify any alternatives to the proposed governmental action that may fulfill the agency's legal obligations while reducing the extent of limitation of the use of the private property and reducing the risk that the action will be deemed a taking; and (6) ensure that any conditions imposed under a permit directly relate to the public health, safety, or welfare purpose for which the permit is to be issued, substantially advance that purpose, and are authorized by law.

Prior to taking action in a situation where a written report is required, the agency must submit the report to the governor and the attorney general. Agencies are further required to review and evaluate all of their existing rules and regulations in accordance with the attorney general guidelines and to make a report to the governor and the attorney general.

When a private property owner establishes in court that a government action was a taking of private property, the court may award attorney fees and expenses.

Legal Authority:

- Kan. Stat. Ann. § 77-702 (public policy; purpose of act)

"... [I]t is the public policy of the state of Kansas that state agencies, in planning and carrying out governmental actions, anticipate, be sensitive to and account for the obligations imposed by the [federal and state constitutions]. It is the express purpose of this act to reduce the risk of undue or inadvertent burdens on private property rights resulting from certain lawful governmental actions."

- Kan. Stat. Ann. § 77-703 (definitions)

"... (a) "Take" or "taking" means, due to a governmental action, private property is taken or its use is restricted or limited by a governmental action such that compensation to the owner of the property is required by the [federal and state constitutions].

(b)(1) "Governmental action" means any of the following actions by a state agency which may constitute a taking:

(A) Proposed legislation;

(B) proposed rules and regulations or directives; or

(C) proposed agency guidelines and procedures concerning the process of issuing licenses or permits;

(2) "Governmental action" does not include: [exceptions not relevant here]. ...

(d) "State agency" means an officer, department, division or unit of the executive branch of the state of Kansas authorized to propose, adopt or enforce rules and regulations. "State agency" shall not include the legislative or judicial branches of the state of Kansas or any political or taxing subdivision of the state of Kansas."

- Kan. Stat. Ann. § 77-704 (attorney general to establish guidelines for state agencies to follow)

  "The attorney general for the state of Kansas shall establish ... and update annually guidelines to assist state agencies in evaluating proposed governmental actions and in determining whether such actions may constitute a taking. These guidelines shall be published in the Kansas register. The guidelines shall be based on current law as articulated by the United States supreme court and the supreme court of Kansas."

- Kan. Stat. Ann. § 77-705 (same; promulgation of rules and regulations)

  "... [T]he guidelines developed by the attorney general shall be adhered to by state agencies in promulgating rules and regulations ... and amendments thereto."

- Kan. Stat. Ann. § 77-706 (written report prepared by state agency prior to governmental action; guidelines)

  "... (a) Before any governmental action is initiated, the state agency shall prepare a written report available for public inspection that follows the guidelines established by the attorney general and complies with the following, when applicable:
  (1) Clearly and specifically identifies the public health, safety or welfare risk created by the use of the private property;
  (2) describes the manner in which the proposed action will substantially advance the purpose of protecting public health, safety or welfare against the specifically identified risk;
  (3) sets forth the facts relied upon to establish and justify the need for the restrictions or limitations;
  (4) analyzes the likelihood that the governmental action may result in a taking;
  (5) identifies the alternatives, if any, to the proposed governmental action that may:
  (A) Fulfill the legal obligations of the state agency;
  (B) reduce the extent of limitation of the use of the private property; and
  (C) reduce the risk to the state that the action will be deemed a taking; and
  (6) ensure that any conditions imposed on issuing a permit shall relate directly to the public health, safety or welfare purpose for which the permit is to be issued, shall substantially advance that purpose and shall be authorized by law. ...

  (c) If a governmental action involves a permit process or any other procedure that will limit or otherwise prohibit the use of private property pending completion of the process or procedure, the duration of the limitation on or prohibited use of the property shall not extend beyond a reasonable period of time.

(d) Before any state agency implements a governmental action for which a report is required under this section, the state agency shall submit a copy of the report to the governor and the attorney general.

(e) Each state agency shall submit with the economic impact statement as required by K.S.A. 77-416 [filing rules and regulations; numbering; citation of statutory authority; economic impact statement; documents adopted by reference; review of economic impact statement by director of the budget; environmental benefit and economic impact statement; authority of secretary of state], and amendments thereto, a copy of the taking assessment as required pursuant to this act."

- Kan. Stat. Ann. § 77-707 (state agencies evaluate and review rules and regulations)

  "... [E]ach state agency shall:

  (a) Review and evaluate all of the agency's existing rules and regulations in accordance with the guidelines issued by the attorney general pursuant to this act; and

  (b) prepare and submit to the governor and the attorney general a report containing the results of the evaluation."

- Kan. Stat. Ann. § 77-709 (attorneys fees and expenses)

  "... [T]he court may award reasonable attorney fees and expenses to an owner of private property who successfully establishes that a governmental action constitutes a taking of such owner's private property."

  History: The Kansas Private Property Protection Act was enacted in 1995.[242] Prior to adoption, the bill was criticized for its potential to "gut" current environmental regulations.[243]

3) Other

   None identified.

[242] Law of April 19, 1995, ch. 170, 1995 Kan. Sess. Laws 563, 563–66 (enacting H.B. No. 2015).

[243] Dave Toplikar, "Supporters Say Private Property Bill Stops Taxation Without Representation," *Lawrence Journal-World* (Feb. 19, 1995), available at http://news.google.com/newspapers?id=WcUxAAAAIBAJ&sjid=WuYFAAAAIBAJ&pg=3962,7903825&dq=kansas+private+property+legislation&hl=en.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Kansas does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. Kansas has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

KENTUCKY

Kentucky law imposes *stringency prohibitions* and *qualified stringency prohibitions.*

STRINGENCY LIMITATIONS

1) Prohibitions

Kentucky administrative bodies may promulgate implementing regulations only where authorized to do so by the state legislature, or where regulations are required by federal law. In the latter instance, the state regulations may be "no more stringent than the federal law or regulations."[244]

Under a separate provision, the Energy and Environment Cabinet is prohibited from imposing under a Clean Water Act permit any effluent limitation, monitoring requirement, or other condition that is more stringent than the effluent limitation, monitoring requirement, or other condition that "would have been applicable under federal regulation if the permit were issued by the federal government."

Legal Authority:

- Ky. Rev. Stat. Ann. § 13A.120(1)(a), (4) (promulgation of administrative regulations; prohibitions concerning promulgations)

"(1)(a) An administrative body may promulgate administrative regulations to implement a statute only when the act of the General Assembly creating or amending the statute specifically authorizes the promulgation of administrative regulations or administrative regulations are required by federal law, in which case administrative regulations shall be no more stringent than the federal law or regulations....

(4) Any administrative regulation in violation of this section or the spirit thereof is null, void, and unenforceable...."

[Note: Pursuant to Ky. Rev. Stat. Ann. § 13A.010(1), "administrative body" is broadly defined to apply to state departments, boards, and commissions, but does not cover the state legislature.]

[244] A Kentucky court interpreting the state stringency provision determined that where a state mining regulation failed to provide a strip miner, who stood accused of violations, with procedural protections parallel to those afforded by the federal mining law, the state regulation was more stringent than federal law and regulations—and thus "null, void, and unenforceable." *Franklin v. Natural Resources and Environmental Protection Cabinet, Com. of Ky.*, 799 S.W.2d 1, 3 (Ky. 1990).

- Ky. Rev. Stat. Ann. § 224.16-050(4) (issuance of federal permits by cabinet; activities not requiring permit; wetlands delineation; application fee)

  "The [Energy and Environment Cabinet] shall not impose under any permit issued pursuant to this section [covering permits issued under the federal Clean Water Act] any effluent limitation, monitoring requirement, or other condition which is more stringent than the effluent limitation, monitoring requirement, or other condition which would have been applicable under federal regulation if the permit were issued by the federal government."

  History: The relevant statutory language of § 13A.120 was enacted in 1986.[245] The relevant language of § 224.16-050 was enacted in 1978.[246]

2) Qualified Prohibitions

   If a Kentucky administrative body issuing a regulation is (1) not required by federal law to do so, and (2) is required or authorized by state law to issue a regulation governing the subject matter, the regulation must "conform to a federal law or regulation governing a subject matter."

   When enacting a regulation "in response to a federal mandate," an administrative body is required to compare its proposed compliance standards with "any minimum or uniform standards suggested or contained in the federal mandate." The comparison must contain a written determination as to whether the proposed state regulation will impose "stricter requirements or other responsibilities" on regulated entities than required by the federal mandate. If so, the comparison analysis must further include "a written statement justifying the imposition of stricter standards, requirements, or responsibilities."

   Additionally, if the state regulation is more stringent than or otherwise differs from the federal law or regulation governing the subject matter, the administrative body must state in detail in its regulation the manner in which it is more stringent than or otherwise differs from the federal law or regulation, and give reasons.

   These provisions—which allow for the possibility that a Kentucky administrative body could issue a regulation more stringent than otherwise provided by federal law—are arguably in conflict with the broader stringency prohibition provision, discussed above (*i.e.*, where state implementing regulations are required by federal law, they can be "no more stringent than the federal law or regulations"). Both sets of provisions were enacted in 1986.

[245] Act of April 15, 1986, ch. 499, § 8, 1986 Ky. Acts 1354, 1358 (enacting H.B. No. 310; passed over governor's veto; amended 1996).

[246] Act of March 30, 1978, ch. 257, § 2, 1978 Ky. Acts 758, 759 (enacting H.B. No. 359; amended 2005).

Legal Authority:

- Ky. Rev. Stat. Ann. § 13A.245 (agencies to prepare a federal mandate analysis comparing proposed state regulatory standards to federal standards; relationship between state administrative regulation and federal law or regulation governing a subject matter)

"(1)(a)When promulgating administrative regulations and amending existing administrative regulations in response to a federal mandate, an administrative body shall compare its proposed compliance standards with any minimum or uniform standards suggested or contained in the federal mandate.
(b) Such a comparison shall include, in detail, a written determination by the administrative body on whether the proposed state administrative regulation will impose stricter requirements or other responsibilities on the regulated entities than those required by the federal mandate.
(c) If the administrative body determines that the proposed state administrative regulation imposes additional requirements or responsibilities on the regulated entities than is required by the federal mandate, the administrative body shall include in its comparison analysis a written statement justifying the imposition of stricter standards, requirements, or responsibilities.

(2) (a) Except as provided by paragraph (b) of this subsection, an administrative regulation shall conform to a federal law or regulation governing a subject matter if an administrative body is:
1. Not required by federal law or regulation to promulgate an administrative regulation to comply with a federal law or regulation governing the subject matter; and
2. Required or authorized by state law to promulgate an administrative regulation governing the subject matter.
(b) If the administrative regulation is more stringent than or otherwise differs from the federal law or regulation governing the subject matter, the administrative body shall state in detail in the "NECESSITY, FUNCTION, AND CONFORMITY" paragraph of the administrative regulation the manner in which it is more stringent than or otherwise differs from the federal law or regulation, and the reasons therefor."

[Note: Pursuant to Ky. Rev. Stat. Ann. § 13A.010(8), a "federal mandate" is "any federal constitutional, legislative or executive law or order which requires or permits any administrative body to engage in regulatory activities which impose compliance standards, reporting requirements, recordkeeping, or similar responsibilities upon entities in [Kentucky]."]

History: Subsection 2 of § 13A.245 was added in 1996.[247] The provision was originally enacted in 1986.[248]

[247] Act of April 9, 1996, ch. 330, § 2, 1996 Ky. Acts 1515, 1517 (enacting S.B. No. 360).

[248] *See* Act of Mar. 13, 1986, ch. 89, § 8, 1986 Ky. Acts 179, 183 (enacting S.B. No. 208).

PROPERTY-BASED LIMITATIONS

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Kentucky does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. Kentucky has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

LOUISIANA

Louisiana law imposes *property-based limitations*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.

2) Qualified Prohibitions

None identified.

However, one of the *exceptions* to the property-based compensation provisions for agricultural property and forest land operations (discussed below) is action "taken in compliance with federal law or regulation." This provides incentive for state regulators to limit their regulation to the degree of stringency required by federal provisions.

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

Louisiana affords private property protections to owners of *agricultural property* and *forest land* affected by a state or local governmental action such as issuance of a rule, regulation, policy, guideline, order or other legally binding directive, with certain exceptions. The processes established for agriculture and forestry are very similar.

Agriculture. An owner of private *agricultural property* may sue a governmental entity to determine whether a governmental action caused a twenty percent or greater diminution in value of any portion of the owner's property. If the court so finds, the owner may recover a sum equal to either: (1) the diminution in value of the property (and retain title); or (2) the entire fair market value of the property prior to the diminution in value of twenty percent or more (and transfer title to the government). If the owner prevails, the government may respond by rescinding or repealing the rule or regulation at issue, although the government remains liable for any damages caused.

Louisiana government entities must: (1) avoid imposing an undue burden on their resources by actions that require compensation of private agricultural property owners as takings; (2) avoid diminution in value of private agricultural property; (3) expedite a decision in cases where delay will substantially interfere with the use or value of private agricultural property rights affected; and (4) avoid unnecessary delays in compensating owners of private agricultural property when diminution in value

occurs. Although the provision containing these requirements reads like a statement of policy, it is framed as a legal mandate to state government entities.

Forestry. Similarly, an owner of *forest land* may sue a governmental entity for damages resulting from governmental action that "prohibits or limits" the owner's ability to conduct forestry activities. Consistent with the agricultural provisions, a "prohibition or limitation" means a reduction in the fair market value of any portion of the forested property by twenty percent or more. Following a favorable determination by the court, the owner is entitled to recover a sum equal to the diminution in value of the property, and retain title. If the government subsequently rescinds or repeals the action at issue, the owner may still seek damages caused by the action and, at the court's discretion, recover fees.

In either type of action, the court may award costs and reasonable fees to the prevailing party.

The definition of "governmental action" *excludes* the exercise of the police power to prohibit activities that are "harmful to the public safety and health," actions by the legislature, and actions "taken in compliance with federal law or regulation." The extent to which these exceptions, and primarily the first, might apply to regulations to protect water resources is unknown (and the case law provides no guidance).

The twenty percent diminution-in-value threshold under Louisiana law has been described as "arguably ... the most expansive takings standard in any state takings law."[249] However, as of 2008, a study of state private property rights acts concluded that the Louisiana legislation, with its narrow scope, appears not to have had any impact.[250]

Legal Authority:

- La. Rev. Stat. Ann. § 3:3610 (private agricultural property owner's right of action; remedies)

  "A. An owner of private agricultural property may bring an action against a governmental entity to determine whether the governmental action caused a diminution in value of a parcel of private agricultural property in which the owner has an interest. The owner of the affected private agricultural property shall show that the diminution in value did not result from a restriction or prohibition of a use of the private agricultural property that was not a use already prohibited by law....

[249] State Environmental Resource Center (SERC), "Issue: Takings Legislation," 2005, available at http://www.serconline.org/Takings/stateactivity.html.

[250] *See* Georgetown Environmental Law and Policy Institute, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, at 38 (2008).

C. Owners and governmental entities are encouraged to seek resolution of actions brought under this Section through mediation or any other mutually agreeable alternative dispute resolution method prior to the filing of any action. When a pending action has not been the subject of an attempted mediation, the court may require the parties to attempt mediation at any point in the proceedings prior to trial.

D. In an action brought pursuant to this Section, upon a determination that a governmental action caused a diminution in value of private agricultural property, the owner shall, at the option of the owner, recover a sum equal to the diminution in value of the property and retain title thereto, or recover the entire fair market value of the property prior to the diminution in value of twenty percent or more and transfer title to the property to the governmental entity.

E. The court in issuing any final order in any action brought pursuant to this Section may award costs of litigation, including reasonable attorney and expert witness fees, to the prevailing party in addition to other remedies provided by law.

F. If a property owner prevails in a suit filed as provided in this Section, the governmental entity may rescind or repeal the rule or regulation which caused the diminution in value of the property, and if such rule or regulation is rescinded or repealed the governmental entity shall be liable for damages sustained by the property owner to his affected property which were caused by the application of the rescinded or repealed rule or regulation."

- La. Rev. Stat. Ann. § 3:3608 (minimization of impact of governmental action)

  "To minimize the impact of governmental action affecting private agricultural property and private agricultural property rights, a governmental entity shall:

  (1) Avoid imposing an undue burden on the resources of that governmental entity by actions that require compensation of private agricultural property owners under the [federal or state constitutions].

  (2) Avoid diminution in value of private agricultural property which is used in agricultural production or which may potentially be used in agricultural production.

  (3) Expedite a decision by the entity in cases in which a delay of the decision will substantially interfere with the use or value of private agricultural property rights affected by the provisions of this Part [right to farm].

  (4) Avoid unnecessary delays in compensating owners of private agricultural property when diminution in value occurs by governmental action."

- La. Rev. Stat. Ann. § 3:3602 (10), (13), (14) (definitions)

  "(10) "Diminution in value" means an existent reduction of twenty percent or more of the fair market value or the economically viable use of, as determined by a qualified

appraisal expert, the affected portion of any parcel of private agricultural property or the property rights thereto for agricultural purposes, as a consequence of any regulation, rule, policy, or guideline promulgated for or by any governmental entity....

(13) "Governmental action" means ... the issuance of a rule, regulation, policy, or guideline promulgated for or by any governmental entity, or an order or other legally binding directive having the force of law or capable of being enforced by government. Governmental action does not mean the following: ...

(b) The adoption, enactment, repeal, or amendment of a statute or resolution by the legislature....

(g) Actions taken in compliance with federal law or regulation.

(h) A result of police power to prohibit activities that are harmful to the public safety and health.

(14) "Governmental entity" means:

(a) A board, authority, commission, department, office, or agency of the state government.

(b) A local governmental subdivision with a population of less than four hundred twenty-five thousand.

(c) A special purpose district."

- La. Rev. Stat. Ann. § 3:3623 (landowner's right of action; remedies)

"A. An owner of forest land shall have a cause of action against a governmental entity for damages resulting from governmental action which prohibits or limits an owner's ability to conduct forestry activities on forest land in which the owner has an interest....

C. In an action brought pursuant to this Section and subject to the provisions of R.S. 13:5105 et seq. [pertaining to jury trials], upon a determination that a governmental action caused a diminution in value of forest land resulting in prohibition or limit of use in violation of this Part [right to forest], the owner shall recover a sum equal to the diminution in value of the property and retain title thereto.

D. The court in issuing any final order in any action brought pursuant to this Section may award costs of litigation, including reasonable attorney and expert witness fees, to the prevailing party in addition to other remedies provided by law.

E. A subsequent repeal or rescission by the governmental entity of the governmental action, which is the subject of a suit, shall not preclude the owner of the right to recover damages resulting from such action and in the discretion of the court, reasonable attorney and expert witness fees."

- La. Rev. Stat. Ann. § 3:3622 (3)-(4), (6) (definitions)

"(3) "Governmental action" means ... the issuance of a rule, regulation, policy, or guideline promulgated for or by any governmental entity, or an order or other legally

binding directive having the force of law or capable of being enforced by government which prohibits or limits the right of an owner to conduct forestry activities on forestry land. Governmental action does not mean the following: ...

(b) A result of police power to prohibit activities that are harmful to the public safety and health....

(d) The adoption, enactment, repeal, or amendment of a statute or resolution by the legislature....

(h) Actions taken in compliance with federal law or regulation.

(4) "Governmental entity" means:

(a) A board, authority, commission, department, office, or agency of the state government.

(b) A local governmental subdivision with a population of less than four hundred twenty-five thousand.

(c) A special purpose district....

(6) "Prohibits or limits" means an existent reduction of twenty percent or more of the fair market value of forest land, or any portion thereof, or property rights thereto associated with conducting forestry activities on forest land before the action."

History: The relevant language in §§ 3:3610, 3:3608, and 3:3602 was enacted in 1995 through amendments to the Right to Farm Law.[251] The relevant language in §§ 3:3623 and 3:3622 was enacted in 1995 as the Right to Forest Law.[252]

2) Assessment

A state or local governmental entity must prepare a written assessment of any proposed governmental action prior to taking an action that will "likely result in a diminution in value" (*i.e.*, a twenty percent reduction in value, as discussed above) of either private agricultural property or forest land. The "analyses and conclusions" of the assessment must cover: the purpose of the action; whether, and if so, to what extent the action would result in a diminution in value of the affected property; the extent to which the action would interfere with the potential for agricultural development of private property; alternatives that would lessen or eliminate any adverse impact on the property; an estimate of the cost to the governmental entity if it is required to compensate one or more property owners; and the identity of the source of payment for any compensation ordered. The government entity must deliver copies of the assessment to the governor, the commissioner of agriculture and forestry, and affected landowners. The terms "governmental entity" and "governmental action" are broadly defined (see discussion above).

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[251] Act of June 15, 1995, Act 302, § 1, 1995 La. Acts 857, 858–63 (enacting H.B. No. 2199; amended 2008). The original Right to Farm Law was passed in 1983. *See* Louisiana Right to Farm Law, Act 95, § 1, 1983 La. Acts 253, 253–56 (enacting S.B. No. 20; amended 2008).

[252] Louisiana Right to Forest Law, Act 302, § 1, 1995 La. Acts 857, 863–67 (enacting H.B. No. 2199).

The Commissioner of Agriculture and Forestry is required to issue guidelines for private agricultural property owners and governmental entities to assist in determining what actions are likely to result in a diminution of value under these provisions.[253]

Legal Authority:

- La. Rev. Stat. Ann. § 3:3609 (impact assessment)

"A. A governmental entity shall prepare a written assessment of any proposed governmental action prior to taking any proposed action that will likely result in a diminution in value of private agricultural property.

B. The written assessment shall include written analyses and conclusions concerning:
(1) A clear and specific identification of the governmental action and the purpose of the governmental action....
(3) The length of time that the governmental action would interfere with the use of private agricultural property.
(4) Whether the governmental action would result in a diminution in value as to the affected private agricultural property and, if so, the extent thereof.
(5) The extent to which the governmental action would interfere with the potential for agricultural development of the private property of owners.
(6) Whether the proposed governmental action restricts or prohibits a use which is already prohibited by existing law.
(7) Alternatives to the proposed action that would lessen or eliminate any adverse impact on private agricultural property.
(8) An estimate of the cost to the governmental entity if the entity is required to compensate one or more private agricultural property owners.
(9) The identity of the source of payment within the entity's budget or otherwise for any compensation that may be ordered....

D. The governmental entity preparing the assessment shall deliver copies to the governor, the commissioner of agriculture and forestry, and any affected landowners.

E. The commissioner of agriculture and forestry shall promulgate guidelines for owners of private agricultural property and governmental entities to assist in determining what governmental actions are likely to result in a diminution of value of private agricultural property."

[253] As of mid-2010, the Louisiana Department of Agriculture and Forestry maintained no publicly available guidelines under La. Rev. Stat. Ann. § 3:3609(E). ELI Staff Communication with Louisiana Department of Agriculture and Forestry, August 5, 2010 (email on file with the authors).

- La. Rev. Stat. Ann. § 3:3622.1 (impact assessment)

  "A. A governmental entity shall prepare a written assessment of any proposed governmental action prior to taking any proposed action that will likely result in a diminution in value of forest land.

  B. The written assessment shall include written analyses and conclusions concerning:
  (1) A clear and specific identification of the governmental action and the purpose of the governmental action....
  (3) The length of time that the governmental action would interfere with the use of forest land.
  (4) Whether the governmental action would result in a diminution in value as to the affected forest land and, if so, the extent thereof.
  (5) The extent to which the governmental action would interfere with the potential for forestry development of the property of owners.
  (6) Whether the proposed governmental action restricts or prohibits a use which is already prohibited by existing law.
  (7) Alternatives to the proposed action that would lessen or eliminate any adverse impact on forest land.
  (8) An estimate of the cost to the governmental entity if the entity is required to compensate one or more forest landowners.
  (9) The identity of the source of payment within the entity's budget or otherwise for any compensation that may be ordered....

  D. The governmental entity preparing the assessment shall deliver copies to the governor and the commissioner of agriculture and forestry, and any affected landowners."

  History: These provisions were enacted as part of the Louisiana Right to Farm Law in 1995.[254]

3) Other

   None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Louisiana does not have a regulatory program under state law addressing dredge and fill activities in its nontidal waters and wetlands. It relies on Clean Water Act § 401. Louisiana has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

[254] Louisiana Right to Farm Law, Act 302, 1995 La. Acts 857 (enacting H.B. No. 2199).

The Louisiana State and Local Coastal Resources Management Act created the Louisiana Coastal Resources Program (LCRP), which issues coastal use permits (CUPs) for activities in the state's coastal zone.[255] CUPs are required in order to conduct the following activities: dredge and fill work, bulkhead construction, shoreline maintenance, and other construction projects.[256]

[255] *See* La. Rev. Stat. Ann. §§ 49:214.21 to 49:214.42.

[256] La. Rev. Stat. Ann. § 49:214.25. For more on Louisiana law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase III*, Appendix: Louisiana, at 119 (Mar. 2007).

MAINE

Maine law imposes a *qualified stringency prohibition* and *property-based limitations*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.

2) Qualified Prohibitions

Maine's Department of Environmental Protection must, "when feasible," identify any proposed rule that is anticipated to be more stringent than the federal standard, "if an applicable federal standard exists." During consideration of a proposed rule, the Department must (again, "when feasible"): (1) identify provisions of the proposed rule that it believes would impose a regulatory burden "more stringent than the burden imposed by the federal standard, if such a federal standard exists;" and (2) justify the difference between the rule and the federal standard.

Legal Authority:

- Me. Rev. Stat. Ann. tit. 38, § 341-H(3) (departmental rulemaking)

"... The [Department of Environmental Protection] shall:

A. Identify in its regulatory agenda ... when feasible, a proposed rule or provision of a proposed rule that is anticipated to be more stringent than the federal standard, if an applicable federal standard exists;

B. During the consideration of any proposed rule, when feasible, and using information available to it, identify provisions of the proposed rule that the department believes would impose a regulatory burden more stringent than the burden imposed by the federal standard, if such a federal standard exists, and shall explain in a separate section of the basis statement the justification for the difference between the agency rule and the federal standard...."

History: The relevant statutory language was enacted in 1993 as Me. Rev. Stat. Ann. tit. 38, § 341-D(1-B), with minor amendments made in 1995.[257] It was amended and recodified in 2011.[258]

[257] Law effective Oct. 13, 1993, ch. 328, § 1, 1993 Me. Laws 493 (enacting H.P. No. 1222; amended 2010); Law effective Sept. 29, 1995, ch. 347, § 1, 1995 Me. Laws 371 (enacting S.P. No. 347; amended 2010).

[258] Law effective June 13, 2011, ch. 304, § H-14, 2011 Me. Laws 444-45 (enacting S.P. 10 L.D. 1); further amended 2011).

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

Under the rulemaking procedures of the Maine Administrative Procedure Act, every rule adopted by a Maine agency must be submitted to the attorney general for review. The attorney general is prohibited from approving a rule if it is "reasonably expected to result in a taking of private property" under the state constitution—unless that result is "directed by law," or there are sufficient procedures already in the law, or in the proposed rule, to allow for a variance designed to avoid a taking.[259]

Legal Authority:

- Me. Rev. Stat. Ann. tit. 5, § 8056(6) (filing and publication—attorney general review and approval)

"The review required in subsection 1 [all agencies must submit proposed rules to the attorney general for approval as to form and legality] may not be performed by any person involved in the formulation or drafting of the proposed rule. The Attorney General may not approve a rule if it is reasonably expected to result in a taking of private property under the Constitution of Maine unless such a result is directed by law or sufficient procedures exist in law or in the proposed rule to allow for a variance designed to avoid such a taking."

History: The relevant statutory language of § 8056 was enacted in 1995.[260]

2) Assessment

Under the Maine APA, agency rules that are deemed "major substantive rules" may be adopted by an agency only provisionally; legislative review is required before they can be finally adopted. A major substantive rule (in contrast to a "routine technical rule") is one that either requires significant agency discretion or interpretation in drafting, or, because of its subject matter or anticipated impact, is reasonably expected to result in "a significant increase in the cost of doing business, a significant

[259] In May 2012, Maine legislators in the Senate and the House voted to "indefinitely postpone" consideration of a proposed regulatory takings bill, L.D. 1810 (125th Me. Leg.), effectively killing it. *See* Maine Legislature: Summary of LD 1810 (H.P. 1334), available at http://www.mainelegislature.org/LawMakerWeb/summary.asp?ID=280043775. The February 2012 version of the bill would have provided for compensation to private property owners who suffered at least a fifty percent loss in fair market value to property resulting from a regulation, as determined by a jury.

This bill followed in the wake of L.D. 1477 (H.P. 1086), which was enacted in 2011 and resolved to create a committee to study regulatory takings. The committee issued its final report in Dec. 2011; it "did not reach consensus on whether the Maine Legislature should enact a statutory definition of regulatory takings and establish a process for landowners to seek compensation or regulatory relief." *See* "Final Report of the Committee to Review Issues Dealing with Regulatory Takings," at 6, Dec. 2011, available at http://www.maine.gov/legis/opla/RegulatoryTakingsStudyrpt.pdf.

[260] Law effective July 4, 1996, ch. 537, § 6, 1995 Me. Laws 1365, 1368 (enacting H.P. No. 1188; amended 1999).

reduction in property values ... , or other serious burdens on the public or units of local government." Any rule adopted by a state agency to address *SWANCC* and *Rapanos* issues would almost certainly qualify as a major substantive rule for purposes of Maine law.

Major substantive rules are referred to legislative committees for review, and public hearings may be convened. Among the items to be considered by the committee is whether, "[f]or a rule that is reasonably expected to result in a significant reduction in property values," sufficient variance provisions exist to avoid an unconstitutional taking, and whether, as a matter of policy, the expected reduction is "necessary or appropriate for the protection of the public health, safety and welfare advanced by the rule." The committee must issue to the legislature a final report and recommendation on the rule. If the legislature chooses not to act on the recommendation, the agency may proceed with final adoption.

Major substantive rules that must be adopted to comply with federal law or regulations—and over the adoption of which the agency exercises "no option or discretion"—are not subject to these legislative review requirements, unless the rules impose requirements or conditions that exceed the federal requirements.

Legal Authority:

- Me. Rev. Stat. Ann. tit. 5, § 8071(2)-(3) (legislative review of certain agency rules)

"2. Categories of rules. There are 2 categories of rules authorized for adoption ....

B. Major substantive rules are rules that, in the judgment of the Legislature: ...

(1) Require the exercise of significant agency discretion or interpretation in drafting; or

(2) Because of their subject matter or anticipated impact, are reasonably expected to result in a significant increase in the cost of doing business, a significant reduction in property values, the loss or significant reduction of government benefits or services, the imposition of state mandates on units of local government ... , or other serious burdens on the public or units of local government.

3. Levels of rule-making process. In order to provide for maximum agency flexibility in the adoption of rules while retaining appropriate legislative oversight over certain rules that are expected to be controversial or to have a major impact on the regulated community, each agency rule authorized and adopted ... is subject to one of 2 levels of rule-making requirements. ...

B. Major substantive rules are subject to the requirements of section 8072. ... [A]ny grant of general or specific rule-making authority to adopt major substantive rules is considered to be permission only to provisionally adopt those rules subject to legislative review. Final adoption may occur only after legislative review of provisionally adopted rules as provided in section 8072. ..."

- Me. Rev. Stat. Ann. tit. 5, § 8072(1), (4), (7), (11) (legislative review of major substantive rules)

  "1. Preliminary adoption of major substantive rules. An agency proposing a major substantive rule ... shall proceed with rule-making procedures to the point of, but not including, final adoption. At that point, known in this section as "provisional adoption," the agency shall file the provisionally adopted rule and related materials with the Secretary of State ... and submit the rule to the Legislature for review and authorization for final adoption as provided in this section. The rule has legal effect only after review by the Legislature followed by final adoption by the agency. ...

  4. Committee review. The committee shall review each provisionally adopted rule and, in its discretion, may hold public hearings on that rule. ... The committee's review must include, but is not limited to, a determination of: ...

  H. For a rule that is reasonably expected to result in a significant reduction in property values, whether sufficient variance provisions exist in law or in the rule to avoid an unconstitutional taking, and whether, as a matter of policy, the expected reduction is necessary or appropriate for the protection of the public health, safety and welfare advanced by the rule. ...

  7. Report to the Legislature. Unless otherwise provided by the Legislature, each joint standing committee of the Legislature that receives a rule submitted during the legislative rule acceptance period shall report to the Legislature its recommendations concerning final adoption of the rule no later than 30 days before statutory adjournment of the legislative review session....

  11. Prohibited final adoption. A provisionally adopted rule or part of a provisionally adopted rule may not be finally adopted by an agency unless:

  A. Legislation authorizing adoption of the rule or part of the rule is enacted into law; or

  B. The agency submits the rule or part of the rule in accordance with this section during the legislative rule acceptance period and the Legislature fails to act on the rule or part of the rule.

  For purposes of this subsection, the Legislature fails to act on a rule or part of a rule if the Legislature fails to enact legislation authorizing adoption or disapproving adoption of the rule or part of the rule during the legislative review session or during any subsequent session to which a legislative instrument expressly providing for approval or disapproval of the rule or part of the rule is carried over. ...."

- Me. Rev. Stat. Ann. tit. 5, § 8074 (federally mandated rules)

  "Major substantive rules that must be adopted to comply with federal law or regulations or to qualify for federal funds and over the adoption of which the agency exercises no option or discretion are not subject to the legislative review requirement of this subchapter unless they impose requirements or conditions that exceed the federal requirements. An agency must file notice of the adoption of major substantive rules that are required by federal law and that do not exceed federal requirements

with the Legislature in the same manner as it files notice of proposed rules under section 8053-A [notice to legislative committees]."

History: With the exception of § 8072(4)(H), the relevant statutory language of §§ 8071, 8072, and 8074 was enacted in 1995.[261] Section 8072(4)(H) was enacted in 1995 and became effective in 1996.[262]

3) Other

Maine's Land Use Mediation Program affords property owners with a low-cost mediation option. The program applies to landowners who have "suffered significant harm as a result of a governmental action regulating land use." The law covers municipal and state governmental land use actions, and the purpose of the mediation is "to facilitate, within existing land use laws, ordinances and regulations, a mutually acceptable solution to a conflict between a landowner and a governmental entity regulating land use."

Legal Authority:

- Me. Rev. Stat. Ann. tit. 5, § 3341 (land use mediation program)

"1. Program established. The land use mediation program is established to provide eligible private landowners with a prompt, independent, inexpensive and local forum for mediation of governmental land use actions as an alternative to court action.

2. Provision of mediation services; forms, filing and fees. The Court Alternative Dispute Resolution Service created in Title 4, section 18-B shall provide mediation services under this subchapter. [That court] shall:

A. Assign mediators under this subchapter who are knowledgeable in land use regulatory issues and environmental law;

B. Establish a simple and expedient application process. Not later than February 1st of each year, the Court Alternative Dispute Resolution Service shall send to the chair of the Land and Water Resources Council a copy of each completed application received and each agreement signed during the previous calendar year; and

C. Establish a fee for services in an amount not to exceed $175 for every 4 hours of mediation services provided. In addition, the landowner is responsible for the costs of providing notice as required under subsection 7.

3. Application; eligibility. A landowner may apply for mediation under this subchapter if that landowner:

[261] Law effective Sept. 29, 1995, ch. 463, § 2, 1995 Me. Laws 914, 914–15 (enacting H.P. No. 806; amended 1995, 2011).

[262] Law effective July 4, 1996, ch. 537, § 6, 1995 Me. Laws 1365, 1368 (enacting H.P. No. 1188; amended 1999).

A. Has suffered significant harm as a result of a governmental action regulating land use;

B. Applies for mediation under subsection 4 within the time allowed under law or rules of the court for filing for judicial review of that governmental action;

C. Has:

(1) For mediation of municipal governmental land use action, sought and failed to obtain a permit, variance or special exception and has pursued all reasonable avenues of administrative appeal; or

(2) For mediation of state governmental land use action, sought and failed to obtain governmental approval for a land use of that landowner's land and has a right to judicial review under section 11001 [right to judicial review under state APA] either due to a final agency action or the failure or refusal of an agency to act; and

D. Submits to the Superior Court clerk all necessary fees....

4. Submission of application for mediation. A landowner may apply for mediation under this subchapter by filing an application for mediation with the Superior Court clerk in the county in which the land that is the subject of the conflict is located. The Superior Court clerk shall forward the application to the Court Mediation Service.

5. Stay of filing period. Notwithstanding any other provision of law, the period of time allowed by law or by rules of the court for any person to file for judicial review of the governmental action for which mediation is requested under this subchapter is stayed for 30 days beyond the date the mediator files the report required under subsection 12 with the Superior Court clerk, but in no case longer than 120 days from the date the landowner files the application for mediation with the Superior Court clerk.

6. Purpose; conduct of mediation. The purpose of a mediation under this subchapter is to facilitate, within existing land use laws, ordinances and regulations, a mutually acceptable solution to a conflict between a landowner and a governmental entity regulating land use. The mediator, whenever possible and appropriate, shall conduct the mediation in the county in which the land that is the subject of the conflict is located. When mediating that solution, the mediator shall balance the need for public access to proceedings with the flexibility, discretion and private caucus techniques required for effective mediation.

7. Schedule; notice; participants. The mediator is responsible for scheduling all mediation sessions. The mediator shall provide a list of the names and addresses and a copy of the notice of the mediation schedule to the Superior Court clerk, who shall mail the notices. The mediator shall include on the list persons identified in the following ways.

A. The landowner and the governmental entity shall provide to the mediator the names and addresses of the parties, intervenors and other persons who significantly participated in the underlying governmental land use action proceedings.

B. Any other person who believes that that person's participation in the mediation is necessary may file a request with the mediator to be included in the mediation.

C. The mediator shall determine if any other person's participation is necessary for effective mediation.

8. Parties to mediation. A mediator shall include in the mediation process any person the mediator determines is necessary for effective mediation, including persons representing municipal, county or state agencies and abutters, parties, intervenors or other persons significantly involved in the underlying governmental land use action. ... This subsection does not require a municipality to participate in mediation under this subchapter.

9. Sharing of costs. Participants in the mediation may share the cost of mediation after the initial 4 hours of mediation services have been provided. ...

11. Agreements. A mediated agreement must be in writing. The landowner, the governmental entity and all other participants who agree must sign the agreement as participants and the mediator must sign as the mediator.

A. An agreement that requires any additional governmental action is not self-executing. If any additional governmental action is required, the landowner is responsible for initiating that action and providing any additional information reasonably required by the governmental entity to implement the agreement. The landowner must notify the governmental entity in writing within 30 days, after the mediator files the mediator's report under subsection 12, that the landowner will be taking action in accordance with the agreement.

B. Notwithstanding any procedural restriction that would otherwise prevent reconsideration of the governmental action, a governmental entity may reconsider its decision in the underlying governmental land use action in accordance with the agreement as long as that reconsideration does not violate any substantive application or review requirement.

12. Mediator's report. Within 90 days after the landowner files an application for mediation, the mediator shall file a report with the Superior Court clerk. The mediator shall file the report as soon as possible if the mediator determines that a mediated agreement is not possible. The report must contain:

A. The names of the mediation participants, including the landowner, the governmental entity and any other persons;

B. The nature of any agreements reached during the course of mediation, which mediation participants were parties to the agreements and what further action is required of any person;

C. The nature of any issues remaining unresolved and the mediation participants involved in those unresolved issues; and

D. A copy of any written agreement under subsection 11.

13. Application. This subchapter applies to final agency actions and failures and refusals to act occurring after July 4, 1996."

History: These provisions were enacted in 1995 and amended in 1997 and 2001.[263]

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Maine provides legal protections for some waters that may be subject to a loss of protection under federal law. "Waters of the state," for purposes of statutes administered by the Department of Environmental Protection, are defined as "any and all surface and subsurface waters that are contained within, flow through, or under or border upon this State or any portion of the State, including the marginal and high seas, except such waters as are confined and retained completely upon the property of one person and do not drain into or connect with any other waters of the State, but not excluding waters susceptible to use in interstate or foreign commerce, or whose use, degradation or destruction would affect interstate or foreign commerce."[264]

Maine's Natural Resources Protection Act requires applicants to obtain a permit from the Department of Environmental Protection for certain dredging, draining, filling, and construction activities.[265] These permits cover activities in or on protected natural resources or adjacent to: "(A) a coastal wetland, great pond, river, stream or brook or significant wildlife habitat contained within a freshwater wetland, or (B) freshwater wetlands consisting of or containing: (1) ... at least 20,000 square feet of aquatic vegetation, emergent marsh vegetation or open water, except for artificial ponds or impoundments; or (2) peatlands...."[266]

The Mandatory Shoreland Zoning Act empowers municipalities to adopt zoning and land use ordinances that dictate the type of activities that can occur in certain shoreland areas.[267] The upland edge of both coastal and freshwater wetlands are included in the statute's description of "shoreland areas."[268]

Maine's Department of Environmental Protection issues permits for the state's waste discharge licensing program. Under this program, a discharge may not reduce the quality of a water body beyond its legal classification and it must conform to the state's antidegradation policy.[269]

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[263] Law effective July 4 1996, ch. 537, § 5, 1995 Me. Laws 1365, 1366-68 (enacting H.P. No. 1188; amended 2001).

[264] Me. Rev. Stat. Ann. tit. 38, § 361-A(7).

[265] Me. Rev. Stat. Ann. tit. 38, § 480-C(2).

[266] Me. Rev. Stat. Ann. tit. 38, § 480-C(1).

[267] Me. Rev. Stat. Ann. tit. 38, § 438-A.

[268] Me. Rev. Stat. Ann. tit. 38, § 435.

[269] Me. Rev. Stat. Ann. tit. 38, § 413.

Maine's Land Use Regulation Commission (LURC) administers the "Use Regulation" statute, which essentially accomplishes the objectives of the Mandatory Shoreland Zoning Act and Natural Resources Protection Act in the "unorganized" areas of the state.[270]

[270] Me. Rev. Stat. Ann. tit. 12, §§ 683-A to 685-H. Maine's lands are classified as organized and unorganized (or deorganized) areas of the state. The Department of Environmental Protection has jurisdiction over the former, and the LURC has jurisdiction over the latter. For more on Maine law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase I*, Appendix: Maine, at 56 (Jan. 2005).

MARYLAND

Maryland law imposes a *qualified stringency prohibition.*

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.

2) Qualified Prohibitions

By executive order, each unit of Maryland state government[271] is required to take certain steps when it proposes to adopt a regulation that "provides a standard that is more restrictive or stringent than an applicable standard established under a federal law or regulation which governs the same program or conduct." The agency must: (1) identify the manner in which the proposed regulation is more restrictive than the applicable federal standard; (2) identify the benefit to public health, safety, welfare, or the environment, expected from adopting the standard; (3) in consultation with the Department of Business and Economic Development, identify whether having a more restrictive standard places an additional burden or cost on regulated persons; and (4) justify the need for the standard by determining one if the following—(a) the benefit from the more restrictive standard exceeds the burden or cost on regulated persons; (b) circumstances specific or special to Maryland require the more restrictive standard; (c) the applicable federal standard is insufficient to protect the public health, safety, or welfare of Maryland citizens; or (d) state law requires the adoption of a more restrictive standard.

Legal Authority:

- Md. Exec. Order No. 01.01.1996.03 (1996) (regulatory standards and accountability)

"A. Any unit of State government that proposes to adopt a regulation that provides a standard that is more restrictive or stringent than an applicable standard established under a federal law or regulation which governs the same program or conduct shall:

(1) Identify the manner in which the proposed regulation is more restrictive than the applicable federal standard;

(2) Identify the benefit to the public health, safety or welfare, or the environment, expected from adopting a standard that is more restrictive than the federal standard;

(3) In consultation with the Department of Business and Economic Development, identify whether having a more restrictive standard places an additional burden or cost on the regulated person or business; and

[271] Pursuant to the state Administrative Procedure Act, a "unit" is defined as "an officer or unit authorized by law to adopt regulations." Md. Code Ann., [St. Gov't] § 10-101.

(4) Justify the need for a more restrictive standard by determining that either:
(a) The benefit from the more restrictive standard exceeds the burden or cost of the more restrictive standard on the regulated person or business;
(b) Conditions or circumstances specific or special to Maryland require that Maryland enact a more restrictive standard;
(c) The applicable federal standard is not sufficient to protect the public health, safety, or welfare of Maryland citizens; or
(d) State law requires the adoption of a more restrictive standard.

B. A unit proposing a regulation under Subsection A of this Executive Order shall include in the notice of the proposed regulation published in the Maryland Register a summary of the information required in Subsection A."

History: This executive order was issued in 1996 by then-Governor Parris Glendening.[272] It was intended to "stimulate private sector job growth through a customer-focused and competitive regulatory environment."[273] The order was issued the same year as the defeat of a bill that would have prohibited any state government unit from adopting a regulation more restrictive than federal standards, except where justified by an economic analysis.[274]

PROPERTY-BASED LIMITATIONS

None identified.[275]

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Maryland provides legal protections for some waters that may be subject to a loss of protection under federal law. Maryland's regulatory definition of "waters of this state" includes "(1) [b]oth surface and underground waters within the boundaries of this State subject to its jurisdiction,

[272] Exec. Order No. 01.01.1996.03, 23:4 Md. Reg. 193 (Feb. 1, 1996), available at http://www.dsd.state.md.us/comar/comarhtml/01/01.01.1996.03.htm.

[273] *Table of State Rulemaking Reforms (1995-2000)*, Winthrop & Weinstine, available at http://www.commissions.leg.state.mn.us/rtf/statetable.pdf.

[274] See Karl Blankenship, "Md. 1996 Legislative Highlights," *Bay Journal*, available at http://www.bayjournal.com/article/md_1996_legislative_highlights.

[275] Legislation proposed in 2012 would have created a new cause of action against the state where the application of a regulation by one of various departments (including the department of the environment and the department of natural resources) "restricts, limits, or otherwise infringes on a right to the private property that would exist absent the application." The property owner could recover his loss of fair market value plus his attorney fees. *See* S.B. No. 819, § 1, 2012 Reg. Sess., introduced by Sen. Pipkin, available at http://mgaleg.maryland.gov/2012rs/bills/sb/sb0819f.pdf. The bill was not enacted. Bill history available at http://mgaleg.maryland.gov/webmga/frmMain.aspx?tab=subject3&ys=2012rs/billfile/sb0819.htm.

including that part of the Atlantic Ocean within the boundaries of this State, the Chesapeake Bay and its tributaries, and all ponds, lake, rivers, streams, tidal and nontidal wetlands, public ditches, tax ditches, and public drainage systems within this State, other than those designed and used to collect, convey, or dispose of sanitary sewage; and (2) [t]he flood plain of free-flowing waters determined by the Department of Natural Resources on the basis of the 100-year flood frequency."[276]

The Maryland Nontidal Wetlands Protection Act imposes a "no net loss" policy.[277] Permitting requirements under the law cover activities in isolated nontidal wetlands, except where such wetlands are smaller than one acre and have no significant plant or wildlife value (provided that notice is given to the Department and best management practices are implemented).[278]

The Tidal Wetlands Protection Act requires a permit prior to any dredging or filling activity on private tidal wetlands.[279] A license from the State Board of Public Works is required prior to dredging or filling publicly-owned wetlands.[280]

The Chesapeake and Atlantic Coastal Bays Critical Area Protection Program[281] mandates that local jurisdictions adopt codes, plans, ordinances, and policies for lands within one thousand feet of Maryland's tidal waters and tidal wetlands. Habitat protection areas may afford additional protection to nontidal wetlands.[282]

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[276] Md. Code Ann., [Envir.] § 9-101(l) (for purposes of water title of state code); Md. Code Regs. 26.08.01.01(B)(103) (for purposes of water quality and water pollution control regulations).

[277] *See* Md. Code Ann., [Envir.] § 5-902(b).

[278] Md. Code Ann., [Envir.] §§ 5-901, 5-906(a)(2).

[279] *See* Md. Code Ann., [Envir.] § 16-302.

[280] Md. Code Ann., [Envir.] § 16-202.

[281] Md. Code Ann., [Nat. Res.] tit. 8, subtit. 18.

[282] *See* Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, "Frequently Asked Questions," available at http://www.dnr.state.md.us/criticalarea/faq.asp. For more on Maryland law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase III*, Appendix: Maryland, at 133 (Mar. 2007).

MASSACHUSETTS

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Massachusetts provides legal protections for some waters that may be subject to a loss of protection under federal law. For purposes of implementing the state's water pollution control laws, Massachusetts defines "waters" and "waters of the commonwealth" as "all waters within the jurisdiction of the commonwealth, including, without limitation, rivers, streams, lakes, ponds, springs, impoundments, estuaries, wetlands, coastal waters, groundwaters, and vernal pools."[283]

The Massachusetts Wetlands Protection Act serves as the primary tool for safeguarding both coastal and freshwater wetlands.[284] Under the Act, filling, dredging, or altering any freshwater or coastal wetland *bordering on* the ocean or on a creek, river, stream, or pond or other water body, without government approval, is prohibited.[285] The Department of Environmental Protection administers the law, but local conservation commissions are responsible for making permit determinations regarding activities that may impact wetlands or surrounding buffer zones. It is the commissions' responsibility to ensure that proposed activities alter neither wetlands nor their related ecological services. The Department hears appeals from commission permitting decisions.[286]

Under the Inland[287] and Coastal[288] Wetland Restriction Act, the Commissioner of the Department of Environmental Protection may issue orders to prohibit certain activities in specified wetlands—prior to any work being proposed. These orders run with the land and are filed with the registries of deeds in the counties where the properties are located.

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[283] 314 Mass. Code Regs. 4.02 (Massachusetts surface water quality standards—definitions) & 5.02 (ground water discharge permit program—definitions).

[284] *See* Mass. Gen. Laws ch. 131, § 40.

[285] Mass. Gen. Laws ch. 131, § 40.

[286] Mass. Gen. Laws ch. 131, § 40; 310 Mass. Code Regs. 10.00 to 10.60.

[287] Mass. Gen. Laws ch. 131, § 40A; 310 Mass. Code Regs. 13.00.

[288] Mass. Gen. Laws ch. 130, § 105; 310 Mass. Code Regs. 12.00.

Additionally, over one hundred Massachusetts communities have their own local wetlands protection bylaws.[289]

[289] *See* Mass. Department of Environmental Protection, "Water, Wastewater & Wetlands: Protecting Wetlands in Massachusetts," available at http://www.mass.gov/dep/water/resources/protwet.htm. For more on Massachusetts law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase IV*, Appendix: Massachusetts, at 59 (Oct. 2007).

MICHIGAN

Michigan law imposes *property-based limitations*.

STRINGENCY LIMITATIONS

None identified.[290]

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

None identified.

2) Assessment

Pursuant to Michigan's Property Rights Preservation Act (Mich. Comp. Laws §§ 24.421 to 24.425), the attorney general is required—in conjunction with the Department of Natural Resources and the Department of Environmental Quality—to develop and annually update takings assessment guidelines to assist those departments in the identification and evaluation of government actions that may result in a constitutional taking. Prior to undertaking a "government action" (defined to include promulgation of a rule that "may limit the use of private property," making a permitting decision, and issuance of an order), either department must review the guidelines and consider the likelihood that the action may result in a taking.

Pursuant to the Act, the Michigan attorney general has issued guidelines, including a checklist for to be used by agencies in assessing their actions for takings implications.[291] Among the issues to be considered by the departments are whether an action: requires a property owner to dedicate a portion of the property to the government or for public use; deprives the owner of all economically viable use of the

[290] In 2011, the Michigan Legislature passed a bill to amend the state Administrative Procedures Act so as to prohibit state agencies from, in most instances, promulgating or adopting a rule more stringent than the applicable federal standard. EHB No. 4326 (H-2), 96th Leg., Reg. Sess. 2011 (introduced by Rep. Farrington). Gov. Rick Snyder vetoed the bill on Nov. 30, 2011. 97 Mich. Journal of the House of Reps., 96th Leg., Reg. Session of 2011, available at http://www.legislature.mi.gov/(S(hpluzsvhkrwc4p2iutz2qg55))/documents/2011-2012/Journal/House/htm/2011-HJ-12-06-097.htm. A legislative analysis prepared by the Michigan House of Representatives noted that [s]upporters of this legislation believe overly stringent rules make Michigan less attractive than neighboring states when trying to attract new businesses." House Fiscal Agency, "Legislative Analysis: APA Amendments," at 6, June 2, 2011, available at http://www.legislature.mi.gov/(S(uhwlrpetogparojgj3qro02u))/documents/2011-2012/billanalysis/House/pdf/2011-HLA-4573-3.pdf.

As introduced, another bill, SB No. 272, featured similar stringency restrictions. But the stringency language was dropped before that bill was passed.

[291] Office of the Michigan Attorney General, Takings Assessment Guidelines (1998 annual update) (not available online; provided to ELI staff upon request (together with an update for 2000-01) and on file with the authors). The guidelines do not represent a formal attorney general opinion. *Id.* at 2.

property; or has too severe an economic impact on the property in light of the public interest advanced by the government action.

Although the departments are required by the statute to carry out takings assessments, administrative judges are without authority to decide constitutional issues.[292]

Legal Authority:

- Mich. Comp. Laws § 24.422 (definitions)

  "As used in this act: ...
  (a) "Constitutional taking" or "taking" means the taking of private property by government action such that compensation to the owner of that property is required by [the federal or state constitutions].

  (b) "Departments" means the departments of natural resources, environmental quality, and transportation.[293]

  (c) "Government action" means any of the following:
  (i) A decision on an application for a permit or license.
  (ii) Proposed rules that if promulgated or enforced may limit the use of private property.
  (iii) Required dedications or exactions of private property.
  (iv) The enforcement of a statute or rule, including the issuance of an order. ...

  (e) "Rule" means a rule promulgated pursuant to the administrative procedures act...."

- Mich. Comp. Laws § 24.423 (takings assessment guidelines, development)

  "The attorney general, in conjunction with the [Department of Natural Resources and Department of Environmental Quality], shall develop takings assessment guidelines pursuant to the administrative procedures act ... that will assist the departments in the identification and evaluation of government actions that may result in a constitutional taking. The attorney general and the departments shall base the guidelines on current law as articulated by the United States supreme court and

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[292] *See* Petition of Peter W. & Mary Ellen Hunt, Case No. 96-06-0311W, 1998 WL 515161 (Mich. Dep't of Natural Res. 1998) (denying application for permit to fill wetland). *See also*, *e.g.*, Petition of William Crick, Case No. 99-12-0690, 2002 WL 32082900 (Mich. Dep't of Natural Res. 2002) (denying application for permit to deposit fill and noting that administrative tribunals have no jurisdiction to determine whether a taking has occurred).

[293] The statute refers separately to the Department of Natural Resources and the Department of Environmental Quality. In October 2009, Gov. Jennifer Granholm issued Executive Order 2009-45, eliminating those departments and establishing in their place the new Department of Natural Resources and Environment. In January 2011, Gov. Rick Snyder promptly abolished the new department and reestablished the Department of Natural Resources and the Department of Environmental Quality, pursuant to Executive Order 2011-01.

the supreme court of this state and shall update the guidelines at least on an annual basis to reflect changes in the law."

- Mich. Comp. Laws § 24.424 (takings assessment guidelines, review)

  "Prior to taking a governmental action, the [Department of Natural Resources or Department of Environmental Quality] shall review the takings assessment guidelines prepared under [this statute] and shall consider the likelihood that the governmental action may result in a constitutional taking."

  History: The Property Rights Preservation Act was enacted in 1996.[294]

3) Other

   None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Michigan provides legal protections for some waters that may be subject to a loss of protection under federal law. Michigan defines "waters of the state" for purposes of point-source pollution control to mean "groundwaters, lakes, rivers, and streams and all other watercourses and waters, including the Great Lakes, within the jurisdiction of this state."[295]

Pursuant to the Goemaere-Anderson Wetlands Protection Act, the Department of Environmental Quality administers § 404 of the federal Clean Water Act (Michigan is one of only two states, together with New Jersey, to have assumed this permitting authority).[296] Wetlands are jurisdictional under state law if: contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream; not contiguous, and more than five acres in size; or not contiguous, and five acres or less in size *if* the Department determines that protection of the area is essential to the preservation of the natural resources of the state from pollution, impairment, or destruction (and the Department has so notified the owner).[297] State permits are required to undertake the following activities

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[294] Property Rights Preservation Act, No. 101, 1996 Mich. Pub. Acts 245, 246 (enacting H.B. No. 4433).

[295] Mich. Comp. Laws § 324.3101(z).

[296] Mich. Comp. Laws §§ 324.30301 to 324.30329; Mich. Admin. Code §§ 281.921 to 281.925. For some waters, there is overlapping state and federal jurisdiction, and for others, jurisdiction remains with the federal government. *See* Michigan Department of Environmental Quality, "State and Federal Wetland Regulations," available at http://www.michigan.gov/deq/0,1607,7-135-3313_3687-10801--,00.html.

[297] Mich. Comp. Laws § 324.30301(l)(m). *See also* Executive Directive No. 2004-4, issued in 2004 to establish a process "to bring Michigan's critical non-contiguous wetlands located on public land within the jurisdiction" of the wetland protection law, available at https://michigan.gov/granholm/0,1607,7-168-36898_36900-91329--,00.html.

in wetlands: depositing fill, dredging, construction or development, and draining surface water.[298]

The Shorelands Protection and Management provisions of the law protect parts of the Great Lakes shoreline that are specifically designated by the state as high risk erosion, flood risk, and environmental areas.[299] To be designated, environmental areas (EAs) must be deemed "necessary for the preservation and maintenance of fish and wildlife," and be "within 1000 feet landward of the ordinary high water mark of lands adjacent to waters affected by levels of the Great Lakes."[300] The following activities within EAs require a permit from the Department: dredging, filling, grading, or other alterations; alteration of natural drainage; alteration of vegetation utilized by fish or wildlife; and placement of permanent structures.[301]

[298] Mich. Comp. Laws § 324.30304.

[299] *See* Mich. Comp. Laws §§ 324.32301 to 324.32315; Mich. Admin. Code §§ 281.21 to 281.26.

[300] Mich. Comp. Laws § 324.32301.

[301] Mich. Admin. Code § 281.23(6). For more on Michigan law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase I*, Appendix: Michigan, at 67 (Jan. 2005).

MINNESOTA

Minnesota law imposes *stringency prohibitions* and *qualified stringency prohibitions*.

STRINGENCY LIMITATIONS

1) Prohibitions

Minnesota law provides that in the event the state assumes responsibility for the federal 404 permitting program, the rules adopted to establish the program "may not be more restrictive" than the federal 404 program—or more restrictive than state law, if state law is more restrictive than the federal 404 program. *Because Minnesota has not assumed administration of the federal 404 program, this state stringency provision currently has no effect.*

Legal Authority:

- Minn. Stat. Ann. § 103G.127 (permit program under section 404 of the federal clean water act)

"Notwithstanding any other law to the contrary, the [Commissioner of Natural Resources], with the concurrence of the Board of Water and Soil Resources and the commissioner of agriculture, may adopt rules establishing a permit program for regulating the discharge of dredged and fill material into the waters of the state as necessary to obtain approval from the United States Environmental Protection Agency to administer the permit program under section 404 of the federal Clean Water Act, United States Code, title 33, section 1344. The rules may not be more restrictive than the program under section 404, or state law, if it is more restrictive than the federal program."

History: The relevant statutory language in § 103G.127 was enacted in 1991.[302]

2) Qualified Prohibitions

Every two years, the Minnesota Pollution Control Agency must present to the state house and senate committees with primary jurisdiction over the agency's budget a list of existing and proposed state water quality standards that are "more stringent than is necessary to comply with federal law"—either because there are no applicable federal water quality criteria for the standard, or because the standard is more stringent than the applicable federal criteria.

[302] Wetland Conservation Act of 1991, ch. 354, art. 9, § 1, 1991 Minn. Laws 2794, 2830–31 (enacting H.F. No. 1; amended 1996).

Legal Authority:

- Minn. Stat. Ann. § 115.03(9)(4) (water pollution control—power and duties)

"The [Commissioner of the Minnesota Pollution Control Agency] shall [in] ... each even-numbered year ... provide the chairs of the house of representatives and senate committees with primary jurisdiction over the agency's budget with the following information: ...

(4) a list of existing and proposed state water quality standards which are more stringent than is necessary to comply with federal law, either because the standard has no applicable federal water quality criteria, or because the standard is more stringent than the applicable federal water quality criteria."

History: The relevant statutory language was enacted in 1997.[303]

PROPERTY-BASED LIMITATIONS

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulations: Minnesota provides legal protections for some waters that may be subject to a loss of protection under federal law.[304]

Minnesota, under its water pollution control law, defines "waters of the state" as "... all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigations systems, drainage systems, and all other bodies or accumulations of water, surface, or underground, natural or artificial, public or private, which are contained within, flow through, or border upon the state or any portion thereof."[305]

Under the Public Waters Law, the Minnesota Department of Natural Resources is authorized to regulate public waters of the state, which it has accomplished through the Public Waters Permit Program and the Public Waters Inventory Program.[306] Under the permit program, the Department may issue public waters work permits for projects that

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[303] Law of May 30, 1997, ch. 216, § 93, 1997 Minn. Laws 1995, 2100 (enacting H.F. No. 2150; amended 2009, 2011, 2012).

[304] *See generally* Minn. Board of Soil and Water Resources, *SWANCC Analysis: Preliminary assessment of geographic scope of federal wetland regulatory changes in Minnesota based on Jan. 10, 2003, post-SWANCC guidance and Jan. 15, 2003, ANPRM*, available at http://www.bwsr.state.mn.us/wetlands/publications/wetlandreport-swancc.pdf (originally published Mar. 2003) (discussing post-*SWANCC* gaps in Minnesota's legal protections for isolated wetlands and intermittent waters, notwithstanding state law).

[305] Minn. Stat. Ann. § 115.01(22).

[306] *See* Minn. Stat. Ann. ch. 103G (waters of the state). *See also*, *generally*, Minn. Dep't of Natural Res., "History of Water Protection," available at http://www.dnr.state.mn.us/waters/watermgmt_section/pwpermits/history.html.

impose "a minimum encroachment, change, or damage to the environment, particularly the ecology of the waterway."[307] The Public Waters Inventory requires the Department to identify and map all state public waters, including wetlands that are regulated under the permit program.[308]

The Wetlands Conservation Act prohibits wetlands from being drained or filled, unless replaced by restoring or creating wetland areas of at least equal public value under an approved replacement plan.[309] Local government units administer the Act by issuing determinations for projects that result in fill, drainage, or excavation of wetlands.[310] The Board of Water and Soil Resources oversees and promulgates regulations in accordance with the Act, including rules for replacement plan standards.[311]

[307] Minn. Stat. Ann. § 103G.245(7)(a). *See also* Minn. R. 6115.0190(1)(A), 6115.0200(1)(A), 6115.0270(4)(B).

[308] *See* Minn. Stat. Ann. § 103G.201.

[309] *See* Minn. Stat. Ann. §§ 103G.222 to 103G.2372, 103G.222(1a).

[310] Minn. R. 8420.0100(3), 8420.0105.

[311] *See* Minn. Stat. Ann. § 103G.2242. For more on the Wetlands Conservation Act, see Minn. Board of Water and Soil Resources, "Wetland Conservation Act Forms and Guidance," available at http://www.bwsr.state.mn.us/wetlands/wca/index.html. For more on Minnesota law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase IV*, Appendix: Minnesota, at 77-79 (Oct. 2007).

MISSISSIPPI

Mississippi law imposes *stringency prohibitions* and *property-based limitations*.

STRINGENCY LIMITATIONS

1) Prohibitions

The Mississippi Commission on Environmental Quality is prohibited from enacting a rule, regulation, or standard relating to water quality or water discharge standards that exceeds the requirements of federal statutes, regulations, standards, criteria, and guidance relating to water quality or water discharge standards promulgated under the federal Administrative Procedure Act. The provision expressly covers "the identity and scope of water pollutants included as water quality or discharge standards," as well as the numerical and narrative limitations of any such standards.

In the absence of federal laws or regulations, the Commission may promulgate regulations to address these matters under the Mississippi APA—if the Commission determines that the regulations are "necessary to protect human health, welfare or the environment."

Under a separate state statute, the board of commissioners for a storm water management district may not adopt regulations more stringent or extensive in scope, coverage, or effect than regulations promulgated or recommended by U.S. EPA. However, a board may adopt appropriate regulations if federal regulations do not address any matter relating to a storm management system.

Legal Authority:

- Miss. Code Ann. § 49-17-34(2)-(3) (permit applications)

"(2) All rules, regulations and standards relating to air quality, water quality or air emissions or water discharge standards promulgated by the [Mississippi Commission on Environmental Quality] ... shall be consistent with and shall not exceed the requirements of federal statutes and federal regulations, standards, criteria and guidance relating to air quality, water quality or air emission or water discharge standards that have been duly promulgated pursuant to the federal Administrative Procedures Act, including but not limited to the identity and scope of air pollutants included as air toxics or air quality or emission standards, the identity and scope of water pollutants included as water quality or discharge standards and the numerical and narrative limitations of such standards.

(3) If there are no federal statutes or federal regulations, standards, criteria or guidance that have been duly promulgated pursuant to the federal Administrative Procedures Act addressing matters relating to air quality or water quality, or air emission or water discharge standards, the commission may promulgate regulations to

address these matters in accordance with the Mississippi Administrative Procedures Act, when the commission determines that such regulations are necessary to protect human health, welfare or the environment."

- Miss. Code Ann. § 51-39-27 (regulations or best management practices)

  "(1) Any regulations or best management practices adopted by [a board of commissioners for a storm water management district] under this chapter [covering storm water management districts], shall be no more stringent or extensive in scope, coverage or effect than the regulations and best management practices promulgated or recommended by the United States Environmental Protection Agency.

  (2) If federal regulations or recommended best management practices do not address any matter relating to a storm water management system, the board may adopt or promulgate appropriate regulations or best management practices to address those matters."

  History: Section 49-17-34 was enacted in 1993.[312] Section 51-39-27 was enacted in 2000.[313]

2) Qualified Prohibitions

   None identified.

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

   Under the Mississippi Agricultural and Forestry Activity Act (Miss. Code Ann. §§ 49-33-1 to 49-33-17), which applies only to forested and agricultural lands, a property owner may bring suit for inverse condemnation where a state action "prohibits or severely limits" the right of the owner to conduct forestry or agricultural activities. State action here *includes* actions by the state legislature—though the legislature could presumably exempt any future legislative action from this requirement should it choose to do so.

   To trigger these provisions, the government action must reduce the fair market value of the land, or of related products or personal property rights, by more than forty percent of their value before the action. There is an exception for state actions undertaken for public health and safety purposes. The government entity sued may repeal the action at issue prior to a final decision; however, this entitles the owner to recover its damages arising out of the action before the repeal, and the court also may award fees and costs.

[312] Law of April 16, 1993, ch. 611, § 6, 1993 Miss. Laws 1124, 1130 (enacting S.B. No. 2649).

[313] Law of May 20, 2000, ch. 597, § 14, 2000 Miss. Laws 1105, 1115 (enacting S.B. No. 3053).

As of 2008, a study of state private property rights acts concluded that the Mississippi legislation, with its narrow scope, appears not to have had any impact.[314]

Legal Authority:

- Miss. Code Ann. § 49-33-3 (purpose)

"The purpose of this chapter is to establish the policy of the State of Mississippi as allowing owners of property classified as forest or agricultural land and owners of timber, wood and forest products on forest land owned by another to conduct forestry or agricultural activities, or if the State of Mississippi prohibits or severely limits such forestry or agricultural activities, to compensate the owners for their loss."

- Miss. Code Ann. § 49-33-7 (definitions)

"... (e) "Inverse condemnation" means any action by the State of Mississippi that prohibits or severely limits the right of an owner to conduct forestry or agricultural activities on forest or agricultural land. Inverse condemnation *shall not include* an action by the state that is:

(i) A taking ...;

(ii) A result of police power to prohibit activities that are noxious in fact or are harmful to the public health and safety; or

(iii) An order issued as a result of a violation of state law; ...

(h) "Prohibits or severely limits" means to reduce the fair market value of forest or agricultural land (or any part or parcel thereof) or timber, wood or forest products including nongame species (or any part or parcel thereof) or personal property rights associated with conducting forestry or agricultural activities on the forest or agricultural land by more than forty percent (40%) of their value before the action.

(i) "Public health and safety" means actions by the State of Mississippi based upon its police powers. Public health and safety actions prohibiting or severely restricting forestry or agricultural activities shall be:

(i) Taken only in response to real and substantial threats to public health and safety;

(ii) Designated to significantly advance the health and safety purpose; and

(iii) No greater than necessary to achieve the health and safety purpose....

(j) "State of Mississippi" or "state" means the State of Mississippi, any county, municipality or any political subdivision thereof.

(k) "State law" means any statute, rule, regulation, ordinance, resolution or similar action by the State of Mississippi validly existing and as interpreted on the effective date of this act [July 1, 1995]. State law shall not include:

[314] Georgetown Environmental Law and Policy Institute, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, at 38 (2008).

(i) Any judicial or executive interpretation of a state law after the effective date of this act ... that prohibits or severely limits the conducting of forestry or agricultural activities that were not prohibited or severely limited before the effective date of this act ... ; or
(ii) Any legislative amendment, interpretation or enactment by the state after the effective date of this act ... that prohibits or severely limits the conducting of forestry or agricultural activities (except such actions that are the result of police power to prohibit activities that are noxious in fact or are harmful to the public health and safety)."

- Miss. Code Ann. § 49-33-9 (inverse condemnations)

"(1) Right of action: Any action by the State of Mississippi that constitutes an inverse condemnation of forest or agricultural land, timber, wood or forest products, including nongame species or personal property rights associated with conducting forestry or agricultural activities, shall give the owner a cause of action under Section 11-46-1 et seq. [immunity of state and political subdivisions from liability and suit for torts and torts of employees] for the payment of awards against the entity or entities causing the inverse condemnation, notwithstanding any provision of this chapter to the contrary. The owner shall have the right to file an inverse condemnation action before any court having jurisdiction over the county in which the forest or agricultural land is located. A determination that a use is noxious in fact or possesses a demonstrable harm to the public health and safety is not binding upon a court of law and a judicial review of the action shall be de novo.

(2) Subsequent repeal or rescission by the state: The entity sued in any inverse condemnation action shall have the right to repeal the action complained of in the suit before a decision becoming final. Such repeal shall entitle the owner to recover its damages arising out of the action before the repeal, and, in the discretion of the court, its costs of litigation (including reasonable attorney and expert witness fees). Subsequent repeal of the action by the state after a decision has become final shall not entitle the state to refuse payment, obtain a return of payment (if made) or result in ownership in the property by the state (absent a taking of one hundred percent (100%) of the property).

(3) Payment of awards for inverse condemnation: Payment of awards for inverse condemnation shall be made by the entity or entities as determined by the court subject to applicable limits provided in Section 11-46-15 [concerning limitations on liability of government entities and employees]. Payment shall not result in ownership in the property by the state (absent a taking of one hundred percent (100%) of the property). If more than one (1) entity is involved, the payment shall be made in the percentage of liability as allocated by the trier of fact in the inverse condemnation action. If any county, municipality, or political subdivision of the state whose actions constitute inverse condemnation as defined in this chapter are unable to pay the costs awarded, then the action causing the inverse condemnation shall be rescinded within sixty (60) days after the judgment of the court."

- Miss. Code Ann. § 49-33-11 (conditional waivers prohibited)

  "The state shall not make a waiver of the provisions of this chapter a condition for approval of the use or continued use of real property or the issuance of any permit or other entitlement. The acceptance by an owner of any approval of use, continued use, permit or other entitlement shall not constitute a waiver of the rights of the owner to compensation for inverse condemnation."

- Miss. Code Ann. § 49-33-13 (constitutional requirements and legal challenges)

  "This chapter shall not affect any right or remedy granted an owner under the United States or Mississippi Constitutions or the laws of the United States and the State of Mississippi. Nothing in this chapter shall be construed to preclude an owner from bringing a legal challenge and seeking remedies at law or equity arising out of any action of the State of Mississippi regardless of whether the action constituted a taking, an inverse condemnation, or resulted in a diminution in value of forty percent (40%) or less."

  History: These provisions were adopted in 1994,[315] making Mississippi the first state to enact legislation requiring property owners to be compensated when state regulation diminishes the value of their property.[316] The law was recodified in 1995.[317]

2) Assessment

   None identified.

3) Other

   None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Mississippi does not have a regulatory program under state law addressing dredge and fill activities in its nontidal waters and wetlands. It relies on Clean Water Act § 401. Mississippi has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*. In fact, for purposes of the state water pollution control law, Mississippi defines "waters of the state" as "all waters within the jurisdiction of this State, including all streams, lakes, ponds, wetlands,

[315] Law of April 8, 1994, ch. 647, 1994 Miss. Laws 1308 (enacting S.B. No. 2464; amended 1995).

[316] *See* John R. Nolon, *Takings and Property Rights Legislation*, Environmental Outlook, at 4 (1996), available at http://landuse.law.pace.edu/landuse/documents/PublishedArticle/TakingsPropRightsLegis.doc.

[317] Mississippi Agricultural and Forestry Activity Act, ch. 379, 1995 Miss. Laws 225 (enacting H.B. No. 1541).

impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, situated wholly or partly within or bordering upon the State, and such coastal waters as are within the jurisdiction of the State, *except lakes, ponds, or other surface waters which are wholly landlocked and privately owned*, *and which are not regulated under the Federal Clean Water Act* ...."[318]

Pursuant to the Coastal Wetlands Protection Act, Mississippi regulates "coastal wetlands."[319] The Department of Marine Resources (MDMR) is authorized to review permits for all regulated activities that affect coastal wetlands in Jackson, Harrison, and Hancock Counties, including "dredging, filling or dumping, killing or damaging flora or fauna, and building any structure that would disrupt the tide's ebb and flow or structures on suitable sites for water dependent industries."[320]

[318] Miss. Code Ann. § 49-17-5(1)(f).

[319] Miss. Code Ann. §§ 49-27-5(a), 49-27-59.

[320] Miss. Code Ann. §§ 49-27-5(a) & (c), 49-27-9(1). For more on Mississippi law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase IV*, Appendix: Mississippi, at 93-95 (Oct. 2007).

MISSOURI

Missouri law imposes a *property-based limitation*.

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

None identified.

2) Assessment

State departments and agencies must conduct a takings analysis on any proposed rule or regulation that "limits or affects the use of real property." The analysis evaluates whether the rule or regulation, on its face, constitutes a taking under federal or state law. The department or agency must certify in its transmittal letter to the secretary of state that the analysis has taken place; a non-complying rule is invalid.

Legal Authority:

- Mo. Rev. Stat. § 536.017 (taking private property defined—proposed rules require takings analysis, when, purpose, procedure—rule invalid, when—exceptions)

"For purposes of this section, "taking of private property" shall mean an activity wherein private property is taken such that compensation to the owner of the property is required by the fifth and fourteenth amendments to the Constitution of the United States or any other similar or applicable law of this state. No department or agency shall transmit a proposed rule or regulation which *limits or affects* the use of real property to the secretary of state until a takings analysis has occurred. The takings analysis shall evaluate whether the proposed rule or regulation on its face constitutes a taking of real property under relevant state and federal law. The department or agency shall certify in the transmittal letter to the secretary of state that a takings analysis has occurred. Any rule that does not comply with this section shall be invalid and the secretary of state shall not publish the rule. A takings analysis shall not be necessary where the rule or regulation is being promulgated on an emergency basis, where the rule or regulation is federally mandated, or where the rule or regulation substantially codifies existing federal or state law."

History: This provision was enacted in 1994 and amended in 1998.[321]

[321] Law of June 3, 1994, H.B. 1099, 1994 Mo. Laws 1128, 1128 (enacting H.B. No. 1099; amended 1998).

3) Other

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Missouri does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. Missouri has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

MONTANA

Montana law imposes *qualified stringency prohibitions* and *property-based limitations*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.[322]

2) Qualified Prohibitions

Montana has qualified stringency prohibitions that apply to rules implementing water quality and public water supply programs. The statutory language, identical for both programs, provides that the Board of Environmental Review may not adopt an implementing rule that is more stringent than the federal regulations or guidelines that address the same circumstances unless the Board makes a written finding—following a public hearing and comment, and based on record evidence—that the more-stringent state requirement: (1) protects public health or the environment of Montana; (2) can mitigate the harm to public health or the environment; and (3) is achievable under current technology. The written finding must refer to information and peer-reviewed scientific studies contained in the record that form the basis for the Board's conclusion, and the finding must include information from the hearing record regarding costs to the regulated community.

The statute further provides that a person may petition the Board for a rule review when the Board has adopted a rule in an area in which no federal regulations or guidelines previously existed, but the federal government subsequently establishes comparable regulations or guidelines that are less stringent than the previously adopted Board rule. In this case, the Board must either conform the rule to federal requirements or comply with the statutory requirement to prepare a written finding.

Another Montana qualified stringency provision is similar. The Board of Environmental Review may adopt rules implementing water quality law that are more stringent than corresponding draft or final federal regulations, guidelines, or criteria, only if it makes written findings, based on sound scientific or technical evidence in the record, stating that the stricter state requirements are necessary to protect the public health, beneficial use of water, or the environment of Montana. The Board must issue an accompanying opinion referring to and evaluating the

[322] Although not directly related to the state's ability to address *SWANCC* and *Rapanos* issues, note that Montana's Agricultural Chemical Ground Water Protection Act places qualified prohibitions on the adoption of rules for minimizing the impacts of agricultural chemicals on groundwater that are more stringent than the comparable federal regulations addressing the same circumstances. Mont. Code Ann. § 80-15-110 (state regulations no more stringent than federal regulations or guidelines).

public health and environmental information and studies in the record that form the basis for the Board's conclusion.

Under Montana case law, the stringency provisions pertaining to water quality apply only where the state provision is more stringent than *federally promulgated* regulations or criteria.[323] They do not apply where the Board adopts a new state standard that is more stringent than a previous EPA approval of a prior *state* water quality standard.[324]

Legal Authority:

- Mont. Code Ann. § 75-5-203 (water quality—state regulations no more stringent than federal regulations or guidelines)
- Mont. Code Ann. § 75-6-116 (public water supply—state regulations no more stringent than federal regulations or guidelines)

"(1) ... [E]xcept as provided in subsections (2) through (5) or unless required by state law, the [Board of Environmental Review] may not adopt a rule to implement this chapter [Ch. 5, covering water quality; or Ch. 6, covering public water supplies, distribution, and treatment] that is more stringent than the comparable federal regulations or guidelines that address the same circumstances. The board may incorporate by reference comparable federal regulations or guidelines.

(2) The board may adopt a rule to implement this chapter that is more stringent than comparable federal regulations or guidelines only if the board makes a written finding after a public hearing and public comment and based on evidence in the record that:

(a) the proposed state standard or requirement protects public health or the environment of the state; and

(b) the state standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology.

(3) The written finding must reference information and peer-reviewed scientific studies contained in the record that forms the basis for the board's conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed state standard or requirement.

(4) ...

(b) A person may also petition the board for a rule review ... if the board adopts a rule ... in an area in which no federal regulations or guidelines existed and the federal government subsequently establishes comparable regulations or guidelines

[323] *Pennaco Energy v. Mont. Bd. of Envtl. Review*, 199 P.3d 191, 200 (Mont. 2008).

[324] Montana also has a qualified stringency provision that governs adoption of rules by the Department of Environmental Quality to implement the code chapter on the regulation of subdivisions. *See* Mont. Code Ann. § 76-4-135. Although DEQ rules subject to this provision can pertain to water quality, the narrow focus of the provision on subdivisions makes it unlikely to be significant with respect to the state's ability to address *SWANCC* and *Rapanos* issues.

that are less stringent than the previously adopted board rule. [If the board determines that the rule is more stringent than comparable federal regulations or guidelines, the board shall comply with this section either by revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 12 months after receiving the petition. A petition under this section does not relieve the petitioner of the duty to comply with the challenged rule.]..."

- Mont. Code Ann. § 75-5-309 (water quality—standards more stringent than federal standards)

  "(1) In adopting rules to implement this chapter [ch. 5, covering water quality], the board may adopt rules that are more stringent than corresponding draft or final federal regulations, guidelines, or criteria if the board makes written findings, based on sound scientific or technical evidence in the record, which state that rules that are more stringent than corresponding federal regulations, guidelines, or criteria are necessary to protect the public health, beneficial use of water, or the environment of the state.

  (2) The board's written findings must be accompanied by a board opinion referring to and evaluating the public health and environmental information and studies contained in the record that forms the basis for the board's conclusion."

  History: The relevant statutory language in each of these provisions was enacted in 1995.[325]

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

   None identified.[326]

2) Assessment

   Under the Montana Private Property Assessment Act (Mont. Code Ann. §§ 2-10-101 to 2-10-112), a state agency must conduct an impact assessment prior to undertaking

[325] Law of April 14, 1995, ch. 471, § 1, 1995 Mont. Laws 2268, 2269 (enacting H.B. No. 521; §§ 75-5-203 and 75-6-116); Law of April 15, 1995, ch. 497, § 1, 1995 Mont. Laws 2423, 2423 (enacting S.B. No. 331; § 75-5-309).

[326] In 2011, legislation was proposed (but not enacted) that would have provided for landowner compensation when a government action results in a diminution of property value by at least ten percent. *See* "The Montana Property Fairness Act," S.B. No. 344 (62d Leg. 2011), introduced by J. Priest, available at http://data.opi.mt.gov/bills/2011/sb0399/SB0344_1.pdf. Also in 2011, Governor Brian Schweitzer vetoed a bill that would have created a new protest mechanism for landowners whose property value would be adversely affected by proposed zoning requirements. *See* S.B. No. 379 (62nd Leg. 2011), introduced by A. Olson, available at http://data.opi.mt.gov/bills/2011/sb0399/SB0379_3.pdf; details of veto available at http://data.opi.mt.gov/bills/2011/AmdHtmS/SB0379GovVeto.pdf.

any "action with taking or damaging implications"—that is, an action that could result in a deprivation of private property requiring compensation under the state or federal constitutions. The statute covers proposed agency rulemaking and permitting conditions "pertaining to land or water management or to some other environmental matter." The attorney general is required to develop, and annually update, guidelines (including a checklist) to assist agencies in identifying and evaluating actions subject to preparation of an impact assessment under the statute.

The Montana attorney general has issued guidelines and a checklist pursuant to the Act.[327] Among the issues to be considered by the agency are whether the action requires a property owner to dedicate a portion of property and whether the action has a "severe impact" on the value of the property.

When an impact assessment is required, it must be prepared using the attorney general's guidelines and must include an analysis of at least the following items: (1) the likelihood that a court would find the action to be a taking; (2) alternatives to the action that would fulfill the agency's statutory obligations while reducing the risk of a taking; and (3) the estimated cost (and source of payment), should financial compensation be required as a result of the action.

A copy of the impact assessment must be provided to the governor prior to action being taken.

After completing an impact assessment, a state agency must provide public notice of its intent to engage in the proposed action. The agency must provide a summary of the impact assessment and a link to a source for the complete impact assessment. Action may not be taken until the public notice requirement is satisfied.

A state agency action subject to impact assessment requirements is invalid unless those requirements are satisfied. If they are not, an affected property owner may sue the agency for a declaration of invalidity of the action. The court is required to award attorney fees and costs to a property owner who prevails in such a suit.

Next, under Montana's "Little NEPA"—which requires environmental impact statements for major state actions significantly affecting the quality of the human environment—agencies are required to consider any regulatory impacts of a proposed action on private property rights. This consideration must include whether the agency has analyzed alternatives that reduce, minimize, or eliminate the regulation of private property rights.

[327] Montana Attorney General's Guidelines and Checklist, Jan. 2011, available at https://doj.mt.gov/wp-content/uploads/2011/06/agguidelines.pdf. An earlier version (dated Feb. 2007), which was not available online and was provided to ELI staff upon request, is on file with the authors.

Legal Authority:

- Mont. Code Ann. § 2-10-102 (purpose)

  "... An assessment of each state agency action with taking or damaging implications is needed to avoid imposing expensive litigation burdens on citizens and to minimize the risk of unanticipated demands on the state's fiscal resources. The purpose of this part is to establish an orderly and consistent process that better enables state agencies to evaluate whether an action with taking or damaging implications might result in the taking or damaging of private property. It is not the purpose of this part to expand or diminish the private property protections provided in the federal and state constitutions."

- Mont. Code Ann. § 2-10-103 (definitions)

  "As used in this part, the following definitions apply:

  (1) "Action with taking or damaging implications" means a proposed state agency administrative rule, policy, or permit condition or denial pertaining to land or water management or to some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana constitution....

  (2) "Private property" means all real property, including but not limited to water rights.

  (3) "State agency" means an officer, board, commission, department, or other entity within the executive branch of state government.

  (4) "Taking or damaging" means depriving a property owner of private property in a manner requiring compensation under the [federal or state constitutions]."

- Mont. Code Ann. § 2-10-104 (guidelines for actions with takings implications)

  "(1) The attorney general shall develop and provide to state agencies guidelines, including a checklist, to assist the agencies in identifying and evaluating agency actions with taking or damaging implications. The attorney general shall at least annually review the guidelines and modify them as necessary to comply with changes in statutes and court decisions...."

- Mont. Code Ann. § 2-10-105 (impact assessment)

  "(1) Each state agency shall assign a qualified person or persons in the state agency the duty and authority to ensure that the state agency complies with this part [private property assessment act]. Each state agency action with taking or damaging implications must be submitted to that person or persons for review and completion of an impact assessment. The state agency may not take the action unless the review and

impact assessment have been completed, except that the action with taking or damaging implications may be taken before the review and impact assessment are completed if necessary to avoid an immediate threat to public health or safety.

(2) Using the attorney general's guidelines and checklist, the person shall prepare a taking or damaging impact assessment for each state agency action with taking or damaging implications that includes an analysis of at least the following:

(a) the likelihood that a state or federal court would hold that the action is a taking or damaging;

(b) alternatives to the action that would fulfill the agency's statutory obligations and at the same time reduce the risk for a taking or damaging; and

(c) the estimated cost of any financial compensation by the state agency to one or more persons that might be caused by the action and the source for payment of the compensation.

(3) A copy of the impact assessment for a proposed action with taking or damaging implications must be given to the governor before the action is taken, except that an action to avoid an immediate threat to public health or safety may be taken before the impact assessment is completed and the assessment may be reported to the governor after the action is taken."

- Mont. Code Ann. § 2-10-111 (notice to public and interested persons)

"(1) After an impact assessment has been completed, and regardless of the findings in the assessment, the state agency that performed the impact assessment shall provide notice to the public and interested persons of its intent to engage in the proposed action. The notice must be provided through use of either electronic e-mail lists or postal mail lists to all persons who have elected to be notified of impact assessments and through the use of the state's official internet website used by all state agencies.

(a) The electronic e-mail lists and postal mail lists must be established to allow interested persons to be on lists notifying them of impact assessments of all state agencies or of specific information based on agency name or geographical location of a proposed action and may provide notice based on other criteria that would promote public awareness of proposed actions.

(b) The agency website link must allow access to impact assessments of all state agencies or to specific information based on agency name or geographical location of a proposed action and may also be based on other criteria that would promote public awareness of proposed actions. The website must provide a summary of the impact assessment and a link to a source for the complete impact assessment.

(2) If due to time constraints a state agency is compelled to take an action allowed by this part before completion of an impact assessment, it shall, within 3 days of learning of the requirement to take the action, post notice of the action and provide a brief explanation of the action, the need for expedited action, and an estimate of when the action will be completed and the expected availability of the completed summary and impact statement.

(3) Unless the action may be taken without a completed impact statement as provided in this part, the state agency may not take the proposed action until it has completed and posted the impact statement.

(4) The state agency shall update the assessment and provide notice to the public if the action is not adopted before the 180th day after the date the original notice was given."

- Mont. Code Ann. § 2-10-112 (suit to invalidate state agency action)

"(1) A state agency's adopted action is not valid unless the action was taken in compliance with 2-10-105. A private property owner affected by a state agency action taken without fulfilling the requirements of 2-10-105 may bring suit for a declaration of invalidity of the action.

(2) A suit under this section must be filed in a court in the county in which the property owner's affected property is located. ...

(3) The court shall award a property owner who prevails in a suit under this section reasonable and necessary attorney fees and court costs."

- Mont. Code Ann. § 75-1-201 (general directions—environmental impact statements)

"(1) The legislature authorizes and directs that, to the fullest extent possible: ...
(b) under this part [covering environmental impact statements], all agencies of the state, except the legislature ... shall: ...
(iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment in Montana are evaluated for regulatory restrictions on private property ... ;
(iv) include in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment in Montana a detailed statement on: ...
(D) any regulatory impacts on private property rights, including whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed. The analysis ... need not be prepared if the proposed action does not involve the regulation of private property....
(c) prior to making any detailed statement [under this Section], the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved in Montana and with any Montana local government ... that may be directly impacted by the project. The responsible state official shall also consult with and obtain comments from any state agency in Montana with respect to any regulation of private property involved. Copies of the statement and the comments and views of the appropriate state, federal, and local agencies that are authorized to develop and enforce environmental standards must be made

available to the governor, the environmental quality council, and the public and must accompany the proposal through the existing agency review processes."

History: Most of the relevant statutory language in each of these provisions was enacted in 1995.[328] However, Mont. Code Ann. §§ 2-10-111 and 2-10-112 were enacted in 2011.[329] According to a memo authored by the Montana Association of Realtors, these new 2011 provisions would add "teeth" to the Montana Private Property Assessment Act by adding public oversight and creating a cause of action for private property owners to use when agencies fail to comply with the Act.[330]

3) Other

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Montana does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. Montana has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

[328] Private Property Assessment Act, ch. 462, §§ 2, 5, 1995 Mont. Laws 2230, 2231-32 (enacting H.B. No. 311; §§ 2-10-102 through 2-10-105); Law of April 11, 1995, ch. 352, § 3, 1995 Mont. Laws 1130, 1131-32 (enacting S.B. No. 321; § 75-1-201; amended 2009, 2011).

[329] Law of April 28, 2011, ch. 286, §§ 1-2, 2011 Mont. Laws (enacting S.B. No. 347; §§ 2-10-111 through 2-10-112).

[330] *See* Montana Association of Realtors/Political Affairs, "Bill Memo: SB 347, Revise the Private Property Assessment Act (PPAA)," March 23, 2011, available at http://data.opi.mt.gov/legbills/2011/Minutes/House/Exhibits/juh65a01.pdf.

NEBRASKA

Nebraska law imposes a *property-based limitation*.

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

None identified.

2) Assessment

By executive order, state executive departments and agencies must determine, "to the extent feasible and permitted by law," if a proposed rule or regulatory action affecting real property may: require a private property owner to dedicate a portion of property or grant an easement; deprive the owner of all economically viable use of the property; or result in a compensable taking under state or federal law. Where the government entity identifies one of these conditions, it must write to the Governor's Policy Research Office and explain the need and justification for the proposed action and describe the potential fiscal impact on the state.

Executive departments and agencies must develop procedures to guide their determination under the executive order as to any proposed rule or regulatory action.[331]

Legal Authority:

- Neb. Exec. Order No. 95-9 (1995)

"... 1. To the extent feasible and permitted by law, executive departments and agencies shall determine if a proposed rule or regulatory action affecting real property may: ... (2) Require a private property owner to dedicate a portion of property or grant an easement; (3) Result in depriving a private property owner of all economically viable use of said property; or (4) result in a compensable taking of private property [under state or federal law].

2. To the extent feasible and permitted by law, executive departments or agencies shall develop procedures to determine if any of the above four conditions exist within a proposed rule or regulatory action. If such conditions exist, the executive

[331] As of mid-2010, the Nebraska Department of Environmental Quality maintained no procedures pursuant to this executive order. ELI Staff Communication with Nebraska DEQ, Aug. 13, 2010 (email on file with the authors).

department or agency should immediately notify the Governor's Policy Research Office in writing and explain the need and/or justification for such a proposed rule or regulatory action and the potential fiscal impact on the state, if any....

Executive order 95-9 shall exist until repealed or superseded...."

History: Governor E. Benjamin Nelson issued this executive order on July 20, 1995,[332] as part of a legislative bargain to end debate over a contentious property rights bill (L.B. 168). In exchange, Senator Jim Jones dropped the proposed legislation, which would have required the attorney general to review all regulations to determine whether they would constitute a taking. Critics had complained that the bill was unnecessary and would hinder the effectiveness of zoning and environmental laws.[333]

3) Other

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Case-by-case: Nebraska does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. Nebraska has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

However, Nebraska provides legal protections for some waters that may be subject to a loss of protection under federal law. Nebraska defines "waters of the state," for purposes of its Environmental Protection Act, to include "all waters within the jurisdiction of [the] state, including all streams, lakes, ponds, impounded reservoirs, marshes, wetlands, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, situated wholly or partly within or bordering upon the state."[334]

Isolated wetlands are subject to the state's surface water quality standards.[335] Although there is no permitting program that covers them, fill activities may still violate water standards. Project proponents may consult with and obtain an informal advisory opinion

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[332] Exec. Order. No. 95-9 (1995), available at http://nlc1.nlc.state.ne.us/docs/pilot/pubs/eofiles/95-9.pdf.

[333] *See* "Gov. Nelson Issues Order to Shield Property Rights[;] Action May Replace Bill on Regulations," *Omaha World-Herald Company*, July 21, 1995, at 11SF.

[334] Neb. Rev. Stat. § 81-1502(21).

[335] 117 Neb. Admin. Code ch. 7, § 003.02.

from DEQ, which has developed procedures "to assist project proponents who wish to avoid violating state water quality standards and potential enforcement actions."[336]

[336] For more on Nebraska Department of Environmental Quality water quality certification as it pertains to isolated wetlands, see the Department's website: http://www.deq.state.ne.us/SurfaceW.nsf/Pages/S401. For more on Nebraska law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase II*, Appendix: Nebraska, at 57 (June 2006).

NEVADA

Nevada law imposes *qualified stringency prohibitions*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.

2) Qualified Prohibitions

Nevada's Administrative Procedure Act provides that for purposes of a state agency's notice of intent to adopt a regulation, as well as in a statement to accompany an adopted regulation, the agency must summarize any state provisions that are more stringent than their federal counterparts. Additionally, when a small business impact statement is required, the agency must further explain why the more-stringent state provisions are necessary. These limitations apply only where the state regulation would regulate "the same activity" as its federal counterpart.

Legal Authority:

- Nev. Rev. Stat. Ann. § 233B.0603(1)(a)(9) (Nevada Administrative Procedure Act—contents and form of notice of intent to adopt, amend or repeal permanent or temporary regulation; solicitation of comments from public or affected businesses); Nev. Admin. Code § 233B.010 (prescribing the form to be used by state agencies to adopt, amend, or repeal a regulation)

  "1. The notice of intent to act upon a regulation required pursuant to NRS 233B.060 [addressing agency notice of adoption, amendment, or repeal of permanent and temporary regulations] must:
  (a) Include: ...
  (9) If the regulation includes provisions which are more stringent than a federal regulation that regulates the same activity, a summary of such provisions."

- Nev. Rev. Stat. Ann. § 233B.0609(6) (Nevada Administrative Procedure Act—proposed permanent or temporary regulation: Contents of small business impact statement)

  "A small business impact statement prepared pursuant to NRS 233B.0608 [concerning impact of a proposed regulation on small businesses] must set forth the following information: ... 6. If the proposed regulation includes provisions which duplicate or are more stringent than federal, state or local standards regulating the same activity, an explanation of why such duplicative or more stringent provisions are necessary."

- Nev. Rev. Stat. Ann. § 233B.066(1)(i) (Nevada Administrative Procedure Act—informational statement required concerning adopted permanent or temporary regulation; contents of statement)

  "1. Except as otherwise provided in subsection 2 [concerning emergency regulations], each adopted regulation which is submitted to the Legislative Counsel pursuant to NRS 233B.067 [concerning the adoption of permanent regulations] or filed with the Secretary of State pursuant to subsection 2 or 3 of NRS 233B.070 [concerning temporary regulations and emergency regulations, respectively] must be accompanied by a statement concerning the regulation which contains the following information: ...
  (i) If the regulation includes provisions which are more stringent than a federal regulation which regulates the same activity, a summary of such provisions."

  History: The relevant text of § 233B.0603 became law in 1997.[337] At the committee hearings, a staff member of the Legislative Counsel Bureau explained that the language was included in the bill because the Committee to Study State Regulations that Affect Business and Economic Development wanted agencies to notify businesses when an agency promulgated regulations that were more stringent than federal regulations.[338] A legislator added that the language would require agencies to clearly delineate for local businesses where federal regulations ended and where state regulations began.[339]

  The relevant text of the next provision identified above, § 233B.0609, was enacted in 1999.[340]

  The relevant text of § 233B.066 first appeared in a 1993 bill that was vetoed by the governor.[341] Another version of the bill with the same relevant text was subsequently introduced and enacted in 1995.[342] During consideration of the 1993 bill, a lobbyist for the Nevada Taxpayers Association stated that agencies often adopt regulations whose language has previously been considered and rejected by the state legislature. For this reason, the Association supported language limiting regulations to the scope contained in the organic statutes and their federal regulatory counterparts.[343]

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[337] Law of May 28, 1997, ch. 97, 1997 Nev. Stat. 184, 184-85 (enacting A.B. No. 122; amended 2007).

[338] Minutes of the Assembly Committee on Government Affairs: Hearing on A.B. 122 Before Assem. Comm. on Government Affairs, 69th Sess. (1997) (statement of Denice Miller, Committee Policy Analyst, Legislative Counsel Bureau).

[339] Minutes of the Assembly Committee on Government Affairs: Hearing on A.B. 122 Before Assem. Comm. on Government Affairs, 69th Sess. (1997) (statement of Assemblyman David Humke).

[340] Law of May 31, 1999, ch. 443, § 4, 1999 Nev. Stat. 2070, 2071 (enacting A.B. No. 486).

[341] S.B. No. 370, 67th Leg. (Nev. 1993).

[342] Law of July 5, 1995, ch. 672, § 3, 1995 Nev. Stat. 2579, 2580-81 (enacting S.B. No. 573, amending Law of May 17, 1995, ch. 106, § 7, 1995 Nev. Stat. 128, 131-32 (enacting S.B. No. 277); amended 2003, 2011).

[343] Minutes of the Senate Sub-Committee on Government Affairs: Hearing on S.B. No. 370 Before S. Subcomm. on Government Affairs, 67th Sess. (Nev. 1993) (statement of Carole Vilardo, Lobbyist, Nevada Taxpayers Association, on April 26, 1993).

Similarly, a senator said, "... I find most regulations passed after the session adjourns [are regulations] on something they couldn't get passed during the session. So they use regulations as a back door issue because they couldn't get legislation passed in the interim...."[344]

PROPERTY-BASED LIMITATIONS

None identified.[345]

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Nevada does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. Nevada has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

[344] Minutes of the Senate Sub-Committee on Government Affairs: Hearing on S.B. No. 370 Before S. Subcomm. on Government Affairs, 67th Sess. (Nev. 1993) (statement of Sen. Leonard Nevin on April 26, 1993).

[345] In consecutive elections in 2006 and 2008, Nevada voters approved a ballot initiative, known as the "People's Initiative to Stop the Taking of Our Land (PISTOL)," that amended the eminent domain provisions of Nevada's constitution. Prior to the 2006 election, the *proposed* version of the ballot initiative contained a provision requiring that "[g]overnment actions which result in substantial economic loss to private property shall require the payment of just compensation." However, this provision was never considered by the electorate: it was stripped out by a court for procedural reasons prior to the vote in 2006 and thus not enacted with the rest of the law. *See Nevadans for the Protection of Property Rights* v. *Heller* 141 P.3d 1235, 122 Nev. 894 (2006).

NEW HAMPSHIRE

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage: New Hampshire provides legal protections for waters that may be subject to a loss of protection under federal law. "Surface waters of the state" are defined under the Water Pollution and Waste Disposal Act as "perennial and seasonal streams, lakes, ponds, and tidal waters within the jurisdiction of the state, including all streams, lakes, or ponds bordering on the state, marshes, water courses, and other bodies of water, natural or artificial."[346] Related regulations indicate that "surface waters of the state" include both wetlands (as defined by New Hampshire's Fill and Dredge Wetlands Act) and "waters of the United States" (as defined under the federal Clean Water Act).[347]

The Fill and Dredge in Wetlands Act is New Hampshire's primary instrument for regulating activities that affect wetlands. Under this statute, wetlands are defined as "an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[348] The Act governs tidal wetlands, nontidal wetlands, and tidal buffer zones; it contains no minimum threshold size for wetlands or wetlands impacts.[349]

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[346] N.H. Rev. Stat. Ann. § 485-A:2(XIV).

[347] N.H. Code Admin. R. Ann. [Env-ws] 401.03(t).

[348] N.H. Rev. Stat. Ann. § 482-A:2(X).

[349] *See* N.H. Rev. Stat. Ann. ch. 482-A. For more on New Hampshire law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase IV*, Appendix: New Hampshire, at 116 (Oct. 2007).

NEW JERSEY

New Jersey law imposes *qualified stringency prohibitions* and a *property-based limitation*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.

2) Qualified Prohibitions

By executive order issued in 1994, New Jersey agencies adopting a rule or regulation to implement or otherwise comply with federal programs must provide a statement as to whether the rule or regulation "contains any standards or requirements which exceed the standards or requirements imposed by federal law." The agency must include a cost-benefit analysis supporting its determination to impose the standards and showing that the standards are achievable under current technology.

A related requirement in a 2010 executive order prohibits a state agency from proposing a rule that "exceeds the requirements of federal law," except when required to do so by state law, or when doing so "is necessary ... to achieve a New Jersey specific public policy goal." Agencies are further required to "detail and justify" every instance where a proposed rule "exceeds the requirements of federal law or regulation." Similarly, under the same executive order, agencies are to adopt federally promulgated rules "as written"—again, unless separate state rules are allowable under state law and necessary to achieve "a New Jersey specific public policy goal."

Also under this executive order, each state agency—including the New Jersey Department of Environmental Protection—is required to adopt regulations that "allow for waivers from the strict compliance with agency regulations." New Jersey DEP issued its final rule on waiver, effective August 1, 2012. The rule includes the possibility of the agency waiving regulatory compliance that would result in "actual, exceptional hardship" for a particular property. It remains to be seen how this will operate in the context of protecting water resources, though it is noteworthy that many public comments on the proposed rule, as well as the agency's responses, raise questions about wetlands.[350] Various environmental and labor groups have sued in state court to challenge the rule.[351]

[350] *See generally* 44 N.J. Reg. 981(b) (Apr. 2, 2012) (Waiver of Department Rules) (containing public comments on the proposed rule, together with the agency's responses).

[351] *E.g.*, Editorial, "Lawsuit against N.J. DEP waiver rule points out potential environmental pitfalls," *Times of Trenton*, Mar. 29, 2012, available at http://www.nj.com/times-opinion/index.ssf/2012/03/editorial_lawsuit_against_nj_d.html.

Legal Authority:

- N.J. Exec. Order No. 27 (Gov. Whitman), Nov. 2, 1994

  "1. ... [E]ach administrative agency that adopts, readopts or amends any rule or regulation described in section 2 of this Order shall, in addition to all requirements imposed by existing law and regulation, include as part of the initial publication and all subsequent publications of such rule or regulation, a statement as to whether the rule or regulation in question contains any standards or requirements which exceed the standards or requirements imposed by federal law. Such cost-benefit analysis that supports the agency's decision to impose the standards or requirements and also supports the fact that the State standard or requirement to be imposed is achievable under current technology, notwithstanding the federal government's determination that lesser standards or requirements are appropriate [sic].

  2. This Order shall apply to any rule or regulation that is adopted, readopted or amended under the authority of or in order to implement, comply with or participate in any program established under federal law or under a State statute that incorporates or refers to federal law, federal standards or federal requirements.

  3. The head of a State agency, upon submission by the agency of the required explanation or analysis of the rule or regulation subject to the provisions of this Order, shall certify in writing that the submission of the State agency permits the public to understand accurately and plainly the purposes and expected consequences of the adoption, readoption or amendment of the rule or regulation."

- N.J. Exec. Order No. 2 (Gov. Christie), Jan. 20, 2010

  "1. For immediate relief from regulatory burdens, State agencies shall: ...
  c. Adopt rules for "waivers" which recognize that rules can be conflicting or unduly burdensome and shall adopt regulations that allow for waivers from the strict compliance with agency regulations and such waivers shall not be inconsistent with the core missions of the agency. Each State agency shall prepare and publish on its website a policy describing the circumstances in which such waivers will be granted.[352] ...

  e. Detail and justify every instance where a proposed rule exceeds the requirements of federal law or regulation. State agencies shall, when promulgating proposed rules, not exceed the requirements of federal law except when required

[352] The New Jersey Department of Environmental Protection promulgated regulations setting forth its waiver requirements in 2012. *See* N.J. Admin. Code §§ 7:1B-1.1 to 7:1B-2.4. The Department may "prospectively waive the strict compliance with any of its rules only when it determines that at least one of the following exists and all other requirements of this chapter are met .... The strict compliance with the rule would be unduly burdensome." N.J. Admin. Code § 7:1B-2.1(a). "Unduly burdensome" includes circumstances where strict compliance with a rule would result in "[a]ctual, exceptional hardship for a particular project or activity, or property." N.J. Admin. Code § 7:1B-1.2. These regulations took effect on August 1, 2012. The agency's web page on the waiver rule is at http://www.state.nj.us/dep/waiverrule/index.html.

by State statute or in such circumstances where exceeding the requirements of federal law or regulation is necessary in order to achieve a New Jersey specific public policy goal. ...

3. For long-term relief from regulatory burdens, State agencies shall: ...
b. Adopt federally promulgated rules as written, unless separate State rules are permitted and appropriate to achieve a New Jersey specific public policy goal. ..."

History: Executive Order No. 27 was issued in 1994 by then-Governor Christine Whitman. Executive Order No. 2 was issued in 2010 by Governor Chris Christie. The preamble to Christie's executive order states that New Jersey's ability "to produce growth and opportunity" is "challenged by chronically high costs and regulatory burdens that have resulted in New Jersey's consistently low rankings nationally on regulatory burdens, costs-of-doing business and similar such economic measures making New Jersey the worst business climate in the nation ...."

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

New Jersey's Freshwater Wetlands Protection Act contains a provision under which a property owner affected by a freshwater wetlands permitting decision made by the Department of Environmental Protection under the Act may bring suit to determine whether the action constitutes a taking of property without just compensation. If the court so finds, the Department has the option of compensating the owner for the full amount of lost value, condemning the property, or modifying the decision so as to minimize the detrimental effect on the property's value. Case law makes clear that the requirement that a permit be obtained under the Freshwater Wetlands Protection Act prior to development does not, in and of itself, constitute a taking.[353]

Legal Authority:

- N.J. Stat. Ann. § 13:9B-22 (recorded interest holder; action to determining taking without just compensation; option of compensation)

"a. Any person having a recorded interest in land affected by a freshwater wetlands permit issued, modified or denied pursuant to the provision of this act may file an action in a court of competent jurisdiction to determine if the issuance, modification

[353] *Griffith v. State Dep't of Education*, 775 A.2d 54, 63 (N.J. Super. A.D. 2001). There is additional New Jersey case law interpreting this provision.

Although a property owner aggrieved by an agency permitting decision could presumably bring a takings claim in most states even absent a provision such as this one, and although the provision does not apply to the adoption of regulations, the provision is included in the "compensation/prohibition" category of this study because it articulates a specific remedy and because it includes a pay-or-waive component common to this category of provisions. The extent to which the provision has been invoked, and whether (if at all) the presence of the provision has actually impacted state permitting decisions, are unknown.

or denial of the freshwater wetlands permit constitutes a taking of property without just compensation.

b. If the court determines that the issuance, modification, or denial of a freshwater wetlands permit by the [Department of Environmental Protection] pursuant to this act constitutes a taking of property without just compensation, the court shall give the department the option of compensating the property owner for the full amount of the lost value, condemning the affected property pursuant to the provisions of the "Eminent Domain Act of 1971," … , or modifying its action or inaction concerning the property so as to minimize the detrimental effect to the value of the property."

History: The relevant statutory language was enacted in 1987.[354]

2) Assessment

None identified.

3) Other

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: New Jersey provides legal protections for some waters that may be subject to a loss of protection under federal law. Under state water quality rules, "waters of the state" are defined as "the ocean and its estuaries, all springs, streams, wetlands, and bodies of surface or ground water, whether natural or artificial, within the boundaries of the State of New Jersey or subject to its jurisdiction."[355]

The Freshwater Wetlands Protection Act, administered by the New Jersey Department of Environmental Protection, regulates the state's freshwater wetlands and their buffers.[356] The statute requires a permit for "regulated activities"—such as discharging, dredging, and filling—in freshwater wetlands and state open waters.[357] Permits are also necessary to conduct "prohibited activities" in upland buffers adjacent to certain wetlands.[358] A statutory wetlands classification system guides the Department's permitting process, and

[354] Freshwater Wetlands Protection Act, ch. 156, § 22, 1987 N.J. Laws 950, 973.

[355] N.J. Admin. Code § 7:9B-1.4.

[356] N.J. Stat. Ann. tit. 13, ch. 9B.

[357] *See* N.J. Stat. Ann. §§ 13:9B-2, 13:9B-3, & 13:9B-9.

[358] *See* N.J. Stat. Ann. § 13:9B-17.

transition area waivers are available for regulated activities occurring in wetland buffers.[359]

New Jersey is one of two states (the other is Michigan) to have assumed authority for the federal Clean Water Act § 404 wetlands program. Activities proposed for non-delegable waters require a permit from both the Department and the Corps.[360]

The Wetland Act of 1970 generally applies to New Jersey's coastal wetlands. Permits are required for "regulated activities," including draining, dredging, dumping, or constructing structures within a protected area.[361] Tidal wetlands protected by the Act are mapped.[362]

The Pinelands Protection Act regulates the state's pineland ecosystem and includes some provisions applicable to wetlands that apply in addition to state and federal protections—such as land use planning requirements, development prohibitions, and specifications on impact types and requirements.[363] The Hackensack Meadowlands Reclamation and Development Act authorizes the adoption of a master plan for the Meadowlands wetlands complexes.[364] The Highlands Water Protection and Planning Act regulates highlands open waters, including wetlands, by requiring a three-hundred-foot buffer adjacent to the regulated waters and strictly limiting development activities that may impact these waters.[365]

[359] *See* N.J. Stat. Ann. §§ 13:9B-7, 13:9B-17(b).

[360] N.J. Admin. Code § 7:7A-2.1(c).

[361] *See* N.J. Stat. Ann. §§ 13:9A-1, 13:9A-4.

[362] *See* N.J. Stat. Ann. § 13:9A-1.

[363] *See* N.J. Stat. Ann. §§ 13:18A-1 to 13:18A-29; N.J. Admin. Code §§ 7:50-6.1 to 7:50-6.15.

[364] *See* N.J. Stat. Ann. §§ 13:17-1, 13:17-9.

[365] *See* N.J. Stat. Ann. §§ 13:20-1 to 13:20-35; N.J. Admin. Code §§ 7:38-3.1 to 7.38-3.11, 7:38-3.6. For more on New Jersey law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase II*, Appendix: New Jersey, at 63 (June 2006).

NEW MEXICO

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

None identified.

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IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: New Mexico does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. New Mexico has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

NEW YORK

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage: New York provides legal protections for some waters that may be subject to a loss of protection under federal law.

Under its Water Resources Law, New York defines "waters" to include "lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial limits of the state of New York, and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private, which are wholly or partially within or bordering the state or within its jurisdiction."[366] The state constitution requires the legislature to "include adequate provision for the abatement of ... water pollution ... , the protection of ... wetlands and shorelines, and the development and regulation of water resources."[367]

Except for those wetlands located within the boundaries of the Adirondack Park, freshwater wetlands are managed and protected by the New York State Department of Environmental Conservation under the authority of the Freshwater Wetlands Act.[368] The agency's jurisdiction extends to freshwater wetlands that are *12.4 acres or more in size,* as well as those smaller than 12.4 acres if they are considered to have "unusual local importance."[369] The regulated area includes a protective buffer, or "adjacent area," extending one hundred feet landward of the wetland boundary.[370] Permits are required for draining, dredging, dumping, and related activities.[371] Jurisdiction over freshwater

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[366] N.Y. Envtl. Conserv. Law § 15-0107(4).

[367] N.Y. Constit. art. XIV § 4 (conservation—protection of natural resources; development of agricultural lands).

[368] N.Y. Envtl. Conserv. Law §§ 24-0101 to 24-1305.

[369] *See* N.Y. Envtl. Conserv. Law § 24-0301(1).

[370] *See* N.Y. Envtl. Conserv. Law § 24-0701(2). *See also* N.Y. State Department of Environmental Conservation, "Freshwater Wetlands Permit Program: Do I Need a Permit?" available at http://www.dec.ny.gov/permits/6279.html.

[371] *See* N.Y. Envtl. Conserv. Law § 24-0701(2). *See also* N.Y. Comp. Codes R. & Regs. tit. 6, part 663 (freshwater wetlands permit requirements).

wetlands that are smaller than 12.4 acres in size and not of "unusual local importance" is reserved to the city, town, or village in which they are located.[372]

Within Adirondack Park boundaries, the Adirondack Park Agency regulates activities affecting wetlands greater than one acre in size—or located adjacent to a body of water, including a permanent stream, with which there is free interchange of water at the surface, in which case there is no size limitation.[373]

The Tidal Wetlands Act authorizes the Department of Environmental Conservation to map and administer a permitting program that regulates tidal wetlands.[374] Permits are required for almost any activity that alters an inventoried tidal wetland or immediately adjacent land.[375]

New York's Water Resources Law provides that in the absence of a permit, excavation or placement of fill is prohibited in "any navigable waters of the state, or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state and that are inundated at a mean high water level or tide...."[376]

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[372] N.Y. Envtl. Conserv. Law § 24-0507.

[373] *See* N.Y. Envtl. Conserv. Law § 24-0801; N.Y. Exec. Law 27 § 802(68). *See also* N.Y. State Department of Environmental Conservation, "Freshwater Wetlands Permit Program: Jurisdictions of Other Agencies" (discussing jurisdiction of various agencies, including Adirondack Park Agency), available at http://www.dec.ny.gov/permits/6269.html.

[374] *See* N.Y. Envtl. Conserv. Law §§ 25-0101 to 25-0601.

[375] N.Y. Envtl. Conserv. Law § 25-0401(2); N.Y. Comp. Codes R. & Regs. tit. 6 § 661.5 (tidal wetlands—land use regulations—use guidelines).

[376] N.Y. Envtl. Conserv. Law § 15-0505(1). For more on New York law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase I*, Appendix: New York, at 87 (Jan. 2005).

NORTH CAROLINA

North Carolina law imposes a *stringency prohibition*.

STRINGENCY LIMITATIONS

1) Prohibitions

North Carolina significantly amended its administrative procedure act pursuant to the Regulatory Reform Act of 2011. Subject to certain exceptions, North Carolina agencies that implement and enforce environmental laws may not adopt a rule "for the protection of the environment or natural resources" that imposes "a more restrictive standard, limitation, or requirement than those imposed by federal law or rule, if a federal law or rule pertaining to the same subject matter has been adopted."[377] The exceptions, which are narrow, include where adoption of a more restrictive rule would be "required" by a "serious and unforeseen threat to the public health, safety, or welfare."[378]

This prohibition took effect on October 11, 2011 and does not apply to North Carolina's wetlands rules (or any other rules) adopted prior to that date.[379]

Legal Authority:

- N.C. Gen. Stat. § 150B-19.3 (Limitation on certain environmental rules)

"(a) An agency authorized to implement and enforce State and federal environmental laws may not adopt a rule for the protection of the environment or natural resources that imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule, if a federal law or rule pertaining to the same subject matter has been adopted, unless adoption of the rule is required by one of the following:

(1) A serious and unforeseen threat to the public health, safety, or welfare.
(2) An act of the General Assembly or United States Congress that expressly requires the agency to adopt rules.
(3) A change in federal or State budgetary policy.
(4) A federal regulation required by an act of the United States Congress to be adopted or administered by the State.
(5) A court order."

[377] N.C. Gen. Stat. § 150B-19.3(a). The law expressly applies to the Department of Environment and Natural Resources and the Environmental Management Commission, among other state administrative bodies. N.C. Gen. Stat. § 150B-19.3(b).

[378] *Id.* at § 150B-19.3(a)(1)-(5).

[379] 2011 N.C. Laws S.L. 2011-398 (S.B. 781), at § 63.

History: The relevant statutory language was adopted in 2011, pursuant to "An Act To Increase Regulatory Efficiency in Order to Balance Job Creation and Environmental Protection," also known as the Regulatory Reform Act of 2011.[380] Governor Beverly Eaves Perdue vetoed the bill; the General Assembly overrode the veto.[381]

2) Qualified Prohibitions

None identified.

PROPERTY-BASED LIMITATIONS

None identified.[382]

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: North Carolina adopted administrative regulations to "fill the gap" in federal Clean Water Act coverage created by *SWANCC* with respect to certain geographically isolated wetlands.

North Carolina defines "waters" for purposes of its water resources laws to mean "any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction."[383] Although North Carolina had relied on § 401 to address dredge and fill activities in freshwater wetlands and waters, following *SWANCC*, North Carolina's Environmental Management Commission adopted rules under the state water pollution

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[380] 2011 N.C. Laws S.L. 2011-398 (S.B. 781). This law further required each state agency with rule-making powers to deliver to the Joint Select Regulatory Reform Committee of the General Assembly by October 1, 2011, a list of all permanent rules adopted by that body that includes for each rule the following information:

(1) Whether the rule is mandated by a federal law or regulation.

(2) If the rule is not mandated by a federal law or regulation, whether there is a federal regulation that is analogous to the rule. For purposes of this subdivision, "analogous" means the federal regulation regulates the same conduct or activity as the State regulation.

(3) If there is a federal statute or regulation analogous to the rule, whether the rule is more stringent than the federal law or regulation. *Id.* at § 57.

[381] Bill history available at http://www.ncleg.net/gascripts/billlookup/billlookup.pl?Session=2011&BillID=S781.

[382] However, a North Carolina law provides a cause of action for a person claiming that certain legal requirements deprived him or her of "private property rights in land under navigable waters" or the "right of fishery in navigable waters," without just compensation. N.C. Gen. Stat. § 113-206(e). This very narrow provision appears unlikely to bear on state efforts to regulate additional classes of waters.

[383] N.C. Gen. Stat. § 143-212(6). Wetlands are deemed waters of the state, pursuant to an agency decision upheld by a court ruling. *See In re Ruling by Environmental Management Commission*, 573 S.E.2d 732 (N.C. App. 2002).

law to ensure state protection for isolated waters not subject to federal jurisdiction under CWA § 404.[384]

North Carolina's Coastal Area Management Act regulates coastal waters located within "Areas of Environmental Concern," including coastal wetlands.[385] Development activities in these areas require a permit from North Carolina's Department of Environment and Natural Resources' Division of Coastal Management.[386]

The Riparian Area Buffer Rules establish fifty-foot-wide buffers along waterways in the Neuse and Tar-Pamlico river basins, and in the Randleman lake basin. Buffers are provided for intermittent or perennial streams, lakes, ponds, and estuaries; however, ditches, ephemeral streams, and wetlands are not buffered.[387]

[384] *See* 15A N.C. Admin. Code 02H § .1300 (discharges to isolated wetlands and isolated waters).

[385] N.C. Gen. Stat. § 113A-113.

[386] *See* N.C. Gen. Stat. § 113A-118; 15A N.C. Admin. Code 07H.0102, 07H.0205.

[387] *See* 15 N.C. Admin. Code 02B.0233, 02B.0250, & 02B.0259. For more on North Carolina law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase I*, Appendix: North Carolina, at 101 (Jan. 2005).

NORTH DAKOTA

North Dakota law imposes a *qualified stringency prohibition* and *property-based limitations*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.

2) Qualified Prohibitions

The North Dakota Department of Health[388] is prohibited from adopting a rule for purposes of administering a program under the federal Clean Water Act that is "more stringent than corresponding federal regulations which address the same circumstances," or for which there is no corresponding federal regulation—unless the Department satisfies additional requirements. To adopt a more stringent rule, the Department must make a written finding, after public comment and hearing and based upon evidence in the record, that the corresponding federal regulations are inadequate to protect public health and the environment of North Dakota. The findings must be supported by an opinion of the Department referring to and evaluating the public health and environmental information and studies contained in the record that form the basis for the Department's conclusions.

If the Department is petitioned by a person affected by a rule, and the Department identifies a rule more stringent than federal regulations, or a rule for which there are no corresponding federal regulations, the Department has nine months to "review and revise" its rule rules to comply with the qualified stringency provisions.

If a person is issued a notice of violation (or denied a permit) by the Department based on a more-stringent state rule, and the rule was not issued in compliance with the state's qualified stringency requirements, that person may assert a partial defense (or a partial challenge to the permit denial) on the basis and to the extent that the Department's rule is not in compliance.

Legal Authority:

- N.D. Cent. Code § 23-01-04.1(1)-(3), (5) (rulemaking authority and procedure)

"1. Except as provided in subsection 2, no rule which the state department of health ... adopts for the purpose of the state administering a program under the federal Clean Air Act, federal Clean Water Act, federal Safe Drinking Water Act, federal Resource Conservation and Recovery Act, federal Comprehensive Environmental Response, Compensation and Liability Act, federal Emergency Planning and

[388] This is North Dakota's primary environmental agency. *See* N.D. Cent. Code § 23-01-01.2.

Community Right to Know Act of 1986, federal Toxic Substances Control Act, or federal Atomic Energy Act of 1954, may be more stringent than corresponding federal regulations which address the same circumstances. In adopting such rules, the department may incorporate by reference corresponding federal regulations.

2. The department may adopt rules more stringent than corresponding federal regulations or adopt rules where there are no corresponding federal regulations, for the purposes described in subsection 1, only if it makes a written finding after public comment and hearing and based upon evidence in the record, that corresponding federal regulations are not adequate to protect public health and the environment of the state. Those findings must be supported by an opinion of the department referring to and evaluating the public health and environmental information and studies contained in the record which form the basis for the department's conclusions.

3. If the department, upon petition by any person affected by a rule of the department, identifies rules more stringent than federal regulations or rules where there are no corresponding federal regulations, the department shall review and revise those rules to comply with this section within nine months of the filing of the petition. ...

5. Any person who is issued a notice of violation, or a denial of a permit or other approval, based upon a rule of the department which is more stringent than a corresponding federal regulation or where there is no corresponding federal regulation, may assert a partial defense to that notice, or a partial challenge to that denial, on the basis and to the extent that the department's rule violates this section by imposing requirements more stringent than corresponding federal regulations, unless the more stringent rule of the department has been adopted in compliance with this section."

History: The relevant statutory language was adopted in 1989.[389]

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

None identified.

2) Assessment

State agencies in North Dakota are required to prepare a written assessment of the "constitutional takings implications" of any proposed rule "that may limit the use of private real property." For purposes of the assessment provision, a regulatory taking is a taking of real property through the exercise of the police and regulatory powers of the state that reduces the property's value by more than fifty percent. There is no

[389] Law of April 10, 1989, ch. 299, § 1, 1989 N.D. Laws 814, 814 (enacting H.B. No. 1537; amended 1995). H.B. No. 1537 was introduced by Reps. Goetz and Marks. *See id.*

taking, however, where a state action "substantially advances legitimate state interests, does not deny an owner economically viable use of the owner's land, or is in accordance with applicable state or federal law."

The agency's written assessment must: (1) assess the likelihood that the proposed rule may result in a regulatory taking; (2) identify the purpose of the proposed rule; (3) explain why the rule is necessary to substantially advance that purpose, and why no alternative is available that would achieve the agency's goals while reducing the impact on private property owners; (4) estimate the potential cost to the government if a court finds that the rule constitutes a regulatory taking; (5) identify the source of payment in the agency's budget if compensation is ordered; and (6) certify that the benefits of the rule exceed possible compensation costs.

A private landowner affected by an agency rule that limits the owner's use of the property may request in writing that the agency "reconsider the application or need for the rule." The agency has thirty days to consider the request and to inform the landowner in writing whether it intends to maintain, modify, or repeal the rule.

Legal Authority:

- N.D. Cent. Code § 28-32-09 (takings assessment)

"1. An agency shall prepare a written assessment of the constitutional takings implications of a proposed rule that may limit the use of private real property. The agency's assessment must:

a. Assess the likelihood that the proposed rule may result in a taking or regulatory taking.

b. Clearly and specifically identify the purpose of the proposed rule.

c. Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners.

d. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.

e. Identify the source of payment within the agency's budget for any compensation that may be ordered.

f. Certify that the benefits of the proposed rule exceed the estimated compensation costs.

2. Any private landowner who is or may be affected by a rule that limits the use of the landowner's private real property may request in writing that the agency reconsider the application or need for the rule. Within thirty days of receiving the request, the agency shall consider the request and shall in writing inform the landowner whether the agency intends to keep the rule in place, modify application of the rule, or repeal the rule.

3. In an agency's analysis of the takings implications of a proposed rule, ... "[r]egulatory taking" means a taking of real property through the exercise of the

police and regulatory powers of the state which reduces the value of the real property by more than fifty percent. However, the exercise of a police or regulatory power does not effect a taking if it substantially advances legitimate state interests, does not deny an owner economically viable use of the owner's land, or is in accordance with applicable state or federal law."

[Note: pursuant to N.D. Cent. Code § 28-32-01(2), the term "agency" applies broadly to state departments, boards, commissions, and other administrative units of the executive branch of state government.]

History: This statutory provision was enacted in 2001.[390]

3) Other

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: North Dakota does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. North Dakota has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

[390] Law of March 14, 2001, ch. 293, § 12, 2001 N.D. Laws 1066, 1113 (enacting H.B. No. 1030).

OHIO

Ohio law imposes a *qualified stringency prohibition*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.[391]

2) Qualified Prohibitions

Ohio law requires state agencies to follow an additional regulatory procedure when proposing a rule that deals with "environmental protection," a term defined to include "appropriation or regulation of privately owned property to preserve ... water resources in a natural state or to wholly or partially restore them...." Prior to adoption of such a rule, the agency must: (1) consider documentation relevant to the environmental benefits and technological feasibility of the rule; (2) identify whether the rule is being adopted to enable the state to obtain or maintain approval under a federal environmental law or program; (3) identify whether the rule is "more stringent than its federal counterpart;" and (4) if the rule is more stringent, give the rationale for not incorporating its federal counterpart. Additionally, if the state rule is more stringent, the agency must provide to the appropriate legislative committee for its rule review process the relevant information on this point, together with the documentation considered by the agency with respect to the rule's environmental benefits and technological feasibility. The information and documentation submitted by the agency may be in the form of a summary or an index of available information, but it must be based on "the best available generally accepted knowledge or information in the appropriate fields."

The statute makes clear that the insufficiency, incompleteness, or inadequacy of any of the required information or documentation provided by an agency is *not* grounds for invalidating its rule.

[391] There is a related provision addressing effects of local building regulations on drainage/stormwater. A board of county commissioners may adopt regulations that provide for a review of the effects of proposed new construction on existing surface or subsurface drainage. These regulations may require reasonable drainage mitigation and reasonable alterations before a building permit is issued. However, the regulations "shall not be inconsistent with, more stringent than, or broader in scope than" standards adopted by the USDA NRCS concerning drainage, or rules adopted by EPA for reducing, controlling, or mitigating storm water runoff from construction sites. *See* Ohio Rev. Code Ann. § 307.37(c)(3)(a) (adoption of county building code).

Legal Authority:

- Ohio Rev. Code Ann. § 121.39 (requirements for proposed environmental protection legislation and rules)

"(A) As used in this section, "environmental protection" means any of the following:

(1) Protection of human health or safety, biological resources, or natural resources by preventing, reducing, or remediating the pollution or degradation of air, land, or water resources or by preventing or limiting the exposure of humans, animals, or plants to pollution;

(2) Appropriation or regulation of privately owned property to preserve air, land, or water resources in a natural state or to wholly or partially restore them to a natural state; ...

(D) ... [P]rior to adopting a rule or an amendment proposed to a rule dealing with environmental protection or containing a component dealing with environmental protection, a state agency shall do all of the following: ...

(2) Consider documentation relevant to the need for, the environmental benefits or consequences of, other benefits of, and the technological feasibility of the proposed rule or amendment;

(3) Specifically identify whether the proposed rule or amendment is being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal environmental law or to participate in a federal environmental program, whether the proposed rule or amendment is more stringent than its federal counterpart, and, if the proposed rule or amendment is more stringent, the rationale for not incorporating its federal counterpart;

(4) Include with the proposed rule or amendment and the rule summary and fiscal analysis ... when they are filed with the joint committee on agency rule review ... one of the following in electronic form, as applicable:

(a) The information identified under division (D)(3) of this section and, if the proposed rule or amendment is more stringent than its federal counterpart, as identified in that division, the documentation considered under division (D)(2) of this section;

(b) If an amendment proposed to a rule is being adopted or amended under a state statute that establishes standards with which the amendment shall comply, and the proposed amendment is more stringent than the rule that it is proposing to amend, the documentation considered under division (D)(2) of this section; ...

The information or documentation submitted under division (D)(4) of this section may be in the form of a summary or index of available knowledge or information and shall consist of or be based upon the best available generally accepted knowledge or information in the appropriate fields, as determined by the agency that prepared the documentation. ...

(F) The insufficiency, incompleteness, or inadequacy of a statement, information, documentation, or a summary of information or documentation provided in

accordance with division ... (D) of this section shall not be grounds for invalidation of any ... rule, or amendment to a rule."[392]

History: The relevant statutory language was enacted in 1995.[393]

PROPERTY-BASED LIMITATIONS

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Ohio has enacted legislation to "fill the gap" in federal Clean Water Act coverage created by *SWANCC* with respect to certain geographically isolated wetlands.

Under the water quality standards chapter of the state administrative code, Ohio defines "surface waters of the state" or "water bodies" to mean "all streams, lakes, reservoirs, ponds, marshes, wetlands, or other waterways which are situated wholly or partially within the boundaries of the state, except for those private waters which do not combine or effect a junction with natural surface or underground waters. ..."[394]

Ohio's 2001 Isolated Wetlands Law defines an "isolated wetland" as one that is not subject to regulation under the federal Clean Water Act.[395] The statute prohibits filling or disposing dredged materials in isolated wetlands without a permit from the Ohio Environmental Protection Agency's Division of Surface Water.[396] Wetlands are categorized according to their ecological significance and are subject to different levels of review, different criteria for approval or disapproval, and different mitigation requirements depending upon acreage and classification.[397] The Isolated Wetlands Law imposes no minimum size threshold for isolated wetlands.[398]

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[392] This statute also establishes a procedure to be followed by bill sponsors and legislative committees with respect to "proposed *legislation* dealing with environmental protection"—although there is no applicable stringency provision in that regard. *See* Ohio Rev. Code Ann. § 121.39(B)-(C).

[393] Law effective on Mar. 5, 1996, 1995 Ohio Laws 761, 763 (enacting H.B. No. 106; amended 1999, 2011).

[394] Ohio Admin. Code § 3745-1-02(77).

[395] *See* Ohio Rev. Code Ann. §§ 6111.02 to 6111.28; 6111.02(F).

[396] Ohio Rev. Code Ann. §§ 6111.021 to 6111.028.

[397] *See* Ohio Admin. Code § 3745-1-54; Ohio Rev. Code Ann. §§ 6111.02(A), 6111.022 to 6111.024.

[398] The Law does, however, exempt from coverage isolated wetlands that were created by previous coal mining activities where re-mining is proposed. Ohio Rev. Code Ann. § 6111.021(B). For more on Ohio law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase I*, Appendix: Ohio, at 117 (Jan. 2005).

OKLAHOMA

Oklahoma law imposes a *qualified stringency prohibition*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.

2) Qualified Prohibitions

When a state environmental agency seeks to issue any permanent rule that is more stringent than corresponding federal requirements, the agency must determine, in writing, the economic impact of the rule on—and the environmental benefit of the rule to—the people of the state, including the entities that will be subject to the rule. The agency must issue its economic impact and environmental benefit statement prior to public comment and review. The agency also must submit the statement to the governor and the legislature, together with a summary of any public comments on the statement and the agency's response to the comments.

Legal Authority:

- Okla. Stat. tit. 27A, § 1-1-206 (economic impact and environmental benefit statements)

"A. Each state environmental agency [defined to include the Oklahoma Water Resources Board, the State Department of Agriculture, and the Department of Environmental Quality, among others][399] in promulgation of permanent rules within its areas of environmental jurisdiction, prior to the submittal to public comment and review of any rule that is more stringent than corresponding federal requirements, unless such stringency is specifically authorized by state statute, shall duly determine the economic impact and the environmental benefit of such rule on the people of the State of Oklahoma including those entities that will be subject to the rule. Such determination shall be in written form.

B. Such economic impact and environmental benefit statement of a proposed permanent rule shall be issued prior to or within fifteen (15) days after the date of publication of the notice of the proposed permanent rule adoption....

C. The economic impact and environmental benefit statement shall be submitted to the Governor ... and to the Legislature.... Such reports submitted to the Governor and to the Legislature shall include a brief summary of any public comments made concerning the statement and any response by the agency to the public comments

[399] Okla. Stat. tit. 27A, § 1-1-201(13).

demonstrating a reasoned evaluation of the relative impacts and benefits of the more stringent regulation."

History: This provision became law in 1994.[400]

PROPERTY-BASED LIMITATIONS

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Oklahoma does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. Oklahoma has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

[400] Law of April 24, 1994, ch. 96, § 1, 1994 Okla. Sess. Laws 275, 276 (enacting H.B. No. 1919).

OREGON

Oregon law imposes *stringency prohibitions*, *qualified stringency prohibitions*, and *property-based limitations*.

STRINGENCY LIMITATIONS

1) Prohibitions

The Oregon Environmental Quality Commission (EQC) and the Department of Environmental Quality are prohibited from promulgating or enforcing effluent limitations "upon nonpoint source discharges of pollutants resulting from forest operations on forestlands," unless required to do so by the federal Clean Water Act. This atypical stringency provision appears to be an effort to shield Oregon's forestry industry from regulation. A 2004 briefing paper of the EQC and Board of Forestry concluded that the meaning of this provision is ambiguous.[401]

Legal Authority:

- Or. Rev. Stat. § 468B.110(2) (establishment of water quality standards, authority)

"(2) Unless required to do so by the provisions of the Federal [Clean Water Act], neither the Environmental Quality Commission nor the Department of Environmental Quality shall promulgate or enforce any effluent limitation upon nonpoint source discharges of pollutants resulting from forest operations on forestlands in this state. Implementation of any limitations or controls applying to nonpoint source discharges or pollutants resulting from forest operations are subject to ORS 527.765 [best management practices for maintenance of water quality] and 527.770 [good faith compliance with best management practices; application of subsequent practices and standards]. However, nothing in this section is intended to affect the authority of the commission or the department provided by law to impose and enforce limitations or other controls on water pollution from sources other than forest operations."

History: The relevant statutory language was enacted in 1991.[402] The hearings before the Senate Committee on Agriculture and Natural Resources were held over the course of two months, during which time members spent over forty hours debating the bill.[403]

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[401] *See* Ian Whitlock and Larry Knudsen, *Regulation of Water Quality and Forest Practices*, Environmental Quality Commission and Board of Forestry Joint Meeting (Sept. 7, 2004), available at http://www.deq.state.or.us/about/eqc/agendas/attachments/oct2004/10.21.04.EQC-BOFAttchE.pdf.

[402] Law of August 7, 1991, ch. 919, § 24, 1991 Or. Laws 2037, 2047 (enacting S.B. No. 1125; amended 2003).

[403] *See* Hearing on Senate Bill 555 and Senate Bill 1125 Before the S. Comm. on Agric. and Natural Res., 66th Leg. Assemb., Reg. Sess. (Or. 1991).

2) Qualified Prohibitions

Oregon's Administrative Procedure Act sets forth the state policy that agencies are to adopt rules that "correspond with equivalent federal laws and rules," unless: (1) there is specific statutory direction to the agency that authorizes adoption of the rule; (2) a federal waiver authorizes the adoption of the rule; (3) local or special conditions in the state warrant a different rule; (4) the state rule clarifies federal rules, standards, procedures, or requirements; (5) the state rule achieves the goals of the federal and state law with the least impact on public and private resources; or (6) there is no corresponding federal regulation.

Legal Authority:

- Or. Rev. Stat. § 183.332 (state policy of conformity of state rules with equivalent federal laws and rules)

"It is the policy of this state that agencies shall seek to retain and promote the unique identity of Oregon by considering local conditions when an agency adopts policies and rules. However, since there are many federal laws and regulations that apply to activities that are also regulated by the state, it is also the policy of this state that agencies attempt to adopt rules that correspond with equivalent federal laws and rules unless:

(1) There is specific statutory direction to the agency that authorizes the adoption of the rule;
(2) A federal waiver has been granted that authorizes the adoption of the rule;
(3) Local or special conditions exist in this state that warrant a different rule;
(4) The state rule has the effect of clarifying the federal rules, standards, procedures or requirements;
(5) The state rule achieves the goals of the federal and state law with the least impact on public and private resources; or
(6) There is no corresponding federal regulation."

History: The relevant language was enacted in 1997.[404]

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

Oregon's present-day private property rights framework is known as "Measure 49," the ballot initiative through which the current legal regime was enacted in 2007. This scheme substantially amended (and narrowed) Oregon's property rights framework under "Measure 37," which had been approved by voters in 2004. Oregon law is intended to provide just compensation for unfair burdens on particular property owners caused by land use regulations—while retaining the state's protections for farm and forest uses and water resources. Specifically, the law enables property

[404] Law of July 25, 1997, ch. 602, § 2, 1997 Or. Laws 1449, 1449 (enacting H.B. No. 2799).

owners to be compensated when a future "land use regulation," enacted by a state or local public entity after the owner's acquisition of the property, both: (1) restricts the *residential use of the property, or a farming or forest practice,* and (2) reduces the fair market value of the property.

The term "land use regulation" is broadly defined and expressly covers laws governing wetlands development and management of water quality on agricultural lands. There is an exception for land use regulations that restrict or prohibit activities for the protection of public health and safety.

Just compensation under the statute is typically equal to the decrease in fair market value of the property from one year prior to enactment of the regulation until one year after enactment, plus interest.[405] The property owner has five years to submit a claim to the public entity that enacted the land use regulation. The entity may respond by paying for the reduction in fair market value or by waiving application of the land use regulation with respect to that property. The public entity has 180 days to respond. The public entity must give public notice of the claim and must accept written comments; it may also hold a public hearing. Judicial review of the public entity's final determination may be sought by any person who is "adversely affected"—which includes not only the property owner, but also other persons who submitted evidence, arguments, or comments.

The Oregon Department of Land Conservation and Development provides online resources, including answers to "frequently asked questions," that describe the procedure for bringing Measure 49 claims (and explain how Measure 49 claims may impact and otherwise relate to earlier-filed Measure 37 claims).[406]

Legal Authority:

- Or. Rev. Stat. § 195.300 (definitions)

"... (14) "Land use regulation" means:
(a) A statute that establishes a minimum lot or parcel size;
(b) A provision in ORS 227.030 to 227.300 [planning and zoning; ordinances], 227.350 [wetlands development], ... or in ORS chapter 215 [county planning; zoning; housing codes] that restricts the residential use of private real property;
(c) A provision of a city comprehensive plan, zoning ordinance or land division ordinance that restricts the residential use of private real property zoned for residential use;
(d) A provision of a county comprehensive plan, zoning ordinance or land division ordinance that restricts the residential use of private real property;
(e) A provision ... of:

[405] With certain exceptions: for example, just compensation based on the application of certain forestry regulations may be assessed differently.

[406] *See* http://www.oregon.gov/LCD/MEASURE49/information.shtml.

(A) The Oregon Forest Practices Act;
(B) An administrative rule of the State Board of Forestry; or
(C) Any other law enacted, or rule adopted, solely for the purpose of regulating a forest practice;
(f) ORS 561.191 [department of agriculture program and rules relating to water quality], a provision of ORS 568.900 to 568.933 [agricultural water quality management] or an administrative rule of the State Department of Agriculture that implements [these statutory provisions];
(g) An administrative rule or goal of the Land Conservation and Development Commission; or
(h) A provision of a Metro[407] functional plan that restricts the residential use of private real property....

(21) "Protection of public health and safety" means a law, rule, ordinance, order, policy, permit or other governmental authorization that restricts a use of property in order to reduce the risk or consequence of fire, earthquake, landslide, flood, storm, pollution, disease, crime or other natural or human disaster or threat to persons or property including, but not limited to, building and fire codes, health and sanitation regulations, solid or hazardous waste regulations and pollution control regulations.

(22) "Public entity" means the state, Metro, a county or a city....

(24) "Waive" or "waiver" means an action or decision of a public entity to modify, remove or not apply [certain land use regulations], to allow the owner to use property for a use permitted when the owner acquired the property."

- Or. Rev. Stat. § 195.301 (legislative findings)

"(1) The Legislative Assembly finds that: (a) In some situations, land use regulations unfairly burden particular property owners. (b) To address these situations, it is necessary to amend Oregon's land use statutes to provide just compensation for unfair burdens caused by land use regulations.

(2) ... Oregon law [must] provide[] just compensation for unfair burdens while retaining Oregon's protections for farm and forest uses and the state's water resources."

- Or. Rev. Stat. § 195.305 (compensation for restriction of use of real property due to land use regulation)

"(1) If a public entity enacts one or more land use regulations that restrict the residential use of private real property or a farming or forest practice and that reduce the fair market value of the property, then the owner of the property shall be entitled

[407] "Metro" is the directly elected regional government of the Portland, Oregon metropolitan area.

to just compensation from the public entity that enacted the land use regulation or regulations....

(2) Just compensation ... shall be based on the reduction in the fair market value of the property resulting from the land use regulation.

(3) Subsection (1) of this section *shall not apply* to land use regulations that were enacted prior to the claimant's acquisition date *or to land use regulations*:

(a) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law;

(b) Restricting or prohibiting activities *for the protection of public health and safety*;

(c) To the extent the land use regulation is required to comply with federal law....

(4) (a) Subsection (3)(a) of this section shall be construed narrowly in favor of granting just compensation under this section....

(b) Subsection (3)(b) of this section does not apply to *any farming or forest practice regulation ... unless the primary purpose of the regulation is the protection of human health and safety*.

(c) Subsection (3)(c) of this section does not apply to any farming or forest practice regulation ... unless the public entity enacting the regulation has no discretion under federal law to decline to enact the regulation.

(5) A public entity may adopt or apply procedures for the processing of claims....

(6) The public entity that enacted the land use regulation that gives rise to a claim under subsection (1) of this section shall provide just compensation as required...."

- Or. Rev. Stat. § 195.310 (just compensation due to land use regulations)

"(1) A person may file a claim for just compensation ... if:

(a) The person is an owner of the property and all owners of the property have consented in writing to the filing of the claim;

(b) The person's desired use of the property is a residential use or a farming or forest practice;

(c) The person's desired use of the property is restricted by one or more land use regulations enacted after January 1, 2007; and

(d) The enactment of one or more land use regulations after January 1, 2007, other than land use regulations described in ORS 195.305(3), has reduced the fair market value of the property.

(2) ... [T]he reduction in the fair market value of the property caused by the enactment of one or more land use regulations that are the basis for the claim is equal to the decrease, if any, in the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment, plus interest. If the claim is based on the enactment of more than one land use regulation enacted on different dates, the reduction in the fair market value of the property caused by each regulation shall be determined separately and

the values added together to calculate the total reduction in fair market value. … A claimant must provide an appraisal showing the fair market value of the property one year before the enactment of the land use regulation and the fair market value of the property one year after the enactment. The actual and reasonable cost of preparing the claim, including the cost of the appraisal, not to exceed $5,000, may be added to the calculation of the reduction in fair market value under this subsection. The appraisal must: ...

(c) Unless the claim is based on the enactment of one or more land use regulations described in ORS 195.300 (14)(e), expressly determine the highest and best use of the property at the time the land use regulation was enacted.

(3) Unless the claim is based on the enactment of one or more land use regulations described in ORS 195.300 (14)(e), relief may not be granted under this section if the highest and best use of the property at the time the land use regulation was enacted was not the use that was restricted by the land use regulation.

(4) For a claim based on a land use regulation described in ORS 195.300 (14)(e), the reduction in fair market value:

(a) Is the reduction in fair market value of a lawfully established unit of land that is attributable to the land use regulation on the date the claim is filed.

(b) May, at the election of the owner who files the claim, be supported:

(A) In the manner described in subsection (2) of this section; or

(B) By appraisals showing the value of the land and harvestable timber, with and without application of the land use regulation, conducted in accordance with generally accepted forest industry practices for determining the value of timberland.

(5) If the claimant establishes that the requirements of subsection (1) of this section are satisfied and the land use regulation was enacted by Metro, a city or a county, the public entity must either:

(a) Compensate the claimant for the reduction in the fair market value of the property; or

(b) Authorize the claimant to use the property without application of the land use regulation to the extent necessary to offset the reduction in the fair market value of the property.

(6) If the claimant establishes that the requirements of subsection (1) of this section are satisfied and the land use regulation was enacted by state government ... , the state agency that is responsible for administering the statute, statewide land use planning goal or rule, or the Oregon Department of Administrative Services if there is no state agency responsible for administering the statute, goal or rule, must:

(a) Compensate the claimant for the reduction in the fair market value of the property; or

(b) Authorize the claimant to use the property without application of the land use regulation to the extent necessary to offset the reduction in the fair market value of the property.

(7) A use authorized by this section has the legal status of a lawful nonconforming use in the same manner as provided by ORS 215.130 [application of ordinances and comprehensive plan; alteration of nonconforming use]. The claimant may carry out a use authorized by a public entity under this section except that a public entity may waive only land use regulations that were enacted by the public entity. When a use authorized by this section is lawfully established, the use may be continued lawfully in the same manner as provided by ORS 215.130.

(8) For a claim based on a land use regulation described in ORS 195.300 (14)(e), an authorization granted to a claimant under subsection (5)(b) or (6)(b) of this section may be used by an owner of the property subsequent to the owner who filed the claim."

- Or. Rev. Stat. § 195.312 (procedures for new claims; writing requirement; contents)

"(1) A person filing a claim ... shall file the claim in the manner provided by this section....

(3) A claim filed under ORS 195.310 must be filed with the public entity that enacted the land use regulation that is the basis for the claim....

(5) A person must file a claim under ORS 195.310 within five years after the date the land use regulation was enacted.

(6) A public entity that receives a claim filed under ORS 195.310 must issue a final determination on the claim within 180 days after the date the claim is complete....

(7) If a claim ... is filed with state government, ... , the claim must be filed with the department. If the claim is filed with Metro, a city or a county, the claim must be filed with the chief administrative office of the public entity, or with an individual designated by ordinance, resolution or order of the public entity.

(8) A claim ... must be in writing and must include: ...
(d) A citation to the land use regulation that the claimant believes is restricting the claimant's desired use of the property that is adequate to allow the public entity to identify the specific land use regulation that is the basis for the claim;
(e) A description of the specific use of the property that the claimant desires to carry out but cannot because of the land use regulation; and
(f) An appraisal of the property....

(11) If a public entity does not notify a claimant within 60 days after a claim is filed ... that information or the fee is missing from the claim, the claim is deemed complete when filed...."

- Or. Rev. Stat. § 195.314 (public entity notice of a claim; public hearing; contents of notice; final determination)

  "(1) A public entity that receives a complete claim ... shall provide notice of the claim at least 30 days before a public hearing on the claim or, if there will not be a public hearing, at least 30 days before the deadline for submission of written comments....

  (2) The notice required under subsection (1) of this section must describe the claim and state:
  (a) Whether a public hearing will be held on the claim, the date, time and location of the hearing, if any, and the final date for submission of written evidence and arguments relating to the claim;
  (b) That judicial review of the final determination of a public entity on the claim is limited to the written evidence and arguments submitted to the public entity; and
  (c) That judicial review is available only for issues that are raised with sufficient specificity to afford the public entity an opportunity to respond....

  (5) A public entity shall make the record on review of a claim, including any staff reports, available to the public before the close of the record....

  (6) A public entity shall mail a copy of the final determination to the claimant and to any person who submitted written evidence or arguments before the close of the record. The public entity shall forward to the county, and the county shall record, a memorandum of the final determination in the deed records of the county in which the property is located."

- Or. Rev. Stat. § 195.318 (judicial review of final determination; limitations)

  "(1) A person that is adversely affected by a final determination of a public entity … may obtain judicial review of that determination....

  (2) A person is adversely affected ... if the person:
  (a) Is an owner of the property that is the subject of the final determination; or
  (b) Is a person who timely submitted written evidence, arguments or comments to a public entity concerning the determination.

  (3) ... [J]udicial review of a final determination ... is:
  (a) Limited to the evidence in the record of the public entity at the time of its final determination.
  (b) Available only for issues that are raised before the public entity with sufficient specificity to afford the public entity an opportunity to respond."

- Or. Rev. Stat. § 195.336 (compensation and conservation fund)

  "(1) The Compensation and Conservation Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned on moneys in the Compensation and Conservation Fund shall be credited to the fund. The fund

consists of moneys received by the Department of Land Conservation and Development under [this law] ... and other moneys available to the department for the purpose described in subsection (2) of this section.

(2) Moneys in the fund are continuously appropriated to the department for the purpose of paying expenses incurred to review claims ... , and for the purpose of paying the expenses of the Compensation and Conservation Ombudsman...."

History: Ballot Measure 37, entitled "Governments Must Pay Owners, or Forgo Enforcement, When Certain Land Use Restrictions Reduce Property Value," was approved on November 2, 2004.[408] It broadly covered all forms of private property and would apply retroactively.[409] At the time, many farmers and homeowners feared that Measure 37 would cause an increase in taxes while failing to protect private property rights as promised.[410] Environmentalists argued that Measure 37 would diminish the effect of Oregon's land use laws.[411] Yet, the measure passed with overwhelming support.[412] Measure 37 could be seen as part of the long-fought battle over Oregon's statewide land use program, which dates to the 1970s and is prescriptive about what land uses are allowed, and where. Indeed, the pro-Measure 37 effort was led by the property-rights group Oregonians in Action (OIA), which had been founded in part to work against 1000 Friends of Oregon, the advocacy group launched to support Oregon's land use program.[413]

After two years on the books, Measure 37 had generated almost 3,000 claims from landowners, which forced many counties to "grant waivers, rather than cash to those who won their claims."[414] By October 2007, over 7,500 claims had been filed.[415] Due to the large number of claims, Governor Ted Kulongoski proposed legislation that would place certain larger claims on hold and help local and state governments

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[408] Measure 37: Ballot Title, available at http://www.oregonvotes.org/pages/history/archive/nov22004/guide/meas/m37_bt.html.

[409] *See* Act effective Dec. 2, 2004, ch. 1, 2005 Or. Laws 1 (codified at Or. Rev. Stat. § 195.352; amended and renumbered 2007).

[410] Measure 37: Arguments in Opposition, available at http://www.sos.state.or.us/elections/pages/history/archive/nov596/voters.guide/MEASURES/MEAS37/m37ao.html.

[411] *E.g.*, Corey Wicks, "Will Measure 37 Causes Drastic Changes in Oregon?" *Wallowa County Chieftain*, Oct. 12, 2006 (article no longer available online; on file with the authors).

[412] *E.g.*, Todd Myers, "Oregon's Measure 37: Lessons from the First Eleven Months," Washington Policy Center (2005), available at http://www.washingtonpolicy.org/sites/default/files/PN2005-14.pdf.

[413] *See* Georgetown Environmental Law and Policy Institute, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, at 27-28 (2008) (discussing these groups and the history of the Oregon property rights debate).

[414] *See* Wicks, *supra* note 411.

[415] Pauline Vu, "Oregonians Reconsider Land-Use Measure," Stateline.org, Oct. 23, 2007, available at http://www.stateline.org/live/details/story?contentId=250859.

struggling to cope with the influx.[416] Consequently, House Bill 3546 was enacted to give state and county government entities a one-year extension to complete processing of Measure 37 claims—which the governor said was necessary "to protect the state from potentially ruinous costs and liability."[417]

Measure 49 was eventually enacted to modify, and significantly roll back, Measure 37.[418] It was approved in a public referendum by a 62% statewide majority on November 9, 2007, and further amended in 2009 and 2010.[419] Striking a political compromise between environmental interests and the timber industry,[420] Measure 49 reestablished the state government's ability to regulate industrial and commercial activity without triggering the need for compensation.[421] The Oregon Supreme Court would explain that "[a]n examination of the text and context of Measure 49 conveys a clear intent to extinguish and replace the benefits and procedures that Measure 37 granted to landowners."[422]

By the time of Measure 49's enactment, property owners had submitted over 7,700 claims under Measure 37 seeking around $20 billion and covering approximately 800,000 acres. For valid claims, the government almost always granted a waiver rather than paying; it has been estimated that the number of waivers granted under Measure 37 was in the thousands.[423] In 2010, a federal appeals court ruled that a waiver issued by a county under Measure 37 was not a legally binding contract with a

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[416] *See* Christian Gaston, "Oregon Governor Moves to Put Measure 37 Claims on Hold," *Regal Courier*, Feb. 5, 2007 (article no longer available online; on file with the authors).

[417] "Legislature Give Measure 37 Claims Reviews One-Year Extension," *Hells Canyon Journal*, May 14, 2007, available at http://news.google.com/newspapers?id=f-A4AAAAIBAJ&sjid=vhQGAAAAIBAJ&pg=924,3024767&dq=oregon+ballot+measure+37&hl=en.

[418] Measure 49 was introduced as House Bill 3540, and later codified at Or. Rev. Stat. § 195.305.

[419] "Urban-rural divide blurs: The Measure 49 vote bridged a long-standing split," *Register-Guard*, Nov. 9, 2007, available at http://news.google.com/newspapers?nid=1310&dat=20071109&id=7ydRAAAAIBAJ&sjid=qPADAAAAIBAJ&pg=3982,1807630. *See* Act effective Jan. 1, 2010, ch. 464, 2009 Or. Laws ch. 464 (S.B. No. 691) (compensation for the loss of value of private forestland resulting from regulation of forest practices). *See also* Act effective July 28, 2009, ch. 855, 2009 Or. Laws ch. 855 (H.B. No. 3225), and Act effective Feb. 25, 2010, ch. 8, 2010 (sp. session) Or. Laws ch. 8 (S.B. No. 1049).

[420] Georgetown Environmental Law and Policy Institute, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, at 44 (2008).

[421] *Compare* Act effective Dec. 6, 2007, ch. 424, 2007 Or. Laws 1138, 1140 (H.B. No. 3540, § 4), *with* Act effective Dec. 2, 2004, ch. 1, 2005 Or. Laws 1, 1 (Ballot Measure No. 37).

[422] *Corey v. Dep't of Land Conservation & Dev.*, 184 P.3d 1109, 1113 (Or. 2008). The court added, "... Measure 49 extensively amends [Measure 37] in a way that wholly supersedes the provisions of Measure 37 pertaining to monetary compensation for and waivers from the burdens of certain land use regulations under that earlier measure." *Id.*

[423] Georgetown Environmental Law and Policy Institute, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, at 33, 39 (2008).

property owner.[424] In 2012, the same court concluded that the enactment of Measure 49 did not effect a constitutional "taking," violate substantive due process, or run afoul of equal protection.[425]

The vast majority of Measure 49 claims were related to farmland and forestland.[426] According to the Oregon Department of Land Conservation and Development, "Measure 49 authorized home sites for thousands of rural landowners across Oregon. Relative to the potential for development under Measure 37, the primary effect of Measure 49 was to prevent large-scale subdivision, commercial and industrial developments in prime farm lands, forest lands, and wilderness areas."[427]

2) Assessment

None identified.

3) Other

Oregon has an ombudsman for compensation and conservation.[428] This individual, appointed by the governor, is tasked with reviewing proposed land use regulation claims for completeness, if asked to do so by a claimant. At the request of either the claimant or a public entity, the ombudsman may facilitate resolution of issues involving a claim.

Oregon also has a provision requiring any state agency participating in Oregon Plan programs and activities to, on request, provide written information about the agency's dispute resolution services to any person who believes his private property rights may be adversely affected by the Oregon Plan. The Oregon Plan is a comprehensive program for the protection and recovery of species and for the restoration of watersheds throughout the state. The agency must report all requested dispute resolution services, and their outcome, to the appropriate legislative committee.

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[424] *Citizens for Constitutional Fairness v. Jackson County*, 388 F. App'x 610 (9th Cir. 2010). *See also* Editorial, "A reprieve for the land-use system," *The Oregonian*, July 27, 2010 (arguing that this court ruling was a win for voters, as it helped to ensure that Measure 37 would not, in effect, be reinstated by the courts after voters had replaced it with Measure 49), available at http://www.oregonlive.com/opinion/index.ssf/2010/07/a_reprieve_for_the_land-use_sy.html.

[425] *Bowers v. Whitman*, 671 F.3d 905, 912, 916, 917 (9th Cir. 2012), *amending and superseding on denial of rehearing en banc* 664 F.3d 1321 (9th Cir. 2012), and *cert. denied*, *sub. nom. Bruner v. Whitman*, 133 S.Ct. 163 (2012).

[426] Oregon Department of Land Conservation and Development, "Ballot Measures 37 (2004) and 49 (2007): Outcomes and Effects," at 8, Jan. 2011.

[427] *Id.* at 14.

[428] For more about this position, see http://www.oregon.gov/LCD/MEASURE49/m49_ombudsman.shtml.

Legal Authority:

- Or. Rev. Stat. § 195.320 (compensation and conservation ombudsman)

  "(1) The Governor shall appoint an individual to serve, at the pleasure of the Governor, as the Compensation and Conservation Ombudsman.

  (2) The ombudsman must be an individual of recognized judgment, objectivity and integrity who is qualified by training and experience to:
  (a) Analyze problems of land use planning, real property law and real property valuation; and
  (b) Facilitate resolution of complex disputes."

- Or. Rev. Stat. § 195.322 (ombudsman duties)

  "(1) For the purpose of helping to ensure that a claim is complete ... , the Compensation and Conservation Ombudsman may review a proposed claim if the review is requested by a claimant that intends to file a claim....

  (2) At the request of the claimant or the public entity reviewing a claim, the ombudsman may facilitate resolution of issues involving a claim...."

- Or. Rev. Stat. § 541.916 (responsibilities of state agency participating in Oregon Plan)

  "Any state agency participating in the programs and activities described in ORS 541.405 [the Oregon Plan] shall:

  (1) Upon request of any person who believes the person's private property rights may be adversely affected by the Oregon Plan, provide the person with written information about the agency's dispute resolution services available pursuant to ORS 183.502 [state APA; authority of agencies to use ADR].

  (2) Report to the appropriate legislative committee any dispute resolution services requested under this section, and the outcome of such dispute resolution."

  History: The ombudsman provisions were enacted in 2007 as part of Oregon's Measure 49.[429] The Oregon Department of Land Conservation and Development wrote in 2011 that "[a]ll feedback to date indicates that the [Compensation and Conservation Ombudsman] has been a successful component of the M[easure] 49 program."[430]

[429] *See* Law of Dec. 6, 2007, ch. 424, §§ 17-18, 2007 Or. Laws 1138, 1151.

[430] *See* Oregon Department of Land Conservation and Development, *supra* note 426, at 36.

The Oregon Plan provisions were enacted in 1997.[431]

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Oregon provides legal protections for some waters that may be subject to a loss of protection under federal law.

Waters of the state are defined under Oregon's wetlands laws to include "all natural waterways, tidal and nontidal bays, intermittent streams, constantly flowing streams, lakes, wetlands, that portion of the Pacific Ocean that is in the boundaries of this state, all other navigable and nonnavigable bodies of water in this state and those portions of the ocean shore ... where removal or fill activities are regulated under a state-assumed permit program as provided in 33 U.S.C. 1344(g) of the [federal Clean Water Act]."[432]

The state's Removal-Fill Law requires that a permit be obtained from the Oregon Department of State Lands (ODSL) before an applicant may remove or fill fifty cubic yards or more of material in any waters of the state.[433] Oregon also protects wetlands through a wetlands mitigation bank law.[434]

Oregon provides some protections for wetlands at the local level. Statewide land-use planning is expressed through goals that localities implement through their comprehensive planning. Goal 5 requires local governments to inventory natural resources, including wetlands, and to develop a wetland protection program that is reviewed and approved by ODSL.[435] Goal 16 governs the inventory and protection of estuarine wetlands,[436] and Goal 17 addresses wetlands within coastal shoreland areas.[437]

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[431] Law of March 25, 1997 ch. 7, § 10, 1997 Or. Laws 72, 77 (enacting S.B. No. 924). In 2011, this provision was renumbered by the Legislative Counsel from Or. Rev. Stat. § 541.411.

[432] Or. Rev. Stat. § 196.800(14).

[433] Or. Rev. Stat. §§ 196.800(3) & (12)(a), 196.810, 196.850.

[434] Or. Rev. Stat. §§ 196.600 to 196.655.

[435] *See* Oregon's Statewide Planning Goals & Guidelines, "Goal 5: Natural Resources, Scenic and Historic Areas, and Open Spaces," OAR 660-015-0000(5).

[436] *See* Oregon's Statewide Planning Goals & Guidelines, "Goal 16: Estuarine Resources," OAR 660-015-0010(1).

[437] *See* Oregon's Statewide Planning Goals & Guidelines, "Goal 17: Coastal Shorelands," OAR 660-015-0010(2). For more on Oregon law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase II*, Appendix: Oregon, at 75 (June 2006).

PENNSYLVANIA

Pennsylvania law imposes *qualified stringency prohibitions*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.

2) Qualified Prohibitions

Pursuant to executive order, agencies under the jurisdiction of the governor's office, such as the Department of Environment and the Department of Conservation and Natural Resources, must adhere to various principles in drafting new regulations and reviewing existing ones. One such principle is that if federal regulations exist, state regulations "may not exceed federal standards" unless justified by "a compelling and articulable" state interest, or required by state law.

Rules are subject to review by the governor's office. Accordingly, for each proposed rulemaking, the agency head must submit a written regulatory analysis to the governor's general counsel, secretary of the budget, and policy director. If the regulation "exceeds federal standards," the analysis must include a statement of the compelling state interest. General counsel will consider whether the proposed regulation exceeds federal standards, and if it does, the policy office will evaluate whether the regulation is justified by a compelling and unique Pennsylvania interest.

Legal Authority:

- Pa. Exec. Order No. 1996-1 (Feb. 6, 1996);
  4 Pa. Admin. Code § 1.371(5) (agency operation and organization—general requirements)

"1. General Requirements. In the drafting and promulgating of new regulations and the application and review of existing regulations, all agencies shall adhere to the following principles: ...

e. Where federal regulations exist, Pennsylvania's regulations shall not exceed federal standards unless justified by a compelling and articulable Pennsylvania interest or required by state law. ...

4. Review by Governor's Office ...

a. Prior to submitting a proposed rulemaking, the agency head shall evaluate each regulation and attest to the fact that the regulation addresses a compelling public need that can be best remedied by the promulgation of the regulation.

b. The agency head shall submit to the General Counsel, Secretary of the Budget, and Governor's Policy Director a written Regulatory Analysis. The analysis shall state: ...

- A statement of the compelling Pennsylvania interest if the regulation exceeds federal standards. ...

d. The regulatory analysis, along with the preamble and draft regulation, will be reviewed by the Office of General Counsel.... The Governor's Policy Office will review the request to determine that public interest [sic] is compelling, that no viable alternative to the regulation exists, and that the costs of the regulation reasonably relate to the benefits. The Office of General Counsel will also consider whether the proposed regulation exceeds federal standards. If the regulation does exceed federal standards, the Policy Office will then evaluate whether the regulation is justified by a compelling and unique Pennsylvania interest. The Budget Office will evaluate the cost analysis prepared by the agency and prepare a fiscal note for the regulation."

The administrative code provision tracks (and appears simply to codify) the language of the executive order. The provision appears in a subchapter of the administrative code "intended only to improve the internal management of executive agencies," and does "not ... create a right or benefit, substantive or procedural, enforceable at law by a party against the [state], its agencies, its officers or any person." 4 Pa. Admin. Code § 1.380(b).

History: Executive Order No. 1996-1 was issued on February 6, 1996, by then-Governor Thomas Ridge. (It rescinded the existing executive order on regulatory review, No. 1982-2.)

PROPERTY-BASED LIMITATIONS

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Pennsylvania provides legal protections for some waters that may be subject to a loss of protection under federal law. Pennsylvania defines a "body of water" under the Dam Safety and Encroachments Act as including "[a]ny natural or artificial lake, pond, reservoir, swamp, marsh, or wetland."[438]

The Dam Safety and Encroachments Act, implemented by the Pennsylvania Department of Environmental Protection, provides for wetland permitting.[439] Wetlands are singled out for protection, and the law is to be "construed broadly" to protect them from

[438] 32 Pa. Cons. Stat. § 693.3.

[439] 32 Pa. Cons. Stat. §§ 693.1 to 693.27; 25 Pa. Admin. Code ch. 105.

construction and encroachment—particularly where the wetlands are deemed to be of "exceptional value."[440] The law also contains wetland mitigation and replacement requirements.[441]

[440] *See* 25 Pa. Admin. Code §§ 105.17, 105.18a.

[441] *See* 25 Pa. Admin. Code §§ 105.21(c)(2), 105.20a. For more on Pennsylvania law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase I*, Appendix: Pennsylvania, at 131 (Jan. 2005).

RHODE ISLAND

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

None identified.[442]

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IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Rhode Island provides legal protections for some waters that may be subject to a loss of protection under federal law. "Waters of the state" or "waters" are defined for purposes of state water pollution and environmental management laws as "all surface water and groundwater of the State of Rhode Island, including all tidewaters, territorial seas, wetlands, and land masses partially or wholly submerged in water; and both inter-state and intra-state bodies of water which are, have been or will be used in commerce, by industry, for the harvesting of fish and shellfish or for recreational purposes."[443]

Rhode Island's Fresh Water Wetlands Act, administered by the Department of Environmental Management, governs freshwater wetlands.[444] Under this law, applicants may seek an insignificant alteration permit for activities that impose minimum impacts on wetlands.[445] Alternatively, an application to alter may be submitted to obtain a significant alteration permit.[446] The Act also provides protection for intermittent streams.[447]

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[442] To the contrary, Rhode Island's constitution contains a provision that would likely constrain the legislature's authority to enact a property-based limitation and apply it to environmental regulations: "The powers of the state and of its municipalities to regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property." R.I. Const. art. I § 16.

[443] R.I. Water Quality Regulations, Rule 7 (Dec. 2010).

[444] R.I. Gen. Laws §§ 2-1-18 to 2-1-25.

[445] *See* R.I. Rules and Regulations Governing the Administration and Enforcement of the Fresh Water Wetlands Act, Rule 9.03(C) (Dec. 2010).

[446] *See* R.I. Gen. Laws § 2-1-22; R.I. Rules and Regulations Governing the Administration and Enforcement of the Fresh Water Wetlands Act, Rule 9.03(B) (Dec. 2010).

[447] *See* R.I. Rules and Regulations Governing the Administration and Enforcement of the Fresh Water Wetlands Act, Rule 4.00 (Dec. 2010).

Rhode Island's Coastal Resources Management Council was established in 1971 to regulate the use and conservation of coastal wetlands within the state.[448] Council assent is necessary for most activities along the state's shorelines, including coastal wetlands. This requirement covers "freshwater wetlands in the vicinity of the coast."[449]

[448] R.I. Gen. Laws §§ 46-23-1 to 46-23-25.

[449] Rhode Island Coastal Resources Management Program, Authorities and Procedures, §§ 100.1, 100.4. For more on Rhode Island law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase II*, Appendix: Rhode Island, at 85 (June 2006).

SOUTH CAROLINA

STRINGENCY LIMITATIONS

None identified.[450]

PROPERTY-BASED LIMITATIONS

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: South Carolina does not have a regulatory program under state law addressing dredge and fill activities in its nontidal waters and wetlands (but see discussion below regarding broad state authority over wetlands located in the coastal zone). It relies on Clean Water Act § 401. South Carolina has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

In 2011, the South Carolina Supreme Court interpreted the state's pollution control act to cover "isolated wetlands," bringing these features within the jurisdiction of the S.C. Department of Health and Environmental Control (DHEC).[451] In 2012, however, the General Assembly amended the law to, in effect, overturn the 2011 ruling and established the Isolated Wetlands and Carolina Bays Task Force to study and make recommendations concerning issues surrounding isolated wetlands in South Carolina by July 2013.[452]

DHEC's Office of Ocean and Coastal Resource Management (OCRM) administers a permitting program for critical tideland areas under the state's Coastal Zone Management Act.[453] This statute authorizes the OCRM to regulate "coastal wetlands,

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[450] *But cf.* S.C. Code Ann. § 1-23-115 (regulations requiring assessment reports; report contents; exceptions; preliminary assessment reports). This provision requires that assessment reports be prepared for *all regulations* that impose a substantial economic impact upon taxpayers, industry, or commercial enterprises whenever two or more members of the General Assembly so request. Certain rules are exempt from review pursuant to § 1-23-120, including rules promulgated to maintain compliance with federal law, but not rules that are more stringent than federal law.

[451] *Georgetown County League of Women Voters v. Smith Land Co., Inc.*, 713 S.E. 2d 287, 288-89 (S.C. 2011), citing S.C. Code Ann. § 48-1-10(2).

[452] 2012 South Carolina Laws Act No. 198 (H.B. 4654), S.C. Legis. 198 (2012) (providing, *inter alia*, that no private right of action exists under the Pollution Control Act, and that the Act's permitting requirements do not apply to discharges for which DHEC has no regulatory permitting program in place). *See also*, *e.g.*, Sammy Fretwell, "Supreme Court wetlands ruling targeted," *The State*, June 1, 2012, available at http://www.thestate.com/2012/06/01/2297689/supreme-court-wetlands-ruling.html - .UOSavo6WF8s.

[453] S.C. Code Ann. § 48-39-130.

mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved."[454] The state supreme court in 2010 interpreted the scope of the Act broadly, ruling that DHEC's authority under the Act is not limited to wetlands linked with the downstream system of coastal rivers and creeks.[455]

[454] *See* S.C. Code Ann. § 48-39-10(G); S.C. Code Ann. Regs. 30-1.

[455] *Spectre, LLC v. S.C. Dep't of Health and Envtl. Control*, 688 S.E.2d 844, 849 (S.C. 2010). For more on South Carolina law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase IV*, Appendix: South Carolina, at 147 (Oct. 2007).

SOUTH DAKOTA

South Dakota law imposes *stringency prohibitions*.

STRINGENCY LIMITATIONS

1) Prohibitions

South Dakota has a broad stringency provision that applies across multiple titles of the South Dakota legislative code, prohibiting state agencies from enacting rules more stringent than the corresponding federal requirements in a range of areas bearing on aquatic resources protection. The provision applies to areas of state regulation including:

- water pollution control; livestock discharge control; water supply and treatment system operators; safe drinking water; endangered and threatened species; and environmental impact assessment of government actions (under Title 34A); and

- the appropriation, use, and management of water resources, including groundwater and irrigation water (under Titles 46 & 46A).

This South Dakota statutory provision is particularly broad in scope with respect to the federal provisions that trigger it: the provision applies with respect to any federal law, rule, or regulation "governing an essentially similar subject or issue." The statute has been characterized as the nation's "most sweeping limitation on state stringency."[456]

Another South Dakota stringency provision governs the rules pertaining to applications "for a federal license or permit necessary to conduct an activity which may result in a discharge into waters of the state...."[457] It prohibits the Water Management Board from establishing rules for certification that exceed minimum federal requirements.

Legal Authority:

- S.D. Codified Laws § 1-40-4.1 (limitation on stringency of certain rules)

"No rule that has been promulgated pursuant to Title 34A [Environmental Protection], 45 [Mining, Oil, and Gas], 46 [Water Rights], or 46A [Water Management] may be more stringent than any corresponding federal law, rule, or regulation governing an essentially similar subject or issue."

[456] James M. McElfish, Jr., "Minimal Stringency: Abdication of State Innovation," 25 *Environmental Law Reporter* 10003, 10004 (1995).

[457] S.D. Codified Laws § 34A-2-33.

- S.D. Codified Laws § 34A-2-34 (rules for grant or denial of certification—procedural requirements of rules)

  "The [Water Management Board] shall promulgate rules pursuant to chapter 1-26 [governing South Dakota administrative procedure and rules] establishing procedures which the secretary [of the Department of Environment and Natural Resources] shall follow in granting or denying certification under § 34A-2-33 [certification of compliance with federal pollution control requirements]. The rules may not exceed minimum federal regulations...."

  History: The first of these provisions was enacted in 1992.[458] The second provision was enacted in 1976 and amended in 1993.[459]

2) Qualified Prohibitions

   None identified.

PROPERTY-BASED LIMITATIONS

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: South Dakota does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. South Dakota has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

[458] An Act to Adopt and Revise Certain Provisions Relating to Mining, Water Development, Environmental Grants and Loans, Waste Management, Environmental Regulatory Programs and Administrative Provisions Relating to the Department of Environment and Natural Resources, ch. 254, § 100, 1992 S.D. Sess. Laws 353, 395 (enacting H.B. No. 1001).

[459] 1976 S.D. Sess. Laws, ch. 285, § 1; An Act to Make Certain Revisions to the Administrative Rule-making Authority of the Department of Environment and Natural Resources and Its Associated Boards and Commissions, ch. 256, § 16, 1993 S.D. Sess. Laws 381, 383 (enacting S.B. No. 2).

TENNESSEE

Tennessee law imposes a *qualified stringency prohibition* and *property-based limitations*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.

2) Qualified Prohibitions

Tennessee agency rules are subject to legislative review. The government operations committee reviewing an environmental protection or water pollution control rule must recommend to the general assembly termination of any rule that imposes on municipalities or counties "environmental requirements or restrictions" that are "more stringent than federal statutes or rules on the same subject" *and* that "result in increased expenditure requirements on municipalities or counties beyond those required to meet the federal requirements"—provided that, during the public comment period, the agency was made aware of the issue, and the increased expenditure level was specified. The provision does not apply if the general assembly has appropriated funds to cover the increased expenditures.

Legal Authority:

- Tenn. Code Ann. § 4-5-226(k) (rules; expiration; review by government operations committees)

"[I]t shall ... be grounds for the government operations committee to recommend to the general assembly to terminate a rule promulgated under authority of any provision of title 68, chapters 201-221 [addressing environmental protection], or title 69, chapter 3 [water pollution control], that imposes environmental requirements or restrictions on municipalities or counties that are more stringent than federal statutes or rules on the same subject, and that result in increased expenditure requirements on municipalities or counties beyond those required to meet the federal requirements, unless the general assembly has appropriated funds to the affected local government or governments to cover the increased expenditures, in addition to those they receive pursuant to other laws; provided, a timely comment was addressed to the promulgating authority pursuant to § 4-5-204 [conduct of hearings], raising this issue and specifying the level of increased expenditure mandated by the rule."

History: The relevant statutory language was enacted in 1994 and subsequently reenacted in 2009.[460]

[460] Act of April 27, 1994, ch. 878, § 1, 1994 Tenn. Pub. Acts 769, 769 (enacting S.B. No. 2040); Act of June 18, 2009, ch. 566, § 19, 2009 Tenn. Pub. Acts 1, 7–12 (enacting H.B. No. 1815).

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

None identified.

2) Assessment

Under Tennessee's "Government Taking of Private Property" provisions (Tenn. Code Ann. §§ 12-1-201 to 12-1-206), the attorney general is required to develop and annually update guidelines to assist agencies in the identification and evaluation of government actions that may result in an unconstitutional taking.

The Tennessee attorney general has issued the required guidelines, which establish a basic framework for agencies to use in their internal evaluations of their actions for takings implications.[461] When considering whether a government action may constitute a regulatory taking, an agency should consider the following factors: whether the regulation denies the landowner all economically viable use of his property or substantially interferes with his reasonable investment-backed expectations; whether the regulation is not reasonably related or roughly proportional to the projected impact of the landowner's proposed use; and the degree to which a regulatory action resembles or has the effect of physical occupation of property. The guidelines highlight the need for agencies to be aware of regulatory takings concerns in the context of permitting decisions. The guidelines also emphasize that agencies should consider the economic impact of their regulations, as well as any available alternatives. The guidelines note that a "mere" diminution in the value of the property to be regulated by the government's denial of the highest and best use of the property will not generally constitute a taking.

A property owner who brings suit and successfully establishes that a government action is an unconstitutional taking is entitled to recover attorney fees, costs, and expenses.

Legal Authority:

- Tenn. Code Ann. § 12-1-201 (purpose)

"The purpose of this part is to provide a mechanism for education of, and consideration by, state agencies and the public regarding what government actions may result in an unconstitutional taking of private property, in order to avoid an unnecessary burden on the public treasury and unwarranted interference with private property rights. It is not the purpose of this part either to enlarge or to reduce the

[461] Attorney General's Guidelines for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property (July 2012), at 2, available at http://tn.gov/sos/pub/tar/announcements/07-15-09.pdf. The guidelines do not represent a formal attorney general opinion. *Id.* Earlier versions of these guidelines also may be found online.

scope of private property protections afforded by the constitutions of the United States or Tennessee."

- Tenn. Code Ann. § 12-1-202 (definitions)

  "As used in this part, unless the context otherwise requires: ...

  (3) "Unconstitutional taking" or "taking" means the taking of private property by government action such that compensation to the owner of that property is required by either [the federal or state constitution]."

- Tenn. Code Ann. § 12-1-203 (guidelines)

  "The attorney general and reporter shall develop and submit to the secretary of state for publication in the Tennessee administrative register guidelines to assist in the identification and evaluation of government actions that may result in unconstitutional taking. The attorney general and reporter shall base the guidelines on current law as articulated by the United States supreme court and the supreme court of Tennessee, and shall update the guidelines at least on an annual basis to take account of changes in the law. Nothing in the guidelines shall be construed either to enlarge or to reduce the scope of private property protection afforded by [the federal or state constitutions]. Furthermore, in reviewing rules in the process of promulgation, the attorney general and reporter shall not approve rules that would effect an unconstitutional taking."

- Tenn. Code Ann. § 12-1-205 (attorneys' fees)

  "An owner of private property who successfully establishes that a government action is an unconstitutional taking of such owner's private property requiring payment or just compensation shall be entitled to recover the same attorneys' fees, costs and expenses as are allowable in actions brought pursuant to § 29-16-123(b) [eminent domain—action initiated by owner]. Such recovery shall be in accordance with the procedures provided in such section."

  History: The relevant language in these provisions was enacted in 1994 as part of the Government Taking of Private Property law.[462]

3) Other

   None identified.

[462] Act of May 9, 1994, ch. 924, §§ 2 to 6, 1994 Tenn. Pub. Acts 846, 846-47 (enacting S.B. No. 2643).

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Partial: Tennessee law provides legal protections for some waters that may be subject to a loss of protection under federal law.

Tennessee defines "waters" under its Water Quality Control Act to mean "any and all water, public or private, on or beneath the surface of the ground, that are contained within, flow through, or border upon Tennessee or any portion thereof, except those bodies of water confined to and retained within the limits of private property in single ownership that do not combine or effect a junction with natural surface or underground waters."[463]

Under the Act, and the corresponding Aquatic Resources Alteration Rule, a state Aquatic Resources Alteration Permit (ARAP) is required for activities that affect wetlands.[464] Covered activities include dredging, filling, channel widening or straightening, channel relocation, water diversion or withdrawal, and construction of dams. Tennessee has applied the ARAP requirement to waters that fall outside federal jurisdiction. Wetland fills of less than 0.25 acre of isolated wetlands or 0.1 acre of low-functioning non-isolated wetlands can qualify for coverage under Tennessee's general permit for minor alterations to wetlands.[465]

[463] Tenn. Code Ann. § 69-3-103(42).

[464] *See* Tenn. Code Ann. § 69-3-108; Tenn. Comp. R. & Regs. 1200-4-7, 1200-4-7-.01(4).

[465] Tenn. Comp. R. & Regs. ch. 1200-4-7; Tennessee Department of Environment and Conservation, Division of Water Pollution Control, "Aquatic Resource Alteration Permits: Section 401 Water Quality Certification Guide for Permit Applicants—Wetlands fills," at B-15, Feb. 2008 (v 1.0), available at http://www.tn.gov/environment/wpc/forms/cn1091guide.pdf. For more on Tennessee law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase IV*, Appendix: Tennessee, at 155 (Oct. 2007).

TEXAS

Texas law imposes *stringency prohibitions* and *property-based limitations*.

STRINGENCY LIMITATIONS

1) Prohibitions

The Texas Commission on Environmental Quality (TCEQ) is prohibited from entering into a memorandum of agreement or any other form of contract with or among state or federal agencies that would impose requirements on the state with respect to administering the water pollution control permitting program under the Clean Water Act that are "other than" or more stringent than those "specifically set forth" in CWA § 402(b). This narrow provision does not, on its face, prohibit TCEQ from enacting regulatory requirements that are more stringent than federal law; rather, it prohibits TCEQ from imposing stricter requirements by way of inter-agency agreements.

Legal Authority:

- Tex. Water Code Ann. § 26.017(5) (cooperation)

"The [Texas Commission on Environmental Quality][466] shall: … (5) with respect to obtaining or administering the NPDES program in lieu of the government of the United States, not enter into any memorandum of agreement or other contractual relationship with or among state agencies or with the government of the United States which imposes any requirements upon the state other than or more stringent than those specifically set forth in Section 402(b) of the Federal [Clean Water Act], as amended."

History: The relevant statutory language was enacted in 1995,[467] prior to Texas obtaining approval from EPA for its NPDES program in 1998.[468] The original bill was intended to create opportunities for public participation in the enforcement process by providing citizens with the ability to intervene in any action taken by the attorney general.[469] The Senate Committee on Natural Resources added the stringency language.[470]

[466] The statute refers to the agency's predecessor, the Texas Natural Resource Conservation Commission.

[467] Law of June 5, 1995, ch. 310, § 2, 1995 Tex. Gen. Laws 2696-97 (enacting H.B. No. 2015).

[468] *See* U.S. EPA, "NPDES / Specific State Program Status: Texas," available at http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=specific.

[469] *See* H.R. 2015, 74th Leg., Reg. Sess. (as authored by Rep. Talton).

[470] *See* H.R. 2015, 74th Leg., Reg. Sess. (as substituted by S. Comm. on Natural Resources, May 3, 1995).

2) Qualified Prohibitions

None identified.

PROPERTY-BASED LIMITATIONS

The Texas Private Real Property Rights Preservation Act (Tex. Gov't Code §§ 2007.001 to 2007.045) contains provisions that are categorized by this study as "compensation/prohibition," "assessment," and "other" (public notice).

1) Compensation/Prohibition

The Texas Private Real Property Rights Preservation Act expands the definition of a "taking" beyond state and federal constitutional requirements to include any governmental action that: (1) affects an owner's "private real property"—in whole or in part, temporarily or permanently—in a manner that restricts or limits the owner's right to the property; and (2) causes a reduction of at least twenty-five percent in the property's market value. The law applies to a broad range of actions taken by the state and its subdivisions (although actions by municipalities are generally excluded), as well as the enforcement of those actions. The term "private real property" is defined to expressly include "a groundwater or surface water right of any kind." The law exempts many types of governmental actions, however, including certain actions taken in response to "a real and substantial threat to public health and safety."

Under the Act, an aggrieved property owner has 180 days to either: (1) sue the government entity in court, or (2) file an administrative claim with the government entity under the Texas Administrative Procedure Act. The trier of fact must determine whether a taking occurred, and if so, what the property owner's damages are. Upon a finding in either type of proceeding in favor of the property owner, the government entity has 30 days to rescind the action, or the part of the action resulting in the taking, as applied to the property owner. The government entity may elect to pay damages as compensation to the property owner, in which case the action need not be rescinded; any such payment must be made from funds appropriated to the agency. The prevailing party in either type of action is entitled to its fees and costs.

As of 2008, a study of state private property rights acts noted that property owners had rarely invoked the Act, and that legal claims based on the Act had seldom, if ever, met with success.[471]

[471] Georgetown Environmental Law and Policy Institute, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, at 22 (2008).

Legal Authority:

- Tex. Gov't Code Ann. § 2007.002 (definitions)

"(1) "Governmental entity" means:
(A) a board, commission, council, department, or other agency in the executive branch of state government that is created by constitution or statute, including an institution of higher education ... ; or
(B) a political subdivision of this state....

(4) "Private real property" means an interest in real property recognized by common law, including a groundwater or surface water right of any kind, that is not owned by the federal government, this state, or a political subdivision of this state.

(5) "Taking" means:
(A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by [the state or federal constitutions]; or
(B) a governmental action that:
(i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and
(ii) is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect."

- Tex. Gov't Code Ann. § 2007.003 (applicability)

"(a) This chapter applies only to the following governmental actions:
(1) the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure;
(2) an action that ... requires a dedication or exaction of private real property; ...
(4) enforcement of a governmental action listed in Subdivisions (1) through [(2)], whether the enforcement of the governmental action is accomplished through the use of permitting, citations, orders, judicial or quasi-judicial proceedings, or other similar means.

(b) This chapter does not apply to the following governmental actions:
(1) an action by a municipality [with one exception not relevant here]; ...
(4) an action, including an action of a political subdivision, that is reasonably taken to fulfill an obligation mandated by federal law or an action of a political subdivision that is reasonably taken to fulfill an obligation mandated by state law;

(5) the discontinuance or modification of a program or regulation that provides a unilateral expectation that does not rise to the level of a recognized interest in private real property;
(6) an action taken to prohibit or restrict a condition or use of private real property if the governmental entity proves that the condition or use constitutes a public or private nuisance as defined by background principles of nuisance and property law of this state; ...
(10) a rule or proclamation adopted for the purpose of regulating water safety, hunting, fishing, or control of nonindigenous or exotic aquatic resources;
(11) an action taken by a political subdivision:
(A) to regulate construction in an area designated under law as a floodplain;
(B) to regulate on-site sewage facilities;
(C) under the political subdivision's statutory authority to prevent waste or protect rights of owners of interest in groundwater; or
(D) to prevent subsidence; …
(13) an action that:
(A) is taken in response to a real and substantial threat to public health and safety;
(B) is designed to significantly advance the health and safety purpose; and
(C) does not impose a greater burden than is necessary to achieve the health and safety purpose ...."

- Tex. Gov't Code Ann. § 2007.021 (suit against political subdivision)

"(a) A private real property owner may bring suit under this subchapter to determine whether the governmental action of a political subdivision results in a taking under this chapter....

(b) A suit under this subchapter must be filed not later than the 180th day after the date the private real property owner knew or should have known that the governmental action restricted or limited the owner's right in the private real property."

- Tex. Gov't Code Ann. § 2007.022 (proceeding against state agency)

"(a) A private real property owner may file a contested case with a state agency to determine whether a governmental action of the state agency results in a taking under this chapter.

(b) A contested case must be filed with the agency not later than the 180th day after the date the private real property owner knew or should have known that the governmental action restricted or limited the owner's right in the private real property.

(c) A contested case filed under this section is subject to [the Texas Administrative Procedure Act] except to the extent of a conflict with this subchapter."

- Tex. Gov't Code Ann. § 2007.023 (entitlement to invalidation of governmental action)

  "(a) Whether a governmental action results in a taking is a question of fact.

  (b) If the trier of fact in a suit or contested case filed under this subchapter finds that the governmental action is a taking under this chapter, the private real property owner is only entitled to, and the governmental entity is only liable for, invalidation of the governmental action or the part of the governmental action resulting in the taking."

- Tex. Gov't Code Ann. § 2007.024 (judgment or final decision or order)

  "(a) The court's judgment in favor of a private real property owner under Section 2007.021 or a final decision or order issued under Section 2007.022 that determines that a taking has occurred shall order the governmental entity to rescind the governmental action, or the part of the governmental action resulting in the taking, as applied to the private real property owner [within 30 days].

  (b) The judgment or final decision or order shall include a fact finding that determines the monetary damages suffered by the private real property owner....

  (c) A governmental entity may elect to pay the damages as compensation to the private real property owner who prevails in a suit or contested case filed under this subchapter. Sovereign immunity to liability is waived to the extent the governmental entity elects to pay compensation under this subsection.

  (d) If a governmental entity elects to pay compensation to the private real property owner:
  (1) the court that rendered the judgment in the suit or the state agency that issued the final order or decision in the case shall withdraw the part of the judgment or final decision or order rescinding the governmental action; and
  (2) the governmental entity shall pay to the owner the damages as determined in the judgment or final order [within 30 days].

  (e) If the governmental entity does not pay compensation to the private real property owner as provided by Subsection (d), the court or the state agency shall reinstate the part of the judgment or final decision or order previously withdrawn.

  (f) A state agency that elects to pay compensation to the private real property owner shall pay the compensation from funds appropriated to the agency."

- Tex. Gov't Code Ann. § 2007.025 (appeal)

  "(a) A person aggrieved by a judgment rendered in a suit filed under Section 2007.021 may appeal as provided by law.

(b) A person who has exhausted all administrative remedies available within the state agency and is aggrieved by a final decision or order in a contested case filed under Section 2007.022 is entitled to judicial review under [the Texas APA]. Review by a court under this subsection is by trial de novo.

(c) If a private real property owner prevails in a suit or contested case filed under this subchapter and the governmental entity appeals, the court or the state agency shall enjoin the governmental entity from invoking the governmental action or the part of the governmental action resulting in the taking, pending the appeal of the suit or contested case."

- Tex. Gov't Code Ann. § 2007.026 (fees and costs)

"(a) The court or the state agency shall award a private real property owner who prevails in a suit or contested case filed under this subchapter reasonable and necessary attorney's fees and court costs.

(b) The court or the state agency shall award a governmental entity that prevails in a suit or contested case filed under this subchapter reasonable and necessary attorney's fees and court costs."

History: The Private Real Property Rights Preservation Act was passed in 1995 and signed into law by then-Governor George W. Bush.[472]

2) Assessment

Prior to taking an action that would amount to a taking under the Texas Private Real Property Rights Preservation Act, a government entity is required to prepare a written "takings impact assessment." The assessment must: (1) describe the purpose of the action and identify how the action substantially advances that purpose; (2) identify the burdens imposed on private property and the benefits to society; (3) determine whether the action will constitute a taking; and (4) describe and assess reasonable alternatives for accomplishing the specified purpose. If a governmental action is not undertaken within 180 days, the assessment must be updated.

Prior to engaging in a governmental action covered by the Act that "may result in a taking," a governmental entity must give public notice. The notice must include a summary of the takings impact assessment prepared in connection with the action. A political subdivision must give notice through a newspaper of general circulation in the county where affected private property is located. A state agency must give notice in the Texas Register (and by following the notice requirements of the Texas APA).

[472] Private Real Property Rights Preservation Act, ch. 517, § 1, 1995 Tex. Gen. Laws 3266, 3266-69 (enacting S.B. No. 14); *see also* S.B. 14: History, Texas Legislature Online, available at http://www.legis.state.tx.us/billlookup/History.aspx?LegSess=74R&Bill=SB14.

The attorney general is required to prepare, and annually update, guidelines to assist governmental entities in satisfying their responsibilities under the Act. The attorney general has done so.[473] Pursuant to the guidelines, among the issues to be considered by an agency in determining whether its action may result in a taking are: whether the action requires a property owner to dedicate a portion of property or grant an easement; whether the action deprives the owner of all economically viable uses of the property; whether the action has a "significant impact" on the owner's economic interest; whether the action decreases the market value of the affected property by 25% or more; and whether the action denies a fundamental attribute of ownership.

Additionally, § 2.15 of the guidelines provides that each governmental entity covered by the Act "should" promulgate a set of procedures ("Governmental Entity-Specific Takings Impact Assessment Procedures"), specific to that that entity, that define which of its activities, programs, or policy, rule, or regulation promulgation activities trigger the impact assessment requirement.[474]

A governmental action requiring a takings impact assessment is void if one has not been prepared. When this happens, an affected property owner may bring suit for a declaration of invalidity of the action, and the property owner is entitled to fees and costs.

A 2008 study of state private property rights acts found that Texas state agencies generally appeared to be preparing takings impact assessments when required to do so.[475]

Legal Authority:

- Tex. Gov't Code Ann. § 2007.041 (guidelines)

  "(a) The attorney general shall prepare guidelines to assist governmental entities in identifying and evaluating those governmental actions described in Section 2007.003(a)(1) through (3) that may result in a taking.

  (b) The attorney general shall file the guidelines with the secretary of state for publication in the Texas Register....

  (c) The attorney general shall review the guidelines at least annually and revise the guidelines as necessary to ensure consistency with the actions of the legislature and the decisions of the United States Supreme Court and the supreme court of this state.

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[473] Attorney General of Texas, "Private Real Property Rights Preservation Act Guidelines," last revised May 3, 2011, available at http://www.oag.state.tx.us/AG_Publications/txts/propertyguide2005.shtml. The guidelines do not represent a formal attorney general opinion. *Id.* at § 1.15.

[474] As of mid-2010, TCEQ maintained an internal, non-public guidance document setting forth its procedure. ELI Staff Communication with TCEQ Environmental Law Division, Aug. 3, 2010 (email on file with the authors).

[475] Georgetown Environmental Law and Policy Institute, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, at 23 (2008).

(d) A person may make comments or suggestions or provide information to the attorney general concerning the guidelines. The attorney general shall consider the comments, suggestions, and information in the annual review process required by this section.

(e) Material provided to the attorney general under Subsection (d) is public information."

- Tex. Gov't Code Ann. § 2007.042 (public notice)

"(a) A political subdivision that proposes to engage in a governmental action described in Section 2007.003(a)(1) through (3) that may result in a taking shall provide at least 30 days' notice of its intent to engage in the proposed action by providing a reasonably specific description of the proposed action in a notice published in a newspaper of general circulation published in the county in which affected private real property is located. If a newspaper of general circulation is not published in that county, the political subdivision shall publish a notice in a newspaper of general circulation located in a county adjacent to the county in which affected private real property is located. The political subdivision shall, at a minimum, include in the notice a reasonably specific summary of the takings impact assessment that was prepared as required by this subchapter and the name of the official of the political subdivision from whom a copy of the full assessment may be obtained.

(b) A state agency that proposes to engage in a governmental action described in Section 2007.003(a)(1) or (2) that may result in a taking shall:

(1) provide notice in the manner prescribed by [the Texas APA]; and

(2) file with the secretary of state for publication in the Texas Register ... a reasonably specific summary of the takings impact assessment that was prepared by the agency as required by this subchapter."

- Tex. Gov't Code Ann. § 2007.043 (takings impact assessment)

"(a) A governmental entity shall prepare a written takings impact assessment of a proposed governmental action described in Section 2007.003(a)(1) through (3) that complies with the evaluation guidelines developed by the attorney general under Section 2007.041 before the governmental entity provides the public notice required under Section 2007.042.

(b) The takings impact assessment must:

(1) describe the specific purpose of the proposed action and identify:

(A) whether and how the proposed action substantially advances its stated purpose; and

(B) the burdens imposed on private real property and the benefits to society resulting from the proposed use of private real property;

(2) determine whether engaging in the proposed governmental action will constitute a taking; and

(3) describe reasonable alternative actions that could accomplish the specified purpose and compare, evaluate, and explain:
(A) how an alternative action would further the specified purpose; and
(B) whether an alternative action would constitute a taking....

(c) A takings impact assessment prepared under this section is public information."

- Tex. Gov't Code Ann. § 2007.044 (suit to invalidate governmental action)

"(a) A governmental action requiring a takings impact assessment is void if an assessment is not prepared. A private real property owner affected by a governmental action taken without the preparation of a takings impact assessment as required by this subchapter may bring suit for a declaration of the invalidity of the governmental action....

(c) The court shall award a private real property owner who prevails in a suit under this section reasonable and necessary attorney's fees and court costs."

- Tex. Gov't Code Ann. § 2007.045 (updating of certain assessments required)

"A state agency that proposes to adopt a governmental action described in Section 2007.003(a)(1) or (2) that may result in a taking as indicated by the takings impact assessment shall update the assessment if the action is not adopted before the 180th day after the date the notice is given as required by [the Texas APA]."

History: The relevant statutory language was enacted in 1995 as part of the Private Real Property Rights Preservation Act.[476]

3) Other

None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Texas does not have a regulatory program under state law addressing dredge and fill activities in its nontidal waters and wetlands. It relies on Clean Water Act § 401. Texas has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

[476] Private Real Property Rights Preservation Act, ch. 517, § 1, 1995 Tex. Gen. Laws 3266, 3270-71.

UTAH

Utah law imposes *qualified stringency prohibitions* and *property-based limitations*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.

2) Qualified Prohibitions

The Utah Water Quality Board is prohibited from enacting a rule to administer any program under the federal Clean Water Act that is more stringent than the corresponding federal rule, except where specific conditions are satisfied. To enact a more stringent state rule, the Board must: (1) take public comment and hold a hearing; (2) make a written finding based on record evidence that the federal regulations are inadequate to protect public health and the environment in Utah; and (3) issue an accompanying opinion that cites and evaluates the public health and environmental information and studies in the record that form the basis for the Board's conclusion.

The Board may adopt more stringent rules with respect to agricultural water uses with approval of the Utah Conservation Commission, a 16-person board associated with the Utah Department of Agriculture and Food.

Although this statute creates only a qualified prohibition on enacting more-stringent state rules, it presents a significant burden for the Board to overcome. In fact, one commenter, discussing this and similar statutory stringency provisions applicable to other state agencies, noted in 2003 that "[t]he boards have rarely made the required showing or adopted more stringent regulations."[477]

Legal Authority:

- Utah Code Ann. § 19-5-105 (rulemaking authority and procedure)

"(1) Except as provided in Subsections (2) and (3), no rule that the [Water Quality Board] makes for the purpose of the state administering a program under the federal Clean Water Act or the federal Safe Drinking Water Act may be more stringent than the corresponding federal regulations which address the same circumstances. In making rules, the board may incorporate by reference corresponding federal regulations.

[477] *See* C.G. Galli, *Highlights of Utah Environmental Law,* Parsons Behle & Latimer (2003), available at http://library.findlaw.com/2003/Apr/21/132703.html.

(2) The board may make rules more stringent than corresponding federal regulations for the purpose described in Subsection (1), only if it makes a written finding after public comment and hearing and based on evidence in the record that the corresponding federal regulations are not adequate to protect public health and the environment of the state. Those findings shall be accompanied by an opinion referring to and evaluating the public health and environmental information and studies contained in the record which form the basis for the board's conclusion.

(3) The board may make rules related to agriculture water more stringent than the corresponding federal regulations if the [Conservation Commission] approves."

History: This provision, including the stringency language, was originally enacted in 1987 and became Utah Code Ann. § 26-11-6.5.[478] The law was amended and recodified in 1991,[479] without change to the stringency language. Subsection (3), pertaining to agricultural water, was added by a 2011 amendment.[480]

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

None identified.

2) Assessment

The Utah Private Property Protection Act (Utah Code Ann. §§ 63L-3-101 to 63L-3-202) requires each state agency to adopt guidelines to assist it in identifying actions that have "constitutional takings implications."[481] The agency must update the guidelines annually, taking into consideration recent court rulings on takings. Under its guidelines, when an agency determines that an action has constitutional takings implications, the agency must prepare an assessment of those implications that (1) analyzes the likelihood of the action resulting in a taking; (2) examines alternatives to the action; and (3) estimates the cost of compensation if a taking is found. Prior to undertaking the action, the agency must submit a copy of the assessment to the governor and the Legislative Management Committee.

Where an agency proceeds with an enforcement or implementation action that has constitutional takings implications, the agency must meet various requirements to ensure that the effects on private property are minimized. Prior to undertaking an action that restricts private property use for the protection of public health or safety,

[478] Law of Feb. 25, 1987, ch. 12, § 2, 1987 Utah Laws 301, 301 (enacting H.B. No. 57; amended 1991).

[479] Law of Mar. 15, 1991, ch. 112, § 101, 1991 Utah Laws 246, 337 (enacting S.B. No. 34).

[480] Law of March 22, 2011, ch. 155, § 2, 2011 Utah Laws 731, 732 (enacting H.B. No. 132). This law also added new Utah Code Ann. § 19-5-105.5 (pertaining to "agriculture water").

[481] Note that Utah has also enacted the Constitutional Takings Issues Act (Utah Code Ann. §§ 63L-4-101 to 63L-4-301), which addresses physical takings of private real property by state political subdivisions.

the agency must, in internal deliberative documents, identify the public health or safety risk, justify the action in light of the risk, establish that the limitations on private property are proportionate, and estimate the cost to the government if the action is found to constitute a taking (and the source of funds to pay compensation).

The Utah Department of Environmental Quality (DEQ) has issued guidelines pursuant to the Act.[482] The guidelines identify various "warning signals" that, if present, indicate the need for "careful review" of a proposed DEQ action with agency counsel to determine whether an assessment may be necessary. These signals include whether the action requires a property owner to dedicate a portion of property, and whether the action has a "severe impact" on the property owner's economic interest.

Legal Authority:

- Utah Code Ann. § 63L-3-201 (state agencies to adopt guidelines)

"(1) Each state agency shall adopt guidelines to assist them in the identification of actions that have constitutional taking implications.

(2) In creating the guidelines, the state agency shall take into consideration recent court rulings on the taking of private property.

(3) Each state agency shall ... review and update the guidelines annually to maintain consistency with court rulings."

- Utah Code Ann. § 63L-3-202 (agency actions)

"(1) Using the guidelines prepared under Section 63L-3-201, each state agency shall:
(a) determine whether an action has constitutional taking implications; and
(b) prepare an assessment of constitutional taking implications that includes an analysis of the following:
(i) the likelihood that the action may result in a constitutional taking, including a description of how the taking affects the use or value of private property;
(ii) alternatives to the proposed action that may:
(A) fulfill the government's legal obligations of the state agency;
(B) reduce the impact on the private property owner; and
(C) reduce the risk of a constitutional taking; and
(iii) an estimate of financial cost to the state for compensation and the source of payment within the agency's budget if a constitutional taking is determined.

(2) In addition to the guidelines prepared under Section 63L-3-201, each state agency shall adhere, to the extent permitted by law, to the following criteria if implementing or enforcing actions that have constitutional taking implications:

[482] Utah Department of Environmental Quality, Guidelines: Private Property Protection Act (Oct. 2009) (not available online; provided to ELI staff upon request and on file with the authors).

(a) If an agency requires a person to obtain a permit for a specific use of private property, any conditions imposed on issuing the permit shall directly relate to the purpose for which the permit is issued and shall substantially advance that purpose.
(b) Any restriction imposed on the use of private property shall be proportionate to the extent the use contributes to the overall problem that the restriction is to redress.
(c) If an action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.
(d) Before taking an action restricting private property use for the protection of public health or safety, the state agency, in internal deliberative documents, shall:
(i) clearly identify, with as much specificity as possible, the public health or safety risk created by the private property use;
(ii) establish that the action substantially advances the purpose of protecting public health and safety against the specifically identified risk;
(iii) establish, to the extent possible, that the restrictions imposed on the private property are proportionate to the extent the use contributes to the overall risk; and
(iv) estimate, to the extent possible, the potential cost to the government if a court determines that the action constitutes a constitutional taking.

(3) If there is an immediate threat to health and safety that constitutes an emergency and requires an immediate response, the analysis required by Subsection (2)(b) [sic—should probably refer to Subsection (1)(b)] may be made when the response is completed.

(4) Before the state agency implements an action that has constitutional taking implications, the state agency shall submit a copy of the assessment of constitutional taking implications to the governor and the Legislative Management Committee."

History: These provisions were enacted in 1993.[483] During legislative debates, one of the sponsors stated that "[i]f government takes a person's private property, it must compensate that person for that taking. House Bill 171 reinforces that principle."[484] Responding to questions, the sponsors indicated that the bill does not interfere with regulations involving environmental quality situations, health regulations, and licensing.[485] However, a subsequent amendment removed the environmental exception from the bill.[486] The amendment's sponsor, when questioned about its

[483] Private Property Protection Act, ch. 269, § 4, 1993 Utah Laws 1315, 1316 (enacting H.B. No. 171; amended 2009).

[484] House Floor Debate on House Bill 171 on Feb. 25, 1993, 1993 Gen. Sess. (Utah 1993) (statement of Rep. Olsen).

[485] *Id.* (statement of Rep. Johnson).

[486] *Id.* (proposed amendment by Rep. Howard).

effect on the law's original intent, suggested that the intent of the amendment was that an agency should follow the rules of this new bill if the agency commits a taking.[487]

3) Other

The Utah Property Rights Ombudsman Act (Utah Code Ann. §§ 13-43-101 to 13-43-206) establishes the Utah Office of the Property Rights Ombudsman.[488] Among other duties, the office assists state agencies to develop the takings guidelines required by Utah law, and it may also assist agencies to analyze actions with potential takings implications. The office may advise real property owners who have a legitimate takings claim or questions about takings; advise government entities about actions that have potential takings implications; and educate stakeholders about their rights and responsibilities under property law. The rules of the office are established by a seven-member board appointed by the governor. The office, upon request, may arrange for mediation or arbitration between private property owners and government entities pertaining to takings issues. Where mediation or arbitration is requested by a property owner, the government must participate as if ordered to do so by a court.

Legal Authority:

- Utah Code Ann. § 13-43-201 (office of the property rights ombudsman)

  "(1) There is created an Office of the Property Rights Ombudsman in the Department of Commerce.

  (2) The executive director of the Department of Commerce, with the concurrence of the Land Use and Eminent Domain Advisory Board ... shall appoint attorneys with background or expertise in takings, eminent domain, and land use law to fill legal positions within the Office of the Property Rights Ombudsman. ..."

- Utah Code Ann. § 13-43-202 (land use and eminent domain advisory board—appointment—compensation—duties)

  "(1) There is created the Land Use and Eminent Domain Advisory Board, within the Office of the Property Rights Ombudsman, consisting of the following seven members: [representing nominees of the Utah Association of Special Districts; the Utah League of Cities and Towns; the Utah Association of Counties; the Utah Home Builders Association; the Utah Association of Realtors; the Utah Association of Realtors and the Home Builders Association of Utah jointly; and one other citizen not employed by these organizations within the last year].

  (2) After receiving nominations, the governor shall appoint members to the board....

[487] *Id.* (statement of Rep. Howard).

[488] For more about this office, see http://propertyrights.utah.gov/.

(9) The board shall:

(a) receive reports from the Office of the Property Rights Ombudsman that are requested by the board;

(b) establish rules of conduct and performance for the Office of the Property Rights Ombudsman;

(c) receive donations or contributions from any source for the Office of the Property Rights Ombudsman's benefit;

(d) subject to any restriction placed on a donation or contribution ... , authorize the expenditure of donations or contributions for the Office of the Property Rights Ombudsman's benefit;

(e) receive budget recommendations from the Office of the Property Rights Ombudsman; and

(f) revise budget recommendations ...."

- Utah Code Ann. § 13-43-203 (office of the property rights ombudsman—duties)

"(1) The Office of the Property Rights Ombudsman shall:

(a) develop and maintain expertise in and understanding of takings, eminent domain, and land use law;

(b) assist state agencies and local governments in developing the guidelines required by Title 63L, Chapter 4, Constitutional Taking Issues;

(c) at the request of a state agency or local government, assist the state agency or local government, in analyzing actions with potential takings implications or other land use issues;

(d) advise real property owners who:

(i) have a legitimate potential or actual takings claim against a state or local government entity or have questions about takings, eminent domain, and land use law; ...

(e) identify state or local government actions that have potential takings implications and, if appropriate, advise those state or local government entities about those implications; and

(f) provide information to private citizens, civic groups, government entities, and other interested parties about takings, eminent domain, and land use law and their rights and responsibilities under the takings, eminent domain, or land use laws through seminars and publications, and by other appropriate means...."

- Utah Code Ann. § 13-43-204 (office of the property rights ombudsman—arbitration or mediation of takings or eminent domain disputes)

"(1) If requested by the private property owner and otherwise appropriate, the Office of the Property Rights Ombudsman shall mediate, or conduct or arrange arbitration for, disputes between private property owners and government entities that involve:

(a) takings or eminent domain issues; ...

(2) If arbitration or mediation is requested by a private property owner under this section ... and arranged by the Office of the Property Rights Ombudsman, the

government entity or condemning entity shall participate in the mediation or arbitration as if the matter were ordered to mediation or arbitration by a court...."

History: Utah's Office of the Property Rights Ombudsman, the first in the country,[489] was established by the state legislature in 1997.[490] A re-write of the law in 2006[491] moved the Ombudsman from the Department of Natural Resources to the Department of Commerce.[492]

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Utah does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. Utah has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

[489] *See*, *e.g.*, "Penny Wise and Pound Foolish," *Connecticut Law Tribune*, Apr. 13, 2009 (article no longer available online; on file with the authors).

[490] Law of Mar. 21, 1997, ch. 293, 1997 Utah Laws 1120 (repealed 2006).

[491] Property Rights Ombudsman Act, ch. 258, 2006 Utah Laws 1260.

[492] *See* Senate Floor Debates, 56th Leg., Gen. Sess. (Utah 2006) (statements by Sen. Mansell on Feb. 21, 2006), audio available at http://le.utah.gov/asp/audio/index.asp?Sess=2006GS&Day=37&House=S.

VERMONT

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

None identified.

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IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Vermont provides legal protections for some waters that may be subject to a loss of protection under federal law. Vermont defines "waters" under its water resources management law as "any and all rivers, streams, brooks, creeks, lakes, ponds or stored water, and groundwaters, excluding municipal and farm water supplies."[493]

The Vermont Wetland Rules require that all wetlands be categorized according to the significance of their functions.[494] The highest-ranking wetlands and adjacent buffer zones are protected under a permitting program.[495] Geographically isolated freshwater wetlands are subject to protection.[496]

Vermont's Land Use and Development Law (known as Act 250) requires a permit for certain kinds of development activities.[497] Applicants must make a showing that they are in compliance with both the Wetland Rules and wetlands-specific criteria listed in Act 250. District Environmental Commissions are responsible for administering Act 250 and the Wetland Section of Vermont's Department of Environmental Conservation plays an advisory role in reviewing permit applications.[498]

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[493] Vt. Stat. Ann., tit. 10, ch. 37, § 902.

[494] Vermont Wetland Rules (Vt. Code R. 12 004 056) § 4.1.

[495] Vermont Wetland Rules (Vt. Code R. 12 004 056) § 9.1.

[496] *See* Vermont Wetland Rules (Vt. Code R. 12 004 056) § 5.4.

[497] Vt. Stat. Ann., tit. 10, § 6081.

[498] Specifically, Act 250's wetlands criteria address the following: water pollution, waste disposal, floodplains, streams, shorelines, wildlife habitats, and public investments. Vt. Stat. Ann., tit. 10, § 6086. For more on Vermont law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase II,* Appendix: Vermont, at 111 (June 2006).

VIRGINIA

Virginia law imposes a *stringency prohibition* and *qualified stringency prohibitions*.

STRINGENCY LIMITATIONS

1) Prohibitions

The State Water Control Board may not require the state or any of its political subdivisions to upgrade the level of treatment in a *sewage treatment* works to a level more stringent than that required by applicable provisions of the federal Clean Water Act.

Legal Authority:

- Va. Code Ann. § 62.1-44.15:1 (limitation on power to require construction of sewerage systems or sewage or other waste treatment works)

"Nothing contained in this chapter [state water control law] shall be construed to empower the [State Water Control Board] to require the Commonwealth, or any political subdivision thereof, to upgrade the level of treatment in any works to a level more stringent than that required by applicable provisions of the [federal Clean Water Act], as amended."

History: The relevant statutory provision was first enacted in 1971,[499] and amended in 1973.[500]

2) Qualified Prohibitions

Virginia has multiple qualified stringency provisions.

When the Virginia State Water Control Board proposes a standard or policy to be adopted by regulation under the Water Control Law that contains provisions that are "more restrictive than applicable federal requirements," the Board must provide to the proper standing committee of each house of the state legislature a description of those provisions and the reason why they are needed.[501]

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[499] Act of March 16, 1971, ch. 197 § 1, 1971 Va. Acts 425 (enacting H.B. No. 192).

[500] Act of March 10, 1973, ch. 179, § 1, 1973 Va. Acts 219 (enacting S.B. No. 85).

[501] In addition, pursuant to various rules of the State Water Control Board, the Department of Environmental Quality has been required to perform an analysis of chapters of the administrative code and report to the Board within three years of the promulgation of each respective rule. Among the items to be included by the Department in each report was the results of a review of "current state and federal statutory and regulatory requirements, including identification and justification of requirements" in the chapter that are "more stringent than federal requirements." 9 Va. Admin. Code § 25-260-260(B) (water quality standards—modification, amendment, and cancellation of standards) (promulgated 1992, amended 1997); 9 Va. Admin. Code § 25-280-80(B) (groundwater standards—

When the Board adopts water quality standards, it is required to adopt them "according to applicable federal criteria or standards," unless the Board determines that "an additional or more stringent standard" is necessary to protect public health, aquatic life, or drinking water supplies.

By administrative rule, when either the Department of Game and Inland Fisheries or the Habitat Management Division of the Marine Resources Commission proposes a rule that contains provisions that are "more restrictive than applicable federal requirements," the agency's notice of public comment for the rule must describe the provisions and the give the reason why they are needed.

Legal Authority:

- Va. Code Ann. § 62.1-44.15(3a), (10) (powers and duties; civil penalties)

  "It shall be the duty of the [State Water Control Board] and it shall have the authority: ...

  (3a) To establish such standards of quality and policies for any state waters consistent with the general policy set forth in this chapter [state water control law], and to modify, amend or cancel any such standards or policies established and to take all appropriate steps to prevent quality alteration contrary to the public interest or to standards or policies thus established, except that a description of provisions of any proposed standard or policy adopted by regulation which are more restrictive than applicable federal requirements, together with the reason why the more restrictive provisions are needed, shall be provided to the standing committee of each house of the General Assembly to which matters relating to the content of the standard or policy are most properly referable. ...

  (10) To adopt such regulations as it deems necessary to enforce the general water quality management program of the Board in all or part of the Commonwealth, except that a description of provisions of any proposed regulation which are more restrictive than applicable federal requirements, together with the reason why the more restrictive provisions are needed, shall be provided to the standing committee of each house of the General Assembly to which matters relating to the content of the regulation are most properly referable...."

- Va. Code Ann. § 62.1-44.19:7(B) (plans to address impaired waters)

  "(B) The plan required by subsection A [to achieve water quality objectives for impaired waters] shall include, but not be limited to, the promulgation of water quality standards for those substances: (i) listed on the Chesapeake Bay Program's "toxics of concern" list as of January 1, 1997; (ii) listed by the USEPA Administrator pursuant to § 307 (a) of the Clean Water Act; or (iii) identified by the [State Water

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modification, amendment, and cancellation of standards) (promulgated 2004); 9 Va. Admin. Code § 25-415-60 (Potomac River embayments—administrative review) (promulgated 1997).

Control Board] as having a particularly adverse effect on state water quality or living resources. ... Standards shall be adopted according to applicable federal criteria or standards unless the Board determines that an additional or more stringent standard is necessary to protect public health, aquatic life or drinking water supplies."

- 4 Va. Admin. Code § 15-10-30(H) (public participation procedures)

  "H. The [Notice of Public Comment issued in connection with a draft proposed regulation] shall include at least the following: ...
  4. A statement that an analysis of the following has been conducted by the [Department of Game and Inland Fisheries] and is available to the public upon request: ...
  e. A description of provisions of the proposed regulation which are more restrictive than applicable federal requirements, together with the reason why the more restrictive provisions are needed; ..."

- 4 Va. Admin. Code § 20-340-30(H) (public participation procedures)

  "H. The [Notice of Public Comment issued in connection with a draft proposed chapter] shall include at least the following:…
  4. A statement that an analysis of the following has been conducted by the [Habitat Management Division of the Marine Resources Commission] and is available to the public upon request: ...
  e. A description of provisions of the proposed chapter which are more restrictive than applicable federal requirements, together with the reason why the more restrictive provisions are needed."

History: The relevant statutory language contained in § 62.1-44.15 was enacted in 1993.[502] The relevant statutory language in § 62.1-44.19:7 was enacted in 1997.[503] The two administrative code provisions on public participation were promulgated as follows: 4 Va. Admin. Code § 15-10-30 became effective in 1994, and 4 Va. Admin. Code § 20-340-30 became effective in 1987, and was further amended in 1993 and 1994.

PROPERTY-BASED LIMITATIONS

None identified.

[502] Act of Mar. 23, 1993, ch. 456, § 1, 1993 Va. Acts 540, 541–43 (enacting S.B. No. 345; amended 2007).

[503] Act of Mar. 18, 1997, ch. 519, 1997 Va. Acts 792, 794 (enacting S.B. No. 1122; amended 2006).

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Virginia provides legal protections for some waters that may be subject to a loss of protection under federal law. Virginia defines "state waters," for purposes of the State Water Control Law, as "all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands."[504]

Pursuant to this law, it is prohibited to excavate, fill, discharge to, dump in, or otherwise alter wetlands without a permit.[505] The law is administered by the Virginia Department of Environmental Quality through the Virginia Water Protection Permit Program.[506] The VWPP serves as Virginia's CWA § 401 process for both tidal and non-tidal impacts permitted under CWA § 404, and it expressly covers activities in isolated wetlands that are not subject to § 404 of the Clean Water Act.[507] Jurisdiction under the VWPP was expanded by legislation enacted in 2000, just prior to the *SWANCC* decision.[508]

The Virginia Tidal Wetlands Act establishes a permitting system for impacts to tidal wetlands including vegetated tidal wetlands and non-vegetated shoreline between low and mean high water. The Marine Resources Commission is the regulating authority for tidal wetlands, although localities in tidewater Virginia have the option to regulate their own tidal wetlands through citizen Wetlands Boards, with oversight from the Commission.[509]

The Chesapeake Bay Preservation Act establishes water quality protection measures specifically for the Chesapeake Bay, its tributaries, and other state waters, which include wetlands. Each of Virginia's tidewater jurisdictions is required to designate Resource Protection Areas along the shorelines of streams, rivers, and other waterways, including tidal wetlands, and to regulate certain activities in those areas, such as building and tree cutting.[510]

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[504] Va. Code Ann. § 62.1-44.3.

[505] *See* Va. Code Ann. § 62.1-44.5.

[506] Va. Code Ann. §§ 62.1-44.15, 62.1-44.15:20; 9 Va. Admin. Code §§ 25-210-10 to 25-210-260.

[507] The Board may issue a general permit, or deem activities to be in compliance with a general permit, where the wetlands at issue are "isolated wetlands of minimal ecological value." *See* Va. Code Ann. § 62.1-44.15:21; 9 Va. Admin. Code § 25-210-10.

[508] Acts 2000, ch. 1032, 1054, amending Va. Code Ann. §§ 62.1-44.3, 62.1-44.5, & 62.1-44.15:5.

[509] *See* Va. Code Ann. §§ 28.2-1300 to 28.2-1320.

[510] *See* Va. Code Ann. §§ 10.1-2100 to 10.1-2116. For more on Virginia law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase III*, Appendix: Virginia, at 161 (Mar. 2007).

WASHINGTON

Washington law imposes a *property-based limitation*.

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

None identified.[511]

2) Assessment

A provision contained in the counties title of the state code requires the Washington attorney general to establish, and annually review and update, a mandatory process to better enable state agencies and local governments to evaluate their regulatory or administrative actions to ensure that they do not result in an unconstitutional taking. Guidelines for local governments matter in the aquatic protection context because Washington counties and local governments have authority over wetlands and other critical areas.

The Washington attorney general has issued guidelines under the statute.[512] The guidelines include a list of warning signals (typically referred to as a "checklist" by other states with similar attorney general guidelines); when local government or state agency staff encounter these factors, there may be a constitutional issue, and consultation with legal counsel about the proposed action is encouraged. Among the warning signals identified are whether the proposed action or regulation: deprives an owner of all economically viable uses of a property; denies or substantially diminishes a fundamental attribute of property ownership; requires a property owner to dedicate

[511] In 2006, Washington voters rejected a property rights ballot measure, Initiative 933, by 59% to 41%. Washington Secretary of State, "Elections: 2006 General Election Results," available at http://vote.wa.gov/Elections/general/Measures.aspx. This initiative, known as the "Property Fairness Act," would have required government agencies to compensate owners for actions that "damage the use or value" of private property, broadly defined—with compensation to be made prior to applying the ordinance, regulation, or rule. The Act also would have expanded on the assessment requirements of current Rev. Code. Wash. ch. 36.70A, discussed here. Similar legislation was introduced, and failed, in 2011, and was reintroduced in 2012. *See* S.B. 5267, 2011 Reg. Session (62nd Leg.), introduced by Sen. Swecker, available at http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate Bills/5267.pdf.

[512] State of Washington, Office of the Attorney General, "Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property" (Dec. 2006), available at http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Takings/2006%20AGO%20Takings%20Guidance(1).pdf. The document does not represent a formal attorney general opinion. *Id.* at 2.

a portion of property or to grant an easement; or has a severe impact on the landowner's economic interest.

The statute provides no cause of action for a private party to bring suit to compel a government entity to comply with the evaluation process.

Legal Authority:

- Rev. Code Wash. § 36.70A.370 (protection of private property)

"(1) The state attorney general shall establish ... an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. It is not the purpose of this section to expand or reduce the scope of private property protections provided in the state and federal Constitutions. The attorney general shall review and update the process at least on an annual basis to maintain consistency with changes in case law.

(2) Local governments that are required or choose to plan under RCW 36.70A.040 [who must plan—summary requirements—development regulations must implement comprehensive plans] and state agencies shall utilize the process established by subsection (1) of this section to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property. ...

(4) The process used by government agencies shall be protected by attorney client privilege. Nothing in this section grants a private party the right to seek judicial relief requiring compliance with the provisions of this section."

History: The relevant statutory language was adopted in 1991.[513] Although the provision does not expand the scope of takings law, according to the legislative history, it does provide a safeguard that requires planners to evaluate their actions for potential constitutional takings.[514]

3) Other

None identified.

[513] Act effective July 16, 1991, ch. 32, § 18, 1991 Wash. Sess. Laws 2903, 2913–14 (enacting H.B. No. 1025).

[514] *See* S. Rep. No. 1025-S (1991); H.R. Rep. No 1025-S (1991).

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Washington provides some level of protection to waters and wetlands subject to loss of federal protection under the Clean Water Act.

Washington administrative regulations "fill the gap" in federal Clean Water Act coverage created by *SWANCC* and *Rapanos* with respect to certain geographically isolated wetlands.

Washington defines "surface waters of the state," for purposes of state water quality regulations, to include "lakes, rivers, ponds, streams, inland waters, saltwaters, wetlands, and all other surface waters and water courses within the jurisdiction of the state of Washington."[515]

Washington's Water Pollution Control Act provides protection for wetlands—including isolated wetlands, as the law makes no distinction—under the authority of the Department of Ecology.[516] If the U.S. Army Corps of Engineers determines that a wetland is isolated and not subject to federal jurisdiction, landowners must still seek authorization from the Department for proposed wetland impacts. If the request is approved, the Department issues an administrative order.[517]

The Growth Management Act requires local governments to identify and protect "critical areas" for conservation purposes.[518] Wetlands are expressly included as among these areas.[519] The Shoreline Management Act protects all marine waters, lakes and reservoirs greater than twenty acres in size, streams and river segments meeting minimal flow requirements—and all associated wetlands.[520]

Under the State Hydraulic Code, Washington regulates construction and other work in state waters with the purpose of protecting fish life in all marine and fresh waters of the state. While not directly aimed at the protection of wetlands, the Hydraulic Code applies to all activities that affect the bed or flow within the ordinary high water line of state waters, which often includes wetlands.[521]

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[515] Wash. Admin. Code § 173-201A-010(2).

[516] *See* Wash. Rev. Code ch. 90.48; Wash. Admin. Code ch. 173-201A. *See also* Department of Ecology, "Isolated Wetlands Information," available at http://www.ecy.wa.gov/programs/sea/wetlands/isolated.html. The primary wetlands group within the Department is the Shorelands and Environmental Assistance (SEA) Program.

[517] *See* Department of Ecology, Shorelands and Environmental Assistance Program, "Focus on Regulating Isolated Wetlands" (Rev. June 2010), available at http://www.ecy.wa.gov/pubs/0106020.pdf.

[518] Wash. Rev. Code ch. 36.70A, § 36.70A.172; Wash. Admin. Code ch. 365-190.

[519] Wash. Admin. Code § 365-190-090.

[520] *See* Wash. Rev. Code ch. 90.58, § 90.58.030(d)-(e).

[521] Wash. Rev. Code ch. 77.55; Wash. Admin. Code ch. 220-110.

Wetland provisions of the federal Clean Water Act and the state Water Pollution Control Act are further implemented on state and private forest lands through the Forest Practices Act, which focuses on maintaining functions important to the forest ecosystems of the state.[522]

[522] *See generally* Wash. Rev. Code ch. 76.09; Wash. Admin. Code tit. 222. For more on Washington law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase I*, Appendix: Washington, at 140 (Jan. 2005).

WEST VIRGINIA

West Virginia law imposes a *qualified stringency prohibition* and *property-based limitations*.

STRINGENCY LIMITATIONS

1) Prohibitions

None identified.

2) Qualified Prohibitions

With several exceptions, West Virginia's Department of Environmental Protection may adopt environmental provisions that are "more stringent than the counterpart federal rule or program" *if* the Department provides specific written reasons demonstrating that the provisions are reasonably necessary to protect, preserve, or enhance the quality of West Virginia's environment or human health or safety, taking into consideration: the scientific evidence (including any technical basis), specific environmental characteristics of the state (or an area of the state), or stated legislative findings, policies, or purposes relied upon in making the determination.[523] Where there is no federal rule, adoption of a state rule is not construed to be more stringent than a federal rule.

Legal Authority:

- W. Va. Code § 22-1-3a (rules—new or amended environmental provisions)

"Except for legislative rules promulgated for the purpose of implementing the provisions of section four, article twelve [authority of secretary to promulgate standards of purity and quality—groundwater protection act], section six, article seventeen [promulgation of rules and standards by director—underground storage tank act], and section six, article eighteen [promulgation of rules by director—hazardous wastes management act], all of this chapter, and notwithstanding the provisions of section four, article five of this chapter [powers and duties of director; and legal services; rules—air pollution control], legislative rules promulgated by the director [secretary of the Department of Environmental Protection] ... may include new or amended environmental provisions which are more stringent than the counterpart federal rule or program to the extent that the director first provides specific written reasons which demonstrate that such provisions are reasonably necessary to protect, preserve or enhance the quality of West Virginia's environment or human health or safety, taking into consideration the scientific evidence, specific environmental characteristics of West Virginia or an area thereof, or stated legislative findings, policies or purposes relied upon by the director in making such

[523] The exceptions to this provision pertain to the subjects of drinking water, hazardous waste management, and air pollution control—each of which is subject to its own specific stringency limitations.

determination. In the case of specific rules which have a technical basis, the director shall also provide the specific technical basis upon which the director has relied....

In the absence of a federal rule, the adoption of a state rule shall not be construed to be more stringent than a federal rule, unless the absence of a federal rule is the result of a specific federal exemption."[524]

History: The relevant statutory language was enacted in 1994.[525]

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

None identified.

2) Assessment

West Virginia's Private Real Property Protection Act (W. Va. Code §§ 22-1A-1 to 22-1A-6) applies only to programs administered by the Department of Environmental Protection. Under the Act, the Department is required to prepare an assessment whenever it considers any action that is "reasonably likely" to deprive a private real property owner of "all productive use" of the property. The assessment must include: (1) an identification of the risk created by the private real property use, and a description of the environmental, health, safety, or other benefit to be achieved by the proposed action; (2) the anticipated effects on other property owners or on the environment if the action is not taken; (3) an explanation of how the action advances the purpose of protecting against the risk; (4) the reasons that the action is likely to result in requiring the state to compensate the owner of private property, including a description of how the action affects the use or value of private property; (5) alternatives to the action that would fulfill the legal obligations of the Department, reduce the impact on the property owner, and reduce the likelihood of requiring compensation; and (6) an estimate of the cost to the state if compensation is required.

An assessment is *not* required unless either the highest state or federal court "has under similar factual circumstances required compensation to be paid."

Additionally, where the Department proposes to establish a buffer zone on private property, it must identify the public purpose or policy to be served and how the creation and maintenance of the buffer zone carries out that public purpose or policy.

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[524] The Department of Environmental Protection also must provide written reasons where it adopts "environmental provisions which are *less* stringent than a counterpart federal rule which recommends, but does not require, a particular standard or any federally recommended environmental standard whether or not there be a counterpart federal rule." *Id.* (emphasis added).

[525] Act of Mar. 12, 1994, ch. 61, 1994 W. Va. Acts 349, 450-51 (enacting H.B. No. 4065).

When a property owner brings a successful state or federal takings claim or nuisance claim in response to an action by the Department of Environmental Protection, the owner is entitled to attorney fees and costs under the Act if the Department either failed to perform an assessment required by the Act, or performed an assessment but failed to conclude that its action was reasonably likely to require the payment of compensation.

Legal Authority:

- W. Va. Code § 22-1A-2 (legislative findings and purpose)

"It is the policy of this state that action by the division of environmental protection affecting private real property is subject to such protection as is afforded by the [federal and state constitutions] and the principles of nuisance law. The Legislature intends that the division of environmental protection follow certain procedures to ensure constitutional protection of private real property rights, while also meeting its obligation to protect the quality of the environment, and reduce the burden on citizens, local governments and this state caused by certain actions affecting private real property. The purpose of this article is to establish an orderly, consistent process that better enables the division to evaluate how potential administrative action by it may affect privately owned real property. It is not the purpose of this article to reduce or expand the scope of private real property protections provided in [the state and federal constitutions], as those provisions have been and may in the future be interpreted by the state and federal courts of competent jurisdiction with respect to such matters for this state."

- W. Va. Code § 22-1A-3 (actions by division of environmental protection; requirement for assessment)

"(a) Whenever the division of environmental protection considers any action within its statutory authority that is reasonably likely to deprive a private real property owner of ... all productive use of his or her private real property, it shall prepare an assessment that includes, but need not be limited to, the following:

(1) An identification of the risk created by the private real property use, and a description of the environmental, health, safety, or other benefit to be achieved by the proposed action;

(2) The anticipated effects, if any, on other real property owners or on the environment if the division does not take the proposed action;

(3) An explanation of how the division believes its action advances the purpose of protecting against the risk;

(4) The reasons that the division believes that its action is likely to result in requiring the state, under applicable constitutional principles and case law, to compensate the owner of private real property, including a description of how the action affects the use or value of private real property;

(5) Alternatives, if any, to the proposed action that the division believes will fulfill the legal obligations of the division, reduce the impact on the private real property owner and reduce the likelihood of requiring compensation; and

(6) An estimate of the cost to the state for compensation in the event such compensation is required.

No assessment is required under this article, unless the West Virginia Supreme Court of Appeals or the United State Supreme Court has under similar factual circumstances required compensation to be paid. ..."

- W. Va. Code § 22-1A-4 (buffer zones)

"(a) Prior to the division of environmental protection requiring that a buffer zone be created on private real property, the division shall prepare a report which shall identify the public purpose or policy which is to be served by the creation of the buffer zone and how the creation and maintenance of the buffer zone promotes or fulfills that public purpose or policy. This report is in addition to any other assessment required pursuant to the provisions of this article.

(b) Any report made pursuant to this section is public information. ..."

- W. Va. Code § 22-1A-5 (remedies)

"When a court of competent jurisdiction determines that action of the division of environmental protection, within its statutory authority, requires that compensation be paid to a private real property owner pursuant to [the state or federal constitutions] or the principles of nuisance law, the private real property owner is also entitled to his or her reasonable attorney fees and costs:

(1) If the court determines that the division failed to perform the assessment required in section three of this article; or

(2) If the court determines that the division performed the assessment required in section three of this article but failed to conclude that its action was reasonably likely to require compensation to be paid to the private real property owner."

- W. Va. Code § 22-1A-6 (scope of application)

"The provisions of this article only apply to the programs administered by the division of environmental protection on the effective date of this article."

History: These provisions were enacted in 1994.[526]

3) Other

None identified.

[526] Act of Mar. 12, 1994, ch. 61, 1994 W. Va. Acts 349, 466-69 (enacting H.B. No. 4065).

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Case-by-case: West Virginia does not have a full regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401.

However, wetlands—including isolated wetlands—are waters of the state for purposes of the West Virginia Water Pollution Control Act. That law defines "water resources," "water," or "waters" to mean "any and all water on or beneath the surface of the ground, whether percolating, standing, diffused or flowing, wholly or partially within this state, or bordering this state and within its jurisdiction, and includ[ing], without limiting the generality of the foregoing, natural or artificial lakes, rivers, streams, creeks, branches, brooks, ponds (except farm ponds, industrial settling basins and ponds and water treatment facilities), impounding reservoirs, springs, wells, watercourses and wetlands...."[527]

The West Virginia Department of Environmental Protection asserts authority on a case-by-case basis under the Act to review and decide whether to allow filling of isolated waters and wetlands based on the potential to violate water quality standards, even in the absence of federal Clean Water Act jurisdiction.[528]

[527] W. Va. Code § 22-11-3(23).

[528] Communication from W. Va. Dep't of Environmental Protection, Div. of Water and Waste Management, to ELI staff, Oct. 15, 2010 (email on file with the authors). For more on West Virginia law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase II*, Appendix: West Virginia, at 119 (June 2006).

WISCONSIN

Wisconsin law imposes *stringency prohibitions* and *qualified stringency prohibitions*.

STRINGENCY LIMITATIONS

1) Prohibitions

The Wisconsin Department of Natural Resources is required to "comply with and not exceed the requirements of" the federal Clean Water Act and federal regulations in promulgating pollution discharge elimination rules, as those rules relate to: point source discharges, effluent limitations, municipal monitoring requirements, standards of performance for new sources, toxic effluent standards or prohibitions, and pretreatment standards. Under a related provision, rules concerning storm water discharges may be no more stringent than the requirements under the federal Clean Water Act and federal regulations.

Legal Authority:

- Wisc. Stat. Ann. § 283.11(2) (state and federal standards—compliance with federal standards)

"(a) Except for rules concerning storm water discharges for which permits are issued under s. 283.33, all rules promulgated by the [Department of Natural Resources] under this chapter [pollutant discharge elimination] as they relate to point source discharges, effluent limitations, municipal monitoring requirements, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards shall comply with and not exceed the requirements of the federal [Clean Water Act], 33 USC 1251 to 1387 [water pollution and prevention control], and regulations adopted under that act.

(b) Rules concerning storm water discharges may be no more stringent than the requirements under the federal [Clean Water Act], 33 USC 1251 to 1387, and regulations adopted under that act."

History: The relevant language in § 283.11(2)(a) was adopted in 1985 or before.[529] The relevant language in § 283.11(2)(b) was enacted in 1993.[530] A failed 2011 bill would have required DNR to repeal and reenact its nonpoint source water pollution rules and ensure that they are no more stringent than the requirements under the federal CWA.[531]

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[529] *See* Law of Aug. 10, 1993, Act 16, § 2615, 1993 Wis. Sess. Laws 26, 340 (enacting S.B. No. 44; renumbered as amended in 1995) (referencing earlier language; 1993 amendment was first substantive amendment since 1985).

[530] Law of Aug. 10, 1993, Act 16, § 2616, 1993 Wis. Sess. Laws 26, 340 (enacting S.B. No. 44; renumbered as amended in 1995).

[531] S.B. No. 27, § 9135, 2011-12 Legis., introduced Mar. 1, 2011, available at http://docs.legis.wisconsin.gov/2011/related/proposals/sb27.pdf.

2) Qualified Prohibitions

Administrative regulations provide that, with respect to federally delegated programs, the Department of Natural Resources may adopt an environmental quality standard that is "more restrictive than a standard provided under corresponding federal law or regulations" only if the Department advises the Natural Resources Board as to why the more restrictive standard is needed in Wisconsin to protect public health, safety, or the environment.

An environmental quality standard is *not* considered more restrictive than a corresponding federal standard if the federal government has not enacted a law or regulation establishing a corresponding standard.

In addition, where the Department has adopted an environmental quality standard for which there is a corresponding standard under federal law or regulations, and the federal standard is subsequently relaxed, the Department has 120 days to notify the Board and propose a schedule to advise the Board whether the current state standard is needed to protect public health, safety, or the environment in the state.

Legal Authority:

- Wisc. Admin. Code [NR] § 1.52(3) (policy on promulgation of environmental quality standards—adoption of environmental quality standard more restrictive than corresponding federal law or regulations)

  "For environmental programs subject to a delegation of authority by [U.S. EPA], whenever the [Department of Natural Resources] seeks to adopt an environmental quality standard more restrictive than a standard provided under corresponding federal law or regulations, the department shall advise the [Natural Resources Board] why the more restrictive standard is needed in Wisconsin to protect public health, safety or the environment. For the purposes of this subsection, any environmental quality standard is not considered more restrictive than a standard provided under corresponding federal law or regulations if the federal government has not enacted a law or regulation establishing a corresponding standard. ..."

- Wisc. Admin. Code [NR] § 1.52(4) (policy on promulgation of environmental quality standards—federal standard relaxed)

  "If the department has adopted an environmental quality standard which has a corresponding standard adopted under federal law or regulations, and after August 1, 1996, that corresponding federal standard is relaxed by promulgation of a more lenient standard in federal law or regulations, the department shall within 120 days of the federal action notify the board and propose a schedule for the department to advise the board whether the current state standard is needed in Wisconsin to protect public health, safety or the environment."

History: The relevant language in these rules was promulgated in 1996.[532]

PROPERTY-BASED LIMITATIONS

None identified.[533]

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IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

Coverage or partial coverage by state regulation: Wisconsin was the first state to enact legislation (in 2001) to "fill the gap" in federal Clean Water Act coverage created by *SWANCC* with respect to certain geographically isolated wetlands. But in 2012, Wisconsin enacted a new wetlands regulatory reform law, discussed below, that opponents characterized as weakening wetland protections.[534]

Wisconsin defines "waters of the state" for purposes of its water resources laws as "those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within [the State of Wisconsin] or its jurisdiction."[535]

By 2011 it was evident that Wisconsin's wetlands regulation regime would be changing,[536] and this did in fact occur, effective June 1, 2012. The new law, 2011 Wisconsin Act 118, eliminated water quality certification requirements for wetlands and established a new system of wetland general permits and wetland individual permits.[537] The DNR is required to establish general permits for various kinds of discharges that do not affect

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[532] Policy on Promulgation of Environmental Quality Standards, 487 Wis. Admin. Reg. 34 (July 31, 1996).

[533] Wisconsin does, however, provide robust protection to water access and use by cranberry growers under a state law that dates to 1867. *See* Wisc. Stat. Ann. § 94.26. *See also*, *e.g.*, *Tenpas v. Dep't of Natural Resources*, 436 N.W.2d 297 (Wisc. 1989) (holding that state laws imposing financial and maintenance requirements on dam transferees did not apply to cranberry dams as a result of longstanding Wisconsin cranberry law).

[534] *E.g.*, Wisconsin Wetlands Association, "2012 Wetland Bill Recap," Feb. 29, 2012, available at http://www.wisconsinwetlands.org/2012WetlandBillRecap.pdf.

[535] Wisc. Stat. Ann. § 281.01(18).

[536] *See*, *e.g.*, Wisc. Exec. Order #1(6): Relating to a Special Session of the Legislature, Jan. 3, 2011 (convening a special session of the legislature to enact legislation relating to, among other things, "exemptions from water quality certification and wetland mitigation requirements for certain nonfederal wetlands that are less than two acres in size"); 2011 Wisc. Act 6, enacted Feb. 4, 2011 (creating an exemption from water quality standards for wetlands and from certain other regulatory provisions concerning water quality and surface water use that apply to a wetland area in the village of Ashwaubenon).

[537] Previously, under 2001 Wisconsin Act 6, water quality certification was required for "nonfederal wetlands," a designation covering: a wetland for which there is no federal jurisdiction over discharges of dredged or fill material as a result of the *SWANCC* decision, or a wetland that is determined to be non-navigable, intrastate, and isolated under *SWANCC*. It was illegal to discharge dredged or fill material into a nonfederal wetland unless the discharge was authorized by a water quality certification issued by the DNR.

more than two acres of wetland or 10,000 square feet of wetland (depending on the reason for and nature of the discharge).[538] A person wishing to discharge to a wetland absent authority under a general permit or subject to an exemption may seek an individual permit.[539] The DNR is require to "make a finding that a proposed project causing a discharge is in compliance with water quality standards and that a wetland individual permit may be issued" if the DNR determines that all of the following apply: "(1) the proposed project represents the least environmentally damaging practicable alternative taking into consideration practicable alternatives that avoid wetland impacts; (2) all practicable measures to minimize the adverse impacts to wetland functional values will be taken; and (3) the proposed project will not result in significant adverse impact to wetland functional values, in significant adverse impact to water quality, or in other significant adverse environmental consequences."[540]

Wisconsin's laws on navigable waters protection apply to wetlands below the ordinary high water mark. Requirements cover construction and waterway alteration pertaining to navigable waters, which may include dredging and filling, as well as dam construction, water diversion, and grading.[541]

Local governments are required to design and administer zoning laws for shorelands and wetlands in the shoreland zone. The Department provides technical assistance to local zoning officials and oversees local decisions and development of shorelands standards.[542]

[538] Wisc. Stat. Ann. § 281.36(3g).

[539] Wisc. Stat. Ann. § 281.36(3m).

[540] Wisc. Stat. Ann. § 281.36(3n)(c). For a detailed analysis of how the new law revised existing Wisconsin wetlands law, see Larry Konopacki & Rachel Letzing, Wisconsin Legislative Council, "2011 Wisconsin Act 118, Relating to Regulation of Activities Related to Wetlands and Fees for Approvals Relating to Activities in or Near Navigable Waters," Wisconsin Legislative Council Information Memorandum, Mar. 22, 2012, available at http://legis.wisconsin.gov/lc/publications/im/IM2012_05.pdf.

[541] *See* Wisc. Stat. Ann., chs. 30, 31.

[542] *E.g.*, Wisc. Stat. Ann. §§ 59.691, 61.351, & 62.231. For more on Wisconsin law and policy pertaining to wetlands, see generally Environmental Law Institute, *State Wetland Program Evaluation: Phase II*, Appendix: Wisconsin, at 125 (June 2006).

WYOMING

Wyoming law imposes *property-based limitations*.

STRINGENCY LIMITATIONS

None identified.

PROPERTY-BASED LIMITATIONS

1) Compensation/Prohibition

None identified.

2) Assessment

Under the Wyoming Regulatory Takings Act (Wyo. Stat. Ann. §§ 9-5-301 through 9-5-305), a state agency must evaluate proposed administrative actions or regulations that have "constitutional implications"—meaning that the action could result in an unconstitutional taking of private property. The statute covers proposed rules that may limit the use of private property, and dedications or exactions from owners of private property.

The Wyoming attorney general must develop (and has developed) guidelines and a checklist to assist agencies in identifying and evaluating actions subject to the statute.[543] Pursuant to the guidelines and checklist, among the issues to be considered by an agency are whether its action requires a property owner to dedicate a portion of property, whether the action has a "significant impact" on the owner's economic interest, and whether the problem that necessitated the government action could be addressed in a less restrictive manner. An agency evaluating its proposed action under the statute is required to use the attorney general guidelines and checklist.

Where a person is required to obtain a permit for the use of private property, the agency must consider whether the permit conditions directly relate to and substantially advance the purpose for which the permit is issued.

Legal Authority:

- Wyo. Stat. Ann. § 9-5-302 (definitions)

"(a) As used in this act:
(i) "Constitutional implications" means the unconstitutional taking of private property as determined by the attorney general in light of current case law;

[543] State of Wyoming Takings Guidelines and Checklist (Oct. 1995; statutory appendix updated to July 1, 2001) (not available online; provided to ELI staff upon request and on file with the authors). The guidelines do not represent a formal attorney general opinion. *Id.*

(ii) "Government agency" means the state of Wyoming and any officer, agency, board, commission, department or similar body of the executive branch of state government;
(iii) "Governmental action" or "action":
(A) Means:
(I) Proposed rules by a state agency that if adopted and enforced may limit the use of private property;
(II) Required dedications or exactions from owners of private property by a state agency.
(B) Does not include: ...
(V) Actions necessary to maintain or protect public health and safety....
(v) "Taking" means an uncompensated taking of private property in violation of the state or federal constitution...."

- Wyo. Stat. Ann. § 9-5-303 (guidelines and checklist for assessment of takings)

"(a) The attorney general shall develop guidelines and a checklist ... to assist government agencies in the identification and evaluation of actions that have constitutional implications that may result in a taking. The attorney general shall review and update the checklist and guidelines to maintain consistency with changes in the law.

(b) In formulating the guidelines and checklist, the attorney general shall consider the following:
(i) A description of how the action or regulation affects private property;
(ii) The likelihood that the action or regulation may constitute a taking;
(iii) The statutory purpose to be served by the action or regulation;
(iv) Whether the action or regulation advances that purpose;
(v) Whether the restriction imposed is proportionate to the overall problem;
(vi) An estimate of the agency's financial liability should the action or regulation be held to constitute a taking of private property;
(vii) Alternatives considered by the agency, or proposed by the public, which would reduce the impact of the regulation upon private property;
(viii) Any other relevant criteria as may be determined by the attorney general."

- Wyo. Stat. Ann. § 9-5-304 (agency responsible to evaluate takings)

"(a) The agency shall use the guidelines and checklist prepared [by the attorney general] to evaluate proposed administrative actions or regulations that may have constitutional implications.

(b) In addition to the [attorney general] guidelines ... , state agencies shall consider the following criteria in their actions:
(i) If an agency requires a person to obtain a permit for a specific use of private property, conditions imposed on issuing the permit shall directly relate to the purpose for which the permit is issued and shall substantially advance that purpose;

(ii) Any other relevant information as may be determined by the agency."

- Wyo. Stat. Ann. § 9-5-305 (declaration of purpose)

  "The purpose of this act is to establish an orderly, consistent process that better enables governmental bodies to evaluate whether proposed regulatory or administrative actions may result in a taking of private property or violation of due process. It is not the purpose of this act to expand or reduce the scope of private property protections provided in the state and federal constitutions."

  History: The relevant provisions were enacted in 1995.[544]

3) Other

   None identified.

IN BRIEF: STATUS OF STATE REGULATION OF NON-CWA WATERS

No coverage: Wyoming does not have a regulatory program under state law addressing dredge and fill activities in its waters and wetlands. It relies on Clean Water Act § 401. Wyoming has not enacted legislation nor issued regulations to cover waters that are outside of the scope of federal law under *SWANCC* and *Rapanos*.

[544] Wyoming Regulatory Takings Act, ch. 113, § 1, 1995 Wyo. Sess. Laws 212, 212 (enacting H.B. No. 171). A bill introduced in 2003, S.F. No. 0023, would have broadened the Wyoming Regulatory Takings Act by establishing a property rights advocate office and by providing a mechanism for compensation of private property owners that experience a diminution in value of their property as the result of a government taking. The bill died in committee. *See* http://legisweb.state.wy.us/2003/introduced/sf0023.pdf for the bill text and http://legisweb.state.wy.us/2003/Digest/sf0023.HTM for the history.

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