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## FEDERAL CIRCUIT REJECTS ONE WETLANDS REGULATORY CLAIM AND SUPPORTS ANOTHER

The Federal Circuit in *Mehaffy v. United States*, 12 WL 6097768 (Fed. Cir. 2012), recently affirmed the Court of Federal Claims decision rejecting a regulatory taking case filed by Mike Mehaffy. In a subsequent case, *infra*, the Federal Circuit did the opposite.

In 1970, the federal government purchased a flowage easement for land from Nomikano, an Arkansas corporation holding assets for the benefit of the Mehaffy family. The easement granted the government the right to flood or submerge 49 acres of the Mehaffy land. The family added a reservation of certain rights to the easement to fill wetlands without government interference. Mehaffy Construction Company purchased the property in 1987. Mike Mehaffy, the executive of the company, bought the property from the company in 2000. The Mehaffy family began to develop the property, and in 2006, Mr. Mehaffy sought a permit under Section 404 of the Clean Water Act, which requires a Corps of Engineers permit to discharge dredge or fill material in wetlands.

Mr. Mehaffy did not respond to the Corps' request for information during the permit application, including requests for alternative site and hydrology analyses. The Corps denied the permit, and Mehaffy sought an administrative appeal, which he lost. He then sued the United States in the Claims Court claiming a compensable, partial regulatory taking of his property in violation of the Fifth Amendment of the United States Constitution. A regulatory taking, or inverse condemnation, can legally be a taking, even if the government does not intend that result.

At one point in the litigation, the government argued that the permit denial was not a final government action ripe for judicial action because Mr. Mehaffy had not provided all the information the Corps requested during the permit process. The Court found that the Corps of Engineers had only a choice of two options under its regulations when a permit applicant does not respond to information requests—consider the permit application withdrawn and return the application to the applicant, or if there is sufficient information, take final action on the permit. In this case, the Court found that indeed the Corps did make a final permit decision in denying the Mehaffy permit. *See* 98 Fed. Cl. 604 (Fed. Cl. 2011).

The Claims Court then found that there was not a physical or total (*per se* or categorical taking) taking of Mr. Mehaffy's property, as only 48 of his acres required a wetlands permit. A *per se* taking would have required compensation. *See Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). However, here 10 other acres of land which did not need a 404 permit were upland property and were used by Mehaffy for storage. The total acreage was used by the Court as the relevant parcel for its analysis. Therefore, the Claims Court used the *Penn Central Transportation Co. v. City of New York* standard, 438 U.S. 104 (1978), which uses a balancing test to decide if there is a partial (not total) regulatory taking.

This test usually has a court examine the character of the government action, the extent to which government action interferes with reasonable investment bank-backed expectations and the economic impact of the regulations. The Clean Water Act was passed in 1972, some 28 years before Mehaffy purchased the property. The Court reasoned that investment-backed expectations are measured from the time the property was acquired. Mehaffy also had knowledge that federal regulations prevented him from exercising the reservations attached to the easement without a permit. The Court held that the Mehaffy taking claim lacked sufficient investment-backed expectations, and the Court ruled in favor of the government. *See* 102 Fed. Cl. 755 (Fed. Cl. 2012). The Federal Circuit affirmed. That holding means there was no compensable taking.



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The lesson to be learned from this case is that during a wetlands property acquisition, if landowners are fearful of 404 permit denial and wish to preserve a taking claim, they should ensure before closing on their purchase that the relevant parcel of land is 100 percent wetlands. Otherwise, if a 404 permit is denied and the property owner has some upland acreage left for use, the owner will usually not be successful in a partial taking claim. This is a legal or litigation strategy and not a development strategy, and may not always be feasible. If all of the property is wetlands and the 404 permit is denied depriving the landowner of all beneficial use, arguably a total regulatory or *per se* taking claim would arise. However, a permit usually is more successful than in the *Mehaffy* case, and a landowner should strongly support his or her permit application with information needed by the agencies.

In a subsequent wetlands taking case, *Lost Tree Village Corporation v. United States*, 2013 WL 106052 (Fed. Cir. 2013), the Federal Circuit reversed the Claims Court and found a compensable regulatory taking had occurred.

This case involved the Corps denial of a 404 permit on 4.99 acres of wetlands (Plat 57). Plat 57 was purchased in 1974 by Lost Tree. In 1969-1974, Lost Tree had previously purchased nearby upland and wetland property for a substantial 1,300 acre development, known as John's Island Community in Florida. This earlier purchase included Plat 55, which was permitted and developed by the mid-1980s. Plat 57, however, was ignored until a 404 permit was sought in 2002. Plats 55 and 57 were continuous and were subject to the same development usage objectives.

The Federal Circuit clarified that the relevant parcel issue applies to both a partial taking claim and a categorical or *per se* taking claim. In the former case, economic impact is analyzed by the Court; in the latter case, whether the parcel is taken "as a whole" is examined. Not all of the landowner's property is included as the "parcel as a whole," but only the parcels with a single economic expectation are included. A flexible, fact-specific judicial analysis is used here. Here, despite the fact that Plats 55 and 57 were commonly owned, co-located, and proposed for similar development, the Court found there were distinct economic expectations of both. Plat 55 was developed in the 1980s while Plat 57 was ignored until 2002. No master plan for both was evident; therefore, the Federal Circuit concluded that the Claims Court had erred in rejecting Lost Tree's taking claim as a mere diminution in value, and remanded the case for further economic valuation. Impliedly, a *per se* or total taking should be the Claims Court's focus on remand.

This case complements *Mehaffy*, in that even in potential total taking scenarios, if apparent separate development of common wetland/upland properties occur, they should avoid being planned, delayed project(s) with a single purpose. Otherwise, all properties will comprise the relevant parcel for judicial analysis and only a partial taking case may occur.

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*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

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