No. 99-5030

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PALM BEACH ISLES ASSOCIATES, a Florida Partnership;
MARTIN SLIFKA, individually and as trustee; MARJORIE MARGOLIS and ROBERTA FRANKLIN, individuals as tenants in common; and the ESTATE OF JOSEPH SLIFKA, represented by Alan Slifka and Barbara J. Slifka, co-executors,

Plaintiffs-Appellants
vs.
UNITED STATES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS, JUDGE MARIAN BLANK HORN
BRIEF OF *AMICUS CURIAE*
FLORIDA AUDUBON SOCIETY
IN SUPPORT OF DEFENDANT-APPELLEE UNITED STATES
SEEKING AFFIRMANCE OF THE JUDGMENT BELOW

John D. Echeverria
Environmental Policy Project
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, DC 20001
(202) 662-9850

Counsel for *Amicus Curiae*
May 10, 1999
Florida Audubon Society

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980)
Andrus v. Allard, 444 U.S. 51 (1979)
Applegate v. United States, 35 Fed. Cl. 406 (1996)
Ciampitti v. United States, 22 Cl. Ct. 310 (1991)
Clajon Production Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995)
Coastal Petroleum Co. v. United States, 524 F.2d 1206 (Ct. Cl. 1975)
Coastal Petroleum v. Chiles, 701 So. 2d 619 (Fla. Dist. Ct. App. 1997), rev. denied, 707 So. 2d 1123 (Fla. 1998), cert. denied, 118 S. Ct. 2369 (1998)
Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993)
Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981)
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)
Florida Rock Industries v. United States, 18 F.3d 1560 (Fed.Cir. 1994), cert. denied, 513 U.S. 1109 (1995)
Front Royal v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998)
Good v. United States, 39 Fed. Cl. 81 (1997)
Goodman v. City of Crystal River, 669 F. Supp. 394 (M.D. Fla. 1987)
Goose Creek Hunting Club, Inc. v. United States, 518 F.2d 579 (Ct. Cl. 1975)
Hadacheck v. Sebastian, 239 U.S. 394 (1915)
Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981)
Kaiser Aetna v. United States, 444 U.S. 164 (1979)
Kennecott Corp. v. Kyocera Int'l, Inc., 835 F.2d 1419 (Fed. Cir. 1987)
Keystone Bituminous Coal v. DeBenedictis, 480 U.S. 470 (1987)
Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1995)
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) *Lykes Brothers, Inc. v. U.S. Army Corps of Engineers*, 821 F. Supp. 1457 (M.D. Fla. 1993)
M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995)
Marks v. United States, 34 Fed. Cl. 387 (1995), aff'd, 116 F.3d 1496 (Fed. Cir. 1997), cert denied, 118 S. Ct. 852 (1998)
Marret v. United States, 82 Ct. Cl. 1 (1935)
Miller v. United States, 220 Ct. Cl. 718, 1979 WL 10193 (1979)
Owen v. United States, 851 F.2d 1404 (Fed. Cir. 1988)
Palm Beach Isles Associates v. United States, 42 Fed.Cl. 340 (1998)

Florida Audubon Society ("Florida Audubon") respectfully submits this brief *amicus curiae* in support of the position of the United States and urges the Court to affirm the judgment below rejecting the regulatory takings claim in this case.

STATEMENT OF INTEREST

Florida Audubon is Florida's oldest and largest conservation organization, with over 35,000 members and 45 local chapters. Florida Audubon is devoted to the protection of Florida's natural resources through education, advocacy, monitoring, and restoration efforts. Florida Audubon has a stake in this case because appellants' expansive regulatory takings theory, which has no foundation in either precedent or the original understanding of the takings clause, would undermine the ability of government to adopt and enforce reasonable regulations to protect the environment. As indicated in the motion being filed simultaneously with this brief, the parties have consented to the filing of this brief *amicus curiae*.

SUMMARY OF ARGUMENT

Palm Beach Isles Associates, an investment partnership, and various individual members of the partnership (hereinafter "PBIA"), seek $10,000,000 in "just compensation" for an alleged taking of their private property under the Fifth Amendment. The claim is without merit and, therefore, the Court should affirm the Court of Federal Claims' decision rejecting this claim.

PBIA's contention that it suffered a taking of the 50.7 acres it now owns as a result of the denial of a fill permit by the U.S. Army Corps of Engineers (hereinafter "Army Corps") is incorrect as matter of law. First, PBIA is incorrect in asserting that the 50.7 acres represent the relevant parcel for the purpose of takings analysis in this case. Under the "parcel as a whole" rule, the relevant parcel in this case is the entire 311.7 acres which PBIA originally purchased.

However, even if one accepted PBIA's definition of the relevant parcel for the sake of argument, there still would be no taking. PBIA's takings claim is precluded with respect to 49.3 acres of the 50.7 acres because the 49.3 acres are subject to the federal navigational servitude, a pre-existing limitation on PBIA's title. With regard to the remaining 1.4 acres not covered by the navigational servitude, PBIA has presented no evidence of any adverse economic effects as a result of the Army Corps' action, much less the kind of substantial economic impact necessary to support a viable takings claim.

Using the correct definition of the relevant parcel, PBIA also did not suffer a taking of the 311.7 acres as a whole, even if the navigational servitude did not apply. The evidence shows that PBIA originally purchased this entire property for $380,000. Approximately twelve years later it sold five-sixths of the property for development for approximately $1 million, producing a nearly three-fold increase in the value of PBIA's investment. While PBIA may have been denied the opportunity to earn the highest possible return from its investment, it has not suffered a taking.

ARGUMENT

I. THE TRIAL COURT PROPERLY REJECTED PBIA'S TAKINGS CLAIM BECAUSE MOST OF THE 50.7-ACRE PARCEL PBIA HAS RETAINED IS SUBJECT TO THE FEDERAL NAVIGATIONAL SERVITUDE, AND THE VALUE OF THE REMAINING PORTION WAS NOT ADVERSELY AFFECTED BY THE DENIAL OF THE DREDGE-AND-FILL PERMIT.

The United States Court of Federal Claims properly rejected PBIA's takings claim because the Army Corps' denial of PBIA's application did not effect a taking as a matter of law.

As discussed below in section II, the relevant parcel in this case for purposes of regulatory takings analysis is the entire 311.7 acres which PBIA originally purchased. However, even if the relevant parcel were limited, as PBIA contends, to the 50.7 acres that PBIA now owns, the permit denial would still not amount to a taking. The submerged 49.3-acre portion of the 50.7 acres is covered by the federal navigational servitude, a pre-existing limitation on PBIA's title that prevents PBIA from claiming a property right to develop the submerged acreage. Absent a property right to develop this area, PBIA cannot assert a viable takings claim with respect to the 49.3 acres. With regard to the remaining 1.4 acres not covered by the navigational servitude, PBIA presented no evidence that the denial of the permit even affected the value of this tiny portion of the 50.7 acres now owned by PBIA. Accordingly, even accepting for the sake of argument PBIA's definition of the relevant parcel, it is clear that the trial court properly rejected PBIA's takings claim as a matter of law.

A. 49.3 Acres Of PBIA's Property Are Subject To The Federal Navigational Servitude. There are two independent bases for affirming the trial court's ruling that 49.3 acres of PBIA's property are subject to the federal navigational servitude. First, PBIA conceded that these lands are subject to the navigational servitude, and it cannot now retreat from that concession. Second, there is no material issue concerning whether the 49.3-acre parcel is, in fact, subject to the navigational servitude.

1. PBIA conceded that the 49.3 acres are subject to the federal navigational servitude.

PBIA conceded in the trial court that the 49.3 acres are subject to the navigational servitude. In its pleadings, PBIA admitted that "[m]uch of all coastal land [in Florida] is subject to the Corps' right of navigational servitude (as is PBIA's property which is the subject of this dispute)." PBIA's Response to United States' Motion for Summary Judgment, at 7 (Feb. 13, 1995) (emphasis added). In addition, PBIA conceded at oral argument before Judge Horn that the 49.3 acres are submerged beneath the navigable waters of Lake Worth and thus subject to the navigational servitude. See Oral Argument Transcript, at 20-21 (June 16, 1995).

Because PBIA conceded in the trial court that the 49.3 acres are subject to the federal navigational servitude, it cannot now seek to dispute this conclusion for the first time on appeal. See *Kennecott Corp. v. Kyocera Int'l, Inc.*, 835 F.2d 1419, 1420 n. 3 (Fed. Cir. 1987) (holding that appellee cannot raise issues on appeal that "contradict its concessions before the district court" because "it is too late in the proceeding . . . to retreat from its . . . concession").
2. In any event, the 49.3 acres are subject to the federal navigational servitude as a matter of law.

Regardless of whether PBIA has waived the issue, it is clear as a matter of law that the 49.3 acres are subject to the federal navigational servitude.

The navigational servitude applies to waters that "in their natural state are in fact capable of supporting navigation." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). PBIA does not dispute that Lake Worth represents a naturally navigable body of water. Any such suggestion is foreclosed by the fact that Lake Worth is directly connected to the Atlantic Ocean and serves as an important segment of the Atlantic Intracoastal Waterway, which carries extensive commercial and private waterborne traffic between Florida and Virginia. See *Palm Beach Isles Assocs. v. United States*, 42 Fed. Cl. 340, 342 (1998) [hereinafter PBIA]. While the specific 49.3 acres PBIA now owns are closer to the banks of, rather than in the center of, Lake Worth, they are nevertheless clearly covered by the navigational servitude. First, there is undisputed evidence in the record that the waters above these 49.3 acres are in fact used for navigation by a variety of shallow draft vessels. See *Army Corps of Engineers' Memorandum for the Record*, at 12-13 (May 16, 1990). While PBIA points to decisions suggesting that intermittent use by smaller crafts may not be sufficient to establish a waterbody's navigability, these decisions are plainly distinguishable. See *Lykes Bros., Inc. v. U.S. Army Corps of Engineers*, 821 F. Supp. 1457, 1463 (M.D. Fla. 1993) (concluding that Army Corps lacked jurisdiction under the Rivers and Harbors Act where "[m]uch of the creek was described as requiring the operator of [a] canoe to carry or drag the boat over impenetrable vegetation or cypress knees [sic] several feet high and often following a thread of the creek to find it end in a broad expanse of marsh or an impenetrable wall of cypress trees"); *Strother v. Bren Lynn Corp.*, 671 F. Supp. 1118, 1118-19 (W.D. La. 1987) (concluding that admiralty jurisdiction did not apply in area "described as 'rang[ing] with water, some small amounts of water and green grass, mostly grass and vegetation,'" where "'the only type of boat you [could even] think about putting in there was [an] air boat or maybe a small pirogue'") (brackets in original) (internal citations omitted).

These decisions cited by PBIA involved non-navigable swamps or creeks that bear no physical or logical resemblance to the navigable waters at issue in this case, a nearly 50-acre expanse of water directly connected to a heavily traveled waterway. In fact, courts that have addressed the navigability issue on facts similar to this case have consistently held that waterbodies like Lake Worth, which are connected to established navigable waterways, are themselves navigable waters. See, e.g.,*United States v. Moretti*, 478 F.2d 418, 428 (5th Cir. 1973) (bay connected to Intracoastal Waterway held to be navigable waterbody even though site of proposed dredge-and-fill activity was in the bay but not within Waterway itself); *Goodman v. City of Crystal River*, 669 F. Supp. 394, 399 (M.D. Fla. 1987) (waterway held navigable because it was connected to Gulf of Mexico and there was substantial evidence that it was used for commercial fishing, diving, and glass-bottom boat sightseeing).

Second, even if there were some dispute about the actual navigability of the 49.3 acres, this submerged area is still subject to the navigational servitude because Lake Worth as a whole is subject to the servitude. Contrary to PBIA's crabbed understanding of the navigational servitude, once it is established that a particular waterbody is navigable, the servitude extends to all land lying below the waterbody's ordinary high water mark. See *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 312 U.S. 592, 596-97 (1941) ("The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark."); *Miller v. United States*, 220 Ct. Cl. 718, 721 (1979) (en banc) ("[I]t is well settled that the Government's navigation servitude extends to all

submerged property within the bed of a navigable river from ordinary high-water mark on one side to ordinary high-water mark on the other.");*Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579, 583 (Ct. Cl. 1975) (per curiam) ("The bed of a navigable stream is bounded by -- and, therefore, the navigational servitude of the Government extends to -- the ordinary high-water mark on either side of the stream."). Because it is undisputed that Lake Worth as a whole is navigable, the navigational servitude extends up to the ordinary high water mark of the entire lake, including PBIA's 49.3 acres.

Contrary to PBIA's contention, the extent of the actual navigation in the lake water covering the 49.3-acre parcel itself is irrelevant in determining the reach of the navigational servitude. See *Owen v. United States*, 851 F.2d 1404, 1409 (Fed. Cir. 1988) (en banc) (servitude covers entire bed of navigable water, which includes "that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water") (citation omitted); *Coastal Petroleum Co. v. United States*, 524 F.2d 1206, 1209-10 (Ct. Cl. 1975) (navigational servitude "is not limited to the thread of the stream where vessels pass, but extends from ordinary high water on one side to ordinary high water on the other");*Marret v. United States*, 82 Ct. Cl. 1, 13, (1935) ("The paramount title of the Government in the bed of a stream embraces not only that portion continuously submerged but also that portion of the soil above low-water mark and below the ordinary and usual high-water mark known generally as the shore and banks of the stream."). As these authorities clearly establish, because Lake Worth itself is navigable, the navigational servitude extends laterally up to the ordinary high water mark of the lake's banks, even if "portions of the water body may be extremely shallow, or obstructed by shoals, vegetation or other barriers." *United States v. Harrell*, 926 F.2d 1036, 1040-41 (11th Cir. 1991).

Moreover, courts have repeatedly considered -- and consistently rejected -- PBIA's idea that specific non-navigable portions should be carved out of a waterbody that is otherwise navigable as a whole. For example, in *United States v. Ray*, 423 F.2d 16, 19 n. 4 (5th Cir. 1970), the court held that the "fact that a portion of a body of water is nonnavigable does not affect the legal character of general navigability of the area." Similarly, in *United States v. Turner*, 175 F.2d 644, 647 (5th Cir. 1949), the court dismissed as inconsistent with "common sense" the same cramped view of navigability that PBIA advances in this case. The property at issue in Turner was a portion of land submerged in the shallow area of a navigable bay. Id. Rejecting the argument that shallow waters cannot be "navigable waters" simply because they are incapable of supporting "actual navigation," the court explained that "common sense . . . permits no distinction upon the ground of navigability between the shallows and depths of navigable waters." Id.

Lastly, PBIA's narrow view of the navigational servitude does not square with the natural geography of navigable waters. Under PBIA's view, all shallow waters near the shoreline of a navigable water -- even if below the ordinary high water mark -- should be categorically excluded from the reach of the navigational servitude. This view is untenable, however, because in every body of water "there comes a point where the depth of water is minimal as the bottom slopes up to the bank." Moretti, 478 F.2d at 428. As the court in Moretti correctly pointed out, "one would hardly contend that the Mississippi is any less navigable simply because a pirogue would go aground at the water's edge." Id. Following the common sense approach in Ray, Turner, and Moretti, this Court should reject PBIA's argument that the 49.3 acres are not subject to the navigational servitude.

B. PBIA Has No Compensable Property Right Protected By The Fifth Amendment To Develop Submerged Land Subject To The Navigational Servitude.

As a matter of law, PBIA has no compensable property right to develop the 49.3 acres of submerged property encumbered by the federal navigational servitude. Thus, the Army Corps' denial of PBIA's dredge-and-fill permit did not constitute a taking within the meaning of the Fifth Amendment.

No compensation is due under the Takings Clause when government regulation prevents a property owner from putting land to a use that is already proscribed by pre-existing "background principles[,] . . . rules or understandings that stem from an independent source." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992) (internal citations omitted). Therefore, "even when a governmental land use regulation deprives a claimant of all economically beneficial use of his property, the government may avoid compensation if 'the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.'" *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995) (quoting Lucas, 505 U.S. at 1027).

The United States' navigational servitude is one such pre-existing "background principle" that -- under the "logically antecedent inquiry" -- precludes liability under the Fifth Amendment as a matter of law. See Lucas, 505 U.S. at 1028-29 (citing *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900)). As the Court explained in Scranton:

Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.

179 U.S. at 163 (emphasis added); see also *Applegate v. United States*, 35 Fed. Cl. 406, 414-15 (1996) ("The holdings of the Supreme Court and the Federal Circuit establish that the Government owes no compensation for injury or destruction of a claimant's rights when they lie within the scope of the navigational servitude.") (citing *Chicago, Milwaukee, St. Paul & Pac. R.R.*, 312 U.S. at 596-97; Owen, 851 F.2d at 1411-12).

Accordingly, PBIA's takings claim is foreclosed because PBIA has never had an unencumbered property right to develop these 49.3 acres of submerged property. See *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 704 (1987) ("The proper exercise of this power is not an invasion of any private property rights in the stream or lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.") (citation omitted); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950) ("When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone."). In short, the denial of the dredge-and-fill permit did not constitute a taking because it simply paralleled a pre-existing limitation on PBIA's title to its submerged property.

Furthermore, PBIA's contention, see Appellants' Brief, at 21 n. 2, that the federal navigational servitude does not apply to dredge-and-fill activities is patently wrong. If anything, preventing the destruction of navigable waters by filling activities is the quintessential type of activity barred by the navigational servitude. See, e.g., *Marks v. United States*, 34 Fed. Cl. 387, 403 (1995) (no compensation due in takings claim arising from restrictions on dredging and filling of submerged land subject to navigational servitude), aff'd, 116 F.3d 1496 (Fed. Cir. 1997), cert denied, 118 S. Ct. 852 (1998); *Good v. United States*, 39 Fed. Cl. 81, 96 n. 28 (1997) (noting that proposed dredging below ordinary high water mark would fall within navigational servitude).

Finally, PBIA argues that, even if the navigational servitude applies to the submerged 49.3 acres, its takings claim can still survive if its "interests outweigh those of the public." Appellants' Brief, at 20. This argument must be rejected because it flatly contradicts Supreme Court precedent.

First, PBIA's proposed balancing test is in direct conflict with the Court's holding in Cherokee Nation of Oklahoma, 480 U.S. at 703-05. In Cherokee Nation, a unanimous Court rejected a Tenth Circuit ruling that public and private interests should be balanced to determine if

interference with an Indian tribe's use of a riverbed could require compensation under the Takings Clause in spite of the navigational servitude. Id. at 703. The Court held that "the Court of Appeals erred in formulating a balancing test to evaluate this assertion of the navigational servitude," and said that "[n]o such 'balancing' is required where, as here, the interference with in-stream interests results from an exercise of the [servitude]." Id. The Court concluded that a balancing of different interests was inappropriate in the navigational servitude context because exercise of the servitude "is not an invasion of any private property rights . . . within the meaning of the Fifth Amendment." Id. at 704 (quoting *United States v. Rands*, 389 U.S. 121, 123 (1967)).

Second, PBIA's proposed balancing approach also conflicts with the Court's analysis in Lucas, 505 U.S. at 1028-29. In Lucas, the Court held that when pre-existing "background principles" apply, there can be no compensable taking under the Fifth Amendment. Id. (citing navigational servitude as one "background principle" that operates as "a pre-existing limitation upon the landowner's title"). As the Court's reasoning in Lucas made clear, whether a background principle of property law applies in a particular case is a straightforward legal question, not an inquiry subject to balancing of public and private interests. Id.; see also *Coastal Petroleum v. Chiles*, 701 So. 2d 619, 624 (Fla. Dist. Ct. App. 1997), rev. denied, 707 So. 2d 1123 (Fla. 1998), cert. denied, 118 S. Ct. 2369 (1998) (state law barring development along Florida coast not a taking because public rights in lands under navigable waters limit private property rights in these lands as a matter of law). Thus, where the navigational servitude applies, there is no room for a court to engage in the sort of balancing inquiry advocated by PBIA.

C. The Remaining 1.4-Acre Parcel Cannot Support PBIA's Takings Claim Because Its De Minimis Value Was Unaffected By The Denial Of The Dredge-And-Fill Permit.

Given that PBIA has no viable takings claim with respect to the 49.3 acres subject to the navigational servitude, the undisputed evidence also leads to the conclusion that PBIA has no viable takings claim with respect to the remaining 1.4 acres of the property that it has retained.

While the 1.4 acres might potentially have had some development value if this small sliver of property had been developed in conjunction with the 49.3 acres subject to the navigational servitude, that possibility is irrelevant to the resolution of this case. Because PBIA has never had an unencumbered property right to develop the 49.3 acres covered by the navigational servitude, it cannot claim an entitlement to the value that might have accrued to the adjacent 1.4 acres of wetland property if the Army Corps had not enforced the navigational servitude over the submerged 49.3 acres. See *United States v. Twin City Power Co.*, 350 U.S. 222, 225 (1956) (no compensation due for value of upland property that is derived from use or flow of adjacent navigable waters because such value "inheres in the Government's [navigational] servitude"); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 424 (1940) ("Exclusion of riparian owners from [the] benefits of [the flow of a navigable stream] without compensation is entirely within the Government's discretion.").

Furthermore, when viewed in isolation, the 1.4 acres are clearly too small and too irregular in shape to support any meaningful development use. As the trial court correctly observed, this tiny parcel, standing alone, "could not support a housing development project, let alone a single a house," PBIA, 42 Fed. Cl. at 364, and PBIA points to no evidence contradicting that finding. As a result, "it is apparent from the record that the 1.4 acres of wetland shoreline, independent of the 49.3 acres subject to the navigational servitude . . . would be of minimal value, either pre- or post-government regulation." Id. Absent some evidence that the denial of the dredge-and-fill permit has had some adverse effect on the value of the 1.4 acres, the decision below rejecting PBIA's takings claim must be affirmed as a matter of law.

II. THE TRIAL COURT PROPERLY REJECTED PBIA'S TAKINGS CLAIM BECAUSE PBIA TRIPLED THE VALUE OF ITS INVESTMENT IN THE 311.7-ACRE PARCEL IT ORIGINALLY PURCHASED.

For the reasons set forth in section I, if this Court adopts PBIA's view that the relevant parcel is the 50.7 acres PBIA now owns, there was no taking in this case. But even if the Court believes that the denial of the dredge-and-fill permit could have effected a taking of the 50.7 acres, there still would be no taking because the Takings Clause must be analyzed in relation to the entire 311.7 acres which PBIA originally purchased. Under the established parcel as a whole rule, the relevant parcel for the purpose of regulatory takings analysis in this case includes all 311.7 acres. PBIA almost tripled its original $380,000 investment in the 311.7-acre property when it sold off most of the property for development and, therefore, it is clear that there was no taking of PBIA's property as a whole.

PBIA argues against defining the relevant parcel as the 311.7 acres it originally purchased based on the Court's decision in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1995). But that ruling, which establishes only a narrow exception to the general parcel as a whole rule, is easily distinguished from this case. Loveladies Harbor provides no support for departing from the parcel as a whole rule on the facts here.

A. Applying The Parcel As A Whole Rule, PBIA's Takings Claim Fails As A Matter Of Law.

There is perhaps no more clearly established principle in takings doctrine than the rule that a regulatory takings claim must be evaluated based on the claimant's entire property. In Pennsylvania Central Transp. Co. v. New York City, 438 U.S. 104 (1978), the Supreme Court established that:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular government action has effected a taking, the Court focuses rather both on the character of the action and the interference with rights in the parcel as a whole.

Id. at 130 (emphasis added).

The Supreme Court has subsequently reaffirmed the parcel as a whole rule on numerous occasions. See, e.g., *Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. 470, 480 (1987) (relevant unit of coal for purpose of evaluating restriction on coal mining includes not only the coal affected by the restriction but also the coal available to be mined);*Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("[W]here an owner possesses a 'bundle' of rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). Most recently, in *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602 (1993), the Supreme Court, in a unanimous opinion, specifically and forcefully rejected a challenge to the parcel as a whole rule:

We rejected this analysis years ago in Penn Central, . . . where we held that a claimant's parcel of property could not first be divided into what was taken and what was left behind for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.

Id. at 610.

This Circuit, in accordance with Supreme Court precedent, has applied the parcel as a whole rule in numerous cases. See, e.g., *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981) (all five portions of a five-part development project constitute the relevant unit of property for the purpose of determining whether restrictions applicable to two parts effect a taking); *Jentgen v. United States*, 657 F.2d 1210, 1214 (Ct. Cl. 1981) (developable uplands included in parcel as a whole when determining the regulatory impact on wetland portion of property); *Ciampitti v. United States*, 22 Cl. Ct. 310, 320 (1991) (relevant parcel consists "not only of those areas as to which

dredge and fill permits were denied, but also those areas that had been successfully developed earlier").

Applying the parcel as a whole rule in this case, there clearly is no taking. PBIA purchased the 311.7 acres for investment in 1956 for $380,190.00. Approximately twelve years later PBIA sold virtually the entire property (five-sixths of the original property) for nearly three times the original purchase price, reaping a very substantial profit on its investment. Under these facts, it cannot reasonably be suggested that this case presents the kind of "extreme circumstances" necessary to support a finding of a regulatory taking. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). PBIA may have been deprived of the full potential value of its investment, but a "mere diminution" in the value of private property is insufficient to support a finding of a taking. Penn Central, 438 U.S. at 104. Indeed, the Supreme Court has repeatedly rejected takings challenges despite far more substantial "partial" reductions in economic value than is alleged in this case. See, e.g., *Agins v. City of Tiburon* 447 U.S. 255, 262 (1980) (rejecting takings challenge to zoning restrictions which allegedly reduced property value by 85%); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (75% reduction in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (92.5% reduction in value).

The irony of this case lies in the fact that PBIA is claiming a taking when, in reality, it is far from clear that PBIA suffered any adverse economic effect as a result of government regulation. The profit PBIA reaped from its investment in this property is attributable, at least in part, to the scenic beauty of the Florida coast, which is preserved by federal (and state) regulations protecting coastal wetlands and other environmental values. In addition, these same restrictions, by regulating the supply of land along the Florida coast available to meet the demand for development, undoubtedly increased the value of PBIA's property, contributing to the substantial profit PBIA earned on its investment. Now, PBIA challenges these same laws as a taking of its property. PBIA is contending, in effect, that it was entitled to reap the economic advantage of environmental restrictions imposed on other Florida landowners, but it should be permitted to seek compensation on the theory that it alone should be exempt from the duty to comply with these same laws. Fortunately, the law does not allow such a patently unreasonable and unfair result.

B. Loveladies Harbor Does Not Justify A Departure From The Parcel As A Whole Rule.

PBIA invokes Loveladies Harbor in an attempt to avoid the parcel as a whole rule. PBIA contends that Loveladies Harbor stands for the following proposition: when the government imposes a new regulatory restriction following the development and sale of a portion of a property, the relevant parcel no longer includes all of the property the owner originally purchased; instead, the relevant parcel is limited to the property the owner owned at the time of the change in the regulatory environment. See Appellants' Brief, at pp. 26-36. Applying this supposed principle in this case, PBIA contends that the relevant parcel is the 50.7 acres PBIA now owns, rather than the 311.7 acres it originally purchased.

Contrary to PBIA's argument, Loveladies Harbor does not establish this supposed exception to the parcel as a whole rule. The unusually narrow definition of the relevant parcel adopted in Loveladies Harbor was the result of the important "factual nuances" present in that case. No similar nuances weighing in favor of an unusually narrow definition of the parcel are present in this case. Furthermore, even if PBIA's reading of Loveladies Harbor were accepted, PBIA's proposed definition of the relevant parcel still must be rejected. In this case, PBIA sold off five-sixths of the original parcel for development after the regulatory environment had changed, not before.

1. The "factual nuances" in Loveladies Harbor are not present in this case.
First, contrary to PBIA's view, Loveladies Harbor does not establish a blanket rule that the parcel as a whole should be defined more narrowly when a part of the property was developed and sold

off prior to a change in the applicable regulatory environment. While the Court relied in part on this factor in defining the parcel in that case, it relied on other important "factual nuances" as well.

In Loveladies Harbor, the original parcel consisted of 250 acres purchased in 1956. Loveladies Harbor developed 199 acres of the original parcel "over a substantial period of years beginning in 1958[.]" Id. at 1181. The development of the 199 acres was completed, the Court concluded, before a change in the regulatory environment as a result of the enactment of the Clean Water Act in 1972, and before the State of New Jersey made "[any] effort to impose restrictions on the development of [the relevant] wetlands area[.]" Id.

After this change in the regulatory environment, Loveladies Harbor sought to develop the remaining 51 acres, 50 of which were wetlands that, at this point in time, required a fill permit from both the State of New Jersey and the Army Corps. After "lengthy and contentious" negotiations, the State allowed Loveladies Harbor to develop 12.5 acres on the condition that Loveladies Harbor grant the State a conservation easement with respect to the remaining 38.5 acres. Id. When Loveladies Harbor then sought a permit from the Army Corps, the State advised the Army Corps that "denial of the federal permit appears appropriate[.]" Id. at 1174. The Army Corps rejected Loveladies Harbor's permit application pursuant to its regulatory authority under section 404 of the Clean Water Act. Id. Thus, the State, after ostensibly agreeing to allow the development of a portion of the 51 acres, succeeded in its apparent goal to block development of the wetland acreage altogether.

The trial court in Loveladies Harbor held that the relevant parcel in determining the economic impact of the permit denial was the 12.5-acre portion, not the entire 250-acre parcel. Id. at 1181. Unlike the trial court in this case, the trial court in Loveladies Harbor found a taking, and this Court affirmed, concluding that "[t]he Government has failed to convince us that the trial court clearly erred in this conclusion." Id.

Clearly, the Court in Loveladies Harbor felt that an unusually narrow definition of the relevant parcel was justified in that case by what it viewed as inequitable conduct by the State of New Jersey. The State granted Loveladies Harbor permission to dredge and fill 12.5 acres of wetlands and to construct 35 single-family homes on the filled land in exchange for preservation rights on 38.5 acres. But when Loveladies Harbor sought to implement that agreement through the federal permitting process, the State, in effect, reneged.

This Court placed great emphasis upon the State's efforts to undermine Loveladies Harbor's federal permit application after having approved the state permit in order to gain a conservation easement on 38.5 acres. The Court said: "It would be inequitable to allow the state, through the medium of the federal permit process, to now exercise authority to prevent the fill, an authority which it publicly acknowledged it either did not have or was unwilling to exercise." Id. at 1182. Loveladies Harbor is distinguishable from the present case because of these very unusual facts.

2. A stringent regulatory regime was already in place when PBIA sold off most of the property.

In any event, even accepting PBIA's broad reading of Loveladies Harbor for the sake of argument, there was no taking in this case because the basic elements of the regulatory regime about which PBIA now complains were already in place at the time PBIA sold off five-sixths of the parcel. In this respect as well, this case is completely different from Loveladies Harbor. First, in contrast to Loveladies Harbor, 28 F.3d at 1181, where the State of New Jersey had not made "[any] effort to impose restrictions" prior to the sale and development of a portion of the property, in this case the State of Florida already had imposed stringent wetlands restrictions prior to the sale of the portion. First, in 1965, Florida adopted the Beach and Shore Preservation Act establishing an extensive regulatory regime to protect the state's coastal wetlands. See 1965 Fla. Laws ch. 65-404. This law established, among other things, a major new permitting program,

requiring "any person . . . [who] desire[s] to make any coastal construction . . . upon the sovereignty lands of the State of Florida, below the mean high water line of any tidal water of the state, [to] . . . obtain[] [a permit]" from the State Board of Conservation. Id. Two years later, the State enacted comprehensive environmental protection legislation declaring that "[t]he pollution of the . . . waters of this state constitutes a menace to public health and welfare, creates public nuisances, [and] is harmful to wildlife, fish and other aquatic life." 1967 Fla. Laws ch. 67-436. The law established, as a matter of Florida "public policy," the goal of "conserv[ing] the waters of the state and . . . protect[ing] . . . the quality thereof for . . . the propagation of wildlife, fish, and aquatic life." Id.

In addition, federal regulation of wetlands filling also was already in place at the time PBIA sold off and developed a portion of the property. Under the Rivers and Harbors Act of 1899, PBIA was required to obtain a permit from the Army Corps of Engineers -- as PBIA was well aware -- because it had already applied for a permit under this Act in 1957 (and for an extension of this permit in 1960). While these earlier applications had been granted, the permits in each case were only for a term of three years. PBIA obviously had no assurance that future applications would be granted. Thus, when it sold off the upland portions of this property in 1968, PBIA was aware that the wetland portion of the property was subject to a distinct set of federal permitting requirements which did not apply to the balance of the property.

In sum, PBIA's wetland property was subject to extensive regulation prior to PBIA's sale of 261 acres of the 311.7-acre parcel. Therefore, even if this Court were to embrace PBIA's overly broad reading of Loveladies Harbor, there was no dramatic change in the regulatory environment following the sale sufficient to justify defining the relevant parcel as only 50.7 acres. Rather, the relevant parcel in this case is the entire 311.7-acre property that PBIA originally purchased, and any diminution in value of the 50.7 acres PBIA has retained cannot constitute a compensable taking as a matter of law.

CONCLUSION

For all the foregoing reasons, Florida Audubon respectfully urges the Court affirm the decision below rejecting appellants' takings claim.

Respectfully Submitted,

John D. Echeverria
Environmental Policy Project
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, DC 20001
(202) 662-9850

Counsel for Amicus Curiae
Florida Audubon Society

May 10, 1999