COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Quality
Larry G. Lawson, P.E., Director

Subject: Guidance Memorandum Number 04-2007
Avoidance & Minimization of Impacts to Surface Waters

To: Regional Directors

From: Larry G. Lawson, P.E., Director

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Summary:
This guidance is provided to the Central Office and Regional Office Virginia Water Protection Permit (VWPP) Program Staff concerning the consideration of avoidance and minimization of impacts to surface waters as part of the VWPP application review process. Per the VWPP regulations, applicants must first demonstrate that all practicable efforts to minimize unavoidable impacts to state waters, including wetlands, have been taken into consideration and then provide a plan for compensation for all unavoidable impacts.

Electronic Copy:
An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at http://www.deq.state.va.us/water.

Contact information:
Please contact Ellen Gilinsky, Director of the Office of Wetlands and Water Protection and Compliance, at 804-698-4375 with any questions about the application of this guidance.

Disclaimer:
This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

DEQ GUIDANCE ON AVOIDANCE AND MINIMIZATION OF IMPACTS TO STATE WATERS

I. INTRODUCTION

As part of the permit evaluation process used to authorize a particular project proposing to impact state waters (including wetlands), Virginia Water Protection Permit (VWPP) regulations incorporate, by reference, the mitigation sequencing guidelines from the Clean Water Act, also known as the Section 404(b)(1) guidelines (reference 9 VAC 25-210-115A). These implementing guidelines for the Clean Water Act (40 CFR 230.10) state that the burden of proof for demonstrating compliance with the Section 404(b)(1) guidelines is the responsibility of the applicant, not the permitting entity. Applicants must (1) establish that avoidance of impacts to state waters, including wetlands is not practicable; (2) demonstrate that all practicable efforts to minimize unavoidable impacts to state waters, including wetlands, have been taken in project design and construction plan; and (3) provide a plan for compensation for all unavoidable impacts. Note that compensatory mitigation is not considered as a method to reduce environmental impacts, but rather as a means to replace lost functions and values of those impacts that cannot be first avoided and minimized.

The VWPP regulations define "avoidance", "minimization", and "practicable" as follows (9 VAC 25-210-10):

- "Avoidance" means not taking or modifying a proposed action or parts of an action so that there is no adverse impact to the aquatic environment;
- "Minimization" means lessening impacts by reducing the degree or magnitude of the proposed action and its implementation; and,
- "Practicable" means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. [Note that in order to be practicable, an alternative must be both available to the permit applicant and capable of fulfilling the overall project purpose.]

These definitions are similar to those found in federal regulations and guidance. The following document is intended to provide guidance to VWPP project managers, applicants for VWP permits, and others on how these factors are considered within the framework of the Virginia Water Protection Permit Regulation.

II. PROJECT REVIEW CONSIDERATIONS

The statutory purpose of the VWPP program is to ensure that there is no net loss of wetlands through permitted impacts and to ensure that permits are only issued if the State Water Control Board determines that the cumulative impacts will not cause or contribute to a significant impairment of state waters or fish and wildlife resources. Following these guidelines will help assure that our aquatic resources are protected to the maximum extent practicable while allowing property owners reasonable use of their property.

A. WATER DEPENDENCY AND PROJECT PURPOSE AND NEED

Water dependency and a project's purpose are entwined, as the project's purpose is the foundation for evaluating water dependency and, subsequently, avoidance and minimization. Water dependent projects are defined by the Section 404(b)(1) guidelines as those activities that require "access or proximity to or siting within the wetland to fulfill [the project's] basic purpose." Examples of water dependent projects include boat ramps, bulkheads, marinas, piers, docks, or similar structures.

Courts generally have given significant discretion to the regulatory agencies regarding water dependency and purpose and need. In *Louisiana Wildlife Federation v. York*, the Fifth Circuit Court of Appeals held that "not only is it permissible for the [U.S. Army Corps of Engineers (the Corps)]to consider the applicant's objective; the Corps has a duty to take into account the objectives of the applicant's project. Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable." In *Friends of the Earth v. Hintz*, the Ninth Circuit Court of Appeals affirmed that the Corps had correctly determined that the siting of a saw mill and log export facility adjacent to a harbor was a water dependent activity, and, therefore, access to a special aquatic site was necessary.

In light of the Section 404(b)(1) guidelines and relevant court rulings, VWPP project managers must give full consideration to the project applicant's stated purpose and need when making a water dependency determination. If a project is determined to be water dependent, then it is presumed that alternatives that completely avoid impacts to the aquatic ecosystem are not practicable, and the review can move to other factors to further minimize impacts prior to considering compensation. If a project is determined to be non-water dependent, then the applicant must clearly demonstrate that there are no other practicable alternatives to the proposed impacts. VWPP project managers should explore other practicable factors (i.e. design changes, siting changes, project reconfiguration, different construction practices, etc.) that first avoid the proposed impact, then minimize those unavoidable impacts (see Section C of this document).

Note that while the Section 404(b)(1) guidelines as well as the VWPP regulations ask the applicant to provide the purpose and need for the project as part of the Joint Permit Application (JPA), we normally do not evaluate the need for a project (for instance, multiple shopping centers in close proximity to each other) in making a permit determination. Exceptions are in the consideration of water withdrawal projects, when we assess the need for additional water as part of the purpose of the project. However, part of the Corps' public interest review considers project need based upon the information provided in the JPA and any subsequently submitted additional information.

B. Alternatives Analysis and Investment-Backed Expectations for Non-Water Dependent Projects

Once it is determined that a project is non-water dependent, it is the responsibility of the applicant to perform an alternatives analysis to clearly demonstrate that their project is the least environmentally damaging practicable alternative in light of the applicant's overall project purpose. Remember that DEQ must take into account the objectives of the applicant's project as presented, and not change the nature of the project (i.e. substitute apartments for single family housing), and thus its impacts, by changing its stated purpose. However, we can ask an applicant to reconfigure their project, for example the number or placement of dwelling units, to further avoid and minimize wetland impacts if they will still realize economic gain from the project as reconfigured.

The alternatives analysis is a tool to identify the practicable alternative with the least environmental impact that also meets the project's overall purpose. The methods used to conduct an alternatives analysis must evaluate the practicability of each of the alternatives independently, rather than relative to the preferred alternative. The alternatives analysis must consider avoidance and minimization of impacts to aquatic resources during the evaluation of each alternative, unless sufficient justification is provided that an alternative is not practicable.

Section 404(b)(1) guidelines state that a practicable alternative may include "an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity" (40 CFR 230.10(a)(2)). In *Bersani v. EPA*, the Second Circuit Court of Appeals held that the practicable alternatives test relative to the availability of sites should be conducted at the time an applicant enters the market for a site, instead of at the time it applies for a permit. The courts often, but not always, support the position that if a property with less environmental impact was available at the time of purchase of the subject property, then a less environmentally damaging alternative

did exist. Note that this is often difficult to prove, especially for properties that have been owned for a long period of time but are just now being developed.

When taking cost into consideration for the alternatives analysis, the preamble of the Section 404(b)(1) guidelines states that "[t]he determination of what constitutes an unreasonable expense should generally consider whether the project cost is substantially greater than the costs normally associated with the particular type of project under consideration." The preamble further states that "if an alleged alternative is unreasonably expensive to the applicant, the alternative is not practicable." The most important point regarding cost considerations is that the Section 404(b)(1) guidelines are not meant to consider financial standing of an individual applicant, but rather the characteristics of the project and what constitutes a reasonable expense for these projects that are most relevant to practicability determinations. Note that we rely on the applicant to provide this economic information, but that we may need to involve independent review depending on the complexity of the information presented.

Based upon federal case law on this point (specifically, *Bersani v. EPA* and *National Wildlife Federation* v. *Whistler)*, a project's overall purpose should be established first, then a list of alternative sites meeting the project's purpose would be evaluated. Ideally, the preferred alternative should be selected that meets both the project purpose and has the least environmental impact. However, usually this sequential evaluation must occur in reverse, as the applicant may own a property for a period of time prior to establishing the purpose for a project on that property.

Many times, an entity already owns, leases, contracts to purchase, or otherwise has control over a particular parcel of land. To maximize an investment-backed expectation, the entity identifies a project that serves a community need (i.e., housing, retail, institutional, or other socioeconomic factor), then seeks to fulfill this need by proposing to develop the parcel. At this point, an alternatives analysis is conducted to determine that the preferred alternative (i.e., using this site for that particular community need) will meet the project purpose at the exclusion of other alternatives. Often, the argument for pre-selecting the preferred alternative is that the entity is already in possession of or controls the land, the land may already have the required land use zoning, or the entity is attempting to realize an investment-backed expectation. This situation is precisely what the courts addressed in *Bersani*: that the practical alternatives test should be conducted at the time the applicant entered the market for a site. However, the courts have also addressed the need to consider investment-backed expectations. In *Penn Central v. New York City*, the court established a multi-factor balancing test, where the economic impact and character of the government action is balanced against the extent to which the government action interferes with reasonable investment-backed expectations of the regulant. In *Claridge v. New Hampshire Wetlands Board*, the court held that "[a] person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights...." *Claridge* is further supported by *City of Virginia Beach v. Bell*, where the court denied a takings claim by the plaintiff who acquired a parcel two years after a municipal sand dune protection ordinance had been adopted. In this case, the court held that "[plaintiffs] cannot suffer a taking of rights never possessed."

Focusing on an investor's actual expectations makes good sense. If an investor knows about restrictions already in place when he purchases property, he cannot reasonably assert that the restrictions result in an unfair taking or that he is being asked to avoid impacts to an unreasonable extent. In essence, a property owner cannot complain of regulatory limits on the use of the property that the owner knew about at the time of purchase, or that the owner should have known about. Conversely, if regulations have changed in the time since the owner purchased the property, then he cannot have known at the time of purchase of the difficulties in developing the parcel due to new laws and regulations currently in place. Therefore, the applicant's investment-backed expectations get more consideration than another applicant, who purchased property with knowledge of regulatory constraints.

In summary, given regulatory requirements and the outcome of these various court cases, the VWPP project manager should ask the applicant to evaluate, and the project manager should consider, <u>all practicable alternatives</u> for a project that achieves the applicant's stated purpose. Moving the proposed project to another parcel that would result in less environmental impact while achieving the overall project purpose is an alternative that must be considered, if practicable. However, the VWPP project manager

must be mindful that using another parcel of land for a particular project is not practicable in every instance. The VWPP regulations and incorporated federal guidelines also require DEQ to take into account the applicant's investment backed expectations at the time of the purchase.

C. Avoidance & Minimization

Once the least environmentally damaging practicable alternative is identified, design and construction plans are reviewed for modifications that can further avoid or minimize environmental impacts. As each project has site-specific issues and constraints, it is impossible to establish a bright line to determine when enough avoidance and minimization has occurred. The following factors should be considered based upon data provided by the applicant: cost to develop the project on the chosen property versus cost to develop the project on another property; reasonable investment-backed economic expectations; logistics and feasibility; overall project purpose, and whether other alternatives would have less of an environmental impact.

The VWPP Regulations state the following (9 VAC 25-210-115A):

Avoidance and minimization opportunities shall be evaluated as follows: The applicant must demonstrate to the satisfaction of the board that practicable alternatives, including design alternatives, have been evaluated and that the proposed activity, in terms of impacts to water quality and fish and wildlife resources, is the least environmentally damaging practicable alternative. The applicant must also demonstrate to the satisfaction of the board that all steps have been taken in accordance with the Guideline for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230 (Federal Register, December 24, 1980) to first avoid and then minimize adverse impacts to surface waters to the maximum extent practicable. Measures, such as reducing the size, scope, configuration, or density of the proposed project, that would avoid or result in less adverse impact to surface waters shall be considered to the maximum extent practicable.

The Section 404(b)(1) guidelines allow the Corps to require "minor project modifications" to minimize wetland impacts. "Minor project modifications" are defined as those that are feasible (cost, constructability) to the applicant and that will generally meet the applicant's purpose. This includes reduction in scope and size, changes in construction methods or timing, operation and maintenance practices, and other changes reflecting a sensitivity to environmental impacts. The federal guidelines also address what constitutes an unreasonable expense when evaluating the practicability of project options. They are to consider whether the project cost would be substantially greater than the costs normally associated with a particular type of project (or the investment return substantially lower). If an alleged alternative is unreasonably expensive to the applicant, the alternative is not practicable. For a developer, the federal guidelines state that the primary test of whether a project is still viable is, after all the costs have been paid from project revenues, the remaining value of the project is sufficiently high to proceed. Again, we rely on the applicant to provide financial information on the economic viability of the project, as modified. In complex cases independent review of these economic figures may be warranted.

The VWPP project manager should consider a general list of questions when performing the avoidance and minimization review. The list of questions below is not intended to be all-inclusive, but is based on permit application review practices employed by various state and federal regulatory agencies.

1. On-Site Avoidance

- Spatial or dimensional changes to structure lay-out
  - Can another vertical level be added to a building to decrease the overall building footprint?
  - Can the building footprint be reduced and still achieve the project's purpose and need?
  - Can a building be repositioned on the parcel to reduce or eliminate environmental impacts?

- Can multiple structures be clustered to reduce or eliminate impacts?
- Can road or utility alignments be reconfigured?
- Can spans and bridges be used instead of culverts?

- Site engineering changes
  - Can 2:1 side slopes be used instead of gentler slopes?
  - Can retaining walls be used instead of slopes?
  - Can grading be minimized by incorporating natural topography?
  - Can more trees and vegetation be preserved?
  - Can lot layout be reconfigured?
  - Can state waters, including wetlands, be concentrated into subdivision "common areas"?
- Incorporate Low Impact Development (LID) Techniques
  - Can the amount of impervious surface be reduced to preserve as much natural cover as possible, especially for soils in hydrologic groups A and B?
  - Can stormwater management facilities be sited outside of streams and wetlands?
  - Can the use of pipes be minimized?
  - Can downspouts be directed to vegetated areas instead of impervious areas?
  - Have direct stormwater impacts to streams and wetlands been minimized to the maximum extent practicable?
  - Can impervious areas be disconnected from one another by retaining natural cover?
  - Can the travel time of water off site (time of concentration) be increased?
  - Can engineered swales for stormwater conveyance be used instead of or to reduce curb and gutter?

2. On-Site Minimization

- Can some of the above listed suggestions be used to further minimize impacts?
- Can directional drilling be used to install underground utilities across a State water instead of excavation and backfill?
- Can equipment fitted with low pressure tires or tracks be used?
- Can any permanent impacts (e.g. access roads) be converted to temporary impacts?
- Can construction staging or stockpiling of materials occur in areas outside of State waters?

In practice, application of the Section 404(b)(1) Guidelines is proportional to the significance of the environmental impact proposed by a permit application. For example, the detail of information required of an applicant with regard to such requirements will be much greater if the proposed environmental impacts are significant. A less detailed analysis would be required for permit proposals that have impacts which are minor in nature.

D. Compensation Requirements

Avoidance and minimization of impacts must be accomplished before considering compensatory mitigation for impacts to state waters, including wetlands. Note, however, that because of the permit process, the information needed to evaluate the entire mitigation hierarchy is submitted at the same time. As a practical matter, staff work with the applicant, both before and after an application is submitted, to avoid and minimize wetland impacts and to finalize the mitigation package.

The VWP regulation specifies how compensation proposals should be considered (excerpted from 9 VAC 25-120-115):

> *B. Compensatory mitigation proposals shall be evaluated as follows:*

1. On-site, in-kind compensatory mitigation, when available, shall be deemed the most ecologically preferable form of compensation for project impacts, in most cases. However, off-site or out-of-kind compensation opportunities that prove to be more ecologically preferable or practicable may be considered. When the applicant can demonstrate satisfactorily that an off-site or out-of-kind compensatory mitigation proposal is practicable and ecologically preferable, then such proposal may be deemed appropriate for compensation of project impacts.
2. Compensatory mitigation for unavoidable project impacts may be met through wetland or stream creation or restoration, the purchase or use of mitigation bank credits, or a contribution to an approved in-lieu fee fund. Compensation may incorporate preservation of wetlands or streams or preservation or restoration of upland buffers adjacent to state waters when utilized in conjunction with creation, restoration or mitigation bank credits as appropriate to ensure protection or enhancement of state waters or fish and wildlife resources and their habitat.
3. Generally, preference shall be given in the following sequence: restoration, creation, mitigation banking, in-lieu fee fund. However, the appropriate compensatory mitigation option for project impacts shall be evaluated on a case-by-case basis, in terms of replacement of wetland or stream acreage and function.
C. No net loss. Compensatory mitigation for project impacts shall be sufficient to achieve no net loss of existing wetland acreage and functions. Compensatory mitigation ratios appropriate for the type of aquatic resource impacted and the type of compensation provided shall be applied to permitted impacts to help meet this requirement. Credit may be given for preservation of upland buffers already protected under other ordinances to the extent that additional protection and water quality and fish and wildlife resource benefits are provided.
D. Alternatives analysis [note, this refers to compensation alternatives in this context]
1. An alternatives analysis shall be required to justify that the following alternatives are ecologically preferable and practicable compensatory mitigation options to on-site, in-kind compensation: off-site including purchase or use of mitigation bank credits, or contribution to an in-lieu fee fund; or out-of-kind.
2. An alternatives analysis shall include, but is not limited to, the following criteria, which shall be compared between the impacted and replacement sites: water quality benefits; acreage of impacts; distance from impacts; hydrologic source; hydrologic regime; watershed; functions and values; vegetation type; soils; constructability; timing; property acquisition; and cost. The alternatives analysis shall compare the ability of each compensatory mitigation option to replace lost acreage and function.

The federal wetland programs consider similar criteria in evaluating compensatory mitigation. In 1990, the Corps and the U.S. Environmental Protection Agency (EPA) issued a Memorandum of Agreement (MOA) formalizing the three-step sequencing requirements of first avoiding, then minimizing, and finally compensating for impacts to the aquatic community. The 1990 MOA outlines a preference for compensation to occur on-site, then off-site. In deciding whether the proposed compensation is acceptable relative to the existing functions and values of the aquatic community proposed to be impacted, the 1990 MOA outlines a preference for in-kind replacement of lost functions and values over out-of-kind replacement. In 1993, the Corps and EPA issued a Memorandum to the Field that provided additional guidance for reviewing projects under the Section 404(b)(1) guidelines. This memorandum states that it is inappropriate to consider compensation before avoidance, minimization, and alternatives analyses have occurred; meaning compensation cannot be used as a tool to "minimize" proposed impacts (as summarized in Dennison 1997). The guidance contained in these MOA's is included as part of the Section 404(b)(1) guidelines and has been incorporated by the State Water Control Board for implementation of the VWP permitting requirements.

III. SUMMARY

No bright line exists to determine when enough avoidance and minimization for a particular project has been completed. Many factors must be considered together on a project-specific basis to determine when this criteria has been met, including the following:

- Physical Constraints
  - Property boundaries
  - Adjacent land uses
  - Presence of underground or overhead utilities
  - Presence of easements
  - Site topography
  - Site geology
- Other Conflicting Requirements
  - Local government ordinances (e.g. set-back requirements and building codes)
  - Other state and federal environmental regulations
  - Other on-site environmentally sensitive features
- Design and Construction Considerations
  - Effects on public health, public welfare, and public safety
  - Available technology
  - Construction or industry standards
  - Available equipment

It is the VWPP project manager's responsibility to review the proposed project in light of the applicant's stated purpose. This review should include consideration of all practicable alternatives, including other parcels, for avoidance and minimization based upon the site-specific details of the project. It is not the VWPP project manager's responsibility to substitute some other project purpose or to maximize the applicant's return on his investment. Each project's purpose, alternatives, avoidance and minimization evaluation, and, subsequently, appropriate compensation should be reviewed in light of the proposed impacts (direct, indirect, and cumulative) to the aquatic community.

APPENDIX A – SUMMARY OF RELEVANT CASES

In ***Louisiana Wildlife Federation v. York*** (761 F.2d 1044, 5th Cir. Ct., 1985), the Fifth Circuit Court of Appeals affirmed the issuance of several Section 404 permits for conversion of 5,000 acres of wetlands to agricultural uses (soybean farming). The U.S. Army Corps of Engineers (the Corps), in reviewing the project, determined that the proposed activity was non-water dependent, and, therefore, a practicable alternative not involving wetland impacts existed. After analysis of alternatives, the Corps determined that "based on considerations of costs, reasonable availability, and the nature of the proposal itself, there are no practicable alternatives that will allow the applicant to achieve the basic purpose of the proposed project" (as quoted in Steinberg, 1989). The court disagreed with the plaintiff's contention that alternatives to the proposed project should not be reviewed in light of the project's purpose and need. On this issue, the appellate court held that "not only is it permissible for the Corps to consider the applicant's objective; the Corps has a duty to take into account the objectives of the applicant's project. Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable."

In ***Friends of the Earth v. Hintz*** (800 F.2d 822, 9th Cir. Ct., 1986), the Ninth Circuit Court of Appeals affirmed that the Corps had correctly determined that the siting of a saw mill and log export facility adjacent to a harbor was a water dependent activity, and, therefore, access to a special aquatic site was necessary. Further, the court held that the Corps did not err in its evaluation (and subsequent dismissal) of four alternatives based upon cost, existing technology, and logistics in light of the applicant's purpose and need. Prior to receiving a permit from the Corps, the landowner began filling a 17-acre tract — containing intertidal mudflats — for log export storage and sorting. The landowner had previously received a shoreline conditional use permit from the state, and an estuary management plan designated the log sorting yard as being outside of jurisdictional wetlands. The landowner neither applied for nor obtained a Corps permit. The Corps was subsequently notified of the fill activity, determined that the fill was a regulated activity, and began negotiating with the landowner for an "after-the-fact" permit that included compensatory mitigation. Further, the Corps determined that the log sorting was a water-dependent use and that no feasible alternatives existed.

In ***Bersani v. EPA*** (850 F.2d 36, 2nd Cir. Ct., 1988), the Second Circuit Court of Appeals held that the U.S. Environmental Protection Agency's (EPA's) "market entry theory" — which looked at the availability of alternative sites at the time the developer entered the market — was applicable and consistent with both regulatory language and past practice. *Bersani* involved the attempt by Pyramid Companies to construct a shopping mall on an 82-acre site in South Attleboro, Massachusetts. The site contained approximately 50 acres of wetlands (known as Sweedens Swamp), and the site development plan proposed filling just over 32 acres of wetlands, enhancing 13 acres of wetlands for wildlife, and preserving 4 acres of wetlands. Further, the plan proposed an additional 36 acres of off-site wetland creation to offset project impacts. EPA vetoed the approval by the Corps because EPA found that an alternative site had been available to Pyramid at the time it entered the market to search for a site. The trial court agreed with EPA, and held that Pyramid failed to consider available alternatives at the time it entered into the market to build a shopping mall. The appeals court affirmed the trial court's decision.

In ***City of Virginia Beach v. Bell*** (255 Va. 395; 498 S.E. 2d 414, 1998; *cert. denied*, 119 S. Ct. 73), the Supreme Court of Virginia reversed the lower court's decision, and held that a compensable regulatory takings — under either the U.S. Constitution (5th and 14th amendments) or the Virginia Constitution (Article 1, Section 11) — did not occur when the local government denied a permit for beachfront development under the City's Coastal Primary Sand Dune Zoning Ordinance. The Coastal Primary Sand Dune Zoning Ordinance was modeled after a state law designed to "preserve and protect coastal primary sand dunes and beaches and to prevent their despoliation and destruction and whenever practical to accommodate necessary economic development in a manner consistent with the protection of such features." The landowner appealed the permit denial to the Virginia Marine Resources Commission (VMRC), which also denied the permit application, then appealed the VMRC decision to state Supreme Court. The Supreme Court of Virginia held that the ordinance at issue in this case "predated the

landowner's acquisition of the property. Therefore, the 'bundle of rights' under which [the landowner] acquired upon obtaining title to the property did not include the right to develop the [property] without restrictions. Thus, because the regulatory restriction was in [the landowner's] chain of title, the City did not deprive [the landowner] of the right to develop the property freely since that right was never [the landowner's] to lose."

In ***Claridge v. New Hampshire Wetlands Board*** (125 N.H. 745; 485 A.2d 287, 1984), the Supreme Court of New Hampshire affirmed the lower court's decision, and held that a compensable regulatory takings — under either the U.S. Constitution (5th and 14th amendments) or the New Hampshire Constitution (Article 12, Part 1) — did not occur when the local government denied a permit for filling wetlands for the purpose of installing a septic tank and leachfield. The septic tank and leachfield installation was needed to construct a single family dwelling on the property, and local ordinances required compliance with a state regulation that septic tank/leachfields adhere to a minimum 75-foot set-back from surface waters. Most of the property in question bordered a tidal creek, and was composed of saltmarsh vegetation and woods. The landowner appealed the permit denial to the lower court, which appointed a Special Master to review the case. During discovery, it was revealed that the landowner had received a letter from the locality, prior to purchasing the property in question, advising that any proposed fill in wetlands would require the locality's approval. Subsequently, the Special Master recommended that denial of the permit "was a valid exercise of police powers and did not require compensation." The Supreme Court of New Hampshire held that "[a] person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights." The state Supreme Court further held that "[t]he State cannot be guarantor, via inverse condemnation proceedings, of the investment risks which people choose to take in the face of statutory or regulatory impediments."

In ***National Wildlife Federation v. Whistler*** (27 F.3d 1341, 8th Cir. Ct., 1994), a land development company sought permission from the Corps to provide access to the Missouri River from their planned housing development. River access included re-opening an old river channel, which had converted over time from deep water habitat to wetlands. The project proposed to remove an earthen roadway, dredge and widen the old river channel, widen the connection between the old channel and the Missouri River, and replace 200 feet of river bank along the Missouri River. The dredging activity would convert 14.5 acres of wetland back to deep water habitat. In reviewing the permit application, the Corps determined that the planned community was located on uplands, and construction of the housing development could proceed without a permit. Given this fact, the Corps further determined that the project's purpose was to provide boat access from housing lots to the Missouri River, and, was, therefore, a water-dependent activity. Based upon these findings, the Corps issued a Section 10 (Rivers and Harbors Act, *33 USC § 403*) permit with 42 conditions, including the requirement to enhance an existing 20-acre wetland area by providing it with year-round water and saturated soil conditions. An adjacent landowner, who was also a member of the National Wildlife Federation, argued that the Corps failed to perform an alternatives analysis by not considering a nearby public boat ramp as water access for the planned development, and that the Corps permit decision was arbitrary and capricious. The lower court dismissed the plaintiff's argument, citing *Louisiana Wildlife Federation, Inc. v. York*'s reasoning (see above) for determining a project's purpose and need, and the Eighth Circuit Court of Appeals affirmed the lower court's decision.

In ***Penn Central Transportation Co. v. New York City*** (438 U.S. 104; 98 S. Ct. 2646, 1978), New York City's Landmarks Preservation Commission rejected a plan to construct a multistory office building over Grand Central Terminal, citing the locality's Landmarks Preservation Law. Under the Landmarks Law, Grand Central Terminal, which is owned by the Penn Central Transportation Co., was designated a "landmark" and the block it occupies a "landmark site." Penn Central, though opposing the "landmark" designation before the Commission, did not seek judicial review of the final designation decision. However, once plans to construct the office building were rejected, Penn Central brought suit in state court claiming that the application of the Landmarks Law had "taken" their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment.

The trial court's decision was reversed on appeal, with the New York Court of Appeals ultimately concluding that there was no "taking" since the Landmarks Law had not transferred control of the property to the city, but only restricted appellants' exploitation of it. Further, the appellate court held that there was no denial of due process because (1) the same use of the terminal was permitted as before; (2) the appellants had not shown that they could not earn a reasonable return on their investment in the terminal itself; (3) even if the terminal could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area must realistically be imputed to the terminal; and (4) the development rights above the terminal, which were made transferable to numerous sites in the vicinity, provided significant compensation for loss of other rights above the terminal itself. On a writ of certiorari to the U.S. Supreme Court, that Court characterized its past takings decisions as "essentially ad hoc, factual inquiries." The Court created a balancing test for determining when a regulation constituted a taking. The factors were: (1) "[t]he economic impact of the regulation on the claimant," (2) "particularly, the extent to which the regulation has interfered with distinct, investment-back expectations," and (3) "the character of the governmental action."

APPENDIX B - REFERENCES USED

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