

Town of Washington
10 Reservoir Drive
P.O. Box 667
Millbrook, NY 12545

How much will it cost to protect our Wetlands?

Dear Town of Washington Board;

I want to give additional information regarding the proposed Wetland Ordinance that is before the board for further review and public comment. I have included a few articles regarding private property rights/values/assessments and wetland protection that I gathered. These articles appear at the end of this letter and have links included in the electronic version which I will forward by email.

As a Town of Washington resident and property owner, father, husband and human I am deeply concerned about the state of our environment. Future generations not only rely on us to leave the world a better place when we are gone, but we must ACTIVELY pursue remediation of past crimes against nature that poison our environment. From GE cleaning toxic PCB's from the Hudson River to sealing and capping landfills across the county and state to promoting local farms and produce, we are helping reduce pollution and climate change. I am also an ardent believer in watercourse and aquifer protection. Clean drinking water may become the major health issue for the next generation. Reasonable and logical people in our town would probably agree with me so far.

The major concerns I have with passing a Wetland Ordinance in our town include, but are not necessarily limited to:

- Cost to property owners, both in loss of value and increases in fees for improvements.

- Additional regulations beyond those already in place that are NOT being enforced.

- Tax implications for the town for "Wetlands Administrator".

- Tax implications for assessments.

- Private Property Rights and possible lawsuits.

In closing I would like to strongly urge you to vote AGAINST passage of the proposed ordinance, consider utilizing existing fees to better enforce current regulations, or keep the public comment period open until some of the issues I have mentioned can be addressed.

Thank you.
Respectfully,

Thomas S. Barger, Jr.
6 Rodrigo Court
Millbrook, NY 12545

Wetlands - Concern Over Property Rights

The dispute over wetlands regulation reflects the nation's ambivalence when private property and public rights intersect, especially since three-fourths of the nation's wetlands are owned by private citizens. In recent years, many landowners have complained that wetland regulation devalued their property by blocking its development. They have argued that efforts to preserve the wetlands have gone too far, citing instances where a small wetland precludes the use of large tracts of land. Many people believe that this constitutes taking without just compensation.

The "takings" clause of the Constitution provides that when private property is taken for public use, just compensation must be paid to the owner. Wetland owners claim that when the government, through its laws, eliminates some uses for their land, the value is decreased, and they believe that they should be paid for the loss.

While some people believe that wetland protection should take priority over property concerns, a significant portion of the public is troubled over what it sees as growing government infringement on the rights of property owners. They believe that just as landowners must be compensated for property seized by eminent domain (the authority of the government to take private property for public use, with compensation to the owner), so should the losses (devaluation of wetland acreage) be compensated, even though no physical taking of property occurs.

State Must Reimburse an Owner for Loss

In the 1970s and 1980s, state courts and the lower federal courts frequently handed down contradictory rulings on the issue of compensation for wetland-related takings. In 1992 the U.S. Supreme Court, in *Lucas v. South Carolina Coastal Council* (60 LW 4842), resolved the issue of compensation when land taken for an accepted public good loses significant value.

David Lucas, a homebuilder, bought two residential lots on a South Carolina barrier island in 1986. He planned to build and sell two single-family houses similar to those on nearby lots. At the time he purchased the land, state law allowed house construction on the lots. In 1988 South Carolina passed the Beachfront Management Act to protect the state's beaches from erosion. Lucas's land fell within the area considered in danger of erosion; as a result, Lucas could no longer build the houses.

Lucas went to court, claiming that the Beachfront Management Act had taken his property without just compensation because it no longer had any value if he could not build there. Lucas did not question the right of the State of South

Carolina to take his property for the common good. Rather, he claimed the state had to compensate him for the financial loss that resulted from the devaluing of the property.

On June 29, 1992, the U.S. Supreme Court, in a seven-to-two decision, agreed:

There are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.... When...a regulation...declares "off-limits" all economically productive or beneficial use of land ... compensation must be paid.

The Supreme Court said that a state could stop a landowner from building on his property only if he was using it for a "harmful or noxious" purpose—for example, building a brickyard or a brewery in a residential area. This was not the case. Lucas had planned to build homes, a legitimate purpose that was neither harmful nor noxious. Although it was possible to define the planned buildings as harmful to South Carolina's ecological resources, this would not be consistent with earlier Court interpretations of "harmful." Only by showing that Lucas had intended to do something "harmful or noxious" with the land could the state take his land without compensation. This they did not do, and, therefore, they owed him the money.

<http://www.libraryindex.com/pages/2630/Wetlands-CONCERN-OVER-PROPERTY-RIGHTS.html#ixzz118n1aK99>

Property Rights, Regulatory Takings, and Environmental Protection

By [Jonathan H. Adler](#)
March 31, 1996

Executive Summary

Under current environmental laws individual Americans have been prevented from building homes, plowing fields, filling ditches, felling trees, clearing brush, and repairing fences, all on private land. Many believe that such regulations infringe upon private property rights and violate the Fifth Amendment to the U.S. Constitution "...nor shall private property be taken for public use without just compensation." When the federal government condemns a piece of private land to create a publicly-desired resource, such as a military base, road, or wildlife preserve, it pays the landowner for the value of the property. However when the government regulates the use of the same private land to achieve the same purpose, it rarely pays a dime. In this manner, private land is taken for public use -- through a "regulatory taking" -- without just compensation.

The Supreme Court held in *Armstrong v. United States* that the Constitutional prohibition on uncompensated takings "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Private individuals should not be forced to bear the costs of providing public goods desired by other people. Owning property should entitle the owner to the full use of that property, so long as the use of that property does not lead to the harming of other people or their properties. Ensuring compensation for regulatory takings will not only restore much-needed property protections, it also serves as the first step toward the development of a new generation of environmental protection.

Federal environmental laws are not the sole source of so-called regulatory takings by the federal government. However they are the most prominent. For two decades, federal land-use control has been the dominant means of achieving many environmental objectives. Two federal laws, in particular, have been the focus of the debate over compensation for regulatory takings: the Endangered Species Act (ESA) and Section 404 of the Clean Water Act (CWA), the source of regulations limiting the development of wetlands.

Numerous legislative proposals have been introduced in response to the growing demand for a greater protection of private property. Twenty-three states have enacted property rights legislation of some kind. The two primary property rights proposals under consideration in Congress are S. 605 and H. R. 925, both of which would require the payment of compensation to landowners for regulatory takings.

Groups opposing compensation for regulatory takings suggest that requiring compensation for regulatory takings would impose an extreme financial burden upon the federal government. Such claims are overstated. Under most proposals, compensation is paid directly out of those funds appropriated to the agency responsible for the taking, and therefore would have no impact on the deficit. Requiring federal agencies to pay compensation for regulatory takings would also make agencies more aware of the financial risks of over-relying on land-use regulation to achieve statutory goals.

There is a fundamental distinction between government actions that incidentally affect land values -- positively or negatively -- and those that affect property values because they are directed at particular properties. Property values are not the fundamental issue in the property rights debate. Compensation should be paid when the federal government acts so as to deprive a property owner of a right to use and enjoy that property. Yet property rights, properly understood, do not include the right to injure or harm the person or property of another. This means that when the government limits or prohibits the use of property in a manner that is likely to harm another person or property -- what would be considered a nuisance under common law -- no compensation is called for. However, should the government limit the use of property for some other purpose, such as the provision of wildlife habitat or some other "public good," compensation should be paid.

Because the government does not pay for the costs of regulatory takings, it overuses coercive land-use regulations to achieve environmental goals, even when other approaches are available. Reviews of incentive-based wetland conservation programs have concluded that such programs are far more cost-effective than land-use regulation. Forcing agencies to pay for the private property rights that they take through regulatory action will encourage them to examine non-regulatory approaches to achieving their statutory goals. Being forced to bear the costs of regulation can markedly change agency behavior.

It must also be recognized that efforts to regulate land use -- to "take" private property without compensation -- are often bad for both landowners and the environmental values that the government regulation is designed to protect. By making the ownership of wetlands or endangered species habitat a liability, federal land-use regulation actually discourages stewardship by private parties.

Private property should be viewed as the cornerstone of environmental protection. Whether the owner is seeking a profit on the property or not, self-interest still provides a powerful incentive to preserve, if not enhance, the value of the resource. Not all property owners will follow the incentives, but, in the aggregate, most property owners will. The institution of private property promotes stewardship and conservation. In fact, the private sector provides a wide array of environmental amenities, typically in a more effective and responsive manner than the federal government. Moreover, if private property rights are respected by the federal government, then those lands protected privately are not dependent upon the vicissitudes of politics for their preservation.

Property rights are important for both economic and environmental reasons, and must be protected from both government regulation and private malfeasance. Compensating landowners when they are deprived of the reasonable use of their land will not produce environmental catastrophe. Far from it. In many cases it will eliminate the negative environmental incentives created by the heavy hand of existing government regulations. Properly understood, property rights do not undermine sound environmental conservation, they lie at its foundation.

Property Rights Movement

The property rights movement has had a significant impact on the nation's environmental policies since 1980. The groups identified with the movement commonly oppose federal regulation or intrusion on land that is privately held, especially in cases where federal involvement is in the form of environmental laws that limit the owner's full or partial use of the land. The movement began with the Sagebrush Rebellion of the mid-1970s, when legislators from states in western United States sought the transfer of federal public lands to state control.

Researchers have identified numerous groups and organizations that fall under the general classification of the environmental opposition, one of which is the property rights movement. These groups commonly oppose federal regulation or intrusion related to land that is privately held, especially environmental laws that limit the owner's full or partial use of the land. This segment of activists is distinct from the wise use movement, which grew out of the Sagebrush Rebellion of the mid-1970s. Wise use advocates support an antigovernment regulatory agenda related to the use of public land and resources, where the property rights movement is based on the use of privately held land.

The property rights movement first surfaced in the early 1990s with local grassroots organizations made up of individuals seeking to develop their own property, usually by building a home, clearing out trees or brush, or draining a **wetland**. Many of the landowners had been unaware of federal regulations and permits that could thwart their efforts, such as provisions of the Clean Water Act or the Endangered Species Act. After being prohibited from developing their properties by the federal government, they often joined other frustrated property owners, usually in their area or neighborhood, who were similarly prohibited from doing what they wanted with their land. The "members" of the movement rarely joined a specific, formal organization; more commonly, they shared grievances against the government based on their individual disputes. They would, however, rely upon an organization for legal advice and updates on land regulations that would affect them.

The property rights movement has been most active in regions in the eastern and southern United States, where title to land is often in a family's name for many generations. Historically, there has been an assumption that the right to control the land belongs to the **titleholder**, regardless of changes in the law or public policy. Many activists are farmers, ranchers, or rural or beachfront property owners who are unaware of the ecological value of their land until they decide to develop it. This has led to a national debate over competing land-related interests—the rights of the property owner to use the land versus the government's interest in controlling pollution, protecting wildlife and their habitat, and managing ecosystems or even other landowner's property.

Property rights stem from English common law and the **Magna Carta**, although there has been an evolution in legal interpretation of those rights since the 1920s. Most of the recent litigation has dealt with the concept of federalism, and more specifically, the Fifth Amendment to the U.S. Constitution. One of the clauses in the amendment refers to "takings"—a requirement that the government cannot take privately owned land for public use without compensating the owner for the value of the land. University of Chicago law professor Richard Epstein created an intellectual basis for the property rights movement in 1985 in *Takings: Private Property and the Power of Eminent Domain*. This book placed the takings clause in the context of wilderness designations, endangered species, and wetlands protection.

The takings issue has often resulted in a private property owner seeking compensation from the government by filing a suit before the U.S. Court of Federal Claims or the U.S. Supreme Court. Since 1987, the courts have frequently ruled that federal regulations like the Clean Water Act that deny the owner the economically viable use of the land must pay the owner for the loss of the use of the land. The government further expanded the rights of property owners with an executive order by President Ronald Reagan and with regulations that called for government agencies to evaluate the risk of unanticipated takings. The 1988 policy calls for the federal government to budget funds for a **takings impact analysis** that property owners feel protects their constitutional rights, although

the law continues to evolve over these issues as movement activists continue to press for what they believe are their constitutional right to compensation.

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This is the html version of the file <http://landuse.law.pace.edu/landuse/documents/PublishedArticle/TakingsPropRightsLegis.doc>.
Google automatically generates html versions of documents as we crawl the web.

Federal

Published Article

Land Acquisition

EPA Region- All

Federal

Takings and Property Rights Legislation

Summary

Professor John R. Nolon of Pace University School of Law discusses the trends in legislation designed to protect **property rights** of the individual. Nolan focuses specifically on the legislation used to protect the land owner from takings (regulatory takings).

Published Article

TAKINGS AND **PROPERTY RIGHTS** LEGISLATION¹

John R. Nolon

I. Introduction

Many of the seminal regulatory takings cases prove the cliché that "bad facts make bad law." In Lucas v. South Carolina Coastal Council, the regulatory scheme examined by the U.S. Supreme Court failed to provide owners denied all economic use of their land the simple and routine mechanism of applying for a hardship exemption. In Dolan v. City of Tigard, another U.S. Supreme Court decision, the city could offer no reason at all to justify its requirement that Mrs. Dolan convey her interest in the environmentally constrained land to the municipality.

A principal New York case, Seawall Associates v. City of New York, involved a coercive and costly scheme that the city's own consultant study demonstrated would not accomplish the legitimate public objective it was designed to achieve. Finally, in Nollan v. California Coastal Commission, Justice Scalia encountered a regulatory requirement that he found "utterly fails to further the end advanced as the justification for the prohibition."

Over the years, regulatory takings case law has supported land use regulations by cloaking them with a presumption of validity and placing a heavy burden on their challengers of proving either that the regulation fails to substantially advance a legitimate public purpose or that it deprives the owner of all economically beneficial use of the land. Insulated in this way, regulators, on occasion, have transgressed the boundaries of fundamental fairness.

The recent trend on the part of **state** legislators and the national congress to consider adopting statutes to protect **property rights** is, in significant part, a reaction to the minority of land use regulations that cause extreme hardship on the part of individual owners.

Some of the provisions of these statutes are beneficial and progressive. They require greater attention to the benefits to be achieved by a proposed regulation and provide for some balancing of those benefits to the public against the costs to regulated parties; they urge regulators to involve affected parties in the drafting of regulations and to seek market-based solutions that achieve the same benefits.

Some of the provisions of these statutes, however, have a retributive effect, and eye-for-an-eye quality; they would impose on regulators the burdens that the harshest regulations have imposed on **property** owners: excessive cost, undue complexity and extensive process.

As we examine pending **property rights** proposals, and the few statutes that have been adopted at the **state** level, we should take seriously those progressive features that seek to promote fairness. We also should recognize and reject those retributive provisions which diverge as far from fundamental fairness as do the excessive regulations of which **property rights** advocates complain.

II. **Property Rights Protection Statutes:**

Bills to protect **property rights** fall into four general categories.

1. First, there are **compensation statutes**, which require the government to compensate landowners whose **property** values have been diminished by a regulation beyond an established percentage of value, such as 25% or 50%.

2. Second, there are **assessment statutes**. The most popular type of assessment bill, at the **state** level, requires government agencies to review the potential of their regulations to effect a taking of private **property**. Another type requires agencies to conduct cost-benefit assessments, or risk assessments, which may require elaborate and comparative analyses of the costs and benefits of proposed regulations. Their purported aim is to insure that the most cost-effective alternatives are selected or that regulations not be adopted when their benefits do not sufficiently outweigh their costs. Proposals pending in both houses of the federal congress take this latter approach.

3. Third, there are **review statutes** which require the attorney general, or other official, to conduct a review of the potential of proposed regulations to effect a taking of private **property** with varying consequences.

4. Finally, there are **hybrid laws** that include two or more of these types of provisions.

In very general terms, these statutes tend to have several effects, most often described as benefits by their proponents. Of the following effects, the first four can have a retributive quality. The other effects represent generally the progressive features of the proposals. Such statutes tend to:

1. Require **state** regulators to be more cautious;
2. Slow down the regulatory process;
3. Make the regulatory process more elaborate and complex;
4. Cause the offending agency to pay for any diminution in **property** value caused by the regulation if that diminution exceeds an established percentage of fair market value;
5. Require regulators to articulate clearly the specific benefits to be achieved;
6. Require regulators to consider and balance these benefits against the economic costs to regulated parties and society as a whole; and
7. Encourage regulators to search for market-based alternatives and establish means of involving regulated parties to review regulations before they are adopted.

State Action:

By the end of 1995, nearly all **state** legislatures were considering, or had passed or rejected, at least one of these types of statutes. In the following 18 states, some such legislation has been enacted: Arizona, Florida, Idaho, Indiana, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, North Dakota, Texas, Tennessee, Utah, Virginia, Washington, West Virginia and Wyoming.

This trend in the states began in 1991 with the enactment of a Washington bill that required the Attorney General to review regulations to determine whether they have potential for affecting a regulatory taking. Since then, Delaware, Indiana and Tennessee have adopted bills of this type. A bill of this type is pending before the New York **State** Assembly (A.5820) and is discussed below. A. 5820 is an example of a hybrid statute since it provides for compensation as well as review.

In 1992, Utah adopted a statute that requires **state** agencies to conduct assessments of their regulations' potential to affect takings. Since then, Arizona, Idaho, Kansas, Missouri, North Dakota, Virginia, West Virginia and Wyoming have adopted statutes of this general type. These statutes may exempt certain emergency or public health **protection** regulations from their coverage. A bill pending in the New York Senate (S.5099), discussed below, would require an elaborate risk benefit assessment of any "major rule" proposed by three particular departments of **state** government.

In 1994, Mississippi enacted the first **state** statute requiring compensation to **property** owners whose **property** values are diminished by **state** regulation. Since then, Florida, Louisiana and Texas have adopted such statutes. The Florida and Texas statutes are discussed below.

In November of 1995, by a 60-40% margin, voters in Washington **State** rejected what would have become the nation's most sweeping **property rights protection** measure. The rejected Washington initiative would have required compensation to **property** owners for any diminution of value caused by public benefit regulations unless the regulated activity is a public nuisance; it would also have required agencies to conduct extensive takings impact assessments of land use regulations. This follows a 1994 vote by Arizona voters to reject, by the same margin, a less sweeping **property rights protection** measure.

Federal Proposals:

Nearly two dozen bills are being considered at the federal level which contain features of these **state** statutes. Several of these are discussed below. They include S. 605 (Omnibus **Property Rights** Act of 1995); S 343 (Comprehensive Regulatory Reform Act of 1995); HR 9 which includes separate titles on risk assessment, regulatory reform and private **property rights protection**; HR 961 and S. 851 (Clean Water Act amendments); and HR 2275, S 1364, and S 768 (Endangered Species Act reauthorization).

III. Bills Pending Before the New York Legislature

A. A. 5820: The Real **Property Regulatory Impacts Act. A Takings Statute.**

A. 5820 would add a new Article 12-d §447 to the Real **Property** Law of New York. It would authorize **property** owners to file suit against the **state** if a statute, regulation or rule causes a diminution of **property** value of 50% or more. (§447-d). Suit is authorized, as well, if the diminution is caused by the denial of any permit, license or authorization of any kind by the **state**. A. 5820 was introduced by 11 members of the assembly and is currently before the Committee on Judiciary.

The bill provides that a **property** owner who suffers 50% or greater diminution of value may recover either the amount of diminution and retain title or recover the fair market value of the parcel and transfer title to the **state**. If the offending rule or regulation is rescinded, or the withheld permit granted, prior to final judgment, the owner may recover any economic loss sustained by reason of the acts giving rise to the diminution in value.

The "taking of private **property**" is defined as an activity wherein private **property** is taken such that compensation to the owner is required by the fifth and fourteenth amendments to the U.S. Constitution or by § 447-d of the statute.

The bill would prohibit **state** agencies from issuing any rule or regulation until the Attorney General has reviewed it and has informed the agency as to the potential of such rule or regulation to result in a taking. Where such a review has occurred, the bill creates a cause of action to invalidate any statute, rule or regulation because it does not substantially advance its stated governmental purpose.

B. S. 5099 - New York **State Regulatory Reform Act of 1995. A Risk/Benefit Assessment Bill**

The proposal was introduced by seven Senators including Senator Bruno and referred to the Committee on Commerce, Economic Development and Small Business. It amends the **State** Administrative Procedures Act to insure the issuance of cost-effective regulations grounded in scientifically sound, objective and unbiased data, analysis and assessment. It applies only to major rules adopted by three **state** departments: Environmental Conservation, Health and Labor.

The Act contains three sections. They require a risk benefit analysis, a risk assessment and a system for peer review:

I. Risk Benefit Analysis: §202-e

Prior to adopting a "major rule" these agencies must publish a notification of the rule and issue a draft cost-benefit analysis. A major rule is one with a gross annual effect on the state's economy of \$5 million or more (direct and indirect costs), or one that will have a substantial impact on a sector of the economy, substantially increase consumer prices, have a significant adverse effect on competition or productivity. Whether a rule is major or not is determined by the proposing agency or by the "governor or his designee."

The DCBA (Draft Cost-Benefit Analysis) must contain:

1. a detailed analysis of the benefits of the proposed rule, 2. an analysis of its costs, an identification of reasonable alternatives to the rule,
3. an assessment of the feasibility of establishing a regulatory program that operates through the application of market-based mechanisms,

4. how the agency has verified the accuracy of scientific evaluations used in the DCBA,

5. the aggregate effect on small businesses,

6. an analysis of whether the proposed benefits exceed the proposed costs, and

7. an analysis of whether the proposed rule will provide greater net benefits "to society" than any of the alternatives.

A FCBA (Final Cost-Benefit Analysis) must accompany the publication of a major rule by an affected agency. The FCBA must include:

1. a description an comparison of benefits and costs,

2. an analysis of whether net benefits accrue,

3. an analysis of incremental risk reduction vs. incremental costs, and

4. an analysis of alternatives.

A Certification must accompany the publication of a major rule. The Certificate must include:

1. certification that the FCBA is based on unbiased data,

2. that the rule is likely to justify the costs, and

3. that there is no satisfactory alternative.

II. Risk Assessment Required: §202-f.

The act provides for a separate risk assessment of all proposed major rules including:

1. a description of the risks addressed,

2. a comparison of these risks to other risks,

3. a statement of risks posed by implementing the rule,

4. an assessment of the costs and benefits associated with the rule,

5. a certification that the risk assessment is objective,

6. a certification that the rule will substantially advance the protection of the environment or human health,

7. a certification that the rule will produce benefits that justify the costs, and
8. a certification that there is no equivalent and more cost-effective alternative.

III. Peer Review: §202-g.

The Act requires that each agency establish a system of peer review of any cost benefit analysis or risk assessment attending the promulgation of any major rule. This system shall include broadly representative peer review panels of independent experts which shall not exclude reviewers "merely because they represent entities with a potential interest in the outcome, provide that is disclosed." The governor may order peer review of any other major risk assessment or cost assessment that is likely to have a significant regulatory impact on public policy decisions.

Each peer review shall produce a report to the agency that must include:

1. an evaluation of the data used and merits of the methods used for the assessment and analysis,
2. a list of considerations not taken into account, and
3. a discussion of the methodology used.

The head of the agency shall respond in writing to all significant peer review comments. Both the peer review report and agency comments shall be made available publicly.

Governor's Veto: The governor may order the agency not to adopt a rule if he finds that the cost-benefit analysis or risk assessment is inadequate based on peer review.

Relevant language: Section 202-g (Cost-benefit analysis) requires a description and comparison of the benefits and costs of the rule. §202-g(e)(i)(A) states:

The description of the benefits and cost of a proposed and adopted rule...shall include, to the extent feasible, a quantification or numerical estimate of the quantifiable benefits and costs. Such quantification or numerical estimate shall be made in the most appropriate unit of measurement, using comparable assumptions, including time periods, and shall specify the ranges of predictions and shall explain the margins of error involved in the quantification methods and in the estimates used. An agency shall describe the nature and extent of the nonquantifiable benefits and costs of an adopted rule pursuant to this section in as precise and succinct a manner as possible.

C. Other Bills Pending in New York:

S.B. 5077 requires a private property rights protection analysis be completed when rules or regulations involve a taking of property or when license or permit requirements condition the use of property. Senator Johnson. Referred to Senate Committee on Commerce, Economic Development and Small Business.

A. 4502 provides for definition of regulatory takings and requires governmental compensation for property rights infringement. It establishes inverse condemnation procedures, provides for regulatory rollback procedures, legal challenges and tax adjustments. The proposal was introduced by Assemblyman Straniere and referred to the Committee on Judiciary.

III. Florida Legislation:

A. Compensation Provisions:

In 1995, the Florida legislature adopted the Private Property Rights Protection Act which creates a new cause of action if any agency (state, regional or local) "inordinately burdens" the use of real property. The owner is permitted to sue in state court for the actual loss in fair market value based on its existing use as well as reasonably foreseeable and suitable land uses compatible with adjacent land uses and which have created an existing fair market value. The act became effective on October 1, 1995.

The term "inordinately burden" is defined to mean a restriction on the use of property that renders the owner permanently unable to realize a reasonable investment-backed return. The statute makes it clear that this standard is not the standard used by the courts in takings cases; rather it 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."

180 Day Notice Period: 180 days prior to bringing this new cause of action, the property owner must present his claim to the head of the affected agency accompanied by an appraisal demonstrating the alleged loss. During this period, the agency

must make a written settlement offer.

The statute contains an interesting list of inducements the agency may offer the owner including the adjustment of applicable standards, increases in density, transfer of development rights, land swaps, relocation of proposed development on the site, offer of a variance, or purchase of an interest in the land. The agency is authorized to implement the settlement offer by appropriate development agreement. Where the agreement contravenes other statutes applying to the property, the agency and owner are authorized to file an action for judicial approval of the settlement agreement to ensure that the public interest is protected and the relief appropriate to eliminate the inordinate burden.

B. Dispute Resolution Provisions:

The Property Rights Protection Act also provides a system for dispute resolution, based on non-binding mediation. It gives an owner who believes that a government action unfairly burdens his real property the right to request relief. Such a request, which follows exhaustion of applicable administrative remedies, is made to the head of the governmental agency involved and referred to a special master, mutually selected by the agency and the property owner.

The master must hold an informal hearing and attempt a resolution of the conflict. If the conflict cannot be resolved, the master must determine whether the government action is unreasonable or unduly burdens the owner's property, in which event the master may recommend alternative courses of action. These actions may be rejected by the parties. If rejected by the agency, a written decision must be issued which describes the specific uses to which the property may be put. After this decision is issued, the owner may appeal to the courts for relief.

Where the mediation results in a determination by the special master that the agency action is unreasonable or unfairly burdens the property, that determination may serve as an indication of sufficient hardship to support modifications, exceptions and variances in the application of statutes or regulations applicable to the property.

This dispute resolution option is not a prerequisite to filing a civil action contesting the governmental action. However, invoking this option tolls the statute of limitations applicable to such civil action.

IV. Texas Legislation:

The Private Real Property Rights Preservation Act adopted in Texas takes a very different approach. It defines a taking as a government action that affects private real property in a manner that restricts the owner's right to use his property and is the "producing cause of a reduction of at least 25 percent in the market value" of the property. The law has limited application to municipal actions and does not apply to certain regulations of flood plains, sewage facilities, groundwater and subsidence.

An owner is authorized to bring a suit or administrative proceeding to determine whether the government action results in a taking. Where the trier of fact determines that there has been a taking, the owner is entitled to the invalidation of the governmental action and to monetary damages determined from the date of the taking. If the agency elects to pay compensation from its funds, it is entitled to a withdrawal of the order rescinding the action.

The statute requires the Attorney General to prepare guidelines for agencies regarding takings. Further governmental agencies must prepare a written takings impact assessment of a proposed action in accordance with the Attorney General's guidelines. This assessment must describe the action and its purpose, how it substantially advances its purpose, the burdens imposed on private real property and the benefits to society, whether it will constitute a taking, and a comparable analysis of alternative solutions.

V. Key Bills In U.S. Senate:

A. S. 605; Omnibus Property Rights of 1995 - A Takings and Takings Impact Bill:

This is a takings and compensation bill, requiring compensation if government action reduces the value of private property by one-third, providing alternate dispute resolution procedures, clarifying court jurisdiction, providing for administrative procedures for agencies responsible for ESA and CWA and requiring agencies to conduct takings impact analyses of all regulations that may result in a taking. It is pending, awaiting final action by the Judiciary Committee.

Compensation is required if an agency action diminishes value by 33 percent and it cannot be established that the restricted use was an actionable nuisance. A government action is defined to include invasive actions, regulations, exactions, conditions or other means of restricting use. Awards of compensation are to be paid "by the agency out of currently available appropriations supporting the activities giving rise to the claims for compensation. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose." (§ 204(f))

All federal agencies that effect such actions would be required to conduct a private property taking impact analysis before taking such any such action. The analysis must include the actions purpose, assessment of the likelihood of a taking, alternatives to the action that can achieve the purpose and lessen the likelihood of a taking.

The bill requires a review of existing regulation and requires agencies to reissue regulations if necessary to carry out the purposes of the bill.

Under the proposal, an agency action is defined as any action that takes a property right or unreasonably impedes the use of property or the exercise of property interests. Just compensation means compensation equal to the full extent of a property owner's loss, including the fair market value of the private property taken and the business losses arising from a taking, including compounded interest from the date of the taking until the tender of payment. Property includes estates in fee, life estates, estates for years, remainders and future interests and fixtures, easements, leaseholds, water rights, rents, recorded liens and contracts. Taking is defined by reference to those interests protected by the 5th Amendment or protected "under this Act."

Section 204 provides that no agency shall take private property. Compensation is required if the property is physically invaded or taken for a public use and the action:

1. does not substantially advance the stated governmental interest to be achieved;

2. exacts the owners right to use as a condition for a permit or action without rough proportionality;
3. deprives the owner of substantially all economically beneficial or productive use;
4. diminishes the fair market value of the affected portion of the property affected by the action by 33% or more; or
5. constitutes a taking under the 5th Amendment.

S. 605 reverses the historical burden in these matters, noting that the government shall bear the burden of proof "with regard to showing the nexus between the stated governmental purpose" and the impact on the proposed property use; with regard to showing the proportionality between the "exaction and the impact of the proposed use of the property," and with regard to showing that "such deprivation of value inheres in the title to the property." § 204(c))

Section 401 of S. 605 states that the federal government should "avoid takings of private property by assessing the effect of government action on private property rights." All agencies of the federal government are required to complete a private property taking impact analysis before issuing "any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property" as defined in this act. (§403(a)(1)(B))

The takings impact analysis must be in writing and include a statement of the action's purposes, an assessment of the likelihood of taking, an evaluation of whether compensation is likely to be required, the alternatives to the action that would achieve the purposes and lessen the likelihood of a taking occurring, and an estimate of the potential liability for taking compensation to the government. The Attorney General is required to provide guidance, if requested, to any agency regarding compliance with these provisions.

Finally, S.605 forbids the promulgation of a regulation if it "could reasonably be construed to require an uncompensated taking of private property." (§404(a).

B. S. 343: Federal Regulatory Reform Bill - A Cost-Benefit and Risk Assessment Bill:

See above description of proposed bill New York S. 5099 for the essence of S.343. S. 5099 is an adaptation of S. 343.

C. Clean Water Act and Endangered Species Act Amendments

S. 851 would amend the Federal Water Pollution Control Act to drastically reduce the protection of wetlands. No compensation provisions are included. S. 1364 would

amend the Endangered Species Act to require government compensation for any portion of a parcel diminished in value by more than 30% by species listing or habitat designation. S. 768 imposes cost, or burden, sharing on the federal government. This provision requires the federal government and the property owner to share equally in the cost of compliance with the provisions of the Endangered Species Act.

VI. Key Bills In U.S. House of Representatives:

A. H.R. 9: Job Creation and Wage Enhancement Act of 1995 - A Takings, Cost-Benefit and Risk Assessment Bill:

This bill has several divisions. Those relevant to this subject are Divisions B, C and D.

Division B: Private Property Protection Act of 1995:

This Act is fairly brief. It requires the federal government to compensate an owner of property whose use of any portion of that property has been limited by an agency action that diminishes the fair market value of that portion by 20%. Exceptions are created when the purpose of the action is to prevent a hazard to public health or safety or damage to property other than the affected parcel.

A provision for arbitration of alleged takings claims is provided as is a civil action for an owner who does not choose arbitration. The source of payments for compensation awarded is the annual appropriation of the affected agency.

Division C: Regulatory Reform and Relief Act

Under Title II of this act, a process is required for the issuance of any major rule. That process includes:

1. notice of intent to engage in rule making,
2. determination of whether rule is a major rule,
2. including a preliminary regulatory impact analysis,
3. provision for hearing on rule making, upon petition,
4. comment period, and
5. filing of a final regulatory impact analysis.

The preliminary and final regulatory impact analyses shall contain:

1. description of benefits and who benefits,

2. description of why the rule is needed,
3. analysis of alternatives, including market based mechanisms, and
4. an estimate of the costs of implementation and likelihood of implementation given agency's appropriation.

Division D: Risk Assessment and Cost-Benefit Act of 1995

This Act contains six separate titles, each with significant potential ramifications. It applies to the actions of a dozen federal agencies, EPA and Interior permits and clean up actions that are likely to result in an annual cost increase of \$25 million.

Title I requires the federal agency to prepare a "risk characterization document" and a "risk assessment document." There are extensive provisions requiring great detail in the characterization of the populations and resources at risk and the validity of the scientific and economic data and methods used to define those risks. The degree of risk posed by these risks must be quantified.

Title II sets forth a procedure for assessing and comparing the costs and the benefits of agency actions subject to the act. This analysis centers on the identification of reasonable "alternative strategies" to the action that require no government action, accommodate differences among the states or that employ market based mechanisms permitting flexibility in compliance. The agency is required to consider any reasonable alternative strategies proposed during the comment period.

Under Title II, before a final rule may be issued, the agency must certify that its analyses are based on objective scientific and economic evaluations, that the benefits justify the costs, and explain why the other alternatives are less cost effective and provide less flexibility at the state level. The criteria contained in this act shall supersede the criteria contained in the statute under which the regulations are issued. This agency certification must be supported by substantial evidence on the record.

Title III provides for a system of peer review that must be used if the agency action will effect an annual cost of over \$100 million. Each agency must create a peer review panel that is broadly representative and does not exclude experts because they represent entities with potential interests in the outcome, so long as those interests are disclosed.

Judicial review of agency actions are provided for in Title IV which notes that the action shall be considered unlawful if the risk characterization and assessment documents do not comply with the act's standards.

B. H.R. 961: Clean Water Act Reauthorization

This bill has passed the House. It eases the restrictions on wetlands development, provides for the compensation to owners whose property values are reduced by over

20%, and requires the EPA to conduct risk/benefit analyses of rule makings imposing costs of over \$25 million in any year.

C. H.R. 2275: Endangered Species Act Reauthorization

This bill, which has emerged from Committee, provides for compensation to owners whose values are diminished by 20% by the effects of ESA enforcement; further, it requires that species listing and habitat designation be supported by current factual information and peer review.

VII. Open Questions Raised by Property Rights Proposals:

Elaborate cost/benefit assessment statutes have yet to generate much popular support. For them to do so, they should answer a number of questions generally raised by this type of proposal. A partial checklist of these issues follows:

1. How do they determine what level of risk to the public is acceptable?
2. How exactly are the public risks and benefits to be balanced against these costs?
3. How are nonquantifiable public risks and benefits to be balanced against quantifiable private sector costs?
4. How precise must the cost/benefit analysis be? To what extent do science and economics provide adequate data and methods to conduct these analyses?
5. What costs do the required procedures impose on the process of considering and adopting rules needed to protect the environment and human health?
6. Is a failure to follow any step in the required procedure a jurisdictional defect in any adopted rule which threatens its validity?
7. By enabling affected parties to challenge regulations based on alleged procedural defects, does the bill provide an opportunity for unduly delaying implementation of needed regulations?
8. How are cost/benefit procedures to be coordinated with any separate impact review mandated by environmental quality review statutes? For example, in New York, if S. 5099 were to pass, when a state agency proposes to adopt a "major rule" it would have to conduct both a extensive environmental review under the State Environmental Quality Review Act and a Risk Assessment and Cost/Benefit Analysis under S. 5099. When these processes are integrated, as they must be, they will require that all environmental reviews be subject to:
 - a. risk assessment;

- b. cost benefit analysis;
- c. peer review; and a
- d. search for market-based alternatives?

9. How does an agency decide what a major rule is? The test in S. 5099, for example, is whether it has an "annual effect" of over \$5 million on the state's economy. This effect is to be measured in direct and indirect cost terms. To the extent that this determination is an imprecise one, agencies will be encouraged to take a very broad view of what a major rule is, subjecting a larger percentage of rules to this process than is immediately apparent.

For a takings compensation statute to win popular support, it should answer a number of questions generally raised by this type of proposal. A partial checklist of these questions follows:

1. How is the diminution of value of a property interest which constitutes a taking to be established?
2. How is the property interest protected defined? For example, if the established percentage of a leasehold or easement's value is "taken", as opposed to that percentage of the value of the full title of the property, is there a taking?
3. Does the statute apply if the use restricted by the regulation is prohibited by nuisance, or underlying property law principles? If so, how does the statute determine whether the restriction in property use effected by the regulation is contained in established law?
4. If the statute protects legitimate "investment backed" investments in real property, how are they defined? If an agency carefully determines that a restriction is needed to substantially advance the public interest, is an investment based on the unrestricted use of that land legitimate?

This last question reveals the basic tension involved in shifting from the current system of case law adjudication of these disputes to requiring compensation for specified diminutions of property value.