REGULATORY TAKINGS IN AQUACULTURE

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I. INTRODUCTION

Aquaculture refers to the "breeding, rearing, and harvesting of fish, shellfish, algae, and other organisms in all types of water environments."[2] There is growing interest in aquaculture as a means of economic development in the form of job creation and food production at a time of increased demand and emphasis on the need for sustainable growth.[3] Whereas aquaculture projects already exist at varying sizes and levels of success in *state* waters, at present no robust permitting system exists for aquaculture operation in *federal* waters.

Growth in aquaculture projects has not been without pushback from the general public. In late 2018, the Virginia Office of the Secretary of Natural Resources formed a work group tasked with assessing use conflicts resulting from growth in clam and oyster aquaculture.[4] The resulting report identified a laundry list of public conflicts with aquaculture projects such as interference with navigational and recreational uses of public waters.[5] Furthermore, secondary land-

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[2] *What is aquaculture?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://oceanservice.noaa.gov/facts/aquaculture.html#:~:text=Aquaculture%20is%20the%20breeding%2C%20rearing,all%20types%20of%20water%20environments.&text=NOAA%20efforts%20primarily%20focus%20on,in%20the%20ocean%20and%20estuaries (last visited July 27, 2021). Specific prefixes delineate the types of organism being bred, reared, and harvested. These include algaculture for seaweed and mariculture for aquaculture occurring in marine – as opposed to freshwater – settings. Additionally, because aquaculture is functionally equivalent to agricultural farming in the water, using the verb "farming" to describe aquaculture of various resources is not uncommon.
[3] Lester, et. al., *Opinion: Offshore Aquaculture in the United States: Untapped Potential in Need of Smart Policy*, PROC. OF THE NAT'L ACAD. OF SCI. (2021), https://www.pnas.org/content/115/28/7162.
[4] OFF. OF THE SEC'Y OF NAT. RES., REPORT OF THE WORK GROUP'S DELIBERATIONS AND RECOMMENDATIONS TO ADDRESS AQUACULTURE USE CONFLICTS (2018), https://www.naturalresources.virginia.gov/media/governorvirginiagov/secretary-of-natural-resources/pdf/Clam-and-Oyster-Aquaculture-Work-Group---FINAL-REPORT.pdf.
[5] *Id.*

based activities required to establish and subsequently maintain aquaculture sites were listed as a source for concern.[6]

Public opposition to aquaculture is inherently a property rights issue. It informs the broader legal and regulatory concerns affecting growth of the industry at the state level. Some have argued that proximity to aquaculture sites may decrease property value because of the nuisance burdens they pose to residential property. Others have suggested that a robust regulatory framework which authorizes a transition to federal waters, "can avoid many user conflicts [aquaculturalists] have encountered in inshore [state waters]."[7]

To that end, the National Oceanic and Atmospheric Administration (NOAA) has issued funding opportunities, fostered the creation of outreach materials, and launched various initiatives addressing the expansion of aquaculture outside state jurisdiction.[8] These larger scale projects would develop in the United States's Exclusive Economic Zone (EEZ). The EEZ begins where state jurisdiction ends, three miles off coast, and its outer boundary ends 200 miles offshore.[9] The term offshore is used to refer to these projects that will be sited in waters under federal jurisdiction.[10]

Although efforts to commence aquaculture projects in federal waters are still in the early stages, as the industry evolves, regulators, policymakers, private investors, and aquaculture operators will need to consider the vast legal questions brough on by this transition.[11] For example, what will happen if federally permitted aquaculture sites come into conflict with other federal interests like

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[6] *Id.*

[7] HAROLD UPTON, CONG. RSCH. SERV., U.S. OFFSHORE AQUACULTURE REGULATION AND DEVELOPMENT (2019).

[8] *Aquaculture,* NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://www.fisheries.noaa.gov/topic/aquaculture (last visited July 27, 2021).

[9] *Frequently Asked Questions*, U.S DEP'T OF STATE, https://www.state.gov/frequently-asked-questions-u-s-extended-continental-shelf-project/ (last visited July 27, 2021).

[10] This is as opposed to subtidal and intertidal aquaculture projects under state jurisdiction.

[11] Deborah Sullivan Brennan, *Aquaculture Approved for Federal Waters off Southern California*, THE SAN DIEGO TRIBUNE, August 28, 2020, https://www.sandiegouniontribune.com/news/environment/story/2020-08-28/aquaculture-approved-for-federal-waters-off-southern-california. *But see,* Sam Hill, *Federal Court Ruling Complicates U.S. Offshore Aquaculture Efforts*, SEAFOOD SOURCE, August 5, 2020, https://www.seafoodsource.com/news/aquaculture/federal-court-rules-against-offshore-aquaculture-in-the-gulf-of-mexico.

naval operations, resource conservation efforts, or oil and gas drilling permits? In the event of new regulatory restrictions on offshore activities, will aquaculture operators have a valid legal claim?

This article focuses on one such potential legal claim, called regulatory takings, which parties who currently own or operate aquaculture operations in state waters have asserted in response to state regulation. After briefly exploring the origin and evolution of the takings clause, this article examines instances of litigation in three different states, the outcomes of which will be instructive as the aquaculture industry opens itself to new regulatory challenges. As there are not yet any federally sited projects and therefore none that have come into conflict with federal regulations, this article uses examples from state litigation. By understanding what has happened at the state level, decision makers will be better able to plan for federal project siting by identifying and preempting potential takings issues.

II. TAKINGS CLAIMS

The "takings clause" is the final provision of the Fifth Amendment to the United States Constitution.[12] It requires that the government provide just compensation if and when it *takes* private property *for public use*.[13] Unlike a physical taking of private property via eminent domain or condemnation proceedings, *regulatory* takings claims can be understood as a "taking" of private property in function rather than form. A regulatory taking occurs when a regulation eliminates or significantly diminishes a property's value, utility, or purpose.[14] Regulation can have a wide range of effects on the factors that do or do not give a property value. Regulations can also impose cost burdens on property owners and inefficiencies for business operations. For instance, a regulation that bans previously allowed activities might frustrate the purpose of investments made prior to the regulation's enactment.

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[12] U.S. CONST. amend V.

[13] "Takes" and "taking" is sometimes used synonymously with "appropriates" or "condemns", but because this article focuses on a specific category of takings that results from government regulation (i.e., regulatory takings), it will avoid use of terms that have specific and contoured application in interrelated takings claims based on eminent domain and condemnation.

[14] *See* Terra Bowling, *Takings 101,* THE SANDBAR, Vol. 7:1 (2008), http://nsglc.olemiss.edu/SandBar/archives/vol7/1/index.html [hereinafter *Takings 101*] (defining the takings clause and surveying pertinent caselaw).

Regulatory takings are not the stereotypical example that comes to mind when one considers the property rights protected under the Fifth Amendment. One is more likely to picture the government taking land for an energy pipeline, justifying the taking by claiming it keeps energy prices low for its citizens. Regulatory takings on the other hand are not so direct. As the cases discussed later in this article will show, regulatory takings occur when laws prevent use of property, diminishes its value, or otherwise intrudes on the rights of a property owner. These regulations, like taking land for an energy project, might also be enacted with a public interest in mind.

For example, consider a local zoning law which prohibits an oyster harvester from using power tools to clean shellfish on a privately owned dock. Prohibiting him from doing so might ensure that people living in the neighborhood are not bothered at all hours of the day by the sound of heavy machinery. But countervailing that protection afforded to the public is a detriment experienced by the oyster harvester. If the harvester cannot clean shellfish at the dock, the harvester might need to transport it elsewhere. If he cannot afford a separate lease for another location where he can use power tools, it could mean that he invested in coastal property that he can no longer legally use. In the simplest terms, a regulation in the form of a new coastal zoning law "took" something from the harvester – the ability to clean shellfish with power tools – that he had when he leased or bought the property.

In this sense, the possibilities for regulations that interfere with the use or value of property might seem limitless. There are judicial guideposts, however. Courts hear and decide regulatory takings cases under two dominant judicial tests in modern American jurisprudence: (1) a multifactor balancing test and (2) a categorical approach for determining compensable harm. The following subsections will take a deeper look at each of these tests.

A. A Multifactor Balancing Test

The U.S. Supreme Court's 1978 decision in *Penn Cent. Transp. Co. v. New York City* established a multifactor balancing test for determining whether a taking has occurred as a result of a government regulation.[15] The factors include: "1) the extent to which the regulation interferes with investment-backed expectations; 2) the economic impact of the regulation on the claimant; and 3) the

[15] Penn Cent. Transp. Co. v. City of New York City, 438 U.S. 104 (1978).

character of the government's interest, or the social goals being promoted by the government."[16]

In 1965, New York City adopted a Landmark Preservation Law pursuant to a state enabling act. The purpose of the law was to protect the character and aesthetic value of historic properties in the city.[17] The law authorized the creation of a commission whose primary function would be to identify and designate "landmark sites." The designation was subject to a judicial review at the discretion of the property owner.[18] Once the commission designates a site as a landmark, it limits "the property owner's options concerning use of the landmark site . . . [and] imposes a duty upon the owner to keep the exterior features of the building in good repair."[19]

The commission designated Grand Central Terminal Station as a landmark in 1967, two years after the city adopted the Landmark Preservation Law. Penn Central, the owner of Grand Central Terminal, did not seek judicial review of the commission's decision. However, it did later enter into a 50-year leasing agreement to build a 55-story office building, "to be cantilevered above the existing facade and to rest on the roof of the Terminal."[20] When plans for the proposed construction were denied, Penn Central and its lessee sued the city claiming that the decisions of the commission pursuant to the Landmark Preservation Law resulted in a taking without just compensation and therefore violated the Fifth Amendment.[21]

The case made its way through the courts, ultimately reaching the U.S. Supreme Court, where the Court affirmed the decision of the lower court that the commission's denial of Penn Central's construction plan *did not* constitute a taking. The Court stated:

> Since (1) the law did not interfere with the present uses of the building, but allowed the owner to continue using it as had been done in the past, permitting the owner to profit from the building and obtain a reasonable return on its investment, (2) the law did

[16] *Takings 101*, *supra* note 14, at 1.
[17] *Penn Cent.*, 438 U.S. at 109 (citing N.Y.C. ADMIN. CODE, ch. 8-A, § 205-1.0 *et seq*. (1976)).
[18] *Id.* at 110-111.
[19] *Id.* at 111 (internal quotation marks omitted).
[20] *Id.* at 116.
[21] *Id.* at 119.

> not necessarily prohibit occupancy of any of the air space above the landmark building, since under the procedures of the law, it was possible that some construction in the air space might be allowed, and (3) the law did not deny all use of the owner's preexisting air rights above the landmark building, since under a transferable development rights program, it was possible for the owner to transfer the development rights it was foreclosed from using as to Grand Central Terminal to other neighboring properties which it owned.[22]

The Court found that all three factors (interference with investment backed expectations, economic impact on owner, and character of the government's interests) weighed in favor of the commission's decision and therefore did not result in a compensable taking. A key factor in this conclusion was the Court's finding that there were profitable options still available to Penn Central. For example, it found that although the Landmark Preservation Law restricted the *extensive* development pursued by Penn Central, it could still transfer development rights to adjacent property.[23] Alternatively, it could propose a less extensive development above the terminal that was more consistent with the goals of the Landmark Preservation Law.[24] On balance, the existence of other reasonable options available to the property owner weighed against the claim that the regulation's restrictions amounted to a taking.

B. A Categorical Approach

In a subsequent 1992 decision, the U.S. Supreme Court established an additional test for regulatory takings claims.[25] In *Lucas v. S.C. Coastal Council*, a South Carolina law called the Beachfront Management Act prohibited the appellant from developing residential property on his land adjacent to the coast.[26] The purpose of the Beachfront Management Act was to prevent increasing erosion and destruction of the shorescape, but the appellant had purchased the land for development in 1986, two years prior to passage of the act in 1988.[27]

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[22] *Id*.
[23] *Id*. at 114.
[24] *Id*. at 137.
[25] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
[26] *Id*. at 1009 (citing S.C. CODE ANN. § 48-39-250 *et seq.*).
[27] *Id.* at 1008.

Due to the impact of the Beachfront Management Act, the state trial court found that the law left Lucas' land valueless, as the prohibition allowed for no exceptions at the time he brought suit.[28] However, the South Carolina Supreme Court reasoned that even the complete loss of value in Lucas's property did not result in a compensable taking because of the great public interest in preventing the destruction of coastal property and public nuisances. It analogized Lucas's residential development and its destructive effect on the coast to a long list of property uses which the state Supreme Court found were public nuisances and in which it determined no taking had occurred.[29] These included uses of a property for purposes such as the "manufacture of alcoholic beverages . . . operation of a brick mill in a residential area . . . [or] operation of quarry in a residential area."[30]

The Supreme Court of the United States disagreed. It found that whereas noxious use and nuisance was an early justification for states to exert police power and issue regulations in the public interest without being required to provide just compensation. The Court stated that "the legislature's recitation of a noxious-use justification cannot be the basis for departing from our *categorical* rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed."[31]

Justice Blackmun, in his dissent, described the majority's decision as one that "*creates* . . . a new categorical rule."[32] His dissent characterized the majority rule as novel, not one explicitly rooted in precedent. Indeed, in legal commentary *Lucas* is described as the representative case which established a categorical approach to regulatory takings.[33]

Unlike the balance between interests and the development options still available to Penn Central (to build a more modest development, or otherwise still derive profit from the existing station or a greater profit by transferring development rights), the regulation in *Lucas* left the coastal property valueless

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[28] *Id.*
[29] *Id*. at 1022.
[30] *Id.* (citations omitted).
[31] *Id*. at 1026 (emphasis added).
[32] *Id.* at 1036 (emphasis added).
[33] Carol Necole Brown, *The Categorical Lucas Rule and the Nuisance and Background Principles Exception*, 30 TOURO L. REV. 349, 354 (2014) (recognizing that the *Lucas* decision articulated the categorical test but left open to debate in subsequent cases whether the test applies in cases with "denial of all *value* or denial of all *use.*") (emphasis in original).

according to the Court. Taking a categorical approach to compensate for property rendered completely valueless and with no alternative options to develop the property, the Court held that the Beachfront Management Act's bar on development resulted in a compensable regulatory taking.

To sum up both tests, it is useful to return to the original example of an oyster harvester prohibited from using power tools to clean shellfish on his private dock. If for example, the zoning law only prohibited him from using power tools at certain times or on certain days, then the fact pattern might be more consistent with a *Penn Central* balancing approach. A court would likely balance the regulation's limited use requirements with the public interest achieved by preventing nuisance. However, if the law remained as originally described, prohibiting the harvester from using power tools on his land at *all* times, then a court might apply a categorical test under *Lucas*. Just as Lucas had purchased the land for development, the harvester had purchased the waterfront property to run his aquaculture business.

Of course, this is a simplified example. In federal waters, the scale and the consequences of a regulatory decision will be exponentially more severe than a local zoning law. However, the principal distinction between the *Penn Central* and the *Lucas* approach will still be key.

C. A Scattered Jurisprudence

While the Fifth Amendment itself did not originally apply to state governments, it was incorporated following passage of the Due Process and Equal Protection provisions of the Fourteenth Amendment.[34] State constitutions also therefore recognize state takings claims. However, it is evident that an easily articulable and uniform consensus on the way states address regulatory takings issues does not exist. For example, legal commentary has described that "the judicial development of regulatory takings doctrine, particularly since the modern burst of United States Supreme Court activity commenced in 1987, is a murky

[34] *See*, *Due Process*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/due_process (last visited July 27, 2021). "In the middle of the Twentieth Century, a series of Supreme Court decisions found that the Due Process Clause "incorporated" most of the important elements of the Bill of Rights and made them applicable to the states. If a Bill of Rights guarantee is 'incorporated' in the 'due process' requirement of the Fourteenth Amendment, state and federal obligations are exactly the same." *Id.*

swamp of illogic, undefined terms, and dicta-riddled opinions."[35] The unclear origin of the categorical approach is one example of this confusion, discrepancies in the ways that states resolve takings issues is yet another.

As the discussion below will show, uniformity has not abounded since that appraisal over three decades ago. Original jurisdiction in the hands of zoning boards and local commissions adds another procedural complication for parties bringing takings claims. Appellate procedures depend on state and local rules, and courts heavily defer to administrative bodies who are authorized by law to oversee decisions affecting the property rights of aquaculture operators.

This article will touch on, but not dig deeper into, the nuances of state law and administrative procedures inherent in state takings claims. This is not because it is not an important area of study, but rather because an industry transition into federal waters might be able to subvert or simplify many of the confusing characteristics of state takings claims by being part of a larger, more streamlined, nationwide permitting process. This next section instead identifies the key legal reasons why takings claims were or were not successful, as well as the impact that takings conflicts had on the viability of aquaculture operations.

III. SURVEY OF LITIGATION

A. Louisiana

i. Federal court decision

In 1994, oyster growers in Louisiana brought separate federal and state takings claims in response to a federally funded and state operated freshwater diversion project which encroached on oyster aquaculture leases.[36] It is important to note at the outset that the project was in state waters. As described below, the grower's federal claim was possible because a federal agency was partially responsible for funding, planning, and authorizing the freshwater diversion project. In addition to not being sited in federal waters, the project did not conflict with federal regulation.

[35] Bruce Burton, *Regulatory Takings, Private Property Protection Acts, and the Moragne Principle: A Proposal for Judicial-Legislative Comity*, S.C. L. REV., 83, 85 (1997).
[36] Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996); Avenal v. State, 886 So. 2d. 1085 (La. 2004).

Interestingly, the long-term goal of the Caernarvon diversion project was to restore salinity levels that would create conditions more conducive to oyster aquaculture.[37] However, in the short-term, the influx of diverted freshwater did just the opposite. The growers' takings claim alleged that the government, by way of its upstream project supported by a public purpose, failed to compensate state leaseholders for the diminished value of their property and the destruction of growing rights appurtenant to that property.

The oyster growers brought a federal claim against the United States and the U.S. Army Corps of Engineers, who "designed, financed, and built Caernarvon."[38] The Federal Circuit Court of Appeals applied a traditional *Penn Central* balancing test. The Court recognized that even though the leaseholders had acquired valuable property rights from the state, the determinative factor in granting the growers' compensatory relief was whether or not they had *reasonable* investment-backed expectations. Put briefly, the Court found that the growers knew not only that the diversion was necessary for the long-term viability of the waters but also that "the [Caernarvon] investigation itself was prompted, in part, by requests from local groups, including the oyster industry, concerning the need for such diversions."[39] Knowledge of the need and even impending likelihood of a diversion did not just diminish the growers' takings claim, it defeated the claim altogether.

As established by the record, there was a factual dispute over whether the growers had reasonably known about potential interferences. For example, a memorandum written by the U.S. Fish and Wildlife Service stated that, "the effect of the Area 4 [Caernarvon] diversion would *not* be to change the salinity levels themselves, but to combat the effects of subsidence and push back salt-water intrusion."[40] This memo was evidence with authoritative weight (by a federal authority) suggesting that a "reasonable" risk of impending harm would not be the likely effect of the diversion. Nevertheless, the deciding factor which tipped the scales against a finding of a compensable taking were the "planned and announced efforts of the Government to act in ways that would affect [the growers] uses of their after-acquired property interests."[41]

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[37] *Avenal v. U.S.*, 100 F.3d. at 935.
[38] *Avenal v. State*, 886 So. 2d. at 1092.
[39] *Avenal v. U.S.*, 100 F.3d at 935.
[40] *Id.* at 934 (emphasis added).
[41] *Id*. at 938.

ii. State court decision

The Louisiana Supreme Court's decision in *State v. Avenal* is the state analogue to the oyster growers' failed federal claim. The state claim failed for multiple reasons. Unlike the comparatively conclusory federal decision, the state court's decision deeply detailed the underlying reasons *why* the diversion project had an adverse effect on leases downstream. Another less predictable factor and one equally outside the purview of leaseholders, was the project managers' decision to increase flowrates *beyond* those that were reasonably necessary to maintain the proper salinity level useful for oyster growth. The decision states: "Caernarvon became operational in September of 1991 in accordance with the recommended flow rates, and this achieved some, but not all of the intended effects of the project. As a result, the CIAC eventually voted to *significantly* increase the flows of the Caernarvon project in 1993."[42]

Due to the risks presented by the project, the state included a hold-harmless provision in its oyster leases which "indemnified and held [the state] harmless for any claims related to coastal restoration."[43] The court considered that the decision to include the hold-harmless clause was already a compromise between the need for a diversion project and the extreme result of denying all leases in the interim. For the vast majority of leases involved in the state class action, the court held that the hold-harmless clause validly precluded their claims.

The hold harmless clauses included in a majority of the growers' leases were significant because they specifically denied growers the right to sue for damages resulting from the diversion project. The right of the Secretary of the Louisiana Department of Wildlife and Fisheries to include hold harmless clauses was codified in a state statute, "[which] recognizes that the Secretary may 'make such stipulations in the leases made by him as he deems necessary and proper to develop the [oyster] industry.'"[44]

Additionally, pursuant to another Louisiana statute, the court held that the leaseholders' takings claims were actually a claim for damages.[45] Whereas the

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[42] *Avenal v. State*, 886 So. 2d. at 1091 (emphasis added). The CIAC acronym used in this quote refers to the Carnarvon Interagency Advisory Committee, which included state-level decisionmakers who coordinated and communicated project planning with Federal actors.
[43] *Id.* at 1090.
[44] *Id.* at 1095.
[45] *See* LA. STAT. ANN. 13:1511; LA. STAT. ANN. 9:5624.

lower court found a takings claim, the Louisiana Supreme Court found that it had, "assume[d] that the State intended to guarantee each lessee a commercially viable oyster lease."[46] In other words, when the state leased its water bottoms it was not a guarantee of commercially viable oyster growth. Rather, it was merely the conferral of a leased right. The Louisiana Supreme Court found that this right was not "taken" by the diversion project, but rather it was damaged. Ultimately, claims for damages pursuant to the statutory scheme are subject to a prescriptive period of two years.[47] Because the claims were brought after that period expired, and because the remaining claims were subject to a valid hold harmless clause, all the growers' state claims were dismissed.

B. Alabama

Inverse condemnation "involves a taking by a governmental entity without invoking available statutory bases for such taking under which the property owner would have been entitled to just compensation."[48] Inverse condemnation claims are therefore brought by property owners or right-holders to seek compensation for a taking when the state fails to bring formal condemnation proceedings for its actions in the public interest.

In *Portersville Bay Oyster Co., LLC v. Blankenship*, the state granted riparian landowners an easement to construct on and off bottom oyster cages and floating cages. Pursuant to an Alabama statute, "[a] riparian landowner has the right to harvest oysters to the distance of 600 yards from the shore." A riparian landowner "does not have a right to harvest oysters using cages above the submerged surface[;] such activity is permissible only when the [s]tate grants a shellfish aquaculture easement for that purpose."[49] The riparian landowners leased that easement to oyster growers who began a commercial oyster aquaculture operation.

Following the valid grant of an easement, the state contracted with a construction company to build a nearby breakwater, a structure constructed near the coast to reduce the intensity of wave action on inshore waters. The state and the construction company were reasonably aware that construction of the breakwater would "carry the excess sediment and silt onto the areas embraced by

[46] *Avenal v. State*, 886 So. 2d. at 1106.
[47] *Id.* at 1107-08.
[48] Portersville Bay Oyster Co., LLC v. Blankenship, 275 So. 3d 124, 130 (Ala. 2018).
[49] *Id.* at 124. *See also* ALA. CODE § 9-12-22.

the leases and the shellfish aquaculture."[50] The public interest in the breakwater project was clear, but despite being aware of the impending harms to surrounding oyster cages, the state did not bring formal condemnation proceedings.

Competing with the public benefit posed by the breakwater project were the interests of the oyster growers who saw a dramatic loss in their aquaculture yield rates:

> Before the Marsh Island Project began, [the oyster farmers] had a normal oyster mortality rate of 3 to 5%. Since construction began, the mortality rate has risen to 40 to 50% for oysters in elevated cages. The mortality rate for oysters on the bottom is even higher, in some locations 100%.[51]

This occurred directly as a result of the displaced sediments which smother the oyster spat and larvae – baby oysters.

The threshold controversy in *Portersville* was the State Commissioner's effort to be dismissed from the suit by claiming state immunity. The trial court erroneously granted this dismissal, and the Alabama Supreme Court reversed. It found that takings issues are distinct from the general immunity granted to the state and its officials and excepted from that general immunity pursuant to an Alabama statute.[52] With the Commissioner as a valid defendant, the court briefly weighed in on the plaintiff's claim for compensable relief by inverse condemnation.

The Alabama Supreme Court analogized the effects of the breakwater project to another inverse condemnation case, *Ex parte Alabama Department of Transportation* wherein the state transportation department flooded private property with contaminated water.[53] It found that the leaseholders had pleaded a sufficient inverse condemnation claim. The public record shows that a rehearing was denied in an October 2018 unpublished opinion. This was two months after the initial decision was made in August 2018. The status of any damages ordered on remand is unclear as of the time of publication.

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[50] *Portersville Bay Oyster Co., LLC*, 275 So. 3d at 133.
[51] *Id*. at 128.
[52] *Id*. at 130; *see also* ALA. CONST., Art. I, § 23, 1901.
[53] *Ex parte* Alabama Dep't of Transp., 143 So. 3d 730 (Ala. 2013).

C. Washington

In *Washington Shell Fish, Inc. v. Pierce County*, the plaintiff company ran a geoduck aquaculture operation on parcels leased from shoreland owners.[54] Geoducks are a type of clam most commonly harvested in the Northwest and are particularly common in Washington state.[55] The Pierce County code requires that the company acquire a substantial development permit, "when it harvested and planted geoducks on the leased properties" because the activities prevented the general public from using certain areas of the water.[56] The company failed to acquire development permits. The county issued cease and desist orders on all eleven leased parcels and the plaintiff company appealed to the county. The county held a public hearing and, upon testimony from experts and recreational windsurfing groups who had been injured by the unpermitted aquaculture equipment, upheld the County's cease and desist orders.

Pierce County's substantial development permit regulation was created pursuant to the requirements of a legislative act passed by the state government:

> The legislature enacted the Shoreline Management Act (SMA): (1) to protect and to manage the private and public shorelines of Washington State; (2) to protect against adverse effects to public health, public rights of navigation, land, vegetation, and wildlife; and (3) to plan for and to foster reasonable and appropriate shoreline uses.[57]

Along the same theme as other regulatory acts and government projects described in the section, the purpose of the SMA was to protect the public interests in access and use of coastal waters.

The appellate court reviewed the decision of the county examiner who had upheld the cease-and-desist order and concluded similarly that the aquaculture operation was in violation of the substantial development permitting requirement because of the extensive PVC pipe apparatus placed in the leases. It concluded that the county code required substantial development permits for "placing of

[54] Washington Shell Fish, Inc. v. Pierce County, 131 P.3d 326 (Wash. Ct. App. 2006).
[55] *Geoducks*, *Species Directory*, NOAA FISHERIES, https://www.fisheries.noaa.gov/species/geoduck (last visited July 27, 2021).
[56] *Washington Shell Fish, Inc.*, 131 P.3d at 332.
[57] WASH. REV. CODE § 90.58.020.

obstructions, or any project of a permanent or temporary nature *which interferes with the normal public use of the surface of waters* overlying lands subject to the Shoreline Management Act at any state of water level."[58]

D. Analysis

Each of these three state cases represents a different facet of the takings analysis and will be instructive to stakeholders preparing for a transition into federal waters. As all three cases have shown, the first question that the courts ask is whether an aquaculture operator had the right to harvest in the water at all. In *Avenal*, members of the class action had leased the right to grow oysters in the area affected by the diversion directly from the state. In *Portersville*, riparian landowners secured an easement from the government and leased the rights on that easement to a company which began aquaculture operations. In both cases, the court concluded that the aquaculture operator had secured a valid legal right to harvest as a threshold matter. In *Washington Shell Fish, Inc.* however, the court found that the project was in violation of state and local law by failing to apply for a substantial development permit. Because it never gained a legal right to harvest, that right was never taken away by enforcement of the regulation.

In *Avenal*, the court basically engaged in a *Penn Central* analysis. It weighed the reasonability of the grower's expectation to grow oysters in their leased waters against the public interest of the diversion project to restore salinity levels in the area. The court found that the reasonability in investing in aquaculture operations was diminished due to the public character of the diversion project. Furthermore, because the state had inserted hold-harmless clauses in the leases, the growers had indemnified the state from any liability resulting from intrusions to their growing rights. Finally, it found that to the extent that growers' property interests were "damaged" by the diversion, they had brought the incorrect claim against the state and the correct claim was barred by a statute of limitations. This balancing of interests weighed in a favor of the state on multiple levels.

The court's reasoning in *Portersville*, however, took more of a *Lucas* approach. Because the state and its contractors knew that the breakwater project would create an adverse effect and because of the severe effect it did indeed have on harvest yield rates, a categorical approach to compensate for significant

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[58] *Id*. § 90.58.030(3)(d).

damages made more sense. Unfortunately, the record on remand is not publicly available and the amount of damages the aquaculture company received because of the state's interference is not known.

As mentioned above, state takings decisions do not always overlap perfectly with theoretical legal tests established by the Supreme Court of the United States. In both decisions, the Court's opinion clarified that there is a no "set-formula" of exhaustive factors that claimants must demonstrate or that the court must identify.[59] For this reason, it makes sense that the judiciary uses a fact-bound approach instead of a one-size-fits-all method for resolving takings conflicts. Ultimately, these tests establish the outer limits that courts will use as guideposts for their takings analysis, each a necessary but not always sufficient reason to conclude that a taking has or has not occurred.

The value of identifying the legal mechanisms like state hold harmless clauses or differing state permitting structures is that a *federal* siting and permitting regime will look to what has already been done at the state level. While creating a national structure might bring the sense of uniformity needed in takings analyses, it will be important to ensure that past conflicts are identified, understood, and avoided. For example, a robust federal permitting system, one that makes legally clear which rights have been vested in the leaseholder, will be crucial to potential takings challenges. Similarly, it will be critical for those interested in seeking permits to begin aquaculture activities in federal waters to understand and evaluate the terms of their contract and know the consequences of hold harmless clauses should they be adapted into the federal permitting system.

IV. CONCLUSION

This article has demonstrated that takings issues resulting from aquaculture projects are as complicated as they are diverse. In almost every example in the survey of cases, either lack of understanding of statutory requirements, noncompliance, miscommunication, or the reasonability of decision-making played a dispositive role in the subsequent takings analysis.

Right now, there are growing advocacy efforts to create a robust authorization framework for federal offshore aquaculture. The industry may be in

[59] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992); Penn Cent. Transp. Co. v. City of New York City, 438 U.S. 104, 124 (1978).

the early stages of this transition, but the lessons learned from takings issue closer to the shore will help to inform the long-term legal considerations necessary for success in this new frontier.