

# Clean Water Act/Rivers and Harbors Act Permit Denials: U.S. Court of Federal Claims Addresses Taking Issue



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The United States Court of Federal Claims (“Court”) addressed in a March 20th opinion a Fifth Amendment takings case. See *Lemon Bay Cove, LLC v. United States*, No. 17-436L, 2020 WL 1316839.

The taking allegedly occurred because of the United States Army Corps of Engineers (“Corps”) denial of permits that prevented residential development of a property.

The property included 5.64 acres of submerged wetlands, mangrove wetlands, and small upland regions. It serves as a habitat for several animal species.

Portions of the property were located within Clean Water Act and Rivers and Harbors Act jurisdictional waters. Therefore, Section 404 and Section 10 permits were respectively required under the referenced programs.

Lemon Bay planned to develop the property. It applied to the Corps for the required permits. The Corps issued a public notice regarding the development project.

Numerous letters in opposition to the development were submitted. Further, the United States Environmental Protection Agency (“EPA”) and the National Marine Fisheries Service expressed concerns about the development’s impact on mangrove wetlands, marine habitats, and local wildlife.

To improve its chances of getting the permit application approved, Lemon Bay amended its permit application multiple times. Nevertheless, the Corps denied Lemon Bay’s permit application on February 1, 2016.

Lemon Bay appealed the Corps’ denial of the permit. It then filed an action in March 2017, alleging four takings theories. They included two categorical takings under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and two regulatory takings under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

Lemon Bay moved for partial summary judgment on its Lucas claims. The government moved for summary judgment on all four claims.

The Court denied both motions holding that there were general genuine disputes of material facts as to:

- The reasonableness of the plaintiff’s investment-backed expectations in the development of the property
- The character of the government action taken

- The amount of the plaintiff's investment in the property
- The property's value with and without the permit
- Whether there is a market for a different use of the property

A copy of the Opinion can be downloaded [here](#).