

Codification of Presidential Proclamations and Executive Orders

By the authority vested in me as President by the Constitution and statutes of the United States of America, including the Executive Exchange Program Voluntary Services Act of 1986 (5 U.S.C. 4103 note, 100 Stat. 964), it is hereby ordered as follows:

SECTION 1. *Establishment of the Program.* Effective October 1, 1986, there is established, within the Executive Exchange Program of the President's Commission on Executive Exchange, an experimental program under which Executive agencies of the government may accept voluntary services for the United States from private sector participants in the Executive Exchange Program.

SEC. 2. *Program Limits.* The experimental program shall be conducted during the fiscal years 1987 through 1989, and not more than ten individuals may commence participation in the program during any fiscal year. Acceptance of voluntary services from such individuals may not result in the displacement of any employee of the government.

SEC. 3. *Participant Restrictions.* An individual participating in the experimental program shall be considered an employee of the agency to which assigned for purposes of any laws, rules, and regulations of the United States, except that such individual shall not be covered by chapters 51, 53, 63, 83, 87, or 89 of title 5, United States Code, or any comparable provisions relating to classification, pay, leave, retirement, life insurance, or health benefits for employees of the government.

Executive Order 12606—The family

SOURCE: The provisions of Executive Order 12606 of Sept. 2, 1987, appear at 52 FR 34188, 3 CFR, 1987 Comp., p. 241, unless otherwise noted.

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that the autonomy and rights of the family are considered in the formulation and implementation of policies by Executive departments and agencies, it is hereby ordered as follows:

SECTION 1. *Family Policymaking Criteria.* In formulating and implementing policies and regulations that may have significant impact on family formation, maintenance, and general well-being, Executive departments and agencies shall, to the extent permitted by law, assess such measures in light of the following questions:

(a) Does this action by government strengthen or erode the stability of the family and, particularly, the marital commitment?

(b) Does this action strengthen or erode the authority and rights of parents in the education, nurture, and supervision of their children?

(c) Does this action help the family perform its functions, or does it substitute governmental activity for the function?

(d) Does this action by government increase or decrease family earnings? Do the proposed benefits of this action justify the impact on the family budget?

(e) Can this activity be carried out by a lower level of government or by the family itself?

(f) What message, intended or otherwise, does this program send to the public concerning the status of the family?

Chapter 34—Government Management

(g) What message does it send to young people concerning the relationship between their behavior, their personal responsibility, and the norms of our society?

SEC. 2. *Governmentwide Family Policy Coordination and Review.*

(a) Executive departments and agencies shall identify proposed regulatory and statutory provisions that may have significant potential negative impact on the family well-being and provide adequate rationale on why such proposal should be submitted. The head of the department or agency, shall certify in writing that, to the extent permitted by law, such measure has been assessed in light of the criteria in Section 1 of this Order and how such measures will enhance family well-being. Such certification shall be transmitted to the Office of Management and Budget. Departments and agencies shall give careful consideration to family-related concerns and their impact in notices of proposed rule-making and messages transmitting legislative proposals to the Congress.

(b) The Office of Management and Budget shall, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are applied in light of the criteria set forth in Section 1 of this Order.

(c) The Office of Policy Development shall assess existing and proposed policies and regulations that impact family well-being in light of the criteria established by Section 1 of this Order, provide evaluations on those measures that have significant potential impact on the family to the Office of Management and Budget, and advise the President on policy and regulatory actions that may be taken to strengthen the institutions of marriage and family in America.

SEC. 3. *Report.* The Office of Policy Development shall submit preliminary reports including specific recommendations to the Domestic Policy Council and shall submit a final report to the President no later than 180 days from the date of this Order. Each year thereafter, a report, including recommendations shall be submitted, through the Domestic Policy Council to the President.

SEC. 4. *Judicial Review.* This Order is intended to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Executive Order 12612—Federalism

SOURCE: The provisions of Executive Order 12612 of Oct. 26, 1987, appear at 52 FR 41685, 3 CFR, 1987 Comp., p. 252, unless otherwise noted.

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

SECTION 1. *Definitions.* For purposes of this Order:

(a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on

Presidential Documents

Title 3—

Executive Order 12778 of October 23, 1991

The President

Civil Justice Reform

WHEREAS, the tremendous growth in civil litigation has burdened the American court system and has imposed high costs on American individuals, small businesses, industry, professionals, and government at all levels;

WHEREAS, several current litigation practices add to these burdens and costs by prolonging the resolution of disputes, thus delaying just compensation and encouraging wasteful litigation;

WHEREAS, the harmful consequences of these litigation practices may be ameliorated by encouraging voluntary dispute resolution, limitations on unnecessary discovery, judicious use of expert testimony, prudent use of sanctions, improved use of litigation resources, and, where appropriate, modified fee arrangements;

WHEREAS, the United States sets an example for private litigation by adhering to higher standards than those required by the rules of procedure in the conduct of Government litigation in Federal court, and can continue to do so without impairing the effectiveness of its litigation efforts;

WHEREAS, improving the quality of legislation and regulation to eliminate ambiguities in drafting would reduce uncertainty and unnecessary litigation; and,

WHEREAS, improving the quality of administrative adjudications would reduce the time and resources expended during the administrative process.

NOW, THEREFORE, I, GEORGE BUSH, by the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 31 of title 28, United States Code, and section 301 of title 3, United States Code, and in order to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, hereby order as follows:

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) *Pre-filing Notice of a Complaint.* No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

(b) *Settlement Conferences.* As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the

Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) *Alternative Methods of Resolving the Dispute in Litigation.* Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal or structured Alternative Dispute Resolution (ADR) process or court proceeding. At the same time, litigation counsel should be trained in dispute resolution techniques and skills that can contribute to the prompt, fair, and efficient resolution of claims. Where such benefits may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the private parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) Litigation counsel shall neither seek nor agree to the use of binding arbitration or any other equivalent ADR technique. A technique is equivalent to binding arbitration if an agency is bound, without exercise of that agency's discretion, to implement the determination arising from the ADR technique. The requirements of this paragraph shall be interpreted in a manner consistent with section 4(b) of the Administrative Dispute Resolution Act, Public Law 101-552, 104 Stat. 2736 (1990). Practice under Tax Court Rule 124 shall be exempt from this provision.

(d) *Discovery.* To the extent practicable, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

(1) *Disclosure of Core Information.* In those cases where discovery will be sought, litigation counsel shall, to the extent practicable, make reasonable efforts to agree with other parties mutually to exchange a disclosure statement containing core information relevant to the dispute and to stipulate to an order memorializing such agreement. For purposes of this subsection, "core information" means the names and addresses of people having information that is relevant to the proffered claims and defenses, and the location of documents most relevant to the case. This guideline to disclose core information shall not apply in cases while a dispositive motion is pending.

(2) *Review of Proposed Document Requests.* Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(3) *Discovery Motions.* Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) *Expert Witnesses.* Litigation counsel shall make every reasonable effort to present only reliable expert testimony before a court.

(1) *Widely accepted theories.* Litigation counsel shall refrain from presenting expert testimony from experts who base their conclusions on explanatory theories that are not widely accepted. For purposes of this subsection, a theory is widely accepted if it is propounded by at least a substantial minority of the experts in the relevant field.

(2) *Expertise in the field.* Litigation counsel shall present expert testimony only from those experts whose knowledge, background, research, or other expertise lies in the particular field about which they are testifying.

(3) *Expert disclosure.* Litigation counsel shall offer to engage in mutual disclosure of expert witness information for those experts that a party expects to call as expert witnesses at trial, provided, and to the extent, that the other parties agree to make comparable disclosures of any expert witnesses they expect to call at trial.

(4) *Ban on contingency fees.* The amount of compensation paid to an expert witness shall not be linked to a successful outcome in the litigation.

(f) *Sanctions.* Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(g) *Improved Use of Litigation Resources.* Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable; and,

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried.

(h) *Fees and Expenses.* To the extent permissible by law, in civil litigation involving disputes over Federal contracts pursuant to 41 U.S.C. 601 *et seq.*, or in any civil litigation initiated by the United States, litigation counsel shall offer to enter into a two-way fee shifting agreement with opposing parties to the dispute, whereby the losing party would pay the prevailing party's fees and costs, subject to reasonable terms and limitations. The Attorney General shall review the legal authority for entering into such agreements.

Sec. 2. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

(a) *General Duty to Review Legislation and Regulations.* Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB Circular A-19 (legislation) and Executive Order No. 12291 (regulation), each agency that is promulgating new regulations, reviewing existing regulations, developing legislative proposals concern-

ing regulations, and developing new legislation shall adhere to the following requirements:

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and needless ambiguity.

(2) The agency's proposed legislation and regulations shall be written to minimize needless litigation.

(3) The agency's proposed legislation and regulations shall provide a clear and certain legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

(b) *Specific Issues for Review.* In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation—

(A) Specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) Specifies in clear language the preemptive effect, if any, to be given to the law;

(C) Specifies in clear language the effect on existing Federal law, if any, including all provisions repealed or modified;

(D) Provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(E) Specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions, subject to constitutional requirements;

(F) Specifies whether the provisions of the law are constitutionally severable, if appropriate;

(G) Specifies in clear language the retroactive effect, if any, to be given to the law;

(H) Specifies in clear language the applicable burdens of proof;

(I) Specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for any authorized award of attorney's fees, if any;

(J) Specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;

(K) Specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) Sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) Defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(N) Specifies whether the legislation applies to the Federal Government or its agencies;

(O) Specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands; and,

(P) Addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after

consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(2) that the regulation—

(A) Specifies in clear language the preemptive effect, if any, to be given to the regulation;

(B) Specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed or modified;

(C) Provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(D) Specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) Specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) Defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items;

(G) Addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(c) *Certification of Compliance for Agency Legislation or Regulations.* When transmitting such draft legislation or regulation to the Office of Management and Budget ("OMB"), the agency must certify that (i) it has reviewed such draft legislation or regulation in light of this section, and (ii) either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards. Where the standards are not met, the agency certification must include an explanation of the reasons for the departure from the standards. Recommendations and cost-benefit analyses under subsection (d) of this section shall be included in the agency certification required by this subsection.

(d) *One-Way Fee Provisions.* Each agency shall review, and shall perform a cost-benefit analysis on, all provisions of any legislation or regulation that the agency proposes which provide for an award for attorney's fees in favor of only one class of parties, including those statutes which require the Government to pay a prevailing private party's attorney's fees. The agency shall recommend against enactment of the fee shifting provisions of such legislation if the costs significantly outweigh the benefits, or if the legislation does not define the fees and costs covered by the statute or detail when an award of fees and costs would be appropriate. Such agency recommendations shall be presented to OMB through the Circular A-19 legislative coordination and clearance process and included in the agency certification required under subsection (c) of this section.

Sec. 3. Principles to Promote Just and Efficient Administrative Adjudications. In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).

Sec. 4. Coordination by the Department of Justice.

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1 and 3 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 3 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines which may be issued by other agencies pursuant to this order.

Sec. 5. Definitions. For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 451 of title 28, United States Code, except that it shall exclude all departments and establishments in the legislative or judicial branches of the United States.

(b) The term "litigation counsel" shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or a litigating division of the Department of Justice. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by any Federal agency to conduct litigation on behalf of the agency or the United States.

Sec. 6. No Private Rights Created. This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

Sec. 7. Scope.

(a) *No Applicability to Criminal Matters or Proceedings in Foreign Courts.* This order is applicable to civil matters only. It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

(b) *Application of Notice Provision.* Notice pursuant to subsection (a) of section 1 is not required (i) in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; (ii) in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; (iii) when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation, or destruction; (iv) when the defendant is subject to flight; (v) when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (vi) in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation.

(c) *Application of Alternative Dispute Resolution and Core Disclosure Provisions.* Subsections (c) and (d)(1) of section 1 of this order shall not apply (i) to any action to seize or forfeit assets subject to forfeiture, or (ii) to any debt collection case (including any action for civil penalties or taxes) involving an amount in controversy less than \$100,000.

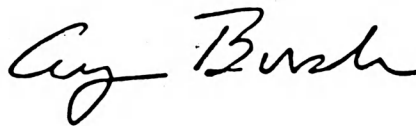
(d) *Additional Guidance as to Scope.* The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 2, consistent with the purposes of this order.

Sec. 8. *Conflicts with Other Rules.* Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

Sec. 9. *Privileged Information.* Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement information, information affecting national security, or information the disclosure of which is prohibited by law.

Sec. 10. *Effective Date.* This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

THE WHITE HOUSE,
October 23, 1991.



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✓ **Editorial note:** For the President's remarks on civil justice reform, see issue no. 43 of the *Weekly Compilation of Presidential Documents*.

(f) Executive Order No. 12435, establishing the President's Commission on Organized Crime.

(g) Executive Order No. 12575, establishing the President's Special Review Board.

(h) Executive Order No. 12546, establishing the Presidential Commission on the Space Shuttle Challenger Accident.

Sec. 4. Executive Order No. 12534 is superseded.

Sec. 5. This Order shall be effective September 30, 1987.

RONALD REAGAN

THE WHITE HOUSE,
September 30, 1987.

Executive Order 12611 of October 15, 1987

Delegating Authority To Implement Assistance for Central American Democracies and the Nicaraguan Democratic Resistance

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Military Construction Appropriations Act, 1987, enacted by section 101(k) of the Joint Resolution Making Continuing Appropriations for the Fiscal Year 1987 (Public Laws 99-500 and 99-591), the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151 *et seq.*), the Joint Resolution Making Continuing Appropriations for the Fiscal Year 1988 (Public Law 100-120), and section 301 of title 3 of the United States Code, and in order to delegate certain functions concerning the use of funds, it is hereby ordered as follows:

Section 1. Executive Order No. 12570 of October 24, 1986, is amended by adding the following to the end of Section 2(b):

"and funds provided in the Joint Resolution Making Continuing Appropriations for the Fiscal Year 1988 (Public Law 100-120)."

Sec. 2. This Order shall be effective immediately.

RONALD REAGAN

THE WHITE HOUSE,
October 15, 1987.

Executive Order 12612 of October 26, 1987

Federalism

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to restore the division of governmental responsibilities between the national government and the States

that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

Section 1. Definitions. For purposes of this Order:

(a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

(b) "State" or "States" refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

Sec. 2. Fundamental Federalism Principles. In formulating and implementing policies that have federalism implications, Executive departments and agencies shall be guided by the following fundamental federalism principles:

(a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.

(b) The people of the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

(e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."

(f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

(g) Acts of the national government—whether legislative, executive, or judicial in nature—that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of—and should encourage opportunities for—individuals, families, neighbor-

hoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

Sec. 3. Federalism Policymaking Criteria. In addition to the fundamental federalism principles set forth in section 2, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There should be strict adherence to constitutional principles. Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the necessity for such action. To the extent practicable, the States should be consulted before any such action is implemented. Executive Order No. 12372 ("Inter-governmental Review of Federal Programs") remains in effect for the programs and activities to which it is applicable.

(b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For the purposes of this Order:

(1) It is important to recognize the distinction between problems of national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them).

(2) Constitutional authority for Federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States.

(c) With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary nor desirable.

(d) When undertaking to formulate and implement policies that have federalism implications, Executive departments and agencies shall:

(1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States.

(2) Refrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards.

(3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.

Sec. 4. Special Requirements for Preemption. (a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

(e) When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings.

Sec. 5. Special Requirements for Legislative Proposals. Executive departments and agencies shall not submit to the Congress legislation that would:

(a) Directly regulate the States in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions;

(b) Attach to Federal grants conditions that are not directly related to the purpose of the grant; or

(c) Preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

Sec. 6. Agency Implementation. (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring the implementation of this Order.

(b) In addition to whatever other actions the designated official may take to ensure implementation of this Order, the designated official shall determine which proposed policies have sufficient federalism implications to warrant the preparation of a Federalism Assessment. With respect to each such policy for which an affirmative determination is made, a Federalism Assessment, as described in subsection (c) of this section, shall be prepared.

The department or agency head shall consider any such Assessment in all decisions involved in promulgating and implementing the policy.

(c) Each Federalism Assessment shall accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A-19, and shall:

(1) Contain the designated official's certification that the policy has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(2) Identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(3) Identify the extent to which the policy imposes additional costs or burdens on the States, including the likely source of funding for the States and the ability of the States to fulfill the purposes of the policy; and

(4) Identify the extent to which the policy would affect the States' ability to discharge traditional State governmental functions, or other aspects of State sovereignty;

Sec. 7. Government-wide Federalism Coordination and Review. (a) In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A-19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of those authorities, shall take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order.

(b) In submissions to the Office of Management and Budget pursuant to Executive Order No. 12291 and OMB Circular No. A-19, Executive departments and agencies shall identify proposed regulatory and statutory provisions that have significant federalism implications and shall address any substantial federalism concerns. Where the departments or agencies deem it appropriate, substantial federalism concerns should also be addressed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress.

Sec. 8. Judicial Review. This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN

THE WHITE HOUSE,
October 26, 1987.

Executive Order 12613 of October 29, 1987

Prohibiting Imports From Iran

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 505 of the International Se-

curity and Development Cooperation Act of 1985 (22 U.S.C. 2349aa-9), and section 301 of Title 3 of the United States Code,

I, RONALD REAGAN, President of the United States of America, find that the Government of Iran is actively supporting terrorism as an instrument of state policy. In addition, Iran has conducted aggressive and unlawful military action against U.S.-flag vessels and merchant vessels of other non-belligerent nations engaged in lawful and peaceful commerce in international waters of the Persian Gulf and territorial waters of non-belligerent nations of that region. To ensure that United States imports of Iranian goods and services will not contribute financial support to terrorism or to further aggressive actions against non-belligerent shipping, I hereby order that:

Section 1. Except as otherwise provided in regulations issued pursuant to this Order, no goods or services of Iranian origin may be imported into the United States, including its territories and possessions, after the effective date of this Order.

Sec. 2. The prohibition contained in Section 1 shall not apply to:

(a) Iranian-origin publications and materials imported for news publications or news broadcast dissemination;

(b) petroleum products refined from Iranian crude oil in a third country;

(c) articles imported directly from Iran into the United States that were exported from Iran prior to the effective date of this Order.

Sec. 3. This Order shall take effect at 12:01 p.m. Eastern Standard Time on October 29, 1987, except as otherwise provided in regulations issued pursuant to this Order.

Sec. 4. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, as may be necessary to carry out the purposes of this Order. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the Federal Government. All agencies of the United States Government are directed to take all appropriate measures within their authority to carry out the provisions of this Order, including the suspension or termination of licenses or other authorizations in effect as of the date of this Order.

Sec. 5. The measures taken pursuant to this Order are in response to the actions of the Government of Iran referred to above, occurring after the conclusion of the 1981 Algiers Accords, and are intended solely as a response to those actions.

This Order shall be transmitted to the Congress and published in the **Federal Register**.

RONALD REAGAN

THE WHITE HOUSE,
October 29, 1987.

Editorial note: For the President's message to the Congress, dated Oct. 29, 1987, on the import prohibition, see the *Weekly Compilation of Presidential Documents* (vol. 23, p. 1240).

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ATTORNEY GENERAL'S GUIDELINES
FOR THE EVALUATION OF RISK
AND AVOIDANCE OF UNANTICIPATED TAKINGS

Authority: Executive Order No. 12630
(53 Fed. Reg. 8859 (March 18, 1988))

Contents: Section I Explanatory Note
 Section II Scope of the Guidelines
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 General and the Director of the
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 Section VIII Judicial Review and Enforcement

I. EXPLANATORY NOTE

A. Policy, Purpose, and Mandate

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without payment of just compensation. Over the course of our nation's history, this constitutional requirement has had important legal and fiscal consequences in the development and implementation of government policies and actions at the local, state, and national levels.

During the past year, the Supreme Court of the United States again examined the protection of private property under the Fifth Amendment. In First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (1987) and Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987), the Supreme Court addressed the fundamental protections afforded by the Fifth Amendment whenever a government policy or action is determined to result in a taking of private property for public use.

The President issued Executive Order No. 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," on March 15, 1988, pursuant to his authority as president and in service of his constitutional

obligations to manage the executive branch and to ensure constitutionality of governmental actions. This Executive Order directs Executive Branch departments and agencies, as a part of their internal management process, to assess the takings implications of proposed policies and actions on private property interests protected by the Fifth Amendment. In this way, federal agency decisionmakers will be better informed about the potential effects of proposed agency activities and to the extent permitted by law, consistent with their statutory obligations, can minimize the impacts of such activities on constitutionally protected private property rights.

In Section 1(c) of Executive Order No. 12630, the President directed the Attorney General to promulgate, in consultation with the Executive Branch departments and agencies, Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings. In accordance with the direction provided in the Executive Order, these Guidelines establish a basic, uniform framework for federal agencies to use in their internal evaluations of the takings implications of administrative, regulatory, and legislative policies and actions. Neither the Executive Order nor these Guidelines prevents an agency from making an independent decision about proceeding with a specific policy or action which the decisionmaker determines is statutorily required. Rather, their purpose is to assure that governmental decisionmakers are fully informed of any potential takings implications of proposed policies and actions, thereby enhancing the cost-efficient administration of agency programs. In those instances in which a range of alternatives are available, each of which would meet the statutorily required objective, prudent management requires selection of the least risk alternative. In instances in which alternatives are not available, the takings implications are noted.

As detailed in Section VIII of the Guidelines, the evaluations conducted under the Executive Order, the Guidelines, and the accompanying Appendix to the Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings (incorporated by reference herein) are intended solely as internal and predecisional management aids for agency decisionmakers. Neither any part of the evaluation process nor any conclusions reached under that process are admissions of the existence -- possible, probable, or otherwise -- of takings or are otherwise subject to judicial review. Further, terms utilized in the process established in these Guidelines (for example, "takings implication" and "significant takings implications") are terms of art and their meanings are limited to the context of this evaluation process.

B. Overview of the Guidelines

The Guidelines first present, in Sections II and III, information regarding the scope of policies and actions subject to evaluation under Executive Order No. 12630 and the agencies that must conduct these evaluations. Generally, an agency's administrative, regulatory, and legislative policies and actions that affect, or may affect, the use or value of private property must be evaluated. The policies and actions specifically excluded from review, for example, agency plans and studies, and policies and actions initiated prior to issuance of the Executive Order, are also set forth. Even as to excluded matters, however, agency decisionmakers must take steps to ensure that their constitutional obligations are recognized and fulfilled.

Section V of the Guidelines then explains the Fifth Amendment principles and specific assessment factors to be used in evaluating the takings implications of policies and actions. This evaluation, called the takings implication assessment (TIA), will enable the agency to determine whether, and to what extent, a proposed policy or action poses risks of a taking of private property and to estimate the potential financial exposure of the proposal. The basic elements of the TIA appear in Section VI of the Guidelines. Once completed, the TIA, which will usually be based on a specific factual setting, will serve as an evaluative tool for the agency decisionmaker. This predecisional assessment should be incorporated by the agency, in a form and manner chosen by the agency, into existing planning processes and procedures.

Section VI of the Guidelines explains specific executive branch management responsibilities with regard to the Executive Order and details special reporting requirements. For instance, Sections VI(B) and VI(C) address agency reporting requirements under Section 5(b) of the Executive Order to the Office of Management and Budget.

In addition, Section VI(D) of the Guidelines establishes a supplementation process enabling agencies to adapt these implementation procedures and management requirements to their specific program responsibilities. Through supplementation, an agency has flexibility, with the approval of the Attorney General, to exempt specific policies and actions from analysis under the Executive Order whenever such policies and actions, as a class, have no takings implications. For example, under current case law, no takings implication arises solely because an otherwise lawful permit system is established with respect to subsequent uses of property. In addition, through supplementation, an agency may make specific modifications, as necessary, to the management process. Supplementation may be initiated by an agency at any time, subject to review and approval by the Attorney General.

Section VII sets forth the general responsibilities of the Attorney General and the Director of the Office of Management and Budget in implementation of the Executive Order. The Attorney General is responsible for taking action, to the extent permitted by law, to ensure that the policies of the agencies are consistent with the principles, criteria, and administrative requirements established in the Executive Order and these Guidelines, and for revising and reissuing these Guidelines, as necessary, to reflect fundamental changes in takings law that occur as a result of United States Supreme Court decisions. Finally, in Section VIII of the Guidelines, the non-reviewability of actions taken under the Executive Order, the Guidelines, and the accompanying Appendix to the Guidelines is explained.

An Appendix to the Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings has also been prepared and is incorporated by reference into these Guidelines. This Appendix provides further information for the use of departments and agencies regarding the case law surrounding considerations of whether a taking has occurred and the extent of any potential just compensation claim. As with the Guidelines themselves, this Appendix addresses only a general framework for the evaluation of takings implications of proposed agency policies and actions under the Executive Order and these Guidelines.

II. SCOPE OF THE GUIDELINES

A. Policies and Actions Subject to Evaluation

Except for the policies and actions specified in the exclusions in Subsections II(B) and (C) below, an agency must evaluate, for their takings implications, its administrative, regulatory, and legislative policies and actions that affect, or may affect, the use or value of private property in accordance with the framework established in these Guidelines. These will include, but are not limited to, the following.

1. Administrative and Regulatory Policies and Actions

An agency must evaluate its administrative and regulatory policies and actions that affect, or may affect, the use or value of private property. These policies and actions (as discussed in Sections 2(a) and 2(c) of Executive Order No. 12630) include, but are not limited to, federal regulations that propose or implement licensing or permitting requirements, conditions or restrictions otherwise imposed by an agency on private property use, and actions relating to or

causing the physical occupancy or invasion of private property.

2. Legislative Policies and Actions

An agency must evaluate its legislative policies and actions that affect, or may affect, the use or value of private property whenever such legislative policies and actions are subject to coordination and clearance by the Office of Management and Budget pursuant to Circular No. A-19, Revised, or succeeding management directives issued by the Office of Management and Budget for legislative coordination and clearance.

3. Recommendations to Other Federal Agencies

Written agency comments or recommendations by other than the lead agency on policies or actions within the Executive Order are subject to evaluation under these Guidelines whenever such comments or recommendations are required by law. In that circumstance, the commenting agency shall prepare a limited takings implication assessment consisting only of an assessment of the likelihood that the proposed action or policy may effect a taking for which compensation is due pursuant to Section VI(A)(2)(c)(i), infra.

B. Exclusions

The following federal policies and actions are excluded from evaluation under these Guidelines. Although these specific policies and actions are excluded from evaluation, they should be conducted or undertaken by federal agencies with due regard for the Fifth Amendment. Accordingly, even as to excluded matters, federal agency decisionmakers must take steps to ensure that their constitutional obligations are recognized and fulfilled.

Those policies and actions explicitly excluded from coverage under Executive Order No. 12630 and these Guidelines are as follows:

1. Programs or Regulations Reducing Federal Restrictions on Use of Private Property

Federal policies or actions involving amendments to regulations, deregulation, or discontinuance of federal programs in a manner that lessens interference with the use of private

property are excluded from coverage under the Executive Order and these Guidelines.

2. Trust Property and Treaty Negotiations

Those policies or actions involving the property of person(s) or identified groups (for example, a federally recognized Indian tribe) for which the United States is serving as trustee and those actions taken while the United States is preparing to enter into or undertaking treaty negotiations with a foreign nation are excluded from coverage under the Executive Order and these Guidelines. For purposes of this exclusion, properties held in trust do not include trust territories of the United States (such as the Trust Territories of the Pacific) or other properties over which the United States is acting as a government, rather than serving in the capacity of a statutory trustee.

3. Seizures of Property

All policies or actions involving seizures of property, which will be used by federal civil or military law enforcement officers either as evidence in a criminal proceeding or for criminal or civil statutory forfeiture proceedings, are excluded from coverage under the Executive Order and these Guidelines. Property attached pursuant to law by court or administrative order in any proceeding initiated by the United States is also excluded.

4. Agency Plans and Studies

Preliminary data gathering and evaluation activities, which occur prior to the agency's decision to implement a policy or action and which neither (1) physically occupy or invade private property nor (2) purport to regulate or otherwise restrict the use of private property, are excluded from coverage under the Executive Order and these Guidelines. Such activities are preliminary aids in the decisionmaking process and are excluded even though disclosure of their mere existence may, in certain instances, result in a drop in property values.

Once a proposed policy or action has advanced beyond this preliminary stage, the agency's policy

or action is subject to evaluation under the Executive Order.

5. Consultations Regarding Regulation of Private Property by State and Local Governments

Communications between federal agencies and state or local land-use planning agencies regarding planned or proposed state or local policies or actions regulating private property are excluded from coverage under the Executive Order and these Guidelines. This exclusion applies regardless of whether such communications are initiated by a federal agency or are undertaken by a federal agency in response to an invitation from the state or local authority. This exclusion does not apply to any policy or action for which a federal agency has decisionmaking authority, including authority to require or otherwise direct the state or local government to undertake or refrain from undertaking the activity in question.

6. Military Property

Policies or actions involving placement of military facilities, in the exercise of the power of eminent domain, are excluded from coverage under the Executive Order and these Guidelines. Military activities that are undertaken solely on federal property, for example, artillery practice and military maneuvers and exercises, are also excluded.

7. Exercise of the Power of Eminent Domain

The formal exercise of the power of eminent domain by federal agencies is excluded from coverage under the Executive Order and these Guidelines.

8. Military and Foreign Affairs Activities

Policies and actions involving military and foreign affairs functions of the United States, such as foreign sanctions programs, military exercises, procurement activities, and regulation of personnel, are excluded from coverage under the Executive Order and these Guidelines. This exemption does not apply to regulation by the military of the use by citizens of private property, including the United States Army Corps of Engineers' civil works program. Thus, for

purposes of this subsection, military functions do not include those activities in which the military component or personnel are substituting for, or performing as, a civilian regulatory body or agency.

9. Pending or Imminent Litigation; Enforcement Actions Seeking Statutorily Authorized Penalties, Debt Collection, or the Like

Policies and actions taken in furtherance of pending or imminent litigation, whether judicial or administrative, are excluded from coverage under these Guidelines. In addition, judicial and administrative adjudicatory actions brought pursuant to federal law seeking penalties, the collection of debts authorized by statute, or the like, are excluded from coverage under these Guidelines. Policies and actions of offices of the Inspector General under the Inspector General Act of 1978, as amended, are also excluded from coverage under these Guidelines.

C. Special Exclusion for Agency Policies and Actions Initiated Prior to Issuance of Executive Order No. 12630

Administrative, regulatory, or legislative policies and actions that were finally developed and implemented by an agency at the time of issuance of Executive Order No. 12630 are excluded from coverage under the Executive Order. Agency policies and actions proposed, but not initiated, prior to issuance of the Executive Order or these Guidelines are likewise excluded from coverage under the Executive Order. However, these categories of policies and actions should be evaluated in accordance with the Executive Order and these Guidelines to the maximum extent practicable in order to ensure that constitutional and managerial obligations are met.

III. AGENCY APPLICABILITY

Executive Order No. 12630 and these Guidelines apply, except as provided in Section 2 of the Executive Order and Section II(B) herein, to any executive department, agency, or military department of the United States Government, and to any United States Government corporation, United States Government controlled corporation, or other establishment in the Executive Branch of the United States Government other than those entities defined as "independent regulatory agencies" in 44 U.S.C. § 3502(10).

The term "agency," when used in these Guidelines, shall refer to any of the departments, corporations, or other establishments identified in this section.

IV. DEFINITIONS

- A. "Private Property": "Private Property" includes all property protected by the Fifth Amendment to the United States Constitution, including, but not limited to, real and personal property and tangible and intangible property.
- B. "Takings Implication": Any policy or action to which the Executive Order applies that, upon examination by the decisionmaker under Section V(D)(3), *infra*, appears to have an effect on private property sufficiently severe as to effectively deny economically viable use of any distinct legally protected property interest to its owner, or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation, shall be deemed to have a takings implication for purposes of the Executive Order and these Guidelines.
- C. "Significant Takings Implications": For purposes of the Executive Order and these Guidelines, a "significant takings implication" exists when, on the basis of available information, the decisionmaker concludes as to any policy or action with a takings implication that:
1. The proposed policy or action poses a substantial risk that a taking of private property may result, or
 2. Insufficient information as to facts or law exists to enable an accurate assessment of whether significant takings consequences may result from the proposed policy or action.
- D. "Legislation": For purposes of an agency's evaluation and reporting responsibilities under the executive order and these guidelines, "legislation" is limited to those agency legislative policies and actions that are subject to coordination and clearance by the Office of Management and Budget pursuant to Circular No. A-19, Revised, or succeeding management directives issued by the Office of Management and Budget on legislative coordination and clearance. Examples of the types of legislative submissions subject to review include an

agency's proposed legislation and agency comments or testimony concerning pending legislation.

E. "Lead Agency": This is the federal agency designated to supervise the preparation of the reviews and assessments directed by the Executive Order and these Guidelines.

1. Designation of a lead agency is necessary whenever more than one department or agency is involved in a group of policies or actions directly related to each other because of their functional interdependence or geographic proximity.
2. For purposes of all policies and actions subject to evaluation under the Executive Order and these Guidelines, the lead agency is the one which will have primary responsibility for implementing the proposed policy or action or whose program would otherwise be primarily affected by the proposed policy or action. Any other agency having interagency consultation and review responsibilities for the policy or action in question shall, to the maximum extent possible, work with the lead agency to identify any takings implications.
3. Potential lead agencies have the responsibility to coordinate and determine, in a timely manner, which agency will be lead agency and which will be cooperating agencies. If there is disagreement among the agencies, the following factors should be considered in resolving the lead agency question:
 - a. Magnitude of the agency's involvement in the policy or action;
 - b. The agency's approval/disapproval authority over the policy or action;
 - c. Duration of the agency's involvement in the policy or action; and
 - d. Sequence of the agencies' involvement in the policy or action.
4. When agencies are unable to resolve the choice of the lead agency, an official, to be

designated by the Office of the President, shall be responsible for selecting the lead agency.

V. GENERAL PRINCIPLES AND ASSESSMENT FACTORS

Section V of these Guidelines provides a discussion of the general principles and assessment factors which inform considerations of whether a takings implication (Section V(D)(3)) exists. Section V(A) surveys takings factors generally; Section V(B) addresses current takings law more specifically; and Section V(C) points to specific takings risks discussed in Executive Order No. 12630. The accompanying Attorney General's Appendix to these Guidelines further details case law considerations on the risk of a taking. Section V(D) describes the current legal criteria through which the factors identified in Section V are analyzed. And, Section V(D)(3) specifies the term of art risk assessment criteria -- "takings implication" -- used to assess risk. Section VI of the Guidelines, especially Section VI(A)(2), sets forth the general process for documentation of the agency's application of these factors and criteria.

A. Underlying Premises of the Fifth Amendment

1. The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." Ownership, use, and transfer of private property of all types are rights. They are not benefits or privileges bestowed by government. At the same time, government also has the obligation to lawfully govern. Thus, the rights of property owners are not absolute and government may, within limits, regulate the use of property. Where those regulations amount to a taking of private property, government must pay the owner just compensation for the property rights abridged. The fact that the government's actions are otherwise constitutionally authorized does not mean that those actions cannot effect a taking. On the other hand, government may not take property except for a public purpose within its constitutional authority, and only then, on the payment of just compensation.
2. Government has historically used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. However, government may become liable

for the payment of just compensation to private property owners whose property permanently or temporarily has been, either physically occupied or invaded by government or others with the assistance or approval of government, or so affected by governmental regulation as to have been effectively taken despite the fact that the government has neither physically invaded, confiscated, or occupied the property nor taken legal title to the property.

3. So long as an action having consequences sufficiently severe as to constitute a taking is within the constitutional authority of the government, and the action taken is expressly or impliedly authorized by Congress or other constitutional source of authority (for example, an action directed by the President that the President may constitutionally authorize), the just compensation obligation will attach regardless of whether government contemplated or intended the taking to result. In contrast to the formal exercise of eminent domain, the private property owner can obtain compensation by filing what is called an "inverse condemnation" suit.
4. The Fifth Amendment's protection extends to all forms of property -- real and personal, tangible and intangible. Property is not defined by the Constitution, but by independent sources such as state, local, and federal law.
5. In planning and carrying out federal program policies and actions undertaken by statute and otherwise, government officials have the obligation to be fiscally responsible. In addition, they must respect the constitutional rights of individuals who are affected by those program policies and actions. Accordingly, officials must be aware of and avoid, to the extent possible and consistent with the obligations imposed by law, actions that may inadvertently result in takings. Where such taking risk cannot be wholly avoided, responsible government officials should, to the extent possible and consistent with the obligations imposed by law, minimize the potential financial impact of takings by appropriate planning and implementation. To do this, officials must make decisions informed by the general and specific principles of takings case law.

B. The Nature of a Taking

Takings may occur when permanent or temporary government actions result in the physical occupancy of property, the physical invasion of property, or the regulation of property.

1. Physical Occupancies

Permanent or temporary physical occupancy is the most traditional type of taking and is therefore the most familiar and most easily recognized as a taking. As a general rule, where a physical occupancy exists no balancing of the economic impact on the owner and the public benefit will occur in the taking analysis. Examples of physical occupancy takings include not only formal condemnation exercises, such as the taking of land to build a highway, but also utility easements and access easements. [See Appendix to Guidelines, Section III(E)(1)]

2. Physical Invasions

As a general rule, physical invasions of property, as distinguished from physical occupancies, may also give rise to a taking where the invasions are of a recurring and substantial nature. Examples of physical invasion takings include, among others, flooding and water related intrusions and overflight or aviation easement intrusions. [See Appendix to Guidelines, Section III(E)(2)]

3. Regulatory Takings

a. Like physical occupations or invasions, regulation which affects the value, use, or transfer of property may constitute a taking if it goes too far. Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922); Hodel v. Irving, 107 S. Ct. 2076 (1987); Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987). Regulation has gone too far and may result in takings liability if:

i. The regulation in question does not substantially advance a legitimate governmental purpose; it is not enough that the regulation or action might rationally advance the purpose purported to be served; or

- ii. In assessing the character of the government action, the economic impact of the action on the property interest involved, the extent to which the regulation interferes with the reasonable, investment-backed expectations of the owner of the property interest, and other relevant factors, justice and fairness require that the public, and not the private property owner, pay for the public use. Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980); First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 107 S. Ct. 2378, 2389, n.10 (1987).
- b. Regulatory actions that closely resemble, or have the effect of, a physical invasion or occupation of property are more likely to be found to be takings. See, Nollan v. California Coastal Commission, 107 S. Ct. 2076 (1987). The greater the deprivation of use, the greater the likelihood that a taking will be found.
- c. Regulation of an individual's property must not be disproportionate, within the limits of existing information or technology, to the degree to which the individual's property use is contributing to the overall problem. Thus, regulatory actions designed to compel public benefits, rather than prevent privately imposed harms, are also more likely to be takings.

[See Appendix to Guidelines, Section III(F)]

C. Special Situations

When implementing a regulatory policy or action and evaluating the takings implications of that policy or action, agencies should consider the following special factors:

1. Permitting Programs

[Executive Order No. 12630, Section 4(a);
Appendix to Guidelines, Section III(F)(2)]

The programs of many agencies require private parties to obtain permits before making specific uses of, or acting with respect to, private property, without necessarily effecting a taking for which compensation is due. Those agencies may place conditions on the granting of such permits. However, a condition on the granting of a permit risks a takings implication unless:

- a. The condition serves the same purpose that would be served by a prohibition of the use or action; and
- b. The condition imposed substantially advances that purpose.

2. Public Health and Safety

[Executive Order No. 12630, Section 4(d);
Appendix to Guidelines, Section III(F)(5)]

Policies or actions undertaken to protect public health and safety are ordinarily given greater latitude by courts before being held to give rise to takings. For purposes of that deference, however, the Supreme Court has ruled that "public health and safety" is not coextensive with the government's power to act. Public health and safety represents a component of that broader power. Again, that governmental power exists does not mean that its exercise is free of takings concerns. The deference discussed here extends only to public health and safety interests.

- a. Where public health and safety is the asserted regulatory purpose, then the health and safety risk posed by the property use to be regulated must be identified with as much specificity as possible and should be "real and substantial." That is, it must be more than speculative. It must present a genuine risk of harm to public health and safety and the claim of risk of harm must be supported by meaningful evidence, in light of available technology and information, that such harm may result from the use to be regulated.

- b. Any action taken to regulate property use for public health and safety purposes must address the health and safety risk; that is, it must be designed to counter the identified risk and must substantially advance the public health and safety purpose. The action should also, within the limits of available technology and information, be no more restrictive than necessary to alleviate the health and safety risk created by the use to be regulated.
- c. In assessing these issues, an agency should examine the following factors:
 - i. The certainty that the property use to be regulated poses a health and safety risk in the absence of government action; and
 - ii. The severity of the injury to public health and safety should the identified risk materialize, based on the best available information in the field involved.

From the perspective of a takings implication analysis, the greater the certainty or the greater the severity, the more stringent measures are justified.

- d. Although the ideal is that the response taken to counter the risk be "no greater than" the risk posed, reasonable proportionality presupposes available technology and information.

3. Delay

[Executive Order No. 12630, Section 3(d);
Appendix to Guidelines, Section IV]

Undue delay in decisionmaking processes, whether intentional or unintentional, may give rise to takings liability, or increase the amount of compensation due if the decisionmaking process interferes with the use of property pending the decision. Hence, decision-making processes should be kept to the minimum time necessary to allow the agency to meet its obligations.

D. Policy and Action Evaluation Criteria

[Executive Order No. 12630, Section 4; Appendix to Guidelines, Sections II, III, and V]

When evaluating policies or actions for takings implications, the following criteria (informed by the guidance of Executive Order No. 12630, Sections V(A-C) of these Guidelines, the Appendix to these Guidelines, and applicable case law) will apply. These criteria will form the basis for the assessment of takings implications as outlined in Section VI(A)(2), infra.

1. Takings Implication Considerations: Physical Intrusion

Physical intrusion takings analysis is appropriate where the action or policy involves physical presence by the government, or by others pursuant to government authorizations, on private property. Where that presence amounts to occupancy of the property, takings exposure is measured by the physical limits of the occupation. Where the intrusion is less than occupancy, takings exposure turns on both the character of the invasion (for example, overflight, flooding) and a physical presence that is the natural and probable consequence of authorized government action.

2. Takings Implication Considerations: Regulatory Takings

As discussed in Section V(B)(3), regulation may result in a taking of property.

a. Character of the Government Action

In assessing the character of the government action, an agency should examine:

- i. The purpose intended to be served by the enabling statute, where the policy or action is taken pursuant to statute. Agencies should examine both the legislative history and the operative terms of the statute to determine that a legitimate purpose identified in the statute is being served.
- ii. Whether the policy or action will substantially advance a legitimate public purpose of the enabling statute,

where the policy or action is in furtherance of obligations imposed or authorized by statute. The proposed policy or action both must have the purpose of furthering, and must substantially further, the purpose embodied in the statute. It is not enough that the policy or action or regulation might rationally advance the purpose purported to be served.

- iii. The degree to which the property-related activity or use that is the subject of the proposed policy or action contributes to a harm that the proposed policy or action is designed to address. The less direct, immediate, and demonstrable the contribution of the property-related activity to the harm to be addressed, the greater the risk that a taking will have occurred.
- iv. The extent to which the intended policy or action totally abrogates a property interest which has been historically viewed as an essential stick in the bundle of property rights.

b. Economic Impact of the Proposed Policy or Action

In assessing the economic impact of the proposed policy or action, an agency should examine:

- i. To the extent reasonably possible, what economic and property interests will be, or are likely to be, affected by the proposed policy or action. In that context, economic impact should be considered as to each property interest recognized by the applicable law.
- ii. The likely degree of economic impact on identified property and economic interests;
- iii. To the extent reasonably possible, among other relevant factors, the character and present use of the property, the anticipated duration of

the proposed or intended action, and variations in state law;

iv. Whether the proposed policy or action carries benefits to the private property owner that offset or otherwise mitigate the adverse economic impact of the proposed policy or action; and,

v. Whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.

c. Interference with Reasonable Investment-Backed Expectations

To the extent reasonably possible, an agency should examine the degree to which the proposed policy or action will interfere with reasonable, investment-backed expectations of those private property owners affected by the proposed action, even if such expectations are not formally recognized as property interests under the generally applicable law.

3. Determination of Policies or Actions Having Takings Implications or Significant Taking Implications

a. When an agency decisionmaker, in applying the Section V(D) criteria, determines that a policy or action appears to have an effect on private property sufficiently severe as to effectively deny economically viable use of any distinct legally protected property interest to its owner, or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation, that appearance shall be deemed to give rise to a takings implication for purposes of the Executive Order and these Guidelines. See Section IV(B), supra (definition of "takings implication").

b. Similarly, a significant takings implication shall be deemed to exist for purposes of the Executive Order and these Guidelines when, on the basis of available information, the decisionmaker concludes as to any policy or action with a takings implication that:

- i. The proposed policy or action poses a substantial risk that a taking of private property may result; or
- ii. Insufficient information as to facts or law exists to enable an accurate assessment of whether significant takings consequences may result from the proposed policy or action.

See Section IV(B), supra (definition of "significant takings implication").

4. Evaluation of Alternatives for Policies and Actions Having Takings Implications

Agencies should strive to the extent permitted by law, consistent with their statutory obligations, to undertake policies or actions in a way which minimizes their takings implications. Where such implications cannot be wholly avoided, the agencies should take appropriate actions to minimize the potential financial impact of takings.

VI. IMPLEMENTATION, MANAGEMENT, AND SPECIAL REPORTING REQUIREMENTS

A. Implementation and Management Requirements

In order to apply the general principles contained in the Executive Order, Sections V(A)-(C) of these Guidelines, and the Appendix to these Guidelines, through the criteria detailed in Section V(D) of the Guidelines, Executive Order No. 12630 imposes the following obligations on agencies subject to its provisions.

1. Federal Agency Contact

The head of each agency required to review its policies and actions under Executive Order No. 12630 shall designate an agency official to be responsible for ensuring that agency's compliance with the Executive Order and these Guidelines. The designation of this official is solely within the discretion of the agency head. The designated federal agency contact shall serve as the agency's liaison on questions of compliance with the Executive Order and shall make information available to the Office of Management and Budget

and/or the Attorney General, upon request, regarding the agency's compliance procedures and activities.

The identity of the designated official shall be communicated, by no later than July 15, 1988, to the Assistant Attorney General, Land and Natural Resources Division, Department of Justice, and the Director, Office of Management and Budget. Notification of any change in this designation shall also be forwarded within ten (10) working days of the effective date of the change.

2. Takings Implication Assessment (TIA)

Before undertaking any proposed action or implementing any policy or action subject to evaluation, each agency shall perform a Takings Implication Assessment (TIA). The TIA shall be made available to the agency decisionmaker responsible for determining whether and how to implement a policy or to undertake an action, in such form and in such manner as is calculated to ensure that the decisionmaker may make meaningful use of the TIA in formulating his or her decision.

- a. The TIA is to be integrated, in a form and manner in the agency's discretion, into normal agency decisionmaking processes.
- b. The TIA will serve as a tool for assessing the taking implications and related fiscal impact of policies and actions within the Executive Order. It is to provide candid, predecisional advice as a part of the continuing process of developing government policies and actions.
- c. For administrative and regulatory policies and actions subject to evaluation under the Executive Order and these Guidelines, a TIA must include:
 - i. An assessment of the likelihood that the proposed action or policy may effect a taking for which compensation is due, in light of the principles referenced in the Executive Order and these Guidelines (see Section V, supra) and under applicable case law;

- ii. Identification and consideration of alternatives, if any, to the proposed policy or action which also achieve the government's obligations under law but would reduce intrusions on the use or value of private property; and
 - iii. An estimate of the potential financial exposure to the government should a court find the proposed policy or action to be a taking. It is important to emphasize, in this respect, that this estimate is to be that -- an estimate. Agencies are encouraged to employ available data to the extent possible.
- d. For legislative policies and actions subject to evaluation under the Executive Order and these Guidelines, a TIA must include:
- i. An assessment of the likelihood that the proposed policy or action may effect a taking for which compensation is due, in light of the principles referenced in the Executive Order and these Guidelines (see Section V, supra) and under applicable case law;
 - ii. An assessment of whether there are alternatives to the proposed policy that could accomplish the legislative objective, but would present a lesser intrusion on the use or value of private property; and
 - iii. An estimate of the potential financial exposure to the government should a court find the proposed policy or action to be a taking. This estimate may be presented, in summary, in one of the following alternative forms, or in similar language in the agency's discretion:
 - a. If enacted as proposed, this legislation would pose a substantial risk of significant financial exposure for the United States.
 - b. If enacted as proposed, this legislation would pose a likelihood

of some degree of financial exposure for the United States.

c. If enacted as proposed, this legislation would pose a limited risk of financial exposure for the United States.

e. In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, the TIA may be done upon completion of the emergency action in a form and manner in the agency's discretion.

B. Special Reporting Requirements

1. Required Submissions to the Office of Management and Budget

For regulations submitted for Office of Management and Budget review under Executive Order No. 12291, each agency should include a discussion summarizing any identified takings implications, consistent with Section VI(A)(2)(c), and addressing the merits of the regulations in light of those implications, if the regulation is:

- a. A "major" rule as defined or designated under Executive Order No. 12291;
- b. Any rule that has "significant takings implications," regardless of whether it is properly classified as a "major rule"; or
- c. Any rule otherwise designated by the Office of Management and Budget.

The agency should retain the Takings Implication Assessment and make it available, upon request, to the Office of Management and Budget.

2. Notices of Proposed Rulemaking

"Significant taking implications" shall be identified and discussed, in form and manner chosen by the agency, in notices of proposed rulemaking.

3. Legislative Proposals

For legislative policies and actions subject to coordination and clearance by the Office of Management and Budget (OMB) under Circular No. A-19, Revised, or any successor directive or circular, each agency shall, consistent with Section VI(A)(2)(d), identify the takings implications of the legislation, if any, in such form and manner as the agency deems appropriate. When the agency then elects not to address an identified takings implication in the document submitted for legislative coordination and clearance, the agency shall notify OMB of the existence of such implication. Where an agency determines that a legislative policy or action has significant takings implications, it shall include an evaluation of such implications in its submission to OMB under Circular No. A-19, Revised.

In every instance, agencies should retain the Takings Implication Assessment and make it available, upon request, to the Office of Management and Budget.

C. Agency Budget Submissions

Separate guidance will be provided by the Office of Management and Budget regarding documentation requirements. (e.g., OMB Circular No. A-11)

D. Agency Supplementation

1. Purpose

Section 5(e)(2) of Executive Order No. 12630 directs that the Attorney General shall, in consultation with each agency, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that agency. Supplemental guidelines may be issued for one specific agency or for a group of related agencies, as appropriate. The supplemental guidelines shall set forth implementing procedures that will aid an agency in administering its specific program responsibilities in accordance with the analytical and procedural framework presented in the Executive Order and these Guidelines. The supplemental guidelines should not be used to restate the terms of the Executive Order or these Guidelines.

2. Initiation of Supplementation Process

The Guidelines supplementation process may be initiated either by an affected agency or by the Attorney General, as set forth below. However, in either event, the Attorney General is responsible for final approval and issuance of the supplemental guidelines.

a. Federal Agency Review

Each agency to which Executive Order No. 12630 applies is responsible, on a continuing basis, for reviewing its internal policies and procedures to ensure full compliance with the Executive Order. In conjunction with this review, each agency shall assess whether procedures to supplement these Guidelines (including, for example, exclusions supported by a Takings Implication Assessment, or special processes for certain categories of policies or actions) are necessary and appropriate in light of its specific statutory obligations. Whenever an agency determines that issuance of supplemental guidelines is warranted, the Secretary or head of the agency shall inform the Attorney General and submit proposed supplemental guidelines for review, approval, and issuance by the Attorney General.

b. Department of Justice Review

In conjunction with his responsibilities for oversight of agency implementation of Executive Order No. 12630, the Attorney General may initiate the preparation and issuance of supplemental guidelines for an individual agency or group of agencies. Initiation and development of such guidelines by the Attorney General may be appropriate, for example, to ensure that similar types of government program activities, conducted by several agencies, are evaluated in a comparable manner under the Executive Order. The Attorney General shall consult with the Secretary or head of the individual agency or agencies involved regarding the need for, and advisability of, issuance of such supplemental guidelines.

3. Issuance of the Supplemental Guidelines

The Attorney General has the responsibility under section 5(e)(2) of the Executive Order to promulgate any such agency supplemental guidelines. Accordingly, the Attorney General shall review an agency's proposed supplemental guidelines, submitted in accordance with Section VI(D)(2)(a) above, for conformance with the Executive Order and these Guidelines. At the completion of this review, including consultation with the agency involved, the Attorney General may, in his discretion, issue agency supplemental guidelines. In the event the Attorney General has initiated preparation and development of agency supplemental guidelines, he shall consult with, and fully consider the recommendations of, the agency involved prior to issuance of Executive Order No. 12630 supplemental guidelines. Any policy or action for which a categorical exclusion has been created by supplemental guidelines will automatically lose that exclusion from the Executive Order No. 12630 process where such conduct is held by a court of competent jurisdiction to have the potential of a taking.

4. National Security Exemption

Executive Order No. 12630 supplemental guidelines may include specific criteria for providing limited exceptions to the provisions of these guidelines for classified activities and actions. Such activities and actions are those specifically authorized under criteria established by an executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such executive order or statute.

VII. RESPONSIBILITIES OF THE ATTORNEY GENERAL AND THE DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET

A. Attorney General

In addition to the specific responsibilities for implementation of Executive Order No. 12630 set forth above, the Attorney General shall, to the extent permitted by law, take action to ensure that the policies of the agencies are consistent with the principles, criteria, and administrative requirements established in the Executive Order and these Guidelines. The Attorney General shall also revise and

reissue these Guidelines, as necessary, to reflect fundamental changes in takings law that occur as a result of United States Supreme Court decisions.

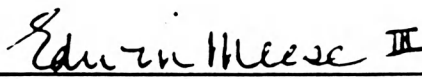
B. Director, Office of Management and Budget

The Director, Office of Management and Budget, shall, to the extent permitted by law, take action to ensure that the policies of the agencies are consistent with the principles, criteria, and requirements stated in Executive Order No. 12630 and that all takings awards levied against agencies are properly accounted for in agency budget submissions.

VIII. JUDICIAL REVIEW AND ENFORCEMENT

Consistent with Section 6 of Executive Order No. 12630, these Guidelines and the Appendix to the Guidelines are intended only to improve the internal management of Executive Branch agencies and are therefore enforceable only by and within the Executive Branch. Accordingly, like the Executive Order itself, these Guidelines and the Appendix to the Guidelines shall not be deemed to create any right or benefit, substantive or procedural, enforceable by anyone in any court against the United States, its agencies, its officers, or any person. For these reasons, neither these Guidelines, the Appendix, nor the deliberative processes or products resulting from their implementation by agencies shall be treated as establishing criteria or standards that constitute any basis for judicial review of agency actions. Thus, the extent or quality of an agency's compliance with the Executive Order or these Guidelines shall not be justiciable in any proceeding for judicial review of agency action.

Issued in Washington, D.C. the 30th day of June, 1988.



EDWIN MEESE III
Attorney General

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APPENDIX
TO
GUIDELINES FOR THE EVALUATION OF RISK AND
AVOIDANCE OF UNANTICIPATED TAKINGS

I. Introduction

This Appendix is a part of, and incorporated by reference into, the Guidelines promulgated by the Attorney General pursuant to Executive Order No. 12630. It provides further detail for the case law parameters surrounding the consideration of the risk that a taking may have occurred. See Guidelines, Section V(A)(5). This discussion is not meant to be exhaustive. In that respect, the takings implication consideration and the evaluation of applicable case law will normally be one requiring close consultation between agency program personnel and agency counsel.

As with the Guidelines themselves, this Appendix speaks only to a general framework for the takings implication analysis under Executive Order No. 12630. Similarly, it is important to reiterate that Executive Order No. 12630 contemplates agency-specific supplemental guidelines. See Executive Order No. 12630, § 5(e)(2); Guidelines, § VI(D).

II. General Considerations

A. The Framework

Executive Order No. 12630, as further explained in the Guidelines, provides for: (a) completion of a Takings Implication Assessment (TIA) before undertaking any proposed action or implementing any policy as defined by Section 2(b) and 2(c) of the Executive Order (see Guidelines, § VI(A)(2)) and (b) certain Special Reporting Requirements, including the identification of takings implications of proposed regulatory actions in certain specific submissions to the Office of Management and Budget (OMB), and the identification and discussion of significant takings implications (as defined in the Guidelines) in notices of proposed rulemaking and, subject to the normal OMB legislative coordination and clearance process, messages transmitting legislative proposals to Congress. These obligations will be integrated, in ways to be determined by the agency in light of the particular program, into its normal decisionmaking processes.

The Guidelines contemplate that agency decisionmakers will continue to meet the obligations imposed upon them by statute. They do not, and should not be read to, preclude actions or policies which the decisionmaker determines necessary to meet those obligations. In those circumstances, the TIA process will identify the takings implications, if any, of the necessary governmental conduct while permitting that conduct to go forward.

B. The Takings Implication Assessment

The TIA serves as an evaluative tool for the takings implications of policies and actions within the Executive Order and provides candid advice on those implications. As a part of the continuing process of developing government policies and actions, the TIA focuses attention on the fiscal and policy concerns arising from takings risk. Intended as a predecisional document, the TIA will be available for meaningful use by the decisionmaker prior to the decision. See Guidelines, § VI(A)(2).

C. Significance of Factual Information to Takings Implication Analysis

Questions as to the existence of takings require the sifting of numerous facts for the isolation of significant and insignificant factors. This focus on facts also lies at the heart of the advice contemplated by the TIA. Thus, a separate TIA will normally be prepared for each policy or action within the Executive Order. Similarly, because the TIA's do evaluate specific factual settings, a TIA prepared for one policy or action will normally have no precedential value for another policy or action.

III. Takings Implications Analysis: General Principles and Framework

[See Executive Order No. 12630, §§ 1(b), 3(a); Guidelines, § V(D)]

A. Introduction

The Executive Order requires identification of takings implications. See Executive Order 12630, § 5(b). This Appendix now turns to a general discussion of the case law framework which provides the current background for assessing takings implications.

B. Fairness and Justice Under the Fifth Amendment

Ratified in 1791, the Fifth Amendment provides, for pertinent purposes:

nor shall private property be taken for public use without just compensation.

Its terms do not prohibit the taking of private property for lawful purposes. Rather, they operate "to secure compensation in the event of otherwise proper interference amounting to a taking". First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2386 (1987). The constitutional guarantee of the Amendment precludes 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." Armstrong v. United States, 364 U.S. 40, 49 (1959).

1. Focus on Impact of Actions and Self-Executing Character

The assessment of governmental interference under the Amendment turns ultimately not on what the government may say, or what it may intend, but on the impact of its actions. Hughes v. Washington, 389 U.S. 290, 298 (1967); Armstrong v. United States, 364 U.S. at 48-49. Moreover, where the interference effects a taking, that governmental action implicates a "constitutional obligation to pay just compensation." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. at 2386. The Amendment has a "self-executing character . . . with respect to compensation." United States v. Clarke, 445 U.S. 253, 257 (1980) (citations omitted), quoted in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, id.

In the face of this self-executing obligation, it is not enough that an agency discontinue its intrusion when a court finds that a taking has occurred. First English Evangelical Lutheran Church of Glendale v. Country of Los Angeles, 107 S. Ct. at 2387-2389. In those circumstances, just compensation would still be due for the period between the point at which the government action created compensable interference (see Sections III(E-G), infra) and the termination of that intrusion. Id. at 2388-2389.

Nor is it necessary that just compensation be paid in advance of a taking, provided that a process is available for meeting the obligation. Williamson Co. Regional Planning v. Hamilton Bank, 105 S. Ct. 3108, 3121 (1985).

2. Fact Sensitive Analysis

The takings analysis proceeds in the particular factual circumstances of the governmental impact on property. This leads to what have been described as "ad hoc" analyses in the context of particular facts. See Hodel v. Irving, 107 S. Ct. 2076, 2082 (1987); Kaiser Aetna v. United States, 444 U.S.

164, 175 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). See Section II(C), supra.

3. Public Use Requirement

The Amendment reaches the taking of private property for public use. In that respect, the "public use" requirement is "coterminous with the scope of the sovereign's police powers." Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321, 2329 (1984) (Hawaii Land Reform Act created condemnation process for transfer of title from lessors in land oligopoly to lessees in order to reduce concentration of land ownership). The Court will not "substitute its judgment for a legislature's judgment as to what constitutes a public use unless the use be palpably without reasonable foundation." Id. See also Berman v. Parker, 348 U.S. 26, 33 (1954) (comprehensive use of eminent domain power for slum redevelopment). Although analysis of the legislative public purpose may include the legislative statement of purpose and the legislative history, the operative terms and provisions of the statute will control any inconsistency between the former and the latter. See Keystone Bituminous Coal Association v. De Benedictis, 107 S. Ct. 1232, 1243 n.16 (1987) ("examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature"). That the Legislature has found a public use does not necessarily, however, answer the more critical question -- for Fifth Amendment purposes -- of whether the lawful exercise of governmental power effects a compensable taking. See Sections III(C-F), infra; Guidelines, § V.

C. Property Interests Within the Fifth Amendment

[See Executive Order No. 12630, § 2(b)]

"Property interests...are not created by the Constitution." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980). Instead, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Id. See also Ruckelshaus v. Monsanto Company, 467 U.S. 986, 1001 (1983) (trade secret property right). Federal statutes may, however, provide a basis for the perfection of property interests by individuals. For instance, subject to the federal law limitations for establishing that necessary predicates for the vesting of interests have occurred, federal mining claims are private property within the Fifth Amendment. Freese v. United States, 639 F.2d 754 (Ct. Cl. 1982). In a later opinion, Freese v. United States, 6 Cl. Ct. 1, aff'd, 770 F.2d 177 (Fed. Cir. 1984), the court found that plaintiffs had not perfected their claim. Cf. Cape Fox Corporation v. United States, 4 Cl. Ct. 223 (1983) (ANCSA "selections" contingent and speculative).

The Amendment reaches property interests of whatever specie -- realty, personalty, or intellectual. In the context of the Fifth Amendment, the word "property" is used in the sense of "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, to use and dispose of it." The provision addresses every sort of interest the citizen may possess. United States v. General Motors Corp., 323 U.S. 373, 378 (1945). See also United States v. Willow River Power Co., 324 U.S. 499, 502 (1945); but cf. Reichelderfer v. Quinn, 287 U.S. 315 (1932) (sovereign-created values may not be private property interests under the Fifth Amendment); Acton v. United States, 401 F.2d 896 (9th Cir. 1968), cert. denied, 395 U.S. 945 (1969) (no property rights accrued to licensee upon revocation which are compensable in condemnation). Nor are all economic interests property interests. United States v. Willow River Power Co., 324 U.S. 499, 502 (1945). Where a property interest exists, however, the authority of the government to limit the interest by legal redefinition is constrained by the Fifth Amendment. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1012 (1984).

And, even though the right to build on private property can be the subject of legitimate permitting regulation, that right "cannot remotely be described as a 'governmental benefit'." Nollan v. California Coastal Commission, 107 S.Ct. 3141, 3146 (1987).

Further, compensation due under the Amendment when a taking does occur accrues to the owner of the property interest at the time of the taking, not to the owner at an earlier or later date. United States v. Dow, 357 U.S. 17 (1958). For special statutory limitations with respect to the assignment of taking claims, see 31 U.S.C. § 3727 (1986).

D. Congressional Authorization to Act

[See Executive Order No. 12630, § 3(e)]

Congressional authorization to undertake the government action at issue is an essential element of a taking. See generally, Section 3(e), supra. The test is not whether Congress authorized or even contemplated a taking effect from action pursuant to its purpose. Rather, the test is whether the government conduct said to give rise to the taking was authorized. See Florida Rock Industries v. United States, 791 F.2d 893, 898 (Fed. Cir. 1986), citing Portsmouth Harbor Land and Hotel Company v. United States, 260 U.S. 327 (1922); NBH Land Company v. United States, 576 F.2d 317, 319 (Ct. Cl. 1978); Barnes v. United States, 538 F.2d 865, 871 (Ct. Cl. 1976). Where Congress has acted so as to preclude implication of authority for takings purposes, however, a taking cannot lie. NBH Land Company v.

United States, 576 F.2d at 319; Southern California Financial Corporation v. United States, 634 F.2d 521, 524 (Ct. Cl. 1980).

E. Physical Intrusion Takings: Physical Occupancy and Physical Invasion

[See Executive Order No. 12630, § 3(b); Guidelines, § V(B)(1) & (2)]

1. Physical Occupancy [Guidelines, § V(B)(1)]

In general, governmental actions resulting in physical intrusions constitute property restrictions long viewed by the Supreme Court as having "an unusually serious character for purposes of the Takings Clause." Loretto v. Teleprompter Manhattan CATV Corporation, 458 U.S. 419, 426 (1982). Moreover, "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." Id.

In the circumstances of a physical occupation, the taking reaches to "the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Id., at 425-426. Thus, the presence of CATV cables and related boxes (occupying approximately 1 1/2 cubic feet) pursuant to New York law requiring landlords to permit the facilities on their rental property was a taking. Id. at 441.

2. Physical Invasions [Guidelines, § V(B)(2)]

The Supreme Court recognizes a distinction between instances of permanent physical occupation and those of physical invasions falling short of occupation. Id. at 430. Classic examples of the latter in federal law include, but are not limited to, aviation easement, or so-called overflight, and flooding taking cases.

Thus, where flights of government aircraft are so low and frequent over private property as to constitute a direct and immediate interference with the use and enjoyment of the subjacent land, compensable takings may arise. United States v. Causby, 328 U.S. 256 (1946). See also Aaron v. United States, 311 F.2d 798 (Ct. Cl. 1963) (finding overflight taking in navigable airspace); Branning v. United States, 654 F.2d 88 (Ct. Cl. 1981) (liability from flights over 500 feet AGL not precluded merely by that fact); Stephens v. United States, 11 Cl. Ct. 352 (1986) (vast majority of flights in navigable airspace and no peculiar circumstances warranting liability there). Where flights occurring below the navigable airspace are involved, those intruding flights must interfere "substantially with the use or enjoyment of the property" in order to risk taking liability. Hero Lands Company v. United States, 1 Cl. Ct. 102,

105 (flights in conjunction with operations of NAS-New Orleans), aff'd, 727 F.2d 1118 (Fed. Cir.), cert. denied, 466 U.S. 972 (1983).

Where flooding occurs as the natural and probable consequence of authorized government action and, although intermittent, is inevitably recurring, a taking also may be found. United States v. Cress, 243 U.S. 316, 330 (1917). See also Bartz v. United States, 633 F.2d 571 (Ct. Cl. 1980); Barnes v. United States, 538 F.2d 865 (Ct. Cl. 1976) (alteration of sedimentation patterns resulting in above high water flooding causing taking). The flooding must be productive of substantial interference in order to risk taking liability. Barnes v. United States, 538 F.2d at 870 (citing United States v. Cress, 243 U.S. at 328).

F. Regulatory Takings

[See Executive Order No. 12630, §§ 3(b), 3(c), 4(a), 4(d), 5(b); Guidelines, § V(B)(3)]

1. In General

Governmental regulatory conduct may go "too far", thus requiring just compensation. Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922) (statute prohibited the mining of anthracite coal in a manner causing surface subsidence and damage to overlying structures). Where the Mahon line is crossed and the vehicle for payment of just compensation provided by 28 U.S.C. § 1491 (1986) is unavailable, for instance, the Court has invalidated federal regulatory action. Specifically, in Hodel v. Irving, 107 S. Ct. 2076, 2084 (1987), the Supreme Court invalidated congressional legislation providing that certain property could not descend by intestacy or devise to successors in interest but, instead, would escheat to Indian tribes. Stressing the extraordinary character of the government regulation and the virtual "abrogation of the right to pass on a certain type of property," the Court concluded that the statute went "too far."

The Court has indicated, in land use regulation contexts, that the line will be crossed when a regulation does "not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." Agins v. Tiburon, 447 U.S. 255, 260 (1980) (zoning density restrictions neither prevented best use of property nor extinguished a "fundamental" attribute of ownership), cited in Nollan v. California Coastal Commission, 107 S. Ct. 3141, 3146 (1987) and United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455, 459 (1985). The existence of a permit system, for instance, and the requirement that an individual resort to the system before engaging in a property use does not effect a taking per se. Id.

"Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." Id.

2. Permitting Programs and Conditions
Substantially Advancing Legitimate
Government Purposes

[See Executive Order No. 12630, § 4;
Guidelines, § V(C)(1)]

a. In General

The programs of many agencies require private parties to obtain permits in order to undertake a specific use of, or action with respect to, private property. Takings precedent requires that permitting programs give special thought with respect to any conditions imposed on the granting of a permit. Specifically, in Nollan v. California Coastal Commission, 107 S. Ct. 3141, 3144 (1987), the Court addressed a situation where the California Coastal Commission granted property owners a permit to replace a small beachfront bungalow with a larger house on the condition that the owners provide, by easement, additional lateral access for the public to public beaches on the water side of the house.

Analyzing the case under the Takings Clause, the Court first reiterated the proposition that the right to exclude others from property was one of the most essential sticks in the property owners' bundle of rights. Id. at 3145. That the burden on this right resulted from a condition on a permit as contrasted to acquisition of an easement for access was insignificant. Id. Pointing to the permanent and continuous right given to individuals to traverse the lateral beachfront, the Court found a physical occupation. Id. Accord Loretto v. Teleprompter Manhattan CATV Corporation, 458 U.S. 419, 426 (1982).

Analyzing the question of whether exaction of this concession by permit condition effected a taking, Nollan cited Agins language and began with the proposition that "land use regulation would not effect a taking if it 'substantially advance[d] legitimate state interests' and [did] not 'den[y] an owner economically viable use of his land.'" Id. at 3146 (citing Agins v. City of Tiburon, 447 U.S. at 260). Significantly, the Court held that the regulatory requirement must "substantially advance" the legitimate interest and not merely be a requirement which might rationally achieve the governmental objective. Nollan v. California Coastal Commission, 107 S. Ct. at 3147, n.3.

The Court assumed, arguendo, the legitimacy of the government interest -- protecting the public's ability to see the beach -- in the first instance. Id. at 3147. Given that legitimacy, a "condition that would have protected the public's ability to see the beach notwithstanding construction of the new house," for example, would have been constitutional. Id. at 3148. Such a condition would have served the same governmental purpose as the building restriction in the first instance.

Where the condition imposed failed to advance the governmental interest which anchored the restriction in the first instance, but instead sought to achieve a different purpose without just compensation, "the building restriction [was] not a valid regulation of land use but 'an out and out plan of extortion'." Id. (citations omitted). In the Court's view, this nexus failure resulted, for Takings Clause purposes, in something beyond the "outer limits of 'legitimate state interests.'" Id.

b. Executive Order and Guidelines Requirements

Accordingly, in the interest of minimizing unanticipated takings, Section 4(a) of the Executive Order and Section V(C)(1) of the Guidelines provide that a permitting requirement imposing a condition on the granting of the permit should: (1) serve the same purpose that would have been served by a prohibition of the use or action; and, (2) substantially advance that purpose.

3. Proportionality of Burden to Risk Created

[See Executive Order No. 12630, § 4(b);
Guidelines, § V(B)(3)(c)]

a. In General

It is also important to the justice and fairness analysis compelled by the Fifth Amendment to demonstrate, to the extent possible, that the restriction imposed is proportional to the contribution to that risk occasioned by the restricted use. Nollan v. California Coastal Commission, 107 S. Ct. 3141, 3143 n.4 (1987) ("If . . . singled out to bear the burden . . . although they had not contributed to it more than other . . . landowners . . . [the action] might violate either the . . . Takings Clause or the Equal Protection Clause.").

b. Executive Order and Guidelines Requirements

Accordingly, Section 4(b) of Executive Order No. 12630 provides:

When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

See also Guidelines, § V(B)(3)(c).

4. Three-Part Regulatory Taking Analysis

[Guidelines, § V(D)(2)]

a. In General

In addition to the specific requirements with respect to permitting conditions (Section III(F)(2), supra), the location of the Mahon "line" requires careful consideration of what has come to be viewed as a three-part regulatory taking test: (1) the character of the governmental action; (2) the economic impact of the action; and (3) the extent of interference with reasonable investment-backed expectations. Penn Central Transportation Company v. New York City, 438 U.S. 104, 124 (1978) (New York Landmark Law prohibited appellants from occupying airspace, i.e., developing, above Grand Central Station but permitted use of the remainder of the parcel as well as sanctioned the transfer of this precluded right to develop to other property; no taking found). This three-part test is applied in Section V(D) of the Guidelines when evaluating regulatory actions for their takings implications.

b. Examples of Application of Three-Part Analysis

The following are examples of the application of the three-tiered test: Hodel v. Irving, 107 S. Ct. at 2082 (act effected uncompensated taking; character of action, analogized significance of right to devise property to the right to exclude others; economic impact could be substantial and right to devise property "a valuable right"; taking found even though interference with investment backed expectations was not substantial; Connolly v. Pension Benefit Guaranty Corporation, 106 S. Ct. 1018, 1026 (1986) (withdrawal liability provisions of Multi-Employer Pension Plan Amendments of 1980 not takings; character of action, economic reallocation; economic impact, in proportion to experience with pension plan; interference with investment backed expectations, not substantial because of early notice to participants); Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979) (action unlawful taking where petitioners, in presence of government consent and acquiescence, committed substantial investment of resources to link private body of water to navigable water; loss of right to exclude characterized as a

fundamental right of property; assertion of navigation servitude here would result in physical invasion; impact not insubstantial; expectancies evidenced by substantial investment of funds entitled to protection).

The ad hoc three-part test is not fully predictable, and therefore, proposed actions and policies should be sensitive to takings implications even if the case precedents finding a taking were decided on somewhat different facts. For example, even on the same subject matter, application of the tests can result in different takings conclusions. For instance, in Keystone Bituminous Coal Association v. De Benedictis, 107 S. Ct. 1232, 1242 (1987), the Court considered recent Pennsylvania legislation which -- like the Kohler Act analyzed in Mahon -- addressed concerns of subsidence damage associated with coal mining activities. The opinion finds the Mahon line unviolated for two reasons.

First, the 1966 Subsidence Act contained specific legislative findings that important public interests warranted the regulation, unlike the Kohler Act which involved "a balancing of the private economic interests of coal companies against the private interests of surface owners." 107 S. Ct. at 1242. Thus, the 1966 legislation brought to bear the "substantial" public interest in "preventing activities similar to public nuisances". 107 S. Ct. at 1246. See § III (F)(5)(a), infra. In determining the purposes, the Court emphasized that, although legislative declarations were important, the analysis required judicial consideration of the operative terms of the statute. 107 S. Ct. at 1243, n.16.

Second, Keystone petitioners demonstrated no material interference with reasonable investment backed expectations on the part of the coal industry. Specifically, the cases presented a facial challenge to the 1966 Act -- essentially, an allegation that the mere enactment of the legislation constituted a taking. 107 S. Ct. at 1242. Petitioners made no claim that the 1966 Act made continued mining of bituminous coal commercially impracticable. Nor did the Court have before it any evidence that the Act's requirement to leave certain coal in place had made mining unprofitable in those locations. These factors stood in contrast to Mahon's finding that the Kohler Act rendered mining commercially impracticable. Petitioners' "support estates" (which under Pennsylvania law included the right to remove coal underlying the surface or to leave those layers intact and which could be owned by either the surface or mineral estate owner), in the Court's view, had value only in that they protected or enhanced the mineral estates also owned by petitioners -- that is, the support estate was simply one strand in the bundle of rights owned by the coal owner. The Court stressed that petitioners "retain[ed] the right to mine

virtually all of the coal in their mineral estates". Thus, the burden imposed on the surface estate did not constitute a taking.

c. Economic Impact Factors

[Guidelines, § V(D)(2)(b)]

Among the factors which may be relevant in assessing the economic impact of governmental action are the character of the property, the volatility of property values, variations in state property laws affecting the utility of the property, market, regional and demographic information, the existence of irretrievable economic opportunities, the anticipated duration of the proposed action, and the extent to which the property owner may have enhanced the existing use of the property. This list of factors is illustrative only and is neither exhaustive nor obligatory.

5. Regulation in the Service of Public Health and Safety

[See Executive Order No. 12630, § 4(d); Guidelines, § V(C)(2)]

a. In General: Deference in Matters of Public Health and Safety

In evaluating government regulatory conduct under the Takings Clause, courts have evidenced a "hesitance" to find takings where the public purpose of the underlying legislation is to "restrain[] uses of property that are tantamount to public nuisances" Keystone Bituminous Coal Association v. De Benedictis, 107 S. Ct. at 1245. Important to claiming the deference shown in such public nuisance regulation is recognition of the concept of "reciprocity of advantage" -- that, in demonstrable ways, each who is regulated benefits from the similar regulation of others. Id. Cf. Mugler v. Kansas, 123 U.S. 623 (1887) (prohibition of liquor sale in interest of health, safety, or morals of public); Euclid v. Ambler, 272 U.S. 365 (1926) (in a facial challenge, conclusion that noise and traffic might be very nearly a public nuisance in an area; thus, regulations bore substantial relationship to public welfare); Miller v. Schoene, 276 U.S. 272 (1928) (nuisance rationale sustains state's destruction of cedar rust trees); Goldblatt v. Hempstead, 369 U.S. 590, 595-596 (1961) (safety based regulation prohibiting further excavation of sand and gravel mine below water table not unreasonable; plaintiffs' failed to meet burden of showing that prohibition would further reduce value of property or that regulation unreasonable).

b. Deference Not Coextensive with "Public Use"

Although "public use" for purposes of the Fifth Amendment is coterminous with the governmental police power (Section III(B)(3), supra) the deferential "nuisance exception" discussed here is not coextensive with the police power. Keystone Bituminous Coal Association v. De Benedictis, 107 S. Ct. at 1245, n.20. In other words, even when governmental action is designed to protect health and safety, some consideration of that action's economic impact may nevertheless be appropriate. Thus, Florida Rock v. United States, 791 F.2d 893, 902 (Fed. Cir. 1986) has cautioned that a "regulation under the Clean Water Act can be a taking if its effect on a landowners's ability to put his property to productive use is sufficiently severe."

c. Executive Order and Guidelines Requirements

[See Executive Order 12630, § 5(d); Guidelines, § VI(A)]

With respect to public health and safety directed actions, then, management must, in any internal deliberative documents and any submissions to the Director, Office of Management and Budget, that are required:

- i. Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;
- ii. Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;
- iii. Establish to the extent possible, that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and,
- iv. Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking. See § V, infra.

Under the Guidelines procedure, this reporting is accomplished by completion of the TIA process and consideration of the factors identified in Section V(C)(2) of the Guidelines for public health and safety actions. The "required submissions" are defined in Section VI(B) of the Guidelines.

6. Examples of Regulatory Takings Litigation

Although clearly not exhaustive, federal regulatory takings litigation include the following examples: Kirby Forest Industries v. United States, 467 U.S. 1, 4-6 (1984) (mere initiation of condemnation action does not result in taking even if accompanied by lis pendens); Yuba Goldfields v. United States, 723 F.2d 884 (Fed. Cir. 1983) (taking: government assertion of mineral rights title, was later found inaccurate by court ruling, and related "prohibition" of dredging activity); Deltona Corporation v. United States, 657 F.2d 1184 (Ct. Cl. 1981) (no taking: multi-stage development; permits as to early stages granted, but two permits under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act denied as to latter stages; where many "economically viable uses" remain, denial of highest and best use not a taking); Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981) (no taking: Corps of Engineers denied section 404 permits, but offered modification; plaintiffs declined offer); Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977) (taking: statutory requirements for development of Pennsylvania Avenue property, in combination with congressionally imposed moratorium, in interest of preserving building facade deprived owner of any reasonable use); Hendler v. United States, 11 Cl. Ct. 91 (1986) (no taking: issuance of emergency access order under CERCLA alone not a taking; left open question of physical intrusion); Snowbank Enterprises v. United States, 6 Cl. Ct. 476 (1984) (no taking: regulatory constraints imposed by Boundary Waters Canoe Wilderness Act on access not so pervasive as to amount to a taking); Mesa Ranch Partnership v. United States, 2 Cl. Ct. 700 (1983) (no taking: threat of condemnation not a taking; interested party persuasion of local zoning body to down-zone property not a taking).

G. Examples of Non-Categorical Takings Litigation

Government action may not fall clearly into either a physical intrusion or regulatory burden category. In these instances, courts have proceeded to analyze the justice and fairness, in the context of Armstrong, supra, of the burden placed on the property owner. Examples include Eyherabide v. United States, 345 F.2d 565 (Ct. Cl. 1965) (taking: gunnery range around property; evidence of physical intrusion combined with other factors, such as signs indicating that area within ranch was a gunnery range); Drakes Bay Land Company v. United States, 424 F.2d 574 (Ct. Cl. 1970) (taking: government officials found to have ignored means, placed in their hands, to prevent economic harm from congressional taking; instead, found to have taken positive steps to prevent exploitation of land).

IV. Temporary Takings Resulting from Government Activity

[See Executive Order No. 12630, §§ 3(b), 3(d), 4(c) Guidelines, § V(C)(3)]

A. In General

"'[T]emporary' takings which ... deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. at 2388 (finding that the Constitution's Takings Clause, as applicable to the states through the Fourteenth Amendment, compelled a cause of action for the government's payment for the value of the use of land during a temporary period). Where government action is found to occasion a temporary taking, "the government may elect to abandon its intrusion or discontinue regulations." Id. at 2387 (citations omitted). Time consumed by administrative processes in good faith which may be viewed as "normal delay" will likely raise no takings implication. Id. at 2389. However, government-imposed moratoria on use raise colorable takings considerations. See, e.g., Benenson v. United States, supra.

B. Executive Order and Guidelines Requirements

[See Executive Order No. 12630, § 3(d) & 4(c); Guidelines, § V(C)(3)]

Conversely, as the Executive Order highlights, "undue delays in decision-making during which private property use is interfered with carry a risk of being held to be takings." Executive Order No. 12630, § 3(d). In the interest of fiscal responsibility and minimizing the just compensation that might eventually be found due for any temporary taking, the Executive Order provides that:

When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

Executive Order No. 12630, § 4(c). Types of delay requiring especially careful attention would include moratoria on the development or use or conduct which might be viewed as acquisitory in character.

V. Estimation of Potential Financial Exposure

[See Executive Order, § 4(d)(4); Guidelines,
§ VI(A)(2)(c)(3)]

A. In General

By way of overview, the United States may be held liable for the taking of a fee or lesser interest in property. See Benenson v. United States, 548 F.2d at 948 (fee interest); United States v. Causby, 328 U.S. at 267 (easement). Importantly, when the government takes, it acquires a property interest. With respect to the compensation due for the taking, the goal is to provide the monetary equivalent necessary to place the property owner in the same position he or she would have been had the taking not occurred. United States v. Reynolds, 397 U.S. 14, 15-16 (1970); Foster v. United States, 2 Cl. Ct. 426, 445 (1983). Where the taking is for less than a fee interest, the just compensation measure is frequently described as the difference between the value of the property before the taking and the value after the taking. Aaron v. United States, 311 F.2d at 802. Damages resulting from the loss or destruction of business incidental to the taking are not recoverable as part of the just compensation due. Mitchell v. United States, 267 U.S. 341, 346 (1925). But see Prudential Insurance Company of America v. United States, 801 F.2d 1295, 1300, n.13 (Fed. Cir. 1985).

The award of just compensation also entitles the successful plaintiff to interest from the date of the taking to the date of payment. See Jacobs v. United States, 290 U.S. 13, 16-17 (1933); Henry v. United States, 8 Cl. Ct. 389, 393-94 (1985); Foster v. United States, 3 Cl. Ct. 738, 745 (1983). Litigation expenses, including the reimbursement of reasonable attorney and appraisal fees, will also be available pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4654(c) (1986).

B. Financial Exposure

The Guidelines require an estimation of potential financial exposure. First, it is critical to recognize that this is an estimation only. These estimates are not intended to be close approximations of ultimate takings liability, if any, in a given case. Second, the estimates will vary with the nature and scope of the government policy or action proposed. For instance, in the context of a proposed major rule under Executive Order No. 12291 for which a regulatory impact analysis has been prepared, that analysis may provide an appropriate vehicle for exposure estimation. See Sections 3(b) and (d), Executive Order No. 12291. In the context of other proposed rules, an economic assessment of the rule's impact on society will likely be prepared. See Sections 2(b)-(e), Executive Order No. 12291.

Treatment of the economic impact of the rule on the use or value of private property within that economic assessment may provide an appropriate vehicle for exposure estimation. In the context of legislation, economic assessments of the impact of such policies and action on the use or value of private property may provide an appropriate vehicle for exposure estimation. In the context of other policies and actions -- for example, permit applications -- applicants may be requested to supply the acquisition cost they paid for the property, adjusted for time to the date of the application.

April 20, 1994

TALKING POINTS ON CLINTON ADMINISTRATION EXECUTIVE ORDER ON PRIVATE PROPERTY

WHAT DOES THE CLINTON ORDER DO?

- **General Intent** -- To address the legitimate concerns of private property owners that necessary government action not unnecessarily impact on their property and that they be compensated if a "taking" under the Constitution has occurred; to address these concerns while carrying out the government's responsibilities to protect the general health, safety, welfare and the environment; to address these concerns without imposing unnecessary and costly bureaucratic requirements on agencies; and to do so in a manner consistent with constitutional law as interpreted by the Supreme Court.

- **General Principles for Agency Actions** -- With respect to any action which an agency believes has a substantial likelihood of being a taking, the agency is required to:

Ensure that those actions are in compliance with the Just Compensation clause of the Constitution;

Seek ways to reduce the impact on the public fisc by minimizing actions that are "takings" and thus require compensation payments to property owners;

Attempt to limit any unnecessary adverse effect of an agency's action on private property, even if such action would not amount to a "taking" under the Constitution;

When requiring a private party to get a permit to take a specific action on his property, carefully tailor any conditions placed on that permit to limit any unnecessary burdens on private property.

- **Agency Analyses of Proposed Regulations** -- If an agency proposes a significant regulation that the agency believes has takings implications, the agency is required to analyze the following information, and submit that analysis with any other submission required to be made to OMB:

The likelihood that the regulation may effect a taking for which compensation is due;

An estimate of the potential cost to the government should a court determine that the regulation effects a taking;

Any reasonably feasible alternatives that would not cause a taking, and an explanation of why the proposal nevertheless is preferable to the alternatives.

- **Guidance to Agencies** -- Agencies will be able to receive guidance on ways to avoid impacts on private property and the legal requirements under the Constitution from the Department of Justice as well as the interagency Regulatory Working Group established under Executive Order 12866.
- **Agency Reporting Requirements** -- Agencies must submit an annual report to OMB and the Attorney General identifying all takings claims and awards made that year, and the rule or regulation that led to the claim or award.
- **Revocation of Reagan Administration Order** -- This Order revokes Executive Order 12630 and all guidelines and other directives issued under that order, and replaces it with this equally effective but more accurate and efficient order.

WHY AND HOW DOES THIS ORDER CHANGE THE REAGAN EO ON PRIVATE PROPERTY?

- **General** -- The Clinton Order shares, and addresses, the general concerns stated in the Reagan Order -- to ensure that agency actions are well-reasoned and have due regard for the Constitution and for the fiscal impact of compensation obligations imposed on the government by the Constitution.
- **Provisions that Are Retained** -- The Clinton Order retains the following specific aspects of the Reagan order:
 - The definition of agency "actions" covered by the order; the scope of the two orders is essentially the same.
 - The most significant principles to guide agency actions -- respect for the Constitution and avoidance of unnecessary burdens on the public fisc.
 - The requirement that agencies perform an analysis of proposed regulations that have takings implications to avoid unnecessary costs.

-- The requirement that agencies designate an officer to be directly responsible for compliance with the Order.

-- The requirement that agencies prepare an annual report of takings claims and awards.

■ **General Differences** -- There are three general reasons the Reagan Order is being replaced:

1. To expand the reach of the order to address agency actions that are not be a "taking" under the Constitution, but that nevertheless may affect property owners -- the agencies should work to minimize the impacts of their actions on private property, consistent with their other obligations, even if no "taking" requiring compensation has occurred.

2. To eliminate inaccurate characterizations of the law. Certain aspects of the Reagan Order were not consistent with the law as interpreted by the Supreme Court or have been superseded by Supreme Court decisions that postdated the original order. To allow for the evolution in the Supreme Court's law in the area, the Clinton Order does not set out a statement of current law, which will become outdated, but rather requires compliance with the Constitution as interpreted by the Supreme Court.

3. To clarify and streamline the agencies' obligations in carrying out the purpose of the Order and thereby eliminate unnecessary bureaucratic activities and expense.

■ **Provisions That Are Eliminated** -- Specific provisions that are eliminated by the Clinton Order are:

1. Inaccurate statements of law (Sections 1,3 and 4);

2. Requirement that the Attorney General write general legal guidelines in the area to be updated as required. Replaced with a more efficient requirement that the Department of Justice provide guidance to agencies on request. (Section 1(c)).

3. Special analysis required for regulatory actions involving protection of the public health and safety. (Section 4(d)). Replaced with more general requirement that a "takings" analysis be performed for all proposed regulations that have takings implications. Serves the same purpose, but is more streamlined and efficient.

THE WHITE HOUSE
WASHINGTON

THE PRESIDENT HAS SEEN
5/9/94

May 9, 1994

MEMORANDUM FOR THE PRESIDENT

FROM:

TODD STERN *TS*

SUBJECT:

Executive Order on Private Property Rights

Attached is a decision memo from Jack Quinn and Linda Lance on private property rights -- the so-called "takings" issue -- recommending that you approve a proposed executive order, a draft of which is attached. The proposed Order would revise and replace a Reagan Executive Order on the same subject which our policy people see as seriously flawed. The Vice President's Office has been working on this Order for some time and he as well as the NEC, DPC, OMB, OSTP, OEP, CEA and the relevant agencies all approve the proposed Order.

Problematic takings amendments are likely to be proposed to various upcoming environmental bills -- for example, Senator Dole is expected to offer such an amendment to the Safe Drinking Water Act on the Senate floor. These amendments range from codifying the Reagan Order (Dole's approach) to Rep. Tauzin's effort to require compensation any time government regulation diminishes the value of property by more than 50%. At the harsher extremes, such amendments could threaten the government's ability to implement health, safety and environmental regulations.

The purpose of the proposed Order is to allow the Administration and Members of Congress to demonstrate their support for an alternative that would protect private property rights without endangering necessary government regulation. The consensus is that **some** kind of private property legislation is likely to pass this year and, unless we present a viable alternative, it will be very difficult to defeat more extreme amendments.

The differences between the Reagan Order and our proposed Order are spelled out in the Quinn/Lance memo. I have circulated this memo and the proposed Order to relevant White House staff, including George and Pat Griffin, and no one objects.

Approve Order ☐

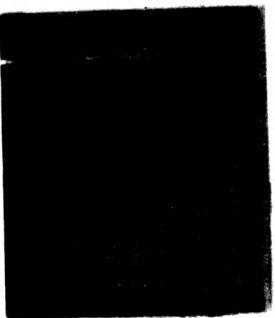
Disapprove ☐

Discuss ☒

The President wants
a practical peace on
this issue - who's
on what side —

Copy given
to Todd

5/10



May 13, 1994

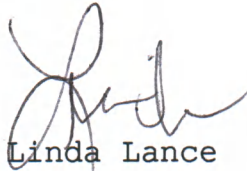
Note to Todd Stern:

94 MAY 16 P7:04

Attached is an interim response to the President's request on private property/takings. John Podesta suggested to Sally Katzen that perhaps the substantive response to his request should come from her in order to address all the "regulatory relief" issues such as risk assessment, cost-benefit analysis, unfunded mandates, and takings. She and I have discussed that, and agree that only the takings issue needs to be raised with the President at this time. The others have been resolved for the purposes of legislation currently pending. Since no immediate decision is required from the President on those issues, we see no need to add discussion of them to his agenda.

Unless we hear otherwise, Jack and I will work with Legislative Affairs to provide the President with the takings information he has requested as soon as possible. If you or John think the memorandum should be broadened to encompass other issues, please let me know.

cc: Sally Katzen
Jack Quinn
Katie McGinty


Linda Lance

John - ✓
FYI. I see
no point in
sending the
attached memo
to the POTUS.
— L



OFFICE OF THE VICE PRESIDENT
WASHINGTON

May 13, 1994

MEMORANDUM FOR THE PRESIDENT

FROM: JACK QUINN AND LINDA LANCE

SUBJECT: YOUR REQUEST FOR MORE INFORMATION ON THE EXECUTIVE
ORDER ON PRIVATE PROPERTY

You requested additional political information on the so-called private property "takings" issue and, specifically, the likely views of individual members of Congress on the draft Executive Order we provided to you. We have requested a political analysis from the Legislative Affairs office. Because many Members are just beginning to focus on this issue, it will take a few days to obtain reliable detailed information on Members' current views. We will provide you with that information as soon as it is available.

cc: Pat Griffin
Tracy Thornton

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

17-May-1994 12:16pm

TO: Lance, Linda L.
TO: Lorraine C. Miller
TO: Jennifer N. Palmieri
TO: Todd Stern

FROM: William W. Stelle
 Office on Environmental Policy

CC: Kathleen A. McGinty

SUBJECT: Takings

Two items. First, Katie has circulated the proposed Presidential directive to the Attorney General on the subject of access to the claims procedure to the relevant WH offices for their review prior to her sending it to Todd Stern for formal circulation. So far I have heard back from Peter Yu at the NEC and Paul Weinstein at the DPC and Jack Quinn, all expressing their support for the directive.

Obviously, the timing is an issue since it is generally tied to the proposal for a new EO on private property and since the issuance of that EO is in doubt over the short term.

I would suggest that we not bother to solicit formal sign-off on the directive from the WH offices or the agencies as per the Staff Secretary process unless and until we have a clearer picture of where this directive might fit in to the overall picture -- if at all. Therefore, unless being advised otherwise we will simply hold it here for now.

On another matter, Andy Gordon from Sam Coppersmith's office called about the EO, and expressed a strong interest in making sure that Coppersmith is involved with this issue as the SDWA moves through the House -- and the CWA. Coppersmith is running for governor, and so it may be that we want to coordinate closely with him and provide him whatever help we could as this moves to ensure that he is as well positioned as possible for the race back home. In short, FYI.

THE WHITE HOUSE
WASHINGTON

THE PRESIDENT HAS SEEN
5/10/94

May 9, 1994

MEMORANDUM FOR THE PRESIDENT

FROM:

TODD STERN 703

SUBJECT:

Executive Order on Private Property Rights

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The purpose of the proposed Order is to allow the Administration and Members of Congress to demonstrate their support for an alternative that would protect private property rights without endangering necessary government regulation. The consensus is that some kind of private property legislation is likely to pass this year and, unless we present a viable alternative, it will be very difficult to defeat more extreme amendments.

The differences between the Reagan Order and our proposed Order are spelled out in the Quinn/Lance memo. I have circulated this memo and the proposed Order to relevant White House staff, including George and Pat Griffin, and no one objects.

Approve Order ☐

Disapprove ☐

Discuss ☒

*The President wants
a practical deal on
this issue - who's
on what side -*



THE VICE PRESIDENT
WASHINGTON

94 APR 30 P12:25

April 29, 1994

MEMORANDUM FOR THE PRESIDENT

FROM: JACK QUINN AND LINDA LANCE
OFFICE OF THE VICE PRESIDENT

SUBJECT: EXECUTIVE ORDER ON PRIVATE PROPERTY RIGHTS

I. ACTION-FORCING EVENT

The Reagan Administration Executive Order on "Governmental actions and interference with constitutionally protected property rights" (the so-called "takings" order), issued in 1988, is still in effect. It has been reviewed by a working group of all relevant White House Offices, including this office, the National Economic Council, the Office of Science and Technology Policy, the Office on Environmental Policy, the Council of Economic Advisers, the Domestic Policy Council, and the Office of Management and Budget.

Activities in Congress related to this issue, including attempts to codify the existing Executive Order, necessitate our formulation of a position on the issue at the earliest reasonable time. Senator Dole is expected to offer a "takings" amendment to the Safe Drinking Water Act on the Senate floor next week. Senators Baucus and Chafee recently wrote to you urging Administration action before such an amendment is offered. And, it is our view that, unless the Administration addresses the issue, it will be resolved for us in a fashion we do not like -- on the Safe Drinking Water Act, the Clean Water Act, or perhaps some other important environmental legislation.

II. BACKGROUND

The "Property Rights" Movement and Legislative Activity

As you know, those opposed to governmental, and particularly environmental, regulation have seized on and exploited the public's concern over protection of private property in an effort to thwart legitimate governmental action to protect the public interest. These efforts typically, and sometimes successfully, portray necessary regulation and protection of private property as mutually exclusive, which of course they are not.

These "property rights" interests have grown into a powerful force composed of many organizations and backed by conservative think tanks.

This movement has been active legislatively at both the state and federal levels. Bills to advance the "private property" cause have been introduced in the majority of state legislatures, although so far they have been enacted in only a few states. In the Congress, many and varied bills have been introduced in both Houses, ranging from Sen. Dole's effort to codify the Reagan Executive Order to Rep. Tauzin's effort to provide compensation for any government action that diminishes the value of property by more than 50%. In general, the bills attempt to thwart environmental, health and safety regulation by at least raising the specter of requiring compensation as a result of virtually all governmental regulation, thereby making such regulation economically infeasible.

The threat posed by this legislation at the federal level is real, and virtually all involved, including the environmental community, agree that the Congress is likely to pass some version of this legislation. The general view is that a majority of members believe that they need to vote in favor of "private property" in some form.

For reasons identified below, the existing Reagan order does not reflect this Administration's philosophy or the best agency practice on this issue. It should be rescinded. However, there is a real danger that rescission of the Reagan order without a suitable replacement from this Administration will both imply a lack of concern on your part for private property rights and increase the likelihood of Congress' adopting legislation that goes too far. On the other hand, to leave the Reagan order undisturbed will put the Administration in an awkward and largely untenable position during debate on amendments such as the Dole bill, which seeks to codify the Reagan order. If we have not revised the existing order, we will be hard-pressed to oppose such legislation on grounds related to the substance of that order. And, it is our hope that we will be able to prevail in the Senate if we choose to encourage codification of the Clinton order as a substitute for the Reagan order.

To this end, our preliminary discussions with moderate members of Congress, who are likely to believe they need to cast some vote in favor of private property, have been largely encouraging. Most see the existence of a Clinton Administration order as something protective of private property that they can support. Without it, their need to vote in favor of private property may require them to vote for more extreme measures since they have no available alternative.

Reagan Administration "Takings" Order

This order (EO 12630) was issued in 1988 and has remained in effect, although it has had little practical impact on the agencies since it has been narrowly interpreted and, to some extent, honored in the breach. It has at least three major substantive flaws:

1. According to the Department of Justice, its statements of what may amount to a constitutional "taking" reflect the Reagan Administration philosophy in the area and are not consistent with the current state of the law as interpreted by the Supreme Court. The statements suggest that a number of activities may be "takings" when current case law does not support that view, and it confuses constitutional "takings" requiring compensation with government activities which may have an impact on private property but do not amount to a constitutional and compensable "taking."

2. It requires the issuance of Attorney General's "guidelines" to the agencies regarding the constitutional requirements in the area, implying that the agencies are not permitted to make their own judgments about the applicable legal requirements. Those guidelines have not been updated since written in 1988, and do not reflect post-1988 Supreme Court decisions.

3. It requires that agencies perform a variety of different "takings" analyses of their activities and that they identify and discuss "significant takings implications" in rulemaking publications in the Federal Register and in the transmittal of legislative proposals to Congress. The bureaucratic requirements are cumbersome and ineffective. In addition, such a public discussion of the issue effectively waives the attorney-client and executive privileges and provides a road map for potential litigants seeking compensation from the government.

Draft Clinton Administration Order

The draft order retains as much of the Reagan order as possible, provides a Clinton Administration statement of its respect for private property, and eliminates the problematic aspects of the Reagan approach.

In summary, it

- (1) States as your belief that protection of public health, safety and welfare is not inconsistent with respect for private property;

(2) Expresses your intention to minimize the impact of governmental actions on private property while committing you to carrying out the legitimate government function of protecting health, safety, and welfare;

(3) Requires that agencies, when considering actions with a substantial likelihood of effecting a taking, be guided by certain general principles including: full compliance with applicable constitutional requirements; making efforts to reduce the likelihood that compensation will have to be paid as the result of a taking; and undertaking efforts to limit adverse impacts on private property (even if they are not takings) to the extent possible and consistent with protection of health, safety and welfare;

(4) Requires agencies, when proposing regulations that have a substantial likelihood of having takings implications, to analyze (i) the likelihood that a taking will occur, (ii) the cost of compensation should a taking occur, and (iii) the alternatives that are available that would not constitute a taking; and

(5) Requires the agencies to report annually to the Attorney General and OMB all takings claims and awards made, and the regulatory action involved.

The major changes made to the Reagan order are as follows:

(1) Interpretive statements of constitutional law are eliminated. Instead, the order simply requires that the agencies ensure that their obligations are consistent with constitutional requirements as interpreted by the U.S. Supreme Court;

(2) Attorney General's guidelines on the legal requirements are not mandated. Instead, the DOJ is required to provide timely guidance to the agencies in response to agency requests.

(3) The "takings" analysis required of agencies is simplified and does not depend on the Reagan Administration philosophy of actions that may constitute takings. There is no requirement that agency analyses be published.

(4) The draft is more explicit than the Reagan order that this Administration intends to minimize all impacts on private property, even those that would not be a "taking" under the Constitution, to the extent that it can be done consistently with protection of the public health, safety, and the environment.

(5) The draft order makes explicit that it applies only to those agency actions that the agencies determine may have takings implications. The Reagan order is limited to actions "that may have takings implications," but is not clear about who determines which those actions are.

III. RECOMMENDATION

The Vice President, the Domestic Policy Council, the National Economic Council, the Office of Management and Budget, the Office of Science and Technology Policy, the Office on Environmental Policy, the Council of Economic Advisers, and all Executive Branch agencies concur in the recommendation that you approve the rescission of the current Executive Order and all guidelines issued under that Order, and that you approve the attached draft replacement Order, to be signed at a time to be scheduled.

IV. DECISION

___ Approve ___ Approve as amended ___ Let's discuss

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EXECUTIVE ORDER

- - - - -

PRIVATE PROPERTY RIGHTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to ensure that Executive department and agency decision-making comports with the Just Compensation Clause of the Fifth Amendment to the United States Constitution, the regulatory reform initiated by Executive Order No. 12866 entitled "Regulatory Planning and Review," and the principles stated herein, it is hereby ordered as follows:

Section 1. Statement of Purpose. Private ownership and use of property is a cornerstone of this country's constitutional heritage, historical tradition, and economic growth. Private property ownership and values are fundamentally consistent with, and supported by, the Federal Government's constitutional and statutory responsibilities to protect public and private property and the public health, safety, and welfare.

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. At the same time, the Fifth Amendment does not give individuals the right to use their property in ways that harm other property owners or the community at large. Thus, the Federal Government must be vigilant in recognizing and respecting the fundamental protection afforded private property rights while it fulfills its responsibilities to protect the public health, safety, and welfare.

In addition, government decision-makers must carefully evaluate the effect of their actions on constitutionally protected property rights in order to carry out their responsibilities for sound management of the government's limited financial resources. Each payment required under the Just Compensation Clause is an expenditure of taxpayer dollars, and actions that unnecessarily or inadvertently require such payments must be avoided.

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Moreover, some legitimate government actions necessary to the public health, safety, or welfare that are not takings under the Just Compensation Clause of the Fifth Amendment may nevertheless have some effect on private property. In such circumstances, even though no taking is involved, the government should work to avoid unnecessary restrictions on the use of private property.

The purpose of this order is to ensure that Executive departments and agencies properly balance their responsibilities to protect the public health, safety, and welfare and their responsibilities to protect private property. This order thus requires that Executive departments and agencies evaluate the constitutional implications arising from the Just Compensation Clause of the Fifth Amendment when planning and implementing governmental actions to ensure that the Federal Government's constitutional obligations are recognized, evaluated, and fulfilled. This order also ensures the agencies' awareness of the need to avoid unnecessary restrictions on the use of private property even when those restrictions would not constitute a taking under the Just Compensation Clause of the Fifth Amendment.

Sec. 2. Definitions. For purposes of this Executive order: (a) "Actions" refers to proposed federal regulations, proposed federal legislation, comments on proposed legislation, application of federal regulations to specific property, federal governmental actions physically invading or occupying private property, or other policy statements or actions related to federal regulation or direct physical invasion or occupancy, but does not include:

(1) actions in which the power of eminent domain is formally exercised;

(2) actions taken with respect to properties held in trust by the United States or actions in preparation for or during treaty negotiations with foreign nations;

(3) law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

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(4) studies or similar efforts or planning activities;

(5) communications between Executive departments or agencies and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by an Executive department or agency or are undertaken in response to an invitation by the State or local authority;

(6) the placement of military facilities or military activities involving the use of exclusively Federal property; or

(7) any military or foreign affairs functions (including procurement functions thereunder) but not including the U.S. Army Corps of Engineers civil works program.

(b) A "taking" or "takings" refers to an action or actions that, in order to be valid, require the Federal Government to compensate a property owner under the Just Compensation Clause of the Fifth Amendment to the United States Constitution as interpreted by the United States Supreme Court.

(c) "Actions that have takings implications" refers to actions that, if implemented or enacted, have a substantial likelihood of effecting a taking pursuant to the Just Compensation Clause of the Fifth Amendment to the United States Constitution as interpreted by the United States Supreme Court.

(d) "Private property" refers to all property protected by the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

(e) "Agency" refers to any authority of the United States that is an agency under 44 U.S.C. § 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. § 3502(10). All independent regulatory agencies are requested to comply with the provisions of this order.

Sec. 3. General Principles. With respect to actions that in the agency's judgment constitute actions that have takings implications, each agency shall consider the obligations imposed by the Just Compensation Clause of the Fifth Amendment to the United States Constitution to ensure that those obligations are recognized, evaluated, and fulfilled, and shall, consistent with

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achieving the lawful goal of the governmental action and to the extent permitted by law:

(a) Seek opportunities to reduce the risk of unwarranted or inadvertent burdens on the public fisc resulting from lawful government actions triggering valid takings claims.

(b) Seek opportunities to limit restrictions on the use of private property while fulfilling the government's responsibilities to protect the public health, safety, and welfare, even if the contemplated government action would not constitute a taking.

(c) When requiring a private party to obtain a license or permit in order to undertake a specific use of, or other action with respect to, private property, consider carefully any proposals to tailor conditions imposed upon the granting of the license or permit so as to reduce restrictions on the use of private property, even if such conditions would not otherwise constitute a taking.

Sec. 4. Agency Analyses. (a) With respect to proposed regulations that in the agency's judgment constitute actions that have takings implications, each agency shall, as part of its internal deliberative process and to the extent practicable and permitted by law, perform the following analyses and provide such analyses at the same time as any submission otherwise required to be made to the Office of Management and Budget in conjunction with the review of the proposed regulation under Executive Order No. 12866:

(1) an assessment of the likelihood that the proposed regulation may effect a taking;

(2) an estimate of the potential financial risk to the government in the event that a court later determines that the regulation constitutes a taking; and

(3) consideration of reasonably feasible alternatives, if any, to the proposed regulation that would achieve the government's purpose but would not effect a taking, and an explanation of why the planned regulation is preferable to the alternatives.

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(b) In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring an immediate response, the analysis may be done upon completion of the emergency action.

(c) Each agency shall designate the Regulatory Policy Officer appointed pursuant to Executive Order No. 12866 as the official to be responsible for ensuring compliance with this order with respect to the actions of that agency.

Sec. 5. Agency Guidance. (a) The Regulatory Working Group established by Executive Order No. 12866 shall serve, in response to an agency's request, as a forum to assist agencies in addressing regulatory issues involving takings implications.

(b) The Department of Justice shall provide legal guidance in a timely manner, in response to an agency's request, to assist the agencies in complying with this order.

Sec. 6. Reporting Requirements. Agencies shall identify each existing federal rule and regulation against which a takings award has been made or against which a taking claim is pending, including the amount of each claim or award, for fiscal year 1994 and thereafter. A takings award has been made or a takings claim is pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of this information shall be submitted to the Director of the Office of Management and Budget and to the Attorney General on an annual basis beginning no later than December 1994 for fiscal year 1994 and each December 31st for each fiscal year thereafter.

Sec. 7. Revocation. Executive Order No. 12630 and all guidelines and other directives issued pursuant thereto are hereby revoked.

Sec. 8. Judicial Review. This order is intended only to improve the internal management of the Executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party at law or equity against the United States, its agencies or

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instrumentalities, its officers or employees, or any other person.

THE WHITE HOUSE,