

NLWJC- Kagan

Counsel - Box 014 - Folder 003

Takings (95) [8]

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2
3 **U.S. DEPARTMENT OF JUSTICE**
4 **ENVIRONMENT AND NATURAL RESOURCES DIVISION**
5 **POLICY, LEGISLATION AND SPECIAL LITIGATION**
6 **WASHINGTON, D.C. 20530**

7 **FAX NUMBER 202/514-4231**
8 **CONFIRMATION NUMBER 202/514-1442**

9
10 **DATE: 2-26-95**

11
12 **FROM: Tim Dowling**

13
14 **PHONE NUMBER: 514-4642**

15
16 **NUMBER OF PAGES TO BE TRANSMITTED (including**
17 **cover): 35 (2 DOCS: ONE IS 14 PP., ONE IS 20**
18 **PP.)**

19
20 **TO:**

	FAX	PHONE
21 Tom Jensen	395-3744	
22 Joe Sax	208-7508	208-4177
23 Ed Cohen	219-1220	208-4123
24 Lance Wood	761-0270	761-0035
25 Jim Van Ness	703-693-6367	
26 Carol Dennis	395-5836	395-4822
27 Gary Guzy	260-8046	260-8040
28 Eric Olsen	720-5437	
29 Marvin Krislov	456-1647	

30
31
32 **MESSAGE:**

33
34 Most recent draft bill attached.
35 2 versions: one clean, and one redline.

36
37 --The bill now focuses on "homeowners, small
38 farms, and small businesses"

39
40 --\$500,000 cap for claims appears in 5(c)(1)

41
42 --"no exhaustion" statement appears in 5(c)(4)

43
44 **PLEASE CALL ME AT 514-4642 IF YOU SEE ANY**
45 **MAJOR GLITCHES....THANKS.**

1
2
3 104th CONGRESS
4
5 1st Session
6
7 S. XX
8
9)TITLE*
10
11)Rule*
12
13 IN THE SENATE OF THE UNITED STATES
14

15)DATE*

16
17)SPONSOR* Mr. Bumpers

18)•L)

19

20)•L)

21

22

23 XXXXXXXXX)* introduced the following bill;
24 which was read twice and referred to the
25 Committee on

26

27)•L)

28

29)Rule*

30

31 A BILL

32

33)TITLE*To ensure that Federal agencies take
34 into account and are accountable for the
35 effect of their actions on the property rights
36 and values of affected citizens and their
37 communities, and for other purposes.

38

39 Be it enacted by the Senate and House of
40 Representatives of the United States of
41 America in Congress assembled,

42

43 SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

44

45 (a) Short Title. This Act may be cited as
46 the "Private Property, Homeowner, and
47 Community Protection Act of 1995".

48

49 (b) Table of Contents. The table of contents
50 of this Act is as follows:

51

52 Sec. 1. Short title; table of contents.

53

54 Sec. 2. Findings.

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Sec. 3. Purposes.

Sec. 4. Definitions.

Sec. 5. Agency procedure.

Sec. 6. Homeowner, small farm, and small business assistance programs.

Sec. 7. Written permission for entry.

Sec. 8. Emergency exceptions.

Sec. 9. Modifications to the Clean Water Act.

Sec. 10. Modifications to the Endangered Species Act.

Sec. 11. Judicial review.

SEC. 2. FINDINGS.

Congress finds that_

(1) the protection of private property from government takings for public use without just compensation is a foundation of American freedom enshrined in the Bill of Rights within the fifth amendment to the United States Constitution;

(2) the ability to use private property is fundamental to the personal prosperity of individual Americans as well as to the economic vitality of communities and our Nation as a whole;

(3) the application of Federal laws (including regulations) and policies can affect, directly or indirectly, the use and enjoyment of real property, and the effects may serve to reduce or enhance the value of such property;

1 (4) Federal laws (including regulations)
2 and policies can protect private property from
3 adverse effects resulting from unwise use of
4 the private property of others, thereby aiding
5 individuals and the community as a whole in
6 the advancement of economic stability, public
7 health, safety, the environment and the
8 general welfare;
9

10 (5) the Supreme Court has interpreted the
11 fifth amendment to recognize that necessary
12 and appropriate governmental action may so
13 severely restrict an individual's use of
14 private property while benefiting the public
15 that in fairness and justice, the burden
16 should be borne by the public as a whole,
17 rather than solely by the individual affected;
18

19 (6) the Supreme Court has recognized that
20 the determination of when the public, rather
21 than the individual, must bear the burden in
22 the form of providing a property owner with
23 just compensation is one made on a case by
24 case basis;
25

26 (7) active and properly informed
27 participation by citizens in the governmental
28 process helps balance the rights of
29 individuals, communities, corporations, and
30 other entities to use property in accordance
31 with the rights of other property owners and
32 the general public;
33

34 (8) clarification is desirable_

35 (A) to help ensure that Federal agencies_

36 (i) respect the private property rights of
37 citizens;
38

39 (ii) include as an integral part of their
40 decisionmaking process a consideration of the
41 effect of agency action on privately-owned
42 property; and
43
44
45

1 (iii) communicate with and consider the
2 views of property owners and other members of
3 the community; and
4

5 (B) to ensure that legitimate claims for
6 just compensation are brought, adjudicated,
7 and resolved as expeditiously as possible; and
8

9 (9) homeowners, small farms, and small
10 businesses may lack the financial resources to
11 fully and adequately pursue through judicial
12 process claims relating to Federal regulatory
13 effect on their property.
14
15

16
17 SEC. 3. PURPOSES.

18 The purposes of this Act are to_
19
20

21 (1) establish new procedures to ensure that
22 Federal agencies consider the effect of their
23 actions on private real property as those
24 actions relate to homeowners, small farms, and
25 small businesses;
26

27 (2) ensure that Federal agencies assist
28 homeowners, small farms, and small businesses
29 to comply efficiently and fully with Federal
30 laws by providing timely explanations of
31 requirements and assistance;
32

33 (3) assist homeowners, small farms, and
34 small businesses in receiving prompt
35 responses to their requests for consideration
36 of the effect of agency actions on private
37 property;
38

39 (4) enhance the opportunities of citizens
40 to participate in the process of government
41 and to achieve greater equity in Federal
42 environmental and land use decisions affecting
43 the rights of homeowners, small farms, and
44 small businesses and the effect of those
45 decisions on their communities;

1 (5) reduce the cost to homeowners, small
2 farms, and small businesses of pursuing
3 claims that agency action has resulted in a
4 taking of their property; and
5

6 (6) protect against unexpected Federal
7 financial liability that could result from
8 court determinations that agency actions
9 require the payment of just compensation when
10 such liability could have been otherwise
11 avoided while accomplishing full compliance
12 with the law.
13

14 SEC. 4. DEFINITIONS.

15 In this Act:

16 (1) Adverse effect. The term "adverse
17 effect" means any substantial limitation on
18 the use or value of property resulting from
19 agency action.
20
21

22 (2) Agency. The term "agency" means an
23 agency as defined in section 551 of title 5,
24 United States Code.
25

26 (3) Agency action. The term "agency
27 action" means an agency action as defined in
28 section 551 of title 5, United States Code.
29
30

31 (4) Homeowner. The term "homeowner" means
32 an owner of a qualified residence as
33 determined under section 163(h)(5)(A)(i)(II)
34 of the Internal Revenue Code of 1986.
35

36 (5) Property. The term "property" means
37 privately-owned real property.
38

39 (6) Property owner. The term "property
40 owner" means the holder of an interest in a
41 property that may be subjected to an adverse
42 effect as a result of agency action.
43

1 (7) Small Business. The term "small
 2 business" means small business as defined in
 3 the agency procedures issued under section 5.
 4

5 (8) Small Farm. The term "small farm"
 6 means small farm as defined in the agency
 7 procedures issued under section 5.
 8

9 (9) Taking. The term "taking" means a
 10 Federal agency action affecting property
 11 such that compensation is required by the
 12 fifth amendment to the United States
 13 Constitution as interpreted by the United
 14 States Supreme Court.
 15

16
 17 SEC. 5. AGENCY PROCEDURES TO ADDRESS ADVERSE
 18 IMPACTS ON PROPERTY AND TAKINGS CLAIMS.
 19

20 (a) Establishment of Procedure. Each agency
 21 identified by the Attorney General under
 22 subsection (g)(1) shall establish a process or
 23 procedure, consistent with its statutory
 24 authorities and coordinated with existing
 25 processes, for the consideration of the
 26 adverse effects of agency actions on property
 27 rights of homeowners, small farms, and small
 28 businesses that is consistent with the
 29 requirements of this section and the
 30 guidelines established by the Attorney General
 31 under subsection (g)(2).
 32

33 (b) Requirements. In developing its
 34 procedures under section 5(a), the agency
 35 shall provide for_
 36

37 (1) the preparation of a publicly available
 38 report by the head of the agency addressing
 39 adverse effects of agency actions on
 40 homeowners, small farms, and small businesses,
 41 regardless of whether such adverse effects
 42 would constitute a taking, including:
 43

44 (A) an identification of the statutory
 45 authorities administered by the agency

1 that may adversely affect the ability of
 2 homeowners, small farms, and small
 3 businesses to utilize their property;
 4

5 (B) an assessment of such authorities,
 6 and the specific rules, processes and
 7 mechanisms by which they are
 8 administered, to assess adverse impacts
 9 on homeowners, small farms, and small
 10 businesses, as well as benefits to other
 11 property owners and the public interest;
 12

13 (C) consideration of potential
 14 improvements, including but not limited
 15 to regulatory changes and legislative
 16 proposals, that would reduce adverse
 17 impacts on homeowners, small farms, and
 18 small businesses; and
 19

20 (D) consideration of the availability of,
 21 and the need for, any special procedures
 22 or programs to prevent undue burdens on
 23 homeowners, small farms, and small
 24 businesses, even where such burdens do
 25 not constitute a taking.
 26

27 (2) consideration by the agency, on the
 28 request of a homeowner, small farm, or small
 29 business, of a claim that an agency action
 30 constitutes a taking, including expedited
 31 agency consideration of such claims under
 32 subsection (c);
 33

34 (3) the conduct of adjudications under
 35 subsection (d); and
 36

37 (4) training of agency personnel to better
 38 consider the effect of agency actions on
 39 property rights and community relations.
 40

41 (c) Expedited Agency Consideration of
 42 Takings Claims._
 43

44 (1) In general. When an agency identified by
 45 the Attorney General under subsection (g)(1)

1 receives a request from a homeowner, small
2 farm, or small business to consider whether an
3 agency action constitutes a taking of property
4 of a value not exceeding \$500,000, the agency
5 shall_

6
7 (A) consider the request, including, as the
8 agency deems appropriate, the consideration
9 of_

10
11 (i) information supplied by the homeowner,
12 small farm, or small business;

13
14 (ii) information provided by other affected
15 persons, including State and local
16 governments, community organizations, and
17 adjacent landowners; and

18
19 (iii) information developed by the agency in
20 the course of proposing the agency action or
21 investigating the request;

22
23 (B) make available to the homeowner, small
24 farm, or small business, on request, its
25 determination in writing, including any
26 publicly available analysis of the effect of
27 the agency action on the owner's property;

28
29 (C) if the agency considers it necessary
30 in order to reach an appropriate
31 determination, conduct an adjudication under
32 subsection (d); and

33
34 (D) if the matter is referred for
35 adjudication, take prompt action pursuant to
36 subsection (d)(3) in response to the findings
37 made in the adjudication.

38
39 (2) Expedition. An agency shall ensure that
40 its procedure provides for expeditious
41 completion under this subsection and
42 adjudication and response to adjudication
43 under subsection (d).
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(3) Effect on Agency Action. Consideration of a taking claim under this section shall not stay or otherwise delay the effect of the agency action alleged to constitute a taking.

(4) Exhaustion of Remedies. A homeowner, small farm, or small business need not request consideration of a taking claim under this section as a prerequisite to the filing of a taking claim in federal court.

(d) Adjudication.

(1) Hearing. When a claim is referred under subsection (c)(1)(C), the agency shall consider the claim on the record following an opportunity for hearing under section 554 of title 5, United States Code.

(2) Basis of decision. The decision of a claim referred under subsection (c)(1)(C) shall include findings of fact and conclusions of law regarding:

(A) the authority under which the agency action is taken;

(B) whether the agency action amounts to a taking of property;

(C) whether modifications are available pursuant to subsection 3(A); and

(D) if a taking is found, the amount of payment necessary to provide just compensation.

(3) Remedies. If the agency determines that an agency action constitutes a taking the agency, in consultation with the Attorney General, is authorized to take one or more of the following actions:

(A) Reverse or modify the agency action so as to avoid or reduce the effect of the agency

1 action on the homeowner, small farm, or small
 2 business, if and to the extent to which a
 3 reversal or modification would be consistent
 4 with and permit the full enforcement of, the
 5 overall purposes of the law under which the
 6 agency action is taken, including the
 7 protection of other property owners and the
 8 public interest;
 9

10 (B) With the concurrence of the Attorney
 11 General, pay just compensation from the
 12 agency's appropriated funds;
 13

14 (C) To the extent statutory authorization
 15 exists and to the extent that funds are
 16 available in advance through an appropriation,
 17 pay just compensation for the taking through
 18 other appropriate procedures, including the
 19 first section of the Act of February 26, 1931
 20 (40 U.S.C. 258a), to condemn a property
 21 interest taken for public use, limited to the
 22 interests in property determined to be taken
 23 pursuant to this subsection; or
 24

25 (D) Notify the homeowner, small farm, or
 26 small business of other remedies available
 27 under the fifth amendment to the United States
 28 Constitution.
 29

30 (e) Alternative Dispute Resolution. _
 31

32 (1) Determination of no taking. If the
 33 agency, in consultation with the Attorney
 34 General, determines that an agency action does
 35 not constitute a taking, or there is a dispute
 36 as to the amount of just compensation, the
 37 agency shall promptly notify the homeowner,
 38 small farm, or small business of the
 39 decision.
 40

41 (2) Consent to alternative dispute
 42 resolution. If a homeowner, small farm, or
 43 small business brings a claim seeking
 44 compensation in the Court of Federal Claims,
 45 on the request of the homeowner, small farm,

1 or small business , the agency and the
2 Attorney General shall consent, where
3 consistent with the interests of the United
4 States, to submit the claim to any process of
5 alternative dispute resolution which has been
6 approved by the Attorney General.
7

8 (f) Time For Filing Requests. A homeowner,
9 small farm, or small business shall submit to
10 the agency a request for expedited agency
11 consideration of a takings claim under
12 subsection (c) not later than 30 days after
13 the date on which the agency action is
14 published or interested parties are otherwise
15 given notice of the proposed or final agency
16 action as required by agency procedures.
17

18 (g) Responsibilities of the Attorney General
19 and Agencies. _
20

21 (1) Not later than 60 days after the date of
22 enactment of this Act, the Attorney General
23 shall publish a list of agencies that must
24 establish a procedure under subsection (a),
25 which list shall include, at a minimum, all
26 agencies the actions of which have a
27 significant possibility of effecting a taking
28 of property;
29

30 (2) Not later than 180 days after the date
31 of enactment of this Act, the Attorney General
32 shall publish guidelines for each Federal
33 agency identified under paragraph (1) to
34 ensure that, to the maximum extent
35 practicable, each agency's procedure is
36 sufficient to achieve the objectives of this
37 Act; and
38

39 (3) Not later than 240 days after the
40 Attorney General publishes guidelines pursuant
41 to paragraph (2), each agency designated
42 pursuant to paragraph (1) shall prepare and
43 publish, with the concurrence of the Attorney
44 General, final procedures pursuant to
45 subsection (a).

SEC. 6. HOMEOWNER, SMALL FARM, AND SMALL BUSINESS ASSISTANCE PROGRAMS.

(a) Establishment.

(1) In general. The Attorney General shall designate at least 3 of the agencies identified under section 5(g)(1) to establish pilot homeowner, small farm, and small business assistance programs.

(2) Basis for designation. In designating such agencies, the Attorney General shall choose agencies the programs of which have the potential to affect a broad range of homeowners, small farms, and small businesses on a regular basis.

(b) Functions. The programs established under this section shall include the following functions:

(1) Identification of solutions to potential conflicts with homeowners, small farms, and small businesses and application of all available expedited procedures and incentives to achieve those solutions.

(2) Service as a focal point for questions, requests, complaints, and suggestions from homeowners, small farms, small businesses, and the public concerning the policies and activities of the agency that affect property.

(3) Provision of advice to homeowners, small farms, and small businesses on how to comply with applicable requirements of Federal law as efficiently and expeditiously as possible.

(4) Provision of information to homeowners, small farms, and small businesses on the availability of procedures under section 5,

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1 including procedures of the Court of Federal
2 Claims and alternative dispute resolution
3 procedures.

4
5 (5) Coordination among designated agencies
6 to ensure consistent responses and
7 communications relating to the homeowner,
8 small farm, and small business assistance
9 programs.

10
11 (6) Annual reporting to the head of the
12 agency of information and comments
13 communicated by homeowners, small farms, and
14 small businesses that will better fulfill the
15 mission of the agency while reducing potential
16 conflicts relating to regulatory effects on
17 property.

18
19 (7) Annual reporting by the head of the
20 agency to the appropriate committees of
21 Congress describing the information and
22 comments received under paragraph (6).

23
24 (c) Prohibition of Advocacy. Agency
25 personnel involved in a homeowner, small
26 farm, and small business assistance program
27 under this section shall not serve as
28 advocates or legal counsel for property owners
29 .

30
31 (d) Authorization of Appropriations. There
32 is authorized to be appropriated to carry out
33 this section \$1,500,000 for each of fiscal
34 years 1996, 1997, 1998, 1999, 2000, and 2001.
35 [DISCUSS]
36
37
38

39 SEC. 7. EMERGENCY EXCEPTIONS.
40

41 This Act does not apply in a case in which
42 an agency determines that agency action is
43 necessary to_
44

45 (1) safeguard life or property;

(2) respond to a state of disaster; or

(3) respond to a threat to national security.

SEC. 8. MODIFICATIONS TO THE CLEAN WATER ACT.

¶TO BE SUPPLIED.¶

SEC. 9. MODIFICATIONS TO THE ENDANGERED SPECIES ACT.

¶TO BE SUPPLIED.¶

SEC. 10. JUDICIAL PROCEEDINGS.

(a) Rule of Construction. Nothing in this Act shall be construed to impair any right of judicial review derived from other statutory authority or the Constitution.

(b) Scope of Review. Judicial review of implementation of this Act shall be limited to final agency actions pursuant to section 5(d), review of which shall be in the same manner as provided for in the statute authorizing the agency action alleged to constitute a taking.

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Sec. 3. Purposes.

Sec. 4. Definitions.

Sec. 5. Agency procedure.

Sec. 6. ~~Small private property owner~~
~~Homeowner, small farm, and small business~~
assistance programs.

Sec. 7. Written permission for entry.

Sec. 8. Emergency exceptions.

Sec. 9. Modifications to the Clean Water Act.

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Sec. 11. Judicial review.

SEC. 2. FINDINGS.

Congress finds that_

(1) the protection of private property from ~~unreasonable governmental interference~~
~~government takings for public use without just~~
~~compensation~~ is a foundation of American freedom enshrined in the Bill of Rights within the fifth amendment to the United States Constitution;

(2) the ability to ~~put use~~ private property ~~to economically viable use~~ is fundamental to the personal prosperity of individual Americans as well as to the economic vitality of communities and our Nation as a whole;

(3) the application of Federal laws (including regulations) and policies can affect, directly or indirectly, the use and enjoyment of real property, and the effects may serve to reduce or enhance the value of

1 such property;

2
3 (4) Federal laws (including regulations)
4 and policies can protect private property from
5 adverse effects resulting from unwise use of
6 the private property of others, thereby aiding
7 individuals and the community as a whole in
8 the advancement of economic stability, public
9 health, safety, ~~the environment~~, and the
10 general welfare;

11
12 (5) the Supreme Court has interpreted the
13 fifth amendment to recognize that necessary
14 and appropriate governmental action may so
15 severely restrict an individual's use of
16 private property while benefiting the public
17 that in fairness and justice, the burden
18 should be borne by the public as a whole,
19 rather than solely by the individual affected;

20
21 (6) the Supreme Court has recognized that
22 the determination of when the public, rather
23 than the individual, must bear the burden in
24 the form of providing a property owner with
25 just compensation is one made on a case by
26 case basis;

27
28 (7) active and properly informed
29 participation by citizens in the governmental
30 process helps balance the rights of
31 individuals, communities, corporations, and
32 other entities to use property in accordance
33 with the rights of other property owners and
34 the general public;

35
36 (8) clarification is necessary ~~desirable~~

37
38 (A) to ~~help~~ ensure that Federal agencies_

39
40 (i) respect the private property rights of
41 citizens;

42
43 (ii) include as an integral part of their
44 decisionmaking process a consideration of the
45 effect of agency action on privately-owned

1 property; and

2
3 (iii) communicate with and consider the
4 views of property owners and other members of
5 the community; and
6

7 (B) to ensure that legitimate claims for
8 just compensation are brought, adjudicated,
9 and resolved as expeditiously as possible; and
10

11 (9) ~~owners often homeowners, small farms,~~
12 ~~and small businesses may lack the financial~~
13 ~~resources to fully and adequately pursue~~
14 ~~through judicial process claims relating to~~
15 ~~Federal regulatory effect on their property,~~
16 ~~and~~
17

18 ~~(10) Executive Order No. 12360 has not~~
19 ~~fully provided small property owners with~~
20 ~~adequate guidance or assistance in working~~
21 ~~with Federal agencies on issues involving land~~
22 ~~use and planning in cases in which small~~
23 ~~property owners feel adversely effected by the~~
24 ~~agency action.~~
25

26 SEC. 3. PURPOSES.

27
28 The purposes of this Act are to_

29
30 (1) establish new procedures to ensure that
31 Federal agencies consider the effect of their
32 actions on private real property as those
33 actions relate to ~~homeowners, small farms, and~~
34 ~~small businesses small property owners;~~
35

36 (2) ensure that Federal agencies assist
37 ~~homeowners, small farms, and small businesses~~
38 ~~small property owners to comply efficiently~~
39 ~~and fully with Federal laws by providing~~
40 ~~timely explanations of requirements and~~
41 ~~assistance;~~
42

43 (3) assist ~~homeowners, small farms, and~~
44 ~~small businesses small property owners in~~
45 ~~receiving prompt responses to their requests~~

for consideration of the effect of agency actions on private property;

(4) enhance the opportunities of citizens to participate in the process of government and to achieve greater equity in Federal environmental and land use decisions affecting the rights of homeowners, small farms, and small businesses, small property owners and the effect of those decisions on their communities;

(5) reduce the cost to homeowners, small farms, and small businesses, small property owners of pursuing claims that agency action has resulted in a taking of their property; and

(6) protect against unexpected Federal financial liability that could result from court determinations that agency actions require the payment of just compensation when such liability could have been otherwise avoided while accomplishing full compliance with the law.

SEC. 4. DEFINITIONS.

In this Act:

(1) Adverse effect. The term "adverse effect" means any substantial limitation on the use or value of property resulting from agency action.

(2) Agency. The term "agency" means an agency (as defined in section 551 of title 5, United States Code).

(3) Agency action. The term "agency action" means an agency action as defined in section 551 of title 5, United States Code, proposed action, or a determination not to act or proposed determination not to act, with respect to a project, activity, or program

6

1 ~~funded in whole or in part under the direct or~~
2 ~~indirect jurisdiction of an agency, including~~
3 ~~a project, activity, or program that~~

4
5 ~~(A) is carried out by or on behalf of the~~
6 ~~agency;~~

7
8 ~~(B) is carried out with Federal financial~~
9 ~~assistance;~~

10
11 ~~(C) requires a Federal permit, license, or~~
12 ~~approval; or~~

13
14 ~~(D) is subject to State or local regulation~~
15 ~~administered pursuant to a delegation of~~
16 ~~authority by or approval of a Federal agency.~~

17
18 ~~(3) Community organization. The term~~
19 ~~"community organization" means an entity~~
20 ~~described in section 501(c) (3) or (4) of the~~
21 ~~Internal Revenue Code of 1986 that is exempt~~
22 ~~from taxation under section 501(a) of the~~
23 ~~Internal Revenue Code of 1986, the charitable~~
24 ~~purpose of which includes~~

25
26 ~~(A) the protection of health, safety,~~
27 ~~quality of land, or natural or cultural~~
28 ~~resources;~~

29
30 ~~(B) advancement of the goals of~~
31 ~~environmental justice;~~

32
33 ~~that demonstrates an active and federally~~
34 ~~recognized participation in a case or~~
35 ~~controversy involving property, the division~~
36 ~~of the unit of local government responsible~~
37 ~~for land use and resource planning, and the~~
38 ~~applicable soil and water conservation~~
39 ~~district.~~

40
41 ~~(4) Indirect regulatory effect. The term~~
42 ~~"indirect regulatory effect" means the~~
43 ~~regulatory effect of agency action on property~~
44 ~~other than property that is the immediate~~
45 ~~subject of an agency action.~~

1 ~~(5) Affected Person. The term "person"~~
2 ~~means an individual, corporation, community~~
3 ~~organization, or unit of State or local~~
4 ~~government that claims to suffer an indirect~~
5 ~~regulatory effect on private property rights~~
6 ~~as the result of an agency action.~~

7
8 ~~(4) Homeowner. The term "homeowner" means an~~
9 ~~owner of a qualified residence as determined~~
10 ~~under section 163(h)(5)(A)(i)(II) of the~~
11 ~~Internal Revenue Code of 1986.~~

12
13 (65) Property. The term "property" means
14 privately-owned real property.

15
16 (6) Property owner. The term "property
17 owner" means the holder of an ownership or
18 leasehold interest in a small property that
19 may be subjected to ~~an adverse effect as a~~
20 ~~result of agency action a regulatory effect or~~
21 ~~indirect regulatory effect as the result of an~~
22 ~~agency action.~~

23
24 ~~(8) Regulatory effect. The term~~
25 ~~"regulatory effect" means a substantial~~
26 ~~reduction or increase in the economic value of~~
27 ~~a property or interest in property [Does~~
28 ~~"interest in property" include anything~~
29 ~~other than an ownership interest or leasehold~~
30 ~~interest? We should probably delete "interest~~
31 ~~in property."] or any substantial curtailment~~
32 ~~or expansion of any particular use to which a~~
33 ~~property has been made that is, or can~~
34 ~~reasonably be projected to be, the direct or~~
35 ~~indirect result of an agency action.~~

36
37 ~~(9) Small property. The term "small~~
38 ~~property" means a property that~~

39
40 ~~(A) is a qualified residence, as determined~~
41 ~~under section 163(h)(5)(A)(i)(II) of the~~
42 ~~Internal Revenue Code of 1986;~~

43
44 ~~(B) is connected with a farming, ranching,~~
45 ~~aquaculture, or nonindustrial forestry~~

1 ~~operation with respect to which payments are~~
2 ~~limited under section 1001 of the Food~~
3 ~~Security Act of 1985 (7 U.S.C. 1308); and~~

4
5 ~~(C) is connected with the operation of a~~
6 ~~small business concern (as determined under~~
7 ~~section 3 of the Small Business Act (15 U.S.C.~~
8 ~~632)).~~

9
10 (7) ~~Small Business. The term "small~~
11 ~~business" means small business as defined in~~
12 ~~the agency procedures issued under section 5.~~

13
14 (8) ~~Small Farm. The term "small farm" means~~
15 ~~small farm as defined in the agency procedures~~
16 ~~issued under section 5.~~

17
18 (9) ~~Taking. The term "taking" means~~
19 ~~Federal an Federal agency action affecting~~
20 ~~with respect to a property [or interest in~~
21 ~~property? probably not.] to the extent such~~
22 ~~that compensation is required by the fifth~~
23 ~~amendment to the United States Constitution as~~
24 ~~interpreted by the United States Supreme~~
25 ~~Court.~~

26
27 ~~SEC. 5. AGENCY PROCEDURES TO ADDRESS ADVERSE~~
28 ~~IMPACTS ON PROPERTY AND TAKINGS CLAIMS.~~

29
30 (a) ~~Establishment of Procedure. Each agency~~
31 ~~identified by the Attorney General under~~
32 ~~subsection (a)(1) shall establish a process~~
33 ~~or procedure, consistent with its statutory~~
34 ~~authorities and coordinated with existing~~
35 ~~processes, for the consideration of the~~
36 ~~regulatory adverse effects of the agency's~~
37 ~~actions on property rights of homeowners,~~
38 ~~small farms, and small businesses property~~
39 ~~owners that is consistent with the~~
40 ~~requirements of this section and the~~
41 ~~guidelines established by the Attorney General~~
42 ~~under subsection (a)(2).~~

43
44 (b) ~~Requirements. A procedure under~~
45 ~~subsection (a) shall at a minimum provide for~~

In developing its procedures under section 5(a), the agency shall provide for

(1) the preparation of a publicly available report by the head of the agency addressing adverse effects of agency actions on homeowners, small farms, and small businesses, regardless of whether such adverse effects would constitute a taking, including:

(A) an identification of the statutory authorities administered by the agency that may adversely affect the ability of homeowners, small farms, and small businesses to utilize their property;

(B) an assessment of such authorities, and the specific rules, processes and mechanisms by which they are administered, to assess adverse impacts on homeowners, small farms, and small businesses, as well as benefits to other property owners and the public interest;

(C) consideration of potential improvements, including but not limited to regulatory changes and legislative proposals, that would reduce adverse impacts on homeowners, small farms, and small businesses, and

(D) consideration of the availability of, and the need for, any special procedures or programs to prevent undue burdens on homeowners, smaller farms, and small businesses, even where such burdens do not constitute a taking.

(12) consideration by the agency, on the request of a property owner, of the regulatory effect that an agency action would have on the property of a property owner, a homeowner, small farm, or small business of a claim that an agency action constitutes a taking, including expedited agency consideration of

1 regulatory effects such claims under
2 subsection (c);

3
4 (2) the conduct of adjudications under
5 subsection (d); and

6
7 ~~(3) resolution of any findings that an~~
8 ~~agency action has resulted or will result in a~~
9 ~~taking of property; and~~

10
11 (4) training of agency personnel to better
12 consider the effect of agency actions on
13 property rights and community relations.

14
15 (c) Expedited Agency Consideration of
16 Regulatory Effects Takings Claims.

17
18 (1) In general, When an agency identified by
19 the Attorney General under subsection (b)(1)
20 receives a request from a property owner, or
21 other person indirectly affected, to consider
22 the effect of a agency action on the property
23 owner's use and value of property, homeowner,
24 small farm, or small business to consider
25 whether an agency action constitutes a taking
26 of property of a value not exceeding \$500,000,
27 the agency shall

28
29 (A) consider the request, including, as the
30 agency deems appropriate, the consideration
31 of

32
33 (i) information supplied by the homeowner,
34 small farm, or small business property owner;

35
36 (ii) information provided by other affected
37 persons, including State and local
38 governments, community organizations, and
39 adjacent landowners; and

40
41 (iii) information developed by the agency in
42 the course of proposing the agency action or
43 investigating the request;

44
45 (B) ~~take into account the effect of the~~

~~agency action to the extent consistent with the purposes and requirements of the law under the authority of which the agency action is taken and make available to the homeowner, small farm, or small business property owner, on request, a detailed analysis of that effect its determination in writing, including any publicly available analysis of the effect of the agency action on the owner's property;~~

(C) ~~if the property owner so requests or if the agency considers it necessary for the development of facts sufficient in order to reach an appropriate determination, conduct an adjudication under subsection (d); and~~

(D) if the matter is referred for adjudication, take prompt action pursuant to subsection (d) (3) in response to the findings made in the adjudication.

(2) Expedition. An agency shall ensure that its procedure provides for the most expeditious completion under this subsection and adjudication and response to adjudication under subsection (d) as the nature and complexity of the agency action in question will allow.

(3) Effect on Agency Action. Consideration of a taking claim under this section shall not stay or otherwise delay the effect of the agency action alleged to constitute a taking.

(4) Exhaustion of Remedies. A homeowner, small farm, or small business need not request consideration of a taking claim under this section as a prerequisite to the filing of a takings claim in federal court.

(d) Adjudication. _

(1) Hearing. When a claim is referred under subsection (c) (3) (C), the agency shall consider the claim on the record following an

1 opportunity for hearing under section 554 of
2 title 5, United States Code.

3
4 (2) Basis of decision. The decision of a
5 claim referred under subsection (c) (3) (C)
6 shall be based on a consideration of ~~include~~
7 ~~findings of fact and conclusions of law~~
8 ~~regarding:~~
9

10 (A) the authority under which the agency
11 action is taken;

12
13 (B) whether the agency action is ~~or would~~
14 ~~likely amount~~ to a taking of property;

15
16 (C) whether modifications ~~are available~~
17 ~~pursuant to subsection (A) could be made to~~
18 ~~reduce any adverse effect on the use,~~
19 ~~enjoyment, or value of the property; and~~
20

21 (D) if a taking is ~~likely to be found~~, the
22 amount of payment ~~that would be necessary to~~
23 ~~make provide~~ just compensation.

24
25 (3) ~~Remedies Agency Response to Adjudicatory~~
26 ~~Findings. If it is determined in an~~
27 ~~adjudication the agency determines that an~~
28 ~~agency action constitutes a taking, or that~~
29 ~~there are sufficiently persuasive reasons why~~
30 ~~the agency action might be held to constitute~~
31 ~~a taking as to justify taking 1 of the~~
32 ~~following actions, the agency, in consultation~~
33 ~~with the Attorney General, shall is authorized~~
34 ~~to take 1 one or more of the following~~
35 ~~actions:~~
36

37 (A) Reverse or modify the agency action so
38 as to avoid or reduce the effect of the agency
39 action on the ~~homeowner, small farm, or small~~
40 ~~business property owner~~, if and to the extent
41 to which a reversal or modification would be
42 consistent with and permit the full
43 enforcement of, the overall purposes of the
44 law under which the agency action is taken,
45 ~~including the protection of other property~~

1 ~~owners and the public interest.~~

2
3 ~~(B) Prepare and serve on the property owner~~
4 ~~a detailed statement stating reasons why the~~
5 ~~agency does not concur with the~~
6 ~~determination.~~

7
8 ~~(B) With the concurrence of the Attorney~~
9 ~~General, pay just compensation from the~~
10 ~~agency's appropriated funds;~~

11
12 ~~(C) On the request of the property owner,~~
13 ~~and to the extent statutory authorization~~
14 ~~exists and to the extent that funds are~~
15 ~~available in advance through an appropriation,~~
16 ~~pay just compensation for the taking through~~
17 ~~appropriate procedures, including, file a~~
18 ~~declaration under the first section of the Act~~
19 ~~of February 26, 1931 (40 U.S.C. 258a), to~~
20 ~~condemn a property interest taken for public~~
21 ~~use, limited to the interests in property~~
22 ~~determined to be taken pursuant to this~~
23 ~~subsection (d), and this Act shall constitute~~
24 ~~authority for the taking for the purposes of~~
25 ~~the second sentence of the first undesignated~~
26 ~~paragraph of that section.~~ or

27
28 ~~(D) Notify the homeowner, small farm, or~~
29 ~~small business of remedies available under the~~
30 ~~fifth amendment to the United States~~
31 ~~Constitution.~~

32
33 (e) Alternative Dispute Resolution. _

34
35 (1) Determination of no taking. If the
36 agency, in consultation with the Attorney
37 General, determines that an agency action does
38 not constitute a taking, or there is a dispute
39 as to the amount of just compensation, the
40 agency shall promptly notify the homeowner,
41 small farm, or small business property owner
42 of the decision.

43
44 (2) Consent to alternative dispute
45 resolution. If a homeowner, small farm, or

1 ~~small business property owner~~ brings a claim
2 seeking compensation in the Court of Federal
3 Claims, on the request of the ~~homeowner, small~~
4 ~~farm, or small business property owner,~~ the
5 agency and the Attorney General shall consent,
6 where consistent with the interests of the
7 United States, to submit the claim to the any
8 process of alternative dispute resolution
9 which has been approved by the Attorney
10 General in a form consistent with the
11 practices of the court.
12

13 ~~(f) Qualification To Invoke Proceedings~~
14 ~~Under This Section. A property owner shall be~~
15 ~~entitled to invoke proceedings under this~~
16 ~~section to enforce or protect a use or~~
17 ~~enjoyment or the value of the property only if~~
18 ~~the property owner (or, in the case of a~~
19 ~~property that the property owner acquired by~~
20 ~~inheritance, a person from whom the~~
21 ~~inheritance was received) had the use,~~
22 ~~enjoyment, or value of the property prior to~~
23 ~~the date on which~~
24

25 ~~(1) in the case of an agency action that is~~
26 ~~explicitly required by a state, regulation, or~~
27 ~~court decision, the date of enactment or~~
28 ~~issuance of the statute, regulation, or court~~
29 ~~decision; or~~
30

31 ~~(2) in the case of an agency action that is~~
32 ~~committed to determination by the agency, the~~
33 ~~date on which the agency action is published~~
34 ~~or interested parties are otherwise given~~
35 ~~notice as required by law.~~
36

37 ~~(g) Time For Filing Requests.~~
38

39 ~~(1) Request for consideration. A homeowner,~~
40 ~~small farm, or small business property owner~~
41 ~~shall submit to the agency a request for~~
42 ~~expedited agency consideration of regulatory~~
43 ~~effects a takings claim under subsection (c)~~
44 ~~not later than 30 days after the date on which~~
45 ~~the agency action is published or interested~~

1 parties are otherwise given notice of the
2 proposed or final agency action as required by
3 law agency procedures.
4

5 ~~(2) Request for consent to alternative~~
6 ~~dispute resolution. A property owner shall~~
7 ~~submit to the agency a request for consent to~~
8 ~~alternative dispute resolution under~~
9 ~~subsection (e)(2) not later than 30 days after~~
10 ~~the agency notifies the property owner of its~~
11 ~~determination that an agency action does not~~
12 ~~constitute a taking.~~
13

14 (hg) Responsibilities of the Attorney
15 General and Agencies. ~~The Attorney General~~
16 ~~shall~~
17

18 (1) ~~Not later than 60 days after the date~~
19 ~~of enactment of this Act, the Attorney General~~
20 ~~shall publish a list of agencies that must~~
21 ~~establish a procedure under subsection (a),~~
22 ~~which list shall include, at a minimum, all~~
23 ~~agencies the actions of which have a~~
24 ~~significant possibility of affecting a taking~~
25 ~~the value, use, or enjoyment of property;~~
26

27 (2) ~~Not later than 90 180 days after the~~
28 ~~date of enactment of this Act, the Attorney~~
29 ~~General shall publish guidelines for each~~
30 ~~Federal agency identified under paragraph (1)~~
31 ~~to ensure that, to the maximum extent~~
32 ~~practicable, each agency's procedure is~~
33 ~~uniform and sufficient to achieve the~~
34 ~~objectives of this Act; and~~
35

36 (3) ~~Not later than 240 days after the~~
37 ~~Attorney General publishes guidelines pursuant~~
38 ~~to paragraph (2), each agency designated~~
39 ~~pursuant to paragraph (1) shall prepare and~~
40 ~~publish, with the concurrence of the Attorney~~
41 ~~General, final procedures pursuant to~~
42 ~~subsection (a).~~
43

44 ~~(3) not later than 180 days after the date~~
45 ~~of enactment of this Act, review and approve~~

~~the procedure established by each agency designed to comply with the requirements of subsection (a) and paragraph (2).~~

SEC. 6. ~~SMALL PRIVATE PROPERTY OWNER HOMEOWNER, SMALL FARM, AND SMALL BUSINESS ASSISTANCE PROGRAMS.~~

(a) Establishment.

(1) In general. The Attorney General shall designate at least 3 of the agencies identified under section 5(h)(1) to establish ~~pilot property owner homeowner, small farm, and small business~~ assistance programs.

(2) Basis for designation. In designating such agencies, the Attorney General shall choose agencies the programs of which have the potential to affect a broad range of ~~property owners homeowners, small farms, and small businesses~~ on a regular basis.

(b) Functions. The programs established under this section shall include the following functions:

(1) Identification of solutions to potential conflicts with ~~property owners homeowners, small farms, and small businesses~~ and application of all available expedited procedures and incentives to achieve those solutions.

(2) Service as a focal point for questions, requests, complaints, and suggestions from ~~property owners homeowners, small farms, small businesses, and the public~~ concerning the policies and activities of the agency that affect property.

(3) Provision of advice to ~~property owners homeowners, small farms, and small businesses~~ on how to comply with applicable requirements of Federal law as efficiently and

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1 expeditiously as possible.

2
3 (4) Provision of information to ~~property~~
4 ~~owners homeowners, small farms, and small~~
5 ~~businesses~~ on the availability of procedures
6 under section 5, including procedures of the
7 Court of Federal Claims and ~~the~~ alternative
8 dispute resolution ~~process~~.

9
10 (5) Coordination among designated agencies
11 to ensure consistent responses and
12 communications relating to the ~~private~~
13 ~~property owner homeowner, small farm, and~~
14 ~~small business~~ assistance programs.

15
16 (6) Annual reporting to the head of the
17 agency of information and comments
18 communicated by ~~property owners homeowners~~
19 ~~small farms, and small businesses~~ that will
20 better fulfill the mission of the agency while
21 reducing potential conflicts relating to
22 regulatory effects on property.

23
24 (7) Annual reporting by the head of the
25 agency to the appropriate committees of
26 Congress describing the information and
27 comments received under paragraph (6) ~~7~~
28 ~~including recommendations that Congress might~~
29 ~~consider to reduce or eliminate overly~~
30 ~~burdensome regulations on property owners.~~

31
32 (c) Prohibition of Advocacy. Agency
33 personnel involved in a ~~private property owner~~
34 ~~homeowner, small farm, and small business~~
35 assistance program under this section shall
36 not serve as advocates or legal counsel for
37 property owners ~~seeking to invoke proceedings~~
38 ~~under this Act.~~

39
40 (d) Authorization of Appropriations. There
41 is authorized to be appropriated to carry out
42 this section \$1,500,000 for each of fiscal
43 years 1996, 1997, 1998, 1999, 2000, and 2001.

44 ~~DISCROSS~~
45

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~~SEC. 7. WRITTEN PERMISSION FOR ENTRY.~~

~~(a) Compliance With Law. An employee or agent of an agency acting within the scope of the employee or agent's employment or authority shall fully comply with~~

~~(1) State and tribal trespass law when entering a small property; and~~

~~(2) other applicable law relating to privacy.~~

~~(b) Requirements. An employee or agent of any Federal agency shall not enter a property unless~~

~~(1) the employee or agent has provided to the holder of an ownership or leasehold interest in the property, or the interest holder's authorized representative, a written statement generally describing the reason for entry; and~~

~~(2) the interest holder or authorized representative has given written permission for the entry.~~

~~(c) Exceptions. Subsection (b) This section shall not apply in a case of entry for the purpose of~~

~~(1) obtaining consent necessary to comply with subsection (b);~~

~~(2) conducting an investigation under Federal law;~~

~~(3) enforcing Federal law; or~~

~~(4) responding to an emergency.~~

SEC. 8. EMERGENCY EXCEPTIONS.

This Act does not apply in a case in which

1 an agency determines that agency action is
2 necessary to_

3 (1) safeguard life or property;

4 (2) respond to a state of disaster; or

5 (3) respond to a threat to national
6 security.

7
8
9
10 SEC. 98. MODIFICATIONS TO THE CLEAN WATER
11 ACT.

12
13
14 ~~TO BE SUPPLIED.~~

15
16 SEC. 109. MODIFICATIONS TO THE ENDANGERED
17 SPECIES ACT.

18 ~~TO BE SUPPLIED.~~

19
20 SEC. 110. JUDICIAL PROCEEDINGS.

21
22 (a) Rule of Construction. Nothing in this
23 Act shall be construed to impair any right of
24 judicial review derived from other statutory
25 authority or the Constitution.

26
27 (b) Scope of Review. Judicial review of
28 implementation of this Act shall be limited to
29 ~~a question relating to the establishment of~~
30 ~~procedures under to section 5 and to any~~
31 ~~Federal question that may arise out of section~~
32 ~~9 or 10. Final agency actions pursuant to~~
33 ~~section 5(d), review of which shall be in the~~
34 ~~same manner as provided for in the statute~~
35 ~~authorizing the agency action alleged to~~
36 ~~constitute a taking.~~

37
38 ~~(c) Admission Into Evidence. Any information~~
39 ~~obtained in proceedings under section 5 (c),~~
40 ~~(d)(3), or (e) shall not be subsequently~~
41 ~~entered into evidence in any judicial~~
42 ~~proceeding without the consent of the agency~~
43 ~~and of the property owner to whom the evidence~~
44 ~~relates, unless the information would have~~
45 ~~been obtainable through judicial discovery~~

20

1 ~~procedure if those proceedings had not~~
2 ~~occurred. [NOTE: This subsection should be~~
3 ~~expanded to deal with the question what~~
4 ~~weight, if any, the court should give to~~
5 ~~factual findings were made and what deference~~
6 ~~to legal conclusions were reached in the~~
7 ~~proceedings, particularly in light of the~~
8 ~~usual rule that would apply to a section 554~~
9 ~~adjudication.]~~