

NLWJC- Kagan

Counsel - Box 014 - Folder 004

Takings [1]

Marvin Krislov
Old Executive Office Building
Room 128

456-7903

SPECIAL

**PHOTOCOPY
PRESERVATION**

THE WHITE HOUSE
WASHINGTON

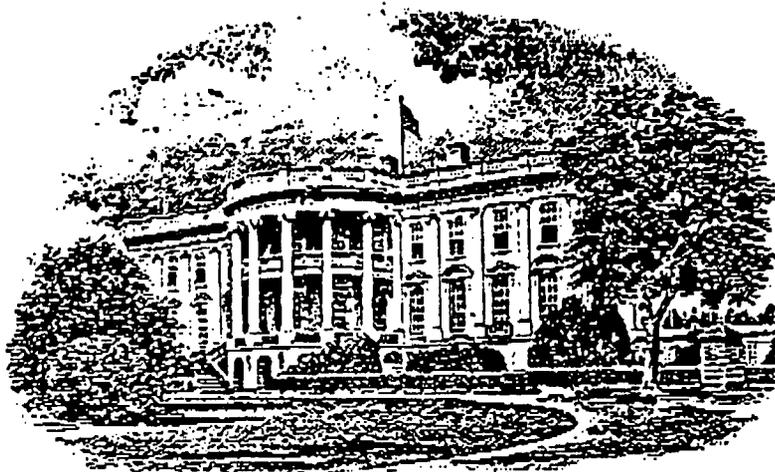
DATE: 3-4-94

TO: *Lesia Krim*

FROM: *Marvin Kistler* ✓
White House Counsel
Room 128, OEOB, x79003

(Mamm-
I made
myself
a copy-
list)

- FYI
- Appropriate Action
- Let's Discuss
- Per Our Conversation
- Per Your Request
- Please Return
- Other



FAX TRANSMISSION

**The National Economic Council
The White House**

To: Marvin Krislow

Phone: 67903 FAX: 61647

From: Peter Yu

Phone: 202-456-2802 FAX: 202-456-2223

Date: 3/1/94

Time: _____

Pages to follow: _____

p.21) citizens -

2) p3 - delays ? → move to 4

3) DOJ - 21 days,
timely response

3(d) - may not

THE WHITE HOUSE

WASHINGTON

March 5, 1994

MEMORANDUM FOR SALLY KATZEN

JOE STIGLITZ & JON BAKER
LINDA LANCE & STEVE WARNATH
PAUL WEINSTEIN
WILL STELLE
TODD STERN
BOB WATSON & ROSINA BIERBAUM
MARVIN KRISLOV

FROM:

PETER YU 

SUBJECT:

ATTACHED DRAFT DECISION MEMORANDUM

Friday, Marvin Krislov of the White House Counsel's office and I met with OLC staff to discuss E.O. 12630. I would summarize OLC's judgment as follows: while on policy grounds, OLC would support rescission of E.O. 12630, any legal imprecision in the Order could be corrected through the issuance of revised Guidelines.

That judgment led me to draft the following decision memorandum. I would appreciate any comments on this draft, and perhaps a brief discussion of it at our next meeting. I am, of course, not wedded to the notion of a Deputies meeting, but thought a draft memorandum would crystallize some of our thinking on this issue.

Thank you.

White House
Office on Environmental Policy
Voice: (202) 456-6224 FAX: (202) 456-2710

From: Will Stelle
Associate Director for Natural Resources

To: Jack Quinn 67044
Greg Simon 66231
Sally Katzen 53047
Joe Stiglitz 66947
Ellen Seidman 62223
Paul Weinstein 67028
Steve Warnath 67028
Todd Stern 62215
Bob Watson 51571
Rosina Bierbaum 51571
Jonathan Baker 66809
Peter Yu 62223
Marvin Krislov 61647
Craig Crutchfield 55691
Lorraine Miller 62604
Tracy Thornton 62604

Pages including cover: 8

If there are problems with this fax, please call Matt Zinn at (202) 456-6447

THE WHITE HOUSE
WASHINGTON

March 5, 1994

DRAFT

DRAFT

MEMORANDUM FOR [DEPUTIES IN INTERESTED WHITE HOUSE OFFICES]

FROM: Interagency Group on Takings Issues

SUBJECT: Decision Requested Regarding Administration Position on Takings Issues

This memorandum summarizes a proposed Administration strategy to respond to anticipated legislative initiatives regarding "regulatory takings" and presents for your decision an issue concerning the Administration's treatment of Executive Order 12630.

I. BACKGROUND

Government regulations--such as permitting requirements, limitations on use, and regulatory restrictions--are often criticized for reducing the value of private property. In recent years, these criticisms have increased, particularly with regard to federal wetlands and endangered-species policies, and have developed into a loosely-knit "wise-use" or "private-property" movement.

In Congress, several bills and amendments designed to reduce such federal actions have been introduced. One such bill would codify Executive Order 12630, which was signed by President Reagan in 1988, and which articulates certain principles for federal regulatory action and requires agencies to complete a "Takings Impact Analysis" (TIA) before undertaking certain actions. Another bill would require the federal government to compensate any owner whose property was reduced in value by more than half due to federal action. These sorts of propositions have been and will be raised as amendments to pending legislation, including the reauthorizations of the Clean Water Act and the Superfund program, as well as the EPA-elevation bill.

II. RESPONSE STRATEGY

An interagency group, chaired by the Vice President's office, has developed a comprehensive strategy for addressing the political and legislative aspects of this difficult situation. The overall objective of the strategy is straightforward: to prevent passage of "takings" legislation and to minimize the deleterious effect that promotion of such legislation will have on the Administration's agenda. The approach includes:

- a coordinated legislative-outreach effort involving the White House and key agencies;
- an economic analysis led by OMB and CEA; and
- a communications strategy involving the White House and key agencies.

DRAFT

-2-

III. TREATMENT OF EXECUTIVE ORDER 12630: OPTIONS & ANALYSIS

One aspect of this strategy--the treatment of E.O. 12630--requires your decision. As suggested above, E.O. 12630 and the guidelines promulgated by the Attorney General pursuant to the Order play an important, if somewhat symbolic, role in the takings debate. Environmental and consumer groups have long criticized the Order as chilling appropriate governmental action and as largely redundant with existing constitutional obligations. The private-property movement has generally supported the Order, although it has criticized executive agencies for not consistently complying with the Order; moreover, some in the movement have urged more substantial action to reduce governmental regulation or to increase compensation.

At this point, we have at least two options.

Option 1: Replace the Executive Order with a revised, more balanced Order. Under this option, a revised Order would be issued that recognized the importance of private property, directed agencies to weigh the risk of takings and to take measures to minimize that risk. The revised Order would not include the more troubling hortatory statements of the current Order and would reduce agencies' obligation to undertake TLA's.

Option 2: Leave E.O. 12630 in place, but revise the Guidelines issued under the Order. Under this option, the Attorney General would promulgate new Guidelines that would both bring the Order in line with current law and substantially revise the operation of the Order. The Justice Department's Office of Legal Counsel has indicated that certain aspects of E.O. 12630 may no longer be accurate statements of the law but that those aspects could be amended through the issuance of new Guidelines, and do not require the rescission of the Order.

Option 1 allows us to eliminate an Order that most in the Administration agree is undesirable, and to leave a Clinton legacy in the area of property rights. Certain constituencies--environmental and consumer groups--would support this Option. Option 2 is less desirable as a policy matter, but may be politically more advantageous. Some argue that, in a context in which many Congresspersons appear to support codification of E.O. 12630, eliminating that Order would only increase charges that the Administration does not take property rights seriously. Supporters of Option 2 contend that any Order we were to issue would be viewed as less protective of property rights than E.O. 12630, and thus Option 1 may only increase the pressure for legislative action in the "opposite" direction. While neither environmental and consumer interests nor the private-property movement will be wholly satisfied by Option 2, preserving E.O. 12630 may provide some "cover" for those Members who wish to vote against more radical takings legislation.

III. RECOMMENDATIONS

[to be completed]

REAL ESTATE



Among cases cheered by property rights activists is a \$7 million judgment for a development firm against the Army Corps of Engineers over wetlands use in Long Beach, N.J.

HUD to Block Housing Aid to Illegal Aliens

Agency to Begin Enforcing Law 14 Years After Passage

By Ann Mariano
Washington Post Staff Writer

The Clinton administration has decided it is going to enforce a law that denies housing assistance to illegal immigrants in the United States, 14 years after the measure was passed.

People who have entered the country without government permission will be barred from getting the rental and mortgage subsidies that are available to citizens and legal immigrants with low incomes, according to the Department of Housing and Urban Development.

In the past, some undocumented aliens have been able to live in public housing or receive rental assistance, even though they are not entitled to the aid.

Families composed of illegal immigrants and citizens, who usually are children born after their families arrived in the United States, will get partial assistance, according to HUD.

The Immigration and Naturalization Service estimates that 3.4 million residents were in the United States illegally in October 1992 and that 600,000 have arrived since then. About 70,000 illegal aliens live in the Washington area, including an estimated 8,000 students, according to private studies. Educating illegal immigrant students costs about \$50 million a year, the studies said.

HUD Secretary Henry Cisneros said his department's decision to bar undocumented aliens from housing assistance is a move that was "long overdue." It is not known how many undocumented immigrants receive such housing aid or at what cost.

Organizations representing Hispanic Americans and other groups said they believe anti-immigrant forces in Washington and throughout the country influenced the decision to enforce the law.

Several bills recently introduced in Congress to curtail aid to illegal residents are evidence of the growing trend, they said, as is action by the Virginia legislature that bars illegal immigrants 18 and over from attending the state's schools.

PHOTOCOPY PRESERVATION

Private Property Rights Proponents Gain Ground

Coalition Against Land-Use Laws Takes On Environmentalists, Scores Wins in Congress and Courts

By H. Jane Lehman

property rights issues are before Congress, according to Peggy Reidle of Cambridge, Md., founder of the Fair-

Private Property Rights Proponents Gain Ground

Coalition Against Land-Use Laws Takes On Environmentalists, Scores Wins in Congress and Courts

By H. Jane Lehman
Special to The Washington Post

In a surprising show of strength, the private property rights movement has racked up a string of recent victories in Congress and in the courts.

The visible progress comes four years since the property rights crusade began to coalesce, yet remains far short of the influence wielded by what the activists consider their chief nemesis—the environmental community.

At its core, the property rights coalition is railing against land-use laws, particularly those protecting wetlands and endangered species, that it claims rob property owners of the full use and value of their land.

At the moment, 22 pieces of legislation addressing

property rights issues are before Congress, according to an analysis by Robert Melz, a property law expert at the nonpartisan Congressional Research Service.

When the property rights advocates are not seeking direct relief from the laws, they are suing for monetary compensation from the public treasury commensurate with the drop in property value or limitation on its use brought on by government regulation.

"Judging from the decibel level of the debate, the property rights movement is coming on strong," Melz said.

The movement, Melz said, consists of three flanks that often operate independently of one another. They are small property owners wrapped up in land battles; the building, mining, logging and farming industries; and conservatives seeking to limit the sphere of government influence as a matter of principle.

Peggy Reigle of Cambridge, Md., founder of the Fairness to Landowners Committee, said she is heartened by the progress.

"Our message is finally being received. . . . We have instilled a fear in the environmental community and I think we have made a huge, huge impact in four years," said Reigle, whose group claims 16,000 "mom and pop" members in 50 states.

None of the legislation is expected to pass the full Congress in the time remaining before the scheduled adjournment in October, but some of provisions have cleared one chamber or the other. Some of the measures also are credited by supporters and detractors alike with killing legislation to reauthorize the Clean Water Act, elevate the status of the Environmental Protection Agency.

See PROPERTY, E24, Col. 1

Organizations representing Hispanic Americans and other groups said they believe anti-immigrant forces in Washington and throughout the country influenced the decision to enforce the law.

Several bills recently introduced in Congress to curtail aid to illegal residents are evidence of the growing trend, they said, as is action by the Virginia legislature that bars illegal immigrants 18 and over from attending the state's schools.

Arnoldo Ramos, executive director of the Council of Latino Agencies here, and other activists said they believe there is growing antagonism toward newcomers to the United States.

HUD's action "is clearly part of a trend to penalize immigrants as a whole," Ramos said. "It's a nationwide trend."

Raul Yzaguirre, president of the National Council of La Raza, the nation's largest Hispanic advocacy group, said: "We are concerned that the proposed rule goes beyond what the law requires. Our reading of the law suggests that full financial assistance be provided to any otherwise eligible household that includes at least one citizen or legal immigrant."

A major problem "is that people enforcing the rules of

See ALIENS, E13, Col. 1

THE NATION'S HOUSING

Computerized Loan System Gives the Lowdown on Rates

By Kenneth R. Harney

The future shape of American home mortgage lending was put on display here for the first time last week, and the odds are strong: Once you've seen, shopped and applied for a mortgage using a multilender computerized loan origination (CLO) system, you'll never want to go back to the past. Or to the present.

In fact, you'll probably ask yourself: Why has the process of getting a mortgage—the biggest single debt I may incur in my lifetime—been stuck in the horse-and-buggy age for so long? If technology exists that empowers me to identify and analyze dozens of competing loans—and to choose the most advantageous mortgage according to my own financial and personal needs—why

am I flipping through the Yellow Pages with no idea what's best? Why am I borrowing tens or hundreds of thousands of dollars so blindly?

That was the main consumer question before mortgage industry executives and federal officials who gathered for a CLO technology demonstration. As the name suggests, CLOs are interactive electronic systems that not only display local and national lenders' current loan offerings and underwriting criteria, but actually take the consumer through the application and funding commitment stages.

CLOs enable you to sit in a builder's or real estate or mortgage broker's office and shop the market with a precision you've never experienced before. Rather than getting truth-in-lending good faith

See HARNEY, E3, Col. 1

Where We Live

In Burtonsville, There's Room to Grow

By Kate Moore
Washington Post Staff Writer

George and Pam Swegman and Richard and Elaine Blackman all moved to the nine-year-old Valley Stream Estates community of Burtonsville for the same reasons: The decades-old reputation of the Montgomery County schools and the affordable housing.

The Swegmans have lived on Cavalcade Court for five years with their children, Colin, 11, and Casey, 9. George Swegman, 45, is president of the neighborhood Saddle Creek Homeowners Association board of directors. Swegman, a plaintiff's attorney in the District, said he believes many of his neighbors were attracted to the area for similar reasons.

"And there's a real exposure in the schools to understand ethnic and racial diversity. I think it's beneficial for the kids to learn this lesson early on," Swegman said.

Saddle Creek, part of the broader area of Valley Stream Estates, is home to whites, blacks, Asians and a large Armenian population. There are teachers, police officers, doctors, lawyers and military personnel. The residents are mostly young people with families, but singles and retired people say they like the community as well.

There are so many children, in fact, that Swegman and other residents would like to see the county turn the vacant field at the end of Saddle Creek Drive into a ball field. "There are a heck of a lot of kids running around out here and it would be nice for them to be able to walk out of their yards to a community field, instead of having to be driven to the several area parks," he said.

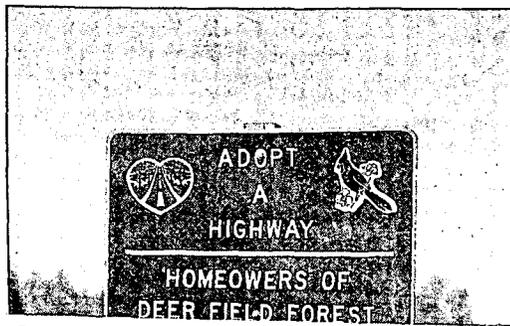
Lisa Ringler, property manager for the Saddle Creek homeowners group, which is run by Chambers Management Inc., said the subdivision is home to about 2,000 people who live in 664 detached homes and town houses. The detached homes are colonial and



PHOTOCOPY
PRESERVATION

THE ROAD THAT JUST DOESN'T N

If you know how to read the subtle signs, you can determine which homeowners' groups seemingly find their mortgage payments a little daunting these



rights movement has racked up a string of recent victories in Congress and in the courts.

The visible progress comes four years since the property rights crusade began to coalesce, yet remains far short of the influence wielded by what the activists consider their chief nemesis—the environmental community.

At its core, the property rights coalition is railing against land-use laws, particularly those protecting wetlands and endangered species, that it claims rob property owners of the full use and value of their land.

At the moment, 22 pieces of legislation addressing

When the property rights advocates are not seeking direct relief from the laws, they are suing for monetary compensation from the public treasury commensurate with the drop in property value or limitation on its use brought on by government regulation.

"Judging from the decibel level of the debate, the property rights movement is coming on strong," Melz said.

The movement, Melz said, consists of three flanks that often operate independently of one another. They are small property owners wrapped up in land battles; the building, mining, logging and farming industries; and conservatives seeking to limit the sphere of government influence as a matter of principle.

Our message is many being received. . . . We have instilled a fear in the environmental community and I think we have made a huge, huge impact in four years," said Reigle, whose group claims 16,000 "mom and pop" members in 50 states.

None of the legislation is expected to pass the full Congress in the time remaining before the scheduled adjournment in October, but some of provisions have cleared one chamber or the other. Some of the measures also are credited by supporters and detractors alike with killing legislation to reauthorize the Clean Water Act, elevate the status of the Environmental Protection Agency

See PROPERTY, E24, Col. 1

the United States. HUD's action "is clearly part of a trend to penalize immigrants as a whole," Ramos said. "It's a nationwide trend."

Raul Yzaguirre, president of the National Council of La Raza, the nation's largest Hispanic advocacy group, said: "We are concerned that the proposed rule goes beyond what the law requires. Our reading of the law suggests that full financial assistance be provided to any otherwise eligible household that includes at least one citizen or legal immigrant."

A major problem "is that people enforcing the rules of" See ALIENS, E13, Col. 1

THE NATION'S HOUSING

Computerized Loan System Gives the Lowdown on Rates

By Kenneth R. Harney

The future shape of American home mortgage lending was put on display here for the first time last week, and the odds are strong: Once you've seen, shopped and applied for a mortgage using a multilender computerized loan origination (CLO) system, you'll never want to go back to the past. Or to the present.

In fact, you'll probably ask yourself: Why has the process of getting a mortgage—the biggest single debt I may incur in my lifetime—been stuck in the horse-and-buggy age for so long? If technology exists that empowers me to identify and analyze dozens of competing loans—and to choose the most advantageous mortgage according to my own financial and personal needs—why

am I flipping through the Yellow Pages with no idea what's best? Why am I borrowing tens or hundreds of thousands of dollars so blindly?

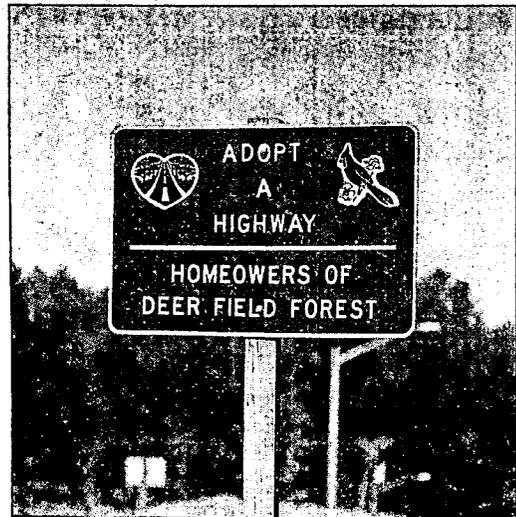
That was the main consumer question before mortgage industry executives and federal officials who gathered for a CLO technology demonstration. As the name suggests, CLOs are interactive electronic systems that not only display local and national lenders' current loan offerings and underwriting criteria, but actually take the consumer through the application and funding commitment stages.

CLOs enable you to sit in a builder's or real estate or mortgage broker's office and shop the market with a precision you've never experienced before. Rather than getting truth-in-lending good faith

See HARNEY, E3, Col. 1

THE ROAD THAT JUST DOESN'T N

If you know how to read the subtle signs, you can determine which homeowners' groups seemingly find their mortgage payments a little daunting these days. In this case, the sign is in Fairfax County, on Shirley Gate Road just past the intersection with Braddock Road. No telling whether the association's next adoption is of a proofreader.



BY TOM ALLEN—THE WASHINGTON POST

PHOTOCOPY PRESERVATION

Where We Live

In Burtonsville, There's Room to Grow

By Kate Moore
Washington Post Staff Writer

George and Pam Swegman and Richard and Elaine Blackman all moved to the nine-year-old Valley Stream Estates community of Burtonsville for the same reasons: The decades-old reputation of the Montgomery County schools and the affordable housing.

The Swegmans have lived on Cavalcade Court for five years with their children, Colin, 11, and Casey, 9. George Swegman, 45, is president of the neighborhood Saddle Creek Homeowners Association board of directors. Swegman, a plaintiff's attorney in the District, said he believes many of his neighbors were attracted to the area for similar reasons.

"And there's a real exposure in the schools to understand ethnic and racial diversity. I think it's beneficial for the kids to learn this lesson early on," Swegman said.

Saddle Creek, part of the broader area of Valley Stream Estates, is home to whites, blacks, Asians and a large Armenian population. There are teachers, police officers, doctors, lawyers and military personnel. The residents are mostly young people with families, but singles and retired people say they like the community as well.

There are so many children, in fact, that Swegman and other residents would like to see the county turn the vacant field at the end of Saddle Creek Drive into a ball field. "There are a heck of a lot of kids running around out here and it would be nice for them to be able to walk out of their yards to a community field, instead of having to be driven to the several area parks," he said.

Lisa Ringler, property manager for the Saddle Creek homeowners group, which is run by Chambers Management Inc., said the subdivision is home to about 2,000 people who live in 664 detached homes and town houses. The detached homes are colonial and Victorian, with front and back yards and garages, while the town houses are brick-faced with small yards and street parking.

Melissa Leone, an agent with Long & Foster Real Estate's Burtonsville office, said the average 1994 price for the detached homes in Saddle Creek is \$204,216 and \$121,689 for the town houses.

Burtonsville was named after Isaac Burton, who bought a large parcel of land about 1853 for \$523. Back then, Montgomery



Casey Swegman, 9, and her parents, Pam and George Swegman, share a moment at home in the Saddle Creek development, part of the Valley Stream Estates community in Burtonsville.

County had 34 public one-room schools with 750 students and a population of about 15,000. The community is located off routes 29 and 198 and accessible to the Silver Spring Metro station.

Spencerville Road and Old Columbia Pike were Burtonsville's main roads for decades. They were unpaved until the late 1920s and early 1930s. It was a common sight in those

See BURTONSVILLE, E23, Col. 1

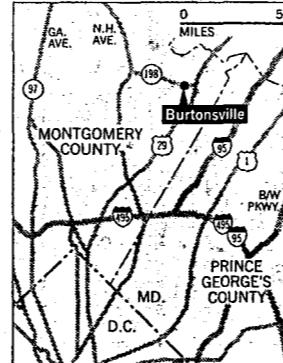
Diversity, Growth Make Burtonsville Distinctive

BURTONSVILLE, From E1

days for residents to "work off" their taxes by pitching in with road construction. The completion of Route 29 followed: Now the community finds itself accessible to both Washington and Baltimore:

"There has been phenomenal growth in the Burtonsville area with over 1,000 units built on Route 198 south since 1982," said Piera Weiss, a planner with the Maryland National Capital Park and Planning Commission.

When it was built, C&P Telephone gave Valley Stream Estates a Laurel telephone exchange instead of a Montgomery County exchange. The community wasn't listed in the



BY DAVE COOK—THE WASHINGTON POST

"There has been phenomenal growth in the Burtonsville area with over 1,000 units built on Route 198 south since 1982."

— planner Piera Weiss

Montgomery telephone directory, only in the Laurel directory, and residents weren't able to call the governing Wheaton-Glenmont police station or any of the county offices without being charged long-distance rates.

Residents worked with local council members and the Maryland Public Service Commission for the last two years to correct the problem. As of July, the community has a Montgomery County exchange. People

were given the choice of keeping their Laurel number for an additional monthly charge of \$15.25, or of receiving a new Montgomery number with no additional charges.

There's more good news for the Saddle Creek homeowners association members: Swegman credits past association president William C. Burgy as the driving force in successfully reducing the monthly dues for the fourth time in three years. Fees for town homes are \$28, and detached homes are \$16.50. The group is organizing its annual Halloween parade, planned for Oct. 29. There is also Christmas caroling in December. An association newsletter, the Saddle Creek Messenger, is published eight times a year.

The Burtonsville Crossing Shopping Center, also at routes 29 and 198, has a Giant Food store, along with other specialty stores. Restaurants and other shops can be found nearby and also in the downtown Burtonsville district. The area is also home to Burn Brae Dinner Theatre, now in its 25th season. And Seibel's restaurant has been serving "home-made super premium ice cream" to



BY CAROL GUZY—THE WASHINGTON POST

Ramzy Handal applies a coat of paint to his Saddle Creek home. The Burtonsville community boasts an ethnically diverse population from all walks of life.

Burtonsville residents since 1943:

Principal Dawn Ellis said Burtonsville Elementary School won the Maryland state School of Excellence Blue Ribbon award in 1992 and 1994. This past year, the school proceeded to win the National Blue Ribbon Award, an example of its resources of support and enthusiasm.

Ellis attributes the success to three programs that the school intends to continue, "A very strong technology program, a very, very strong community outreach program and a very, very innovative instructional program."

Elaine Blackman, 42, lives with her family on Saddle Creek Drive, in a detached house for which they paid \$182,000 in 1988. Blackman was PTA president at the elementary school for two years and was thrilled about the state and national awards. She is now vice president of the Parent Teacher Student Association of the Benjamin Banneker Middle School. Blackman said the other main area school is Paint Branch High.

Her son, Mark, 9, attends Burtonsville Elementary, and her daughter, Sandy, 11, attends middle school. "We think this is a great

place to live," Blackman said. "We've gotten to know loads and loads of families through the PTA."

Dan Straub is vice president of the Saddle Creek homeowners board. Straub, 36, and his wife, Fay, live on Meanderwood Lane with their daughters, Lauren, 7, Kristina, 5, and Elaina, 2. Straub, who works in law enforcement in the District, helped other residents to coordinate a National Night Out as part of the neighborhood watch program with the help of the Montgomery police department.

"It was a great opportunity for the

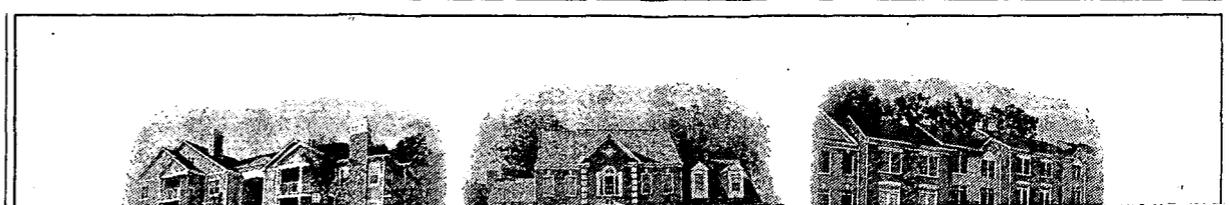
residents to interact with the local police," he said.

The police spoke to the residents about how to curb crime and offered ideas for better security in their homes and community.

"Our goal is to get everyone involved," Straub said. "It's a really good thing that comes out of neighborhood watches. You find yourself interacting with your neighbors and you see neighbor getting to know neighbor. It also allows you to rely on each other in times of need. This helps strengthen the bond in the community."

PHOTOCOPY
PRESERVATION

No Bull.
FROM \$105,000



Recent Court Wins Bolster Property Rights Activists

PROPERTY, From E1

to Cabinet level and, finally, to instigate a nationwide survey of plant and animal species on public and private land.

"Essentially, we are deadlocked, because neither side has the votes to move anything" in dispute between the property rights and environmental factions, said Stephen Driesler, chief lobbyist for the National Association of Realtors, which considers itself a property rights ally.

The logjam will break, Driesler predicted, after the Nov. 8 elections, when he expects Republican gains in the House and the Senate. "I think the tide is shifting," he said.

One of the latest wins for the property rights protectors came earlier this summer, when they outmaneuvered the Democratic leadership in the House to modify the California Desert Protection Act.

The government must acquire 700,000 acres of private land through eminent domain to complete

"Judging from the decibel level of the debate, the property rights movement is coming on strong."

— Robert Melz, property law expert at the Congressional Research Service

the 6.4 million-acre preserve. The amendment prohibits the government from using the presence of the desert tortoise and other endangered and threatened species to offer cut-rate prices for the land.

The adversaries in the environmental movement are taking the property rights challenge more seriously, as well, said Darrell Knuffke, a Denver-based regional director for the Wilderness Society.

"As someone who follows politics, I am in awe of their success," Knuffke said.

Knuffke is particularly wary of legislation that would codify private property rights, such as the measure introduced by Rep. W.J. "Billy" Tauzin (D-La.).

Robert Bannister, chief lobbyist for the National Association of Home Builders, called the Tauzin bill a "fairly sweeping stand-alone piece of legislation that is a rallying point for those of us concerned about property rights."

The bill instructs the federal government to minimize the impact of environmental programs on property rights and to obtain written owner consent before entering private land to collect information on the property. It also gives property owners a vehicle to appeal permit denials and other government decisions instead of pursuing the case in federal court.

The Tauzin proposal would further require landowner compensation when government regulation devalues property by 50 percent or more of its fair market value or economically viable use. Other bills introduced earlier this year variously would set the compensation trigger at a 50 percent, 25 percent, 10 percent or 1 percent reduction in value.

"Through a single cross-cutting statute they are winning what they have lost on an individual issue-by-issue basis," Knuffke said.

"The American public is overwhelmingly supportive of reasonable regulation to protect the environment and public health and safety," which Knuffke contends the private

it to build on the 12.5 acres of wetlands the government wanted to protect.

The company, starting in 1958, already had developed 199 acres of the Long Beach, N.J., tract. When it proposed building on the remaining 51 acres in 1982, the state agreed to allow construction on 12.5 acres. But the Corps of Engineers rejected even that compromise.

In March the U.S. Court of Federal Claims awarded Harry Bowles \$55,000, plus interest, court costs and legal fees to compensate him for when the Corps of Engineers sought to protect wetlands he wanted to fill on a small lot in a Texas subdivision to put in a septic tank and build a home.

Even with the property rights victories this year, researcher Melz found that in 1993 only two of 31 takings decisions in the federal courts favored the landowner over the government.

"Despite all the talk about property rights and court decisions, when you look at what the courts are doing, there are still incredibly few successful property cases," he said.

Knuffke said the decisions that defer to property owners bolster the environmental viewpoint. "The cases confirm what we have been arguing: that the right to habitat and the right to use property are more than adequately protected," he said.

The environmental lobby also maintains that the expansion of private property rights amounts to little more than a money grab.

The property movement, National Wildlife Federation attorney Glenn Sugameli said, is but a cover for monied interests intent on a "radical reinterpretation" of property rights.

"Property rights do not include the right to squeeze every dollar of profit out of every square inch, only the right to a reasonable return," Sugameli said.

BIG VALUE. BIGGER DEALS. LAST CHANCE.



ONLY 7 REMAIN

ONE AND TWO LEVEL CONDOMINIUM HOMES WITH PRIVATE GARAGES

- Landscaped courts • Private entrances • Two bedrooms, two baths
- Easy access to Routes 28 and 7 • Priced from \$124,700.

From the Route 28 and Route 7 interchange take Route 7 west to the first light. Turn right into University Center to Chelsea Courts on the right (just past University Heights Apartments).

Open Daily 11: a.m. to 6: p.m.



Brokers Welcome
Marketing by The Haywood Company



**AT UNIVERSITY CENTER
(703) 581-1020**



THE VALUE OF A GOOD NAME

This Exquisite Acorn Built On The Chesape

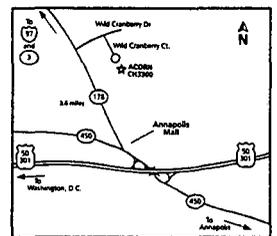


May We Build Your A

There's no wiser investment, no better good taste and good sense. Acorn homes acclaimed, and crafted to standards you One of our architects will create a custom your concept of home with the unique n You'll enjoy the free and exciting conten has distinguished Acorn houses for over

Waited long enough for an Acorn? L

Come visit us at the Acorn we live in how warm and open a house can be.



Model ho
Monday t
9:00 am t
Saturday
12:00 noon



1442 Wild
Crownsvil
(410) 823-
DC Metro:

P 9,4RE

Use It Or Lose

Centex Homes' Custom Finish Allowance will be gone at the end of this month!

So you better use it now, or you're going to lose it.

The Custom Finish Allowance gives you thousands of dollars to spend on finishes and buyer choices in any Centex single-family home or townhome in Northern Virginia. It's built in to every Centex home right now, along with standard features like brick fronts,

nine-foot ceilings, lavish master bedrooms, fully-e kitchens, and more.

Here's the last chance you have to get everything a new home — for less. Use it for a first-floor library bedroom. An extended family room or sunroom,

kitchen or m fireplace. Tw ceilings or a and unique l use it now, b September 3

\$

**Custom Finish Allowance Coupon
From Centex Homes**

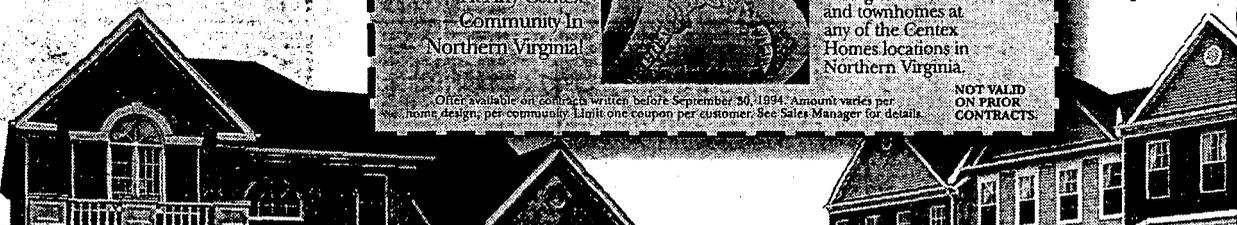
Present This Valuable Coupon At Any Centex Community In Northern Virginia

\$

Good for a credit towards closing costs, financing or the many buyer choices available in single-family homes and townhomes at any of the Centex Homes locations in Northern Virginia.

Offer available on contracts written before September 30, 1994. Amount varies per home design, per community. Limit one coupon per customer. See Sales Manager for details.

NOT VALID ON PRIOR CONTRACTS



PHOTOCOPY PRESERVATION

PHOTOCOPY PRESERVATION

rights movement is coming on strong."

— Robert Melz, property law expert at the Congressional Research Service

the 6.4 million-acre preserve. The amendment prohibits the government from using the presence of the desert tortoise and other endangered and threatened species to offer cut-rate prices for the land.

The adversaries in the environmental movement are taking the property rights challenge more seriously, as well, said Darrell Knuffke, a Denver-based regional director for the Wilderness Society.

"As someone who follows politics, I am in awe of their success," Knuffke said.

Knuffke is particularly wary of legislation that would codify private property rights, such as the measure introduced by Rep. W.J. "Billy" Tauzin (D-La.).

Robert Bannister, chief lobbyist for the National Association of Home Builders, called the Tauzin bill a "fairly sweeping stand-alone piece of legislation that is a rallying point for those of us concerned about property rights."

The bill instructs the federal government to minimize the impact of environmental programs on property rights and to obtain written owner consent before entering private land to collect information on the property. It also gives property owners a vehicle to appeal permit denials and other government decisions instead of pursuing the case in federal court.

The Tauzin proposal would further require landowner compensation when government regulation devalues property by 50 percent or more of its fair market value or economically viable use. Other bills introduced earlier this year variously would set the compensation trigger at a 50 percent, 25 percent, 10 percent or 1 percent reduction in value.

"Through a single cross-cutting statute they are winning what they have lost on an individual issue-by-issue basis," Knuffke said.

"The American public is overwhelmingly supportive of reasonable regulation to protect the environment and public health and safety," which Knuffke contends the private property proposals undermine.

The property rights movement also is cheering a number of decisions handed down recently in various courts. Most of the cases claim the government has taken private land by virtue of imposing controls so strict as to erode or destroy the value of the property but refused to compensate the owners for their losses.

In a 5-to-4 decision, the Supreme Court in June ordered a lower court to reassess whether the decision by the city of Tigard, Ore., to deny a building permit to Florence Dolan was reasonably related to the environmental impacts of the proposed development. The town wanted 7,000 square feet of Dolan's land for a bicycle path and public green space before it would give her permission to expand her plumbing and electrical supply store.

Nine days earlier, a U.S. Circuit Court of Appeals upheld a lower court ruling that the U.S. Army Corps of Engineers must pay Loveladies Harbor, a development company, \$7 million for refusing to allow

to use property are more than adequately protected," he said.

The environmental lobby also maintains that the expansion of private property rights amounts to little more than a money grab.

The property movement, National Wildlife Federation attorney Glenn Sugameli said, is but a cover for monied interests intent on a "radical reinterpretation" of property rights.

"Property rights do not include the right to squeeze every dollar of profit out of every square inch, only the right to a reasonable return," Sugameli said.

University Heights Apartments)

Open Daily 11: a.m. to 6: p.m.

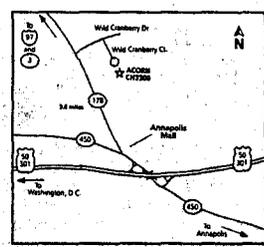
Brokers Welcome Marketing by The Mayhoad Company



AT UNIVERSITY CENTER (703) 581-1020

SMITH

THE VALUE OF A GOOD NAME



Model Monday 9:00 am to Saturday 12:00 pm

1442 W. Crown (410) 9... DC Md

Use It Or Lose

Centex Homes' Custom Finish Allowance will be gone at the end of this month!

So you better use it now, or you're going to lose it.

The Custom Finish Allowance gives you thousands of dollars to spend on finishes and buyer choices in any Centex single-family home or townhome in Northern Virginia. It's built in to every Centex home right now, along with standard features like brick fronts,

nine-foot ceilings, lavish master bedrooms, fully kitchens, and more.

Here's the last chance you have to get everything a new home — for less. Use it for a first-floor living bedroom. An extended family room or sunroom

kitchen or fireplace. The ceilings or and unique use it now, September

Custom Finish Allowance Coupon From Centex Homes

Present This Valuable Coupon At Any Centex Community In Northern Virginia

Good for a credit towards closing costs, financing or the many buyer choices available in single-family homes and townhomes at any of the Centex Homes locations in Northern Virginia.

*Offer available on contracts written before September 30, 1994. Amount varies per home design, per community. Limit one coupon per customer. See Sales Manager for details. NOT VALID ON PRIOR CONTRACTS



THE GENESIS Centex Homes COLLECTION

FAIRFAX COUNTY

NEW MODELS NOW OPEN! BRYARTON
Garage Townhomes from the \$150's.
Directions: Take I-66 West to Route 29. Turn right onto Rt. 29 and continue to next traffic light. Turn right on Stone Rd. Follow 1/4 mile to Sales Center on right. Phone: 703/818-9351.

NEW MODELS NOW OPEN! CENTRE RIDGE
Single-Family Homes from the low \$200's.
Directions: Take I-66 West to Route 28 South. Continue on Rt. 28 South to New Braddock Rd. Turn right onto New Braddock Rd. and follow to the end to Sales Center on left. Phone: 703/802-6575.

GRAND CLOSEOUT! THE ESTATES AT FAIR LAKES
An Enclave of Special Single-Family Homes from the \$300's. Directions: Take I-66 West to exit 55 (Fairfax County Parkway) to left on Fair Lakes Parkway to Sales Center on right. Phone: 703/631-3937.

PRE-CONSTRUCTION - NOW SELLING! ISLAND CREEK
Townhomes from the \$150's & \$170's.
Directions: Take I-95 south to the Springfield/Franconia exit (exit 57). Take exit towards Franconia Road. Turn right at second light onto Frontier Drive. Follow Frontier Drive to a left-turn onto the Fairfax County Parkway. Continue approximately 1 mile and turn right onto Beulah Road. Follow Beulah Road and turn right onto Morning View Lane. Sales Center is on the left. Phone: 703/971-3533.

PRE-CONSTRUCTION - NOW SELLING! KINGSTOWNE
Luxury Townhomes from the low \$200's.
Directions: Take the Capital Beltway (I-495) to the Van Dorn Street exit (exit 3). Turn right onto S. Van Dorn St. and continue approximately 1 mile to the Kingstowne Information Center on the right. Phone: 703/971-4834.

PRE-CONSTRUCTION - NOW SELLING! LEE OVERLOOK
Townhomes from the \$130's. Directions: Take I-66 West to exit 52 (Route 29). Turn right onto Rt. 29 and continue to 2nd traffic light. Turn left onto Paddington Rd. to Sales Center on right. Phone: 703/830-0143.

NEW MODELS NOW OPEN! McNAIR FARMS
3-Level Garage Townhomes from the \$150's.
Directions: From the Beltway (I-495) take the Dulles Toll Road (Rt. 267) west to exit 2 - Chantilly/Herndon. Turn left onto Centreville Rd. toward Chantilly. Continue to traffic light at Fryling Pan Rd. Turn left onto Fryling Pan Rd. to left on Thomas Jefferson Dr. to model homes on right. Phone: 703/713-0818.

BIG ROCKY FOREST/LONG MEADOW
Single-Family Homes on Wooded Homesites from the \$270's. Directions: Take I-66 to exit 55 (Fairfax County Parkway) to left on Fair Lakes Parkway to Sales Center on right. Phone: 703/631-3937.

NEW MODELS NOW OPEN! SYCAMORE LAKES
Single-Family Homes from the \$230's.
Directions: From the Beltway (I-495), take the Dulles Toll Road (Rt. 267) west to Fairfax County Parkway exit. Go left on Fairfax County Parkway to right on Fox Mill to Sales Center on left. Phone: 703/478-0292.

NEW MODELS NOW OPEN! WATER'S EDGE
3-Level, 24' Wide, 2-Car Garage Townhomes from the low \$200's. Directions: Take I-66 West to exit 55 (Fairfax County Parkway) to left on Fair Lakes Parkway to left on Fair Lakes Boulevard to right on Great Heron Drive. Sales Center straight ahead. Phone: 703/631-8236.

NEW MODELS NOW OPEN! WHISPERWOOD
Single-Family Homes from the \$230's.
Directions: Take I-95 south to Franconia/Springfield exit. Follow Franconia to 2nd traffic light. Go right on Frontier to right on Fairfax County/Springfield/Franconia Parkway. Go approx. 3 miles, take second Hoops Road exit, turn right at light to Sales Center. OR, Take Route 123 south to left on Pohick Rd. Exit at Hoops Rd., at top of exit turn left. Go through next light to Sales Center. Phone: 703/569-5801.

PRE-CONSTRUCTION - NOW SELLING! FAIR LAKES GLEN (Willow Pond)
Single-Family Homes from the \$230's.
Directions: Take I-66 West to exit 55 (Fairfax County Parkway) to left on Fair Lakes Parkway to Sales Center on right. Phone: 703/631-3937.

PRE-CONSTRUCTION - NOW SELLING! BARKLEY
Single-Family Homes from the \$230's.
Directions: From the Beltway (Fairfax exit) and continue on Barkley Drive to Sales Center. For information, please call 703/450-8639.

PRE-CONSTRUCTION - NOW SELLING! BARKLEY
3-Level Garage Townhomes from the \$230's.
Directions: From the Beltway (Fairfax exit) and continue on Barkley Drive to Sales Center.

LOUDOUN COUNTY POTOMAC LAKES
3-Level Townhomes from the \$230's.
Directions: Take Rt. 7 west to right on Palisades Pkwy. to left Sales Center. Phone: 703/450-8639.

RICHLAND FOREST
Single-Family Homes from the \$230's.
Directions: From Rt. 7 pass R.R. Rd. to right on Augusta Drive entrance. Go 1/2 mile straight decorated models. Phone: 703/450-8639.

Open Daily, 11-7pm. Brokers Welcome.

Coming Friday, Sept. 23

1994 Hunting Guide

The Weekend section publishes its annual mid-Atlantic hunting chart. Bill Sautter shows you what's in season when and what the bag-limits are. Hank Burchard looks at the new infrared deer finder.

-4/7/94 DRAFT-

EXECUTIVE ORDER
PRIVATE PROPERTY RIGHTS

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 Executive department and agency decision-making comports with existing law interpreting 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. The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. While this Constitutional guarantee does not stand as a bar to the federal government's legitimate actions in fulfilling its responsibilities to protect and improve the public's health, safety and welfare, and the natural environment, it does require the federal government to be vigilant when fulfilling these responsibilities also to recognize its responsibility in this fundamental protection afforded private property rights.

In addition to respect for private ownership and use of property, principles of good government and sound management of

the federal government's limited fiscal resources require that government decision-makers evaluate carefully the effect of their actions on Constitutionally protected property rights. Such evaluation must be made to ensure that agency actions have the minimum possible adverse effect on private property consistent with the government's obligation to protect and improve the health and safety of the public and their environment.

Even when a government action does not constitute a "taking" under the Fifth Amendment, the government nevertheless has an obligation to treat property owners fairly and reasonably and to minimize unnecessary adverse effects on private property.

The purpose of this Order is to ensure that Executive departments and agencies (hereafter collectively "agency" or "agencies") evaluate the Constitutional implications arising from ^{disproportionate} ~~the Just Compensation Clause of the Fifth Amendment~~ ^{impact} when planning and implementing governmental actions to ensure that the federal government's Constitutional obligations are recognized, evaluated, and fulfilled. It is also the purpose of this Order to ensure that legitimate governmental objectives be implemented in a manner that seeks to minimize unnecessary adverse effects on property owners even if those government actions would not constitute a taking under the Just Compensation Clause.

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 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;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments 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 a Federal agency or department 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 Federal property alone; 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) "Takings" refers to actions that require the federal government to compensate a property owner under the Just

Compensation Clause of the Fifth Amendment to the United States Constitution.

Disproportionate Impact:

(c) "Actions that have takings implications" refers to actions that, if implemented or enacted, could effect a taking pursuant to the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

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

(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 which in the agency's judgment constitute actions that have takings *disproportionate* *impact* implications, each agency shall, consistent with achieving the lawful goal of the governmental action and to the extent permitted by law:

(a) Consider the obligations imposed by the Just Compensation Clause of the Fifth Amendment to ensure that all governmental actions are in compliance with that Constitutional requirement.

(b) Seek opportunities to reduce the risk of unnecessary or inadvertent burdens on the public fisc resulting from lawful government actions triggering valid Just Compensation claims.

(c) Attempt to minimize any adverse effect of an agency's action upon private property, consistent with achieving the lawful goal of the government action, even if such action would not constitute a taking.

(d) When requiring a private party to obtain a license or permit in order to undertake a specific use of, or action with respect to, private property, carefully tailor any conditions imposed upon the granting of a license or permit to minimize any unnecessary burdens on private property caused by such conditions, whether or not the agency action constitutes a taking.

Sec. 4. Agency Analyses. (a) With respect to proposed regulations or proposed legislation which in the agency's judgment constitute actions that have takings implications, each agency, in order to support informed evaluation of takings issues, shall to the extent permitted by law, perform the following analyses in internal deliberative documents, and shall provide such analyses as part of any submission otherwise required to be made to the Office of Management and Budget in conjunction with the proposed regulation or legislation:

(1) an assessment of the likelihood that the proposed

Disproportionate Impact

regulation or legislation may effect a taking for which compensation is due;

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

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

(b) 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 agency 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 takings 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, 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 against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

THE WHITE HOUSE,

April __, 1994

TO: Marvin Krislov
FROM: Michael Huttner
DATE: September 1, 1994
RE: Regulatory Takings and E.O. 12630

I. Policy Options:

1. Rescission of E.O. 12630 and issue a new E.O.:

Replace the Executive Order with a revised, more balanced Order. Under this option a revised Order would be issued that recognized the importance of private property, directed agencies to weigh the risk of takings and to take measures to minimize that risk. The revised Order would not include the more troubling hortatory statements of the current Order and would reduce agencies' obligation to undertake TIA's.

Result: This allows us to eliminate an Order that most in the Administration agree is undesirable, and to leave a Clinton legacy in the area of property rights. Certain constituencies -- environmental and consumer groups -- would support this option.

2. Correct legal imprecision of E.O. 12630 through the issuance of revised guidelines.

Under this option, the Attorney General would promulgate new guidelines that would both bring the Order in line with current law and substantially revise the operation of the Order. Certain aspects of E.O. 12630 may not be accurate statements of the law but those aspects could be amended through the issuance of new Guidelines, and do not require the rescission of the Order.

Result: Option 2 is less desirable as a policy matter, but may be politically more advantageous. Some argue that in a context in which many Congresspersons appear to support codification of E.O. 12630, although defeated in H.R. 561, eliminating that Order would only increase charges that the Administration does not take property rights seriously.

Supporters of this option contend that any Order we were to issue would be viewed as less protective of property right than E.O. 12630, and thus Option 1 may only increase the pressure for legislative action in the "opposite" direction.

While neither environmental nor and consumer interest no the private-property movement will be wholly satisfied with Option 2, preserving E.O. 12630 may provide some "cover" for those Members who wish to vote against more radical takings legislation.

Note: Either option could be attributed to the change in takings law, i.e. Dolan.

II. Three Reason for adopting Policy Option 1, a new E.O.:

1. E.O. 12630 influences policy and law: There is lingering controversy regarding E.O. 12630, liberals, and specifically consumers and environmentalists are opposed to it. Even Republicans thinks it's a "dead letter" -- that it's not being enforced (quoting Orrin Hatch, 8/18/94). One might argue that the E.O. 12630 is nothing more than a risk-management tool and that emphasis on this central function of the Order renders any "tilt" in its statement of takings law of slight importance. However, E.O. 12630 appears that it not only contains a statement of takings law, but a host of directives based thereon, and the AG's guidelines and even the Supreme Court [e.g. see Dolan infra] are heavily influenced by such directives.

2. E.O. 12630 may focus too heavily on takings: The existing E.O. tied to takings, poses several problems. Few agency actions so clearly constitute takings that agencies can easily spot them in advance. More often, a taking is known to have occurred only when a court, using ad hoc, case-by-case analysis and applying broad and ill-defined criteria, tells us that a taking has occurred. Moreover, the Court decisions make evident that the Court prefers to adjudicate takings challenges based on the application of a government action to a specific parcel -- so-called "as-applied challenges." E.O. 12630 demand that agencies evaluate proposed action on their face, in the absence of knowledge about particular parcels.

3. New Language in previous legislation: While we have a draft of a new Order, we may wish to look to existing language in bills which balance public and private property rights. We might look to language of S. 921, the Endangered Species Act, that emphasizes measures that will reduce conflict between endangered species conservation and development on private and public lands. Similarly in S. 1114, the Clean Water Act, there are measures to reduce private landowners' frustrations in complying with conservation regulations.

III. Proposed E.O.:

1. The proposed E.O. should address the concern that Federal government frequently takes people's property without justification by encouraging Federal agencies to avoid takings situations whenever possible.

2. The proposed E.O. [or a Directive to the Attorney General] should address the concern that existing remedies for securing compensation where takings occur are not adequate, particularly of people of limited means who cannot afford the time or money to hire lawyers and experts to press their claims effectively. It should require the AG to examine if there are significant impediments to access for purposes of securing compensation, and if so, to make recommendation on how to minimize or eliminate those impediments.

3. Changing the E.O. focus to a general assessment of land-value impacts would seem to alleviate the problems under reason two above. Nor would the assessment have to be parcel specific in order to be of use. On the other hand, takings criteria, as ill-defined as they are, do offer some guideposts; use of an economic-impacts-on-land approach may require the creation of new standards.

IV. Impact of Dolan v. Tigard:

In the June 24, 1994 decision of Dolan v. Tigard, the Court, in a 5-4 decision, ruled against the city of Tigard and held that state and local government cannot exact impact fees or land from developers to support public benefits such as greenways unless the exaction is "roughly proportional" to the benefit.

The Court held that the city's demand that a property owner dedicate land for public use as a condition for approval of an expansion permit violates the Fifth Amendment. According to the Court, "No precise mathematical calculation is required" to meet the proportionality standard, "but the city must make some sort of individualized determination that the required dedication is related in both nature and extent to the impact of the proposed development."

Writing for the majority, C.J. Rehnquist stated that the court took the Dolan case to answer a question left open by Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), as to the extent to which exactions imposed by the city must be connected to projected impacts of proposed development.

In Nollan, the Court struck down a commission attempt to force property owners to let the public walk along their beachfront to satisfy the public interest of visual access to the ocean. The Court found no connection between visual access from the roadway and the public easement and concluded the commission's plan was "out-and-out . . . extortion." But the Court said such "gimmickry" is absent in Dolan, which involves plans by property owner Dolan to expand her existing hardware store in the city's central business district and that the city failed to show a "reasonable relationship" between its exactions on the developer -- a bikepath and a floodplain -- and the public benefits.

Dolan & E.O. 12630: Dolan appears to adopt the proportionality language of E.O. 12630 Sec. 4(b) which states: "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."

Under Dolan's "rough proportionality" standard, federal, state and local regulators will not be able to as easily make demands on developers. In a departure from past cases, the Court stated that the burden should be on the city to prove that it needs the land, not on the property owners to prove that they should not have to give it up.

Policy Implications of Dolan: Many local governments will be forced to incur added expense to meet this burden, and the development process will take longer, thereby delaying receipt of associated tax revenues. In addition, if impact fees are found to be too high under the rough proportionality standard, regulators will be forced to seek needed revenue for public improvements from other sources.

2ND ITEM of Level 1 printed in FULL format.

CONGRESSIONAL RECORD -- Senate

Tuesday, April 26, 1994
(Legislative day of Monday, April 11, 1994)

103rd Congress 2nd Session

140 Cong Rec S 4912

REFERENCE: Vol. 140 No. 47

TITLE: GOVERNMENT TAKINGS

SPEAKER: MR. LEAHY

TEXT: [*S4912]

Mr. LEAHY. Mr. President, I would like to submit for the Record today an article by Edward Thompson Jr., the director of the public policy for the American Farmland Trust. We hear a large amount of discussion about whether whenever a governmental action affects private property, the government should make a payment to the landowners.

Often when we hear governmental action and private property in the same sentence, a negative image is created in our heads. However, as Mr. Thompson explains in his article, governmental action often increases rather than reduces the value of private property. In fact, governmental givings commonly are equal to, or outweigh, any governmental takings. Nevertheless, governmental givings are frequently lost in the takings debate. This article offers both an insightful look into the root of the problem and proposes possible solutions. I would invite my fellow colleagues to each take a look at this article and carefully listen to what it has to say. I ask that Mr. Thompson's article be printed in its entirety.

The Government Giveth

(By Edward Thompson, Jr.)

By decreeing in the landmark case *First English Evangelical Lutheran Church v. City of Los Angeles* that landowners may collect monetary damages from the government when property is "taken" by regulation, the U.S. Supreme Court may have done a favor for a nation struggling to reconcile private enterprise with environmental protection. Now that the public treasury is at stake, budget-conscious legislators are being forced to take a harder look at the risk that government regulation may take property by too severely regulating its use.

When they do so, they are likely to discover that the best way to manage the risk of takings may be to eliminate "givings": government subsidies that simultaneously encourage uses of land that require public regulation and increase the value of the land itself. Examples range from farm subsidies that have promoted wetlands drainage and [*S4913] soil erosion to the income tax deduction for home mortgage interest that drives wasteful urban sprawl. Eliminating or redirecting subsidies such as these would not just minimize potential takings claims. It would also result in budgetary savings that could

be re-invested in incentives to make environmentally desirable land uses more profitable—a win-win outcome for the environment and property owners alike.

There isn't an acre of property in the United States with a value strictly attributable to private enterprise. Government actions exert a powerful influence on the utility and, hence, the value of land, whether it is waterfront property in South Carolina or farm fields in Illinois. As often as not, such actions increase property values by making formerly uneconomic uses profitable. That, of course, is the essential purpose of subsidies.

Take the celebrated case of David Lucas, the real estate developer who recently won a \$ 1.5-million takings judgment because he

was denied permission to build houses on the beach at Isle of Palms, South Carolina. Whether or not one agrees with the decision in his case, the fact remains that both Lucas's ability to build on the beach and the value of his beachfront lots were augmented by government action. Public authorities had constructed a bridge to provide access to the island, roads to drive on, water and sewage systems to serve the houses, and beach protection measures to prevent them from washing away. On top of that, the government has helped underwrite flood insurance to cushion the loss when those measures fail. All of these taxpayer-financed improvements contributed to the value of Lucas's property and in all likelihood spelled the difference between its being attractive for development and a financially worthless strip of shifting sand. In effect, much of the government's financial exposure for taking the Lucas property was attributable to the government itself.

Another example of government action that has given value to private property is the payment of agricultural subsidies. On average, the federal government pays the nation's farmers about \$ 30 million a day to encourage them not to plant crops on part of their land. The "set aside" payments are intended to regulate the supply of corn, wheat, and other major commodities so that their prices do not become depressed. Together, the payments and higher commodity prices maintain farm income, keep farms in business, and help assure that the United States has the world's most abundant and affordable food supply.

In so doing, however, agricultural subsidies have been capitalized into land prices, increasing the total value of U.S. farmland by around \$ 250 billion, according to the American Farm Bureau Federation. This windfall has helped make it profitable for farmers to drain wetlands and to plow up fencerows and highly erodible ground that otherwise would have been untouched. While the "sodbuster" and "swampbuster" provisions of the 1985 farm bill seem to have enjoyed some success at preventing new drainage and plowouts, the ironic fact remains that agricultural givings have probably done as much as anything to fuel the current takings debate between farm groups and environmentalists over wetlands and erosion-control regulations.

A third example of givings is another sacred cow: the income tax deduction for home mortgage interest. For taxpayers whose combined federal and state income tax bracket is, say, 35 percent, the deduction reduces the cost of every \$ 100 in mortgage payments to only \$ 65. This enables people to buy houses almost half again as expensive as

they could without the write-off and is, thus, a massive subsidy to the real estate industry. The Congressional Budget Office estimates the annual revenue

cost of this tax preference to be \$ 44 billion. Assuming capitalization at 6 percent, today's average mortgage rate, it can be said to have enhanced residential property values by approximately \$ 730 billion.

The mortgage deduction is intended, of course, to make home ownership more affordable. Few would argue with this objective. But the subsidy is conferred regardless of how or where houses are built. They can be built in wetlands or endangered species habitat, on barrier islands, floodplains, or Civil War battlefields. The subsidy is the same whether the pattern of development is low-density sprawl or compact communities that have a wide variety of environmental and economic advantages: conservation of prime farmland and open space, lower energy consumption and air pollution, reduced public service costs and demand for property tax collections. Though some would argue that the neutrality of the mortgage deduction keeps land use planning at the local government level, as a practical matter it gives developers a powerful incentive to try to upset local plans.

These are only a few of the public subsidies built into private property values in the United States. Ironically, givings such as these are at least partly responsible for the increased attention to takings of private property now manifesting itself both in litigation and in legislative attempts to require review of proposed government regulations, ostensibly for purposes of avoiding takings litigation and the potential liability now associated with it.

By creating expectations of profit from land where none formerly existed, givings have almost certainly encouraged takings litigation, the mere threat of which intimidates government officials into making questionable land use decisions. But a more explicit judicial recognition of the influence of givings on property value as it relates to the issue of just compensation might help restore government officials' confidence by discouraging borderline litigation and reducing potential damage claims.

A recognition of governmental givings is already a significant-though seldom acknowledged-part of modern takings jurisprudence. Notwithstanding *First Lutheran Church*, *Lucas*, and other recent cases, the basic takings rule has remained unchanged since it was first articulated by Justice Oliver Wendell Holmes in *Pennsylvania Coal Co. v. Mahon*: Virtually all economic value of land must be destroyed by regulation for a taking

to occur. Only under such circumstances, Holmes said, does regulation "go too far" in shifting the cost of improving the social condition from the public to private property owners.

Some property rights advocates have criticized the all-or-nothing rule. They seek to enlarge the concept of takings to include circumstances where regulation proscribes use of only part of a larger property or the whole has merely been reduced in value. This, they claim, is necessary to restore fairness to the system of land use regulation and make government, which is to say the general public, pay its fair share of protecting the environment. A closer examination of the philosophical and practical basis for the current rules suggests, however, that compensation for partial takings or mere diminution in value would itself go too far.

The source of the current "all-or-nothing" rule was Holmes's insight that property values are increased as often as decreased by government action; that,

on the whole, landowners are benefitted and burdened in roughly equal measure by government spending and regulatory decisions. The renowned jurist termed this "average reciprocity of advantage," but in plain English it could simply be said that "givings tend to balance takings."

Though the rule is a practical one—"Government could hardly go on," Holmes observed, "if to some extent values incident to property could not be diminished without paying for every such change"—it also implicates fundamental fairness. Would it be just to charge the public for every diminution in property value, while at the same time allowing property owners to reap a windfall every time government action increases land values?

The "all-or-nothing" rule thus insulates government from liability except when regulations proscribe all economic use of property. Few regulations go that far, but there may be some important exceptions, including regulations designed to protect wetlands, barrier beaches, and some endangered species habitat. None of these environments can tolerate much if any economic use and survive. They will remain fertile ground for future takings litigation and the source of potential government financial liability. It is, therefore, worth exploring how the concept of givings could further inform takings jurisprudence as it affects the sharing of responsibility and cost of environmental protection.

One promising avenue of inquiry might be a re-examination of the notion of just compensation. Currently, the measure of damages for takings is the fair market value of the property whose use is prohibited. This concept of valuation reflects, among other things, enhancements of land value attributable to governmental givings. Arguably, where government has subsidized property value, a takings award based on fair market value results in unjust enrichment of property owners who are compensated not only for their "equity" but also for the windfall value created at public expense.

Whether the courts will entertain this argument remains to be seen. Currently, they look only at the harm suffered by the aggrieved landowner—not the potential loss to the government or taxpayers—in determining just compensation. But how can it be said that a property owner has been harmed when the government decides to take back by regulation what it has given through subsidies or other action? Why shouldn't courts consider evidence that property values have been inflated by government action in deciding what compensation is fair? Why shouldn't they reduce damage awards by an amount attributable to givings?

The prospect of government financial liability for takings has prompted officials to analyze proposed regulations affecting land use to determine the extent to which they could lead to damage claims. Though it is questionable whether such analysis can actually help government avoid takings exposure by rewriting regulations, it does afford officials an opportunity to examine how they can do so by eliminating givings.

Executive Order 12630, signed by President Reagan in the early 1980s' was the first initiative to require regulatory analysis aimed at reducing takings exposure. While a U.S. Senator, Steve Symms (R-Idaho) later succeeded in persuading the Senate to pass a bill (S. 50) in the 102nd Congress that would have codified this order, but it died in the House. Variations on it have been resurrected in the current Congress by Senator Robert Dole (R-Kansas) (S. 117) and a number of members of the House, where an agriculture subcommittee recently

held hearings on such a measure (H.R. 561). Many state legislatures are considering similar bills and a [*S4914] few-such as Indiana and Utah-have passed them, but most bills have been defeated.

It is difficult to see how prospective analyses of takings claims could possibly result in any meaningful conclusions. If 70 years of Fifth Amendment jurisprudence have taught anything, it is that takings determinations are perforce a case-by-case exercise. To predict government liability in advance, so

many assumptions would have to be made about the on-the-ground impact of regulation on individual properties as to defy credulity: the number of affected properties of record, the environmental characteristics of each property, patterns of ownership relevant to "total taking" analysis, the appraised value of each parcel under future market conditions, and any circumstances that under Lucas could excuse a taking. If the government really tried to get access to that much information about private land in the United States, property rights advocates would scream invasion of privacy-as indeed they have in opposing the National Biological Survey.

One conclusion about government's potential exposure to takings claims is clear under any set of assumptions: Its exposure could almost certainly be reduced by eliminating, conditioning, or redirecting governmental givings that increase the value of private property by encouraging uses that must be regulated in the interest of protecting the environment. While the courts may be reluctant to consider the extent to which taxpayers enrich landowners-yes, there's an overlap, but taxpayers don't get to spend their own money-there is no reason why Congress, the administration, and state officials should not. Indeed, at a time when budgets are tight all over, and the nation's environmental and social deficits continue to grow, re-examining how tax dollars are distributed among classes of subsidy beneficiaries would seem to be an imperative.

A hard, careful look at real givings-not putative takings-is the kind of analysis that needs to be undertaken if the nation is to avoid both financial and environmental bankruptcy. For too long, we have been subsidizing the very uses of land we need to regulate in the interest of environmental protection. This has set the stage for double dipping in the public treasury by those who benefit from taxpayer largesse and then sue the government for damages when regulation frustrates their plans. The last thing we can afford is to pay twice for environmental protection. Paying once-compensating property owners for using the land as the public sees fit-is probably the most effective way of achieving harmony between private enterprise and protection of our environment.

Instead of continuing to subsidize new development of barrier islands and other flood plains, we could reprogram funds now used to build infrastructure and use them to buy and retire development rights on flood-prone lands. That is in effect what South

Carolina was forced to do in Lucas's case, except that it is now offering the property for sale for development purposes. It probably could have bought two or three times as much land on an island where property values were not as inflated by government subsidies.

Agricultural subsidies are also fertile ground for fiscal reprogramming. They could be shifted from Traditional set asides to "green incentives" paid to farmers for conserving soil, protecting wetlands and other habitat, cleaning

up non-point-source water pollution, and dedicating prime farmland to rural open space. Existing programs like the Conservation Reserve, Wetlands Reserve, Water Quality Incentives, and Farms for the Future, which now account for only about one-sixth of annual farm spending, provide ready-made vehicles for doing this. Farm income would continue to be supported, assuring a stable food supply. But many of the environmental impacts of modern agriculture would be ameliorated by withdrawing the incentive to push the land beyond its capacity and replacing it with an incentive to conserve resources and protect the environment.

It is probably too much to ask for Congress to re-examine the home mortgage interest deduction in any meaningful way. But what would happen if this subsidy to real estate development were graduated or conditioned on the basis of the impact of new dwellings on the environment and their consistency with local comprehensive plans? Developers would be encouraged to build houses on land with few environmental constraints because those houses would be less expensive than comparable dwellings located on prime farmland, in wetlands, critical wildlife habitat, and maybe even on barrier beaches. The revenue recaptured could be used to fund a housing tax credit for lower-income families to maintain the overall affordability of housing. For perhaps the first time in history, federal tax policy would harness the marketplace to improve the quality of community growth and to protect the environment, rather than promoting its destruction.

The Fifth Amendment seeks to assure that the cost of achieving social objectives is fairly shared by property owners and the public at large. Property rights advocates complain that regulations are forcing landowners to bear a disproportionate share of the burden by taking property value. All but ignored in the debate are givings, governmental subsidies that enrich property owners by making uneconomic uses of land profitable and which, not coincidentally, increase the need for the regulations that landowners find so vexatious.

An honest recognition of, and accounting for, givings has tremendous potential to inform the debate over private property rights and change the way we approach the protection of public environmental values. Though the courts implicitly consider givings in takings jurisprudence, they are powerless to curb them and can only arbitrate when the government sends property owners confusing signals about the appropriateness of land uses by simultaneously subsidizing and regulating them. It is up to the political branches of government to reexamine how tax dollars are spent on subsidies to unwise land use, and to reprogram scarce funds so that they send the unmistakable market message that there is more profit in protecting the environment than in destroying it.

THE WHITE HOUSE
WASHINGTON

MEMORANDUM TO: Takings Working Group
FR: Will Stelle (6-6551) *WSt*
RE: Draft Decision Memorandum on the Executive
Order
DATE: 17 March 94

Attached is a draft decision memorandum on the question of whether to replace the existing takings executive order. I would like your comments on it by 3 pm tomorrow, Friday March 18th so that I can complete it and distribute it to the principals before the weekend.

We will plan to circulate the revised EO at the same time, so if you have additional comments on it, please provide them to Steve Warnath at 6-5576.

Thank you for your help.

DRAFT

MEMORANDUM TO: Phil Lader
Joan Baggett
Leon Panetta
Bob Rubin
Pat Griffin
Carol Rasco
Marcia Hale
Jack Quinn
Tom Epstein

FR: Katie McGinty

RE: Decision on Executive Order on Takings

DATE: 16 March 94

This memorandum is intended to apprise you of several ongoing activities associated with developing an Administration strategy to respond to anticipated legislative battles on "takings" issues. It is also to present for your decision an issue concerning the Administration's treatment of Executive Order 12630. The issue for decision is whether to replace the existing Reagan Executive Order on Takings with a Clinton Order. The pros and cons are discussed below, and a draft replacement Executive Order is also attached.

I would like to schedule a meeting with you in the near future to discuss these matters and settle on an approach, particularly with regards to the Executive Order, which has been prepared by a small White House working group on the subject.

1. BACKGROUND

Government regulations -- such as permitting requirements, limitations on use, and regulatory restrictions -- are often criticized for reducing the value of private property. In recent years, these criticism have increase, particularly with regard to federal wetlands and endangered species policies, and have developed into a loosely-know "wise use" or "private property" movement.

The private property-wise use movement reflects a virulent anti-government perspective that purports to champion the rights of the little guy. Its central premise is that government has the obligation to compensate landowners for any diminution in the value of their property due to governmental action. The wise use movement has sponsored "takings" legislation in a large number of states -- bills in 24 legislatures are currently pending, and 32 states had proposals introduced last year -- and thus far only

six have been enacted.

In Congress, several bills and amendments designed to reduce such federal actions have been introduced. One such bill would codify Executive Order 12630, which was signed by President Reagan in 1988. The bill articulates certain legal and policy principles for federal regulatory action and requires agencies to prepare an analysis of takings implications before undertaking certain actions.

Another more radical bill sponsored by Rep. Tauzin would require the federal government to compensate any owner whose property was reduced in value by more than half due to federal action under the wetlands or endangered species program.

2. PENDING LEGISLATIVE ACTION.

Upcoming action on the Clean Water Act poses the greatest risk. The debates on takings have thus occurred in several settings during the 103rd Congress: the authorization of and appropriation for funds for the National Biological Survey; the debate on grazing reforms; the debate on mining reforms; the reauthorization of the Endangered Species Act; the reauthorization of the Clean Water Act; the EPA cabinet bill and most recently the National Competitiveness Act.

None of these legislative initiatives are complete, and most will see further action in the 103rd Cong., 2nd Sess. In particular, the reauthorization of the federal wetlands program in the context of the Clean Water Act will likely set the stage for the most vigorous debate -- now anticipated for May/June.

3. RESPONSE STRATEGY

We are developing a comprehensive strategy for addressing the political and legislative aspects of this difficult situation. The overall objective of the strategy is straightforward: (1) to demonstrate our overall commitment to protecting private property and to minimize unnecessary regulatory burdens; and (2) to prevent passage of harmful "takings" legislation. The approach includes:

- o a coordinated legislative-outreach effort involving the White House and key agencies;
- o an economic analysis of the various legislative proposals led by OMB and CEA;
- o a communications strategy involving the White House and key agencies;
- o development of alternative "second degree" amendments that might be needed to undercut more damaging amendments; and
- o the drafting of a new Executive Order that would replace the existing Reagan EO on takings.

4. TREATMENT OF EXECUTIVE ORDER 12630.

As suggested above, E.O. 12630 plays an important role in the takings debate, particularly because one of the legislative proposals being given serious consideration in both the House and Senate would codify E.O. 12630. This provision was most recently offered as an amendment to S.4, the National Competitiveness Act on the floor the week of March 7. Although the amendment was ultimately withdrawn, the absence of an Administration position on E.O. 12630 made it very difficult for opponents of the amendment to mount a cogent argument. Had the provision gone to a vote, the vote count was very close.

Labor, environmental and consumer groups have long criticized E.O. 12630 as chilling appropriate governmental action and potentially imposing unnecessary bureaucratic obligations on the agencies (useless agency "takings" analyses on their regulations). In addition, they note that the existence of the Order is being used in some state legislatures as a model for legislation at the state level.

The Congressional Research Service and the Department of Justice's Office of Legal Counsel have serious reservations about the accuracy of the Order to the extent that it purports to state the requirements of the law in the area, although the Order does provide for the Attorney General to issue guidelines to reflect changes in the law. The guidelines have not been updated since 1988, and are unquestionably out of date given post-1988 Supreme Court decisions in the area. Many of the legal/policy statements in the Order reflect the Reagan Administration's philosophy in this area, and are not consistent with what we believe to be the Clinton Administration philosophy.

The "wise use" movement has generally supported the Order, although it has criticized executive agencies for not consistently complying with the Order. Moreover, some in the movement have urged more substantial action to reduce governmental regulation or to increase compensation to those whose property values are thought to be diminished.

The pendency of legislative proposals to codify E.O. 12630 requires the Administration to take a position on the merits of the Order. The working group has identified two available options, and the key decision criteria is probably which approach works better as a legislative tactic.

Option 1: Replace the Executive Order with a revised, more balanced Order. Under this option, a revised Order (a draft of which is attached) would be issued that would replace the more troubling legal/policy statements in the current Order with the Clinton Administration's philosophy in the area. This statement would not purport to restate the law in the area, but would require compliance with the constitution as interpreted by the

Supreme Court and recognize the importance of private property and the general principles of good government in this area. These would include a responsibility to minimize the intrusion on private property even when that intrusion does not constitute a taking in the constitutional sense.

The order also would require the agencies to assess the costs of and alternatives to takings for actions that the agencies believe have takings implications, and to provide those analyses to OMB for actions that are subject to OMB review. The revised Order would not require the issuance of Attorney General's guidelines in this area, but would assume the agencies' ability to evaluate the law in the area and require that the Attorney General should provide timely guidance at the agencies' request. Finally, the Order would require regular reporting by the agencies to OMB and the Attorney General of all takings claims made against the agency.

The Order would be presented not as a weakening of the current EO (although this would undoubtedly be disputed by the "wise use" supporters), but as an elimination of inaccurate statements of law and an additional recognition of the need to be cognizant of effects on private property that may not constitute a constitutional taking.

This option allows us to eliminate an Order that most in the Administration agree is undesirable, and to leave a Clinton legacy in the area of property rights. Certain constituencies including environmental, public interest, and labor groups would support this option, as would certain congressional opponents of proposed takings legislation. It would permit a strong argument against codification of E.O. 12630 based on substantive disagreements with the content of the Order, rather than the much weaker argument that the Administration has retained E.O. 12630, but that it should not be codified. And if Congress decided to legislate an Executive Order on this subject because of the need to cast a vote in favor of protecting private property, better that it be the Clinton EO rather than something else.

Option 2: Leave E.O. 12630 in place, but revise the Guidelines issued under the Order. Under this option, the Attorney General would promulgate new Guidelines that would both bring the Order in line with current law and substantially revise the operation of the Order. The Justice Department's Office of Legal Counsel has indicated that certain aspects of E.O. 12630 may no longer be accurate statements of the law, but that those aspects could be amended through the issuance of new Guidelines, and do not require the rescission of the Order.

This option is less desirable as a policy matter because it would leave in place a flawed E.O. Some believe this approach preferable, though, because the rescission of the existing E.O. would only add fuel to the fires and increase charges that the Administration does not take property right seriously,

strengthening their arguments that they must codify the existing E.O. or lose its protections. Supporters of Option 2 contend that any Order we were to issue would be viewed as less protective of property rights than E.O. 12630, and thus Option 1 may only increase the pressure for legislative action in the "opposite" direction.

Attachment

cc. The Working Group on Takings

3/4/94

Yates, Schroeder

Secs:

3(b) - 1st ^{statement} Lucas, Keystone

2nd statement - nondivis. Conc. Pipe
Pena Central.

wrong - regulatory use principles

Mahan overruled Keystone B. Hum.

3(c) after Lucas-wrong
too generous - width + safety

Dolan

1st sent - wrong doctrinal

3(d) - 1st sent - ct. suggestion.
Fed Cir - said delay normal govtal procedure

4(a) - ^{misstates} Nollan

stringent - only when permit condit. or concessions.

Riverside Bay View - std. permitting process studies

Dolan

"exactions" Nollan: unfunded mandates.

[Dolan - land - storm ~~water~~ drain - sewerage
bike path]

3/23 - argued.

will limit Nollan to exactions,
will push → taking.

(1) + (2) - both required.

Amy Credit

Yates, Schroeder

4(b) proportionality not supported by cases.
Penn Central - only 400 bldgs.
Mahon - bldgs
rough principle - don't raze 1 house.

4(c) - overstates risks.

4(a) Wetlands - not nec. quid pro quo.

CS-agency practice haven't prohib.
False negatives

envt., land use
clean air

CS - define overall prob - air pollution.

not fair treatment

1) Conflict guidelines + EO - sec. 3

- some law anti - gov 3c

~~2)~~

4-d pub. health + safety.

2) guidelines

3) if ^{EO} certified, -

Sher - Baucus
Schimberg - Chofee

(Inquiries, risk assess, unfulfilled mandates)

15090
EPA

3b - defn. of taking

permits v. temp.
(cases) (EO)

3c - misstake, test

Lucas - substantial advancement - broad int.
Reag EO - significant advance - health + safety purpose

3d Temporary - broadens to include delays as poss. taking
Clinton EO - doesn't include

4a - Conditions on permits

4(b) - Proportionality

Nollan

substantially furthered govt. purposes that wd. justify denial

EO Takings

2/25/94

Assignments

Deer Creek - reg. impact

Towson - 50% ea.

reg. impact

Draft EO

1) A.G. guidelines or not

2) agencies - paper thys. analysis

only if agencies determine taking implication

Q: Do we revise EO guidelines or revise EO?

OLC - statement of law, or stmt. of philos.

1) guidelines - not EO

2) OLC opinion

3) new EO

Tauzin bill - soon

Clear Water - May June

EO

+ 2nd deg. and 1st?

1) shd we rescind?

2) comments on draft order

Office of the Vice President

Domestic Policy
Old Executive Office Building
Washington, DC 20501
(202) 456-6222

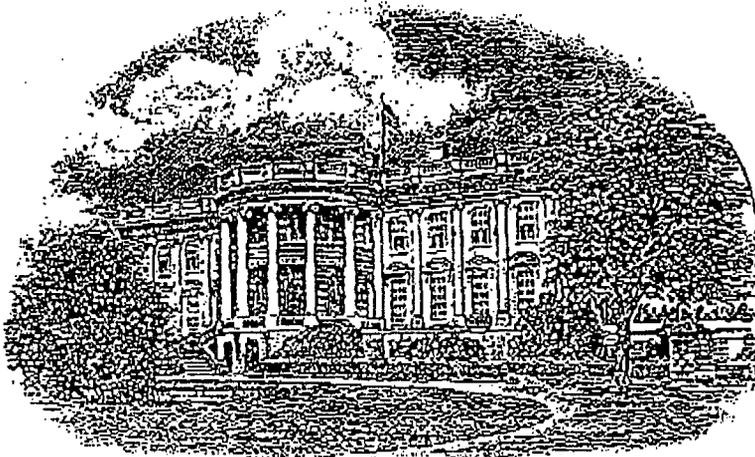
TO: Marvin Kristov

FROM: Linda Lance

DATE: Apr 7

number of pages including cover: 8

COMMENTS: Closed Circulation



Steve Neumann

February 22, 1994

MEMORANDUM FOR DISTRIBUTION

FROM: Linda Lance, Stephen Warnath and Will Stelle

RE: Administration's Takings Policy/Strategy

Friday 11:30-12:30

As discussed at the last meeting of the working group on executive orders, this memo is a first draft planning document for Administration activities on takings and related issues. It is a working draft only, written to give interested offices an opportunity to work from a common vehicle, and does not represent a consensus view at this point. However, some of the offices listed in the assignment section have begun working on the research projects described, which will be necessary regardless of the strategy selected. **There will be a short meeting of the White House working group on this issue on Thursday, February 24, from 10 -11 a.m., in the Vice President's Ceremonial Office.** Please be prepared to provide your comments on the draft executive order and to discuss your views on the assignments outlined in this memo.

This memo provides a brief statement of background on the issue as well as an update on upcoming legislative activities. The memo also discusses possible action on the current executive order, and sets out a preliminary list of actions necessary to prepare for upcoming legislative activities (which pose the greatest short-term risk). As we've discussed, however, the so-called "private property," or "wise-use" movement is not an isolated short-term phenomenon. It is, therefore, imperative that any activities of the Administration in the short-term be viewed in context and set the stage for a substantive position on the subject that reflects the Administration's long-term interests.

BACKGROUND

The "wise use" movement reflects an anti-government perspective that purports to champion the rights of the little guy. It finds its current strength in local backlash against the wetlands and endangered species programs in numerous settings around the United States. Its central premise is the proposition that government has the obligation to compensate landowners for any diminution in the value of their property due to governmental action.

Several pending legislative proposals reflect this approach. For example, H.R. 1388 posits that any Federal action that affects private property rights will entitle the property owner to full compensation for the fair market value of the property. H.R. 404, addressing the wetlands program under the Clean Water Act, states that any regulatory activity under the wetlands program that diminishes more than fifty percent of the fair market value of property will be deemed a taking for purposes of the Fifth Amendment and will entitle the landowner to compensation from the U.S. Treasury.

UPCOMING LEGISLATIVE ACTIONS

Upcoming action on the Clean Water Act reauthorization poses the greatest immediate risk of legislative activity reflecting the interests of the "wise use" movement. The House Merchant Marine and Fisheries Committee has scheduled a hearing on the House Clean Water bill for February 22. The Senate has scheduled a full Committee markup for February 23. The bill is expected to be on the Senate floor sometime in March.

As you know, debates on takings have already occurred in several settings during the 103d Congress: the authorization of and appropriation for funds for the National Biological Survey; the debate on grazing reform; the debate on mining reforms; the reauthorization of the Endangered Species Act; and the EPA Cabinet bill. None of these legislative initiatives are complete, and most will see further action in this Congress.

In addition, the Agriculture Committee has indicated its intention to markup H.R. 561, the Private Property Protection Act, in March. The bill also has been referred to the Judiciary Committee, which has indicated that it does not intend to act on the bill. This bill would preclude an agency regulation from becoming effective unless the Attorney General certified that the affected agency is in compliance with the existing Executive Order (EO 12630). It also would require USDA to prepare a study and report detailing the legislation's effect on the farm economy and agricultural production. USDA has prepared a draft letter from Secretary Espy reflecting the Administration's opposition to this bill, and a decision needs to be made as to whether the Administration should express its views at the Ag markup stage or await further action on the bill.

EXECUTIVE ORDER

set
his [The Congressional Research Service (see CRS Letter to Walter B. Jones, et al., Re: Comparison of Taking Principles in EO No. 12630 With Supreme Court Taking Jurisprudence, and Related Questions, 12/19/88), and the Justice Department's Office of Legal Counsel, agree that the current executive order on takings (EO 12630) is seriously flawed as a legal matter and does not correctly state the law on takings even as it existed in 1988 when the EO was written. In addition, it does not reflect significant Supreme Court decisions issued since 1988. The primary problems identified by CRS and DOJ are with sections 3 and 4 of the current EO.

As we've discussed, during the debate on the Clean Water Act there are likely to be amendments to attempt to codify this executive order which will require that the Administration either repudiate or endorse this order. Although no action in this area is free of political consequences, we need to give serious consideration to either amending this order or replacing it with one of our own.

In order to assist consideration of this issue, attached is a first draft of a Clinton

Administration executive order on takings. Please note that this is a working draft that has not yet been shared with any interested parties outside the White House. In order to ensure that the Administration retains all its options in this area, please do not share or discuss this draft outside the White House at this time. Should the Administration decide to move forward with a revised EO, it will be vetted with agencies and other interested parties as appropriate before issuance.

This draft attempts to state and act upon the Administration's concern for private property rights without incorrectly stating the law, and while recognizing the value of health and safety regulation. It attempts to retain as much of the current EO as possible, in order to counter claims that this Administration is less cognizant of the needs of property owners.

Please pay particular attention to two areas of the draft, both of which are, of course, open for discussion and in our view are particularly close calls. First, note that the draft EO rescinds the existing Attorney General's guidelines and appendix, which were, of necessity, based on the erroneous reading of the law set out in the current EO. The draft EO does not require the Attorney General to prepare generic guidelines on takings law, but rather provides that any agency may seek the guidance of the Attorney General on any issue it believes to be necessary.

This approach was taken because the requirement for the issuance of guidelines arguably sets an unfortunate precedent that the agencies cannot interpret the law for themselves, but rather must always await guidance from the Attorney General. The approach taken in the draft makes AG guidance on the law available to the agencies, but does not require them to await such guidance before making a judgment on this or any other constitutional requirement.

Second, the draft retains in amended form the requirement that the agencies give special consideration to the necessity for actions that have "takings implications," and provide those assessments to OMB for actions that OMB would otherwise review that have takings implications. Since the application of this requirement is limited to those actions that have "takings implications" as defined in the order, it is intended to apply only to those few instances in which the agency itself determines that a constitutional taking is likely to occur by virtue of its action. However, such requirements could be made more onerous by a less friendly Administration. Consider whether such assessments should be retained at all.

OTHER INITIATIVES AND ASSIGNMENTS

In order to be prepared for upcoming legislative action, we propose the following activities within the Administration and with our allies on this issue. Our goals in these undertakings include:

- o advancing a constructive approach to the fairness issues that underlie the

takings movement;

- o opposing those legislative proposals that fail to address the real issues and that would otherwise cause significant harm to federal, state and local interests;
- o mounting a concerted internal effort to educate congress on the issues; and
- o coordinating our internal Administration activities, and working closely with the states, local governments, and other constituencies.

1. Convene Interagency Working Group on Legislative Strategy

A small group of senior agency officials should be convened to develop and execute the Administration's legislative strategy in this area. At a minimum, DOI, EPA, DOJ, DOL and FDA should be represented, as well as all interested White House offices, particularly Legislative Affairs. Additional agency support for communications, legal, economic and legislative analysis will likely also be required, and this same group should be given fair warning and begin to divide these responsibilities.

Assignment: DOI lead with EPA, DOJ, DOL and WH participation

Schedule: Begin immediately

2. Convene Substantive Interagency Working Group

The Administration needs a general statement on this subject, acceptable to all agencies and White House offices, that reflects our commitment to protecting private property and individual rights while ensuring that our environment, health and safety are protected. This general statement should be included in any Executive Order issued by the Administration (see draft attached). Secretary Babbitt's speech and the wetlands policy statement, distributed to the working group earlier, contain the primary Administration statements on the issue to date, and any general statement developed should reflect those themes. Once such a statement is agreed to, it can be individualized and tailored for use by the various agencies.

a. Assignment: WH lead with EPA, DOJ, DOL, HHS/FDA, representation. On message research, WH media should assume the lead responsibility with agency support.

b. Delivery: White House statement, perhaps in the context of issuance of a new executive order. To be reinforced by statements by individual Cabinet secretaries (Reno, Babbitt, Reich, and perhaps David Kessler (FDA)).

c. Schedule: March 18

3. Summary of Legal Implications of Existing Legislative Proposals

A short analysis is needed on the specific legal implications of the major legislative proposals that have been made to address this issue: what do they propose, and how would they affect current law?

- a. Assignment: Mike Heyman (DOI) and DOJ Office of Legal Counsel.
- b. Schedule: Due February 28.

4. Federal Economic Impact Analysis

The dominant legislative proposals that have been made would have a profound effect on Federal budgets, and if made applicable to the states through the operation of the 14th amendment, would have similar effects on state and local budgets. An economic analysis of the impact of these proposals will be required to drive the point home that a vote for these proposals will bankrupt Federal and state governments. If warranted by the language, these proposals (particularly H.R. 1388) should be construed broadly to reach any Federal action affecting any property rights (i.e. patent rights, etc.) and not just real estate, to ensure that the full economic impact is recognized.

- a. Assignment (Federal Impacts): OMB, CIA.
- b. Schedule: March 11th for estimate on Federal fisc.

fiscal - 5/13

5. Federal Regulatory Impact Analysis

Implementation of many of the pending legislative proposals could have significant impacts on the operation of governmental regulatory programs designed to protect important public values such as public health and safety. An analysis of these potential impacts should be prepared.

- a. Assignment: OMB/OIRA
- b. Schedule: March 11th

6. Congressional Analysis and Outreach

The Administration must undertake an effort to educate Members of Congress on the implications of these proposals. That effort, which will be time-consuming, may include one or two blanket mailings to set out the Administration position. However, more detailed efforts should focus on those Members who have demonstrated themselves to be swing votes on the issue. Legislative experts within the agencies and the White House should analyze the relevant voting records and develop a set of recommendations on which Members might be important to contact. Also, an effort needs to be undertaken to encourage Members who may represent the proper viewpoint to engage them actively and on a sustained basis in the effort to persuade their colleagues, and to assist them in this endeavor.

- a. Assignment: DOI and EPA Legislative Affairs, WH Legislative Affairs.
- b. Schedule: February 28 for initial determination of swing votes

7. State Legislative Analysis

Thirty states have considered various legislative takings proposals, which will constitute an important source of experience on the subject. A detailed analysis of those state records should be undertaken to identify what themes work and don't work. Further, the analysis should gather information on state and local economic and regulatory impacts for purposes of the above report. Finally, the analysis should yield a wealth of information on individuals within the states who might be willing to participate in Federal activities.

- a. Assignment: Coordinated by American Resources Information Network
- b. Schedule: March 11 for initial report.

8. State Economic Analysis

Just as these "takings" proposals might dramatically affect the Federal budget, so too might they bankrupt state and local budgets. A major effort should be undertaken to analyze selectively the impacts of the proposals on individual states. This analysis, together with the state legislative analysis, should assist in identifying the key Members who should have an interest in the information.

- a. Assignment: Coordinated by American Resources
- b. Schedule: March 11 for initial report

9. Communications

A major effort should be undertaken to develop a legislative and general communications strategy to convey the necessary information to the proper audiences. A communications strategy should: (1) develop the baseline information; (2) develop and convey the proper anecdotes on the subject; (3) identify major public figures who might lend a hand; (4) identify media markets of greatest interest; (5) etc.

- a. Assignment: DOI/EPA with input from all interested agencies and White House offices
- b. Schedule: Ongoing

10. Coordinating Constituency Activities

The many outside constituencies which have an interest in this subject will be engaging in complementary activities. Those groups should be encouraged to establish a regular meeting, typically held weekly, to coordinate these activities and to ensure that they are mutually reinforcing.

- a. Assignment: Coordinated through American Resources
- b. Schedule: Check with current schedule of American Resources' meetings.

Distribution:

Jack Quinn
Greg Simon
Kumiki Gibson
Sally Katzen
Joe Stiglitz
Ellen Seidman
Paul Weinstein
Steve Warnath
Will Stelle
Todd Stern
Bob Watson
Rosina Bierbaum
Jonathan Baker
Peter Yu
Vicki Radd
Craig Crutchfield fax 395-5691

DRAFT

EXECUTIVE ORDER
PRIVATE PROPERTY RIGHTS

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 Executive department and agency decision-making comports with existing law interpreting 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. The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. The federal government must be vigilant in recognizing its responsibility in this fundamental protection afforded private property rights.

Principles of good government and sound management of the federal government's limited fiscal resources require that government decision-makers evaluate carefully the effect of their ~~administrative, regulatory, and legislative~~ actions on constitutionally protected property rights. Such assessment must be made to ensure that agency actions have the minimum possible impact on private property consistent with the government's

obligation to protect and improve the health and safety of our citizens and their environment.

Even when a government action does not constitute a taking under the Fifth Amendment, the government nevertheless has an obligation to treat all citizens fairly and reasonably, and to act in the least intrusive way in order to minimize unnecessary impact on private property.

The purpose of this Order is to ensure that Executive departments and agencies (hereafter collectively "agency" or "agencies") evaluate the constitutional implications arising from the Just Compensation Clause of the Fifth Amendment when planning and implementing government actions to ensure that the Federal government's Constitutional obligations are recognized, evaluated, and fulfilled. It is also the purpose of this Order to ensure that legitimate government objectives be implemented in a manner that seeks to minimize unnecessary adverse impact on property owners even if those government actions do not constitute a taking under the Just Compensation Clause.

Sec. 2. Definitions. For purposes of this Executive Order: (a) "Actions" refers to proposed Federal regulations, proposed Federal legislation, and actions taken pursuant to Federal law. It includes, but is not limited to, federal regulations that propose or implement licensing or permitting requirements.

(b) "Policies that have takings implications" refers to actions

that if implemented or enacted, could effect a taking pursuant to the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

(c) "Private property" refers to all property protected by the Just Compensation Clause of the Fifth Amendment.

Sec. 3. General Principles. In formulating or implementing policies that have takings implications, each agency shall:

(a) Consider the obligations imposed by the Just Compensation Clause of the Fifth Amendment to ensure that all governmental actions are in compliance with that Constitutional requirement.

(b) Seek opportunities to reduce the risk of unnecessary or inadvertent burdens on the public fisc resulting from lawful government actions triggering valid Just Compensation claims.

(c) Attempt to minimize the extent of any impact of an agency's action upon private property, consistent with achieving the lawful goal of the government action, even if such action does not constitute a taking.

(d) Avoid unnecessary delays in decision-making that impact on private property owners, even though such delay does not constitute a taking.

(e) When requiring a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, carefully tailor any conditions imposed upon the granting of a permit to minimize any unnecessary burdens on private property caused by such conditions, whether or not such burdens constitute a taking.

Sec. 4. Agency Action. (a) Before taking any action which in the agency's judgment has takings implications, in order to support informed evaluation of takings issues, each agency shall perform the following analyses, and shall provide such analyses as part of any submission required to be made to the Office of Management and Budget:

(1) an assessment of the likelihood that the proposed action or policy may effect a taking for which compensation is due;

(2) an estimate of the potential cost to the government in the event that a court later determines that the action constitutes a taking;

(3) identification of reasonably feasible alternatives, if any, to the proposed policy or action, identified by the agencies or the public, which also achieve the government's purpose but would not affect a taking, and an explanation^{of} why the planned action is preferable to

the identified potential alternatives.

(b) 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 the 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, as necessary, as a forum to assist agencies in addressing regulatory issues involving takings implications.

(b) The Department of Justice ("DOJ") shall provide legal guidance, in response to an agency's request, to assist the agency in complying with this Order. DOJ shall respond to such requests within 21 days of receipt of an agency's request.

Sec. 6. Reporting Requirements. (a) Agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. 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 all such awards made in each fiscal year and all such pending claims shall be submitted to the Director, Office of

Management and Budget and to the Attorney General on an annual basis beginning October 1994.

(b) Each agency shall submit on an annual basis beginning in October 1994 to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601.

Sec. 7. Revocation. Executive Order No. 12630, and 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 against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

THE WHITE HOUSE,

March ____, 1994

THE WHITE HOUSE

WASHINGTON

December 14, 1993

MEMORANDUM FOR LINDA LANCE & KUMIKI GIBSON

FROM: Peter Yu

SUBJECT: Comments on Executive Order 12630

This memorandum summarizes my initial reactions to E.O. 12630, discussing both substantive and strategic considerations.

Legal Analysis. The substantive requirements of the E.O. seem to me largely unproblematic in that they are largely coextensive with constitutional standards. The only section I find troubling is § 4(a). That section provides in part that

any conditions imposed on the granting of a permit shall

- (1) Serve the same purpose that would have been served by a prohibition of the use or action; and
- (2) Substantially advance that purpose.

The "[s]ubstantially advance" requirement simply reiterates existing law (which dates back at least to *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). How that phrase is applied in various cases is a matter of some controversy, but the words themselves are unproblematic.

Section 4(a)(1) is more troubling. That section, which seems to have its origins in the *Nollan* decision, suggests that it is not enough that a condition serve a legitimate state purpose, but that it serve the *same* purpose as *denial* of the permit would serve. Thus, while the Nollans' new house might block the view of the ocean *from the street*, a beachfront easement would not serve to redress *that* problem--while a visual easement from street to shore would. Under this standard, an agency could condition a permit to fill wetlands on certain protections of the site's groundwater, but could not condition the permit on the clean-up of some other, unrelated groundwater problem (e.g., groundwater at a different site or contaminated by a different source). Thus a narrow reading of this requirement would be in some tension with the tradeable-permits scheme now being tested in several regulatory regimes.

Section 4(a)(1) reflects one reading of *Nollan*. Others (including myself) read *Nollan* more narrowly, to stand for the proposition that the "same purpose" test applies only to cases in which the condition imposed is an easement or some other physical occupation. Read this way, *Nollan* is an extension of *Loretto*, not a revision of *Agins*. Replacing the broader interpretation

of *Nollan* with the narrower interpretation appears, at my first reading, to be our primary legal problem with the E.O.

Policy Analysis. As a policy matter, E.O. 12630 raises at least two distinct questions: (i) is it desirable to reiterate constitutional obligations in an Executive Order, and (ii) assuming we do so, are the mechanisms for "operationalizing" those obligations sound.

With regard to the first, I generally believe it undesirable to restate either statutory or constitutional obligations in an Executive Order. Such restatements are superfluous and create risks of differential interpretations of obligations under the Order and other laws, and--particularly in an area such as takings law that is in flux--impose significant transition costs. Thus, if we were writing on a blank slate, I would argue against an Executive Order on takings.

Assuming one were to have such an Order, the mechanisms set forth in the E.O. are neither attractive nor inherently flawed. The Takings Impact Analysis, while a variation on a traditional theme, is not a particularly elegant way to address takings concerns, and can be quite cumbersome. At the same time, however, there is some risk that agencies will discount the risk of takings--both in terms of litigation costs and out-year liability--and thus it is reasonable to impose a "think-before-you-act" requirement. In short, while I believe an Executive Order is generally not desirable, the current E.O. is not, in policy terms, untenable.

Strategic and Tactical Considerations. Based on the political assessments offered at the last two meetings, it seems best (i) not to disturb the E.O., (ii) to convince the wise-use groups of the Administration's seriousness about the E.O., and (iii) to contain the effects of the E.O. This path would reduce the risk of codification of the E.O., while at the same time reducing the anxiety of environmental and other groups.

Toward these ends, a two-part strategy might be pursued. In general, the approach would emphasize that we believe the E.O. to be simply a restatement of constitutional obligations--no more and no less. As a first step, we might correct the issues raised by § 4(a)(2) by amending the guidelines rather than by amending the E.O. One way to do this would be to craft guidelines that made clear that the word "purpose" in § 4(a)(1) should be interpreted *broadly*. Under this approach, the "purpose" of the condition on the wetland permit discussed above would be "to maintain and improve the quality of groundwater supplies." Conditioning the permit would then serve the same purpose as denying the permit--namely, maintaining and improving the quality of groundwater supplies.

It is likely that the wise-use groups would view such a change alone as a retreat from the constitutional standard. Thus, to meet the requirements of *Nollan* (and mitigate the concerns of wise-use groups), we might also state in the guidelines that the "purpose" of a condition should be defined more narrowly when the condition involves a physical occupation. This is basically the "unconstitutional conditions" reading of *Nollan*: the government cannot condition a permit on something that would otherwise be unconstitutional--that is, a physical occupation without

just compensation.

As a second part of this strategy, in order to demonstrate that the E.O. was alive and well and codification unnecessary, we might begin *immediately* enforcing the E.O. through OIRA. This should not be too difficult: a line or two summarizing takings analysis in each NPRM in the *Federal Register*. This would strengthen our case against codification by demonstrating that the E.O. was not dormant.

In sum, I believe these two steps would, at once, minimize any legal error in E.O. 12630, reduce the likelihood of codification, and minimize political dissatisfaction surrounding this issue.

cc: Jack Quinn
Greg Simon
Sally Katzen
Joe Stiglitz
Ellen Seidman
Paul Weinstein
Steve Warnath
Will Stelle
Todd Stern
Bob Watson
Rosina Bierbaum
Jonathan Baker
Vicki Radd

Wahana Bank

Lisa
Addel AT+T

700

~~MM
Thanks
S-Pls. xerox for me,
and send back to Peter Yu
PRIORITY~~



Congressional Research Service
The Library of Congress

Washington, D.C. 20540

December 19, 1988

TO : Hon. Walter B. Jones
Hon. Jack Brooks
Hon. John Dingell
Hon. Morris K. Udall
Hon. Glenn M. Anderson
Hon. Gerry Studds
Hon. Mike Synar
Hon. E. (Kika) de la Garza
Hon. George Miller
Hon. Bruce F. Vento
Attention: Don Barry, Will Stelle
House Comm. on Merchant Marine and Fisheries

FROM : American Law Division

SUBJECT : Comparison of Taking Principles in Executive Order No. 12630 with Supreme Court Taking Jurisprudence, and Related Questions

You have asked, by letter dated July 22, 1988, for an analysis of (a) the degree to which the constitutional taking principles enumerated in Executive Order No. 12630 accurately reflect those set forth by the United States Supreme Court, (b) whether there is legal justification for the especially restrictive treatment accorded public health and safety programs in the Order, and (c) how the Order might affect federal environmental programs.

Executive Order No. 12630, titled "Government Actions and Interference with Constitutionally Protected Rights," was signed by President Reagan on March 15, 1988.¹ Its stated purpose is to assist federal departments and agencies in gauging the taking implications of their actions, with a view toward "due regard for the constitutional protections [of private property] provided by the Fifth Amendment" and "reduc[ing] the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental

¹ 53 Fed. Reg. 8859 (March 18, 1988).

action."² In the brief period since its issuance, the Order has already been the subject of extensive comment.³

We consider each of your questions in turn. Reference to the Department of Justice Guidelines mandated by the Executive Order⁴ is made only where the Guidelines significantly illuminate or alter the meaning of the Order.

Comparison of Executive Order and Supreme Court Taking Precepts

The "General Principles" Section

Principles of taking law are asserted in Executive Order 12630 primarily in section 3, calling for Executive departments and agencies to be "guided by ... general principles," and in section 4, commanding those same departments and agencies to "adhere, to the extent permitted by law, to the following criteria." Here we discuss the "general principles" of section 3; following, the "criteria" of section 4.

As a threshold matter, we note that several of the Order's general principles take the form: such-and-such government action "may" be a taking. "May," of course, covers a multitude of sins, ranging from almost never to near certain -- making the general principles somewhat elusive targets, even as explicated in the Guidelines. In the following, we read "may" to mean "of more than minimal probability."

1. "Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property ... may constitute a taking." Exec. Order § 3(b).

This is undoubtedly true. The Supreme Court has repeatedly characterized the right to exclude others from one's property as among the

² Exec. Order No. 12630 § 1(c).

³ A Reagan Administration defense of the Order is contained in an article by the Assistant Attorney General for the Justice Department's Lands and Natural Resources Division, where the Order and implementing Guidelines reportedly originated. Marzulla, *The New "Takings" Executive Order and Environmental Regulation -- Collision or Cooperation?*, 18 Env'l Law Rptr. 10254 (July 1988). Articles critical of the Order are Jackson and Albaugh, *A Critique of the Takings Executive Order in the Context of Environmental Regulation*, 18 Env'l Law Rptr. 10463 (Nov. 1988), and McElfish, *The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?*, 18 Env'l Law Rptr. 10474 (Nov. 1988).

⁴ Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, issued June 30, 1988 (unpublished).

most precious strands of the "bundle of sticks" (rights) making up the concept of property.⁵ Hence, physical intrusions of property by government traditionally have been considered "of an unusually serious character,"⁶ and are more likely to be deemed takings than "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."⁷ Indeed, in using the ambiguous "may" the Order understates the chance of a taking holding as regards one subset of physical intrusions: "permanent physical occupations." These, the Supreme Court has declared, are *always* a taking, regardless of the importance of the public interest asserted or the physical extent of the occupation.⁸ By contrast, mere temporary "physical invasions" may or may not be takings, depending on a balancing of the invasion's frequency and impact against the governmental interest underlying it.

2. "[R]egulations imposed on private property that substantially affect its value or use ... may constitute a taking." Exec. Order § 3(b).

This statement is overbroad, both as to "value" and as to "use." Supreme Court decisions indicate that government regulations generally must do more than "substantially affect" value or economic use, but must eliminate them totally, before a taking will be discerned based chiefly on either of these factors. Though "substantially" is not defined in either the Order or the Guidelines, the everyday sense of the term clearly encompasses lesser degrees of government interference with private property than the Court's taking threshold.

Beginning with "value," we note that the Supreme Court continues to cite as good law two of its early decisions in which government-caused reductions in property value of 90% and 75% provoked no substantive due process objections from the Court.⁹ More recently, the Court pointed out that its

⁵ *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3145 (1987) (citing earlier cases).

⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 433 (1982).

⁷ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1244 n.18 (1987), *quoting* *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 124 (1978).

⁸ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-438 (1982).

⁹ *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (90% reduction); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (75% reduction). Though, as noted, these are due process rather than taking decisions, they are cited as authority in the Court's recent taking analyses – undoubtedly because
(continued...)

decisions sustaining local land-use regulations that are fairly within the police power "uniformly reject the proposition that diminution in property value, standing alone, can establish a taking."¹⁰ Lower federal courts are similarly unimpressed with reduction-in-market-value arguments by property owners.¹¹

Proponents of the diminution-in-value standard are fond of citing the words of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. ¹²

Despite Justice Holmes, and despite more modern judicial lip service to the relevance of value loss,¹³ federal courts today are more likely to focus on whether a government restriction denies all economically viable use of land than on whether it results in an impermissibly large loss in market value.

As for "use," Supreme Court decisions in the land-use field assert that for a taking to occur, property must be deprived of *all* "economically viable"

⁹(...continued)

substantive due-process doctrine is the direct forbear of some latter-day taking jurisprudence.

¹⁰ *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 131 (1978).

¹¹ *See, e.g., Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir. 1987) (89% reduction in property value effects no taking); *William C. Haas v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (90% loss in property value effects no taking). *Cf. Q.C. Construction Co. v. Gallo*, 649 F. Supp. 1331, 1337 (D.R.I. 1986) (taking occurred where land suffered 90% loss in value *and* only had passive use as an empty lot), *aff'd without opinion*, 836 F.2d 1340 (1st Cir. 1987).

¹² 260 U.S. 393, 413 (1922).

¹³ *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1248 (1987) ("Our test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains in the property").

use¹⁴ -- clearly a tighter standard than the Order's threshold that property use be merely "substantially affect[ed]." Outside the land-use arena, taking suits prompted by "substantially affected" property use are repeatedly rebuffed by the Court where plaintiffs fail to prove that reasonable return on investment is precluded under the challenged restriction.¹⁵ In this connection, the Court has stressed that eliminating a property's most profitable use -- arguably "substantially affecting" it -- is not without more a taking.¹⁶

3. "Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature." Exec. Order § 3(b).

The first clause of this quote, dealing with "less than ... complete" deprivation of use or value, may on one reading do no more than clarify the "substantially affects" phrase in quote number 2. If that is its intent, our analysis under quote number 2 applies and the quote here would appear to overstate the taking danger. If, on the other hand, the Executive Order is trying to explain that factors other than deprivation of value and economic use may work a taking even where value and economic use remain in the property, then it is correct. As noted elsewhere, the existence of a physical invasion, or possibly a use restriction not substantially related to a legitimate government interest, may bring about a taking even when considerable value or economic uses remain in a tract.¹⁷

The second portion of the quote, dealing with less-than-complete deprivation of separate and distinct "interests" in the same property, is also ambiguous. "Interests" could mean traditional less-than-fee interests in property such as easements, leaseholds, liens, life estates, mineral estates, water rights, and the like, rather than each individual use to which a property may lawfully be put. If so, then the second portion of the quote is

¹⁴ Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3146 (1987), quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

¹⁵ See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1247-1248 (1987); *Andrus v. Allard*, 444 U.S. 51, 66 (1979); *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 136 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

¹⁶ *Andrus v. Allard*, 444 U.S. 51, 66 (1979); *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962).

¹⁷ Another indicium of taking independent of remaining value or economic uses in the subject property has not been mentioned here. Elimination of an individual's right to pass on property to heirs is a *per se* taking, regardless of property uses available during the individual's life. *Hodel v. Irving*, 107 S. Ct. 2076 (1987).

certainly true, particularly if the deprivation it speaks of occurs through government appropriation. All the foregoing interests have been held property for taking-clause purposes,¹⁸ and governmental appropriation of any one is likely a taking per se, regardless of uses or value left to the property owner. If, on the other hand, "interests" extends to physical components of a tract of land, use of which is eliminated by regulation alone, then the quote goes beyond recognized taking principles. The Supreme Court has said twice that it will not countenance physical "segmentation" of a tract as a basis for arguing that even though economic uses remain elsewhere on a tract, any segment deprived of all economic use has been taken. The remaining-use test is to be applied to the property *as a whole*.¹⁹

The third portion of the quote, asserting that a taking is no less so by virtue of being temporary, is generally true. The Court has repeatedly held that *if* a government action constitutes a taking, it is no defense that the action's impact was short-lived.²⁰ In fact, the principle is crucial to the Court's recent stress on regulatory takings: if temporariness were a defense, government could invariably escape compensation liability by simply rescinding property restrictions found by a court to be a taking.

Notwithstanding, it deserves mention that the temporariness of a governmental interference with property may keep that interference from being viewed as a taking *in the first place*. For instance, a few overflights by government aircraft, or a few floods caused by government dams, are likely actionable solely in tort rather than as a taking.²¹ And some regulatory

¹⁸ See, e.g., *United States v. Welch*, 217 U.S. 333 (1910) (easements); *United States v. General Motors*, 323 U.S. 373 (1945) (leaseholds); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935) (real estate liens).

¹⁹ *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 130-131 (1978); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1248-1250 (1987). A four-justice dissent by Chief Justice Rehnquist in the latter case, however, appears to be accepting of segmentation.

²⁰ *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987) (summarizing cases).

²¹ In the leading overflight case of *Causby v. United States*, 328 U.S. 256, 266 (1946), the Court articulated the current standard: to be a taking, overflights by government aircraft must be "so frequent" as to be a direct and immediate interference with the use and enjoyment of land.

Similarly, flooding case law makes clear that where the flooding is not permanent, the taking plaintiff must at least be able to demonstrate that it is "inevitably recurring." *United States v. Cress*, 243 U.S. 316, 318, 328-329 (1917); *Amick v. United States*, 5 Cl. Ct. 426, 429-430 (1984). In practice, this standard has been read as meaning "sufficiently frequent": flooding that

(continued...)

interferences of circumscribed duration, such as development and production moratoria with foreseeable termination dates, have been held not actionable under any legal theory.²²

4. "Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking." Exec. Order § 3(c).

This assertion fails to make clear that in most instances the judicial deference accorded government actions protecting public health and safety is not merely "broader," but almost total. The issue has a long history.²³ In 1887 the Supreme Court sustained against taking attack a state ban on the sale or manufacture of alcoholic beverages, noting that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot ... be deemed a taking."²⁴ In effect, the Court was advancing a categorical exception to taking liability for uses of state police power to curtail "injurious" use of property. Such a broad immunity appeared to be qualified in 1922, however, in *Pennsylvania Coal Co. v. Mahon*,²⁵ where the Court saw a taking in a state ban on coal mining that might cause subsidence of land on which certain structures were located. Still, *Pennsylvania Coal* involved special issues of contractual right and narrow private benefit, and an early-Sixties

²¹(...continued)

occurs at least annually is usually held a taking, while less frequent flooding is rarely so held.

²² See, e.g., *Union Oil Co. v. Morton*, 512 F.2d 743, 750-752 (9th Cir. 1975), discerning a taking where the Secretary of the Interior, after the Santa Barbara oil spill, suspended oil company operations under their leases for an indefinite period, rather than providing for termination of the suspension upon the occurrence of a specified future event. See also *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369 (D. Md. 1975), rejecting a claim by developers that a five-year-old county moratorium on sewer hook-ups was a taking.

²³ See generally R.J. Marzulla, *The New "Takings" Executive Order and Environmental Regulation - Collision or Cooperation?*, 18 Env'l Law Rptr. 10254, 10258-59 (1988).

²⁴ *Mugler v. Kansas*, 123 U.S. 623, 668 (1887).

²⁵ 260 U.S. 393 (1922). Justice Brandeis, in a dissenting opinion, would have reaffirmed the police-power exception.

decision of the Court again appeared to equate police-power abatement of noxious property use with taking immunity.²⁶

The modern view, first advanced in a 1978 dissent, is that there may be a "nuisance exception" to taking liability allowing government to prohibit without compensation property uses akin to common-law nuisances, even if those are the only economically viable uses of a property.²⁷ Critically, however, this nuisance exception is said not to be coterminous with the police power, but rather narrower.²⁸ Those government health-and-safety actions not addressed to nuisance-like activity remain fully subject to taking challenge, the Court implies, though even as to this group the historical deference of courts to government prohibitions of noxious property use makes takings unlikely.

9 In light of the above, the quote from the Executive Order seems to inflate greatly the taking danger where a government action "to protect public health and safety" takes aim at nuisance-like property uses. The Order speaks only of "broader latitude," whereas the modern Court appears to be fashioning an absolute, total exemption. Even as to government health-and-safety actions aimed at property uses *not* constituting nuisances, the Order could be more explicit as to just how small the taking danger is, given the longstanding deference of courts in this area.

5. "Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose." Exec. Order § 3(c) (immediately following quote #4 above).

This statement is cast as a directive, rather than as precepts of taking law. Nonetheless, the quote seems intended to at least embody such precepts -- namely, that actions responding to "real and substantial" health and safety threats, "advanc[ing] significantly" such purpose, and "no greater than necessary" are less likely to be takings. Supreme Court taking decisions in the health and safety area, however, nowhere appear to state the foregoing precepts, and in some instances arguably contradict them.

The requirement that property interests not be infringed in the absence of "real and substantial" health and safety threats may have been drawn from

²⁶ Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

²⁷ Penn Central Transp. Co. v. New York City, 438 U.S. 104, 145 (1978) (Rehnquist, J. dissenting); Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1245 (1987).

²⁸ Keystone Bituminous Coal Co. v. DeBenedictis, 107 S. Ct. 1232, 1245 n. 20 (1987).

the Court's assertion in the land-use context that government regulation must advance "legitimate" governmental interests.²⁹ It is precarious, however, to extend taking criteria developed for evaluating comprehensive *land-use* control schemes to the health and safety area, one where greater judicial deference to government actions has always been shown. Moreover, it is certain that the Order's "real and substantial" represents a quantum leap beyond the Supreme Court's "legitimate."

The "advance significantly" phrase appears to have been extracted from the same Supreme Court taking decisions involving broad schemes for regulating land use. Thus, once again, its applicability to narrow property-use prohibitions directed at specific health and safety threats must be doubted. Moreover, it has been said that "no court has ever found that a taking has occurred solely because a legitimate state interest was not substantially advanced."³⁰

Finally, the "no greater than necessary" requirement seems indirectly contradicted by the Court's lax attitude toward questions of over- or under-inclusiveness with regard to land-use controls.³¹ In the less closely scrutinized area of health and safety regulation, it would be anomalous indeed for the Court to adopt a rigid "no greater than necessary" standard.

To be sure, the Court has articulated three interrelated principles that could be regarded as loosely undergirding the Order's implied precepts. These principles are (1) that the taking determination involves a balancing of public and private interests,³² (2) that proportionality of private burden and public benefit may be one factor in taking analysis,³³ and, most broadly, (3) that "fairness and justice" should underly all taking determinations.³⁴ Speculative inference from these very general rules, however, is scant justification for the Order's specific and peremptory directive. The Supreme Court to date has shown no taste in its taking decisions for fine dissection of the degree of threat to the public health and safety, or the precise probability that the

²⁹ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3146 (1987).

³⁰ *Loveladies Harbor, Inc. v. United States*, No. 243-83 L (Cl. Ct. Aug. 12, 1988).

³¹ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1243 n.16 (1987) ("That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it.").

³² *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980).

³³ *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 226 (1986); *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3147 n.4 (1987).

³⁴ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

government's chosen remedy will bring about a solution. Where the Court accepts that the government-imposed burden is rationally related to averting a plausible threat, that has ended the Court's inquiry and led it to sustain the remedy.³⁵

6. "While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use if [sic] interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred." Exec. Order § 3(d).

The first assertion, that "undue" delays in government decision-making can be takings, is misleading in suggesting that this is an established principle of federal taking law. In fact, the Supreme Court has not yet addressed the issue directly, and pertinent decisions in the lower federal courts are sparse.

Research reveals only two mentions of the delay issue in Supreme Court taking cases. In a 1987 opinion holding that the fifth amendment requires compensation for temporary regulatory takings, the Court noted that:

We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.³⁶

From this statement, some appear to have inferred that the Court was cautioning that government processing delays longer than "normal" may be takings, while in fact the Court *assumed* that a taking occurred in the case and focussed exclusively on the remedy required. Thus, the meaning of the statement is ambiguous. In its only other mention of government delays, the Court appeared to be quite tolerant of them, albeit in the different context of land-value fluctuation during government planning activities. Said the Court:

Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, *absent extraordinary delay*, are incidents of ownership.

³⁵ See, e.g., *Keystone Bituminous Coal Co. v. De Benedictis*, 107 S. Ct. 1232 (1987); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887).

³⁶ *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2389 (1987).

They cannot be considered as a taking in the constitutional sense.³⁷

Research reveals only one federal court decision to squarely address the issue of whether delay in granting or denying an environmental permit constituted a taking -- holding, on the facts presented, that it did not.³⁸ In the related circumstance of temporary moratoria on property use, courts have been similarly disinclined to find takings.³⁹

In light of this scant record, the claim in the Order that undue government processing delays may effect a taking seems premature and can have little content for federal decision-makers charged with implementing it. Moreover, by raising the spectre of takings in connection with all undue delays "during which private property is interfered with," the claim misleads in another sense. Under current case law, it is not *any* interference with land use, but only *complete deprivation* of economically viable use, that may result in a taking.

The second assertion in the quote, that a processing delay may increase significantly the size of compensation due if a taking is later found to have occurred, appears to be true -- granting that a taking is later found to have occurred. Though the measure of compensation for a temporary regulatory taking has yet to be fully developed in the courts, logic dictates that the compensation owed must be in direct proportion to the duration of the taking.⁴⁰ Hence, it follows that the longer the processing delay after that

³⁷ *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1979) (emphasis added; quotation marks omitted).

³⁸ *Lachney v. United States*, 765 F.2d 158 (Fed. Cir. 1985). In response to plaintiff's claim that the passage of two years between the application for and issuance of a Clean Water Act section 404 permit effected a temporary taking, the court said: "Mere passage of time during the administrative process for issuance of a permit under the Clean Water Act ... does not constitute an event upon which a taking suit ... may be maintained."

³⁹ See, e.g., *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369 (D. Md. 1975) (five-year-old moratorium on sewer hook-ups in county did not constitute taking); *Union Oil Co. v. Morton*, 512 F.2d 743, 750-752 (9th Cir. 1975) (moratorium on OCS lease operations effected taking chiefly because no terminating event or date was specified). See also *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (upholding, against impairment of contracts attack, moratorium on the repayment of mortgages during the Depression).

⁴⁰ After holding in 1987 that the fifth amendment requires compensation for temporary regulatory takings, the Supreme Court suggested in dicta that the measure of compensation might be "the value of the use of the land (continued...)"

point in time -- if any -- when the delay effects a taking, the greater the constitutionally required compensation.

The "Criteria" Section

Section 4 of the Executive Order instructs federal departments and agencies to "adhere, to the extent permitted by law, to the following criteria when implementing policies that have taking implications." Some of these criteria, which take the form of mandatory action requirements, clearly derive from the Supreme Court's recent decision in *Nollan v. California Coastal Commission*,⁴¹ as follows.

1. "When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall: (1) serve the same purpose that would have been served by a prohibition of the use or action, and (2) substantially advance that purpose." Exec. Order § 4(a).

The criterion embodied in this mandate doubtless is drawn from *Nollan*. There, the Court informed the California Coastal Commission that it could not condition the issuance of a building permit on the applicants' grant of a public right-of-way across the beach portion of their property, without offending the taking clause. California argued that the right-of-way was needed to assure "visual access" to the beach by passersby on the road in front of the Nollans' property; the Court saw no relation between the two. Hence, a taking occurred, since, the Court held, an easement imposed as a permit condition must advance the *same* legitimate governmental interest as the permit to which it is attached.

Nollan is a tough case to fathom: its holding is arguably narrow, but its rationale is couched in broad terms. A narrow and quite arguable view of the

⁴⁰(...continued)

during this [regulatory taking] period." *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2388 (1987). Clearly implied in this standard is that the amount of compensation varies with the duration of the taking. Indeed, one can hardly imagine how it could be otherwise.

Only one lower federal court has attempted a more precise formulation of the measure of compensation since *First English*. In *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987), a landowner found to have suffered a temporary regulatory taking was held to be entitled to "the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair value with the restriction" -- again, a duration-based standard.

⁴¹ 107 S. Ct. 3141 (1987).

decision is that it applies only to permit conditions like easements which, had they been appropriated directly, would have resulted in a taking. Under this reading, *Nollan* at bottom establishes an exemption from taking liability, allowing government to obtain gratis property interests that would be compensable were it not for the fact that they take the form of permit conditions satisfying *Nollan*. By contrast, the broadest construction, that implicitly adopted in the Order, is that *Nollan* applies to *all* permit conditions. This view comports with some language in the opinion but flies in the face of common sense by elevating minor inconsistencies between permits and technical, non-physically invasive permit conditions to the level of constitutional takings.

If, as we believe, the narrow reading above is the proper view of the case, then the Executive Order stretches *Nollan* substantially. The Order applies its nexus requirements to "any" conditions on permits, not merely those which, if appropriated directly, would effect takings. Thus, the Order brings within its scrutiny a wide gamut of environmental permit conditions - involving monitoring, reporting, financial responsibility, effluent limits, etc. - that, in our view, are beyond the scope of *Nollan*.

2. "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." Exec. Order § 4(b).

The Attorney General's Guidelines attribute this criterion to a footnote in *Nollan*, as follows:

If the Nollans were being singled out to bear the burden of California's attempt to [ensure the public's ability to see the beach], although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause.⁴²

The Guidelines do not mention, however, that this statement is only dictum, the Court revealing in the same footnote that the Nollans did not press a "singled out" theory.⁴³

On the other hand, the status of proportionality as at least one factor for consideration in a taking analysis is suggested in another recent Supreme

⁴² 107 S. Ct. at 3147 n.4. See Appendix to Guidelines at 9.

⁴³ 107 S. Ct. at 3147 n.4.

Court taking decision.⁴⁴ In addition, the Supreme Court repeatedly stresses "fairness and justice" as the equitable foundation of taking jurisprudence, suggesting that it might some day be receptive to articulating a proportionality requirement, as difficult as proportionality is to determine. Still, whether current authority supports the absolute, across-the-board criterion in the Order is at best debatable.

3. "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." Exec. Order § 4(c).

See discussion at pages 10-12.

4. Before undertaking any proposed action regulating private property use for the protection of public health and safety, the ... agency ... shall ... (1) identify ... the risk ... created by the private property use ..., (2) establish that such proposed action substantially advances the purpose of protecting ... against the specifically identified risk, [and] (3) establish ... that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk Exec. Order § 4(d).

As to requirement "(2)," see discussion at page 9. For requirement "(3)," see discussion at pages 13-14.

In closing this section, it warrants mention that the overstated taking danger in many of the Order's principles and criteria has some parallel in the Order's failure to list almost any of the factors cutting *against* the existence of a taking. Mentioned earlier in this memorandum was the recently asserted "nuisance exemption" to taking liability, the Court's repeated declarations that interference with property rights through adjustment of economic benefits and burdens to promote the common good is generally not a taking, and the rule against segmentation.

Legal Justification for Restrictive Treatment of Government Actions Having Public Health and Safety Purposes

We find nothing in federal taking jurisprudence to suggest why federal health and safety actions, alone among all federal actions with taking implications, should be accorded the restrictive treatment in the Executive

⁴⁴ In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the Court upheld against taking challenge a statutory monetary penalty imposed on employers who withdraw from multiemployer pension plans. Among other grounds for its decision, the Court pointed out that "[t]here is nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan." *Id.* at 226.

Order.⁴⁶ To be sure, the Order is correct in saying that generally "the mere assertion of a public health and safety purpose is insufficient to avoid a taking" -- as discussion on pages 7-8 shows. Nonetheless, as the same discussion notes, health and safety actions are still the *least* likely to generate successful taking claims. Data on recent and pending taking actions against the United States amply confirm this point.⁴⁶ If, as the Executive Order claims, its concern is reducing unanticipated taking liability, then the restraints it imposes on health and safety actions would far more profitably be imposed elsewhere -- as, for example, on federal actions in the nature of direct land-use control or physical invasion.

One could conceivably argue that the Order does not single out federal health and safety programs because of hostility to them, but rather because of their sheer number. In contrast with local government, the United States is not regularly involved in land-use control, far more often affecting activity on private property through its myriad health, safety, and environmental programs. Notwithstanding, the argument fails, for it is still the non-health-and-safety programs that historically have generated the overwhelming majority of the taking suits against the United States.⁴⁷

Possible Impact of the Executive Order
on Federal Environmental Programs

Your final question asks that we assess how the Executive Order could affect federal environmental programs -- particularly those likely to result in

⁴⁶ Exec. Order 12630 §§ 3(c), 4(d). Under the Guidelines, certain requirements in sections 3(c) and 4(d) are made applicable to *all* government actions with taking implications, not merely those with health and safety purposes.

⁴⁶ The General Accounting Office (GAO) recently listed twenty taking actions against the United States in which disbursements from the Judgment Fund (31 U.S.C. § 1304) were made during fiscal years 1985 through 1988. None of these cases, judging from GAO's capsule descriptions, appears to have involved federal health and safety regulation. Letter of Oliver Krueger, GAO Associate Director, to the Honorable Walter B. Jones, Chairman, House Comm. on Merchant Marine and Fisheries, dated September 28, 1988 (enclosure).

The rarity of successful taking actions against the United States in the health and safety area appears to be largely due to the fact that relatively few such actions are brought. Thus far, required submissions to the Office of Management and Budget under the Executive Order reveal that only a minute fraction of pending taking actions against the United States involve the Environmental Protection Agency. (Figures were not available, however, for the other health-and-safety agencies, such as the Occupational Safety and Health Administration.)

⁴⁷ See, e.g., *id.*

land use restrictions. Of course, predicting with precision the impact of a new, broadly worded executive order on the myriad federal environmental programs is an impossible task. How the Department of Justice, Office of Management and Budget (OMB), and the program agencies choose to effectuate the Executive Order will undoubtedly prove pivotal in determining the degree of burden or regulatory chilling effect that the Order may entail. Hence, we can do no more here than make a preliminary cut.

At the outset, it is clear that under any objective reading of Supreme Court taking criteria, most federal environmental programs raise taking issues on only rare occasion. Air and water emission standards, maximum contaminant levels under the drinking water program, workplace exposure standards, hazardous materials transport standards, manifest requirements for tracking hazardous waste, groundwater monitoring regulations, and countless other such federal requirements simply do not in the typical case affect property use or value in a substantial way, and even where they do are unlikely to result in takings.

7 The improbability of taking issues in connection with such environmental actions means that they *should* be beyond the reach of Executive Order 12630. The Guidelines, however, state a rather expansive version of the Order's coverage. Under them, agencies must evaluate policies and actions "that affect, or may affect, the use or value of private property ..."⁴⁸ — dropping the qualification in the Order that the effect be "significant."⁴⁹ The Guidelines' universe of application is thus a potentially huge one, of which only a small subset would likely pose a taking danger. Taking them literally, a Takings Implication Assessment (TIA)⁵⁰ could be required for each EPA determination on a proposed SIP revision relaxing an air emissions standard,⁵¹ for each EPA decision on an NPDES permit application,⁵² or for many of

⁴⁸ Guidelines at 4.

⁴⁹ Exec. Order No. 12630 § 3(e).

⁵⁰ Guidelines at 21-23.

⁵¹ SIPs are state implementation plans, required under the Clean Air Act. An EPA decision on a proposed easing of a plant's emission ceiling arguably "may affect the use or value of private property," thus falling under the Guidelines.

⁵² Under the Clean Water Act, discharges of pollutants into the waters of the United States are prohibited, unless covered by a National Pollutant Discharge Elimination System (NPDES) permit. Denial of a permit, or granting one with excessively burdensome restrictions, could arguably "affect the use or value" of a commercial operation, hence come under the Guidelines.

EPA's written comments on proposed actions of other federal agencies.⁵³ These items likely total a thousand or so annually, and the resultant TIA preparation burden could potentially constitute a significant drain on agency resources.

On the other hand, the Order and Guidelines allow for "supplemental guidelines," written in the usual instance by the departments and agencies and submitted to the Department of Justice for approval. Supplemental guidelines may contain "categorical exclusions" for classes of agency action that typically have no taking implications, despite their effect on use or value.⁵⁴ Categorical exclusions, we are informed by the Department of Justice, will be approved where a category of agency actions has never been held to effect a taking, or has affirmatively been held not to effect a taking. Presumably, then, categorical exclusions could be used to remove from the takings evaluation process those actions mistakenly brought in by overbroad threshold criteria in the Order and Guidelines. Draft supplemental guidelines written by EPA, for example, seek to exempt the lion's share of the agency's regulatory program through such exclusions, though it remains to be seen whether the Justice Department will approve them.⁵⁵

Parenthetically, we note that the Order and Guidelines themselves recite specific "exclusions" -- in addition to the "categorical exclusions" developed for individual program agencies. The former exemptions would appear to have little relevance, however, to those aspects of federal environmental regulation raising genuine taking issues.

We move on to the minority of federal environmental activities that are not likely to qualify for categorical exclusions, and thus could regularly trigger the Order's evaluative process. Likely examples are:

1. *Dredge-and-fill permits.* Clean Water Act section 404 prohibits the discharge of dredged or fill material into "waters of the United States," interpreted to include wetlands, unless the discharger obtains a "404 permit" from the Corps of Engineers. Wetlands often having no economic use to their

⁵³ The Guidelines require an abbreviated TIA for "[w]ritten agency comments or recommendations by other than the lead agency on policies or actions within the Executive Order ... whenever such comments or recommendations are required by law." Unfortunately for EPA, such comments appear to be *always* required by law. Clean Air Act § 309, 42 U.S.C. § 7609.

⁵⁴ "Supplemental guidelines" are expressly authorized by both the Order, section 5(e)(2), and the Guidelines, section VI(D). "Categorical exclusions" are mentioned only in the Guidelines, section VI(D), not in the Executive Order.

⁵⁵ EPA Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings.

owner if not filled in, the decision whether to grant a 404 permit obviously meets Executive Order 12630's evaluation threshold. History confirms, there being more court decisions adjudicating taking attacks on 404-permit denials than any other federal environmental program. Several decisions assert that denials of 404 permits may, in proper circumstances, effect takings.⁵⁶

In contrast with its decision granting or denying the permit, the Corps' prior determination that a given wetland falls under its regulatory jurisdiction cannot be a taking. This purely jurisdictional determination, the Supreme Court has ruled, works no property interference of itself; it is only when a permit is denied so as to bar all economic use of a property that a taking arguably occurs.⁵⁷ On the other hand, EPA's pre-permit decision that a wetland is unsuitable for discharge⁵⁸ represents a direct limitation on property use. Thus, the Corps' determination would seem an ideal candidate for a categorical exclusion,⁵⁹ while the EPA one would not.

2. *Wild and scenic rivers.* Recommendations to Congress by federal agencies and the President of additions to the national wild and scenic rivers system, and administratively proposed additions of state-designated wild and scenic rivers, would presumably come under the Executive Order.⁶⁰ Such recommendations and proposals might meet the Guidelines' criterion "may affect the use or value of private property," since system components are to be administered "[so] as to protect and enhance the values which caused it to be included within said system ...,"⁶¹ possibly constraining activities on private inholdings.

However, federal advice and technical assistance for state/local efforts to establish wild, scenic, and recreational rivers would be outside the Executive

⁵⁶ See, e.g., *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986) (en banc), *cert. denied*, 107 S. Ct. 926 (1987); *Loveladies Harbor v. United States*, No. 243-83 L (Cl. Ct. Aug. 12, 1988).

⁵⁷ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

⁵⁸ Clean Water Act § 404(c).

⁵⁹ The Corps' draft supplemental guidelines under the Executive Order would reportedly establish a categorical exclusion for jurisdictional assertions under section 404.

⁶⁰ Wild and Scenic Rivers Act § 4, 16 U.S.C. § 1275.

⁶¹ 16 U.S.C. § 1281(a). Indeed, in another provision of the Act, 16 U.S.C. § 1284(b), the possibility that water rights may be taken following inclusion in the system is expressly acknowledged.

Order, either under its exemption for "communications" between federal and state agencies⁶² or pursuant to probable categorical exclusion.

3. *National Park System inholdings.* Policies adopted by the National Park Service in order to discourage incompatible uses of private inholdings directly affect the use or value of such inholdings. In the small subset of instances where interference with inholding use has been egregious and protracted, takings have been judicially discerned.⁶³

4. *Surface mining restrictions.* A variety of actions under the Surface Mining Control and Reclamation Act⁶⁴ seemingly would come under the Executive Order. Obvious examples are governmental entry upon property for abating the adverse effects of past coal mining or for conducting studies related thereto, promulgation of performance standards, and promulgation and operation of federal programs where states fail to submit or enforce their own, including in particular the designation of non-federal lands as unsuitable for surface mining.⁶⁵

5. *Rails to trails.* Under the National Trails System Act, the Interstate Commerce Commission (ICC) may approve interim use of railroad rights of way as trails, where a qualified entity comes forward to take responsibility for trail operation.⁶⁶ Where the railroad's interest in the right of way is conditional upon its continued use for railroad purposes, such ICC approvals come under the Order with respect to their impact on any reversionary interests or underlying fee title in the right of way.⁶⁷

6. *Endangered species.* Designation of critical habitat under the Endangered Species Act might well fall under the Executive Order, since such designation ultimately could constitute a ground for denying federal permits

⁶² Exec. Order No. 12630 §§ 2(a)(5), 2(c)(5).

⁶³ *Althaus v. United States*, 7 Cl. Ct. 688 (1985); *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970).

⁶⁴ 30 U.S.C. § 1201 et seq.

⁶⁵ In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), the Supreme Court rejected only a facial taking challenge to the surface mining act; the possibility of subsequent, as-applied attacks was expressly recognized. *Id.* at 297 n.40.

⁶⁶ 16 U.S.C. § 1247(d).

⁶⁷ See, e.g., *National Wildlife Federation v. ICC*, 850 F.2d 694 (D.C. Cir. 1988) (rails-to-trails rules remanded to ICC for consideration of whether such conversions may effect taking of reversionary interests).

and hence presently affects property value.⁶⁸ It seems appropriate, however, that critical-habitat designations be accorded a categorical exclusion, since it is not the designation, but rather the permit denial, that might form the basis for a taking action.⁶⁹ Consultation responsibilities of the Department of the Interior (DOI) under the Act, to ensure that federal agencies do not jeopardize listed species or designated habitat, may require DOI to prepare abbreviated TIAs assessing the chance that the action as modified effects a taking.⁷⁰

Though other wildlife-protective activities of the United States have occasioned taking actions, such activities would not appear to routinely trigger the Executive Order. Moreover, the fact that all such taking actions to date have proved unsuccessful⁷¹ would likely warrant categorical exclusion status for many federal wildlife protections.

7. *Superfund response actions.* Response actions under the Superfund Act may raise taking implications where they either interfere with a landowner's making economic use of his property, or where, through installation of monitoring equipment and the like, they bring about an enduring physical invasion.⁷² Case law to date affirms the possibility that such actions may effect takings, as to either a tract that is the source of contamination or adjacent tracts.⁷³ The Order does make plain, however, that where there is a health and safety emergency requiring immediate response, Order-mandated analysis may be postponed until after the emergency action.

In contrast, EPA condemnations to gain remedial access are entirely exempt from the Order as "[a]ctions in which the power of eminent domain is formally exercised."⁷⁴

⁶⁸ 16 U.S.C. § 1536(a)(2).

⁶⁹ See discussion of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), text accompanying note 57 *supra*.

⁷⁰ Guidelines at 5.

⁷¹ See, e.g., *Andrus v. Allard*, 444 U.S. 51 (1979); *Mountain States Legal Fdn. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (en banc), *cert. denied*, 107 S. Ct. 1616 (1987); *Bailey v. Holland*, 126 F.2d 317, 324 (4th Cir. 1942).

⁷² See esp. 42 U.S.C. § 9604(e)(5).

⁷³ *United States v. Charles George Trucking Co.*, 682 F. Supp. 1260, 1271 (D. Mass. 1988); *Hendler v. United States*, 11 Cl. Ct. 91 (1986).

⁷⁴ Exec. Order No. 12630 § 2(c)(1).

We reiterate that how the executive branch implements the Order may be the dominant factor in determining its impact. Informal reports are that several agencies are striving to keep the burden to an absolute minimum.⁷⁶ Plainly there is considerable latitude in making such choices, given the breadth of the Order and Guidelines and the generality of Supreme Court regulatory taking precepts. One should pay close attention, in particular, to proposed supplemental guidelines submitted to the Department of Justice, and how that Department reacts. What proportion of an agency's actions, for example, will be immunized through categorical exclusions and one-time generic TIAs?

Despite the unpredictability of implementation details, a few factors may be commented upon – one tending to mitigate any chilling effect the Executive Order could have on environmental programs, but several others arguably contributing thereto.

On the mitigating side is the qualification in the Guidelines that the Order's requirements apply only "to the extent permitted by law,"⁷⁶ notwithstanding the absence of such limitation in section 3 of the Order.⁷⁷ While this only makes explicit what is legally obvious – that an executive order cannot inject into agency decisionmaking factors that are precluded by Congress⁷⁸ – it is a welcome clarification nonetheless.

⁷⁶ Agencies may have a dual motivation for keeping documentation under the Executive Order as cursory as possible. In addition to conserving energies, preparation of a broad, general TIA might prove less harmful to the agency should the TIA be deemed discoverable in a subsequent taking action against the agency.

⁷⁶ Guidelines at 20. Similarly, the Guidelines state: "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." *Id.* at 2.

In determining what is "statutorily required," agencies are not to adopt narrower statutory constructions simply because to do so might reduce the number of takings when the statute is implemented. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

⁷⁷ Recall that section 3 contains the prescription that health and safety actions be "undertaken only in response to real and substantial threats, ... advance significantly the health and safety purpose, and be no greater than is necessary" In the absence of the Guidelines' qualifier, one might well ask whether this quote is consistent with triggers for agency response in several federal statutes.

⁷⁸ See, e.g., *Hazardous Waste Treatment Council v. EPA*, 28 Env't Rptr. (Cases) 1305, 1308 (D.C. Cir. Oct. 7, 1988).

Tending to promote less aggressive environmental regulation, on the other hand, is a plethora of factors -- some enumerated in the very text of the Order and/or Guidelines, others more in the nature of practical effects.

Textual factors include the Order's directive that agencies "prevent unnecessary takings" and the Guidelines' companion instruction that where a range of alternatives satisfies statutory criteria, the alternative carrying the least risk of causing takings be selected.⁷⁹ Quite literally, this calls for more cautious environmental regulation -- if applicable and the law allows. Moreover, statutory standards in federal environmental laws are often broadly worded, providing latitude in which the aforementioned mandates could operate.

Another textual factor of a similar, openly inhibiting nature, is the Order's requirement that government health and safety actions (to which the Order applies) respond only to real and substantial threats, advance significantly the health and safety purpose, and be no greater than necessary.⁸⁰ Again, the actual degree of impact will be a function of the range of activities to which the Order applies and the degree to which program statutes allow this directive room to operate.

Still other textual restraints are the related factors of proportionality and contribution. The Order's proportionality requirement⁸¹ could lead regulators to be more cautious when acting under a statute which, based on cumulative past contributions to an environmental problem, authorizes disproportionate burdens on future proposed activities contributing to the problem. Illustrative here are the dredge-and-fill-permit regulations, requiring an evaluation of cumulative impacts as one factor in ascertaining whether to allow filling in of a wetland.⁸² A close cousin of proportionality is the Guidelines' contribution factor,⁸³ asserting that the less directly a property use contributes to an environmental problem, the greater the taking risk when that activity is regulated. Where an agency is wrestling with whether to permit an activity linked to environmental harm only indirectly, through intermediate steps, might this principle skew the decision against interference?

⁷⁹ Exec. Order No. 12630 § 1(b); Guidelines at 2.

⁸⁰ The Guidelines imply that the "significantly advance" requirement applies to all actions under the Executive Order, whether directed at health and safety threats or not. Guidelines at 18.

⁸¹ Exec. Order No. 12630 §§ 4(b), 4(d)(3).

⁸² 33 C.F.R. §§ 320.4(a)(1), 320.4(b)(3). EPA also considers cumulative impacts in deciding whether to veto a fill site under Clean Water Act § 404(c).

⁸³ Guidelines at 18.

Other aspects of the Order and Guidelines may as a practical matter prompt hesitation in property use-restricting environmental programs. First and foremost, there is the cumulative "justification load" facing an agency considering whether to initiate a rulemaking -- partly the result of earlier Reagan Administration executive orders. Besides having to prepare a TIA (with attendant economic analysis), the agency may face the daunting prospect of having to do a Regulatory Impact Analysis under Executive Order 12291⁸⁴ (with more economic analysis) and a Federalism Assessment under Executive Order 12612,⁸⁵ not to mention a Regulatory Flexibility Analysis under the Regulatory Flexibility Act⁸⁶ and an Environmental Impact Statement under the National Environmental Policy Act.⁸⁷ The sheer quantity of analysis and paperwork required by these executive orders and statutes may very likely nip some worthwhile regulatory initiatives in the bud, at least where such initiatives are not statutorily mandated.

As always, however, there are implementation imponderables. All three executive orders above require that the reports mentioned be submitted (routinely or upon request) to OMB.⁸⁸ Will OMB utilize Executive Order 12630 to increase substantially its influence and control over environmental programs, or will the Order prompt only a marginal expansion of the OMB role over that authorized in earlier executive orders and statutes? The question is a central one; it was Executive Order 12291 and OMB's role thereunder that, in the view of many, brought about a substantial drop in

⁸⁴ 46 Fed. Reg. 13193 (Feb. 19, 1981), 5 U.S.C. § 601 note. This Order also requires that to the extent permitted by law the potential benefits of regulation outweigh potential costs, and that among alternative approaches the alternative involving the least net cost to society be chosen.

⁸⁵ 52 Fed. Reg. 41685 (Oct. 30, 1987).

⁸⁶ 5 U.S.C. §§ 603, 604.

⁸⁷ 42 U.S.C. § 4332(2)(C).

⁸⁸ The Guidelines instruct that for "major" and other regulations submitted to OMB under Executive Order 12291, the agency should include "a discussion summarizing any identified taking implications, and addressing the merits of the regulations in light of those implications." This "discussion" is apparently distinct from the TIA, which the Guidelines declare shall be made available "upon request" of OMB.

federal regulations promulgated during the Eighties.⁸⁹ One commentator describes a pervasive OMB input into EPA decisionmaking under 12291.⁹⁰ Still, if agency efforts to exclude the majority of their actions through categorical exclusions are approved by the Justice Department, Executive Order 12630 may yet prove a minor hindrance compared to its predecessors.

A second practical issue is the public obtainability and litigation discoverability of documents prepared pursuant to the Executive Order, an issue fueled by concern that availability of such documents might invite taking litigation rather than discourage it. The Order states that it "is intended only to improve the internal management of the Executive Branch and is not intended to create any right or benefit ... enforceable at law by a party against the United States ..."⁹¹ Based on this, the Administration has indicated it will assert the privilege for predecisional deliberative matter in discovery proceedings, and the Freedom of Information Act (FOIA) exemption for "inter-agency or intra-agency memorandums ... which would not be available by law to a party ... in litigation with the agency."⁹² Should the United States succeed in establishing the former, it will be entitled *ipso facto* to the latter.⁹³

Whether the Administration's theories will succeed in preventing disclosure is beyond the scope of this memorandum; pertinent case law is voluminous. We note only a Supreme Court ruling that if an agency in making a final decision "chooses expressly to adopt or incorporate by reference" a predecisional document, that document loses its protection under

⁸⁹ See, e.g., Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 Harv. L. Rev. 1059, 1063 n.17 (1986).

OMB figures document the decline in federal rulemaking during the Eighties, at least judged by annual figures on the number of pages and the number of final rulemaking documents in the Federal Register. OMB, *Regulatory Program of the United States Government* (April 1, 1988 - March 31, 1989) App. IV, Exhibit 16. Looking at the annual number of published rulemaking documents, some of the largest declines during the period are shown to be at the Environmental Protection Agency and the Department of the Interior. *Id.* at Exhibit 18.

⁹⁰ Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 1984 Virginia J. Nat. Res. L. 1 (1984).

⁹¹ Exec. Order No. 12630 § 6.

⁹² Marzulla, *The New "Takings" Executive Order and Environmental Regulation - Collision or Cooperation?*, 18 Env't'l Law Rptr. 10254, 10258 (1988). The quoted FOIA exemption, commonly called "Exemption 5," is at 5 U.S.C. § 552(b)(5).

⁹³ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

the FOIA exemption.⁹⁴ Disclosure is further mandated by the Guidelines themselves, which require that discussion of "significant taking implications" be included in notices of proposed rulemaking published in the Federal Register.⁹⁵ Hopefully, TIA estimates of property value loss will be devoid of detailed factual support, allowing the United States leeway to substitute more modest value-loss figures before a court. Still, a TIA assertion that the probability of taking is high at least makes it awkward for government litigators to later argue the contrary.

A minor issue raised by the Executive Order is the impact of taking awards on agency budgets. The Order instructs OMB to "take action to ensure that all taking awards levied against agencies are properly accounted for in agency budget submissions," said to require that after being paid out of the Judgment Fund,⁹⁶ taking awards are to be subtracted on a dollar-for-dollar basis from an agency's next-fiscal-year budget request to Congress.⁹⁷ Whether this provision will provoke a budget-conscious timidity among environmental program managers is impossible now to say: we are unable to ascertain from OMB the extent to which taking awards were set off against agency budgets prior to the Executive Order, and as previously noted the size of such taking awards is likely to be small.

Summary

We have concluded first that the majority of taking principles stated or implied in Executive Order 12630 overestimate the likelihood of a taking, and that the Order does not list most of the factors that cut against the occurrence of a taking. Second, there appears to be no justification in federal taking jurisprudence for the added demands imposed by the Order on government actions aimed at protecting public health and safety. Finally, by explicit text and practical effect the Order has the potential to burden implementation of federal environmental programs. Such potential may be substantially mitigated, however, by widespread use of categorical exclusions,

⁹⁴ *Id.* at 161 (emphasis in original).

⁹⁵ Guidelines at 23.

⁹⁶ 31 U.S.C. § 1304.

⁹⁷ Remarks of Assistant Attorney General Roger Marzulla before the United States Claims Court Bar, November 4, 1988.

Of course, Congress may, if it sees fit, disregard the budget request and appropriate an amount not including any Order-mandated reduction. As long as the agency's budget request itemizes this reduction, Congress is at least on notice.

generic TIAs, and other streamlining devices, and by the degree of flexibility shown by DOJ and OMB as they carry out their watchdog roles.



Robert Meltz
Legislative Attorney
American Law Division

The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?

by James M. McElfish Jr.

In its final year before the 1988 election, the Reagan Administration has issued a number of pronouncements attempting to cement in place several of the doctrinal changes it has wrought in the regulatory landscape over the past eight years. This recent efflorescence has included two sweeping executive orders—one on “Federalism,” designed to consolidate and ratify the “New Federalism” philosophy announced in the Reagan first term,¹ and another setting out limits upon federal regulation, entitled “Government Actions and Interference With Constitutionally Protected Property Rights.”² This latter Executive Order, while premised on “takings” jurisprudence under the Fifth Amendment, is more fundamentally a restatement of the Administration’s core political philosophy of minimizing the intrusiveness of federal regulation upon private interests.³

The “takings” Executive Order is purportedly a response to two recent Supreme Court decisions—*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*⁴ and *Nollan v. California Coastal Commission*.⁵ But it goes beyond the holdings in either decision to prescribe for the federal government a strict regime of regulatory self-restraint. The Order has three features that will make the task of regulation more difficult. These are: (1) the Order’s requirement that agencies prepare and submit to the Office of Management and Budget (OMB) takings implication assessment documents with proposed governmental actions that may affect private interests; (2) the requirement that no action be taken to regulate use of property unless the restriction or condition imposed will “substantially advance” the “same” governmental purpose as an outright governmental prohibition of the use or activity; and (3) the requirement that governmental regulation of any private property use may not be “disproportionate” to that use’s contribution to the “overall problem” that the regulation is designed to redress.

A further feature of the Order should prove illuminating. The Order requires federal agencies to report on previous regulatory “takings” adjudications, and to update that information annually. This requirement should aid governmental decisionmakers by illustrating how seldom federal regulation is found to create a compensable “taking” within the meaning of the Fifth Amendment to the Constitution.

Mr. McElfish is a Senior Attorney at the Environmental Law Institute.

1. Exec. Order 12612, 52 Fed. Reg. 41685, ELR ADMIN. MATERIALS 45035 (Oct. 30, 1987). See Symposium, *The New Federalism in Environmental Law: Taking Stock*, 12 ELR 15065 (1982).
2. Exec. Order 12630, 53 Fed. Reg. 8859, ELR ADMIN. MATERIALS 45037 (Mar. 18, 1988).
3. Marzulla, *The New “Takings” Executive Order and Environmental Regulation—Collision or Cooperation?*, 18 ELR 10254 (July 1988) discusses the Order, drafted by the President’s Task Force on Regulatory Relief. Assistant Attorney General Marzulla emphasizes the jurisprudential basis for the Order, portraying it simply as the logical governmental response to two Supreme Court decisions discussed *infra*.
4. 107 S. Ct. 2378, 17 ELR 20787 (1987).
5. 107 S. Ct. 3141, 17 ELR 20918 (1987).

The Takings Implication Assessment

The Executive Order provides that, with certain enumerated exceptions, federal agency heads must evaluate the takings implications of proposed federal policies and actions—including proposed legislation and regulations—that affect or may affect the use of or interests in private property.⁶ The primary vehicle for this evaluation is the “takings implication assessment” (TIA).⁷ The TIA is another regulatory “hoop” for governmental regulators. It resembles the Regulatory Impacts Analysis (RIA) already required under Executive Order 12291, which was the Reagan first term effort designed to gain control over the federal bureaucracy in order to prevent perceived over-regulation.⁸ The TIA is an additional requirement designed to make agencies take a “hard look” at their proposed policies, actions, and regulations affecting private interests. It must be included in any submissions to the Office of Management and Budget—already required by Executive Order 12291—and undoubtedly will give OMB further control over regulations and policy decisions.

As both the Executive Order and the Justice Department Guidelines interpreting the order make clear, the TIA dictates a policy choice of the alternative that poses the “least risk” to private interests.⁹ This is an interesting variation of risk assessment, which Congress more typically structures so as to compel the agencies to adopt policies and regulations that produce the least risk to *public* interests (i.e., health, safety, environment).¹⁰

The TIA must analyze the extent to which the proposed action will interfere with private property interests, applying the “governmental purpose” and “proportionality” tests discussed *infra*. In addition, it must arrive at a dollar “estimate” of the potential Tucker Act liability of the government should the action, legislation, or regulation be found to be a taking. Interestingly, this latter requirement only applies to “proposed action[s] regulating private property use for the protection of public health or safety.”¹¹ This is probably due to a drafting error in the Order

6. The Order exempts actions abolishing regulations, discontinuing governmental programs, or modifying regulations in order to lessen restrictions on the use of private property. It also exempts various law enforcement and military-related functions, planning and research, and communications with state or local land-use planning agencies. Exec. Order §2, ELR ADMIN. MATERIALS 45037.
7. This is the term coined by the Justice Department in its “Guidelines implementing the Executive Order under §1, ELR ADMIN. MATERIALS 45037. Attorney General’s Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings 21 (June 30, 1988), ELR ADMIN. MATERIALS 35172 [hereinafter Guidelines].
8. 3 C.F.R. §127, ELR ADMIN. MATERIALS 45025 (Feb. 17, 1981).
9. Guidelines, *supra* note 7, at 2, ELR ADMIN. MATERIALS 35168 (“those instances in which a range of alternatives are [sic] available each of which would meet the statutorily required objective, prudent management requires selection of the least risk alternative.”)
10. For example, Congress required that the primary national ambient air quality standards (NAAQSs) Clean Air Act under §109 provide for protection of public health with an “adequate margin of safety.” 42 U.S.C. §7409, ELR STAT. CAA 007. Compare Safe Drinking Water Act §1401, 42 U.S.C. §300f, ELR STAT. SDWA 4110.
11. Exec. Order §4(d), ELR ADMIN. MATERIALS 45038. Assistant Attorney

itself; the Justice Department's Guidelines make no such distinction. Under the Order as issued, however, regulatory actions aimed at the general public "welfare" (as opposed to health and safety) are arguably subject to *less* internal scrutiny.¹²

The TIA process is peculiar in a number of ways. First, it will clearly require a great deal of staff time to implement. The agencies are even now engaged in drafting their "supplemental guidelines" under §5(e)(2) of the Order in cooperation with the Department of Justice. The agencies are attempting to develop valuation methodologies and internal guidance for the implementation of the ongoing TIA requirements. Staff economists and policymakers are devoting considerable efforts to this task. An agency official must be designated as the TIA compliance official. Each future rulemaking package, policy, legislative proposal, and other action must be accompanied by a completed TIA. When added to the existing RIA requirements, Paperwork Reduction Act requirements, small business impact analyses, National Environmental Policy Act (NEPA) obligations, and internal agency and OMB review, the TIA may well be the innovation that finally paralyzes the federal bureaucracy.

Second, the TIA appears to run counter to the protection of the public fisc. The creation of documents in the rulemaking record, or permit or policy record, that (1) actually assess takings possibilities in terms of "likelihoods" that these actions will be found to be takings, and (2) "estimate" probable dollar exposures, can only encourage litigation challenging those governmental actions that do occur and those regulations that are adopted.¹³ The assertion that the TIA and related materials are pre-decisional documents will not necessarily protect them from disclosure in civil discovery.¹⁴ Although the Executive Order contains the usual *caveat* that it is "not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States,"¹⁵ the government's own estimates set forth in the TIA will

clearly be at least evidentiary in any action challenging a federal regulation, permit condition, or permit denial as taking in violation of the Fifth Amendment. It is likely that the Department of Justice lawyers handling the Tucker Act dockets will not find their task simplified by the existence of TIAs assessing the likelihood of takings findings and assigning a probable value.¹⁶

The "Substantially Advances" the Governmental Purpose Provisions

The Executive Order contains provisions that require that governmental agencies restrain themselves from marginal improvements in public health, welfare, and safety. It provides:

When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

- (1) Serve the *same purpose* that would have been served by a prohibition of the use or action; and
- (2) *Substantially advance* that purpose.¹⁷

• • •

Before undertaking any proposed action regulating private property use for the protection of public health and safety, the Executive Department or agency involved shall . . . :

- (2) Establish that such proposed action *substantially advances the purpose* of protecting public health and safety against the specifically identified risk.¹⁸

These provisions purport to find their basis in the "nexus" requirement enunciated by the Supreme Court in *Nollan v. California Coastal Commission*.¹⁹ In *Nollan*, the Court held that the California Coastal Commission's attempt to require private property owners to convey a public access easement across their beachfront as a condition of receiving a building permit gave rise to a taking. In its analysis the Court said that if an outright ban on an activity were sustainable as a noncompensable exercise of the police power, a less burdensome condition could also be upheld (and not give rise to a taking) if it served "the same governmental purpose" as the ban. The Court also referred to the "substantially advance the legitimate state interest" language found in *Agins v. City of Tiburon*,²⁰ stating that "we are inclined to be particularly careful about the adjective where the actual conveyancing of property is made a condition to the lifting of a land use restriction."²¹ Ultimately, the Court concluded that there was

General Marzulla appends the words "or for other purposes" outside the quotation marks in his discussion of the TIA requirement under this section. See Marzulla, *supra* note 3, at 10258.

12. This contrasts with the usual takings analysis employed by the courts, wherein health and safety regulation receives *greater* deference than measures aimed at the general public "welfare." E.g., *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S. Ct. 1232, 17 ELR 20440 (1987). Of course, if the omission of "welfare" in this section of the Order were deliberate, it may be that the Administration intended its agencies to apply *greater* scrutiny precisely in those areas where it knew the courts would not. It is most probable, however, that the Order was drafted with less care than it might have been and that all actions were intended to be subject to the same basic TIA requirements, relying on §5(b) of the Order, ELR ADMIN. MATERIALS 45038.
13. Indeed, under the Order the estimated dollar value must be assigned even if the risk of a takings finding is deemed to be low. See, e.g., Guidelines, *supra* note 7, at 22, ELR ADMIN. MATERIALS 35173. This requirement creates potentially adverse material in the administrative record should someone subsequently bring a Tucker Act claim challenging the governmental action. Given that most regulatory and permitting activity is *required* by statute, the rules will be adopted and actions will be undertaken. They will merely hereafter be accompanied by documents potentially beneficial to private litigants.
14. Assistant Attorney General Marzulla suggests that the TIA will "normally" be exempt from production under the Freedom of Information Act, 5 U.S.C. § 552, ELR STAT. ADMIN. PROC. 011. Marzulla, *supra* note 3, at 10258. Like the RIA, however, the TIA will be part of the rulemaking record, and hence discoverable in actions challenging the federal rules.
15. Exec. Order §6, ELR ADMIN. MATERIALS 45039.

16. An additional peculiarity of the TIA process is that the designated Justice Department official for overseeing agency implementation (and who must be notified of the agency officials responsible for ensuring compliance with the Executive Order) is the Assistant Attorney General for the Lands and Natural Resources Division, rather than the Assistant Attorney General for the Civil Division. Guidelines, *supra* note 7, at 21, ELR ADMIN. MATERIALS 35172. One would expect that most regulatory defenses and the majority of the Tucker Act docket would be handled by the latter official. Clearly, the chief impetus for this Executive Order has come from Administration desires to control undue environmental and natural resources regulation.
17. Exec. Order §4(a), ELR ADMIN. MATERIALS 45038 (emphasis added).
18. Exec. Order §4(d), ELR ADMIN. MATERIALS 45038 (emphasis added).
19. 107 S. Ct. at 3147, 17 ELR at 20921. See Marzulla, *supra* note 3, at 10257.
20. 447 U.S. 255, 10 ELR 20361 (1980).
21. 107 S. Ct. at 3150, 17 ELR at 20922.

an insufficient nexus between the Commission's presumed-lawful ability to preserve visual access by denying the building permit outright, and its attempt to condition the permit in order to preserve lateral physical access (i.e., by requiring conveyance of an easement).

The Executive Order, however, goes well beyond the "nexus" requirement in *Nollan* in circumscribing federal permitting and health and safety regulation. It requires that if a condition is imposed it *must* serve the "same" purpose as a denial of a permit or prohibition of the activity, and that the condition or governmental regulation must "substantially advance" that purpose.²² In effect, the Order does not countenance either indirect regulation of activities, or the imposition of "optional" conditions.

Regulation and permitting actions, however, commonly include conditions that do not advance the "same" purpose as that which would be served by a denial or outright prohibition of a given activity. For example, government regulations may effectuate secondary purposes, or be designed to induce an unrelated but desired behavior (e.g., tax regulations imposing nondiscrimination requirements upon tax-exempt institutions; or Fair Labor Standards provisions applicable to government contractors). Licensing or permitting regulations also may have requirements or conditions that do not serve the same purpose as a "denial" of the license or permit (e.g., "fairness doctrine" requirements that broadcasters provide air time at no cost for responses on controversial issues).²³ A regulation need not serve the same purposes as a prohibition to be sustainable.

Similarly, many permits have conditions aimed entirely at providing greater ease in governmental oversight and enforcement. Specifications of reporting requirements, site access, monitoring equipment and monitoring frequency, for example, do not necessarily serve the "same" purpose as a "prohibition" of the regulated activity. Indeed, less intrusive provisions could probably be devised at less cost to the permittee and greater cost to the government (e.g., the government could conduct all sampling). Nevertheless, these enforcement-based conditions plainly satisfy the nexus test of *Nollan*.

The problem with the version of the nexus requirement set forth in the Executive Order is even more apparent when the "substantially advance" component of the requirement is examined. Many common permit provisions marginally advance the underlying governmental purpose, to the greater protection of the public health, safety, and welfare. Yet the Order states that "any" condition must not only serve the same purpose as a denial but must also "substantially advance" that purpose. This policy requirement may, in truth, be aimed at preventing the imposition of "nickel and dime" conditions upon hapless permittees by presumed overzealous governmental regulators. But it does not plainly flow from the *Nollan* decision.

22. In *Nollan*, the Court did not say that sustainability of a ban on an activity was the only test for a regulation or restriction. Indeed, many regulations are sustainable precisely because they are *not* a ban (or substitute thereof)—e.g., many regulatory permit schemes are sustainable, while an outright prohibition of the permitted activities might constitute a taking. The "nexus" requirement is only relevant where the claim is that the challenged action is less restrictive than a plainly lawful prohibition.

23. This example was, of course, itself the subject of deregulation efforts by the Administration prior to the recent "takings" decisions and Executive Order 12630.

The "substantially advance" language found in the majority opinion in *Nollan* is expressly drawn from *Agins v. City of Tiburon*. In *Agins*, the Court applied this standard to review a general zoning ordinance's effect on a parcel of property—viz. did the down-zoning of the appellants' property bear a substantial relationship to protection of public health, welfare, and safety? The Court found that the "general" scheme of regulation as applied to a particular property substantially advanced "legitimate state interests."²⁴ The substantiality test is not a requirement to conduct a condition-by-condition review of a permit to conduct a regulated activity. Rather it is used to evaluate the effect of the regulation as a whole. Thus, in *Nollan*, the Court held that the real effect of the challenged governmental action was to require conveyance of a public easement, and hence was not substantially related to the claimed public purpose.²⁵ The regulatory link between the scheme and the public purpose is the basis of the substantiality test. The Executive Order, however, looks not to the link between the overall regulatory scheme and a legitimate public purpose, but to condition-by-condition review.

In many permitting decisions, there are numerous permit conditions involved. Some of these "substantially advance" the governmental purpose that would be served by a permit denial. Other conditions contribute marginally to advance the governmental purpose. The latter are not constitutionally suspect by virtue of their limited intrusiveness. They in fact serve to protect public health, welfare, and safety. For example, permit conditions that specify a network of 12 monitoring wells rather than the minimum of 4 around a RCRA hazardous waste management unit may add only marginally to the protection of the public health and safety. But the regulatory scheme *as a whole* serves a legitimate public interest. Yet the Executive Order expressly directs agency decisionmakers that "any" permit conditions must "substantially advance"—not merely advance—the governmental purpose. This is not required by the Supreme Court decisions. Indeed, to the contrary, the courts give substantial deference to agency expertise in setting permit conditions in matters of public health and safety.

Agency decisionmakers should not be hamstrung by requirement to forego each and every condition that is not itself a "substantial" advancement of the underlying regulatory goal. Moreover, under the "takings" decision the "substantiality" consideration is at most one element in deciding whether a given scheme of regulation goes "too far."²⁶ Other elements include whether or not economically viable uses of the property remain. The Executive Order, however, makes this element *determinative* of the regulatory choice—thus precluding certain governmental actions or decisions that are not takings at all. This outcome clearly owes more to a political philosophy of regulation than to a neutral understanding of "takings" jurisprudence or to preservation of the public fisc.

24. 447 U.S. at 260, 10 ELR at 20362.

25. In *Nollan*, the Court found it unnecessary to decide how "substantial" a fit existed between the potential building permit denial and the permit condition requiring the landowners to convey a public access easement, holding that "this case does not meet even the most untailored standards" for the nexus. 107 S. Ct. at 3147, 17 ELR 20921.

26. "[I]f regulation goes too far it will be recognized as a taking." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

The Proportionality Requirement

The most unusual feature of the Executive Order is its creation of an entirely new requirement of "proportionality." The Order 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.²⁷

This provision is purportedly based on footnote four to the *Nollan* decision.²⁸ In that footnote Justice Scalia suggested that if the landowners in that case had been "singled out" to bear the burden of remedying a problem to which they had contributed no more than other coastal landowners, the governmental action at issue "might violate either the incorporated Takings Clause or the Equal Protection Clause."²⁹ This footnote is the jurisprudential underpinning for the new "proportionality" requirement.

But the proportionality (of a use's contribution to a public health, welfare, or safety problem vs. the solution of the problem) is not a takings issue at all. The proper inquiry is whether the state's action is a valid exercise of the police power—which must include its conformance to equal protection standards. Then, and only then, does the takings inquiry occur—*viz.* does this exercise of the police power destroy a distinct property interest so as to deny economically viable use of the property? The Court's hint that the legitimate governmental purpose of the regulation could be assessed by looking to whether certain costs should be borne by the public as a whole rather than a single property owner goes to whether there is a *scheme* plan of regulation (i.e., rather than a "spot zoning" norm of taking). Where a neutral scheme or plan exists, the governmental action is less likely to be deemed a taking, despite its impact on particular pieces of property.³⁰ Also, despite the import of the Executive Order to the contrary, the Court did not use the term "proportional" or "proportionality" in *Nollan*. Proportionality is not a takings test.

The Executive Order postulates that regulations must "fit the crime"—i.e., by "fixing" only that part of the "overall problem" caused by the regulated property owner. This position, however, is contrary to virtually every form of police power regulation of property. For example, zoning laws typically regulate *future* uses, while those past uses which contribute "proportionally" to creation of the "problem" (e.g., overcrowding, loss of green space, in-

adequate transportation and sewage capacity) are allowed to continue. Similarly, governments often regulate that portion of the problem-causing activity that is easiest to correct, most cost-effective to correct, or that must be regulated first as a practical precondition to further action. For example, although point source discharges contribute far less to the pollution of U.S. waterways than non-point sources (such as agricultural runoff, road salt, etc.), they were regulated first—and more stringently—than their "contribut[ion] to the overall problem" of water pollution. The same is true for the strict regulation of commercial hazardous waste treatment, storage, and disposal facilities under RCRA. These are strictly regulated even though discharges of hazardous pollutants to sewer lines or land application of pesticides, which also contribute to the problem, are less strictly regulated. Oil and gas industry wastes were excluded from regulation as hazardous wastes under RCRA because of congressional judgments about the effect of such requirements upon the industry. Their exclusion means that other hazardous waste generators are bearing a "disproportionate" share of the cleanup and prevention responsibilities. Nearly every police power regulation falls disproportionately upon some segment of the industry, the general population, or property owners.³¹

Moreover, the very nature of governmental regulation requires that proportionality (i.e., fairness) be only one of many components considered in protecting the public health, welfare, and safety.³² The Executive Order, however, makes it determinative. By casting the issue in terms of the specific contribution to the "overall problem," the Order potentially thwarts creative, closely targeted, cost-effective solutions to serious problems of health, pollution, worker safety, and the like.

If applied, the new "proportionality" requirement will make rational regulation extremely difficult. The solutions to problems of public health, welfare, and safety are rarely mirror images of the conditions that led to their creation. Some forms of regulation or technical solutions for some contributing factors will remain unknown. Shall the government make no attempt—or only a "proportional" attempt—to solve a problem where certain contributing factors are beyond its reach? The Executive Order's requirement that government shall not burden any property owner with regulation beyond its own contribution to the "overall problem" reflects a political philosophy far more than a response to extant takings law.

The Beneficial Provision: An Inventory of Prior Regulatory Takings

Along with the three problematic provisions—the TIA, the "substantially advance" test, and the "proportionality" test—the Executive Order contains one very useful provi-

27. Exec. Order §4(b), ELR ADMIN. MATERIALS 45038.

28. See, e.g., Marzulla, *supra* note 3, at 10257 ("The *Nollan* decision contributes to the evolution of regulatory takings law by setting forth the principles of 'nexus' and 'proportionality'."). The Guidelines expressly rely on footnote 4 to the *Nollan* decision as creating the proportionality "principle." Guidelines, *supra* note 7, Appendix at 9, ELR ADMIN. MATERIALS 35177.

29. 107 S. Ct. at 3148 n.4, 17 ELR at 20920 n.4. The point was not expanded upon in the text, and the throwaway nature of the footnote was made clear both by Justice Scalia's use of the word "might," and the Court's further observation that "that is not the basis of the *Nollan*'s challenge here." *Id.*

30. See, e.g., Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 8 ELR 20528 (1978), cited in *Nollan*, 107 S. Ct. at 3146, 17 ELR at 20920 (upholding scheme of historic preservation against challenge that it "took" individual structures for the benefit of the public).

31. A proportionality standard is inconsistent with technology-based solutions as well. If we can achieve meaningful air quality improvements through reducing emissions by 90 percent from a class of industry, but such industry is only 20 percent responsible for the "overall problem" of air pollution, shall we limit our regulation of that industry so that we achieve no more than 20 percent of our overall reduction by regulating its emissions?

32. The proportionality feature of the Order is in some respects reminiscent of the recent Superfund Amendments and Reauthorization Act debate on who should pay for Superfund—manufacturers or chemical companies.

sion. It requires all departmental and executive agency heads to submit to the Office of Management and Budget by May 16, 1988, an "itemized compilation" of all takings awards made against rules and regulations of the respective agencies in Fiscal Years 1985, 1986, and 1987.³³ Such compilations are thereafter to be updated annually.³⁴

The value of this provision is that it should reveal the limited scope that the "takings" clause plays in ordinary governmental regulation and permitting. Claims dockets may be high, but actual awards against regulatory programs are infrequent and low. The data show that Executive Order 12630 is largely a philosophy of regulation built on a slim factual and jurisprudential foundation.

According to OMB, in response to a request under the Freedom of Information Act, the "takings" reports filed by the agencies pursuant to the Executive Order show no regulatory takings awards against the government in fiscal years 1985, 1986, and 1987. For its part, the Land and Natural Resource Division of the Justice Department filed its entire Tucker Act "takings" award figures for those three years. These were \$23.1, \$5.5, and \$20.2 million, respectively. Of these figures, the vast majority were traditional nonregulatory takings.³⁵ There is no substantial

record of takings by permit or regulation. Thus, the rationale of protecting the federal treasury through the Executive Order is unsupported by the data or recent judicial experience. The recent and continuing flurry of procedures, guidelines, economic analyses, and the like under the Order has undoubtedly already exceeded in cost the successful takings claims likely to be avoided.

This factual record makes it difficult to assess the effect, if any, of the Executive Order in avoiding future claims and awards. If, as is apparent, most or all regulatory takings claims are currently unsuccessful, then it is also apparent that even without the Executive Order the government has not engaged in significant regulation taking private property without just compensation. The claimed prophylactic effect of the Executive Order is unnecessary. As a result, it is difficult to understand why the Order has been issued at all, except as a statement of regulatory philosophy—or as a technical means of slowing the pace of regulation. It has little to do with judicial realities in defending governmental actions against private claims.

undation of private property by federal dams. Of the \$23.1 million listed for fiscal year 1985, \$21.0 million fit into these traditional takings categories. Likewise, \$4.1 million of the \$5.5 million in fiscal year 1986, and \$14.1 million of the \$20.2 million in fiscal year 1987 plainly fit into these categories. The remainder of the claims, with few exceptions, were simply not sufficiently characterized to permit a clear assessment as to whether any might be deemed "regulatory" takings. The bulk of the unclassified amount for fiscal year 1987 is a \$5.5 million settlement for cancellation of the Fort Chafee oil and gas leases, which might conceivably be a one-time regulatory taking

33. Exec. Order §5(c), ELR ADMIN. MATERIALS 45038.

34. Exec. Order §5(d), ELR ADMIN. MATERIALS 45038.

35. The takings awards and settlements listed by the Department of Justice involved property claims related to inclusion of lands within national park and wilderness area boundaries, claims against the government by its lessors and contractors, and claims involving in-

3/1/94 6pm.

Martin -

This draft is very rough. The policy stuff needs much more work. I also have not finished working through the CRS memo. I will be around tomorrow morning to meet on this. I'm planning to go to the conference from 12-4. Let me know about the meeting. Lisa

DRAFT

March 1, 1994

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT**

MEMORANDUM FOR MARVIN KRISLOV
SPECIAL COUNSEL TO THE PRESIDENT

FROM: LISA KRIM
LEGAL INTERN

SUBJECT: Constitutionality of Executive Order 12630

This memorandum focuses on the parts of Executive Order 12630 that are inconsistent, to one degree or another, with Supreme Court takings jurisprudence. The language of the Executive order is in bold, followed by a discussion of the problems with that particular language and, in some cases, indicates how the draft Clinton Executive Order would handle the issue.

Physical Invasions

3(b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

Saying that a physical invasion or occupancy of private property may constitute a taking is basically consistent with current Supreme Court holdings. In Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), the Court said that regulations that result in physical invasions "are compensable without case-specific inquiry into the public interest advanced in support of the restraint." Id. at 2893. The Court relied on Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

The Executive Order, however, is not entirely precise because it does not make clear the distinction made by the Court between temporary and permanent physical invasions. The Court said that, "(at least with regard to **permanent** physical invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." 112 S. Ct. at 2893 (emphasis added). In contrast, temporary invasions seem to be governed by First English Evangelical Church of

Glendale v. County of Los Angeles, 482 U.S. 304 (1987). In that case, the Court held that "'temporary' 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." Id. at 318.

The Court cases thus leave open whether a regulation which temporarily deprives a landowner of part of the economic benefit or use of his property should constitute a compensable taking. The Executive Order does nothing to fill in this gap in the law. It merely says that a physical invasion "may constitute a taking." Critics of the Executive Order say that this language "may be attempting to create a new, vague factor for finding a taking, and one that the Supreme Court has never articulated."¹ These critics also argue that the second sentence in this section of the Executive Order is "directly incorrect when it conjoins less than complete deprivation with the principle of temporary takings." Id. In First English, the Court specifically limits its holding to the facts of the case in which the landowner was denied all use of its property, 482 U.S. at 321, while the Executive Order says that "less than complete deprivation of all use or value" may constitute a taking.

Draft Executive Order

The draft Clinton Executive Order makes no specific distinction between ~~of~~ physical takings or takings that substantially affect the value or use of land, and takings that minimally or temporarily decrease the value or use of land. It avoids the problems of Executive Order 12630 by not trying to explain what may or may not constitute a taking.

Health and Safety Regulations

3(c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.

This section of the Executive Order is problematic because it misstates the test used by the Supreme Court to determine when

¹Jerry Jackson & Lyle D. Albaugh, A Critique of the Takings Executive Order in the Context of Environmental Regulation, 18 ELR News & Analysis 10463, 10465 (November 1988).

takings occur, and it raises a higher barrier to health and safety regulations than to other types of regulations.²

Misstatement of the Test

In Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), the Court says, "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Id. at 834. (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)). However, the Court recognizes that it has never clearly set out a standard for when regulations "substantially advance" a state interest, nor what constitutes a "legitimate" state interest. Id. The Executive Order implies that health and safety regulations that deprive private owners use of their land will constitute takings unless they "advance significantly" the health and safety purpose. Not only does the Executive Order use a word ("significantly") that is not used by the Court in its test, but it also limits legitimate state purposes to health and safety purposes while the Court holds that "a broad range of governmental purposes and regulations satisfies these requirements." Nollan, 483 U.S. at 824-25.

The Lucas case, decided since the Executive Order took effect, shows that the Executive Order continues to conflict with the direction and intent of the Court's takings jurisprudence. In Lucas, the Court explains that, while early opinions allowed the government to regulate "harmful or noxious uses" of property without compensation, the contemporary test is whether the land-use regulation "substantially advances legitimate state interests." 112 S. Ct. at 2897 (quoting Nollan, 483 U.S. at 834). The Court says:

The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one

112 S. Ct. at 2897.

Thus in Lucas, the Court requires a substantial advancement of state interests and considers those interests to be quite broad, in contrast to the Executive Order which requires significant advancement of a health and safety purpose. Critics of the Executive Order explain that, while the "harmful or noxious uses" test (sometimes referred to as the "nuisance exception") was "clearly intended to narrow the circumstances in which regulatory action will result in a judicially determined taking, the

²See Jackson & Albaugh at 10465-66.

Executive Order transforms it into a limitation on when agencies may regulate for health and safety purposes."³

Higher standard

Critics of the Executive Order point out that a second problem with this section is that it erects a higher barrier to health and safety regulation than other types of regulations. Under the Executive Order, it appears that only health and safety regulations, and not welfare regulations, for example, must be based on a showing of "real and substantial threats."⁴

The Executive Order also requires that the regulations be "no greater than necessary" to achieve the health and safety purpose. Critics point out that this is in direct conflict with the Court's statement in Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 487, n.16 (1987), where the Court recognizes that the fact that "land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it." Id. The critics argue that the Court's approach is preferable because it allows Congress or the agencies to determine how much to regulate, instead of using takings law to over constrain agency action.⁵

Draft Executive Order

The draft Clinton Executive Order makes no special distinctions for health and safety regulations and, as discussed above, avoids the problems of Executive Order 12630 by not adding language foreign to Supreme Court takings jurisprudence in an effort to define what may or may not constitute a taking.

Temporary Takings

3(d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use is interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

4(c) 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.

³Jackson & Albaugh at 10466.

⁴Jackson & Albaugh at 10466.

⁵Jackson & Albaugh at 10466.

These two sections of the Executive order are both inconsistent with Supreme Court language. As discussed above, First English held that a taking occurs when a landowner is deprived of all use of his or her land, even if use is later restored. This appears to be the language upon which the Executive Order relies. However, First English is limited to its facts and the Court explicitly says that it does not deal "with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." 482 U.S. at 321.

Draft Executive Order

The draft Clinton Executive Order is written to be consistent with the Supreme Court cases. It says that when agencies formulate or implement policies with takings implications (defined as "actions that if implemented or enacted, could effect a taking pursuant to the Just compensation Clause of the Fifth Amendment to the United States Constitution"), they should "[a]void unnecessary delays in decision-making that impact on private property owners, even though such delay does not constitute a taking." (Emphasis added.)

Conditions on Permits

4(a) When an executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

- (1) Serve the same purpose that would have been served by a prohibition of the use or action; and
- (2) Substantially advance that purpose.

Critics of the Executive Order call this language in the Executive Order the "broadest leap beyond existing takings law."⁶ These critics argue that this language is based on Nollan, which, like First English, is an extremely narrow holding. Nollan established that "a classic right-of-way easement" is a "permanent physical occupation." 483 U.S. at 832 & n.1. Then the Court created an exception to the rule that all permanent physical invasions constitute takings. It said that regulations may place conditions on permits without creating a taking if the condition "serves the same legitimate police-power purpose as a refusal to issue the permit . . . and if the refusal to issue the permit would not constitute a taking." Id. at 836. Thus the Court has made it possible for the government, through

⁶Jackson & Albaugh at 10467.

regulation, to "extract a permanent physical invasion as a permit condition and do so free of a taking."⁷

Lucas reinforces the argument that the Nollan Court carved out an exception to the general rule that all permanent, physical invasions constitute takings. In Lucas, the Court lays out two discrete categories of regulatory action that are compensable without case specific inquiry into the public interest advanced in support of the restraint: physical invasions and regulations that deprive the owner of all economic beneficial or productive use of the land. 112 S. Ct. at 2893. The Court's one exception to this rule is that the government will not have to compensate landowners if the regulation prohibits a land use that would be prohibited under "background principles of nuisance and property law." Id. at 2901.

In contrast, the Executive Order appears to interpret Nollan as having placed additional restrictions on regulatory agencies' ability to impose conditions on permits. The Order goes further than any Supreme Court language in requiring that any condition on a permit must not only serve the same purpose as a prohibition on the activity would have served, but also "substantially advance" that purpose.

Two critics argue that "a Supreme Court decision that actually held that an uncompensated physical invasion may be effected in some circumstances through a permit condition has been tortured into a rule that all conditions in permits subject to the Order, whether or not they constitute physical invasions, are impermissible unless they meet a standard that was never articulated in that decision."⁸

Another critic of the Order points out the problem with this language:

Agency decisionmakers should not be hamstrung by a requirement to forego each and every condition that is not itself a "substantial" advancement of the underlying regulatory goal. Moreover, under the "takings" decisions the "substantiality" consideration is at most one element in deciding whether a given scheme of regulation goes "too far." . . . The Executive Order, however, makes this element determinative of the regulatory choice--thus precluding certain governmental actions or decisions that are not takings at all.⁹

⁷Jackson & Albaugh at 10468.

⁸Jackson & Albaugh at 10468.

⁹James M. McElfish, Jr., The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?, 18 ELR 10474, 10476 (November 1988)(footnotes omitted, emphasis in

Some of the critics also find fault with the Attorney General's Guidelines issued under this Executive Order that deal with permit programs. The Guidelines say that agencies should consider that placing a condition on a permit "risks a takings implication" unless the condition meets the requirements spelled out in the Executive Order. Guidelines at V(C)(1). The Guidelines appear to give the agencies more flexibility in determining when to use conditions, allowing them to make an assessment, instead of imposing mandatory requirements that the conditions substantially advance the same purpose as would a prohibition. Yet, the critics argue that the Guidelines reflect the same misreading of Nollan as the Executive Order and thus create the same chilling effect on agency action that is inconsistent with the Supreme Court cases.¹⁰

In a memorandum on December 14, 1994 to Linda Lance and Kumiki Gibson, Peter Yu took the position that Nollan should be read narrowly and that the "same purpose" test should only apply to cases in which the condition imposed in an easement or other physical occupation.

Draft Executive Order

The draft Clinton Executive Order addresses conditions on permits by instructing agencies to "carefully tailor any conditions imposed upon the granting of a permit to minimize any unnecessary burdens on private property caused by such conditions, whether or not such burdens constitute a taking." This provision is consistent with the more narrow reading of Nollan and with the Lucas decision. Specifically, it again leaves the determination of what constitutes a taking to the courts and does not try to mandate additional requirements on agencies that wish to condition grants of permits.

Proportionality

4(b) 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.

This language in the Executive Order is problematic because it is based on dictum in Nollan and directly contradicts Keystone. In Keystone, the Court said, "The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received." 480 U.S. at 491 n.21. In Nollan the Court articulated the concept of proportionality and

original).

¹⁰Jackson & Albaugh at 10468-69.

said that one principle underlying the Takings Clause is that the Government should not be allowed to place a burden on a few individuals that should be borne by the public as a whole. 483 U.S. 835 n.4. But they also observed that this proportionality theory "is not the basis of the Nollan's challenge." Id.

This language in the Executive Order also fails to embody two other concepts that run through Supreme Court takings cases. First is that "everyone can be expected to bear burdens to promote the public good."¹¹ This principle counteracts the proportionality emphasis in the Executive Order. A second principle emphasized by the Supreme Court, but ignored by the Executive Order, is the concept of reciprocity. In Keystone, the Court notes that, "while each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions placed on others." 480 U.S. at 491. The Guidelines direct agencies to consider this concept of reciprocity, but limit its applicability to situations where the benefit to the private property owner directly offsets economic impacts to the use or value of the land.¹² Guidelines V(D)(2)(b)(iv)

Critics of the Executive Order point out one other flaw with the Guidelines. They note that the Guidelines assert that "[t]he 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." Guidelines V(D)(2)(a)(iii). They point out that the Appendix to the Guidelines contains no authority for this theory.¹³

Draft Executive Order

The draft Clinton Executive Order imposes no specific proportionality requirement.

Policy Issues

-Chilling effect on agencies (the expense and difficulty of the "takings implication assessment")--see Jackson and Albaugh at 10471. The draft order appears to streamline this requirement while allowing monitoring of the costs and frequency of takings claims. The draft gives the agencies far more flexibility, eliminating the Attorney General's guidelines, requiring agencies to consult with the Attorney General only if they need assistance.

¹¹Jackson & Albaugh at 10470. The authors find this concept expressed in Connolly v. Pension Benefit Guaranty Co., 475 U.S. 211, 225 (1986).

¹²Jackson & Albaugh at 10470.

¹³Jackson & Albaugh at 10470.

--Duplicative--makes the law more mucky, not clearer to have the E.O. on top of the case law, also, doesn't keep up with evolving case law.

--Separation of powers--Jackson and Albaugh argue that the proportionality requirement in the Executive Order creates a separation of powers problem because it limits the regulatory agencies' authority to deny permits.

NEWS & ANALYSIS

Get p - 10470

DIALOGUES

Editors' Summary: On March 15, 1988, President Reagan signed Executive Order 12630 entitled "Governmental Actions and Interference With Constitutionally Protected Property Rights." In the July issue of ELR, Roger Marzulla, head of the Land and Natural Resource Division of the U.S. Department of Justice, described the genesis of the takings Executive Order and how it might affect environmental regulation. Mr. Marzulla characterized the Order as a logical response to two 1987 regulatory takings decisions by the Supreme Court and concluded that the Order provides a systematic method for agencies to account for the takings implications of their actions without necessarily hindering vigorous enforcement of environmental laws. The authors of the two Dialogues that follow take a different view of the Executive Order. They assert that the Order imposes on federal agencies an expanded view of takings law not warranted by Supreme Court decisions, will not achieve its stated purposes, and will make environmental regulation more difficult.

A Critique of the Takings Executive Order in the Context of Environmental Regulation

by Jerry Jackson and Lyle D. Albaugh

On March 15, 1988, the White House released Executive Order 12630 entitled "Governmental Actions and Interference With Constitutionally Protected Property Rights."¹ The Executive Order purports to address the issue of whether federal regulatory action affecting private property results in a taking or inverse condemnation subject to the Just Compensation Clause of the Fifth Amendment. The Executive Order describes its two purposes as (1) ensuring that federal agencies act "with due regard for the constitutional protections provided by the Fifth Amendment," and (2) reducing "the risk of undue or inadvertent burdens on the public fisc resulting" from agency action.²

The Executive Order fails its first purpose because it does not accurately describe current takings law as articulated by the Supreme Court. In fact, the document seeks to impose on federal agencies a view of takings law that is well beyond the point reached by the Supreme Court on inverse condemnation. Therefore, the Executive Order cannot en-

sure that the agencies act with due regard for the Just Compensation Clause, because it asserts that certain actions are or may be takings when in fact such actions have not been found to be takings by the Supreme Court. Also, the Executive Order implies that the Fifth Amendment create a constitutional protection of private property against inverse condemnation.³ In contrast, the Supreme Court has held that the Just Compensation Clause merely ensure compensation for such takings and does not bar inverse condemnation.⁴

3. Agencies are directed to "evaluate carefully the effect of their . . . actions on constitutionally protected property rights." Exec. Order 12630, §1(b), ELR ADMIN. MATERIALS 45037. The Guideline promulgated by the U.S. Department of Justice pursuant to the Executive Order direct agencies to "minimize the impacts of [their] activities on constitutionally protected private property rights." Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings 2 (June 30, 1988), ELR ADMIN. MATERIALS 35168 [hereinafter Guidelines]. Neither document identifies any "constitutionally protected property rights."

4. "[T]he Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of an otherwise proper interference amounting to a taking." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2386, 17 ELR 20787, 20790 (1987) (emphasis in original). Cf. Hodel v. Irving, 107 S. Ct. 2076 (1987) (invalidating statute as unconstitutional violation of just compensation clause because it effected takings and contained no express provision for compensation) and Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016-1017, 14 ELR 20539, 20546 (1984) (refusing to enjoin application of statute on ground of potential taking so long as statute did not express abrogate right to seek compensation in Court of Claims).

Mr. Jackson is an associate with the Washington, D.C., office of Skadden, Arps, Slate, Meagher & Flom. He was formerly an attorney with the National Wildlife Federation in Washington, D.C. Mr. Albaugh is a third-year student at the University of Pennsylvania School of Law. The authors gratefully acknowledge the assistance of Erik J. Myers, a Senior Attorney at the Environmental Law Institute, in reviewing this Dialogue. The views expressed in this Dialogue do not necessarily reflect the views of Skadden, Arps, Slate, Meagher & Flom.

1. Exec. Order 12630, 53 Fed. Reg. 8859, ELR ADMIN. MATERIALS 45037 (Mar. 18, 1988).

2. Exec. Order 12630, §1(c), ELR ADMIN. MATERIALS 45037, 57

As for the second purpose, the Executive Order never defines or describes "undue or inadvertent burdens on the public fisc" resulting from agency actions that may result in takings. Unless a federal statute provides otherwise, federal agencies are limited to the factors prescribed in their authorizing statute and regulations when making decisions on the application of federal regulatory authority to private property.⁵ For example, whether a permit denial may be construed by a court to effect a taking is not a relevant factor in an agency's decision to grant or deny the permit, absent express legislative authority making it a factor.⁶ As a result it is logical to conclude that agency actions that may be construed as takings are not "undue or inadvertent" so long as they are not arbitrary, capricious, unlawful, or outside of the authority granted by the enabling legislation.⁷ Of course, if agency regulatory actions fail to meet the test of the Administrative Procedure Act (APA)⁸ (if applicable) or they are beyond the scope of the agency's authority, they are subject to invalidation by a federal court, which would obviate any claim of a taking.⁹ Therefore, regulatory actions that may result in takings are either authorized and valid, in which case they are neither "undue nor inadvertent," or they are not, in which case they cannot withstand judicial scrutiny and, therefore, would not result in takings.¹⁰

Since neither stated purpose is valid or logical, one can conclude that the Executive Order's true purposes are unstated: to expand the circumstances in which a taking will be considered to have occurred and to "chill" the agencies from making regulatory decisions that may be construed as takings under existing inverse condemnation law as well as the expanded view of this law reflected in the Executive Order. Indeed, the Executive Order literally requires agencies to examine all regulatory actions that af-

fect private property to consider potential takings.¹¹ If the agencies thus apply the Executive Order, even day-to-day operations, such as routine consideration of permit applications that have no apparent takings implications, would become enmeshed in a review that is essentially judicial in nature. However, the Executive Order goes on to suggest that the delay engendered by the Order may itself raise the liability for a taking.¹² The document appears to be a parting legacy from an Administration hoping to impose its regulatory philosophy on future administrations.

Expansion of Takings Law

The Executive Order is intended to respond to two takings cases decided by the Supreme Court in 1987: *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*; and *Nollan v. California Coastal Commission*.¹³ The general thrust of the Executive Order reflects an interpretation of these cases as new takings law. However, to the extent these cases simply reiterate preexisting takings law there is no need for the Executive Order, because nothing has changed. To the extent some new takings law was arguably articulated in these cases, the Executive Order does not accurately reflect the holdings in these cases.

Diminution in Value

The Executive Order states that "[a]ctions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property."¹⁴ The reference to physical invasion presents nothing new. In fact, physical invasion was first recognized by the Supreme Court as a type of inverse condemnation over 100 years ago and was the only kind of implied taking so recognized for 50 years.¹⁵

The assertion that "regulations imposed on private property that substantially affect its value or use . . . may constitute a taking of property" is an example of the subtle way in which this Executive Order seeks to undermine

5. E.g.: "[O]n remand the Secretary must make new determinations based strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes If . . . [the] Secretary . . . took into account 'considerations that Congress could not have intended to make relevant,' his action proceeded from an erroneous premise and his decision cannot stand." D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1246-1247, 1 ELR 20572, 20579 (D.C. Cir. 1972), cert. denied, 405 US 1030 (1972), quoting *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (footnotes omitted).
6. "Normally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider" *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 13 ELR 20672, 20679 (1983). This implies that the Executive Branch cannot unilaterally create new "relevant" factors contrary to congressional intent.
7. See 5 U.S.C. §706(2)(A), ELR STAT. ADMIN. PROC. 007.
8. 5 U.S.C. §§500-559, 701-706, ELR STAT. ADMIN. PROC. 001.
9. In the event of invalidation it is possible that a claim may be stated for compensation for some period before the invalidation. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S.Ct. 2378, 17 ELR 20787 (1987), and discussion of that case in text accompanying notes 38-53 *infra*.
10. The Appendix to the Guidelines, *supra* note 3, impliedly recognizes this principle by pointing out that Congress is presumably empowered to statutorily prohibit agencies from committing takings except in specified circumstances, thus arguably making the existence of a taking a relevant factor. See Appendix to Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings at 5-6, ELR ADMIN. MATERIALS 35175 [hereinafter Appendix], citing *Southern California Financial Corp. v. United States*, 634 F.2d 521, 524 (Ct. Cl. 1980); *NBH Land Co. v. United States*, 576 F.2d 317, 319 (Ct. Cl. 1978). The Guidelines cite no statutes and the Executive Order is not limited in its application to only such statutes.

11. Exec. Order 12630, §2(a), ELR ADMIN. MATERIALS 45037.

12. Section 3(d), ELR ADMIN. MATERIALS 45038.

13. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378, 17 ELR 20787 (1987); and *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 17 ELR 20918 (1987). See Guidelines, *supra* note 3, at 1, ELR ADMIN. MATERIALS 35168. In the 1987 Term, the Court also decided another significant takings case, *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S. Ct. 1232, 17 ELR 20440 (1987). Although *Keystone* receives little attention in the Guidelines, it is a significant case because it reaffirms a number of takings law principles established before the 1987 Term.

14. Exec. Order 12630, §3(b), ELR ADMIN. MATERIALS 45038.

15. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872). Inverse condemnation was expanded to include other takings in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). See Meltz, *Revisiting the Law of Regulatory Takings: The Supreme Court's Decisions in Keystone, Nollan, and First English*, CONG. RES. SERV. REP. 87-959A, at 2-3 (1987) [hereinafter Meltz]; McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 ELR 10369, 10372 (1987). "When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982) (footnote omitted).

regulatory protection by chilling agency action.¹⁶ Strictly speaking, this excerpt may be accurate because of the word "may." However, inclusion of the same word strips this assertion of any value to agencies in determining whether a permit denial or regulation will effect a taking. Worse still, the Executive Order may be attempting to create a new, vague factor for finding a taking, and one that the Supreme Court has never articulated. Thus the Executive Order is calculated to gratuitously raise doubts about agency action as a taking without providing any guidance for assessment of whether a taking has occurred in the described situation and without being based on established takings law.

The next sentence in the Executive Order suffers from similar defects: "Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature."¹⁷ The reference to a taking through "less than a complete deprivation of all use or value" is seriously misleading because it states the reverse of Supreme Court holdings. The Supreme Court has expressly "reject[ed] the proposition that diminution in property value, standing alone, can establish a 'taking' . . ."¹⁸ The Court has also described a taking as occurring if a regulation "denies an owner economically viable use of his land . . ."¹⁹ Even complete elimination of "a beneficial use to which individual parcels had previously been devoted" does not constitute a taking.²⁰ In fact, the Court has rejected a takings determination in cases where the remaining value was only 13 to 25 percent of the unregulated value.²¹ These cases strongly imply that a taking is precluded if any economically viable use remains.²²

The same sentence is directly incorrect when it conjoins less than complete deprivation with the principle of temporary takings. *First Evangelical*, which established the principle of temporary takings, expressly limited its holding to circumstances "where the government's activities have already worked a taking of all use of property . . ."²³

Public Health and Safety Regulation

The Executive Order states that "[a]ctions to which this Order applies asserted to be for the protection of public health and safety . . . should be undertaken only in response to real and substantial threats to public health

and safety, be designed to advance significantly the health and safety purpose and be no greater than is necessary to achieve the health and safety purpose."²⁴ There is no basis in the 1987 trilogy of Supreme Court takings cases for the assertion that actions for protection of health and safety must be limited to "real and substantial threats" and designed "to advance significantly" such protection. The standard as articulated by the Court in the past and in these three cases is actually much broader.

Neither *First English* nor *Nollan* holds that the threat to the public health and safety must be "real and substantial." Instead, the Court in *Keystone Bituminous Coal Association v. DeBenedictis* restated well-established law that a taking occurs if the regulation "does not substantially advance a legitimate state interest."²⁵ The Court gave no indication that a threat to public health or safety must rise to the level of "substantial" to be considered a legitimate state interest. *Nollan* repeats the exact same language and explains, "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' . . . They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements."²⁶

The Executive Order is misleading because it suggests that a regulation or action that is arguably undertaken to protect health and safety must "be designed to advance significantly the health and safety purpose" or else it will be deemed a taking. Instead, the action need only "substantially advance" a "broad range of governmental purposes." Moreover, the Executive Order uses the word "significantly" rather than "substantially." It may be argued that "substantially" does not connote as high a standard as "significantly" but in any event the Executive Order provides no explanation for why it uses a different term than the one used by the Supreme Court. The Order does not explain whether a different standard is actually intended and, if so, the nature of the new standard, despite the Executive Order's purported intent of providing "guidance."

Even correctly stated, this standard is not new. That an ordinance must substantially advance a legitimate state interest was stated eight years ago by the Supreme Court in *Agins v. City of Tiburon*, citing a 1928 case, *Nectow v. Cambridge*.²⁷ Indeed, in *Nectow* the Supreme Court merely stated that an ordinance must "bear a substantial relation to the public health, safety, morals, or general welfare."²⁸ There is no apparent need to issue an executive order reminding the agencies of a 60-year-old case, especially when the Order does not accurately reflect the statement in that case. Besides, the enabling statute will normally provide the necessary public interest—protection of the environment or public health. If the agency's regulations are consistent with the statute's purpose, then the public interest test is met.

A clue to the origin of this limitation on health and safety regulations is provided by the Guidelines and Appendix

16. The Order does not define "substantially affect," giving rise to potential inconsistency in application by the agencies.

17. Exec. Order 12630, §3(b), ELR ADMIN. MATERIALS 45038.

18. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 131, 8 ELR 20528, 20535 (1978).

19. *Agins v. City of Tiburon*, 447 U.S. 255, 260, 10 ELR 20361, 20362 (1980) (emphasis added).

20. *Penn Central*, 438 U.S. at 125, 8 ELR at 20533.

21. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75 percent reduction); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87½ percent reduction). Both cases were cited by the Court in 1978 for the identical proposition. *Penn Central*, 104 U.S. at 131, 8 ELR at 20535.

22. "Land use restrictions . . . work a taking if they either (1) do not substantially advance a legitimate government objective, or (2) fail to leave the owner any 'economically' viable use of his property." Meltz, *supra* note 15, at 4 (first emphasis original, second emphasis added).

23. 107 S. Ct. at 2389, 17 ELR at 20791 (emphasis added). 59

24. Exec. Order 12630, §3(c), ELR ADMIN. PROC. 45038.

25. 107 S. Ct. 1232, 1242, 17 ELR 20440, 20443 (1987), quoting *Agins* 447 U.S. at 260, 10 ELR at 20362 (emphasis added).

26. 107 S. Ct. at 3146, 17 ELR at 20920 (emphasis added).

27. *Agins*, 447 U.S. at 260, 10 ELR at 20362, citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928).

28. 277 U.S. at 188.

promulgated by the U.S. Department of Justice pursuant to the Executive Order.²⁹ The Guidelines appear to derive the limitation on health and safety regulations from the so-called nuisance exception to the requirement for just compensation. The nuisance exception was recently restated in *Keystone*:

The special status of this type of state action [i.e., restraint of public nuisance] can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.³⁰

Although this language is clearly intended to narrow the circumstances in which regulatory action will result in a judicially determined taking, the Executive Order transforms it into a limitation on when agencies may regulate for health and safety purposes.

This problem is compounded by the Order's additional imposition of evidentiary requirements that may be stricter than those imposed by Congress in the enabling legislation or the APA or by the courts in reviewing agency action. For example, the Guidelines state that

the health and safety risk posed by the property use to be regulated 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.³¹

Further, the agencies "should" consider the "certainty that the property use to be regulated poses a health and safety risk in the absence of government action" as well as 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."³²

In contrast, agency action is normally subject to a much lower standard of proof of the relationship between the evidence of potential harm and the regulatory cure: "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"³³ At best, the Executive Order merely confuses the level of proof necessary for agency actions to withstand legal challenge. At worst, the Order seeks to limit regulatory actions to those meeting the higher level of proof notwithstanding the APA or relevant provisions of the applicable authorizing statute.

The Executive Order also seems to erect a higher barrier for health and safety regulatory actions than for other

types of regulatory actions. The required showings of "real and substantial threats" and "certainty of risk" seem to apply only to regulatory actions based on public health and safety; no similar requirements are imposed on other types of regulatory actions. As a result, agencies may be tempted to premise their regulatory actions on other purposes to avoid the restrictions of the Executive Order. This would indeed be an ironic result, because agencies concerned about potential takings might previously have been tempted to do just the opposite to take advantage of the nuisance exception, which itself is supposedly the source of the Order's restrictions on health and safety regulations.

This all presupposes that the Executive Order is intended to force agencies to tailor regulatory actions precisely to the level of provable contribution to the targeted harm. This is conceded by the Order's requirement that the regulatory action must "be no greater than is necessary to achieve the health and safety purposes."³⁴ Given the inherent imperfectibility of risk assessment, especially in the area of human health, this standard may be intended to encourage agencies to err in favor of underregulating a health threat rather than overregulating it. At any rate it is in direct conflict with *Keystone*: "That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no means for rejecting it."³⁵ The Supreme Court's approach is preferable because it leaves the decision of regulatory parameters up to Congress. Of course, Congress is free to delegate it to the agencies. However, in some situations, such as stratospheric ozone depletion, Congress may elect to overregulate before regulation can be precisely tailored to contribution, since it may be too late to take effective measures once the level of contribution is precisely determined.³⁶ Nonetheless, the Executive Order seems to be using the Just Compensation Clause as an excuse to impose a regulatory philosophy on the agencies notwithstanding different determinations that may have been made by Congress and reflected in enabling legislation.

Finally, the Executive Order ignores the fact that the failure of agency regulations to meet the standards imposed by the Order means, at most, that the agencies supposedly cannot invoke the nuisance exception. That fact alone does not transform a regulatory action into taking; it just removes the availability of an exception. Nonetheless, the Order's wording is such that it precludes agency actions based on health and safety considerations because they supposedly fail to meet the nuisance exception regardless of whether they would otherwise effect a taking under standards articulated by the Supreme Court.³⁷

29. Exec. Order 12630, §1(c), ELR ADMIN. MATERIALS 45037.

30. *Keystone*, 107 S. Ct. at 1245, n. 20, 17 ELR at 20445, n.20. The Guidelines' discussion of the Executive Order's health and safety regulation requirements cites a portion of the Appendix that discusses the nuisance exception and cites *Keystone* and other cases. Guidelines, *supra* note 3, at 15-16, ELR ADMIN. MATERIALS 35171; Appendix, *supra* note 10, at 12-13, ELR ADMIN. MATERIALS 35178.

31. Guidelines, *supra* note 3, at 15, ELR ADMIN. MATERIALS 35171.

32. Guidelines, *supra* note 3, at 16, ELR ADMIN. MATERIALS 35171.

33. Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co., 463 U.S. at 43, 13 ELR at 20676, quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). Under the APA, the agency may at most be subject to the substantial evidence test in certain circumstances. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414, 1 ELR 20110, 20113 (1971).

34. Exec. Order 12630, §3(c), ELR ADMIN. MATERIALS 45038.

35. 107 S. Ct. at 1243, n. 16, 17 ELR at 20444, n.16.

36. The Court has made it clear that the Commerce Clause (the source of constitutional power for most environmental regulation) provides Congress ample power to over- or underregulate as it sees fit in solving any particular problem: "[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." *Westfall v. United States*, 274 U.S. 256 (1927). Cf. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937) ("The Constitution does not forbid 'cautious advance, step by step,' in dealing with . . . evils . . .").

37. See Exec. Order 12630, §4(d), ELR ADMIN. MATERIALS 45038. Perhaps this is not the intent of the Executive Order and the language under discussion here is limited to agency assessments of whether the nuisance exception applies. However, neither the Order nor the Guidelines contains any such express disclaimer.

Temporary Taking

The Executive Order states that "a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred."³⁸ The Order also states that "[w]hen 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."³⁹ The Executive Order suggests that mere "delay" in processing a permit application is a factor in determining a taking or just compensation. These statements presumably react to *First English*, a decision involving unusual circumstances and a narrow holding.

First English involved an "interim" county ordinance in California prohibiting structures on land owned by a church in an area that had suffered severe flooding.⁴⁰ The landowner challenged the validity of the ordinance and sought compensation for the loss of use during the period the ordinance was in effect. The state trial court dismissed this portion of the suit under the theory that the state could elect to disown the ordinance if it were found to have created a taking.⁴¹ Therefore, the landowner could not state a claim for relief for loss of use, regardless of the disposition of the challenge to the ordinance's validity, or presumably could not do so until the county had the opportunity to abandon the ordinance if a taking were found. The state court of appeals affirmed.⁴²

The Supreme Court reversed on the narrow issue of whether a litigant may state a claim for an alleged taking through an absolute deprivation of all use of property by regulation, even though the loss of use may be temporary. The Court expressly declined to rule whether a taking had occurred under these alleged facts.⁴³ When the case is limited to only the result reached by the Supreme Court, its holding is extremely limited, hardly surprising, and largely irrelevant to the regulatory activities of most federal agencies.

For example, Federal Water Pollution Control Act (FWPCA) §404,⁴⁴ in conjunction with §301 of the Act,⁴⁵ prohibits the discharge of dredged or fill material into "navigable waters" absent a §404 permit. Although unpermitted discharges are banned, the statute does not contain an absolute ban on discharges of such materials; they simply must be accompanied by a permit which the U.S. Army Corps of Engineers annually issues by the thousands.⁴⁶ Sections 301 and 404 do not ban other activities in or affecting "navigable waters," and do not ban any activities outside of "navigable waters" even on parcels or tracts containing such waters.⁴⁷ In contrast, the *First English* ord-

inance banned all structures on all of the property in question with no provision for permitting any such structures.⁴⁸ The Court held that the landowner was entitled to state a claim alleging that the ordinance constituted a taking.⁴⁹ The Court has also held in a previous case that the mere assertion of §404 jurisdiction over privately owned wetlands cannot be challenged as a taking.⁵⁰

Since the circumstances presented in *First English* are unlikely to ever occur in the §404 regulatory program, and may not constitute a taking in any event, there seems no reason why that program should be directed to keep "the duration of the [permitting] process to the minimum necessary."⁵¹ *First English* directly repudiated this concern as well as the Executive Order's claim that "delay in processing may increase significantly the size of compensation due,"⁵² by excluding from its ruling "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."⁵³

Conditions

The Executive Order makes its broadest leap beyond existing takings law in the following directive:

Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

(1) Serve the same purposes that would have been served by a prohibition of the use or action; and

(2) Substantially advance that purpose.⁵⁴

Although this language is presumably based on the *Nollan* decision, there is in fact no legal basis for so restricting a regulatory agency's legislatively created power to impose conditions on permits. The *Nollan* decision created no new law relating to agencies' authority to condition permits "when implementing policies that have takings implications," or otherwise.

Nollan shares the same characteristic as *First English* in that the only new takings principle established by the case was exceedingly narrow and not particularly surprising. In addition, the new principle would seem to have little if any relation to most federal regulatory programs. Stripped of its dictum, *Nollan* established nothing more than the principle that "a classic right-of-way easement" is "a permanent physical occupation."⁵⁵ Once this point was reached, a compensatory taking seemed inevitable because "[w]hen

38. Exec. Order 12630, §3(d), ELR ADMIN. MATERIALS 45038.

39. Exec. Order 12630, §4(c), ELR ADMIN. MATERIALS 45038.

40. *First English*, 107 S. Ct. at 2381-2382, 17 ELR at 20788.

41. *Id.* at 2382-2383, 17 ELR at 20788.

42. *Id.*

43. *Id.* at 2384-2385, 17 ELR at 20789.

44. 33 U.S.C. §1344, ELR STAT. FWPCA 054.

45. 33 U.S.C. §1311(a), ELR STAT. FWPCA 025.

46. OFFICE OF TECHNOLOGY ASSESSMENT, WETLANDS: THEIR USE AND REGULATION 143-144 (1984).

47. The term "navigable waters" is defined by the Act to mean "waters of the United States," FWPCA §502(7), 33 U.S.C. §1362(7), ELR

STAT. FWPCA 058, which in turn has been construed by the Corps to include wetlands. 33 C.F.R. §328.3(b) (1987).

48. 107 S. Ct. at 2381-2382, 17 ELR at 20788.

49. *Id.* at 2387-2389, 17 ELR at 20791.

50. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-129, 16 ELR 20086, 20087-88 (1985).

51. Exec. Order 12630, §4(c), ELR ADMIN. MATERIALS 45038.

52. Exec. Order 12630, §3(d), ELR ADMIN. MATERIALS 45038.

53. 107 S. Ct. at 2389, 17 ELR at 20791.

54. Exec. Order 12630, §4(a), ELR ADMIN. MATERIALS 45038.

55. *Nollan*, 107 S. Ct. at 3145 & n.1, 17 ELR at 20919 & n.1.

faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking,"⁵⁶ an observation made by the Court nearly six years before the promulgation of the Executive Order.

Many observers, presumably including the authors of the Executive Order, have perceived *Nollan* as establishing new restrictions on the ability of regulatory agencies to impose conditions on permits the denial of which might otherwise constitute a taking. In reality, the case actually achieved just the opposite: the Court created an exception to the rule that a permanent physical invasion "invariably" creates a taking. The Court impliedly held that if denial of the permit would not constitute a taking then conditioning a permit to "serve[] the same legitimate police-power purpose as a refusal to issue the permit would not constitute a taking."⁵⁷ As long as the regulatory agency established that the condition "serves the same end . . . advanced as the justification for the prohibition," the agency may extract a permanent physical invasion as a permit condition and do so free of a taking.⁵⁸

This is a rather remarkable result because earlier the Court had held that

when the "character of the governmental action," . . . is a permanent physical occupation of property, our cases uniformly have found a taking 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.*⁵⁹

Never mentioned in the Executive Order's "guidance" to the regulatory agencies is the simple fact that *Nollan*, seems to hold that an agency may impose a physical invasion free of compensation even though the original prohibition itself, refusal to permit construction of a new dwelling, for example, did not involve such an invasion. Moreover, the agency can achieve through permit condition what it could not do through outright seizure.⁶⁰

Rather than acknowledge the true holding in *Nollan*, the Executive Order attempts to impose new hobbles on the conditioning of permits in any regulatory scheme that "implement[s] licensing, permitting, or other condition requirements or limitations on private property use . . ."⁶¹ Although the *Nollan* decision dealt only with a condition

that required a permanent physical invasion, the Executive Order purports to impose the supposedly limiting criterion of *Nollan* on all permit conditions of any nature: "where implementing policies that have takings implications." Worse still, the Executive Order requires not only that the condition serve the same purpose as the prohibition of the regulated activity but also gratuitously adds the requirement that the condition itself "substantially advance the purpose."⁶² This last requirement is totally baseless under *Nollan*. Because the Supreme Court found that the permit condition at issue did not meet even the nexus requirement arguably articulated in *Nollan*, any further narrowing of the standard by adding the word "substantially" would have been dictum. The *Nollan* case went no further than to hold that the condition at issue "utterly fails to further the end advanced as the justification for the prohibition,"⁶³ which is a far cry from erecting a requirement that the condition "substantially advance" a particular purpose. The language in the Executive Order is found nowhere in the Court's opinion, not even in dictum.⁶⁴

Therefore, a Supreme Court decision that actually held that an uncompensated physical invasion may be effected in some circumstances through a permit condition has been tortured into a rule that all conditions in permits subject to the Order, whether or not they constitute physical invasions, are impermissible unless they meet a standard that was never articulated in that decision.

The Guidelines promulgated by the Justice Department take a somewhat different approach to this issue. Instead of imposing requirements on the criteria for conditioning permits, the Guidelines attempt to warn of the situation in which a taking may be found:

C. When implementing a regulatory policy or action and evaluating the takings implications . . . agencies should consider the following special factors:

1. *Permitting Programs*

[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.⁶⁴

Thus the Guidelines seem to leave these criteria open for the agency's consideration rather than simply making them mandatory limitations on the agency's power to condition permits. However, even the Guidelines provide no realistic guidance for the agencies because they reflect the Executive

56. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982) (footnote omitted).

57. *Nollan*, 107 S. Ct. at 3147, 17 ELR at 20921. The quotation is actually the Court's paraphrase of the argument presented by the regulatory agency in question but it is followed by the sentence, "We agree." *Id.*

58. *Id.* at 3148, 17 ELR at 20921.

59. *Loretto*, 458 U.S. at 434-435, quoting *Penn Central*, 438 U.S. at 124, 8 ELR at 20528 (emphasis added).

60. "Although . . . a . . . permanent grant of continuous access to the property would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights that serves the same end." *Nollan*, 107 S. Ct. at 3148, 17 ELR at 20921.

61. Exec. Order 12630, §2(a), ELR ADMIN. MATERIALS 45037. The quotation comes from the portion of the Executive Order that euphemistically bills itself as a "definition" of the phrase "Policies that have takings implications," which in turn is the operative phrase in the requirements on permit conditions mandated by §4(a). The Executive Order defines this term as including policies or actions that "could effect a taking."

62. Exec. Order 12630, §4(a), ELR ADMIN. MATERIALS 45038.

63. Exec. Order 12630, §4(a)(2), ELR ADMIN. MATERIALS 45038.

64. 107 S. Ct. at 3148, 17 ELR at 20921.

65. The requirement that a condition "substantially advance" "the purpose served by a prohibition of the use or action" cannot be justified by the *Keystone* case's reiteration that a regulation must "substantially advance a legitimate state interest," 107 S. Ct. at 1242. ELR at 20443, because the *Keystone* standard is much broader. *supra* text accompanying notes 25-26. If this language in the Executive Order purports to rest on *Keystone* and not *Nollan*, it raises unanswered questions such as why the Order uses different language than *Keystone* to supposedly reach the same result and, since *Keystone* language merely restates a 1928 holding, why the White House waited 60 years to bring this principle to the attention of agencies. See *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928).

66. Guidelines, *supra* note 3, at 15, ELR ADMIN. MATERIALS 35171 (emphasis in original).

Order's incorrect reading of the actual holding in *Nollan*, as discussed above. For that reason they fail to dispel the chilling effect created by the Executive Order.

Proportionality

The Executive Order also imposes the following restriction on regulatory agencies: "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."⁶⁷

Taken literally this language creates an obviously severe and significant limitation on regulatory agencies' authority to deny permits. For example, the Corps' §404 regulations require an assessment of cumulative impacts in determining whether to permit the destruction of wetlands.⁶⁸ Therefore, an application to destroy a discrete parcel of wetlands may be denied or conditioned on the ground that too many similar wetlands or too many wetlands in the same region have already been destroyed. This would be true regardless of whether the applicant had made any historic contribution to "the overall problem [i.e., wetlands destruction] that the restriction [i.e., permit denial] is imposed to redress." Indeed, many federal statutes intended to protect water quality, endangered species, and marine mammals, for example, are premised on the principle that historic losses of these resources are not in the national interest and that future activities affecting these resources will be subject to stricter federal regulation in an effort to halt historic trends.⁶⁹

The Executive Order language, however, can be read to provide an argument that a landowner whose project is subject to restriction under the Endangered Species Act,⁷⁰ for example, is bearing a disproportionate burden if a species has been depleted through no fault of the landowner's and if the landowner's proposed activity will make only an incremental contribution toward further depletion.⁷¹

The same would presumably be true for wetlands destruction. For example, suppose a person applies for a

§404 permit to develop a 50-acre tract of wetlands located in a state where 100,000 acres of wetlands remain (i.e., the permit would allow destruction of .05 percent of remaining wetlands). The applicant could argue that if the Corps and the Environmental Protection Agency (EPA) fail to grant permission to destroy all but .025 acres (.05 percent of the tract at issue), the applicant's burden of protecting wetlands will be greater than the applicant's proportion of the destruction of all remaining wetlands in the state (.05 percent which equals .025 acres).⁷² In other words, the applicant could argue that the proportion of wetlands to be preserved on the discrete tract should be no greater than the applicant's proportional contribution to destruction of all remaining wetlands. Since Congress often cites historic losses as a justification for legislation and since agency regulations or practice often consider cumulative impacts in making discrete regulatory decisions, the Executive Order may put a significant limitation on the agencies' power to comply with congressional intent and their own regulations.

Aside from separation of powers and administrative procedure questions raised by this language, the Executive Order's language is also not premised on any recognizable principle yet established in takings law. In fact it appears to directly contradict *Keystone*: "The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received."⁷³

The directive in the Executive Order is presumably derived from the following observation in *Nollan*: "If the *Nollans* were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'⁷⁴

Taken at face value, this language from *Nollan* appears to contradict the previously quoted statement in *Keystone*, even though both cases were decided in the same Term.⁷⁵ However, the *Nollan* majority was quick to follow the quoted statement with the observation that the theory of proportional contribution "is not the basis of the *Nollans*' challenge here."⁷⁶ Therefore, the purported basis for the Executive Order is once again dictum.

Finally, the proportionality theory rests on a statement of philosophy that provides no standards or guidance for

67. Exec. Order 12630, §4(b), ELR ADMIN. MATERIALS 45038. The Guidelines restate this requirement somewhat differently: "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." Guidelines, *supra* note 3, at 14, ELR ADMIN. MATERIALS 35171. The rationale behind this difference is not explained.

68. 33 C.F.R. §320.4(a)(1) (1987). The U.S. Environmental Protection Agency also considers cumulative impacts in determining whether to invoke its authority under §404(c), 33 U.S.C. §1344(c), ELR STAT. FWPCA 054, to "veto" a permit which the Corps may intend to issue. See Final Determination of the Assistant Administrator for External Affairs Concerning the Sweedens Swamp Site in Attleboro, Massachusetts, Pursuant to Section 404(c) of the Clean Water Act at 10, 25, and 30-31 (May 13, 1986) [hereinafter Sweedens Swamp Veto].

69. FWPCA §101, 33 U.S.C. §1251(a), ELR STAT. FWPCA 003; Endangered Species Act §2, 16 U.S.C. §1531, ELR STAT. ESA 002; Marine Mammal Protection Act §2, 16 U.S.C. §1361, ELR STAT. MMPA 002.

70. 16 U.S.C. §§1531-1543, ELR STAT. ESA 001.

71. A federal agency may be required to deny a permit for activity on private property if that activity "is likely to jeopardize the continued existence of any endangered species . . ." Endangered Species Act §7(a)(2), 16 U.S.C. §1536(a)(2), ELR STAT. ESA 010. See *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 15 ELR 20333 (10th Cir. 1985).

72. If over half of the original wetlands in the state have already been destroyed then the Corps and EPA may be subject to the argument that the proportions should apply to the total original wetlands acreage rather than what is left.

73. *Keystone*, 107 S. Ct. at 1245 n.21, 17 ELR at 20445 n.21.

74. *Nollan*, 107 S. Ct. at 3147 n.4, 17 ELR at 20920 n.4, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

75. Both the *Keystone* and *Nollan* majority opinions arose from 5-4 votes and only Justice White joined the majority in both cases. Assuming there is a conflict in the two decisions and that it reflects continuing uncertainty over the Court's basic philosophy of takings law, it is hardly appropriate for the White House to resolve this conflict before the Court does and to do so adversely to the fiscal interests of the federal agencies and the statutory integrity of their regulatory programs.

76. *Nollan*, 107 S. Ct. at 3147 n.4, 17 ELR at 20920 n.4.

(c) ELI, Environmental Law Reporter, 1988

n74. Nollan, 107 S. Ct. at 3147 n.4, 17 ELR at 20920 n.4, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Taken at face value, this language from Nollan appears to contradict the previously quoted statement in *Keystone*, even though both cases were decided in the same Term. n75 However, the Nollan majority was quick to follow the quoted statement with the observation that the theory of proportional contribution "is not the basis of the Nollans' challenge here." n76 Therefore, the purported basis for the Executive Order is once again dictum.

n75. Both the *Keystone* and Nollan majority opinions arose from 5-4 votes and only Justice White joined the majority in both cases. Assuming there is a conflict in the two decisions and that it reflects continuing uncertainty over the Court's basic philosophy of takings law, it is hardly appropriate for the White House to resolve this conflict before the Court does and to do so adversely to the fiscal interests of the federal agencies and the statutory integrity of their regulatory programs.

n76. Nollan, 107 S. Ct. at 3147 n.4, 17 ELR at 20920 n.4.

Finally, the proportionality theory rests on a statement of philosophy that provides no standards or guidance for determining whether any particular governmental action is a taking. The idea that some landowners should not be forced to bear what all of society should bear is just as useless for this purpose as Justice Holmes' famous assertion that "if regulation goes too far it will be recognized as a taking." n77 While this abstract statement might spawn no disagreement, it also provides no guidance as to precisely how far is "too far," particularly in any individual situation where a line must be drawn. The Court has recognized this problem posed by the burden-shifting homily quoted in Nollan:

n77. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

[T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." n78

n78. *Penn Central*, 438 U.S. at 124, 8 ELR at 20533, quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (citations omitted).

Thus the Supreme Court believes that the philosophical generality quoted in Nollan provides an unworkable test for establishing a taking. The Executive Order, however, has transformed it into a prohibition of agency action with potentially severe consequences for regulatory protection of natural resources.

Public Benefit

If the Executive Order were truly intended to provide guidance to agencies on takings law, then it would have reminded the agencies of a countervailing philosophical statement frequently employed by the Supreme Court. For example, in one case the Court found no taking because

(c) ELI, Environmental Law Reporter, 1988

[t]his interference with the property rights of an employer arises from the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation. n79

n79. *Connolly v. Pension Benefit Guaranty Co.*, 475 U.S. 211, 225 (1986).

Thus, while individuals should not alone bear burdens that should be borne by the public as a whole, everyone can be expected to bear burdens to promote the public good. No one, least of all the Supreme Court, has been able to draw a line between this principle and the notion of proportionality or use them to establish whether a taking has occurred in any situation. n80 Nonetheless, the Executive Order selectively requires the agencies to obey one of these general homilies while ignoring the other.

n80. The fact that neither of these general philosophical statements provides a useful standard is demonstrated by *Connolly*, where the Court quoted both the "public good" and "proportionality" homilies in the same opinion and still found no taking. 475 U.S. at 225 and 227.

Contribution

The Guidelines create a similar but slightly different problem for agencies by asserting that "[t]he 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." n81 The Appendix to the Justice Department Guidelines does not identify any legal authority for this particular theory.

n81. Guidelines, *supra* note 3, at 18, ELR ADMIN. MATERIALS 35172.

Most environmental regulatory agencies can probably ignore this "advice" because showing a direct contribution from their action will not be a problem. Denying a permit to discharge pollutants into water or air, to destroy a wetland, or to take marine mammals or endangered species should meet this test with ease. However, a more substantial problem is presented by statutes that appropriately attempt to grapple with more indirect but nonetheless harmful environmental impacts. Examples include nonpoint source discharges subject to the 1987 amendments to the FWPCA n82 and the provisions of the Endangered Species Act that mandate protection of wildlife habitat as distinguished from prohibitions against the taking of individual animals. n83 Assessing a proposed use of private property to determine its indirect impacts on an endangered species population due to alteration or removal of habitat is already a complex biological and political problem. The Guidelines needlessly exacerbate this complexity by gratuitously injecting the element of a potential taking of private property without identifying any legal authority for this criterion. The same problem may also arise when the Corps or EPA denies or vetoes a @ 404 permit on the ground that destruction of a particular wetland has unacceptable adverse cumulative effects on wildlife habitat.

n82. FWPCA @ 319, 33 U.S.C. @ 1329, ELR STAT. FWPCA 046.

n83. For illustrations of how the Act governs habitat encroachment see *National Wildlife Federation v. Coleman*, 529 F.2d 359, 6 ELR 20344 (5th Cir. 1976) and *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 12 ELR 21058 (D.C. Cir. 1982). Under the Act the term "taking" refers to killing or

otherwise harming individual members of a protected species. See Endangered Species Act @ 3(19), 16 U.S.C. @ 1532(19), ELR STAT. ESA 003; 50 C.F.R. @ 17.3 (1987).

Under statutes such as the Endangered Species Act, for example, an agency should ignore this "guidance," concentrate on the responsibilities mandated by Congress in the Act, and let the courts determine whether the agency's biological judgment based on the best "scientific and commercial data available" n84 affected a taking under the tests so far articulated by the Supreme Court, not those of the Justice Department.

n84. Endangered Species Act @ 7(a)(2), 16 U.S.C. @ 1536(a)(2), ELR STAT. ESA 010.

Reciprocity

As discussed, the Supreme Court's general statements about proportionality of burdens are counterbalanced by general statements focusing on the "public good" to be derived from regulation of property. The Supreme Court also cites a related general concept of reciprocity as articulated in *Keystone*: "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions placed on others." n85 The Executive Order characteristically fails to remind the agencies to take this principle into account when evaluating a potential taking. The Guidelines refer to reciprocity but restate the concept by requiring agencies to determine "[w]hether the proposed . . . action carries benefits to the private property owner that offset or otherwise mitigate the adverse economic impact of the proposed policy or action. . . ." n86 The Justice Department language implies that this principle is applicable only if the reciprocal benefit directly offsets economic impacts.

n85. *Keystone*, 107 S. Ct. at 1245, 17 ELR at 20445. The Court expressly rejected any notion that the reciprocity must be exactly proportional to avoid a taking. *Id.* at 1245 n.21, 17 ELR at 20445 n.21.

n86. Guidelines, *supra* note 3, at 19, ELR ADMIN. MATERIALS 35171 (emphasis added).

Thus the Supreme Court might consider the benefit to a landowner's health from clean air regulations that have led to denial of a permit for a smokestack necessary for construction of the landowner's proposed industrial plant, while the Guidelines seem to require a showing that this beneficial impact must offset the economic impact of permit denial to the landowner. The Guidelines establish a test that may make it difficult if not impossible for an agency not to find a taking. The Guidelines do not indicate whether a negative response to this determination (i.e., no offset can be demonstrated) implicates a taking. However, a landowner could cite the Guidelines and make such an argument against the United States in an inverse condemnation case. This would certainly be an ironic result given the origin of the reciprocity concept as militating against a taking finding.

~~Takings Implication Assessment -- A Shot in the Dark~~

~~The Guidelines require the agencies to perform a "takings implication assessment" (TIA) which must include "[a]n assessment of the likelihood that~~

posed . . . action carries benefits to the private property owner that offset or otherwise mitigate the adverse economic impact of the proposed policy or action"⁸⁶ The Justice Department language implies that this principle is applicable only if the reciprocal benefit directly offsets economic impacts.

Thus the Supreme Court might consider the benefit to a landowner's health from clean air regulations that have led to denial of a permit for a smokestack necessary for construction of the landowner's proposed industrial plant, while the Guidelines seem to require a showing that this beneficial impact must offset the economic impact of permit denial to the landowner. The Guidelines establish a test that may make it difficult if not impossible for an agency not to find a taking. The Guidelines do not indicate whether a negative response to this determination (i.e., no offset can be demonstrated) implicates a taking. However, a landowner could cite the Guidelines and make such an argument against the United States in an inverse condemnation case. This would certainly be an ironic result given the origin of the reciprocity concept as militating against a taking finding.

Takings Implication Assessment—A Shot in the Dark

The Guidelines require the agencies to perform a "takings implication assessment" (TIA) which must include "[a]n assessment of the likelihood that the proposed action or policy may effect a taking" and "[a]n estimate of the potential financial exposure to the government should a court find the . . . action to be a taking."⁸⁷ The administrative burden placed on the agencies in complying with this requirement is obvious. Indeed, compliance may cause the Corps and EPA to run afoul of the FWPCA's requirement for the "drastic reduction of paperwork . . . , and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays"⁸⁸

More importantly the Guidelines seem to impose an impossible task because the Supreme Court has repeatedly conceded its inability

"to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by a public action be compensated by the government Rather, [the Court] has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors . . . that have particular significance." . . . These "ad hoc, factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances."⁸⁹

Neither the Executive Order nor the Guidelines provide any clue to the agencies of how to make such an assessment in light of the "ad hoc" nature of even the Court's own analysis.

If, for example, the Corps or EPA proposes regulations or legislation intended to reduce wetlands destruction, they are required by the Guidelines to determine whether such regulations may affect a taking and what it will cost. Given the fact that approximately 100 million acres of wetlands still exist in the lower 48 states,⁹⁰ the task seems impossible, especially if the agencies are in no position to determine precisely what potential plans to develop these wetlands may be affected by such regulations. Moreover, even if they could answer that question, they would still be left with the task of "engaging in essentially ad hoc, factual inquiries [that] . . . must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." Even if the agencies could perform this task, it requires the agencies to also make essentially ad hoc decisions as to whether the Supreme Court would find a taking in any particular instance, which is probably impossible in view of the total lack of coherence exhibited by the Court's taking decisions over approximately the last 10 years.

The Executive Order presumably does not expect exact estimates of either the amount of takings or the total costs. But given the scope of the task and the virtual lack of meaningful standards it is unlikely that any useful information will be generated by this procedure, which of course raises the question of why bother to make the Corps or EPA engage in a useless paper chase. On the other hand, the sheer size and impossibility of the task may well discourage either agency from even attempting to propose regulations to further tighten controls on wetlands destruction.

One could of course speculate that this is in fact the real purpose of the Executive Order, since development of useful information does not seem likely. Lest there be any doubt on this score, the Guidelines make it clear that agencies proposing to reduce impacts on private property are exempt from the burdensome bureaucratic requirements of the Executive Order.⁹¹ Therefore, agencies have an incentive to propose regulations that weaken regulatory control over wetlands destruction, for example, rather than vice versa.

The same problem will frustrate agency attempts to assess takings potential in the application of regulation to an individual parcel of property. Even the Supreme Court must engage in "ad hoc" factual inquiries and it concedes the absence of any "set formula." What will constitute a taking depends largely if not entirely on the reactions of at least five of the Justices to the "unique circumstances" presented by any particular regulatory action. The Executive Order fails to acknowledge this problem and the Guidelines fail to provide the agencies with any solution. There is no reason to assume that the agencies will be able to anticipate the Supreme Court's reaction and thus no reason to have any confidence in the agencies' guesswork.

Impact of the Takings Implication Assessment

Once an agency has plowed through the Executive Order

86. Guidelines, *supra* note 3, at 19, ELR ADMIN. MATERIALS 35171 (emphasis added).

87. Guidelines, *supra* note 3, at 21-22, ELR ADMIN. MATERIALS 35172-73.

88. FWPCA §101(f), 33 U.S.C. §1251(f), ELR STAT. FWPCA 003.

89. *Keystone*, 107 S. Ct. at 1247, 17 ELR at 20446, quoting *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 294-296, 11 ELR 20569, 20576-77 (1981), and *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 10 ELR 20042, 20045 (1979) (citation omitted).
65

90. R. TINER, *WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS* 28 (1984). The destruction of wetlands may equal a half-million acres per year. *Id.* at 31.

91. Guidelines, *supra* note 3, at 5-6, ELR ADMIN. MATERIALS 3516

and Guidelines and prepared a TIA, the question arises of what to do with it. Where does this document fit into the agency's ordinary decisionmaking process in ruling or commenting on permit applications or proposing regulations or legislation? More important, what is supposed to be the impact on agency decisionmaking if the TIA concludes that a taking will occur?

The Guidelines superficially disclaim any intent to "prevent[] an agency from making an independent decision about proceeding with a specific policy or action" But this disclaimer rings hollow when the Guidelines also require that the TIA

shall be made available to the agency decisionmaker . . . to ensure that the decisionmaker may make a meaningful use of [it] in formulating his or her decision. . . . The TIA is to be integrated . . . into normal decisionmaking processes."

In addition, agencies are directed to "minimize the potential financial impact of takings by appropriate planning and implementation."⁹² It is hard to believe that the agencies will still be able to reach independent decisions about regulatory actions in the face of such language when the TIA concludes that a taking will occur and estimates the cost thereof. If the agencies are to make "meaningful use" of the analysis and "minimize potential financial impact" they will need to think twice about denying the permit or promulgating the regulations.

The disclaimer is also unconvincing because the Executive Order and the Guidelines never remind the agencies that even if a potential for taking is present they can nonetheless "just say no" to the permit applicant. This reminder was conspicuously absent from these documents until it finally appeared in the last version of the Appendix:

The Guidelines . . . do not . . . preclude actions or policies which the decisionmaker determines necessary to meet [statutory] 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."

This begrudged acknowledgement of Congress' role in administrative decisionmaking is tempered by the Guidelines, which indicate that action such as permit denial or tougher regulations should be taken only as a last resort:

In those instances in which a range of alternatives are [sic] 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."⁹³

Where the circumstances or Congress has provided a range of alternatives, the potential for a taking will now govern the decisionmaking, notwithstanding Congress' failure to make it a factor and the inability of anyone to determine what will be a taking absent Supreme Court review.

Because of the technical complexity of many environmental issues, Congress tends to give the agencies broad discretion in applying the statutes and promulgating regula-

tions. Therefore, the Executive Order has vast potential for skewing agency decisions toward a more permissive posture due to a possible taking based on legal analyses of takings law that are either incorrect or predisposed toward an expansion of takings law that has yet to occur. Thus, the disclaimer in the Appendix does little to offset the subtle but potentially significant goal of regulatory reduction, which the Reagan Administration has sought for eight years."

Even in situations where the agencies presumably have no choice but to say "no," the Executive Order may still provide a basis for avoiding regulatory denial through "mitigation." This can be illustrated through a wetlands case in which a developer proposed to site a shopping mall in a wetland known as Sweedens Swamp in Massachusetts. The FWPCA §404(b)(1) Guidelines govern the issuance of §404 permits and they appear to prohibit permits for most activities in wetlands that are not "water-dependent," i.e., they need not be located in aquatic sites to achieve their project purposes.⁹⁴ Shopping centers are seldom water dependent. In reviewing the application for this particular shopping mall the Corps concluded that the Guidelines could be met because the applicant proposed to build another wetland somewhere else to replace Sweedens Swamp.⁹⁵ EPA concluded that using "mitigation" (actually compensation) to avoid the water dependency test was not valid and exercised its §404(c) power to veto the permit.⁹⁶

Regardless of which agency correctly read the Guidelines, this example demonstrates how agencies can transform a statute that presumably prohibits wetlands destruction in certain instances into a "wetlands removal" statute. The Executive Order will simply exacerbate what is already a problem in the Reagan Administration, especially among some agencies.

Takings Implication Assessment—A Shot in the Foot

It is anyone's guess where takings law is headed in the wake of the 1987 trilogy of cases. Maybe the Supreme Court will expand the circumstances in which a taking may be found. Maybe the Court will articulate a "set formula" for determining the existence of a taking. At any rate, it is perfectly legitimate to argue that the 1987 cases can be construed quite narrowly and that they do not represent any major departures in takings law, particularly for most federal agencies.

97. The Guidelines pay lip service to the agencies' legal obligations to take regulatory action notwithstanding a potential taking: "[F]ederal agency decisionmakers . . . to the extent permitted by law, consistent with their statutory obligations, can minimize the impacts of [agency] activities on constitutionally protected private property rights." Guidelines, *supra* note 3, at 2, ELR ADMIN. MATERIALS 35168. However, the Executive Order and the Guidelines clearly intend to interject potential takings as a factor that governs decision making notwithstanding the absence of statutory authority for the agencies to do so and notwithstanding this disclaimer.

98. 40 C.F.R. §230.10(a)(3) (1987).

99. Sweedens Swamp Veto, *supra* note 68, at 4-7.

100. *Id.* at 53-66. Using mitigation in such situations due to the Executive Order runs counter to the Council on Environmental Quality regulations which suggest that mitigation, especially in the form of compensation, is itself a last resort. 40 C.F.R. §1508.20 (1987). The Executive Order seeks to reverse this philosophy by making permit denial the last resort. EPA also vetoed the Sweedens Swamp permit for other reasons. See *Bersani v. U.S. Environmental Protection Agency*, 850 F.2d 36, 18 ELR 20874 (2d Cir. 1988).

92. Guidelines, *supra* note 3, at 2, ELR ADMIN. MATERIALS 35168.

93. *Id.* at 21 (emphasis added), ELR ADMIN. MATERIALS 35172.

94. *Id.* at 12, ELR ADMIN. MATERIALS 35170-71.

95. Appendix, *supra* note 10, at 2, ELR ADMIN. MATERIALS 35175. This sentence was absent from the May 16, 1988, draft of the Appendix which was then called a "Supplement" to the Guidelines.

96. Guidelines, *supra* note 3, at 2, ELR ADMIN. MATERIALS 35168.

Assuming it can be argued just as legitimately that *Nollan* and *First English* presage a great expansion of the circumstances that will result in takings, one has to wonder why the United States Department of Justice is making such an argument. After all, Justice Department lawyers will represent the agencies in inverse condemnation actions in which landowners will presumably urge expansive views of *Nollan* and *First English* upon the lower courts and the Supreme Court.¹⁰¹ The agencies and the taxpayers have a right to expect that their lawyers will attempt to construe these two cases as narrowly as has been suggested in the preceding discussion. However, such arguments by Justice will be rather awkward, if not unpersuasive, when the landowner cites the Executive Order, the Guidelines, and the Appendix to support a contrary reading of these cases.

The agencies may well complain that the Justice Department has gratuitously shot itself in the foot with the unnecessarily broad interpretation of the *Nollan* and *First English* decisions. So, too, might the taxpayer, because this sort of undermining of the agency's case may make a takings finding more likely than it might have been without the Executive Order and Guidelines.

Indeed, the Executive Branch is effectively creating new takings law without waiting for the Supreme Court to do so. This is a truly ironic result if the whole purpose of the Executive Order is "to reduce the risk of undue or inadvertent burdens on the public fisc . . ."¹⁰² This may be the sort of assistance the public fisc can do without.

Similar problems may arise with the takings implication assessment. If such a document concludes that a taking is likely and the agency makes "an independent decision" to proceed with the regulatory action, the analysis is likely to become "Exhibit A" for the landowner in an inverse condemnation action arising from the regulatory decision. This will especially be true if the landowner agrees with the cost estimate contained in that analysis. Indeed, that estimate should be looked at as establishing the floor for the government's expert appraiser at trial and for any damages award in an inverse condemnation action.¹⁰³ Of

course, the agencies are aware of these risks and this may lead them to fudge their analysis against a taking conclusion or to make their cost estimates as low as possible. In that event the analysis loses whatever utility it arguably might have had to begin with. Again, it is difficult to see how this reduces the burden on the public fisc.

None of these problems will be lost on the agencies and this will further the chilling effect that the Executive Order will have on agency decisionmaking.

Conclusion

Conservation organizations and their members would probably support any effort by the Executive Branch to reduce the likelihood that the application of environmental regulations result in takings findings by the courts. However, this support assumes that the effort does not reduce the amount of regulatory protection, through permit denials or tougher regulations, for example, which would be counterproductive from the conservationists' point of view. The Executive Branch could advise the agencies on how to structure regulatory decisions to make them as defensible as possible in the event they result in inverse condemnation claims. The Justice Department could devote the considerable legal talents of its lawyers to the task of developing arguments that construe *Nollan* and *First English* as narrowly as possible.

However, rather than helping the agencies to preserve as many regulatory options as possible notwithstanding the threat of a taking finding, the Executive Order and the Guidelines do just the opposite. Takings law is expanded and regulatory options are narrowed. This approach appears effectively to usurp the respective roles of Congress and the Supreme Court, to the extent the takings issue influences agency decisions, by precluding regulatory actions that would have been taken in the absence of the Executive Order. Also, the process envisioned by the Executive Order may well weaken an agency's position in potential inverse condemnation suits, which would seem to create just the opposite effect of the stated intent of the Executive Order.

The next Administration would be well-advised to rescind Executive Order 12630 at the earliest opportunity.

101. In fact, the Justice Department is currently defending \$1 billion in takings claims. Marzulla, *The New "Takings" Executive Order and Environmental Regulation—Collision or Cooperation?*, 18 ELR 10254, 10255 (July 1988).

102. Exec. Order 12630, §1(c), ELR ADMIN. MATERIALS 45037.

103. The Justice Department may well assert the privilege for predecisional deliberative materials but asserting a privilege is no guarantee that the trial court will not order production of the document, especially with regard to factual materials that are not subject to the privilege. See generally LITIGATION UNDER THE FREEDOM OF IN-

FORMATION ACT AND PRIVACY ACT 79-90 (A. Adler ed. 1987). Resisting discovery requests under this privilege may be especially difficult since the Appendix states that "Questions as to the existence of takings require the sifting of numerous facts . . . This focus on facts lies at the heart of the advice contemplated by the" takings implication assessment. Appendix, *supra* note 10, at 2, ELR ADMIN. MATERIALS 35175.

NEWS & ANALYSIS

DIALOGUES

Editors' Summary: On March 15, 1988, President Reagan signed Executive Order 12630 entitled "Governmental Actions and Interference With Constitutionally Protected Property Rights." In the July issue of ELR, Roger Marzulla, head of the Land and Natural Resource Division of the U.S. Department of Justice, described the genesis of the takings Executive Order and how it might affect environmental regulation. Mr. Marzulla characterized the Order as a logical response to two 1987 regulatory takings decisions by the Supreme Court and concluded that the Order provides a systematic method for agencies to account for the takings implications of their actions without necessarily hindering vigorous enforcement of environmental laws. The authors of the two Dialogues that follow take a different view of the Executive Order. They assert that the Order imposes on federal agencies an expanded view of takings law not warranted by Supreme Court decisions, will not achieve its stated purposes, and will make environmental regulation more difficult.

A Critique of the Takings Executive Order in the Context of Environmental Regulation

by Jerry Jackson and Lyle D. Albaugh

On March 15, 1988, the White House released Executive Order 12630 entitled "Governmental Actions and Interference With Constitutionally Protected Property Rights."¹ The Executive Order purports to address the issue of whether federal regulatory action affecting private property results in a taking or inverse condemnation subject to the Just Compensation Clause of the Fifth Amendment. The Executive Order describes its two purposes as (1) ensuring that federal agencies act "with due regard for the constitutional protections provided by the Fifth Amendment," and (2) reducing "the risk of undue or inadvertent burdens on the public fisc resulting" from agency action.²

The Executive Order fails its first purpose because it does not accurately describe current takings law as articulated by the Supreme Court. In fact, the document seeks to impose on federal agencies a view of takings law that is well beyond the point reached by the Supreme Court on inverse condemnation. Therefore, the Executive Order cannot en-

sure that the agencies act with due regard for the Just Compensation Clause, because it asserts that certain actions are or may be takings when in fact such actions have not been found to be takings by the Supreme Court. Also, the Executive Order implies that the Fifth Amendment creates a constitutional protection of private property against inverse condemnation.³ In contrast, the Supreme Court has held that the Just Compensation Clause merely ensures compensation for such takings and does not bar inverse condemnation.⁴

Mr. Jackson is an associate with the Washington, D.C., office of Skadden, Arps, Slate, Meagher & Flom. He was formerly an attorney with the National Wildlife Federation in Washington, D.C. Mr. Albaugh is a third-year student at the University of Pennsylvania School of Law. The authors gratefully acknowledge the assistance of Erik J. Myers, a Senior Attorney at the Environmental Law Institute, in reviewing this Dialogue. The views expressed in this Dialogue do not necessarily reflect the views of Skadden, Arps, Slate, Meagher & Flom.

1. Exec. Order 12630, 53 Fed. Reg. 8859, ELR ADMIN. MATERIALS 45037 (Mar. 18, 1988).

2. Exec. Order 12630, §1(c), ELR ADMIN. MATERIALS 45037.

3. Agencies are directed to "evaluate carefully the effect of their . . . actions on constitutionally protected property rights." Exec. Order 12630, §1(b), ELR ADMIN. MATERIALS 45037. The Guidelines promulgated by the U.S. Department of Justice pursuant to the Executive Order direct agencies to "minimize the impacts of [their] activities on constitutionally protected private property rights." Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings 2 (June 30, 1988), ELR ADMIN. MATERIALS 35168 [hereinafter Guidelines]. Neither document identifies any "constitutionally protected property rights."

4. "[T]he Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of an otherwise proper interference amounting to a taking." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2386, 17 ELR 20787, 20790 (1987) (emphasis in original). Cf. Hodel v. Irving, 107 S. Ct. 2076 (1987) (invalidating statute as unconstitutional violation of just compensation clause because it effected takings and contained no express provision for compensation) and Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016-1017, 14 ELR 20539, 20546 (1984) (refusing to enjoin application of statute on ground of potential taking so long as statute did not expressly abrogate right to seek compensation in Court of Claims).

As for the second purpose, the Executive Order never defines or describes "undue or inadvertent burdens on the public fisc" resulting from agency actions that may result in takings. Unless a federal statute provides otherwise, federal agencies are limited to the factors prescribed in their authorizing statute and regulations when making decisions on the application of federal regulatory authority to private property.⁵ For example, whether a permit denial may be construed by a court to effect a taking is not a relevant factor in an agency's decision to grant or deny the permit, absent express legislative authority making it a factor.⁶ As a result it is logical to conclude that agency actions that may be construed as takings are not "undue or inadvertent" so long as they are not arbitrary, capricious, unlawful, or outside of the authority granted by the enabling legislation.⁷ Of course, if agency regulatory actions fail to meet the test of the Administrative Procedure Act (APA)⁸ (if applicable) or they are beyond the scope of the agency's authority, they are subject to invalidation by a federal court, which would obviate any claim of a taking.⁹ Therefore, regulatory actions that may result in takings are either authorized and valid, in which case they are neither "undue nor inadvertent," or they are not, in which case they cannot withstand judicial scrutiny and, therefore, would not result in takings.¹⁰

Since neither stated purpose is valid or logical, one can conclude that the Executive Order's true purposes are unstated: to expand the circumstances in which a taking will be considered to have occurred and to "chill" the agencies from making regulatory decisions that may be construed as takings under existing inverse condemnation law as well as the expanded view of this law reflected in the Executive Order. Indeed, the Executive Order literally requires agencies to examine all regulatory actions that af-

fect private property to consider potential takings.¹¹ If the agencies thus apply the Executive Order, even day-to-day operations, such as routine consideration of permit applications that have no apparent takings implications, would become enmeshed in a review that is essentially judicial in nature. However, the Executive Order goes on to suggest that the delay engendered by the Order may itself raise the liability for a taking.¹² The document appears to be a parting legacy from an Administration hoping to impose its regulatory philosophy on future administrations.

Expansion of Takings Law

The Executive Order is intended to respond to two takings cases decided by the Supreme Court in 1987: *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*; and *Nollan v. California Coastal Commission*.¹³ The general thrust of the Executive Order reflects an interpretation of these cases as new takings law. However, to the extent these cases simply reiterate preexisting takings law there is no need for the Executive Order, because nothing has changed. To the extent some new takings law was arguably articulated in these cases, the Executive Order does not accurately reflect the holdings in these cases.

Diminution in Value

The Executive Order states that "[a]ctions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property."¹⁴ The reference to physical invasion presents nothing new. In fact, physical invasion was first recognized by the Supreme Court as a type of inverse condemnation over 100 years ago and was the only kind of implied taking so recognized for 50 years.¹⁵

The assertion that "regulations imposed on private property that substantially affect its value or use . . . may constitute a taking of property" is an example of the subtle way in which this Executive Order seeks to undermine

5. E.g.: "[O]n remand the Secretary must make new determinations based strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes If . . . [the] Secretary . . . took into account 'considerations that Congress could not have intended to make relevant,' his action proceeded from an erroneous premise and his decision cannot stand." D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1246-1247, 1 ELR 20572, 20579 (D.C. Cir. 1972), cert. denied, 405 US 1030 (1972), quoting United States ex rel. Kaloudis v. Shaughnessy, 180 F.2d 489, 491 (2d Cir. 1950) (footnotes omitted).
6. "Normally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider" Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43, 13 ELR 20672, 20679 (1983). This implies that the Executive Branch cannot unilaterally create new "relevant" factors contrary to congressional intent.
7. See 5 U.S.C. §706(2)(A), ELR STAT. ADMIN. PROC. 007.
8. 5 U.S.C. §§500-559, 701-706, ELR STAT. ADMIN. PROC. 001.
9. In the event of invalidation it is possible that a claim may be stated for compensation for some period before the invalidation. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S.Ct. 2378, 17 ELR 20787 (1987), and discussion of that case in text accompanying notes 38-53 *infra*.
10. The Appendix to the Guidelines, *supra* note 3, impliedly recognizes this principle by pointing out that Congress is presumably empowered to statutorily prohibit agencies from committing takings except in specified circumstances, thus arguably making the existence of a taking a relevant factor. See Appendix to Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings at 5-6, ELR ADMIN. MATERIALS 35175 [hereinafter Appendix], citing *Southern California Financial Corp. v. United States*, 634 F.2d 521, 524 (Ct. Cl. 1980); *NBH Land Co. v. United States*, 576 F.2d 317, 319 (Ct. Cl. 1978). The Guidelines cite no statutes and the Executive Order is not limited in its application to only such statutes.

11. Exec. Order 12630, §2(a), ELR ADMIN. MATERIALS 45037.

12. Section 3(d), ELR ADMIN. MATERIALS 45038.

13. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378, 17 ELR 20787 (1987); and *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 17 ELR 20918 (1987). See Guidelines, *supra* note 3, at 1, ELR ADMIN. MATERIALS 35168. In the 1987 Term, the Court also decided another significant takings case, *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S. Ct. 1232, 17 ELR 20440 (1987). Although *Keystone* receives little attention in the Guidelines, it is a significant case because it reaffirms a number of takings law principles established before the 1987 Term.

14. Exec. Order 12630, §3(b), ELR ADMIN. MATERIALS 45038.

15. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872). Inverse condemnation was expanded to include other takings in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). See Meltz, *Revisiting the Law of Regulatory Takings: The Supreme Court's Decisions in Keystone, Nollan, and First English*, CONG. RES. SERV. REP. 87-959A, at 2-3 (1987) [hereinafter Meltz]; McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 ELR 10369, 10372 (1987). "When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982) (footnote omitted).

regulatory protection by chilling agency action.¹⁶ Strictly speaking, this excerpt may be accurate because of the word "may." However, inclusion of the same word strips this assertion of any value to agencies in determining whether a permit denial or regulation will effect a taking. Worse still, the Executive Order may be attempting to create a new, vague factor for finding a taking, and one that the Supreme Court has never articulated. Thus the Executive Order is calculated to gratuitously raise doubts about agency action as a taking without providing any guidance for assessment of whether a taking has occurred in the described situation and without being based on established takings law.

The next sentence in the Executive Order suffers from similar defects: "Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature."¹⁷ The reference to a taking through "less than a complete deprivation of all use or value" is seriously misleading because it states the reverse of Supreme Court holdings. The Supreme Court has expressly "reject[ed] the proposition that diminution in property value, standing alone, can establish a 'taking'"¹⁸ The Court has also described a taking as occurring if a regulation "denies an owner economically viable use of his land"¹⁹ Even complete elimination of "a beneficial use to which individual parcels had previously been devoted" does not constitute a taking.²⁰ In fact, the Court has rejected a takings determination in cases where the remaining value was only 13 to 25 percent of the unregulated value.²¹ These cases strongly imply that a taking is precluded if any economically viable use remains.²²

The same sentence is directly incorrect when it conjoins less than complete deprivation with the principle of temporary takings. *First Evangelical*, which established the principle of temporary takings, expressly limited its holding to circumstances "where the government's activities have already worked a taking of *all* use of property"²³

Public Health and Safety Regulation

The Executive Order states that "[a]ctions to which this Order applies asserted to be for the protection of public health and safety . . . should be undertaken only in response to real and substantial threats to public health

and safety, be designed to advance significantly the health and safety purpose and be no greater than is necessary to achieve the health and safety purpose."²⁴ There is no basis in the 1987 trilogy of Supreme Court takings cases for the assertion that actions for protection of health and safety must be limited to "real and substantial threats" and designed "to advance significantly" such protection. The standard as articulated by the Court in the past and in these three cases is actually much broader.

Neither *Firrst English* nor *Nollan* holds that the threat to the public health and safety must be "real and substantial." Instead, the Court in *Keystone Bituminous Coal Association v. DeBenedictis* restated well-established law that a taking occurs if the regulation "does not substantially advance a legitimate state interest."²⁵ The Court gave no indication that a threat to public health or safety must rise to the level of "substantial" to be considered a legitimate state interest. *Nollan* repeats the exact same language and explains, "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' They have made clear, however, that a *broad range* of governmental purposes and regulations satisfies these requirements."²⁶

The Executive Order is misleading because it suggests that a regulation or action that is arguably undertaken to protect health and safety must "be designed to advance significantly the health and safety purpose" or else it will be deemed a taking. Instead, the action need only "substantially advance" a "broad range of governmental purposes." Moreover, the Executive Order uses the word "significantly" rather than "substantially." It may be argued that "substantially" does not connote as high a standard as "significantly" but in any event the Executive Order provides no explanation for why it uses a different term than the one used by the Supreme Court. The Order does not explain whether a different standard is actually intended and, if so, the nature of the new standard, despite the Executive Order's purported intent of providing "guidance."

Even correctly stated, this standard is not new. That an ordinance must substantially advance a legitimate state interest was stated eight years ago by the Supreme Court in *Agins v. City of Tiburon*, citing a 1928 case, *Nectow v. Cambridge*.²⁷ Indeed, in *Nectow* the Supreme Court merely stated that an ordinance must "bear a substantial relation to the public health, safety, morals, or general welfare."²⁸ There is no apparent need to issue an executive order reminding the agencies of a 60-year-old case, especially when the Order does not accurately reflect the statement in that case. Besides, the enabling statute will normally provide the necessary public interest—protection of the environment or public health. If the agency's regulations are consistent with the statute's purpose, then the public interest test is met.

A clue to the origin of this limitation on health and safety regulations is provided by the Guidelines and Appendix

16. The Order does not define "substantially affect," giving rise to potential inconsistency in application by the agencies.

17. Exec. Order 12630, §3(b), ELR ADMIN. MATERIALS 45038.

18. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 131, 8 ELR 20528, 20535 (1978).

19. *Agins v. City of Tiburon*, 447 U.S. 255, 260, 10 ELR 20361, 20362 (1980) (emphasis added).

20. *Penn Central*, 438 U.S. at 125, 8 ELR at 20533.

21. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75 percent reduction); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87½ percent reduction). Both cases were cited by the Court in 1978 for the identical proposition. *Penn Central*, 438 U.S. at 131, 8 ELR at 20535.

22. "Land use restrictions . . . work a taking if they either (1) do not substantially advance a legitimate government objective, or (2) fail to leave the owner any 'economically' viable use of his property." Meltz, *supra* note 15, at 4 (first emphasis original, second emphasis added).

23. 107 S. Ct. at 2389, 17 ELR at 20791 (emphasis added). 59

24. Exec. Order 12630, §3(c), ELR ADMIN. PROC. 45038.

25. 107 S. Ct. 1232, 1242, 17 ELR 20440, 20443 (1987), quoting *Agins*, 447 U.S. at 260, 10 ELR at 20362 (emphasis added).

26. 107 S. Ct. at 3146, 17 ELR at 20920 (emphasis added).

27. *Agins*, 447 U.S. at 260, 10 ELR at 20362, citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928).

28. 277 U.S. at 188.

promulgated by the U.S. Department of Justice pursuant to the Executive Order.²⁹ The Guidelines appear to derive the limitation on health and safety regulations from the so-called nuisance exception to the requirement for just compensation. The nuisance exception was recently restated in *Keystone*:

The special status of this type of state action [i.e., restraint of public nuisance] can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.³⁰

Although this language is clearly intended to narrow the circumstances in which regulatory action will result in a judicially determined taking, the Executive Order transforms it into a limitation on when agencies may regulate for health and safety purposes.

This problem is compounded by the Order's additional imposition of evidentiary requirements that may be stricter than those imposed by Congress in the enabling legislation or the APA or by the courts in reviewing agency action. For example, the Guidelines state that

the health and safety risk posed by the property use to be regulated 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.³¹

Further, the agencies "should" consider the "certainty that the property use to be regulated poses a health and safety risk in the absence of government action" as well as 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."³²

In contrast, agency action is normally subject to a much lower standard of proof of the relationship between the evidence of potential harm and the regulatory cure: "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"³³ At best, the Executive Order merely confuses the level of proof necessary for agency actions to withstand legal challenge. At worst, the Order seeks to limit regulatory actions to those meeting the higher level of proof notwithstanding the APA or relevant provisions of the applicable authorizing statute.

The Executive Order also seems to erect a higher barrier for health and safety regulatory actions than for other

types of regulatory actions. The required showings of "real and substantial threats" and "certainty of risk" seem to apply only to regulatory actions based on public health and safety; no similar requirements are imposed on other types of regulatory actions. As a result, agencies may be tempted to premise their regulatory actions on other purposes to avoid the restrictions of the Executive Order. This would indeed be an ironic result, because agencies concerned about potential takings might previously have been tempted to do just the opposite to take advantage of the nuisance exception, which itself is supposedly the source of the Order's restrictions on health and safety regulations.

This all presupposes that the Executive Order is intended to force agencies to tailor regulatory actions precisely to the level of provable contribution to the targeted harm. This is conceded by the Order's requirement that the regulatory action must "be no greater than is necessary to achieve the health and safety purposes."³⁴ Given the inherent imperfectibility of risk assessment, especially in the area of human health, this standard may be intended to encourage agencies to err in favor of underregulating a health threat rather than overregulating it. At any rate it is in direct conflict with *Keystone*: "That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no means for rejecting it."³⁵ The Supreme Court's approach is preferable because it leaves the decision of regulatory parameters up to Congress. Of course, Congress is free to delegate it to the agencies. However, in some situations, such as stratospheric ozone depletion, Congress may elect to overregulate before regulation can be precisely tailored to contribution, since it may be too late to take effective measures once the level of contribution is precisely determined.³⁶ Nonetheless, the Executive Order seems to be using the Just Compensation Clause as an excuse to impose a regulatory philosophy on the agencies notwithstanding different determinations that may have been made by Congress and reflected in enabling legislation.

Finally, the Executive Order ignores the fact that the failure of agency regulations to meet the standards imposed by the Order means, at most, that the agencies supposedly cannot invoke the nuisance exception. That fact alone does not transform a regulatory action into taking; it just removes the availability of an exception. Nonetheless, the Order's wording is such that it precludes agency actions based on health and safety considerations because they supposedly fail to meet the nuisance exception regardless of whether they would otherwise effect a taking under standards articulated by the Supreme Court.³⁷

29. Exec. Order 12630, §1(c), ELR ADMIN. MATERIALS 45037.

30. *Keystone*, 107 S. Ct. at 1245, n. 20, 17 ELR at 20445, n.20. The Guidelines' discussion of the Executive Order's health and safety regulation requirements cites a portion of the Appendix that discusses the nuisance exception and cites *Keystone* and other cases. Guidelines, *supra* note 3, at 15-16, ELR ADMIN. MATERIALS 35171; Appendix, *supra* note 10, at 12-13, ELR ADMIN. MATERIALS 35178.

31. Guidelines, *supra* note 3, at 15, ELR ADMIN. MATERIALS 35171.

32. Guidelines, *supra* note 3, at 16, ELR ADMIN. MATERIALS 35171.

33. Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co., 463 U.S. at 43, 13 ELR at 20676, quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). Under the APA, the agency may at most be subject to the substantial evidence test in certain circumstances. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414, 1 ELR 20110, 20113 (1971).

34. Exec. Order 12630, §3(c), ELR ADMIN. MATERIALS 45038.

35. 107 S. Ct. at 1243, n. 16, 17 ELR at 20444, n.16.

36. The Court has made it clear that the Commerce Clause (the source of constitutional power for most environmental regulation) provides Congress ample power to over- or underregulate as it sees fit in solving any particular problem: "[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." *Westfall v. United States*, 274 U.S. 256 (1927). Cf. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937) ("The Constitution does not forbid 'cautious advance, step by step,' in dealing with . . . evils . . .").

37. See Exec. Order 12630, §4(d), ELR ADMIN. MATERIALS 45038. Perhaps this is not the intent of the Executive Order and the language under discussion here is limited to agency assessments of whether the nuisance exception applies. However, neither the Order nor the Guidelines contains any such express disclaimer.

Temporary Taking

The Executive Order states that "a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred."³⁸ The Order also states that "[w]hen 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."³⁹ The Executive Order suggests that mere "delay" in processing a permit application is a factor in determining a taking or just compensation. These statements presumably react to *First English*, a decision involving unusual circumstances and a narrow holding.

First English involved an "interim" county ordinance in California prohibiting structures on land owned by a church in an area that had suffered severe flooding.⁴⁰ The landowner challenged the validity of the ordinance and sought compensation for the loss of use during the period the ordinance was in effect. The state trial court dismissed this portion of the suit under the theory that the state could elect to disown the ordinance if it were found to have created a taking.⁴¹ Therefore, the landowner could not state a claim for relief for loss of use, regardless of the disposition of the challenge to the ordinance's validity, or presumably could not do so until the county had the opportunity to abandon the ordinance if a taking were found. The state court of appeals affirmed.⁴²

The Supreme Court reversed on the narrow issue of whether a litigant may state a claim for an alleged taking through an absolute deprivation of all use of property by regulation, even though the loss of use may be temporary. The Court expressly declined to rule whether a taking had occurred under these alleged facts.⁴³ When the case is limited to only the result reached by the Supreme Court, its holding is extremely limited, hardly surprising, and largely irrelevant to the regulatory activities of most federal agencies.

For example, Federal Water Pollution Control Act (FWPCA) §404,⁴⁴ in conjunction with §301 of the Act,⁴⁵ prohibits the discharge of dredged or fill material into "navigable waters" absent a §404 permit. Although unpermitted discharges are banned, the statute does not contain an absolute ban on discharges of such materials; they simply must be accompanied by a permit which the U.S. Army Corps of Engineers annually issues by the thousands.⁴⁶ Sections 301 and 404 do not ban other activities in or affecting "navigable waters," and do not ban any activities outside of "navigable waters" even on parcels or tracts containing such waters.⁴⁷ In contrast, the *First English* ord-

inance banned all structures on all of the property in question with no provision for permitting any such structures.⁴⁸ The Court held that the landowner was entitled to state a claim alleging that the ordinance constituted a taking.⁴⁹ The Court has also held in a previous case that the mere assertion of §404 jurisdiction over privately owned wetlands cannot be challenged as a taking.⁵⁰

Since the circumstances presented in *First English* are unlikely to ever occur in the §404 regulatory program, and may not constitute a taking in any event, there seems no reason why that program should be directed to keep "the duration of the [permitting] process to the minimum necessary."⁵¹ *First English* directly repudiated this concern as well as the Executive Order's claim that "delay in processing may increase significantly the size of compensation due,"⁵² by excluding from its ruling "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."⁵³

Conditions

The Executive Order makes its broadest leap beyond existing takings law in the following directive:

Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

- (1) Serve the same purposes that would have been served by a prohibition of the use or action; and
- (2) Substantially advance that purpose.⁵⁴

Although this language is presumably based on the *Nollan* decision, there is in fact no legal basis for so restricting a regulatory agency's legislatively created power to impose conditions on permits. The *Nollan* decision created no new law relating to agencies' authority to condition permits "when implementing policies that have takings implications," or otherwise.

Nollan shares the same characteristic as *First English* in that the only new takings principle established by the case was exceedingly narrow and not particularly surprising. In addition, the new principle would seem to have little if any relation to most federal regulatory programs. Stripped of its dictum, *Nollan* established nothing more than the principle that "a classic right-of-way easement" is "a permanent physical occupation."⁵⁵ Once this point was reached, a compensatory taking seemed inevitable because "[w]hen

38. Exec. Order 12630, §3(d), ELR ADMIN. MATERIALS 45038.

39. Exec. Order 12630, §4(c), ELR ADMIN. MATERIALS 45038.

40. *First English*, 107 S. Ct. at 2381-2382, 17 ELR at 20788.

41. *Id.* at 2382-2383, 17 ELR at 20788.

42. *Id.*

43. *Id.* at 2384-2385, 17 ELR at 20789.

44. 33 U.S.C. §1344, ELR STAT. FWPCA 054.

45. 33 U.S.C. §1311(a), ELR STAT. FWPCA 025.

46. OFFICE OF TECHNOLOGY ASSESSMENT, WETLANDS: THEIR USE AND REGULATION 143-144 (1984).

47. The term "navigable waters" is defined by the Act to mean "waters of the United States," FWPCA §502(7), 33 U.S.C. §1362(7), ELR

STAT. FWPCA 058, which in turn has been construed by the Corps to include wetlands. 33 C.F.R. §328.3(b) (1987).

48. 107 S. Ct. at 2381-2382, 17 ELR at 20788.

49. *Id.* at 2387-2389, 17 ELR at 20791.

50. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-129, 16 ELR 20086, 20087-88 (1985).

51. Exec. Order 12630, §4(c), ELR ADMIN. MATERIALS 45038.

52. Exec. Order 12630, §3(d), ELR ADMIN. MATERIALS 45038.

53. 107 S. Ct. at 2389, 17 ELR at 20791.

54. Exec. Order 12630, §4(a), ELR ADMIN. MATERIALS 45038.

55. *Nollan*, 107 S. Ct. at 3145 & n.1, 17 ELR at 20919 & n.1.

faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking,"⁵⁶ an observation made by the Court nearly six years before the promulgation of the Executive Order.

Many observers, presumably including the authors of the Executive Order, have perceived *Nollan* as establishing new restrictions on the ability of regulatory agencies to impose conditions on permits the denial of which might otherwise constitute a taking. In reality, the case actually achieved just the opposite: the Court created an exception to the rule that a permanent physical invasion "invariably" creates a taking. The Court impliedly held that if denial of the permit would not constitute a taking then conditioning a permit to "serve[] the same legitimate police-power purpose as a refusal to issue the permit would not constitute a taking."⁵⁷ As long as the regulatory agency established that the condition "serves the same end . . . advanced as the justification for the prohibition," the agency may extract a permanent physical invasion as a permit condition and do so free of a taking.⁵⁸

This is a rather remarkable result because earlier the Court had held that

when the "character of the governmental action," . . . is a permanent physical occupation of property, our cases uniformly have found a taking 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.*⁵⁹

Never mentioned in the Executive Order's "guidance" to the regulatory agencies is the simple fact that *Nollan*, seems to hold that an agency may impose a physical invasion free of compensation even though the original prohibition itself, refusal to permit construction of a new dwelling, for example, did not involve such an invasion. Moreover, the agency can achieve through permit condition what it could not do through outright seizure.⁶⁰

Rather than acknowledge the true holding in *Nollan*, the Executive Order attempts to impose new hobbles on the conditioning of permits in any regulatory scheme that "implement[s] licensing, permitting, or other condition requirements or limitations on private property use . . ."⁶¹ Although the *Nollan* decision dealt only with a condition

that required a permanent physical invasion, the Executive Order purports to impose the supposedly limiting criteria of *Nollan* on all permit conditions of any nature "when implementing policies that have takings implications."⁶² Worse still, the Executive Order requires not only that the condition serve the same purpose as the prohibition of the regulated activity but also gratuitously adds the requirement that the condition itself "substantially advance that purpose."⁶³ This last requirement is totally baseless under *Nollan*. Because the Supreme Court found that the permit condition at issue did not meet even the nexus requirement arguably articulated in *Nollan*, any further narrowing of the standard by adding the word "substantially" would have been dictum. The *Nollan* case went no further than to hold that the condition at issue "utterly fails to further the end advanced as the justification for the prohibition,"⁶⁴ which is a far cry from erecting a requirement that the condition "substantially advance" a particular purpose. The language in the Executive Order is found nowhere in the Court's opinion, not even in dictum.⁶⁵

Therefore, a Supreme Court decision that actually held that an uncompensated physical invasion may be effected in some circumstances through a permit condition has been tortured into a rule that all conditions in permits subject to the Order, whether or not they constitute physical invasions, are impermissible unless they meet a standard that was never articulated in that decision.

The Guidelines promulgated by the Justice Department take a somewhat different approach to this issue. Instead of imposing requirements on the criteria for conditioning permits, the Guidelines attempt to warn of the situations in which a taking may be found:

C. When implementing a regulatory policy or action and evaluating the takings implications . . . agencies should consider the following special factors:

1. *Permitting Programs*

[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.⁶⁶

Thus the Guidelines seem to leave these criteria open for the agency's consideration rather than simply making them mandatory limitations on the agency's power to condition permits. However, even the Guidelines provide no realistic guidance for the agencies because they reflect the Executive

56. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982) (footnote omitted).

57. *Nollan*, 107 S. Ct. at 3147, 17 ELR at 20921. The quotation is actually the Court's paraphrase of the argument presented by the regulatory agency in question but it is followed by the sentence, "We agree." *Id.*

58. *Id.* at 3148, 17 ELR at 20921.

59. *Loretto*, 458 U.S. at 434-435, quoting *Penn Central*, 438 U.S. at 124, 8 ELR at 20528 (emphasis added).

60. "Although . . . a . . . permanent grant of continuous access to the property would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights that serves the same end." *Nollan*, 107 S. Ct. at 3148, 17 ELR at 20921.

61. Exec. Order 12630, §2(a), ELR ADMIN. MATERIALS 45037. The quotation comes from the portion of the Executive Order that euphemistically bills itself as a "definition" of the phrase "Policies that have takings implications," which in turn is the operative phrase in the requirements on permit conditions mandated by §4(a). The Executive Order defines this term as including policies or actions that "could effect a taking."⁶²

62. Exec. Order 12630, §4(a), ELR ADMIN. MATERIALS 45038.

63. Exec. Order 12630, §4(a)(2), ELR ADMIN. MATERIALS 45038.

64. 107 S. Ct. at 3148, 17 ELR at 20921.

65. The requirement that a condition "substantially advance" "the purpose served by a prohibition of the use or action" cannot be justified by the *Keystone* case's reiteration that a regulation must "substantially advance a legitimate state interest," 107 S. Ct. at 1242, 17 ELR at 20443, because the *Keystone* standard is much broader. See *supra* text accompanying notes 25-26. If this language in the Executive Order purports to rest on *Keystone* and not *Nollan*, it raises unanswered questions such as why the Order uses different language than *Keystone* to supposedly reach the same result and, since the *Keystone* language merely restates a 1928 holding, why the White House waited 60 years to bring this principle to the attention of its agencies. See *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928).

66. Guidelines, *supra* note 3, at 15, ELR ADMIN. MATERIALS 35171 (emphasis in original).

Order's incorrect reading of the actual holding in *Nollan*, as discussed above. For that reason they fail to dispel the chilling effect created by the Executive Order.

Proportionality

The Executive Order also imposes the following restriction on regulatory agencies: "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."⁶⁷

Taken literally this language creates an obviously severe and significant limitation on regulatory agencies' authority to deny permits. For example, the Corps' §404 regulations require an assessment of cumulative impacts in determining whether to permit the destruction of wetlands.⁶⁸ Therefore, an application to destroy a discrete parcel of wetlands may be denied or conditioned on the ground that too many similar wetlands or too many wetlands in the same region have already been destroyed. This would be true regardless of whether the applicant had made any historic contribution to "the overall problem [i.e., wetlands destruction] that the restriction [i.e., permit denial] is imposed to redress." Indeed, many federal statutes intended to protect water quality, endangered species, and marine mammals, for example, are premised on the principle that historic losses of these resources are not in the national interest and that future activities affecting these resources will be subject to stricter federal regulation in an effort to halt historic trends.⁶⁹

The Executive Order language, however, can be read to provide an argument that a landowner whose project is subject to restriction under the Endangered Species Act,⁷⁰ for example, is bearing a disproportionate burden if a species has been depleted through no fault of the landowner's and if the landowner's proposed activity will make only an incremental contribution toward further depletion.⁷¹

The same would presumably be true for wetlands destruction. For example, suppose a person applies for a

§404 permit to develop a 50-acre tract of wetlands located in a state where 100,000 acres of wetlands remain (i.e., the permit would allow destruction of .05 percent of remaining wetlands). The applicant could argue that if the Corps and the Environmental Protection Agency (EPA) fail to grant permission to destroy all but .025 acres (.05 percent of the tract at issue), the applicant's burden of protecting wetlands will be greater than the applicant's proportion of the destruction of all remaining wetlands in the state (.05 percent which equals .025 acres).⁷² In other words, the applicant could argue that the proportion of wetlands to be preserved on the discrete tract should be no greater than the applicant's proportional contribution to destruction of all remaining wetlands. Since Congress often cites historic losses as a justification for legislation and since agency regulations or practice often consider cumulative impacts in making discrete regulatory decisions, the Executive Order may put a significant limitation on the agencies' power to comply with congressional intent and their own regulations.

Aside from separation of powers and administrative procedure questions raised by this language, the Executive Order's language is also not premised on any recognizable principle yet established in takings law. In fact it appears to directly contradict *Keystone*: "The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received."⁷³

The directive in the Executive Order is presumably derived from the following observation in *Nollan*: "If the *Nollans* were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"⁷⁴

Taken at face value, this language from *Nollan* appears to contradict the previously quoted statement in *Keystone*, even though both cases were decided in the same Term.⁷⁵ However, the *Nollan* majority was quick to follow the quoted statement with the observation that the theory of proportional contribution "is not the basis of the *Nollans*' challenge here."⁷⁶ Therefore, the purported basis for the Executive Order is once again dictum.

Finally, the proportionality theory rests on a statement of philosophy that provides no standards or guidance for

67. Exec. Order 12630, §4(b), ELR ADMIN. MATERIALS 45038. The Guidelines restate this requirement somewhat differently: "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." Guidelines, *supra* note 3, at 14, ELR ADMIN. MATERIALS 35171. The rationale behind this difference is not explained.

68. 33 C.F.R. §320.4(a)(1) (1987). The U.S. Environmental Protection Agency also considers cumulative impacts in determining whether to invoke its authority under §404(c), 33 U.S.C. §1344(c), ELR STAT. FWPCA 054, to "veto" a permit which the Corps may intend to issue. See Final Determination of the Assistant Administrator for External Affairs Concerning the Sweedens Swamp Site in Attleboro, Massachusetts, Pursuant to Section 404(c) of the Clean Water Act at 10, 25, and 30-31 (May 13, 1986) [hereinafter *Sweedens Swamp Veto*].

69. FWPCA §101, 33 U.S.C. §1251(a), ELR STAT. FWPCA 003; Endangered Species Act §2, 16 U.S.C. §1531, ELR STAT. ESA 002; Marine Mammal Protection Act §2, 16 U.S.C. §1361, ELR STAT. MMPA 002.

70. 16 U.S.C. §§1531-1543, ELR STAT. ESA 001.

71. A federal agency may be required to deny a permit for activity on private property if that activity "is likely to jeopardize the continued existence of any endangered species . . ." Endangered Species Act §7(a)(2), 16 U.S.C. §1536(a)(2), ELR STAT. ESA 010. See *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 15 ELR 20333 (10th Cir. 1985).

72. If over half of the original wetlands in the state have already been destroyed then the Corps and EPA may be subject to the argument that the proportions should apply to the total original wetlands acreage rather than what is left.

73. *Keystone*, 107 S. Ct. at 1245 n.21, 17 ELR at 20445 n.21.

74. *Nollan*, 107 S. Ct. at 3147 n.4, 17 ELR at 20920 n.4, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

75. Both the *Keystone* and *Nollan* majority opinions arose from 5-4 votes and only Justice White joined the majority in both cases. Assuming there is a conflict in the two decisions and that it reflects continuing uncertainty over the Court's basic philosophy of takings law, it is hardly appropriate for the White House to resolve this conflict before the Court does and to do so adversely to the fiscal interests of the federal agencies and the statutory integrity of their regulatory programs.

76. *Nollan*, 107 S. Ct. at 3147 n.4, 17 ELR at 20920 n.4.

determining whether any particular governmental action is a taking. The idea that some landowners should not be forced to bear what all of society should bear is just as useless for this purpose as Justice Holmes' famous assertion that "if regulation goes too far it will be recognized as a taking."⁷⁷ While this abstract statement might spawn no disagreement, it also provides no guidance as to precisely how far is "too far," particularly in any individual situation where a line must be drawn. The Court has recognized this problem posed by the burden-shifting homily quoted in *Nollan*:

[T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."⁷⁸

Thus the Supreme Court believes that the philosophical generality quoted in *Nollan* provides an unworkable test for establishing a taking. The Executive Order, however, has transformed it into a prohibition of agency action with potentially severe consequences for regulatory protection of natural resources.

Public Benefit

If the Executive Order were truly intended to provide guidance to agencies on takings law, then it would have reminded the agencies of a countervailing philosophical statement frequently employed by the Supreme Court. For example, in one case the Court found no taking because

[t]his interference with the property rights of an employer arises from the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation.⁷⁹

Thus, while individuals should not alone bear burdens that should be borne by the public as a whole, everyone can be expected to bear burdens to promote the public good. No one, least of all the Supreme Court, has been able to draw a line between this principle and the notion of proportionality or use them to establish whether a taking has occurred in any situation.⁸⁰ Nonetheless, the Executive Order selectively requires the agencies to obey one of these general homilies while ignoring the other.

Contribution

The Guidelines create a similar but slightly different problem for agencies by asserting that "[t]he 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."⁸¹ The Appendix to the Justice Department Guidelines does not identify any legal authority for this particular theory.

Most environmental regulatory agencies can probably ignore this "advice" because showing a direct contribution from their action will not be a problem. Denying a permit to discharge pollutants into water or air, to destroy a wetland, or to take marine mammals or endangered species should meet this test with ease. However, a more substantial problem is presented by statutes that appropriately attempt to grapple with more indirect but nonetheless harmful environmental impacts. Examples include nonpoint source discharges subject to the 1987 amendments to the FWPCA⁸² and the provisions of the Endangered Species Act that mandate protection of wildlife habitat as distinguished from prohibitions against the taking of individual animals.⁸³ Assessing a proposed use of private property to determine its indirect impacts on an endangered species population due to alteration or removal of habitat is already a complex biological and political problem. The Guidelines needlessly exacerbate this complexity by gratuitously injecting the element of a potential taking of private property without identifying any legal authority for this criterion. The same problem may also arise when the Corps or EPA denies or vetoes a §404 permit on the ground that destruction of a particular wetland has unacceptable adverse cumulative effects on wildlife habitat.

Under statutes such as the Endangered Species Act, for example, an agency should ignore this "guidance," concentrate on the responsibilities mandated by Congress in the Act, and let the courts determine whether the agency's biological judgment based on the best "scientific and commercial data available"⁸⁴ affected a taking under the tests so far articulated by the Supreme Court, not those of the Justice Department.

Reciprocity

As discussed, the Supreme Court's general statements about proportionality of burdens are counterbalanced by general statements focusing on the "public good" to be derived from regulation of property. The Supreme Court also cites a related general concept of reciprocity as articulated in *Keystone*: "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions placed on others."⁸⁵ The Executive Order characteristically fails to remind the agencies to take this principle into account when evaluating a potential taking. The Guidelines refer to reciprocity but restate the concept by requiring agencies to determine "[w]hether the pro-

77. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

78. *Penn Central*, 438 U.S. at 124, 8 ELR at 20533, quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (citations omitted).

79. *Connolly v. Pension Benefit Guaranty Co.*, 475 U.S. 211, 225 (1986).

80. The fact that neither of these general philosophical statements provides a useful standard is demonstrated by *Connolly*, where the Court quoted both the "public good" and "proportionality" homilies in the same opinion and still found no taking. 475 U.S. at 226 and 227.

81. Guidelines, *supra* note 3, at 18, ELR ADMIN. MATERIALS 35172.

82. FWPCA §319, 33 U.S.C. §1329, ELR STAT. FWPCA 046.

83. For illustrations of how the Act governs habitat encroachment see *National Wildlife Federation v. Coleman*, 529 F.2d 359, 6 ELR 2034 (5th Cir. 1976) and *Cabinet Mountains Wilderness v. Peterson*, 68 F.2d 678, 12 ELR 21058 (D.C. Cir. 1982). Under the Act the term "taking" refers to killing or otherwise harming individual members of a protected species. See *Endangered Species Act §3(19)*, 16 U.S.C. §1532(19), ELR STAT. ESA 003; 50 C.F.R. §17.3 (1987).

84. *Endangered Species Act §7(a)(2)*, 16 U.S.C. §1536(a)(2), ELR STAT. ESA 010.

85. *Keystone*, 107 S. Ct. at 1245, 17 ELR at 20445. The Court expressly rejected any notion that the reciprocity must be exactly proportional to avoid a taking. *Id.* at 1245 n.21, 17 ELR at 20445 n.21.

posed . . . action carries benefits to the private property owner that offset or otherwise mitigate the adverse *economic* impact of the proposed policy or action”⁸⁶ The Justice Department language implies that this principle is applicable only if the reciprocal benefit directly offsets economic impacts.

Thus the Supreme Court might consider the benefit to a landowner's health from clean air regulations that have led to denial of a permit for a smokestack necessary for construction of the landowner's proposed industrial plant, while the Guidelines seem to require a showing that this beneficial impact must offset the *economic* impact of permit denial to the landowner. The Guidelines establish a test that may make it difficult if not impossible for an agency not to find a taking. The Guidelines do not indicate whether a negative response to this determination (i.e., no offset can be demonstrated) implicates a taking. However, a landowner could cite the Guidelines and make such an argument against the United States in an inverse condemnation case. This would certainly be an ironic result given the origin of the reciprocity concept as militating against a taking finding.

Takings Implication Assessment—A Shot in the Dark

The Guidelines require the agencies to perform a “takings implication assessment” (TIA) which must include “[a]n assessment of the likelihood that the proposed action or policy may effect a taking” and “[a]n estimate of the potential financial exposure to the government should a court find the . . . action to be a taking.”⁸⁷ The administrative burden placed on the agencies in complying with this requirement is obvious. Indeed, compliance may cause the Corps and EPA to run afoul of the FWPCA's requirement for the “drastic reduction of paperwork . . . , and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays”⁸⁸

More importantly the Guidelines seem to impose an impossible task because the Supreme Court has repeatedly conceded its inability

“to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by a public action be compensated by the government Rather, [the Court] has examined the ‘taking’ question by engaging in essentially ad hoc, factual inquiries that have identified several factors . . . that have particular significance.” . . . These “ad hoc, factual inquiries” must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.”⁸⁹

Neither the Executive Order nor the Guidelines provide any clue to the agencies of how to make such an assessment in light of the “ad hoc” nature of even the Court's own analysis.

If, for example, the Corps or EPA proposes regulations or legislation intended to reduce wetlands destruction, they are required by the Guidelines to determine whether such regulations may affect a taking and what it will cost. Given the fact that approximately 100 million acres of wetlands still exist in the lower 48 states,⁹⁰ the task seems impossible, especially if the agencies are in no position to determine precisely what potential plans to develop these wetlands may be affected by such regulations. Moreover, even if they could answer that question, they would still be left with the task of “engaging in essentially ad hoc, factual inquiries [that] . . . must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.” Even if the agencies could perform this task, it requires the agencies to also make essentially ad hoc decisions as to whether the Supreme Court would find a taking in any particular instance, which is probably impossible in view of the total lack of coherence exhibited by the Court's taking decisions over approximately the last 10 years.

The Executive Order presumably does not expect exact estimates of either the amount of takings or the total costs. But given the scope of the task and the virtual lack of meaningful standards it is unlikely that any useful information will be generated by this procedure, which of course raises the question of why bother to make the Corps or EPA engage in a useless paper chase. On the other hand, the sheer size and impossibility of the task may well discourage either agency from even attempting to propose regulations to further tighten controls on wetlands destruction.

One could of course speculate that this is in fact the real purpose of the Executive Order, since development of useful information does not seem likely. Lest there be any doubt on this score, the Guidelines make it clear that agencies proposing to reduce impacts on private property are exempt from the burdensome bureaucratic requirements of the Executive Order.⁹¹ Therefore, agencies have an incentive to propose regulations that weaken regulatory control over wetlands destruction, for example, rather than vice versa.

The same problem will frustrate agency attempts to assess takings potential in the application of regulations to an individual parcel of property. Even the Supreme Court must engage in “ad hoc” factual inquiries and it concedes the absence of any “set formula.” What will constitute a taking depends largely if not entirely on the reactions of at least five of the Justices to the “unique circumstances” presented by any particular regulatory action. The Executive Order fails to acknowledge this problem and the Guidelines fail to provide the agencies with any solution. There is no reason to assume that the agencies will be able to anticipate the Supreme Court's reaction and thus no reason to have any confidence in the agencies' guesswork.

Impact of the Takings Implication Assessment

Once an agency has plowed through the Executive Order

86. Guidelines, *supra* note 3, at 19, ELR ADMIN. MATERIALS 35171 (emphasis added).

87. Guidelines, *supra* note 3, at 21-22, ELR ADMIN. MATERIALS 35172-73.

88. FWPCA §101(f), 33 U.S.C. §1251(f), ELR STAT. FWPCA 003.

89. *Keystone*, 107 S. Ct. at 1247, 17 ELR at 20446, quoting *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 294-296, 11 ELR 20569, 20576-77 (1981), and *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 10 ELR 20042, 20045 (1979) (citation omitted). 65

90. R. TIER, *WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS* 28 (1984). The destruction of wetlands may equal a half-million acres per year. *Id.* at 31.

91. Guidelines, *supra* note 3, at 5-6, ELR ADMIN. MATERIALS 35169

and Guidelines and prepared a TIA, the question arises of what to do with it. Where does this document fit into the agency's ordinary decisionmaking process in ruling or commenting on permit applications or proposing regulations or legislation? More important, what is supposed to be the impact on agency decisionmaking if the TIA concludes that a taking will occur?

The Guidelines superficially disclaim any intent to "prevent[] an agency from making an independent decision about proceeding with a specific policy or action" But this disclaimer rings hollow when the Guidelines also require that the TIA

shall be made available to the agency decisionmaker . . . to ensure that the decisionmaker may make a meaningful use of [it] in formulating his or her decision. . . . The TIA is to be integrated . . . into normal decisionmaking processes."

In addition, agencies are directed to "minimize the potential financial impact of takings by appropriate planning and implementation."⁹⁴ It is hard to believe that the agencies will still be able to reach independent decisions about regulatory actions in the face of such language when the TIA concludes that a taking will occur and estimates the cost thereof. If the agencies are to make "meaningful use" of the analysis and "minimize potential financial impact" they will need to think twice about denying the permit or promulgating the regulations.

The disclaimer is also unconvincing because the Executive Order and the Guidelines never remind the agencies that even if a potential for taking is present they can nonetheless "just say no" to the permit applicant. This reminder was conspicuously absent from these documents until it finally appeared in the last version of the Appendix:

The Guidelines . . . do not . . . preclude actions or policies which the decisionmaker determines necessary to meet [statutory] 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."

This begrudged acknowledgement of Congress' role in administrative decisionmaking is tempered by the Guidelines, which indicate that action such as permit denial or tougher regulations should be taken only as a last resort:

In those instances in which a range of alternatives are [sic] 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."⁹⁵

Where the circumstances or Congress has provided a range of alternatives, the potential for a taking will now govern the decisionmaking, notwithstanding Congress' failure to make it a factor and the inability of anyone to determine what will be a taking absent Supreme Court review.

Because of the technical complexity of many environmental issues, Congress tends to give the agencies broad discretion in applying the statutes and promulgating regula-

tions. Therefore, the Executive Order has vast potential for skewing agency decisions toward a more permissive posture due to a possible taking based on legal analyses of takings law that are either incorrect or predisposed toward an expansion of takings law that has yet to occur. Thus, the disclaimer in the Appendix does little to offset the subtle but potentially significant goal of regulatory reduction, which the Reagan Administration has sought for eight years."⁹⁷

Even in situations where the agencies presumably have no choice but to say "no," the Executive Order may still provide a basis for avoiding regulatory denial through "mitigation." This can be illustrated through a wetlands case in which a developer proposed to site a shopping mall in a wetland known as Sweedens Swamp in Massachusetts. The FWPCA §404(b)(1) Guidelines govern the issuance of §404 permits and they appear to prohibit permits for most activities in wetlands that are not "water-dependent," i.e., they need not be located in aquatic sites to achieve their project purposes.⁹⁸ Shopping centers are seldom water dependent. In reviewing the application for this particular shopping mall the Corps concluded that the Guidelines could be met because the applicant proposed to build another wetland somewhere else to replace Sweedens Swamp.⁹⁹ EPA concluded that using "mitigation" (actually compensation) to avoid the water dependency test was not valid and exercised its §404(c) power to veto the permit.¹⁰⁰

Regardless of which agency correctly read the Guidelines, this example demonstrates how agencies can transform a statute that presumably prohibits wetlands destruction in certain instances into a "wetlands removal" statute. The Executive Order will simply exacerbate what is already a problem in the Reagan Administration, especially among some agencies.

Takings Implication Assessment—A Shot in the Foot

It is anyone's guess where takings law is headed in the wake of the 1987 trilogy of cases. Maybe the Supreme Court will expand the circumstances in which a taking may be found. Maybe the Court will articulate a "set formula" for determining the existence of a taking. At any rate, it is perfectly legitimate to argue that the 1987 cases can be construed quite narrowly and that they do not represent any major departures in takings law, particularly for most federal agencies.

97. The Guidelines pay lip service to the agencies' legal obligations to take regulatory action notwithstanding a potential taking: "[F]ederal agency decisionmakers . . . to the extent permitted by law, consistent with their statutory obligations, can minimize the impacts of [agency] activities on constitutionally protected private property rights." Guidelines, *supra* note 3, at 2, ELR ADMIN. MATERIALS 35168. However, the Executive Order and the Guidelines clearly intend to interject potential takings as a factor that governs decisionmaking notwithstanding the absence of statutory authority for the agencies to do so and notwithstanding this disclaimer.

98. 40 C.F.R. §230.10(a)(3) (1987).

99. Sweedens Swamp Veto, *supra* note 68, at 4-7.

100. *Id.* at 53-66. Using mitigation in such situations due to the Executive Order runs counter to the Council on Environmental Quality regulations which suggest that mitigation, especially in the form of compensation, is itself a last resort. 40 C.F.R. §1508.20 (1987). The Executive Order seeks to reverse this philosophy by making permit denial the last resort. EPA also vetoed the Sweedens Swamp permit for other reasons. See *Bersani v. U.S. Environmental Protection Agency*, 850 F.2d 36, 18 ELR 20874 (2d Cir. 1988).

92. Guidelines, *supra* note 3, at 2, ELR ADMIN. MATERIALS 35168.

93. *Id.* at 21 (emphasis added), ELR ADMIN. MATERIALS 35172.

94. *Id.* at 12, ELR ADMIN. MATERIALS 35170-71.

95. Appendix, *supra* note 10, at 2, ELR ADMIN. MATERIALS 35175. This sentence was absent from the May 16, 1988, draft of the Appendix which was then called a "Supplement" to the Guidelines.

96. Guidelines, *supra* note 3, at 2, ELR ADMIN. MATERIALS 35168.

Assuming it can be argued just as legitimately that *Nollan* and *First English* presage a great expansion of the circumstances that will result in takings, one has to wonder why the United States Department of Justice is making such an argument. After all, Justice Department lawyers will represent the agencies in inverse condemnation actions in which landowners will presumably urge expansive views of *Nollan* and *First English* upon the lower courts and the Supreme Court.¹⁰¹ The agencies and the taxpayers have a right to expect that their lawyers will attempt to construe these two cases as narrowly as has been suggested in the preceding discussion. However, such arguments by Justice will be rather awkward, if not unpersuasive, when the landowner cites the Executive Order, the Guidelines, and the Appendix to support a contrary reading of these cases.

The agencies may well complain that the Justice Department has gratuitously shot itself in the foot with the unnecessarily broad interpretation of the *Nollan* and *First English* decisions. So, too, might the taxpayer, because this sort of undermining of the agency's case may make a takings finding more likely than it might have been without the Executive Order and Guidelines.

Indeed, the Executive Branch is effectively creating new takings law without waiting for the Supreme Court to do so. This is a truly ironic result if the whole purpose of the Executive Order is "to reduce the risk of undue or inadvertent burdens on the public fisc . . ."¹⁰² This may be the sort of assistance the public fisc can do without.

Similar problems may arise with the takings implication assessment. If such a document concludes that a taking is likely and the agency makes "an independent decision" to proceed with the regulatory action, the analysis is likely to become "Exhibit A" for the landowner in an inverse condemnation action arising from the regulatory decision. This will especially be true if the landowner agrees with the cost estimate contained in that analysis. Indeed, that estimate should be looked at as establishing the floor for the government's expert appraiser at trial and for any damages award in an inverse condemnation action.¹⁰³ Of

course, the agencies are aware of these risks and this may lead them to fudge their analysis against a taking conclusion or to make their cost estimates as low as possible. In that event the analysis loses whatever utility it arguably might have had to begin with. Again, it is difficult to see how this reduces the burden on the public fisc.

None of these problems will be lost on the agencies and this will further the chilling effect that the Executive Order will have on agency decisionmaking.

Conclusion

Conservation organizations and their members would probably support any effort by the Executive Branch to reduce the likelihood that the application of environmental regulations result in takings findings by the courts. However, this support assumes that the effort does not reduce the amount of regulatory protection, through permit denials or tougher regulations, for example, which would be counterproductive from the conservationists' point of view. The Executive Branch could advise the agencies on how to structure regulatory decisions to make them as defensible as possible in the event they result in inverse condemnation claims. The Justice Department could devote the considerable legal talents of its lawyers to the task of developing arguments that construe *Nollan* and *First English* as narrowly as possible.

However, rather than helping the agencies to preserve as many regulatory options as possible notwithstanding the threat of a taking finding, the Executive Order and the Guidelines do just the opposite. Takings law is expanded and regulatory options are narrowed. This approach appears effectively to usurp the respective roles of Congress and the Supreme Court, to the extent the takings issue influences agency decisions, by precluding regulatory actions that would have been taken in the absence of the Executive Order. Also, the process envisioned by the Executive Order may well weaken an agency's position in potential inverse condemnation suits, which would seem to create just the opposite effect of the stated intent of the Executive Order.

The next Administration would be well-advised to rescind Executive Order 12630 at the earliest opportunity.

101. In fact, the Justice Department is currently defending \$1 billion in takings claims. Marzulla, *The New "Takings" Executive Order and Environmental Regulation—Collision or Cooperation?*, 18 ELR 10254, 10255 (July 1988).

102. Exec. Order 12630, §1(c), ELR ADMIN. MATERIALS 45037.

103. The Justice Department may well assert the privilege for predecisional deliberative materials but asserting a privilege is no guarantee that the trial court will not order production of the document, especially with regard to factual materials that are not subject to the privilege. See generally LITIGATION UNDER THE FREEDOM OF IN-

FORMATION ACT AND PRIVACY ACT 79-90 (A. Adler ed. 1987). Resisting discovery requests under this privilege may be especially difficult since the Appendix states that "Questions as to the existence of takings require the sifting of numerous facts . . . This focus on facts lies at the heart of the advice contemplated by the" takings implication assessment. Appendix, *supra* note 10, at 2, ELR ADMIN. MATERIALS 35175.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

FEB 17 1994

Memorandum

To: Takings Group

From: I. Michael Heyman
Counselor to the Secretary
Department of Interior

Subject: Bills Introduced in the 103rd Congress with Takings Provisions

As promised, we have collected what appear to be all the bills with takings provisions that have been introduced in the 103rd Congress and are awaiting action.¹ We did not attempt to collect bills that have yet to be introduced, but be aware that draft bills are being circulated with takings provisions. Probably they contain provisions similar to those in introduced bills.

Below is a table and summary of the takings provisions of the bills collected. Eleven bills are before Congress, two in the Senate and nine in the House. As the table below indicates, some are cross-cutting, i.e., apply to all federal actions regardless of the statute, whereas others apply to a certain act or acts.

Bill number & sections	Main sponsor	Introduced	Target
S 177 (§§ 1-4)	Dole	1/21/93	all regulations
S 1521 (§ 307)	Shelby	10/6/93	ESA final decisions
HR 322 (§ 425)	Rahall	1/5/93	action under HR 322 (mining reform bill)

¹ This research was done on Westlaw, using the "cq-billtxt" database. The following search strings were used: "property /p privat! /p compensat!"; "just compensation' or 'Fifth Amendment'"; and "tak! /10 property." The list generated as a result of these searches was checked against a list compiled by the Congressional Research Service (Robert Meltz 707-7891).

HR 385 (§§ 1-4)	Solomon	1/5/93	all regulations
HR 561 (§§ 1-7)	Condit	1/25/93	all regulations
HR 1388 (§§ 1-7)	Smith, R.F.	3/17/93	regulations or actions under ESA, SMCRA, CWA § 404, and Nat'l Trails System Act
HR 1414 (§ 4)	Hansen	3/18/93	ESA regulations
HR 1490 (§ 306)	Tauzin	3/25/93	ESA final decisions
HR 1992 (§ 9)	Smith, R.F.	5/5/93	ESA activities or regulations
HR 3732 (§ 7)	LaRocco	1/25/94	effects of wilderness designation (Idaho wilderness bill)
HR 3784 (§ 1)	Smith, L.	2/2/94	all final agency decisions

Among these bills, the takings provisions fall into four types.

(1) Bills keying off EO 12,630. Four bills, three in the House and one in the Senate, essentially attempt to codify EO 12,630. In general, these bills require that before an agency's regulation may become effective, the Attorney General must certify that the agency is in compliance with EO 12,630 "to assess the potential for the taking of private property . . . with the goal of minimizing such where possible." S 177; HR 385, HR 1414; see HR 561 (same language but "takings" is inserted after "such"). The three House bills also allow certification to be made if the agency is in compliance with "similar procedures" to those in EO 12,630, apparently anticipating that the Clinton Administration will modify or rescind the EO. However, the Senate bill (sponsored by Dole) omits this language; instead, it explicitly incorporates the language of EO 12,630 "as in effect in 1991" and enacts it "into public law." (The only other major difference among these four bills is HR 561's direction to the Secretary of Agriculture to study the bill's effect on the farm economy and agricultural production, and report the findings to

Congress).

All four of these bills define "taking" as consistent with a taking under the Fifth Amendment. (Several other bills, as discussed below, have "taking" standards that may be more stringent than the Fifth Amendment standard). One of the bills defines "property" as "all property protected by the fifth amendment . . ., including real and personal property and tangible and intangible property." HR 561. The other three bills do not have this definition.

All four bills create a right of judicial review only with respect to whether the Attorney General has certified the agency as in compliance with the executive order (or "similar procedures" in the case of the three House bills). However, the four bills state that they are not to be construed to preclude judicial review under any other law.

(2) Bills establishing a statutory taking standard and a claimant-driven administrative process. Three bills establish a "taking" standard and create an administrative procedure by which an aggrieved property owner can be compensated if this standard is transgressed. S 1521; HR 1490; HR 3784. Two of the bills articulate the "taking" standard as whether the agency action "substantially deprives a property owner of the economically viable use" of the property. S 1521; HR 1490. No further guidance is given.

The third bill declares that a taking occurs when, as a result of an agency's written denial of the "right to develop or physically alter" property, the owner is "deprived of the beneficial or productive use" of the property. HR 3784. The only additional guidance provided by this bill is that the standard "includes economic loss through diminished development rights and the taking of private lands that results in a decrease in the fair market value of that property." HR 3784.

Under all three of these bills, if a property owner finds that an action results in a "taking" as defined, the owner is given 90 days to file a claim with the agency. Within 180 days (90 days in HR 3784), the agency's head must offer to purchase the property at fair market value and offer to compensate the owner for the reduction in fair market value caused by the action. The property owner then has 60 days to accept one of the offers, or if the owner rejects both, to submit the matter to binding arbitration as to whether the "taking" occurred and the amount of compensation due. In two of the bills, if the property owner accepts one of the agency's offers or submits the matter to arbitration, the agency action may be "deemed" a "taking under the Constitution and a judgment against the United States." HR 1490; HR 3784. In the third bill, if the property owner accepts

one of the offers or the arbitrated amount, the agency action simply constitutes a judgment "against the United States." S 1521.

All three bills also define "property" and "property owner." Two bills define "property" as "land," "any interest in land," or "any proprietary water right." S 1521; HR 1490. The two bills then define "property owner" as a "non-Federal person" who either "owns" land or an interest in land or "holds" a water right. The third bill contains similar definitions, but emphasizes that the definitions also include security interests: "Property" is defined as "land," "any interest in land, including recorded liens or other security interests in such land," and "any proprietary water right, including any recorded liens on such proprietary water right." HR 3784. "Property owner" is defined as "a person" who "owns" land or an interest in land, "holds" a water right, or "holds a legal, financial, or beneficial interest in property."

All three bills expressly preserve any right to judicial review the property owner may have under any other law.

(3) Bills establishing a statutory taking standard and an agency-driven administrative process. Two other bills also establish a "taking" standard and an administrative process, but they require the agency head to review the agency's actions and provide any warranted compensation without the active participation of the property owner. HR 1388; HR 1992. The bills are nearly identical except in scope (both have the same primary sponsor (Smith, R.F. (R-Or.))), one applying to ESA actions and the other to actions under ESA, SMCRA, CWA § 404, and the National Trails System Act.

Under these bills, a "taking" occurs when an agency action results in the "diminution in value of private property." The bills offer no guidance as to the degree of diminution necessary to effect a "taking" or how the diminution is to be measured. The bills merely state that a "taking" may result "even though the action results in less than a complete deprivation of all use or value or of all separate distinct interests in the same private property; and . . . even if the action is temporary in nature." "Property" is defined as all property protected by the Fifth Amendment, "including (but not limited to) real and personal property and tangible and intangible property."

The bills' administrative procedure is initiated by the agency. The agency head, "at the time of issuing regulations or undertaking any activity," must assess the regulation or activity against the "taking" standard. If a "taking" as defined will occur, the agency head must offer compensation to the property owner within 60 days of issuing the regulation or undertaking the action. After receiving the offer, the property owner has one

year to accept it or file a claim in the United States Claims Court. The bills authorize the court to pay attorneys fees and litigation expenses in addition to fair market value of the affected property. The bills also authorize the compensation to be achieved through an exchange of lands, tax benefits, mineral rights credits, and "comparable offers of value"; otherwise, cash judgments are to be levied against the Land and Water Conservation Fund.

(4) Bills incorporating the Fifth Amendment takings standard. Two bills incorporate by reference the Fifth Amendment takings standard. HR 322; HR 3732. A provision of the Idaho wilderness bill authorizes "[a]ny owner of lands adjacent" to wilderness designated by the act "who claims any reduction in value of such lands" as a result of the designation or subsequent management to file a claim with the Secretary of Agriculture.

HR 3732. The Secretary may enter into negotiations to determine appropriate compensation, but is only required to pay such compensation "to the extent required by the Fifth Amendment."

The second bill simply provides that any compensation required under the Fifth Amendment (through judicial action or settlement) is to be awarded from the Abandoned Locatable Minerals Mine Reclamation Fund, which is established by title III of the bill. The bill also authorizes the payment of reasonable fees and expenses to the extent provided in 42 U.S.C. § 4654(c).

Available are photocopies of select pages of the bills as reproduced by Westlaw. We have included the initial pages describing the bill and section titles, and the pages that contain the takings provisions.

ANALYSIS OF THE APPROACHES

The Dole Approach

The Dole approach (codifying the Reagan Executive Order) adopts an impact assessment process analogous to environmental impact analysis. The problem is that what is to be assessed is uncertain in two regards. First the standard floats -- it depends on interpretation of judicial utterances which do not pretend to be comprehensive and mean different things to different folk. (This can be minimized, of course, by guidelines issued by Justice. These will always lag, however. Second, the bite of regulations comes when they are applied and it is difficult meaningfully to anticipate and minimize the myriad of potential applications at the time of issuance.

Two predictions if Dole is successful:

(1) Agency analysis will be so general as to be relatively meaningless and the Attorney General (and courts) will find such analyses responsive to the statutory command. OR

(2) The Attorney General (and/or courts) will demand speculative specificity leading to a blizzard of paper (most meaningless in the real world), significant delay, and the potentiality of silly adventures by ideological judges.

The Approach of Bills Establishing Taking Standards and Processes

Standards

Four kinds of standards are illustrated in the bills analyzed. Roughly they go as follows:

(1) Whenever the Fifth Amendment requires (HR 3732)

(2) Whenever the action "substantially deprives a property owner of the economically viable "use" of the property (a Lucas standard). (HR 1490) (S. 1521).

(3) Whenever the action results in a deprivation "of beneficial or productive use" including "economic loss through diminished development rights . . . that results in a decrease in value. (HR 3784)

(4) Whenever agency action results in diminution in value of private property "even though less than a complete deprivation of all use or value . . . (HR 1388)

Approaches (3) and (4) would limit the use of regulation extensively, especially if combined with a process that requires an offer of compensation solely on an agency's initiative at the time an action is taken.

Approaches (1) and (2) are considerably more generous in these regards. Approach (1) is more uncertain in meaning as indicated in the analysis concerning the Dole approach. Approach (2), however, to be adequate should also address how to define "the property" involved (does it include contiguous property owned by the same person?) and whether the intended use that is barred is an actionable common law public nuisance (as defined by Lucas). This creates drafting difficulties.

Processes

One group of bills provides relief to property owners upon

the making of a claim. The other requires agency assessment and compensation offers when it takes an action.

The latter approach is pernicious. For reasons already stated, it is very difficult to assess whether diminution in property values has been caused at the time a regulation is issued. Any serious attempt to do this would require gargantuan efforts. If coupled with a low threshold standard, it would clearly stymie nearly all environmental regulations.

The claimant-activated approach is preferable. Important, however, is what remedies are available.

Remedies

There are four potential remedies where an applicable standard has been violated: (1) the U.S. acquires a fee interest; (2) the U.S. acquires a less than fee interest; (3) the U.S. pays compensation; (4) the U.S. varies the application of the regulation. There is an issue as to whether all four options should be made available and who exercises the option. The statutes go in all directions, but they all omit option (4).

First, it is quite arguable that an agency should be able to vary the application of regulation when it would cause unique hardship to the property owner that would be violative of the standard. There is a rich history of variance law in zoning administration and one could include an analogous provision here. Care should be taken, however, to make sure that the standards for issuance of a variance will protect the public interest, e.g., a variance may be issued (1) unless the activity thus permitted will seriously undermine the purposes of the Act being enforced, and (2) will allow only such variances from the regulations otherwise applicable as are necessary to assure consistency with the hardship standard. The availability of variance remedy might take care of a great majority of cases.

Second, I am not keen on the simple payment of compensation, especially at the property owner's option, because it might well result in a future windfall if the regulation is changed. Rather, compensation should be coupled with the acquisition of an interest in the subject property in the nature of an easement or an equitable servitude.

Third, requiring acquisition of a fee interest seems undesirable -- it could lead to fragmented patterns of Federal land ownership.

Fourth, if multiple remedies are to be available, I would leave the option to the agency to be exercised in a reasonable manner subject to judicial review for arbitrariness.

Funding

I have not addressed the source of funding if compensation is to be paid.

THE WHITE HOUSE
WASHINGTON

Mawm -
O.K., so this may not
be exactly the type of
memo you were thinking of,
but your person can use
it as a starting point.

Steve

8 S177 Dole (R-KS) 01/21/93 (76 lines)
Introduced in Senate

To ensure that agencies establish the appropriate procedures for assessing whether or not regulation may result in the taking of private property, so as to avoid such where possible.

Item Key: 938

12 HR109 Boehlert (R-NY) 01/05/93 (934 lines)
Introduced in House

To establish the Department of the Environment, provide for a Bureau of Environmental Statistics and a Presidential Commission on Improving Environmental Protection, and for other purposes.

Item Key: 238

14 HR385 Solomon (R-NY) 01/05/93 (73 lines)
Introduced in House

To ensure that agencies establish the appropriate procedures for assessing whether or not regulation may result in the taking of private property, so as to avoid such where possible.

Item Key: 514

15 HR561 Condit (D-CA) 01/25/93 (129 lines)
Introduced in House

To ensure that Federal agencies establish the appropriate procedures for assessing whether or not Federal regulations might result in the taking of private property, and to direct the Secretary of Agriculture to report to the Congress with respect to such takings under programs of the Department of Agriculture.

Item Key: 831

20 HR1330 Hayes (D-LA) 03/11/93 (1187 lines)
Introduced in House--Star Print

To amend the Federal Water Pollution Control Act to establish a comprehensive program for conserving and managing wetlands in the United States, and for other purposes.

Item Key: 3196

21 HR1388 Smith R.F. (R-OR) 03/17/93 (126 lines)
Introduced in House

To compensate owners for the diminution in value of their property as a result of Federal actions under certain laws, and for other purposes.

Item Key: 2847

HR 3875 Towson's

30 HR1992 Smith R.F. (R-OR) 05/05/93 (254 lines)
 Introduced in House

To amend the Endangered Species Act of 1973 to ensure that listing of species is in the public interest, that species are listed only on basis of actual threats, not speculative future threats to their existence, that listing of species and designation of their critical habitat will be subject to blind peer review, that persons conducting listing processes do not benefit economically from a listing decision, that emergency listing without full public and scientific community participation will occur only in emergency situations, that incidental take prosecutions will occur only after a recovery plan has been prepared which provides guidance as to what constitutes a take, and that the Act does not encourage suits between private citizens, and for other purposes.

Item Key: 4189

35 HR3673 Herger (R-CA) 11/22/93 (158 lines)
 Introduced in House

To minimize the impact of Federal acquisition of private lands on units of local government, and for other purposes.

Item Key: 9489

36 HR3784 Smith L. (R-TX) 02/02/94 (117 lines)
 Introduced in House

To provide for compensation to owners of property substantially diminished in value as a consequence of a final decision of any United States agency.

Item Key: 9959

103rd CONGRESS
2nd SESSION

Billy Tauzin
(Original Signature of Member)

H.R. 3875

Insert
title
here

To enact the Private Property Owners Bill of Rights

IN THE HOUSE OF REPRESENTATIVES

February 22, 1994

Insert
sponsor's
names
here

Mr. Tauzin, (for himself, Mr. Fields of Texas, Mr. Hayes, Mr. Taylor ✓
of North Carolina, Mr. Stenholm, Mr. Young, Mr. Montgomery, Mr. Stupak,
Mr. Stump, Mr. Pombo, Mr. Brewster, Mr. Callahan, Mr. Hutto, Mr. Ortiz,
Mr. Laughlin, Mrs. Bentley, Mr. Donilla, Mr. Cunningham, Mrs. Darner,
Mr. Pickett Mr. Packard,

Mr. Studd

BT + 20 cosponsors

A BILL

1 Be it enacted by the Senate and House of Representatives of the United
2 States of America in Congress assembled,

- 2 -

(3) As new Federal programs are proposed that would limit and restrict the use of private property to provide habitat for plant and animal species, the rights of private property owners must be recognized and respected.

(4) Private property owners are being forced by Federal policy to resort to extensive, lengthy, and expensive litigation to protect certain basic civil rights guaranteed by the Constitution.

(5) Since many private property owners do not have the financial resources or the extensive commitment of time to proceed in litigation against the Federal government, a clear Federal policy is needed to guide and direct Federal agencies with respect to their implementation of environmental laws that directly impact private property.

(6) While all private property owners should and must abide by current nuisance laws and should not use their property in a manner that harms their neighbors, these laws have traditionally been enacted, implemented, and enforced at the State and local levels where they are best able to protect the rights of all private property owners and local citizens.

(7) While traditional pollution control laws are intended to protect the general public's health and physical welfare, current habitat protection programs are intended to protect the welfare of plant and animal species, while allowing the recreational and aesthetic opportunities for the public.

- 4 -

(b) Subsection (a) does not prohibit entry onto property for the purpose of obtaining consent or providing notice required under subsection (a).

SEC.5. RIGHT TO REVIEW AND DISPUTE DATA COLLECTED FROM PRIVATE PROPERTY.

An agency head may not use data that is collected on privately-owned property to implement or enforce any of the Acts, unless-

(1) the agency head has provided to the private property owner--

(A) access to the information;

(B) a detailed description of the manner in which the information was collected; and

(C) an opportunity to dispute the accuracy of the information; and

(2) the agency head has determined that the information is accurate, if the private property owner disputes the information pursuant to subparagraph (C).

SEC.6. RIGHT TO AN ADMINISTRATIVE APPEAL OF WETLANDS DECISIONS.

Section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) is amended by adding at the end the following new subsection:

"(u) Administrative Appeals.-

(1) The Secretary or Administrator shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property owners or their authorized representatives an opportunity for an

- 6 -

"(A) A determination that a particular parcel of property is critical habitat of a listed species.

"(B) The denial of a permit for an incidental take.

"(C) The terms and conditions of an incidental take permit.

"(D) The imposition of an administrative penalty.

"(E) The imposition of an order prohibiting or substantially limiting the use of the property.

"(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the parcel of property involved in the action."

SEC.8. COMPENSATION FOR TAKING OF PRIVATE PROPERTY.

(a) **ELIGIBILITY.**-A private property owner that, as a consequence of a final qualified agency action of an agency head, is deprived of 50 percent or more of the fair market value, or the economically viable use, of the affected portion of the property, as determined by a qualified appraisal expert, is entitled to receive compensation in accordance with this section.

(b) **DEADLINE.**-Within 90 days after receipt of a final decision of an agency head that deprives a private property owner of fair market value or viable use of property for which compensation is required under subsection (a), the private property owner may submit in writing a request to the agency head for compensation in accordance with subsection (c).

- 8 -

(e) JUDGMENT.-A qualified agency action of an agency head that deprives a private property owner of property as described in subsection (a), is deemed, at the option of the private property owner to be a taking under the Constitution of the United States and a judgment against the United States if the private property owner-

(1) accepts the agency head's offer under subsection (c); or

(2) submits to arbitration under subsection (d).

(f) PAYMENT.-An agency head shall pay a private property owner any compensation required under the terms of an offer of the agency head that is accepted by the private property owner in accordance with subsection (d), or under a decision of an arbiter under that subsection, by not later than 60 days after the date of the acceptance or the date the issuance of the decision, respectively.

(g) FORM OF PAYMENT.-Payment under this section, as that form is agreed to by the agency head and the private property owner, may be in the form of-

(1) payment of an amount equal to the fair market value of the property on the day before the date of the final qualified agency action with respect to which the property or interest is acquired;

(2) a payment of an amount equal to the reduction in value; or

(3) conveyance of real property or an interest in real property having a fair market value equal to that amount.

- 10 -

(4) "private property owner" means a non-Federal person (other than an officer, employee, agent, department, or instrumentality of a State, municipality, or political subdivision of a State, or a State, municipality, or subdivision of a State) that-

(A) owns property referred to in paragraph (5)(A) or (B); or

(B) holds property referred to in paragraph (5)(C)."

(5) "property" means

(A) land;

(B) any interest in land; and

(C) any proprietary water right.

(6) "qualified agency action" means an agency action (as that term is defined in section 551(13) of title 5, United States Code) that is--

(A) under section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344); or

(B) under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

SEC.10. PRIVATE PROPERTY OWNER PARTICIPATION IN COOPERATIVE AGREEMENTS.

Section 6 of the Endangered Species Act of 1973 (16 U.S.C. 1535) is amended by adding at the end the following new subsection:

"(j) Notwithstanding any other provision of this section, when the Secretary enters into a management agreement under subsection (b) with any non-Federal person that establishes