

## **Excerpt from Guidance on "Takings" from the Department of Justice**

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

### **IV. DEFINITIONS**

**A. “Private Property”:** “Private Property” includes all property protected by the Fifth Amendment to the United States Constitution, including, but not limited to real and personal property and tangible and intangible property.

**B. “Takings Implication”:** Any policy or action to which the Executive Order applies that, upon examination by the decisionmaker under Section V(D)(3), infra, appears to have an effect on private property sufficiently severe as to effectively deny economically viable use of any distinct legally protected property interest to its owner, or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation, shall be deemed to have a takings implication for purposes of the Executive order and these Guidelines.

**C. “Significant Takings Implications”:** For purposes of the Executive Order and these Guidelines, a “significant takings implication” exists when, on the basis of available information, the decisionmaker concludes as to any policy or action with a takings implication that:

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

D. **“Legislation”**: For purposes of an agency's evaluation and reporting responsibilities under the executive order and these guidelines, “legislation” is limited to those agency legislative policies and actions that are subject to coordination and clearance by the Office of Management and Budget pursuant to Circular No. A-19, Revised, or succeeding management directives issued by the Office of Management and Budget on legislative coordination and clearance. Examples of the types of legislative submissions subject to review include an .....

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## B **The Nature of a Taking**

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

### 1. **Physical Occupancies**

Permanent or temporary physical occupancy is the most traditional type of taking and is therefore the most familiar and most easily recognized as a taking. As a general rule, where a physical occupancy exists no balancing of the economic impact on the owner and the public benefit will occur in the taking analysis. Examples of physical occupancy takings include not only formal condemnation exercises, such as the taking of land to build a highway, but also utility easements and access easements. [See Appendix to Guidelines, Section III(E)(2)]

### 2. **Physical Invasions**

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

Appendix to Guidelines, Section III[(E)(2)]

**3. Regulatory Takings**

- a. Like physical occupations or invasions, regulation which affects the value, use, or transfer of property may constitute a taking if it goes too far. Pennsylvania Coal Company v. Mahon, 260 U.S.393 (1922); Hodel v. Irving, 107 S. Ct. 2076 (1987); Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987). Regulation has gone too far and may result in takings liability if:
  - i. The regulation in question does not substantially advance a legitimate governmental purpose; it is not enough that the regulation or action might rationally advance the purpose purported to be served; or
  - ii. In assessing the character of the government action, the economic impact of the action on the property interest involved, the extent to which the regulation interferes with the reasonable, investment-backed expectations of the owner of the property interest, and other relevant factors, justice and fairness require that the public, and not the private property owner, pay for the public use. Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) ; Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980); First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 107 S. Ct. 2378, 2389, n.10 (1987).
- b. Regulatory actions that closely resemble, or have the effect of, a physical invasion or

occupation of property are more likely to be found to be takings. See, Nollan v. California Coastal Commission, 107 S. Ct. 2076 .

(1987) . The greater the deprivation of use, the greater the likelihood that a taking will be found.

c. Regulation of an individual's property must not be disproportionate, within the limits of existing information or technology, to the degree to which the individual's property use is contributing to the overall problem.

Thus, regulatory actions designed to compel public benefits, rather than prevent privately imposed harms, are also more likely to be takings.

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

### C. Special Situations

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

#### CATEGORICAL EXEMPTIONS

Pursuant to section VI (D) (3) of the Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, the following are designated as categorical exclusions for agencies and bureaus of the Department of the Interior:

(1) Non-legislative actions to which the affected property owners have consented, to the extent the policies affect only such consenting owners, including:

(a) policies relating to decisions to purchase, sell, lease, or provide goods or services (or refusals to provide such goods or services on grounds of breach of contract or failure to provide information or complete forms required by law), including entry into water

delivery and distribution system contracts and grants-in-aid;

(b) decisions to issue or deny a permit based solely on conditions for which the property owner has voluntarily applied;

(c) policies conditioning the issuance of a permit upon compliance with certain conditions, but only to the extent those conditions are either (i) expressly required by statute in a manner which leaves no discretion to the agency or (ii) are among alternative conditions offered to the applicant from which he may freely negotiate a choice; and

(d) renewals of outstanding permits upon the same bases and conditions as ones presently outstanding, or upon fewer or less intrusive bases and conditions.

(2) Regulations or permits authorizing the taking, possession, transportation or use of migratory birds or wildlife, issued under the Migratory Bird Treaty Act, 16 U.S.C. §§703, et seq., the National Wildlife Refuge System Administration Act, 16 U.S.C. §§460k, et seq., the Refuge Recreation Act, 16 U.S.C. §§460k, et seq., the Eagle Protection Act, 16 U.S.C. §§668, et seq., or the Endangered Species Act, 16 U.S.C. §§1531, et seq., provided, that this exception shall not be applicable to any regulations or permits which restrict the possession, transportation or use of wildlife already reduced to possession or ownership.

(3) Biological opinions issued pursuant to the Endangered Species Act, 16 U.S.C. §1536(c), where the opinion either:

- (a) governs only the use of Federal land by Federal personnel;
- (b) finds no jeopardy is likely to result; or
- (c) proposes alternatives which have been accepted by the applicant.

#### APPENDIX IV

(4) Listings of endangered and threatened species under the

Endangered Species Act, 16 U.S.C. §1533(c), where the species involved either:

- (a) is found solely on Federal lands not subject to leasehold or similar perfected interests, or on private lands whose owner has agreed to the proposed listing; or
- (b) is not found within the United States.

(5) The denial of permits to import species into, or export species from, the United States, under:

- (a) the Endangered Species Act, 16 U.S.C. §1539(a), provided this exclusion does not apply to the denial of hardship exemption pursuant to 16 U.S.C. §1539(b) to owners of property interests in species reduced to possession prior to their listing pursuant to 16 U.S.C. §1533, or to the modification of regulations under 16 U.S.C. §1539 (h) (2) ,
- (b) the Endangered Species Act, 16 U.S.C. §1539(e), provided this exclusion does not apply to the proposed regulation of Alaska Natives pursuant to 16 U.S.C. § 1539 (e)(4) ;
- (c) the Marine Mammal Protection Act, 16 U.S.C. §1361, et seq, provided this exclusion does not apply to: the modification, suspension, or revocation under 16 U.S.C. §1374(e)(1)(A) of any permit; or, reposed regulation of Alaska Natives pursuant to 16 U.S.C. §1371(b); and
- (d) the Eagle Protection Act, 16 U.S.C. §668, et seq.