



DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECC-E

10 MAY 1989

MEMORANDUM FOR: SEE DISTRIBUTION

SUBJECT: Guidance on Preparation of Takings Implication
Assessments (TIA)

1. Enclosed for your study and implementation are the following materials addressing Executive Order (EO) 12630, entitled "Governmental Actions and Interference With Constitutionally Protected Property Rights":

a. The Attorney General's Supplemental Guidelines to Evaluate Risk and Avoid Unanticipated Takings for the Department of the Army's Civil Works Program (Supplemental Guidelines);

b. Chief Counsel's Legal Analysis for a Permit Denial;

c. Chief Counsel's Legal Analysis for a Permit with Conditions Unacceptable to the Applicant; and,

d. Sample Takings Implication Assessment (TIA).

2. On March 15, 1988, President Reagan issued EO 12630, which stated in part that "Executive departments and agencies should review their actions carefully to prevent unnecessary takings" and required the Attorney General to promulgate guidelines for agencies to follow when making these evaluations. The Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings (Guidelines) were promulgated on July 1, 1988, and state in part that

Before undertaking any proposed action or implementing any policy or action subject to evaluation, each agency shall perform a Takings Implication Assessment (TIA). The TIA shall be made available to the agency decisionmaker responsible for determining whether and how to implement a policy or to undertake an action, . . .

(Guidelines, Section VI(A)(2)).

3. However, the Guidelines make it clear that the TIA should not inhibit the independent decision process of the Corps decisionmaker.

CECC-E

SUBJECT: Guidance on Preparation of Takings Implication Assessments (TIA)

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."

(Guidelines, Section I(A)).

4. The Attorney General's Supplemental Guidelines provide more specific guidance on when, within the context of the Corps Civil Works activities, a TIA is required and how such TIAs should be prepared. The Supplemental Guidelines require that a TIA be prepared only in cases where the decisionmaker proposes to deny a Corps permit or where an applicant is not willing to accept the permit conditions required by the Corps in order to grant the permit. Furthermore, as stated in the Guidelines, the TIA should not be used to avoid the statutory requirements of the Corps permit process, as implemented in the applicable regulations (e.g., the 404(b)(1) Guidelines). To insure that the permit decision would not be improperly affected by the TIA, the Supplemental Guidelines provide for the TIA to be prepared separate from the public interest review and the 404(b)(1) analysis and towards the end of the decisionmaking process, after the regulatory staff has determined to recommend denial or conditioning of the permit.

5. According to the Supplemental Guidelines, the TIA may contain up to three items: a legal analysis, a discussion of alternatives, and an estimate of potential financial exposure. The first step in preparing a TIA is a legal analysis prepared by the Office of Counsel. The question to be answered by this legal analysis is whether it appears that the proposed permit decision may have a "Takings Implication"; that is:

. . . an effect on private property sufficiently severe as to effectively deny economically viable use of any distinct legally protected property interest to its owner.

(Guidelines, Section IV(B)). The Guidelines and the Supplemental Guidelines establish a two-prong legal analysis which includes, (1) a review of the character of the government action; followed by (2) a review of the economic impact of the permit decision on any legally protected property interest. Guidelines, Section V(D)(2), and Supplemental Guidelines, Appendix A(4)(a). If no takings implication is indicated, the Supplemental Guidelines, Appendix A(4)(a)(iii), states that the TIA should be concluded at the legal analysis stage. Only if a

CECC-E

SUBJECT: Guidance on Preparation of Takings Implication Assessments (TIA)

takings implication is found by the legal analysis are the alternatives and financial exposure analyses included in the TIA.

6. If the Corps were to adhere to its normal decentralized approach to doing business, implementation of these guidelines would be left solely to the discretion of individual FOAs. However, since the current state of the law on constitutional takings is particularly ambiguous, we believe that it is important for the implementation of EO 12630 to be as uniform and consistent throughout the Corps as we can practicably manage. Furthermore, it is important that the TIA provide the takings implication review required by EO 12630 without compromising the Corps regulatory decisionmaking process under the 404(b)(1) Guidelines and the public interest review. Consequently, we have provided two Chief Counsel's Legal Analyses for general use in all cases where a TIA is required (i.e., Corps permit denials and all instances where the applicant objects to permit conditions). These Legal Analyses provide the desired consistency that will ensure that the integrity of the Corps regulatory decisionmaking process is preserved while still providing for the preparation of individual, fact specific TIAs as required by the Supplemental Guidelines. In addition, application or incorporation of the attached Legal Analyses in individual TIAs will avoid time intensive analysis for each individual application and thus minimize the regulatory and legal workload.

7. The Corps is, and must continue to be, sensitive to the rights of private property owners and the legal rights of permit applicants; however, this sensitivity should not interfere with the Corps' legally mandated regulatory responsibilities. Corps decisionmakers should continue to make reasonable, balanced permit decisions in the context of applicable legal requirements. The administrative record should always be carefully prepared to reflect this balanced decisionmaking process. In particular, when the regulatory staff proposes to recommend a permit denial or conditions likely to be unacceptable to the applicant, as a general rule they should contact counsel for assistance in the preparation of the administrative record. Counsel should review the administrative record to make sure that it clearly states the appropriate rationales for the denial or conditions in the manner and form least likely to lead to possible "takings" problems.

8. Specifically, the administrative record should present and reflect a fair, reasonable and balanced decisionmaking process that does not mislead the applicant. The U.S. Supreme Court's assessment of the Corps' administrative record and the ultimate outcome in Kaiser Aetna v. U.S., 444 U.S. 164, 175 (1979) demonstrate that "takings" problems are more likely to arise

CECC-E

SUBJECT: Guidance on Preparation of Takings Implication Assessments (TIA)

when the application process is not handled properly (e.g., when the applicant has relied to his detriment on inaccurate advice from the Corps). If the decisionmaker proposes to deny or condition the permit, any such denial or condition should clearly state the reasons for the decision, and whenever applicable, such decisions should be justified in the record in terms of public health and welfare concerns, water quality, flood control, public navigation, or other important public interests. The U. S. Supreme Court's holding in Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. ___, 107 S.Ct. 1232 (1987) suggests that regulation that advances important public interests, such as public health and welfare, may never be a taking, or at least is much less likely to present "takings" problems.

9. In addition, the record should clearly state the statutory purpose or important public interest advanced by the denial or conditions. This purpose should, whenever it is reasonable and appropriate, be based upon the specifically stated purpose of the authorizing statute or the statutory purpose as expanded by related environmental laws. (See, e.g., list at 33 C.F.R. 320.3). When the permit decision is based upon general purposes of the permit program instead of a specific statutory purpose, the record should state a purpose based upon one or more of the relevant factors in the public interest review (33 C.F.R. 320.4(a)) as discussed in the attached Legal Analyses.

10. Furthermore, it is important that the permit decision is limited to the specific application under consideration. Every denial or conditioned permit should specifically state that the denial or conditioned permit is for that specific application only and that the Corps retains an open mind regarding other possible uses of the property and regarding any possible future permit application.

11. As discussed in the attached Legal Analysis for Conditioned Permits, special care must be taken to ensure that the conditions imposed in a Corps permit specifically advance the statutory purpose, as implemented and interpreted by Corps regulations, and the 404(b)(1) Guidelines, etc. Permit conditions should not be used to advance public objectives unrelated to the general purposes of the Corps permit program, as reflected in the applicable regulations. In particular, conditions that lead to a physical invasion of private property are more likely to constitute a taking than other types of permit conditions. Nollan v. California Coastal Commission, 480 U.S. ___, 107 S.Ct. 3141 (1987). For example, requiring public access to privately constructed, privately owned waterways is likely to raise serious takings implications. See e.g., Vaughn v. Vermilion Corp., 444 U.S. 206 (1979).

CECC-E

SUBJECT: Guidance on Preparation of Takings Implication Assessments (TIA)

12. Following a review of the administrative record by counsel, counsel will prepare an individual, fact specific TIA to be provided to the decisionmaker as part of the decisionmaking package. The attached Chief Counsel's Legal Analyses provides a discussion of the important legal principles to be applied to the specific facts and should be used in preparation of each individual TIA. The TIA prepared by FOA counsel should begin with a fact specific legal analysis, and it should be no more than two pages in length. The TIA legal analysis should include:

- a. A Description of the specific activity proposed by the permit application;
- b. A statement of the proposed Corps permit decision (i.e., to deny or condition the permit);
- c. A discussion of the reasons for the Corps decision and the statutory/regulatory purpose or public interest advanced by the decision; and,
- d. A discussion of what economic impact the proposed decision would have on applicant's proposal and on the value and uses of applicant's property. Particularly in terms of
 - (1) upland and other alternatives available to applicant, and
 - (2) remaining economic value of the applicant's property, i.e., resale value, other possible economic uses, etc.

13. The principles discussed in the appropriate attached Chief Counsel's Legal Analysis should be applied to each part of the individual TIA legal analysis. In fact, in the great majority of cases it will probably be appropriate to incorporate the appropriate Chief Counsel's Legal Analysis by reference in the fact specific TIA, as provided in Appendix A(3) of the Supplemental Guidelines. If, and only if, a takings implication is found, then the TIA should also include a discussion of alternative actions available to the Corps and potential financial exposure raised by the takings implication. A sample TIA, based upon a hypothetical permit application and applying the appropriate attached Chief Counsel's Legal Analysis, is attached for guidance.

14. In my opinion, given the current ambiguity in the law, it is unlikely that any given permit denial or conditioned permit will raise takings implications for purposes of E.O. 12630. Therefore, application of the principles discussed in the attached Legal Analyses will generally lead to a conclusion that

CECC-E

SUBJECT: Guidance on Preparation of Takings Implication Assessments (TIA)

no takings implication is indicated. Of course, it is possible that a unique factual situation may arise in which application of the appropriate Legal Analysis to the fact specific TIA could lead to the conclusion that a particular permit decision will raise takings implications. In such a case FOA counsel should coordinate the TIA with the Office of the Chief Counsel, Attn: CECC-E, before it is finalized or presented to the decisionmaker.

15. The Chief Counsel's Legal Analyses provided herein represent our interpretation of the current state of the law. Of course, if the law changes substantially, reanalysis of the law will be required. Nevertheless, unless or until the U.S. Supreme Court provides further guidance, the appropriate attached Chief Counsel's Legal Analysis should be applied to each individual TIA.

16. However, each individual TIA, as well as the Legal Analyses applied to or incorporated into the TIA, should be kept confidential, must not be shown to the applicant, and may not be released under FOIA. The TIA is an internal predecisional legal opinion and is covered by Exemption 5 of FOIA. Not only is it exempt from FOIA prior to the decision because of its predecisional nature, but it is exempt from FOIA after the decision because as a legal opinion it is covered by attorney-client privilege. Therefore, following the decision to deny or condition the permit, the TIA should be removed from the administrative record. In place of the TIA the following statement should be included in the administrative record:

In compliance with the requirements of Executive Order 12630 and the Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, I, (name and title of the decisionmaker, e.g., District Engineer), have reviewed and considered the Takings Implication Assessment (TIA) prepared for this permit application and have concluded that (the action contemplated, e.g., denial of this permit) does not indicate a takings implication.

17. If you have any questions on this matter, please contact Lance Wood or Karl Huber of my office (CECC-E) at (202) 272-0035.

FOR THE COMMANDER:

Enclosures



LESTER EDELMAN
Chief Counsel