



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.

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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

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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

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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).

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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

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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

ATTORNEY GENERAL'S SUPPLEMENTAL GUIDELINES
TO EVALUATE RISK AND AVOID UNANTICIPATED TAKINGS
FOR THE DEPARTMENT OF THE ARMY'S CIVIL WORKS PROGRAM

1. AUTHORITY. Executive Order No. 12630, 53 Fed. Reg. 8359 (March 13, 1988); and the Attorney General's Guidelines for the Evaluation and Avoidance of Unanticipated Takings, signed June 30, 1988.

2. PURPOSE. These Supplemental Guidelines implement Executive Order (EO) 12630, which requires Army decisionmakers to evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies are required by the EO to review their actions carefully to prevent unnecessary takings and to account in decisionmaking for those takings that are necessitated by statutory mandate. Neither the Executive Order nor the Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings prevent an agency from making an independent decision about proceeding with a specific policy or action which the decisionmaker determines is statutorily required. Thus, the decisionmaker should continue to carry out his mission and responsibilities in full compliance with all legally binding statutes and regulations.

3. CONTACT FOR INFORMATION. David Barrows, Assistant for Regulatory Programs, Office of the Assistant Secretary of the Army (Civil Works).

4. OVERVIEW OF PROCEDURES. These supplemental guidelines provide a process for evaluation of the takings risks associated with policies, legislative initiatives, and other actions of the U.S. Army Corps of Engineers. As illustrated in Figure 1 of Appendix A, this process will be implemented in a sequential manner and only those steps necessary to the evaluation need be completed. The evaluation will begin with a determination as to whether the action affects or may affect the use or value of private property. If so, it will be necessary to determine if the action falls within any of the nine exclusions listed at Section II(B) of the Attorney General's Guidelines. If not excluded, the next step is to determine whether the action is exempted by a categorical exclusion. Finally, those actions not otherwise excluded will be evaluated by a case specific individual takings implications assessment.

5. STEP ONE. The first step of the evaluation process is to determine whether the Federal program, policy, or action may affect the use or value of private property in a Fifth Amendment context. Differentiation must be made between those actions which may adversely affect private interests but are remedied by damage claims and those which trigger the just compensation requirements of the Fifth Amendment.

- (a) The U.S. Army Corps of Engineers performs a myriad of civil works functions requiring hundreds of thousands of decisions to accomplish its daily tasks. Few of these actions have the potential to affect the use or value of private property in a Fifth Amendment context. No further evaluation is necessary for those actions which do not have the potential to affect the use or value of private property in a Fifth Amendment context. Examples of actions which do not cross this threshold include: personnel actions; information management activities; procurement activities; administrative support; financial, accounting, and budget functions; public affairs; auditing; security; employee and facility safety programs; research; and legal advice.
- (b) Additionally, certain management actions have the potential to affect financial interests without affecting property rights. For example, while the individual who owns a fishing supply store near a Corps park has a financial interest in management plans to close the park for the winter, he does not possess a legally recognized property interest in that decision. Management actions which are unlikely to affect the use or value of private property in a Fifth Amendment context include decisions involving user fees; private use of Government property; and operation of project lands under Federal ownership, navigational facilities, hydroelectric plants, pollution abatement projects, and fish and wildlife mitigation areas. Certain operational actions, however, do have the potential to affect the use or value of private property in a Fifth Amendment context and are to be further evaluated under these guidelines. Examples include: emergency operations (such as flood fighting) on private lands; flood water storage and releases; disposal of dredged material from Federal navigation projects; dredging operations with the potential of causing increased bank erosion; and the U.S. Army Corps of Engineers regulatory program.

6. STEP TWO. The following activities which may have an effect on the use or value of private property are excluded from further evaluation under the terms of Executive Order 12630.

- (a) PROGRAMS OR REGULATIONS REDUCING FEDERAL RESTRICTIONS ON USE OF PRIVATE PROPERTY. This exclusion has potential relevance for future changes in the Corps regulatory program and other civil works actions.
- (b) TRUST PROPERTY AND TREATY NEGOTIATIONS.
- (c) SEIZURES OF PRIVATE PROPERTY. The seizure of vessels in admiralty actions to recover damages owed to the United States are exempt from further review.
- (d) AGENCY PLANS AND STUDIES. The following predecisional civil works planning, engineering, and design actions fall within this exclusion: local cooperation agreements, general design memorandums, reconnaissance studies, feasibility studies and reports, floodplain hazard information, and EISs.
- (e) CONSULTATIONS REGARDING REGULATION OF PRIVATE PROPERTY BY STATE AND LOCAL GOVERNMENTS. Floodplain hazard mapping identifies the frequency and location of flooding in urban areas; local governments may then adopt land use restrictions to avoid damage to development in these areas. The consultations by the Corps with local governments are exempt from further consideration.
- (f) MILITARY PROPERTY. Corps construction activities on military property and Corps property leased to the military are included within this exclusion.
- (g) EXERCISE OF THE POWER OF EMINENT DOMAIN. Real estate actions exercising the power of eminent domain to purchase property for the military or for public works projects.
- (h) MILITARY AND FOREIGN AFFAIRS ACTIVITIES. Corps civil works and military construction performed in foreign countries or for foreign governments and those activities implementing international treaty requirements such as fisheries management and mitigation activities on the Columbia River are exempt from further evaluation.
- (i) PENDING OR IMMINENT LITIGATION.

7. STEP THREE. The following activities are categorically excluded from case-by-case evaluation based upon takings implications assessments which have been prepared for each category.

- (a) Operation and Maintenance of Flood Control Structures and Facilities Within System Design Limitations.
- (b) Disposal of dredged material in association with Federal projects in the navigable waters or on lands provided by the sponsor or acquired through eminent domain.
- (c) Emergency operations on private property. Natural Disaster activities of the Corps on private property taken in response to a National Emergency or widespread threat to life and safety are excluded. This includes flood fighting pursuant to 33 CFR 203 and disaster recovery.
- (d) Impoundment of abandoned property or vessels on Federally managed land or posing a threat to safe navigation pursuant to 36 CFR 327 or 33 CFR 245.
- (e) Certain regulatory actions pursuant to the U.S. Army Corps of Engineers regulatory program:
 - (i) Jurisdictional determinations
 - (ii) Investigations
 - (iii) Cease and desist orders. Cease and desist orders including those cease and desist orders which call for initial corrective measures where there is a determination that serious jeopardy to life and property exists which cannot otherwise be avoided during the period required for resolution of the violation.
 - (iv) Site restoration agreed to by the violator
 - (v) General permit authorizations
 - (vi) Individual permit approvals
 - (vii) Permit denials without prejudice. This denial occurs when another appropriate Federal, State, or local agency has previously denied certification to the permit applicant thereby

resulting in the applicant not satisfying statutory preconditions to permit issuance or has denied a required permit or authorization. Either action has no bias to the right of the applicant to reinstate processing of the Army permit application if subsequent approval is received from the agency.

8. STEP FOUR. Actions which have not been excluded from consideration by steps 1-3 of these supplemental guidelines will require preparation of an individual takings implications assessment (TIA). The TIA will address the case specific factors of the action in question using the following model:

(a) LEGAL ANALYSIS

- (i) Character of the government action.
 - Purpose of the enabling statute.
 - Will the permit decision substantially advance this purpose?
 - Degree to which private property interest affected by permit decision contributes to harm intended to be remedied by statute.
 - Will the permit decision effectively deny viable economic use?
- (ii) Economic impact of permit decision on private property.
 - What property interests will be affected by the action?
 - Degree of impact on private property.
 - Present use of property.
 - Does the permit decision substantially interfere with reasonable investment backed expectations of the applicant?

(b) ALTERNATIVES ANALYSIS

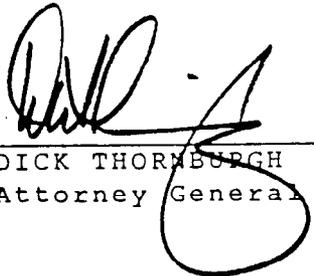
- (i) Identify alternatives which achieve the Corps' legal obligations but do not have takings implications.

- (ii) Identify alternatives which achieve the Corps' legal obligations and minimize the takings implications.

(c) FINANCIAL EXPOSURE ANALYSIS

9. Appendix A provides specific guidance on preparing individual TIAs for non-exempted regulatory permit decisions. More general guidance can be found by consulting the Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings and the Appendix to Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings.

Issued in Washington, D.C. the 23rd day of January, 1989



DICK THORNBURGH
Attorney General

APPENDIX A

PREPARATION OF TAKINGS IMPLICATIONS ASSESSMENTS FOR US ARMY CORPS OF ENGINEERS REGULATORY PERMIT DECISIONS

1. Introduction. This appendix provides the format for preparation of individual takings implications assessments (TIA) for those Corps' actions subject to Executive Order 12630. Where appropriate, categorical TIAs have been prepared for each of the unexcluded policies and categories of actions involved in the Corps of Engineers' Civil Works Program. Permit denials based on reasons other than denial of other lawfully required Federal, state, or local authorization (denials without prejudice) cannot be categorically excluded and must be evaluated using an individual TIA. Additionally, those decisions to issue permits with modifications or conditions unacceptable to the applicant must be similarly evaluated. This will include only those actions where a permit form has been sent to the applicant for signature and he has requested reconsideration of the conditions or other requirements. Individual TIA's will be prepared by FOAs for these actions using the procedures contained in this Appendix.

2. General Discussion. The TIA is an internal working document not subject to applicant or public review or release under the Freedom of Information Act. It is not an action forcing mechanism, but will provide the decision maker with full disclosure of the takings implications and fiscal impacts of the proposed action. It should be integrated into the normal decisionmaking process, but prepared as a separate document since it is an internal predecisional management and not subject to judicial review or discovery. The TIA, Executive Order 12630, and the Attorney General's Guidelines do not displace the statutes and regulations governing the Civil Works program. Thus, the Corps must continue to make all permit decisions in full compliance with applicable statutes and regulations, including the Corps permit regulation and the 404(b)(1) Guidelines. The TIA should be brief, concise, and no more than 2 pages in length. Once completed, it shall be made available to the decision maker prior to the decision to ensure meaningful use of its information in the decision formulation. The Statement of Findings required by 33 CFR 325 should include a statement that the decision complies with Executive Order 12630.

3. Takings Implication Assessment. The specific format for the TIA is left to the discretion of the FOA; however, it should provide a discussion of the following questions when appropriate. The TIA may incorporate by reference any detailed analysis contained in other documentation.

4. Preparation of the TIA.

a. Legal Analysis. The first step of a TIA is a legal analysis prepared by the appropriate Office of Counsel in coordination with the Real Estate Division. The legal analysis involves a review of the character of the government action as well as a review of the economic impact of the permit decision on property interests. This analysis involves an examination of the principles of existing case law to determine whether it appears that the proposed permit decision may 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...."

(i) Character of Government Action: In reviewing the character of the government action, consider the following principles from case law as applicable to the specific facts of the permit decision at issue.

- Purpose of Enabling Statute: Examine the operative provisions of the statute, including the stated purpose and legislative history and the legally binding regulations which implement the statute. Regulatory actions designed to compel public benefits, rather than prevent privately imposed harms, are more likely to result in takings. Keystone Bituminous Coal Assoc. v. DeBenedictis, 107 S. Ct. 1232, 1243 n.16 (1987).
- Will Permit Decision Substantially Advance the Statutory Purpose? An action may be considered "regulation which has gone too far" and may result in a takings liability if the regulation does not substantially advance a legitimate government purpose. Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Hodel v. Irving, 107 S. Ct. 2076, 2082 (1987); Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987).

- Degree to Which Applicant's Proposal Contributes to the Harm That the Statute Intends to Prevent: Regulation of an individual's property should 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. However, this does not preclude appropriate measures to deal with documented environmental cumulative impacts.
- Will Permit Decision Effectively Deny Economically Viable Use: In Deltona Corporation v. United States, 657 F.2d 1184 (Ct. Cl. 1981), the court found no taking in a multi-stage development in wetlands where early stages were permitted but latter stages denied. Where many economically viable uses remain, denial of the highest and best use is not necessarily a taking. Likewise the court found no taking where the Corps denied a 404 permit but offered a modified permit which the applicants rejected. Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981); see also, Kaiser Aetna v. United States, 444 U.S. 164 (1979). See generally Penn Central Transportation Company v. New York, 438 U.S. 104 (1977) (No taking when action leaves a reasonably beneficial use).

(ii) Economic Impact of Permit Decision on Applicant:
The following applicable principles from case law should guide consideration of the economic impact of the permit decision on the applicant.

- Property Interests Affected: First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2389 (1987), held that time consumed by administrative processes in good faith which may be viewed as normal delay will likely raise no takings implication. The Court recognized the existence of a temporary taking remedy, but did not specify a test as to whether a delay was undue or not.
- Degree of Impact: Florida Rock v. United States, 791 F.2d 893, 902 (Fed. Cir. 1986) cautioned that a regulation under the Clean

Water Act can be a taking if its effect on a landowners's ability to put his property to productive use is sufficiently severe.

- Present Use of Property: 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. Nollan, above. The greater the deprivation of use, the greater the likelihood that a taking will be found.

- Will Permit Decision Significantly Interfere With Applicant's Reasonable Investment Backed Expectations? One factor the courts consider in determining whether a taking has occurred is the extent to which the regulation interferes with the reasonable investment-backed expectations of the owner of the property interest. Pennsylvania Coal Co., above; 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, above.

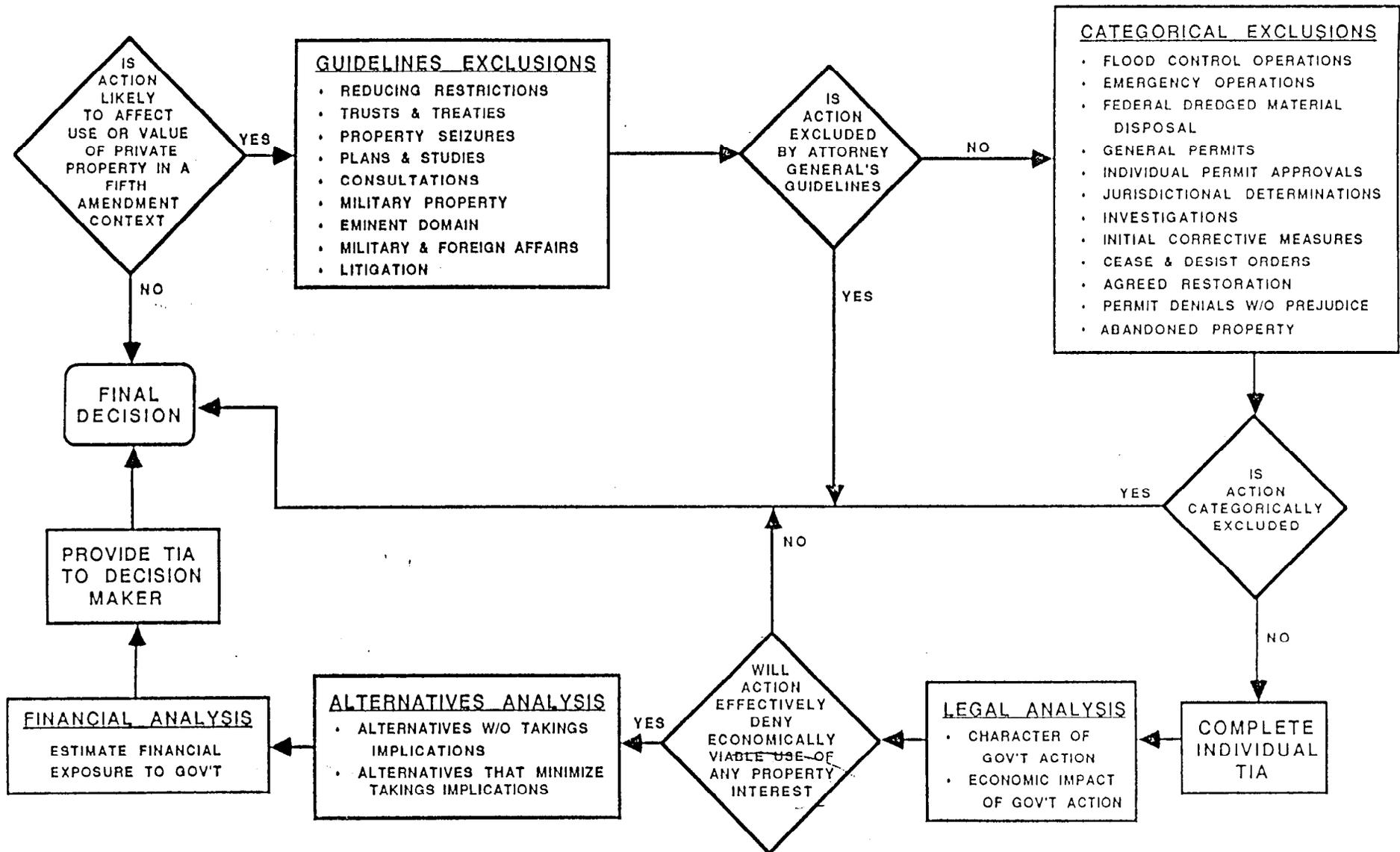
(iii) If no takings implication is indicated, the TIA should be concluded at the legal analysis stage. If a takings implication is indicated, the analysis moves to a second step involving identification and consideration of alternatives.

b. Alternatives. This step involves the consideration of alternatives which avoid the takings implications, or, failing in that respect, minimize the takings implications. In most permit decisions the record will already contain a review of reasonable alternative options available to the decisionmaker. It will not be necessary to repeat this analysis in the TIA. The earlier analysis may simply be referenced along with any additional discussion which may be required. Only those alternatives that achieve the same statutory obligations as the permit decision should be considered in the TIA. The statutory obligations are determined through consideration of all statutes and regulations for which the Corps is responsible during the permit process (33 CFR 320 and 325).

c. Estimate of the Potential Financial Exposure to the Government. The Attorney General's Guidelines are clear that this estimate should be just that--an estimate. It should not include extensive market surveys, real estate appraisals, or other labor intensive investigations. The intent here is to

provide a dollar amount for which the government may be liable should a court find the proposed action to be a taking. Undue delay in the permit process may increase the amount of just compensation due the applicant. Damages resulting from the loss of business incidental to the taking are not recoverable as part of the just compensation due. Mitchell v. United States, 267 U.S. 341, 346 (1925). Just compensation entitles the successful plaintiff to interest from the date of the taking to the date of payment Jacobs v. United States, 267 U.S. 13, 16-17 (1933) and litigation expenses 42 U.S.C. 4654(c). It may be necessary to request the applicant to provide certain information, such as their property acquisition cost and other costs that may assist in the development of this estimate.

FIGURE I



CHIEF COUNSEL'S LEGAL ANALYSIS
for a Permit Denial

1. In order to avoid a takings implication the character of the government action (the permit denial) must be such that it will prevent the harm that the enabling statute seeks to prevent and it must substantially advance the purpose of the enabling statute. Supplemental Guidelines, Appendix A(4)(a)(i) and see also, Agins v. Tiburon, 447 U.S. 255, 260 (1980). There are three basic statutory authorities providing for permits to be granted or denied by the Corps: (1) Section 404 of the Clean Water (CWA), 33 U.S.C. 1344; (2) Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401 and 403; and (3) Section 103 of the Marine Protection, Research and Sanctuaries Act (MPRSA), 33 U.S.C. 1413. [1] Each of these was enacted for a specific purpose; however, the Corps broader public interest review has been applied to all of them by means of rulemaking under the Administrative Procedures Act (APA), 5 U.S.C. 553. Moreover, other statutes such as the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the Coastal Zone Management Act (CZMA), and other laws (e.g., those listed at 33 C.F.R. 320.3) have modified or expanded the original statutory purposes of the Corps regulatory authorities.

2. Section 301 of the Clean Water Act (CWA), 33 U.S.C. 1311, states that the discharge of any pollutant by any person into the waters of the United States shall be unlawful, unless in compliance with provisions of the CWA, specifically including Section 404 of the CWA. The denial of a permit for the discharge of dredged or fill material into the waters of the United States is authorized by Section 404 and required by regulation if the proposed discharge fails to meet the requirements of the EPA's Section 404(b)(1) Guidelines, 40 C.F.R. Part 230, and/or the Corps Regulations, 33 C.F.R. Parts 320 through 330, and/or other applicable statutes such as ESA, NEPA or CZMA. The statutory purpose of the CWA is stated in Section 101 of the CWA, 33 U.S.C. 1251, as follows:

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

3. Sections 9 and 10 of the RHA prohibit the creation of any obstruction and/or the construction of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structure in the navigable waters of the United States, or any excavation, filling, or any other modification of the course, location, condition, or capacity of any navigable water, unless authorized and approved by the Department of the Army. Although the purpose of Section 10 is not specifically stated in the RHA, it is well established through its legislative history and case law

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Chief Counsel's Legal Analysis for a Permit Denial

that Sections 9 and 10 were originally enacted to protect the public interest in the navigable waters of the U. S. by, for example, regulating any activity that could interfere with navigation in the navigable waters of the United States. See e.g., U.S. v. Logan & Craig Charter Service, Inc., 676 F.2d 1216 (8th Cir. 1982).

4. However, in addition to the original statutory purposes, in 1968 the Corps expanded its regulatory purview for Sections 9 and 10 permits to consider the overall public interest in the navigable waters of the U. S. The current Corps Regulatory Program Regulations read as follows:

All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

33 C.F.R. 320.4(a).

5. Over the years this broad public interest review has been approved by the Federal Courts. They have held that other laws and public concerns have expanded the Corps review of the acceptability of a proposed activity well beyond the original stated purpose of the statute. Thus laws, such as those listed at 33 C.F.R. 320.4, have clearly expanded the statutory purposes of the enabling statutes. In Zable v. Tabb, 430 F.2d. 199 (5th Cir. 1970), the Fifth Circuit Court of Appeals found that the National Environmental Policy Act of 1969 (NEPA) extended the Section 10 public interest review to include consideration of ecological factors in determining whether to grant a Section 10 permit. The court stated that

The District Engineer is given the initial responsibility of evaluation all relevant factors in reaching a decision as to whether the particular permit involved should be granted or denied. (Emphasis added.)

Zable, at 211. (See also, U.S. v. Morretti, 478 F. 2d. 418 (5th Cir. 1973)). In fact in over twenty years no court has struck

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down as invalid the Corps broad public interest review in either Section 10 or Section 404 permit analysis. Considering, the Federal courts' general acceptance of the broad scope of the public interest review under Sections 9 and 10 and Section 404, the Federal courts are likely to give some deference to the Corps regulations and are likely to consider any permit denial based upon a relevant factor in the public interest review to advance a statutory purpose. [2]

6. Of course, this does not mean that all relevant factors in the public interest review will carry the same weight with the courts in determining whether the Corps action significantly advances a legitimate purpose. Undoubtedly certain public purposes such as public health and welfare are much less likely, if ever, to raise "takings" problems. Whereas, we cannot say that other relevant factors in the public interest review, such as aesthetics, will be accorded such importance by the courts. However, in many cases the relevant factors that lead to a permit denial will be those specifically stated in the statute.

7. As a general rule, Section 404 permits are denied when, in the view of the Corps decisionmaker, the proposed activity either fails the requirements of EPA's 404(b)(1) Guidelines or is found to be contrary to the public interest in the context of the statutory purpose of restoring and maintaining the chemical, physical and biological integrity of the waters of the United States. Similarly, Section 9 or 10 permits are normally denied when the proposed activity will interfere with navigation or where the proposed structure would be environmentally unacceptable or otherwise contrary to a judicially accepted relevant factor in the Corps public interest review. In such cases the Section 404 or Section 9 or 10 permit denial clearly advances their respective statutory purposes. [3] Of course, a permit denial based upon a specific statutory purpose or upon an important public interest such as public health and welfare will clearly advance a legitimate purpose. However, if the Corps permit denial is properly based upon either the express statutory purposes or upon any of the relevant public interest factors in the Corps regulations adopted through APA rulemaking (and the related statutes cited therein), the nature of the government action significantly advances a legitimate purpose and passes the first test in the legal analysis.

8. After examining the nature of the Corps action, the second step in the TIA legal analysis is to review the economic impact of the permit denial. This analysis is more difficult because the United States Supreme Court has not provided any clear guidance to determine whether the denial of a permit under the Corps regulatory authorities can deny the owner economically

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viable use of any legally protected property interests. In Kaiser Aetna v. U.S., 444 U.S. 164, 175 (1979) the Supreme Court stated that

this court has generally "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." Penn. Central Transportation Co. v. New York City, 438 U.S. 104, 124. Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries. . .

See also MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 349 (1986).

9. The Supreme Court has stated that a land use regulation that substantially advances a statutory purpose will not constitute a taking if it does not "den[y] an owner economically viable use of his land." Agins v. Tiburon, supra at 260. However, at present it does not appear that even denial of all economically viable use of a legally protected property interest will necessarily be considered a taking. In Keystone Bituminous Coal Ass'n. v. DeBenedictis, (Keystone), 480 U.S. ____, 107 S.Ct. 1232 (1987) the Supreme Court held that a statute that required that 50 percent of the coal beneath certain structures must be left in place (to provide surface support) was not a taking even though the mining companies had purchased the "support estate" from the surface owners. The Pennsylvania statute prevented any viable use of the support estate, a clearly recognized and legally protected property interest, which the mining companies had purchased. However, the Court maintained that since the regulation substantially advanced the statutory purpose of protecting the health, safety and general welfare of the public (Keystone, at 1242.) and preventing a public nuisance (Keystone, at 1245.) no taking had occurred. [4] (For similar reasoning see also Deltona Corporation v. U.S., 657 F.2d 1184 (Ct.Cl. 1981).)

10. The U.S. Supreme Court has yet to clarify what land use regulations could constitute a taking. Other holdings of the Supreme Court can be interpreted to imply that valid regulation advancing the statutory purpose may, in some cases, deny all economically viable use and constitute a taking.[5] However, to date the U.S. Supreme Court has rendered no decision from which we can conclude that the denial of a Corps permit would "deny the owner all economically viable use of a legally protected

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property interest" and thereby constitute a regulatory taking.[6] In my opinion, unless or until the U.S. Supreme Court provides us with more than case by case, "ad hoc" determinations of when government action that substantially advance statutory purposes will deny economically viable use of legally protected property interests so as to constitute a taking, it is very difficult, if not impossible, to predict with any legally certainty whether a particular permit denial causes sufficient economic impact to give rise to a takings implication.

11. However, we do know that if the regulation advances a legitimate purpose, as long as there is some economically viable use of property, even if the value of the property has been substantially diminished by the regulation, there is not a taking. If nothing else, the holding of the United States Supreme Court in Keystone demonstrates that regulation that substantially advances a state interest may significantly diminish the value of private property without constituting a taking. Moreover, in Deltona Corporation v. U.S. the United States Court of Claims applied this same rationale to a Corps permit case.

The Court, however, clearly rejects the notion that diminution in value, by itself, can establish a taking.

Deltona Corporation v. U.S., at 1193.

12. Furthermore, there will seldom be no economic use of the property in question after a permit denial. In many cases the applicant can make modification or provide mitigation that will make the proposed activity permissible, or the applicant may be able to sell the property for close to the original purchase price. Certainly, the denial may prevent the most valuable use or the use that the owner wishes to employ; but there will usually be some use to which the property can be put. However, even if the owner is able to demonstrate that there is no economically viable use for his land, it is not clear from the current Supreme Court cases whether even this circumstance would necessarily constitute a taking. (See Keystone, supra.) Therefore, given the uncertain status of the law, it is unlikely that any Corps permit denial will "deny all economically viable use of any legally protected property interest" so as to constitute a regulatory taking.

13. The above analysis applies to Section 9 and 10 and Section 103 permit denials, as well as denials of Section 404 permits. However, in addition, due to the Federal navigation servitude, there are much more limited private property rights in the

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traditionally navigable waters of the United States covered by Section 9, 10, and 103 permits. In cases where a Section 9 or 10 or Section 103 permit is denied in order to protect and maintain navigation, the Federal courts generally will not consider a takings claim. For example, in Kaiser Aetna the Court stated

When the "taking" question has involved the exercise of the public right of navigation over [navigable waters of the U.S.], however, this Court has held in many cases that compensation may not be required as a result of the federal navigation servitude. See, e.g., United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913)

Kaiser Aetna, at 175. (See also, Zable v. Tabb, at 215.) Therefore, in addition to the reasons stated above for Corps permit denials in general, there is very little chance of a takings implication when the Corps denies a Section 9 or 10 or Section 103 permit for reasons of public navigation.

14. In conclusion, as a general rule, based upon current law, the proper denial of a permit under Section 9 or 10, Section 103, or Section 404 (i.e., a denial consistent with the relevant statute and regulations, as discussed above) will (1) substantially advance either a legitimate public interest or a specific statutory purpose, and (2) is unlikely to deny the owner all economically viable use of a legally protected property interest.

FOOTNOTES

[1] The purpose of the MPRSA is to

. . . prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

33 U.S.C. 1401(b). Due to the broad scope of this purpose it is unlikely that the Corps would deny a Section 103 permit for a reason other than to advance this purpose. However, Section 103 permits represent a very small percentage of the Corps regulatory program, and since Section 103 permits will seldom, if ever, involve legally protected private property interests, no specific discussion of Section 103 permits is provided in the memorandum. Nevertheless, the principles discussed herein regarding Section 10 and Section 404 permits also apply where applicable to Section 103 permits.

[2] It should be noted, however, that this rationale can be taken too far, if the factors considered are unrelated to the impacts which a proposed project will have on the environment. In Mall Properties Inc. v. Marsh, 672 F.Supp. 561 (1987), the court held that adverse economic impacts on the commerce of the City of New Haven was not a legitimate factor for consideration. Nevertheless, the Court acknowledged the broad scope of the public interest review.

[T]he court concludes that in deciding whether to grant a permit the Corps may consider economic effects which are proximately related to changes in the physical environment. The Corps may not, however, properly consider and give significant weight to economic effects unrelated to the impact which a proposed project will have on the environment.

Mall Properties Inc., at 566.

[3] On the other hand, the advancement of a statutory purpose is less clear in cases where the District Engineer determines that the permit should be denied based upon a

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relevant factor in the public interest review, not specifically stated in the law or specifically accepted by the Federal courts.

[4] As an aside, the Court stated that there was not a sufficient diminution in value to constitute a taking, since the mining companies could still mine the rest of the coal. But regardless of the viable use of the rest of the coal the support no economically viable use remained in the support estate.

[5] Nollan v. California Coastal Commission, 480 U.S. ____, 107 S.Ct. 3141 (1987) and First English Evangelical Lutheran Church v. County of Los Angeles, 480 U.S. ____, 107 S.Ct. 2378 (1987).

[6] Recently several lower courts have implied that a Section 404 permit denial might deny all economically viable uses and constitute a taking. See, e.g., Florida Rock v. U.S., 791 F.2d. 893 (Fed. Cir. 1986) and Loveladies Harbor v. U.S., 15 Cl.Ct. 375 (1988), and Beure-Co. v. U.S., 16 Cl.Ct. 42 (1988).

CHIEF COUNSEL'S LEGAL ANALYSIS
for a Permit with Conditions Unacceptable to the Applicant

1. In order to avoid a takings implication the character of the government action (the conditioned permit) must be such that it will prevent the harm that the enabling statute seeks to prevent, and it must substantially advance the purpose of the enabling statute. Supplemental Guidelines, Appendix A(4)(a)(i) and see also, Agins v. Tiburon, 447 U.S. 255, 260 (1980). There are three basic statutory authorities providing for permits to be granted or denied by the Corps: (1) Section 404 of the Clean Water Act (CWA), 33 U.S.C. 1344; (2) Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401 and 403; and (3) Section 103 of the Marine Protection, Research and Sanctuaries Act (MPRSA), 33 U.S.C. 1413. [1] Although each of these statutes was enacted for a specific purpose, the Corps broader public interest review has been applied to all of them by means of rulemaking under the Administrative Procedures Act (APA), 5 U.S.C. 553. Moreover, other statutes such as the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the Coastal Zone Management Act (CZMA), and other laws (e.g., see those listed at 33 C.F.R. 320.3) have modified or expanded the original statutory purposes of the Corps regulatory authorities.

2. Section 301 of the Clean Water Act (CWA), 33 U.S.C. 1311, states that the discharge of any pollutant by any person into the waters of the United States shall be unlawful, unless in compliance with provisions of the CWA, specifically including Section 404 of the CWA. The denial of a permit for the discharge of dredged or fill material into the waters of the United States is authorized by Section 404 and required by regulation if the proposed discharge fails to meet the requirements of the EPA's Section 404(b)(1) Guidelines, 40 C.F.R. Part 230, and/or the Corps Regulations, 33 C.F.R. Parts 320 through 330, and/or other applicable statutes such as ESA, NEPA or CZMA. The statutory purpose of the CWA is stated in Section 101 of the CWA, 33 U.S.C. 1251, as follows:

The objective of this chapter is to
restore and maintain the chemical, physical,
and biological integrity of the Nation's
waters.

3. Sections 9 and 10 of the RHA prohibit the creation of any obstruction and/or the construction of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structure in the navigable waters of the United States, or any excavation, filling, or any other modification of the course, location, condition, or capacity of any navigable water, unless authorized and approved by the Department of the Army. Although the

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purpose of Section 10 is not specifically stated in the RHA, it is well established through its legislative history and case law that Sections 9 and 10 were originally enacted to protect the public interest in the navigable waters of the U. S. by, for example, regulating any activity that could interfere with navigation in the navigable waters of the United States. See e.g., U.S. v. Logan & Craig Charter Service, Inc., 676 F.2d 1216 (8th Cir. 1982).

4. However, in addition to the original statutory purposes, in 1968 the Corps expanded its regulatory purview for Sections 9 and 10 permits to consider the overall public interest in the navigable waters of the U. S. The current Corps Regulatory Program Regulations read as follows:

All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

33 C.F.R. 320.4(a).

5. Over the years this broad public interest review has been approved by the Federal Courts. They have held that other laws and public concerns have expanded the Corps review of the acceptability of a proposed activity well beyond the original stated purpose of the statute. Thus laws, such as those listed at 33 C.F.R. 320.4, have clearly expanded the statutory purposes of the enabling statutes. In Zable v. Tabb, 430 F.2d. 199 (5th Cir. 1970), the Fifth Circuit Court of Appeals found that the National Environmental Policy Act of 1969 (NEPA) extended the Section 10 public interest review to include consideration of ecological factors in determining whether to grant a Section 10 permit. The court stated that

The District Engineer is given the initial responsibility of evaluation all relevant factors in reaching a decision as to whether the particular permit involved should be granted or denied. (Emphasis added.)

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advance the statutory purpose. As stated in Nollan v. California Coastal Commission, 480 U.S. ____, 107 S.Ct. 3141 (1987), to avoid takings implications a condition on land use must be such that it will advance the statutory purpose by preventing the harm addressed by the statute and caused by the applicant and not merely provide some ancillary benefit or prevent some ancillary harm. In particular the Court in Nollan warned that

As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a "substantial advanc[ing]" of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

Nollan, at 3150. Permit conditions should not be used to advance public objectives unrelated to the various general purposes of the Corps permit program, as reflected in the applicable regulations.

9. In particular, conditions that lead to a physical invasion of private property are very likely to constitute a taking. Nollan, supra. For example, requiring public access to privately constructed, privately owned waterways are likely to raise serious takings implications. See e.g., Vaughn v. Vermilion Corp., 444 U.S. 206 (1979). Instead, proper Corps permit conditions should be of such a nature that they work to advance the specific statutory purpose or advance one of the relevant public interest factors in the Corps regulations (e.g., 33 C.F.R. 320.3 or 320.4), as discussed above. However, as long as the conditions on Section 9 or 10, Section 103, or Section 404 permits are reasonably related to advancing such purposes, the Corp decision will advance a legitimate purpose and pass the first part of the analysis.

10. After examining the nature of the Corps action, the second step in the TIA legal analysis is to review the economic impact of the conditioned permit. This analysis is more difficult because the United States Supreme Court has not provided any clear guidance to determine whether the the denial or conditioning of a permit under the Corps regulatory authorities can deny the owner all economically viable use of any legally

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Zable, at 211. (See also, U.S. v. Morretti, 478 F. 2d. 418 (5th Cir. 1973)). In fact in over twenty years no court has struck down as invalid the Corps broad public interest review in either Section 10 or Section 404 permit analysis. Considering, the Federal courts' general acceptance of the broad scope of the public interest review under Sections 9 and 10 and Section 404, the Federal courts are likely to give some deference to the Corps regulations and are likely to consider any permit condition based upon a relevant factor in the public interest review to advance a statutory purpose. [2]

6. Of course, this does not mean that all relevant factors in the public interest review will carry the same weight with the courts in determining whether the Corps action substantially advances a legitimate purpose. Undoubtedly certain public purposes such as public health and welfare are much less likely, if ever, to raise "takings" problems. Whereas, we cannot say that other relevant factors in the public interest review, such as aesthetics, will be accorded such importance by the courts. However, in many cases the relevant factors that lead to a conditioned permit will be those specifically stated in the statute.

7. As a general rule, Section 404 permits are conditioned when, in the view of the Corps decisionmaker, the proposed activity, without the conditions, either fails the requirements of EPA's 404(b)(1) Guidelines or is found to be contrary to the public interest in the context of the statutory purpose of restoring and maintaining the chemical, physical and biological integrity of the waters of the United States. Similarly, Section 9 or 10 permits are normally conditioned when the proposed activity, without the conditions, would interfere with navigation or where the proposed structure, without the conditions, would be environmentally unacceptable or otherwise contrary to a judicially accepted relevant factor in the Corps public interest review. In such cases conditioning the grant of the Section 404 or Section 9 or 10 permit clearly advances their respective statutory purposes. [3] Of course, conditions to a permit based upon a specific statutory purpose or upon an important public interest such as public health and welfare will clearly advance a legitimate purpose. Nevertheless, if the Corps permit conditions are properly based upon either the express statutory purposes or upon any of the relevant public interest factors in the Corps regulations adopted through APA rulemaking (and the related statutes cited therein), the nature of the government action significantly advances a legitimate purpose and passes the first test in the legal analysis.

8. However, special care must be taken in determining whether the terms or conditions required by the Corps substantially

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protected property interests. In Kaiser Aetna v. U.S., 444 U.S. 164, 175 (1979) the Supreme Court stated that

 this court has generally "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." Penn. Central Transportation Co. v. New York City, 438 U.S. 104, 124. Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries. . .

See also MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 349 (1986).

11. The Supreme Court has stated that a land use regulation that substantially advances a statutory purpose will not constitute a taking if it does not "den[y] an owner economically viable use of his land." Agins v. Tiburon, supra at 260. However, at present it does not appear that even denial of all economically viable use of a legally protected property interest will necessarily be considered a taking. In Keystone Bituminous Coal Ass'n. v. DeBenedictis, (Keystone), 480 U.S. ___ , 107 S.Ct. 1232 (1987) the Supreme Court held that a statute that required that 50 percent of the coal beneath certain structures must be left in place (to provide surface support) was not a taking even though the mining companies had purchased the "support estate" from the surface owners. The Pennsylvania statute prevented any viable use of the support estate, a clearly recognized and legally protected property interest, which the mining companies had purchased. However, the Court maintained that since the regulation substantially advanced the statutory purpose of protecting the health, safety and general welfare of the public (Keystone, at 1242.) and preventing a public nuisance (Keystone, at 1245.) no taking had occurred. [4] (For similar reasoning see also Deltona Corporation v. U.S., 657 F.2d 1184 (Ct.Cl. 1981).)

12. The U.S. Supreme Court has yet to clarify what land use regulations could constitute a taking. Other holdings of the Supreme Court can be interpreted to imply that valid regulation advancing the statutory purpose may, in some cases, deny all economically viable use and constitute a taking.[5] However, to date the U.S. Supreme Court has rendered no decision from which we can infer that the denial of a Corps permit, let alone a permit with conditions, would "deny the owner all economically

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viable use of a legally protected property interest" and thereby constitute a regulatory taking.[6] In my opinion, unless or until the U.S. Supreme Court provides us with more than case by case, "ad hoc" determinations of when government action that substantially advance statutory purposes will deny economically viable use of legally protected property interests so as to constitute a taking, it is very difficult, if not impossible, to predict with any legally certainty whether a particular conditions to a permit cause sufficient economic impact to give rise to a takings implication.

13. However, we do know that if the regulation advances a legitimate purpose, as long as there is some economically viable use of property, even if the value of the property has been substantially diminished by the regulation, there is not a taking. If nothing else, the holding of the United States Supreme Court in Keystone demonstrates that regulation that substantially advances a state interest may significantly diminish the value of private property without constituting a taking. Moreover, in Deltona Corporation v. U.S. the United States Court of Claims applied this same rationale to a Corps permit case.

The Court, however, clearly rejects the notion that diminution in value, by itself, can establish a taking.

Deltona Corporation v. U.S., at 1193.

14. The economic impacts of permit conditions will normally be much less, and will never be greater than, a permit denial, since the applicant may always treat the conditions as a denial and choose not proceed with the proposed activities. Therefore based upon the fact that we cannot say whether even a permit denial will constitute a denial of all economically viable use of a legally protected property interest, there will certainly not be a denial of economically viable use of a legally protected property interest for a permit that is granted with conditions. Arguably, by definition the conditioned permit itself provides the owner an economically viable use of his property. Therefore, even if the conditions substantially diminish the economic value of the property, there should always be an economically viable use of any legally protected property interest in the case of a conditioned permit.

15. The above analysis applies to conditioned Section 9 and 10 and Section 103 permits, as well as conditioned Section 404 permits. However, in addition, due to the Federal navigation servitude, there are much more limited private property rights

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in the traditionally navigable waters of the United States covered by Section 9, 10, and 103 permits. In cases where a Section 9 or 10 or Section 103 permit is conditioned in order to protect and maintain navigation, the Federal courts generally will not consider a takings claim. For example, in Kaiser Aetna the Court stated

When the "taking" question has involved the exercise of the public right of navigation over [navigable waters of the U.S.], however, this Court has held in many cases that compensation may not be required as a result of the federal navigation servitude. See, e.g., United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913)

Kaiser Aetna, at 175. (See also, Zable v. Tabb, at 215.) Therefore, in addition to the reasons stated above, there is very little chance of a takings implication when the Corps conditions a Section 9 or 10 or Section 103 permit for reasons of public navigation.

16. In conclusion, as a general rule, based upon current law, the proper conditioning of a permit under Section 9 or 10, Section 103, or Section 404 (i.e., conditions that are consistent with the relevant statute and regulations, as discussed above) will (1) substantially advance either a legitimate public interest or a specific statutory purpose, and (2) is unlikely to deny the owner all economically viable use of a legally protected property interest.

FOOTNOTES

[1] The purpose of the MPRSA is to

. . . prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

33 U.S.C. 1401(b). Due to the broad scope of this purpose it is unlikely that the Corps would condition a Section 103 permit for a reason other than to advance this purpose. However, Section 103 permits represent a very small percentage of the Corps regulatory program, and since Section 103 permits will seldom, if ever, involve legally protected private property interests, no specific discussion of Section 103 permits is provided in the memorandum. Nevertheless, the principles discussed herein regarding Section 10 and Section 404 permits also apply, where applicable, to Section 103 permits.

[2] It should be noted, however, that this rationale can be taken too far, if the factors considered are unrelated to the impacts which a proposed project will have on the environment. In Mall Properties Inc. v. Marsh, 672 F.Supp. 561 (1987), the court held that adverse economic impacts on the commerce of the City of New Haven was not a legitimate factor for consideration. Nevertheless, the Court acknowledged the broad scope of the public interest review.

[T]he court concludes that in deciding whether to grant a permit the Corps may consider economic effects which are proximately related to changes in the physical environment. The Corps may not, however, properly consider and give significant weight to economic effects unrelated to the impact which a proposed project will have on the environment.

Mall Properties Inc., at 566.

[3] On the other hand, the advancement of a statutory purpose is less clear in cases where the District Engineer determines that the permit should be conditioned based upon a

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relevant factor in the public interest review, not specifically stated in the law or specifically accepted by the Federal courts.

[4] As an aside, the Court stated that there was not a sufficient diminution in value to constitute a taking, since the mining companies could still mine the rest of the coal. But regardless of the viable use of the rest of the coal the support no economically viable use remained in the support estate.

[5] Nollan v. California Coastal Commission, 480 U.S. ____, 107 S.Ct 3141 (1987) and First English Evangelical Lutheran Church v. County of Los Angeles, 480 U.S. ____, 107 S.Ct. 2378 (1987).

[6] Recently several lower courts have implied that a Section 404 permit denial might deny all economically viable uses and constitute a taking. See, e.g., Florida Rock v. U.S., 791 F.2d. 893 (Fed. Cir. 1986) and Loveladies Harbor v. U.S., 15 Cl.Ct. 375 (1988), and Beure-Co. v. U.S., 16 Cl.Ct. 42 (1988).

SAMPLE TAKINGS IMPLICATION ASSESSMENT (TIA)

Takings Implication Assessment (TIA)
for the Glommonoid Corp. Section 404 Permit Application,
U.S. Army Engineer District, Zenith City, State of Miasma

1. The Glommonoid Corporation has applied for a Section 404 permit to fill 21 acres of coastal marsh as part of a fully integrated, multipurpose, multi-unit, 35 acre condominium/residential development. The proposed development includes a marina, three tennis courts, a ten acre golf course, two high rise condominiums, 20 homes, and an ice skating rink.
2. The regulatory staff has recommended that the permit be denied. The proposed activity would destroy 21 acres of high quality coastal marshland that is important to the nearby town of Quagmire for both water quality and flood control purposes. The application fails the requirements of the 404(b)(1) Guidelines. It is not water dependent and the applicant has not demonstrated that there are not other less damaging alternatives available. In addition, it is likely that the loss of these marshlands could seriously threaten the critical habitat of the Freckle-bellied Whatnot, an endangered species.
3. The proposed denial is necessary to maintain the chemical, physical and biological integrity of the State of Miasma's coastal wetlands, to protect the health and welfare of the people of Quagmire, and to protect the critical habitat of an endangered species as required by the Endangered Species Act. This denial substantially advances the specific statutory purposes of the the Clean Water Act, as well as other important public interests. Therefore, as more fully discussed in the Chief Counsel's Legal Analysis for Permit Denials, attached hereto and incorporated by reference, the denial of Glommonoid Corporation's permit advances a legitimate government purpose and passes the first part of the test for determining whether there is a takings implication.
4. Furthermore, the denial of this permit, does not in my opinion, deny all economically viable use of Glommonoid Corporation's property. Glommonoid owns 14 acres of upland property that could be developed. Moreover, there is no evidence that adjacent upland property could not be purchased. In addition, there are water dependent uses available for the 21 acres of coastal marsh. A marina could probably be designed in a manner so that with proper mitigation it would be pass the 404(b)(1) Guidelines and the Corps public interest review. This type of coastal marsh is also suitable and has been successfully used for crawfish farming in nearby Crawdadville.

5. Even if these uses are not viable to the applicant, the property was purchased two years ago and can probably be sold for close to its original purchase price. Therefore, although denial of this permit may deny Glommonoid the most profitable use of its property, mere diminution of value does not raise takings implications. Based upon the the facts and the application of the principles discussed in the Chief Counsel's Legal Analysis, incorporated herein, in my opinion denial of Glommonoid's current permit application will not deny the applicant economically viable use of it property.

6. In view of the fact that denial of this permit will advance the statutory purpose of the Clean Water Act and will not deny economically viable use of Glommonoid Corporation's property, in my opinion there is no takings implication indicated in this case. Consequently, no further analysis is required for this TIA.

ALGONQUIN J. PETTIFOGGER
District Counsel