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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

AUG 31 1989

MEMORANDUM

SUBJECT: Cherokee County Site
Galena Subsite, OU #2
Groundwater/Surface Water
Remedial Action

FROM: E. Jane Kloeckner *E. Jane Kloeckner*
Assistant Regional Counsel

TO: Glen Curtis, SPFD
Remedial Project Manager

This memo is to document the implications of the "takings" clause of the Fifth Amendment of the U.S. Constitution in regard to the proposed plan for remediation of the ground water and surface water at the subject site. The Fifth Amendment requires that the government shall not take private property for public use without just compensation.

In July 1989, EPA announced the proposed plan for remedial action. This plan includes four (4) major components: (1) removal and selective placement of surface mine wastes below the ground; (2) diversion of surface streams; (3) recontouring and vegetation of land surface; and (4) investigation of deep wells. In addition, land use restrictions will be placed on the subsite by the State of Kansas for proper maintenance of the action. All of these activities interrelate with each other and are essential parts of this remedy.

EPA recognizes that some property owners in the subsite may allege that certain components of the proposed plan may be considered a "taking" of private property for public use. These property owners might argue that because the surface mine wastes have potential economic value as road construction materials, the removal and placement of surface mine wastes below ground deprives the property owner of the right to sell these mine wastes. These landowners may claim that recontouring, vegetation and land use restrictions deprive them of a use of private property. Therefore, these owners might allege that under the Fifth Amendment such "taking" of private property for public use requires just compensation. In light of these potential arguments, the Agency has considered whether or not the current



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property owners should be compensated for possible economic losses or for restricted uses of their property due to implementation of the proposed plan for remedial action at the Galena subsite.

The Agency has determined that no compensation is required for the property owners even though this remedial action may result in the permanent use of their property. The essence of this determination is that the surface mine wastes contain significant concentrations of hazardous substances, which threaten human health and the environment and that the proposed plan will abate this threat to human health and the environment.

The proposed plan for remedial action has been developed in accordance with CERCLA, which provides broad authority to respond to releases of hazardous substances into the environment. Some actions under this authority may have the effect of interfering with, restricting or otherwise burdening uses of property. For example, the proposed plan removes surface mine wastes, recontours and vegetates the land and will restrict the land use after completion of the action. Although such effects raise the issue of compensation to the property owner pursuant to the "takings" clause of the Fifth Amendment, generally actions authorized by CERCLA are undertaken to protect health and safety, which fall within the scope of the nuisance exception to the "taking" clause. The proposed plan will be undertaken to protect the public health and safety and the environment from the release and threatened release of hazardous substances. The proposed plan falls within the scope of the nuisance exception.

The nuisance exception encompasses any government action to respond to a threat to public health and safety. Originally, the exception was applied to government actions to abate a nuisance, however, the exception has now been applied broadly to actions to prevent an impending danger. The President has formally recognized the special status of actions undertaken "for purposes of protection public health and safety." Executive Order 12630, §3(c), attached. Ordinarily, no "taking" occurs when the government is acting to protect public interests in health and environment or to prevent an impending danger.

In summary, the proposed plan for remedial action at Galena is similar to an abatement of a nuisance and is to protect public health and the environment from the release of hazardous substances from the surface mine wastes. As such, this action is not a "taking" of property and compensation to property owners is not required for economic losses or the restricted land use related to this action. See the attached documents for more guidance, Executive Order 12630 and EPA's supplemental Guidelines on Executive Order 12630.

Federal Register

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Friday, March 18, 1988

Presidential Documents

Title 3—

Executive Order 12830 of March 15, 1988

The President

Governmental Actions and Interference With Constitutionally Protected Property Rights

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows:

Section 1. Purpose. (a) The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

(b) Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

(c) The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action. In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order. The Guidelines shall be promulgated no later than May 1, 1988, and shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.

Sec. 2. Definitions. For the purpose of this Order: (a) "Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. "Policies that have takings implications" does not include:

(1) Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder) but not including the U.S. Army Corps of Engineers civil works program.

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

(c) "Actions" refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, or Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to Federal regulation or direct physical invasion or occupancy, but does not include:

(1) Actions in which the power of eminent domain is formally exercised;

(2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

(3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;

(4) Studies or similar efforts or planning activities;

(5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;

(6) The placement of military facilities or military activities involving the use of Federal property alone; or

(7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.

Sec. 3. General Principles. In formulating or implementing policies that have takings implications, each Executive department and agency shall be guided by the following general principles:

(a) Governmental officials should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.

(b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of

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

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

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

(e) The Just Compensation Clause is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation. Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

Sec. 4. Department and Agency Action. In addition to the fundamental principles set forth in Section 3, Executive departments and agencies shall adhere to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

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

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

(2) Substantially advance that purpose.

(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

(c) When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

(d) Before undertaking any proposed action regulating private property use for the protection of public health or safety, the Executive department or agency involved shall, in internal deliberative documents and any submissions to the Director of the Office of Management and Budget that are required:

(1) Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

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

(3) Establish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

(4) Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking.

In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, this analysis may be done upon completion of the emergency action.

Sec. 5. Executive Department and Agency Implementation. (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring compliance with this Order with respect to the actions of that department or agency.

(b) Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any, in all required submissions made to the Office of Management and Budget. Significant takings implications should also be identified and discussed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

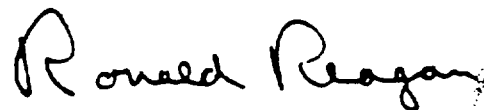
(c) Executive departments and agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A "takings" award has been made or a "takings" claim pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in Fiscal Years 1985, 1986, and 1987 and all such pending claims shall be submitted to the Director, Office of Management and Budget, on or before May 16, 1988.

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

(e)(1) The Director, Office of Management and Budget, and the Attorney General shall each, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in Sections 1 through 5 of this Order, and the Office of Management and Budget shall take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions.

(2) In addition to the guidelines required by Section 1 of this Order, the Attorney General shall, in consultation with each Executive department and agency to which this Order applies, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that department or agency.

Sec. 6. Judicial Review. This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.



THE WHITE HOUSE
March 15, 1988.

CLP
Cy sent to Branch Chief
RLP

From: L.JENSEN (EPA2800) Delivered: Fri 5-Aug-88 15:50 EDT Sys
Subject: Supplemental Guidelines for EPA (Takings)
Mail Id: IPM-163-880805-142600301

Copy to team 8/12/88

August 5, 1988

Honorable Roger J. Marzulla
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Roger:

Please find enclosed Supplemental Guidelines for EPA implementing Executive Order 12630.

These Supplemental Guidelines address the concepts that I have discussed with your staff and more recently addressed in my June 24 letter to you. They have been developed to give recognition to EPA's specific statutory responsibilities and mission while attempting to remain consistent with the generic Attorney General's Guidelines.

The EPA Supplemental Guidelines have been through internal EPA review and are ready for implementation.

Sincerely,

/s/

Lawrence J. Jensen
Acting General Counsel

Enclosure

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**EPA SUPPLEMENTAL GUIDELINES
FOR THE EVALUATION OF
RISK AND AVOIDANCE OF UNANTICIPATED TAKINGS**

I. PURPOSE OF THE EPA SUPPLEMENTAL GUIDELINES

The purpose of the EPA Supplemental Guidelines is to implement Executive Order 12630, 53 Fed. Reg. 8859 (March 18, 1988) and to adopt the Attorney General Guidelines, dated June 30, 1988, where specifically incorporated by reference in these Supplemental Guidelines.

These Supplemental Guidelines together with Executive Order 12630 and the Attorney General Guidelines apply to EPA policies and actions that directly affect the value and use of distinct property interests and shall be construed to neither hinder or alter the carrying out of statutorily authorized responsibilities nor to impair the exercise of the Agency's best professional judgment as to how to administer its laws and regulations. Rather, they are to be used to inform, where appropriate, EPA decisionmakers as to any likely or significant taking implications.

II. EXCLUSIONS

To supplement the exclusions set forth in Section 2(c) of Executive Order 12630 and subsections II.B. and II.C. of the Attorney General Guidelines, the following EPA exclusions are provided:

A. State, Local Government, and Indian Tribe Policies and Actions.

Policies and actions taken by a State, local government or Indian Tribe under the authority of any Federal law or regulation administered by EPA are excluded. Examples include but are not limited to: (1) State or Indian Tribe environmental programs authorized by EPA statutes or regulations; (2) State, local government, or Indian Tribe projects funded under Federal grant, cooperative agreement, or contract; or (3) any other cooperative activities or communications carried out with a State, local government, or Indian Tribe.

B. EPA Policies or Actions Reducing Federal Restrictions on Use of Private Property.

EPA policies or actions that lessen interference with the use of distinct property interests are excluded. Examples include but are not limited to: (1) policies

or actions that authorize, license, or permit the use of distinct property interests where such use but for the EPA policies or actions would be completely prohibited by Federal law; (2) EPA policies or actions that amend existing policies or actions in a manner that lessens interference with the use of private property or increases the uses of private property; or (3) EPA policies or actions that will reduce public health or safety risks in a manner that increases the use or value of distinct property interests.

C. Seizures of Distinct Property Interests.

All policies or actions involving seizures of distinct property interests by EPA pursuant to statutory authority are excluded. For purposes of this exclusion the term "seizure" means the taking of legal possession of any distinct property interest by court order, administrative order, subpoena or any other legal means for use in a civil, criminal or administrative proceeding or action.

D. Agency Plans and Studies.

Preliminary data gathering and evaluation activities as set forth in II.B.4. of the Attorney General Guidelines are excluded. Examples of preliminary data gathering and evaluation activities are studies, plans, reports, requests for information, listing of distinct property interest identifiers, etc. that will be used by EPA to develop, analyze, or implement a proposed policy or action. This exclusion focuses not on the type of activity but rather upon the timing. Hence, this exclusion does not cover a proposed policy or action other than a policy or action to gather and evaluate preliminary data once it has advanced beyond a preliminary stage unless the proposed policy or action recognizes that additional preliminary data gathering and evaluation activities are necessary.

E. Federal Property and EPA Operational Activities.

EPA policies or actions that relate to federally owned or leased property are excluded. EPA operational activities such as internal Agency practices and procedures, regulation of personnel, procurement activities, and financial assistance activities are also excluded.

F. Pending or Imminent Litigation, Enforcement Actions Seeking Statutorily Authorized Penalties, Debt Collection, or the Like.

In addition to the excluded activities specified in II.B.9. of the Attorney General Guidelines, enforcement actions (civil or administrative) seeking equitable relief; administrative adjudicatory actions or proceedings authorized by Federal law, regulation, Executive Order, Office of Management and Budget Circular; or any other administrative remedy that must be exhausted as a precondition to filing suit in Federal court are also excluded.

G. Ancillary Exclusion.

Any policies, actions or comments by, to, or from EPA related to or implementing an exclusion authorized by Executive Order 12630, Attorney General Guidelines, or EPA Supplemental Guidelines are excluded. Written EPA recommendations or comments that are not required by law to other Federal agencies are also excluded.

III. AGENCY APPLICABILITY

Executive Order 12630 applies to EPA. The general principles and assessment factors contained in the Attorney General Guidelines generally apply to EPA. These Supplemental Guidelines have adopted the Attorney General Guidelines implementation, management, and special reporting requirements as appropriate to conform with EPA statutory authorities.

IV. DEFINITIONS

In addition to the definitions provided in Executive Order 12630 and the Attorney General Guidelines, the following definitions are to be used for EPA policies and actions.

- A. "Agency": "Agency" as used in these Supplemental Guidelines is the United States Environmental Protection Agency or EPA.
- B. "Designated EPA Takings Official": The "Designated EPA Takings Official" is the Assistant Administrator for the Office of Policy, Planning, and Evaluation (OPPE).
- C. "Deputy Designated EPA Takings Officials": Assistant Administrators other than for OPPE and Regional Administrators are designated as "Deputy Designated Takings Officials".

- D. "Distinct Property Interest": A "Distinct Property Interest" is an existing and specifically known private property interest that is owned by a person or persons and that is directly identifiable and legally recognizable by law at the time EPA is proposing or applying a policy or action.
- E. "Policies and Actions That Have No Taking Implications": "Policies and actions that have no taking implications" include EPA regulations, proposed EPA regulations, proposed Federal legislation related to EPA statutory authorities, EPA comment on any proposed Federal legislation or any other EPA policies or actions that:
1. Establish a lawful permit or registration system including program approval requirements, with respect to subsequent uses of private property (U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985) (Mere act of establishing permit system not a taking; taking can occur "[o]nly when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question".));
 2. Establish a lawful rule or standard through rulemaking that: (a) does not involve distinct property interests; notwithstanding, that the subsequent application of the rule or standard to distinct property interests may affect the use or value of such property interest (Id.; Penn Central Transportation Co. v. New York City, 438 U.S. 104, 125 (1978) (Constitution protects only those "interests that ... constitute 'property' for Fifth Amendment purposes."); and Hodel v. Virginia Surface Mining and Reclamation Association, Inc., et al., 452 U.S. 264, 295 (1981) (Takings analysis must be conducted with respect to specific property.)); (b) does not regulate all uses of a distinct property interest or does not deny all economically viable use, either in domestic or international markets, of any distinct property interest, considered in appropriate circumstances separately or in relation with other commonly owned distinct property interests (Nollan v. California Coastal Commission, ___ U.S. ___, 107 S. Ct. 3141, 3146 (1987); Keystone Bituminous Coal Association v. DeBenedictis, ___ U.S. ___, 107 S. Ct. 1232, 1242 (1987) (Regulatory action that substantially advances legitimate State interest constitutes taking only if it denies owner economically viable use of property); Id. at 1248-51 (consider rights

in parcel as a whole); Penn Central Transportation Co. v. New York City, 438 U.S. at 130-31; and Andrus v. Allard, 444 U.S. 51, 65-66 (1979)); or (c) collects information or data pursuant to statutory authority (Ruckelshaus v. Monsanto Company, 467 U.S. 981, 1007 (1984) (Collection and use of confidential business information consistent with statutory authority is not a taking.)));

3. Issue, deny, modify, or cancel a permit or registration or apply a rule or standard that does not regulate all uses of a distinct property interest or does not deny all economically viable use, either in domestic or international markets, of any distinct property interest, considered in appropriate circumstances separately or in relation with other commonly owned distinct property interests (See cases cited in paragraph 2(b) above.);
4. Reduce a public health or safety risk in a manner authorized by and consistent with specific Federal law or regulation or where the property interest owner has or may have caused or contributed to or has or may have any other legal responsibility for such risk (Keystone Bituminous Coal Association v. DeBenedictis, supra at, 1243-46, 1243 n. 17, 1245 n. 20, 1246 n. 22; See also Id. at 1256 (Rehnquist, J., dissenting)); or
5. Result in a temporary physical occupation, invasion, or deprivation of a distinct property interest or a delay in the decisionmaking processes related to the use or value of a distinct property interest where: (a) such temporary physical occupation, invasion, or deprivation or delay in association with other related governmental action affecting such distinct property interest is not a denial of all economically viable uses of such distinct property interest; (b) such temporary physical occupation, invasion, or deprivation is imposed by court order or administrative order or subpoena authorized by Federal law; or (c) such temporary physical occupation, invasion, or deprivation is necessary to determine or reduce a public health or safety risk in a manner authorized by and consistent with specific Federal law or regulation or where the property interest owner has

or may have caused or contributed to or has or may have any other legal responsibility for such risk. (Id. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, ___ U.S. ___, 107 S. Ct. 2378, 2384-85, 2388-89 (1987)).

- F. "Statutes Having a Public Health or Safety Purpose": The following Federal statutes administered by EPA have a statutory public health or safety purpose: Clean Water Act, Clean Air Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, Comprehensive Environmental Response, Compensation and Liability Act, Superfund Amendments and Reauthorization Act of 1986, Toxic Substances Control Act, Federal Insecticide, Fungicide and Rodenticide Act, Marine Protection, Research and Sanctuaries Act and Atomic Energy Act.

V. SUPPLEMENTAL GENERAL PRINCIPLES AND ASSESSMENT FACTORS

A. Regulatory Takings.

In reviewing a policy or action that may give rise to a "regulatory takings", a key consideration is whether a distinct property interest is being affected. If the policy or action does not involve a distinct property interest, there are no taking implications. However, if the application or implementation of such policy or action may later involve a distinct property interest, there is no compensable taking if the government policy or action substantially advances legitimate governmental interests and is not so severe as to prohibit all economically viable uses of the owner's property interest. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, supra at, 1235 (1987) *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, et al., supra at, 294-5 (1981), and *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). If the policy or action involves a distinct property interest, then the Agency must consider the economic impact of the government action, its interference with reasonable investment-backed expectations, and the character of the government action in addition to whether the policy or action substantially advances legitimate governmental interests. *Penn Central Transportation Co. v. New York City*, supra at 124. These factual inquiries must be conducted with respect to distinct property interests. In addressing the factual inquiries, the statutory framework can be used to define some of the requirements that are part of the reasonable investment-backed expectations, and in certain circumstances a statutory requirement or compliance

with a statutory requirement can be used as the sole factor in addressing the taking question. *Ruckelshaus v. Monsanto Company*, supra at 1005 (1984).

In examining the economic impact, one major consideration is whether the policy or action singles out one property interest owner to bear the sole burden of remedying a problem to which the property interest owner had not disproportionately contributed. An examination of the economic impact of a governmental action on a specific property owner should not focus solely on the burden the action imposes on that owner. Each citizen is burdened by restrictions society places on individual conduct, but all citizens "benefit greatly from the restrictions that are placed on others." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, supra at 1245. For this reason, the government need not "calculate whether a specific individual has suffered burdens" from a particular government action that exceed that action's benefits to that individual. *Id.* at 1245, n. 21. Moreover, when the actions of an individual property owner, either alone or, cumulatively, in conjunction with the acts of other property owners, substantially contribute to a problem, no taking occurs when the government addresses the problem by regulating the actions of the individual property owner. *Nollan v. California Coastal Commission*, supra at 3147. Where this is not the case, singling out a particular individual to bear a disproportionate share of the burden of efforts to remedy a problem may violate either the Takings Clause or the Equal Protection Clause. *Id.* at 3147 n. 4. Where the property interest owner as well as the public shares the benefits and burdens of the policy or action, such benefits must be considered along with any diminution in market value that the property interest owner may suffer as part of the economic impact. *Agins v. Tiburon*, supra at 262.

B. Actions to Protect Public Health and Safety.

For the past one hundred years, the courts have recognized that the valid exercise of police power to protect public health and safety is not a taking. *Mugler v. State of Kansas*, 123 U.S. 623 (1887). The government may adopt a wide variety of regulations that affect the uses to which an owner may put his property without compensating the owner. *Sierra Club v. EPA*, 540 F.2d. 1114, 1140 (D.C. Cir.) (air pollution controls); *Smoke Rise, Inc. v. Washington Suburban San. Com.*, 400 F.Supp. 1369, 1382-83 (D.C. Md. 1975) (moratorium on sewer hookups). Property owners may even be required

to destroy hazardous property without compensation, or the government may itself act to eliminate or destroy the property that poses the risk. *Jarboe-Lackey Feedlots, Inc. v. United States*, 7 Cl. Ct. 329, 338-39 (1985) (seizure of meat implanted with prohibited drug). The nature of the government's authority to respond evolves to meet the changing threats to public health and safety. *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935).

The special status of this type of governmental action was recently articulated in *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, supra. In *Keystone* a statute prohibiting the mining of coal beneath certain structures was challenged. The statute was enacted for the protection of "the health, safety and general welfare of the people...by providing for the conservation of surface land areas..., to aid in protection of the public, to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands...". *Id.*, at 1242.

The Court found that the Commonwealth was acting to protect the public interest in health, the environment and the fiscal integrity of the area. Such mining would lead to subsidence of the surface and was therefore "akin to a public nuisance." *Id.*, at 1243.

The Court then analyzed the long line of cases where the exercise of police power to combat a public nuisance was not found to constitute a compensable taking. *Mugler v. State of Kansas*, supra; *Miller v. Schoene*, 276 U.S. 272 (1928); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). The Court explained that restraints on uses of property that are tantamount to a public nuisance are "properly treated as part of the burden of common citizenship". *Id.*, at 1245, citing *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). Property is held under the implied obligation that the owner's use of it shall not be injurious to the community. *Id.*, at 1245, citing *Mugler v. State of Kansas*, supra. "(T)he Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Id.*, at 1245-1246, citing *Mugler v. State of Kansas*, supra. In a footnote, the Court adopts Professor Epstein's conclusion that "the issue of compensation

cannot arise until the question of justification has been disposed of. In the typical nuisance prevention case, this question is resolved against the claimant." *Id.*, at 1246, n.22.

Neither First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, *supra*, nor Nollan v. California Coastal Commission, *supra*, addresses the issue of whether a taking may have occurred in the context of a regulatory action to protect public health or safety. The First English and Nollan opinions are not so broad as to modify the treatment of public health and safety activities by the courts. In contrast, Keystone has reinforced the long line of cases holding that such actions do not constitute compensable takings even where the impact on the property owner is very severe.

Where the health and safety purpose is clear from the Agency's statutory authorities, the Agency does not need to undertake any further analysis to identify the public purpose for which a policy or action is being carried out. In Keystone, the public purpose was reflected in the legislature's conclusion that existing mine subsidence legislation had failed to protect the public interest. Having examined the operative provisions of the statute, as instructed in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court agreed with the lower courts that the "legislative purposes set forth in the statute were genuine, substantial, and legitimate." *Id.*, at 1242. Hence, the legislative purpose is a critical element in determining the public purpose.

C. Property Interest.

In analyzing a distinct property interest, how much is taken and what property interest is taken must be considered.

1. How Much is Taken

To protect against a public health or safety risk, a governmental action can deny a property owner all economically viable use of a distinct property interest without effecting a compensatory taking where such denial substantially advances a legitimate state public health or safety interest. *Mugler v. State of Kansas*, *supra*. For other activities, the Supreme Court has unequivocally stated that a governmental action regulating property use can constitute "a taking only 'if ...

[it] does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land.'" U.S. v. Riverside Bayview Homes, 474 U.S. 121, 126 (1985) quoting Agins v. Tiburon, supra at 260; see also Nollan v. California Coastal Commission, supra at 3146; Keystone Bituminous Coal Assoc. v. DeBenedictis, supra at 1242 (both quoting same language). Thus government action is not considered a taking unless and until there is no "economically viable use" of the property left to its owner. The Court has "recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values ... [or] real property interests." Penn Central Transportation Co. v. New York City, supra at 124-25. An owner can be deprived of the best use of his property without compensation. Goldblatt v. Hempstead, supra. The extent of the diminution of value is not dispositive, and even a substantial diminution may not be a taking. See e.g. Hadacheck v. Sebastian, supra (reduction in value from \$800,000 to \$60,000); Euclid v. Amber Realty Co., 272 U.S. 365 (1926) (75% diminution in value). See generally Penn Central, supra at 123-27.

2. What Interest is Taken

The Supreme Court has recognized that it is "critical" to define the unit of property that must be analyzed to determine how much value has been lost in a takings case. Keystone Bituminous Coal Assoc., v. DeBenedictis, supra at 1248.

In Keystone, plaintiffs asserted that they had been denied two types of economically viable use. They first argued that they had been denied all economically viable use of the particular tons of coal the challenged statute prevented them from mining. Noting that zoning ordinances often "place limits on the property owner's right to make use of some segments of his property," Id. at 1249, the Court held that the specific tons of coal did not "constitute a separate segment of property for takings law purposes," since they could not properly be viewed as separate from the entire parcel of coal the plaintiffs owned. Id.

The plaintiffs also noted that Pennsylvania law recognizes a "support estate" as a distinct property interest giving its owner the right to mine coal even when the mining might cause surface

subsidence. They therefore asserted that a statute limiting subsidence deprived them of that property interest. The Court rejected this argument as an attempt to draw "legalistic distinctions within a bundle of property rights." Id. at 1250.

The Court's analysis is consistent with its reasoning in prior cases. In Penn Central the Court characterized the proper framework for analysis as follows:

"'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole...."

Penn Central Transportation Co. v. New York City, supra at 130-31, quoted in Keystone Bituminous Coal Assoc. v. DeBenedictis, supra at 1248. Similarly, in Andrus v. Allard, 444 U. S. 51 (1979) the Court noted that:

"where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."

Id. at 65-66, quoted in Keystone Bituminous, supra at 1248.

The Court has consistently followed this approach, evaluating takings claims only in the context of the entire property interest of the claimant where the governmental purpose is for the public benefit. Government actions that have completely deprived owners of their interest in using their property in certain ways have not been found to constitute takings. In Penn Central the Court found that no taking occurred when a property owner was denied the right to erect a structure above an existing building (air rights). In Andrus v. Allard, a complete denial of the right to sell certain types of property legally in the owner's possession was likewise found not to constitute a taking because that denial was "necessary to [an] environmental protection regulatory scheme". Hodel v. Irving, ____

U.S. ____, 107 S. Ct. 2076, 2084 (1987). See also *Mugler v. Kansas*, supra (deprivation of right to brew beer in a brewery was held not to be a taking); *Miller v. Schoene*, supra, (deprivation of right to have ornamental trees harboring an organism harmless to them but harmful to nearby apple trees was held not to be a taking), *Goldblatt v. Hempstead*, supra (State ban of excavations below water table that effectively prohibited continuation of well-established business was held not to be a taking). See generally *Penn Central Transportation Co. v. New York City*, supra at 124-28 and cases cited therein.

VI. EPA IMPLEMENTATION, MANAGEMENT, AND SPECIAL REPORTING REQUIREMENTS

A. EPA Implementation.

1. If an EPA proposed policy or action is not within an exclusion or the above definition of "policies and actions that have no taking implications" and the proposed policy or action may directly affect the use or value of a distinct property interest, then the EPA proposed policy or action may be subject to evaluation as described in paragraph 5 of this section.
2. To determine whether such proposed policy or action as delineated in paragraph 1 of this section may be subject to evaluation, it is important to distinguish between physical intrusion and other policies and actions that either involve a distinct property interest or do not involve a distinct property interest at the time but may later.
 - (a) Physical intrusion by permanent or temporary physical occupation, or invasion will be subject to evaluation.
 - (b) For other policies and actions that at the time do not involve a distinct property interest but may involve a distinct property interest later in applying or implementing the policy or action, the only takings question is whether the property interest owner is denied all economically viable uses of the property interest. If the answer is yes, then the policy or action is subject to evaluation. If the answer is no, see IV.E.2. and E.3.

- (c) For other policies and actions that involve a distinct property interest, the character of the EPA action, its interference with the reasonable investment-backed expectations, and its economic impact (factual inquiries) are to be considered.
3. In considering the factual inquiries described in paragraph 2.(c) above, the first step is to look to the EPA statute for guidance.
- (a) The statute may define requirements that must be included in the consideration of the reasonable investment-backed expectations. Some examples of such statutory requirements are meeting standards, obtaining permits, or using property in a manner to avoid causing a public health, safety or environmental risk. Where the proposed policy or action is legally consistent with the statutory requirement, there is per se no interference with the reasonable investment-backed expectations irrespective of when the distinct property interest was acquired. In such instances, this factor disposes of any taking implications without the need to examine the other two factors, and no further evaluation is required.
 - (b) In instances where the proposed policy or action is carrying out a statutory requirement, then the character of the EPA action may be determined from the statute (i.e., protecting public health, safety, or the environment) without further inquiry. See IV.F. above. If the character of the proposed policy or action is to protect against a public health and safety risk, see IV.E.4. above.
 - (c) It is unlikely that the statute will be helpful in determining the economic impact of the proposed policy or action. This may require additional analysis. Where such analysis is needed, it must be done only at the point if and when a distinct property interest can be identified. In considering the economic impacts, an important factor is whether the property interest owner is being singled out to solely bear the burden of a policy or action where the property interest owner has not disproportionately contributed to the problem being remedied by the policy or action. Where

the property interest owner as well as the public shares the benefits and burdens of a policy or action, the benefits are to be considered together with any diminution in market value of the property interest. See V.A. above for additional guidance.

4. Where the statute does not provide guidance in analyzing the factual inquiries, policy and action evaluation criteria are provided in the Attorney General Guidelines at pages 17-19. In addition, where a proposed policy or action is intended to protect against a public health and safety risk without a statutory reference, assessment criteria for such policy or action to be given public health and safety deference is provided in the Attorney General Guidelines at pages 15-16.
5. For those proposed policies and actions subject to evaluation, a Takings Implication Assessment (TIA) must be prepared. The TIA is described in the Attorney General Guidelines at pages 21-23.

B. EPA Management.

1. The Designated Takings Official is the EPA contact for EPA implementation of Executive Order 12630.
2. The Designated Takings Official may assign the Deputy Designated Takings Officials any necessary duties to assure compliance with Executive Order 12630 and to support any certifications required to be made by the Designated Takings Official.
3. Except as provided in paragraph 4 below, the Designated Takings Official shall approve and the General Counsel shall concur on any EPA determination that:
 - (a) a policy or action has no taking implications;
 - (b) a policy or action is not subject to evaluation; or
 - (c) a policy or action has significant taking implications.

Where appropriate, Assistant Administrators and Regional Administrators can seek such approval and concurrence on a program-wide basis.

4. Each Regional Administrator shall approve and the Regional Counsel shall concur on any EPA determination that:
 - (a) a specific regional policy or action has no taking implications; or
 - (b) a specific regional policy or action is not subject to evaluation.
5. In developing a TIA, each Assistant Administrator and Regional Administrator should coordinate with the Designated Takings Official and General Counsel or Regional Counsel as appropriate. The TIA requirement for an estimate of the potential financial exposure to the government should be prepared only in those instances where the General Counsel or Regional Counsel has determined there is a likely expectation or probability of a Federal court finding the proposed policy or action to be a compensatory taking.
6. The General Counsel with the concurrence of the Designated Takings Official shall review and update these Supplemental Guidelines as necessary, and both are to provide implementational guidance in their respective areas to Assistant Administrators and Regional Administrators as needed.

C. EPA Reporting Requirements.

1. Only significant taking implications are to be discussed in proposed rulemakings published in the Federal Register. All other discussions related to EPA implementation and determinations are not required to be discussed in rulemakings published in the Federal Register.
2. To the extent permitted by the Freedom of Information Act, all documents related to EPA implementation and determinations are entitled to be protected from disclosure.
3. The Designated Takings Official will coordinate and transmit all reports except for EPA budget submissions required to be submitted to comply with Executive Order 12630.

4. The Assistant Administrator for Office of Administration and Resources Management will comply with any budget submission requirements required by Executive Order 12630.

Lee M. Thomas
Administrator

Date