



Office of the Attorney General
Washington, D.C.

September 16, 2008

MEMORANDUM FOR ALL DEPARTMENT AND AGENCY HEADS

FROM: THE ATTORNEY GENERAL

SUBJECT: Implementation of Executive Order 13406: Protecting the
Property Rights of the American People

Executive Order 13406, "Protecting the Property Rights of the American People," confirms that it "is the policy of the United States to protect the rights of Americans to their private property," and that "the taking of private property by the Federal Government" should be limited to "situations in which the taking is for public use, with just compensation, and for the purpose of benefitting the general public. . . ." The Order instructs the Attorney General to "issue instructions to the heads of departments and agencies to implement" this policy, as well as to "monitor takings by departments and agencies for compliance" with the Order.

The enclosed memorandum provides instructions to all departments and agencies regarding the implementation of Executive Order 13406. The memorandum reviews the contents of the Executive Order and describes a process by which departments and agencies seeking to acquire property through the exercise of eminent domain must certify their compliance with the Executive Order to the Department of Justice. To the extent that the Department of Justice is charged with representing your agency in affirmative eminent domain proceedings, this process involves only a modest change to the existing process for initiating eminent domain actions. To the extent that your agency has independent authority to bring eminent domain proceedings, compliance reporting to the Department of Justice in connection with such proceedings is required.

Responsibility for monitoring compliance with the Executive Order has been delegated to the Environment and Natural Resources Division of the Department of Justice. If you have any questions about this memorandum, please contact the Chief of the Land Acquisition Section of the Environment and Natural Resources Division at 202-305-0316.

September 16, 2008

Implementation of Executive Order 13406:
Protecting the Property Rights of the American People

On June 23, 2006, the President issued the attached Executive Order 13406, entitled "Protecting the Property Rights of the American People." The Executive Order confirms that it is "the policy of the United States to protect the rights of Americans to their private property." Under this policy, any "taking of private property by the Federal Government" should be limited "to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken."

This memorandum is being issued pursuant to Section 2 of the Executive Order, which provides that the Attorney General shall "issue instructions to the heads of departments and agencies to implement the policy" set forth in the Order, and shall "monitor takings by departments and agencies for compliance with [this] policy."

Instructions for Implementing Order and Compliance Monitoring Provisions

Whenever a department or agency seeks to take private property by direct condemnation, the department or agency must evaluate that acquisition of property in light of the policy set forth in Executive Order 13406. That is, the department or agency must assess whether the proposed taking is "for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken."

In making this assessment, departments and agencies should be aware that the Executive Order does not prohibit takings for the following specified purposes:

- (a) public ownership or exclusive use of the property by the public, such as for a public medical facility, roadway, park, forest, governmental office building, or military reservation;
- (b) projects designated for public, common carrier, public transportation, or public

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utility use, including those for which a fee is assessed, that serve the general public and are subject to regulation by a governmental entity;

(c) conveying the property to a nongovernmental entity, such as a telecommunications or transportation common carrier, that makes the property available for use by the general public as of right;

(d) preventing or mitigating a harmful use of land that constitutes a threat to public health, safety, or the environment;

(e) acquiring abandoned property;

(f) quieting title to real property;

(g) acquiring ownership for use by a public utility;

(h) facilitating the disposal or exchange of Federal property; or

(i) meeting military, law enforcement, public safety, public transportation, or public health emergencies.

See Section 3, Executive Order.

An exercise of eminent domain undertaken for one of the purposes enumerated in Section 3, and that otherwise complies with applicable law, complies with the Executive Order. The agency or department pursuing such a direct condemnation thus satisfies its obligation to evaluate the condemnation for compliance with the policy in the Executive Order by establishing that it is for one of these specified purposes. As detailed below, an agency or department considering whether to pursue a direct condemnation shall seek the Department of Justice's review as to whether the proposed condemnation is consistent with this Order. If the Department of Justice determines it is consistent with this Order, then the agency may make a final determination as to whether it wishes the condemnation to go forward.

To enable the Department of Justice to "monitor takings by departments and agencies for compliance with the policy set forth in section 1" of the Order, as required by Section 2(a)(ii) of the Order, the Department of Justice hereby directs any department or agency that is seeking to acquire property through the exercise of eminent domain to certify that it has evaluated the

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proposed acquisition in light of Executive Order 13406 and that the proposed acquisition complies with the policy set forth in Section 1 of the Order.

In particular, such a certification shall explain the nature of the public use for which the acquisition is sought and certify that the proposed taking complies with Executive Order 13406.

Certifications may be made in two ways:

First, whenever an agency or department applies to the Attorney General pursuant to 40 U.S.C. § 3113 to have the Department of Justice pursue condemnation proceedings to acquire real estate, the agency or department shall include in its application a certification of the nature described above. Pursuant to current practice, applications for condemnation proceedings are submitted to the Land Acquisition Section of the Environment and Natural Resources Division of the Department of Justice; the certification required by this memorandum should be included in the materials submitted to the Land Acquisition Section.

Second, to the extent an agency or department is authorized to exercise eminent domain independently, without having the Department of Justice pursue condemnation proceedings on its behalf, that agency or department shall submit a letter or memorandum to the Attorney General indicating its intent to exercise eminent domain and certifying that the exercise of eminent domain in this case is for a public use and thus is consistent with Executive Order 13406; the letter or memorandum should include the statutory authorization on which the agency is relying for its use of eminent domain. Such letters or memoranda should be submitted to the Land Acquisition Section of the Environment and Natural Resources Division of the Department of Justice.

Consistent with Section 2(b)(ii) of the Order directing that federal departments and agencies shall "provide to the Attorney General such information as the Attorney General determines necessary to carry out" his obligation under Section 2(a)(ii) to monitor takings, on receipt of a certification, the Land Acquisition Section may request additional information from the agency or department submitting that certification or may request a consultation with the agency or department about its certification. Following its review, if the Land Acquisition Section determines that a proposed taking does not comply with the Order, it will advise the agency or department of its adverse determination. Upon receipt of an adverse determination, the agency or department may request further consultation with the Land Acquisition Section, may

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request that the Land Acquisition Section reconsider its determination, or may provide a modified proposal or certification for consideration. The agency or department may appeal the Land Acquisition Section's determination to the Assistant Attorney General for the Environment and Natural Resources Division. The Department of Justice's determination of whether the proposed condemnation is consistent with the Executive Order shall be authoritative.

If any departments or agencies have questions about compliance with the Executive Order, including questions about whether a particular purpose constitutes a public use, the agency may contact the Land Acquisition Section of the Environment and Natural Resources Division of the Department of Justice.

Any submissions to the Land Acquisition Section may be sent to:

Chief, Land Acquisition Section
Environment and Natural Resources Section
P.O. Box 561
Ben Franklin Station
Washington, DC 20044

or, for overnight deliveries, to:

Chief, Land Acquisition Section
Environment and Natural Resources Section
601 D St. NW, Rm. 3638
Washington, DC 20004

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