



Highlights of [GAO-04-120T](#), a testimony before the Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives

## Why GAO Did This Study

Each year federal agencies issue numerous proposed or final rules or take other regulatory actions that may potentially affect the use of private property. Some of these actions may result in the property owner being owed just compensation under the Fifth Amendment. In 1988 the President issued Executive Order 12630 on property rights to ensure that government actions affecting the use of private property are undertaken on a well-reasoned basis with due regard for the potential financial impacts imposed on the government.

This testimony is based on our recent report on the compliance of the Department of Justice and four agencies—the Department of Agriculture, the Army Corps of Engineers, the Environmental Protection Agency, and the Department of the Interior—with the executive order. (*Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use*, GAO-03-1015, Sept. 19, 2003).

Specifically, GAO examined the extent to which (1) Justice has updated its guidelines for the order to reflect changes in case law and issued supplemental guidelines for the four agencies, (2) the four agencies have complied with the specific provisions of the executive order, and (3) just compensation awards have been assessed against the four agencies in recent years.

[www.gao.gov/cgi-bin/getrpt?GAO-04-120T](http://www.gao.gov/cgi-bin/getrpt?GAO-04-120T).

To view the full product, including the scope and methodology, click on the link above. For more information, contact Anu K. Mittal at (202) 512-3841 or [mittala@gao.gov](mailto:mittala@gao.gov).

## REGULATORY TAKINGS

# Agency Compliance with Executive Order on Government Actions Affecting Private Property Use

## What GAO Found

Justice has not updated the guidelines that it issued in 1988 pursuant to the executive order, but has issued supplemental guidelines for three of the four agencies. The executive order provides that Justice should update the guidelines, as necessary, to reflect fundamental changes in takings case law resulting from Supreme Court decisions. While Justice and some other agency officials said that the changes in the case law since 1988 have not been significant enough to warrant a revision, other agency officials and some legal experts said that significant changes have occurred and that it would be helpful if a case law summary in an appendix to the guidelines was updated. Justice issued supplemental guidelines for three agencies, but not for Agriculture because the two agencies were unable to resolve issues such as how to assess the takings implications of denying or limiting permits that allow ranchers to graze livestock on federal lands managed by Agriculture.

Although the executive order's requirements have not been amended or revoked since 1988, the four agencies' implementation of some of these requirements has changed over time as a result of subsequent guidance provided by the Office of Management and Budget (OMB). For example, the agencies no longer prepare annual compilations of just compensation awards or account for these awards in their budget documents because OMB issued guidance in 1994 advising agencies that this information was no longer required. According to OMB, this information is not needed because the number and amount of these awards are small and the awards are paid from the Department of the Treasury's Judgment Fund, rather than from the agencies' appropriations. Regarding other requirements, agency officials said that they fully consider the potential takings implications of their regulatory actions, but provided us with limited documentary evidence to support this claim. The agencies provided us with a few examples of takings implications assessments stating that such assessments were not always documented in writing or retained on file. In addition, our review of the agencies' rulemakings for selected years that made reference to the executive order revealed that relatively few specified that an assessment was done and few anticipated significant takings implications.

According to Justice, property owners or others brought 44 regulatory takings lawsuits against the four agencies that were concluded during fiscal years 2000 through 2002, and of these, 14 cases resulted in just compensation awards or settlement payments totaling about \$36.5 million. The executive order's requirement for assessing the takings implications of planned actions applied to only three of these cases. The actions associated with the other 11 cases either predated the order's issuance or were otherwise excluded from the order's provisions. The relevant agency assessed the takings potential of its action in only one of the three cases subject to the order's requirements. According to Justice, at the end of fiscal year 2002, 54 additional lawsuits involving the four agencies were pending resolution.