

# Valuing Contaminated Property in Eminent Domain: A Critical Look at Some Recent Developments

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When a government agency uses the power of eminent domain to acquire private property for public use, it must compensate the landowner appropriately. The Fifth Amendment to the United States Constitution declares that private property shall not “be taken for public use, without just compensation.”<sup>1</sup> State constitutions impose similar requirements. Ohio’s, for example, provides that when private property is taken for building public roads, “a compensation shall be made to the owner, in money.”<sup>2</sup>

The usual measure of that constitutionally required compensation is the amount of money the property would command at a voluntary sale. The Fifth Amendment’s “just compensation” clause, the United States Supreme Court explained, generally means the owner is entitled to “the fair market value of the property on the date it is appropriated. Under this standard, the owner is entitled to receive ‘what a willing buyer would pay in cash to a willing seller’ at the time of the taking.”<sup>3</sup>

If current information about market transactions involving similar properties is available, an appraiser can arrive at a fairly accurate estimate of the condemned property’s market value. However, when a condemned property is environmentally contaminated, there are few, if any, market sales or leases to rely upon, because there are fewer such properties and they sell less readily.

Many courts, faced with this problem, have attempted to overcome the lack of market data by allowing evidence of the cost of environmental remediation, which the fact-finder can deduct from the expected market value of the uncontaminated property.<sup>4</sup> This straightforward approach

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1. U.S. CONST. amend. V.

2. OHIO CONST. art. I, § 19.

3. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 9-10 (1984) (internal citations omitted). For appraisers valuing property to be acquired by the federal government, the market value standard is more precisely defined as follows:

Market value is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date of the appraisal, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal.

James D. Eaton, Dep’t of Justice, Uniform Appraisal Standards for Federal Land Acquisitions § B-2, at 30 (2000), available at <http://www.usdoj.gov/enrd/land-ack/yb2001.pdf>.

4. See, e.g., Ne. Conn. Econ. Alliance, Inc. v. ATC P’ship, 776 A.2d 1068, 1079-80 (Conn. 2001) (citing cases).

seemingly mirrors the market by allowing expert witnesses and the jury to treat unremediated environmental contamination like unrepaired fire or flood damage, the cost of which an open-market buyer would expect the seller to deduct from the purchase price.

Unlike the owner of a fire- or flood-damaged property, however, the owner of an environmentally contaminated property might have a legal duty to clean it up—a duty that continues even after title to the property is transferred.<sup>5</sup> In theory, this might mean the owner of a condemned property would have to pay twice for its environmental contamination: once by a reduced condemnation award, and a second time through an environmental cost-recovery action.<sup>6</sup> To prevent this result, and to avoid a premature finding of environmental liability, some courts have refused to allow jurors to hear evidence of contamination in eminent domain cases.<sup>7</sup> But this approach, too, is open to criticism. As one court put it:

Excluding contamination evidence, as a matter of law, is likely to result in a fictional property value—a result that is inconsistent with the principles by which just compensation is calculated. It blinks at reality to say that a willing buyer would simply ignore the fact of contamination, and its attendant economic consequences, including specifically the cost of remediation, in deciding how much to pay for property.<sup>8</sup>

Over the past decade, a significant split in authority has developed over this issue. Most courts do admit evidence of environmental contamination, reasoning that it is relevant to the condemned property's fair market value. Some, however, exclude it entirely, reasoning that the condemnor could recover its remediation costs in an environmental law action, which is the appropriate forum for determining such liability. More recently, still other courts have taken a compromise position,

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5. See Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (2000).

6. See generally Paul W. Moomaw, Notes & Comments, *Fire Sale! The Admissibility of Evidence of Environmental Contamination To Determine Just Compensation in Washington Eminent Domain Proceedings*, 76 WASH. L. REV. 1221, 1221-22 (2001) (arguing that adjudication of environmental contamination in an eminent domain proceeding “raises various troubling issues, including procedural due process concerns and the risk of double liability for the landowner”); Jeffrey Dworin, *Doing a Double Take: Environmental Damage Suits and Eminent Domain*, 1996 MICH. ST. L. REV. 687 (discussing potential for condemnation followed by a suit for environmental remediation).

7. See, e.g., *Aladdin, Inc. v. Black Hawk County*, 562 N.W.2d 608, 610-18 (Iowa 1997) (finding procedural and policy considerations supporting the exclusion of evidence of contamination and cost of cleanup in eminent domain proceedings); *Dep't of Transp. ex rel. People v. Parr*, 633 N.E.2d 19, 23 (Ill. App. 1994) (admitting evidence of remediation cost in an eminent domain proceeding deprives property owners of their rights and defenses under a state statute).

8. *Ne. Conn. Econ. Alliance, Inc.*, 776 A.2d at 1080.

limiting contamination evidence to that which is probative of the property's value in a remediated state, and then allowing some of the condemnation award to be escrowed until environmental liability has been determined.

This Article will discuss these three general approaches to valuation of contaminated property in eminent domain and the reasoning that supports each of them. It will then examine some of the assumptions underlying the evidence-excluding and evidence-limiting approaches and discuss whether the expressed due process concerns justify the exclusion (or limitation) of contamination-related data that would be relevant to an actual market transaction. Finally, it will explore some implications that the courts have not addressed, and suggest how they should be handled in eminent domain litigation.

#### I. EARLY DEVELOPMENT OF THE LAW

During the 1990s, courts confronted with the problem of valuing contaminated property for eminent domain purposes adopted two basic approaches. Most considered evidence of the contamination's effect on the property's value to be relevant and allowed its introduction, at least if an adequate factual predicate was first laid. Two courts, however, refused to let the jury hear evidence of contamination in the eminent domain trial, reasoning that it would be tantamount to adjudicating environmental liability without the procedural safeguards the landowner would enjoy in an environmental cost-recovery proceeding.

##### A. *The Majority Rule: Evidence of Contamination and Remediation Costs Is Admissible Because It Is Relevant to the Condemned Property's Value*

###### 1. *Thrifty Oil*

The first reported appellate decision on valuation of contaminated property taken for public use<sup>9</sup>—*Redevelopment Agency of Pomona v.*

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9. An earlier decision in *Department of Health v. Hecla Mining*, 781 P.2d 122 (Colo. App. 1989), dealt with uranium-contaminated land being condemned for remediation under the federal Uranium Mill Tailings Radiation Control Act. Valuation of land condemned *because it is contaminated*, rather than because it is needed for a public use such as highway construction, is outside the scope of this Article. Interestingly, however, the *Hecla Mining* court agreed that the value of the condemned property had to be "based on the use and adaptability of the property in its contaminated condition." *Id.* at 126; *see also* *Dep't of Health v. The Mill*, 887 P.2d 993 (Colo. 1994) (holding Colorado's rule against considering public project's enhancement of condemned property's value dictated that public cleanup of uranium contamination could not be considered in establishing just compensation for taking).

*Thrifty Oil Co.*, from 1992—dealt with condemnation of a gas station that had petroleum-contaminated soil.<sup>10</sup> The landowner argued that evidence of remediation costs was not properly before the jury and, even if it was, the condemnor had engaged in a “wasteful cleanup.”<sup>11</sup>

The California appellate court disagreed.<sup>12</sup> With regard to the allegation of excessive remediation costs, the court noted that “[e]xtensive cross-examination was conducted as to the proper remediation procedure and the costs of different types of remediation.”<sup>13</sup> As to the more fundamental claim of inadmissibility, the court observed that all the experts had considered the contamination in determining the property’s fair market value and,<sup>14</sup> in any event, “[a]s a characteristic of the property which would affect its value, the remediation issue was properly before the trier of fact.”<sup>15</sup>

## 2. *Stott*

In its 1993 decision in *City of Olathe v. Stott*, the Kansas Supreme Court followed a similar approach to valuation of petroleum-contaminated service station property, reasoning that “[o]ne of the primary purposes in any eminent domain proceeding is to determine the fair market value of the property taken. Underground petroleum contamination necessarily affects the market value of real property.”<sup>16</sup> Therefore, the court concluded, “[e]vidence of such contamination is . . . admissible in an eminent domain action” unless some other reason dictated its exclusion.<sup>17</sup>

The landowners argued that Kansas’ act regulating petroleum storage tanks supplied that reason by being an exclusive remedy for

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10. 5 Cal. Rptr. 2d 687 (Cal. Ct. App. 1992).

11. *Id.* at 689 n.9.

12. *Id.*

13. *Id.*

14. *Id.* The condemnor actually spent \$182,000 for remediation. A court-appointed expert testified that the cleanup could have been done for \$100,000, and the landowner’s expert testified to \$50,000 in remediation costs. *Id.* at 689. Presumably Thrifty Oil objected to evidence of remediation costs in the first instance and, after the objection was overruled, put on evidence that the remediation could have been done more cheaply.

Interestingly, all the experts appraised the property as if it were uncontaminated and then deducted the anticipated cost of remediation. *Id.*

15. *Id.*

16. 861 P.2d 1287, 1290 (Kan. 1993).

17. *Id.* *But see* Wray v. Duffy & DeBloss, Inc., No. 91-B-37, 1993 Ohio App. LEXIS 233, at \*3 (Ct. App. Jan. 19, 1993) (evidence of soil contamination and associated remedial expenses were irrelevant and inadmissible because remedial costs were necessitated by laws that only became effective after case was filed).

petroleum contamination.<sup>18</sup> Like most states, Kansas has enacted a statute to regulate the registration, installation, and removal of petroleum underground storage tanks, require corrective action of petroleum releases, and establish a state fund to reimburse complying owners or operators for cleanup costs.<sup>19</sup>

Under Kansas law, however, the storage tank act was not “complete in itself” with respect to the issue of cleanup costs,” so it did not preempt general eminent domain law allowing consideration of the issue in a condemnation case.<sup>20</sup> As the court noted, reimbursement was contingent and did not cover all costs associated with petroleum contamination.<sup>21</sup> Finally, the act did not cover “reduction in property value attributable to risk or stigma associated with the contamination” that might remain even after proper remediation.<sup>22</sup>

Therefore, the trial court properly admitted evidence of the contamination, the total cleanup costs, and of the amount of those costs not reimbursable from the state fund.<sup>23</sup> Accordingly, it was proper for the condemnor’s appraisal witnesses to reduce their opinion of the property’s value to account for “unreimbursable cleanup costs in addition to stigma and risk.”<sup>24</sup> After considering the effect of these contamination-related factors as a whole on market value, the court held it was appropriate for the jury to have reduced the property’s market value by ten percent.<sup>25</sup>

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18. 861 P.2d at 1292.

19. See generally KAN. STAT. ANN. §§ 65-3401 to -3424 (2003). In 1986, Congress amended subtitle I of the Resource Conservation and Recovery Act (RCRA) to mandate financial responsibility requirements for underground storage tank owners and operators. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 205, 100 Stat. 1613, 1696-98 (1986). One option allowed states to develop regulatory programs to assure compliance with RCRA and provide funds to reimburse cleanup expenses. *Id.*; see also *Sanders v. Warr*, 646 So. 2d 647, 649 (Ala. 1994) (describing state assurance fund program). According to U.S. EPA data reported at <http://www.epa.gov/swerust1/states/finstatus.htm>, as of November 2004, forty-three states had developed such programs.

20. 861 P.2d at 1292.

21. *Id.*

22. *Id.* Environmental stigma has been defined as “an adverse effect on the market’s perception of the value of property containing an environmental risk even after cleanup costs have been expended or considered in estimating value.” Richard J. Roddewig, *Classifying the Level of Risk and Stigma Affecting Contaminated Property*, in VALUING CONTAMINATED PROPERTIES 219, 221 (Richard J. Roddewig ed., 2002) (internal citation omitted). The concept of stigma, discussed more fully *infra* notes 166-167, encompasses a variety of buyer concerns related to contamination, such as the potential for future remediation costs, regulatory changes, higher transactional costs, and difficulty selling or leasing the property because it has been contaminated. Roddewig, *supra*, at 221.

23. *Stott*, 861 P.2d at 1294.

24. *Id.* at 1298.

25. *Id.* at 1290, 1298-99. The landowners also argued that evidence of contamination should have been suppressed because the condemnor hid it from them, depriving them of the

3. *Brandon*

In its 1994 *State ex rel. Department of Transportation v. Brandon* decision, a Tennessee appellate court followed *Thrifty Oil* and *Stott*, holding that “there can be no doubt that the contaminated nature of the property would be evidence relevant to the issue of valuation.”<sup>26</sup>

*Brandon* involved condemnation of part of a gasoline service station property for a state highway project.<sup>27</sup> After obtaining an order of possession, the Department of Transportation went onto the property, removed some storage tanks, and conducted testing that showed petroleum-related soil and groundwater contamination.<sup>28</sup>

The state’s environmental enforcement agency then notified the landowners of the contamination, instructing them to do further testing and abatement.<sup>29</sup> The landowners denied liability, so the Department of Transportation did the necessary remediation work.<sup>30</sup> At the condemnation trial, however, the court excluded all evidence of the contamination, even though the state presented evidence that before a market buyer could get a loan, the bank would require an environmental assessment.<sup>31</sup>

The appeals court, however, held that “the trial court should have permitted the introduction of evidence of contamination,” reasoning that if “a property’s contaminated condition hinders a prospective buyer’s ability to obtain a loan to purchase it, then surely that condition is relevant on the issue of valuation” in an eminent domain case.<sup>32</sup> Likewise, the court held that “evidence of the cost of reasonable steps

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opportunity to mitigate their own damages before the City filed suit to appropriate the property. *Id.* at 1289-90. The court gave this argument little credence, noting that “the landowners could not have fixed the contamination problem between the May 1989 report,” in which the City’s environmental consultant first reported the existence of contamination, and March 1990, when the landowners received the consultant’s report detailing the extent of contamination and the options for remediation. *Id.* at 1296. As the court pointed out, “[t]he Act requires that [the state environmental agency] approve a corrective action plan before reimbursement is available, and a plan cannot be developed until the nature and extent of the contamination is known.” *Id.*

26. 898 S.W.2d 224, 226 (Tenn. Ct. App. 1994).

27. *Id.* at 224-25.

28. *Id.* at 225.

29. *Id.*

30. *Id.* The state’s appraisal expert was prepared to testify that his appraised “clean value” of the property was \$72,500, which would fall to a fair market value of \$7,974.42 after a dollar-for-dollar subtraction of the \$64,525.58 the state spent on remediation. *Id.*

31. *Id.* at 225-26.

32. *Id.* at 227.



taken to remedy the contamination is also relevant to the issue of the fair market value of the property taken.”<sup>33</sup>

#### 4. *Finkelstein*

Like all of the cases discussed above, the Florida Supreme Court’s 1995 decision in *Finkelstein v. Department of Transportation* dealt with a contaminated gasoline service station.<sup>34</sup> Unlike those earlier cases, however, the petroleum contamination in *Finkelstein* had already been detected and reported by the service station operator under a program that ensured reimbursement of *all* remediation costs.<sup>35</sup> Because those costs were reimbursable, the court held that evidence of them was irrelevant and therefore inadmissible.<sup>36</sup>

The court recognized, however, that buyers might be reluctant to purchase a property that had been contaminated, even if it was successfully cleaned up, because of the increased risk of owning such property.<sup>37</sup> Accordingly, if an expert testified to a decrease in market value due to contamination-related “stigma” damages, evidence of the cleaned-up contamination would be admissible to explain the basis of that opinion.<sup>38</sup> However, the court cautioned, a foundation of “facts and data reasonably relied upon by experts in the field of real property valuation” showing contamination stigma would first have to be laid, and

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33. *Id.* In a short 1995 opinion the Court of Appeals of Georgia followed suit, holding that “the general environmental condition of the condemned property, as a former landfill requiring remediation, was a relevant factor in fairly assessing the market value of the property . . . as to all prospective buyers.” *Stafford v. Bryan County Bd. of Educ.*, 466 S.E.2d 637, 640-41 (Ga. Ct. App. 1995), *rev’d on other grounds*, 476 S.E.2d 727 (Ga. 1996).

34. 656 So. 2d 921, 923 (Fla. 1995); *see also* Amended Brief of Petitioners, Respondent’s Brief on Merits and Reply Brief of Petitioners, *Finkelstein v. Dep’t of Transp.*, No. 83-308 (Fla. 1994), *available at* [www.law.fsu.edu/library/flsupct/83308/83308.html](http://www.law.fsu.edu/library/flsupct/83308/83308.html). The parties’ briefs more fully discuss the nature of the property.

35. *Finkelstein*, 656 So. 2d at 923.

36. *Id.* at 924-25. The court carefully limited its holding to the facts, reserving decision as to whether remediation costs would be admissible in a valuation proceeding affecting property for which full reimbursement was not available. *Id.*; *accord* *Murphy v. Town of Waterford*, No. 520173, 1992 Conn. Super. LEXIS 2085, at \*22 (Conn. Super. Ct. July 9, 1992) (holding the condemnor could not require reduction for remediation costs at former gasoline service station because the costs were reimbursable by statute).

One commentator described the court’s decision as “a measured step in the right direction” because “[i]t is logical to hold that evidence of contamination is relevant to value.” Michael A. Sheridan, Note & Comment, *Finkelstein v. Department of Transportation: The Supreme Court of Florida “Takes” a Look at Evidence of Contamination*, 20 NOVA L. REV. 951, 985 (1996).

37. *Finkelstein*, 656 So. 2d at 924.

38. *Id.* at 924-25 (holding that because the property qualified for full cleanup reimbursement at the time of the taking, it “should be valued as if the cleaning . . . had been successfully completed at the time of the taking”).

evidence of contamination—because of its prejudicial nature—should be limited to what is necessary to explain the basis for the expert’s opinion.<sup>39</sup>

### 5. *Hughes*

In 1999, an Oregon appellate court considered yet another scenario: what happens when petroleum contamination is discovered during highway construction, but before the condemnation trial?<sup>40</sup>

In *State ex rel. Department of Transportation v. Hughes*, the Oregon Department of Transportation condemned part of a motorized equipment repair business—which had been a grocery store with gas pumps from 1945 into the 1960s—for a highway project.<sup>41</sup> Neither the landowner nor the state knew of any contamination at the time the condemnation action was filed.<sup>42</sup> But during excavation for the highway project, petroleum-related contamination was discovered.<sup>43</sup>

At trial, evidence of this contamination was excluded because no one actually knew about it on the date the action was filed.<sup>44</sup> But the appeals court reversed, holding that the state should have been allowed to put on evidence that a reasonable buyer would have inquired into the history of the property and, upon learning of its use for gasoline sales, would have done testing that would have revealed the contamination.<sup>45</sup> According to the appeals court, “[e]vidence relating to contamination on the property and the possibility of its discovery on the date that the action was commenced would bear directly on the fair market value at that time and easily passes the threshold for relevance,” which the court described as being “very low.”<sup>46</sup>

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39. *Id.* at 925.

40. *See State ex rel. Dep’t of Transp. v. Hughes*, 986 P.2d 700, 701 (Or. Ct. App. 1999).

41. *Id.* at 701-03.

42. *Id.* at 701.

43. *See id.*

44. *See id.* at 702.

45. *Id.* at 703-04. *But see* *Murphy v. Waterford*, 1992 Conn. Super. LEXIS 2085, at \*18-24 (Conn. Super. Ct. 1992) (finding that the condemnor knew property had been used as a gasoline service station before the taking and could have tested for contamination but did not; equitable considerations precluded condemnor from seeking setoff for remediation costs incurred after the taking).

46. *Hughes*, 986 P.2d at 703.

*B. The Minority Rule: Evidence of Contamination Must Be Excluded Because an Eminent Domain Proceeding Is Not the Proper Forum for Determining a Landowner's Liability for Environmental Contamination*

1. *Parr*

The first reported appellate decision precluding evidence of contamination in an eminent domain proceeding—the 1994 decision of the Illinois court of appeals in *Department of Transportation v. Parr*—dealt with a rather extreme factual scenario.<sup>47</sup> As the court described it:

Dennis and Betty Parr . . . owned property abutting the Illinois River . . . in Peoria. In early 1990, [The Illinois Department of Transportation] IDOT informed the Parris that the construction of [a] bridge necessitated the condemnation of their property. At that time, IDOT informed the Parris that they owed IDOT over \$100,000 for the property's environmental remediation costs.<sup>48</sup>

At a quick-take bench trial, the state transportation department presented evidence that the property had no value “due to the alleged presence of environmental hazards on the property and the costs of removing the hazards.”<sup>49</sup> IDOT took possession of the property and entered into an agreement with the Illinois Environmental Protection Agency “regarding the remediation procedures necessary to alleviate any contamination.”<sup>50</sup> At the hearing to award preliminary just compensation, however, the trial court precluded any evidence of environmental hazards, and then certified the question to the appeals court.<sup>51</sup>

The appeals court rested its decision to exclude the evidence on two grounds. First, the property's environmental problems were only alleged, not shown, and in the absence of proof of an “illegal condition” the Illinois Eminent Domain Act did not authorize the admission of environmental remediation costs.<sup>52</sup>

Second, the court reasoned that admission of evidence of contamination at an eminent domain trial would violate the landowners'

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47. 633 N.E.2d 19 (Ill. App. Ct. 1994).

48. *Id.* at 20.

49. *Id.*

50. *Id.* at 21.

51. *See id.*

52. *Id.* at 22. The Illinois Legislature later amended the state's eminent domain act specifically to allow evidence of “any violation of any environmental law or regulation,” its effect on “the fair market value of the property,” and the cost of bringing the property into “compliance with environmental laws and regulations.” ILL. COMP. STAT. ANN. 5/7-119 (West 2004).

procedural due process rights.<sup>53</sup> Under the state's environmental protection act, they were entitled to an administrative hearing in which the complainant would have to prove the landowners caused a violation of the act and the landowners could file a third-party action against other responsible persons.<sup>54</sup> Neither of these protections would have been available to them in the eminent domain proceeding.<sup>55</sup>

Tellingly, the court observed that after IDOT took possession of the Parrs' property, it was "legally entitled to commence an enforcement action to recover environmental remediation costs but did not do so."<sup>56</sup> Therefore, in the court's view, "permitting IDOT to admit evidence of remediation costs in an eminent domain proceeding would effectively allow IDOT to recover these costs without adhering to the procedures established to provide that remedy."<sup>57</sup>

## 2. *Aladdin*

In its 1997 decision in *Aladdin, Inc. v. Black Hawk County*, a narrowly divided Iowa Supreme Court agreed with the *Parr* rationale, holding that procedural due process required the contamination issue to be adjudicated in an environmental proceeding where the complainant "must prove the owner generated the contamination" to recover cleanup costs.<sup>58</sup> As the court observed, "[i]f the DNR or a citizen can prove the owner is legally responsible, and cleanup costs are incurred, such costs can be recovered from the owner after the condemnation proceeding has been completed."<sup>59</sup> Two members of the court joined the opinion, and two others concurred in the result.<sup>60</sup>

The plurality opinion noted, but did not distinguish, the decisions from several other jurisdictions admitting evidence of contamination and cleanup costs in eminent domain proceedings.<sup>61</sup> Rather significantly, it

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53. *Parr*, 633 N.E.2d at 22. While the amendment to Illinois's eminent domain statute allowing evidence of contamination and remediation costs eliminates the *Parr* court's first ground for exclusion, it does not address the court's due process concern; neither does any subsequent appellate decision. IDOT does take remediation costs into account in valuing the entire property if the Illinois EPA has assessment or remediation data on file. ILL. DEP'T OF TRANSP., LAND ACQUISITION MANUAL 2.02-19, VALUATION OF CONTAMINATED PROPERTY (rev. 11/02), available at <http://www.dot.state.il.us/landacq/lamannual/ch2/chapter%202%20Text.pdf>.

54. *See Parr*, 633 N.E. 2d at 22-23.

55. *See id.* at 23.

56. *Id.*

57. *Id.*

58. 562 N.W.2d 608, 615 (Iowa 1997).

59. *Id.*

60. *Id.* at 617 (Harris and Lavorato, JJ., concurring).

61. *Id.* at 616-17.

also noted that Iowa law permitted evidence of contamination and estimated cleanup cost as a factor affecting market value for tax assessment purposes, but distinguished the concept of “just compensation” in eminent domain from market value for tax assessment.<sup>62</sup>

Three justices, however, strongly disagreed with the court’s conclusion.<sup>63</sup> To them, whether Aladdin was legally accountable for the contamination had no bearing on the value of its property.<sup>64</sup> As they explained:

What is really at issue here is the effect that the environmental contamination of Aladdin’s property would have on the decision of a willing buyer to purchase it. The cost of cleaning up the contamination is only one element that a buyer would consider in this regard, but it is a very important element. A buyer would take this circumstance into consideration irrespective of whether it believed that it could be legally compelled to pay for that cost.<sup>65</sup>

The dissenters also underscored the court’s previous recognition, in a tax case, “that ordinarily market value for contaminated property can be established in the usual manner, i.e., through the testimony of expert witnesses.”<sup>66</sup> Since the record included testimony from expert witnesses who specialized in valuing contaminated property, the dissenters concluded, there was no “illegality in the matter in which the compensation commission considered and acted upon consequences of environmental contamination.”<sup>67</sup>

## II. RECENT DEVELOPMENTS: THE SPLIT IN AUTHORITY GROWS WIDER

Since 2000, four state appellate courts have balanced the relevance of contamination against the condemnee’s due process concerns. Two supreme courts, in Connecticut and Michigan, came down solidly in favor of allowing contamination and remediation cost evidence, which they viewed as being inseparably linked to the contaminated property’s actual market value.<sup>68</sup> The New Jersey Supreme Court adopted an

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62. *Id.* at 617.

63. *Id.* (Carter, J., dissenting).

64. *Id.* (Carter, J., dissenting).

65. *Id.* (Carter, J., dissenting).

66. *Id.* at 618 (Carter, J., dissenting).

67. *Id.* (Carter, J., dissenting).

68. This link is so firmly established that, if a property’s offered price is significantly less than that of comparable properties, it puts the buyer on constructive notice that environmental contamination may exist. If the buyer does not appropriately investigate that possibility, it may lose its ability to invoke Comprehensive Environmental Response, Compensation, and Liability

alternative approach—which a New York appellate court followed—admitting contamination-related evidence to show the property’s value “as if remediated” and allowing the trial court to escrow the condemnation award for payment of response costs in a separate environmental action.

A. *Relevance Tips the Balance: Traditional Constitutional Principles of Just Compensation Permit Evidence of Environmental Contamination and Remediation Costs*

1. The Connecticut Decisions in *ATC Partnership*

In its 2001 decision in *Northeast Connecticut Economic Alliance, Inc. v. ATC Partnership*, the Connecticut Supreme Court reviewed the cases on both sides of the split and decided to adopt the majority rule, declaring that “under traditional constitutional principles of just compensation, evidence of environmental contamination and remediation costs may not be excluded, as a matter of law, from a condemnation proceeding.”<sup>69</sup>

At issue was the value of a forty-acre former textile mill being condemned for economic redevelopment.<sup>70</sup> A previous owner, American Thread, had filed a document, required by Connecticut law, indicating that a release of hazardous waste had occurred at the mill complex and certifying that it would remediate the discharge as required by the state department of environmental protection.<sup>71</sup> Evidence indicated that the soil on the site, and possibly the groundwater, had been contaminated by petroleum and PCBs, and many of the buildings contained lead paint and asbestos insulation.<sup>72</sup> The condemnee, ATC Partnership, bought the property for \$2.7 million in 1987 but never used it for manufacturing.<sup>73</sup>

The trial court precluded any evidence of environmental contamination or remediation costs, but ultimately decided the property

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Act defenses. See, e.g., William H. Dolan, Recent Development, *Maintaining Innocence: All Appropriate Inquiry Under the Small Business Liability Relief and Brownfields Revitalization Act*, 8 J. SMALL & EMERGING BUS. L. 117, 127-28 (2004) (discussing the standard for “all appropriate inquiry” under the Brownfields Act including the criteria that the purchase price be compared to value of the property, if the property was not contaminated).

69. 776 A.2d 1068, 1076 (Conn. 2001). Given this holding, the court did not have to decide whether a later-enacted statute, which required the fact finder to make a separate finding for remediation costs and allow the landowner to claim that as a setoff in an environmental action, had retroactive effect.

70. See *id.* at 1071.

71. See *id.*

72. See *id.* at 1073-75.

73. *Id.* at 1071.

was worth only \$1,675,000.<sup>74</sup> The supreme court disagreed, holding that “evidence of environmental contamination and remediation costs is relevant to the valuation of real property taken by eminent domain and admissible in a condemnation proceeding to show the effect, if any, that those factors have on the fair market value of the property on the date of taking.”<sup>75</sup>

Just how to admit the evidence, however, was a matter of some disagreement among the justices.<sup>76</sup> The majority favored a broad rule of admissibility, reasoning that “[j]ust as the cost of repair of physical property damage may bear on the fair market value of property in other legal contexts . . . the cost of remediation of contamination may bear on the fair market value of property in the condemnation context.”<sup>77</sup>

Two concurring justices advocated an even broader rule, arguing that “evidence that federal and state funds may be available for reimbursement and that a polluter . . . is obligated to remediate the site, should be considered as to the effect, if any, that remediation costs may have on fair market value.”<sup>78</sup>

None of the justices gave much credence to ATC Partnership’s invocation of the due process argument made in *Parr* and *Aladdin*, finding it to be misplaced.<sup>79</sup> As the court reasoned:

The condemnor is acquiring property in a given condition, and with a value based on that condition. How the property got to be that way and who is responsible has nothing to do with that determination. To deny the condemnor the right to put on evidence [of contamination] . . . because it may not reflect the owner’s degree of responsibility for the condition

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74. *Id.* at 1076. After oral argument on appeal, but before the supreme court decided the case, the Connecticut legislature amended the state’s eminent domain act to specify, “[i]n all condemnation proceedings, environmental remediation costs shall be considered in assessing fair market value.” CONN. GEN. STAT. ANN. § 48-17(d) (West 1997).

75. *Ne. Conn.*, 776 A.2d at 1080.

76. *See id.* at 1086-87.

77. *Id.* at 1081. Excluding evidence of contamination, by contrast, “would violate the well established principle that the property owner or condemnee receive what he or she would have received in the open market.” *Id.*

78. *Id.* at 1086-87 (McDonald, C.J., concurring in part and dissenting in part). The concurring justices felt that available government grants—and the potential for recovery of response costs from the former owner—might defray the remediation costs. *Id.* Acknowledging that “factors of stigma [and] delay and difficulty in a cleanup” might affect market value, the concurring justices emphasized that “[i]t is inconceivable that a seller having such a cost free cleanup in place would willingly give such a discount.” *Id.* at 1086 n.1, 1087 n.1.

Conversely, the majority emphasized that, in addition to the actual costs of remediation, a purchaser of contaminated property would bear the risk of potential liability under environmental statutes, potential tort lawsuits relating to the contamination, stigma to the property even after remediation, higher financing costs, and increased regulation. *Id.* at 1080-81.

79. *See id.* at 1084.

misses the point of an eminent domain valuation process. If a condemnor sought to acquire a property which had been damaged by the negligence of a third party (e.g., lateral support, landslides), the condemnor would not pay the undamaged value of the property because the condition was not the owner's fault.<sup>80</sup>

Relatedly, ATC Partnership maintained that “permitting evidence of environmental contamination in an eminent domain proceeding might result in double liability to the condemnee because the owner might face the same liability in a subsequent environmental action.”<sup>81</sup> The majority dismissed this argument, observing that no remediation action had been brought against this owner (even though the release had been reported years before) and that, in any event, excluding the evidence would violate a fundamental principle of eminent domain law by giving the condemnee “an inflated and fictional value for the property.”<sup>82</sup>

In 2004, the case came before the court again—this time to decide what evidence the condemnee could present as to the effect on market value of potential sources of reimbursement for remediation costs.<sup>83</sup> The trial court assumed that a “potential buyer would seek all sources of funds to reimburse or defray the environmental costs” and, weighing the evidence after a new trial on remand, concluded that eighty percent of those costs could be recovered from the polluter and from state financial assistance, arriving at an award of \$1,752,365.<sup>84</sup>

A unanimous court had little difficulty affirming the admissibility of testimony as to the reasonable availability of a state environmental cleanup and economic development grants.<sup>85</sup> An expert had testified that the property would have been eligible for grant consideration, and that the potential availability of such grant money would have been significant to a real estate developer or purchaser.<sup>86</sup> Likening the testimony to evidence of a potential zoning change, which is admissible when “reasonably probable,” the court held the testimony was proper.<sup>87</sup>

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80. *Id.* at 1083.

81. *Id.* at 1083-84.

82. *Id.* Writing separately, one of the concurring justices suggested the trial court should be given discretion to equitably “require the condemning authority to place the diminution sum due to environmental contamination and remediation costs in trust to cover future remediation costs” incurred in responding to federal or state pollution abatement orders. *Id.* at 1091 (Flynn, J., concurring in part and dissenting in part).

83. *Ne. Conn. Alliance, Inc. v. ATC P’ship*, 861 A.2d 473 (Conn. 2004).

84. *Id.* at 480-81.

85. *Id.* at 484-87.

86. *Id.* at 483, 486.

87. *Id.* at 484, 486.



Furthermore, the court noted, “[I]t would be inequitable to consider the impact of environmental contamination on the property’s value . . . , but exclude evidence of grant moneys that plausibly might mitigate the negative financial impact of the pollution in the eyes of a potential buyer.”<sup>88</sup>

The Connecticut Supreme Court also agreed that, in view of “the broadly inclusive approach [it had] endorsed in the context of property valuation,” it was appropriate for the trial court to consider potential recovery of remediation costs from the polluter.<sup>89</sup> Following that approach to admit cost-recovery evidence, the court rather lukewarmly opined, “we cannot conclude that a prospective purchaser absolutely would not consider the reasonable possibility of such recovery.”<sup>90</sup>

## 2. The Michigan Decision in *Silver Creek*

In a 2003 opinion echoing Connecticut’s first *ATC Partnership* decision, the Michigan Supreme Court announced that the state constitution’s guarantee of “just compensation” was, and always has been, a legal phrase of art meaning “that the proper amount of compensation for property takes into account all factors relevant to market value,” including environmental contamination and remediation costs.<sup>91</sup> Starting from that point, the court reasoned that the legislature could not have intended to restrict the evidence in an eminent domain proceeding when it enacted a statute allowing a condemnor to escrow its offer of just compensation to satisfy any judgment it might secure against the condemnee for contamination-cost recovery.<sup>92</sup>

The Silver Creek Drain District initially followed that statutory process by escrowing its \$211,300 offer, filing a condemnation action, and reserving the right to bring a federal or state cost-recovery action

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88. *Id.* at 486.

89. *Id.* at 491. The court’s citation to tax cases revealed a split in authority in that area, as well. *Id.* at 491-92. While courts generally agree that environmental contamination must be considered when assessing real property tax, they disagree on whether the potential for polluter contribution should be considered as an offset. *Id.* (citing *In re Commerce Holding Corp. v. Bd. of Assessors*, 673 N.E.2d 127, 130 (N.Y. 1996) (finding that the effect of consent order to pay cleanup costs “is a factual matter for the assessment board”); *Mola Dev. Corp. v. Orange County Assessment Appeals Bd.*, 95 Cal. Rptr. 2d 546, 558 (2000) (finding that “[t]he idea that prudent buyers might be willing to lessen the discount that they would demand . . . [because] parties other than the seller might also have to contribute to cleanup costs simply does not accord with market reality”)).

90. *Ne. Conn.*, 861 A.2d at 491.

91. *Silver Creek Drain Dist. v. Extrusions Div., Inc.*, 663 N.W.2d 436, 441-44 (Mich. 2003), *cert. denied*, 540 U.S. 1107 (2004).

92. *See id.* at 438, 442.

against the landowner, Extrusions Division, Inc.<sup>93</sup> However, when Extrusions presented evidence that it did not cause the contamination and so could not be liable, the District agreed to release the escrow.<sup>94</sup>

After a bench trial, the court determined that the eight-acre vacant parcel was worth \$278,800 if environmental concerns were ignored.<sup>95</sup> The court then found that, because of the environmental contamination on site, “a reasonably prudent purchaser would have required, at a minimum, a formal Type-C closure from the [state environmental agency] as a condition precedent to closing.”<sup>96</sup> After deducting the reasonable cost of that closure, the trial court concluded that the parcel’s net fair market value was \$41,032.<sup>97</sup>

The appeals court reversed, holding that since Michigan had amended its condemnation procedures act to establish a specific mechanism for dealing with environmental cost-recovery claims, that mechanism was the condemnor’s exclusive remedy.<sup>98</sup> It reasoned that there “would be no purpose to these amendments if a court, in the process of determining just compensation, could simply deduct remediation costs from the fair market value of the condemned property.”<sup>99</sup> In addition, allowing remediation costs to reduce fair market value would circumvent any defenses to liability the landowner might have—a result it deemed to be particularly inequitable here, where the parties stipulated that the land was contaminated when Extrusions bought it.<sup>100</sup>

In the eyes of the Michigan Supreme Court, however, the appeals court’s reasoning was flawed because it commingled two distinct concepts: (1) the effect of contamination on fair market value in an eminent domain case and (2) liability for remediation costs in an environmental cost-recovery action.<sup>101</sup>

A condemnation case, the court explained, is an in rem proceeding against the property itself, so “the value of the property is unaffected by

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93. *Id.* at 439.

94. *Id.* Under Michigan law, a court can order the condemnor to release the escrow and waive its right to seek cost-recovery if the condemnee can show it has no liability. *See id.* Extrusions was able to show that it had done nothing with the property after buying it except build a fence around it. *Silver Creek Drain Dist. v. Extrusions Div., Inc.*, 630 N.W.2d 347, 349 (Mich. Ct. App. 2001).

95. *Silver Creek*, 663 N.W.2d at 439.

96. *Id.*

97. *Id.*

98. *See Silver Creek*, 630 N.W.2d at 353-55.

99. *Id.* at 353.

100. *See id.*

101. *Silver Creek*, 663 N.W.2d at 443.

whether its owner would be liable for the contaminated state of the property. The estimated costs of remediation are relevant only as they pertain to the fair market value of the property.”<sup>102</sup>

An environmental cost-recovery proceeding, by contrast, is an in personam action against the property’s owner to assign liability for remediation costs.<sup>103</sup> Those costs, as the court noted, can be vastly different from the amount by which contamination affects market value—as witness the \$2.3 million actual cost of remediation versus the \$237,768 cost of a minimal cleanup for a Type-C closure.<sup>104</sup>

*B. Giving More Weight to Due Process: Valuing the Condemned Property “As If Remediated” and Escrowing the Condemnation Award as Security for Cleanup Costs*

1. New Jersey’s *Suydam* Decision

In its 2003 decision in *Housing Authority of the City of New Brunswick v. Suydam Investors, LLC*, the New Jersey Supreme Court agreed that environmental contamination could be “a relevant factor in assessing fair market value.”<sup>105</sup> That, however, was not the court’s major concern. Rather, it focused on the possibility that the condemnee might end up paying twice for the contamination:

When property is devalued for contamination in condemnation, landowners first receive discounted compensation in the condemnation proceeding and then are subject to full cleanup costs, thus suffering what is colloquially denominated as a “double take.” Under that scheme, the condemnor receives a windfall by ultimately obtaining the property in a remediated state at the condemnee’s cost, yet paying a discounted price due to the contamination. We think that is fundamentally unfair.<sup>106</sup>

The court recognized that, even if a contaminated property has been cleaned, its value might still be affected by “remediation stigma.”<sup>107</sup> Borrowing one commentator’s example, the court likened stigma to “a house with a roof that has been properly repaired,” which would be less valuable to a buyer than a house with an intact roof “because of the fear

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102. *Id.*

103. *Id.*

104. *Id.* at 443 n.16.

105. 826 A.2d 673, 685 (N.J. 2003).

106. *Id.* at 686 (internal citations omitted).

107. *Id.* at 685 n.4.

of further leaks and possible hidden damage in the house.”<sup>108</sup> Therefore, the court held, a condemnor should appraise contaminated property as if it had been remediated, allowing the property to be valued on that basis at trial.<sup>109</sup>

The court further recognized it “would be unfair . . . to value the property as if remediated and allow the condemnee to withdraw that enhanced amount without a withholding to secure” the costs incurred to put the property in that state.<sup>110</sup> Therefore, the court approved the escrow of some or all of the condemnation award until the owner’s liability for cleanup costs could be determined.<sup>111</sup>

## 2. New York’s *Mobil Oil* Decision

In October 2004, a New York appeals court adopted the New Jersey court’s *Suydam* approach.<sup>112</sup> As issue was the value of a six-acre petroleum storage facility, owned by Mobil Oil, that the City of New York was condemning to build a water treatment plant.<sup>113</sup> The City had also sued Mobil for environmental cleanup costs under a separate state statute, the Navigation Act.<sup>114</sup>

Following *Suydam*, the court held:

At the condemnation proceeding, the property should be valued “as if remediated.” It must be pointed out that the valuation of property “as if remediated” is not exactly equivalent to valuation of “clean” property. As stated by Professor Nichols in his treatise on Eminent Domain, “even after remediation ‘stigma’ may persist, depressing value below ‘fair market value.’” Thus the term “as if remediated” takes into account any residual

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108. *Id.* (citing Robert N. Sechen, *Relevance and Admissibility of Evidence of Environmental Contamination in an Eminent Domain Valuation Trial*, 25 STETSON L. REV. 823, 831-32 (1996)).

109. *See id.* at 687-88.

110. *Id.* at 688. As the court explained, unlike most condemnation cases in which the money substitutes for the *res* condemned, when a contaminated property is valued as if remediated, an additional component is introduced—the transactional cost that will be incurred to give the condemnee the benefit of the as if remediated value.” *Id.*

111. *See id.* When an environmental cost-recovery claim can be adjudicated with a condemnation in one proceeding, the procedure is much simpler. *See, e.g.*, *Redevelopment Agency of S.D. v. Salvation Army*, 127 Cal. Rptr. 2d 30, 36-37 (Ct. App. 2002) (noting that in the condemnation part of the suit, the parties stipulated to \$550,000 value “as if clean” and \$260,000 in estimated cleanup costs, with the condemnor reserving the right to seek other recoverable costs if the remediation was more expensive than estimated).

112. *See In re City of New York v. Mobil Oil Corp.*, 783 N.Y.S.2d 75, 80 (N.Y. App. Div. 2004).

113. *Id.* at 76.

114. *Id.* at 76-77.

stigma which may attach to real property as a result of the fact that it was previously contaminated.<sup>115</sup>

The court also agreed that it was appropriate to hold the condemnation award in escrow pending the result of the City's Navigation Act proceeding.<sup>116</sup>

### III. WEIGHING THE ARGUMENTS: A CLOSER LOOK AT THE DUE PROCESS CLAIMS

Courts on each side of the issue have agreed that environmental contamination is relevant to the fair market value of property being condemned. Some of the opinions adopting the relevance-based approach have been rather strident about it, stressing, for example, that the exclusion of contamination evidence "blinks at reality" and would "result in a fictional property value."<sup>117</sup>

But relevance is not the only factor governing admissibility of market data in eminent domain proceedings. Courts can and do exclude evidence relevant to value when necessary to protect other, more important interests. If an impending public project has increased or decreased property values, for example, evidence of that project-related change is excluded to avoid penalizing the condemnor or the landowner.<sup>118</sup> So the critical question is not whether evidence of environmental contamination is relevant in an eminent domain trial, but whether a more compelling policy dictates that it should be excluded.

Two general arguments have been made to justify excluding evidence of contamination or remediation costs. The first, a procedural due process argument, centers on the eminent domain trial itself, and the perceived risk of imposing liability for an environmental condition without the procedural safeguards that the landowner would have in an environmental cost-recovery proceeding. The second, a substantive due process argument, focuses on the perceived risk of an unfair outcome of the trial: that the condemnor might acquire not only the property (at a discount, because of the contamination) but also the right, as the property's new owner, to sue the condemnee for the cost of cleaning up the contamination.

As the following analysis will show, however, the procedural due process argument is based on a misunderstanding of the fundamental

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115. *Id.* at 80 (citations omitted).

116. *Id.*

117. *Ne. Conn. Econ. Alliance, Inc. v. ATC P'ship*, 776 A.2d 1068, 1080 (Conn. 2001).

118. *See United States v. Reynolds*, 397 U.S. 14, 16-17 (1970).

nature and implications of an eminent domain proceeding, while the substantive due process argument overlooks statutory and common law provisions that prevent a “double recovery” by the condemnor. Therefore, neither argument can justify the exclusion of contamination-related evidence that is relevant to the condemned property’s fair market value.

A. *The Procedural Due Process Illusion: Failing To Recognize That Environmental Liability and Property Value Are Apples and Oranges*

At first blush, the argument for excluding contamination evidence to avoid imposing environmental liability on the landowner without proper procedural safeguards seems persuasive. For example, in an eminent domain trial the jury determines property value only. By contrast, to impose liability on a landowner for environmental cleanup costs, the plaintiff might have to prove certain additional facts, such as the presence of contamination and causation. Although a defendant in an environmental proceeding can make third-party claims against other potentially responsible parties, no such option exists in an eminent domain case: the landowner is stuck with whatever diminution in property value the jury believes. Finally, in an environmental cost-recovery action the property owner might have certain defenses, such as the “innocent landowner” defense, that are not available in a condemnation trial.

On closer analysis, though, these concerns prove to be illusory. As the Michigan Supreme Court explained in its *Silver Creek* opinion, the error arises

by the commingling of two different concepts: (1) accounting for contamination in a determination of fair market value and (2) making an assessment of liability and damages for the cost of remediation of environmental contamination.

As the Attorney General pointed out, a condemnation action is an in rem proceeding. An essential part of the proceeding is the determination of the fair market value of the property. Because this proceeding is not designed to assign liability for environmental contamination, the value of the property is unaffected by whether its owner would be liable for the contaminated state of the property. The estimated costs of remediation are relevant only as they pertain to the fair market value of the property.

In contrast, a cost-recovery action under Michigan’s environmental-cleanup laws is an in personam proceeding specifically designed to assign liability for remediation costs. Those costs are typically sought under [The

Comprehensive Environmental Response, Compensation, and Liability Act] CERCLA or [state statute] and the fair market value of property is not relevant in such proceedings.<sup>119</sup>

This explanation encompasses several important points.

First, there is no need to find liability for the contamination, or even to consider liability, in an eminent domain proceeding. The fair market value of the contaminated land would be the same no matter whether the current landowner unknowingly bought it a week before or used it to store chemical waste for decades. As the Connecticut Supreme Court put it:

The admissibility of evidence of environmental contamination does not impose . . . a fictional value on the property by virtue of the personal liabilities of the condemnee, specifically, the *potential liability* under the environmental statutes. Instead, it permits the trier to take into account the effect, if any, such contamination and remediation costs had on the property's fair market value on the date of taking.<sup>120</sup>

Simply put, the property is worth what it is worth whether the owner put the contamination there or not.

Second, an eminent domain suit is an action in rem.<sup>121</sup> As the United States Supreme Court explained, the action is “a taking, not of the rights of designated persons in the thing needed, but of the thing itself,” and the payment for it “stands in place of the thing appropriated, and represents all interests acquired.”<sup>122</sup> Unlike in personam actions, which “adjudicate the rights and obligations of individual persons or entities,” in rem actions “affect only the property before the court and carry no in personam significance, other than to foreclose any person from later seeking rights in the property subject to the in rem action.”<sup>123</sup>

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119. *Silver Creek Drain Dist. v. Extrusions Div., Inc.*, 663 N.W.2d 436, 443 (Mich. 2003), *cert. denied*, 540 U.S. 1107 (2004).

120. *Ne. Conn. Econ. Alliance*, 776 A.2d at 1083. Continuing its explanation, the court said, “the valuation trial no more allocates liability under the environmental statutes than . . . in a situation where a parcel of property, prior to a taking, is damaged by a third party tortfeasor.” *Id.* It then compared the situation to the accidental destruction of a building before the taking, which gave rise to a suit in which the damages would be allocated among the tortfeasors. *Id.* Under the condemnee's argument, the court observed, “the condemnee should receive the value of the parcel as though the building had not been destroyed, merely because: (1) the building's destruction was not caused by the fault of the condemnee; and (2) there was a separate proceeding . . . designed to allocate liability.” *Id.*

121. *See, e.g.*, *United States v. Carmack*, 329 U.S. 230, 235 n.2 (1946); *United States v. Petty Motor Co.*, 327 U.S. 372, 376 (1946); *A.W. Duckett & Co. v. United States*, 266 U.S. 149, 151 (1924).

122. *United States v. Dunnington*, 146 U.S. 338, 352-53 (1892) (quoting *Crane v. City of Elizabeth*, 36 N.J. Eq. 339, 343 (N.J. 1882)).

123. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 957 (4th Cir. 1999).

Third, and relatedly, the claims and issues litigated in an eminent domain case would not have any preclusive effect on the landowner's ability to defend an environmental cost-recovery action.

The doctrine of claim preclusion, or *res judicata*, is not applicable for several reasons. To begin with, *res judicata* acts to bar only those claims (or defenses) that could have been raised in the first proceeding.<sup>124</sup> But in an eminent domain action, the landowner's defenses normally are limited to those challenging the propriety of the taking itself.<sup>125</sup> Therefore, defenses to liability for environmental contamination could not be raised, nor should they be, because they would be irrelevant to the litigated issue of property value. In addition, the landowner's procedural concern is that a matter adjudicated in condemnation case might be used offensively against it in an environmental enforcement action. But *res judicata* normally is a defense,<sup>126</sup> used to bar a second action, and on the very rare occasions when it is used offensively, it cannot be used to broaden or alter the plaintiff's judgment from the first proceeding.<sup>127</sup>

The doctrine of issue preclusion, or collateral estoppel, also would not apply to the issue of landowner liability for the contamination. Since it is only the presence of contamination that is relevant to fair market value, and not liability or causation, neither of those issues would "actually" or "necessarily" be decided in the eminent domain case, ruling out any issue-preclusive effect.<sup>128</sup> Moreover, because the condemnation trial is narrowly focused on the issue of valuation, the landowner would have neither incentive nor opportunity to litigate causation or liability, making the doctrine of issue preclusion inapplicable.<sup>129</sup>

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124. *See, e.g.*, *Credit Alliance Corp. v. Williams*, 851 F.2d 119, 122 (4th Cir. 1988) (holding that *res judicata* precluded defendant from "raising here defenses that he could have raised in the [first] action").

125. *See, e.g.*, FED. R. CIV. P. 71A(e) (allowing an "objection or defense to the taking of the defendant's property" and "evidence as to the amount of compensation to be paid for the property" but no "other pleading or motion asserting any additional defense or objection"); *United States v. 87.30 Acres of Land*, 430 F.2d 1130, 1132 (9th Cir. 1970) (determining landowner's defenses are limited to those challenging the taking); *Kan. Pipeline Co. v. A 200 Foot by 250 Foot Piece of Land*, 210 F. Supp. 2d 1253, 1258 (D. Kan. 2002) (finding counterclaims are not permitted in an eminent domain proceeding; they must be filed in a separate action); OHIO REV. CODE ANN. § 163.09 (West 2002) (noting a landowner may deny the agency's right to appropriate, the necessity of the appropriation, or the inability of the parties to agree only). *See generally* 7 NICHOLS' THE LAW ON EMINENT DOMAIN § 2.07[3] (Julius L. Sackman, 3d rev. ed. 1973) (discussing condemnee's potential defenses to the taking).

126. *See* *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 439 (5th Cir. 2000).

127. *See* *Stone v. Dep't of Aviation*, 296 F. Supp. 2d 1243, 1249 (D. Colo. 2003).

128. *See* *Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979) (emphasizing collateral estoppel applies only to issues actually and necessarily decided in the first proceeding).

129. *See* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 n.15 (1979). Courts are especially reluctant to allow the offensive use of collateral estoppel to establish facts or issues in a



Accordingly, there is little merit to the argument that evidence of contamination should be precluded from condemnation trials for procedural due process reasons. The Supreme Courts of Connecticut and Michigan have considered and rejected it,<sup>130</sup> and while the New Jersey Supreme Court acknowledged the argument in its decision limiting the introduction of such evidence, it gave the argument little weight.<sup>131</sup>

*B. Substantive Due Process and the Mythical “Double Take”*

The substantive due process argument, which hypothesizes that a condemnee might have to part with its property at a discounted price and yet still be responsible for cleanup costs, seems even more troubling. As the New Jersey Supreme Court described it:

When property is devalued for contamination in condemnation, landowners first receive discounted compensation in the condemnation proceeding and then are subject to full cleanup costs, thus suffering what is colloquially denominated as a “double-take.” Under that scheme, the condemnor receives a windfall by ultimately obtaining the property in a remediated state at the condemnee’s cost, yet paying a discounted price due to the contamination. We think that is fundamentally unfair.<sup>132</sup>

This argument, however, assumes that the availability of two litigation forums—an eminent domain and an environmental cost-recovery proceeding—makes possible a double recovery by the condemnor. But some specific statutory provisions, as well as the common law, make such an outcome highly unlikely.

1. Rules Preventing Double Recovery by a Condemnor

The principal environmental law affecting real estate transactions is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>133</sup> CERCLA broadly imposes liability on

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second proceeding that were incidentally litigated in a prior action. *Id.* For an example of the courts’ caution in applying this doctrine, see *In re Microsoft Corp. Antitrust Litigation*, 355 F.3d 322, 326-27 (4th Cir. 2004) (rejecting use of offensive collateral estoppel to bar relitigation of facts “supportive” of first verdict; relevant standard was “critical and necessary” or “essential”).

130. See *Silver Creek Drain Dist. v. Extrusions Div., Inc.*, 663 N.W.2d 436, 443 (Mich. 2003); *Ne. Conn. Econ. Alliance, Inc. v. ATC P’ship*, 776 A.2d 1068, 1082-83 (Conn. 2001).

131. See *Hous. Auth. of New Brunswick v. Suydam Investors*, 826 A.2d 673, 685-86 (N.J. 2003); see also *In re City of New York v. Mobil Oil Corp.*, 783 N.Y.S.2d 75, 79 (N.Y. App. Div. 2004).

132. *Suydam*, 826 A.2d at 686 (internal citations omitted).

133. 42 U.S.C. §§ 9601-9675 (2000). For general information on the impact of CERCLA on real estate transactions, see, e.g., Eva M. Fromm, Edward C. Lewis & Heather M. Corken, *Symposium: Environmental Law and Business in the 21st Century: Allocating Environmental*

current and former owners of hazardous waste sites and other potentially responsible parties (PRPs). “Once a site has been cleaned up, CERCLA provides two causes of action for a party to recover the costs incurred as a result of the cleanup effort.”<sup>134</sup> If the plaintiff is not a PRP,<sup>135</sup> it may sue under 42 U.S.C. § 9607(a), which generally imposes joint and several liability on each defendant regardless of fault.<sup>136</sup> If the plaintiff is a PRP, it may seek contribution from every other PRP under 42 U.S.C. § 9613(f)(1), under which liability is several only and the court may allocate response costs among liable parties.<sup>137</sup>

If a governmental entity acquires a hazardous waste site through “exercise of eminent domain authority by purchase or condemnation” and is careful about how it handles the property afterward, it will be shielded from CERCLA liability under 42 U.S.C. § 9601(35)(A)(ii).<sup>138</sup> In addition, the costs incurred by a state agency in removing or remediating the hazardous waste are presumptively recoverable from former owners and other parties.<sup>139</sup>

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*Liabilities in Acquisitions*, 22 IOWA J. CORP. L. 429, 431 (1997); 3 ENVIRONMENTAL LAW PRACTICE GUIDE § 32.01 (Michael B. Gerrard ed., 2004).

134. *Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 652 (6th Cir. 2000).

135. *See, e.g., City of Wichita v. Aero Holdings, Inc.*, 177 F. Supp. 2d 1153, 1165 (D. Kan. 2000) (reasoning “every circuit to address the issue . . . [has] conclude[d] that a PRP may not maintain an action under § 107”).

136. *Kalamazoo River*, 228 F.3d at 653.

137. *Id.*

138. In addition to taking the property by eminent domain, this defense against CERCLA liability requires proof that the governmental entity (or its agents) did not cause the contamination, that it exercised due care after taking the property (by, for example, actively pursuing remediation), and that it took precautions against foreseeable acts by third persons (by, for example, fencing and guarding the site). *See, e.g., City of Emeryville v. Elementis Pigments, Inc.*, No. C 99-03719 WHA, 2001 U.S. Dist. LEXIS 4712, at \*23 (N.D. Cal. Mar. 6, 2001).

Some courts have held a condemnor to be a PRP if it acquired the property during pre-condemnation negotiations without filing an eminent domain lawsuit. *See City of Wichita*, 177 F. Supp. 2d at 1168 n.15; *City of Toledo v. Beazer Materials & Servs. Inc.*, 923 F. Supp. 1013, 1020 (N.D. Ohio 1996). *But see City of Emeryville*, 2001 U.S. Dist. LEXIS 4712, at \*25 (holding that a precondemnation purchase was an exercise of eminent domain authority; noting it was “doubtful that Congress intended to require senseless litigation as a prerequisite to the defense”). Since condemnors are generally required to negotiate before filing suit (to avoid saddling condemnees with needless litigation costs, among other reasons), the *Emeryville* decision is better reasoned.

139. Under 42 U.S.C. § 9607(a)(4)(A) (2000), costs “not inconsistent with the national contingency plan” are recoverable, and the burden of proof is on the defendant to show the inconsistency. If the governmental plaintiff is not a state agency (for example, if it is a municipality), it must show that the costs incurred were consistent with the national contingency plan. *Id.*; *see, e.g., City of Phila. v. Stepan Chem. Co.*, 713 F. Supp. 1484, 1487-89 (E.D. Pa. 1989) (stating that a municipality may not proceed as a state under CERCLA and there is no presumption its cleanup activities are consistent with the national contingency plan).

Under some circumstances, a private real estate buyer, too, could sue the seller under CERCLA to recover all of its necessary response costs in dealing with environmental contamination.<sup>140</sup> And if the seller knew about the contamination and failed to disclose it or deceived the buyer about it, the buyer could sue to recover damages for the fraud, which would be measured as the difference in value between the property as-represented and as-is.<sup>141</sup>

But what if the buyer tried to do both? It would then be in the same position as the hypothetical government agency seeking a reduced condemnation award (analogous to the fraud damages measured by difference in value) and cleanup costs. How would that buyer fare? Not very well, as it turns out, for two reasons.

First, CERCLA contains a provision that is designed to prevent double recovery. According to 42 U.S.C. § 9614(b), “[a]ny person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this Act.”<sup>142</sup>

Courts have used this section to reduce or completely offset CERCLA damages by the amount of prior judgments,<sup>143</sup> settlements, or government-funded reimbursements.<sup>144</sup> Broadly applying the concept, one federal court recognized that the increase in property value resulting from cleanup efforts could be “compensation” that would offset

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140. See 42 U.S.C. §§ 9601-9675.

141. *Id.*

142. Some states have enacted similar legislation. See, e.g., ARIZ. REV. STAT. ANN. § 49-285.D (1997); HAW. REV. STAT. ANN. § 128D-18(e) (LexisNexis 2000); MINN. STAT. § 115B.13 (West 1997).

143. In *Kelley ex rel. v. John A. Biewer Co. of Schoolcraft Inc.*, No. 1:91-CV-1032, 1993 U.S. Dist. LEXIS 7125, at \*2-3 (W.D. Mich. 21, 1993), the State of Michigan filed a CERCLA suit addressing many of the matters that had been adjudicated in a state lawsuit decided before CERCLA's enactment. *Id.* at \*2. Holding that claims against shareholder Richard Biewer—who was not a party to the state lawsuit—could proceed, the court cautioned that its “opinion should not be interpreted as allowing the state a double recovery. Any amount of damages paid pursuant to the state judgment is not recoverable in this Court.” *Id.* at \*26-27.

144. See *Boeing Co. v. Cascade Corp.*, 920 F. Supp. 1121, 1140 (D. Or. 1996) (noting that funds were used from settlement with other defendants to reduce liability); *Price v. U.S. Navy*, 818 F. Supp. 1326, 1332-33 (S.D. Cal. 1992), *aff'd in part, rev'd in part*, 39 F.3d 1011 (9th Cir. 1994) (finding state reimbursement and funds from settlement with other defendants entirely offset damages); see also *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F. Supp. 2d 1118, 1181-82 (C.D. Cal. 2003) (determining that government-approved rent increase, granted in part because of remediation expenses, could not “result in a windfall” because it was designed to pay for higher current operating expenses, and any recovery in environmental suit had to be reflected as income in the next rent increase application).

damages.<sup>145</sup> Still, other federal courts have applied § 9614(b) to preempt state law damages claims, holding that to do otherwise would “leave open the possibility that the claimant could obtain a double recovery.”<sup>146</sup>

Second, and even more importantly, courts have applied the common law principle against double recovery to preclude double payment of environmental response or remediation costs.<sup>147</sup> Some courts have applied this principle to bar a property owner from seeking both environmental response costs and damages for the contamination’s effect on property value, reasoning that it would amount to an impermissible double recovery.<sup>148</sup> Another federal court endorsed the principle of

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145. See *Allied Corp. v. Frola*, 730 F. Supp. 626, 637 (D.N.J. 1990) (assuming without deciding that increase in property value due to required cleanup of surface contamination was “compensation” under § 9614(b), but holding it would not be applicable to offset claim for damages from subsurface contamination).

146. *SC Holdings, Inc. v. A.A.A. Realty Co.*, No. 95-0947 (GEB) 1996 U.S. Dist. LEXIS 12428, at \*30-31 (D.N.J. Aug. 19, 1996); see also *Cont’l Title Co. v. The Peoples Gaslight & Coke Co.*, No. 96-c-3257, 1999 U.S. Dist. LEXIS 14729, at \*13-17 (N.D. Ill. Sept. 10, 1999) (“There is no ‘independent basis’ under CERCLA for plaintiff’s restitution claim because both the CERCLA private cost recovery claim and the restitution claim seek reparation for the same injury.”). *But cf.* *New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1261 (D.N.M. 2004) (finding “[p]laintiffs have carefully pleaded their . . . state law claims, marking the periphery of the CERCLA remedy as their boundary, and thus avoiding the risk of an impermissible double recovery”).

147. See *Cont’l Title Co.*, 1999 U.S. Dist. LEXIS 14729, at \*16-17 (dismissing restitution claim seeking reparation for the same injury as private CERCLA cost recovery claim because permitting the plaintiff to recover for both “would violate the equitable principle that a plaintiff may not recover twice for the same injury” (internal citation omitted)); see also *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, No. 94-0752, 1996 U.S. Dist. LEXIS 14446, at \*192 (E.D. Pa. Sept. 19, 1996) (reducing cost-recovery award under state environmental statute “to avoid giving . . . double recovery” of costs also recoverable under CERCLA); *Bancamerica Commercial Corp. v. Trinity Indus. Inc.*, 900 F. Supp. 1427, 1477 (D. Kan. 1995) (interpreting indemnity provision in lease and declining to enforce it because lessor got damages under CERCLA, and “allowing additional recovery based on the indemnity provisions contained in the lease would amount to double recovery”).

148. See *Braswell Shipyards, Inc. v. Beazer E., Inc.*, 2 F.3d 1331, 1338-39 (4th Cir. 1993); *Mondry v. Speedway Superamerica LLC*, No. 96-c-2159, 1999 U.S. Dist. LEXIS 9095, at \*23-24 (N.D. Ill. May 12, 1999) (adjudicating the Resource Conservation and Recovery Act (RCRA) claim for petroleum leak; dismissing state law claim for value of affected property; plaintiff was not entitled to “both remediation and the value of her property; that would result in double recovery”).

In *Minyard Enterprises, Inc. v. Southeastern Chemical & Solvent Co.*, the United States Court of Appeals for the Fourth Circuit upheld a verdict awarding Minyard \$24,000 in past response costs and \$200,000 in loss of value of the contaminated property, reasoning that because Minyard no longer owned the property, it could not benefit from a cleanup, so no double recovery could occur. 184 F.3d 373, 383-84 (4th Cir. 1999).

The United States Court of Appeals for the Ninth Circuit acted similarly in *Stanton Road Associates v. Lohrey Enterprises*, 984 F.2d 1015, 1022 (9th Cir. 1993), distinguishing remediation costs from an award for extra maintenance costs and loss of use of money suffered when a buyer backed out of a transaction, and noting, “The award of damages was not intended to compensate Stanton Road for the lost market value of the property.”

awarding cleanup costs and setting off the increased value of a cleaned-up site against a fraudulent concealment damages award.<sup>149</sup> Finally, yet another court permitted the defendant in an environmental lawsuit to plead prior payment of cleanup costs as an equitable defense.<sup>150</sup>

These decisions indicate that, if a court adjudicating a condemnor's CERCLA claim for cost recovery were confronted with the "double take" scenario, it might apply § 9614(b) to set the incurred costs off against the remediation expenses deducted from the property's "as-if-clean" value in the eminent domain action.<sup>151</sup> Even if § 9614(b) did not apply, the court deciding the environmental cost-recovery suit clearly could apply the common law principle against double recovery to prevent the condemnor from getting a "windfall."

Because the court adjudicating the environmental lawsuit has the power to prevent a "double take," the substantive due process argument for excluding or limiting contamination evidence from the preceding eminent domain trial has little merit.

## 2. Rules Preventing Double Recovery by a Potentially Responsible Party

Depending on the facts of the case, the condemnor, too, might be a "potentially responsible party" liable for cleanup costs, either because it contributed in some way to the contamination<sup>152</sup> or because it does not

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In *Penn Central Corp. v. United States*, a railroad acquired by eminent domain under the Regional Rail Reorganization Act of 1973 argued that the government's 1980 settlement of its condemnation case barred a subsequent CERCLA claim against it. 862 F. Supp. 437, 448 (Reg'l Rail Reorg. Ct. 1994). CERCLA became effective days after the settlement agreement was signed. *Id.* at 447-48. After reviewing the record of negotiations, the court found no indication that the parties had considered the potential for tens of millions of dollars of environmental claims when negotiating the value of the property. *Id.* at 449-52. Since the price paid was evidently unaffected by the property's environmental condition, the court concluded that the condemnor's CERCLA claim would not "forc[e] Penn Central to pay twice for these [environmental] burdens." *Id.* at 453.

149. See *Gopher Oil Co. v. Union Oil Co.*, 955 F.2d 519, 528-29 (8th Cir. 1992).

150. See *New York v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 215-16 (N.D.N.Y. 2002).

151. If a condemnor's obligation to pay for property taken is reduced, pursuant to a verdict rendered under state law, because the property is contaminated, that reduction fits conceptually within § 9614(b). The phrase "receives compensation," as used in the section, might be read to encompass a reduced obligation to pay, since it is analogous to forgiveness of a debt, which is a form of income. See, e.g., *Pugh v. Comm'r*, 213 F.3d 1324, 1326-27 (11th Cir. 2000) ("Forgiveness of debt is income because it frees up assets that the tax payer previously had to dedicate toward repaying its obligations.")

152. A governmental entity may become a PRP through a *de minimis* contribution of waste. See *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1277-79 (N.D. Okla. 2003), *vacated on settlement*, No. 01-CV-0900 EA(c), 2003 U.S. Dist. LEXIS 23416 (N.D. Okla. July 16, 2003). A governmental entity may become a PRP because municipal sewers transported

qualify for any of the CERCLA landowner defenses.<sup>153</sup> If so, the condemnor could not recover all its cleanup costs: rather, it would have to seek contribution from the other potentially responsible parties under 42 U.S.C. § 9613(f)(1).<sup>154</sup>

Courts equitably allocate such costs among the various PRPs. Among other factors, courts specifically consider whether the current owner acquired the property at a discount because of the contamination. If so, the current owner may well be required to bear a larger share of the costs, for “if the tract’s price is reduced to allow for future environmental cleanup claims, the purchaser should not be entitled to double compensation.”<sup>155</sup>

In *Bethlehem Iron Works, Inc. v. Lewis Industries, Inc.*, for example, the court allocated sixty-five percent of the cleanup costs to the current owner plaintiffs, noting that they had purchased the property at a substantial discount and that they stood to benefit from the increase in the property’s value resulting from remediation.<sup>156</sup>

Accordingly, if the condemnor is a potentially responsible party, the court adjudicating its environmental cost-recovery claim would consider any “discount” the condemnor got when allocating response costs.

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some of the waste. See *City of Bangor v. Citizens Commc’ns Co.*, No. 02-183-B-S, 2004 U.S. Dist. LEXIS 3845, at \*42-51 (D. Me. Mar. 11, 2004) (citing cases).

153. Under CERCLA, the owner of a contaminated property is presumptively a PRP liable for a share of cleanup costs. 42 U.S.C. § 9607(A)(1) (2000). A governmental entity that acquired the property—knowing it to be contaminated—has a defense to this liability, but the defense can be lost if the property transfer does not result from an actual eminent domain lawsuit. See discussion *supra* note 138. *But see* 42 U.S.C. § 9601(40), enacted in 2002 (providing statutory defense for innocent purchasers knowingly buying brownfield properties for redevelopment). Presumably a government entity that bought, rather than condemned, a contaminated property would qualify for this defense.

154. See, e.g., *Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 653 (6th Cir. 2000) (involving a contribution action by PRPs that had entered into a voluntary consent order with the state).

155. *Smith Land & Imp. Corp. v. Celotex Corp.*, 851 F.2d 86, 90 (3d Cir. 1988) (citing *Phila. Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 314-15 (3d Cir. 1985)); see also *Amoco Oil, Inc. v. Borden, Inc.*, 889 F.2d 664, 673 (5th Cir. 1989) (noting that the circumstances of a property’s conveyance, “including the price paid and discounts granted, should be weighed in allocating response costs”).

156. No. 94-0752, 1996 U.S. Dist. LEXIS 14446, at \*213-216 (E.D. Pa. Sept. 19, 1996); see also *PVO Int’l, Inc. v. Drew Chem. Corp.*, No. 87-3921, 1988 U.S. Dist. LEXIS 18609, at \*21 (D.N.J. June 27, 1988) (reserving decision on contribution claim, even though defendant was responsible for all the contamination, because plaintiff “may have paid a low purchase price for the property . . . [because it] was or might be contaminated” and because defendant “will not reap the benefit of the increased value of the property resulting from its being cleaned up”).

*C. Additional Shortcomings of the Evidence-Limiting Approach*

Even though the court adjudicating an environmental claim can protect the condemnee from double liability for cleanup costs, the approach adopted by New Jersey in *Suydam* still might seem better because it absolutely precludes double liability.<sup>157</sup> By valuing the property as if it had been remediated and escrowing part of the jury award,<sup>158</sup> the *Suydam* approach seems to strike an appropriate, more nuanced balance, allowing the condemnor to present evidence of the contamination's stigma effect on property value but deferring adjudication of cleanup costs to a more competent forum.<sup>159</sup> But this evidence-limiting approach has some significant shortcomings.

First, since the jury will hear evidence about the contamination (as a necessary foundation for an opinion on stigma damages) but not about the remediation (because it is assumed), it will have an incentive to speculate about the evidence it is not hearing.

Second, environmental conditions that affect property value—but do not give rise to cost-recovery claims—might be lumped in with actionable environmental contamination and mistakenly taken away from the jury's consideration.

Third, because the trier of fact must assume that the property has been remediated, it also must overlook some important factors directly related to the cleanup (but only tangentially to cleanup cost) that bear significantly on the condemned property's fair market value. These latter two factors create a real risk that public funds would be used to overcompensate the landowner—a result that is just as undesirable as underpayment.<sup>160</sup>

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157. See *Hous. Auth. of New Brunswick v. Suydam Investors*, 826 A.2d 673, 687 (N.J. 2003).

158. *Id.* at 685 n.4.

159. See *id.*

160. See *Bauman v. Ross*, 167 U.S. 548, 574 (1897) (“The just compensation required by the constitution to be made to the owner [of condemned property] is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.”).

1. Admitting Foundational Evidence About Contamination To Support an Opinion on Stigma Damages, While Excluding Evidence About Remediation, May Invite the Jury To Speculate About What Is Being Kept from It

Environmental stigma has been defined as “an adverse effect on the market’s perception of the value of property containing an environmental risk even after cleanup costs have been expended or considered in estimating value.”<sup>161</sup> The concept of stigma encompasses a variety of buyer concerns related to contamination, such as the potential for future remediation costs or regulatory changes, higher transactional costs, and difficulty selling or leasing the property because it has been contaminated.<sup>162</sup> In addition to eminent domain cases, environmental stigma has been recognized as a factor affecting property value in trespass,<sup>163</sup> nuisance,<sup>164</sup> and *ad valorem* property tax cases,<sup>165</sup> among others.<sup>166</sup>

Professional literature on the subject provides anecdotal evidence that environmental stigma can seriously affect the market value of property, even after it has been remediated to the satisfaction of the

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161. Roddewig, *supra* note 22, at 221.

162. *Id.*

163. *See, e.g.*, Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245-48 (Utah 1998) (holding that stigma damages are recoverable in Utah when there is temporary physical injury to land and repair of the temporary injury will not return the value of the property to its prior level because of lingering negative public perception).

164. *See, e.g.*, Nashua Corp. v. Norton Co., No. 90-CV-1351 (RSP/RWS), 1997 U.S. Dist. LEXIS 5173, at \*17-19 (N.D.N.Y. Apr. 15, 1997) (allowing proof of stigma as part nuisance claim for diminished value).

165. *See, e.g.*, *In re* Custom Distrib. Servs., Inc., 216 B.R. 136, 155 (Bankr. D.N.J. 1997) (finding twenty percent postremediation reduction in value due to stigma); Westling v. County of Mille Lacs, 543 N.W.2d 91, 93 (Minn. 1996) (affirming the tax court’s decision to adopt an appraisal evaluation giving a stigma discount based on a market case study of fourteen improved industrial properties sold after cleanup of contamination).

166. *See, e.g.*, *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 795-98 (3d Cir. 1994) (recognizing stigma as a factor in toxic tort litigation). *See generally* Thomas Hofbauer & Clare Ryan, *The Stigma Enigma: Damages Based on Public Perception of Taint*, WISC. LAW., Sept. 2004, at 1, available at [http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin\\_Lawyer&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=47518](http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=47518) (last visited Mar. 15, 2006); Jennifer L. Young, Comment, *Stigma Damages: Defining the Appropriate Balance Between Full Compensation and Reasonable Certainty*, 52 S.C. L. REV. 409, 410 (2001) (noting that stigma is a factor in suits for breach of pest control contracts, defective construction, deceptive trade practices, and CERCLA).

Evidence of a stigma effect on property value can also be relevant outside of the environmental-contamination context. *See, e.g.*, Vista Resorts, Inc. v. Goodyear Tire & Rubber Co., 2004 Colo. App. LEXIS 2119, at \*15-19 (Colo. Ct. App. Nov. 18, 2004) (admitting owner-opinion testimony of stigma damages in product liability suit).



environmental enforcement agency.<sup>167</sup> The seller may be forced to offer a substantial discount in price to attract buyers who “seek an equally desirable substitute property without the contamination problem.”<sup>168</sup>

The literature also indicates that, in evaluating stigma, appraisers consider factors such as the type, intensity, and source of the contamination, in addition to the extent to which the contamination interferes with the property’s probable postremediation use.<sup>169</sup> This means that a substantial amount of evidence about the environmental contamination will be put before the jury.

Recognizing this problem in its *Finkelstein* opinion, the Florida Supreme Court cautioned that “[e]vidence of contamination, because of its prejudicial nature, should not be a feature of a valuation trial beyond what is necessary to explain facts showing a reduction in value” caused by contamination stigma.<sup>170</sup>

No matter how carefully it might be circumscribed, however, the jury will hear and see evidence about the contamination on the property. But then, instead of hearing expert testimony—developed by advocates for both sides—about the costs and benefits of various remediation approaches, the jury will be asked simply to assume the contamination has been remediated. Such withholding of information invites the jury to speculate, potentially creating more problems than it solves.<sup>171</sup>

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167. Patchin, *supra* note 22 (noting remediated property lost ninety-five percent of its estimated value).

168. *Id.* at 196.

169. *See, e.g.*, APPRAISAL INST., *THE APPRAISAL OF REAL ESTATE* 216 (12th ed. 2001); William N. Kinnard, Jr. & Elaine M. Worzala, *How North American Appraisers Value Contaminated Property and Associated Stigma*, in *VALUING CONTAMINATED PROPERTIES* 15, 23-24 (Richard J. Roddewig ed., 2002); Roddewig, *supra* note 22, at 221.

170. *Finkelstein v. Dep’t of Transp.*, 656 So. 2d 921, 925 (Fla. 1995).

171. Concerns that jurors might speculate about information withheld from them permeate the law. *See, e.g.*, *People v. Paasche*, 525 N.W.2d 914, 920 (Mich. App. 1994) (finding that the prosecutor’s question to accountant, eliciting fact that he had invoked attorney-client privilege when questioned by state investigators, “left the jury free to infer that the privilege was asserted in order to hide damaging information from the investigators”); *Commonwealth v. Crowley*, 556 N.E.2d 1043, 1048 (Mass. App. Ct. 1990) (noting deliberating jurors asked whether sneaker print was in evidence and, if not, “why was it withheld?”: trial court instructed them not to speculate about matters that are not in evidence); *Commonwealth v. Rogers*, 344 A.2d 892, 895 (Pa. 1975) (“Where evidence has been suppressed, no reference to the suppression hearing is permissible because such a reference would reveal to the jury or permit the jury to speculate about the existence of inculpatory evidence withheld from the jury by the suppression order.”); *State v. Kandzierski*, 255 A.2d 154, 156-57 (R.I. 1969) (deliberating jurors asked about a car driven by defendant’s mother; trial court responded that both sides have rested so “there is no further information we can obtain”; objection that this reply created an inference that the defense withheld material evidence was overruled).

## 2. Not All “Contamination” Is Subject to a Cost-Recovery Claim

The evidence-limiting approach might exclude evidence of environmental conditions, relevant to the property’s fair market value, that could never be the basis of an environmental cost-recovery claim. In *Suydam*, for example, the New Jersey Supreme Court lumped asbestos-containing building materials and lead-based paint in with other forms of “contamination,” excluding their remediation costs to prevent a “double take.”<sup>172</sup>

The real estate market may require encapsulation or removal of asbestos and lead-based paint, or indicate that buyers demand a reduction in price for the presence of such materials in a building.<sup>173</sup> But a cost-recovery action for their removal does not lie under CERCLA, unless the materials are being released into the environment outside the building.<sup>174</sup> If the condemnee could not be sued to recover the costs of lead or asbestos abatement,<sup>175</sup> considering those costs in eminent domain valuation could not result in a “double take,” so excluding the evidence on that ground would be erroneous.

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172. See *Hous. Auth. of New Brunswick v. Suydam Investors*, 826 A.2d 673, 677-78 (N.J. 2003); see also *Ne. Conn. Econ. Alliance, Inc. v. ATC P’ship*, 776 A.2d 1068, 1073-74 (Conn. 2001) (discussing evidence of asbestos insulation and lead paint as “environmental contamination”).

173. See, e.g., *ABD Assocs. Ltd. P’ship v. Tobacco Co.*, No. 1:91CV00415, 1995 U.S. Dist. LEXIS 11094, at \*9, \*22 (M.D.N.C. June 26, 1995) (emphasizing that the buyer demanded that the seller remove lead-based paint and asbestos-containing building materials).

174. See, e.g., *California v. Blech*, 976 F.2d 525, 527 (9th Cir. 1992) (finding no private cause of action under CERCLA for removal of asbestos released within the building “from a product that is part of the structure”); *Plaskon Elec. Materials, Inc. v. Allied-Signal, Inc.*, 904 F. Supp. 644, 664 (N.D. Ohio 1995) (finding no CERCLA recovery for cost of removing asbestos insulation); *ABD Assocs.*, 1995 U.S. Dist. LEXIS 11094, at \*9, \*22 (noting buyer demanded seller remove lead-based paint; no private cost-recovery for lead-based paint used on interior walls). But see *CP Holdings, Inc. v. Goldberg-Zoino & Assocs., Inc.*, 769 F. Supp. 432, 436-38 (D.N.H. 1991) (determining seller “disposed” of asbestos-containing building materials under CERCLA when it sold the building to a buyer knowing the buyer intended to raze the building, which caused a release of asbestos into the exterior environment).

175. Product manufacturers have been sued, on product-liability grounds, for diminution in property value caused by asbestos-containing building materials. See, e.g., *S.F. United Sch. Dist. v. W.R. Grace & Co.*, 44 Cal. Rptr. 2d 305, 310-11 (Ct. App. 1995). A seller or former owner might be liable for matters such as fraudulent concealment of asbestos. See, e.g., *La Placita Partners v. Nw. Mut. Life Ins. Co.*, 766 F. Supp. 1454, 1457-60 (N.D. Ohio 1990) (dismissing asbestos-related fraud claims). However, I am not aware of any cause of action against a seller for the mere presence of asbestos or lead in a building if it is properly disclosed to the buyer.

### 3. The Evidence-Limiting Approach Is Overly Broad as to Types of Takings

Courts<sup>176</sup> and commentators<sup>177</sup> relying on the “double take” rationale to exclude evidence of remediation costs have focused on situations in which an entire parcel of real estate is being condemned. If a public agency condemns an entire contaminated parcel, it will become an “owner” that can remove or remediate the contamination and then, in theory, sue to recover its costs. Very often, however, condemnations involve small strips of property used for roads or highways. For condemnations of that kind, the exclusion of remediation-cost evidence could have untoward consequences, as the following hypothetical set of facts will show.

ABC Trucking Co. owns a ten-acre trucking terminal property on a state highway next to a rail line. Soil in a gravel parking area behind the terminal, several hundred feet away from the highway, has been heavily contaminated by chemicals leaking from tank trailers. Experts agree that the cheapest option for remediating this contamination will cost \$1,000,000. Based on that evidence, ABC Trucking applied for (and received) a reduction in the tax value of its property from \$2,400,000 to \$1,400,000.

The state highway department plans to replace the highway’s railroad grade crossing with a bridge. To build the bridge embankment, it will need to acquire a 50-foot strip across the entire frontage of the ABC Trucking property. There are no buildings or contaminated soil in the take area, which is worth about \$25,000. Construction of the embankment will eliminate two of the property’s three access drives. This loss of access means that, after the taking, the property will no longer be usable as a trucking terminal, although it might be used for longer-term storage. As a result, the market value of the property is reduced by about half.<sup>178</sup>

Under the relevance-based approach to admitting evidence of contamination, the state highway department could show that, before the taking, the entire ABC Trucking property would have a fair market value of about \$1,400,000. After the taking, due to the access-related change

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176. See *Suydam*, 826 A.2d at 677 (noting entire property condemned for redevelopment); *In re City of New York v. Mobil Oil Corp.*, 783 N.Y.S.2d 75, 76 (App. Div. 2004) (indicating the entire property was condemned for a water pollution control plant).

177. See generally Moomaw, *supra* note 6; Dworin, *supra* note 6.

178. This assumption is somewhat simplistic, but valid enough for the purposes of this illustration. Better appraisal practice would dictate that the land and building be valued separately, and the severance damages probably would relate more to the building than the land.

in the facility's highest and best use, the highway department's appraiser believes the remaining property will be worth about \$700,000. Based on these findings, the appraiser would testify that ABC Trucking should be paid \$700,000 to compensate it for the land taken and the severance damage to the residue property.

Under the evidence-limiting approach, however, the appraiser would have to value the property as if the contamination had been remediated. Finding market evidence of a moderate "stigma" effect for properties of this type, the appraiser concludes the property's fair market value before the taking is \$2,200,000; afterward, due to the change in functionality, its value is only \$1,100,000. Based on these findings, the appraiser would testify to \$1,100,000 in "just compensation" to the landowner.

As a result of the eminent domain proceeding, the state highway department will own a one-acre parcel of uncontaminated land adjacent to its existing right-of-way. Because the land is not contaminated, the highway department cannot seek any environmental cost recovery from ABC Trucking. But if it is precluded from introducing evidence of the contamination's effect on the value of ABC Trucking's residue property, it will have to pay \$400,000 more in severance damages.

Varying the hypothetical facts, suppose that some soil in the take area is contaminated, and the trial court escrows part of the condemnation award. Using contractor equipment already mobilized for the highway project, the state highway department removes and disposes of the contaminated soil for \$100,000.<sup>179</sup> It then successfully sues ABC Trucking to recover this cost. Afterward, however, ABC Trucking would still be \$300,000 further ahead under the evidence-limiting approach.

This illustration is not unusual. In highway-related eminent domain cases, the value of the property acquired for highway purposes often is low, while damages to the fair market value of the remaining property (or residue) often are relatively high. If the condemnor must value the residue as if it were remediated, the severance damages it must pay will also increase, even though the condemnor will not benefit by (and cannot require) remediation of the contaminated residue.<sup>180</sup>

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179. Removal might be unnecessary. Paved-over soil contamination may require no additional remediation, because the pavement ensures there will be no "release" of a hazardous substance posing an "imminent and substantial endangerment." See, e.g., *Price v. U.S. Navy*, 818 F. Supp. 1326, 1331 (S.D. Cal. 1992), *aff'd in part, rev'd in part*, 39 F.3d 1011 (9th Cir. 1994).

180. Even if an environmental agency were to order cleanup of the remaining part of the property, the benefit (in terms of increased property value) would inure to the condemnee, making a "double taking" impossible.

4. Valuing Contaminated Property “As If Remediated” Overlooks Factors Other than Cleanup Cost That Bear on the Property’s Market Value

Even if the condemnor is taking the entire contaminated property, valuing it “as if remediated” does more than just defer adjudication of cleanup costs—it also assumes away some important factors that bear on the market value of the property.

There is an inverse relationship, for example, between the speed and cost of environmental remediation methods. A strong demand for developable property might justify using a fast but expensive option, such as excavating the contaminated soil and trucking it to an environmental landfill. If the market is stagnant or declining, on the other hand, it might be most cost-effective to put on an impermeable cap over the contaminated soil to prevent migration into the groundwater. That option would be much cheaper, but it would be many years before that part of the property could be developed.

Suppose the property being condemned is a two acre, commercially zoned parcel once used as a gasoline service station. The pumps, underground storage tanks, and dispenser lines were removed when the station went out of business. Because the property is located in an expanding retail area, its highest and best use is for redevelopment with a new commercial structure, such as a restaurant. If available for redevelopment, the property would be worth approximately \$1,000,000. The best location for a new building, however, would require construction in a part of the property that is contaminated with petroleum.

If the soil were excavated, trucked to an environmental landfill, and replaced with clean backfill, redevelopment could begin at any time, but the cost of this remediation option would be about \$400,000. Alternatively, the property owner could use a bioremediation process, in which petroleum-digesting microbes would break the contamination down into harmless byproducts. This option would cost about \$200,000 but would take two years to complete, delaying redevelopment for the same amount of time. Because the buyer could not use the property for two years, its current market value would be reduced to about \$800,000.

As an alternative to redevelopment, the service station building could be remodeled into a small retail store. The property would be worth about \$700,000 for this purpose. Since the contaminated area would not be needed for construction, it could be paved for parking, which would also create an impermeable surface that would prevent rain

from carrying the petroleum down into the groundwater. If this option were selected, it would cost \$100,000, but the owner would have to agree to a land-use control prohibiting any disturbance of the paved area for fifteen years.

Under the hypothetical facts of this illustration, if the property were uncontaminated, it would have a market value of up to \$1,000,000. In its contaminated state, assuming a buyer would insist on a dollar-for-dollar offset of remediation costs against the purchase price (and ignoring any potential “stigma” effect), its market value would be \$600,000. But if, in valuing the property for eminent domain purposes, the property must be valued “as if remediated,” which remediation option should be assumed?

If we assume the first option, the property value would be \$1,000,000. If we assume the second, and adhere strictly to the “as if remediated” scenario, the value would still be \$1,000,000, even though choosing that option would reduce the property’s present fair market value to \$800,000. However, if we assume the third, cheapest remediation option, the choice would affect the property’s highest and best use, resulting in an as-if-remediated market value of \$700,000.

As this example indicates, the time to implement various remediation options, and the uses of the land the various options permit, can have a significant influence on a property’s highest and best use and its fair market value.

Other linkages may exist, too. For example, even though covering contaminated soil with an impermeable cap might be an acceptable alternative to an environmental engineer, a property with contamination still in place (but stabilized) might be much more difficult to sell than one where the known contamination has been removed—leading to a “stigma” effect on value.<sup>181</sup>

Conversely, assume the contaminated property is agricultural land that could be developed either commercially or residentially. Cleaning the property to a residential-use standard would cost more than remediation for commercial use,<sup>182</sup> but experts might disagree as to which

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181. Even if a contaminated property has been properly remediated, the residual contamination might affect its marketability and value. *See, e.g.,* Taylor v. Petroleum Underground Storage Tank, No. 79684, 2001 Ohio App. LEXIS 4778, at \*4-5 (Ohio Ct. App. Oct. 25, 2001) (commenting that former service station site was remediated and “no further action” letter was issued; national drug store chain insisted on removal of remaining soil that was contaminated with petroleum but “within acceptable limits”).

182. *See, e.g.,* Kemper/Prime Indus. Partners v. Montgomery Watson Americas Inc., No. 97-C-4278, 2004 U.S. Dist. LEXIS 5543, at \*12 (N.D. Ill. Mar. 31, 2004) (noting that plaintiff’s expert had offered only an estimate of the cost of remediating a property to the highest level, but a jury “could find that damages for Tier One remediation may not be appropriate for the Property, which has been put to industrial use for over a hundred years and will continue that use for the

use would yield the highest net return. If the trial court used the relevance-based approach, all material facts bearing on this issue would be presented to a fact-finder for decision. But if it used the evidence-limiting approach, the procedure is uncertain. Would the trial court hold a preliminary hearing, decide whether residential or commercial development was the property's the highest and best use, and instruct both sides to present evidence accordingly? Or would each side just assume the use it found most amenable and value the property that way, ignoring the effect that remediation cost normally would have on the decision?<sup>183</sup>

Finally, going back to our first illustration, suppose the trial court rules that the property should be valued as if the contaminated soil had been removed and replaced and, after the verdict is in, orders \$400,000 to be escrowed as security for the recoverable cleanup costs. In the environmental litigation, the central concern is the effectiveness of the cleanup plan, not its impact on the property's usability. If a number of acceptable plans are presented, the environmental agency responsible for overseeing the cleanup should choose the least expensive one.<sup>184</sup> Because the \$100,000 environmental land-use-control option is an effective cleanup plan, the environmental agency might choose it—and might have to—thereby limiting the condemnor's recovery to that amount and creating a windfall for the condemnee.<sup>185</sup>

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foreseeable future"); *Mass. Highway Dep't v. Smith*, 747 N.E.2d 1235, 1240 (Mass. App. Ct. 2001) (finding that a genuine dispute as to whether a cleanup standard is based on reasonably foreseeable future uses or presently planned commercial uses for the property).

183. Relatedly, it has been argued that the *timing* of a condemnation case can have significant effect on value: that by taking the property now, the condemnor deprived the owner of the opportunity to remediate the contamination, restore the property's unimpaired market value, and recover its costs from the polluter. *See Ne. Conn. Econ. Alliance, Inc. v. ATC P'ship*, 776 A.2d 1068, 1090-91 (Conn. 2001) (Flynn, J., concurring in part and dissenting in part). But that is no different than taking land currently used for farming, which might in the future be subdivided and sold as home sites, or taking land currently zoned for residential use, which might in the future be rezoned for commercial use. In each instance, if the owner can show that the property's present market value is enhanced by the potential for more intensive future development, the verdict should reflect that value. *See Ne. Conn. Econ. Alliance, Inc. v. ATC P'ship*, 861 A.2d 473, 483-86 (Conn. 2004).

184. *See United States v. Am. Cyanamid Co.*, 786 F. Supp. 152, 162 (D.R.I. 1992) ("The NCP directs EPA to prospectively choose a remedial action that EPA believes will clean-up the site for the least cost.").

185. The "double recovery" principles discussed above probably would not affect this result. Section 9614(b) of CERCLA would not apply because the cost-recovery proceeding is the only one involving compensation for removal costs. And since no one would be paid twice for the same remediation costs, the common law rule does not readily apply, either.

*D. Summary of Analysis*

The foregoing analysis has shown that the due process concerns used to justify excluding or limiting contamination evidence are more apparent than real. In addition, if the trier of fact is required to assume the property has been remediated, some significant factors bearing on the property's fair market value will be overlooked. Accordingly, the relevance-based approach, which allows the two sides to litigate fully all aspects of the contamination's effect on market value, is more likely to produce a verdict that correctly compensates the owner of polluted property.

As discussed below, some additional factors suggest that the relevance-based approach is most appropriate. First, it is consistent with the approach used in *ad valorem* property tax cases and in "inverse condemnation" cases when pollution from a government-owned facility has contaminated private property. Second, the prevalent use of state assurance funds to pay for petroleum-related cleanups, and recent revisions to federal law providing additional protection for nonpolluting buyers of contaminated sites, indicate that the effect of contamination on property value is becoming more predictable. Third, jury interrogatories could be used to isolate the effect of contamination on compensation in an eminent domain case, ensuring that a court hearing a subsequent environmental cost-recovery action would have data sufficient to ensure that no "double taking" occurs.

IV. OTHER FACTORS FAVORING ADMISSIBILITY OF CONTAMINATION-RELATED EVIDENCE

*A. Considering the Effect of Contamination on Property Value in Eminent Domain Promotes Consistency with Other Areas of the Law*

1. *Ad Valorem* Property Tax Law

Many states allow property owners to use the presence of environmental contamination, and the cost to remediate it, as factors decreasing the tax valuation of their properties.<sup>186</sup> Since contamination is

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186. See, e.g., *Columbus City Sch. Dist. Bd. of Educ. v. Wilkins*, 802 N.E.2d 637, 639-43 (Ohio 2004) (discussing statutory tax exemption for property subject to environmental remediation); *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 621 N.W.2d 518, 523-24 (Neb. 2001) (admitting evidence of contamination but holding that presumption in favor of tax board's valuation was not rebutted); *Dealers Mfg. Co. v. County of Anoka*, 615 N.W.2d 76, 79-81 (Minn. 2000) (holding that stigma effect on property value was outside statute capping diminution of assessed value at remediation cost); *Schmidt v. Utah State Tax Comm'n*, 980 P.2d



a legitimate valuation factor for tax purposes, it would be inconsistent to disallow its use in eminent domain valuation.

As a general rule, the assessed valuation of a parcel of real property is “not admissible as evidence of valuation for purposes other than taxation.”<sup>187</sup> Excluding evidence of the tax valuation of a parcel makes sense if the “market value” for tax purposes is considerably less than what the parcel would sell for on the open market.<sup>188</sup>

Conversely, “an owner’s valuation of his property is generally admissible in a case where the value of the property is in issue, if the owner is a party.”<sup>189</sup> From an evidentiary standpoint, a statement made in a tax proceeding by a property owner, or someone acting on the owner’s behalf, normally would be allowed into evidence as an admission by a party-opponent.<sup>190</sup>

Some courts, however, still exclude a property owner’s statements about tax value, reasoning that tax value is too different from market value to make the statements probative.<sup>191</sup> But if the property owner makes statements in a tax proceeding about the cost to remediate

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690, 691-93 (Utah 1999) (admitting evidence of contamination but holding that presumption in favor of tax board’s valuation was not rebutted); *In re Commerce Holding Corp. v. Bd. of Assessors*, 673 N.E.2d 127, 128-31 (N.Y. 1996) (concluding that cleanup costs are an “acceptable, if imperfect, surrogate to quantify environmental damage” and they may be used to determine the fair market price of contaminated property); *Boekeloo v. Bd. of Review*, 529 N.W.2d 275, 278-80 (Iowa 1995) (citing cases and finding that groundwater contamination should be a factor in property valuation); *Reliable Elec. Finishing Co. v. Bd. of Assessors*, 573 N.E.2d 959, 960-61 (Mass. 1991) (finding that the law requires tax assessments to recognize the effects of proven environmental damage on the fair cash value of property); *Inmar Assocs., Inc. v. Borough of Carlstadt*, 549 A.2d 38, 43-46 (N.J. 1988).

187. C.C. Marvel, Annotation, *Valuation for Taxation Purposes as Admissible To Show Value for Other Purposes*, 39 A.L.R.2d 209, 212 (1955).

188. As one commentator noted, “it is an open secret that the assessment rarely approaches the true market value.” 5 NICHOLS’ THE LAW ON EMINENT DOMAIN § 22.1 (Julius L. Sackman, 3d rev. ed. 1973).

189. Marvel, *supra* note 187, at 212. According to the annotation, at least half the states and the federal courts consider an owner’s statements in a tax valuation proceeding to be an admission against interest in a different proceeding in which the owner seeks to establish a higher valuation. *Id.* at 209-53.

190. Under the *Federal Rules of Evidence* 801(d)(2), the statement of a party, or someone authorized to speak for a party, is not hearsay.

191. *See, e.g.*, *State of Arizona ex rel. Mendez v. Am. Support Found., Inc.*, 100 P.3d 932, 935-36 (Ariz. Ct. App. 2004). The court explained that a “property with a true market value of \$1,000,000 may be valued for tax purposes at only \$500,000. The property owner is unlikely to complain about the lower value even if the owner believes that the true market value is much higher. Indeed, the lower value may be appropriate for tax purposes if comparable \$1,000,000 properties are also valued at \$500,000 because the tax burden will be fairly divided between similarly situated property owners based on relative values, not true market values.” *Id.* If tax value is significantly different than actual market value, opinions as to tax value might be irrelevant or unfairly prejudicial in an eminent domain proceeding, and therefore excludable under *Federal Rules of Evidence* 401 or 403.

contamination, even under the most restrictive approach they should be allowed into evidence in an eminent domain case, because the remediation cost is independent of tax value.<sup>192</sup>

In *Westling v. County of Mille Lacs*, for example, the Minnesota Supreme Court agreed with the property owners' contention that their thirteen-acre improved industrial property had no market value because of the presence of contamination.<sup>193</sup> Describing the tax court proceedings, the supreme court noted:

Peter J. Patchin, an appraiser called by the Westlings, testified that if "unimpaired" the tract would have had a market value of \$1,350,000. . . . After deducting the loss of value resulting from the stigma attached to polluted properties and the present value of the anticipated costs of cleanup, Mr. Patchin was of the opinion that the market value of the tract was -\$2,835,000 on January 2, 1992 and -\$2,760,000 on January 2, 1993.<sup>194</sup>

The tax court "accepted Mr. Patchin's cost-to-cure figures because they were based on the environmental engineer's current cost estimates," and since even the county's appraiser did not think "that the market value of the property, unimpaired by contamination, was greater than the \$2,800,000 cost to cure," it directed a reduction of the assessor's estimated market value of the Westling property to \$0.<sup>195</sup>

The result of the *Westling* litigation raises an interesting possibility. If Minnesota courts followed either the evidence-excluding or evidence-limiting approaches to valuing contaminated property for eminent domain purposes, and the Westling property were condemned, then the owners could claim their property was worth nothing for tax purposes but at least \$1,350,000 for eminent domain purposes.

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192. See, e.g., *Holman v. Papio-Mo. River Natural Res. Dist.*, 523 N.W.2d 510, 517 (Neb. 1994) (excluding owner's opinion of tax value but noting that its ruling on admissibility "might be different with respect to Max Holman's representations as to the physical attributes of the property").

193. 543 N.W.2d 91, 93 (Minn. 1996).

194. *Id.* The entire tract was contaminated with tetrachloroethylene (TCE), a volatile organic compound used as a degreaser. *Id.* at 92. The landowners' environmental engineer proposed two remediation alternatives: "(A) The present value of the cost of a single far-field system of treatment, projected to be performed over a 24-year period, [for] \$2,800,000; or (B) the present value of the cost of a double far-field system, which could be expected to be completed in 12 years, [for] \$2,900,000." *Id.* at 92-93.

195. *Id.* at 93; see also *In re Camel City Laundry Co.*, 472 S.E.2d 402, 404-08 (N.C. Ct. App. 1996). The court upheld the county's tax appraisal which reduced the tax value of Camel City's property from \$639,000 to \$430,872 to account for environmental contamination. *Id.* at 408. The tax appraisal amount represented the county's analysis of the value. *Id.* at 406. Camel City's expert appraisal witness opined that the remediation cost exceeded the unimpaired marked value. *Id.* at 405.

While compelling policy reasons might justify attaching different consequences to the same set of facts in different legal settings,<sup>196</sup> no such compelling reasons are evident here. Therefore, a different policy reason, favoring consistency and coherence in the law,<sup>197</sup> indicates that if evidence of contamination's effect on property value is admissible for tax purposes, it should also be admissible for eminent domain purposes.

## 2. Inverse Condemnation

To this point, we have focused on the problem of valuation and compensation when a government agency is condemning contaminated property for public use. But contamination is can also be relevant in inverse condemnation cases, such as when pollutants from a government-operated landfill migrate onto nearby property.

In such cases, the landowner-plaintiff's recovery is measured by determining the difference in the property's fair market value with and without contamination.<sup>198</sup> The cost of remediation may not be an issue, because if a release of contaminants is proven, the government entity may take responsibility for remediation.<sup>199</sup> But even if the contamination

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196. Due to differences in policy goals and administrative mechanisms, for example, courts may allow disabled individuals to assert their ability to work (with reasonable accommodation) under the Americans With Disabilities Act (ADA) but also assert inability to engage in gainful work when seeking Social Security disability income. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 802-07 (1999).

197. Courts keep in mind the goals of consistency and coherence when fashioning the body of law. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (noting that a traditional justification for overruling a case is when the precedent is a positive detriment to coherence and consistency in the law); *Straight v. Wainwright*, 476 U.S. 1132, 1135 (1986) (Brennan, J., dissenting) (describing the "first principles of justice that ultimately define a system of law" as being "the principles of uniform application of rules, of consistency, of evenhandedness, of fairness").

198. *See, e.g., Shealy v. Unified Gov't of Athens-Clarke County*, 537 S.E.2d 105, 108-10 (Ga. Ct. App. 2000) (finding that the measure of damages recoverable in an inverse condemnation proceeding would be the reduction in market value of the property caused by the contamination); *Ravan v. Greenville County*, 434 S.E.2d 296, 307 (S.C. Ct. App. 1993) (agreeing with the jury instruction to measure damages according to the difference between the fair market value if there were no contamination and the current market value); *City of Springdale v. Weathers*, 410 S.W.2d 754, 757 (Ark. 1967) (upholding jury damage award in the difference between the value of the property before and after damage).

199. *See, e.g., City of Bristol v. Tilcon Minerals, Inc.*, No. CV-970572219, CV-030827148, 2004 Conn. Super. LEXIS 1515, at \*1-2 (Conn. Super. Ct. June 9, 2004) (indicating that city agreed to remediate leaching of contaminants from its landfill pursuant to a state consent order); *Shealy*, 537 S.E.2d at 106 (noting that the county government sought to condemn the property in order to facilitate environmental remediation efforts).

is remediated, the subsequent value of the property may be stigmatized, both during and after the remediation process.<sup>200</sup>

In Connecticut, for example, one landowner showed that the stigma of groundwater contamination from a city-owned landfill damaged the market value of adjacent, residentially developable property by half, or \$201,760.<sup>201</sup> Connecticut, of course, has adopted the relevance-based approach for admitting evidence of contamination in condemnation (and inverse condemnation) cases.<sup>202</sup> If it had not, it is doubtful that the law would have recognized the landowner's inverse condemnation claim, and other causes of action might not have provided a remedy.<sup>203</sup>

### 3. Seller's Negligent or Fraudulent Nondisclosure

When a property buyer sues the seller for negligent or fraudulent nondisclosure of contamination, the usual measure of damages is the difference between the actual value of the property received and the purchase price paid for it.<sup>204</sup> As in the tax valuation cases discussed above, it would be inconsistent to allow a landowner to claim that property has little or no value due to contamination in a tort suit against the seller, but preclude the same evidence if offered by a condemnor in an eminent domain proceeding.

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200. *City of Bristol v. Tilcon Minerals, Inc.*, No. CV-970572219, CV-030827148, 2004 Conn. Super. LEXIS 1515, at \*1-2 (Conn. Super. Ct. June 9, 2004).

201. *Id.*

202. *See* *Ne. Conn. Econ. Alliance, Inc. v. ATC P'ship*, 776 A.2d 1068, 1080 (Conn. 2001).

203. If the inverse condemnation were unavailable, the landowner might have sued in trespass. But a trespass claim might be subject to a shorter statute of limitations, or might be barred by governmental immunity. *See* *City of Bristol v. Tilcon Minerals, Inc.*, No. CV-970572219, CV-030827148, 2004 Conn. Super. LEXIS 1515, at \*27 (Conn. Super. Ct. June 9, 2004); *see, e.g.*, *Benson v. Town of Redding*, No. CV-0203446685, 2003 Conn. Super. LEXIS 297, at \*12-16 (Conn. Super. Ct. Feb. 4, 2003) (finding no reason to apply the continuing tort doctrine, the claims for negligence were barred by the statute of limitations); *Lawrence v. Buena Vista Sanitation Dist.*, 989 P.2d 254, 255-56 (Colo. App. 1999) (holding that a trespass claim for contamination caused by a sanitation district was barred by governmental immunity).

204. *See, e.g.*, *Braswell Shipyards, Inc. v. Beazer E., Inc.*, 2 F.3d 1331, 1339 (4th Cir. 1993) (concluding that negligent nondisclosure damage awards should take into account the projected value of the site after the projected cleanup); *Gopher Oil Co. v. Union Oil Co.*, 955 F.2d 519, 528-29 (8th Cir. 1992) (allowing damages to be based upon the difference between the purchase price of the contaminated site and the value of the site after completion of cleanup); *see also* *Foote v. Fleet Fin. Group*, No. 99-6196, 2004 R.I. Super. LEXIS 117, at \*1-2, \*24 (June 25, 2004) (noting seller failed to disclose contamination; buyer purchased property for \$45,000; jury awarded compensatory damages of \$140,000); Paul A. Locke & Patricia I. Elliott, *Caveat Broker: What Can Real Estate Licensees Do About Their Potentially Expanding Liability for Failure to Disclose Radon Risks in Home Purchase and Sale Transactions?*, 25 COLUM. J. ENVTL. L. 71, 100 n.135 (2000) (collecting cases).

*B. The Effect of Contamination on Property Value Is Becoming Better Defined*

1. Cleanups of Petroleum Contamination May Be Reimbursable

As the cases discussed in Part I.A above illustrate, many contaminated-property transactions involve gasoline service stations. Forty-three states have developed programs regulating petroleum underground storage tanks and providing funds to reimburse cleanup expenses.<sup>205</sup> Depending on the state, those expenses might be partly or fully reimbursed.<sup>206</sup>

The availability of cleanup money has important ramifications for market transactions and eminent domain valuation. In some instances, the landowner may incur no out-of-pocket costs for remediation.<sup>207</sup> And even if some remediation-related costs are not covered, the state assurance funds act as a cap on liability, making the total costs finite and knowable.<sup>208</sup>

2. The Brownfields Revitalization Act

The 2002 Small Business Liability Relief and Brownfields Revitalization Act<sup>209</sup> amended CERCLA to give purchasers of contaminated property protection from CERCLA liability and limit the Environmental Protection Agency's (EPA) recourse for unrecovered response costs to a lien on the property for the increase in fair market value resulting from the EPA's remediation activities.<sup>210</sup> While this legislation is still too new to gauge its effect on market-based investment in contaminated property,<sup>211</sup> it can be expected to reduce cleanup-cost-based negative effect on market value.<sup>212</sup>

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205. U.S. EPA data reported at <http://www.epa.gov/swrust1/states/fndstatus.htm>.

206. See, e.g., *City of Olathe v. Stott*, 861 P.2d 1287, 1291, 1294-95 (Kan. 1993) (finding corrective action costs are reimbursed, but not cost of removing tanks); *Finkelstein v. Dep't of Transp.*, 656 So. 2d 921, 923-24 (Fla. 1995) (supporting full reimbursement of remediation costs).

207. See *Finkelstein*, 656 So. 2d at 923-24.

208. See *Stott*, 861 P.2d at 1295 (noting nonreimbursable costs estimated at \$61,600).

209. Pub. L. No. 107-118, 115 Stat. 2356.

210. See Standard and Practices for All Appropriate Inquiries, 69 Fed. Reg. 52,542, 52,546 (proposed Aug. 26, 2004) (to be codified at 40 C.F.R. pt. 312).

211. See, e.g., Amy Pilat McMorrow, Note & Comment, *CERCLA Liability Redefined: An Analysis of the Small Business Liability Relief and Brownfields Revitalization Act and Its Impact on State Voluntary Cleanup Programs*, 20 GA. ST. U. L. REV. 1087, 1100-09 (2004) (discussing the legislation's potential effect on prospective purchasers).

212. Even though a statutorily protected buyer of brownfield property may not have exposure to environmental liability, the value of the property might still be depressed due to the

### 3. The Availability of Environmental Insurance

Reflecting the increasing predictability of environmental cleanup costs, the insurance industry has broadened the range of insurance products it offers to cover environmental risk. Pollution legal liability insurance, sometimes called environmental impairment liability insurance, is available “to eliminate the risk associated with property that may be contaminated as a result of its prior use but does not currently require remediation.”<sup>213</sup> Remediation stop loss insurance, or cost cap insurance, “provides coverage to the insured for any cost overrun incurred in excess of a deductible as part of an approved remediation project of a contaminated site.”<sup>214</sup>

While environmental insurance is not directly relevant to eminent domain litigation, it may offer new possibilities in pre-condemnation negotiations. For example, if its risk of cleanup liability can be eliminated by insurance, a condemnor might agree to pay for contaminated property “as-if-remediated” less the cost of obtaining the insurance coverage.

#### C. Use of Jury Interrogatories

In contamination-related property damage lawsuits, courts commonly use jury interrogatories to provide discrete answers to questions of causation and damage.<sup>215</sup> If jury interrogatories were used in an eminent domain suit, then the landowner-defendant could have the jury give its findings on the before-the-taking and after-the-taking value of the property, both in its contaminated state and “as if remediated.” Alternatively, or in addition, the jury could state its findings of anticipated remediation cost and stigma, if any. Doing so would establish a record the landowner could use in a subsequent environmental cost-

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contamination’s effect on the use of the property, the time to remediate it, and “stigma” factors. None of these items, however, could give rise to a “double take.”

213. Janice E. Falini, Comment, *Using Environmental Insurance To Manage Risk Encountered in Non-Traditional Transactions*, 14 VILL. ENVTL. L.J. 95, 100 (2003).

214. *Id.* at 102.

215. See, e.g., *Lowe’s Home Ctrs., Inc. v. Gen. Elec. Co.*, 381 F.3d 1091, 1096 n.2 (11th Cir. 2004) (noting interrogatories addressing defendant’s contamination of plaintiff’s property); *Union Pac. R.R. Co. v. Reilly Indus., Inc.*, 215 F.3d 830, 841 n.9 (8th Cir. 2000) (noting that a jury interrogatory produced an advisory finding of when plaintiff knew or should have known about contamination); *Chance v. BP Chems., Inc.*, 670 N.E.2d 985, 989 (Ohio 1996) (noting the use of jury interrogatories to track elements of contamination claim); *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d 505, 509 (Wyo. 1983) (addressing the use of jury interrogatories to isolate soil and groundwater damages).

recovery proceeding to ensure it was not charged twice for the same contamination.

## V. CONCLUSION

Perhaps the most crucial test for any legal rule is the simplest one: does it produce a sensible result?

If evidence of contamination and remediation costs is excluded entirely, or if the contaminated property is valued if it had already been remediated, the condemnor will pay more than what the property would fetch in the open market. Even if the condemnor can recoup its remediation costs in a subsequent environmental lawsuit, ignoring the other ways contamination impacts property use and value, as discussed in Part III.C, may mean the landowner is paid more than the property is worth. In effect, the condemnee would be paid more for the land because of the condemnor's need for it—a result eminent domain law normally seeks to avoid.<sup>216</sup> And, as we have seen, courts have the power and the willingness to prevent a “double recovery” for environmental contamination.

Allowing the existence of contamination and its effect on value to be litigated in an eminent domain trial, on the other hand, will result in a verdict that more closely approximates the condemned property's true value, which the market will determine regardless of the owner's fault for the contamination. And by using jury interrogatories, the effect of remediation cost on the verdict can be isolated for the record.

Accordingly, the courts which adopted the relevance-based approach to admitting evidence of remediation costs, stigma, and other contamination-related effects on the market value of condemned property have chosen the better course.

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216. See *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946).