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FIRE SALE! THE ADMISSIBILITY OF EVIDENCE OF ENVIRONMENTAL CONTAMINATION TO DETERMINE JUST COMPENSATION IN WASHINGTON EMINENT DOMAIN PROCEEDINGS

Paul W. Moomaw

Abstract: Jurisdictions across the United States are split on the issue of whether evidence of environmental contamination should be admissible to determine just compensation in an eminent domain proceeding. Jurisdictions that admit this evidence reason that environmental contamination is a property characteristic that necessarily affects the value of the property. Those that exclude the evidence cite procedural due process concerns and the risk of extra liability for the landowner. Washington's Model Toxics Control Act (MTCA) establishes a system of assigning liability and recovering cleanup costs for environmental contamination. No Washington court has addressed whether evidence of environmental contamination should be admissible to determine just compensation in an eminent domain proceeding. This Comment argues that, under MTCA and Washington eminent domain law, the evidence should not be admitted, because its admission (1) would violate the prohibition in Washington eminent domain law against speculative evidence, (2) would infringe upon the procedural due process rights of landowners under MTCA, and (3) may result in additional liability on the part of the landowners and extra recovery on the part of the condemning authority.

The Smith family owns a small, independent service station alongside a Washington highway, selling gasoline and services to motorists who pass by.[1] Recently, motorists using the highway have increased in number, and the Smiths are delighted to see business booming. However, the increase in traffic has also put pressure on the highway system, and it is clear that the two-lane, winding country road is no longer sufficient. State officials have determined that the only solution is to widen the highway to four lanes. Unfortunately, the Smiths' service station is in the path of the planned highway expansion. The Smith family soon receives notice that their property is needed for the highway project, but that they will receive fair market value for the land.

Unbeknownst to the Smiths, the land beneath the service station has become a small environmental catastrophe. As appraisers for the State investigate the land to determine its fair market value, they discover that the underground fuel storage tanks are leaking and have been doing so for years. Accordingly, the appraisers come up with a market value for the land that is significantly less than it would be without the newly discovered contamination. Meanwhile, officials from Washington's

1. Hypothetical created by the author.

Department of Ecology (DOE) have begun an investigation of their own, with the ultimate intention of holding the Smiths liable for the costs of cleanup under Washington's environmental cleanup statute.

Two legal forces have collided on this Washington highway at the intersection between modern environmental regulations and traditional eminent domain law, leaving the Smiths and their family business as the unwitting victims. Under traditional eminent domain principles, an entity that takes land through the exercise of eminent domain must pay a landowner "just compensation,"[2] which is generally deemed to be the fair market value of the land, based upon all of the "elements reasonably affecting value."[3] Certainly, environmental contamination is a characteristic that affects the market value of land. On the other hand, Washington's environmental cleanup statute, the Model Toxics Control Act (MTCA),[4] makes liability strict, joint, and several,[5] and holds past and current landowners alike liable for cleanup.[6] Hence, the Smiths find themselves in the position of receiving less value for their land, while concurrently being held responsible for the cleanup of the contamination.

Jurisdictions across the United States are split on the issue of whether evidence of environmental contamination should be admissible to determine just compensation in an eminent domain action. Some courts have determined that environmental contamination is a property characteristic that bears upon the land's market value.[7] Therefore, those courts deem evidence of contamination admissible.[8] Courts in other jurisdictions have concluded that adjudicating the issue 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.[9] Therefore, these courts hold that the evidence should be excluded.[10] Thus far, no Washington court decision has addressed this issue.

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2. U.S. CONST. amend. V; WASH. CONST. art. I, § 16.
3. *In re* Town of Issaquah, 31 Wash. 2d 556, 564, 197 P.2d 1018, 1022 (1948).
4. WASH. REV. CODE § 70.105D (2000).
5. *Id.* § 70.105D.040(2).
6. *Id.* § 70.105D.040(1); *see also infra* note 62 and accompanying text.
7. *See infra* Part III.B.
8. *See infra* Part III.B.
9. *See infra* Part III.A.
10. *See infra* Part III.A.

This Comment argues that, under Washington law, evidence of environmental contamination should not be admissible to determine just compensation in an eminent domain proceeding. Part I provides an overview of eminent domain law in Washington, covering its statutory basis, procedural aspects, and judicial interpretation, with particular attention to what constitutes just compensation. Part II discusses MTCA, and gives a synopsis of the relevant regulatory procedures the DOE has enacted. Part III outlines the current state of jurisprudence on the issue of admitting evidence of environmental contamination in eminent domain proceedings in jurisdictions across the United States. Finally, Part IV argues that, given the current state of the law in Washington, evidence of environmental contamination is inappropriate in an eminent domain proceeding because (1) it would violate the prohibition in Washington eminent domain law against speculative evidence, (2) it would infringe upon the procedural due process rights of landowners under MTCA, and (3) it may result in extra liability on the part of the landowner and extra recovery on the part of the condemning authority.

I. EMINENT DOMAIN LAW IN WASHINGTON STATE

Eminent domain is the inherent power of a government to take private property for public use.[11] The power of governmental entities to take property through the exercise of eminent domain is limited by the federal and state constitutions.[12] Every eminent domain proceeding includes a determination that the property will be used for public purposes, and an assessment of just compensation to the owner.[13] Just compensation is defined as the fair market value of the property, or what a willing buyer would pay a willing seller for the property in an open-market transaction.[14] Washington courts rely on numerous valuation methodologies to determine fair market value.[15]

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11. BLACK'S LAW DICTIONARY 541 (7th ed. 1999). The exercise of the eminent domain power is frequently referred to as "condemnation." 17 WILLIAM B. STOEBUCK, REAL ESTATE: PROPERTY LAW, *in* WASHINGTON PRACTICE, § 9.1 (1995).

12. U.S. CONST. amend. V; WASH. CONST. art. I, § 16.

13. *See infra* Part I.B.

14. *In re* Town of Issaquah, 31 Wash. 2d 556, 564, 197 P.2d 1018, 1022 (1948).

15. *See infra* Part I.C.1.

A. Sources of Authority for Eminent Domain

The State of Washington inherently possesses the authority to take private land through the exercise of eminent domain as an attribute of state sovereignty.[16] However, under the United States and Washington constitutions, property taken pursuant to eminent domain must be necessary for "public use," and the governmental entity must pay the landowner "just compensation."[17] The state government may delegate the power to local government entities, which do not possess the inherent power of eminent domain.[18]

The Washington Legislature has enacted legislation governing the state's own eminent domain power and delegating the power to various other entities.[19] The legislation requires governmental entities to perform certain procedures before condemning property under eminent domain. For example, the condemnor must provide the landowner with adequate notice.[20] Moreover, the legislation requires a hearing to determine whether the property is necessary for "public use" and an opportunity for a jury trial to assess "just compensation."[21]

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16. *See* City of Tacoma v. Welcker, 65 Wash. 2d 677, 683, 399 P.2d 330, 334 (1965) ("The power of eminent domain is an attribute of sovereignty. It is an inherent power of the state, not derived from, but limited by, the fundamental principles of the constitution."); *see also* STOEBUCK, *supra* note 11, § 9.3.

17. The Washington State Constitution provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having first been made." WASH. CONST. art. I, § 16. Similarly, the Fifth Amendment to the United States Constitution states that "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The question of what properly constitutes "public use" is beyond the scope of this Comment, which focuses on the "just compensation" requirement.

18. *See Welcker*, 65 Wash. 2d at 683, 399 P.2d at 334–35 (stating that a municipal corporation, unlike the state government, does not have the inherent power to take property through eminent domain, but "may exercise such power only when it is expressly so authorized by the state legislature"); *see also* STOEBUCK, *supra* note 11, § 9.3.

19. WASH. REV. CODE §§ 8.04.010–.191 (state), 8.08.010–.150 (counties), 8.12.010–.580 (cities), 8.16.010–.160 (school districts), 8.20.010–.180 (corporations) (2000). This Comment focuses on the issue from the broad perspective of the state's power of eminent domain; any difference between it and the more limited powers of other entities is insignificant for the purposes of this Comment.

20. *Id.* § 8.04.020.

21. *Id.* §§ 8.04.070–.080. Of course, the parties may forego judicial proceedings if they settle upon an amount of compensation that is satisfactory to all. Washington's eminent domain statute provides that "[e]very reasonable effort shall be made to acquire expeditiously real property by negotiation." *Id.* § 8.26.180.

B. *The Exercise of Eminent Domain*

A Washington eminent domain proceeding consists of three discrete phases: a finding that the property to be condemned is necessary for public use, an assessment of just compensation, and an order to transfer title.[22] The condemning authority initiates an eminent domain action by submitting a petition for appropriation to the superior court of the county in which the property sits[23] and serving notice upon all interested parties.[24] Next, a hearing is held to ensure that the condemning authority has notified all parties with an interest in the subject property and that the property is truly necessary for public use.[25] If the government successfully shows that the land is necessary for public use, the court will issue an order adjudicating that the contemplated use of the property is truly a public use,[26] as well as an order to determine damages for the taking of the property.[27]

If the court issues an order for the determination of damages, a jury trial is held to determine the proper amount of just compensation for the property.[28] This portion of the proceeding tends to be the most hotly debated: the great majority of eminent domain cases focus upon the issue of the proper measure of just compensation.[29] Both the landowner and

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22. STOEBUCK, *supra* note 11, § 9.26.

23. WASH. REV. CODE § 8.04.010. The petition must contain the names of any party that has an interest in the property to be condemned, a description of the property, a description of the interests to be condemned, the purposes for which the land is to be condemned, the authority for the condemnation, a request that a jury determine the proper amount of just compensation, and a prayer that the court award the property interest to the condemning authority. STOEBUCK, *supra* note 11, § 9.27.

24. WASH. REV. CODE § 8.04.020. Generally, the notice must contain a statement that the condemnor seeks to condemn the property, a description of the property to be condemned, and a statement of the place and time at which the petition is to be submitted to the court. STOEBUCK, *supra* note 11, § 9.27.

25. WASH. REV. CODE § 8.04.070. "[W]hether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public." WASH. CONST. art. I, § 16. This language explains the requirement that there be a hearing to determine whether the land has actually been taken for a public use. STOEBUCK, *supra* note 11, § 9.20. To meet the requirement that the property be necessary for public use, the court must make a determination "(1) that the use is really public, (2) that the public interests require it, and (3) that the property appropriated is necessary for the purpose." *In re* City of Seattle, 96 Wash. 2d 616, 625, 638 P.2d 549, 555 (1981).

26. WASH. REV. CODE § 8.04.070.

27. *Id.* § 8.04.080.

28. *Id.*

29. STOEBUCK, *supra* note 11, § 9.1.

the condemning authority may present evidence bearing upon just compensation, as neither party has the burden of proof with respect to valuation.[30]

C. *Just Compensation*

An entity that condemns private property under eminent domain must pay the landowner "just compensation."[31] Just compensation is based upon the fair market value of the property, as defined by the amount a willing buyer would pay a willing seller on the open market.[32] The driving principle behind the constitutional just compensation requirement is that the property owner is entitled to be placed in the same monetary position as he or she would have been had the property not been taken.[33] Consequently, the condemnee must receive full value for the property.[34]

1. *Valuation*

Washington courts accept numerous valuation methodologies for purposes of measuring the fair market value of property. The most common valuation methods used in Washington are the capitalized rental value method, the depreciated replacement cost method, and the comparable sales method.[35] Under the capitalized rental value approach, the value of the land is measured according to the income it produces.[36] Under the depreciated replacement cost method, an appraiser determines the replacement cost of improvements, adjusts for depreciation, then adds the market value of the land itself.[37] Finally, under the comparable sales method, a land's value is determined by comparing it to properties

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30. *See* State v. Templeman, 39 Wash. App. 218, 223, 693 P.2d 125, 128 (1984).

31. WASH. CONST. art. I, § 16.

32. *In re* City of Medina, 69 Wash. 2d 574, 578, 418 P.2d 1020, 1022 (1966) (citing *In re* Town of Issaquah, 31 Wash. 2d 556, 564, 197 P.2d 1018, 1022 (1948); 29A C.J.S. *Eminent Domain* § 137); *see also* State v. Sherrill, 13 Wash. App. 250, 255, 534 P.2d 598, 601 (1975).

33. State v. Trask, 98 Wash. App. 690, 697, 990 P.2d 976, 980 (2000) (concluding that pre- and post-judgment interest are to be included in just compensation).

34. *Id.*

35. STOEBUCK, *supra* note 11, § 9.30.

36. *See* 4 JULIUS SACKMAN, NICHOLS ON EMINENT DOMAIN § 12.02[1], at 12-72 (3d ed. Rev. 2000). At its most basic, this method would involve valuing the property according to how much rental income it could generate, capitalized at a reasonable discount rate.

37. *See id.* Of course, the market value of the underlying land would have to be determined using one of the other methodologies.

that have been sold within a reasonable period of time, and that are similar in location, use, improvements, and other qualities.[38]

Parties may present testimony regarding the value of the property through expert witnesses, the property owner, or neighboring property owners. Although experts typically testify about the value of property,[39] "[a]n owner of property may testify as to its value (without qualifying as an expert), upon the assumption that he is particularly familiar with it and, because of his ownership, knows of the uses for which it is particularly adaptable."[40] Neighbors may also be particularly knowledgeable with respect to the value of the property, and may be allowed to testify thereto.[41] For example, the Washington Supreme Court has upheld admission of testimony of a neighbor who had only seen the subject property from the road, reasoning that the decision to admit the testimony was within the trial judge's sound discretion, and that such testimony would go to the weight rather than the admissibility of the evidence.[42]

2. *Speculative Evidence*

While Washington courts allow the trier of fact to consider a wide array of factors that may affect the fair market value of property,[43] these factors must meet two basic requirements: (1) they must actually affect the property's fair market value, and (2) they must be established by the evidence.[44] Hence, evidence that is overly speculative is not admissible to determine fair market value.[45] For example, in In re *City of Medina*,[46] the court held that the fair market value of unimproved property could not be determined by comparing it with town lots that were fully platted and developed.[47] Basing a determination of the property's fair market

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38. *See id.*.

39. *See, e.g.*, City of Renton v. Scott Pac. Terminal, Inc., 9 Wash. App. 364, 370–71, 512 P.2d 1137, 1142 (1973).

40. State v. Larson, 54 Wash. 2d 86, 88, 338 P.2d 135, 136 (1959) (citing Weber v. W. Seattle Land & Improvement Co., 188 Wash. 512, 63 P.2d 418 (1936)).

41. Pac. N.W. Pipeline Corp. v. Myers, 50 Wash. 2d 288, 291–92, 311 P.2d 655, 657 (1957).

42. *Id.*

43. *See In re* Town of Issaquah, 31 Wash. 2d 556, 564, 197 P.2d 1018, 1022 (1948).

44. State v. Williams, 68 Wash. 2d 946, 950, 416 P.2d 350, 353 (1966).

45. *Id.*; *see also In re* City of Medina, 69 Wash. 2d 574, 578, 418 P.2d 1020, 1022–23 (1966).

46. 69 Wash. 2d 574, 418 P.2d 1020 (1966).

47. *Id.* at 578, 418 P.2d at 1022–23.

value on such evidence, the court held, would involve "pure conjecture."[48]

In *State v. Mottman Mercantile Co.*,[49] the Washington Supreme Court stated that land containing mineral content may not be valued by multiplying the number of cubic yards of the mineral in the land by a unit price of the mineral as extracted.[50] *Mottman* involved a piece of property to be condemned that had potential value as a gravel pit. The court stated that evidence of the present value of the mineral content in its natural state was admissible on a cubic yard basis.[51] However, evidence of the gravel's market value as extracted would be inadmissible for determining the land's fair market value, because such evidence would require speculation about the cost of extraction, the extent and duration of market demand for the minerals, marketing costs, and other variable factors.[52]

Other decisions indicate that Washington courts consider the fear of potentially dangerous conditions upon land to be overly speculative and, therefore, inadmissible to determine just compensation in an eminent domain proceeding.[53] In *Pacific Northwest Pipeline Corp. v. Myers*,[54] a corporation condemned an easement for the installation of a gas pipeline. The court approved a jury instruction directing the jury to ignore a witness's testimony regarding the effect that fear of gas transmission lines had on the market value of the subject property.[55] Additionally, in *State v. Evans*,[56] the Washington Supreme Court reversed a lower court's decision that had admitted evidence of fear.[57] The lower court had declared that "[t]he psychological effect of an adverse condition, real or

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48. *Id.* (quoting NICHOLS, EMINENT DOMAIN § 18.11[2] (3d ed. Rev. 1962)) (internal quotation marks omitted).

49. 51 Wash. 2d 722, 321 P.2d 912 (1958).

50. *Id.* at 724–25, 321 P.2d at 914.

51. *Id.* at 725, 321 P.2d at 914.

52. *Id.*; *see also* State v. Larson, 54 Wash. 2d 86, 88, 338 P.2d 135, 136 (1959).

53. *See, e.g.*, Pac. N.W. Pipeline Corp. v. Myers, 50 Wash. 2d 288, 290, 311 P.2d 655, 656 (1957); State v. Evans, 96 Wash. 2d 119, 127, 634 P.2d 845, 849 (1981), *opinion amended*, 649 P.2d 633 (1982).

54. 50 Wash. 2d 288, 311 P.2d 655 (1957).

55. *Id.* at 290, 311 P.2d at 656. Although the court was unwilling to reverse on the grounds that the testimony was given, its refusal to do so was predicated on the fact that the limiting instruction had been given. *Id.*

56. 96 Wash. 2d 119, 634 P.2d 845 (1981), *opinion amended*, 649 P.2d 633 (1982).

57. *Id.* at 128.

imagined, on a potential buyer may [materially influence] the market value of property."[58] Although the Washington Supreme Court did not directly address the lower court's assertion that "real or imagined" psychological effects may be considered in assessing fair market value, it expressed concern that the jury was permitted to consider speculative elements.[59] The court reaffirmed Washington's standard that the only elements that a jury should consider "are those which will actually affect the fair market value of the property and which are established by the evidence."[60]

II. THE MODEL TOXICS CONTROL ACT

The Model Toxics Control Act (MTCA)[61] is Washington's counterpart to the federal environmental cleanup statute, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[62] MTCA provides a statutory framework to allocate liability for environmental contamination, to raise funds for the cleanup of contamination, and to prevent future contamination.[63] MTCA makes owners of contaminated property and other parties that are responsible for the contamination liable for its cleanup.[64] It also creates certain limited defenses to liability.[65] Furthermore, MTCA requires the prioritization of particularly contaminated sites[66] and compels remedial action upon those sites that are deemed to warrant investigation and

58. State v. Evans, 26 Wash. App. 251, 261, 612 P.2d 442, 449 (1980) ("These effects and their impact on the market value have been recognized in cases involving the inherent fear of electricity and gas transmission lines."), *rev'd*, 96 Wash. 2d 119, 634 P.2d 845, *opinion amended*, 649 P.2d 633 (1982).

59. *Evans*, 96 Wash. 2d at 127, 634 P.2d at 849.

60. *Id.*

61. WASH. REV. CODE § 70.105D (2000).

62. 42 U.S.C. §§ 9601–75 (1994 & Supp. V 1999). Although CERCLA may be equally applicable with respect to the issues discussed here, this Comment focuses primarily on Washington law. Hence, CERCLA is beyond its scope.

63. WASH. REV. CODE § 70.105D.010. A "contaminant" is "any hazardous substance that does not occur naturally or occurs at greater than natural background levels." WASH. ADMIN. CODE § 173-340-200 (2001). "'Environment' means any plant, animal, natural resource, surface water (including underlying sediments), ground water, drinking water supply, land surface (including tidelands and shorelands) or subsurface strata, or ambient air within the state of Washington or under the jurisdiction of the state of Washington." *Id.*

64. WASH. REV. CODE § 70.105D.040(1).

65. *Id.* § 70.105D.040(3).

66. *Id.* § 70.105D.030(2)(b).

cleanup.[67] MTCA provides due process to landowners by giving them the right to assert defenses to liability.[68]

A. *Liability and Defenses Under MTCA*

Under MTCA, any current owner or operator of a contaminated site, and any past owner who contributed to the contamination, is a potentially liable party (PLP) for the purpose of remediating the contamination.[69] Liable parties are subject to strict, joint, and several liability[70] for all remedial action costs[71] and any damages to natural resources that occur as a result of the release "or threatened release" of hazardous substances.[72] MTCA requires PLPs to conduct remedial actions or pay the state to conduct those remedial actions.[73] Washington's Attorney General may recover all remedial action costs from the liable parties at the request of the Department of Ecology (DOE).[74]

MTCA provides certain affirmative defenses that may absolve the PLP of liability.[75] These defenses are primarily limited to those situations in which the PLP is innocent, oblivious, or both, with respect to environmental contamination.[76] If the PLP can establish that the contamination was caused by an "act of God,"[77] an "act of war,"[78] or "the

67. *See infra* Part II.B.

68. *See infra* Part II.D.

69. WASH. REV. CODE § 70.105D.040.

70. Strict liability is "[l]iability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe." BLACK'S LAW DICTIONARY 926 (7th ed. 1999). Joint and several liability is:

> [l]iability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties.

Id.

71. *See infra* notes 123–26 and accompanying text.

72. WASH. REV. CODE § 70.105D.040(2).

73. *Id.* §§ 70.105D.030(1)(b), .040(2).

74. *Id.* § 70.105D.040(2).

75. *Id.* § 70.105D.040(3).

76. *Id.*

77. *Id.* § 70.105D.040(3)(a)(i). MTCA does not define "act of God."

78. *Id.* § 70.105D.040(3)(a)(ii). MTCA does not define "act of war."

act or omission of a third party,"[79] the PLP is not liable under MTCA.[80] Moreover, if the PLP can show by a preponderance of the evidence that, upon acquiring the property, the PLP neither knew nor had reason to know that any hazardous substance had been released or disposed of on the property, the PLP is not liable under MTCA.[81]

MTCA absolves governmental entities from liability in certain circumstances. The statute states that the term "owner/operator," for the purposes of MTCA liability, does not include governmental agencies "which acquired ownership or control involuntarily."[82] It is not clear whether MTCA's involuntary acquisition exception to a government's MTCA liability includes the exercise of eminent domain. However, some commentators have indicated that a similar provision in CERCLA[83] may include circumstances in which the government acquires the property through eminent domain.[84] Because Washington courts often look to CERCLA for guidance in interpreting MTCA,[85] it is possible that such an interpretation would extend to MTCA as well. Thus, it is unclear whether a governmental entity that acquires contaminated property through eminent domain is liable for remediation under MTCA.

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79. *Id.* § 70.105D.040(3)(a)(iii). This defense does not apply if the potentially liable party had a direct or indirect contractual relationship with the third party. *Id.*

80. *Id.* § 70.105D.040(3).

81. *Id.* § 70.105D.040(3)(b). This is subject to certain restrictions. For example, the property owner must have made reasonable inquiries into prior uses of the property to show that he or she had no reason to know of the contamination. *Id.* § 70.105D.040(3)(b)(i). Moreover, the court will take into consideration the specialized knowledge of the buyer, the purchase price for the property, the obviousness of the condition, and commonly known or reasonably ascertainable information about the property. *Id.*

82. *Id.* § 70.105D.020(12)(b)(i). Involuntary acquisition, for the purposes of this subsection, means acquiring the property "through bankruptcy, tax delinquency, abandonment, or circumstances in which the government involuntarily acquires title." *Id.*

83. 42 U.S.C. § 9601(20)(D) (Supp. V 1999).

84. *See, e.g.*, Lawrence P. Schnapf, *CERCLA and the Substantial Continuity Test: A Unifying Proposal for Imposing CERCLA Liability Asset on Purchasers*, 4 ENVTL. LAW. 435, 440 n.15 (1998) (stating that 42 U.S.C. § 9601(20)(D) "applies to state or local governments that acquired title to a contaminated facility involuntarily through . . . eminent domain"); *cf.* Robert I. McMurry & David H. Pierce, *Environmental Remediation and Eminent Domain*, C709 ALI-ABA 105, 117 (1992) (stating that, at least in cases in which the government condemns property for cleanup of contaminated property, it is "involuntarily" acquiring property to protect public health and safety).

85. *See* Bird-Johnson Corp. v. Dana Corp., 119 Wash. 2d 423, 427, 833 P.2d 375, 377 (1992).

B. Assessing Contamination and Determining Liability Under MTCA

Washington's legislature has delegated the authority to enforce and administer MTCA to the DOE,[86] which has promulgated regulations governing the procedural aspects of MTCA.[87] The regulations provide for the investigation and assessment of potentially hazardous sites, and outline the various actions that may be taken for the remediation of those sites.[88] They also establish criteria for determining the proper cleanup level for a given piece of property.[89]

1. Investigation and Assessment

Both MTCA and the DOE regulations outline methods by which the DOE can identify contaminated sites. The DOE regulations provide that any owner or operator of a site who discovers the release of a hazardous substance that poses a potential threat to human health must notify the DOE within ninety days of the discovery.[90] MTCA provides that if the DOE has a reasonable basis to believe that a hazardous substance has been or may be released, it may enter upon the property to conduct further investigation, upon notice to the landowner.[91] Furthermore, the DOE regulations provide that the DOE may take any other actions consistent with MTCA to identify potentially contaminated sites.[92]

Upon discovering a potentially hazardous site, the DOE will investigate the site to decide what action, if any, to take with respect to the site.[93] Within ninety days of discovering the release of a hazardous substance, the DOE will conduct an initial site investigation consisting of, at a minimum, a visit to the site to document the conditions observed at the site.[94] Based upon the results of the investigation, the DOE will

86. WASH. REV. CODE § 70.105D.030.

87. WASH. ADMIN. CODE § 173-340 (2001).

88. *See infra* Part II.B.1.

89. *See infra* notes 101–03 and accompanying text.

90. WASH. ADMIN. CODE § 173-340-300(2)(a).

91. WASH. REV. CODE § 70.105D.030(1)(a); *see also* WASH. ADMIN. CODE § 173-340-800.

92. WASH. ADMIN. CODE § 173-340-300(1).

93. *Id.* § 173-340-310.

94. *Id.* § 173-340-310(2). The DOE may defer to another governmental body or independent contractor for the purposes of conducting the investigation, as long as the other entity did not contribute to the hazardous condition at the site. *Id.* § 173-340-310(3).

decide to undertake either (1) a site hazard assessment,[95] (2) emergency remedial action,[96] (3) interim action,[97] or (4) no further action.[98] The DOE maintains a list of sites requiring remedial action and sets priorities for remedial action based upon the results of the site hazard assessment.[99] Once the DOE has credible evidence of liability and is prepared to proceed with remedial action, it notifies PLPs of their potential liability.[100]

The requisite level of cleanup of a piece of property depends largely upon the nature of the site.[101] The proper level of cleanup is dictated by the specific hazardous substances found at a site and the specific media, such as soil, air, or water, by which humans and the environment could become exposed to the hazardous substances.[102] To determine the proper method to set cleanup levels, the DOE must examine the nature of the contamination, the current and potential pathways of human and environmental exposure to the contamination, the current and potential receptors of the contamination, and the current and potential use of the land.[103]

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95. *Id.* § 173-340-310(5)(a). "A site hazard assessment is an early study to provide preliminary data regarding the relative potential hazard of the site." *Id.* § 173-340-320(4).

96. *Id.* § 173-340-310(5)(b). If a site requires emergency remedial action, the DOE must notify the potentially affected area of the threat. *Id.* § 173-340-310(6)(a). "Emergency remedial action" is not defined by the regulations.

97. *Id.* § 173-340-310(5)(c). An interim action may include an action necessary to (1) reduce the threat to human health by eliminating or reducing "pathways for exposure" to a hazardous substance, (2) correct a problem that may become worse or more expensive if action is delayed, or (3) complete a site hazard assessment, remedial investigation, or feasibility study, or provide for the design of a cleanup action. *Id.* § 173-340-430(1).

98. *Id.* § 173-340-310(5)(d). A decision to undertake no further action may be predicated upon a determination that no hazardous substance has been released, no threat to human health exists, or any further action is more appropriately undertaken under a different authority. *Id.*

99. *Id.* §§ 173-340-120(3), -330. A site's appearance on the hazardous sites list is not an implication that the parties associated with the site are subject to MTCA liability. *Id.* § 173-340-330(5).

100. *Id.* § 173-340-500; *see also* WASH. REV. CODE § 70.105D.040 (2000).

101. *See* WASH. ADMIN. CODE § 173-340-700(5).

102. *Id.* § 173-340-700(4)(a).

103. *Id.* § 173-340-700(5). The Washington Administrative Code outlines three basic methods to determine the proper level of remediation. *Id.* "Method A" is used for sites for which cleanup is routine, or which involve relatively few hazardous substances. *Id.* § 173-340-700(5)(a). "Method B" is the standard method used for all sites, unless one of the conditions applicable to Methods A or C exists. *Id.* §§ 173-340-700(5)(b), -705(1). "Method C" is a conditional method, applicable if compliance with Methods A or B is impossible or will cause greater environmental harm. *Id.* § 173-340-700(5)(c). Method C is also applicable to certain industrial properties. *Id.*; *see also id.* § 173-340-745 (setting forth soil cleanup standards for industrial properties).

2. *Remedial Actions*

A remedial action is any action intended to identify and either eliminate or minimize a threat to human health or the environment caused by the release of hazardous substances.[104] Remedial actions include investigation, monitoring, and cleanup activities.[105] The DOE may initiate a remedial action by sending a negotiation letter or enforcement order to a PLP or by requesting an "agreed order."[106] The negotiation letter informs the PLP that the DOE wishes to negotiate toward a consent decree.[107] The letter typically explains the nature of the DOE's conclusions about a contaminated site, requests a written statement of the PLP's willingness to negotiate, and asks for the names of other PLPs.[108] An enforcement order requires a PLP to take action on its own.[109] Under an agreed order, the PLP agrees to undertake remediation of the site.[110] In return, the DOE will not take action against the PLP as long as the PLP complies with the order.[111] However, the agreed order is not a settlement and, therefore, will not contain covenants not to sue or protection from claims of contribution.[112] Finally, the DOE may undertake remedial action entirely on its own if necessary, as in the case of an emergency.[113]

A PLP may also initiate a remedial action by demanding a settlement under a consent decree, by requesting an agreed order, or simply by taking action itself.[114] In a settlement under consent decree, the PLP accepts responsibility for the contamination and proposes a remedial action plan for the site.[115] In requesting a consent decree, the PLP must also identify other PLPs and provide information regarding the history

104. WASH. REV. CODE § 70.105D.020(21).

105. *Id.*

106. WASH. ADMIN. CODE § 173-340-510(3)(b).

107. *Id.* § 173-340-520(2).

108. *Id.* § 173-340-520(2)(b).

109. *Id.* § 173-340-540. The DOE generally issues the enforcement order either after it has sent a negotiation letter or else concurrently, in the case of an emergency. *Id.*

110. *Id.* § 173-340-530(1).

111. *Id.*

112. *Id.*

113. *Id.* § 173-340-510(4).

114. *Id.* §§ 173-340-510(2), -515.

115. *Id.* § 173-340-520; *see also* WASH. REV. CODE § 70.105D.040(4) (2000).

and use of the site.[116] The Attorney General may accept the settlement if it appears that the proposed plan is in compliance with cleanup standards under MTCA and would expedite the cleanup process.[117]

Finally, an independent remedial action[118] is a remedial action undertaken by a PLP outside of an order or decree and without the approval or oversight of the DOE.[119] The DOE may, however, provide a limited amount of informal assistance.[120] Within ninety days of completion, a PLP that initiates such an action must submit to the DOE a report containing a description of its investigation, remediation, and monitoring conducted on the property.[121] The DOE must inform the PLP whether any further action is necessary within ninety days of receiving the report.[122]

C. *Recovery of Remedial Action Costs*

Under MTCA, the Washington Attorney General can file an action to recover remedial action costs that the DOE has spent to clean a contaminated site. The Attorney General is authorized to file an action if necessary to recover all costs incurred, including the costs of undertaking any investigative and remedial actions.[123] Remedial action costs are any costs "reasonably attributable" to the site, and include costs of direct remedial activities,[124] support costs,[125] and interest charges.[126] The Attorney General may also bring an action against a PLP that has failed to comply with an enforcement order or an agreed order issued by the

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116. WASH. ADMIN. CODE §§ 173-340-520(1)(v), (viii).

117. WASH. REV. CODE § 70.105D.040(4)(a); WASH. ADMIN. CODE § 173-340-520(f).

118. WASH. ADMIN. CODE § 173-340-515.

119. *Id.*

120. *Id.* § 173-340-515(5); *see also* 24 TIMOTHY H. BUTLER, ENVIRONMENTAL LAW AND PRACTICE, *in* WASHINGTON PRACTICE, § 15.26 (1997).

121. WASH. ADMIN. CODE § 173-340-300(4).

122. *Id.* §§ 173-340-310(4), -515(4).

123. WASH. REV. CODE § 70.105D.050(3) (2000).

124. Costs of direct remedial activities include, for example, the payment of staff for work on the site, the cost of any travel related to the site, costs incurred publishing documents with respect to the site, the purchase or rental of any equipment necessary for remediation of the site, and the cost of work on the site that must be contracted out. WASH. ADMIN. CODE § 173-340-550(2)(a).

125. Support costs include, for example, costs of any facilities, personnel, and administrative support that are indirectly related to the remediation of the site. *Id.* § 173-340-550(2)(b)–(c).

126. *Id.* § 173-340-550(2).

DOE.[127] In such an action, the Attorney General may recover up to three times the amount that the state must incur to undertake remediation activities, as well as a civil penalty of up to $25,000 for each day that the PLP refuses to comply.[128]

MTCA provides that any "person" who undertakes a remedial action on its own may recover cleanup costs and litigation expenses from PLPs.[129] This private right of action encourages private parties to undertake remedial actions independently. Moreover, the DOE and other governmental entities may also bring a private right of action, as MTCA's definition of "person" includes "state government agenc[ies] [and] unit[s] of local government."[130] Hence, any authority that may exercise the power of eminent domain may also bring a private right of action under MTCA.

A party seeking recovery under the private right of action may recover only remedial action costs that are substantially equivalent to those that the DOE would have undertaken.[131] To facilitate private rights of action, the DOE has enumerated a number of elements that a remedial action should contain in order to meet the substantial equivalent requirement.[132] For example, information on the site and its remediation must be reported to the DOE,[133] the DOE must not object to the action,[134] and the public at large must be notified of the remediation.[135]

D. *Procedural Due Process Under MTCA*

MTCA provides due process to PLPs by giving them the right to assert defenses to liability.[136] The right to due process of law is

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127. WASH. REV. CODE § 70.105D.050(1).

128. *Id.*

129. *Id.* § 70.105D.080.

130. *Id.* § 70.105D.020 (14). "Person" is defined as an "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state government agency, unit of local government, federal government agency, or Indian tribe." *Id.*

131. *Id.* § 70.105D.080.

132. WASH. ADMIN. CODE § 173-340-545(2) (2001).

133. *Id.* § 173-340-545(2)(c)(i).

134. *Id.* § 173-340-545(2)(c)(ii).

135. *Id.* § 173-340-545(2)(c)(iii). The remedial action may also be "substantially equivalent" if it has actually been conducted by the DOE itself, or if it is being conducted under an order or decree, and the requirements of the decree have been fulfilled. *Id.* § 173-340-545(2)(a)–(b).

136. *See supra* notes 75–81 and accompanying text.

embedded in the Washington State and United States Constitutions. The Washington State Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."[137] Similarly, the Fourteenth Amendment to the United States Constitution states that a state may not "deprive any person of life, liberty, or property, without due process of law."[138] In Washington, procedural due process requires that parties whose rights are affected by a governmental proceeding have a meaningful opportunity to be heard, and notice calculated to advise the parties of the proceeding to allow them the opportunity to present defenses.[139] If any "significant property interest" is at stake, the safeguards afforded by due process are applicable.[140]

Encompassed within the constitutional right to due process is the "guarantee of fair procedure," or procedural due process.[141] Procedural due process imposes limitations upon governmental action that deprives individuals of life, liberty, or property.[142] In a procedural due process claim, the question is not whether the deprivation of "life, liberty, or property" is itself unconstitutional, but whether the deprivation took place without the procedural guarantees envisioned by the Constitution.[143] The rules of procedural due process "'minimize substantively unfair or mistaken deprivations of' life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests."[144]

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137. WASH. CONST. art. I, § 3.

138. U.S. CONST. amend. XIV, § 1.

139. Olympic Forest Prods., Inc. v. Chaussee Corp., 82 Wash. 2d 418, 422, 511 P.2d 1002, 1005 (1973) (citing Grannis v. Ordean, 234 U.S. 385, 394 (1914), Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), and Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

140. *Id.* at 428, 511 P.2d at 1008. In determining the level of process that is due, the court will balance the interest to be protected, the risk of deprivation of that interest by the government's acts, and the government's interest in maintaining the procedure. Silver Firs Town Homes, Inc. v. Silver Lake Water Dist., 103 Wash. App. 411, 425, 12 P.3d 1022, 1029 (2000).

141. Zinermon v. Burch, 494 U.S. 113, 125 (1990).

142. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

143. *Zinermon*, 494 U.S. at 125.

144. Carey v. Piphus, 435 U.S. 247, 259–60 (1978) (quoting Fuentes v. Shevin, 407 U.S. 67, 81 (1972)). Whether procedural due process protections are implicated in a given case depends upon whether the interest in question falls within the ambit of "life, liberty, or property." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Neither the Washington State nor the United States Constitutions define exactly what that phrase encompasses. The United States Supreme Court has made it clear, however, that the scope of "property interests" is broader than simply the ownership of money, real estate, or chattel. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571–72 (1972). Similarly, "liberty" means something more than simply freedom from physical confinement. *Id.* at 572 n.11.

In *Mathews v. Eldridge*,[145] the United States Supreme Court articulated a three-part balancing test for identifying the requirements of procedural due process.[146] Under this test, a court should attempt to balance (1) the private interests that are affected by a governmental action, (2) the risk that the procedures employed by a governmental actor will result in the mistaken deprivation of those interests, and (3) the government's own interests, including the economic and administrative burden that the procedural protection would entail.[147] In implementing this test, the Court has generally held that some minimal opportunity to be heard is required before the government deprives an individual of liberty or property.[148]

One of the fundamental requirements of procedural due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."[149] For the opportunity to be meaningful, it must be appropriate to the nature of the case.[150] For example, *Bell v. Burson*[151] involved a due process challenge to a statute that divested uninsured motorists who were

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Moreover, for purposes of procedural due process, property interests "are not created by the constitution but are reasonable expectations of entitlement derived from independent sources such as state law." Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 962 n.15, 954 P.2d 250, 257 n.15 (1998) (citing *Roth*, 408 U.S. at 577). Thus, a property interest may be created by a state statute or statutory scheme. *See Mathews*, 424 U.S. at 332; *Mission Springs*, 134 Wash. 2d at 963, 954 P.2d at 257 (citing Bateson v. Geisse, 857 F.2d 1300, 1304–05 (9th Cir. 1988)).

145. 424 U.S. 319 (1976).

146. *Id.* at 335 (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)).

147. *Id.*

148. *Zinermon*, 494 U.S. at 127–28 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Parham v. J.R., 442 U.S. 584, 606–07 (1979); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18 (1978); Goss v. Lopez, 419 U.S. 565, 579 (1975); Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974); *Fuentes*, 407 U.S. at 80–84; *Goldberg*, 397 U.S. at 264). Once a court has determined whether the protections of procedural due process apply, it must then determine exactly what process is due. *Loudermill*, 470 U.S. at 541.

Again, neither the Washington State nor the United States Constitutions dictate exactly what level or character of due process must be afforded in a given situation. The concept of due process is "flexible," and will vary according to the demands of the particular situation. *Mathews*, 424 U.S. at 334 (quoting *Morrissey*, 408 U.S. at 481). The determination of what process is due depends upon what rights are at stake and entails "'a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.'" *Morrissey*, 408 U.S. at 481 (quoting Cafeteria & Rest. Workers v. McElroy, 367 U.S. 886, 895 (1961)). The same procedural rule won't necessarily satisfy the requirements of due process in every context; "[t]hus, procedures adequate to determine a welfare claim may not suffice to try a felony charge." Bell v. Burson, 402 U.S. 535, 540 (1971).

149. *Goldberg*, 397 U.S. at 267 (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

150. *Bell*, 402 U.S. at 542.

151. 402 U.S. 535 (1971).

involved in accidents of their driver's licenses unless they posted security sufficient to cover the damage alleged by the other party to the accident.[152] The United States Supreme Court held that, under the statute, motorists were entitled to a hearing wherein they were afforded an opportunity to present defenses to liability.[153] Further, *Goldberg v. Kelly*[154] involved a procedural due process claim for the wrongful termination of welfare benefits. The Supreme Court similarly held that the "meaningful" requirement dictated that individuals who were being deprived of their public assistance should have notice of the reasons for the termination and an opportunity to defend themselves by confronting adverse witnesses and presenting arguments and evidence.[155]

In Washington, procedural due process requires that parties whose rights are affected by a governmental proceeding have, at a minimum, a meaningful opportunity to be heard and notice calculated to advise them of the proceeding, to allow the party to present defenses.[156] Moreover, Washington courts also hold that the opportunity must be presented "at a meaningful time and in a meaningful manner."[157] If any "significant property interest" is at stake, the safeguards afforded by due process are applicable.[158] In *Olympic Forest Products, Inc. v. Chaussee Corp.*,[159] the Washington Supreme Court articulated the specific procedures required by due process. It determined that a court must consider the nature of the affected interest, the manner in which it is affected, the government's reasons for acting as it did, what procedural alternatives are available, the amount of protection that ought to be given to the governmental actor, and the balance between the benefit accomplished and the detriment suffered.[160]

152. *Id.* at 535–36.

153. *Id.* at 541–42.

154. 397 U.S. 254 (1970).

155. *Id.* at 267–68.

156. Olympic Forest Prods., Inc. v. Chaussee Corp., 82 Wash. 2d 418, 422, 511 P.2d 1002, 1005 (1973) (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Grannis v. Ordean, 234 U.S. 385, 394 (1914)). In Washington, the court will balance the interest to be protected, the risk of deprivation of that interest by the government's acts, and the government's interest in maintaining the procedure. *See, e.g.*, Silver Firs Town Homes, Inc. v. Silver Lake Water Dist., 103 Wash. App. 411, 425, 12 P.3d 1022, 1029 (2000).

157. *Olympic Forest Prods.*, 82 Wash. 2d at 422, 511 P.2d at 1005.

158. *Id.* at 428, 511 P.2d at 1008.

159. 82 Wash. 2d 418, 511 P.2d 1002 (1973).

160. *Id.* at 423–24, 511 P.2d at 1006 (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring)).

III. JURISDICTIONS ARE SPLIT ON THE ADMISSIBILITY OF EVIDENCE OF ENVIRONMENTAL CONTAMINATION IN EMINENT DOMAIN PROCEEDINGS

There is a split of authority across the United States on the issue of whether evidence of environmental contamination should be admissible to determine just compensation in eminent domain proceedings.[161] Jurisdictions that refuse to admit such evidence have expressed concern that it would circumvent procedures already established by environmental laws and regulations for determining liability for contamination and result in additional liability for the condemnee. Jurisdictions that admit the evidence reason that contamination is a property characteristic—which must necessarily be taken into account to determine fair market value—and that environmental contamination creates a "stigma" upon property.

A. Excluding the Evidence

1. Considerations of Additional Liability

At least one court has refused to admit evidence of environmental contamination in an eminent domain proceeding in order to prevent the potential for extra liability for the landowners.[162] In *Aladdin, Inc. v. Black Hawk County*,[163] a county condemned a contaminated laundry facility in preparation for building a new jail[164] and sought to reduce the compensation it paid for the property on account of the environmental contamination.[165] Because Iowa law provided for administrative procedures to remedy environmental contamination, the Iowa Supreme

161. Thus far, very few jurisdictions have considered the problem at all. A majority in favor of admitting the evidence has emerged. *See, e.g.*, Redev. Agency v. Thrifty Oil Co., 5 Cal. Rptr. 2d 687, 689 n.9 (Cal. Ct. App.1992); State Dep't of Health v. The Mill, 887 P.2d 993, 1008 (Colo. 1994); N.E. Econ. Alliance, Inc. v. ATC P'ship, 776 A.2d 1068, 1080 (Conn. 2001); Finkelstein v. Dep't of Transp., 656 So.2d 921, 922 (Fla. 1995); City of Olathe v. Stott, 861 P.2d 1287, 1290 (Kan. 1993); State v. Hughes, 986 P.2d 700, 703 (Or. Ct. App. 1999); State v. Brandon, 898 S.W.2d 224, 226–27 (Tenn. Ct. App. 1994). *But see* Dep't of Transp. v. Parr, 633 N.E.2d 19 (Ill. Ct. App. 1994); Aladdin, Inc. v. Black Hawk County, 562 N.W.2d 608, 615 (Iowa 1997).

162. *Aladdin*, 562 N.W.2d at 615.

163. 562 N.W.2d 608 (Iowa 1997).

164. *Id.* at 610.

165. *Id*

Court expressed concern that the landowner would incur additional liability if evidence of the contamination were admitted. The court reasoned that if the proper administrative procedures were not followed with respect to the environmental remediation, and the contamination were figured into the amount of compensation for the property, "the landowner will not receive just compensation because the award will be less than full value. In addition, the property owner will have the same legal liability for cleanup cost as before."[166]

2. *Procedural Due Process Concerns*

The *Aladdin* court was also concerned that admitting contamination evidence would compromise the landowner's due process rights.[167] In Iowa, as in Washington, the environmental cleanup statute contained procedural safeguards for the benefit of the landowner.[168] The *Aladdin* court held that admitting evidence of environmental contamination would deprive the landowner of just compensation.[169] In making its determination, the *Aladdin* court cited procedural due process concerns, expressing the fear that the scope of procedural guarantees available in an environmental liability adjudication would not be available in the context of eminent domain.[170] The court reasoned that a landowner has the right to have environmental cleanup liability adjudicated in a proceeding in which there is an opportunity to show that the landowner is not responsible for the contamination.[171] Therefore, effectively establishing the landowner's liability in a condemnation proceeding would violate the landowner's procedural due process rights.[172] Furthermore, if another party is able to prove that the landowner is legally responsible for the contamination, the remediation costs can be recovered in an environmental action after completion of the eminent domain proceeding.[173]

166. *Id.* at 615.

167. *Id.* at 615–16.

168. *See id.* at 615.

169. *Id.*

170. *Id.* at 615–16.

171. *Id.* at 615.

172. *Id.*

173. *Id.* The *Aladdin* court was also concerned that valuation of contaminated property would be problematic due to the difficulty of locating comparable contaminated property, and that the fact-

In *Department of Transportation v. Parr*,[174] the Illinois Court of Appeals also excluded evidence of environmental contamination in an eminent domain proceeding due to procedural due process concerns.[175] In *Parr*, the Illinois Department of Transportation condemned a landowner's contaminated property to construct a bridge.[176] The Illinois environmental statute, like MTCA, set forth a comprehensive process for remediating environmental contamination and adjudicating liability.[177] Among other things, the statute provided for certain procedural safeguards to protect landowners when adjudicating liability for environmental contamination.[178] The court held that admitting evidence of environmental contamination would violate the procedural due process rights of the condemnees, because it would allow the condemning authority to circumvent the procedural safeguards implemented to protect the rights of landowners under the statutory scheme.[179] The court noted that procedural due process requires that "orderly proceedings" advance according to rules that do not violate the fundamental rights of the parties involved.[180] Therefore, depriving landowners of the rights and defenses afforded by the Illinois environmental statute would constitute a violation of procedural due process.[181]

B. *Admitting the Evidence: Environmental Contamination as a Property Characteristic*

Some courts admit evidence of environmental contamination in eminent domain proceedings on the basis that it is a property characteristic and necessarily affects the fair market value of property.[182]

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finder would be required to speculate as to the effect of the contamination upon the property's value. *Id.* at 616.

174. 633 N.E.2d 19 (Ill. Ct. App. 1994).

175. *Id.* at 22.

176. *Id.* at 20.

177. *Id.* at 22–23.

178. *Id.* at 22.

179. *Id.*

180. *Id.* at 23.

181. *Id.* at 22.

182. *See, e.g.*, Redev. Agency v. Thrifty Oil Co., 5 Cal. Rtpr. 2d 687, 689 n.9 (Cal. Ct. App. 1992); City of Olathe v. Stott, 861 P.2d 1287, 1290 (Kan. 1993); State v. Hughes, 986 P.2d 700, 703 (Or. Ct. App. 1999).

For example, in *State v. Hughes*,[183] an Oregon court of appeals held that the evidence of contamination is admissible in an eminent domain action.[184] In *Hughes*, the State of Oregon condemned contaminated property for a highway improvement project.[185] After condemning the property, the condemnor discovered that petroleum contamination was present in the groundwater beneath the site.[186] Citing Oregon's evidentiary rule for relevance,[187] the court reasoned that, although the contamination was discovered subsequent to the condemnation, the evidence could have been discovered on the date the action was commenced and would bear on the fair market value of the property at the time.[188] Therefore, the evidence would "easily pass the threshold for relevance" and should be admitted in a proceeding to determine just compensation.[189]

In *Finkelstein v. Department of Transportation*,[190] the Florida Supreme Court admitted evidence of environmental contamination to determine just compensation in an eminent domain proceeding on the basis that there is a "stigma" associated with contaminated property that affects its market value.[191] In *Finkelstein*, the Florida Department of Transportation condemned a piece of property in connection with the construction of an interstate highway.[192] The Florida Supreme Court held that, as long as the facts show that environmental contamination actually has an effect on the market value of the property to be condemned, evidence of environmental contamination is admissible to determine just

183. 986 P.2d 700 (Or. Ct. App. 1999).

184. *Id.* at 703.

185. *Id.* at 701.

186. *Id.* at 702. The court did not discuss any applicable environmental remediation statute in Oregon.

187. "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* at 703.

188. *Id.*

189. *Id.*; *see also* Redev. Agency v. Thrifty Oil Co., 5 Cal. Rptr. 2d 687, 689 n.9 (Cal. Ct. App. 1992) (stating that remediation issue was properly before jury as a property characteristic that affected value of land); City of Olathe v. Stott, 861 P.2d 1287, 1290 (Kan. 1993) (stating that evidence of contamination should be admissible in eminent domain proceeding because a purpose of an eminent domain proceeding is to determine fair market value of subject property and contamination affects that value).

190. 656 So.2d 921 (Fla. 1995).

191. *Id.* at 924.

192. *See* Dep't of Transp. v. Finkelstein, 629 So.2d 932, 932 (Fla. Ct. App. 1993).

compensation.[193] The court supported its conclusion with an earlier decision holding that the public fear of power lines is relevant to the market value of property.[194] The *Finkelstein* court listed several reasons why the stigma associated with contaminated property would affect its market value.[195] For example, a buyer on the open market would consider the cost of remediating the contamination and the buyer would be subject to strict, joint, and several liability for contamination under environmental statutes.[196] The contamination would subject the buyer to liability to the community.[197] Finally, lenders would hesitate to finance the acquisition or improvement of contaminated property, particularly if the financing arrangement could subject the lender to liability for the contamination.[198]

Recently, in *Northeast Connecticut Economic Alliance, Inc. v. ATC Partnership*,[199] a municipal government condemned a contaminated parcel of property as part of a regional redevelopment plan, seeking to pay $1 in compensation due to the contaminated state of the property.[200]

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193. Finkelstein v. Dep't of Transp., 656 So.2d 921, 922 (Fla. 1995).

194. *See id.* at 924:

> Holding contamination to be relevant to the market value of property in an eminent domain valuation proceeding is consistent with our decision in *Florida Power & Light Co. v. Jennings*, 518 So.2d 895 (Fla. 1987), in which we held that "any factor including public fear which impacts on the market value of land taken for a public purpose may be considered to explain the basis for an expert's valuation opinion."

As noted previously, Washington courts do not follow this reasoning. *See* State v. Evans, 96 Wash. 2d 119, 127, 634 P.2d 845, 849 (1981), *opinion amended*, 649 P.2d 633 (1982).

195. *Finkelstein*, 656 So.2d at 924. The court defined "stigma" as "the reduction in value caused by contamination resulting from the increased risk associated with the contaminated property. In sum, many prospective buyers are afraid of the financial risk associated with contaminated or even previously contaminated properties and would therefore pay less for the property." *Id.* (internal quotation marks omitted).

196. *Id.*

197. *Id.*

198. *Id.* Ultimately, however, the *Finkelstein* court concluded that the evidence of contamination was not admissible in the case before it, as there was not a sufficient factual basis for the state expert's valuation opinion. *Id.* at 925. Because there was no factual evidence in the record upon which to base the conclusion that the property's value had actually been compromised by the alleged environmental contamination, the landowner was entitled to the fair market value of the property without respect to contamination. *Id.*

199. 776 A.2d 1068 (Conn. 2001).

200. *Id.* at 1072–73. The trial court had held that the contamination evidence was not admissible. N.E. Econ. Alliance, Inc. v. ATC P'ship, No. CV 940049248S, 1998 WL 197632, *15 (Conn. Super. April 16, 1998). During the pendency of the parties' appeal, the Connecticut legislature amended its eminent domain statute to provide that evidence of environmental contamination is admissible to determine just compensation. *ATC P'ship*, 776 A.2d at 1076 (citing Public Acts 2000, No. 00-89,

There, the court held 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 had on the fair market value of the property on the date of the taking."[201] The court reasoned that failing to admit the evidence would result in a "fictional" property value, because a purchaser of property on the open market would base the price it was willing to pay on a variety of factors, including (1) potential liability for the contamination, (2) "stigma" related to the property even after it has been remediated, (3) increased financing costs charged by lending institutions, and (4) the potential for increased regulation.[202]

IV. EVIDENCE OF ENVIRONMENTAL CONTAMINATION SHOULD NOT BE ADMISSIBLE TO DETERMINE JUST COMPENSATION IN WASHINGTON EMINENT DOMAIN PROCEEDINGS

Washington courts should not admit evidence of environmental contamination to determine just compensation in eminent domain proceedings. First, evidence of environmental contamination falls short of Washington's rule prohibiting overly speculative evidence. Second, admitting evidence of environmental contamination in eminent domain proceedings deprives landowners of defenses and procedural safeguards under MTCA, thereby constituting a violation of procedural due process. Finally, admitting the evidence may effectively result in additional liability for the landowner and a windfall to the condemnor.

A. Evidence of Environmental Contamination Should Not Be Admitted To Determine Just Compensation Because It Contradicts Washington's Prohibition Against Speculative Evidence in Eminent Domain Proceedings

Admitting evidence of environmental contamination for the purpose of valuing property in an eminent domain proceeding would require the

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entitled "An Act Concerning Fair Market Value Of Brownfields"). However, the *ATC Partnership* court did not decide whether the new provision applied retroactively, but instead based its determination on "traditional constitutional principles of just compensation." *Id.*

201. *ATC P'ship*, 776 A.2d at 1080.

202. *Id.* at 1081.

jury to engage in impermissible speculation.[203] In determining just compensation in Washington eminent domain proceedings, the jury may not consider evidence that "is remote, imaginary, or speculative."[204] Juries may only consider those elements that have an actual effect on the property's fair market value and are established by evidence.[205] For example, the market value of a parcel of land with mineral content may not be determined by using an estimated market price for the mineral as extracted.[206] This would entail speculation about, among other things, the costs of extracting and marketing the mineral and the nature and extent of demand for the mineral.[207]

Similarly, devaluing property based on contamination would require the jury to speculate about the extent of contamination, the necessary responses, and the response costs. Under MTCA, liability for cleanup is based upon all costs which are "reasonably attributable" to remediation of the property.[208] By definition, costs may not be attributed to remediation of the contamination until cleanup is complete, as the DOE expects to receive payment of remediation costs as they are incurred.[209] In addition, cleanup may take years to complete and, consequently, may not be completed while an eminent domain proceeding is taking place. The full extent of contamination and necessary expenses may not be known until the cleanup is complete.[210] Therefore, attempting to estimate the costs of cleanup before remediation is complete and the full extent of the contamination is known would involve a great deal of conjecture. Moreover, even if accurate evidence regarding the extent of the contamination is admitted, the jury would need to speculate to determine the effect of the contamination on the property's value. As at least one commentator has noted, the potential range of devaluation due to

203. *Cf. In re* City of Medina, 69 Wash. 2d 574, 578, 418 P.2d 1020, 1023 (1966).

204. State v. Evans, 96 Wash. 2d 119, 127, 634 P.2d 845, 849 (1981), *opinion amended*, 649 P.2d 633 (1982).

205. *Id.*

206. *See supra* notes 49–52 and accompanying text.

207. *See supra* notes 49–52 and accompanying text.

208. *See supra* notes 101–28 and accompanying text.

209. BUTLER, *supra* note 120, § 15.57.

210. *See* Robert I. McMurry, *Treatment of Environmental Contamination in Eminent Domain Cases*, C975 ALI-ABA 237, 247 (1995) (stating that "consultants will concede that environmental investigations are more than a little like handicapping horse races: there is some science involved and some things we can put into statistics, but a big part of the equation is uncertain, unpredictable, incalculable, and perhaps even unknowable").

contamination can be vast.[211] Moreover, the average jury may not be equipped to handle the complicated technical information involved with environmental contamination and its effect on market value.[212]

Use of the accepted valuation methodologies in Washington eminent domain proceedings does not make determining environmental contamination and its effect on market value in an eminent domain proceeding any less speculative. For example, under the income capitalization approach, the value of a plot of land is measured by projecting the amount of income it is likely to produce, subtracting future expenses, and capitalizing at an appropriate discount rate.[213] Environmental contamination may theoretically be considered a future expense which is deducted from the projected income stream.[214] However, even under this formula, the jury would be required to speculate with respect to the extent of environmental contamination, the necessary remediation measures, and the costs of cleanup.

The comparable sales approach is of little help. Under that approach, the value of a given piece of property is determined by comparing it with similar properties that have been sold within a reasonable period of time.[215] In the case of contaminated property, it would be necessary to find another piece of property that is similarly contaminated and similar in other respects, such as size, location, and zoning. Since the character and extent of contamination tends to be unique to a given piece of property, it would be exceedingly difficult to locate similar property upon which to draw a comparison.[216] Moreover, comparing contaminated property to uncontaminated property that is similar in other respects would certainly be speculative. As one Washington court has noted, even a comparison of undeveloped land with fully developed property to

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211. 7A JULIUS SACKMAN, NICHOLS ON EMINENT DOMAIN § 13B.03[2][i][ii] (3d Ed. Rev. 2000).

212. SACKMAN, *supra* note 211, § 13B.03[2][i][iii]; Amy Grigham Boulris, *Dealing with Contaminated Land from the Condemnee's Perspective*, C975 ALI-ABA 197, 203 (1995).

213. *See* SACKMAN, *supra* note 211, § 13B.04[2].

214. *See* SACKMAN, *supra* note 211, § 13B.04[2].

215. *See* SACKMAN, *supra* note 36, § 12.02[1], at 12-72.

216. *See* Aladdin, Inc. v. Black Hawk County, 562 N.W.2d 608, 616 (Iowa 1997) ("Properties with contamination are hard to compare because they involve multiple varieties of contamination of varying concentrations and require assorted methods of cleanup. The commission, judge, or jury required to determine 'just compensation' would likely be compelled to speculate as to the damages."). *See also* Robert I. McMurry & David H. Pierce, *Environmental Contamination and Its Effect on Eminent Domain*, C791 ALI-ABA 133, 162. Although locating similar property may not, in all cases, be *impossible*, considerations of judicial economy suggest it would be inefficient to always attempt to do so.

estimate market value leads to impermissible speculation and conjecture.[217] As that court declared, a court "cannot be too careful in excluding evidence of this character."[218]

The depreciated replacement cost method is similarly unavailing. Under that approach, just compensation is measured by determining the replacement costs of improvements on the property, subtracting depreciation, and adding the market value of the underlying property.[219] Such an approach simply begs the question: once the cost of improvements and the amount of depreciation have been established, the market value of the property itself must still be determined. Presumably, this will require recourse to the methodologies previously discussed.[220] Thus, the depreciated replacement cost method falls short, for the same reasons that the income capitalization and comparable sales approaches fail.[221]

Some jurisdictions that admit evidence of environmental contamination to determine just compensation have much more liberal standards than Washington for admitting speculative evidence.[222] Therefore, they do not provide persuasive precedent for admitting such evidence in Washington. For example, Florida courts will consider evidence of the public's fear of a condition on land to determine its market value.[223] Based in part upon that reasoning, the *Finkelstein* court was willing to admit evidence of environmental contamination in an eminent domain proceeding, stating that doing so is consistent with the notion that "any factor including public fear which impacts on the market value of land taken for a public purpose may be considered . . . ."[224] However, Washington has eschewed the admissibility of speculative

217. *In re* City of Medina, 69 Wash. 2d 574, 578, 418 P.2d 1020, 1022–23 (1966).

218. *Id.*

219. *See* SACKMAN, *supra* note 36, § 12.02[1].

220. *See supra* notes 213–18 and accompanying text.

221. For a discussion of novel valuation methodologies that may alleviate the problem to some degree, see McMurry & Pierce, *supra* note 216, at 165–69 (suggesting that these novel alternatives are still somewhat unsatisfactory); *see also* SACKMAN, *supra* note 211, § 13B.04[2] (listing newer valuation methods but noting that "[t]he development of techniques for valuing contaminated properties is still in its infancy") (internal quotation marks omitted).

222. *See, e.g.*, Finkelstein v. Dep't of Transp., 656 So.2d 921, 924 (Fla. 1995) (citing Fla. Power & Light Co. v. Jennings, 518 So.2d 895 (Fla. 1987)).

223. *See supra* notes 193–94 and accompanying text.

224. *See supra* notes 193–94 and accompanying text.

evidence like public fear.[225] Thus, one of the primary rationales relied upon by jurisdictions admitting evidence of environmental contamination in eminent domain proceedings is inapplicable in Washington.

B. *Admitting Evidence of Environmental Contamination To Determine Just Compensation in an Eminent Domain Proceeding Violates the Procedural Due Process Rights of Landowners*

Admitting evidence of environmental contamination to determine just compensation would circumvent the procedural safeguards established by MTCA and, therefore, constitute a violation of procedural due process. To determine whether governmental action constitutes a violation of procedural due process, a court must first determine whether a party has been deprived of a property interest.[226] Upon finding such a deprivation, the court must then determine the level of process that is due.[227] Applying the balancing test set forth in *Mathews v. Eldridge*,[228] admission of evidence of environmental contamination to determine just compensation will result in the mistaken deprivation of the landowner's property interests with no significant concomitant governmental benefit and is therefore a violation of the landowner's right to procedural due process.

Reducing just compensation in an eminent domain proceeding due to environmental contamination deprives a landowner of an important property interest. One of the fundamental principles behind just compensation in eminent domain is the requirement that the property owner be put in the same monetary position as she would have occupied had the property not been taken.[229] Payment of anything less than full compensation divests the landowner of that important interest.

Under the *Mathews* balancing test, a court must balance (1) the private interests that are affected by a governmental action, (2) the risk that the procedures employed by the governmental actor will result in the mistaken deprivation of those interests, and (3) the government's own

225. *See, e.g.*, State v. Evans, 96 Wash. 2d 119, 127, 634 P.2d 845, 849 (1981), *opinion amended*, 649 P.2d 633 (1982); Pac. N.W. Pipeline Corp. v. Myers, 50 Wash. 2d 288, 290, 311 P.2d 655, 656 (1957).

226. *See supra* note 144 and accompanying text.

227. *See supra* note 148 and accompanying text.

228. 424 U.S. 319 (1976).

229. *See supra* note 33 and accompanying text.

interests, including the economic and administrative burden that the procedural protection would entail.[230] Reducing just compensation due to environmental contamination in an eminent domain proceeding deprives the landowner of full compensation, without affording the landowner the procedural safeguards outlined in MTCA. MTCA provides a thorough procedural framework for investigating the existence of contamination and assigning responsibility for any contamination discovered. It provides the landowner with numerous options for mitigating the contamination,[231] offers certain defenses to liability,[232] affords the right to seek contribution from other PLPs,[233] and enables the landowner to bring a private right of action by remediating the property according to DOE standards.[234] An eminent domain proceeding provides the landowner with none of these procedural safeguards and, thus, may not be a level of process that is appropriate to the nature of the interests being divested.[235] At the same time, preventing the governmental entity from paying reduced compensation on account of contamination does not deprive it of its interests. On the contrary, whatever interests the government has—for example, remediating contaminated property and holding landowners responsible for the contamination—is amply addressed by MTCA. In addition, any financial loss sustained by the condemnor in paying full value for contaminated property can be amply redressed by forcing the PLPs to remediate the contamination under MTCA. If the proper procedures are employed under MTCA, the government wins by recovering cleanup expenses in an action against the PLP, and the landowner wins by maintaining her procedural guarantees.

Courts in other jurisdictions have come to similar conclusions.[236] For example, *Department of Transportation v. Parr*[237] involved an environmental statute similar to MTCA in that it assigned liability for environmental contamination while providing landowners with certain procedural safeguards.[238] There, the court concluded that adjudicating

230. *See supra* notes 145–47 and accompanying text.

231. *See supra* Part II.B.

232. *See supra* Part II.A.

233. *See supra* note 70 and accompanying text.

234. *See supra* notes 129–35 and accompanying text.

235. *See supra* notes 149–55 and accompanying text.

236. *See, e.g.*, Dep't of Transp. v. Parr, 633 N.E.2d 19, 22 (Ill. Ct. App. 1994); Aladdin, Inc. v. Black Hawk County, 562 N.W.2d 608, 615 (Iowa 1997).

237. 633 N.E.2d 19, (Ill. Ct. App. 1994).

238. *Id.* at 22–23.

liability for environmental contamination in an eminent domain proceeding would constitute a procedural due process violation, because it would circumvent the rights, defenses, and procedural safeguards established by the statute.[239] Because the same holds true under Washington law, Washington should adopt the *Parr* court's reasoning and preclude consideration of environmental contamination to determine just compensation.

C. *Evidence of Environmental Contamination Should Not Be Admitted in an Eminent Domain Proceeding Because It May Create Additional Liability for the Landowner and Result in a Windfall for the Condemnor*

Where the landowner is a PLP under MTCA, admitting evidence of contamination to determine just compensation potentially subjects the landowner to additional liability. First, the landowner receives a reduced price for the property in an eminent domain proceeding due to a determination that the contamination affects its fair market value. Then, the landowner may be subject to liability in a MTCA action and may consequently be forced to pay remediation costs for the contamination. The landowner is forced to sell the land at a price reduced by environmental contamination and subsequently required to pay for the cleanup of the same contamination. Therefore, the landowner is effectively subject to additional liability in the amount that the just compensation is reduced.

Although additional liability may also result if the landowner simply sells the property on the open market and is later held liable for remedial action under MTCA, there are important distinctions between a transaction on the open market and an eminent domain action. No one is forcing the landowner to sell in a transaction on the open market. The seller may prefer to remediate the property on her own and sell at a higher price, rather than selling at a reduced price due to the contamination and later being held liable under MTCA. Moreover, if no buyer is willing to pay what the landowner considers a fair price, the landowner may find it more economically efficient to simply keep the property and take her chances with future liability.

Furthermore, the landowner can bargain away future MTCA liability if permitted to sell the land on the open market. For example, the

239. *Id.*

landowner may agree to sell the land at a discounted rate in exchange for the buyer's promise to indemnify the landowner against any future MTCA liability.[240] In this way, the landowner avoids additional MTCA liability because, although the seller may receive a reduced rate due to the contamination, he or she can avoid future liability under MTCA. Similarly, the parties to a voluntary sale may agree to mitigate potential MTCA liability by taking independent action to remediate environmental contamination. In an eminent domain action, however, the landowner is deprived of the bargaining power to negotiate such a trade.

Similarly, admitting evidence of environmental contamination to determine just compensation may effectively give the condemning authority a windfall. First, the condemning authority acquires the property at a reduced price. Then, once the contamination has been cleaned, the condemnor may subsequently hold the landowner responsible for remediation costs under MTCA. Not only is the state Attorney General entitled to recover its remediation costs from the PLP,[241] but any governmental entity that may condemn property by eminent domain may also bring a private right of action under MTCA.[242] In effect, the condemning authority purchases the property at a price adjusted for contamination, but ultimately receives a piece of property free of contamination. Thus, the condemnor receives a windfall in the amount that the just compensation is reduced for contamination.

V. CONCLUSION

Evidence of environmental contamination should not be admissible to determine just compensation in a Washington eminent domain proceeding. Although it is true that environmental contamination may have an impact on the market value of land, admitting this evidence contravenes Washington's prohibition against speculative evidence to determine just compensation, violates the procedural due process rights

240. *See* Car Wash Enters. v. Kampamos, 74 Wash. App. 537, 544, 874 P.2d 868, 873 (holding that nothing in MTCA prohibits private parties from allocating risk amongst themselves, though emphasizing that such a private agreement has no effect on liability as to the state); *cf.* Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wash. 2d 869, 887, 784 P.2d 507, 516 (1990) (holding that response costs under CERCLA are "damages" within the meaning of an insurance policy); *see also* Olds-Olympic, Inc. v. Comm. Union Ins. Co., 129 Wash. 2d 464, 473, 918 P.2d 923, 927 (1996) (stating that the holding in *Boeing* applies to MTCA).

241. WASH. REV. CODE § 70.105D.050 (2000).

242. *See supra* notes 129–35 and accompanying text.

of landowners, and may result in a windfall for the condemnor and additional liability for the landowner. There is no doubt that the cleanup of contaminated property should be a public priority of the highest order, for the well-being of Washington and for the planet as a whole. However, this interest must be balanced against the interest citizens have in receiving just compensation when their land is taken by the government. Washington has established a comprehensive and effective scheme for addressing the problem of environmental contamination, which provides for the landowners' interests as well as the public interest. The problem of environmental contamination should be addressed under that scheme—condemnors should not have the option of circumventing MTCA in order to obtain property at fire sale prices.