Florida State University Journal of Land Use and Environmental Law

Volume 8
Number 2 *Spring 1993*

Article 3

April 2018

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Recommended Citation

Downey, James P. (2018) "Environmental Cleanup Actions, the Valuation of Contaminated Properties, and Just Compensation for Affected Property Owners," *Florida State University Journal of Land Use and Environmental Law*: Vol. 8 : No. 2 , Article 3.
Available at: https://ir.law.fsu.edu/jluel/vol8/iss2/3

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ENVIRONMENTAL CLEANUP ACTIONS, THE VALUATION OF CONTAMINATED PROPERTIES, AND JUST COMPENSATION FOR AFFECTED PROPERTY OWNERS

JAMES P. DOWNEY*

I. INTRODUCTION

Important questions arise when a property owner is informed that a state or federal agency intends to restrict the owner's use of property because of suspected environmental contamination from hazardous substances. The owner may be an innocent neighbor of the polluter, or one who purchased the property without knowledge of the pollution. The "polluter's" activities may have been perfectly legal, only to be declared unlawful after the fact. The restrictions may include the agency's use of explosives, the installation of fencing, groundwater monitoring wells, and exclusion of the owner.

The questions presented given these fact patterns require decisions which strike a difficult balance among competing interests of property, safety, and procedural fairness. To the environmental zealot, one court emphasized the need for procedural due process when it said "'[t]here is little good in protecting the environment for the sake of a society which fails to insist on fair treatment of its citizens."[1] To the property rights absolutist, it has been emphasized that the public interest can override claims of right.[2] "Property rights serve human values. They are recognized to that end, and are limited by [those values]."[3]

In *Hendler v. United States*,[4] the U.S. Court of Claims stated that a response action that involved the physical occupation of the land of an innocent third party could constitute a taking for which compensation of that party might be required. The case indicates an emerging sense of limits on governmental authority to impair private property interests in the name of environmental remediation. This article will examine the criteria to be applied in cases

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1. Raley v. California Tahoe Regional Planning Agency, 137 Cal. Rptr. 699 (Ct. App. 1977) (quoting People v. Department of Hous. & Community Dev., 119 Cal. Rptr. 266, 276 (Ct. App. 1975)).

2. New Jersey v. Shack, 277 A.2d 369, 372 (N.J. 1971).

3. *Id.*

4. 11 Cl. Ct. 91 (1986), *dismissed on other grounds*, 19 Cl. Ct. 27 (1989), *rev'd*, 952 F. Supp. 1364 (Fed. Cir. 1991).

involving takings and due process challenges to environmental cleanup activities. It will then examine the related question of just compensation for the taking of contaminated properties, which presents the perplexing problem of determining market value in a nonexistent market. In conclusion, it will place the case law in perspective and evaluate current legislative and administrative responses to the taking issue.

II. OVERVIEW OF TAKINGS JURISPRUDENCE

Analysis of these issues must begin with the Takings Clause of the United States Constitution as a point of reference: "private property [shall not] be taken for public use without just compensation."[5] This clause derives from "the English nobles' fear of the King's seizures of land for his own use."[6] The same notion is reflected in the Magna Carta when it says "'no free man shall be deprived . . . of his freehold . . . unless by the lawful judgment of his peers and by the law of the land.'"[7]

This ancient protection from physical deprivation by the sovereign is paralleled by the long standing principle that the *use* of land nevertheless may be restricted. If the public interest requires it, the restrictions may extend to the point of deprivation of all use with no compensation to the owner. The U.S. Supreme Court has said, "[a]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be . . . taking[s] within the meaning of the constitutional provision."[8]

The principle that police power regulations do not constitute compensable takings, except where the government action permanently appropriates the owner's property, even if the purpose of the action is to abate a nuisance, was reaffirmed in the 1887 landmark case of *Mugler v. Kansas*.[9] Mugler was convicted of making beer without a license, an activity officially deemed to be a threat to public health and safety. The difference between regulation and taking was viewed by Justice Harlan as a difference in *kind*, rather than a difference in degree.[10]

The next landmark case was *Pennsylvania Coal Co. v. Mahon*, in which Justice Holmes modified the formal distinction made in

5. U.S. Const. amend. V.

6. Fred Bosselman et al., *The Taking Issue*, U.S. COUNCIL ON ENVIRONMENTAL QUALITY 319 (U.S. Government Printing Office, Washington, D.C. 1973).

7. *Id.* at 319 n.2.

8. Northern Transp. Co. v. City of Chicago, 99 U.S. 635, 642 (1878).

9. 123 U.S. 623 (1887).

10. *Id.* at 669.

Mugler, and pronounced that the line between the police power and the eminent domain power actually is one of *degree*, not one of kind.[11] He stated that "[t]he general rule . . . is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[12] In *Pennsylvania Coal*, the Court invalidated a state statute that prohibited the mining of coal that would cause the subsidence of any building, structure, or transportation route within the limits of a designated class of municipalities. The case stands for the application of a balancing test in regulatory takings cases that is a weighing of the public benefits of the regulation against the extent of loss of property values.[13]

A. The Definition of Property

Working from the settled principles described above, the Court has addressed the definition of property in a recent series of cases. An unsettled issue is whether an "aggregate" theory or "segmentation" theory should be applied. The "aggregate" theory does not recognize that isolated "sticks" in a "bundle" of rights may be the subject of takings.[14] The segmentation theory recognizes that the loss of certain rights may be compensated even where the full bundle is not taken.[15]

In *Penn Central Transportation Co. v. City of New York*,[16] the Court upheld the application of New York City's landmarks preservation law to Grand Central Station, observing that

> [t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated . . . . [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.[17]

The Court held that air rights did not constitute a discrete segment of property, the deprivation of which would constitute a taking.[18] Rather, the property and rights in it were seen as an indivisible

11. 260 U.S. 393 (1922).
12. *Id.* at 415.
13. *Id.* at 414.
14. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978).
15. *Id.*
16. 438 U.S. 104 (1978).
17. *Id.* at 130-31.
18. *Id.* at 136-37.

In other circumstances the Court has favored the segmentation over the aggregate theory. The Court seems to have bestowed preferred status on personal interests such as the right to exclude others from property and the right to alienate to one's heirs. In those instances the Court has applied the segmentation theory and awarded compensation to property owners.[20]

B. The 1987 Takings Trilogy

With expanded environmental awareness has come the enactment of extensive environmental regulation on both the state and federal levels. Advances in technology resulting in increased perception of the presence of pollutants has resulted in the wider application of those regulations. Perhaps sensing a contemporary need for the restatement of takings principles in light of extensive modern regulation of property and activities, the Court decided a "Takings Trilogy" in 1987.

1. No Right to Maintain a Nuisance

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[21] the Court narrowly upheld a Pennsylvania statute designed to guard against subsidence resulting from underground coal mining which could result in insufficient support for the land above. The case confirmed the aggregate theory in holding that twenty-seven million tons of coal must remain in the ground to prevent subsidence because the right to remove the coal was only part of the owner's "bundle" of rights.[22] It also confirmed the "nuisance exception" to the just compensation requirement, holding that because one has no right to maintain a nuisance, the prohibition of this activity could not be a taking inasmuch as it does not deprive an owner of a "right."[23]

2. Compensation Required, Even For Temporary Takings

In *First English Evangelical Lutheran Church v. County of Los Angeles*,[24] the Court addressed whether compensation is the

20. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979) (government attempt to create a public right of access to improved pond on private property could constitute a taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (statute requiring cable installation on landowner's apartment building constituted a taking under the traditional physical occupation test); Hodel v. Irving, 481 U.S. 704 (1987) (statute abrogation right to pass on property to one's heirs constituted taking).

21. 480 U.S. 470 (1987).

22. *Id.* at 497.

23. *Id.* at 492-93.

24. 482 U.S. 304 (1987).

required remedy for a taking under a local ordinance, as opposed to only declaring the regulation invalid. The case involved a campground destroyed by a flood and a local ordinance which prohibited construction of buildings in the flood protection area.[25] The Court held that if a "temporary" regulatory taking denies a landowner all use of his property, the landowner must be compensated for the period during which the taking was effective.[26] Invalidation of the ordinance without payment of fair value for the use of the property during such period would be a constitutionally insufficient remedy.[27] The case did not define the limits of an actual taking and, in leaving that question open, implied that there are situations in which an owner could be deprived of all use of his land, but that public safety reasons might justify such a result without requiring compensation.

3. The Regulation Must Substantially Advance Legitimate State Interests

In *Nollan v. California Coastal Comm'n.*,[28] landowners were granted a permit to replace a small bungalow on their beachfront lot with a larger house, on the condition that they allow the public an easement to pass across their beach, located between two public beaches. The Court stated that a "land-use regulation does not effect a taking if it 'substantially advances legitimate state interests' and does not 'deny an owner economically viable use of his land.'"[29] While the Coastal Commission might have been empowered to prohibit the construction of the larger house in order to ensure visibility of the beach, the Court held that the condition imposed on the access easement must substantially advance legitimate state interests in order for it to be a permissible regulation.[30]

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25. *Id.* at 304-05.

26. *Id.* at 322.

27. *See generally* Norman Williams, Jr. et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984) (discussion of unconstitutional compensation for temporary taking under invalidated regulations); John W. Ragsdale, Jr., *A Synthesis and Integration of Supreme Court Precedent Regarding the Regulatory Taking of Land*, 55 UMKC L. REV. 213, 214 (1987) (identifying "common factors and principles in Supreme Court cases" and forming a "synthesis of regulatory taking doctrine"). The U.S. Supreme Court succinctly stated that compensation was the required remedy in Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984); *see also* Hurley v. Kincaid, 285 U.S. 95 (1932); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); *see* Gideon Kanner, "Measure of Damages in Nonphysical Inverse Condemnation Cases," *Eminent Domain and Land Valuation Litigation*, January 4-6, 1990, The American Law Institute (1990), ALI-ABA Course of Study Materials.

28. 483 U.S. 825 (1987).

29. *Id.* at 834 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

30. *Id.*

C. A Return to Historical Analysis of Property Rights

In *Lucas v. South Carolina Coastal Council*,[31] a state coastal protection statute forbade the owner of two beach lots, for which he paid $1.2 million, from building houses on them. The statute contained both the health and safety aspects of flood control and tourism enhancement. The Supreme Court of South Carolina had ruled that when a "regulation respecting the use of property is designed 'to prevent serious public harm,' no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value."[32]

On *certiorari*, the U.S. Supreme Court had the opportunity to define further the distinction between "health-and-safety-based" and "welfare-based" regulations.[33] One commentator suggested that in welfare-based regulation cases, the balancing of economic damage and public need should be "heavily weighted in favor of taking and compensation."[34] He further suggested that "health and safety-based regulations [should] continue to be subject to the old balancing test: the more needful the regulation for health and safety protection, the more likely [that] economic damage to private property would be permitted without [finding a] taking [requiring] compensation."[35] Such a ruling would have extended the *Keystone* rule to encompass more than traditional nuisances, while acting as a brake on the range of governmental interests deemed legitimate, consistent with the *Nollan* case.

The *Lucas* Court, however, structured the inquiry in terms of the historical "nature of the owner's estate," and whether the proscribed use interests "were part of his title to begin with."[36] It held that "[a]ny limitations so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed [sic] upon land ownership."[37] Under this analysis, the initial inquiry is whether the proscribed use was *always* unlawful, making the proscription merely an explicit statement of "background" principles of nuisance and property law. Examples given by the Court of non-compensable

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31. 112 S. Ct. 2886 (1992).

32. *Id.* at 2890 (quoting Mugler v. Kansas, 123 U.S. 623 (1887)).

33. Welfare-based regulations concern such issues as historic preservation and aesthetics.

34. David L. Callies, *New Paradigm Impacts Regulatory Takings*, URB., ST. & LOC. GOV'T L. NEWSL. (A.B.A.), Winter 1992 at 15:2.

35. *Id.*

36. *Lucas*, 112 S. Ct. at 2899.

37. *Id.* at 2900.

regulation include the denial of a permit to engage in a landfilling operation which would have the effect of flooding another's land and a state directive to remove a nuclear generating plant which is found to sit astride an earthquake fault.[38]

The *Lucas* holding applies to "total" takings. The "background" principles which must be applied in order to sustain the regulation and to determine whether the use was "always" unlawful ordinarily will be: (1) "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities;"[39] (2) "the social value of the claimant's activities and their suitability to the locality in question;"[40] and (3) "the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government."[41] Common law principles were viewed as rarely supporting a prohibition of the "essential use" of land, as in the case of a beachfront construction ban. In remanding the case, the *Lucas* Court placed the onus on the state of South Carolina to identify the background principles of nuisance and property law that prohibit the specific uses in question.[42] Only if the proscription of all such beneficial uses is based upon background principles of nuisance and property law would there be no taking.[43]

D. Unsettled Areas

The *Lucas* case was foreshadowed by both *Nollan* and *Penn Central*. *Nollan* indicated that deprivations of *all* beneficial use are deemed takings,[44] while *Penn Central* made reference to "investment backed expectations."[45] To this, *Lucas* might be said to add *expectations with historical justification.*

Unsettled areas include whether the same test should be applied for a temporary taking as for a permanent taking and the extent to which property rights can be segmented for purposes of assigning value when just compensation is to be awarded. The emphasis on "background principles" required by *Lucas* may further complicate the takings analysis. After *Lucas*, the new question is how to interpret fact patterns involving environmental concerns pertaining to departures from common law *laissez-faire*. Likewise,

38. *Id.*
39. *Id.* at 2901.
40. *Id.*
41. *Id.*
42. *Id.* at 2901-02.
43. *Id.* at 2902.
44. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987).
45. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-28 (1978).

it remains to be seen whether modern prohibitions of activities previously thought to be innocuous but, because of advances in technology now identified as harmful, will be considered expectations with historical justification.

One commentator characterizes property interests as "hierarchical," meaning that some property interests receive greater protection than others.[46] Physical occupation or deprivation of physical access continue to be at the top of the hierarchy,[47] echoing the values of the Magna Carta that physical deprivation or "invasion" requires the greatest showing of public need.[48] Health and safety concerns, particularly those which rise to the level of nuisances, have the greatest capacity to make this showing. The *Lucas* test makes degree of harm the first "background" principle to be applied. Those property interests involving strong personal interests in liberty, such as the right to exclude others, can be expected to receive greater protection.[49]

The public interest in safety tends to be viewed as a paramount concern affecting the general community, thereby justifying extensive regulation. Interests concerned primarily with the profit potential of the property are not likely to be classified as takings unless the regulation also impairs the potential use of the entire property. And, regulations that impose disproportionate burdens on use, while only dubiously connected to their avowed purposes, expose the government to damage claims in inverse condemnation.[50]

III. APPLICATION OF TAKINGS AND DUE PROCESS ANALYSIS TO RESPONSE ACTIONS UNDER CERCLA

Under the Comprehensive Environmental Response, Compensation and Liability Act[51] (CERCLA), the Environmental Protection Agency (EPA) has full power to condemn any property or interest necessary for a remedial action. CERCLA also provides that when EPA has a reasonable basis for believing that a site is contaminated, it may enter the property "to determine the need for

46. Peter W. Salsich, Jr., *Life After the Takings Trilogy - A Hierarchy of Property Interests?*, 19 STETSON L. REV. 795 (1990).

47. *Id.* at 810.

48. *See* Bosselman et al., *supra* note 6.

49. *Id.*

50. Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161 (1990) (denial of discharge permit for limestone mining constituted taking and entitled landowner to damages at full fair market value); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990) (denial of permit to fill wetlands by Army Corp of Engineers constituted taking and entitled landowner to $2,658,000 in damages).

51. 42 U.S.C. §§ 9601- 9675 (1988 & Supp. II 1990).

response or the appropriate response or to effectuate a response action."[52] The mere existence of such legislative authorization does not exempt the agency from liability for takings.

A. Nature and Extent of Governmental Action

In *Hendler v. United States*,[53] the plaintiffs owned property in Riverside County, California, "located near the Stringfellow Acid Pits, a toxic waste disposal site."[54] Federal and state studies determined that hazardous substances dumped at the site "had been released into the environment and that a plume of groundwater contaminated with these hazardous substances was threatening to enter the Chino III Groundwater Basin, a major source of drinking and agricultural water."[55] EPA issued an administrative order requiring the plaintiff to provide access for testing, and to contain and terminate the release of pollutants and contaminants.[56]

On summary judgment, the court found "no basis in fact to support a taking by the mere issuance of [an] EPA order."[57] Upon consideration of whether EPA's installation of monitoring and extracting wells and related testing and data gathering constituted a permanent occupation of property, the court determined the matter inappropriate for summary judgment.[58] The court left for factual determination the extent of economic impact, the extent of interference with investment-backed expectations, and the character of the governmental action inquiries established by *Penn Central*.[59] The court rejected the government's blanket contention that a temporary intrusion on private property, undertaken to counter a serious threat to public health or safety, does not give rise to a taking.[60]

The temporary nature of the occupation occasioned the application of an exception to the rule that physical invasions are considered *per se* takings.[61] This exception, contained in a footnote in *Loretto v. Teleprompter Manhattan CATV Corp.*,[62] states that limitations upon property use caused by temporary invasions are subject

52. *Id.* § 9604(e)(3)(D).
53. 11 Cl. Ct. 91 (1986).
54. *Id.* at 93.
55. *Id.*
56. *Id.*
57. *Id.* at 96.
58. *Id.* at 96-98.
59. *Id.* at 95 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).
60. *Id.* at 98.
61. *Id.* at 96-97.
62. 458 U.S. 419, 435 n.12 (quoting Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74 (1980)); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

to a complex balancing process to determine whether they are takings. The *Hendler* court also stated that it would evaluate the character and duration of EPA's activities, the degree to which EPA interfered with the plaintiff's property, and "how the EPA actions have affected the potential or expected uses or worked a diminution in the value of th[e] property."[63] This holding contrasts with that of *First English Evangelical Lutheran Church v. County of Los Angeles*, which held that virtually all physical invasions are deemed takings and that temporary takings are subject to a *per se* takings test.[64] However, it indicated a greater reluctance to find a taking in cases involving public health and safety issues.

B. Due Process Protection: Nature of the Property Interest

A takings analysis must examine both the government's action and the property at stake. A recent case which addressed the kind of property interest that will trigger due process protection was *Reardon v. United States*.[65] In 1979, the Reardons "purchased a 16-acre parcel in Norwood, Massachusetts, adjacent to an electric equipment manufacturing plant site known as the 'Grant Gear' site."[66] EPA later authorized cleanup of contaminated areas on the site after discovering high levels of polychlorinated biphenyls and thereupon filed a notice of lien under CERCLA.[67] The lien was for

63. 11 Cl. Ct. at 97.
64. 482 U.S. 304 (1987).
65. 947 F.2d 1509 (1st Cir. 1991).
66. *Id.* at 1510-11.
67. *Id.* at 1511. The notice of lien was filed pursuant to 42 U.S.C. § 9607(1), which states:

> (1) Federal Lien. (1) In general. All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a)) shall constitute a lien in favor of the United States upon all real property and rights to such property which–
>
> (A) belong to such person: and
>
> (B) are subject to or affected by a removal or remedial action.
>
> (2) Duration. The lien imposed by this subsection shall arise at the later of the following:
>
> (A) The time costs are first incurred by the United States with respect to a response action under this Act.
>
> (B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.
>
> Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 113 [42 USCS § 9613].
>
> (3) Notice and validity. The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in

an unspecified amount as it secured payment of "'all costs and damages covered by' 42 U.S.C §9607(l) for which the Reardons were liable."[68] Notice of the filing was given after the fact. EPA also informed the Reardons after the fact that they could settle EPA's claims against them for $336,709.[69] Settling the claims would not limit their potential liability, however.[70]

The imposition of the lien without a hearing violated the due process clause of the Fifth Amendment by failing to provide for notice and a predeprivation hearing.[71] The First Circuit Court followed the recent precedent of *Connecticut v. Doehr*,[72] in which a Connecticut attachment statute was invalidated. In *Reardon*, as in *Doehr*, the affected private interest was deemed "significant," notwithstanding its temporary nature and the fact that it did not deprive the landowner of possession and use of his property.[73] The effects of the lien were the focus of the inquiry. "[C]louding title, impairing the ability to alienate the property, tainting credit ratings, and reducing the chance of obtaining any further mortgage" were deemed significant.[74] The CERCLA lien provisions were invalidated for not providing, at the very least, notice and a pre-deprivation hearing to a property owner who claims that the property to be encumbered is not subject to or affected by remedial action.[75]

In the context of prejudgment attachments not involving the exercise of the power of eminent domain, the *Doehr* Court applied a three-fold analysis: (1) balancing the private interest that will be

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which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under State law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. For purposes of this subsection, the terms under section 6323(h) of the Internal Revenue Code of 1954 [26 USCS § 6323(h)].

(4) Action in rem. The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this subsection shall affect the right of the United States bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section.

68. 947 F.2d at 1511.
69. *Id.*
70. *Id.*
71. *Id.* at 1523-24.
72. 111 S. Ct. 2105 (1991).
73. Reardon v. United States, 947 F.2d 1509, 1518-19 (1st Cir. 1991).
74. *Id.* at 1518.
75. *Id.* at 1518-19.

affected by the official action; (2) consideration of the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[76]

C. *The Impact of Site Evaluations*

In *Environmental Waste Control, Inc., v. Agency for Toxic Substances and Disease Registry*,[77] the owners and operators of a hazardous waste disposal facility brought suit against the Agency for Toxic Substances and Disease Registry (Agency), seeking judicial review of the Agency's health assessment and its "refusal to revise or make additions to [its] report in light of data and materials submitted by [owners and operators]."[78] The court held that harm to business reputation, standing alone, and the decrease in value of the business property due to tentative conclusions and recommendations in the health assessment were insufficient to show a cognizable deprivation.[79] Accordingly, the assessment did not effect a taking.[80]

IV. JUST COMPENSATION FOR TAKING OF CONTAMINATED PROPERTIES

In determining compensation for a taking, the fundamental inquiry is "what has the owner lost?"[81] Just compensation is not limited to any set formula. The initial inquiry, however, is the fair market value on the date of acquisition,[82] which equates to the reasonable price that a willing seller would demand and a willing buyer would pay for the property.[83] Property is to be viewed in its present condition and use, and its reasonable use in the future.[84] The owner is not entitled to recover any increase or enhancement in the value of his land that is caused by the very improvement for which the land is acquired.[85]

76. Connecticut v. Doehr, 111 S. Ct. 2105, 2112 (1991).
77. 763 F. Supp. 1576 (N.D. Ga. 1991).
78. *Id.* at 1578-79.
79. *Id.* at 1582-83.
80. *Id.* at 1583.
81. Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910).
82. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984)
83. United States v. 429.59 Acres of Land, 612 F.2d 459, 462 (9th Cir. 1980).
84. Board of County Comm'rs v. Nobel, 184 P.2d 142, 143 (Colo. 1947).
85. Williams v. City of Denver, 363 P.2d 171 (Colo. 1961).

A. Cases Involving Ad Valorem Tax Assessments

Cases that have addressed the valuation of contaminated properties, primarily in the context of *ad valorem* tax assessments, have recognized the shortcomings of traditional appraisal formulae and are affected by the lack of market data from which to build a coherent body of empirical support for their conclusions. There are three generally accepted methods of valuation: cost, income and market data.[86] The paucity of market data necessary for the proper application of each method has resulted in approaches that emphasize the particular facts and equitable solutions to the problem.

Cases addressing *ad valorem* assessments are not necessarily a reliable guide to the approach that would be taken in a just compensation analysis because the fiscal impact of reduced assessments can have a restraining effect on the outcome in such cases. The requirement of just compensation is not rigidly bound to fair market value. The dilemma faced by the courts has been whether to view a contaminated site as being less valuable by an amount equivalent to the cost to clean it up (which can exceed the value it would have if uncontaminated, thus giving the property a negative value in its contaminated state), or to give no reduction for contamination on the theory that an owner should not be permitted to escape taxation by a self-inflicted hardship.[87] A middle ground between these extremes has begun to emerge with promising results.

When an owner loses the right to the productive use of his or her property because of an occupation by EPA, the loss of use and an assignment of a value to that loss is the issue. If the property is contaminated and would not have willing purchasers, a minimal value appears inevitable. The fact that the property may not be inhabitable is not dispositive, however, because it may have significant value in use as a going concern. The clean up cost may be an amortizable expense, making value to the owner more relevant than value in exchange.

The case that has most thoroughly addressed the issue is *Inmar Associates v. Borough of Carlstadt.*[88] The case involved two independent assessment appeals of industrial properties burdened by environmental contamination.[89] The court was unwilling to

86. AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE 70-72 (9th ed. 1987).

87. Robert A. Gladstone, *Contaminated Property: A Valuation Perspective*, BUREAU OF NATIONAL AFFAIRS, TOXICS LAW REPORTER, Nov. 27, 1991, at 798-802; *see also* Department of Health v. Hecla Mining Co., 781 P.2d 122 (Colo. Ct. App. 1989).

88. 549 A.2d 38 (N.J. 1988).

89. *Id.* at 39.

deduct the cost of curing contamination as the proper method of valuation, reasoning that to do so would "reflect only the cost accounting practices of the current owners," and that the owners' ability to borrow money to cure the contamination is a cost of doing business, not a measure of inherent value.[90] This decision reflects the appraisal principle that an industrial property has an identifiable "value in use" separate from its value in exchange.[91] A key observation in the case was that "when the governmental restraints are temporary or subject to cure, the transitory absence of the market does not eliminate value."[92] Another leading case, *Bass v. Tax Comm'n of the City of New York*,[93] rejected the dollar-for-dollar reduction approach when estimating value for a property burdened by significant asbestos removal expense obligations but recognized that the increased operating expenses must be considered.[94]

B. Appraisal Methodology

Select appraisal literature suggests that certain elements should be factored into the valuation estimate on a case by case basis.[95] These elements are:

> (a) quantify the cost of the cleanup program and seek a rational method of amortizing the costs over the useful life of the property;
>
> (b) the capitalization rate for the property can be adjusted to suit the circumstances at hand;
>
> (c) when estimating value in use, the equity yield rate is the primary component of the capitalization rate and should have an additional risk factor for illiquidity if the extent of contamination renders the property unmarketable; and
>
> (d) the presence of toxic contamination may force a change in the property's highest and best use thereby altering the field of comparables to properties with lower value.[96]

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90. *Id.* at 43-44.
91. *Id.* at 44-45.
92. Gladstone, *supra* note 87, at 801.
93. 578 N.Y.S.2d 158 (App. Div.), *app. den.*, 599 N.E.2d 691 (N.Y. 1992).
94. *Id.*
95. *See, e.g.*, Peter J. Patchin, *Valuation of Contaminated Properties*, THE APPRAISAL J., Jan., 1988, at 7; *see also* OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVIRONMENTAL PROTECTION AGENCY, OSWER DIRECTIVE 9355.0-30, (April 22, 1991) (mandating consideration of probable long term uses in risk assessment).
96. *Id.*

V. FUTURE DIRECTIONS IN THE LAW

The American Legislative Exchange Council (ALEC) has proposed a model Private Property Protection Act, which would require compensation for regulatory actions that reduce the value of property by fifty percent or more.[97] The only exception would be for cases in which the purposes of the regulation are to prevent uses "noxious in fact or demonstrable harm to the health and safety of the public."[98]

The ALEC solution is insufficient to encompass the issues presented in CERCLA response action cases because physical ejectment from property has been held to be a segmentable right, as has free alienability, neither of which is quantifiable in percentage terms. Also, the exception for remediation of activities "noxious in fact" would not adequately take into account the need for preliminary investigations and temporary physical occupation for purposes of monitoring. Whether the harm is "demonstrable" depends on preliminary inquiries that require at least temporary physical occupation.

A. Administrative Practice Reform

Federal agencies are subject to Executive Order 12630, entitled "Governmental Actions and Interference with Constitutionally Protected Property Rights."[99] The Order requires federal departments and agencies to scrutinize their formulation and implementation of any policy or action found to have any of a broad range of "takings implications" according to a rigorous substantive due process test.[100] The Order requires the agency to ensure that actions asserted for the purpose of protecting public health and safety meet the following criteria: (1) they are undertaken only in response to real and substantial threats to public health and safety; (2) they are designed to advance significantly their health and safety purposes; and (3) they are no greater than what is necessary to achieve their health and safety purposes.[101]

The burdens imposed on agencies by this Order have been criticized as being disproportionate to the takings threat presented by environmental health and safety regulations.[102] It would

97. AMERICAN LEGISLATIVE EXCHANGE COUNCIL, PRIVATE PROPERTY PROTECTION ACT, 1991-1992 SOURCEBOOK 393-96.

98. *Id.*

99. Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 18, 1988).

100. *Id.*

101. *Id.*

102. Kirsten Engel, *Taking Risks: Executive Order 12,630 and Environmental Health and Safety Regulations*, 14 VT. L. REV. 213, 214 (1989).

appear, however, that the burdens of litigation can be avoided only by thorough factual inquiries at the planning stage of the process. The necessary rigor and discipline of this process is stimulated and enforced by a takings impact statement required by Executive Order 12630.[103] The less desirable alternative is the delayed evidentiary inquiry permitted by *Hendler*.[104]

B. *A Critique of* Lucas

In *Lucas*, Justice Scalia disparages the vague justification that the property owner's desires violate the "public interest."[105] "Background principles" of nuisance law are moved to the foreground as the only justification sufficiently concrete to avoid the subjective mischief that stems from balancing benefits and harm. The doctrinal inertia inherent in this test is perhaps overcome by its second prong, by which the social value of the activity and its suitability to the locality are to be considered. Judicial balancing tests should continue to subject physical intrusions to rigorous tests. But the remediation of public health hazards, which may involve either innovative response methods or new definitions of hazard, should not be hamstrung by a historical takings analysis when current needs may require a rethinking of traditional assumptions. There is no "right" to pollute, although "background principles" of property law might lead one to the opposite conclusion.[106]

VI. CONCLUSION

The number of environmental cleanup actions will increase as public demands for environmental quality translate into action on a wider scale. Property owners who are subjected to governmental intrusion in the name of public safety will expect the law to define the limits of permissible intrusion and the extent of their rights to compensation if those limits are exceeded.

Given the sacrosanct nature of the right to be free from physical deprivation of property by the sovereign, the *Hendler* case cannot be viewed as departure from existing principles. But the personal right of access by a single owner should not outweigh the public interest in the potability of an entire aquifer. Although

103. Section 5 of Executive Order 12,630 requires each Executive department and agency to identify the takings implications of proposed regulatory actions and address the merits of those actions.

104. Hendler v. United States, 11 Cl. Ct. 91 (1986).

105. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992).

106. *See* Old Dominion Land Co. v Warwick County, 200 S.E. 619 (Va. 1939).

Hendler articulates the correct principle of law, it is difficult to foresee a result favorable to the plaintiff on its facts. And it does not appear to be a case which cries out for corrective legislation.

Whether a compensable taking has occurred requires an inquiry not only into the character of the government action but also into the nature of the property right. The continuing explication of "segmented" and "aggregate" property interests is merely the result of a fundamental open-endedness which should characterize the property rights aspect of the inquiry. Which rights deserve greater protection cannot be stated in the abstract and may be defined only with each new fact situation. Foreseeable problem areas include:

> (a) questionable objectives, where the governmental action takes on an unwholesome character;[107]
>
> (b) site characterizations ostensibly in the course of legitimate studies, where the stigma attached to the property in question is allowed to languish for an unreasonable length of time, potentially giving rise to damage for delay;[108]
>
> (c) use limitations which are unduly broad and are therefore not substantially related to legitimate objectives, thus running afoul of *Nollan's* nexus test;
>
> (d) site characterizations based on information that the agency knew or should have known was inaccurate, and that causes a loss in value from the cloud on the market thereby created;
>
> (e) cases where historically justified or investment-backed expectations are enhanced by affirmative government action on which the property owner detrimentally relies, only to be defeated by the subsequent response action.

The *Lucas* case recalibrates the limits of governmental action and provides a limitation against takings by surprise. But just compensation from the government is only one of several potential remedies. Prompt and effective remedies for loss of use also must be available for affected owners with private nuisance and damage claims. The ease with which the government can perfect its lien, illustrated in *Reardon*, should be paralleled by comparable remedies for private parties.

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107. This species of activity was observed in Earth Management, Inc. v. Heard County, 283 S.E.2d 455 (Ga. 1981).

108. United States v. Charles George Trucking Co., 682 F. Supp. 1260 (D. Mass. 1988); *see also* Standard Indus. v. Department of Transp., 454 N.W.2d 417 (Mich. Ct. App. 1990).