

Environmental Contamination, Stigma, and other Detrimental Conditions in Eminent Domain



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Contamination Creates Valuation Challenges



Environmental Issues in Appraisal – Including Eminent Domain

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True or False:

If the type and extent of contamination is the same on two properties, the impact to market value will also be the same.

How is the Property Burdened by the Contamination?

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A contaminated property will frequently impose burdens on the owner that do not exist for an uncontaminated property.

Burdens are three general categories:

1. Cost to cure
2. Use impacts (potential delay in realizing highest and best use)
3. Risk

Will the same contamination create the same burdens?

How can you determine if a property is contaminated?

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1. Review an environmental report
2. Check data on public databases (Geotracker; DTSC)
3. Look for comments from various information sources (Costar; AIR)
4. Interview people who know the property
5. Visit the property and look for indications of possible contamination



Once you know environmental issues affect the property, how do you get more information?

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1. Remember: If you are not the environmental expert, you are not the environmental expert
2. If the property is the subject property, notify your client about a need for an environmental expert
3. When the expert has rendered an opinion, carefully consider the conclusions
4. If the property is a comparable, interview parties to the sale

For a contaminated property, what are the possible remediation processes?

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1. Aeration
2. Bioremediation
3. Capping
4. Encapsulation
5. Enclosure
6. Ex situ (off-site transfer)
7. In situ
8. Monitoring
9. Operations and maintenance
10. Reverse osmosis
11. Soil excavation
12. Vacuum extraction

When the problem is identified, is the solution always the same?

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1. Level of required remediation often influenced by anticipated future use of property
2. Clean-up standards are less rigorous for many industrial uses versus proposed mixed-use with residential
3. For the subject: How would the market respond to get highest and best use? (Remember the project influence rule.)
4. For a comparable: What did the buyer and seller actually do during the transaction? (Was the price adjusted?)
5. How does stigma factor into the process?

*Investigation of the impact may include a case study analysis
(Refer to Advisory Opinion 9 in USPAP)*

The Porter Ranch Gas Leak: Timeline of Events Surrounding the SS-25 Well Blowout

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10/1/1953 - Standard Sesnon (SS-25) Well drilling begins

2/25/1954 - SS-25 completed as oil well

6/6/1973 - SS-25 converted to gas storage

- **Annual temperature and noise logs conducted**

11/2014 - SoCalGas filed a General Rate Case requesting funding for Storage Integrity Management Plan Program (SIMP) with CPUC

10/23/2015 - Initial Leak noted near SS25 wellhead

- **Initial leak growing to a larger leak; and then transitioning to a full-fledged blow out**

10/25/2015 - Beginning of the 7 Surface well control attempts by SoCalGas 12/4/2015 - Relief well #1 Porter 39A (P 39A) spud. This relief well was eventually used to kill the SS-25 Well.

1/6/2016 - Governor's Emergency Proclamation

2/5/2016 - DOGGR's Emergency Regulations mirrored the Governor's Proclamation

2/12/2016 - SS-25 controlled from P 39A

Porter Ranch Timeline of Events (Cont'd)

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2/12/2016 - SS-25 controlled from P 39A

2/13 - 14/2016 - SS-25 cemented

2/15 - 18/2016 - SS-25 confirmed sealed

2/1 - 2/2017 - Aliso Canyon Safety Review Workshop Hearings in Woodland Hills, CA

8/9/2017 - SoCalGas submitted a workplan to DOGGR, pursuant to Order 1118, for identifying and assessing the potential geologic, seismologic, and geo-mechanical hazards at Aliso Canyon Storage Field

DOGGR Commenced Safety Review (Well diagnostic and integrity testing)

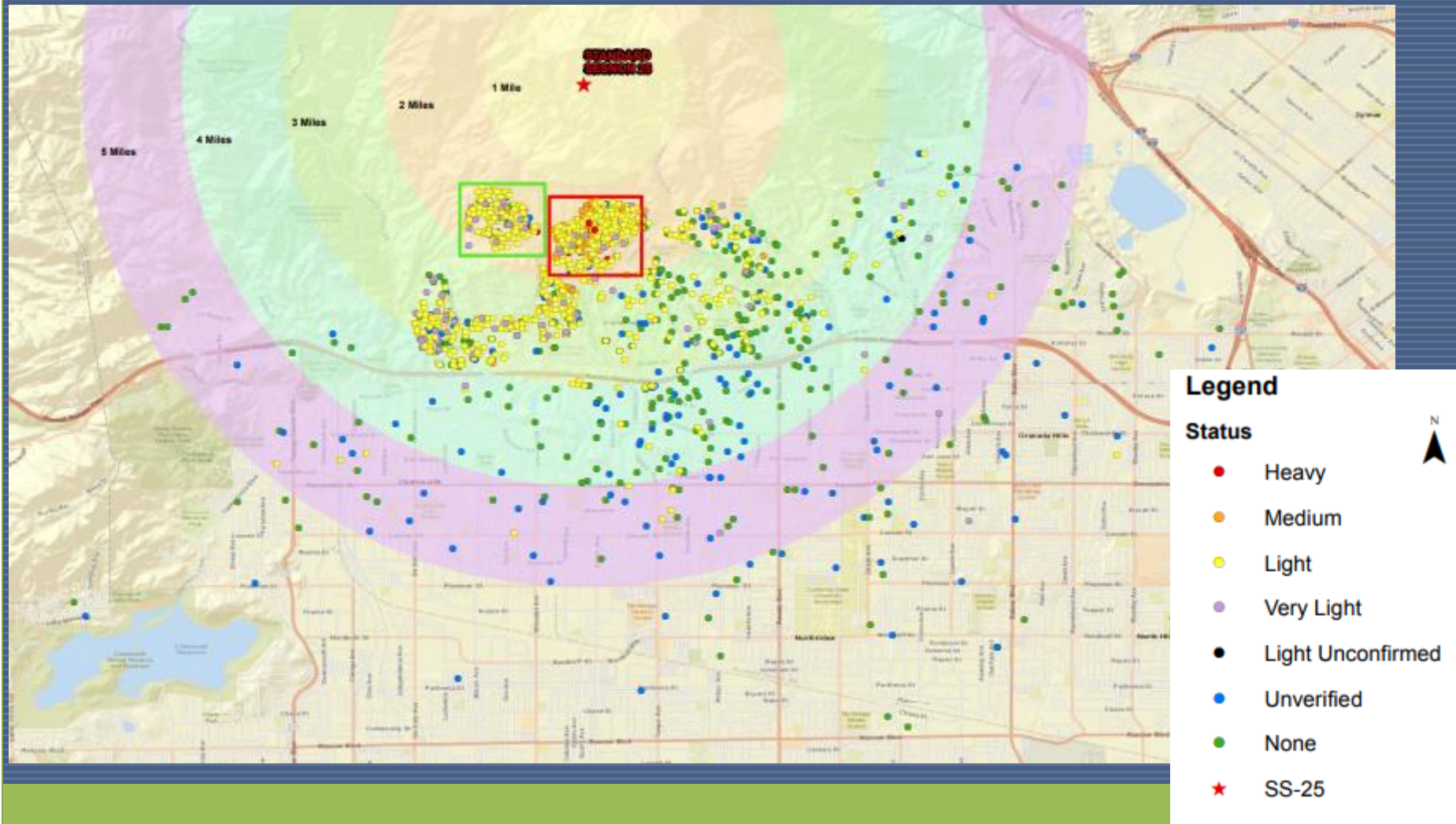
- 1. 65 wells passed Battery 1 & 2 testing and were approved by DOGGR**
- 2. 1 more well is awaiting battery 2 test before going into service**
- 3. 4 Wells are plugged & abandoned (P&A) including SS-25**
- 1. 44 Wells are permanently isolated and planned to be plugged and abandoned (P&A)**

DOGGR adopted and enforced New California Underground Gas Storage Regulations

3/20/2019 - SCG completed and submitted study of the geotechnical hazards present at the Aliso Canyon Storage Field to quantify the level of each hazard and determine the impacts that such events might have on the facility.

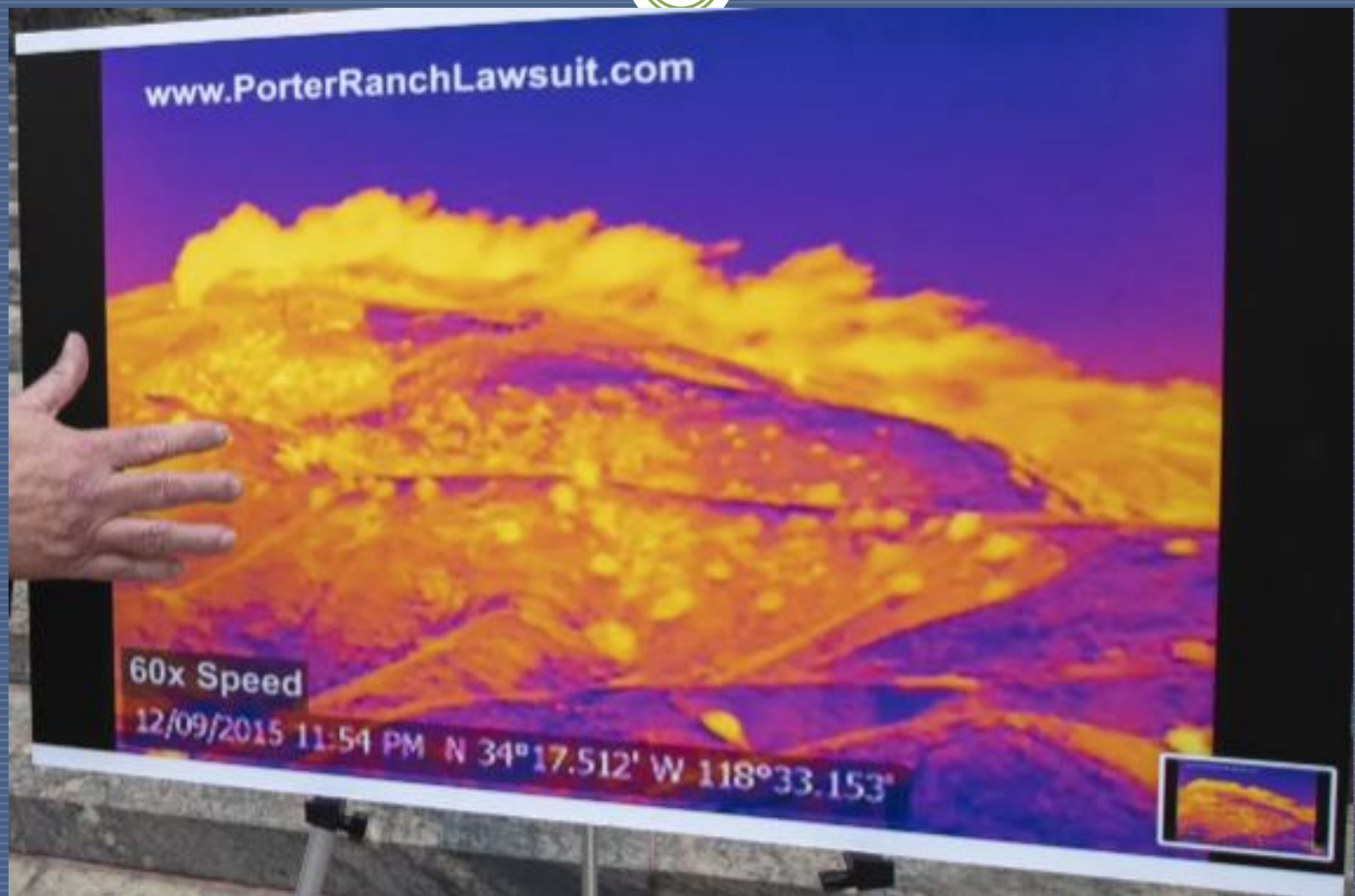
What Properties Were Affected?

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The Lawsuit

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The Protests

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October 23, 2017

The “After” Condition

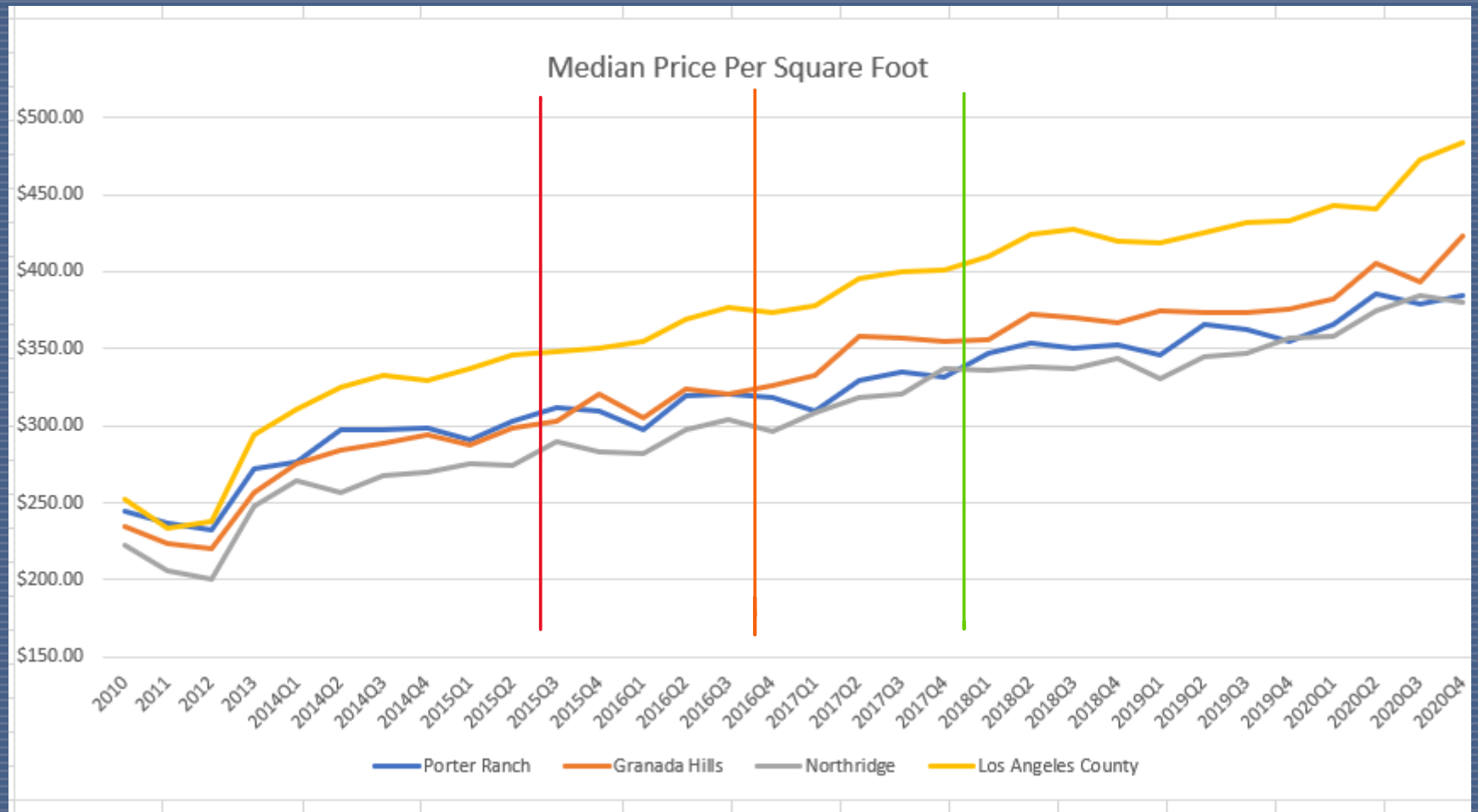
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February 2019

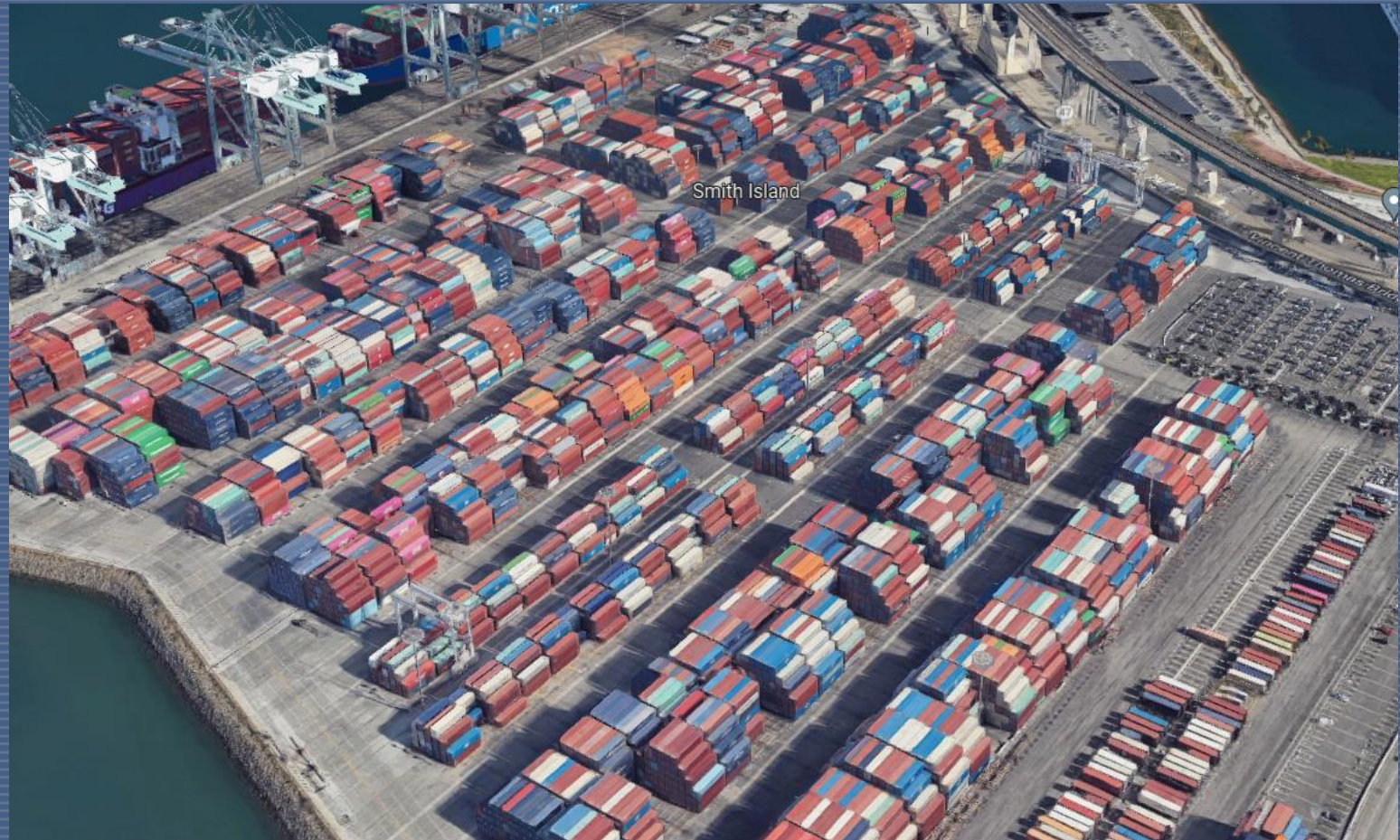
After the remediation has been completed, does value rebound?

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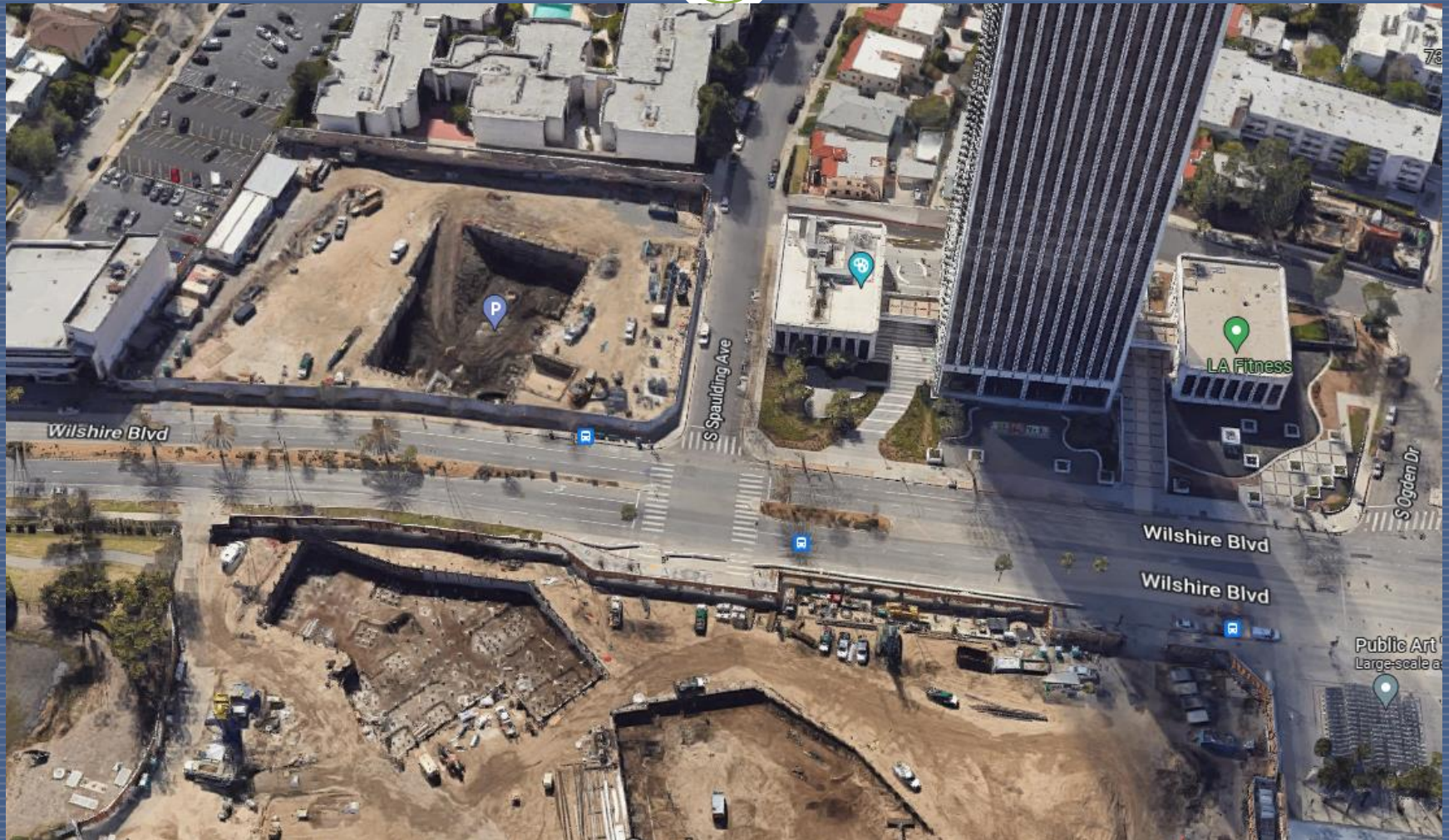


What is the impact to value if this property is contaminated but it is encapsulated?

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Environmental Issues in Appraisal – Including Eminent Domain

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True or False:

If the type and extent of contamination is the same on two properties, the impact to market value will also be the same.

False: The (1) cost (type of required remediation), (2) use (impacts incurred while the site is contaminated), and (3) risks of ownership will vary depending on the type of property and the highest and best use both as impaired and as if clean.

Case Law Examples

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- Survey of case law regarding environmental contamination, stigma, and detrimental condition issues.
- Courts rarely discuss these issues in-depth.
- Precedent versus Dicta?

Redevelopment Agency v. Thifty Oil Co. (1992) 4 Cal.App.4th 469 - Contaminated Property

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- Eminent domain case concerning the condemnation of contaminated land that had been used as a gasoline service station.
- Appraisal experts disagreed regarding the property's value, the cost of remediation, and other issues.
- Each used the same method to reach their valuation opinion: land value less the cost of remediation.

Emeryville Redevelopment Agency v. Harcros Pigments 101 Cal.App.4th1083 – Contaminated Property

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- A redevelopment agency brought eminent domain proceedings to condemn a former pesticide and iron oxide pigments manufacturing operation.
- The soil on the property was found to contain significant levels of contaminants including lead and arsenic.
- Agency also brought separate CERCLA lawsuit to recover cleanup costs



Block v. Golden Eagle Ins. Corp, 121 Cal.App.4th 186 – Contaminated Property and Insurance

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DUTY TO



DEFEND

- Redevelopment agency of the City of Long Beach sought to acquire Plaintiff's property by eminent domain.
- The agency offered \$92,000 as just compensation, which reflected an appraised value of \$159,000 reduced by \$67,250, which was the estimated cost to remediate the environmental problems associated with the property. The agency eventually increased its offer to \$126,000
- Property owner believed that her insurers had a duty to defend because the agency sought to reduce the fair market value of the property by the estimated cost of remediating the environmental condition of the property. The insurers refused to defend Plaintiff
- The court held that the insurers had no duty to defend

Firestone Tire & Rubber Co. v. County of Monterey, 223 Cal.App.3d 382 – Contaminated Property and Tax Assessment

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- County's assessor valued property owner's manufacturing plant based on its use as an operating industrial facility free of contamination.
- The Board found that the assessor had no actual or constructive notice that the plant would be closing, and rejected the argument that the cleanup costs could provide basis for reducing its assessment.
- The Court held that the assessor did not know and could not have known that the plant was contaminated on the date of valuation, therefore no reduction in Valuation



Mola Dev. Corp. v. Orange County Assessment Appeals Bd. 80 Cal.App.4th 309

Contaminated Property and Tax Assessment

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- Issue: Did the assessment appeals board error in its methodology of determining the fair market value of the property if unpolluted, then deducting those of cleanup, but next adding back in expected contributions toward the cleanup from two former owners?
- The court held that the board used an invalid methodology. The proper assessed valuation was the price at which a willing buyer and a willing seller would consummate an open market sale of the property considering the polluted condition of the property.
- Value is what it would cost on the open market, independent of what the taxpayer may be able to recover from others by way of contribution for cleanup costs

Reed v. King, 145 Cal.App.3d 261

Murder!

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- Real estate agents and the seller of a home did not mention to buyer that a woman and her 4 children were murdered there 10 years earlier. Buyer paid \$76,000, but the house was only worth \$65,000 because of its past.
- Court holds that the fact of the murders may have had a quantifiable effect on the market value of the real estate, which plaintiff is entitled to prove



Bartleson v. United States, 96 F.3d 1270 – Adjacent Military Base and Artillery Shelling

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- Property owners held land adjacent to a military reservation, and filed a claim under the Federal Tort Claims Act against the US for nuisance arising out of a number of artillery shells landing on their property
 - The main injury alleged by the plaintiffs was the diminution in their property values due to the stigma caused by the past shelling of their properties and the uncertainty regarding future shelling of their properties and the possible presence of unexploded shells on the properties



People ex rel. Dept. Pub. Wks. v. Volunteers, 21 Cal.App.3d 111 - Freeway Noise

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- Action to condemn a narrow strip of a single parcel of defendant's property in connection with building a new freeway.
- Court held that where property is taken, increased traffic noise could be a proper consideration for assessing the diminution of the value of the remaining property.

Rover Pipeline, LLC v. 1.23 Acres of Land, 2018 U.S. Dist LEXIS 112211 – Stigma from Pipeline

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- Taking for a Pipeline
- Property owner based his appraisals in part on the potential impact radius (PIR)/stigma theory. This theory relies on the Pipeline and Hazardous Safety Materials Administration's definition of PIR, which it defines as "the radius of the circle within which the potential failure of a pipeline could have significant impact on people or property."



- Expert estimated that the land within the radius is devalued anywhere from 25% to 40%, with the land outside of the PIR losing 10% of its value.
- Court held that comparable sales are only one method of estimating property values. Other methods, like using the PIR/stigma theory, may be used when no comparable land sales exists.
- But what about the preexisting pipelines?

Eastern Municipal Water Dist. V. Superior Court 157 Cal.App.4th 1245 – Stigma from Pipeline

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- Eminent domain to acquire an easement for an underground pipeline
- Aboveground signs indicating that the pipeline carried “non-potable water.”
- Was there a stigma severance damage?



CACI 3505

Information Discovered after Date of Valuation

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- CACI 3505- In determining fair market value you must consider any condition that affects the value of the property if the condition existed on [the date of value] but was discovered after that date.
- “[W]hile evidence of a change in the condition of the property after the date of valuation may not be admissible..., information about the condition of the property on the date of valuation which happens to be discovered after that date must be considered. In effect, the parties are presumed to know all relevant information available at the time of trial, even if it could not reasonably have been discovered until after the date of valuation.” (San Diego Water Authority v. Mireiter (1993) 18 Cal.App.4th 1808, 1814)

CACI 3505 (cont)

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- Does 3505 apply to your Comparable Sales?
- What happens if contamination is discovered on your comparable sale after the sale is closed?



Project Effect and Environmental Contamination

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- **Project Effect** – the project effect doctrine, found at CCP § 1263.330, states:

The fair market value of the property taken shall not include any increase or decrease in the value of the property that is attributable to any of the following:

- (a) The project for which the property is taken.
- (b) The eminent domain proceeding in which the property is taken.
- (c) Any preliminary actions of the plaintiff relating to the taking of the property.



Procedural Tactics for Dealing with Contamination in Valuation

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1. Bifurcation of Compensation Trial
2. Legal Issues Motions



Case Study: Metro v. Butterfield

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- Case Study: Los Angeles County Metropolitan Transportation Authority (“Metro”) v. Butterfield Trails Limited Partnership, et al. (LASC Case No. BC551295)
- Eminent Domain action by Metro
- Property: 3 acres of undeveloped land in the Arts District of Los Angeles
- Project: Maintenance of Way Facility in support of the Purple Line Extension Project
- Contaminated Property: formerly used as a paint factory, had significant shallow soil, deep soil, and groundwater contamination, as well as other detrimental conditions such as the presence of underground storage tanks, and buildings containing lead and asbestos.



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- A word cloud of environmental and chemical terms. The most prominent words are 'toxic' and 'chemical' in large, bold, dark blue letters. Other significant words include 'pollution', 'environmental', 'waste', 'industry', 'substance', 'danger', 'chemical', and 'environment'. Smaller words scattered around include 'polluted', 'garbage', 'energy', 'hazardous', 'smoke', 'science', 'people', 'power', 'design', 'warning', 'poison', 'unhealthy', 'toxicity', 'risk', 'chemical', 'medicine', 'factory', 'contaminated', 'equipment', 'explosion', 'ecology', 'research', 'powder', 'laboratory', 'tube', 'nobody', 'plastic', 'metal', 'explosion', 'health', 'dirt', 'color', 'smell', 'taste', 'touch', 'pipe', 'spring', 'dump', 'plastic', 'metal', 'explosion', 'health', 'dirt', 'color', 'smell', 'taste', 'touch', 'pipe', 'spring', 'dump'. The words are arranged in a circular pattern, with 'toxic' and 'chemical' at the top and 'pollution' and 'environmental' at the bottom. The background is a light blue gradient.

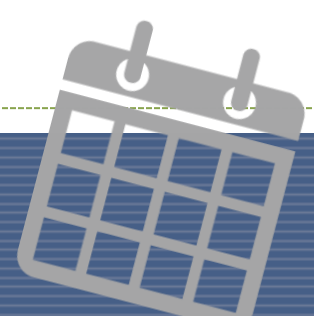
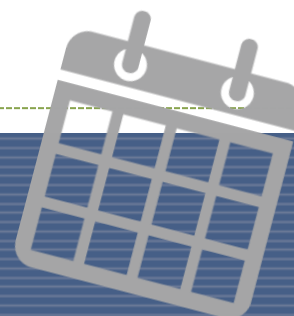
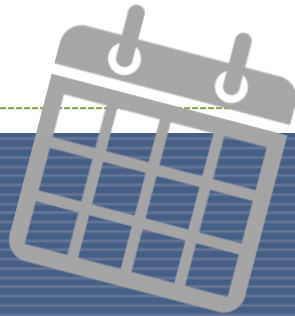
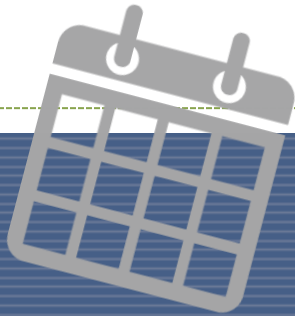
Issues In The Litigation

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- 1. Timing of Acquisition, Possession, and Cleanup
- 2. Valuation of Contaminated Property
- 3. Level of Cleanup
- 4. Cleanup Methods and Cost
- 5. Experts
- 6. Project Effect
- 7. Litigation Procedures and Strategies



Construction & Possession Schedule



- DTSC had jurisdiction over the property and required that certain remediation be performed before it would allow the property to be developed
- Owner was actively fighting with DTSC over the proper level of cleanup; filed a writ action against DTSC
- Metro needed to proceed with its Project; Metro also needed to acquire a small adjacent piece of land and was negotiating a “land swap” with that owner in order to avoid litigation.
- Metro needed not only early possession for the Project, but also title of the Property to allow for the land swap
- But to avoid further delays to development, early possession of the property was effectively useless if Metro did not also control the ongoing cleanup of the property

Construction & Possession Schedule

continued

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- In return for possession / title of the property and to maintain its construction schedule, Metro agreed to take over responsibility for the cleanup of the property, while preserving its right to seek an offset to the purchase price for reimbursement of its cost to clean up the site
- This allowed Metro to begin remediation work at the property, pursuant to a Voluntary Cleanup Agreement with DTSC, so that it could prepare the property for its Project without further delays and ultimately transfer a portion of the site to the adjacent property owner

Litigation Procedural Tools

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- Legal Issues Motion
 - Determine appropriate valuation method in light of contamination
 - ✦ reduction in value based on dollar-for-dollar cleanup costs
 - ✦ Legal ruling allows all experts to apply court's preferred valuation method
- Bifurcate Issues for Trial
 - First phase: determine FMV of property as if it were not contaminated
 - Second phase: determine cost of remediation
 - ✦ Subtract cost from phase one value

Highest and Best Use

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- The Highest and Best Use of the Property
 - Not only relevant to determination of FMV in phase one
 - Also relevant to determination of appropriate level of cleanup in phase two

Substantive Issues re Accounting for Contamination in Valuation

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Calculating Remediation Costs (dollar-for-dollar reduction)



- The Disputes:
 - Commercial or Residential remediation necessary?
 - What remediation activities can be included? Groundwater, UST removal, Asbestos?
 - What remediation methods were reasonable?
 - What amount of project management was reasonable? Is there a difference between the oversight costs on a public entity project versus a private project?
 - What hourly rates were reasonable? Is there a difference between the rates on a public entity project versus a private project? How to account for quality of vendors on the rate selection issue.

Substantive Issues re Accounting for Contamination in Valuation

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Commercial or Residential Remediation Needed?

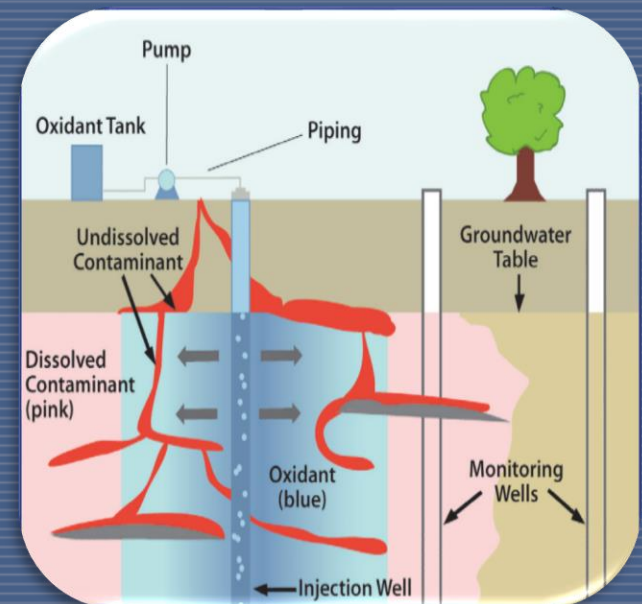
- Metro's position: because the highest and best use of the property was a mixed-use residential/commercial development (i.e. a use that included a residential component), the property needed to be cleaned up to a standard allowing for a residential property use, which is a more extensive and costly cleanup than that required for a strictly commercial/industrial property use.
- Owner: disagreed and argued that since there would only be commercial uses on the *first* floor of the development, only a commercial level cleanup was needed.

Substantive Issues re Accounting for Contamination in Valuation

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Which Conditions Needing Remediation Should Be Included In Reduction?

- **Groundwater** –Metro included the cost of remediation of the groundwater contamination, whereas the Owner did not.
- Metro took the position that DTSC would require the owner of the property to remediate the groundwater contamination, and therefore, those substantial costs needed to be included in the offset.
- The Owner took the position that groundwater remediation was unnecessary because (1) the groundwater contamination was not a threat to human health, (2) groundwater remediation is unreasonably costly, and would not be required of a private party (3) DTSC was legally incorrect to require active remediation of groundwater due to the Low Threat Closure Policy.

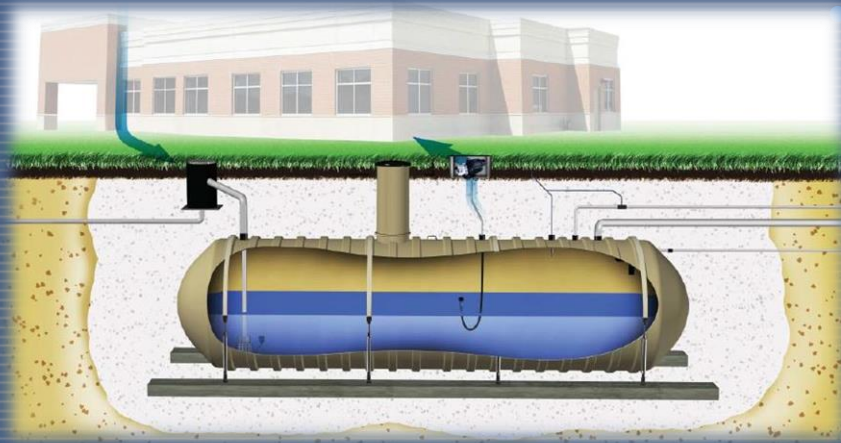


Substantive Issues re Accounting for Contamination in Valuation

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Which Conditions Needing Remediation Should Be Included In Reduction?

- **Underground Storage Tanks (USTs)** – There were at least 16 USTs on the property when Metro acquired it. The USTs were on the property for decades, and had been part of an earlier owner's paint manufacturing business.



It's possible to legally abandon USTs in place, underground. A particular procedure must be followed, and the LAFD (oversight/enforcement agency) must document and approve the abandonment. But the more common method for dealing with USTs is to remove them all together.

Substantive Issues re Accounting for Contamination in Valuation

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Which Conditions Needing Remediation Should Be Included In Reduction?

(USTs continued)

- The Owner argued that the USTs on the property had been properly abandoned by the previous owner and therefore didn't need to be removed for environmental reasons (argued Metro removed to accommodate the Project, so not recoverable). Therefore, Metro should not include the cost of UST removal in the overall cost of remediation.
- Metro sought to recover the cost of the UST removal because there was no proof of proper abandonment AND removal would have been necessary to accommodate HBU development.

Substantive Issues re Accounting for Contamination in Valuation

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Which Conditions Needing Remediation Should Be Included In Reduction?



- **Lead and Asbestos** – there were multiple old buildings on the property in poor condition and containing lead and asbestos. These buildings had to be demolished, but because of the lead and asbestos, the demolition work was more costly. As a result, Metro sought to include these abatement costs in the overall remediation costs/offset.

Substantive Issues re Accounting for Contamination in Valuation

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Which Conditions Needing Remediation Should Be Included In Reduction?

(Lead and Asbestos continued)

- The Owner argued that the lead and asbestos abatement should not be included in the overall cost of remediation because lead and asbestos is always found in old buildings, and is common in the Arts District, and is an expected cost of redeveloping property that is not considered a special remediation cost.
- Metro's appraiser opined that although the presence of lead and asbestos may be standard in old buildings, where the abatement costs are very significant, it is no longer assumed that the buyer will bear this cost.

Substantive Issues re Accounting for Contamination in Valuation

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Which Remedial Measures Should Be Used?



- In addition to whether certain conditions needed to be remediated, the parties disagreed over how to remediate those conditions.
- **Groundwater Remediation** – Owner argued that monitored natural attenuation (MNA) should be used to address the groundwater issues. In the event an active remedial measure was required, the Owner argued that some limited soil vapor extraction (SVE) was the appropriate approach.

Substantive Issues re Accounting for Contamination in Valuation

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Which Remedial Measures Should Be Used?

(Groundwater Remediation continued)



- Metro argued that the most effective remedial measure is In Situ Chemical Oxidation (ISCO).
- This method uses injections of chemicals that break down the contamination, and can achieve results more quickly than SVE, and also imposes less of a physical inconvenience on the development of a property

Substantive Issues re Accounting for Contamination in Valuation

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Cost of Remediation

- The Owner argued that the actual costs incurred by Metro were greater than what a private developer would have to spend to get the job done because public entities are less efficient and are required to comply with a number of wage, environmental, diversity and other requirements when awarding bids.
- Metro argued that it was able to get lower hourly rates than private parties due to the size of the RFPs it could issue. Metro also argued that the reasonableness of the rates could not just be decided by the amount of the bid or rate, but also the quality of the contractors used – i.e. if your contractor does it wrong the first time, you'll be doing the work a second time.

Substantive Issues re Accounting for Contamination in Valuation

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Project Effect (continued)

- Owner argued that, but for Metro's taking of the property, DTSC would have approved a more economical remediation plan for the property, and therefore, the majority of the remediation costs sought by Metro as an off-set to the property value should be disregarded.
- The Owner's theory was that DTSC increased its remediation requirements once it found out that Metro wanted to acquire the property, because it expected Metro to cooperate more than the Owner. Owner accused Metro of not pushing back enough against DTSC remediation requirements.
- Metro's position was that DTSC's remediation requirements for the property had been consistent over the years, and didn't change when Metro got involved with the Property.

Battle of the Experts

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- Expert witnesses play an especially important role in eminent domain cases with contaminated properties.
- Success in addressing the issues that arise in this type of litigation largely depends on working with the right expert witnesses.

Battle of the Experts

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- **Environmental Expert** – environmental contamination and remediation is very technical. It's important to work with an expert who has the appropriate technical credentials, who understands the relevant science and technology, and who is effective at explaining complicated scientific and technical issues to lay persons, such as attorneys and members of the jury.
- Additionally, your expert should have practical field experience with environmental contamination, and with oversight agencies.
- May need more than one expert – someone to testify on contamination issues, and someone to address the costs of remediation.

Battle of the Experts

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- **Appraiser** – because the presence of environmental contamination on the property must be accounted for in valuing the property, it's important to offer the expert opinion of an appraiser who can testify to how the value of the property would be affected by the contamination, if at all.
- Give your appraiser plenty of time to evaluate the property. They will likely run into difficulties in obtaining information on properties that could be used as comps to discuss how contamination effects a property.

What Happened?

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Within 3 years (2014-2017), Metro:

- Obtained title to the property;
- Completed the shallow soil cleanup;
- Settled the value of the property with the former owner;
- Settled the cost of cleanup, as an offset to the value;
- Executed the “land swap” with the adjacent property owner; and
- DTSC resolved their outstanding loan claim.



The completed Project on S. Santa Fe Ave.

QUESTIONS?

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THANK YOU!

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thank you