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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES R. CARY, MARY ALICE CARY, JOHN E. DIEHL, and
WILLIAM D. FOX, SR.,

Petitioners,

v.

MASON CONSERVATION DISTRICT,

Respondent,

and

MASON COUNTY,

Defendant.

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STATE OF WASHINGTON
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BRIEF OF *AMICUS CURIAE* WASHINGTON ASSOCIATION OF
CONSERVATION DISTRICTS

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I. INTRODUCTION

For decades, Washington has sought to preserve and protect its valuable natural resources. One way the state has furthered this goal is through the creation of conservation districts, which are charged with the task of protecting Washington lands. In 1989, after finding that programs seeking to conserve natural resources are of special benefit to lands, the Washington Legislature authorized the use of special assessments to fund conservation district programs and services. *See* RCW 89.08.400.

Petitioners challenge an assessment ("Assessment") enacted for the specific purpose of benefiting non-forested lands in the Mason Conservation District ("Conservation District"). While Petitioners argue that the Assessment is an unconstitutional property tax, they ignore that the purpose of the Assessment is not to raise revenue for the general public benefit, a core characteristic of any tax. Rather, the purpose of the Assessment is to fund specific programs and services available to and benefiting non-forested parcels, or addressing impacts caused by those parcels, and targeted at conserving soil and water resources, remediating contamination, and restoring the parcels. These programs and services serve to specially benefit the non-forested parcels by conserving resources and increasing property values, and to offset the burdens created by non-forested parcels in the District.

While the Assessment's targeted purpose and dedicated use demonstrate that it is not a tax, some confusion has resulted over whether the Assessment is properly characterized as a special assessment or a fee. Respondent Mason Conservation District argues that the Assessment is a fee because it serves to offset the burden produced by the non-forested parcels. *See* Supplemental Br. of Resp't at 14-20. *Amici curiae* the Evergreen Freedom Foundation ("EFF") and the Rental Housing Association of Puget Sound ("RHA") both assert that the Assessment is an invalid special assessment because it does not create a special benefit. *See* EFF's *Amicus Curiae* Memo. in Supp. of Pet. for Review at 5-8; Br. of *Amicus Curiae* RHA at 15-16. In truth, the Assessment both specially benefits *and* offsets the burdens created by non-forested parcels in the District. Thus, regardless of whether the Assessment is characterized as a special assessment or a fee, it is valid and should be upheld.

II. IDENTITY & INTEREST OF *AMICUS CURIAE*

The Washington Association of Conservation Districts ("WACD") is a non-profit organization representing Washington's 47 conservation districts, whose mission is to advance the purposes of conservation districts and their constituents by providing leadership, information, and representation. WACD furthers this mission by working directly with conservation districts statewide and by representing conservation districts

in legislative and other legal matters. Members of the WACD include dairy farmers, wheat farmers, members of the Washington State cattle and horse industries, and many others who share the goals of WACD.

On behalf of its member conservation districts and their constituents, WACD has a substantial interest in upholding the legislatively-authorized assessment system for funding conservation district programs. Accordingly, WACD respectfully submits this *amicus curiae* brief requesting that the Court uphold the Assessment.

III. ISSUES OF INTEREST TO WACD

A. Does the Assessment constitute a tax, when it was enacted for the specific purpose of funding soil and water conservation programs and services for non-forested parcels in the Conservation District and not to raise revenue for the general public good? **Answer: No.**

B. May the Assessment be upheld as a special assessment because it specially benefits non-forested parcels in the Conservation District by providing programs and services available only to those parcels and that increase the parcels' property values? **Answer: Yes.**

C. May the Assessment be upheld as a regulatory burden offset fee because it was enacted to offset the burdens created by water run-off from non-forested parcels in the Conservation District? **Answer: Yes.**

IV. STATEMENT OF THE CASE

A. The Conservation District Was Formed and the Assessment Was Enacted to Benefit Conservation District Lands.

The Washington Legislature first enacted the conservation districts law in 1939. *See* Laws of 1939, ch. 187. Codified at chapter 89.08 RCW, the law provides that “the lands of the state of Washington are among the basic assets of the state and that the preservation of these lands is necessary to protect and promote the health, safety, and general welfare of its people[.]” RCW 89.08.010(1). The Legislature further determined that land practices such as the breaking of “forest cover” harm lands and that “there is a pressing need for the conservation of renewable resources in all areas of the state[.]” RCW 89.08.010(1), (4).

To that end, the Legislature provided for the formation of conservation districts, which are charged with the goal of conserving Washington’s lands and natural resources. *See* RCW 89.08.010(4); RCW 89.08.220. In 1989, in furtherance of these goals, the Legislature enacted RCW 89.08.400, which provides that “[s]pecial assessments are authorized to be imposed for conservation districts” and that “[a]ctivities and programs to conserve natural resources, including soil and water, are declared to be of special benefit to lands and may be used as the basis upon which special assessments are imposed.” RCW 89.08.400(1).

The Mason Conservation District is a special use conservation district formed in 1956 pursuant to chapter 89.08 RCW. CP 53-54. The formation of the Conservation District was approved by District voters. CP 54. In 2002, at the request of the Conservation District, the Board of County Commissioners of Mason County adopted Ordinance No. 121-02, which resolved to establish “an assessment for natural resource conservation as authorized by RCW 89.08.400 in the amount of \$5.00 per non forested land parcel with \$0.00 fee per acre assessed for ten years starting 2003 and continuing through 2012.” CP 97. The Assessment funds are segregated from other funds and, other than covering minimal county assessor costs relating to the funds, are used solely for conservation programs and services for the benefit of non-forested parcels. CP 55.

B. The Assessment Funds Soil and Water Conservation Services and Programs Available Only to Non-Forested Parcels.

In 2003, pursuant to RCW 89.08.220(4), the Conservation District entered into an Interlocal Agreement with Mason County, which clarifies the nature of the services to be provided with Assessment funds. CP 101-07. The Interlocal Agreement states that “[t]he District provides technical assistance and education to *assessed property owners* in managing their property to protect natural resources in a non-regulatory manner” and that “[t]he parties agree that the Assessment is to be spent to support work to

especially benefit assessed parcel owners. Other parties are not direct beneficiaries of the Assessment.” CP 102 (emphasis added). The Interlocal Agreement further provides that “[n]either the County nor the District may use assessment funds to directly benefit citizens who are not assessed property owners.” CP 103.

The Interlocal Agreement also sets forth at least fourteen “special benefits” provided to non-forested parcels with Assessment funds, including water quality workshops, dye testing of septic systems, ambient water quality monitoring, restoration and remediation, educational programs, and matching funds for grants for activities and programs to support soil and/or water conservation on assessed parcels. CP 103-04. .

C. While the Court of Appeals Upheld the Assessment as a Valid Fee, Petitioners Assert It Is an Invalid Tax, and *Amici Curiae* Now Argue It Is an Invalid Special Assessment.

The Mason County Superior Court granted summary judgment to Petitioners on the basis that the Assessment constitutes “an unlawful tax rather than a regulatory fee.” CP 28. On appeal, the Washington Court of Appeals, Division II, reversed and upheld the Assessment as a valid fee. *Cary v. Mason Cnty.*, 152 Wn. App. 959, 966, 219 P.3d 952 (2009). Petitioners sought, and this Court granted, review on April 27, 2010.

Amicus curiae briefs filed by EFF and RHA contend that, rather than constituting an unconstitutional tax, the Assessment is an invalid

special assessment. See EFF's *Amicus Curiae* Memo. in Supp. of Pet. for Review at 5-8; Br. of *Amicus Curiae* RHA at 15-16. WACD submits this *amicus curiae* brief to support the determination that the Assessment may be upheld as a valid special assessment or a valid fee.

V. ARGUMENT

The Assessment does not constitute a tax because it was enacted for specific soil and water conservation purposes tied to the non-forested parcels and not to raise revenue for general public benefit. Because the Legislature authorized use of special assessments for conservation district purposes and the Assessment specially benefits non-forested land in the District, it should be upheld as a valid special assessment. Additionally, the Assessment also may be upheld as a burden offset fee because it reduces the burden on water quality caused by non-forested land.

A. The Mason Conservation District Assessment Is Not A Tax.

Before the trial court and at the Court of Appeals, the parties focused their analysis nearly exclusively on the issue of whether the Assessment constitutes a tax or a regulatory fee. In *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995), this Court identified three factors that distinguish a tax from a regulatory fee:

[W]hether the primary purpose . . . is to accomplish desired public benefits which cost money, or whether the primary purpose is to regulate; . . .

[W]hether the money collected must be allocated only to the authorized regulatory purpose; [and]

[W]hether there is a direct relationship between the fee charged and the service received . . . or between the fee charged and the burden produced by the fee payer.

Id. at 879 (internal citations and quotation marks omitted).

While the *Covell* factors and, in particular, the first factor – *i.e.*, whether the primary purpose is to raise revenue or to regulate – may assist in distinguishing taxes from regulatory fees, they do not necessarily assist in distinguishing taxes from special assessments. *See id.* at 879, 889 (separately considering whether the charge at issue constituted a special assessment). As one commentator has noted, “the key question is not whether a charge is to raise money, but to raise money *for what?*” Hugh D. Spitzer, *Taxes vs. Fees: A Curtious Confusion*, 38 GONZ. L. REV 335, 354 (2002-2003) (emphasis in original). In the context of distinguishing a tax from a special assessment, this latter inquiry is of greater assistance.

Where the purpose of a governmental charge is “revenue collection” for general public purposes, it is a tax. *See, e.g., Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 807, 23 P.3d 477 (2001). On the other hand, where a charge funds improvements that inure to the benefit of specific land, it is a special assessment. *Heavens v. King Cnty. Rural Library Dist.*, 66 Wn.2d 558, 563, 404 P.2d 453 (1965); *see also Okeson v. City of Seattle*, 150 Wn.2d 540, 554-55 & n.3, 78 P.3d 1279

(2003) (determining that a street light charge for a system that “benefits the general public” was an invalid tax, but distinguishing that tax from special assessments collected by local improvement districts “designed to benefit particular customers of the service”). Thus, where an assessment is used to fund a specific improvement or program, rather than raising general fund revenue, it is an assessment, not a tax.

Additionally, Washington case law confirms that a special assessment is distinct from and treated differently than a tax. “[T]he general use of the term ‘taxes’ in the constitution does not necessarily include what is meant by the term ‘assessments,’ in connection with street and other local improvements, but applies only to the larger exercise of the sovereign power of the state . . . in raising general revenues for the support and maintenance of government.” *Austin v. City of Seattle*, 2 Wash. 667, 668-69, 27 P. 557 (1891); *see also State ex rel. Frese v. City of Normandy Park*, 64 Wn.2d 411, 422-23, 392 P.2d 207 (1964) (citing *Austin* and distinguishing a “special assessment” from “special taxation” and taxation generally). Moreover, the Washington Constitution includes a specific provision authorizing the use of special assessments by cities, towns, and

villages, which is separate from the constitutional authorizations to levy taxes. Compare Const. art. VII, § 91 with Const. art. VII, §§ 1, 2, 5.

Thus, regardless of how this Court resolves the inquiry into whether the Assessment constitutes a fee or a special assessment, the Assessment is not a tax.

B. The Mason Conservation District Assessment May Be Upheld as a Valid Special Assessment.

1. The Legislature authorized the Assessment as a special assessment.

In RCW 89.08.400, the Legislature delegated to counties that have created conservation districts the authority to enact special assessments. RCW 89.08.400(1) (“Special assessments are authorized to be imposed for conservation districts as provided in this section.”). The Ordinance adopted by Mason County reflects that the County intended to adopt a “special assessment” within the meaning of RCW 89.08.400. CP 97. Petitioner’s challenge here is a challenge to the constitutionality of special assessments pursuant to RCW 89.08.400(1). Therefore, Petitioners must establish that the statute is unconstitutional “beyond a reasonable doubt.”

¹ “The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited.” Const. art. VII, § 9. Because article VII, section 9 does not apply to counties, Mason County’s authorization to employ special assessments for conservation districts is statutory. See RCW 89.08.400(1).

Sch. Dists. ' Alliance for Adequate Funding of Special Educ. v. State, No. 82961-6, Slip op. at 6 (Wash. Dec. 9, 2010).

Special assessments “pay for local public improvements benefiting specific land[.]” *Heavens*, 66 Wn.2d at 563. Although Washington case law sometimes describes “improvements” as appurtenances, *see, e.g., id.*, this Court has made clear that the provision of services also may constitute an improvement for the purpose of providing a special benefit to property subject to a special assessment, *see City of Seattle v. Rogers Clothing for Men, Inc.*, 114 Wn.2d 213, 223-24, 787 P.2d 39 (1990) (distinguishing *Heavens* and rejecting the proposition that services cannot constitute special benefits). To constitute a “local improvement,” an improvement must be “made primarily for the accommodation and convenience of the inhabitants of a particular locality,” although it also may “incidentally benefit the public at large.” *Id.* at 226 (internal quotation marks and citation omitted).

There is strong historical precedent in Washington to use special assessments to fund improvements that add value to assessed land. Indeed, the Washington Constitution only mentions two mechanisms to fund governmental programs: taxes and special assessments. *See* Const. art. VII, §§ 1, 9. Taxes historically have been used to raise revenue for general governmental purposes. *See Austin*, 2 Wash. at 668-69. And

while in recent years state agencies and local government entities have charged fees to provide certain services and to regulate certain activity within the state, historically the Legislature has authorized local government entities to use special assessments to fund specific improvements and services. *See Heavens*, 66 Wn.2d at 563.

For example, the Legislature has authorized special assessments to fund local improvement districts (“LIDs”) for water, sewer, transportation, and community renewal improvements. *See, e.g.*, RCW 35.44.010 (“All property included within the limits of a local improvement district or utility local improvement district shall be considered to be the property specially benefited by the local improvement[.]”); RCW 57.16.050 (special assessments authorized for water and sewer LIDs); RCW 81.112.150 (transportation LIDs); RCW 35.81.190 (community renewal LIDs). The Legislature also has authorized the use of special assessments to fund parking and business improvements, RCW 35.87A.010; flood control programs, RCW 86.09.382; noxious weed control programs, RCW 17.10.240; and community facilities, RCW 36.145.110.

Where an authorized special assessment brings special benefit to the assessed land, Washington courts repeatedly have upheld the assessments as valid. *See, e.g., Rogers Clothing*, 114 Wn.2d at 225-26 (upholding special assessment for business improvement area); *Bellevue*

Assocs. v. City of Bellevue, 108 Wn.2d 671, 678-79, 741 P.2d 993 (1987) (upholding special assessment for LID); *Otis Orchards Co. v. Otis Orchards Irr. Dist.*, 124 Wash. 510, 516, 215 P.23 (1923) (upholding special assessment for irrigation district).

Because the Assessment here funds specific improvements and programs that specially benefit non-forested parcels in the Conservation District, it is appropriately considered a special assessment.

2. The Assessment specially benefits non-forested parcels.

The Assessment provides special benefits to non-forested parcels, as reflected by legislative declaration, and the goals of the programs and services funded by the Assessment. These benefits in turn contribute to an increase in property values. The Assessment is “presumed legal and proper” and “the party challenging the assessment has the burden of proving its incorrectness.” *Bellevue Assocs.*, 108 Wn.2d at 674.

First, the Legislature has declared that “[a]ctivities and programs to conserve natural resources, including soil and water, are . . . of special benefit to lands and may be used as the basis upon which special assessments are imposed.” RCW 89.08.400(1).² This legislative

² Similarly, the Legislature has determined “that existing entities, including conservation districts and local health departments, should be used by counties to address the water quality problems affecting the recreational and commercial shellfish harvest.” Laws of 1992, ch. 100,

declaration is entitled to great weight and should be deemed conclusive. *Rogers Clothing*, 114 Wn.2d at 224 (whether an assessment “suppl[ies] the proper kind of benefits for special assessment purposes is primarily a legislative question, at least so long as the assessment does not exceed the benefit to the property”); *see also CLEAN v. State*, 130 Wn.2d 782, 808, 928 P.2d 1054 (1996) (“Legislative declarations of fact are deemed conclusive unless they are obviously false and a palpable attempt at dissimulation.”). The legislative declaration that such programs may be funded by special assessment necessarily encompasses the recognition that such programs and services increase the value of the property assessed.

In addition to this legislative declaration, chapter 135-100 WAC, which governs special assessments for natural resource conservation, provides that assessments used for conservation district activities and programs are of special benefit to lands. WAC 135-100-020 defines “special benefits to lands” as “tangible improvements to renewable natural resources,” as well as “intangible improvements to renewable natural resources from conservation programs and activities[.]”

Here, the nature of the programs and services funded by the Assessment demonstrates special benefits to non-forested lands. The

§ 1. Thus, the Legislature also specifically has determined that conservation districts should provide programs to improve water quality.

Assessment funds soil and water conservation services and programs specifically tailored to address the degradation caused by water run-off on non-forested properties in the Conservation District. *See, e.g.*, CP 103-04. That the Assessment here, in the minimal amount of \$5.00 per assessed parcel, brings at least as much benefit to the land can appropriately be presumed. *See Bellevue Assocs.*, 108 Wn.2d at 674 (appellate courts presume assessment is no greater than benefit).

Moreover, in their Interlocal Agreement, the Conservation District and Mason County have confirmed that “[n]either the County nor the District may use assessment funds to directly benefit citizens who are not assessed property owners.” CP 103. Even if the water and soil conservation programs funded by the Assessment do provide some general benefit to Mason County at large, that benefit is only incidental to the special benefits created by the programs, which are exclusively available to owners of non-forested land. *See Rogers Clothing*, 114 Wn.2d at 226 (special assessment may create incidental general benefit).

Finally, the Conservation District programs and services also increase property values, thereby specially benefiting the non-forested parcels. A special assessment may bring a special benefit to assessed land by increasing the value of that land. *See, e.g., Otis Orchards Co.*, 124 Wash. at 513 (“It is generally understood that land within a district is

benefited by an irrigation system to the extent that the added facilities for irrigation add to the value of the land itself[.]”). Here, the Conservation District’s programs and services, by reducing pollution and improving water quality and conserving renewable natural resources, increase property values in the Conservation District.

This legislative determination is buttressed by reference to standard land appraisal methods. In appraising the value of land, appraisers typically take into consideration “the beneficial and detrimental factors inherent in the location of the property,” including factors such as contamination. INTERAGENCY LAND ACQUISITION CONFERENCE, UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS 14 & n.28 (5th ed. 2000), attached as Appendix A; *see also* APPRAISAL STANDARDS BOARD, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE ADVISORY OPINIONS A-16 – A-20 (2008-2009) (appraisal of real property affected by contamination), attached as Appendix B. Thus, the Assessment also specially benefits non-forested parcels in the Conservation District by adding value to those parcels (albeit in the form of avoiding reductions in property value through contamination avoided).

This Court previously has rejected Petitioners’ suggestion that they do not specially benefit from the Conservation District’s programs and services because they do not use those services. *See* Supplemental Br. of

Pet'rs at 13-14. In *Otis Orchards Co.*, this Court confirmed that the determination of whether a special benefit exists turns on whether the services are available, not whether a particular landowner uses the available services. *Otis Orchards Co.*, 124 Wash. at 513-14 (“The value of the right conferred or added, and not the extent to which the property owner may take advantage of the right, is the test to determine whether a benefit has been received.”).³ The *Otis* court further observed that excusing a property owner within the irrigation district from paying the assessment because it was not using the water available during a particular season threatened the entirety of the irrigation district system and improperly shifted the burden of paying for the system to a smaller number of property owners within the district. *Id.* at 514.

Similarly, all non-forested parcels in the Conservation District benefit from the availability of the District's water and soil programs and services, whether or not a particular property owner “uses” those services in a particular year. Not only are the services available when needed, they serve to offset the burden on the environment created by all of the non-

³ Thus, *Holmes Harbor Sewer Dist. v. Holmes Harbor Home Building LLC*, 155 Wn.2d 858, 123 P.3d 823 (2005) is distinguishable on statutory grounds, because the Court determined in that case that the services at issue were not “available” within the meaning of the statute. *Id.* at 866.

forested parcels in the District. Accordingly, this Court should determine that the Assessment specially benefits the non-forested parcels.

3. The Assessment classifies lands according to benefit conferred.

Finally, the Assessment properly “classif[ies] lands in the conservation district . . . according to benefits conferred or to be conferred by the activities of the conservation district,” as required by RCW 89.08.400(3). The Assessment classifies land into forested and non-forested land, corresponding to the burdens placed by non-forested land on soil and water conservation efforts. *See* CP 97. Accordingly, the Assessment properly classifies lands in the Conservation District.

C. The Mason Conservation District Assessment Also Can Be Upheld as a Valid Burden Offset Fee.

While governmental fees often collectively are referred to as “regulatory fees,” such fees include “a wide assortment” of fee types. *Samis Land Co.*, 143 Wn.2d at 805 & n.11. True regulatory fees are but one type of user fee. *See* Spitzer, *supra*, at 343-51. There are “commodity charges,” which pay for the provision of commodities or services of direct benefit to the consumer, such as water. *See, e.g., Twitchell v. City of Spokane*, 55 Wash. 86, 89, 104 P. 150 (1909) (charge for provision of water); Spitzer, *supra*, at 343-45. There also are “burden offset” fees, which offset the cost of burdening others or the public at large, such as for

sewer, garbage, and storm water programs. *See, e.g., Teter v. Clark Cnty.*, 104 Wn.2d 227, 232-34, 704 P.2d 1171 (1985) (charge for provision of storm water services); Spitzer, *supra*, at 345-49. Finally, there are special assessments, which are discussed in Section V(B), *supra*.

In its Supplemental Brief, the Conservation District establishes that the Assessment may be upheld as a valid fee. While the Legislature has authorized the use of special assessments for conservation districts, *see* RCW 89.08.400(1), WACD agrees that “[c]ourts must [] look beyond a charge’s official designation and analyze its core nature by focusing on its purpose, design and function in the real world,” *Samis*, 143 Wn.2d at 806. To the extent that this Court does not agree with WACD’s position that the Assessment should be upheld as a valid special assessment, *see* Section V(B), *supra*, the WACD believes that the Assessment should be upheld as a valid burden offset fee, because it offsets the burden of water run-off from non-forested properties in the Conservation District. *See, e.g., Teter*, 104 Wn.2d at 232-34.

Amicus curiae RHA incorrectly argues that the Conservation District lacks the power to impose regulatory fees, *see* RHA Br. at 6, but the Assessment actually was imposed by the Mason County Board of Commissioners to finance the activities of the Conservation District, CP 97. Counties have the authority to impose fees under their police powers.

Const. art. XI, § 11; *Thurston Cnty. Rental Owners Ass'n v. Thurston Cnty.*, 85 Wn. App. 171, 178, 931 P.2d 208 (1997). Moreover, the Legislature specifically authorized the fee used by the Conservation District. *See* RCW 89.08.400(1). Thus, use of a burden offset fee for Conservation District programs and services is authorized.

VI. CONCLUSION

The Assessment properly furthers the legislative goals of natural resource conservation for the benefit of non-forested lands within the Conservation District. The Assessment is not a tax because, rather than raising revenue for a broad public purpose, it funds a specified set of conservation programs and services available only to non-forested parcels. The Assessment both specially benefits and offsets the burdens created by non-forested parcels in the Conservation District. Thus, regardless of the framework applied – special assessment or burden offset fee – the Assessment should be upheld as valid.

RESPECTFULLY SUBMITTED this 14th day of December, 2010.

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APPENDIX A

INTERAGENCY LAND ACQUISITION CONFERENCE

Uniform Appraisal Standards for Federal Land Acquisitions

WASHINGTON, D.C. 2000



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In cooperation with
the U.S. Department of Justice

appraiser should describe the principal differences in the property between the before and after situations, including a brief description of the government's project and any changes in the highest and best use of the subject property.

If the parcel under appraisal includes water rights, minerals, or suspected mineral values, fixture values, growing crops, or timber values, the treatment of their contributory value should be discussed, including the methodology employed to avoid the forbidden *summation* or *cumulative* appraisal.²⁶ If the valuation of the property required the use of any consulting reports, the appraiser should describe such reports, the method of utilization thereof, and the weight or reliance placed thereon.

Part II—Factual Data—Before Acquisition²⁷

A-11. Legal Description. This description shall be complete as to properly identify the property appraised. If lengthy, it should be referenced and included in the addenda of the report. If the client agency has assigned a parcel, or tract, number to the property, that should also be referenced. A more detailed standard concerning the legal description of the property to be appraised appears in Section D-5 of these Standards.

A-12. Area, City, and Neighborhood Data. This data (mostly social and economic) must be kept to an absolute minimum and should only include such information that directly affects the appraised property, together with the appraiser's conclusions as to significant trends. The use of "boilerplate" or demographic and economic data (often downloaded from the Internet) is unnecessary and, unless the appraiser demonstrates that the specific data directly impacts the current market value of the subject property, it should be excluded.

Changes in the neighborhood, brought about by the government's project for which the property under appraisal is being acquired, shall be disregarded. This specific standard is contrary to USPAP Standards Rule 1-4(f) and is considered a jurisdictional exception. See Section B-10, "Enhancement or Diminution in Value Due to the Project," for a discussion of the legal basis for this specific standard.

A-13. Property Data:

A-13a. Site. Describe the present use, accessibility and road frontage, land contours and elevations, soils, vegetation (including timber), views, land area, land shape, utilities, mineral deposits, water rights associated with the property, easements, etc. A statement must be made concerning the existence or nonexistence of commercially valuable mineral deposits. Also discuss the beneficial and detrimental factors inherent in the location of the property.²⁸ The presence of hazardous substances should be considered by appraisers in accordance with Sections D-3 and D-4 of these Standards. An affirmative statement is required if the property is located within a flood hazard area.²⁹

26. See Section B-13, "The Unit Rule," in these Standards.

27. If the government's acquisition is a *partial acquisition*, it is imperative that the sections of the appraisal report in Part II relate only to the *before situation*. The appraiser should not attempt to combine the discussion of the factual data after the acquisition with the factual data relating to the before situation.

28. Beneficial factors may include such items as desirable views, proximity to desirable public or cultural facilities, or proximity to dedicated open space or green belts. Detrimental factors may include such items as offensive odors, undesirable land uses, contamination, and noxious weeds. Farm properties can be especially impacted by natural environmental factors such as noxious weeds, frost, incidence of hail, floods and droughts, and variations in crop yields. Appraisers should list and describe those beneficial and detrimental factors that may impact the utility and value of the land.

29. For this purpose, appraisers should refer to Federal Emergency Management Administration (FEMA) flood hazard maps.

APPENDIX B

USPAP

ADVISORY OPINIONS

2003-2009 EDITION

APPRAISAL STANDARDS BOARD



THE APPRAISAL FOUNDATION

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1 ADVISORY OPINION 9 (AO-9)

2 *This communication by the Appraisal Standards Board (ASB) does not establish new standards or interpret*
3 *existing standards. Advisory Opinions are issued to illustrate the applicability of appraisal standards in specific*
4 *situations and to offer advice from the ASB for the resolution of appraisal issues and problems.*

5 **SUBJECT: The Appraisal of Real Property That May Be Impacted by Environmental Contamination**

6 **APPLICATION: Real Property**

7 **THE ISSUE:**

8 Appraisals of contaminated properties, or properties suspected of being contaminated, are sometimes developed
9 using either a hypothetical condition or an extraordinary assumption that the property is free of the
10 contamination. While this is acceptable practice under certain conditions and for certain intended uses, there are
11 assignments that require an appraisal of the “as-is” condition of the property, with full consideration of the
12 effects of environmental contamination. In these assignments, the appraiser is asked to analyze the effects of
13 known environmental contamination on the value of the subject property.

14 How does an appraiser comply with USPAP when appraising properties that may be impacted by environmental
15 contamination?

16 **ADVICE FROM THE ASB ON THE ISSUE:**

17 Relevant USPAP & Advisory References

- 18 • **DEFINITIONS**, specifically the definitions of
19 Extraordinary Assumption: *an assumption, directly related to a specific assignment, which, if*
20 *found to be false could alter the appraiser's opinions or conclusions.*
21 Hypothetical Condition: *that which is contrary to what exists but is supposed for the purpose of*
22 *analysis.*
- 23 • **ETHICS RULE**, particularly
24 Conduct: *An appraiser must perform assignments ethically and competently, in accordance with*
25 *USPAP. ... An appraiser must perform assignments with impartiality, objectivity, and*
26 *independence, and without accommodation of personal interests ... An appraiser must not*
27 *communicate assignment results in a misleading or fraudulent manner.*
- 28 • **COMPETENCY RULE**: *Prior to accepting an assignment or entering into an agreement to*
29 *perform any assignment, an appraiser must properly identify the problem to be addressed and*
30 *have the knowledge and experience to complete the assignment competently; or alternatively,*
31 *must: (1) disclose the lack of knowledge and/or experience to the client before accepting the*
32 *assignment; (2) take all steps necessary or appropriate to complete the assignment competently;*
33 *and (3) describe the lack of knowledge and/or experience and the steps taken to complete the*
34 *assignment competently in the report.*
- 35 • **Standards Rule 1-1(a)**: *In developing a real property appraisal, an appraiser must: (a) be aware*
36 *of, understand, and correctly employ those recognized methods and techniques that are necessary*
37 *to produce a credible appraisal;*
- 38 • **Standards Rule 1-2(e)**: *In developing a real property appraisal, an appraiser must: (e) identify the*
39 *characteristics of the property that are relevant to the type and definition of value and intended*
40 *use of the appraisal...*
- 41 • **Standards Rule 1-2(f) and (g)**: *In developing a real property appraisal, an appraiser must: (f)*
42 *identify any extraordinary assumptions necessary in the assignment; and (g) identify any*
43 *hypothetical conditions necessary in the assignment.*
- 44 • **Standards Rule 1-3(b)**: *When necessary for credible assignment results in developing a market*
45 *value opinion, an appraiser must: (b) develop an opinion of the highest and best use of the real*
46 *estate.*

- 47 • Standards Rule 1-4: *In developing a real property appraisal, an appraiser must collect, verify,*
 48 *and analyze all information necessary for credible assignment results.*

49 **Competency and Related Issues**

50 Consistent with Standards Rule 1-1(a): in the appraisal of a property as impacted by environmental
 51 contamination, an appraiser must *be aware of, understand, and correctly employ those recognized methods and*
 52 *techniques necessary to develop and communicate a credible appraisal.* Accordingly, an appraiser must have
 53 the requisite knowledge about appropriate methods, and be able to assemble the required information. An
 54 appraiser who lacks knowledge and experience in analyzing the impact of environmental contamination on the
 55 value of real property must take the steps necessary to complete the assignment competently, as required by the
 56 COMPETENCY RULE. However, an appraiser need not be an expert on the scientific aspects of environmental
 57 contamination, and in most situations the appraiser will utilize scientific and other technical data prepared by
 58 others, such as environmental engineers. In these situations, the appraiser should utilize an extraordinary
 59 assumption [see Standards Rule 1-2(f)] regarding the information obtained from other experts that is used in the
 60 appraisal. Examples of such information include items (1) to (10) under the header titled "Relevant Property
 61 Characteristics" later in this Advisory Opinion. This is especially important in situations where there is
 62 conflicting information about such information.

63 **Specialized Terms and Definitions**

64 The appraisal of properties that may be impacted by environmental contamination involves specialized terms
 65 and definitions that might not be used in an appraisal assignment in which the effect of the property's
 66 environmental condition is not analyzed, or when the property is not contaminated. Though it is recognized that
 67 there are other valid definitions of these and similar terms, for purposes of this Advisory Opinion, the following
 68 definitions apply:

69 **Diminution in Value (Property Value Diminution):** The difference between the unimpaired and impaired
 70 values of the property being appraised. This difference can be due to the increased risk and/or costs attributable
 71 to the property's environmental condition.

72 **Environmental Contamination:** Adverse environmental conditions resulting from the release of hazardous
 73 substances into the air, surface water, groundwater or soil. Generally, the concentrations of these substances
 74 would exceed regulatory limits established by the appropriate federal, state, and/or local agencies.

75 **Environmental Risk:** The additional or incremental risk of investing in, financing, buying and/or owning
 76 property attributable to its environmental condition. This risk is derived from perceived uncertainties
 77 concerning:

- 78 1) the nature and extent of the contamination;
 79 2) estimates of future remediation costs and their timing;
 80 3) potential for changes in regulatory requirements;
 81 4) liabilities for cleanup (buyer, seller, third party);
 82 5) potential for off-site impacts; and
 83 6) other environmental risk factors, as may be relevant.

84 **Environmental Stigma:** An adverse effect on property value produced by the market's perception of increased
 85 environmental risk due to contamination. (See Environmental Risk)

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86 **Impaired Value:** The market value of the property being appraised with full consideration of the effects of its
87 environmental condition and the presence of environmental contamination on, adjacent to, or proximate to the
88 property. Conceptually, this could be considered the "as-is" value of a contaminated property.

89 **Remediation Cost:** The cost to cleanup (or remediate) a contaminated property to the appropriate regulatory
90 standards. These costs can be for the cleanup of on-site contamination as well as mitigation of off-site impacts
91 due to migrating contamination.

92 **Remediation Lifecycle:** A cycle consisting of three stages of cleanup of a contaminated site: before
93 remediation or cleanup; during remediation; and after remediation. A contaminated property's remediation
94 lifecycle stage is an important determinant of the risk associated with environmental contamination.
95 Environmental risk can be expected to vary with the remediation lifecycle stage of the property.

96 **Source, Non-source, Adjacent and Proximate Sites:** Source sites are the sites on which contamination is, or
97 has been, generated. Non-source sites are sites onto which contamination, generated from a source site, has
98 migrated. An adjacent site is not contaminated, but shares a common property line with a source site. Proximate
99 sites are not contaminated and not adjacent to a source site, but are in close proximity to the source site.

100 **Unimpaired Value:** The market value of a contaminated property developed under the hypothetical condition
101 that the property is not contaminated.

102 Relevant Property Characteristics

103 The appraisal of a property that includes the effects of environmental contamination on its value usually
104 requires data not typically used in an appraisal of an otherwise similar but uncontaminated property or an
105 appraisal of a potentially impacted property using either a hypothetical condition or an extraordinary
106 assumption that it is uncontaminated or not impacted. The inclusion of these additional relevant property
107 characteristics is consistent with Standards Rule 1-2(e). The relevant property characteristics may include, but
108 are not limited to:

- 109 1) whether the contamination discharge was accidental or permitted;
- 110 2) the status of the property with respect to regulatory compliance requirements;
- 111 3) the remediation lifecycle stage (before, during or after cleanup) of the property as of the appraisal date;
- 112 4) the contamination constituents (petroleum hydrocarbons, chlorinated solvents, etc.);
- 113 5) the contamination conveyance (air, groundwater, soil, etc.);
- 114 6) whether the property is a source, non-source, adjacent or proximate site;
- 115 7) the cost and timing of any site remediation plans;
- 116 8) liabilities and potential liabilities for site cleanup;
- 117 9) potential limitations on the use of the property due to the contamination and its remediation; and
- 118 10) potential or actual off-site impacts due to contaminant migration (for source sites).

119 Since the appraiser is usually not an expert on the scientific aspects of contamination, experts from other fields
120 will typically provide this information. Appropriate regulatory authorities should also be consulted to confirm
121 the presence or absence of contamination. The appraiser should consider the use of extraordinary assumptions

122 when this information serves as a basis for an opinion of value. The appraiser should also collect similar data
123 for any comparable sales used in the analysis.

124 **Valuation Issues – As If Unimpaired**

125 In some assignments, the appraiser may be asked to appraise a property known to be contaminated under the
126 *hypothetical condition* that the real estate is free of contamination. In these assignments, an appraiser may
127 appraise interests in real estate that is known to be contaminated under the hypothetical condition that the real
128 estate is free of contamination when:

- 129 1) the resulting appraisal report is not misleading,
- 130 2) the client has been advised of the limitation, and
- 131 3) all the requirements of the ETHICS RULE have been satisfied.

132 To avoid confusion in the marketplace, the appraiser should disclose available information about the
133 contamination problem, explain the purpose of the hypothetical condition that the real estate is not
134 contaminated, and state that the use of the hypothetical condition might have affected the assignment results in
135 accordance with SR 2-2(a), (b), and (c)(x).

136 In other situations, the appraiser may be asked to appraise a property believed to be free of contamination or for
137 which the environmental status is uncertain due to the lack of information or conflicting information. For these
138 assignments, the property may be appraised under the *extraordinary assumption* concerning assumed factual
139 information about its environmental condition and status. Indeed, since an appraiser is usually not an expert in
140 detecting contamination, or confirming its absence, extraordinary assumptions regarding environmental
141 condition may be necessary in many assignments.

142 **Valuation Issues - As Impaired**

143 **Highest & Best Use Issues:** The appraisal of properties that may be impacted by environmental contamination
144 usually involves extensive highest and best use analysis. In accordance with Standards Rules 1-2(e) and 1-3(b),
145 the appraiser must consider relevant factors in developing an opinion of the highest and best use of the property
146 in its impaired condition. The valuation of properties impacted by environmental contamination usually
147 involves the estimate of two values: the unimpaired value and the impaired. As such, two highest and best use
148 analyses are typically required. The first does not consider any limitations on the property due to the
149 environmental contamination. The second does consider any limitations due to the contamination, its
150 remediation, and any legal use restrictions associated with the cleanup of the contamination source.
151 Environmental contamination and its remediation to appropriate regulatory standards may affect the feasibility
152 of site development or redevelopment, use of the site during remediation, use of the site after remediation,
153 marketability of the site, and other economic and physical characteristics of a contaminated property. The
154 appraiser should consider the possibility that site remediation and any remaining limitations on the use of the
155 site following remediation may alter or limit its highest and best use in the impaired condition. In addition,
156 excessive environmental risk and stigma may deter site development or redevelopment and thereby limit the
157 highest and best use until the property's environmental risk is reduced to levels acceptable to the relevant
158 market participants.

159 **Satisfying SR 1-4 Requirements:** When the appraiser addresses the diminution in value of a contaminated
160 property and/or its impaired value, the appraiser must recognize that the value of an interest in impacted or
161 contaminated real estate may not be measurable simply by deducting the remediation or compliance cost
162 estimate from the opinion of the value as if unaffected (unimpaired value). Rather, *cost, use* and *risk* effects can
163 potentially impact the value of contaminated property. *Cost effects* primarily represent deductions for costs to
164 remediate a contaminated property. These costs are usually estimated by someone other than the appraiser, and
165 should include consideration of any increased operating costs due to property remediation. The appraiser should

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166 also be aware that the market might not recognize all estimated costs as having an effect on value. *Use effects*
167 reflect impacts on the utility of the site as a result of the contamination. If the contamination and/or its cleanup
168 rendered a portion of the site unusable, or limited the future highest and best use of the property, then there
169 could be a use effect on value. *Risk effects* are typically estimated by the appraiser and often represent the most
170 challenging part of the appraisal assignment. These effects are derived from the market's perception of
171 increased environmental risk and uncertainty. The analysis of the effects of increased environmental risk and
172 uncertainty on property value (environmental stigma) must be based on market data, rather than unsupported
173 opinion or judgment.

174 In general, the unimpaired value of the property being appraised can be estimated using the sales comparison
175 approach [SR 1-4(a)], cost approach [SR 1-4(b)], and income approach [SR 1-4(c)]. Estimating the effects of
176 environmental contamination on real property value usually involves the application of one or more specialized
177 valuation methods. These methods should be consistent with the requirements related to the valuation
178 approaches in USPAP.