

## Green-house Counsel

sponsored by

MANKO | GOLD | KATCHER | FOX<sub>LLP</sub>

AN ENVIRONMENTAL AND ENERGY LAW PRACTICE



# ENVIRONMENTAL ACCESS AGREEMENTS: ENTER AT YOUR OWN RISK

by [Suzanne Ilene Schiller](#) –Partner, Manko, Gold, Katcher & Fox, LLP

If there is one truism about contamination, it is that you can never trust it to stay put. Surface water, groundwater and air can naturally and continuously move potentially hazardous pollutants from property to property, sometimes for great distances. As a result, owners of contaminated realty often seek to conduct [environmental sampling](#) on neighboring properties to assist in determining the source, the level and the spread of the contamination. Similarly, in industrial and other areas, property purchasers will almost always conduct environmental due diligence during the contract period which may include assessment and analysis of the soil and groundwater. Whether one is in the position of needing the sampling, or of responding to a request, it is vitally important that a Site Access Agreement is put into place and before any sampling takes place. In negotiating such agreements, there are several key topics that every counsel needs to pay close attention to.

Scope of Work Agreements can provide for a one-time sampling event or the placement of permanent or semi-permanent wells for ongoing monitoring. They can involve soil sampling, groundwater sampling or even air testing. In addition, the samples can be analyzed for just one or two types of contaminants or for many. Whatever type of sampling is to occur, the Agreement should spell out exactly what the scope of both the work on the property and the subsequent data analysis is going to include. Because the environmental consultant will be responsible for determining the scope of work and for conducting the sampling, the consultant should be a signatory to the Agreement.

Location and Duration Those needing access to another's property are likely to have very specific locations for the sampling to occur in order to locate the source(s) of the contamination, identify the affected area, and/or measure the concentration of contaminants. However, property owners will need to ensure that their business operations are not adversely affected. Thus, Agreements should be very specific as to the time and place of the activity and, to the extent possible, provide for the work to occur during non-business hours and in locations that are not actively in use. Where there are permanent wells in place, the agreement must provide for notice before any entry onto the property to obtain samples.

- more -

## ENVIRONMENTAL ACCESS AGREEMENTS (cont'd)

Safety and Precautionary Measures Agreements should also specify the safety measures that will be taken by the consultants doing the sampling. For example, the Agreement should spell out the methods that will be used to determine the location of all underground utilities and conduits, and consideration should be given to the practicality of hand digging to make sure utilities are not disrupted. Similarly, attention must be given to material safety issues, such as the proper handling of the actual samples or whether items such as asbestos-containing floor tiles will be disturbed. In all cases, the Agreement should specify that the responsibility for permits is on the requesting party and that the property owner is not deemed a generator of any hazardous waste and is not responsible for its disposal. And if work is to occur when a business is open, the safety of patrons and employees must be considered and provided for.

Repair and Replacement of Damaged Property Digging wells and taking soil samples will necessarily involve some damage to property, whether drilling through an asphalt parking lot, digging through landscaped grass, or pulling up carpeting and subflooring. For that reason, every agreement must provide that the property is restored to its former condition and that repairs are made promptly. Property owners will want such a provision to include that the restoration is done to the owner's satisfaction to prevent repairs from being made with lesser quality materials or in a shoddy manner, while those seeking access may want some flexibility if there are more practical methods or modern materials that would be functionally equivalent for restoration.

Insurance and Indemnification Every Agreement should provide that there is appropriate insurance, including workers' compensation, general liability, and professional and pollution liability policies, covering the work. Such insurance should be primary, identify the property owner as an additional insured and, in the case of permanent wells, provide for notice to the property owner before coverage is cancelled, terminated or lapses. Copies of the policies should be requested by the property owner to ensure that coverage is complete. In addition to insurance, the property owner should be indemnified for any claimed losses, waiving any subrogation rights and defenses or immunities such as the workers compensation bar. Finally, in states that permit it, consideration should be given to requiring mechanics' lien waivers from any contractor working on the property, particularly those who may be retained to restore the premises after the sampling activity.

Disclosure of Results The Agreement should be explicit about the timing and scope of any disclosure of the test results. This involves addressing whether the testing party must provide to the property owner not only the sampling data but also any final reports and analyses, and whether such reports should be kept confidential among the parties to the Agreement. Considerations of how to approach these issues include whether the land owner may become subject to certain reporting and clean up requirements if the test results evidence contamination and whether providing such information to the land owner may result in new claims against the sampling party.