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ENVIRONMENTAL LAW

To Grant or Not to Grant Environmental Site Access Requests

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Special to the Legal

Ofentimes the investigation or remediation of environmental contamination at a site triggers the need for access to an off-site property, either to determine whether the off-site property has been impacted by the contaminated site, or to conduct remedial activities to address contamination that has migrated to the site. In recent years, the need for this off-site access has become more frequent because of increased regulatory focus on vapor intrusion—the potential of certain contaminants in soil or groundwater to volatilize, travel through the subsurface, migrate through building floors and foundations, and potentially negatively affect indoor air quality. Sometimes a governmental agency seeks access to a property to conduct a site investigation; other times it is the private party responsible for the contamination who seeks access to the off-site property.

A property owner receiving a request for site access is likely to react with a myriad of questions, such as:

- Who caused the contamination that is suspected to have impacted my property?
- Who is responsible for the investigation and cleanup if contamination is present?
- If my property is contaminated, do I or other occupants of my property face health risks?
- Does the discovery of contamination at my property impose any liability on me?
- Does the presence of contamination diminish my property value?
- Do I have any legal recourse?
- Am I required to grant access to my property?
- Can I be compensated or secure other concessions in exchange for granting access to my property?
- Could my granting site access identify previously unknown conditions that originated on my



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property, potentially triggering additional legal obligations for me?

While all of the above questions reflect rational, real-world concerns for property owners, this article focuses on the question of whether the property owner should grant site access, and if so, what conditions the owner should seek to impose on such access. The answer to this question depends in part on the property's location, as well as the entity that is requesting such access.

While both the Pennsylvania Department of Environmental Protection (PADEP) and New Jersey Department of Environmental Protection (NJDEP) have broad statutory rights to access properties to investigate and respond to actual or threatened releases of hazardous substances, the ability of private parties to access off-site properties to conduct environmental investigations differs dramatically in New Jersey and Pennsylvania.

STATUTORY AUTHORITY FOR GOVERNMENTAL ACCESS

Environmental statutes in both Pennsylvania and New Jersey contain broad provisions

authorizing PADEP and NJDEP to access properties to conduct investigations where hazardous substances are or are suspected to be located. In Pennsylvania, PADEP has been granted authority to order access to a site to allow for the investigation of "pollution" or a "danger of pollution" pursuant to Section 316 of the Clean Streams Law, as well as the ability to issue an order requiring site access, including access to adjacent properties, to investigate for the presence of hazardous substances or take response actions with respect to such hazardous substances pursuant to various sections of the Hazardous Sites Cleanup Act (HSCA). PADEP also has broad rights of access pursuant to Section 1311(b) of the Storage Tank and Spill Prevention Act. Failure to comply with access orders pursuant to any of the above statutes can subject a property owner to the imposition of civil penalties. In addition, pursuant to HSCA, PADEP is authorized to immediately seek enforcement of an access order through a court of competent jurisdiction.

In New Jersey, the NJDEP has also been granted broad statutory authority to enter and inspect property "for the purpose of investigating an actual or suspected source of pollution of the environment." A parallel right of entry also exists pursuant to the New Jersey Water Pollution Control Act, which allows NJDEP to enter "all premises in which a discharge source is or might be located." The Industrial Site Recovery Act requires a property owner of a designated industrial establishment to allow "reasonable access to the industrial establishment and to off-site areas under the owner's or operator's control."

The U.S. Environmental Protection Agency (EPA) has similarly broad rights of access pursuant to Section 104(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Failure to comply with an EPA request for access can result in the issuance of an order, as well as the imposition of civil penalties.

In light of the above, should a property owner faced with an agency request for site access simply unlock the front gate and allow the agency in to conduct the requested investigations? The short answer is, unless the agency is addressing some type of emergency situation, a property owner often has the ability to impose reasonable conditions on the agency's access to its property. In certain instances, the governmental agency will even be willing to enter into an access agreement with the property owner, containing basic provisions such as limiting the duration of access, identifying the timing and scope of access, requiring advance notice before entering the property, limiting disturbance and interference with the property, requiring restoration of the property after the completion of investigatory activities, and requiring the agency to share the results of its investigations with the property owner. Even when the governmental agency is unwilling to enter into an access agreement, the agency is almost always willing to specify the details and timing of the requested access in a written document to the property owner prior to accessing the property. And if the government plans to perform work at the property through the use of private consultants and contractors, it is reasonable for the property owner to request that the private companies first enter into access agreements that contain more traditional provisions, such as requirements that the contractors maintain adequate insurance during site access and identify the property owner as an additional insured under such policies, and that the contractors indemnify the property owner for any damage or liability caused as a result of the contractor's access to the property.

PRIVATE-PARTY ACCESS TO PROPERTY

The ability of private parties to secure access to off-site properties differs dramatically in Pennsylvania and New Jersey. Unlike in Pennsylvania, New Jersey has adopted a specific protocol for obtaining off-site access when necessary to investigate and remediate contamination. Pursuant to Section 58:10B-16 of New Jersey's Brownfield and Contaminated Site Remediation Act, if a party that is remediating contamination is unable to reach a voluntary agreement with a property owner to obtain access to an off-site property, the remediating party can obtain an access order from the New Jersey Superior Court.

NJDEP's site remediation regulations contain specific provisions governing how a remediating party should attempt to secure off-site access to

a property. In fact, NJDEP recently launched a new website dedicated to issues regarding off-site access, with links to relevant statutory and regulatory provisions, template access letters, fact sheets, and guidance documents, available at <http://www.nj.gov/dep/srp/offsite>.

Under New Jersey's brownfield regulations, if the off-site property owner does not respond or refuses to grant access after being served with two requests for access, the remediating party can then file a summary action in the New Jersey Superior Court requesting site access. (See N.J.S.A. 58:10B-16.a; N.J.A.C. 7:26C-8.2(c).) The court will issue an order for access so long as

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there is a "reasonable possibility" that contamination has migrated to the off-site property, or that the off-site access is "reasonable and necessary" to remediate the contamination. In addition to ordering access to the off-site property, the order could also include some benefits for off-site property owners that are typically included in negotiated access agreements, such as the recovery of costs associated with any disruption to operations at the off-site property, as well as the cost of returning the property to its pre-disturbance condition. The order may also include provisions requiring the remediating party to indemnify the off-site property owner for damages, penalties, or any other liabilities associated with the activities undertaken by the remediating party while accessing the property.

Unlike New Jersey, Pennsylvania has not codified the right of a private party to obtain off-site access to perform environmental investigation or remediation. In fact, a private party's only real recourse to secure access from an off-site property

owner who refuses to enter into an access agreement is to request PADEP's assistance to issue an order requiring the uncooperative property owner to grant access. Because of limited resources within the agency, however, it may take PADEP a very long time before it is willing to issue such an access order.

Off-site property owners in Pennsylvania should nonetheless be cautious about implementing such an uncooperative strategy. For example, under the Storage Tank and Spill Prevention Act, if an adjacent property owner denies access to a storage tank owner or operator to perform investigations, this refusal can allow the tank owner or operator to overcome the 2,500-foot presumption of liability found in Section 1311(a) of the act. Similarly, if and when PADEP does issue an order for access, it is almost certain that the terms of such an order will be significantly less favorable than the access provisions that the property owner could have secured had the owner negotiated an access agreement with the requesting party.

While the prospect of providing access to one's property to allow for environmental investigations is rightly fraught with concerns and uncertainty, as described above, the best course of action for a property owner facing such a request is to negotiate and enter into a fair and reasonable agreement with a private party that affords the property owner adequate protections against potential liabilities and damages that can result from such access. Because access to the owner's property clearly poses an imposition on the owner, it is often not unreasonable to request compensation for such a grant of access. Depending on the circumstances, entering into an access agreement may also afford the owner an effective and efficient way to secure contractual commitments from the responsible party that they alone will assume all liability and cost relating to identified contamination. So, to grant or not to grant? In general, the answer to this question is to grant, but with conditions that provide the owner with adequate protections and assurances. •

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