Gaining Access to a Neighbor's Property to Assess & Remediate Hazardous Discharges

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There are several New Jersey environmental laws that require a "responsible party" to investigate and remediate discharges of hazardous substances on its property, as well as neighboring properties upon which those hazardous substances have migrated. When a responsible party is required to investigate contamination that may have migrated from its property onto a neighbor's property, the process of gaining access can be challenging.

Neighbors often have a "victim" mentality or fear that the party requesting access will somehow place the blame on them for the contamination. Upon receipt of a letter requesting access, the neighboring property owners often seek legal advice regarding what rights they have to refuse access, as well as potential liability issues associated with the responsible party's investigation activities.

Under state law (N.J.S.A. 58:10B-16), responsible parties have an obligation to investigate and remediate contamination that has migrated off-site from their property. The law is clear that so long as the request for access is reasonable and necessary to remediate contamination, the neighboring property owner cannot refuse access.

However, the neighboring property owner can require reasonable conditions to be imposed on the responsible party under a private access agreement. These reasonable conditions include requirements for insurance, indemnification and other protections. The neighboring property owner should also request documentation supporting the responsible party's legal right of access onto his property.

Historically, a simple letter from the New Jersey Department of Environmental Protection (NJDEP) would have sufficed for this purpose, but under the current Licensed Site Remediation Professional (LSRP) program these letters from the NJDEP are rarely issued. Hence, without the NJDEP's written "approval" of off-site access, neighbors have more fear and a lack of trust when they receive letters requesting access from private parties.

The "responsible party" is required to file an action in Superior Court seeking access if good faith voluntary negotiations do not succeed.

In addition to the fear and victim mentality, the neighbor also seeks to be made whole for any costs he may have incurred in response to the access request (i.e. legal fees, consulting fees, etc.). Frequently, neighboring property owners want to be reimbursed for legal fees associated with the negotiation of the terms of an access agreement and, on occasion, environmental consultant fees if the neighbor decided to hire an environmental consultant to (a) review the responsible party's documentation supporting access and (b) oversee the responsible party's consultant in the field during the investigation work.

The environmental laws do not expressly allow for the reimbursement of legal or consulting fees, and the New Jersey Appellate Division has ruled against reimbursement. In *State Farm Fire and Casualty Insurance Company v. Florkiewicz,* the Appellate Division found that a neighbor was not entitled to any legal fees for the negotiation of the access agreement or any litigation fees associated with refusing access.

Despite this court decision, the negotiation process is more amicable if the responsible party offers to reimburse the neighbor for some of his legal fees and/or consulting fees associated with the request for access. The reimbursement amount is usually under $3,000. Alternatively, other more creative offers are dangled, such as planting of shrubs, trees or other landscaping restoration. As the saying goes, you catch more flies with honey.

Most parties will realize during the course of requesting access that reimbursing a relatively small amount of legal/consulting fees to the neighbors can avoid more costly litigation. However, if the responsible party refuses to make any payment or reimbursement to the neighbor, that is within its legal rights. Under N.J.S.A. 58:10B-16, the responsible party is required to file an action in Superior Court seeking access if good faith voluntary negotiations do not result in access. Hiring an attorney to file the action is clearly more costly to the responsible party than paying a couple thousand dollars to the neighbor or paying for some landscaping work.

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Since experienced environmental practitioners have realized the cost benefits of suggesting that clients reimburse their neighbors for legal fees associated with negotiating an access agreement, court intervention is rather uncommon in the access scenario. Responsible parties are aware of their neighbor's "victim mentality," especially if the parties have had contentious interactions in the past. Calm minds usually prevail with the reimbursement approach.

The law is clear that so long as the request for access is reasonable and necessary to remediate contamination, the neighboring property owner cannot refuse access.

As discussed above, while neighbors who retain environmental consultants for a peer review of the request for access is not common practice for most commercial (or residential) property owners, it may become more common if the responsible party's Licensed Site Remediation Professional (LSRP) or the responsible party itself is deemed, for whatever reason, as untrustworthy.

Some LSRPs still believe that responsible parties are entitled to access to exculpate their clients from responsibility for the off-site migration. To the contrary, the law is clear that parties only have a right of access where they reasonably believe that contamination has migrated from their property onto a neighbor's property.

Environmental attorneys should be cognizant of this issue with LSRP overreaching. Thus, in addition to the negotiation of the terms of the access, the neighbor's environmental attorney should also be sure that the party requesting access indeed has a legal right to access. Once it is determined that the party requesting access indeed has such a right, the neighbor's cooperation may be contingent upon reimbursement of legal fees and/or consulting fees. ■

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