COMMENTARY

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When Can the Government Access Contaminated Sites?

Regulators need access to investigate and clean up property contaminated with hazardous substances. That need to get onto property does not respect property lines or who may happen to own or occupy that land. Moreover, if regulators want responsible parties to do the investigation or the cleanup at an "enforcement lead" site, then private parties may need access. The Pennsylvania Hazardous Sites Cleanup Act (HSCA) and the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provide statutory authority to enter. This column provides a review.

Section 503 of the HSCA generally covers the right of the Pennsylvania Department of Environmental Protection to enter property to investigate either a release or a threatened release of a hazardous substance or to implement a response action. Section 104(e) of CERCLA governs the United States' right of access and Section 104(j) authorizes the United States to acquire property when necessary to complete a response action.

There must be limits on the government's authority to enter property. A statute that allowed government agents to enter any property anywhere in Pennsylvania because a release of a hazardous substance occurred somewhere else would probably run afoul of the Fourth and 14th amendments. But expressing the limits that make sense turns out to be somewhat tricky.

The HSCA and CERCLA authorize investigations of and "responses" to "releases" or "threatened releases" of "hazardous substances" from "facilities." The facility is inanimate—a building or vessel—and not a person. The response can take place anywhere that is "necessary," not limited to the real estate parcel that is, or that contains, the facility. So, the statutes authorize a cleanup on the property of the "victim" of a release as well as on the property of the facility that caused the problem. Moreover, the statutes authorize a cleanup on the property that contains the facility from which there was a release even if the current owner of that facility is a victim; for example, an innocent purchaser, a person who takes by inheritance or devise, a foreclosing secured lender, may all have no liability and still own the facility from which there is a release.

Allowing the government to enter a victim's property over the victim's objection seems a little bit odd. Should someone who has literally been dumped on by virtue of having been dumped on become subject to a government order for an intrusion onto his or her property? That intrusion might be substantial. A group of people taking soil samples with a hand augur is merely inconvenient. A drill rig is something else. Excavation and removal of soils is even more.

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Section 503 of the HSCA explicitly authorizes entry onto the land of neighbors to a facility from which there is a release. Section 503(c)(3) allows entry when "entry is needed to determine the need for response ... or the appropriate response or to effectuate a response action." Section 503(c)(4) allows entry when "a release ... has occurred on a nearby property, and entry is required to determine the extent of the release." Section 503(e)(1)(ii) requires "a person who owns or occupies land which is near the site of a release or threatened release" to allow access to the DEP for investigation, and Section 503(e)(2)(ii) requires access for purposes of performing a response from "a person who owns or occupies land which may be affected by the release."

Section 104(e) of CERCLA appears at first reading to authorize only access for investigation. Section 104(e)(3)(B) in particular allows "any officer, employee or representative [of the president] ... to enter at reasonable times ... any vessel, facility, establishment or other place or property from which or to which a hazardous substance or pollutant or contaminant has been or may have been released." The Environmental Protection Agency will treat that as authority to seek access to implement a response. In addition, Section 104(j) authorizes the EPA to acquire or to condemn property it may require to implement the permanent cleanup—the remedy—provided that the state agrees to receive the property once the remedy is complete.

These authorities may be enforced by order or by lawsuit. Just recently, the Commonwealth Court affirmed such a case in *Commonwealth v. Spangler*, No 1917 C.D. 2013 (Pa. Commw. Ct. Jan. 23, 2015). That case arose under the HSCA. The defendants had a property on which they kept a number of storage vessels of various types containing oil. At least one spilled. When they did not clean up the property, the DEP sought access to investigate and to address the containers and the contaminated soil. When the defendants refused, the DEP brought an action in the court of common pleas under the Storage Tank Act and the HSCA to obtain access. The defendants contended that petroleum was not a hazardous substance under the HSCA and that they were not "responsible persons" under the statute. While the Commonwealth Court found both defenses to have been waived, it went on to observe that status as a responsible party is irrelevant to the obligation to provide access. "Indeed, Sections 501 and 503 of the HSCA do not require a finding that one is a responsible person before the department can be granted investigative or remediative authority pursuant to those sections."

The CERCLA rule is the same. In the early case of *United States v. M. Genzale Plating*, 723 F. Supp. 877 (E.D.N.Y. 1989), the EPA sought access to conduct a remedial investigation and feasibility study. The landowner, claiming to be the victim of the act of a third party, refused access unless the EPA assured it that it would not be responsible for the costs of the investigation and study. The court ordered access anyway, holding that liability questions would be for a different proceeding.

In addition, each of the statutory defenses available to current owners of contaminated property added to CERCLA in 1986 or later, such as the "innocent purchaser," "bona fide prospective purchaser," and secured lender defenses, each require cooperation and access in order to maintain the defense. The original three CERCLA defenses under Section 107(b)—act of God, act of war and act of a third party—may not require cooperation or access as a condition of the defense.

The rule has to be that the government can order access to effectuate a cleanup. Otherwise, response actions would be optional for landowners. A landowner could deny access indefinitely, and no investigation or cleanup could occur.

State voluntary response programs, like the Land Recycling Program under Act 2 in Pennsylvania, regulate investigations and cleanups that can, as a practical matter, be deferred indefinitely at the discretion of the landowner. CERCLA Section 128 makes the federal program generally defer to state voluntary programs. In Pennsylvania, there is no affirmative obligation under Act 2 (although there may be under other law) to address a site.

A site that requires affirmative attention under the HSCA or CERCLA, or, for that matter, other coercive programs like the corrective action program under the Resource Conservation and Recovery Act, generally cannot await the pleasure of a landowner. Maintaining the condition on the landowner's property presents a risk to the environment or to the public that makes response necessary. That tracks older principles under Sections 316 and 401 of the Clean Streams Law, or even the common law of public nuisance. One has an affirmative obligation not to maintain a public nuisance, and therefore one cannot resist access for the purpose of investigation and cleanup.

There are limits, however. The request for access has to be reasonable. For example, neighborhood complaints about a junkyard did not justify a Section 104(e) request from the EPA in *United States v. Tarkowski*, 248 F.3d 596 (7th Cir. 2001), because they were not connected to a release or threatened release of a hazardous substance. The government also has to be careful not to effect a taking requiring compensation.

Finally, the right to access is in the government under both Pennsylvania and federal law. Recalling an old case, the mere fact that the United States has ordered a private party to perform work under Section 106 of CERCLA does not authorize that party to condemn land, as in *United States v. Hardage*, 58 F.3d 569 (10th Cir. 1995).

Ordinarily, all of these issues get worked out through an access agreement. However, one has to keep in mind the government's background right to order access or to seek it through judicial proceedings. •

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