Published on *The National Law Review* https://natlawreview.com

Penalties Under CERCLA for Denying EPA Access to Test

Article By:

David G. Mandelbaum

When your neighbor's property is contaminated, the environmental regulators may want access to your property to investigate whether the contamination has affected *your* property. You may have business reasons not to want to allow that access. If you in fact stand in the government's way — recalling that you have not caused the contamination, you are not a "polluter," and no one knows yet whether the contamination is on your property — what happens to you? Oddly, the courts have decided very few cases on the point, and most address access to records not to the property itself. But in the last days of 2021, the federal district court in White Plains, New York decided such a case under the federal Superfund statute. *Cannistra Realty, LLC v. Environmental Protection Agency*, No. 19-cv-3558 (CS) (S.D.N.Y. Dec. 27, 2021).

Landlord owned a property that it leased to a car dealership. The property adjoined a site contaminated with radiation in the last century. EPA wanted access to the dealership to test the buildings and soils for radiation. The landlord resisted for fear that the testing would disrupt the dealership's business and induce the tenant to break a lucrative lease. Interestingly, the landlord apparently did not tell the dealership of EPA's request for a year. EPA ultimately issued an administrative order for access to the landlord under section 104(e)(5) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9604(e)(5), to allow the placement of radiation canisters in the building and sampling of soils, presumably through the pavement in the parking lot. Landlord refused access except in terms unacceptable to the EPA for 83 days after the order, and filed a lawsuit challenging the validity of the order. The parties ultimately agreed at that point, and EPA did the work.

Landlord then sought summary judgment that the order had not been valid, a motion that failed. EPA brought a cross-motion for summary judgment for a civil penalty.

The statute permits a civil penalty adjusted for inflation of up to $59,017 per day. EPA sought a penalty in the range of $2000 to $3000 per day for the 83 days. Landlord claimed that no penalty ought to be due because its insistence on terms like night work and insurance coverage was not unreasonable.

The court held that failure to comply when compliance was possible was not of itself unreasonable, but the landlord here had taken an unreasonable position. Applying a series of considerations, the court determined that a "heavy" penalty would be appropriate, even though the landlord was not the polluter. However, the court came out at a penalty of $750 per day, or $62,250.

EPA wanted to test to be sure that employees and customers of the dealership were not exposed to radiation. The court was not sympathetic to business rationales to avoid learning whether the property posed a risk. In general, intentionally not knowing can be a challenging position to defend. On the other hand, the sanction was hardly draconian. Pick the message you want to take away.

National Law Review, Volume XII, Number 4