HIRING ENVIRONMENTAL CONSULTANTS AND MINIMIZING LIABILITY

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Since the enactment of Federal, State and local laws for protection of the environment over forty years ago, the environmental consultant profession has greatly expanded. Environmental consultants provide a variety of services. They conduct audits to determine whether clients are conducting their businesses in accordance with legal requirements. They conduct assessments of real property to determine if it is contaminated, and often assist clients in understanding laws designed to prevent pollution. They also prepare environmental permit applications and proceed through permitting processes, and prepare plans for remediation of contaminated property. Environmental consultants serve as expert witnesses in a variety of lawsuits.

Because of the extent of services rendered, environmental consultants face a growing risk of liability under environmental statutes and common law. The purpose of this article is to provide practical advice with respect to hiring and entering into contracts with environmental consultants. Also discussed are theories of potential liability.

HIRING

Environmental consultants may be located through the internet, trade associations, and business contacts. It is prudent to contact at least three environmental consultants for proposals. It is important to review their qualifications, and find out the types of businesses to which they have provided services in the past. References should be consulted. Inquiries should be made as to the length of time that the consultant has been in business, and as to the consultant's membership in professional associations. Finally, the scope and amount of professional liability insurance held by a consultant should be reviewed and, where applicable, such insurance should cover pollution-related claims. A myriad of types of insurance are available.[2] A potential consultant should provide proof of insurance.

Ability to communicate is key. An environmental consultant that is hired for a job should have the ability to discuss services in a clear, down-to-earth manner. The best type of consultant to hire is one who has worked in similar situations, with training and experience in the locality of the business seeking to hire the consultant. For example, a consultant hired to undertake an environmental permitting process should have working knowledge not only of permitting requirements, but also familiarity with people in the government office that will issue the permit.

THE CONTRACT

Although the costs of hiring an environmental consultant are important, it is equally important to understand exactly what services the consultant will provide, and services not provided. The services should be listed in a clearly-defined contract. Extras, or services that may be provided for an extra cost, should be carefully explained. The contract should clearly set forth the schedule in which specific services will be rendered, and may impose penalties if the schedule is not met. Expenses that are in addition to the costs of services should be described. A schedule for payments to be made under the contract should be included.

In addition to clear definitions of services, costs and timing, there are many other contractual considerations. Preprinted contracts presented by environmental consultants may be the subject of negotiations, and the preparation of an addendum that supersedes the printed contract may be appropriate. Many preprinted contracts limit liability of a consultant to the amount charged; such provision may be negotiated or eliminated. Many contracts state that the work and any reports generated are for the sole benefit of one individual company and not third parties. If the work product of the consultant will be used, for example, by other consultants or persons, restrictions as to use by third parties should be deleted from the contract or revised, as appropriate. Some preprinted contracts transfer risk of liability to the client through indemnification or hold-harmless clauses, which may or may not be enforceable depending upon State law. These provisions should be carefully reviewed, and then deleted or modified after

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[2] Types of insurance coverage available include, but are not limited to, Pollution Liability coverage, Mold and Fungus coverage, Professional Liability Errors and Omissions, Liquidated Damages coverage, and even Punitive Damages coverage.

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negotiation. Dispute resolution provisions such as mandatory arbitration, choice of jurisdiction and venue, should be set forth in the contract.

From the client's standpoint, warranties and representations on the part of the environmental consultant should be included in the contract. For example, a representation in a Phase I environmental site assessment stating that the site assessment will follow ASTM standards would be reasonable in a contract involving such a site assessment. An environmental consultant involved in a petroleum underground storage tank removal may represent that such removal will be in accordance with applicable laws and that the work will result in the issuance of a "no further action" letter from the appropriate governmental agency. Consultants may object to using any warranty or representation. Some will provide "Certifications," which often are opinions.[3]

Other provisions will be of benefit to the client. The contract should define which party has the responsibility to provide notices or disclosures to public agencies in the event (for example) that a release of hazardous substances occurs. Since some types of remediation may be the subject of a mechanic's lien[4], a provision may be added whereby the environmental consultant waives lien rights. The contract should provide for protection of trade secrets and other confidential information regarding the client's business. Last but not least, the contract should define the type of professional liability insurance to be carried by the environmental consultant, and require proof of continuing insurance coverage.

WHEN THINGS GO WRONG

Despite efforts made in carefully interviewing and hiring of an environmental consultant, as well as entering into a carefully written contract, problems may occur, resulting in an environmental consultant becoming legally liable for damages under both environmental statutes and common law. However, case law is sparse, probably due to the settlement of potential claims.

[3] For example, under the California Business and Professions Code §6735.5, the use of the word "certify" means "opinion" and not a "warranty or guarantee".

[4] See Ohio Revised Code §1311.01(J).

Perhaps the most used theory of liability against environmental consultants is that of negligence.[5] In order for a consultant to be held negligent, the standard of care breached is that normally possessed by members of the same profession. Failure of an environmental consultant to take advantage of new techniques or methods available may be regarded as professional negligence, or if the consultant's report (frequently a Phase I environmental assessment) is not accurate.[6]

Negligent misrepresentation is also a potential theory of liability. This claim could arise when a consultant misrepresents its qualifications.

Theories of negligence will extend not only to the consultant's client, but also may extend to a third party in a situation where it is reasonably foreseeable that a third party would be injured by the consultant's conduct. Liability to third parties is often dependent upon the scope of the consultant's services to be undertaken and whether the contract limits reliance upon the work to specific parties.[7]

An environmental consultant may be held liable for breach of contract, such as failure to perform in accordance with contractual promises.

With respect to statutory liability, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"),[8] a Federal law providing for clean-up of inactive sites, a consultant that has control over the disposal of hazardous substances may be held strictly liable as an arranger for remediation of contaminated property. Such liability may extend to the Federal government, and also to other parties (such as the owner of the property or others who arrange for disposal) who may seek contribution toward the remediation from the consultant. See *Kaiser Aluminum & Chem. Port v. Catellus Dev. Corp.*,[9] where a Federal appeals court held that a contractor who relocated contaminated soil could be held liable under CERCLA.

Depending upon the factual situation, liability also may attach under the Federal Toxic Substances Control Act,[10] which generally applies to manufacturers and processers of chemicals, the Clean Air Act,[11] which controls air emissions, including those resulting from asbestos removal, The Resource Conservation and Recovery Act,[12] which governs functioning hazardous waste transportation, treatment, storage and disposal facilities, as well as a myriad of State statutes.

CONCLUSION

Careful hiring and contracting with environmental consultants may involve a substantial amount of time. However, such time will be well spent if the efforts made result in services that timely satisfy needs. Case law outlining liability of environmental consultants is emerging as the variety of services rendered continues to grow.

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5 Restatement 2d of Torts §299A.

6 *Titanium Industries v. S.E.A., Inc*., 118 Ohio App.3d 39 (Mahoning Co. 1997); Restatement 2nd of Torts, §552.

7 *Bronstein v. GZA Geoenvironmental, Inc*., 140 N.H. 253, 665 A.2d 369 (1995).

8 42 U.S.C. §§9601, et. seq.

9 976 F.2d 1338 (9th Cir. 1992)

10 15 U.S.C. §§2601, et. seq.

11 42 U.S.C. §§7401, et. seq.

12 42 U.S.C. §§6901, et. seq.