Environmental Consultants Face Potential Legal Liability

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Some companies subjected to environmental enforcement or cleanup actions may believe others should take the blame or share in the costs. When environmental consultants have been involved, the finger can point in their direction. Accordingly, consultants should be aware of scenarios that could present them with potential liability both under common law and by contract. Likewise, clients should understand what the law expects of environmental consultants and form reasonable expectations around those requirements.

When the relationship between an environmental consultant and its client or a third party goes awry, the most often used common law causes of action brought against the consultant are negligence and negligent misrepresentation. In negligence actions, aggrieved parties may claim the consultant owed them a legal duty to render services at a certain level of professional care, but failed to do so, causing damages. In negligent misrepresentation actions, a party may claim it was justified in relying on information provided negligently by the consultant, which resulted in financial detriment.

In such cases, three questions are commonly at issue:

1. Did the consultant owe the plaintiff a legal duty of care?

Courts in most jurisdictions hold the environmental consultant/client relationship is similar to the doctor/patient or attorney/client relationship, in that it automatically gives rise to a duty of care. The contention made here is that simply because of the fiduciary nature of the relationship, the consultant owes its client a duty of professional care. Many courts hold this duty of care does not extend to third parties (e.g. neighboring property owners, subsequent purchasers, subcontractors) unless it is reasonably foreseeable that the consultant's conduct will result in damages to a third party.

2. When a legal duty of care is owed, what is the standard the consultant must meet?

Most courts hold the professional to a "reasonable consultant" standard of care. The "reasonable consultant" is one who renders services using the same level of care and skill ordinarily exercised in similar circumstances by consultants performing comparable services in the same area or region. To articulate what the "reasonable consultant" standard is in a particular case, a plaintiff must use testimony of an expert witness who has knowledge, skill, experience, training and education in the applicable field.

3. Did the consultant meet the "reasonable consultant" standard?

While each case is fact specific, some common practice scenarios present questions as to the "reasonableness" of a consultant's conduct. For example, many jurisdictions hold the reasonable consultant must take advantage of new technologies and methods available within the profession. A failure to utilize those technologies or methods in rendering services may be all a court needs to find the reasonable consultant standard was breached. If damages result from the consultant's use of outdated technology, the consultant may be exposed to liability.

Next, a consultant may feel tempted to provide assurances to a client regarding results, "We will get you this permit." However, such guaranteed results may be outside a reasonable consultant's conduct. If a client relies on the promise of a permit, incurs planning costs and capital expense in anticipation of project approval, and then the consultant fails to deliver the promised permit, the consultant may be exposed to liability.

Most environmental consultant/client relationships are memorialized by contract, meaning breach of contract claims are common between clients and consultants. The environmental consultant contract provides a mechanism for both parties to articulate what duties apply and to fine tune liability. For example, parties may include a "Standard of Care" clause in the contract, which sets an expectation for the consultant's conduct. A consultant may also choose to limit its scope of work in the contract to a specific set of tasks, which in turn, may limit its exposure to claims related to issues outside the stated scope. Many jurisdictions uphold "Limitation of Liability" clauses in consultant contracts; some even allow a consultant to limit its total liability to the amount of fees paid by the client. Finally, consultants may insert terms in the contract to reduce applicable statutes of limitations, to indicate the circumstances under which it may report information to regulators, and to address issues of confidentiality and ownership of documents.

Both consultants and clients should understand potential liabilities associated with the environmental consultant/client relationship. It is important to remember that the environmental consultant/client relationship automatically gives rise to a duty to render services as a reasonable consultant would. The contract gives both parties an opportunity to further define the standard of care, scope of work, limitations of liability, duty of confidentiality, and other conditions relevant to the engagement. Failure to pay attention to and negotiate the terms and conditions of the contract can lead to unanticipated consequences if something goes wrong.

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