



Minimizing Environmental Consultant Liability

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Consultants Are Common Targets

- ◆ 20% of E & O claims to insurance companies relate to due diligence
- ◆ 80% of claims relate to contractual and historical issues



Legal Theories of Liability

- ◆ Negligence
- ◆ Breach of Contract
 - To Whom Is Duty Owed
 - Foreseeability
 - Third Party Beneficiary
- ◆ Relationship so close as to approach contractual privity
- ◆ Negligent misrepresentation



Purpose of Diligence

- ◆ Focus away from Innocent Purchaser to Business risks
- ◆ Clients want to know more than the ASTM
- ◆ Variations among clients:
 - lender vs. owner
 - buying vs. leasing
 - buying business vs. real estate
 - off-site liability
 - compliance issues



Purpose of Loan

- ◆ Traditional Mortgage Lender
- ◆ Asset-Based Lender
- ◆ Loan Syndication
- ◆ Securitization
- ◆ Refinance vs. New Loan
- ◆ Fannie Mae/Freddie Mac/SBA



Typical Bank Concerns

- ◆ Credit Risk-
 - Borrower Ability to Pay Loan
 - Value of Collateral
- ◆ Direct Liability
 - Cleanup costs
 - Toxic Torts
- ◆ Reputational Risk



Key Legal Issues

- ◆ Identify purpose of Project
- ◆ Identify “Materiality” thresholds
- ◆ Identify time-constraints
- ◆ Identify non-scope issues and ASTM scope elements that are excluded



Some Key Environmental Issues

- ◆ Asbestos
- ◆ LIW
- ◆ LBP Disclosure
- ◆ Heating Oil Tanks
- ◆ Septic Fields/Dry Wells
- ◆ Mold
- ◆ Vapor Intrusion
- ◆ MTBE
- ◆ LUCs




Terms and Conditions

- ◆ Contract should parallel SOW
- ◆ Limitations on Liability- Key issue
- ◆ Use written for to document change orders



Reliance- who does consultant owe duty to?

- ◆ One of the most hotly litigated issues
- ◆ Identify parties who will rely on ESA
- ◆ Time limitation on how long can rely on ESA
- ◆ Note that courts may use “reasonably foreseeability” test to identify parties to whom consultant has duty



Reliance-continued

- ◆ Beware of duty to third parties (e.g., adjoining landowners)
- ◆ Beware of statutory disclosure obligations



Insurance

- ◆ Make sure limitations match insurance
- ◆ Evaluate if aggregate and per claim insurance limits adequate for number of ESAs and whether deductible is reasonable
- ◆ Consider adding coverage for “economic loss”



Historic Research

- ◆ One of key areas of litigation
- ◆ Often overlooked in commodity-style reports
- ◆ Check local sources and local officials (police firing range, farm land)
- ◆ Closed or former heating oil tanks
- ◆ Former Septic Fields (Wall Township NPL)
- ◆ Dry Cleaners at 70% of shopping centers but usually only for 3-4 years



Quality Control

- ◆ Standard Questionnaires
- ◆ Standard terms and phrases in reports (no suspect asbestos)
- ◆ ESA should be able to stand on its own (include all critical documents)
- ◆ standardized training



Case Study 1

- ◆ Consultant Retained by Bank to Perform Phase I ESA on foreclosed property
- ◆ Consultant estimates asbestos abatement costs at \$10,000
- ◆ Bank negotiates sale of property to investor who sells property to plaintiff. Investor indemnifies plaintiff.
- ◆ Plaintiff discovers additional asbestos that will cost \$900,000. Investors sues consultant



Case Study 2

- ◆ Consultant retained by bank to perform Phase I ESA
- ◆ Cost of the ESA included in the fee charged by the bank cost of the ESA was included in the fee charged by the bank
- ◆ Consultants inspects site with bank's borrower
- ◆ Consultant fails to identify prior dry cleaner at site that would have been identified in historical database (current property manager did not know about prior drycleaner)
- ◆ Borrower/purchasers sues consultant when it cannot resell property



Case Study 3

- ◆ Consultant orally retained by law firm on behalf of client
- ◆ ESA stated that ACM survey reportedly showed no ACM and stated there was no ACM at site
- ◆ Client incurred \$4 million in ACM abatement costs and sues consultant



Case Study 4

- ◆ Consultant retained by developer for brownfield site to be built into retirement community
- ◆ Consultant concluded no RECs since historical RECs had been remediated under RCRA and ECRA
- ◆ Farmland attached to the land had been used as a police firing range and illegal dumping



Case Study 5-Oops

- ◆ Phase I for mobile home park only goes back to 1970 when first developed
- ◆ Attorney Requires Consultant to go back to 1940 or first use
- ◆ Historical research shows property used as world war II training ground for bomber pilots



Top Mistakes by Consultants

- ◆ **Failing to Make Sure the Client Understands the Due Diligence Process**
- ◆ **Failing to Understand the Client's Objectives**
- ◆ **Failing to Use a Written Scope of Work**
- ◆ **Failing to Define the Key Parameters of the Assignment**
- ◆ **Failing to Consult With Client's Attorney When Identifying HRECs**



Mistakes, Cont.

- ◆ **Starting Work Without a Written and Executed Contract**
- ◆ **Failing to Define Your Relationship With Law Firms**
- ◆ **Failing to Identify Who Can Rely On the Report**
- ◆ **Failing to Clarify Your Disclosure Obligations**



Top Mistakes, cont.

- ◆ **Clarify How Information is To Be Conveyed**
- ◆ **Beware of Changes Lawyers Request to Reports**
- ◆ **Make Sure Reports Conform to ASTM and Internal Standards**
- ◆ **Make Sure You have Sufficient Insurance Coverage**