

The Environmental Business from the Technical Perspective. Environmental Law Forum, Pennsylvania Bar Institute 2013-7481, Chapter L

Subtopic: Site Remediation – Lawyers and Environmental Consultants Working Together

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The relationship and communication between counsel, environmental consultants and the client is integral to any project running smoothly. This relationship can begin in different ways and depending on the complexity of the project the timing for involvement of all parties will vary. For high profile sites with multiple parties, possible public involvement and/or potential for third party litigation, having counsel involved from the beginning will help shape the process. In addition some basic considerations for all parties are presented below.

Scope of Work and Implementation Considerations

As an environmental consultant, trying to collect the data necessary to quantify potential site-related contamination is critical to determining the right remedial strategy. However, counsel may want to minimize the amount of data collected and raise concerns about the possibility for increased liability associated with the collection of new or additional data. A current site owner or operator may also have concerns related to access or interruption of operations. Although the end result is generally not 100% of what each party desires, the objectives of the client and how those objectives can be achieved within the regulatory program is a good place to start.

A few questions that should be answered by counsel and/or the client prior to beginning any investigation and include:

1. Is there a regulatory driver associated with the site investigation/remediation? Often consent agreements are negotiated prior or during investigative activities. Counsel is generally responsible for negotiating with the regulatory agencies with support from environmental consultants. The consultant should understand what key provisions are included in that document and ensure that any scope of work prepared will be responsive to the agreement. This can include the submittal of progress reports, interim schedules and notification to the regulatory agency. It is also important to determine what involvement counsel and the client will have with respect to the review of deliverables. Has the client deferred the review to counsel or will documents go through in depth review process by multiple parties?
2. Who are the responsible parties (RPs) and the property owner? When the site is owned/operated by the client, working with facility managers

generally does not require counsel; however, if the RP is no longer the property owner/operator (or the client is not the RP and not yet the owner), the access agreement established between the client and the property owner is best left to counsel. The consultant may provide support to counsel by anticipating possible disruptions as a result of the investigation and presenting them during the negotiation process. (Consultants can provide information for negotiations including the number of times access may be required, duration of site activities, and the estimated timeline until closure. Chain of communication should be clearly communicated to all parties)

3. Is the site an active manufacturing or other operating facility? A vacant facility allows unfettered access to most locations; however, understanding vertical clearance distance and the locations of subsurface utilities can impact the schedule. If your client controls facility access this is generally addressed through a pre-investigation site meeting. However, if the RP is not the current owner, negotiating access for environmental consultants and their contractors to conduct a bid walk prior to anticipated invasive work is important to not only develop the proper scope of work but to bring the right equipment to the site.
4. Who is responsible for executing disposal manifests/documentation and are there special considerations? Determining in advance who is responsible for the waste generated as part of remediation activities allows investigative derived wastes to be transported in a timely fashion. In addition, clients may have very specific waste disposal practices and facilities that need to be followed. As such, the consultant will need to understand the client specific requirements. In addition, investigative derived waste will need to be sampled to determine if the waste generated is non-hazardous or hazardous. In addition, in certain circumstances, the waste materials can be classified as RCRA listed (i.e., D or F listed wastes based on use).

Steps for Remedial Work

The steps for most remediation projects, even complex sites, will generally follow the same order:

- Identify the areas of concern;
- Delineate the extent of the contamination; and
- Develop and implement the right remedial strategy for the client

A few complications to site investigation include when contamination extends offsite and access is required for continued investigation activities and if potable water supply wells are impacted as a result of site activities.

Offsite Access

When the investigation requires additional sampling to be conducted offsite, negotiating access with the property owner is an important step. If the property owner has not already been notified of the investigation at the site, finding out that contamination extends to their property may result in difficulty gaining access to their property and possibly create a contentious relationship. As a consultant, having counsel or the client initiate the dialog for the agreement is often preferable. On the other hand, if the consultant has already conducted work on the site, they may have an idea as to which neighbors tend to yell over the fence and which offer water on a hot day. Being approached by a familiar face with a copy of a counsel-drafted agreement may spur progress, as opposed to a lawyer letter just showing up in the mail. Also keep in mind that looking up the site owner on a tax map and executing an access agreement does not necessarily mean that a tenant will then let a consultant in the door, and legitimate tenant concerns may not have been incorporated into the agreement by the owner granting access.

A basic access agreement will include the property and owner information and the terms and conditions of the agreement such as notification, expiration of the agreement, standard of care, indemnification, demonstration of insurance (and possible additional insureds), and providing copies of sampling data. If counsel is negotiating the agreement on behalf of the client, it is critical for the environmental consultant to know if additional insured coverage is required to be extended to the property owner by the consultant and/or their subcontractors. The most common insurance requirements include 1) commercial general liability 2) pollution liability 3) automobile liability 4) professional errors and omissions and 5) workers compensation by statute and employers liability. In addition to insurance coverage, if special provisions are included in the agreement that require contractors to use a specific manufacturer of drilling equipment (i.e., drilling at Geoprobe® Inc. must be with a drill rig manufactured by Geoprobe®) or if site-specific health and safety requirements are required (i.e., Amtrak, Exxon Mobil, etc.) counsel and the environmental consultant must work together so that the provisions requested can be met.

Receptor Impact/Public Participation

If contamination to offsite receptors, in particular potable water supply, has been identified, mitigating the exposure pathway is critical. While the consultant will continue to provide technical expertise, additional support to counsel is often required as impact to potable supply wells may trigger enforcement action and fines from the regulators and toxic tort claims from the potentially affected parties.

Depending on the size of the impact and in addition to public meetings, PADEP may want to set up monthly or quarterly meetings to provide updates to elected officials on mitigation efforts (point of entry treatment, bottled water, alternative water supply, etc.).

There are a number of other considerations depending whether public participation is a regulatory requirement or voluntary, and whether the project as a whole is

welcomed by the community (is this a public meeting about the remediation or will it wind up being about the site redevelopment?). And the format can be important. New Jersey DEP recently provided an interesting case study of the recent vinyl chloride derailment and the poor decision to hold a “public information session” where people could walk from booth to booth, when a “public meeting” was actually needed.

Additional Project Considerations

Additional considerations include understanding if there is the potential for third party litigation, or even an unresolved dispute between parties “cooperating” in the remediation. As a consultant, understanding whether the investigation may result in litigation or is currently the subject of litigation at the start of the project is important. This way communication and protection of information is established early and a specific protocol can be followed for the distribution of investigation results (verbal, email, reports, etc.). Should draft and final documents be stamped with a disclosure such as “Attorney Client Privileged” or “Confidential Work Product, Prepared at the Request of Counsel”? Remedy selection itself can also be responsive to the desires/requirements/litigation positions of various parties. For example, in a simple site redevelopment with contamination under a building, the best remedy may be to demolish the old building and dig. But in the context of a suit by the property owner demanding cleanup and reimbursement for property value diminution and inability to sell the contaminated parcel, a more expensive remedy which leaves the building standing may be in order (presuming that demolition of the plaintiffs building may not help the legal position).

Summary

Throughout all phases of a complex project, there will be legal and technical elements which play off each other and which are best managed by a cooperative technical and legal team. In the context of real estate redevelopment, there are further elements of time, money, taxes, number of housing units or square feet of retail which can also add accountants, architects, lobbyists and others to the client’s team, and the same kinds of cooperative give-and-take is necessary on all fronts to deliver the best possible outcome to all.