

Environmental Due Diligence

Working with Environmental Consultants

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DAVIES

Working with Environmental Consultants



- Regardless of who retains consultant to conduct ESA and/or audit, other party should negotiate to have approval over consultant chosen. Similarly, party who did not retain consultant should negotiate to be permitted to rely on consultant's report
- Request proposal from consultant outlining (i) scope of services, (ii) estimated costs, (iii) schedule of completion of services and (iv) any liability cap. If you have not worked with consultant before, request (i) examples of facilities that prospective consultant has audited/assessed in past and (ii) references who are familiar with consultant's work at similar sites
- While most reputable consultants present unbiased review of property or operation, remember that consultant is generally working for just one party. Be aware, therefore, of "loyalties" consultant may have to other party
- All parties should understand legal significance of, and potential risk associated with, preparing written documentation of possible non-compliance or off-site issues
- Consultant's boilerplate terms and conditions often limit consultant's liability under contract to cost of contract or some other limited amount. At a minimum, consultant's liability insurance should be higher of \$1,000,000 or applicable limits under consultant's professional liability insurance – read fine print

Fine Print - Example #1

Consultant's proposal was prepared for consideration of Client only. Its contents may not be used or disclosed to any party without prior written consent from Consultant

Liability of Consultant or our officers, directors, shareholders or staff will be limited to lesser of \$1,000,000 or damages incurred by Client

Fine Print - Example #2

Indemnification by Consultant – Consultant agrees to indemnify Client and its officers, directors and employees from and against all claims, damages, losses or expenses (including but not limited to reasonable legal fees) arising from personal injury, death or damage to third-party property to extent that all claims, damages, losses or expenses are finally determined to result directly from Consultant's negligence. Such indemnification, as limited by Limitation of Liability, shall be Client's sole and exclusive remedy against Consultant

Limitation of Liability – Client agrees to limit liability of Consultant, its affiliates, and their respective employees, officers, directors, agents, consultants and subcontractors to Client, its employees, officers, directors, agents, consultants and subcontractors, whether in contract, tort or otherwise, which arises from Consultant's acts, negligence, errors or omissions, such that total aggregate liability of Consultant to all those named shall not exceed Fifty Thousand Dollars (\$50,000) or Consultant's total fee for Services rendered under Agreement, whichever is greater

Fine Print - Example #3

Reliance Letter: Notwithstanding any statements in report(s) to contrary, Consultant hereby authorizes Lender to rely on report as if report was addressed directly to Lender, provided that Lender hereby irrevocably and unconditionally covenants and agrees that it is bound by limitation and that it will not under any circumstances make any demands or claims, initiate any suits, actions or other proceedings or seek any form of compensation from or against Consultant that would result in Consultant having greater liability than agreed between Consultant and Client in Agreement

Agreement: To maximum extent permitted by law and notwithstanding and superseding anything to contrary in Agreement:

- Aggregate liability of Consultant arising in connection with Agreement is limited to (i) amount of professional fees paid to Consultant pursuant to Agreement up to \$100,000, plus (ii) 10% of such fees paid in excess of \$100,000; provided that in no event will Consultant's aggregate liability exceed \$1,000,000; and
- Any claim, action or proceeding against Consultant in connection with Agreement must be made within 12 months of earlier of completion of services and termination of Agreement

Fine Print - Example #4

Reliance agreement and parties' reliance on report is conditional upon parties agreeing to:

- Terms, conditions and limitations stipulated in contract(s)/agreement(s) with Client and those stipulated in report
- Relying on report for express and sole purpose of financing involving site
- Having no greater rights than those of Client as contained in contract/agreement with Client and those in report, with consultant's total aggregate liability to parties not to exceed \$2,000,000

