

Environmental due diligence is fundamental for creating a liability defense. It is critical to hire a qualified environmental consultant and negotiate an acceptable consulting contract as a party to the due diligence process. Although the Phase I environmental site assessment process is somewhat standardized, performing a legally defensible Phase I generally requires a reputable consultant with appropriate technical qualifications and a broad understanding of environmental issues, including the technicalities of Michigan's environmental regulations. Having an acceptable contract for services is also important. Consulting companies generally maintain a standard set of terms and conditions that are incorporated into the proposal for environmental services. These terms and conditions should be reviewed carefully and understood. Some important terms to examine are as follows:

Scope of Work. The scope of work that the consultant will perform should include a description of tasks, a schedule for completion, and detailed payment terms. In the case of a Phase I ESA, the scope of work should specify that the Phase I will be performed to American Society for Testing and Materials (ASTM) Standard 1527-05 and list any non-scope issues that need to be evaluated, such as potential asbestos-containing materials or wetlands. It is also advisable to specify that a draft copy of any report will be provided to legal counsel for review prior to issuing the report in final form. The legal review should focus on whether the report satisfies relevant elements of an applicable liability defense.

Indemnification and Limitation of Liability. Many standard environmental consulting contracts include provisions requiring the client to indemnify the consultant for the work performed. This is generally not an acceptable term; with limited exceptions, the consultant should indemnify the client for damages or losses related to the work. Standard contracts often contain limitations on the amount that a client can recover from the consultant in the event of a mistake. One common provision caps the consultant's liability at the amount paid to the consultant for the service. For example, if the client pays \$2,000 for a Phase I ESA that recommends no further investigation, but contamination is later found and the Phase I fails to provide a liability defense, the client's recovery against the consultant may be limited to the \$2,000 fee paid for the report.

Insurance. The contract should specify that the consultant maintains certain levels of comprehensive liability, professional liability, automobile liability, and worker's compensation insurance. While some consultants may agree to permit recovery under the contract up to the amounts of available insurance coverage, it is important to keep in mind that at any given time, the amount of insurance coverage available may not match the amount of coverage maintained. Also, in 2008, the 11th Circuit Court of Appeals issued an opinion in which the Court held that an insurer had no duty to defend or indemnify an environmental consultant against a claim that the consultant negligently performed a Phase I ESA because the environmental consultant's professional liability policy contained a pollution exclusion. See *James River Insurance Co v Ground Down Engineering, Inc* (11th Cir. 2008). While this particular case is not binding precedent in Michigan, it does suggest that there may be situations requiring closer scrutiny of the consultant's insurance coverage. In this case, the lack of insurance coverage available to the consultant impeded the client's ability to recover for its losses that arose due to the consultant's negligence.

Confidentiality. Depending on the particular transaction and the client's position in the transaction, confidentiality provisions may be necessary to prevent the unauthorized disclosure of information provided to the consultant or the work product generated by the consultant.

Reliance Rights. The contract should specify all of the parties who will need reliance on the work product. This includes verifying that all individuals or entities requiring reliance rights are named (e.g., potential owners, lessees or lenders). It is much easier to negotiate reliance rights at the beginning of a project than to obtain reliance rights once the final work product is issued.

environmental due diligence process. We routinely negotiate environmental consulting contracts on behalf of our clients and are familiar with the terms that are typically acceptable to both clients and consultants. We also routinely review environmental assessments and other work product prepared by environmental consultants to evaluate whether legal requirements have been met to support a legal defense to existing contamination. If you have questions regarding a particular project or contract, please contact any member of our Environmental Law Practice Group at 616.235.3500.

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