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Consultant liability and common pitfalls

A column by Willms & Shier Environmental Lawyers LLP

By John Georgakopoulos

Consultant liability is a hot topic that permeates the environmental consulting world. John Georgakopoulos spoke on the topic at EcoLog Legislation's Environmental Liability Seminar on April 9, 2013 in Toronto.

Environmental consultants have been sued in civil court for negligence and breach of contract. Claims against consultants can arise from such things as negligent site testing and investigations to negligently-prepared design plans and specifications.

To a far lesser extent, environmental consultants have been prosecuted and convicted for contravening various environmental Acts and regulations. The end result is that significant fines have been issued against consultants for such contraventions.

Limiting and managing liability is important and challenging. Over the years, we have observed a variety of consultant pitfalls that could have been avoided. What follows is a brief discussion of such pitfalls.

Failure to communicate with the client
Failure to communicate, unfortunately, is not uncommon and leads to huge disconnects between the consultant and client. Effective communication means understanding the client's objectives and instructions, and documenting them throughout the life of the project. A robust paper trail will assist the consultant in documenting expectations, communications and instructions received from the client.

Misunderstanding the client's purpose and objectives
Consultants should ascertain in as much detail as possible the purpose for which the work is required. Asking the right questions will assist in clarifying the purpose of the work and the client's objectives. Understanding the client's objectives is key to delivering the work product that the client expects.

Misunderstanding the scope of work
Understanding the scope of the work is critical. Consider if the scope of work will satisfy the client's purpose, objectives and needs. Again, document and clarify with the client what exactly the client requires to be done.

Oral agreements
Consultants should avoid making oral agreements. Well drafted written agreements will

clearly set out the purpose, scope and extent of the consultant's retainer, minimizing opportunities for dispute that often arise with oral agreements.

Opinions outside area of expertise
Giving an opinion outside one's area of expertise is dangerous and can pave the way to a negligence claim. Consultants should stick to their area of expertise and not deviate from that path.

Failure to use proper judgement
Failure to use proper judgement, skill and expertise not only runs up client costs but is another sure-fire way to expose the consultant to a negligence claim. Consultants should always ensure that they practice with due care.

Missing deadlines
It is crucial that consultants meet their deadlines, especially regulatory deadlines. Failure to meet regulatory deadlines on behalf of a client can significantly impact the client and can result in regulatory action against the client.

Refusing to extend reliance
Extending reliance to third parties is a touchy subject. Reliance comes up often in transactions, whether it is a real estate deal or refinancing. Banks will often require reliance letters from consultants in order to extend financing to clients. Having a policy of refusing reliance letters can negatively impact a consultant's reputation. Providing reliance to others can build value in that consultant's work. However, it is always important to understand the purpose of extending reliance and to whom the consultant is extending reliance. Consultants should ensure that their reliance letter outlines their understanding of the purpose for the reliance and the identity of the new client.

Refusing to negotiate reasonable liability limits
Having a policy of refusing to negotiate liability limits can also have a negative impact on a consultant's reputation. Consultant terms and conditions often limit liability to the fees for the work or $50,000, whichever is higher. Quite often, this is not a reasonable limit on liability. Consultants should be willing to negotiate reasonable liability limits. That said, consultants must ensure that they have appropriate insurance in place to cover the associated risk.

Environmental consultants are an integral component to an environmental team. Their expertise is invaluable and relied upon by clients to make significant business decisions. Minimizing and managing liability will always be an area of concern for environmental consultants.

It is important that consultants work with their clients to understand and define their obligations and work scope. Further, consultants should always document expectations and instructions, avoid oral agreements, recognize their limitations and stay within their area of expertise, and always ensure they practice with due care.

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