

Environmental Compliance 101: Lawyers and Environmental Consultants Working Together

by Robert Newman

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Interactions of the environmental consultants with legal counsel have been somewhat shrouded in myth. A typical point of confusion relates to the roles each party should have in supporting a client's needs. Although this issue can be complex, the focus of this article is to provide practical advice on the process of interaction and cooperation as it relates to environmental compliance and permitting.



Both environmental consultants and practicing attorneys have important roles to play in supporting environmental permitting and compliance initiatives. The “team” approach is essential to the successful completion of any major environmental project. This team will consist of the client, the environmental consultant, subcontractors such as construction firms and laboratories, and environmental legal counsel.

Team Building

The first role the legal counsel may have is in the selection of the environmental consultant. The request to participate in the selection process would normally be made by the client representative (see sidebar: Key Issues to Consider in the Selection of an Environmental Consultant).

Sometimes the role is reversed, and the client asks the consultant for recommendations on hiring legal counsel. This would be the case when a consultant has a long-standing relationship with the client. Key issues that are considered when retaining a law firm may include:

- Experience in handling the particular problem or project
- Experience with relevant regulatory agencies
- Familiarity with the regulations governing the project (e.g., New Source Review)
- Professional reputation
- Business friendly attitude, understanding constraints must make economic sense
- Experience with working with consultants
- Potential conflicts of interest
- Fee structure

Once the team has been established, a variety of administrative issues must be addressed upfront before actual project work commences. First and foremost, is the development of a contract specifying the consultant’s roles and responsibilities. Presumably, the law firm would take the lead in getting such a contract in place. The contract should include the scope of work defining tasks and completion dates. It should also include the project costs and payment terms. Liability and insurance provisions should be stipulated, as well as a confidentiality statement. The contract should address whether it is a time and materials or a fixed cost contract. For a time and materials contract, the

professional labor rates and direct cost mark-ups should be delineated. Fixed cost work normally is billed based on project milestones or percentage of completion. These metrics should be spelled out in the contract.

One issue that arises in situations where there is the potential for litigation is whether the consultant should be retained by the law firm or directly by the client. The concern is that the process is managed so that the consultant’s work is protected as confidential and within the umbrella of “attorney work product.” Depending upon where the action is located and the attorney’s particular viewpoint on the issues, we have seen varying conclusions with regard to this issue. Legal counsel generally makes the final determination.

Permitting Projects

Projects involving the permitting of new facilities or operations typically include six stages: planning, pre-application meetings, application preparation, review of draft permit, review of issued permit, and permit revisions. Provided the facility has not been subject to enforcement actions and is not under stipulated requirements such as a consent decree, the consultant normally takes the lead in preparing the application package. Legal counsel would normally review the application and draft/final

► Key Issues to Consider in the Selection of an Environmental Consultant

- Relevant technical experience and reputation
- Experience with dealing with the relevant agency(ies) and regional offices
- Licenses, registrations, and certifications
- References
- Ability to meet project deadlines
- Approach to project
- Financial stability and longevity
- Project manager qualifications
- Costs and staffing levels
- Creativity
- Ability to communicate
- Company infrastructure for project management (e.g., video conferencing, web meetings)
- Company depth and availability of technical resources
- Location
- QA/QC procedures
- Insurance



An effective and open relationship between the environmental consultant and legal counsel will always best serve the needs of the client.

permits and may take the lead to appeal the final permit if revisions are deemed necessary. In most cases, it is generally not necessary for legal counsel to participate in permit scoping meetings. Participation by an attorney could necessitate the attendance by regulatory agency counsel and prolong and overly complicate the information exchange with agency staff. On the other hand, for a significant project facing anticipated regulatory, legal, or public relations challenges, including an attorney earlier in the process rather than later may be beneficial. Front-end harmony in the application process is of paramount importance. It will be important for a point of contact to be established during the initial communication with the regulatory agency.

The procedures for communication throughout the permitting process should be agreed to in advance. The types of communication should also be specified (e.g., conference calls, web meeting, monthly progress reports). One important point is for the legal counsel to inform the consultant how confidentiality and attorney client privilege should be handled. If during the process of the application development, the consultant believes that future compliance issues could occur; legal counsel should be notified. If public hearings are required, presentations and testimony should be coordinated in close consultation with legal counsel.

Permit requirements are complex. For example, in the Commonwealth of Pennsylvania, there are more than 200 types of environmental permit authorizations.¹ Numerous permit authorizations are required for new sources and operations, as well as for renewals, transfers, modifications (minor and major), and amendments (minor and major). Permit approval times vary widely. The permit decision guarantee (PDG) time can range from 30 days to 380 days, depending on activity and type of permit. A close working relationship between technical consultant and attorney would enhance the position of the client, especially in a complicated regulatory approval process.

Compliance Projects

Compliance activities fall into the categories of “voluntary” and “involuntary” activities. Examples of voluntary actions would be internal environmental

audits commissioned by the client. Such audits can be site-specific or company-wide. Involuntary activities would include agency-directed activities or projects to insure compliance with environmental regulations. The latter typically results from agency enforcement actions and may have stipulated penalties, in addition to requirements for physical improvements (e.g., air pollution control equipment, process changes, enhanced monitoring) to minimize impacts to the environment.

There is considerable debate in the regulated community concerning the liability of voluntary or self-audits. The central issue is that an audit may uncover information, which, if disclosed to the public or regulatory agency, could be harmful to the company or even result in prosecution of employees (including executives and managers). Some states have passed legislation to limit liability, but there can still be a significant exposure. The U.S. Environmental Protection Agency has voiced a strong opposition to the adoption of broad environmental privilege by the states. Understanding the pros and cons of a self-audit is best handled by legal counsel and not the environmental consultant. Once a decision is made to conduct an audit, the attorney and consultant should work together to plan how it will be performed and how findings will be documented. As with permitting, a team approach works best to protect the interests of the client.

With respect to involuntary compliance activities or any sort of enforcement action by a regulatory agency, environmental counsel should be consulted early and often and, in many cases, may take the lead in any communications with the regulatory agency. Environmental consultants should be prepared to provide technical support as needed in consultation with the attorney. A key role for the consultant in such activities is to recommend technical solutions that would result in cost-effective compliance with environmental requirements. Compliance actions that would result in impairing operations and are non-sustainable from a business perspective should be identified and avoided.

From the standpoint of an environmental consultant, one advantage of having legal counsel involved in compliance activities is the clout factor. A consultant



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can explain to a client what will result in a violation of environmental requirements; an attorney will present the implications and liability associated with such actions. When discussing implications, many times the client will be more willing to listen to legal counsel.

One last point involves the role of the expert witness in compliance support. If a project is going into litigation, the consultant should work closely with legal counsel to identify candidates for providing expert witness testimony. Desirable attributes for expert witnesses are unique, and the consultant project manager who is already working on the project may or may not be the correct choice depending on the situation. Attorneys generally (though not always) prefer expert witnesses who have experience testifying as an expert, are thoroughly knowledgeable in their field of practice,

project confidence, create empathy, communicate well, and are sincere and convincing. Not all consultants meet these criteria.

Conclusion

Whether the project involves compliance support or permitting, an effective and open relationship between the environmental consultant and legal counsel will always best serve the needs of the client. There are several key points that are important for such a successful relationship. First, there must be a clear understanding of the roles each party will play. At the same time, there must be complete clarity on communication procedures. Above all, it is critical for all parties to understand the strengths that each can bring to the project in order to provide the best possible technical and legal guidance. **em**

Reference

1. Policy for Implementing the Department of Environmental Protection Permit Review Process and Permit Decision Guarantee; Pennsylvania Department of Environmental Protection; Executive Order 2012-11; November 2, 2012.

