My Consultant Can Beat Up Your Consultant!

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What happens when your consultant disagrees with the findings of another consultant? More specifically, how do findings differ in the first place? After all, the environmental science practiced by ESA is normally based upon empirical data and our specific experience as applied to similar situations. Therefore, shouldn't ESA's data and reports speak for themselves? And if the opposing consultant also provides services in the same fashion, shouldn't their findings also speak for themselves? How can ambiguity exist? It is truly a vexing conundrum when the conclusions of one consultant can conflict so strongly with that of another.

While differences can be found in a variety of scenarios (amplified below), no scenario is potentially more unsettling than when this occurs during a real estate deal. During a deal, both the buyer and seller retain environmental companies in whom they place their utmost faith and confidence. In a recent project, one of our clients (the buyer) was more than a little miffed because he preferred the results rendered by the seller's consultant! In response ESA replied, "But we are working for you, and you are paying ESA to protect your best interests. The other consultant represents the seller whose goals differ from yours."

Let's examine the scenarios that can create this conflicting situation:

When Clients Break the First Rule of an Environmental Inquiry

ESA requires that our clients be forthcoming. This means that we expect full environmental disclosure. Of course, what we require and what we are told may be two different things. While rare, there have been times that a client knew more than he/she was willing to disclose. How do we know this? Because as the project unfolded, ESA became privy to information that the client already knew. How did ESA become privy to this information? The opposing consultant discovered it via their own investigation. Such surprises normally do not support the best interest of either party and they can be especially troubling to the client if they become known during contract negotiations. Such surprises can even torpedo a deal.

Prior Findings and Reports Were Not Known to the Client

Sometimes, despite the best intentions of all parties, a client is simply not privy to the environmental reports and studies that were previously performed upon the subject property. If there is any reason to believe that prior work was performed and no one has those reports, it may be worthwhile to have ESA conduct a file review at NJDEP's offices in Trenton to discover what

may have happened historically. This is especially important if a seller is privy to data and is unable or unwilling to disclose it. Thus, caveat emptor.

Prior Conclusions Were Rendered Using Obsolete Standards or Analytical Methods

The rules and standards governing environmental compliance continually change. Moreover, analytical methods change continually as well. For example let's assume you have a report that discloses a former leaking No. 2 heating oil tank where remediation was performed and the Total Petroleum Hydrocarbon results prove that the site is clean. That is excellent news, don't you agree? Whoa! Not so fast! In what year was this report produced? Is the analytical method used all those years ago still being used today and is it still acceptable? What about the cleanup standard in use at that time; has it changed? In this example, it is probable that both the analytical method and the cleanup standard have both changed. Therefore, new soil samples must be taken and analyzed using a current, approved laboratory methodology. Then, the results should be compared to current cleanup standards to confirm that the site is indeed clean and that no further environmental actions are warranted.

Conclusions Were Rendered Prior to Implementation of the Site Remediation Reform Act (SRRA)

As followers of this e-newsletter know, the SRRA has changed the way remediation is performed and managed in New Jersey. Letters of No Further Action (NFA) granted prior to implementation of the SRRA (and the Remedial Action Outcome that superseded NFA's) may need to be examined to determine if they are still valid under today's new regulatory regimen. Under this scenario, many differences can be found.

Sampling Points Can Vary

The Technical Requirements for Site Remediation prescribe how many samples need to be taken in any given situation. It is very possible that two consultants, working on the same project, can take the required (minimum) number of samples but from different locations. Thus, the laboratory results, derived from different locations, can be vastly different. In this situation, there is no error or oversight by either consultant.

I Received an Approved Affidavit of Negative Declaration Under Industrial Site Remediation Act (ISRA). Is it Still Good?

Maybe. Unfortunately, ESA has examined many closed ISRA cases only to determine that the Negative Declaration approved all those years ago does not hold up under today's regulatory scrutiny. So yes, it is entirely possible that a closed ISRA case may now need additional work to bring the site into compliance via today's regulations.

A Prior Consultant Was Not As Knowledgeable or Thorough as Necessary

I am proud to say that the environmental consulting industry contains many high-quality, reputable firms. And notwithstanding this fact, on rare occasion, ESA becomes privy to work

that, in our opinion, is substandard. We have seen consultants who may not have fully understood what was required of them, thereby rendering a deficient work product. For example, we have reviewed reports missing significant elements (like text, tables and figures) that were required pursuant to NJDEP guidance documents. When this occurs, ESA may have to redo some, if not all, of the work. Being the messenger in those situations is very uncomfortable but dispensing information, even when it is distressing, is part of our responsibility to each of our clients.

Summary

Fans of boxing may be disappointed that there is no pugilistic remedy, as suggested by the title of this essay. Preferably, differences are resolved via discussion (sometimes with the other consultant), research, or sampling. Although at times, a fourth remedy may become necessary. In the case described above, where our client preferred the findings of the seller's consultant, the source of the difference was obvious. The seller's consultant was painting an honest image of the site that reflected the best interests of their client. ESA's client on the other hand, wanted to buy the property but did not want to spend a nickel more on environmental services than he deemed necessary. Our client failed to appreciate that our job was to protect him. He believed that ESA was making a mountain from a mole hill and that we were trying to create work for ourselves. This conflict was not resolvable, so we suggested that he find another consultant who would perform more to his liking.

The most important thing to remember is that scientific differences do occur. But at times these differences occur because the consultant is trying to render an outcome that aligns with the client's goals while simultaneously conforming to all the rules and regulations of the NJDEP. Make no mistake; this is an interesting balancing act.

Call me at 732-469-8888 if you have any questions about consulting or any other issue.

Thanks,
Stephen