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Dangerous Intersections: Where Environmental and Construction Law Collide on Construction Projects



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There are many dangerous intersections on a construction project. Whether you are talking about commercial contracts, regulatory compliance, accidents and fatalities, insurance coverage or employment issues, you need to plan for the risks that may arise. One of the more important crossroads where you can expect potential risk is where environmental and construction law meet. These risks can include: onsite water features, compliance with stormwater runoff regulations, preexisting site contamination, and emergency spills and releases.

What is Environmental Risk?

When you hear the words "environmental risk" on a construction project, you probably only think about the catastrophic accident involving the discovery of a hazardous material or the spill of a harmful substance. However, the term really involves a much broader definition. It is more than bodily injury; it is more than property damage. It is more than clean-up of contamination. Oftentimes, environmental risk is about identifying the legal obligations that arise to avoid an environmental loss of whatever nature. When those losses arise on a construction project, the issue can be more complicated.

Sources of Environmental Law

There are two basic sources of environmental law that are applied on the construction area. First, there is statutory law, which consists of statutes and regulations that apply to all areas of environmental concern, including the use and handling of hazardous materials, proper storm water management, pollution controls on equipment, and land usage and preservation. These laws can be found at the federal, state and local levels. Some of the major environmental laws include the following:

- Clean Air Act
- Water Quality Act
- National Environmental Policy Act 1
- Occupational Safety and Health Act
- Federal Insecticide, Fungicide and Rodenticide Act
- Endangered Species Act
- Safe Drinking Water Act
- Resource Conservation and Recovery Act (RCRA)
- CERCLA or Superfund
- Oil Pollution Act

A second source of environmental liability is tort law, where a party can be held liable for causes of action such as nuisance, trespass, or negligence that is tied to an environmental issue. For example, what would happen if a contractor's activities caused damage to an adjoining landowner because the contractor failed to place proper storm water controls prior to construction? Not only does the contractor face potential regulatory liability, the contractor may be responsible in tort for any damages caused by its conduct.

Types of Claims

Ultimately, the contractor should be focused on the environmental risks that arise out of the construction activities and occurring during the work on the project, as well as the claims arising out of the completed operations after the project is done. Following are a few of the claims that can arise on the project:

1. Water quality. The Clean Water Act (CWA) addresses point source discharges or threatened discharges of pollutants into the waters of the U.S. The U.S. Environmental Protection Agency (EPA) delegates authority to most states to regulate most facets of the CWA, including setting water quality standards and issuing water quality permits for discharge of pollutants, also known as the National Pollutant Discharge Elimination System (NPDES) permit. Pollutants covered under the CWA are specifically listed in the statute and include any dredged spoil, solid waste, sewage, garbage, chemical waste, rock, sand and industrial, municipal and agricultural waste. Possible legal actions under the CWA relating to construction projects include actions to require a responsible party to obtain and comply with permit conditions or limitations. In addition, a responsible party is subject to suits to enjoin any violation of a permit condition or limitation.

2. Storm water permitting. Operators of construction projects that involve clearing, grading or excavation that results in disturbance of one or more acres, or less than one acre if part of a larger common plan, must obtain coverage under a NPDES storm water permit for construction activities. Both general and individual NPDES permits are available for discharge of construction storm water. In some instances, individual permits may be required at sites where construction may pose a higher level of environmental risk, such as landfill construction or construction near impaired or high quality receiving waters. However, permit coverage is available for most construction projects under a construction general permit. Both general and individual permit coverage means that a construction site will be subject to inspection by environmental regulators. Such regulators have broad enforcement authority, ranging from civil penalties of up to \$10,000 per day, to felony prosecution of willful or knowing illegal conduct, and even damage assessments relating to natural resources that may have been impacted.

3. Wetlands regulation. Wetlands may be waters of the U.S. subject to the CWA's Section 404 permitting program, which prohibits the discharge of dredge or fill material into waters of the U.S. without a permit from the U.S. Army Corps of Engineers (Corps). Failure to obtain proper permit certification may subject the regulated entity to substantial penalties and remedial measures, including the possibility of restoring the waters or wetlands that were impacted. The Corps may issue an administrative order called a Cease and Desist Order or institute civil proceedings for an injunction or penalties to force compliance with a permit.

4. Hazardous materials. Many construction projects use hazardous chemicals or generate hazardous waste during the life cycle of construction. Such conditions can raise OSHA safety compliance issues for the "exposing employer" or more catastrophic consequence in the event of a spill. There are a number of federal and state regulations that address the discovery, handling, and abatement of hazardous materials. The typical means to the management of hazardous materials is through proper employee training, written protocols for handling and storage, and emergency best practices manuals.

Manage Risk Through the Contract

Traditional construction contracts include environmental and hazardous material provisions that place the risk on the various parties on the project. As a contractor, you may want to shift to the owner any risk of hazardous materials found on the site. Such a clause may include a stop work provision like the one included in ConsensusDOCS 200, which states: "If after commencing the Work, Hazardous Material is discovered at the Worksite, the Constructor shall be entitled to immediately stop Work in the affected area." Another key provision includes a reservation of rights clause, which allows the contractor to recover additional costs and time if the work is delayed due to hazardous materials. Finally, the contractor should also consider using an indemnification clause, which compensates the contractor for any losses. Again, Section 3.13 of ConsensusDOCS 200 states as follows:

The Owner shall defend, indemnify, and hold harmless the Constructor, its Subcontractors and Subsubcontractors, and the agents, officers, directors, and employees of each of them, from and against all claims, damages, losses, costs, and expenses, including but not limited to reasonable attorneys' fees, costs, and expenses incurred in connection with any dispute resolution process, arising out of or relating to the performance of the Work in any area affected by Hazardous Material.

Most disputes arise because of failed expectations. When the parties to a construction project take the time to define their expectations in a written agreement, there is a stronger likelihood to avoid misunderstandings. More importantly, though, is to realize that the contract can be used as a tool to shift or allocate environmental risks on the project.

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