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**ENVIRONMENTAL LAW CONFIDENTIAL:
Useful Tips and Urban Myths
In Real Estate Transactions**

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I. Introduction

This article provides tips to aid real estate attorneys who advise lenders and borrowers in property acquisitions involving potential contaminated properties where due diligence is critical. These attorneys often find themselves working with an environmental consultant, and may be charged with: (1) reviewing and finalizing the terms of the initial environmental consulting engagement contract; and (2) reviewing and improving the content and language of Phase I Environmental Site Assessments (“Phase I ESA”) and Phase II Environmental Site Investigations (“Phase II ESI”) drafted by the consultant. This article also focuses on issues related to potential lender liability in the CERCLA arena and examines environmental provisions in loan documents relevant to lenders. Finally, the discussions touch on environmental insurance.

The practical advice in this article is a distillation of over 30 years of experience in negotiating consulting agreements, reviewing Phase I ESA and Phase II ESI investigations and working with lenders in contaminated property transactions.

Practice tips are conveniently highlighted in the paper.

II. The Environmental Consulting Engagement Agreement

In a typical real estate acquisition, the role of the environmental consultant is largely to conduct what is known as a Phase I ESA of the property. The consultant may also be asked to conduct a more comprehensive follow-up Phase II ESI or engage in short or long term remediation activities. Because the scope of the work involved in a Phase I ESA and the latter two types of projects is quite different, the scope of the environmental consultant’s engagement for the different projects may vary significantly.

For both a Phase I ESA and Phase II ESI, the real estate lawyer can usually expect the consultant to provide a standard form engagement contract. That contract may very well be one-sided in favor of the consultant. It is the attorney’s job to root out the provisions in the form contract that are unacceptable and to negotiate the appropriate revisions. Consultants are usually open to reasonable revisions made by the attorney on behalf of the client.

A. The Phase I ESA Contract

To understand the necessary components of the consultant contract to conduct a Phase I ESA, the attorney reviewing the draft contract must first be familiar with the Phase I ESA's practical and legal purposes.

1. What is a Phase I ESA?

A Phase I ESA is essentially a non-invasive environmental review of a piece of property. It includes a current and historical records review of the property to determine such things as past ownership, past uses, restrictions, and commonly known environmental conditions. It also involves the consultant conducting a walk-through investigation to note obvious visible potential environmental issues. The Phase I ESA does not involve the collection of any samples. The consultant will then issue a Phase I ESA Report outlining findings and a recommendation as to whether further investigation (a Phase II ESI) is warranted. It is important to note, however, that in conducting a Phase I ESA, the consultant is only looking for releases of hazardous materials, and is not typically assessing other potential environmental concerns such as the presence of wetlands or possible exposure to contaminants such as mold, asbestos, radon, or lead paint. Of course, most consultants routinely offer an expanded scope to the Phase I ESA for an additional price.

Practice Tip: Attorneys should determine whether the basic scope of the Phase I ESA being offered to the client needs to be expanded to cover other environmental concerns of the prospective purchaser. For example, if the client plans to do significant additional development work on the property being acquired, a wetlands review may be called for. Wetlands reviews are not typically included in a base Phase I ESA.

2. Why does my client need a Phase I ESA?

The purpose of the Phase I ESA is twofold. First and most obviously, it provides your client (whether that is a potential purchaser or a lender) with substantive information about the potential for certain types of environmental liability and environmental risk associated with the property. The client can use this information to make business decisions such as whether to buy the property at all, whether to buy the property and engage in specified clean-up activities,

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