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**"Exploring Environmental Liability Risks of Engineers  
and Geologists in New York State: A Brief Overview Of  
How You Can Get Into Trouble on the Job"©**

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**INTRODUCTION**

The focus of this article is on ways that geologists and engineers can incur liability for their work as environmental consultants or contractors in New York. The laws of other states are not necessarily the same as those in New York, and the reader should be sure to make a new assessment of potential liability in any other State in which he or she performs work.<sup>2</sup> The reader

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<sup>1</sup> The author is a 1975 graduate of Hofstra Law School, where he was Editor-in-Chief of the Hofstra Law Review. He founded the first Environmental Crime Unit in the State of New York at the District Attorney level in 1984 while at the Suffolk County District Attorney's Office. He then served as Deputy Chief of the Federal and state Litigation Bureau of the Suffolk County Department of Law, where he was counsel to the Suffolk County Board of Health. His practice focuses on all aspects of environmental law and litigation. The author has served as co-chair of the Environmental Law Committee of the Suffolk County Bar Association on numerous occasions, and currently is the Co-Chair of the Environmental Committee of the HIA and is a director of that Long Island business organization.

<sup>2</sup> Articles in the literature can be found to assist the reader to compare New York's law to that in other states. *See, e.g.,* Schneider, "The Expanding Liability of Environmental Consultants to Third Parties," 13 Vill. Envtl. L.J. 235 (2002); Gerrard, "Consulting Liability in Environmental Due Diligence", 7/22/2005 N.Y.L.J. 3 (Col. 1). The Gerrard article was a particularly helpful jump-off for reviewing New York's standards, and also examines decisions in other states.

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should also be aware that this article is not intended to be comprehensive. Rather, it is the author's goal to impress upon the reader that it is a natural tendency for a person who is asked to pay for environmental contamination to sue anyone that had anything to do with the property and the contamination, and you and your firm can find yourselves named in the resulting lawsuit. It is very difficult to get out of such lawsuits on motions to dismiss for failure to state a cause of action,<sup>3</sup> and the defense costs – if only to the point where you can hope to move for summary judgment and avoid the added cost of trial -- can be significant. And while the reader is advised to make certain that he or she has the protection afforded by adequate insurance. an examination of the types of insurance vehicles available is beyond the scope of this article.

And one last disclaimer: Despite the fact that it is written by an attorney experienced in Environmental Law, this article cannot be relied on as legal advice. After all, this article is about keeping out of trouble. Only after a thorough review of the facts in your individual case and the law that is applicable to those facts, can appropriate legal advice be provided.

### **LIABILITY ARISING OUT OF THE PERFORMANCE OF PHASE I AND PHASE II ENVIRONMENTAL ASSESSMENTS**

It is now the norm that Phase I site assessments will be performed on behalf of a Buyer or Seller or bank in a commercial real estate transaction, and any suspicious condition frequently will lead to a request to perform a limited Phase II environmental assessment which may include soil and groundwater testing, and a search for Underground Storage Tanks (UST's").

Typically, the Contract of Sale will allow the Buyer a period of time to undertake environmental due diligence, and to cancel the contract if any unsatisfactory environmental conditions are found. The Buyer may be given a Phase I report that was done for the Seller, or the Buyer may retain his or her own environmental consultant.

The environmental consultant should make certain that the Contract of Sale does not purport to prevent the consultant from reporting certain conditions that are found to the New York State Department of Environmental Conservation ("DEC"), or other Federal or local regulatory agencies if the consultant is required by law to report what is found. The consultant does not want to be put in the position of choosing between a breach of contract claim for revealing what is found to third parties, and being fined, for example, \$25,000.00 per day for not reporting evidence of a petroleum discharge to the appropriate agency within two hours of discovery.

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<sup>3</sup> See, e.g., *Tyree Organization, Ltd. v. Cashin Associates, P.C.*, 2007 WL 171906 (Sup. Ct. Nassau Co. 2007) (unreported): "When deciding a motion made pursuant to [CPLR 3211\(a\)\(7\)](#), the court must determine whether the pleader has a cause of action, not whether it has been properly plead. [Guggenheimer v. Ginzburg](#), 43 N.Y.2d 268, 401 N.Y.S.2d 182, 372 N.E.2d 17 (1977); and [Rovello v. Orofino Realty Co.](#), 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976). If from the facts alleged in the complaint and the inferences which can be drawn from the facts the court determines that the pleader has a cognizable cause of action, the motion must be denied. [Sokoloff v. Harriman Estates Development Corp.](#), 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 (2001); and [Stucklen v. Kabro Assocs.](#), 18 A.D.3d 461, 795 N.Y.S.2d 256 (2nd Dept.2005)."

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### *Breach of Contract, Negligence and Malpractice Claims Associated With Phase I's and Phase II's*

Problems arise when a Buyer takes title, only to discover an environmental condition that the Buyer now must investigate and remediate. If the Buyer had a Phase I or II performed before the closing, and the environmental consultant missed the presence of the contamination or the abandoned USTs, the Buyer will look to the consultant for its damages. The Buyer will assert that it would not have purchased the property had its true environmental condition been known, or that Buyer would have negotiated a reduced purchase price to reflect the anticipated cost of cleanup.

Some environmental consultants attempt to put clauses into their agreements that exempt themselves from the consequences of their negligence. Such clauses are void in New York as "against public policy" and are "wholly unenforceable."<sup>4</sup>

The environmental consultant that contracted directly with the Buyer can be sued for breach of contract when the consultant fails to discover contamination that should have been found given the scope of the contract.<sup>5</sup>

When the environmental consultant arguably performed every task contemplated by the contract but did not find contamination, the lawsuit often will include causes of action for negligence (sometimes cast as gross negligence) and professional malpractice. The statute of limitations in such cases, where the underlying theory is professional malpractice, is three years.<sup>6</sup>

The court in *Tyree Organization, Ltd. v. Cashin Associates, P.C.*, 2007 WL 171906 (Sup. Ct. Nassau Co. 2007) explained professional malpractice and its relationship to negligence and breach of contract as follows:

Generally speaking, malpractice is the negligence of a professional toward a person for whom a service is rendered. *Santiago v. 1370 Broadway Assoc.*, 264 A.D.2d 624, 695 N.Y.S.2d 326 (1st Dept.1999). A professional will be liable for malpractice if he/she departs from the standard of care expected of members of the profession and the departure was a proximate cause of plaintiff's injury. *Giambona v. Stein*, 265 A.D.2d 775, 697 N.Y.S.2d 399 (3rd

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<sup>4</sup> See NYS General Obligations Law § 5-323: "Every covenant, agreement or understanding in or in connection with or collateral to any contract or agreement affecting real property made or entered into, whereby or whereunder a contractor exempts himself from liability for injuries to person or property caused by or resulting from the negligence of such contractor, his agent, servants or employees, as a result of work performed or services rendered in connection with the construction, maintenance and repair of real property or its appurtenances, shall be deemed to be void as against public policy and wholly unenforceable."

<sup>5</sup> E.G., *Mercy Center, Inc. v. JLC Environmental Consultants, Inc.*, 2005 WL 4441855 (Sup. Ct. N.Y. Co. 2005) (not reported) (JLC could be sued by Buyer for breach of contract when it agreed to undertake an examination of the property for USTs, and the sub-contractor hired by JVC, Advanced Cleanup Technologies, failed to find three USTs.

<sup>6</sup> CPLR §214(6) provides that "the limitations period in non-medical malpractice actions would be three years, irrespective of whether the complain is cast in contract or tort." *Tyree Organization, Ltd. v. Cashin Associates, P.C.*, 2007 WL 171906 (Sup. Ct. Nassau Co. 2007).

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Dept.1999). However, the professional may also be liable in negligence if the gravamen of the complaint is not negligence in furnishing the professional service, but the professional's failure in fulfilling a different duty. *Weiner v. Lenox Hill Hospital*, 88 N.Y.2d 784, 788, 650 N.Y.S.2d 629, 673 N.E.2d 914 (1996). Nevertheless, the distinction between malpractice and negligence is a "subtle one" because "no rigid analytical line separates the two" theories. *Id.* at 787, 650 N.Y.S.2d 629, 673 N.E.2d 914. A lawyer, for example, may be liable, not only for malpractice and negligence, but also for breach of contract, if the lawyer makes an express promise to the client to obtain a specific result or an implied promise to exercise due care in performing services required by the contract. *Santulli v. Englert, Reilly & McHugh*, 78 N.Y.2d 700, 706, 579 N.Y.S.2d 324, 586 N.E.2d 1014 (1992). However, "a breach of contract claim premised on the lawyer's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim." *Levine v. Lacher & Lovell-Taylor*, 256 A.D.2d 147, 151, 681 N.Y.S.2d 503 (1st Dept.1998)

A "profession" has been defined as "an occupation usually associated with long-term educational requirements leading to an advanced degree, license evidencing qualifications met prior to engaging in the occupation and control of the occupation through standards of ethical conduct and malpractice liability rendered."<sup>7</sup> It is the author's opinion that, in most instances, the environmental consultant is going to be considered a "professional" for purposes of a professional malpractice claim.<sup>8</sup>

If the environmental consultant contracts directly with the Seller, or is a sub-contractor of the consultant who contracted with the Seller or the Buyer, and was responsible for the work the contractor agreed to perform, the question arises: When can the allegedly negligent environmental contractor be sued by a third party with whom the environmental consultant had no contractual relationship? The rule is as follows:<sup>9</sup>

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<sup>7</sup> *Tyree Organization, Ltd. v. Cashin Associates, P.C.*, 2007 WL 171906 (Sup. Ct. Nassau Co. 2007), citing *Santiago v. 1370 Broadway Assoc.*, 264 A.D.2d 624 (1<sup>st</sup> Dept. 1999).

<sup>8</sup> In *Tyree Organization, Ltd. v. Cashin Associates, P.C.*, 2007 WL 171906 (Sup. Ct. Nassau Co. 2007), the court indicated it is "unclear whether an 'environmental consultant' is a professional who may be sued for malpractice for breach of professional obligations which the consultant has undertaken by contract." Because Cashin is a firm of architects and engineers, the court concluded it was acting as a professional when it undertook work as an environmental consultant. It also cited *Neumann v. Carlson Environmental, Inc.*, 429 F.Supp.2d 946 (N.D.Ill.2006), where the District Court held that an environmental consultant could be liable for professional malpractice under Illinois law based upon the particularized knowledge and expertise of the consultant. In the author's opinion, New York courts will reach the same conclusion.

<sup>9</sup> *Mercy Center, Inc. v. JLC Environmental Consultants, Inc. and Advanced Cleanup Technologies, Inc.*, 2005 WL 441855 (Sup. Ct. N.Y. Co. 2005) (not reported). The court found that the criteria were met so that the Buyer of a vacant lot who was told by its environmental consultant that there were no USTs present could sue both its

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“The long-standing rule is that recovery may be had for pecuniary loss arising from negligent representations where there is actual privity of contract between the parties *or a relationship so close as to approach that of privity.*

( *Ossining Union Free School Dist. v. Anderson LaRocca Anderson*, 73 N.Y.2d 417, 424 [1989] [emphasis added].) The Court enumerated the following factors in determining whether the requisite relationship, short of actual privity, exists to sustain a cause of action for negligent misrepresentation:

- (1) awareness that the reports were to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct by the defendants linking them to the party or parties and evincing defendant's understanding of their reliance.”

Where a potential Buyer contracts with an environmental consultant who sub-contracts out the agreed upon work, the court is likely to find that these criteria are satisfied. For example, in *Mercy Center, Inc. v. JLC Environmental Consultants, Inc. and Advanced Cleanup Technologies, Inc.*<sup>10</sup> the court denied Advanced Cleanup Technologies’ motion for summary judgment. Plaintiff contracted with JLC Environmental to do a Phase I and Phase II, which included doing a radar survey to determine if chemical storage tanks were at the site. The court denied Advanced Cleanup Technologies’ motion for summary judgment on the causes of action by the plaintiff property owner against it directly:

It cannot be denied as a matter of law that Advanced possessed a clear understanding that such a survey (as, presumably, many others like it performed nationwide by members of a growing environmental consulting industry) was being performed preparatory to reliance by some party having an ownership or prospective ownership interest, or responsibility, vis-a-vis the surveyed property. To deny that would be to deny the very reason for the enterprises which both Advanced and JLC are engaged in. The complaint, reasonably and liberally read, alleges just that; i.e., that Advanced was aware that its report was to be used by a party with an interest in the property that was the subject of its report ( *see, Ossining Union Free School Dist., supra* ). The law does not require that Advanced knows the precise name of the individual just that it knows there exists such an individual, whose use of the

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environmental consultant (JLC Environmental) and the subcontractor that agreed to undertake the radar survey (Advanced Cleanup Technologies) on a theory of negligent misrepresentation or professional misconduct.

<sup>10</sup> 2005 WL 441855 (Sup. Ct. N.Y. Co. 2005) (not reported).

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report is, as the Court of Appeals pragmatically put it, "the end and aim of the transaction" ( *id.*, at 425).

Sometimes, the issue is couched in terms of whether the party who relied on the report that negligently misrepresented the environmental condition of property was an intended third-party beneficiary of the contract, and not merely an "incidental beneficiary." As explained by the court in *Blumenfeld Development Group, Ltd. v. Roux Associates, Inc.*, 2004 WL 2609384 (Sup. Ct. Nassau Co. 2004) (not officially reported):

In order to claim third-party benefits, the putative third-party beneficiary will be deemed an intended beneficiary if "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary [not relevant here]; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.... An incidental beneficiary ... is not an intended beneficiary." *LaSalle Nat. Bank v Ernst & Young LLP.*, 285 AD2d 101, 108 [1st Dept. 2001] quoting Restatement (second) of Contracts §302.

In *Blumenfeld*, it is not clear what Blumenfeld Development's relationship to the property was. The decision merely says that Blumenfeld's law firm retained Roux Associates to undertake a phase I and limited phase II environmental assessment of certain property. That property was sold at a foreclosure sale to non-party Tiago Holdings Corp. which assigned the title to plaintiff Tiago Holdings, LLC. Blumenfeld and Tiago Holdings, LLC sued Roux for negligently failing to find UST's that were present, causing Tiago Holdings, LLC to incur \$180,000 in cleanup costs. Blumenfeld was reimbursed for all of its expenses by Tiago Holdings, LLC. The court found that Blumenfeld could not sue for breach of contract because it could allege no damages. As for Tiago Holdings, LLC, which was not in existence at the time of Roux's contract with Blumenfeld, the court agreed with Roux that Tiago Holdings, LLC was not an intended beneficiary of the contract, and granted summary judgment to Roux.

Of significance to the reader is the fact that the court in *Blumenfeld* found it important that "the Environment Assessment Report prepared by defendant Roux specifically states that it was prepared for the exclusive use of plaintiff BDG - and any third-party use of the report was the sole responsibility of BDG." Because plaintiff BDG was not the purchaser of the property at issue, and plaintiff BDG could not show that it was damaged in any way since it was reimbursed all of its expenses by Tiago Holding, LLC, its claims against defendant Roux for breach of contract, detrimental reliance and indemnification were dismissed.

Sometimes, the negligent misrepresentation alleged can be an exaggeration of the scope of the problem, which caused the plaintiff to take actions it otherwise would not have taken. In *Tyree Organization, Ltd. v. Cashin Associates, P.C.*<sup>11</sup> the Valley Stream UFSD brought a lawsuit against

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<sup>11</sup> 2007 WL 171906 (Sup. Ct. Nassau County 2007) (not officially reported).

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ExxonMobil, the owner of the ExxonMobil station that had a release, and Tyree. Tyree and ExxonMobil settled, and Tyree obtained subrogation rights from the School District. Standing in the shoes of the District, Tyree sued Cashin Associates for \$225,000 in fees paid to Cashin by the District for air testing and the costs associated with relocating the kindergarten classes and administrative offices that followed receipt of Cashin's indoor air report. The report allegedly overstated the level of gasoline contaminants in the air at the elementary school because gasoline-powered equipment was stored at the school, thus causing the District unnecessarily to incur relocation costs. The court denied Cashin's motion to dismiss for failure to state a cause of action.

### *The Relevance of Customary Practices to Establishing the Standard of Care*

Whether or not a defendant environmental consultant complied with relevant industry standards and applicable regulations provides "some evidence" as to whether the consultant's conduct was negligent or constituted professional malpractice, but is not necessarily outcome determinative. Once again, the court in *Tyree v. Cashin* ably sets out the law:

Cashin argues that the testing methods it used were approved by the Environmental Laboratory Approval program, 10 NYCRR § 55-2.1 *et seq.* Thus, as a matter of law, Cashin claims that it complied with customary practice and its contractual obligation.

Compliance with relevant industry standards, be they derived from customary business practice or government regulation, is some evidence that the defendant exercised due care and was not negligent. *Trimarco v. Klein*, 56 N.Y.2d 98, 105-6, 451 N.Y.S.2d 52, 436 N.E.2d 502 (1982). On the other hand, proof of a customary practice coupled with a showing that it was ignored and the departure was a proximate cause of plaintiff's loss, may establish negligence. *Id.* at 106, 451 N.Y.S.2d 52, 436 N.E.2d 502. "Proof of a common practice aids in formulating the general expectation of society as to how individuals will act in the course of their undertakings"

The failure to comply with industry standards or regulations, however, does not in and of itself establish that defendant was negligent. Nor does compliance with regulations or other standards establish that the defendant was not negligent. See, *Mercogliano v. Sears, Roebuck and Co.*, 303 A.D.2d 566, 756 N.Y.S.2d 472 (2nd Dept.2003); and *Duncan v. Corbetta*, 178 A.D.2d 459, 577 N.Y.S.2d 129 (2nd Dept.1991).

In the case of occupations other than professionals, the standard of care remains one of reasonableness. In the case of professionals, the standard remains one of good and accepted practice expected of members of the profession. Thus, while compliance with

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administrative regulations is some evidence that the professional engaged in good and accepted practice, it does not establish as a matter of law that the professional did not commit malpractice. *Id.* See also, *Contini v. Hyundai Motor Co.*, 876 F.Supp. 540 (S.D.N.Y.1995).

Compliance with Public Health regulations does not necessarily establish that Cashin exercised due care in testing the indoor air samples taken from the Clearstream School. Nor does compliance with Public Health regulations establish that Cashin fully performed its contract with the School District. In particular, evaluating air quality by an approved method without allowing for vapor emanating from gas-powered equipment may not be good and accepted practice for an engineer functioning as an environmental consultant. On the other hand, it may have been totally appropriate for an environmental consultant to consider the contamination from the vehicles as a given and focus on the marginal effect of the gasoline spill, particularly since young children were effected.

The issue cannot be resolved without the assistance of expert testimony as to the standard of care required of an engineer functioning in the capacity of an environmental consultant. In any event, compliance with Public Health regulations is but one factor bearing on whether Cashin complied with professional obligations and fully performed its contract.

Just as new lawyers are told they should not rely on forms because the facts of their case may make the forms irrelevant or worse, it is the author's opinion that consultants cannot blindly follow industry practices without consideration of the facts. It is at least possible that everyone in an industry routinely follows a practice that makes no sense under the facts presented to the consultant.

### ***Reliance by the Environmental Consultant on Course of Conduct to Establish That The Contract Was Not Violated***

Environmental Consultants may do work for the same clients in many locations over a lengthy period of time. The court in *Tyree v. Cash* was also asked to determine whether the course of prior conduct between Cashin and the School District established a course of conduct as to the testing protocols for indoor air testing so that it could not be said Cashin breached its contract with the District.

The court first noted that, "In interpreting a contract, the court's role is to ascertain the intention of the parties at the time that they entered into the contract. ... If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further. ... On the other hand, if the language of the contract is ambiguous, the court must look to extrinsic



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evidence for guidance as to which interpretation should prevail. *Evans v. Famous Music Corp.*, *supra*. One form of extrinsic evidence is the parties' course of dealing; that is, the practical construction which the parties themselves have placed on the contract. See, Prince, *Richardson on Evidence* § 11-403 (11th Ed. Farrell)." (citations deleted).

Cashin argued that the protocols it employed at the elementary school for indoor air testing were identical to those used at another school in the District. Because terms like "monitoring services", and "technical assistance" were not defined, the court agreed that "resort to extrinsic evidence is necessary." The court rejected, however, the argument that the parties' course of dealing in this case was an aid for determining their intent with regard to how the testing in the elementary school should be done:

In a contract for professional services, the party for whom the services are performed ordinarily lacks knowledge of the appropriateness of the professional's services. Thus, the party is required "to repose confidence in the professional's ability ... and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 167, 726 N.Y.S.2d 365, 750 N.E.2d 67 (2001). Because the School District lacked knowledge as to the appropriateness of the environmental consulting services performed by Cashin, the course of dealing with regard to the Forrest Road School is not relevant to determine the meaning of the Clearstream School contract. Rather, the meaning of the contract will be determined with reference to the standard of good and accepted practice of engineers acting as environmental consultants.

It is likely then that the consultant's ability to rely on its course of conduct with a particular client will turn on the knowledge and sophistication of the client. For example, if work is done for a major gasoline company, it is likely that the person acting on behalf of the company will be as knowledgeable as the environmental consultant.

### **POTENTIAL SUPERFUND LIABILITY OF CONSULTANTS**

The author presumes that environmental consultants have a basic understanding of Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and will here merely set out without citation the law's draconian terms. Four categories of Potentially Responsible Parties are set out: the current owner of property at which hazardous substances have been released or may be released; the past owner at the time of the release or potential release; any person who arranges for disposal at the facility, and the transporter of hazardous substances to the facility if the transporter selects the disposal site. Liability is strict, joint and several, and applies retroactively to actions that occurred before the law went into effect in late 1980.

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Environmental consultants working at hazardous waste sites face substantial third-party liability under CERCLA in two ways: their actions can make them current operators, or arrangers of disposal. For example, in *New Castle County v. Halliburton NUS Corp.*,<sup>12</sup> EPA hired Halliburton NUS Corporation (NUS) to perform a Remedial Investigation/Feasibility Study (RI/FS) at a county landfill site.<sup>13</sup> The county sued NUS, alleging that NUS negligently installed a well that contributed to the contamination at the site. The court ruled that NUS could be liable to the county under section 9619(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

42 U.S.C. Section 9619(a) provides that:

(1) A person who is a response action contractor with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a vessel or facility shall not be liable under this subchapter or under any other Federal law to any person for injuries, costs, damages, expenses, or other liability (including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury, illness or loss of or damage to property or economic loss) which results from such release or threatened release.

(2) Negligence, etc.

Paragraph (1) shall not apply in the case of a release that is caused by conduct of the response action contractor which is negligent, grossly negligent, or which constitutes intentional misconduct.

The court held that a response action contractor is liable to "any other person" who is harmed by the contractor's negligence. One benefit to response action contractors, however, is that they are held to a negligence, rather than a strict liability, standard of liability.

It is important to keep in mind that the response action contractor provision only applies if services are provided for the government.<sup>14</sup>

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<sup>12</sup> 903 F. Supp. 771 (Del. Dist. 1995), *aff'd in part*, 111 F.3d 1116 (3d Cir. 1997).

<sup>13</sup> The description of the case that follows is taken from Schneider, "The Expanding Liability of Environmental Consultants to Third Parties," 13 Vill. Envtl. L.J. 235 (2002).

<sup>14</sup> Similar but more restrictive limitations on response action responder liability are found in Article 27 of the NYS Environmental Conservation Law and NYS Navigation Law. See ECL § 27-1321. "Protection against liability" which contains the following: "Nothing in subdivision one of this section shall be deemed or construed to relieve from liability for damages or injuries any person who: (a) is alleged to have caused said damages or injuries as the result of gross negligence, or reckless, wanton or intentional misconduct, or (b) is under a legal duty to respond to the incident, or (c) receives compensation other than reimbursement for out-of-pocket expenses for services in rendering assistance or advice." Thus it appears that work for a fee takes the environmental consultant out of the protection intended. NYS Navigation Law § 178-a ("Responder Immunity") only applies to the first 120 days after the discharge, and provides. "The provisions of subdivision two of this section shall not apply to any response efforts undertaken by a person later than one hundred twenty days after a discharge has been stopped. Thereafter, such person shall not be strictly liable without regard to fault, but the liability of such person for personal injury or

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Federal courts have held environmental contractors liable as current operators where they allegedly installed wells in a manner that spread the contamination,<sup>15</sup> or spread contaminated soil around the property where it was found,<sup>16</sup> and/or as arrangers of disposal<sup>17</sup> or transporters<sup>18</sup> of hazardous substances based on their moving contaminated soil across property, thus spreading the contamination.

### CONCLUSION

It should now be apparent that no one should be in the business of environmental contracting or consulting without having adequate insurance protection. Writing your contracts clearly so there is no confusion as to the scope of your work can help, as will high level and appropriate training of all your employees. In the end, however, it is difficult to prevent someone who is being held liable for a potentially multi-million dollar cleanup from seeking contribution in some form from whoever the person can identify. Even if you are wrongfully accused (which may well have been the case in some of the cases discussed above, which after all only involved motions to dismiss or for summary judgment by defendants who believed they were not liable), the cost of defending yourself can be extremely expensive.

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property damage shall be limited to acts or omissions of the person during the course of such response efforts which are shown to be the result of negligence, gross negligence, or reckless, wanton or intentional misconduct.”

<sup>15</sup> *New Castle County v. Halliburton NUS Corp.*, 903 F. Supp. 771 (Del. Dist. 1995), *aff'd in part*, 111 F.3d 1116 (3d Cir. 1997); *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 920 (10<sup>th</sup> Cir. 2000), *reh'g denied*, 247 F.3d 243, *cert. denied*, 121 S. Ct. 2592.

<sup>16</sup> *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9<sup>th</sup> Cir. 1992) (Ferry could be liable as an operator if it “had authority to control the cause of the contamination at the time the hazardous substances were released into the environment.”).

<sup>17</sup> *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5<sup>th</sup> Cir. 1988) (consultant who dispersed contaminated soil during the construction of a housing subdivision could be strictly liable under CERCLA as a person who arranged for disposal or treatment of hazardous substances “since disposal may be merely the ‘placing of any ... any hazardous waste into or on any land...’”). *But see United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996) (consultant only liable for spreading soil around if plaintiff proved the soil investigation was negligently performed).

<sup>18</sup> *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9<sup>th</sup> Cir. 1992) (Ferry could be liable as a transporter under CERCLA 9707(a)(4) because “transportation” is defined as “the movement of a hazardous substance by any mode”).