Knauf Shaw LLP
Attorneys at Law

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**Environmental Law Section**

# Ethics Panel – Interplay of Due Diligence Ethical Issues Between Environmental Engineers & Lawyers


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## I. Engineers and Environmental Professional's Code of Ethics in Relation to Due Diligence and Environmental Data

Recently, the New York State Department of Environmental Conservation (NYSDEC) and New York State Dpeartment of Health (NYSDOH) have been threatening engineers that unless they change their opinions to remove cover systems and vapor barriers they believe are jusitifed to be part of the remedy for sites in the Brownfield Cleanup Program (BCP), the agencies will not issue work plan approvals or a Certificate of Completion (COC) to their clients. In addition, the agencies have dissuaded consultants from applying new the June 2015 EPA Soil Vapor Intrusion guidance document, which contains formulas to develop standards for over 100 substances. NYSDEC and NYSDOH do not appear to be motivated because their policy position is better for human health and the environment, but rather to save the State of New York from paying more BCP tax credits. As a result of this type of policy decision, the Environmental Section of the Bar thought it would be timely to review both the ethical considerations faced collectively by attorneys and engineers in environmental due diligence and during remedial projects.

### A. NSPE Code of Ethics

The National Society of Professional Engineers Code of Ethics indicates that Eningeers must "[h]old paramount the safety, health, and welfare of the public" and once authorized by their client, disclose data subject to applicable law or as required by the Code. They are also required under their Code of Ethics to apply applicable standards. *See* https://www.nspe.org/sites/default/files/resources/pdfs/Ethics/CodeofEthics/Code-2007-July.pdf.

Moreover, "Engineers having knowledge of any alleged violation of this Code shall report thereon to appropriate professional bodies and, when relevant, also to public authorities, and cooperate with the proper authorities in furnishing such information or assistance as may be required."

Therefore, there is a question of whether an engineer has an ethical obligation to report a NYSDEC or NYSDOH engineer who is requiring them to disregard data that could harm safety, health, and welfare of the public.

### B. ASCE Code of Ethics

The Code of Ethics of the American Society of Civil Engineers (which generally is generally applicabel to environmental engineers), which is available at http://www.asce.org/code-of-ethics/, has an even more detailed provision:

> Engineers shall hold paramount the safety, health and welfare of the public and shall strive to comply with the principles of sustainable development in the performance of their professional duties.

a. Engineers shall recognize that the lives, safety, health and welfare of the general public are dependent upon engineering judgments, decisions and practices incorporated into structures, machines, products, processes and devices.
b. Engineers shall approve or seal only those design documents, reviewed or prepared by them, which are determined to be safe for public health and welfare in conformity with accepted engineering standards.
c. Engineers whose professional judgment is overruled under circumstances where the safety, health and welfare of the public are endangered, or the principles of sustainable development ignored, shall inform their clients or employers of the possible consequences.
d. Engineers who have knowledge or reason to believe that another person or firm may be in violation of any of the provisions of Canon 1 shall present such information to the proper authority in writing and shall cooperate with the proper authority in furnishing such further information or assistance as may be required.
e. Engineers should seek opportunities to be of constructive service in civic affairs and work for the advancement of the safety, health and well-being of their communities, and the protection of the environment through the practice of sustainable development.
f. Engineers should be committed to improving the environment by adherence to the principles of sustainable development so as to enhance the quality of life of the general public.

**C. CHMM Code of Ethics:**

A Chemical Hazardous Materials Manager's (CHMM's) primary responsibility is also to protect the public and the environment. All actions taken on behalf of a client or employer must be consistent with this primary responsibility. The interests of individual clients and employers must be **secondary** to protecting public health and safety, national security, and the environment. (emphasis added).
https://www.ihmm.org/sites/default/files/CHMM%20Code%20of%20Ethics%202015.pdf

**D. AGI Guidelines for Ethics Conduct**

While there is no specific Code of Ethics for geologist or qualified environmental professionals, the American Geoscience Institute (AGI) has guidelines for all geoscientists, which notes that the ethics statements of individual societies may expand beyond these guidelines.

The guidelines state the following:

> Geoscientists play a critical role in ethical decision making about stewardship of the Earth, the use of its resources, and the interactions between humankind and the planet on which we live. Geoscientists must earn the public's trust and maintain confidence

in the work of individual geoscientists and the geosciences as a profession. The American Geosciences Institute (AGI) expects those in the profession to adhere to the highest ethical standards in all professional activities. Geoscientists should engage responsibly in the conduct and reporting of their work, acknowledging the uncertainties and limits of current understanding inherent in studies of natural systems. Geoscientists should respect the work of colleagues and those who use and rely upon the products of their work.

In day-to-day activities geoscientists should:

- Be honest.
- Act responsibly and with integrity, acknowledge limitations to knowledge and understanding, and be accountable for their errors.
- Present professional work and reports without falsification or fabrication of data, misleading statements, or omission of relevant facts.
- Distinguish facts and observations from interpretations.
- Accurately cite authorship, acknowledge the contributions of others, and not plagiarize.
- Disclose and act appropriately on real or perceived conflicts of interest.
- Continue professional development and growth.
- Encourage and assist in the development of a safe, diverse, and inclusive workforce.
- Treat colleagues, students, employees, and the public with respect.
- Keep privileged information confidential, except when doing so constitutes a threat to public health, safety, or welfare.
- As members of a professional and scientific community, geoscientists should:

- Promote greater understanding of the geosciences by other technical groups, students, the general public, news media, and policy makers through effective communication and education.
- Conduct their work recognizing the complexities and uncertainties of the Earth system.
- Sample responsibly so that materials and sites are preserved for future study.
- Document and archive data and data products using best practices in data management, and share data promptly for use by the geoscience community.
- Use their technical knowledge and skills to protect public health, safety, and welfare, and enhance the sustainability of society.
- Responsibly inform the public about natural resources, hazards, and other geoscience phenomena with clarity and accuracy.
- Support responsible stewardship through an improved understanding and interpretation of the Earth, and by communicating known and potential impacts of human activities and natural processes.

The following documents are available on their website:
https://www.americangeosciences.org/community/agi-guidelines-ethical-professional-conduct

- 2015 AGI Guidelines for Ethical Professional Conduct (pdf)
- History, context, and intended use of the 2015 Guidelines (pdf)
- 2013 Consensus Statement on Ethics in the Geosciences (pdf)
- 1999 AGI Guidelines for Ethical Professional Conduct (pdf)
- Member Society Codes of Ethics and Statements on Ethics

## II. Attorney's Applicable Code of Ethics Rules of Professional Conduct Provisions

Rule 1.6: Confidentiality of information.

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Part, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is

(a) protected by the attorney-client privilege,

(b) likely to be embarrassing or detrimental to the client if disclosed, or

(c) information that the client has requested be kept confidential.

"Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) **information that is generally known in the local community or in the trade, field or profession to which the information relates**.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rule 1.6, 1.9(c), or 1.18(b).

Therefore, while Rule 1.6 (formerly DR 4-101) generally prohibits attorneys from revealing "confidential information" of a client, this Rule in environmental law may not relieve an attorney from an independent obligation to comply with reporting obligations under the law. *See* N.Y. Stat 681; *Matter of Balter v. Regan*, 63 N.Y.2d 630, 479 N.Y.S.2d 506 (1984), cert. den'd 469 U.S. 934, 105 S. Ct. 332 (1984).

Rule 1.9: Duties to former clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Rule 1.18: Duties to prospective clients.

(a) Except as provided in Rule 1.18(e), a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a “prospective client”.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;

(iii) the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) written notice is promptly given to the prospective client; and

(3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

(e) A person is not a prospective client within the meaning of paragraph (a) if the person:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter.

## III. Applicable Statutory and Regulatory Reporting Obligations

### A. State Petroleum Reporting Obligations

In a now 20-year old decision of the DEC Commissioner, *In the Matter of Middleton, Kontokosta Associates, Ltd. (Dec. 31, 1998),* a consultant who merely observed an oil spill at a site was found to be in violation of the then reporting requirement in 6 NYCRR §613.8 applicable "to all above-ground and underground petroleum storage facilities with a combined storage capacity of over 1,100 gallons, including all facilities registered under Part 612 of this title":

> Any person with knowledge of a spill, leak or discharge of petroleum must report the incident to the department within two hours of discovery. The results of any inventory record, test or inspection which shows a facility is leaking must be reported to the department within two hours of the discovery. Notification must be made by calling the telephone hotline (518) 457-7362.

DEC Commissioner Cahill ruled that:

The term "any person" in §613.8 should be given a broad, not limited or restrictive, interpretation. The term "any person" is intended to apply, not only to persons who are "owners" and "operators", but also to all other persons with knowledge of a spill, leak or discharge in order to implement the remedial and preventive purposes of the Petroleum Bulk Storage Code, of which §613.8 is a part. The rationale for requiring "any person" to report a spill or discharge to the Department within two hours is obviously to enable stoppage of ongoing contamination as quickly as possible after detection of a spill. For example, in the case of an ongoing gush of oil from an overturned tanker truck on the highway, an immediate report will enable a quick response in order to minimize environmental damage. The reporting duty is on everyone with knowledge of the spill.

However, in 2015, this regulation was repealed and now 6 N.Y.C.R.R. §613-2.4(d)(1) states:

> A ***facility*** must report every spill to the Department's Spill Hotline (518-457-7362) within two hours after discovery, contain the spill, and begin corrective action except if it meets the following conditions:
>
> (i) It is known to be less than five gallons in total volume;
> (ii) It is contained and under the control of the spiller;
> (iii) It has not reached and will not reach the land or waters of the State; and
> (iv) It is cleaned up within two hours after discovery. [emphasis added].

*See also* 6 N.Y.C.R.R. §613-1.2(d), which limit the requirements under the regulations, including the spill reporting requirement, to the facility operator or tank system owner. However, a "facility" now also includes an underground storage system having a storage capacity that is greater than 110 gallons. 6 N.Y.C.R.R. §613-1.3(v) Therefore, any owner or operator of "one or more tank systems having a combined storage capacity of more than 1,100 gallons (including a major facility), or "an underground tank system having a storage capacity that is greater than 110 gallons pursuant to the recent facility definition in 6 N.Y.C.R.R. §613-1.3(v) must still report a spill to the hotline.

To make matters more confusing the New York Oil Spill Law still includes the "any

person" language, and at Navigation Law §175, provides that "***[a]ny person responsible for causing a discharge*** shall immediately notify the department pursuant to rules and regulations established by the department, but in no case later than two hours after the discharge."

Regulations at 17 N.Y.C.R.R. §§32.3 and 32.4 (methods of notifcation via the Hotline) implement that statute.

> §32.3 Requirement of notification.
> Any person responsible for causing a discharge which is prohibited by section 173 of the Navigation Law shall immediately notify the department, but in no case later than two hours after the discharge. In addition, the owner or operator of any facility from which petroleum has been discharged in violation of section 173 of the Navigation Law, ***and any person who was in actual or constructive control of such petroleum immediately prior to such discharge***, shall immediately give the department the notification required by this Part unless such owner, operator or person has adequate assurance that such notification has already been given.

Under §32.3, the notification requirement under Navigation Law §175 extends to "[a]ny person responsible for causing a discharge," "the owner or operator of any facility from which petroleum has been discharged," and "any person who has actual or constructive control of such petroleum immediately prior to such discharge." Notification is required by a telephone call to the DEC spill hotline, and a list of detailed information that must be provided with the notification is set forth at 17 N.Y.C.R.R. §32.4(b).

For example, in *State v. Williams*, 26 Misc.3d 743 (Sup. Ct. Albany Co. 2009), *aff'd*, 73 A.D.3d 1401 (3rd Dept. 2010), *leave to appeal denied*, 15 N.Y.3d 709 (2010), NYSDEC's action under the Navigation Law against deliverer of fuel to the site was upheld when NYSDEC spill manager concluded that discharge(s) of petroleum occurred during the delivery process to both tanks because contamination was physically located on top of the underground storage tanks and the deliverer had constructive knowledge and control of the spill.

While the reporting requirement under 6 N.Y.C.R.R. §613.8 appears limited to regulated bulk tanks, the reporting requirement under Navigation Law §175 is not limited to bulk tanks, and covers any unpermitted "discharges," as defined by the New York Oil Spill Law. See also Navigation Law §172(8).

Finally, New York Environmental Conservation Law §17-1743 sets forth the following reporting requirement:

> Any person who is the owner of ***or in actual or constructive possession or control of more than 1,100 gallons***, in bulk, of any liquid, including

> petroleum, which if released, discharged or spilled would or would be likely to pollute the lands or waters of the state, including the groundwaters thereof shall, as soon as he has knowledge of the release, discharge or spill of any part of such liquid in his possession or control onto the lands or into the waters of the state including the groundwaters thereof immediately notify the department.

Thus, this provision requires an immediate call to the DEC spill hotline for a spill from a facility that stored more than 1,100 gallons of petroleum or any other liquid that might pollute ground or surface waters.

**One of the questions the consultant teams will explore is whether a consultant working on a Phase II investigation is "in actual or constructive possession or control of more than 1,100 gallons" if they have visual evidence that a more than 1,100 gallon tank has leaked and is likely actively migrating to a sensitive receptor.**

NOTE: This new regulation and 6 N.Y.C.R.R. §613-2.4(d)(1) are inconsistent with the general advice 'recommendation' DEC still provides on their website, which states that 'anyone with knowledge of a release must report within two hours of discovery'. http://www.dec.ny.gov/chemical/8692.html

**B. Other Hazardous Substance and Federal Reporting Obligations**

1. CERCLA. Reporting is required by "any person in charge of [a] facility... as soon as he or she has knowledge," to the National Response Center at (800) 424-8802, of any release, of a "reportable quantity" within a 24-hour period of a CERCLA hazardous substance, 40 C.F.R. §302.6(a), except for certain continuous releases. 40 C.F.R. §302.8.

2. SARA Title III Reporting. Pursuant to SARA (Superfund Amendments and Reauthorization Act of 1986) Title III, at 42 U.S.C. §11004, the "owner or operator of a facility" must "immediately" report a release or spill of a reportable quantity of a CERCLA hazardous substance or an "extremely hazardous substance" designated by 40 C.F.R. §355.40(a) to "the community emergency coordinator for the local emergency planning committee of any area likely to be affected by the release" and the NYSDEC Spill Hotline. 40 C.F.R. §355.42. For transportation-related releases, the report may be made by calling 911. 40 C.F.R. §355.42. Exemptions are provided for any release that "results in exposure to persons solely within the boundaries of the facility," federally-permitted releases, and continuous releases meeting the requirements of 40 C.F.R. §302.8(b). 40 C.F.R. §§355.31, 355.32.

3. RCRA Facility Reporting. If a hazardous waste treatment, storage or disposal facility has "a release, fire or explosion" by which a hazardous waste "could

threaten human health or the environment outside the facility," federal and state RCRA regulations require that its "emergency coordinator" must immediately notify local authorities, and call the National Response Center at (800) 424-8802 or the federal "on-scene coordinator" designated under the National Contingency Plan, and in New York the state spill hotline, (800) 457-7362, to report information specified at 6 N.Y.C.R.R. §373-2.4(g)(4)(ii). See also 40 C.F.R. §264.56(d). Similar requirements also apply to "accumulators" of hazardous wastes. 6 N.Y.C.R.R. §372.2(a)(8)(ii), 373-1.1(d)(iii)(c)(5), 373-3.4(g)(4)(iii). 40 C.F.R. §262.34(d)(5)(iv)(C).

4. Federal UST Regulations. Federal regulations at 40 C.F.R. Part 280 cover underground storage tanks ("USTs") of at least 110 gallons that store petroleum or any substance defined as hazardous under CERCLA other than hazardous waste. See 40 C.F.R. §§280.10, 280.12. If there is a spill or overfill of petroleum of either more than 25 gallons or that causes a sheen on nearby surface waters, or a CERCLA reportable quantity of a hazardous substance, "owners and operators of the UST system" must report the spill within 24 hours to the NYSDEC Spill Hotline. 40 C.F.R. §280.53(a)(1). If spills of less than 25 gallons or less than a reportable quantity cannot be cleaned up within 24 hours, they must also be reported. 40 C.F.R. §280.53(b).

5. Surface Water Spills. Clean Water Act §311(b)(5), 33 U.S.C. §1321(b)(5) requires that "[a]ny person in charge... shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from [a] vessel or facility" of a "harmful quantity" must "immediately notify" the National Response Center at (800) 424-8802. "Hazardous substances" and their reportable quantities are designated by 40 C.F.R. Part 116. 40 C.F.R. §117.21. For oil, a quantity which violates an applicable water quality standard, or which causes a sheen on the water, 40 C.F.R. §110.3, must be reported. 40 C.F.R. §110.6.

6. Releases of Hazardous Substances in New York. Releases of designated quantities, within 24 hours, of hazardous substances listed at 6 N.Y.C.R.R. Part 597 "must be reported to the Department's Spill Hotline (518-457-7362) within two hours after discovery by any person in actual or constructive control or possession of the hazardous substance when it is released, or any employee, agent, or representative of such person who has knowledge of the release." 6 N.Y.C.R.R. §597.4(b)(1). Also, releases of lesser quantities which cause or "may reasonably be expected to cause" "a fire with potential off-site impacts," an explosion, "vapors, dust and/or gases," which may cause illnesses (not including illnesses to persons in the same building), or contravention of air or water quality standards, must also be reported. 6 N.Y.C.R.R. §597.4(b)(2). A spill that is completely contained and accounted for or recovered within two hours, does not reach land or waters, and does not result in impacts listed above, need not be reported. 6 N.Y.C.R.R §597.4(b)(3). Hazardous substances under this regulation do not

include petroleum unless part of a blend. 6 N.Y.C.R.R. §597.1(b)(7)(b). Since the spill reporting requirement applies to "any employee, agent, or representative of such person who has knowledge of the release," 6 N.Y.C.R.R. §597.4(b)(1), it probably applies to consultants, and perhaps even attorneys.

### C. Privileged Materials.

The attorney/client privilege under CPLR §4503 protects "communications made in confidence to an attorney for the purpose of seeking professional advice." *Matter of Jacqueline F.*, 47 N.Y.2d 215, 219, 417 N.Y.S.2d 884, 887 (1979). CPLR §3101(c) exempts the work product of an attorney from disclosure, which "includes memoranda, correspondence, mental impressions and personal beliefs conducted, prepared or held by the attorney." *Manufacturers and Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 396, 522 N.Y.S.2d 999, 1002 (4th Dep't 1987).

However, if the material could have been prepared by a lay person, it is not covered. Connors, *McKinney's Practice Commentary* C3101:28. CPLR §3101(d)(2) protects "materials prepared in anticipation of litigation" unless "undue hardship" and "substantial need" are shown. This includes non-party witness statements. *Yasnogordsky v. City of New York*, 281 A.D.2d 541, 722 N.Y.S.2d 248 (2d Dep't 2001). Further, CPLR §3101(g) allows discovery of accident reports. While an investigation or accident report prepared in the ordinary course of business is normally discoverab le, reports prepared exclusively for purposes of anticipated litigation are presumptively shielded. *Landmark Insurance Co. v. Beau Rivage Restaurant, Inc.*, 121 A.D.2d 98, 509 N.Y.S.2d 819 (2d Dep't 1986); Connors, *McKinney's Practice Commentary* C3101:33. *See also* FRCP Rule 26(b)(3). Different rules apply to experts retained solely for litigation purposes under CPLR §3101(d) and FRCP Rule 26.

## IV. Relevant Caselaw

Often both consultants and attorneys think that environmental data can be protected under the attorney client privilege if an attorney hires the consultant to perform the Phase II investigation. Merely routing data and studies through a lawyer does not make them privileged. Connors, McKinney's Practice Commentary C3101:35. Therefore, having the attorney subcontract with the consultant may not do any good, although it may make the attorney responsible to pay the bill if the client does not (a good reason not to engage in this practice). The following caselaw concludes data is NOT protected even though communications between the attorney and consultant about the data can be protected.

1. *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156 (E.D.N.Y. 1994)

Here, the court concluded that underlying factual **data** generated through studies and collected through observation of physical condition of property can never be protected by attorney-client

privilege and neither can the resulting opinions and recommendations.

There are few, if any, conceivable circumstances where scientist or engineer employed to gather **data** should be considered agent within scope of attorney-client privilege since information collected will generally be factual, obtained from sources other than client.

2. *ECDC Envtl. v. New York Marine & Gen. Ins. Co.*, No. 96CIV.6033(BSJ)(HBP), 1998 WL 614478, at *8 (S.D.N.Y. June 4, 1998)

In this case, the court found that Defendants made a claim of attorney-client privilege that went well beyond the "outer boundary" of the privilege. Unlike a computer study at issue in *Federal Trade Comm'n v. TRW, Inc.*, 628 F.2d 207 (D.C.Cir.1980), which arguably was undertaken to assist the attorneys in litigation, the studies and work performed by Hart and Conestoga Rovers [an environmental consultant firm] clearly served other purposes. Moreover, these consultants based their opinions on factual and scientific evidence they generated through studies and collected through observation of the physical condition of the Property, information that did not come through client confidences. Such underlying factual data can never be protected by the attorney-client privilege and neither can the resulting opinions and recommendations. There are few, if any, conceivable circumstances where a scientist or engineer employed to gather data should be considered an agent within the scope of the privilege since the information collected will generally be factual, obtained from sources other than the client.

3. *NL Indus., Inc. v. ACF Indus. LLC*, No. 10CV89W, 2015 WL 4066884, at *7 (W.D.N.Y. July 2, 2015)

In *ECDC Environmental*, the court found that the expert's factual and scientific evidence and the opinions and recommendations derived therefrom did not come through client confidences and thus was not protected by attorney-client privilege, concluding that "there are few, if any, conceivable circumstances where a scientist or engineer employed to gather data should be considered an agent within the scope of the privilege since the information collected will generally be factual, obtained from sources other than the client."

4. *In the Matter of CONSUMERS POWER COMPANY (Midland Plant, Units 1 and 2) NUCLEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD*, 14 N.R.C. 1768, 1981 WL 27775 LBP–81–63 (Docket Nos. 50–329–CP, 50–330–CP December 22, 1981)

Attorneys were sanctioned but not fined for failure to disclosure all data in their possession. The Commissioner stated that "Material is not privileged simply because it is an attorney's possession." *See Hickman v. Taylor*, 67 S. Ct. 385; 329 U.S. at 511.

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his

clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted *Zucker v. Sable*, 72 F.R.D. 1, 3 (S.D.N.Y. 1975).

5. *Dunning v. Shell Oil Co.*, 57 A.D.2d 16, 393 N.Y.S.2d 129 (3d Dep't 1977).

Data (even if gathered by a litigation expert) and reports that are prepared in the normal course of business or submitted to government agencies are discoverable, including test results, Phase I and II reports, and remedial investigations.

6. *In Occidental Chemical Corp. v. Ohm Remediation Services Corp.*, 45 ERC 1821 (W.D.N.Y. 1997).

The defendant was allowed discovery of documents produced by the plaintiff's consultant, who was originally hired by the plaintiff's former law firm to handle site remediation.

## V. Three Ethical Due Diligence Case Studies

1. **Petroleum Spill Reporting – Who is responsible and what are Attorney and Engineer/Consultant's ethical obligations under their respective Code of Ethics.**
2. **Attorney and environmental engineer/consultant ethics in relation to Emerging Contaminants compounds in standard environmental due diligence**
3. **Ethical Disclosure of Prior Malpractice by Attorney and Engineer in relation to a prior Phase I Due Diligence Investigation**

**Ethical Case Study #1 -**

Consultant, who is performing a Phase II investigation representing the seller/owner of a facility that has been in operation for 20 years, discovered a "reportable" free product petroleum spill that appears to be from a tank the consultant knows is larger than 1,100 gallons. Attorney, who represents the same seller/owner, reminds the Consultant they no longer need to report the spill to NYSDEC under new petroleum bulk storage reporting regulations, and that only their client, the site owner needs to report. Consultant calls seller/owner who advises the consultant not to report and adds that they do not intend to report and asks the consultat to "keep the information quiet". The Consultant is upset and calls Attorney to advise they believe they have to report the spill due to their Engineer/CHMM's ethical obligations under their respective Code of Ethics because it is pure product and the source area is adjacent to a school foundation. They explain their Code of Ethics dictate that the interests of the individual client must be secondary to protecting public health and safety, and the environment and NYSDEC still has on its website the general recommendation for "any person" to report a spill. The Attorney calls the Owner to advise his that the Consultant intends to disclose the spill. The Owner is furious and tells the Attorney to stop the Consultant from making the report. The Attorney starts to question their own ethical obligations in light of the consultant's ethical obligations and whether the Attorney can advise the Consultant to not report the spill, and if they have their own reporting obligations.

**Ethical Case Study #2 –**

Consultants and attorneys are currently being asked by NYSDEC to require their clients to investigate PFAS and 1,4-dioxane emerging contaminants at pre-existing remedial sites

despite the lack of New York State approved standards. The State has just proposed PFAS drinking water quality standards of 10 parts per trillion (ppt) for PFOS and PFOA, and 1 parts per billion for 1,4-dioxane but not for any of the other 19 PFAS compounds parties are being asked to sample. The State has also declared these two PFAS contaminants hazardous substances. However, the federal EPA has NOT declared any PFAS compounds as hazardous substances even though EPA has created a 70 ppt health advisory level.

An Attorney and environmental consulting firm are engaged in standard environmental due diligence on a site that has a brownfield history and they are representing a buyer. The Attorney asks the Consultant if they should be asking more questions of the seller's property contact, such as whether a fire ever occurred on the site and if fire fighting foam, which contains PFAS compounds, was ever used, or if plastics manufacturing, use of scotch guard or use of Teflon or other PFAS containing compounds were used and if so, if such history should be noted in the Phase I as a Recognized Environmental Condition (REC). The Consultant responds that it is not required to do this because under the ASTM standards, PFAS emerging contaminants are not hazardous substances. The Attorney responds: "but two PFAS compounds are now hazardous substances under State law and we are representing a buyer so we should be more cautious." The Attorney and Consultant each discuss their ethical due diligence obligations if they should make further inquiries or not regarding emerging contaminants even though there are no established "standards" for PFAS at the federal level and no approved standards in New York.

**Ethical Case Study #3 -**

A prospective purchaser relies on a "clean" Phase I Environmental Site assessment report, which the purchaser paid for, but was performed by a Consultant hired by a bank, to purchase a site that states the site was historically a lumber yard since the 1950s but this did not consistute a recognized environmental condition (REC). The Consultant relied upon the standard databases to perform the Phase I, which did not reveal any spills, etc. but a standard Google search would have revealed that the site was a former radioactive plant associated with the Manhattan Project. The purchaser buys the site in reliance upon the Phase I and later finds out about the radioactive history of the site. The purchaser hires an attorney and new environmental consultant to determine if the first consultant committed malpractice in relation to a prior Phase I Environmental Investigation and whether the bank should be sued.

## VI. Due Diligence Procedures

### A. Phase I ESA.

1. **Phase I Requirements.** The Phase I must be conducted by an "environmental professional," 40 C.F.R. §312.21, and completed within one year of closing, with certain aspects updated within 180 days of closing. 40 C.F.R. §312.20. It must either meet ASTM Standard

E1527-13, or the requirements set forth at 40 C.F.R. §§312.20-312.31, including interviews with past and present owners, operators, and occupants, reviews of historical sources of information, searches for recorded environmental cleanup liens, reviews of government records, visual inspections of the facility and adjoining properties, and consideration of specialized knowledge or experience of the purchaser, the relationship of the purchase price to the value of the property if not contaminated, commonly known or reasonably ascertainable information about the property, the degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

2. **RECs.** Normally the Phase I ESA will identify whether a recognized environmental condition ("REC") exists. ASTM Standard E1527-13 defines RECs as "the presence or likely presence of any hazardous substances or petroleum products in, on or at a property: (1) due to any release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of future release to the environment." A Phase I may also identify an historic recognized environmental condition ("HREC"), or a controlled recognized environmental condition ("CREC").

3. **Data Gaps.** These are "a lack of or inability to obtain information required by the standards and practices listed in [40 C.F.R. Part 312] despite good faith efforts by the environmental professional or persons" seeking to claim CERCLA defenses. Gaps should be avoided, and often are due to failures to complete FOIL requests, abstract of title reviews or interviews, and can easily be plugged, if only with supplements.

4. **Certification.** Like an instrument survey, Phase I and II ESAs should be certified to the buyer and buyer's attorney, as well as any lender and environmental insurer. In *Ridge Seneca Plaza LLC v. BP Products North America Inc.*, 2013 U.S. App. LEXIS 21999 (2d Cir. 2013), a Phase I ESA was certified to contract vendee, but later a sole-purpose LLC was formed that was assigned the contract and took title. As a result, negligence claims against the consultant were dismissed due to lack of privity.

**B. Phase II Study.** Phase II is an intrusive investigation where soil, groundwater, vapor or building materials are sampled and tested. A Phase II is normally undertaken when a Phase I ESA identifies RECs that determines a likelihood of contamination. The goal of a Phase II is to confirm environmental contamination. A purchaser is not required to perform a Phase II in order to qualify for defenses, but since the purchaser

must perform due care in relation to the property and stop any ongoing releases in order to maintain the bona fide prospective purchaser defense, sometimes it make sense to perform the Phase II to investigate the potential RECs. While Phase II ESAs are quite different depending on the site conditions and RECs, ASTM Standard E1903-11 addresses Phase IIs. Normally, a Phase II, at a minimum, will compare contaminant levels with "applicable or relevant requirements," including Soil Cleanup Objectives set forth at 6 N.Y.C.R.R. Part 375-6, NYSDEC Soil Cleanup Guidance CP-51 (Oct. 2010), surface and groundwater standards at at 6 N.Y.C.R.R. Part 703, and vapor standards in agency guidance on vapor intrusion, including NYSDOH, *Guidance for Evaluating Soil Vapor Intrusion in the State of New York* (Dec. 2006) and *Updates to Soil Vapor/Indoor Air Decision Matrices* (May 2017). However, a consultant is not limited to state applicable or relevant requirements under ASTM or Ethics and therefore should also look at new requirements such as the June 2015 EPA guidance document on Soil Vapor intrusion, which includes formulas to calculate vapor exceedances for over 100 substances.

[NOTE: For a while both NYSDEC and NYSDOH were telling consultants not to review this applicable and relevant guidance document. After informing USEPA that NYSDEC and NYSDOH were improperly advising consultants in New York not to analyze vapor samples under this EPA guidance document, during a BCP dispute over high exceedances of benzene at a petroleum site where the agencies were concluding no vapor mitigation was needed simply because there were no exceendances of their own State matrices, the agencies were admonished by EPA and DEC lost the BCP dispute. Consultants should use this guidance because it is applicable and relevant. Arguably, this is another instance where the State agencies were advising consultants to violate their own Code of Ethics. This BCP Dispute went through the entire current dispute resolution process, which no longer requires a hearing by an administrative law judge. The NYSDEC administrator selected to decide the dipsute ruled against his own DEC colleagues and agreed the site required a soil vapor barrier presumably because the USEPA guidance exceedances for benzene were relevant and applicable. There was no specific opinion on the Code of Ethics violation but this was raised in the dispute].

In sum, Attorneys and Consultants have ethical obligations that must be considered during the environmental due diligence and site remedial process. If State agencies ask a consultant or attorney to violate their code of ethics, not only should the attorney and consultant advise the agencies that they cannot violate their own Code of Ethics by disregarding data that may impact public health and the environment, but the Attorney and Consultant may have an ethical obligation to report the State engineer trying to force them to do so. This is a relatively new field of law that is continuing to emerge as we learn about new chemicals and their impact on the environment and public health. Therefore, being cautious, but also protecting our client's interest is a delicate balancing act. The ethics associated with this balancing act were analyzed in this article and intended to illustrate basic principles while parties evaluate site specific facts, which may dictate being overly cautious or being more protective of the client's interests.