

Contracts for Environmental Services: Legal and Ethical Considerations

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Topics

- Law v. Professional Ethics
- Contracts 101 – history, ethics, creation and enforcement
- Contracting standards in environmental practice
- Risk management and ethical considerations

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Law v. Professional Ethics

- **The Law:** What we must do per applicable law or regulation. Enforced by a governmental with penalties.
- **Professional Ethics:** guidelines, principles and values that govern how individuals or group should behave in a business environment.
- **Law v. Ethics:** They overlap, but professional ethics play a vital role in filling the gaps.

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CONTRACTS 101

HISTORY, ETHICS, CREATION, AND ENFORCEMENT



Assyrian Cuneiform Tablet, Contract for Loan of Silver, 20th-19th Century BC
Photos Source: Metropolitan Museum of Art, through Wikipedia

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Contracts – History and Ethical Context

- Since the dawn of antiquity
- Reflection of societal values – how we live, work, and treat each other in various settings
- A tool of fairness and equity (if used correctly)
- Creates clarity, expectation, foreseeability, and minimizes conflict

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Contracts 101 – Why bother? An ethical tool for good business

- Whether complex deal or simple Purchaser Order (PO) - establishes a "fair deal" that all parties can agree upon
- Creates foreseeability on which business and personal dealings can be built
- Risk management (i.e., limiting risk to what's "controllable" and "insurable")
- A construct for fair treatment when issues arise
- Avoid liability for unintended "promises" on which others might rely

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Contracts 101 – Creation

- Types of contracts: oral, written, implied by action
- General requirements for oral / written contracts:
 - Offer and Acceptance (“Meeting of the Minds”)
 - Consideration
 - Capacity / Authority
 - Not in violation of public policy (societal ethics)

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Contracts 101 – Creation

- Implied by action
 - Course of dealing contracts
 - “Promissory Estoppel” – reasonable reliance on promises
- Avoid these: ultimately unfair to the parties and unethical if intended (converts to fraud, misrepresentation, etc.)

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Contracts 101 – Enforcement and Societal Ethics

- Courts enforce contracts to promote equitable dealings in our society.
- Courts don’t modify contracts. “Rugged Individualism” still weaves through contract law.
- Only contract terms are considered *unless* ambiguities appear
- Performance-based damages if foreseeable.
 - *Hadley v. Baxendale* (foreseeability for consequential damages; Court of Exchequer, 1854)
 - *Hawkins v. McGee* (expectancy; the “hairy hand” case; Supreme Court of NH, 1929)

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Expectancy: Hawkins v. McGee, NH Supreme Court, 1929

The palm of my hand grows hair after a skin graft I got a few years ago.

[imgur.com/0wtd3C...](#)

"I will guarantee to make the hand a hundred per cent perfect hand or a hundred per cent good hand." – Dr. McGee, Defendant



Photo Credit: Reddit

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"If the defendant said that he would guarantee a perfect result, and the plaintiff relied upon that promise, any mental reservations which he [the defendant] may have had are immaterial. The standard by which his conduct is to be judged is not internal, but external ..."
-- Judge Branch

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Contracts 101 – Enforcement and "Equitable Remedies"

- Law of equity
- Specific performance, rescission, reformation, injunction, etc.
- All geared toward fulfilling societal ethics
- Creates business and personal risk
- **Good contracting practices avoid this!**

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Contracting Standards in Environmental Practice

- Environmental Services Contract - Typical Terms
 - Parties
 - Scope of work
 - Pricing and payment terms
 - Timeline and schedule
 - Standard of care – (professional ethics overlay and risk control)
 - Limitation of liability – (professional ethics overlay and risk control)
 - Choice of Law, venue
 - Dispute resolution

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Contracting Standards in Environmental Practice

- Standard of care – What is it and why does it matter?
 - Degree of care a prudent and reasonable person will exercise under same or similar circumstances
 - Complying with applicable laws and regulations can be a baseline
 - Each profession has a standard of care; sometimes it's in writing in the form of professional standards or licensing requirements
- Failure to meet the standard:
 - liability for tort, contract, regulatory
 - reputational impact, even if never held liable
- Standard of care can change over time. Keeping up with new developments is essential
- **Professional ethics consideration:** clearly align work and services with standard of care, and limit risk to same. Keeps expectations clear and risk insurable for all parties.

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Contracting Standards in Environmental Practice

- Limitation of liability
 - Limit liability to negligence based off standard of care
 - Some Standard Limitations = fees for services, industry standard value, available insurance

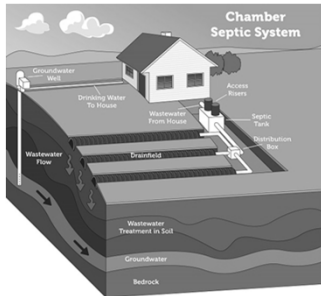
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Contracting Standards in Environmental Practice

- Environmental Services Contract – Additional terms to consider
- **Ethical concepts related to fairness and risk control in business dealings**
 - Indemnity (and waiver of subrogation)
 - Waiver of consequential damages (remember *Hadley v. Baxendale*)
 - Liquidated damages
 - Termination rights
 - Claim notice

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Risk Management and Ethical Considerations: Scenarios



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Risk Management and Ethical Considerations – Scenarios

- **Standards of Performance**
 - **Ethical, legal, risk management overlap**
 - *Ethical / legal obligation to “stay in your lane.”* Contract for work within your licensure and/or experience
 - Standards and guidance set by statutes, rules, licensing boards and industry groups
 - Wetland and soil scientists, septic system evaluators, geologists, electricians (for water treatment plants) and other engineers - NH Office of Professional Licensing and Certification (OPLC)
 - Drinking water system operators – NHDES and NH Water Works Association
 - Septic System designers and installers – NHDES and Granite State Onsite Wastewater Association (GSOWA)
 - Wetland Scientists – RSA 310-A: 76-96; New Hampshire Association of Natural Resource Scientists (Code of Ethics in Bylaws)
 - Geologists – Ethics Code of the American Institute of Professional Geologists

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Risk Management and Ethical Considerations – Scenarios

• **Reporting Obligations**

- **Ethical, legal, risk-management overlap**
 - Failure to report can be a professional ethics issue that creates risk to reputation, licensure, and/or legal liability
 - Options – depending on the situation
 - Inform client/customer of violation
 - Recommend client consultation with their counsel to determine if they must report to NHDES or other authorities
 - Determine if you have an independent duty to report
 - If a code violation, you may have an obligation to fix it (for installers and maintenance scopes)
 - Hypo: Designer discovers failed septic system but client doesn't want it reported because of financial hardship of replacement cost

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Risk Management and Ethical Considerations – Scenarios

Reporting obligations (continued): Oil Pollution Reporting

- "Any person who becomes aware of an oil discharge in violation of this chapter shall immediately notify the department of environmental services." (RSA 146-A:5, II) (Oil = Any type of petroleum product)
- NHDES rules, Env-Or 604.06 clarifies: The responsible person or other person must immediately report: a discharge of any oil to groundwater or surface water; a discharge of 25 gallons or more to land; a discharge of less than 25 gallons of oil to land unless immediately and completely cleaned up immediately and properly disposed of; a discharge of oil that creates the presence of vapors posing an imminent threat to human health
- First Call 911; then call 603-271-3899 (NHDES) or 603-223-4381 (State Police Dispatch)
- Hypo: On a rainy day, you arrive early at a site and discover an excavator whose 50-gallon fuel tank appears to have ruptured. There's an almost overwhelming stench coming from a large amount of oil under the excavator that's flowing rapidly overland toward a nearby stream. It's not your excavator or your property. You're there to meet the contractor, who hasn't arrived yet. What should you do?

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Risk Management and Ethical Considerations – Scenarios

• **Replacement Contractor Considerations**

- Be Careful!
- Avoid disparaging remarks and keep opinions fact based
- Proposals should be in writing; no verbal promises or inducements
- Make sure the prior contractor has been paid before you start, and that any products or goods already installed have been paid for
- Limit your liability by contract (scope, warranty exclusions, limitation of liability, owner indemnity, etc.)
- Carefully record the baseline conditions before you begin work and obtain a release of liability (or indemnity) for anything done by the prior contractor
- Ensure that you will have full legal access to and copies of all plans, specifications, permits, or other documents prepared by others and relating to the project

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Risk Management and Ethical Considerations

- **How to deal with competitors who aren't licensed or insured?**
 - Report them to the licensing authorities (NHDES, OPLC, etc.) or consumer protection entities (NHDOJ/Consumer Protection; Better Business Bureau, etc.)
 - Be smart about your own pricing and timelines to reduce the temptation of potential customers to hire unlicensed or unqualified providers
 - Get involved in trade groups that help ensure the professionalism of your licensed specialty
 - Advocate for laws and enforcement authorities that will penalize

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Risk Management and Ethical Considerations

- **Addressing Client Pressures to Bend the Rules**
 - Contractors can protect themselves with contractual terms that specify that they will seek the best possible outcome for the client consistent with the applicable laws and rules
 - The signatory on any permit application, and the professionals who prepare the application, may both be liable for false statements or misrepresentations; a professional's reputation and licensure could be put at risk
 - It can be far less expensive to do something right the first time than to do it wrong and later be required to both remedy the wrong and make it right.
 - Hypo: Homeowner plans to build a six-bedroom home but only wants to pay for a septic system for two bedrooms. What do you tell them?

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Risk Management and Ethical Considerations – Scenarios

Other Ethical Dilemmas or Questions For Discussion?

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