

# ENVIRONMENTAL AND SAFETY LIABILITIES – ARE YOU THE DESIGNATED JAILEE?

---

**May 9, 2008**

**2008 Mid-America Safety, Health & Environmental Conference**

**Julie O'Keefe**  
**Armstrong Teasdale LLP**  
**One Metropolitan Square, Suite 2600**  
**St. Louis, MO 63102**  
**[jokeefe@armstrongteasdale.com](mailto:jokeefe@armstrongteasdale.com)**



**ARMSTRONG TEASDALE LLP**

[www.armstrongteasdale.com](http://www.armstrongteasdale.com)

MISSOURI | KANSAS | ILLINOIS | NEVADA | CALIFORNIA | WASHINGTON, DC | SHANGHAI

# Sources of Potential Liability for Safety & Environmental Professionals (Both In-house & Contractors)

- **What is Liability? A responsibility due to an act or failure to act.**
  - Because the U.S. is so litigious, injured parties have become more creative about finding liable parties.
- **Types of Liability:**
  - Criminal
  - Civil
    1. Statutes
    2. Common Law (Court decisions)
    3. Regulations

# Criminal

No new law, only new criminals

- Most any regulations can be “criminalized” – Most environmental statutes have criminal provisions
- Congress has recognized that individuals, as well as corporations, should be criminally prosecuted for violations of federal environmental laws
- EPA has criminal investigators who look for crimes – Criminal Investigation Division
- Most environmental statutes have criminal provisions
- Occupational Safety & Health Act allows criminal referral where a willful violation results in the death of an employee

## Criminal (continued)

- Under OSH Act only “employer” can be prosecuted – Who is the employer? Company or Officer, typically
- OSH Act – misdemeanor 250K/500K and 6 months in prison
- Environmental statutes have more teeth and are the subject of prosecution more often than OSH Act
- State Statutes – California Corporate Criminal Liability Act
- Whether a case is prosecuted can depend on differing views of the same facts

## Criminal (continued)

- **Environmental statutes – punishment more severe than OSH Act and “persons” may be punished. Punishment can include 2-5 years and up to a 50K fine per day of violation. “Any person who “knowingly violates.” Knowingly doesn’t necessarily mean the person knows the law – only requires defendant to have been aware of his conduct. Examples of criminal provisions:**
- **RCRA – 42 USC § 6928(d)**
  - **Knowingly disposing of hazardous waste in violation of a permit, condition or regulation**
  - **Knowingly filing documents or making materially false statements**
  - **Knowingly destroying , altering or concealing reports required by law**
  - **Knowingly transporting waste without manifest**

# Criminal (continued)

- **CERCLA – 42 USC § 9603**

- Failure of “person in charge” of vessel or facility to report a reportable release “as soon as he has knowledge” of “such release”
- Up to 3 years in prison

- **Clean Water Act**

- Any person who negligently violates CWA or a permit or negligently introduces into a sewer system or POTW any pollutant the person knew or should have known could cause personal injury or property damage. Up to \$25,000 per day and up to one year in prison
- Knowingly discharging pollutants without a permit

# Criminal (continued)

- **Clean Air Act**
  - Knowingly violating CAA requirements
  - Filing materially false statements
- **Making false statement to Federal Government 18 U.S.C. 1001**
  - Government doesn't have to prove false statement made knowingly. Intent to mislead is sufficient
- **Federal Hazardous Materials Transportation Laws (FHMTL)**
  - Person who willfully or recklessly violates FHMTL up to 5 years in prison and up to 10 years if death or injury results

## Criminal (continued)

- **OSH Act – “Employer” who willfully violates standard resulting in death of employee**
  - **Usually requires knowledge of law and illegal conduct but in absence of actual knowledge of law, can be proven by showing employer’s plain indifference to law.**
- **Largest number of prosecutions under OSH Act have been in Northern Illinois.**



## Criminal (continued)

- **Willful blindness – allows fact finder to infer knowledge from proof that the defendant shielded himself from knowledge of an illegal act – Ostrich approach won't protect you**
- **Proof of knowledge can arise when person has “notice of facts would put one on inquiry as to the existence of that fact, when he has information to generate a reasonable belief as to that fact or when circumstances are such that a reasonable man would believe that such a fact existed.”**

- ***U.S. v. Atlantic States Cast Iron Pipe Co.*, 2007 WL 2282514 D.N.J., 2007: Company Plant Manager, HR Manager, Maintenance Superintendent and Finishing Department Superintendent convicted of crimes (Environmental Manager was acquitted)**
- **Longest environmental crimes case prosecuted by DOJ**
- **Conspiracy to pollute Delaware River by discharging petroleum and paint into storm drains.**
- **Violated CAA permits by burning tires and hazardous waste paint in cupola**
- **Guilty of obstructing OSHA investigation**
- **Guilty of making false statements to government investigations**
- **Altered accident scenes**

# Criminal (continued)

## 2006 Convictions – Examples

- **Farm had hog waste retention lagoon and took no steps to modify it to withstand severe weather to prevent discharge to drinking water reservoir. 50 K fine and 5 years probation.**
- **City worker pled guilty to altering wastewater samples to yield false results. Wastewater was discharged to sewer. 30 months probation and fine.**

## Criminal (continued)

- **Airport pled guilty to negligently allowing ethylene glycol to run off to pond, resulting in fish kill. 48 months probation and \$8.5 million in special projects.**
- **Environmental contractor and managers – Lead, hazardous waste abatement. Had workers falsify training records. Pled guilty. 5-21 months in prison, \$1.5 million fine.**
- **Sewage treatment plant and operator – didn't report hundreds of excursions. Discharges flowed to stream. Pled guilty. 60 months probation, \$2.1 million fine.**



## Criminal (continued)

- Don't Make False Statements, 18 U.S.C. §1001
  - Don't Obstruct Justice, 18 U.S.C. §1519
  - Don't Knowingly Violate Clean Air Act,
  - Don't Knowingly Violate Clean Water Act
- 
- ***U.S. v. Edwards*, 496 F.3d 677 (D.C.C. 2007): Asbestos inspector convicted of taking bribes and extortion (the company he solicited the bribes from was acting with really the FBI).**

# Civil

## Statutes - Examples

- **CERCLA – 42 USC § 9619 - Excludes contractors from the strict liability scheme.**
- **But §9619 also provides cause of action against contractor for negligence, gross negligence and intentional misconduct.**
- **Notwithstanding the above, contractors have been sued and in some cases, held liable, under CERCLA as “operators” and “arrangers” under CERCLA’s general liability provisions.**
- **Does not protect contractor from state common law claims such as negligence.**
- **Kaiser Aluminum v. Catellus, 1992, contractor who unknowingly relocated contaminated soil at Superfund site liable as “arranger.”**
- **New Castle v. Halliburton – 1995 Contractor who improperly installed a well liable under CERCLA and state negligence law.**

- **Environmental Appeals Board held consultant (hired by school district to supervise renovation) liable under Clean Air Act as “Owner/Operator” Issue was Contractor Control. In re School Craft, CAA Appeal 97-1 1998 EPA. App. Lexis Feb. 9, 1998)**



- **Missouri Spill Bill** – “Any person who provides assistance, including equipment or materials, at the request of the department or political subdivision of volunteer fire protection district in the event of a release of a hazardous substance shall not be held liable in any civil action for damages as a result of that person’s acts or omissions in rendering that assistance. Nothing in this section shall relieve any person from civil damages in the following circumstances:
- Where the release referred to is the result of the person’s having control of a spilled hazardous substance;

- **Where the person rendered assistance for payment beyond reimbursement for out-of-pocket expenses or with the expectation of such payment; or**
- **For acts or omissions which result from intentional wrongdoing or gross negligence.**
- **Important to know the statutes of the state you are working in.**
  - **E.g., New York statute made the “person” liable & person could be an individual under the statute. *Middleton Kontokoste Associates* – December, 1998 - Individual VP of consulting firm was held individually liable for not reporting spill within 2 hours as required by New York law.**
  - **Consultant asserted requirement applied only to facility owner or operation.**

## Civil

# Common Law Individual Liability

- **Individual Liability for negligence** – safety or environmental professional (in-house) or other worker negligently fails to handle situation such as machine guarding, personal protective equipment or allows employee to breathe air contaminants that then cause injury.
  - Why would an injured employee do this? Because normally in a work related accident, the employee's recovery against this employer is limited to workers compensation award.
  - If you are sued individually, in most cases your employer ends up paying for your legal defense, but not guaranteed.
- **If you are a “co-employee” you cannot be held liable to an injured worker.**



# Civil

## Common Law Individual Liability (Cont.)

- If you are performing a non-delegable duty of your employer, like providing a safe workplace, you are a co-employee and not liable. Must be something more.
- If you are performing personal duty, not a co-employee and can be liable.

### Examples

- Supervisor observed worker being dangled over boiling water on forklift – Supervisor personally liable.
- Supervisor held personally liable when he personally arranged faulty elevator hoist system
- Store manager held personally liable in operating forklift to elevate employee 15 feet off floor in warehouse.



# Civil

## Common Law Liability of Company (Not an Individual)

- **Negligence inspection/supervision** – a) breach of contract and/or b) tort in failure to exercise the requisite degree of care in performing contracted services creates a danger of injury to third party or property.
- **Torts**
  - Negligence
  - Negligent misrepresentation
  - Must show that it was foreseeable that plaintiff would rely upon report – buyer, bank
- **Standards for professional negligence** – Engineers under duty to exercise the ordinary, reasonable technical skill, ability and competence required for engineer in a similar situation – Expert testimony usually required.

## Civil

### Common Law Liability of Company (Cont.)

- **What if contractors aren't engineers?**
- **General or other contractor of injured employee, subcontractor may be deemed statutory employer and enjoy benefits of Workers Comp loan.**

#### **Elements – 287.040**

- **Work is being performed pursuant to contract**
- **Injury occurs on premises of general contractor**
- **Work is performed in usual course of statutory employer's business**

## Civil

### Common Law Liability of Company (Cont.)

- Carefully drafted contract is key to avoiding this type of liability. Consultant should say report is only for benefit of immediate client and no one else.
- Should limit distribution to client and specified third parties (if appropriate).
- Example – SEA Inc. – 691 N.E. 2d 1087, Ohio case. Jury against consultant to pay \$2.9 million for failing to adequately review files in doing Phase 1.

# Civil

## Common Law Examples

- **Negligent Misrepresentation – Phase 1 - ASTM standard and regulations may apply to define standard of conduct.**

# Civil

## Regulations Examples

- **OSHA allows company to be cited by OSHA (but not by a private party) for non-compliance with OSHA standards. Individual employees can't be cited.**
- **OSHA's multi-employer standard: The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph. The uncertainty the three letters "his" made.**



# Civil

## Regulations Examples

**Does this mean a GC is responsible for the safety of an employee of a sub? No – a sub’s employee is not “his”. Yes – general duty clause.**

**OSHA has “flip flopped” (1971 Yes, 1974 No, 1983 maybe, 1994 Yes). OSHA’s current position is YES. However, under the current Review Commission precedent, construction standards Contractor 1 can’t be cited if contractor 2 employee violates an OSHA standard, unless Contractor 1’s own employees are also exposed to the hazard.**



## Civil

# Regulations Examples

- **May 2007, Summit Contractor's case currently on appeal to the Eighth Circuit, which includes Missouri.**

**Issue: We're in a stand-off. OSHA has primary authority to legislate and enforce workplace safety – but its never formally gone back to clarify/correct the “his” inconsistency in the multi-employer standard. The Commission is the ultimate finder of facts and must apply OSHA laws. Courts give great deference to the authority of both OSHA and the Commission.**

**What do you think? With the Eighth Circuit rule with the Commission or OSHA?**