



*At the Intersection of Environmental Science and Liability: How do you manage your Professional Practice*



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Virtual SMART Remediation Seminar Series 2021  
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# At the Intersection of Environmental Science and Liability: How do you manage your Professional Practice

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## Environmental Liability

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- **Civil Liability**
  - professional negligence, breach of contract, breach of statute
- **Regulatory Liability**
  - orders
  - prosecution of offences under environmental statutes
- **Professional Licensing Liability**
  - disciplinary proceedings
- **Liability can be personal and corporate**



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## Common Areas of Potential Liability

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1. Failing to communicate
2. Performing below the standard of care
3. Extending reliance
4. Liability limits
5. Many others...

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## #1: Failing to Communicate

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## #1: Failing to Communicate

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- **Communication is key**
  - Client Objectives
  - Scope of Work
  - Terms and Conditions
  - Costs
  - Timing and Deadlines
  - Findings and Conclusions

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## #2: Performing Below Standard

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## #2: Performing Below Standard

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- **As environmental professionals, there is a duty to meet the standard expected of a consultant within your area of practice**
- **Includes**
  - communications with clients
  - sampling and conducting testing, modelling
  - reviewing and forming opinions
  - preparation of reports
  - recommendations
  - interactions with the regulator
- **Need to ensure all members of the team meet the appropriate standard**

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## #2: Performing Below Standard

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- **Providing false information to regulator about sample results (ONCA 2008)**
  - PCBs detected in two of consultant's samples
  - Consultant told Regulator there was no PCB in samples
  - Consultant convicted and fined for providing false or misleading information
  - Consultant and engineering firm also faced Professional Engineers Ontario Discipline Committee
  - Consultant and engineering firm found guilty of professional misconduct

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## #2 Performing Below Standard

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- **Free contaminated fill offered for development (NSCA 2014)**
  - Excavator offered soil that smelled of hydrocarbons as free fill
  - Soil used as backfill in subdivision
  - Excavator should have tested soil when appearance made it clear it may be contaminated
  - Excavator ordered to pay \$487,295 for remediation

## #3: Extending Reliance

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### #3: Extending Reliance

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- **Reliance provides a contractual right for the party receiving reliance to rely on the report**
- **Need to understand**
  - identity of new client
  - purpose
  - scope
- **Party receiving reliance will depend on the report in making decisions**
- **Reliance creates potential for additional liability**

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### #3: Extending Reliance

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- **Reliance on Phase I ESA (NLCA 2018)**
  - APS required vendor to provide Phase I ESA to purchaser
  - Consultant Project Agreement contained third party disclaimer
  - PHC contamination discovered after deal closed
  - Purchaser sued vendor and consultant
  - Court found if purchaser wanted reliance, should have initiated discussion with consultant
  - Consultant had turned mind to third party with disclaimer in agreement

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## #4: Negotiating Liability Limits

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## #4: Negotiating Liability Limits

- **Liability limits can set a maximum on potential damages**
- **Limits must be reasonable**
- **Limits must be agreed to prior to commencing work**
- **Ensure you have adequate E&O insurance**

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## Managing Your Professional Liability...

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- **Understand client needs**
- **Confirm instructions**
- **Do excellent work**
- **Stick to your area of expertise**
- **Your words, spoken or written, matter**
- **Have appropriate insurance**

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## Willms & Shier Environmental Lawyers

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- **Established over 40 years ago**
- **Environment, Indigenous, and Energy law**
- **17 lawyers**
  - eight lawyers are certified by the Law Society of Ontario as Environmental Law Specialists
  - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, Nunavut and Yukon
  - offices in Toronto, Ottawa, Calgary, and Yellowknife

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