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## ***Business and Legal Implications for Environmental Consulting Firms: Lessons Learned From the Stratus/Chevron Ecuador Debacle***

### **The Lawsuits**

Recent developments in a case that has made headlines globally have shaken the environmental consulting world and those who utilize their services. In *Maria Aguinda y Otros v. Chevron Corp.*, an environmental contamination suit was brought against Chevron in Lago Agrio, Ecuador by a group of indigenous Ecuadorians in 2003. The underlying suit alleged that Chevron, as successor to Texaco's Ecuadorian operations, was responsible for contamination of water, soil, and other natural resources in that country's Amazon rainforest. In February 2011, the Ecuadorian court found Chevron liable and ordered the company to pay more than \$18 billion in damages.

In response, Chevron brought suit in New York federal court, alleging that the Lago Agrio plaintiffs, their attorney Steven Donziger, their environmental consultants Stratus Consulting, and various other entities had illegally conspired to defraud and extort Chevron by initiating sham litigation and other forms of intimidation.<sup>1</sup> Chevron is seeking damages under various legal theories, as well as declaratory and injunctive relief to block enforcement of the Ecuadorian judgment. There have been two recent dramatic developments. First, two Ecuadorian judges involved in the case have reportedly admitted accepting bribes from plaintiffs' counsel in exchange for letting the case go forward and allowing plaintiffs' counsel to ghostwrite the final judgment against Chevron. Second, Stratus has agreed to a settlement with Chevron in the New York lawsuit in which it has admitted to improper conduct.

### **The Recantations**

In April 2013, two Stratus principals involved in the matter — now former Managing Scientist Ann Maest and former Executive VP Douglas Beltman — filed statements in the New York court disavowing all of the findings and conclusions in their reports and implicating Donziger in the scheme alleged by Chevron. Reports indicate that, in total, at least eight current and former Stratus employees were involved in the Ecuador project.

In her witness statement, Maest detailed how Donziger:

- secretly co-opted the "independent" expert the Ecuadorian court appointed to conduct a comprehensive damage assessment, and instructed Stratus to ghostwrite his final report;

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<sup>1</sup> See *Chevron v. Donziger*, 11-cv-0691 (S.D.N.Y.).

- provided a limited, hand-picked universe of contamination data and then required that Stratus write the expert's report based solely on — and without independently confirming — that data;
- refused repeated requests by Stratus to be permitted to conduct proper groundwater sampling using recognized, reliable technologies;
- instructed Stratus to ignore ongoing remediation efforts in calculating damages and not to consider other possible sources of contamination when assessing Chevron's responsibility;
- insisted that the Stratus damages calculation be based on a remediation level that was 25 times stricter than the conventional standard it would have applied;
- refused to be transparent with Chevron as to its sampling data and conclusions; and
- internally acknowledged that the assessment Stratus was preparing was "just smoke and mirrors and bullshit."

Maest concluded by expressing deep regret for allowing herself to be used in this way. Beltman mirrored Maest's allegations and *mea culpa*, and further stated that:

- Donziger oversaw and managed all of Stratus's work on the project, ranging from supplying raw data to defining the overarching assumptions of the report to editing and approving drafts;
- the engagement contract provided that Stratus would receive technical direction from Donziger;
- Donziger insisted on absolute secrecy, including concealing Stratus's role in drafting the independent expert's report, and Beltman actively enforced this request;
- Beltman also helped restrict the dissemination of unfavorable information;
- Donziger orchestrated a cynical façade in which plaintiffs' attorneys and their experts first ghostwrote the report of the court's independent expert, next drafted responses to that report claiming that it unduly favored Chevron, and finally ghostwrote the expert's reply to their responses;
- Donziger placed language in the Stratus report equating the court's expert to a U.S. Special Master;
- Donziger informed Beltman that local court rules permitted party experts such as Stratus to contribute to the independent expert's report; he also made clear that this was a deception, however, and Beltman indicated that Stratus does not typically engage in the misattribution or concealment of authorship;
- Donziger vetoed Stratus's use of its preferred contractors when their conclusions provided inadequate damages;
- Donziger ordered Stratus not to use the most reliable measures of remediation costs; and
- Beltman allowed himself to be used to make misleading presentations to (or failed to correct Donziger's misstatements to) the media, litigation funders, the U.S. government, and members of the academic and scientific communities.

### **The Repercussions**

Stratus has been a leading environmental consultant to the U.S. Environmental Protection Agency and other U.S. governmental agencies (including most recently and most visibly to the National Oceanic and Atmospheric Administration in the Deepwater Horizon oil

spill). In the wake of the Chevron suit and the Stratus admissions, adverse parties have petitioned Congress and EPA, asking that Stratus's findings and recommendations in various environmental matters be revisited or rejected. In May 2013, for example, the American Resources Policy Network sent a letter to the Senators and Representatives who oversee EPA asking them to investigate the agency's relationship with Stratus, especially with regard to EPA's consideration of proposed copper mining projects. Federal agencies have also reportedly sought Justice Department advice as to whether they should continue to use Stratus, and attorneys for Chevron have even raised the issue that involvement in a fraud can serve as grounds for debarment of individuals and companies from government work.

A statement on Stratus's website acknowledges the disavowals by its now former employees Maest and Beltman, and attributes them to a "tainted" process, but emphasizes that Stratus employees never faked or falsified any data. Referring to the incident as an "aberration," Stratus nevertheless announced several steps it has taken to ensure that such an incident does not happen again:

1. Commissioning an independent, third-party audit of its management systems by an attorney who specializes in business ethics.
2. Retraining staff on appropriate practices for technical experts working both in the United States and internationally.
3. Incorporating additional checks and balances in every aspect of project execution.<sup>2</sup>

### **Issues and Implications**

In the wake of the Stratus admissions, and depending on the internal protocols and protections already in place, the following are some of the key issues and implications environmental consultants may want to consider whether they are working in a business (transactional) context, or in an enforcement (compliance) or other litigation setting.

1. What is the appropriate language to include in the retention contract that will reflect the proper relationship between the consultant and lawyers?
2. How should a consultant respond when instructed to engage in fraudulent, unethical, or unscientific conduct?
3. Does the consultant have any obligation to become familiar with the rules of evidence, discovery, and other relevant law? How about to disclose documents or bring improper conduct to the attention of the opposing party/counsel?
4. What warning signs should the consultant look out for?
5. What training measures and protocols can a consulting firm put into place to help employees recognize and respond to such challenges?
6. What are a consultant's reporting requirements if it becomes aware that an employee has acted improperly?
7. What potential criminal and civil sanctions could a consultant face?
8. To what extent may the attorney participate in editing or authorizing an expert report?
9. To what extent can/should the consultant defer to or rely on attorneys for: (1) defining the types of harms and damages to be considered; (2) identifying the potential causes; and (3) providing relevant evidence or placing certain evidence off limits?

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2 <http://stratusconsulting.com/2013/05/setting-the-record-straight-on-the-chevronecuador-lawsuit-settlement>.



10. When should the consultant insist on using its own chosen testing labs, external experts, sampling methodologies, etc.?
11. To what extent is something like the selection of a remediation standard a matter of legal strategy or choice rather than a matter of scientific norms?
12. What are the proper roles and permissible limits of confidentiality? What are the limits and potential abuses of the attorney-client and work product privileges?
13. What are the consultant's obligations to confirm independently local legal practices, such as when an attorney informs them that the foreign court permits party experts to contribute to a neutral expert's report?
14. What are the proper/permissible roles of the consultant in performing non-scientific functions such as media relations, governmental relations and lobbying on behalf of the legal team? In making presentations to litigation funders? In obtaining external scientific/academic endorsements?

### **The "To Do" List**

In light of the Stratus/Chevron matter, we recommend environmental consulting firms, with assistance from internal and outside counsel, re-examine some of their internal protocols and procedures, including:

1. client/matter intake procedures, including conflict check systems and language of engagement letters (and applicable terms and conditions);
2. terms and limits of relevant insurance programs (including umbrella coverage);
3. document retention/destruction programs (and ensure that they meet corporate-wide requirements as well as those of its clients, in all cases subject to applicable laws and regulations);
4. personnel training on working with outside counsel both in the business/transactional/regulatory context as well as in litigation matters (whether as a consulting expert or testifying expert);
5. if working for the government sector, understanding the rules and pitfalls associated with governmental contracting and debarment scenarios; and
6. identifying matters (ongoing and closed) where Stratus has been involved (as well as where other governmental consultants have exhibited questionable behavior or issued findings and/or reports that strain technical/scientific credibility) and discussing findings and implications with the relevant clients and their counsel.

### **Questions or Assistance**

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