The Clean Up

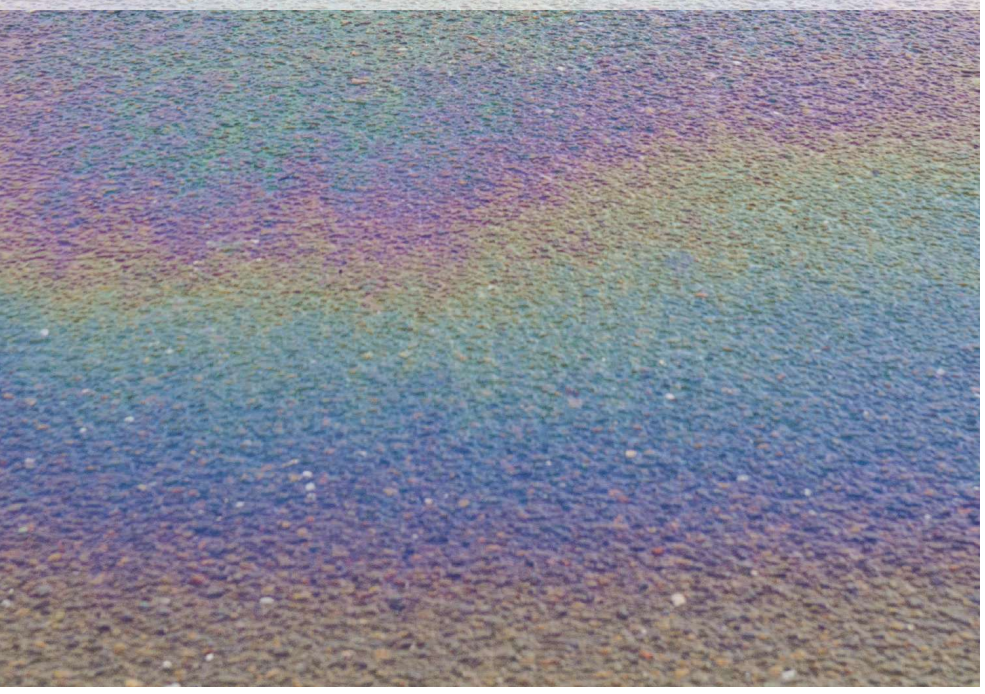
New tax case good news for environmental remediation design contractors

By Charles R. Goulding, Michael Wilshere & Andrea Albanese

Maintaining a healthy environment today is a responsibility that we owe to the generations of tomorrow. In today's sophisticated world, modern technical capabilities, access to vast stores of information and ever increasing analytical capabilities allow us to gain detailed insights about the environment in order to better protect it for the future.

Part of this initiative involves cleaning up spill sites in a responsible and cost efficient way. Design and engineering firms and environmental professionals use a number of technologies in the environmental remediation of polluted sites.

Remediation efforts can range from large, expensive projects, such as the Durango mustard waste water spill in 2015, to smaller, less costly projects, such as cleaning up a highway accident in which gasoline, oil, or other hazardous materials have been spilled.



Given this wide range of projects, individual sites can present technical challenges, due to a variety factors, including the size of the spill, the dynamics of the site, the depth of remediation required, the effect of specific chemicals on the environment and the nature of the contaminants involved.

Many environmental pollution cases involve creative solutions and innovative approaches to problem solving. Bioremediation, which breaks down contaminants through biological processes, is one of the most active areas of research and development.

Innovation efforts in this sector are on par with cancer research and software development. These efforts are the result of contributions from the federal government, academia and private institutions – each realizing the importance of innovative solutions when cleaning up a contaminated site. Federal and state R&D Tax Credits are

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available for design and engineering firms, as well as other companies and organizations innovating within the environmental remediation sector.

The recent R&D Tax Credit case – Geosyntec Consultants Inc. v. United States, 776 F.3d 1330 (Eleventh. Cir. 2015) – provides guidance as to when environmental professionals should claim R&D Tax Credits.

The R&D Tax Credit

Enacted in 1981, the federal Research and Development (R&D) Tax Credit allows a credit of up to 13 percent of eligible spending for new and improved products and processes. Qualified research must meet the following four criteria:

- New or improved products, processes, or software
- Technological in nature
- Elimination of uncertainty
- Process of experimentation

Eligible costs include employee wages, cost of supplies, cost of testing, contract research expenses, and costs associated with developing a patent. On Dec. 19, 2014, President Obama signed the bill extending the R&D Tax Credit for the 2014 tax year.

As of this writing, proposed tax extender legislation would extend the tax credit through Dec. 31, 2016.

Geosyntec Consultants Inc. v. United States

The Geosyntec case of 2015 provided a favorable ruling for consulting and engineering firms that provide environmental remediation services. Well known consulting and engineering firm, Geosyntec Consultants Inc., sought a federal income tax refund of more than $1.6 million in R&D Tax Credits and were claimed for expenses made on a number of projects completed between 2002 and 2005.

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One such project involved design and construction support services for the expansion of a landfill within its existing footprint. Since the landfill sat on a soft foundation, its capacity for vertical expansion was limited. A previously commissioned composite stability analysis of the landfill demonstrated that expansion might be possible and Geosyntec took on the challenge in following seven tasks:

1. Site studies
2. Design work, including site design
3. General services, including permit applications and construction drawings
4. Preparation of an operation and maintenance manual
5. Construction-related services, including on-site supervision and quality assurance monitoring
6. Post-construction services, including as-built drawings and a project completion report
7. Additional analyses, modeling and testing

Geosyntec was successful in completing the expansion and as a result, sought R&D Tax Credits for the qualified research expenses (QREs) incurred. The IRS challenged their position based on a technicality, however, it was clear that the activities involved were eligible R&D activities as the court stated, "like the Fairchild contract, each of the tasks required research, development, and testing."

Another project challenged by the IRS involved the evaluation of a system for remediating contaminated groundwater underneath a warehouse. The site was previously used to manufacture and store weapons and radioactive material. Although also challenged by the IRS, the R&D activities for this project involved the following:

- The performance of laboratory bench tests to evaluate the feasibility and performance of enhanced in situ bioremediation (EISB) for groundwater cleanup
- Preparation of a report describing its methodology, tabulating the results, interpreting the data collected, and discussing site conditions and potential pilot-test designs.

Similar to the landfill expansion project, the IRS did not question the nature of the activity, as it was clear to all parties involved that similar types of projects were targeted by Congress under the enactment of the R&D Tax Credit regulations.

Geosyntec was successful in defending a significant portion of their claims and for environmental remediation professionals, the holding laid out guidelines for the type of activity that will qualify for R&D tax credits. In addition to the Geosyntec activity described above, other eligible activities typically include:

- Treatment design and site mapping
- Prototype development
- Evaluation of alternative cleanup methods
- Smart filter technology
- Ex situ thermal desorption
- Thermal off-gas treatment
- Hot gas decontamination
- Plasma high temperature recovery solutions

Environmental professionals, construction companies, and design and engineering firms often encounter technical challenges when remediating a contaminated land site. Solutions to these challenges often involve technical uncertainty, a process of experimentation, state-of-the-art technology, and sophisticated chemical processing. Federal and state R&D Tax Credits are available to help stimulate and support these innovative solutions. **FC**

Charles R. Goulding, attorney and CPA, is the president of R&D Tax Savers, an interdisciplinary tax and engineering firm that specializes in R&D tax credits. Michael Wilshere is a tax analyst with R&D Tax Savers; and Andrea Albanese is a project Coordinator.