

NEWSLOG

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Fiduciary Liability Claim Creates Huge Exposure

A California jury has ordered an architect (Hellmuth, Obata & Kassabaum) to pay the client \$7 million because the architect's construction observation services failed to prevent curtain wall leaks at the 27-story Lake Merritt Plaza (Oakland, CA). So what's new? Plenty! The award was not based on a theory of professional negligence. Instead, the judge agreed with a plaintiff's novel argument that the archi-



tect owed a fiduciary responsibility to the owner and so instructed the jury. The jury didn't have much choice in its deliberations. A fiduciary is responsible for preserving a "beneficiary's" assets. If an architect's client (beneficiary) is damaged because a given service did not produce optimum results, a *per se* breach of fiduciary responsibility must have occurred.

(cont'd on page 2)

Department Heads Oppose ASTM's Prescriptive Standards

The American Society of Civil Engineers' (ASCE's) Department Heads Council (DHC) has endorsed a resolution opposing "ASTM's promulgation of consensus documents that are labeled as Standard Practices or Standard Guides....". DHC's membership comprises the chairs or heads of the nation's 226 civil and environmental engineering programs accredited by the

(cont'd on page 3)

Submit Your Incident Reports

Being sued for failure to adhere to a standard that you are not legally required to adhere to is extremely unlikely.

We know this statement is NOT true. We have heard, anecdotally, of ASFE members and others being sued for problems allegedly caused by their failure to abide by a "standard" or other written guidelines. In most of these cases, courts have ruled that a text, guide, or nonbinding standard may give evidence that a standard of care exists, but in and of itself it is not the standard of care nor may it be enforced as such.

WE NEED YOUR HELP: Let us know if you or your firm has been involved in one of these situations. Report when the incident occurred and what the outcome was. Call ASFE Executive Vice President John Bachner at 301/565-2733; write c/o ASFE, 8811 Colesville Road, Suite G106, Silver Spring, MD 20910; fax: 301/589-9121; or e-mail: asfe@aol.com.

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Fiduciary Liability Claim

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To an extent, this new area of exposure might cause a professional to assume a contractor's warranty. To an extent, that's what happened in this case. The general contractor and subs settled previously with the owner for \$700,000 or one-tenth what the jury said the architect owed.

Another problem: The exposure involved appears to be a contractual liability, not a negligence liability. Assuming an insurer sees it that way, neither professional nor commercial general liability would afford protection.

The architect originally said it would appeal the decision. In a recent interview with *Newslog* staff, however, the firm's general counsel indicated that the case would be settled.

Do not assume this is a California problem. Plaintiff's attorneys use every argument they can think of to give merit to their claims. Given the speed and effectiveness of electronic communication, you can be confident that this new line of attack will soon be attempted nationwide. The importance of "the observational method" to geotechnical and geoenvironmental practice puts geoprofessionals at particular risk.

You should be able to protect yourself on new projects by using an appropriate contract provision:

Fiduciary Responsibility

CLIENT agrees that CONSULTANT has been engaged to

provide technical professional services only, and that CONSULTANT does not owe a fiduciary responsibility to CLIENT.

Naturally, you should not use the foregoing sample language or any other sample language until you have had your attorney review it. Note, that the sample presumes that the client is the owner. If your client is the prime design professional, it would be essential for the prime to have a similar provision with the owner. Irrespective of client/consultant relationships the owner is the ultimate "beneficiary."

Does your insurer cover such claims?

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Department Heads Oppose ASTM's Prescriptive Standards

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Accreditation Board for Engineering and Technologies (ABET).

According to a source, the DHC is concerned that ASTM's issuance of prescriptive professional standards could force ABET-accredited curricula content to conflict with ABET requirements for the teaching of design. These criteria stress the need to develop design that will "convert resources optimally to meet a stated objective." ASTM's standard practices and standard guides presuppose a standard client with standard risk management objectives for a standard project at a standard site. These conditions will be almost impossible to match in "the real world," making attainment of optimal results almost impossible. Nonetheless, engineers and environmental professionals could be required to follow such ASTM standards, if only to avoid the huge liability exposures that could otherwise accrue.

The resolution reads as follows:

RESOLUTION ON STANDARDIZED GUIDES FOR DESIGN

Whereas, civil engineering is a profession which requires specialty education and knowledge to serve and protect the health, safety and welfare of the public;

Whereas, the practice of civil engineering also depends on experience and judgment for the advancement, innovation and improvement of the practice;

Whereas, ASTM's promulgation of standard practices and standard guides will have the effect of discouraging innovation, thereby threatening the advancement and improvement of the practice;

Therefore, be it resolved that the Midwest Civil Engineering Department Heads/Chairs oppose ASTM's promulgation of consensus documents that are labeled as Standard Practices or Standard Guides, just as they oppose any activities by any organization that could have the effect of standardizing the design function of civil and environmental engineers.

ASCE's Educational Activities Committee (EdAC) referred the resolution to the ASCE Executive Committee which, in turn, has established a Task Committee on Standards. The Task Committee is expected to issue a report in January 1998.

DFI JOINS ADVOCATES GROUP

With the recent addition of the Deep Foundation Institute, Advocates for Professional Judgement in Geoprofessional Practice (APJGP) now has 12 member organizations. These are:

ACIL: Association of Independent Scientific Engineering & Testing Firms

ADSC: The International Association of Foundation Drilling

ASFE: Professional Firms Practicing in the Geosciences

American Consulting Engineers Council,

American Engineering Alliance

Association of American State Geologists

Association of Engineering Geologists

California Geotechnical Engineers Association

Deep Foundation Institute

Geo-Institute (of the American Society of Civil Engineers)

Hazardous Waste Action Coalition, and

National Council for Geo-Engineering and Construction
(The GeoCouncil)

WORKING THROUGH CHANNELS AT ASTM

ASFE is continuing its efforts to work through ASTM procedures to effect change. To date, we have had little success. The most recent foray occurred on August 28. At that time ASTM's Committee on Technical Committee Operations (COTCO)—one of ASTM's top "watchdog" committees—was set to vote on our recommendation that ASTM adopt a third type of document (in addition to "standard" and "provisional standard") called "consensus document." This title would be applied to practices and guides that prescribe professional performance but which fail to include any metric to assess the result (i.e., "standards" that produce nonstandard results). For the occasion, a special ASFE delegation travelled to West Conshohocken, PA to address COTCO. ASFE was represented by ASFE Director W. Jerrold Samford (*Virginia GeoTechnical Services*) and ASFE's ASTM Task Force Chair James Johnson (*PMK Group*). Both are active ASTM committee members—Jerry, Committee E 50, and Jim, Committee D18. ASFE Executive Vice President John Bachner also attended.

The first voting issue ASFE was invited to observe was whether ASTM should abolish "provisional standards." These are standards that are pushed quickly through the initial approval process without full oversight and expire after two years. Usually they are replaced by a "regular" standard.

One COTCO member said, referring to a report, that he was surprised by the number of committee chairs who "abused" the provisional standards process. Then, prior to the vote, a representative of the Consumer Product Safety Commission (CPSC) made a special appearance, urging COTCO not to abolish provisional standards because delays in finalizing standards would result in needless consumer deaths (especially of children) and needless visits to the hospital emergency rooms (especially by children). No one asked the CPSC representative to quantify the anticipated death and dismemberment that would be caused by abolishing provisional standards, and a vote was taken.

ASTM still has provisional standards! At a meeting six months before, ASFE representatives suggested that, because provisional standards were subject to abuse, more safeguards should be enacted to help prevent abuse. The CPSC official addressed the issue, but urged COTCO to refuse to call provisional standards "emergency standards" because the use of the term "emergency standards" could create liability concerns for manufacturers.

ASFE subsequently obtained a copy of the report referred to by the COTCO member. In the report, six committee members stated that provisional standards have value because they permit ASTM to issue a document in cases where internal dissension would prevent consensus; i.e., provisional standards have value because

they permit ASTM to avoid meeting consensus requirements. Four other members said provisional standards are worthwhile because they use them to meet government requests.

John Bachner addressed COTCO on the use of the word "standard." According to ASTM staff, it studied six other organizations that use various titles in their documents in addition to "standard." They found that use of different titles did not prevent the American National Standards Institute (ANSI) or the International Standards Organization (ISO) from recognizing the documents as ANSI or ISO standards.

Bachner also said that ASTM was creating a dire situation for engineering and environmental practitioners, one which the practitioners are in the process of documenting with case histories. Bachner also noted that the heads of the nation's 226 ABET-accredited civil engineering and environmental curricula had issued a resolution condemning ASTM's use of the word "standard" relative to prescriptive professional practices.

One COTCO member asked Bachner incredulously, "How will following an ASTM standard not achieve a standard result?" Bachner answered that, in the case of ASTM E 1527, the ESA Phase I "standard practice," two practitioners could follow the same standard for the same client at the same site and arrive at diametrically opposed conclusions. Another COTCO mem-

ber said ASFE arguments were weak because, in a court of law, a jury could determine that ASTM's "standard" is a consensus document and that practitioners are not required to follow it.

Before Bachner had the opportunity to say that ASFE's concern was that it wants to keep its member firms out of court, the chair said that if the committee wanted to meet its preset adjournment time, it would have to vote now. The ASFE delegation was not surprised that the entire committee, with one exception, voted against its suggestion. Committee D 18 Chair Terry Hawk abstained, saying to fellow COTCO members he hoped they understood. They acknowledged his statement, and departed for lunch.

NOW WHAT?

Unquestionably, ASFE has a shrill voice in the ongoing situation with ASTM. We suspect that voices in the wilderness sometimes sound like that. The tone is not too different from what others in the "establishment" heard 25+ years ago, when ASFE called for use of limitation of liability, or 22 years ago when it called for use of ADR, or 20 years ago when it created Peer Review. Regardless of its experience, ASFE does not relish its position.

We started quietly at first, attempting to highlight subtly the damage that would be caused by the word "standard." Quiet words achieved nothing,

(cont'd on page 6)

Support for Fed Up! Mounts

As reported in the May/June 1997 issue of *Newslog*, the Consulting Engineers and Land Surveyors of California (CELSOC) is leading a strenuous fight against an California ballot initiative, sponsored by the Professional Engineers in California Government (PECG). The initiative would exclude private companies from winning state and local contracts (possibly private sector contracts, too) in California. The situation is critical. Not only does the initiative require that state employees perform all engineering work in the State of California, eliminating most of the private sector jobs in the industry, it sets a precedent for other states.

According to CELSOC, the initiative allows the California government to exclude many expenses, such as employee salaries, benefits, rents, utilities, telephones, office expenses, and more from their bids, making them appear artificially low. Additionally, the initiative's wording misleads taxpayers—and voters—with words such as "cost savings" and "taxpayers' protection," when, in fact, the reduction of competition will probably result in a reduction in quality on projects. If passed, Fed Up! also predicts that a huge bottleneck of projects awaiting approval would build in the state controller's office, jeopardizing the public's well-being and safety.

Many ASFE member firms in California would lose key business if this initiative wins. All groups affiliated with architects, engineers, and environmental consultants are also affected and have indicated their support of CELSOC's mission to educate the public on the initiative. They have donated funds to "Taxpayers Fed Up with More State Bureaucracy," or Fed Up!

Earlier in the year the ASFE Board voted to match voluntary member contributions up to \$10,000. ASFE member contributions have topped \$14,000, and with the \$10,000 match, ASFE has committed \$25,000 to Fed Up!

The Council on Federal Procurement of Architectural and Engineering Services (COFPAES) voted to donate \$25,000 to Fed Up! COFPAES is a coalition of seven design groups: NSPE/PEPP, the American Consulting Engineers Council, the American Institute of Architects, the American Society of Landscape Architects, the American Congress of Surveyors and Mappers, the American Road and Transportation Builders Association, and the American Society of Civil Engineers. NSPE and PEPP have also each contributed \$25,000. Also, supporting Fed Up! is Zweig White & Associates, Inc., which has pledged to donate 10% of all new subscription income from its weekly newsletter, *The Zweig Letter*.

For more information and to find out how you can help, contact Paul Meyer at CELSOC (916/441-7991). The entire text of the initiative and current status of the fight is available on CELSOC's Web site (www.celsoc.org).

Now What?

(cont'd from page 5)

but a threatening news release did attract attention. We were told, however, that nothing could be done because ASTM is an entity comprising independent fiefdoms called committees.

When other groups recognized what could happen, concern grew. An ad hoc group of organizations met with ASTM leaders in February 1997. The ASTM board chair told us that our arguments were "ridiculous." Then we met with COTCO, and now, again with COTCO. During this time ASFE and 10 (now 11) other groups formed a coalition called Advocates for Professional Judgement in Geoprofessional Practice (APJGP).

Now, APJGP is slated to have a special 45-minute meeting with the ASTM board of directors on Tuesday, October 7. The object is to get the board to recognize the gravity of the situation and the potential for it to grow worse, and thus endorse creation of a joint task force to arrive at a solution. Let's hope this works. If it doesn't, then we have no choice but to do whatever we can to counteract an ever-broadening liability dilemma that will almost definitely force civil engineers and environmental consultants to either use the ASTM method or nothing at all.

Make no mistake: Some, possibly many, in ASTM would be delighted by this outcome. They are convinced

The only change required to avoid a debacle for the engineering and environmental community is a nomenclature change, so that ASTM defines its terms accurately, to avoid extremely serious misunderstandings.

that many civil engineers and environmental consultants do shoddy work, and only the issuance of easy-to-follow, fill-in-the-blank ASTM prescriptive standards can save the day. What they don't seem to understand, unfortunately, is the world of difference that exists between following a standard and *saying* one has followed a standard. Members of ASTM's key environmental committee—E 50—said at a gathering about one year after issuance of E 1527 that most reports they saw obviously did not follow the ASTM standard, even though the authors of those reports said they did.

ASFE's position is basic. It suggests that ASTM (and similar groups) use the term "consensus document" to derive "consensus practices" and "consensus guides" instead of "standards," because, in "ASTMspeak," "standard" is defined to mean "consensus document." Juries do not realize this, as case histories now in development show. ASFE has also recommended that ASTM develop user advisories to appear in such

documents, advising how they should and should not be used.

ASFE has gone out of its way to point out the many valuable contributions ASTM has made. It has also pointed out that *all* of its guides and standards are valuable. The only change required to avoid a debacle for the engineering and environmental community is a nomenclature change, so that ASTM defines its terms accurately, to avoid extremely serious misunderstandings. We do not understand why ASTM is so adamantly opposed to the change. Some cynics have suggested that ASTM wants to keep its "standard" because it helps them "live up to their name: Association For Selling Technical Materials." But ASTM has denied financial motivations, and we have no proof that their statements are untrue. (ASTM doesn't really seem to need money. Its *net* assets are close to \$75 million.)

No one questions that ASFE has single-handedly made this issue a national *cause celebre*. We understand that failing to cure the situation could have devastating results, especially for smaller firms that often market based on their high-quality niche/expertise (vs. the commoditization associated with standards) and cannot afford either to settle or to endure a court battle. We do not under any circumstances want to hurt ASTM. However, we cannot under any circumstances permit the existence of an easily correctable problem that could seriously harm our members.

The New Contract Guide

It's finally on the street. The *ASFE Contract Reference Guide, Third Edition* is almost 50% larger than the second edition. It includes a variety of new provisions. Those remaining from the second edition have been updated to reflect current implications and interpretations.

The new guide includes many provisions and guidance for helping firms prevent third-party claims. It also includes information on ASTM standards and other key issues. All member offices have been sent one copy. Additional copies are FREE to ASFE members; \$95 to nonmembers. Do you need more copies?

To place your order, call Publications Coordinator Alpha Moore (301) 565-2733; fax: 310/589-2017; or e-mail: asfe@aol.com.

ASFE MEMO BLASTS ASTM STANDARDIZATION

An Office of Management and Budget (OMB) circular as well as federal legislation urges the federal government to rely on private standards-developing organizations (SDOs) rather than develop standards on their own. A number of federal agencies like the idea because the SDOs can write standards faster for less money. ASTM, in particular, has exhibited a strong willingness to accommodate federal agencies by reissuing existing federal standards as ASTM provisional standards.

Because ASFE has encountered what it believes are deficiencies in ASTM standards-setting procedures, ASFE developed a strongly worded memorandum that was distributed to federal agency employees who attended a September 8, 1997 conference on standard-setting, sponsored by the National Institute of Standards and Technology (NIST).

In the memo, ASFE explicitly described its views and called on the federal government to refrain from relying on SDOs "unless and until the federal government develops procedural criteria by which each SDO is evaluated and approved before it can be entrusted with development of standards for federal agency application."

ASFE describes the following ASTM issues of concern in the memorandum:

- **Assumptions are made about process adequacy and integrity.** ASTM evidently assumed that procedures it has used to develop test methods and similar standards would be adequate for application to development of prescriptive professional practice standards. But prescriptive professional standards, unlike ASTM's other standards, do not ensure standard outcomes nor do they comprise means to measure the adequacy of the outcomes. ASTM has refused to rectify its errors.
- **ASTM relies on "Catch 22 provisions."** ASTM must call its documents "standards" because of the way its bylaws are written. Therefore, any call for elimination of the word "standard" creates a conflict with ASTM's bylaws and is *per se* "non persuasive."
- **No effort is made to assess the expertise required to develop a standard.** ASTM assumes that the expertise of those who volunteer to work on an ASTM task force or subcommittee is enough expertise.
- **Lobbyists**—employees, consultants, and advocates—paid by special interests—participate actively on ASTM committees and gain extensive influence. Genuine volunteers cannot afford to make the same time commitment. The lobbyists' effectiveness

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ASFE Memo Blast ASTM Standardization

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is enhanced by loose procedural safeguards.

- **Loose procedural safeguards are evident at committee meetings.** This is of great concern when a committee has to rule on a subcommittee's opinion of negative ballots. Committee quorum requirements for voting on these evaluations are slack at best. For example, if the 1200-member ASTM Committee D 18 were meeting to vote

on a subcommittee's action, a quorum would consist of five people, each of whom could exercise one proxy. All five could be users (e.g., manufacturers, developers) and they could then pick the five proxies to exercise.

- **Work is done in secrecy.** This is an anathema to the federal government. Nonetheless, ASTM membership and committee rosters are not open to public review, and individual committee members and chairs do not have to reveal their specific affiliations.

- **No effort is made to counter known bias in voting procedures** that should consider technical merit *only*. Committee D 18 Chair Terry Hawk said in a public forum that D 18 members would likely vote against any position ASFE took. He subsequently authored/authorized articles that misrepresented ASFE's position and characterized the standard of care as a means for professionals to excuse poor work.

For a copy of the memorandum issued by ASFE, circle **MSP 1**.

FOPP IS OFF AND RUNNING

Will we be able to matriculate enough students to make the *Fundamentals of Professional Practice* Class 08 a reality? That was the question we were asking a few months ago. Today, the course is under way with 74 students—the largest class to date.

The course curriculum is designed to heighten participants' awareness of a variety of professional issues. As individuals targeted to receive more management responsibilities in the near future, the students need to know how to address the issues in a manner consistent with the continuing demands of the 90s. The students will practice balancing traditional and contemporary demands to create a new brand of professionalism. The exercise isn't easy, but if new managers fail to meet the challenges, they will be pushed aside.

FOPP was created as the Institute of Professional Practice in the early 1970s. It was designed to impart wisdom of professional/management issues to those on the way up, to replace apprentice-type training that principals then no longer had the time to provide. The program's name was changed to the *Introduction to Professional Practice* after ASFE created the now-independent Institute for Professional Practice, and—later—to FOPP, to avoid confusion with other acronyms.

FOPP is widely regarded as one of the most effective professional "boot camp" offered today. The next class will begin in the fall of next year if enough students are enrolled. Now is not too early to submit your application to reserve a spot in Class 09. Not only does ASFE have to have a certain number to make the course worthwhile, it can only take so many. If you indicate interest now by submitting an application, you are not obligated to enroll if circumstances change next year.

If you have any questions about FOPP, call John Bachner at 301/565-2733. To request a brochure, circle **MSP 2**.

NEW MEMBERS

Please join us in welcoming ASFE's newest member firms:

The Eddy Group, LLC (6600 Kensal Court, Springfield, VA 22152; 703/209-8311; fax: 703/567-6757) provides geotechnical engineering consulting and construction as well as materials testing and inspection. The firm's principals are Dana K. Eddy, P.E., and Thomas G. Ali, P.E.

Consolidated Engineering Laboratories (4464 Willow Road, Suite C, Pleasanton, CA 94588; 510/460-5100; fax: 510/460-5118) provides general materials testing and inspection services for building construction. A geotechnical /environmental engineering division provides consulting and soil material testing services. The firm's principals are Gary M. Cappa and Richard D. Alloppenna.

We also welcome two new faculty members:

Danei Pradel, Ph.D. is an adjunct associate professor of geotechnical engineering at UCLA (5731 Boelter Hall, UCLA, Box 951593, Los Angeles, CA 90095-1593; 310/825-2843; fax: 310/246-1754).

Mary Roth, Ph.D, P.E. is an assistant professor of civil and environmental engineering at Lafayette College (Department of Civil and Environmental Engineering, Lafayette College, Easton, PA 18042; 610/250-5427; fax: 610/250-5059).

Keep Us Posted!

NewsLog editors want to publish your news. Mail, fax, or e-mail press releases and announcements relating to your firm's activities to Ann Giblin at ASFE (8811 Colesville Road, G106, Silver Spring, MD 20910; fax: 301/589-2017; or e-mail: asfe@aol.com).

We look forward to hearing from you!

NewsLog Deadline

Submit committee news
and firm announcements
for publication in the
November/December
issue of *NewsLog*
to Ann Giblin by
November 11

MEMBER NEWS

ALTA Environmental Corp. has relocated to 100 Amston Road (Route 85), Colchester, CT 06415; 860/537-2582; fax: 860/537-8374.

CH2MHill's Santa Ana office has relocated to 3 Hutton Centre Drive, Suite 200, Santa Ana, CA 92707; 714/429-2000; fax: 714/429-2050.

James L. Werle, principal geologist at **Converse Consultants Southwest, Inc.**, has been elected chairman of the Association of Engineering Geologists Southwestern Section for a two-year term beginning in the fall of 1997. **Dale W. Walsh**, certified industrial hygienist and head of Converse's health and safety department has been elected president of the American Society of Safety Engineers, Southern Nevada Chapter. In other news, Converse has named **Mike Klein, P.E.**, technical sales manager, and **Don Christiansen, P.E.**, senior engineer and head of the geotechnical department.

Earth Exploration, Inc. (EEI), Indianapolis, IN has acquired Shilts, Graves & Associates, Inc., in South Bend, IN. **John Warner, C.P.G.** and **Linda Laffin, P.E.** will manager the new branch office. **Curtis R. Bradburn, P.E.** has joined EEI as a senior geotechnical engineer. He will be located in Indianapolis.

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Member News

(cont'd from page 9)

Environmental Risk Limited (ERL), Bloomfield, CT, has hired **Syed A. Pasha, C.P.G.**, director of geoenvironmental services for the New York metropolitan region. He will be located in the Clifton, NJ office. **Jennifer Murphy** and **Daniel Rousseau** have joined the air quality service group. Its emissions testing group will now be a separate corporate entity called **Rojac Air Testing Services**. In other news, ERL Associate **Rose Sinclair** has received the Paul Harris Fellowship, the Rotary International's highest award.

Geotechnology, Inc. has opened a branch office in Collinsville, IL. The new facility joins the St. Louis and Indianapolis offices, and will serve the Southwestern Illinois area. **Kevin E. Dyer**, associate, has been appointed manager of the new facility. **Mark H. Kroenig, P.E.** has joined the firm as an associate in the environmental department.

Russell Carey has been named western division manager for **Kleinfelder, Inc.** He will oversee the operations of 20 California offices from the Sacramento office. **Christine M. Welch, P.E.** has been named Reno region manager. She replaces **Chris Spandau, P.E.**, who has been named infrastructure group manager.

NTH Consultants, Ltd., headquartered in Farmington

Hills, MI, has made the following appointments: **Rick Burns**, vice president, waste services; **Rhonda Powell, C.P.A.**, vice president, finance; and **Stephanie Redman**, vice president, human resources.

Sonya Y. Ward, P.G. has joined **Powell-Harpstead, Inc.** as a project manager in the firm's West Chester, PA office. She will manage environmental projects.

Edward G. Drahos, P.E. has rejoined **Schnabel Engineering Associates, Inc.** as a principal. He is located in the firm's Richmond office. He previously worked for Schnabel Engineering from 1981 to 1995.

Shannon & Wilson, Seattle, WA, has named **Kathy Goetz Troost, R.P.G., R.E.P.A.**, senior associate, overseeing site characterization and environmental site assessment projects in the Pacific Northwest, and **Sam Casne**, associate and manager of the natural resources group.

The Terracon Companies, headquartered in Lenexa, KS has acquired **HSE Consulting and Sampling, Inc.**, Omaha, NE. **Paul Johnson**, former president of HSE, holds a similar position with the new Terracon division, which will operate with the same staff. The Terracon Companies has also acquired **IMS (Infrastructure Management Systems), Inc.**, Arlington Heights, IL, which specializes in pavement surface distress analysis and pavement

projects. **IMS** will also operate with the same staff.

Idaho Governor Philip E. Batt has appointed **Jerry A. Peterson, P.E./L.S.** of **Terracon Consultants Western, Inc.** to a five-year term to the Idaho State Board of Professional Engineers and Land Surveyors. He replaces **Roger Bissel, P.E.**, whose term is expiring. In other news, Terracon Consultants Western has opened a branch office in Las Cruces, NM. **Edward H. Martinez, P.E.** has been hired to manage the office.

David W. Peterson, P.E., has been named office manager of **Terracon Environmental, Inc.**'s Naperville, IL branch.

Vector Engineering, Inc., Grass Valley, CA and **ECO:LOGIC Engineering** of Roseville, CA have joined to form **Vector ECO:LOGIC, LLC**, an engineering firm specializing in water, waste water, and storm water engineering. It will be based in offices near Vector's Carson City offices. **John Enloe, P.E.** will be the manager and chief engineer for the new group.

Virginia Geotechnical Services, P.C. has hired **Marcia V. Prowell, P.E.**, project engineer.

UPCOMING MEETINGS

Mark your calendar!

Call ASFE (301/565-2733) for more information unless otherwise noted.

January 24-26, 1998

Winter Leadership Conference
Denver Renaissance Hotel
Denver, CO



April 16-19, 1998

ASFE Spring Meeting
Marriott at Metro Center
Washington, DC

October 15-18, 1998

ASFE Fall Meeting
Resort at Squaw Creek
Olympic Valley, CA

OTHER EVENTS

November 3-6, 1997

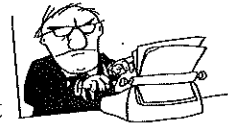
A/E/C Systems Fall Show
San Diego Convention Center
San Diego, CA
Contact: 800/451-1196

March 8-15, 1998

Fourth International
Conference on Case Histories
in Geotechnical Engineering
Marriott Pavilion Downtown
Hotel, St. Louis, MO
Contact: Shamsher Prakash,
308 Civil Engineering,
University of MO-Rolla, Rolla,
MO; tel: 573/341-4489; e-mail:
prakash@novel.civil.umar.edu;
Web: <http://www.umar.edu/~conted/conf8926.html>

DR. ENGLISH

The Editor of *Newslog* received a letter from a concerned reader who found a grammatical error in the last issue's cover story. The editor referred the comment to the Doc for his professional opinion.



The article said, "After reviewing case law, the Court held that LoL was enforceable, providing that the liability cap was not so low . . . " The word "providing" is not correct. "Providing" should be replaced with the word "provided." The difference in usage is obvious. "Providing" is the wrong form of the verb and misleading when used this way.

The editor sends his apologies for this and all other errors that occur primarily, he says, because many contributors and editors are involved and time constraints often prevail. Feel free to ignore this excuse and share errors you find in *Newslog* with me. Mail them to Dr. English, c/o ASFE, 8811 Colesville Road, Suite G106, Silver Spring, MD 20910; fax: 301/589-2017; or e-mail: asfe@aol.com.

Today, the Doc will leave you with the following few general thoughts to ponder:

- Grammar helps us understand how English is structured and to learn to use the language better.
- Never underestimate the power and grace of the simple, declarative sentence.
- If writing were "show and tell," verbs and nouns would be the "show," adverbs and adjectives the "tell." Showing is better than telling.
- Think before you write. After you have written, think about what you have written.

These thoughts have been borrowed from Richard Lederer and Richard Downs, authors of *The Write Way (The Society for the Preservation of English Language and Literature (S.P.E.L.L.) Guide to Real-Life Writing)*, a good desk reference for tricky grammar, syntax, punctuation, jargon, etc.

1997- 1998 Backyard Seminar Schedule

ASFE now has three Backyard Seminars; all are led by John Bachner.

- *Contract Basics for Project Managers* is the newest full-day seminar. It focuses on the basics of professional service agreements and emphasizes 10 significant problem areas. Each participant will receive ASFE's comprehensive *Contract Reference Guide, Third Edition*. More than 10 firms have already indicated they want to host this seminar and scheduling is under way.
- *Write Right*, ASFE's second Backyard Seminar, joined *Loss Prevention 101* on the seminar circuit last year. The first several *Write Right* courses—the basics of good writing for project managers, marketing personnel, "editorial assistants," et al.—grammar and writing reviews for geoprofessionals—have been well received and highly rated.
- *Loss Prevention 101* is a comprehensive introduction to loss prevention for project managers.

If you are interested in attending a seminar that has already been scheduled, contact the person listed below to check if the seminar is open and space is available. For more information on the seminar content and instructions on how to sponsor a seminar, circle **MSP 3** for *Contract Basics*, **MSP 4** for *Loss Prevention 101*; and circle **MSP 5** for *Write Right*.

DATE	LOCATION	CONTACT/SPONSOR	SEMINAR NAME
October 25 (Saturday), 1997	St. Louis, MO	Ed Alizadeh Geotechnology 2258 Grissom Drive St. Louis, MO 63146 314/997-7440	Write Right
November 14 (Friday), 1997	San Francisco, CA	Jim Price Geomatrix Consultants, Inc. 100 Pine Street, 10th Floor San Francisco, CA 94111 415/434-9400	Contract Basics
November 19-20, 1997 (Wednesday-Thursday)	Raleigh, NC	James R. Attaway, Jr. S&ME, Inc. 3109 Spring Forest Road Raleigh, NC 27604 919/872-2660	Loss Prevention 101 Contract Basics
January 17 (Saturday), 1998	Houston, TX	David L. Pickett HBC Engineering, Inc. 3913 Todd Lane, Ste. 312 Austin, TX 78744 512/442-1122	Loss Prevention 101

For more information or to schedule a Backyard Seminar at your firm or in your area, contact Ann Giblin at ASFE (301/565-2733).

FROM THE BENCH

Cheaper is Better

When the city of Lindstrom, MN, wanted a new municipal liquor store designed and built, it decided to utilize design/build. The low bid was \$292,000. The second lowest was \$294,960. The city council selected the second-lowest bidder because, it said, its proposal "provided the best value for the dollar."

The low bidder protested. It said the state's competitive bid law (for construction) required the city to accept its bid. A trial court ruled in favor of the city. It determined the state's low-bid law did not apply, because the contract involved both design and construction.

The decision was appealed and the appellate court reversed in favor of the lowest bidder. According to the court, the city is required by law to accept the lowest bid. Noting that design comprised only 5% of the total cost, the court said, "If the design of the building were of importance to the city, it could have first contracted separately for design services and then solicited competitive bids for the construction of the design." *W.V. Nelson Construction Co. v. City of Lindstrom*, 565 N. W.2d 434 (Minn. App. 1997)

Statute of Limitations Begins When?

In a much publicized case, the Georgia Supreme Court reversed an appellate court's decision which had reversed

the trial court's decision regarding the statute of limitations in a case involving a maligned design firm. The court decided that the contractor's right to sue did not begin until the work began—not when the contract was signed.

In the case, the Georgia Department of Transportation contracted with Parsons, Brinckerhoff, Quade & Douglas, Inc. to design a highway reconstruction and 10 approach bridges for the Talmadge Memorial Bridge, and an erector system of some of the heavy bridge girders. In May 1988, DOT hired another firm to build the project. Construction of the girders was slated to begin in July 1989. In October 1988, the builder asked the designer to verify the design of the erector system and it did. In March 1989, computer analysis revealed that the erector system would fail. In April 1993, the builder sued the designer for misrepresenting its design and causing costly extra work and delays. The designer said the builder could not file a suit because the statute of limitations had expired on the contract. The builder said the limitations period began in June 1989 when the delay began.

The trial court said the builder had sued in time; the appellate court that no, the clock began in May 1988; and, finally, the Georgia Supreme

Court said the builder was within the statute—the clock in fact had begun to run in June

1989. The court ruled, "...the statute of limitations begins to run when the plaintiff suffers pecuniary loss with certainty, and not as a matter of pure speculation."

Hardaway v.

Parsons, Brinckerhoff, Quade & Douglas, Inc., 479 S.E.2d 727 (Sup.Ct.Ga. 1997)

Engineer Places Lien on City Property

A Minnesota court has ruled that an engineering firm may place a lien for unpaid fees on undeveloped public property awaiting economic development, reported *Construction Claims Monthly*.

The city of Eden Prairie had purchased land for development of a retail complex, and entered into an agreement with Centrum Design-Build Corp. to build the complex. In turn, Centrum hired an engineering firm to survey the site and provide other preliminary engineering services. Centrum failed to close on financing the deal, went bankrupt, and couldn't pay for the engineering services.

As an answer to its problems, the firm placed a mechanic's lien on the property. The city said the lien was illegal because 1.) the property was owned by a public

(cont'd on page 14)

"...the statute of limitations begins to run when the plaintiff suffers pecuniary loss with certainty, and not as a matter of pure speculation."

entity and was exempt from liens; and 2.) the land was being held for future development; no improvements had been made.

The Court of Appeals of Minnesota said that the firm's liens were legal. The fact that no improvements had been made was irrelevant. The Minnesota statute governing liens (sec. 514.03) allows engineers and surveyors to place liens equal in value to services performed. Construction doesn't have to be under way.

The Court agreed with the city that public lands can't be lienied, *but* the law only protects public property such as schools, libraries, museum, park, government headquarters, etc. whose administration may be disrupted by a lien. In this case, the lien on public property would not disrupt Eden Prairie's operations nor would it have had if a sale had occurred.

According to the decision, "The fact the public will derive some benefit from use of the property does not, alone, render the property exempt from liens." *Comstock & Davis, Inc. v. City of Eden Prairie* 557 N.W.2d 213 (Minn.App. 1977)

Differing Site Conditions Clause Limited

Although an event occurred after work was under way on a project that affected the contractor's ability to perform on schedule, the U.S. Court of Appeals ruled the owner does not have to compensate the contractor under the differing

site condition clause, reports *Construction Claims Monthly*.

The owner, in this case the federal government, hired a construction company to pave the plant yards at the Stratford Army Engine Plant in Stratford, CN. The contract contained a standard differing site conditions clause. This clause will protect a contractor when the site conditions are found to differ from those described in the contract.

In this case, after work had begun, another contractor broke an underground pipeline and caused extensive soil contamination in the area to be paved. The work was delayed while another contractor cleaned the soil. After being cleaned, however, the soil was different from what it was before and more difficult to pave. Although the contractor was compensated for the cleanup delay, it was not compensated for the fact that the soil was more difficult to handle.

The contractor sued for damages to cover the additional work caused by the contaminated soil. Technically, it said, the site was different from when the contract was written. The U.S. Court of Appeals rejected the contractor's claim. It said the intent of the differing

conditions clause is to transfer liability from the contractor to the government and, thus, promote lower bids with fewer contingencies from contractors. It has nothing to do with accidents affecting the site after

the contract is written and bid accepted.

The court decided that "While the Differing Site Conditions clause is a risk-shifting device, it does not, as [the contractor] argues, shift the risk of all unanticipated adverse site conditions from the contractor to the government. Rather the government bears only those risks that encourage more accurate bidding." *Appeal of Goetz Demolition Co., ASBCA No. 40605 (August 13, 1992)*

"While the Differing Site Conditions clause is a risk-shifting device, it does not, as (the contractor) argues, shift the risk of all unanticipated adverse site conditions from the contractor to the government. Rather the government bears only those risks that encourage more accurate bidding."

Supervising Engineer Not Responsible for Death

Although a representative of the engineering firm was present and had been consulted about the activity, the firm was not responsible when a trench wall collapsed on a worker, reported *Engineering News-Record*. The outcome was far different from that which occurred in a New Jersey case (*Carvalho v. Toll Brothers*,

Inc.) where an engineering firm with the same types of contract provisions in place was found negligent. The judge in that case said the firm was responsible for helping the project proceed on schedule and, since a trench cave-in disrupted the schedule, it was partially liable.

In this case, the accident happened in Duchesne County, Utah. The water district had hired a local plumbing company to install a water pipeline. One of the plumbing company's employees was killed while working in a seven-foot-deep trench that collapsed because it was not shored or sloped adequately.

The worker's mother sued the supervising design firm, Horrocks Engineers Inc. The federal district court ruled that the firm was not responsible for accident. The U.S. Court of Appeals for the Tenth Circuit agreed with the district court. It said, "As a general rule, an engineer with construction inspection responsibility over a construction project owes no duty to an independent contractor's employees."

In this case, as additional support for the engineering firm, both contracts—that between the water district and the plumbing company and that between the water district and the design firm—explicitly stated that the design firm "shall not be responsible for construction means, methods, techniques, sequences, or procedures, or for safety precautions and programs in connection with the work." The court said the plumbing com-

pany was exclusively responsible for safety at the site. *Peck v. Horrocks Engineers Inc.*, 106 F3d 949 (10th Cir. 1997)

Engineer Not First To Breach Contract

In Florida, an engineer was sued by the client for breach of contract when the engineer failed to sign and seal plans. The engineer wrote an agreement indicating the tasks it would perform and the amount of payment. It began work on the project, a residential development, and began to submit invoices, which were paid. The fourth invoice was only paid in part and the fifth and sixth invoices were not paid at all. The engineer then refused to sign and seal, the final plans because, it said, the client owed \$15,000. Then the engineer filed a mechanic's lien on the property.

In turn, the client retained another engineer for breach of contract and claimed the mechanic's lien was fraudulent. The client hired another engineer that copied the plans and signed and sealed them.

The trial court agreed with the client that the first engineer had broken the contract and awarded the client damages of \$24,633. The engineer appealed and the appellate court reversed the lower court's decision. The appellate court said that the client was the first to breach the contract because it failed to pay the engineer the agreed upon fee even though the contract did not explicitly state a method of payment.

The engineer was awarded in damages an amount equal to the profit it would have made. *Scott v. Rolling Hills Place, Inc.*, 688 So. 2d 937 (Fla.App. 1996)

THOMPSON TO HEAD ICB EFFORT

The new International Building Code is in the works. Its proposed Chapter 18 deals with geotechnical engineering design and related issues . . . in a highly prescriptive manner. Because this is a proposed model building code, prescriptive aspects are to be expected. However, early review have indicated the code is not necessarily sound or internationally applicable.

ASFE is spearheading the effort to provide recognized review and input. ASFE Past President David E. Thompson, P.E. (*Haley & Aldrich*), a member of ASFE's Practice Issues and Trends Committee, has volunteered to lead a group in this effort. Dave will assemble a team of reviewers, representing ASFE and various other interested—and influential—geoprofessional organizations.

If you want to be involved in this effort, your help will be welcomed. Contact Dave Thompson at Haley & Aldrich, Inc., 58 Charles Street, Cambridge, MA 02141; 617/494-1606; or fax: 617/577-8142.



EL NINO IS COMING: ARE YOU PREPARED?

News magazines and other media are abuzz with stories about El Nino and how various parts of the nation will probably be affected by unusual weather patterns. One result is heavy rain, and the last time El Nino came through, the damage caused by the rain led to lawsuits. It was not Mother Nature who had to defend. In many cases the defendants were geoprofessionals.

So what can you do? For purposes of providing good client/customer service, for purposes of your own risk management, and for other good reasons, too, you may want to recommend to certain past clients that you perform a site review with El Nino in mind. This will help ensure that the earth-work you designed and/or whose construction you observed still seems to be in a condition to withstand El Nino's potential ravages.

Remember: You need to let clients know that a natural defect of some type may exist despite appearances to the trained naked eye. Just as obviously, if a defect or some other type of risk does appear to exist, you need to inform your clients.

Clients need to understand that you are not an insurance policy. The best you can do is the best you can do. Preventing damage is far, far more effective than trying to collect damages—in terms of time and money saved and relationships maintained.

Do not proceed under the assumption that El Nino will not affect you. History repeats itself. *JPB*

IT HAPPENS

Have you ever noticed how, almost as if a conspiracy is afoot, clients of the same type start saying or requesting the same things?

Bill Kwasny (*GME Consultants, Inc.*) wrote to note that government procurement officials throughout Minnesota suddenly seem to be highly opposed to limitation of liability. Why? What can be done about it?

The "why" may have been answered by an article written by attorney Timothy L. Young that appeared in the May 1997 issue of *Minnesota Cities*. The article is filled with misinformation about limitation of liability. It underscores only its negative aspects, with no discussion of its positive attributes. *Minnesota Cities* is

issued principally to government officials and, as a consequence, the negative actions may have formed from it, or possibly from speaking engagements about that issue. ASFE wrote to the magazine in June and a copy of ASFE's letter along with the original article is available by circling **MSP 6**.

The primary way we can counter negative forces like this is to provide informational materials to those who don't seem to get it. First, it may be worthwhile to speak directly with opponents to point out where they are factually in error and to show them some of the countervailing benefits they may not be noticing. Second, if such individuals have speaking engagements, suggest that the topic may become interesting if two speakers address the issue,

one pro and one con. Third, you may wish to recruit public officials who agree that limitation of liability makes sense and has benefit. Ask them to write and speak about it. Fourth, write articles and solicit speaking engagements on behalf of those who are extensively effected by limitation of liability.

The client is free to choose whether to accept limitation of liability. Before making such decisions, clients need to know the full range of benefits and drawbacks. You can provide some of the answers by identifying client organizations, establishing liaisons with them, and providing them with the information they need to advise their patrons, who are also your clients.

A.M. BEST UPGRADES TERRA RATING

Terra Insurance Company, Corte Madera, CA, has been awarded an A(excellent)/Class V rating by A. M. Best Company, a trusted evaluator of domestic insurance companies. Best rates more than 4,000 insurers. Terra previously held a rating of A-.

According to Terra President David L. J. Coduto, A.M. Best awards letter ratings ranging from A++ to F after comprehensive and qualitative review. Best conducts more than 100 key financial tests and analyzes supporting data. It also evaluates the adequacy of an insurance company's surplus, capital structure, quality and diversification of assets, adequacy of loss and expense reserves,

"We are extremely gratified by the higher rating. It required a lot of hard work and attention to detail," Mr. Coduto said.

management's experience and objectives, and quality of reinsurance, among other factors. The numerical "class" rating given by A.M. Best indicates the size of a company's surplus. All firms rated Class V have a surplus of \$10 to \$25 million.

"We are extremely gratified by the higher rating. It required a lot of hard work and attention to detail," Mr. Coduto said. "We're even more pleased that

Terra earned the rating in only its third year of Best evaluation. Other insurers in our field have had to wait many years to achieve this high A rating."

Terra issues professional, environmental, and remedial implementation liability insurance to firms that provide geotechnical, civil, and environmental engineering services. Although these are generally regarded as high liability risk fields, the average premium rates of Terra insureds are significantly lower than those paid by other design professionals. In fact, pursuant to the most recent ACEC survey, Terra insureds' average premium rates since 1988 have been about 58% of the average design professionals' insurance rates reported by ACEC. When rebates and capital appreciation are netted against these same Terra rates, Terra insureds had an average premium rate equal to 27% of the ACEC average since 1988.

As a risk retention group, Terra is owned by its policy holders. For more information, call Terra at 800/872-0077.

The following list of ASFE staff titles and extensions should help you get in touch with the right person. When in doubt contact John Bachner. He will direct you to the person who can best help you.

John P. Bachner
Executive Vice President
Ext. 223

Ann Giblin
Operations Director
Ext. 230

Joanna Ohring
Membership Director
Ext. 233

Lou Ann Moore
Editor, *Newslog*
Ext. 234

Alpha Moore
Publications Director
Ext. 225

Lorie Meier
Controller
Ext. 235

ASFE Telephone:
301/565-2733

YOU'VE JUST GOT TO BE KIDDING DEPT.

The July 26, 1997, issue of *The Washington Post* ran an article about an immigration raid in North Carolina. It appears that someone has been smuggling deaf and speech-impaired Mexicans into the United States, where they are kept in virtual servitude and forced to sell gifts and trinkets on the street.

The raid netted 11 individuals in Sanford, NC, a small town that reportedly was shocked by the discovery. According to the *Post*, Johann Coley, who lives near the house where the deaf workers were kept, had this to say: "I'd see them go by here, talking on their hands. They were quiet enough."

HAZARDOUS MATERIALS REPORT

Outlook Good for Environmental Business

Analysis by market research firm The McIlvaine Company (Northbrook, IL) indicates the world environmental market will grow from \$888 billion in 1996 to more than \$1 trillion by 2000.

According to news of the analysis in *Engineering Times*, this total comprises environmental products, \$107 billion; services, \$18 billion; managing environmental activities, \$894 billion. In the management area, municipal waste water treatment plants should generate \$191 billion; drinking water plants, \$180 billion; industrial waste water, \$169 billion; and air pollution facility, \$234 billion.

Directory of Environmental Programs Available

The Committee for the National Institute for the Environment (CNIE) has made a new directory of more than 100 degree-granting environmental programs available on its web site. Look for the Directory of Higher Education Environmental Programs (DHEEP) at <http://www.cnie.org>.

DHEEP is a joint program of CNIE and the Center for Conservation Biology Network at Rice University (<http://conbio.rice.edu>). It provides complete program descriptions,

disciplinary emphases, and graduate employment statistics for each entry. More than 80 colleges and universities participated. Faculty and administrators may add information about their program to the site by submitting it to CNIE. Details: CNIE, 202/628-4303.

New Cleanup Technology Needed

Many hazardous waste site remediation projects are suffering for lack of more effective cleanup technologies. According to *Engineering News-Record*, the National Research Council (NRC) has released a report that indicates the federal government should step up its efforts to get new and better technologies to market.

"Current national policy inadvertently keeps most of these technologies from making it to the market place," said Suresh C. Rao, professor at the University of Florida and head of the NRC committee that wrote the report. Although the market for soil and water cleanup is expected to top \$1 trillion over the next 75 years, companies that perform research, manufacture, and sell cleanup products aren't reaping their fair share.

The NRC report makes various recommendations to fix this situation. First, it says the

Securities and Exchange Commission should improve enforcement of the rule that publicly traded corporations report waste sites as financial liabilities and suggests it should require that their cleanup efforts be audited by third parties. It also recommends that new legislation be written to allow owners to write off waste cleanup liabilities over 20 to 50 years, so they don't lose as much asset value at full disclosure of liability.

The NRC also wants the Environmental Protection Agency (EPA) to step up its efforts to better enforce its existing rules to keep companies that delay cleanup from having an unfair advantage over its competitors that do report. Along these lines, the

report calls for giving owners more cleanup options and better incentives for using more innovative technologies.

Water Cleanup Issues

At the American Water Works Association convention this summer, water experts were still considering the effects of last year's Federal Safe Drinking Water Act. The Act has affected those who operate public systems across the country. The Act requires the Environmental Protection Agency (EPA) to develop a

Although the market for soil and water cleanup is expected to top \$1 trillion over the next 75 years, companies that perform research, manufacture, and sell cleanup products aren't reaping their fair share.

(cont'd on page 16)

new list of contaminants to regulate and educate the public in preparation for a debate of the list and related clean water

Not only is clean water a public priority, it's moving to the top of many environmental groups' campaign lists.

issues, said *Engineering News-Record* reporting on the convention.

Not only is clean water a public priority, it's moving to the top of many environmental groups' campaign lists. It is

growing in importance because of increasing evidence of health risks posed by contaminated water supplies.

Another significant "hot" topic confounding experts was discussed before standing-room-only crowds—how to make the most of the meager funds available for cleanup. What are the best and least costly strategies for eradicating system contamination? Drinking water utilities are facing more rules and regulations and more competition.

Bioreactor Test Introduced

American Technologies Inc. (ATI, Oak Ridge, TN) is testing a new bioreactor system at a landfill in Columbia County, GA, reported *Engineering News Record*. The system feeds air to a depth of 10 feet into the waste pile through pipes that are designed to collect leachate. The air encourages microbes to feed off the waste, grow, multiply, and eventually cause a reduction of waste that will

allow more waste to be piled on top. This type of system reduces waste 40 times faster than anaerobic processes.

Meanwhile, the leachate drains to a low point, is pumped into an above-ground collection tank, and pumped over the top of the landfill to rewet it. This technique helps prevent fires. Fire was a hazard in previous systems because the forced air would cause spontaneous combustion of waste. In this system, the waste is continuously rewetted from the top.

The new technology was funded partially by a \$250,000 transfer contract from the Department of Energy. It will pay for itself if it reduces the volume of waste at the landfill by 3%. No reduction has been evidenced yet, but ATI expects to see some within six months.

Ruling Further Defines "Polluter"

The Fifth U.S. Circuit Court of Appeals in New Orleans

reversed a lower court's decision that a store owner who dumped gasoline was guilty of violating the Clean Water Act. The court said the owner should be allowed to present evidence that he thought he was dumping water.

This will limit the liability of engineering firms, which, for instance, don't realize that PCBs were discharged at a project site because they may bring test data that proves they didn't know about the pollution.

Paul Wallach, an attorney reviewing the case for *Engineering Times*, said this is important for engineering firms that may be contracting work that results in unintentional pollution, because they will be allowed to present evidence to prove to a judge and jury that the pollution was not intentional and, therefore, not punishable as a criminal violation. This will limit the liability of engineering firms, which, for instance, don't realize that PCBs were discharged at a project site because they may bring test data that proves they didn't know about the pollution. An appeal to the Supreme Court is not expected.

Administration May Limit Third-Party Liability for Dumping

The Clinton administration backs legislation that protects contractors that don't dump hazardous waste at dumps from suits imposed by those that do.

Contractors that have dumped hazardous waste at sites and, then, are required to clean it up, often search around for innocent contractors to help share the liability and cleanup expense. Under the new law, which may become effective in a year, the government will offer settlements to those that only disposed solid waste, reported *Engineering News-Record*.

OFFER YOUR CLIENTS A FREE TRIP



Contract with an ASFE member firm and win a free trip to Washington, DC. Don't say it, you're right—it isn't professional to use this approach to seduce new clients. But, didn't we get your attention?

And, it's true. ASFE wants to sponsor more "reverse case histories," case histories told from a client's point of view. We want a better idea of the issues associated with "events" from this different—and most important—perspective. A quick scan of the programs for both the San Francisco and Hawaii meetings reveals that each meeting featured excellent client-perspective case histories, and we want more.

If you have a case history you believe would be of value, and a client who would like to make the trip—at ASFE's expense—to tell the tale first hand, contact Program Committee Chair Kevin B. Hoppe at NTH Consultants, Ltd. (313/965-0036, ext. 134; fax: 313/965-0683; or e-mail: KB_Hoppe@compuserve.com).



**Plan to Join us in
Washington, DC
April 16-17, 1998
for the ASFE
Spring Meeting!**

THE RULE OF COMMON SENSE

It is unwise to pay too much, but it's worse to pay too little.

When you pay too much, you lose a little money — that is all. When you pay too little, you sometimes lose everything, because the thing you bought was incapable of doing the thing it was bought to do.

The common law of business balance prohibits paying a little and getting a lot — it can't be done.

If you deal with the lowest bidder, it is well to add something for the risk you run, and if you do that you will have enough to pay for something better.

*John Ruskin (1819-1900)
English Art Critic and Writer*

FIRMS RATE TQM

Twenty percent of the A/E/P and environmental consulting firms surveyed by Zweig White & Associates said Total Quality Management (TQM) is "worthless." Only 12% of the responding firms rated TQM as "excellent." Reasons for firms' lack of TQM enthusiasm varied. Some said TQM is based on good principles, but the program often is poorly implemented, leading to demotivated staff members. Others believe that organizations can be held hostage by the program. Once a firm has committed a certain amount of time, energy, and money to TQM, it feels compelled to follow it, even if it is not working. Of firms that participated in the survey, 18% gave no answer or had no opinion about TQM. Some that expressed opinions said they are not using or have never used the program. **Details:** 508/651-1559.

COMFY CHAIRS FOR SQUEAKY WHEELS

In her book *From Conflict to Cooperation: How to Mediate a Dispute*, Dr. Beverly Potter advises mediators to always offer the most comfortable chair in the office or meeting room to the angriest party. This applies when hearing points-of-view from arguing employees, associates, or clients.

This advice may be difficult to follow if all your chairs are the same, or, if you're not sure who is angrier. However, if the chair styles vary and you know the circumstances, try the tactic—soothe a distraught spirit with a comfy seat. Also, try to position the angriest people out of range of sun rays shooting through windows and other irritating distractions.

Try this simple arrangement next time you are faced with mediating a difficult dispute. Read the book for more insights.

HUMAN RESOURCES MANAGEMENT REPORT

Workers' Comp Rider

One of the most important business moves a company can make is to purchase a rider for its workers' compensation policy so the coverage encompasses all 50 states. Neglecting to do this could cost your company a significant amount of money. Why? If an employee travels on business to another state and is injured on the job, the employee's company could be held liable for major claims if it's not covered in that state.

Some companies may choose to require employees who travel out-of-state to sign waivers stating that any injuries incurred while in another state will be covered by home-state laws. Unfortunately, some courts do not consider such waivers to be legal documents, therefore making them inadmissible.

Follow the Leader

Were people such as President Clinton, Ruth Bader Ginsburg, and Lee Iacocca born to be leaders—does each have an innate sense of leadership? According to *The Competitive Advantage* the answer is a resounding “no.”

How then did these leaders rise to their preeminent status? While they all possess certain characteristics representative of leaders, no one is born with a leadership gene. The environment in which they grew

molded them into who and what they became—who they are. Different forms of research have shown that people who show some of the following characteristics are more likely to play a leadership-type role.

- Leaders do not stagnate in the past or the present. They are able to clearly visualize the future.
- Leaders are able to guide individuals to accomplish tasks in an efficient manner.
- Leaders recognize special talents and abilities in all employees.
- Leaders communicate well with everyone from the receptionist to their “right-hand man.”
- Leaders are often the most intelligent in a group. They usually have remarkable memories, being able to retain knowledge better than an average person.
- Leaders are not afraid to take risks.
- Leaders are self-confident, not self-important.
- Leaders converse well with all types of people. They know how to act and what to do in all situations.

Leadership Isn't Tricky; Stick to the Basics

Bob Ancell suggests in *Executive Update* that we return to the basics to achieve the desired results from our employees. Being a leader in today's high-tech, fast-paced business world doesn't take fancy new leadership skills, but an easy, personalized style that

commands respect and productivity.

Leaders have their own styles. Some push; some pull; and some simply do, expecting employees to follow. Any of these techniques will work. Mr. Ancell recommends that you lead in a way that is comfortable for you, and that you remind yourself of the basics.

Being a leader isn't easy. You must always be ready to work hard, exhibit discipline, and impart enthusiasm.

He says he carries a list of 10 important points, authored by Air Force Four-Star General Louis L. Wilson. These tips can be used by organizations' and companies' officers to accomplish their goals. They are:

1. *Be tough.* Set high standards and expect your people to meet them. Criticize if they fail to meet your expectations.
2. *Manage by walking around.* Discover for yourself what people are doing. Ask questions.
3. *Look for problems.* All organizations and offices have problems. Individuals, systems, structures, teams, etc. may be sources of more widespread problems.
4. *Discover the critical path to success.* Voice your plan. Get involved in the important issues; help your staff move toward goals. Don't waste time on inconsequential problems.

5. *Be sensitive.* You must be sensitive as well as tough. Before criticizing and chastising, listen, communicate, and understand.
6. *Don't take it for granted that problems have been solved.* Check to ensure important directives have been followed and your plan is on track.
7. *Don't make excuses.* You and your team will make mistakes. Brush yourself off, admit your error, and proceed to Plan B.
8. *Don't put off difficult and ugly tasks and decisions.* They won't go away.
9. *Don't tolerate incompetence.* If someone is being lazy, uninterested, or rebellious, and not doing the job as required, you must have the nerve to eliminate that person from your staff. If the individual is unhappy, it will do you both good to send her or him off to a new opportunity.
10. *Be honest.* Don't pretend that the bottom line is different than it is. Don't play with the figures to make you look better than you are. Tell it like it is.

Being a leader isn't easy. You must always be ready to work hard, exhibit discipline, and impart enthusiasm. Your employees are looking to you to be honest—to be sensitive as well as critical, to help them set and reach their goals.

Ottoman Umpire

Here's something you probably never thought about before—in addition to all the other indignities they are forced to suffer in a tall-oriented world, short people whose feet cannot reach the floor while sitting are prone to all sorts of problems related to the pressure on their thighs. *Office Systems* suggests that you provide them a footrest, and the problem will be solved. Unfortunately, the affected party probably does not even realize this is a problem, but pressure on the thighs cuts off blood and increases pressure on the hips, leading to ailments that affect the shoulders and neck.

Stand Your Ground

Some employees, like bad children, will try subversively to get you to change your mind about an issue or project that you are insisting be done a certain way.

A manipulator may try to tell you everyone does it another way. You should answer agreeably that that may be the case, however, "we are going to do it this way." Don't give in to heartless badgering.

Another employee may ask you why you always give the best assignments to someone else. Respond by asking what the person means. Keep the conversation going until you understand what is wrong—or why the individual is disgruntled, so you can try to fix the problem. Chances are

something else is on the person's mind.

Simply ignore the empty threats to quit if "I don't get my way." Stand your ground. If an employee does quit, good riddance.

If an employee acts to undermine your authority in any way, state directly that you do not permit the specific behavior. Let this statement stand as a warning that derisive and contrary actions won't be tolerated.

A manipulative employee will also present all the facts that support one side of the argument and leave out those that support your position. Whether you know you're not hearing the whole story or aren't familiar with the issues, tell the employee you'll look into it and get back later.

Increasing Productivity

Run-of-the-mill employee incentive programs have their pros and cons. One plus is that employees are always satisfied after receiving an incentive like a Christmas bonus. But, one drawback is that they learn to expect it, which can make them lazy during the rest of the year.

To improve performance year-round, try giving unexpected incentives. One company in New York decided to give this a try. In return for awarding unexpected incentives for jobs well done, the company was rewarded with a 300% increase in productivity. Now that's an unexpected incentive!

Better Meetings

Schedule a companywide or departmentwide meeting and ask employees to bring comments about how prior meetings were organized and run. Ask them to identify what made a meeting bad or good; was it productive or a waste of time. How can the procedures be changed to make meetings run more smoothly? Do you need better agendas or is some other element missing? Compile a list of complaints and praises to pass out at the meeting and encourage further discussion. Employees will offer a number of ideas to spur you to implement new procedures to make future meetings more effective.

Reduce Computer Injury

Now that computers are an integral part of almost every business environment, employers should think about how they are used so that they do not cause injury. Make sure employees' wrists and forearms are aligned and tilted no more than 10 degrees upward or downward. This will help relieve repetitive stress injuries. To be safe, buy employees the new generation of wrist supports for keyboards or mice. They are available at any computer peripherals store.

Out of Sight, Out of Mind

Telecommuting is the human resources buzzword of the 90s, but the number of commuters is still small—about two million workers. At the beginning of the millennium, however, that

Telecommuters should not just stay in touch with the office—they should stay in touch with each other, sharing experiences and ideas just as they would in the office environment.

number could explode to 15 million or greater. Now is the time for managers to think about the positives and pitfalls of telecommuting.

First, some pitfalls:

- Out of sight can sometimes turn into out of mind.
- Managers may resist the loss of direct control over employees' progress.
- Employees can feel isolated and out of touch.

Also, some positives:

- Companies can save big on office space.
- Employees are more productive without the long commute.
- Employees can also be more productive without the constant distractions that make up life in a big office environment.

If the telecommuting experience is to be successful on both ends, the manager and telecommuter need to set ground rules in the beginning. They need to agree on when the employee will be available, whether by phone, fax, or e-mail. The manager and employee need to work out detailed methods for reporting status of ongoing work and projections for future work. Telecommuters should not just stay in touch with the office—

they should stay in touch with each other, sharing experiences and ideas just as they would in the office environment.

Certain jobs lend themselves easily to telecommuting, including data entry, sales, professional work, telemarketing/market surveys, and research conducted via computer databases. Naturally, those jobs that require frequent client or face-to-face contact should not be considered. And while telecommuting sounds like a quick route to corporate nowhere, managers should find that the best telecommuters are those who demonstrate skills that lead to advancement.

Thank You Threefold

When thanking an employee for a job well done, don't stop with one thank-you. Carry it two steps farther. Note the following example.

- **Step one:** Thank Bob for preparing an excellent report.
- **Step two:** Get more specific by saying, "I like the way you presented the data on design/build issues."
- **Step three:** Match the specific praise with a more general positive statement such as, "Bob your statistical analyses always make our reports look great. Keep up the good work!"

URGE TO MERGE

Merger and acquisition interest is at an all-time high among design and environmental professionals according to 70% of firms that responded to Zweig White & Associates' *1997 Merger and Acquisition Survey of A/E/P and Environmental Consulting Firms*. Half the participants said they want to acquire firms, and 61% said that a merger and/or acquisition is part of their strategic five-year plan. In fact, 28% of the participants merged or acquired since 1990. Other interesting findings:

- The average revenue-per-employee of respondents was \$95,690.
- Firms looking to acquire averaged \$97,128 per employee; interested sellers averaged \$78,731.
- The Southeast is the hottest target area, with 40% of firms seeking to acquire looking in that region.
- The average staff size of firms seeking to acquire is 253 employees, but 30% have fewer than 50 employees.

Details: 508/651-1559

CONSTRUCTION ACTIVITY DOWN IN JULY

The latest statistics from the construction industry reflect an overall 4% decline in new contracts for July. According to the McGraw-Hill Construction Information Group, the nonbuilding construction sector (public works and utilities) fell

sharply from its brisk pace of recent months, while housing continued its gradual retreat. Softening the overall decline was improving market for nonresidential building.

Nonbuilding construction, at \$61.4 billion, plunged 22% in July. Contracting for highways and bridges dropped 31% from the previous month's large amount, which had been temporarily boosted by several large projects. Over the first seven months of 1997, highway and bridge construction is still running 10% above last year's pace for the same period. Sewer and water supply

projects were down 28%. Running counter to the month's trend was a combined 11% increase for the remaining public works categories, including river/harbor development and mass transit work. Experts who watch the trends think the July figures are an anomaly—that with additional funding for highways from Congress, the figures should bounce back.

Residential building slipped 4% in July to \$136.6 billion, and nonresidential building climbed 8% to \$127.3 billion, rebounding from a weak June.

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