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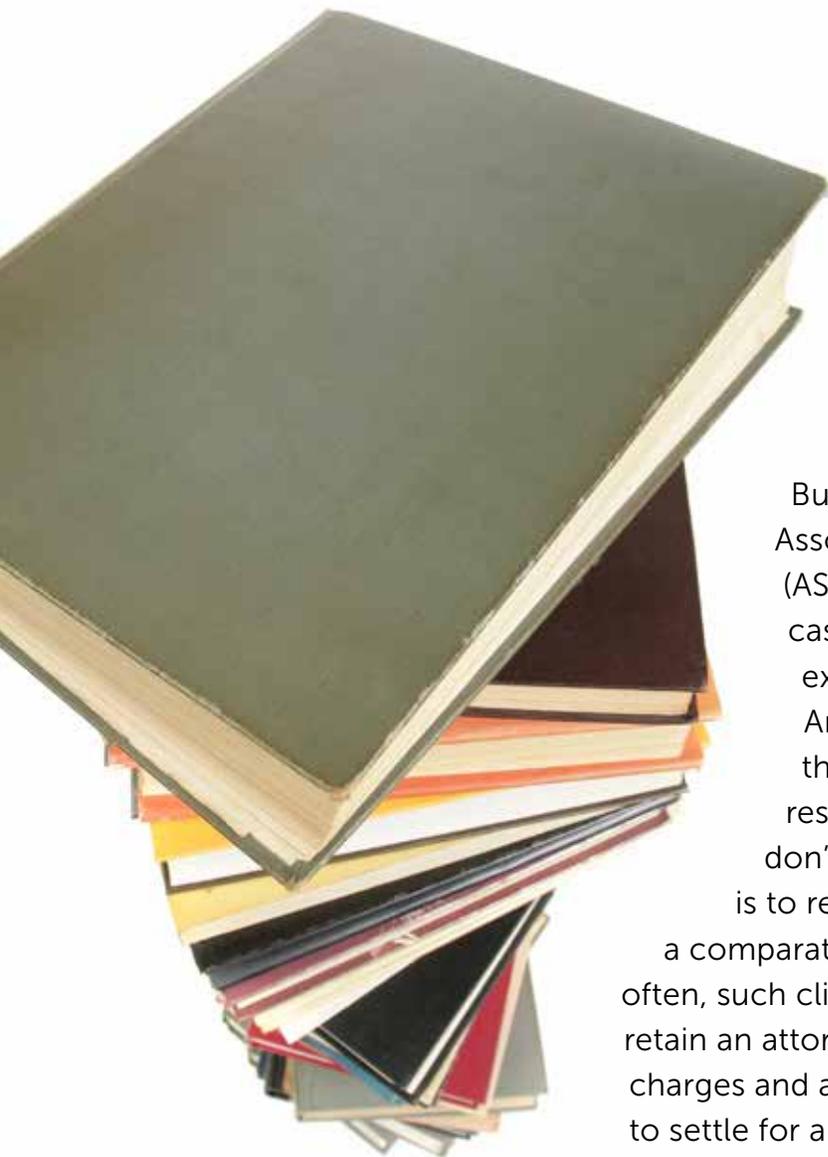
GEO TECHNICS OF GEO-DISASTERS





The Lessons of History

By John P. Bachner



“Those who cannot remember the past are doomed to repeat it.”

You no doubt agree with George Santayana’s famous observation, but what if the history involved was never documented? How could you learn? In fact, you couldn’t. That’s why, in the early 1970s, one of the first steps taken by the Geoprofessional Business Association (GBA) – then named Associated Soil and Foundation Engineers (ASFE) – was to present and then publish case histories of its member firms’ loss experiences and the lessons they taught. And the more case histories GBA reviewed, the more certain patterns emerged, resulting in extensive lists of “do’s and don’ts.” One of the most important “don’ts” – is to refrain from suing clients that owe you a comparatively small amount of money. All too often, such clients will use the money they owe you to retain an attorney and a hired-gun expert to trump up charges and accuse you of negligence, and then seek to settle for a sum that exceeds what they owe you or, at best, is far less than what you’ve earned.

Not everyone believes in the lessons of history (or the law of averages), especially when ignoring them seems to achieve positive results. Consider the case of a firm we'll call GWA Associates, an outfit that, over the years, had taken nonpaying clients to small-claims court 60 times and won every case... except the one that began when a developer retained GWA to perform a phase-one environmental site assessment (ESA). The developer planned to buy the property involved for construction of a small office building. The property's owner – a heating-oil-distribution company – was using the property for truck maintenance. The previous owner used the property for a service station and had installed underground tanks to store diesel fuel, gasoline, and waste oil. Reportedly, the previous owner had removed the tanks, but no documentation was available to prove it.

The developer accepted GWA's proposal and signed its agreement as presented.

GWA's initial assessment indicated that the site's use as a gas station and the undocumented removal of underground storage tanks presented significant risks. GWA recommended a phase-two study, including subsurface exploration and soil and groundwater analysis. GWA submitted a second proposal, which – as the first – the client accepted without change.

GWA set to work and soon detected oil globules in one of the observation wells it had installed. Analysis revealed the presence of heating oil or diesel fuel at levels slightly exceeding the "reportable concentration" under state law. A second round of sampling indicated concentrations just under the reportable threshold, but that didn't matter: State regulations required the property owner to report conditions. GWA therefore recommended that the developer notify the property owner of its reporting requirement, and that GWA perform additional characterization to assess the extent of contamination and the need for remediation.

Concerned by GWA's findings, the property owner asked the developer to conduct more sampling, but the developer refused. Therefore, with the developer's blessing (in writing), the owner retained GWA to resample the affected well and conduct laboratory analysis. The owner signed GWA's contract, the general conditions of which were identical to those the developer had accepted as presented.

Results of the additional sampling, testing, and analysis affirmed the presence of contamination slightly below the reporting threshold. Nonetheless, the owner still was required to report the above-threshold level initially encountered.

Its services complete, GWA billed the owner \$1,200. The owner ignored the bill until four months later, when its CEO wrote to GWA saying it would

pay the bill immediately if GWA would provide a copy of the report GWA had prepared for the developer. The developer okayed the request, and the Member Firm provided the report. But the owner still refused to pay. Instead, it retained a second environmental firm, with no licensed professionals on staff, to review GWA's work and resample the observation well. The new consultant concluded that the owner had no regulatory-reporting requirement, unambiguous regulatory language notwithstanding.

After more than a year of repeated billings, calls, and office visits, GWA decided to take its client to small-claims court. Three days before the court date, the owner sued GWA for \$20,000, claiming the firm had contaminated its property when diesel fuel leaked from its drilling rig. GWA

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The money we lost on this one case exceeded all the money we collected on all prior claims.... Of course, when you think about it, if we had to use the small-claims court so often, we must have been doing something wrong.

retained counsel who was confident GWA would prevail at trial. Counsel estimated that his fees and expenses would come to \$5,000 or so.

GWA's lawyer asked the owner to discuss the matter, per GWA-contract wording requiring mediation before court action. The owner refused, requiring attorneys for both sides to gather and review files and interview participants. While that process was ongoing, GWA's attorney moved to deny action based on contractual language. He also moved for summary judgment. The judge denied both motions, because she "needed to know more about the case." As a result, the case moved into the discovery phase, requiring preparation of documentation, interrogatories, production of expert witnesses, depositions, motions, negotiations, and conferences.

Depositions of the owner's CEO were eye-opening. He openly acknowledged that he had fabricated the drilling-rig fuel-leak claim and that the expert he retained had no evidence that GWA had at any time acted negligently. Based on these revelations, GWA's attorney again moved for summary judgment and also moved to bar the owner's expert from testifying, because he had no relevant testimony to offer and, in

any event, lacked qualifications. At this point, the owner offered to settle if GWA would pay it \$4,000. GWA refused, and both sides then appeared before a pretrial-conference judge. The judge indicated that he probably would bar the owner's expert and might even accept an abuse-of-process claim if GWA wanted to file one.

Immediately after the conference, the owner offered to settle if GWA would pay it \$2,000. GWA rejected the offer, however, because its attorney said the firm would "do really well" with an abuse-of-process claim. Accordingly, GWA countered with an offer to settle if the owner paid the original \$1,200 fee, plus attorney and expert fees totaling \$51,000. The owner offered \$2,000, but GWA, believing it could recover all its legal fees, decided to go to trial. That's when GWA's attorney explained that, even if the firm won its abuse-of-process claim, the owner would be obligated to pay no more than one-third of GWA's legal costs. So, just before trial, GWA offered to settle for \$25,000. The owner responded with a check for \$16,000, which GWA accepted.

What a dreadful outcome! GWA invested close to \$100,000 in out-of-pocket expenses and staff time to collect \$1,200. The client's \$16,000 settlement

reduced the net cost to \$84,000, not including the value of lost morale, lost opportunity, and lost sleep.

Commenting on the case, GWA's COO said, "I knew the lessons of history [taught by GBA], but I tended to 'pooh-pooh' them. The firm had taken clients to small-claims court 60 times and won on almost every occasion. The money we lost on this one case exceeded all the money we collected on all prior claims...." Then he added, "Of course, when you think about it, if we had to use the small-claims court so often, we must have been doing something wrong."

And "something wrong" was not just going to small-claims court. The best slow- and no-pay client preventive is a comprehensive "go/no-go" decision-making process that includes a comprehensive background check. If the project is so small that you don't have the time to do that, reject the commission. Many firms' reluctance to do that is one of the principal reasons why project risk is inversely proportional to project size. (Somewhat ironically, when GWA's COO began to tell his tale of woe to a colleague, the colleague stopped him mid-sentence: "Don't tell me you actually accepted a project from that guy," he said. "He never pays, and he always sues!")

Bottom line: Now that you know where to find the lessons of history, are you going to learn from them...or just repeat them? 

► **JOHN P. BACHNER** is the executive vice president of the Geoprofessional Business Association (GBA), a not-for-profit association of firms that develops programs, services, and materials to help its members and their clients confront risk and optimize performance. GBA-Member Firms provide geotechnical, geologic, environmental, construction-materials engineering and testing (CoMET), and related professional services (*en.wikipedia.org/wiki/Geoprofessions*). Contact GBA at info@geoprofessional.org.