

common ground community chatter:

Supporting Documentation

This is the first a new monthly column that will focus on a late-breaking topic of discussion featured on commonground (commonground.edrnet.com), the global community for property due diligence professionals. Below, key industry insiders provide their insight into the following question posed recently on common-ground:

How long should an environmental professional keep a complete record of a Phase I and any supporting documents?

The attorneys say:

“At the very least, the file should be retained through any regulatory audit period in states that have one, like Massachusetts. Files must be retained through the pendency of any litigation, including any claim against the consultant’s insurer. It would be prudent to retain files through the statute of limitations for breach of contract actions, although consulting contracts often specify a shorter period of time under which the consultant is obligated to retain client files and a shorter period for claims. On balance, I believe it is in the consultants’ interest to keep files as long as possible, particularly for the more complex sites, because having the file will not only help the consultant in any litigation but will also position the consultant to get the next job for that client (e.g., update on refinancing) or another (e.g., update for buyer or tenant, if parties waive conflict), and now that files may be stored electronically, storage is less of a space issue.”

~Susan Phillips, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo

“My answer is longer than you might expect because this simple question does not have a simple answer. Consultants are most likely to face liability for their Phase I work on the basis of professional

liability or for breach of contract and should retain their records for Phase I work long enough to be able to defend against such lawsuits. The statutes of limitations for these actions varies among the states. The Connecticut statute of limitations for personal injury (tort) actions is ‘three years from the date of the action or omission complained of.’ The statute of limitations for breach of contract actions is six years for a written contract. And although medical malpractice actions have maximum three year statutes of limitation, actions against professional engineers, ‘whether in contract, in tort, or otherwise,’ for any work deficiency or other injury is seven years. Prudence dictates that the consultant should retain its records for the longest period under whichever state law is applicable; hence for Connecticut it would be seven years. The consultant should keep in mind, however, that even where its contract selects the law of a particular state to be applied, if the work is not performed in that state it may not be possible to predict that the court in another state where it may be sued will feel obliged to follow that provision, particularly if the action is not based on the contract.”

~Barry Trilling, Wiggin and Dana

“I would echo the comments of the other lawyers, and add that in California, there is a 10 year window for claims against professionals (and insurer involvement as spelled out in the statute.) In Georgia, we have a six year statute on contracts, but if the client is clever enough to type ‘L.S.’ on the signature line, the contract can become a contract ‘under seal’ and can be seen as being of ‘higher dignity,’ with a 20 year statute.

“As for tort/malpractice actions, the worrisome real problem for me is whether or not state law will allow a court to use a discovery trigger – in other words, the statute of limitations does not start to run until the plaintiff knew or should have known there was a problem (see the line

of ‘manifestation’ cases.) If we get into that box, the real firewall becomes the statute of repose and these vary from 20-30 years.

“Having said that, I have begun to advocate a packrat mentality, with good file cleanup before [the documents] go to storage. Historically, this hasn’t been possible, but now with virtually free DVD storage and encrypted on-line storage vaults with backups, it’s very cheap. Some lawyers strongly argue against this approach, saying that the materials there could be hurtful and that everything should be regularly purged and destroyed pursuant to a document retention/ document destruction policy. I’m amenable to that for e-mails because of the sheer volume, but as for reports and lab work, photos, etc., I disagree. I concede that the information could be hurtful in the event of a claim, but it could also contain very helpful information as well. The plus or minus aspect goes both ways, so this is a judgment call. As my old civil procedure professor said to us to illustrate this analytical dilemma: ‘a sword is a very narrow shield, and a shield is a very dull sword.’”

~Karl J. Duff, Ph.D., J.D., Professional Liability Consultants, LLC

The environmental professionals say:

“Start with company policy. If there is no policy, or if you are unsure how it applies to a Phase I report, seek counsel. That said, there are a few things to keep in mind. Be sure to read your contracts carefully. Look for any specific language related to the retention of files and reports. You may also want to check for requirements that extend beyond the report. Some I have seen include elements of the project file such as field notes, sketches, documentation from third parties, and other data that may not appear in the report. Contracts may also specify the retention time or require notice before destroying documents.

continued on page 7

Community Chatter

continued from page 5

“On a practical note, it helps to have a system that assures you can efficiently retrieve a report from storage. I suggest both electronic and hardcopy storage. You can’t beat electronic storage when you need to look up something fast. That said, you still may need to access the hardcopy file for all of the project documentation versus just the report. If you’re a business owner, I strongly recommend that you clearly define the roles and responsibilities for project file closure to staff to assure proper archiving. It should be as second nature as sending the report or invoicing the client.”

~Alan Agadoni, ATC Associates (and commonground Advisory Panelist)

“Many consulting companies have retention policies that dictate how long they retain project and client files. These policies may be overridden by a client requirement for longer retention, or perhaps an edict to return all project files to the client after a certain period of time. Such requirements may be described in a Master Services Agreement or a Professional Services Agreement.

A typical document or file retention policy is seven years, although this can vary widely, from as little as one year to as many as 10. From a regulatory standpoint, the AAI rule renders environmental reports obsolete, or at least stale, after six months, so one year is a good minimum. Another approach may be to retain hard copies for one year, then either ship the files to a secure, offsite disposal facility, such as Iron Mountain, or shred the hard copies and retain the e-copies for a longer duration (e.g., approximately 5-7 years).

“In any case, once the protocol has been established, all files should be properly disposed of – documents should be shredded and completely removed from individual computer hard drives and company servers.”

~Elizabeth Krol, Shaw Environmental (and commonground Advisory Panelist)

“I’m certainly not an attorney and this is not legal advice, but on multiple occa-

sions I have been advised by loss prevention attorneys (working for PLI carriers) that only the final report as submitted to the client should be kept. That means that all other documents that weren’t incorporated into the final report—extra photos, site notes, unused aerials, maps, interviews, etc. should be disposed of. The reason they give is that without any other data, the report stands on its own merit and the extra file materials cannot be re-interpreted by others in the future. The exceptions noted are records of communication with the client or others that affect scope or recommendations and conclusions, as these should support the findings presented in the Phase I itself. This advice has been hotly debated among our principals, and is not in universal use among consultants.” ■

~Mark Shearon, Confluent Solutions

Care to weigh in on this and other discussions?

Visit commonground.edrnet.com!

Mark your calendar for the commonground community's first-ever web event February 25, 2009!

Seeking Out Opportunity in a Sea of Distress

This one-hour event featuring industry expert Anthony Buonicore will provide strategic intelligence to help your firm navigate these difficult economic times and teach you how to take advantage of emerging opportunities. All participants will receive intelligence on what services to offer, what client groups to target, and how to realize the true potential of new prospects in 2009.



For more information about this webinar, send an email to commonground@edrnet.com.

Field Notes

continued from page 6

SM: Yes, I do. It was for a 100-year-old industrial facility. I had very little training and did not have a good idea of what to look for. As the Phase I industry was in its infancy, there were not many others who knew what exactly to look for either.

ESA Report: What is the most rewarding aspect of conducting a Phase I ESA? The most frustrating?

SM: I love learning about the history of older properties and playing “environmental detective.” I hate waiting on information when a deadline is near.

ESA Report: What advice would you give someone just starting out?

SM: Ask a lot of questions and keep any need for immediate gratification and expectations for advancement in check. Do not be afraid to work hard and don’t expect a pat on the back and a thank you for every little thing you do. Over time, as you are able to show your skills and demonstrate a sound work ethic, you will be appreciated. Remember the old saying: “Cream rises to the top.” Pay your dues and you, too, will rise to the top.

ESA Report: Anything else you’d like to share?

SM: All the best to everyone in 2009. It will certainly be an interesting year in the environmental due diligence industry. ■

To see the latest metrics on the Phase I ESA market from EDR’s ScoreKeeper model, read the *4Q08 ScoreKeeper State of the Market Report* at <http://www.edrnet.com/scorekeeper>

Information on the three subscription-based services of ScoreKeeper, including a profile of the Phase I ESA market in your state, is also posted on the site.

