



presents

# Insurance Coverage for Green Building: CGL, E&O and Property

## Anticipating Liabilities and Coverage Risks in Sustainable Building

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

Sean P. Dwyer, Partner, **Havkins Rosenfeld Ritzert & Varriale**, Mineola, N.Y.  
Diana Eichfeld, Assistant Vice President, **ACE USA -- Environmental Risk**, Philadelphia  
Robert M. Fineman, Partner, **Duane Morris**, San Francisco

**Wednesday, April 21, 2010**

The conference begins at:

**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

You can access the audio portion of the conference on the telephone or by using your computer's speakers.  
Please refer to the dial in/ log in instructions emailed to registrations.

CLICK ON EACH FILE IN THE LEFT HAND COLUMN TO SEE INDIVIDUAL PRESENTATIONS.

If no column is present: click **Bookmarks**  or **Pages**  on the left side of the window.

If no icons are present: Click **View**, select **Navigational Panels**, and chose either **Bookmarks** or **Pages**.

If you need assistance or to register for the audio portion, please call Strafford customer service at **800-926-7926 ext. 10**

For continuing education credit purposes, please let us know how many people are listening at your location by

- Closing the notification box
- Typing in the chat box your company name and the number of attendees
- Then clicking the blue circle icon beside the box to send.

Note: For live event only

- If the sound quality is not satisfactory and you are listening via your computer speakers, please dial **1-866-8718924** and enter your PIN when prompted. Otherwise, please send us a chat or e-mail [sound@straffordpub.com](mailto:sound@straffordpub.com) immediately so we can address the problem.
- If you dialed in and have any difficulties during the call, press \*0 for assistance.

# Insurance Coverage for Green Building: CGL, E&O and Property

SEAN DWYER

Havkins Rosenfeld Ritzert & Varriale

[sean.dwyer@hrrvlaw.com](mailto:sean.dwyer@hrrvlaw.com)

516.620.1720

# WHAT IS GREEN BUILDING?

- **WHAT IS GREEN BUILDING?**
- **Sustainable Development: meeting the needs of the present without compromising the ability of future generations to meet their own needs**
- **Green Buildings: designed, located, built and operated using environmentally friendly principles to promote occupant and public health, conserve resources, and minimize detrimental impacts on the environment.**

# A QUICK LOOK AT GREEN BUILDING METHODS

- **Energy Efficient Materials and Systems**
- **Co-Generation (“Co-Gen”) Systems**
- **Ice Storage and HVAC Cooling**
- **Green Roofs**
- **Under Floor HVAC Cooling**
- **Grey Water Systems**
- **Lighting**

# COMPLYING WITH APPLICABLE STANDARDS AND CODES—LEED®

- **No Legal or binding definition**
- **Definitions and Standards may be different and may change from contract to contract, statute to statute, and regulation to regulation**

# Organizations/Rating Systems

Organization	Standards/Rating System
United States Green Building Council (USGBC)	LEED Rating Systems (Leadership in Energy and Environmental Design)
Green Building Initiative (GBI)	Green Globes Rating System
National Association of Home Builders (NAHB)	Model Green Home Building Guidelines
Collaborative for High Performance Schools (CHPS)	CHPS Criteria

# LEED Certification Overview

- Point based system
- Multiple rating systems


<b>New Construction</b>	<b>Schools</b>
<b>Commercial Interiors</b>	<b>Retail</b>
<b>Core &amp; Shell</b>	<b>Healthcare</b>
<b>Existing Buildings</b>	<b>Neighborhood Development</b>
<b>Homes</b>	

# HOW LEED WORKS

- **Utilize specific version**
- **Register with USGBC**
- **Detailed documentation required by Two Phases of Submission: Design and Construction --- Verification**
- **Web Site Resources: Credit Interpretation (CIR); Appeals**


# LEED Online

- Project Tracking
- Templates
  - *The core of LEED certification submittal*
- Upload drawings
- Credit Interpretation Requests
- Technical Support



**LEED-NC**  
LEED FOR NEW CONSTRUCTION

LEED-NC 2.2 Submittal Template  
WE Credit 3: Water Use Reduction



(Responsible Individual) \_\_\_\_\_, from (Company Name) \_\_\_\_\_

verify that the information provided below is accurate, to the best of my knowledge.

---

**GENERAL INFORMATION**

Please enter the following general project information:

Use Default Male / Female Occupancy Breakdown (50% / 50%).  
 ENTER THE TOTAL OCCUPANCY FOR EACH OCCUPANCY TYPE IN TABLE 1.01 BELOW

Special Male/Female Occupancy Breakdown  
 ENTER THE MALE AND FEMALE OCCUPANCY FOR EACH OCCUPANCY TYPE IN TABLE 1.02 BELOW. PROVIDE A NARRATIVE DESCRIPTION AT THE END OF THIS FORM TO EXPLAIN THE UNIQUE MALE/FEMALE OCCUPANCY BREAKDOWN.

**Table 1.01 - Occupancy Breakdown (Default Male / Female Occupancy)**  
 Enter the values as whole numbers without any commas

	Full Time Equivalent (FTE):	Student/Visitor:	Retail Customer:	Residential:	Other:
Total					
Male					
Female					

**Table 1.02 - Occupancy Breakdown (Special Male / Female Occupancy Breakdown)**  
 Enter the values as whole numbers without any commas

	Full Time Equivalent (FTE):	Student/Visitor:	Retail Customer:	Residential:	Other:
Total					
Male					
Female					

Percent of male restrooms with urinals:  %

Annual Days of Operation (1-365):

Powered by  
**Adobe LiveCycle**

LEED-NC 2.2 Submittal Template | Last Modified: April, 2006

# THE LEED FORMAT

- **(1) SITE SELECTION**
- **(2) WATER EFFICIENCY**
- **(3) ENERGY & ATMOSPHERE**
- **(4) MATERIALS AND RESOURCES**
- **(5) ENVIRONMENTAL QUALITY**
- **(6) INNOVATION & DESIGN**

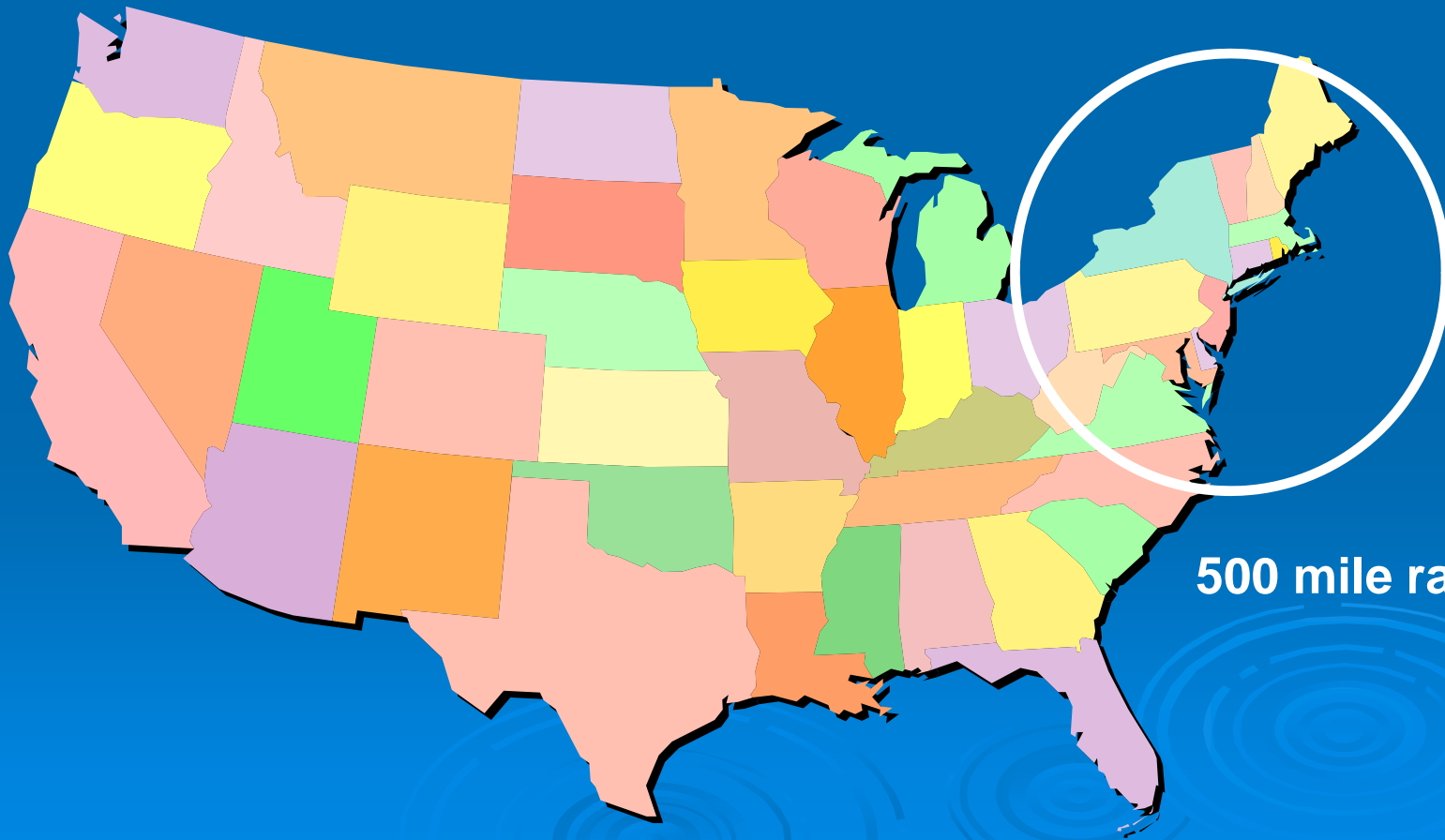
# Materials & Resources

*Credit 5: Regional Materials 10%, 20%*

<b>Intent:</b>	Increase demand for materials and products that are extracted, processed and manufactured regionally, reducing environmental impacts from transportation
<b>Requirements:</b>	Use building materials that have been <i>extracted, harvested/recovered and manufactured</i> , within 500 miles of the project site for a minimum of 10% or 20% of the total material value for the project
<b>Strategy:</b>	<ul style="list-style-type: none"><li>➤ Establish goals in design phase and identify materials and suppliers</li><li>➤ Involve the general contractor in the process</li></ul>

# Materials & Resources

*Credit 5: Regional Materials 10%, 20%*



# Indoor Environmental Quality

## *Credit 4: Low-Emitting Materials, Paints & Coatings*

<b>Intent:</b>	Reduce quantity of indoor air contaminants that are odorous, irritating and/or harmful to installers and occupants
<b>Requirements</b>	Interior paints & coatings must comply with VOC limits according to various standards
<b>Strategy:</b>	Specify low VOC paints/coatings in construction documents
<b>Standards:</b>	<ul style="list-style-type: none"><li>➤ Green Seal Standard GS-11, Paints</li><li>➤ Green Seal Standard GS-03, Anti-Corrosive Paints</li><li>➤ SCAMDQ, Rule 1113, Architectural Coatings</li></ul>

# LEED POINT SYSTEM

## LEED Rating Systems

---

	New Construction	Existing Building	Commercial Interior	Core & Shell
Sustainable Sites	14	14	7	15
Water Efficiency	5	5	2	5
Energy & Atmosphere	17	23	14	16
Materials & Resources	13	16	14	11
Indoor Environmental Quality	15	22	15	13
Innovation & Design Process	5	5	5	5
<b>Total Possible Points</b>	<b>69</b>	<b>85</b>	<b>57</b>	<b>65</b>
Platinum Level	52 – 69	64 – 85	42 – 57	48 – 64
Gold Level	39 – 51	48 – 63	32 – 41	36 – 47
Silver Level	33 – 38	40 – 47	27 – 31	30 – 35
LEED Certified Level	26 – 32	32 – 39	21 – 26	24 – 29

---

# LEED® 2009

- *MAJOR CHANGES*
- **ADJUSTMENT TO POINT SYSTEM**
- **WEIGHTED CREDITS**
- **REGIONALIZATION**

# LEED 2009 Point Adjustments

LEED for New Construction	2009		v2.2	
	Pts	%	Pts	%
Sustainable Sites	26	26%	14	22%
Water Efficiency	10	10%	5	8%
Energy & Atmosphere	35	35%	17	27%
Materials & Resources	14	14%	13	20%
Indoor Environmental	15	15%	15	23%
Innovation & Design	6	6%	5	8%
Regional Bonus	4	4%	0	0%

# ASHRAE 189.1

- **Proposed Standard 189, Standard for the Design of High-Performance Green Buildings Except Low-Rise Residential Buildings**
- **SPONSORED BY BSR/ASHRAE/USGBC/IESNA AND EPA**
- **30% REDUCTION OF ENERGY OVER EXISTING STANDARDS**
- **25% REDUCTION IN WATER USEAGE OVER EXISTING STANDARDS**
- **INCORPORATES EXISTING LEED STANDARDS—WHAT ABOUT LEED 2009?**

# GREEN BUILDING IN GOVERNMENTAL CONSTRUCTION

- **FEDERAL AND STATE ENTITIES  
HAVE ADOPTED LEED® AS THE  
MANDATE FOR CONSTRUCTION**

# Federal Agency Green Building Policies

Agency	Requirements
<b>Dept of Agriculture</b>	All new construction and major renovations must achieve LEED Silver
<b>Dept of Agriculture – Forest Service</b>	New construction of office buildings, visitor centers, research facilities, and climate controlled warehouses over 2,500 sf must achieve LEED Silver
<b>Dept of Energy</b>	All new buildings \$5M or greater must achieve LEED Gold.
<b>Dept of Health and Human Services</b>	All construction projects with federal funds over \$3M must achieve LEED certification or Green Globes certification
<b>Environmental Protection Agency</b>	All new buildings over 20,000 sf must achieve LEED Gold

# LEED Nationwide

## State

- Arizona
- Florida
- Hawaii
- Maryland
- Massachusetts
- Minnesota
- Nevada
- New Mexico
- Rhode Island
- South Carolina
- Washington

## City

- Austin
- Atlanta
- Baltimore
- Boston
- Calgary
- Chicago
- Cincinnati
- Dallas
- Denver
- Houston
- Kansas City
- Los Angeles
- Minneapolis
- New York
- Philadelphia
- Portland
- Sacramento
- San Antonio
- San Diego
- San Francisco
- Seattle
- St. Louis
- Syracuse
- Vancouver
- Washington DC

# OTHER GOVERNMENTAL REGULATORY SCHEMES

- **Rules, Regulations, & Policies for Energy Efficiency**
- **Example: Appliance/Equipment Standards, Energy Standards, Building Energy Codes, Public Funding Regulatory Schemes**
- **Rules, Regulations & Policies for Renewable Energy**
- **Example: Net Metering, Equipment Certification, Construction Design, Access Laws**

# EMERGING GREEN BUILDING REGULATION

- *CALIFORNIA: FIRST GREEN BUILDING CODE*
- *CALIFORNIA GREEN BUILDING STANDARDS CODE (JULY, 2008)*
- *COMMERCIAL AND RESIDENTIAL*
- *MANDATORY REDUCTION OF 15%*
- *MANDATORY FOR NEW HOUSING 2010*
- *PHASE IN FOR COMMERCIAL*

# COMPLYING WITH YOUR LOCAL REGULATORY SCHEME

- **Database of State Incentives for Renewables and Efficiencies (DSIRE)**
- **[www.dsireusa.org](http://www.dsireusa.org)**

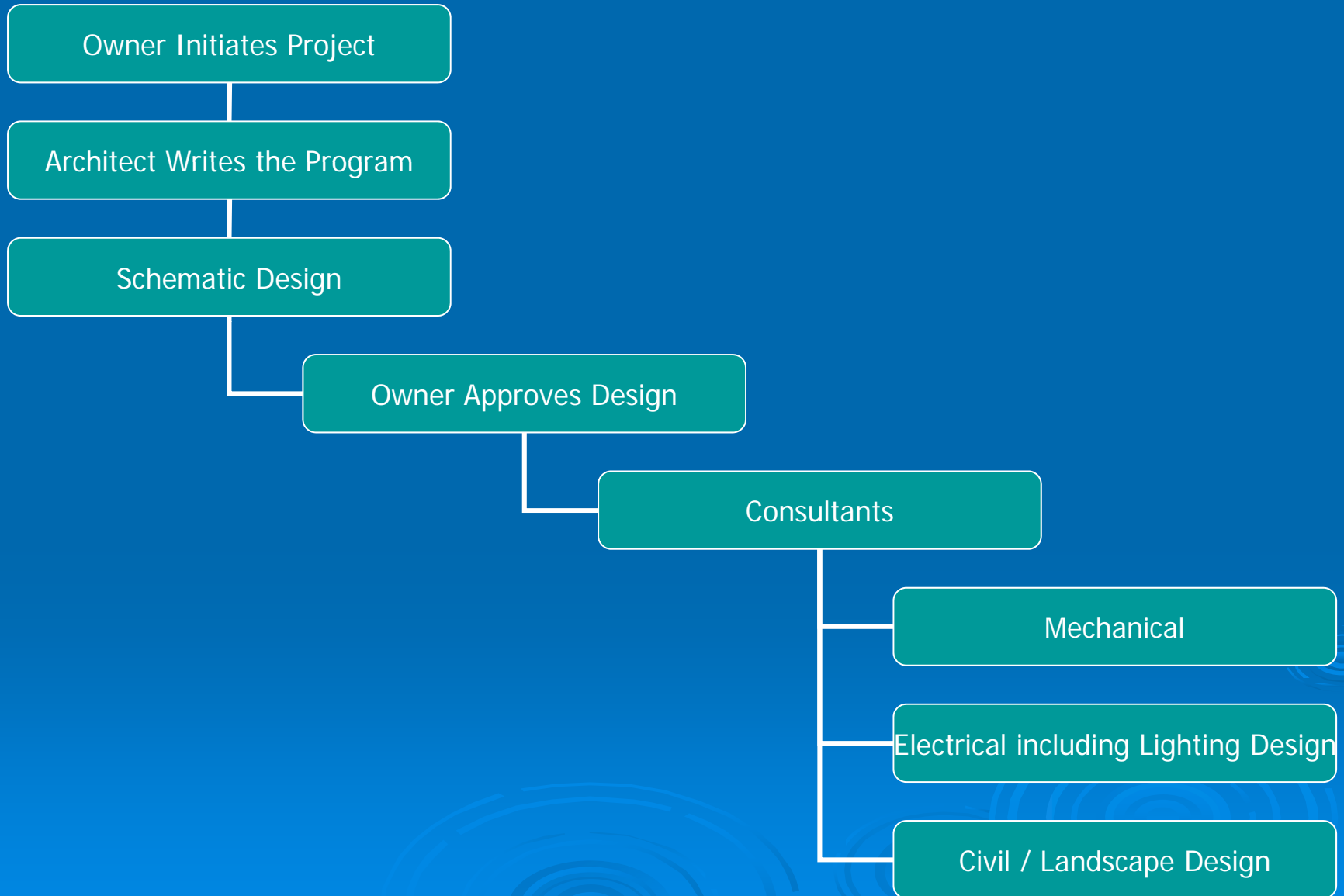
# GOVERNMENTAL RESPONSE: INCENTIVE PROGRAMS

- **Priority in building permit processing and plan review, sometimes with a requirement for posting a bond to guarantee the result;**
- **Tax incentives, particularly property tax abatements, for projects achieving LEED Silver or better certification;**
- **Increased Floor-to-Area (FAR) ratios, which allow a developer to construct more building area than allowed by applicable zoning.**

# USING LEED® IN CONSTRUCTION

## ➤ THE HIDDEN RISKS

# Traditional Design Process

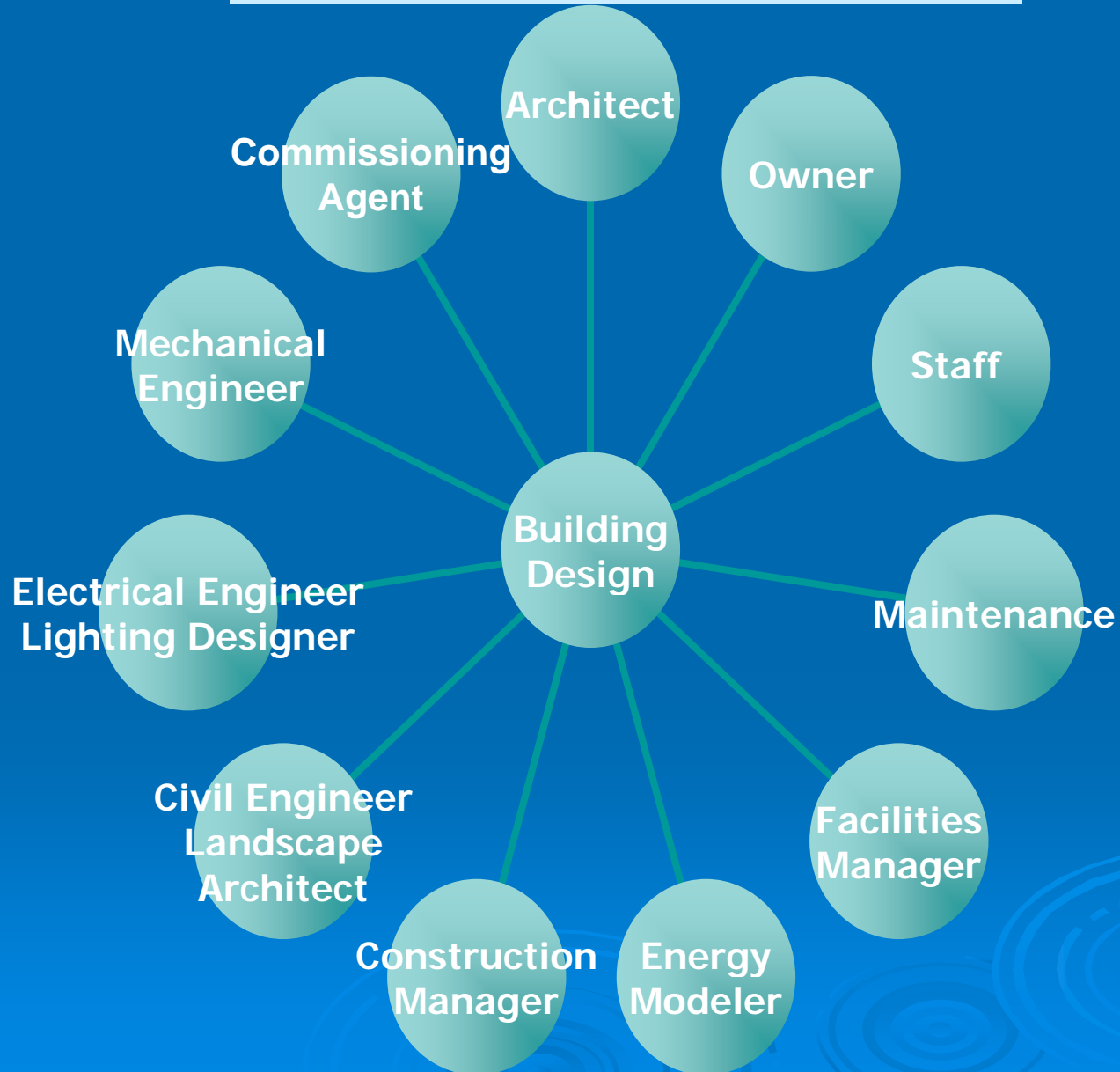


# Traditional Design Process

Continued



# Integrated Design



# THE HIDDEN RISKS

- **LEED shifts and enhances decision-making process for players:**
- **Owners participate in design phase**
- **Contractors have enhanced obligations during construction**
- **Architects have greatly enhanced duties and responsibilities that now influence the manner and method of work**



**25** years of  
insuring progress

# ***Risk and Liabilities Associated with Green Building***

---

**Diana Eichfeld  
Assistant Vice President**

**ACE Environmental Risk**

# ***Risk Liabilities: Overall Perception***

---

***Green is good***



## LEED Statistics

---

- 4,825 U.S. LEED Building Inventory (*The Philadelphia Inquirer, April 2010*)
- 18-20 months commissioning
- Green Driver: \$ (*UK Study*)

# ***Risk Liabilities: The Players***

---

***Recap:***

**Architect & Engineer**

**Contractor**

**Property Owner**



# Green Construction

---

## Building Components

- ◆ Systems (*Traditional*): HVAC; lighting; bicycle racks
- ◆ Systems (*Non-Traditional*): Green Roofs
- ◆ Products: drywall; flooring; paint

## Delivery Systems

Design/Bid/Build  
Design/Build  
Construction Management  
Integrated Project Delivery

## ***Risk Liabilities: Insurance Perception***

---

- *Does insurance view “Green” projects differently?*
- *Does ISO view “Green” projects differently?*
- *Does an underwriter view “Green” projects differently?*

# ***Risk Liabilities: Insurance Perception***

---

- *“Property”*
- *Professional*
- *Pollution*

## *Risk Liabilities: “Property” View*

---

- *Perils*
- *Product/Material Driven*
- *UL/FM certified?*
- *Completed Operations*

## ***Risk Liabilities: Professional View***

---

- *Services*
- *Certification*
- *Standards of Care*
- *Contract Language*

## ***Risk Liabilities: Pollution View***

---

- *Mold*

# *Risk Liabilities*

---

***Is “Green” building insurable?***



# Insurance Coverage for Green Building: CGL, E&O and Property

## Anticipating Liabilities and Coverage Risks in Sustainable Building

DuaneMorris

Strafford Publications Webinar  
April 21, 2010

***Robert M. Fineman, Esq.***  
***Duane Morris LLP***  
***One Market, Spear Tower, Suite 2200***  
***San Francisco, CA 94105***

©2009 Duane Morris LLP. All Rights Reserved. Duane Morris is a registered service mark of Duane Morris LLP.  
Duane Morris – Firm and Affiliate Offices | New York | London | Singapore | Los Angeles | Chicago | Houston | Hanoi | Philadelphia | San Diego | San Francisco | Baltimore | Boston | Washington, D.C.  
Las Vegas | Atlanta | Miami | Pittsburgh | Newark | Boca Raton | Wilmington | Cherry Hill | Princeton | Lake Tahoe | Ho Chi Minh City | Duane Morris LLP – A Delaware limited liability partnership

[www.duanemorris.com](http://www.duanemorris.com)

## Scope of Coverage – Property Policies

- Emerging “Green Policies” Provide Coverage Enhancements to Traditional Policies
  - LEED Certification may be required prior to obtaining specific “green” policies and endorsements
    - LEED Certification provides an additional level of risk management
  - Green Building Restoration/Upgrading Is Becoming More Common as a Form of Additional Property Coverage
    - Recycling
    - Improving Heating and Cooling Systems
    - Conserving Water
    - Actively Managing Indoor Air Quality

## Scope of Coverage – Property Policies

- Green Building Presents Potential Loss Exposures That May Not Be Covered Under Traditional Policies
  - Vegetative Roofing Risks
    - Additional weight of soil and vegetation creates structural integrity and collapse potential
    - Rainwater accumulation adds additional weight to the roofing structure
  - Coverage Disputes May Arise Regarding the Proximate Cause of the Loss
    - Is the cause from the additional weight from the roof or from a preexisting construction defect
  - Specific “Green Endorsements” are designed to cover the replacement of water proof membranes in addition to replanting of the vegetative roof

## Scope of Coverage – Property Policies

- Additional Examples of “Green Building” Coverage Enhancements/Endorsements
  - Rainwater Runoff Exposures
    - Water collected on site may be used for cooling and irrigation
    - Potential exposures could arise from leaks in the system creating a potential for mold growth
    - Insurance for such potential exposures may have to be sought in the excess and surplus lines markets
  - Alternative Energy Generation Systems
    - Solar panels, wind turbines and geo-thermal heating systems may require specific endorsements to the definition of “covered property” in order to be properly insured

## Scope of Coverage – Property Policies

- Additional Considerations for Indirect Business Interruption and Extra Expense Exposures
  - Alternative Energy Systems Coverage
    - Should cover the loss of income due to on-site wind or solar energy production that is sold back to the local utility
  - Re-ventilation of the Building After a Loss
    - Re-commissioning generally is not included in standard business interruption and extra expense forms
    - Specific green insurance policies often cover re-ventilation of the building
  - Rebuilding with Green Materials/Equipment
    - New zoning requirements may add additional expense to construction costs
    - LEED certification requirements for metals recycling
    - Additional costs and time to complete construction may result in business income loss
    - Full replacement coverage for specialty high efficiency equipment

## Scope of Coverage – CGL Policies

- CGL Coverage Is Generally for BI, PD and Advertising Injury
  - Green building initiatives may reduce risks related to bodily injury and property damage because they are perceived as being better designed
- CGL Coverage Typically Excludes Breach of Warranty and Breach of Contract Claims
  - Thus, there likely is no coverage for claims that a green building did not meet its specifications under a CGL policy or other claims that cause predominantly economic or other damage to reputation of the building
- CGL Endorsements Have Been Developed to Provide Crisis Management Consulting Services
  - Such coverage provides services from consulting firms to provide publicity damage control in the event of even the threat of an adverse publicity event or lawsuit

## Scope of Coverage – CGL Policies

- Green Endorsements to CGL Policies May Provide Defense Costs for Claims Involving Certain Green Building Failures
  - Certain green endorsements provide defense for “adverse green claims” which include “a civil lawsuit from anyone other than an insured under the policy demanding monetary or non-monetary relief and alleging your failure to meet or comply with industry recognized green building standards”
- Property policies typically do not provide coverage for “green rebuilds” absent some physical damage to the property
  - Depending on the jurisdiction, construction defects related to green building may not qualify as an “occurrence” within the meaning of a CGL policy
  - Costs of investigating which party (architect, engineer, owner, contractor) is at fault for failure of a building to meet green building standards may not be covered under a CGL policy
  - “Your work” and “your product” exclusions in CGL policies may also preclude coverage for construction defects and performance failures of green buildings

## Scope of Coverage – CGL Policies

- Green Endorsements May Provide Coverage for Pollution Otherwise Excluded Under a CGL Policy
  - Typical pollution exclusions in CGL policies exclude coverage for “fumes and vapors” as pollutants that trigger the exclusion
- Certain green endorsements focus on coverage related to the maintenance of special equipment to improve indoor air, water or climate quality
  - If specialized equipment breaks down, and a substance or odor is released that causes bodily injury, there may be coverage for such an event
- Other green endorsements focus on coverage for non-owned locations to which green contractors take building waste and coverage for transportation of such wastes
  - Premium discounts for green policies may be available as the insurance industry is attempting to create incentives to go “green”

## Scope of Coverage – E&O Policies

- E&O Coverage Provides Defense and Indemnity for Losses Other Than BI and PD
  - Economic loss can occur when a contractor promises to deliver a project complete, on time and within budget but fails to do so
  - Failure to detect faulty work performed by a subcontractor can create an exposure to the construction management team
  - Green building projects that fail to achieve certification through negligence of a party to the construction will likely lead to the owner making claims for economic loss and injury due to the failure to achieve expected results

## Scope of Coverage – E&O Policies

- Professional Liability Policies Typically Contain Exclusions for Claims Arising from Representations and Warranties
  - Green endorsements are emerging to customize E&O and professional liability policies for architects, engineers, consultants and design professionals who work on green buildings
- Traditional E&O Policies May Fail to Respond to Claims Against Professionals Involved in Designing Sustainable Buildings
  - Design professionals are subject to a heightened standard of care that is not reflected in standard negligence language of professional liability policies
  - AIA advocates sustainable design through its code of ethics and in contractual requirements directing architects to present environmentally responsible design alternatives to project owners

## Scope of Coverage – E&O Policies

- Certain Green Endorsements Attempt to Expand the Potential Coverage Gaps in E&O Policies
  - Definition of professional services broadened to include sustainable services performed by green design professionals, green building consultants, architects and engineers
  - Green endorsements are designed to provide coverage for claims arising from a failure to obtain LEED Certification
- Risk Management Services Are Provided by Some Insurers in Conjunction with Green Policies
  - Contract review services are available prior to executing contracts
  - Claims assistance is also provided as part of risk management

## Additional Considerations

- Certain Contract Language Incorporates Green Concepts
  - Template contracting forms created by the American Institute of Architects (AIA) contain sections discussing LEED certification
- Legal Risks of AIA Language Emerging
  - In *Shaw Development v. Southern Builders*, No. 19-C-07-011405 (Circuit Court of Somerset County, MD), the issue pertained to construction contract language requiring compliance with a particular LEED certification level. The project at issue did not receive such certification and the owner brought a \$635,000 damages claim among other against the contractor resulting from the owner's inability to benefit from a Maryland tax credit. The case ultimately settled.
  - Boilerplate contracting provisions requiring compliance with existing laws and regulations may take on new meaning and create new potential liabilities when a municipality enacts a new green building code

## Additional Considerations

- Contracting Issues May Come Into Play in Leasing Arrangements
  - Potential liability issues with a building that is marketed to prospective tenants as “LEED Certified” no longer performs as designed
- LEED Credits May Require Documentation for Credit Approval
  - Potential liability issues for the person held accountable if certification fails by a single credit that does not have documentation
- Risks of LEED Decertification May Present an Emerging Area of Potential Liability
  - LEED 2009 allows a project’s certification to be revoked “upon gaining knowledge of non-compliance with applicable MPR’s
  - Additional legal issues include who has standing to initiate decertification; what is due process for a project’s owner to ensure a just decision

## Additional Considerations

- Focus on defense and indemnification language during contract drafting and negotiations in anticipation of potential gaps in coverage for the project
  - If certain types of green building coverage are not available for a specific project, consider how protections for those risks should be addressed in the design and construction contract process
- Evaluate additional insurance requirements for subcontractors and specify “green endorsements” and “green coverages” that must be included in the subcontractors’ policies
  - Require specific policy forms to be used and confirm the inclusion of such forms in the endorsements to the subcontractor’s policies
  - Do not rely on certificates of insurance alone as evidence of the existence of the green endorsements



**Robert M. Fineman**

Direct No: (415) 957-3210  
rmfineman@duanemorris.com

# Emerging Issues

- Claim Trends
- Litigation Trends