



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

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

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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


New Construction	Schools
Commercial Interiors	Retail
Core & Shell	Healthcare
Existing Buildings	Neighborhood Development
Homes	

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**

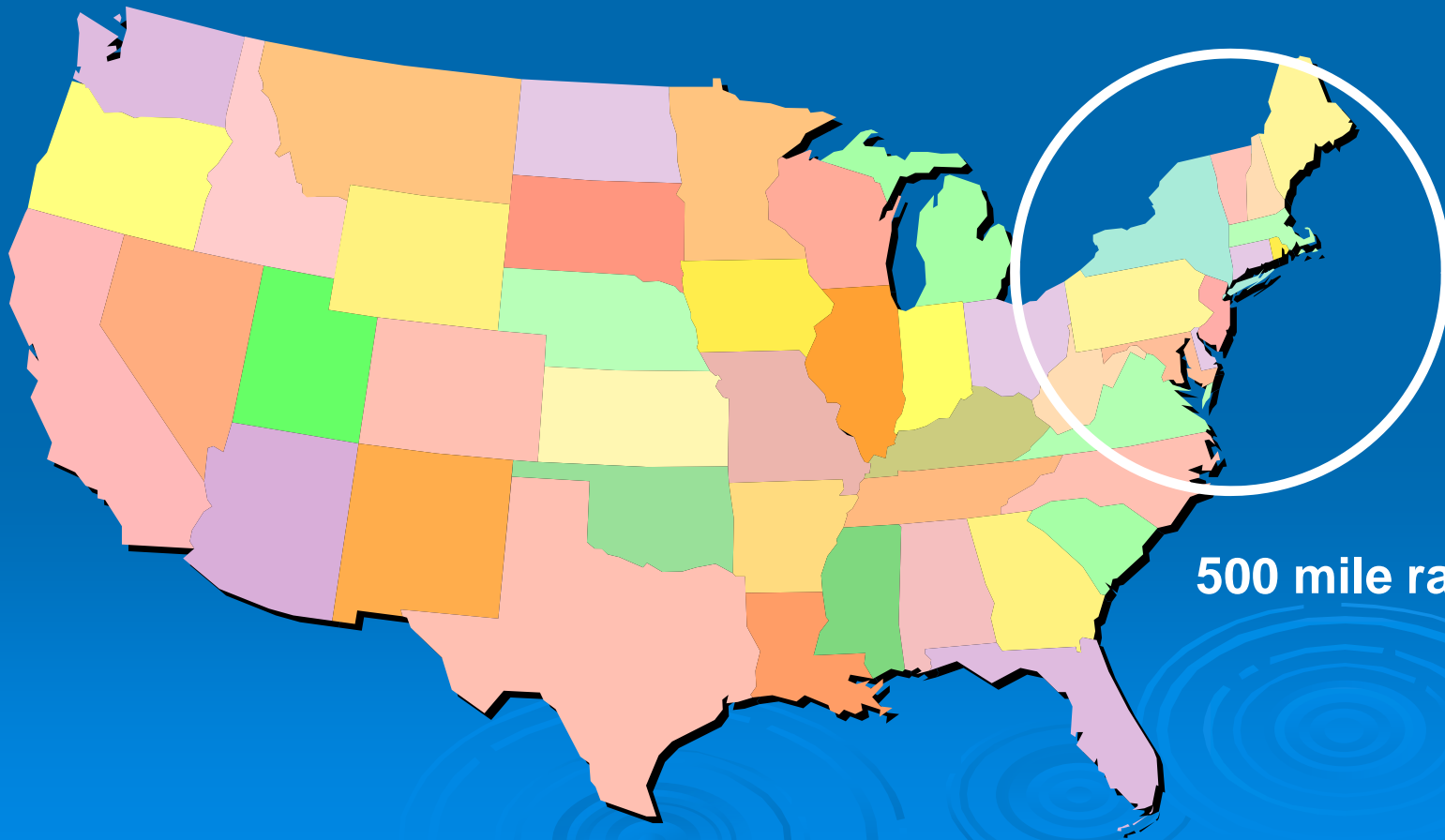
Materials & Resources

Credit 5: Regional Materials 10%, 20%

Intent:	Increase demand for materials and products that are extracted, processed and manufactured regionally, reducing environmental impacts from transportation
Requirements:	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
Strategy:	<ul style="list-style-type: none">➤ Establish goals in design phase and identify materials and suppliers➤ Involve the general contractor in the process

Materials & Resources

Credit 5: Regional Materials 10%, 20%



Indoor Environmental Quality

Credit 4: Low-Emitting Materials, Paints & Coatings

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

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
Total Possible Points	69	85	57	65
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
Dept of Agriculture	All new construction and major renovations must achieve LEED Silver
Dept of Agriculture – Forest Service	New construction of office buildings, visitor centers, research facilities, and climate controlled warehouses over 2,500 sf must achieve LEED Silver
Dept of Energy	All new buildings \$5M or greater must achieve LEED Gold.
Dept of Health and Human Services	All construction projects with federal funds over \$3M must achieve LEED certification or Green Globes certification
Environmental Protection Agency	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**

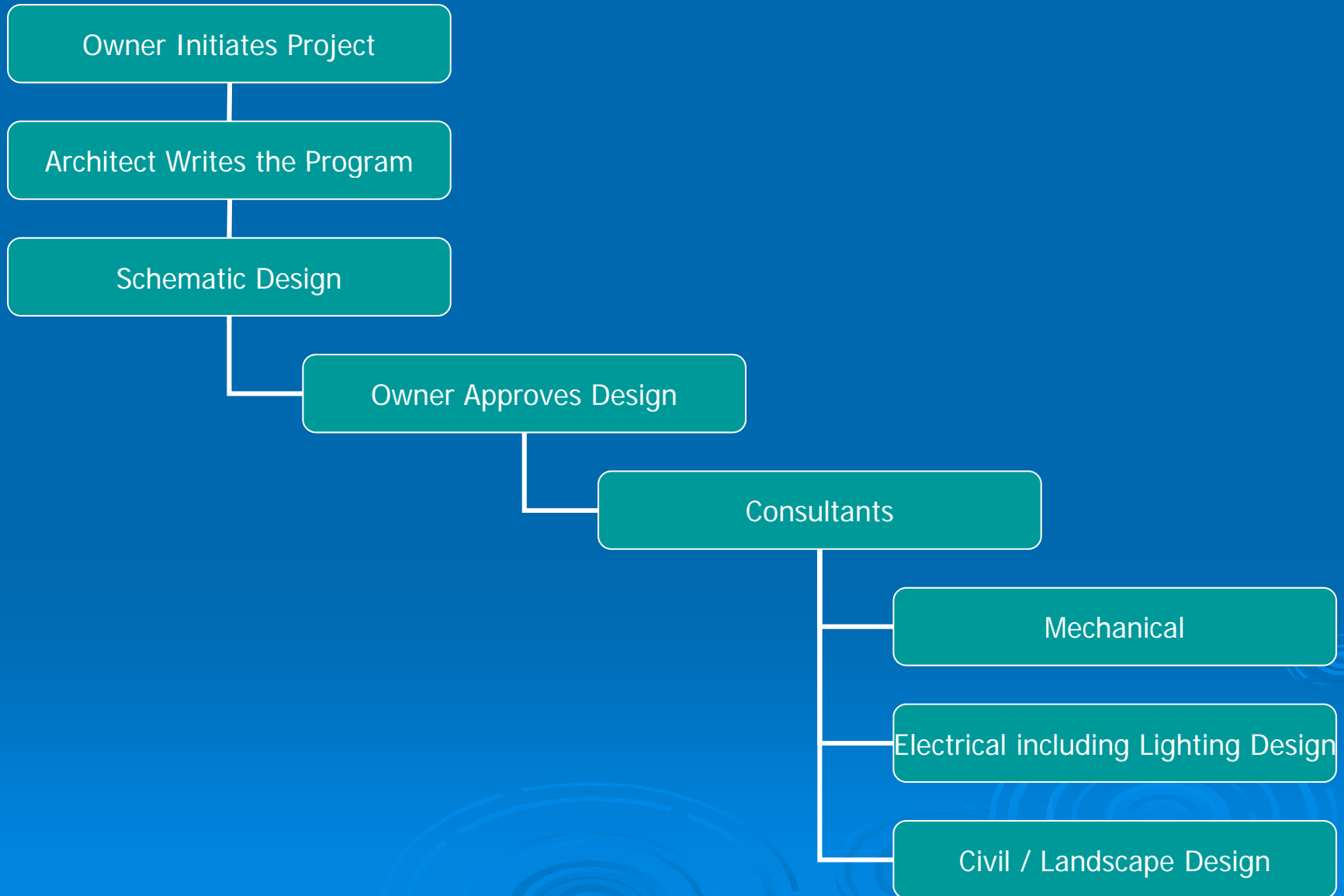
GOVERNMENTAL RESPONSE: INCENTIVE PROGRAMS

- **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

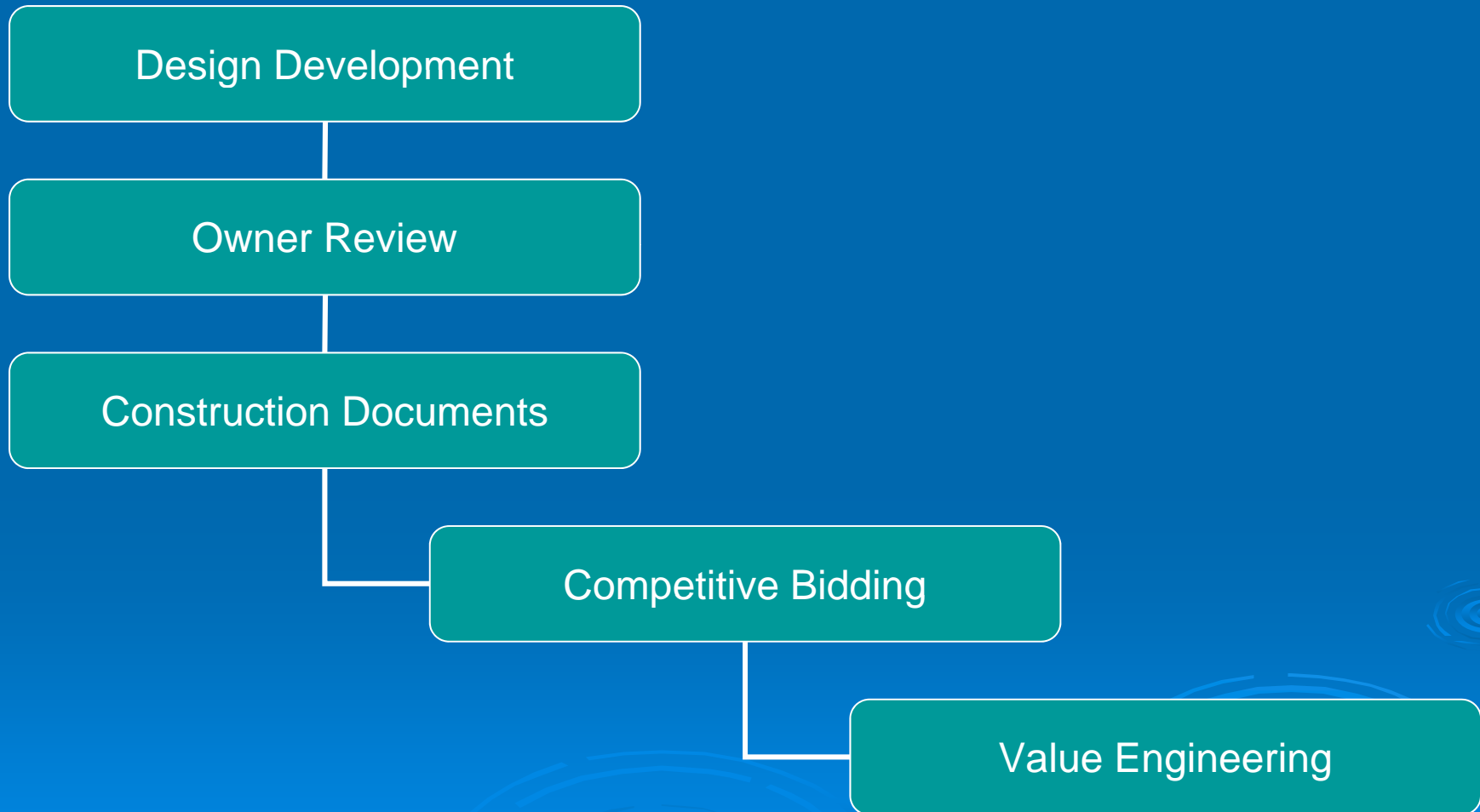
➤ THE HIDDEN RISKS

Traditional Design Process

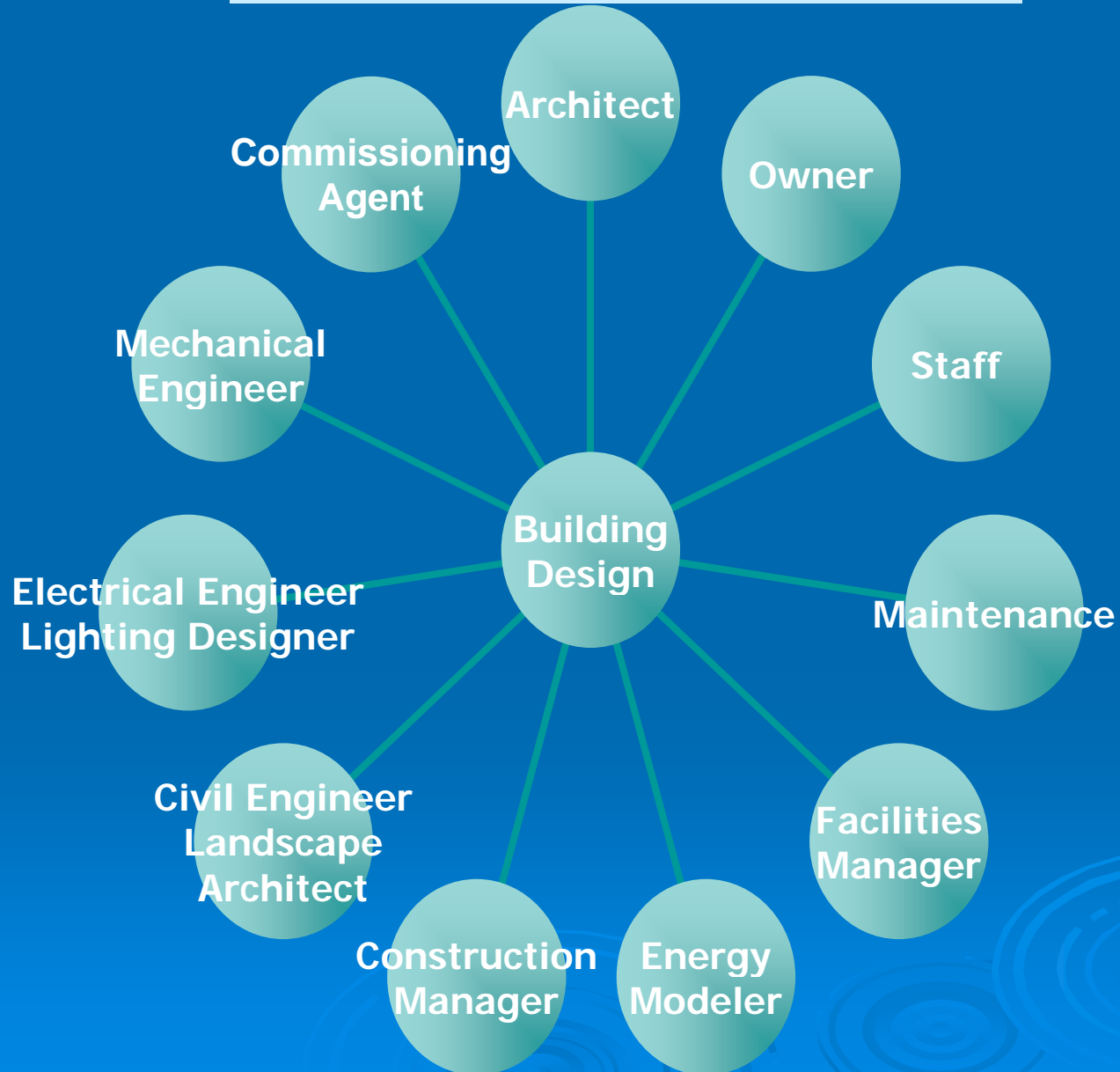


Traditional Design Process

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?



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Anticipating Liabilities and Coverage Risks in Sustainable Building

DuaneMorris

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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



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Emerging Issues

- Claim Trends
- Litigation Trends