



RLI DESIGN PROFESSIONALS
Design Professionals Learning Event

Managing Risks with Hazardous Substances

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DIFFERENT WORKS

Course Description

Managing and assessing risk of hazardous materials is critical. You want to understand the regulations surrounding these substances and be able to identify your potential exposure to liability.

Today's session will provide some effective tools to manage that risk, not just for you but for the benefit of the public's health, safety, and welfare too.

Learning Objectives

Participants will:

Learn about the regulatory bodies that govern matters regarding hazardous substances for the protection of public health, safety and welfare.

Explore case studies, illustrating instances where design professionals have been found liable.

Identify the risks of potential liability and discuss effective ways design professionals can protect the parties for the benefit of both the project and the community at large.

Understand effective risk management solutions that educate design professionals on the importance of responsibility and accountability with regard to the management of hazardous substances for the protection of the public.

Warning



<https://www.sciencenews.org/article/engineered-plants-demolish-toxic-waste>

Hazardous Substances

RLI Policy definition of
Pollution Incident:

“Discharge, dispersal, release, escape, migration, or seepage of any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, soot, vapors, fumes, acids, alkalis, chemicals, hazardous substances, hazardous materials, or waste materials, on in, into, or upon land and structures thereupon, the atmosphere, surface water, or groundwater...”



Definitions

OSHA

- Any substance or chemical which is a “health hazard” or “physical hazard” ...

EPA

- Any item or chemical which can cause harm to people, plants, or animals when released...

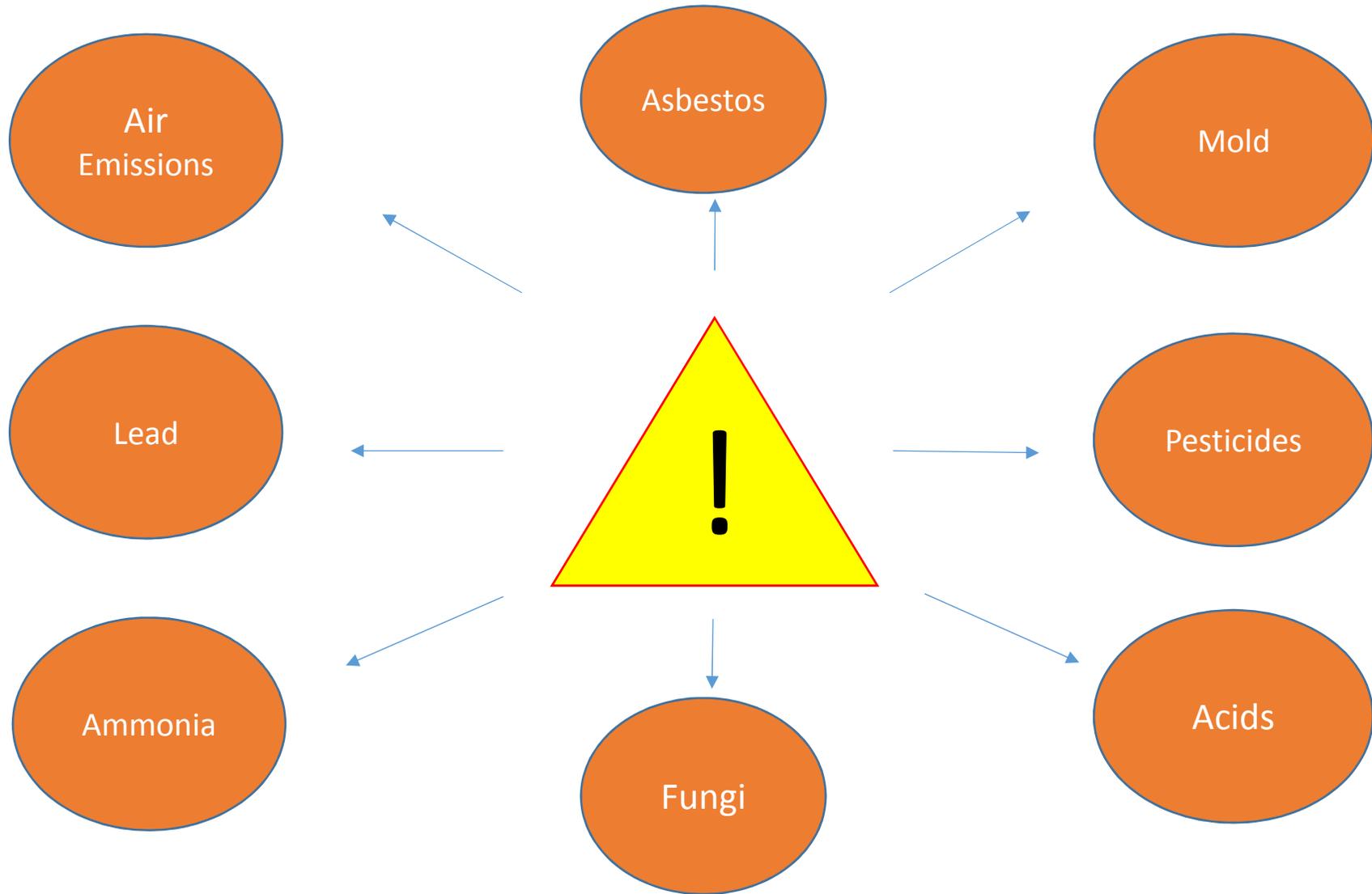
DOT

- Any item or chemical which when being transported or moved in commerce is a risk to public safety or the environment and is regulated...

NRC

- Any material that produces ionizing radiation (paraphrased)

Types of Hazardous Substances



Properties of Hazardous Substances

Corrosive
Substances

- Acids

Ignitable
Substances

- Gasoline
- Paints

Reactive
Substances

- Ammonia
- Bleach

Toxic
Substances

- Pesticides
- Lead

The Cost of Poor Management

Between 1982 and 2005, approximately \$35 billion in federal monies and an unknown amount of private funding had been spent on Superfund cleanups.

In 1995 alone, over \$670 million was spent cleaning up hazardous waste.

More than 425,000 hazardous waste sites may need cleanup of a total estimated cost from between \$400 to \$700 billion dollars over the next 50 years.



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**Learning Objective
#1**

Regulatory Overview

Regulatory Considerations

Environmental Protection Agency (EPA)

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as “Superfund”

United States Department of Transportation (USDOT)

United States Occupational Safety and Health Administration (OSHA)

State and Local Law

CERCLA



Defendant
is “person”
as defined



Release of
hazardous
substance



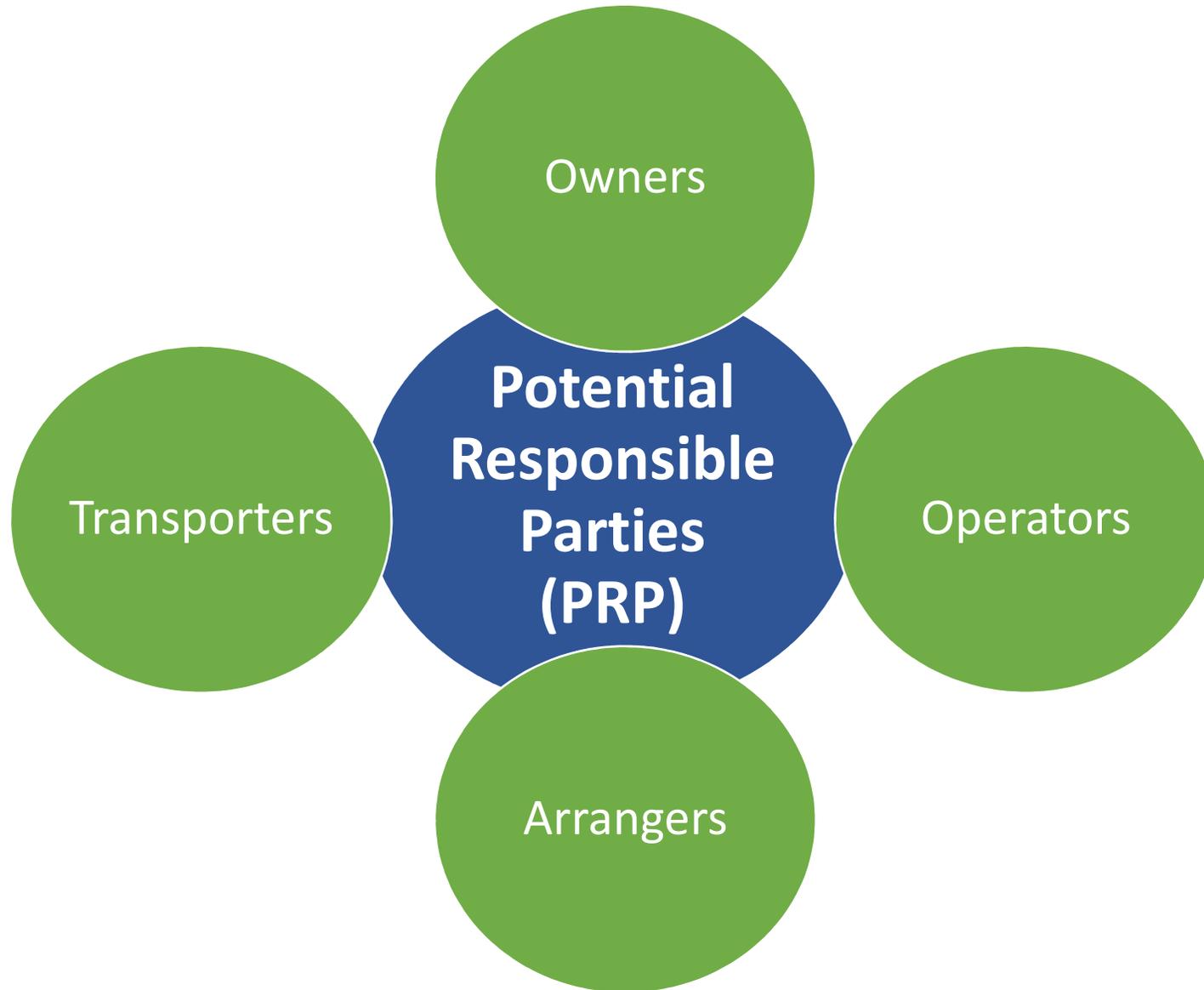
Release
happened
at a
“facility”



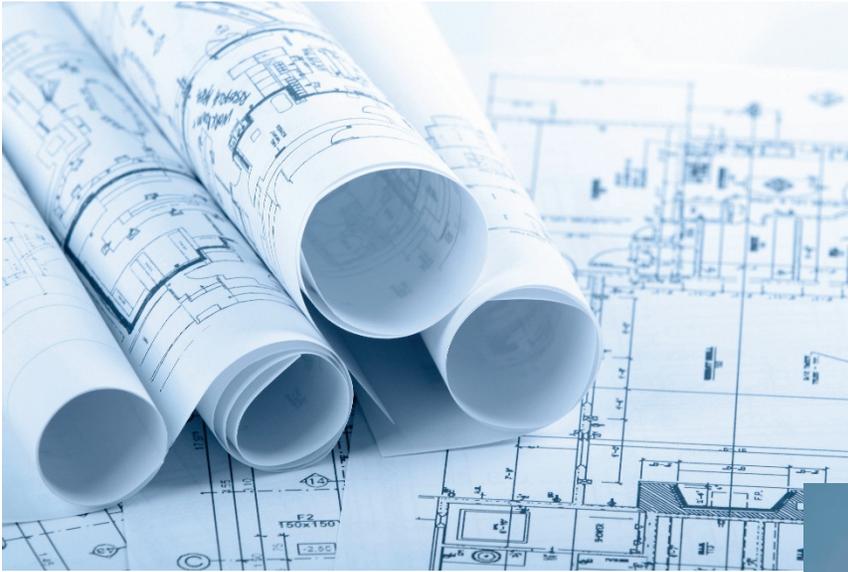
Plaintiff
incurred
response
costs



Potential Responsible Parties



Industry Trends





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**Learning Objective
#2**

Case Studies

Case Study # 1 – *Edward Hines Lumber Co. v. Vulcan Materials*

Design-builder, who had trained the owner's employees and reserved the right to inspect ongoing operations for purposes of insuring quality control, **was not an "operator" as defined by CERCLA.** The owner had day-to-day control of the plant. The owner hired employees and decided how to produce the treated wood, where to sell it, and at what price. As a result, the design-builder was simply an independent construction contractor.



Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 156 (7th Cir.1988)

Relevance to Design Professional

Operator

- “[T]he liability falls on owners and operators; architects, engineers, construction contractors, and instructors must chip in **only to the extent that they agreed to do so by contract . . .**”

Independent Contractor v. Co-Venturer

- “One potential analogy is the distinction between co-venturer and independent contractor. . . . the employer of an independent contractor is not liable for the contractor's torts, and the contractor is not liable for the employer's . . . the independent contractor is not an “operator” of the offending *facility* and therefore escapes liability. . . .”

Case Study # 2 – *Ganton Technologies, Inc. v. Quadicon Corp.*

A contractor hired to clean up hazardous waste was held liable as an “operator” under CERCLA. Court also said that “disposal” under CERCLA is not limited to initial introduction of contaminants into a site. To the extent that the contractors furthered contamination by their actions they are liable as operators even though another party was responsible for the cause of the initial contamination.



Ganton Technologies, Inc. v. Quadicon Corp., 834 F. Supp. 1018
(N.D. Ill. 1993)

Relevance to Design Professional

Operator

- In determining "operator" liability, the court noted that one looks to "**authority to control**" rather than "hands-on control."

CERCLA Liability

- Contractors hired to clean up hazardous material can be liable under CERCLA as "operators" for further contamination caused by cleanup.

Case Study # 3 — *City of North Miami, Fla. V. Berger*

Engineering firm who provided technical and engineering services in connection with the design and operation of a landfill was found NOT liable under CERCLA as an operator because it had **only provided consultations and advice**, thus had **neither actual control nor authority to control** the landfill's operations.

City of N. Miami, Fla. v. Berger, 828 F. Supp. 401, 412 (E.D. Va. 1993)



Relevance to Design Professional

Operator

- “. . . need not have exercised actual control" [over a "facility"] "so long as the authority to control the facility was present . . .”

Generator/ Arranger

- “. . . any person who by contract, agreement, or otherwise *arranged* with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances. . . .”

Case Study # 4 – *Kaiser Aluminum v. Catellus*

Excavator that spread some displaced contaminated soil from property over other parts of property was **liable as an “operator” and “transporter” of hazardous substance under CERCLA for contribution to costs of removing contaminated soil from property, even though material was not conveyed to separate parcel of land but merely another area of same property.**



Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992)

Relevance to Design Professional

Operator

- . . . **authority to control** the cause of the contamination at the time the hazardous substances were released into the environment. . .”

Transporter

- “. . . **moved the contaminated** dirt from one parcel of land to another . . .” “the excavation contractor could be found liable under CERCLA as a person who accepts hazardous substances for transport to disposal . . .”

Case Study # 5 – *Burlington Northern & S.F. R. Co. v. United States*

EPA and the State of California's Department of Toxic Substances Control (DTSC) incurred \$8 Million expense to clean up chemical spill.

The question is whether Shell Oil Company was liable for "arranging" (under CERCLA) the disposal.

Court found that Shell **did not intend for their product to be disposed the way it was. Therefore, not an arranger.**



[Burlington N. & Santa Fe Ry. Co. v. United States](#), 556 U.S. 599. (2009)

Relevance to Design Professional

Arranger

- An entity may qualify as an “arranger” of the disposal of hazardous substances, for purpose of liability provision of CERCLA, when it **takes intentional steps to dispose of a hazardous substance.**

CERCLA Liability

- CERCLA provides that "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person" is liable for contamination under the concept of arranger liability.

Moral of the Story

As a design professional, if you exhibit
“authority to control”, “move,” or “aid” in
the handling and disposal of hazardous substances,
you can be found liable.





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**Learning Objective
#3**

Potential Liability

Risk of Liability

Strict Liability

Joint and Several Liability

Breach of Contract

Contribution

Vicarious Liability

Cost Recovery

Negligence

Architect/Engineer Standard of Care

Architect

- *The Architect shall perform its services consistent with the professional skill and care **ordinarily provided** by architects practicing in the **same** or **similar** locality under the same or similar **circumstances**. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.*
AIA B101-2014, Section 2.2

Engineer

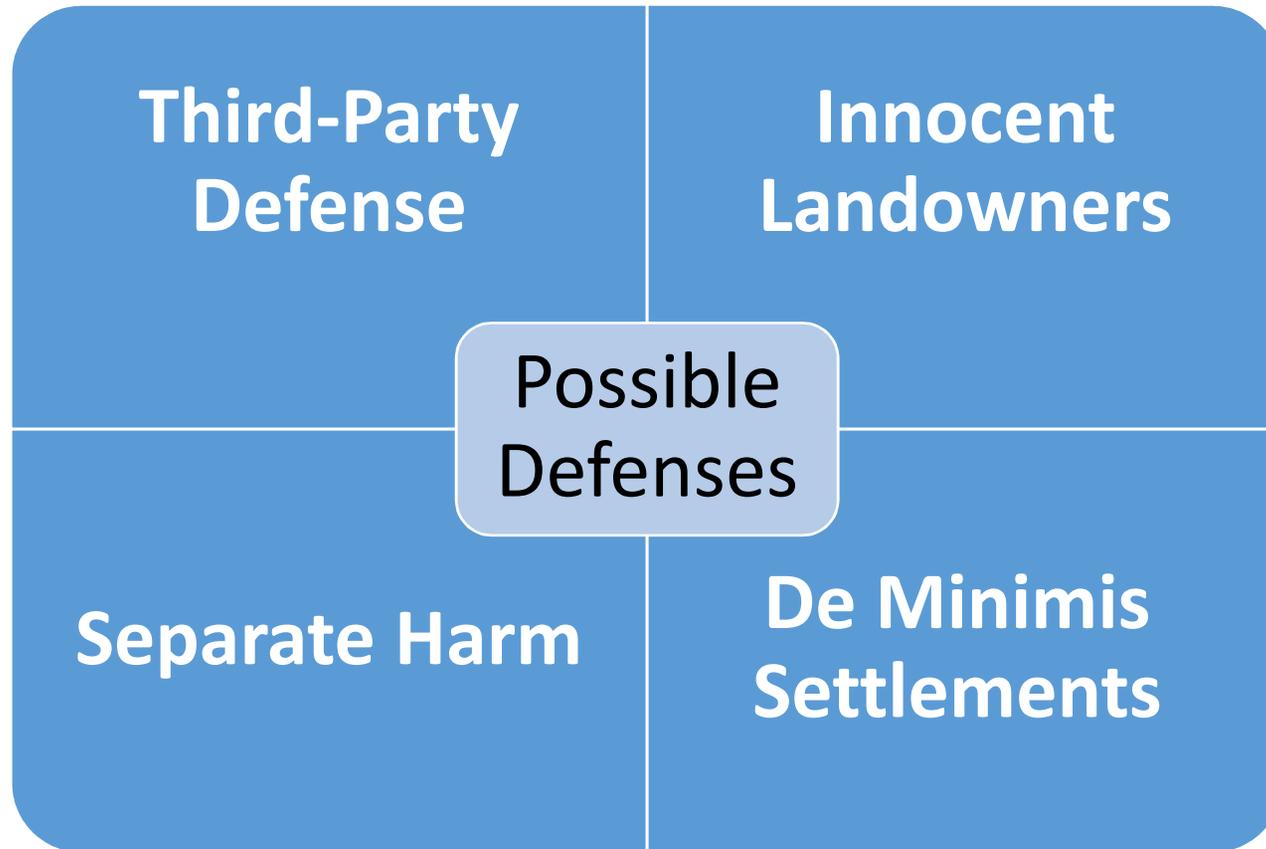
- *The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by **members of the subject profession** practicing under **similar circumstances** at the **same time** in the **same locality**. Engineer makes no warranties, either express or implied, under this Agreement or otherwise, in connection with any services performed or furnished by Engineer.*
EJCDC E-500 (2014), Section 6.01 A

Surveyor Standard of Care

“Surveyor’s services shall be conducted with the same level and degree of skill ordinarily exercised by members of its profession operating in a similar locality, at a similar time and under similar conditions and circumstances. Except as provided in this Section, no other warranties, express or implied, are offered or intended by the Surveyor.”

- North Carolina Society of Surveyors

Possible Defenses



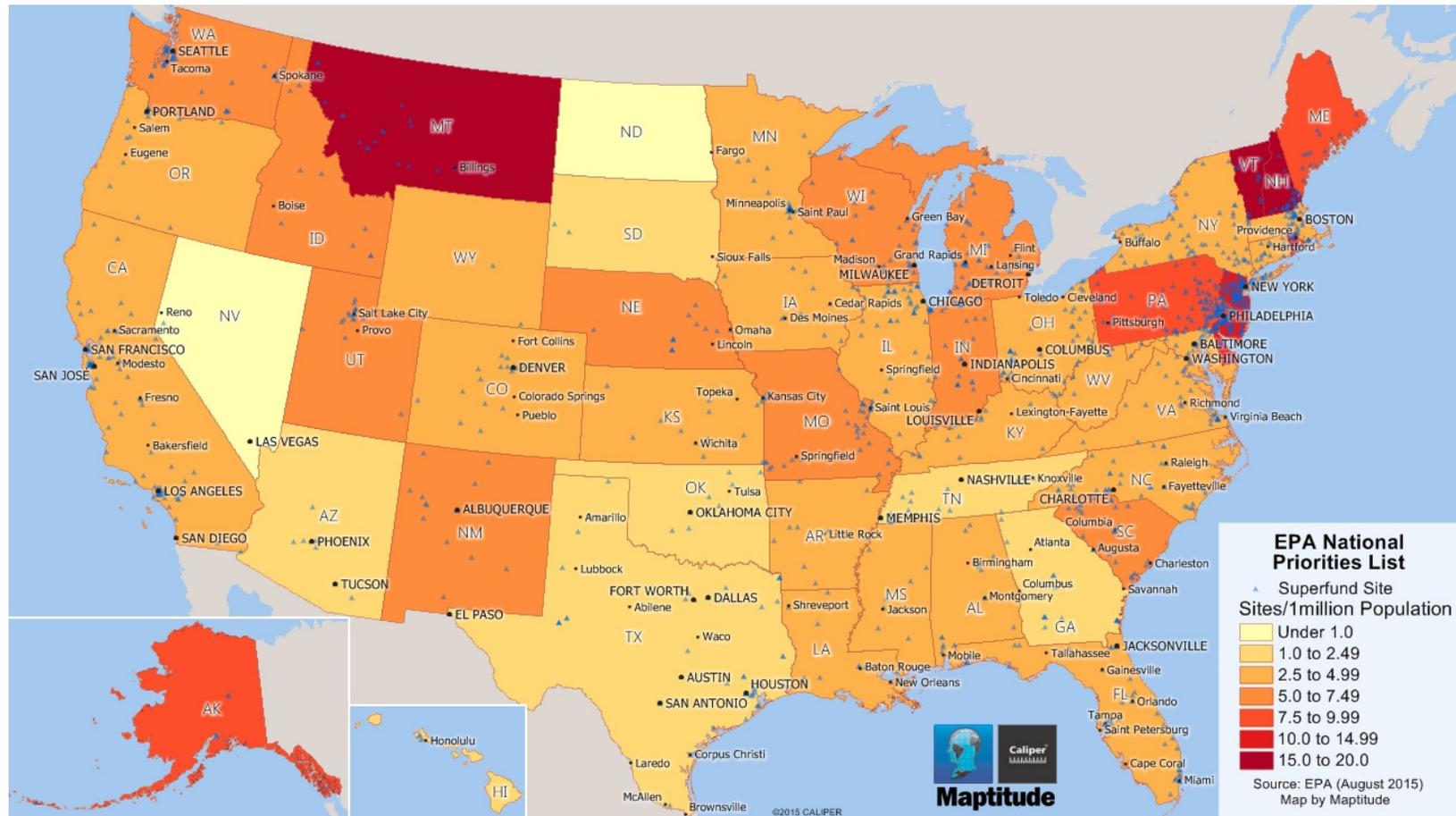


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Learning Objective
#4

Risk Management Tools

Superfund Sites



<http://www.caliper.com/featured-maps/maptitude-epa-superfund-map.html>

Stages of Risk Management

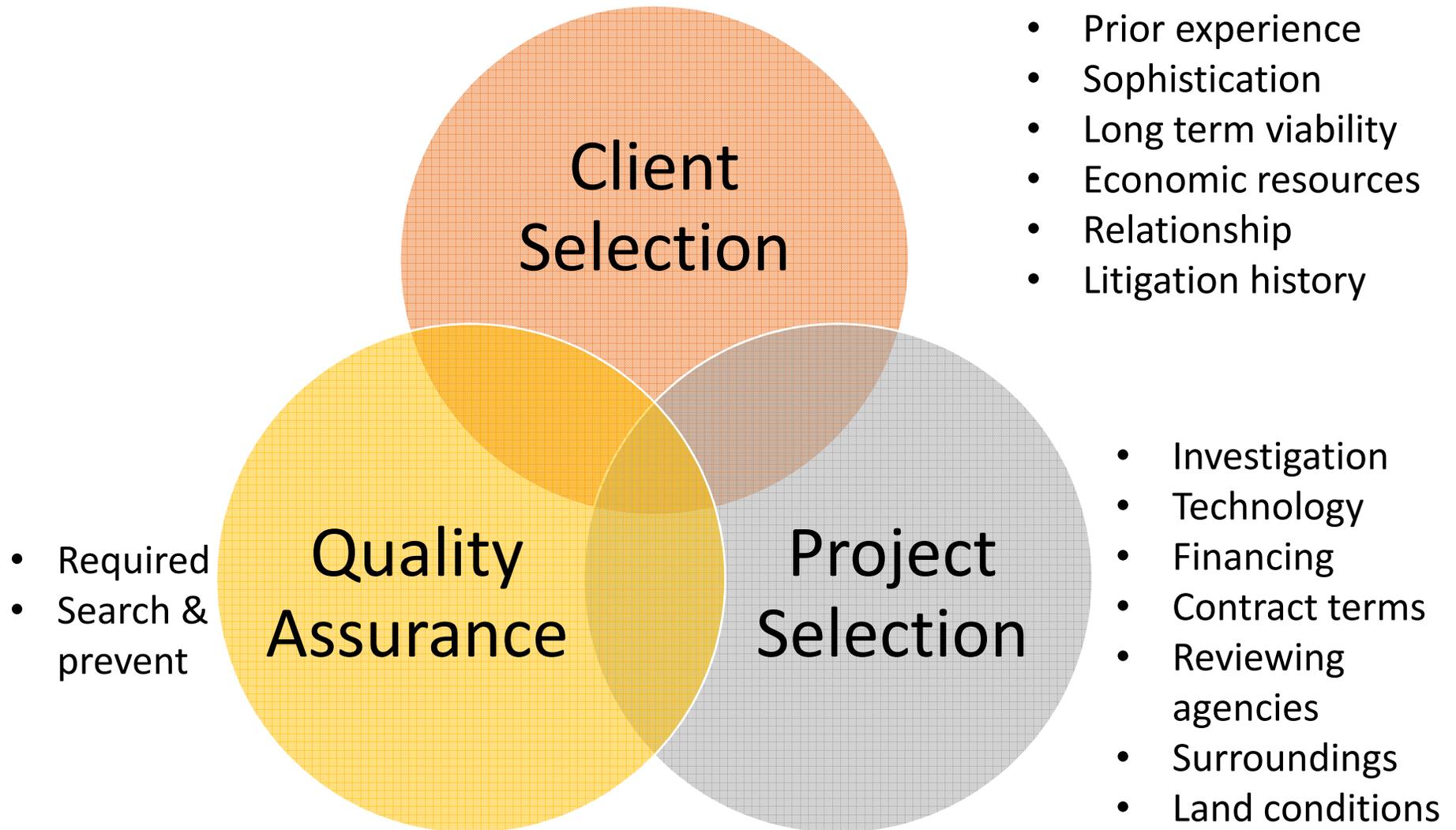


Risk Management Heat Map

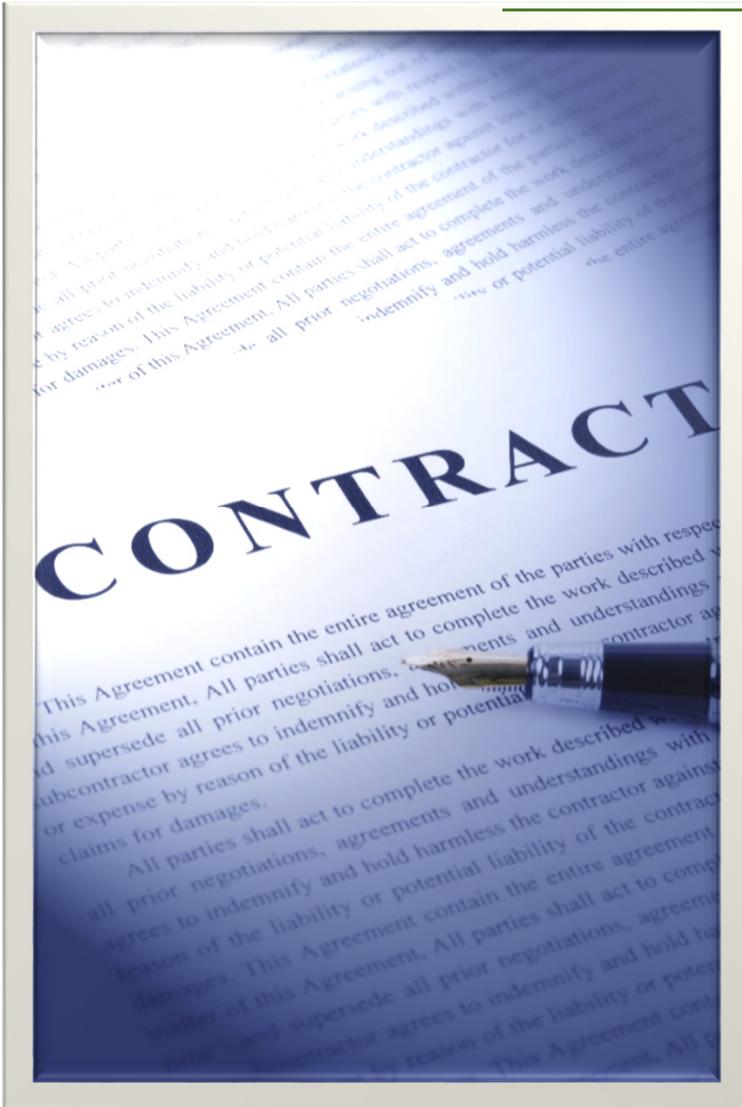
	Rare	Unlikely	Possible	Likely	Almost Certain
Catastrophic	M	M	H	C	C
Major	L	M	M	H	C
Moderate	L	M	M	M	H
Minor	VL	L	M	M	M
Insignificant	VL	VL	L	L	M

Very Low
Low
Medium
High
Critical

Loss Prevention Considerations



Managing Risk Before the Project



Know your limitations and submit proposals accordingly

Develop a Risk Management Plan

Structure your contract and allocate risks appropriately

Investigate the project site

Require owner to test project site before construction begins

Mandate safety trainings for employees

Scope of Services

- Services clearly stated?
- Any services new to you?
- Has time and money been allocated appropriately?
- Terms consistent with product specs, 3rd party standards, other contract docs?

Contract Language Examples

AIA

- *Unless otherwise required in this Agreement, the Architect shall have **no responsibility** for the discovery, presence, handling, removal or disposal of, or exposure of persons to, hazardous materials or toxic substances in any form at the Project site.*

AIA B101-2007, Section 10.6

EJCDC

- *Owner acknowledges that Engineer is performing professional services for Owner and that Engineer **is not and shall not be required to become** an “owner,” “arranger,” “operator,” “generator,” or “transporter” of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act (**CERCLA**), as amended, which are or may be encountered at or near the Site in connection with Engineer’s activities under this Agreement.*

EJCDC E-500, 2014, Section 6.10 F

Certifications

Based on your knowledge,
information, and belief

Professional
judgment

Accurate
and
reasonable

According
to scope of
services

Managing Risk During the Project

Inform the client of risks

Avoid key construction decisions

Avoid operations services

Don't assume additional liability

Immediately escalate any findings

References

CERCLA Overview

- <https://www.epa.gov/superfund/superfund-cercla-overview>

Potentially Responsible Parties (PRP)

- <https://www.epa.gov/enforcement/finding-potentially-responsible-parties-prp>

Toxic Substances Control Act

- <https://www.epa.gov/laws-regulations/summary-toxic-substances-control-act>

ATSDR 2015 Substance Priority List

- <https://www.atsdr.cdc.gov/spl/>

Thank you for your time!

QUESTIONS??

This concludes The American Institute of Architects
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