

# EC RISK REVIEW

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## Avoid Liabilities When Specifying Materials

*The following is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.*

If you are like most environmental consultants, you chose your profession because you like to design solutions and solve problems. Indeed you probably get your greatest pleasure from designing a unique facility or system. This is where environmental consultants feel most comfortable and where they can apply what they learned while earning their degrees.

As a matter of course, however, environmental consultants often find there is a parallel activity that must be performed in order to turn their designs into reality. You are often called upon to specify the materials to be used to execute your designs. This part of your responsibilities may be learned largely on the job. Few environmental engineering courses focus on this less glamorous but equally important skill.

In some cases, material specifications are general in nature, recommending a particular type of material or technology. In other cases you may call for a specific brand name or product model. Regardless, each time you specify a particular material, you are accepting a degree of liability. You are accepting responsibility that the material will perform its intended function in an acceptable manner and that it will not be harmful to the health or welfare of those who work on or later occupy the facility.

## A Clear, Present and Long-Term Danger

The liability related to specifying materials is both extensive and long term. Often, it is not until years have passed that a material fails or proves harmful, by which time damages and the cost of a remedy can be astronomical. What's more, it's a professional liability that can put an environmental consultant in a precarious position even if he or she followed the prevailing standard of care when specifying a material.

Consider that some materials that were widely used in the construction industry just a few decades ago – asbestos, PCB, fiberglass and lead-based paints, for example – were eventually determined to be hazardous. Like everyone else, environmental consultants were largely unaware of any potential for serious risk and commonly specified these materials for their projects.

Who knows which of today's new and untested synthetic products might eventually be found to be harmful to health – or simply fail to live up to expectations? Once a material is ultimately deemed ineffective or hazardous, clients and their team of lawyers will often try to hold environmental firms responsible for any financial damages or injuries that result. Never mind that these materials were widely considered safe, effective and the standard of the industry at the time they were used. These claims seem to imply that consultants need to be able to predict the future. Such claims discourage many consultants from specifying new products in their search for more effective and economical materials.

When specifying materials, you cannot simply rely upon word-of-mouth recommendations or manufacturer claims of quality and effectiveness. The prevailing standard of care calls for you to have personal experience or knowledge that a recommended material

will perform its intended function successfully under prevailing conditions. While environmental firms are not expected to conduct their own physical tests of a new material or system, they are required to keep up to date of the physical properties of the materials they specify and properly apply them in a generally accepted manner.

Court cases demonstrate how relying on second-hand information can prove expensive for both design and environmental firms. In one case, an architect was hired by a school district for a renovation project. Part of the project called for the architect to replace windows with insulation panels to help improve the school's energy efficiency. The architect specified a particular brand of insulation panel and the project was completed. Within two years, the panels began to warp, bow and deteriorate, allowing water and cold air to penetrate the building, resulting in \$300,000 in damages.

In a 1998 appellate court ruling, the architect was found liable for specifying the unproven type of insulation panel. During the trial, the plaintiff presented the testimony of a licensed engineer who stated that the panels were inappropriate because of their "dimensional instability" when exposed to the extreme weather conditions of upstate New York. The expert witness also testified that the architect deviated from the applicable standard of care by relying almost exclusively on the manufacturer's product literature.

Affirming an earlier court finding, the court of appeals found that the panels were indeed defective and the architect was held liable for failing to meet the prevailing standard of care. The court noted that the architect did not have personal experience with the product, nor had it conducted or requested laboratory tests to prove the new product's effectiveness. (*Brushon-Miora School District v. Fred H. Thomas Associates*, 692 N.Y.S. 2d 551.)

### **Avoiding Liabilities**

Fortunately, there are measures you can take to help avoid material specification claims. First, whenever possible, specify only those materials and technologies you know will do the job, are time-tested and proven in a particular application. Ask yourself: what would other reasonable environmental consultant do in similar circumstances? That sets the basis for the current standard of care. Also ask yourself: how would my

decision to specify the material play out in a deposition or on the witness stand? Would a judge or jury consider my actions reasonable?

If you decide to specify a new, unproven material, or one with which you are unfamiliar, do your research. Your goal is to be able to demonstrate that you made a reasonable, professional effort to confirm the suitability and reliability of the material. At a minimum:

- Collect brochures, product specification sheets, test results, warranties and guarantees from the manufacturer and keep them for your records.
- Read all application instructions and label warnings carefully.
- Look for collaborating evidence to support the manufacturer's claims, such as test results of an independent laboratory.
- Document your conversations with the suppliers regarding the product and its application in the specific circumstances, including any reservations you might have raised.
- Require the manufacturers, suppliers and installers to give assurances that the product is suitable for the intended application.
- Go over your findings with your client and seek agreement that your choice of materials is prudent.

*Don't hesitate to ask manufacturers' field representatives to be present during the installation to ensure that their material is installed properly and according to manufacturers' specifications. If feasible, ask the field rep to test the product under appropriate conditions.*

Another scenario presents a difficult dilemma. Suppose your client suggests or even insists that you specify a product you feel may not be safe or reliable. If, against your better judgment, you agree to specify a product that later proves to be flawed or dangerous, you can be liable for damages.

If your client insists on using a material that, although not life-threatening, is a product with which you are not comfortable – a question of quality, durability or ease of maintenance, for instance – put your objections in writing to your client. If the client overrules you, protect yourself by having this confirmed in writing. Ask for an indemnity. At a minimum, document these discussions and decisions.

If the material in question involves known health or safety issues, refuse to use it. You must look to the termination provisions of your contract rather than endanger the life or health of anyone.

You can also address these issues in your contract agreement with a provision that spells out and limits your responsibility. You and your attorney should consider contract language that has the client waive all claims and indemnify you from:

1. The specification and use of materials that are permissible under current building codes but that may, in the future, be discovered to be defective or harmful.
2. The use of any materials specified by the client.

*While you would ideally want a contract clause with these provisions in all of your contracts, some clients may balk at including such blanket language. In such cases, you could forego such a clause in the original contract and then add it as an addendum in the event of a questionable product specification from the client. Regardless, make sure you coordinate any such provisions with any code compliance clause, as well as with the provision you have concerning toxic substances.*

### **Conclusion**

Contractual protection is a recommended safeguard for shielding yourself from liability for specifying materials that later prove ineffective or dangerous. The best protection, however, is taking every reasonable step possible to make sure the products you specify will perform their intended function in a safe and effective manner. There is no substitute for experience, research and common sense when specifying materials.

A final note of caution: If you have any business association or financial interest with a supplier that could influence your judgment in specifying a material, it is always best to reveal that association or interest to your client. Otherwise, if a claim occurs, a conflict of interest can be alleged with the client claiming that you specified a material for your own interest, rather than in the interest of the client.

### **Can We Be of Assistance?**

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance.

We're a member of the Professional Liability Agents Network (PLAN). We're here to help.

### **Sidebar:**

#### **Substitutions for Specified Materials**

You put your reputation on the line every time you specify materials to be used in executing your design. But what if the contractor, a subcontractor or other party to the construction suggests a substitution for your original recommendation?

Here are some tips for minimizing and, when necessary, handling requests for substitutions for your specified materials:

- Develop and regularly update specifications that clearly define performance characteristics and other project requirements.
- Use a "Substitute Request Form" that must accompany any proposed substitution. Set forth the criteria that will be used in reviewing the acceptability of a substitution.
- Include in your contract steps that must be taken to request substitutions. Spell out the approval process. Also specify that you have the right to back charge the contractor for services related to the review of proposed substitutions.
- Be responsive to any substitution requests received. Should a dispute arise, courts do not look kindly upon consultants who fail to respond to or arbitrarily reject reasonable requests for substitutions.

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- Address the issues of specifications and substitutions in a pre-construction review of the construction documents. Include the client and all design and environmental professionals, contractors and major subcontractors. This will help identify those specified materials that may cause concerns among one or more parties. Calls for substitutions can then be addressed before construction begins.