

# Earth Day Master Class

## Resolving Dirty Dirt Disputes

Gideon Kracov – ADR Services, Inc.

Katherine “Kit” Cole – Kit Cole Consulting

Jon-Erik Magnus – Rogers Joseph O’Donnell PC

Alison Torbitt – Nixon Peabody LLP





# Our Speakers



**Katherine "Kit"  
Cole**

Kit Cole Consulting



**Gideon  
Kracov**

ADR services, Inc.



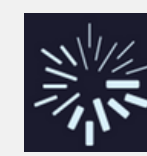
**Jon-Erik  
Magnus**

Rogers Joseph O'Donnell PC



**Alison  
Torbitt**

Nixon Peabody LLP





# Agenda

1. Earth Day and A Hypothetical Site
2. Navigating The Government Oversight Process, Environmental Forensics and Liability Protections
3. Public Participation and Communicating Risk
4. Litigation Tips and Working With Insurance
5. Resolving Dirty Dirt Lawsuits



# The Hypothetical

- Affordable Housing developer acquires a strip mall with a “clean” Phase I
- Financing party performs environmental due diligence (Phase I) and identifies former dry cleaner as a Recognized Environmental Condition (REC)
- Phase II subsurface investigation discovers chlorinated solvents, perchloroethylene (PCE) and trichloroethylene (TCE), on the subject property and migrating downgradient to neighboring residents





# The Players

## The Developer

Including Financing Parties, and the United States Department of Housing and Urban Development (HUD)

## Governmental Oversight Agency

Developer enrolls in Voluntary Cleanup Program with California Department of Toxic Substances Control (DTSC), Regional Water Quality Control Board (RWQCB) or AB304 certified Local Oversight Agency (LOA)

## The Public

Public participation is triggered for approval of Remedial Action Plan (RAP)/Corrective Action Plan (CAP) and on parallel track under CEQA, and public documentation of Geotracker/EnviroStor

## Potentially Responsible Parties (PRPs)

Identification of the dry cleaners' owners and operators and maybe others, and hopefully their respective insurers, through document review, insurance archaeology, forensic accounting, etc.



## Environmental Forensics:

# What Went Wrong, How to Solve it and Drafting the Narrative

- Assembling the right team/choosing the right consultants
- Remind all that the Developer did not cause or contribute to the contamination
  - *Reminder to make sure this remains true! (Due care)*
- Protect human health and environment, while remaining commercially feasible
- Satisfy oversight agency, financing parties, neighbors, and future buyers and lenders!?!
- Remember end goal, while exploring:
  - Who is the Responsible Party for VCP
  - Purchase agreement provisions
  - Access & indemnification agreements
  - Environmental insurance



# Property Setting:

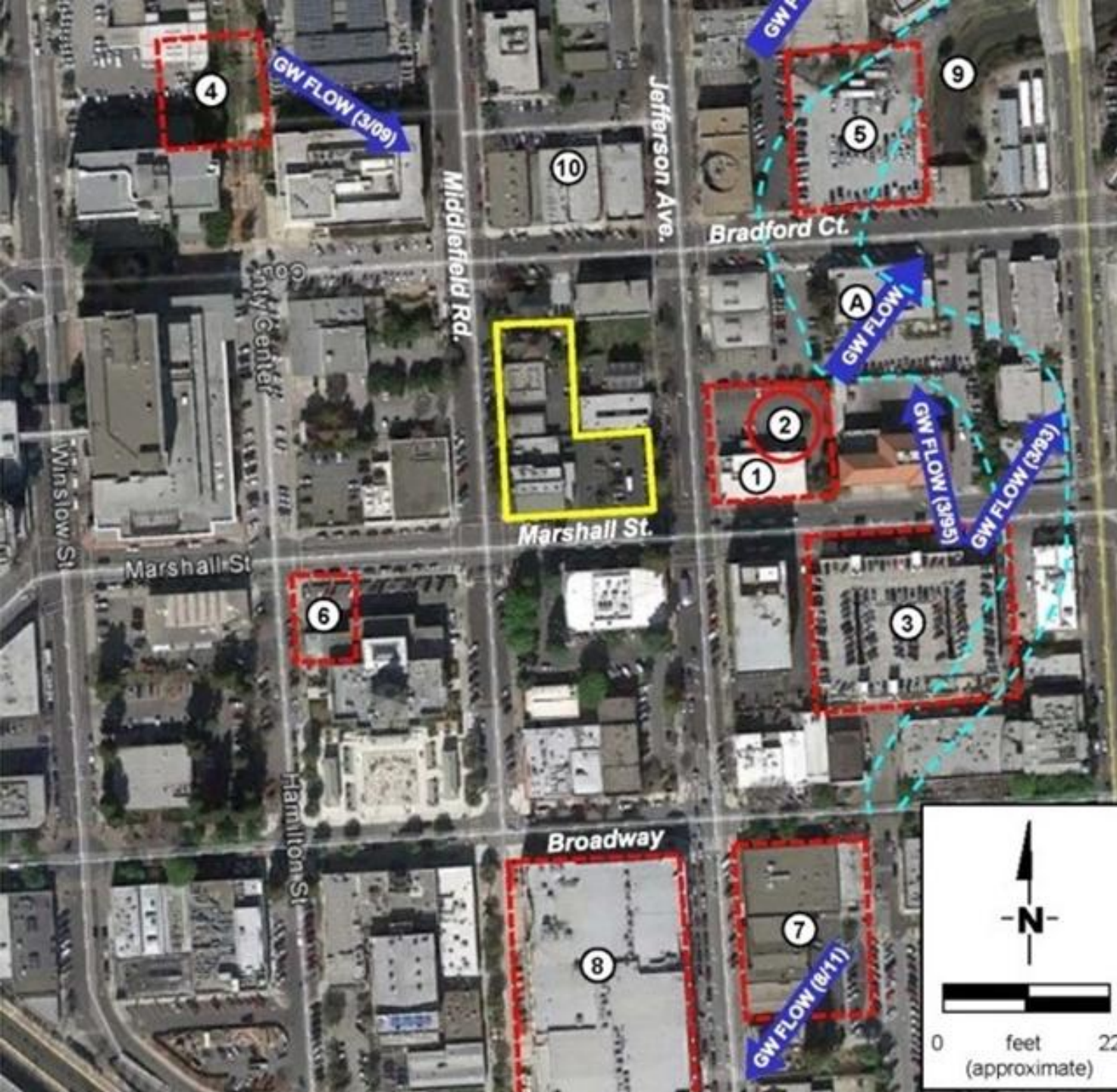
## Whose Contamination is it? On-Site vs. Off-Site

Evaluate adjacent and surrounding property uses and releases

Topographic & hydrogeologic setting.

This is important to get right because this determines what risk other sites may pose:

- **Upgradient**—groundwater flows from an upgradient site to your Site; or
- **Crossgradient**—groundwater flows parallel to your Site
- **Downgradient**—groundwater from your Site flows to downgradient Sites



SOURCE: Google Earth Pro, 2014.

75 Jefferson; Union Bank; PG&E release site (active); former 500,000 ft<sup>3</sup> "Gas Holder" (AST); Natural Gas footprint of former PG&E "Gas Holder"; 1914-1959  
50 Marshall St.; Parking Structure; former PG&E MGP release site; Closed 6/12/97  
Leaking UST Site Study Area; County Motor Pool Facility; 455 County Center (590 Hamilton); Closed 5/14/11  
Bradford Parcels" Impacted Fill Material Site, 707 Bradford St.  
Leaking UST Site Study Area, "Old Courthouse", 711 Hamilton, Closed 3/25/93  
075 Broadway and "1017 Middlefield" Culvert Realignment site; Closed 5/23/14  
Below Grade Parking Garage Dewatering; 850 Broadway  
Redwood Creek  
Buildings removed; apartment complex redevelopment site

GW FLOW  
— Measured or Reported Direction of Shallow Groundwater  
A — Assumed Direction; reported in 1-12-11 Site Characterization Report  
Haley & Aldrich  
B — Assumed Direction; Reported in 4-17-06 Additional Evaluation Report  
Green Environmental Inc.

TITLE: Site Vicinity Map			
LOCATION: Redwood City, California			
 <b>TETRA TECH</b>	CHECKED:	TC	FIGURE
	DRAFTED:	GK	
	FILE:		
	DATE:	07-22-14	



# Vapor Intrusion

The Phase I ESA standard only requires identifying the potential for vapor migration, not to assess it :::::

## Vapor Sources

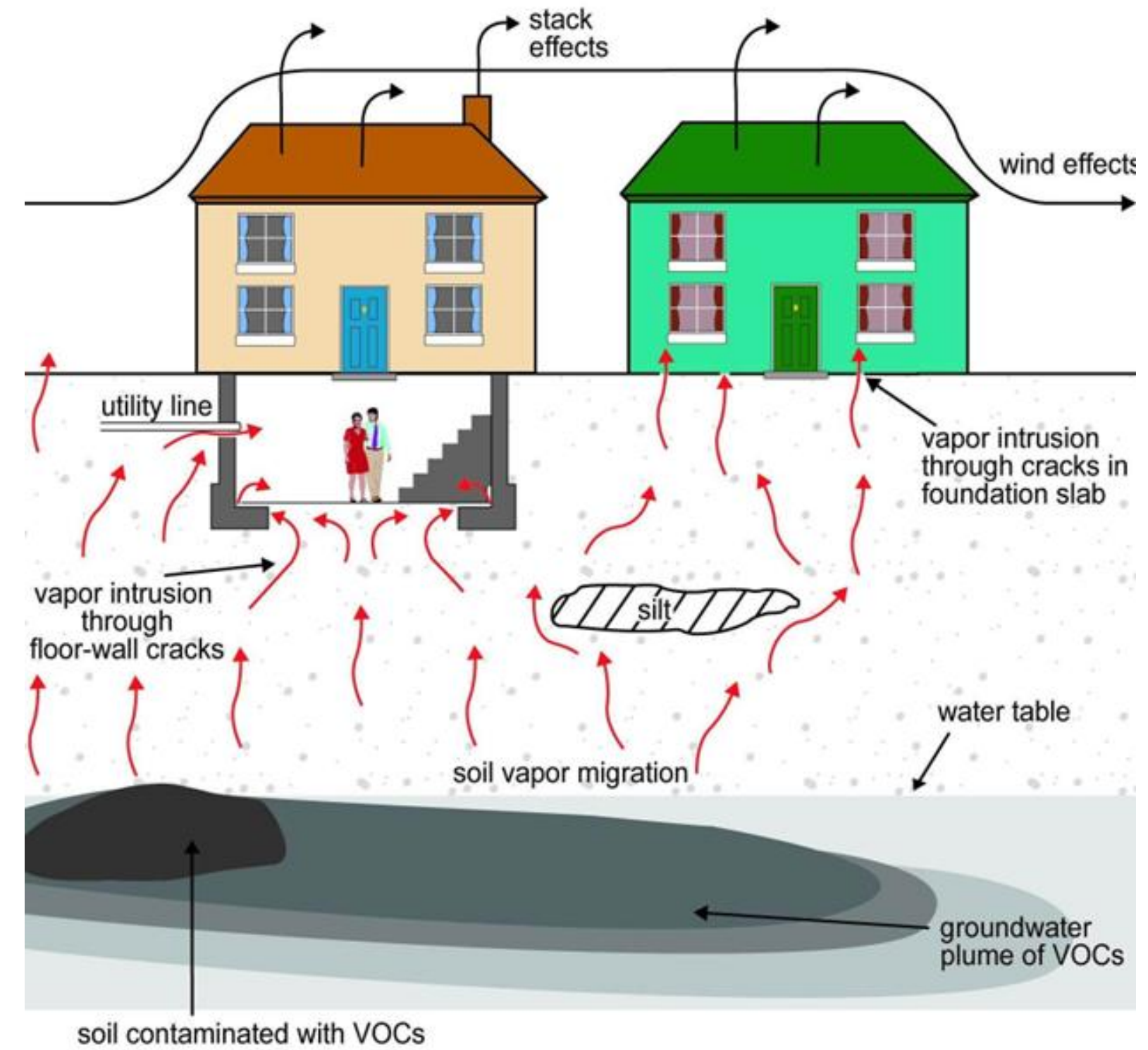
- Anthropogenic VOCs in soil & GW
- Naturally occurring methane & radon

## Human Health Risks

- Carcinogenic
- Toxic (values >)
- Explosive (methane)

## Regulatory Risks

- Agency screening levels keep going down
- The SFRWQCB lowered screening levels January 2019 by 20 times
- Screening levels vary per state; in California it varies by agency



Source: [www.epa.gov/vaporintrusion](http://www.epa.gov/vaporintrusion)



# Phase I ESA | Liability Protection

## CERCLA Defenses:

- Innocent purchaser
- Bona Fide
  - Prospective
  - Purchaser
- Contiguous property owner

- Defenses only apply if the entity claiming the defense has undertaken “All Appropriate Inquiry” before acquiring the property
- All Appropriate Inquiry is defined by regulation to be a Phase I ESA that meets ASTM standard E1527-21
- If your report does not satisfy that standard, and is not issued to the right party, the defenses will be inapplicable
- Also require compliance with certain continuing obligations
  - Appropriate/due care with respect to existing contamination





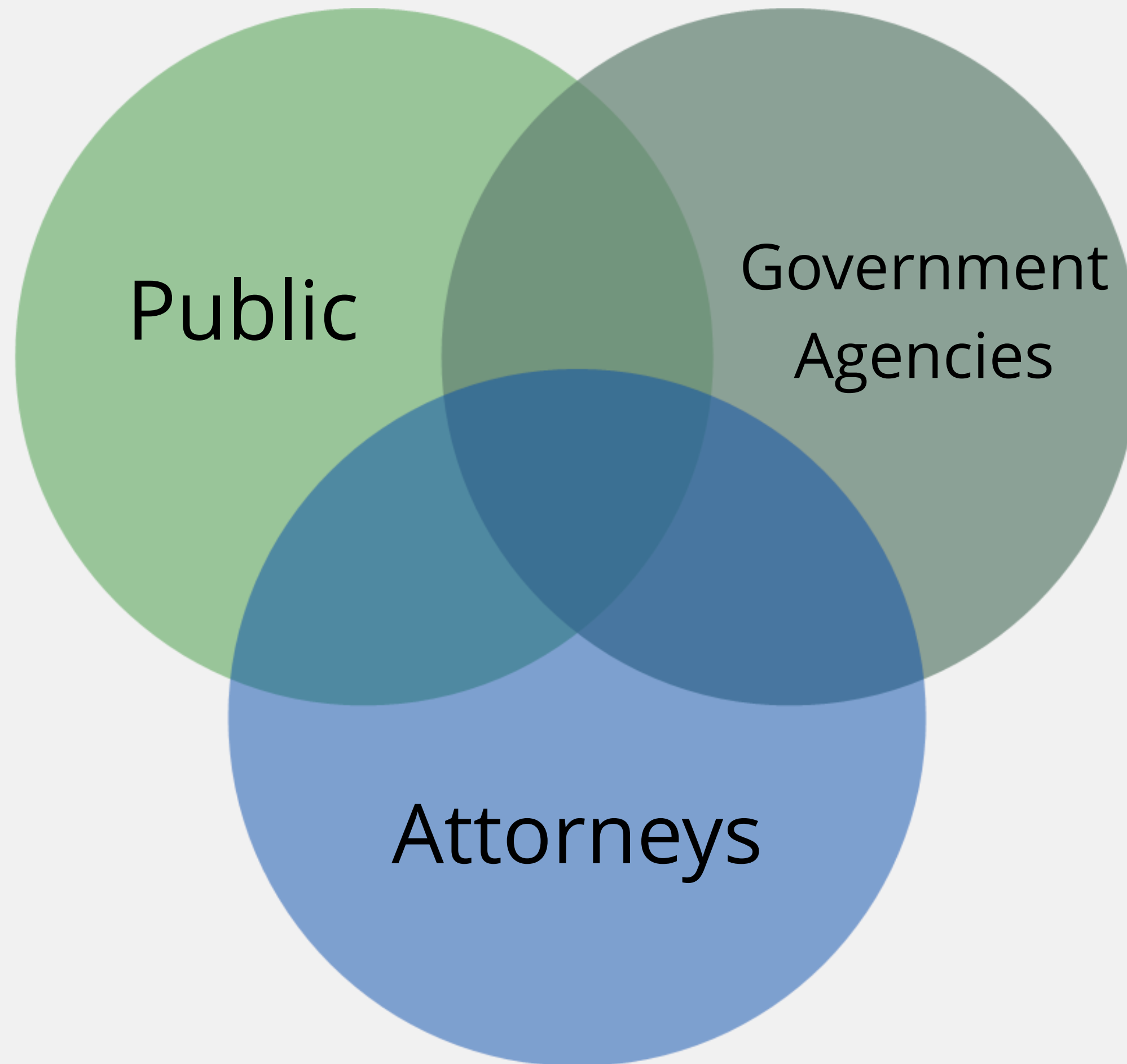
# Public Participation Rules for Our Site

Cal. Water Code Sections 13307.5 and 13307.6 mandate public participation activities for sites under cleanup and abatement orders (CAOs)



- HSC Section 25356.1 spells out public participation requirements that must be met before DTSC issues a final remedial action plan
- HSC Section 25358.7 mandates that DTSC provide any person affected the opportunity to participate in DTSC's decision-making process regarding that action.
- HSC Section 25358.7.1 allows an affected community to establish a community advisory group to review any response action









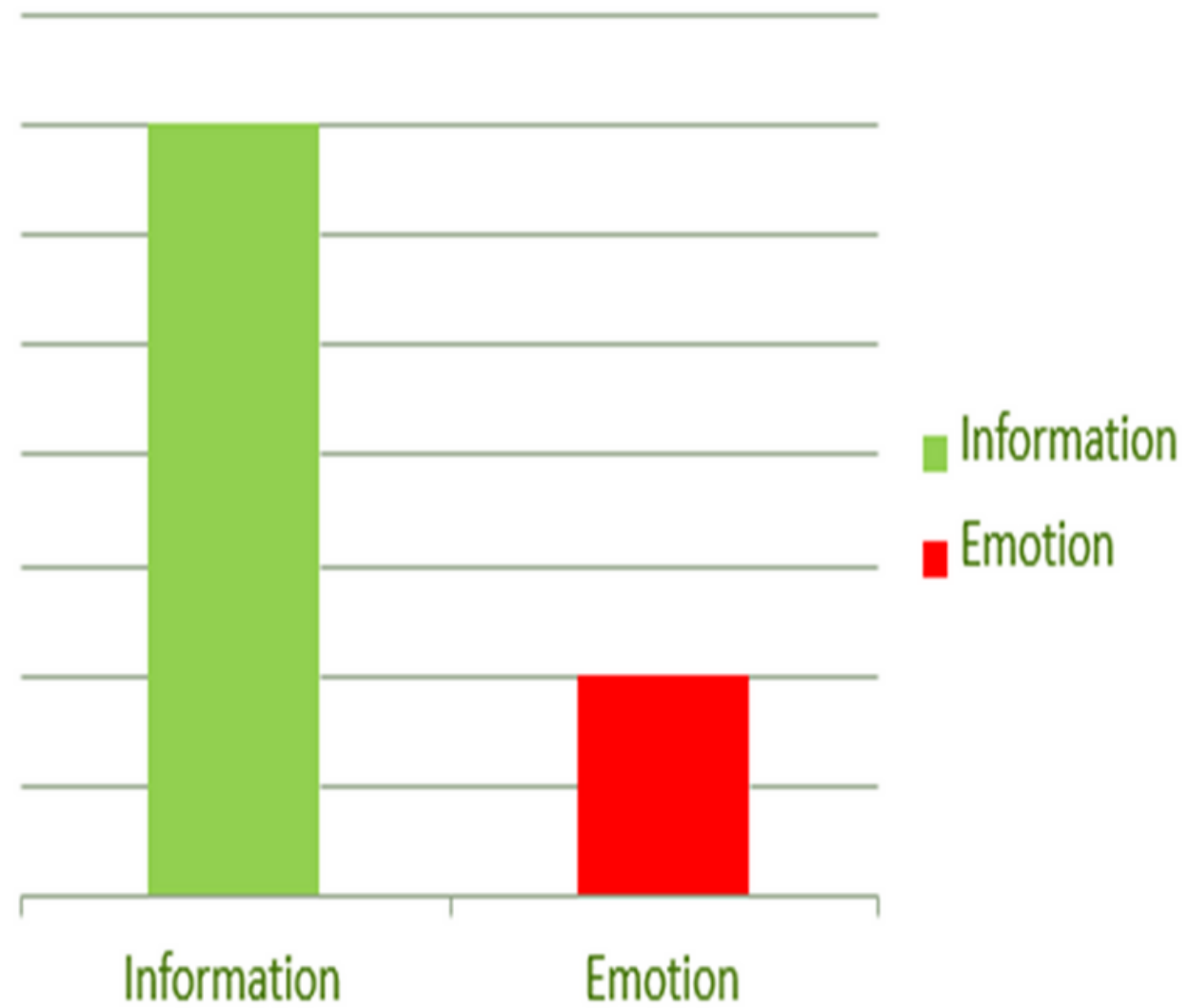
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Risk = Hazard + Outrage

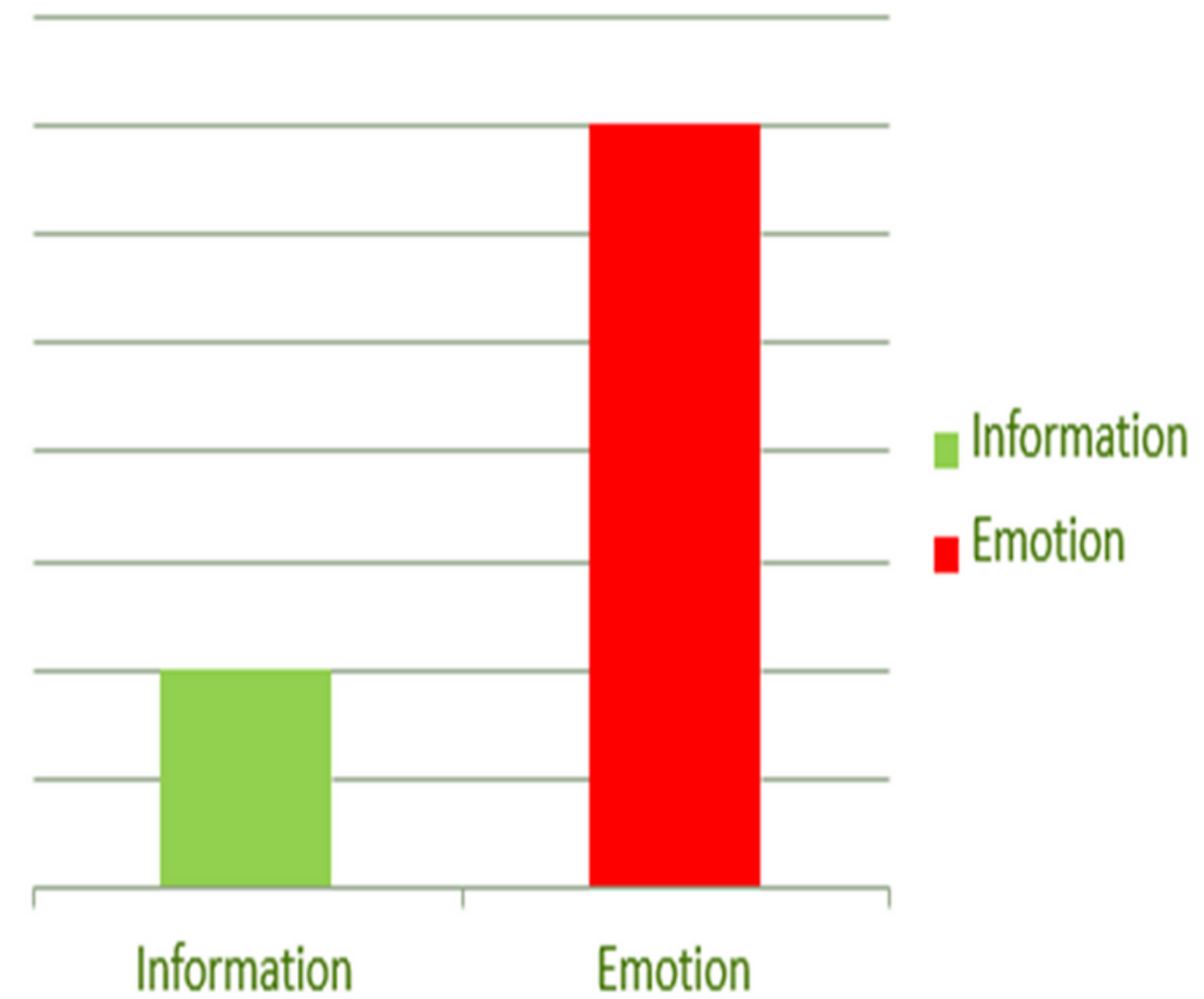
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"Normal" Conditions



High Emotion Conditions



# Information & Emotion



For resources and training, look to IAP2 ([www.iap2.org](http://www.iap2.org))



Source: [City, residents protest disposal of fire debris in Calabasas Landfill](#) - Los Angeles Times



# Designing the P2 Process

1



**KNOW  
YOUR  
"WHY"**

2



**CREATE A  
TEAM  
(DON'T GO  
IT ALONE!)**

**TEAM OF  
SUBJECT  
MATTER  
EXPERTS**

3



**UNDERSTAND  
YOUR STAKE-  
HOLDERS**

4



**MAKE A  
PLAN**

5



**IMPLEMENT,  
MONITOR  
AND TWEAK**



# Environmental Litigation – *Here we go!*



Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA): strict, joint, and several liability for cleanup costs can extend to current and past owners, operators, generators, and transporters who selected the disposal site.

Resource Conservation and Recovery Act (RCRA): strict liability for hazardous waste management issues for current and past owners and operators of facilities, generators, and transporters who handled or disposed of hazardous waste.

California's Hazardous Substance Account Act (HSAA): owners and operators of property with hazardous substance releases are strictly liable for cleanup costs

Torts (Nuisance, Trespass, etc.)



# Define Litigation Goals Prior to Suit

*Litigation goals are a  
product of due diligence and  
thoughtful strategy*

1. Cost Recovery
2. Reimbursement Agreement
3. Injunctive Relief



## Other Objectives:

1. Triggering insurance
2. Incentivizing  
recalcitrant PRPs
3. Issue specific resolution



# Insurance Coverage for Historical Contamination

Generally limited to pre-1985 policies

**Post-1985**, general liability policies contain absolute or total pollution exclusion. But review all of the policies you can locate

Policies **prior to 1985** may contain a “sudden and accidental” pollution exclusion

40 Years Post-Absolute Pollution Exclusion - How to Find Historical Policies





# Insurance Recovery Without a Viable Policyholder



## Probate Code 550 – Deceased Individuals

Allows for a “direct action” against an insurer to recover up to the amount of the insurance without involving probate.

## Cal. Corp. Code § 2011 – dissolved corporations / shareholders

Allow for an action against a dissolved corporations or shareholders of dissolved corporations



## SECTION I – COVERAGES

### COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

#### 1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

# Triggering Coverage:

- A lawsuit is needed to trigger policy benefits including the duty to defend.
- Generally, a carrier's duty to defend under standard CGL policies includes reimbursement of site investigation expenses, including pilot study costs.
- Beware of and understand the risks of the carrier's reservation of rights and ability to recoup uncovered costs.





# Working With Other RPs and Their Insurance Carriers

- Identify all other PRPs (and their insurance) potentially connected with the site.
- Develop strategy re: other PRPs
  - Do you go after all PRPs or use cost benefit analysis to target specific entities.
  - How do you get everyone necessary to the table.
- Working together
  - Can site investigations be shared by PRPs and their carriers?
  - How to develop an agreed scope of work for all parties.
  - Joint investigations can result in tremendous cost savings.



# Mediation and Settlement of the Dirty Dirt Case





# Thank You

For Your Attention

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