

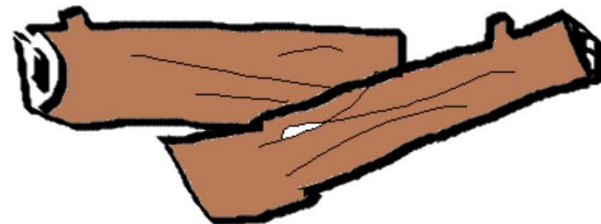
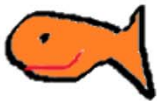
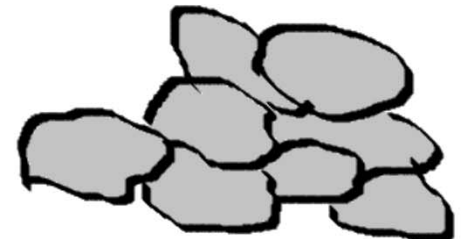
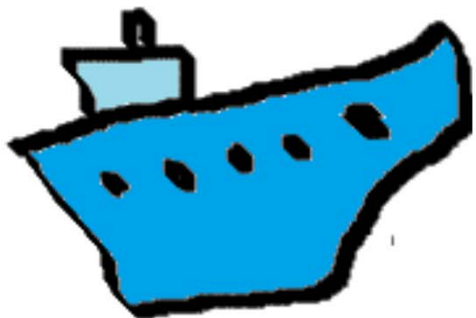
**Differing Site Condition Claims in Dredging Projects**  
**A Legal Framework for Understanding  
and Evaluating Claims**

Colin G. Van Dyke and Lisa F. Glahn

# The Good, The Great, and the Ugly



# What's Down There?



# Who Bears the Risk?



No contingency = Contractor bears risk

Contingency = Owner bears cost (every time)

DSC = Owner retains some risk

# Differing Site Conditions

## Type I

Subsurface or latent physical conditions at the site which differ materially from those indicated in the contract.

# Type I Claims

1. Indications of subsurface conditions in K
  - Including reports and geotech data
  - Express or implied
2. Contractor's interpretation and reliance = reasonable
3. Actual conditions = materially different and reasonably unforeseeable
4. Adjustment relates to DSC

# Differing Site Conditions

## Type II

Unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

# Dealing with Conflicting Provisions

DSC

vs.

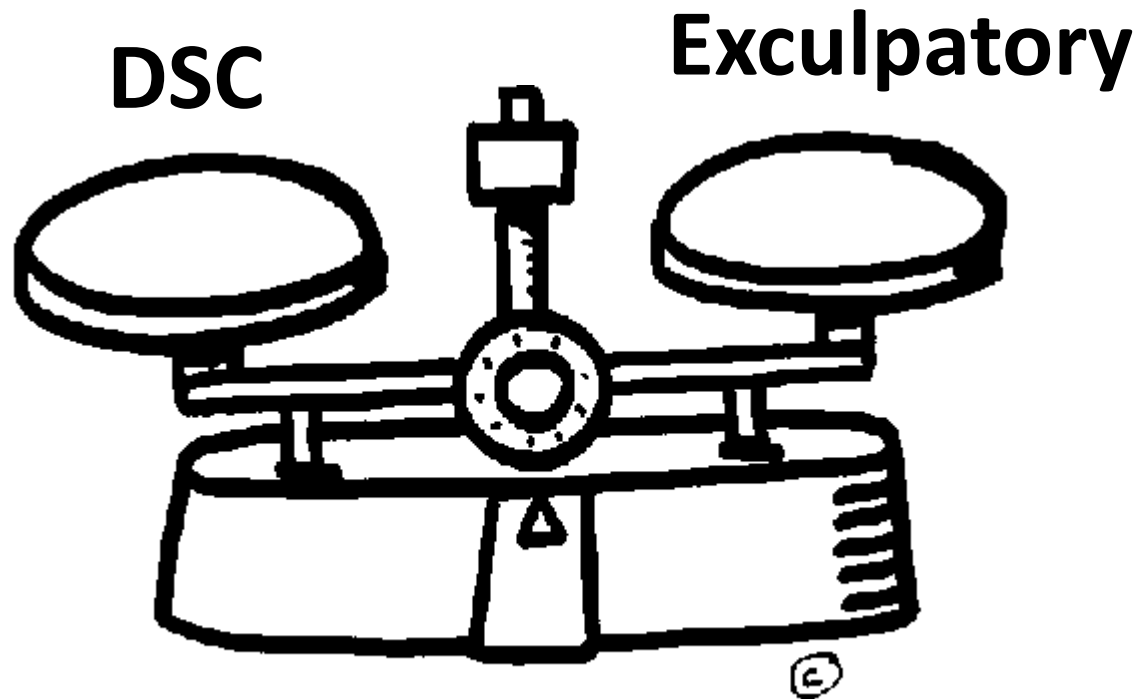
Exculpatory Clause



# Examples of Exculpatory Clauses

- Disclaimer: exclude subsurface information in bid package from contract
- No guarantee that info is accurate
- Bidder must make own determination
- All areas unclassified / bidder must be prepared for all conditions
- Bidder must perform investigation

# Courts Favor DSC Provisions






## **But DSC Not a Slam Dunk**

- Courts won't ignore exculpatory clause
- Likely to be less forgiving

## Courts/Boards will look at:

- How explicit was disclaimer?
  - Did contractor review all information?
  - Was contractor's investigation reasonable?
  - Did contract docs contain obvious errors?
- 
- Did contractor satisfy notice requirements?
  - Contract
  - Course of dealing

# Harmonize DSC and Exculpatory Language

- Require site investigation without precluding all DSC claims
- Are you the owner?
  - Carefully exclude information from contract
  - Memorialize that you shared all information in your possession re: site conditions
- Are you the contractor?
  - Document investigation, what you reviewed, how you developed your estimate, and make that's reasonable
- Limit types of recoverable costs (for example, direct costs)
- Structure notice provisions to allow for flexibility

## Keep in Mind

- Keep the focus on the project
- Prevention is the best medicine: litigation and delay are expensive
  - Spend extra time defining expectations up front