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CONSTRUCTION SCHEDULE DELAYS

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What We Will Cover:

- Chapters 1, 3, 4, & 5
- Define Key Terminology
- Identify and Evaluate Defenses to Delay Claims
  - No-Damages-for-Delay Clauses
  - Concurrent Delay
  - Trade to Trade Clauses
- Explore Delay Damages
  - The Current State of the *Eichleay* Formula



The Nature of Delay Claims

- The basis for delay claims arise from either an express contractual obligation to perform within a given timeframe or the implied obligation not to delay, hinder or interfere with the performance of the other party.



Two Types of Delays

- Excusable Delay
- Nonexcusable Delay



Types of Delays - Continued

Excusable Delays are either:

- Compensable
- Noncompensable



Types of Delays - Continued

Excusable Compensable Delays

- Remedy granting clause
- Implied duty breach
- Contractor must be “free of fault”



8.3 Delays & Extensions of Time 1997/2007 AIA General Conditions

- 8.3.1 If the Contractor is delayed at any time in the . . . progress of the Work by any act or neglect of the Owner or Architect, … or by changes ordered in the work, or by labor disputes, fire, unusual delay in deliveries … or other causes beyond the contractor's control, … then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.



Federal Acquisition Regulation 52.249-14 (Excusable Delays)

- The contractor shall not be in default … if the failure arises from causes beyond the control … of the contractor. Examples of these causes are (1) ***acts of God*** or of the public enemy, (2) ***acts of government*** …, (3) ***fires***, (4) ***floods***, (5) ***epidemics***, (6) ***quarantine restrictions***, (7) ***strikes***, (8) ***freight embargoes***, and (9) ***unusually severe weather***.



Typical Causes of Compensable Delays:

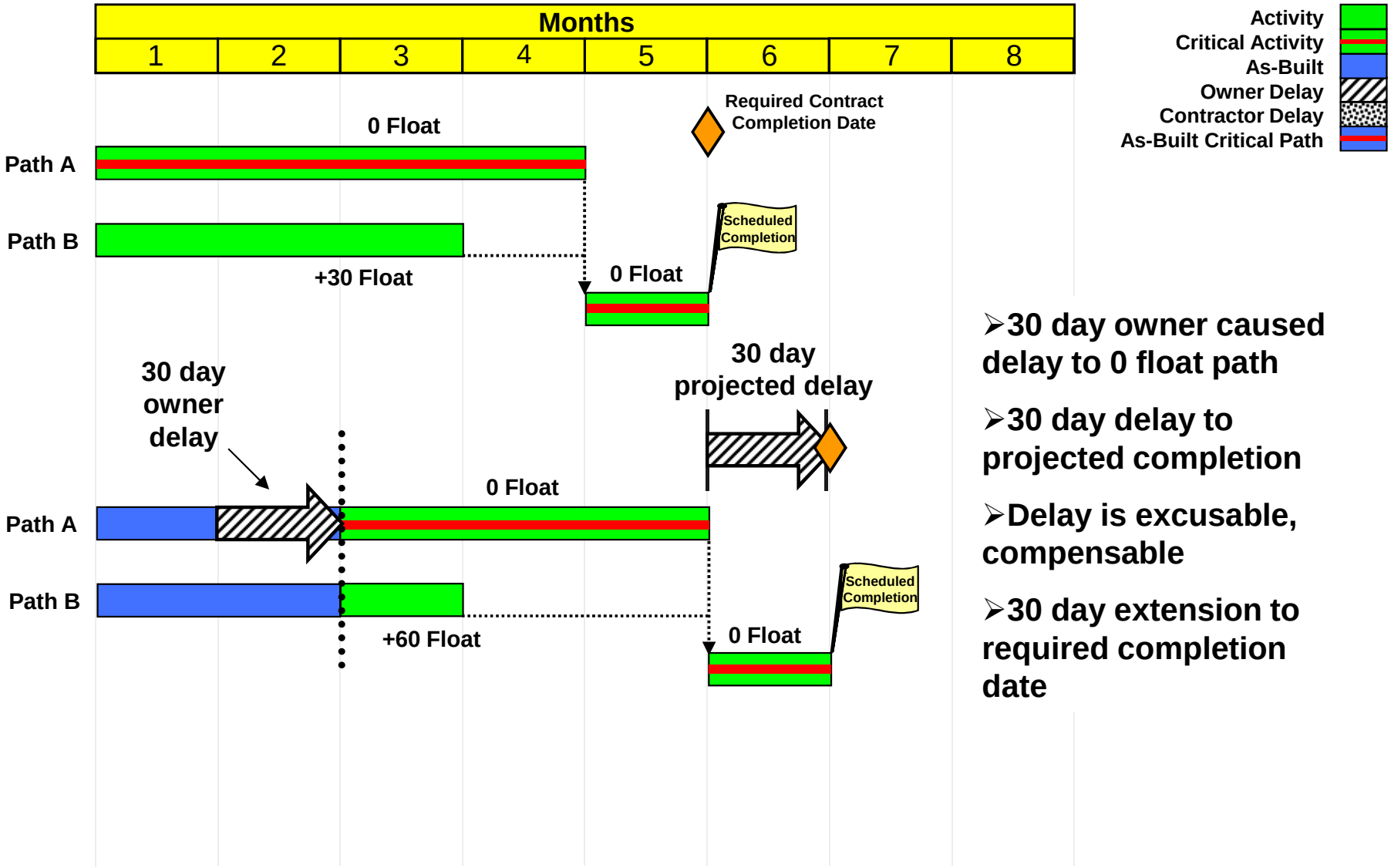
- Defective Drawings or Specifications.
- Failure to Provide Access
- Improper Site Preparation
- Failure to Supply Materials or Labor
- Failure to Provide Plans/Approve Shop Drawings.
- Failure to Coordinate Parallel Prime Contractors



Typical Causes of Compensable Delays: Cont'd

- Failure to Give Timely Work Orders.
- Failure to Make Timely Payment to Contractors
- Failure to Inspect/Over-inspection
- Work Suspensions
- Excessive Change Orders
- Failure to Accept Completed Work
- Acceleration

Owner Delay



- 30 day owner caused delay to 0 float path
- 30 day delay to projected completion
- Delay is excusable, compensable
- 30 day extension to required completion date

Figure 1-1



Types of Delays - Continued

Excusable Non-Compensable Delays

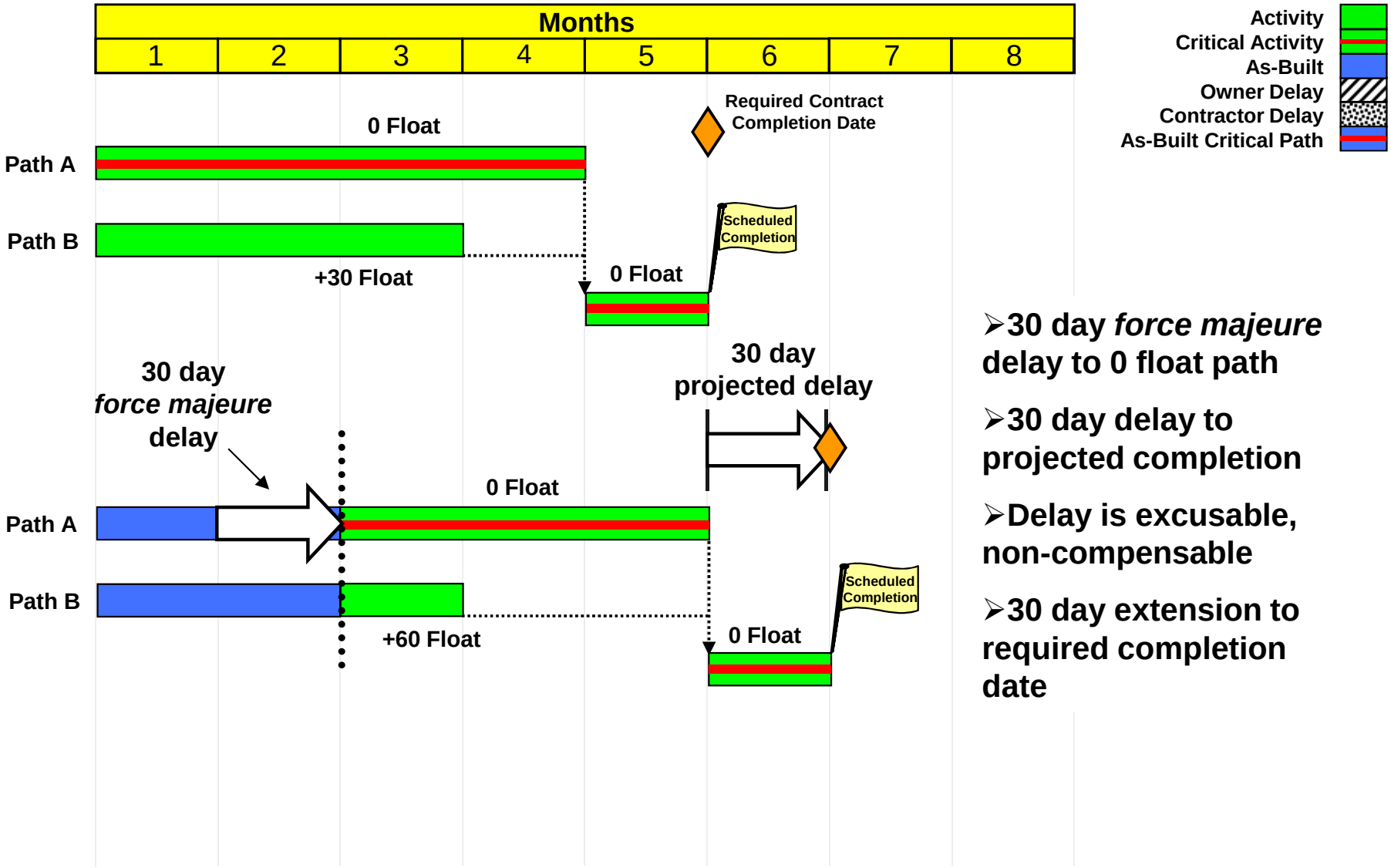
- Unforseeable
- Absence of control
- Typically enumerated in contract



Typical Causes of Noncompensable Excusable Delays (Force Majeure)

- Weather
- Acts of God
- Labor Problems

Force Majeure Delay



- 30 day *force majeure* delay to 0 float path
- 30 day delay to projected completion
- Delay is excusable, non-compensable
- 30 day extension to required completion date

Figure 1-2

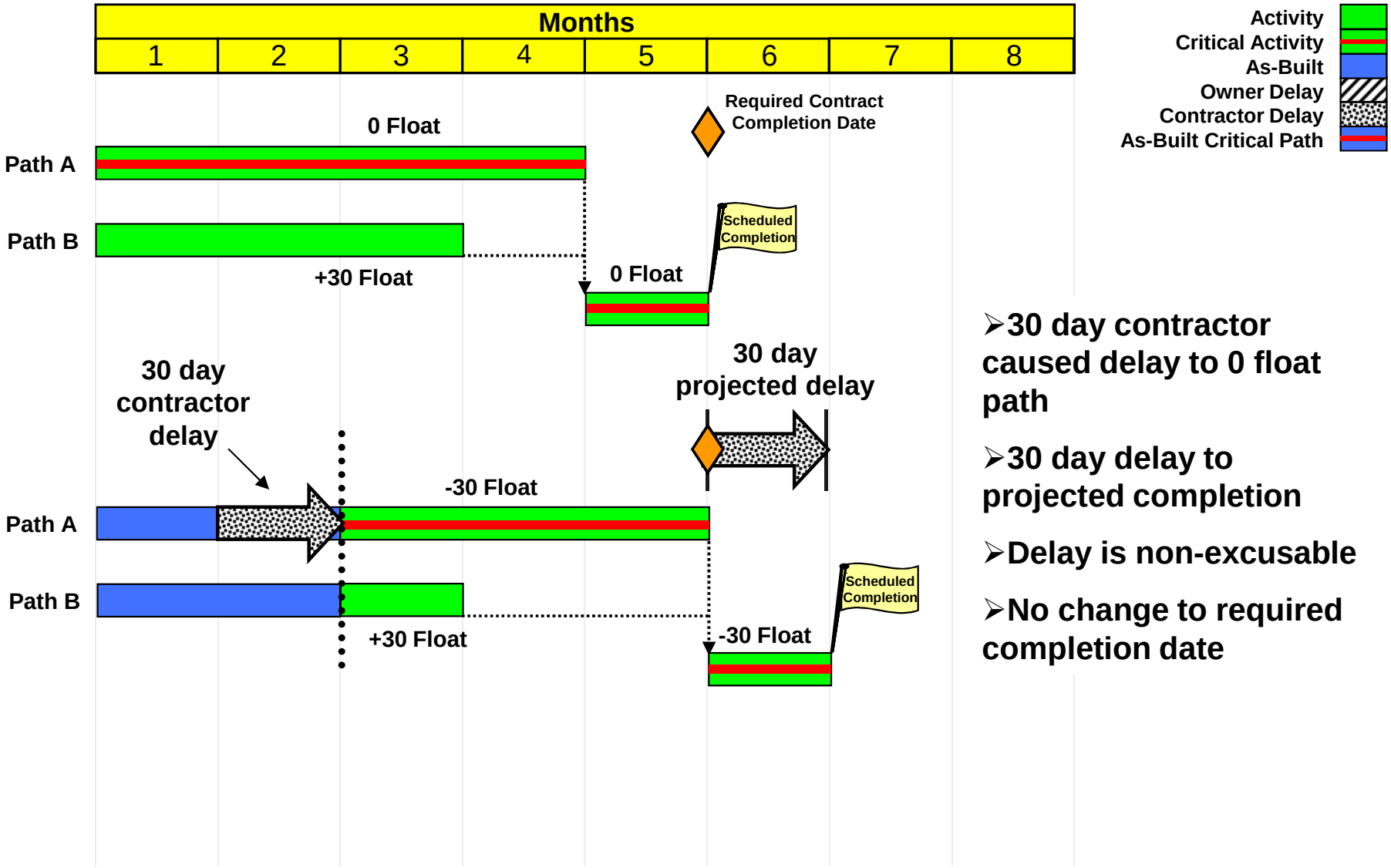


Types of Delays - Continued

Nonexcusable Delay

- Act or neglect by contractor/subcontractor

Contractor Delay



- 30 day contractor caused delay to 0 float path
- 30 day delay to projected completion
- Delay is non-excusable
- No change to required completion date

Figure 1-3



Expert Testimony

- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)
- FRE 702
- Four-Part Test
- Whether testimony rests on a reliable foundation and is relevant



Expert Testimony - Continued

Four-Part Test

- Specialized knowledge that is helpful
- Based in sufficient facts/data
- Reliable methods
- Reliable application



Expert Testimony - Continued

- CPM schedule generally accepted
  - *See Weaver-Bailey Contractors, Inc. v. U.S.*, 19 Cl. Ct. 474 (1990)
- Cautionary Note
  - *See Mega Const. Co., Inc. v. U.S.*, 29 Fed. Cl. (1993)



Legal Issues

- Burden of Proof
- Suspensions versus delays
- Right to finish early
- Acceleration
- Concurrency
- Waiver



Legal Issues – Burden of Proof

- Burden on contractor
- Must show:
  - Extent of delay (CPM preference)
  - Proximate cause
  - Harm



The Claims Process

- A CPM analysis is required to show the relationship between each delay event and its impact on the project schedule;
- Types of Analyses:
  - Contemporaneous CPM Schedule
  - Windows Analysis
  - Impacted, As-Planned Schedule
  - Collapsed, As-Built/But For Schedule



The Claims Process – Cont'd

- The 1984 & 1987 *Santa Fe, Inc.* decisions indicated the VABCA's preference for contemporaneous schedules when assessing delay claims.

- *Santa Fe, Inc.*, VABCA No. 2168, 87-3 BCA ¶ 20,104 – "*in the absence of compelling evidence of actual errors in the CPMs, we will let the parties 'live or die' by the CPM applicable to the relevant time frames*."



P.J. Dick, Inc. v. Principi, 324 F.3d 1364 (Fed. Cir. 2003)

- Commented that the CPM used during the course of the project were “properly constituted in its logic and assiduously and properly maintained throughout the course of the project. This circumstance is in sharp contrast to the usual problems we encounter in dealing with CPMs where warring as-built schedules are constructed by the parties after the fact because the CPM was either never properly prepared or was not updated in accordance with the contract scheduling requirements.”



Suspensions

- **Definition:** A suspension is a form of delay that results from the owner's purposeful interruption of work.

- Two Types:
- ***Directed Suspension***.
- ***Constructive Suspension***.



Suspension of Work Clause FAR 52.242-14

- (a) The Contracting Officer may order the Contractor in writing, to suspend, delay or interrupt all or any part of the work …
- (b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed … ***an adjustment shall be made for the increase in the cost of performance*** of this contract ….



Constructive Suspension

- (b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed or interrupted (1) by an act of the Contracting Officer in the administration of the contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified) …



Suspension - Elements

Contractor must show:

- Proximate cause of delay
- Delay was unreasonable
- Harm



Right to Finish Early

Contractor must show:

(1) it intended to completion the project early;

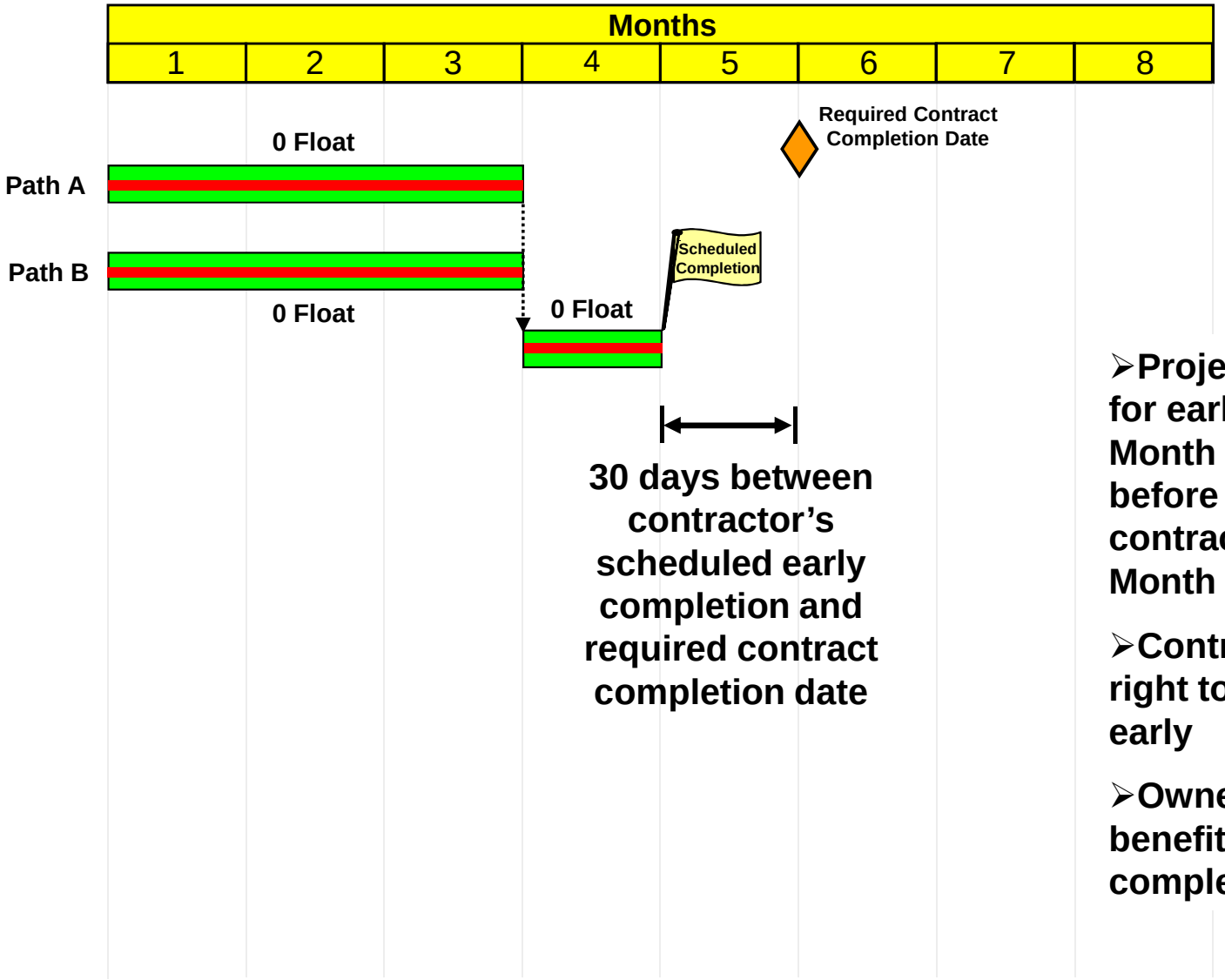
(2) it had the capability to do so; and

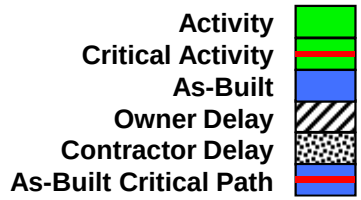
(3) It actually would have completed early, but for the Government's actions.

See Interstate General Gov't Contractors v. West, 12 F.3d 1053 (Fed.Cir. 1993)

Practice Tip: define float ownership in contract

Early Completion

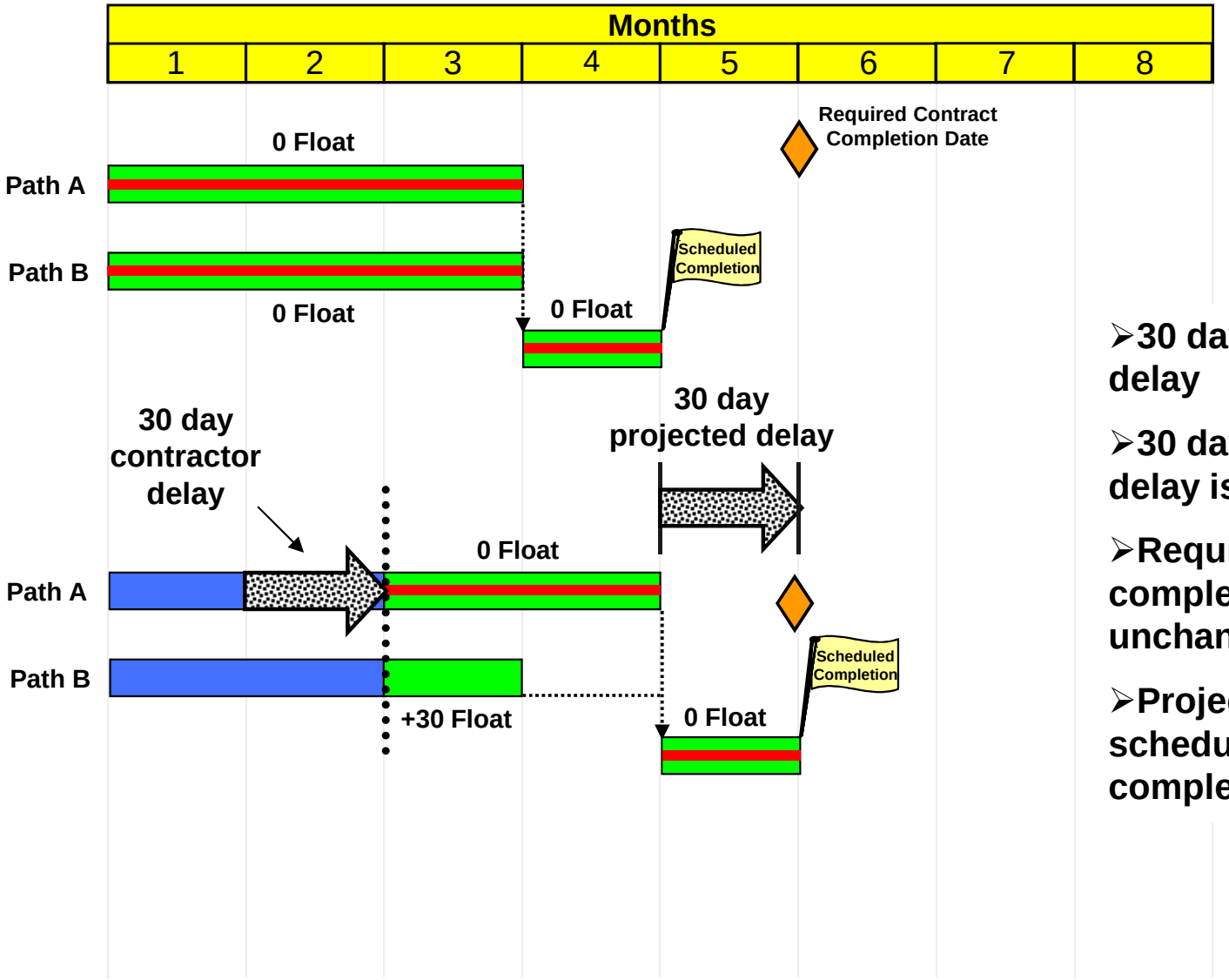


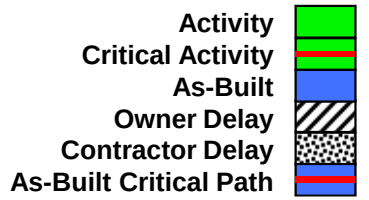


- **Project scheduled for early completion in Month 4, one month before required contract completion in Month 5**
- **Contractor has the right to finish a project early**
- **Owner shares in benefit of early completion**

Figure 3-2

Early Completion Contractor Delay

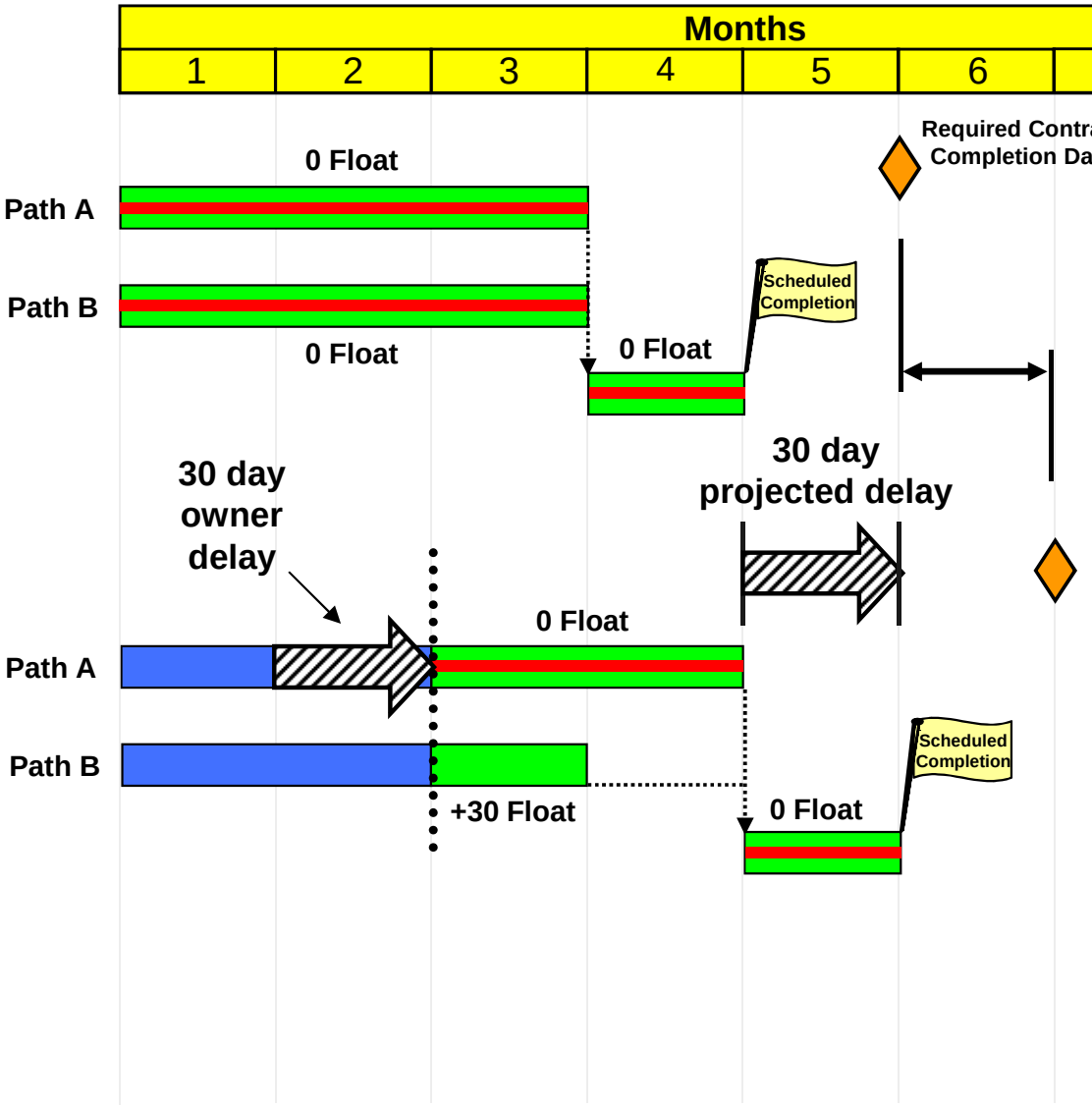


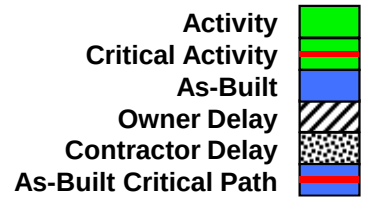


- 30 day Contractor delay
- 30 day projected delay is non-excusable
- Required contract completion date unchanged
- Project still scheduled for required completion date

Figure 3-3

Early Completion Owner Delay





- 30 day Owner delay
- 30 day projected delay is excusable, compensable
- Entitles contractor to 30 day extension to required contract completion
- Puts Contractor back in the position it would have been, but for the Owner delay

Figure 3-4



Acceleration

- Voluntary
- Directed
- Constructive



Directed Acceleration

- The FAR Changes Clause (48 C.F.R. § 52.243-4(a)) provides:
- The Contracting Officer may, at any time … by written order … may make any change in the work within the general scope of the contract, including changes:
- (4) Directing acceleration in the performance of the work.



Constructive Acceleration

(1) excusable delay;

(2) notice and request for a time extension

a) such notice is not necessary if the Gov't order directs compliance with a given schedule expressly without regard to the existence of an excusable delay

b) The supporting information is unnecessary if it is already reasonably available to the Government



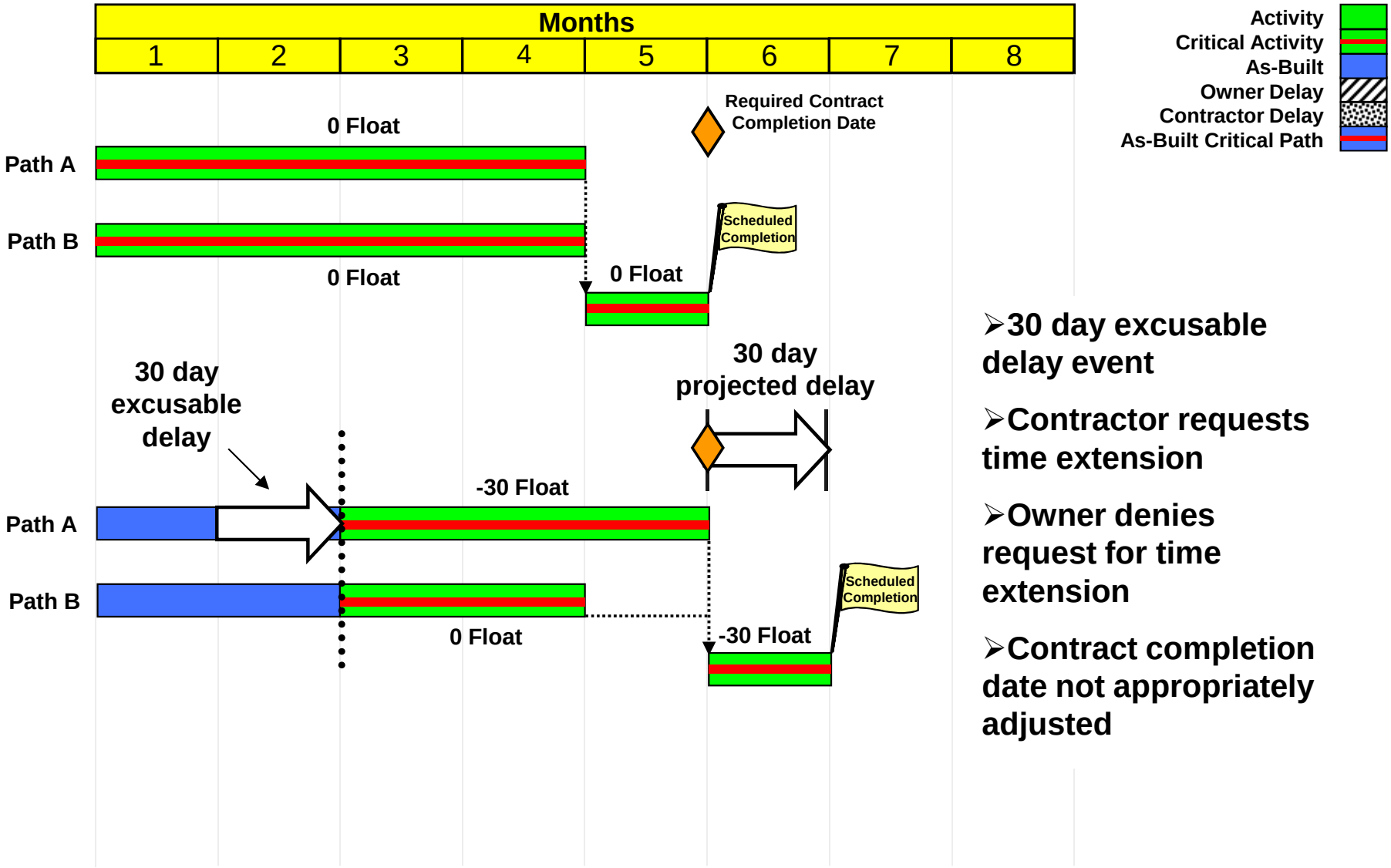
Constructive Acceleration

(3) failure or refusal to grant the requested extension within a reasonable time

(4) a Gov't order; either express or implied … to take steps to overcome an excusable delay or complete the work by the earliest possible date

(5) reasonable efforts by the contractor to accelerate the work, resulting in added costs, even if the efforts are not successful

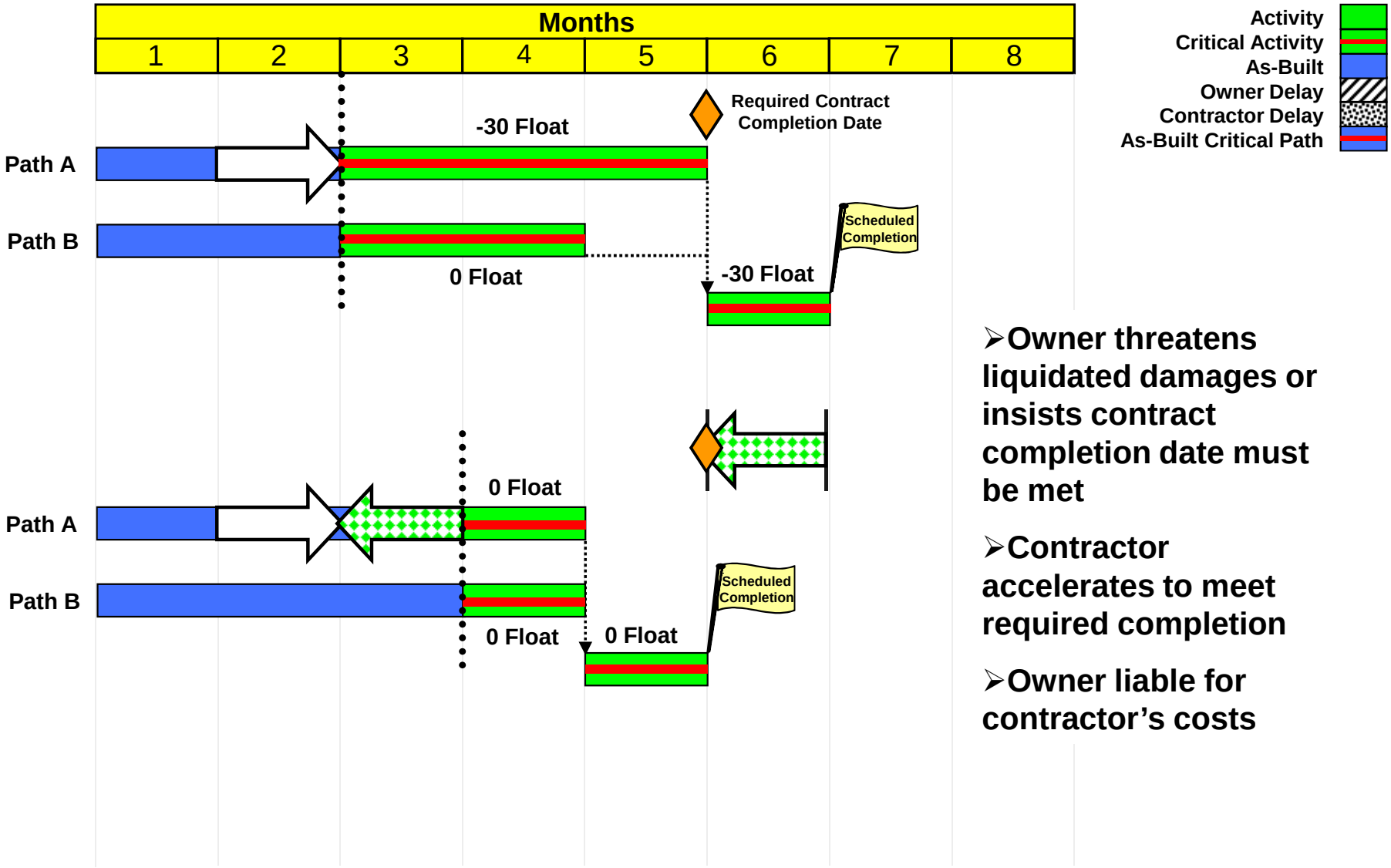
Constructive Acceleration



- 30 day excusable delay event
- Contractor requests time extension
- Owner denies request for time extension
- Contract completion date not appropriately adjusted

Figure 3-5

Constructive Acceleration (cont'd)



- Owner threatens liquidated damages or insists contract completion date must be met
- Contractor accelerates to meet required completion
- Owner liable for contractor's costs

Figure 3-6



Acceleration Damages

- Overtime or shift work
- Added crews or increased crew sizes
- Additional tools & equipment
- Additional supervision
- Jobsite Overhead
- Labor inefficiency



Concurrent Delay

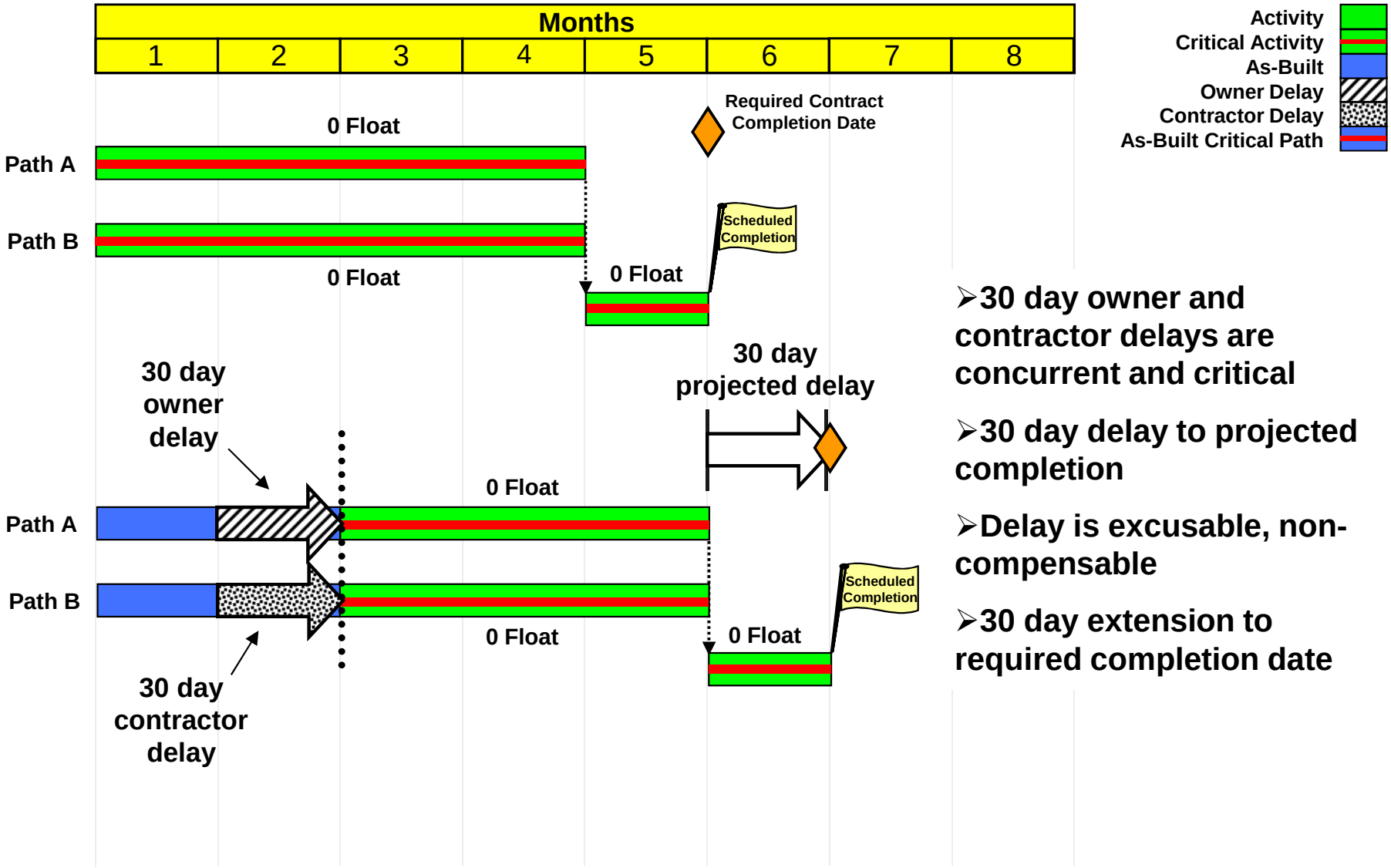
- Two or more independent causes
- Attributable to different parties
- That (1) overlap or (2) affect the same time period
- Presents complex legal issues if:
  - Delay periods are different lengths;
  - Delay periods are not completely concurrent;
  - Delay periods have different impacts on the work activities.



Concurrent Delay – Cont'd

- **<u>Traditional View</u>** – Neither party allowed an affirmative recovery from the other party.
  - No causation
- *J.A. Jones Constr. Co. v. Greenbriar Shopping Center*
  - Prime caused delay through failure of subs to timely perform & owner caused delay by design changes & late issuance of the revised plans.

Concurrent Delay



- 30 day owner and contractor delays are concurrent and critical
- 30 day delay to projected completion
- Delay is excusable, non-compensable
- 30 day extension to required completion date

Figure 3-7



Concurrent Delay – Cont'd

Modern Trends

- Pacing
- Offsetting
- Apportionment

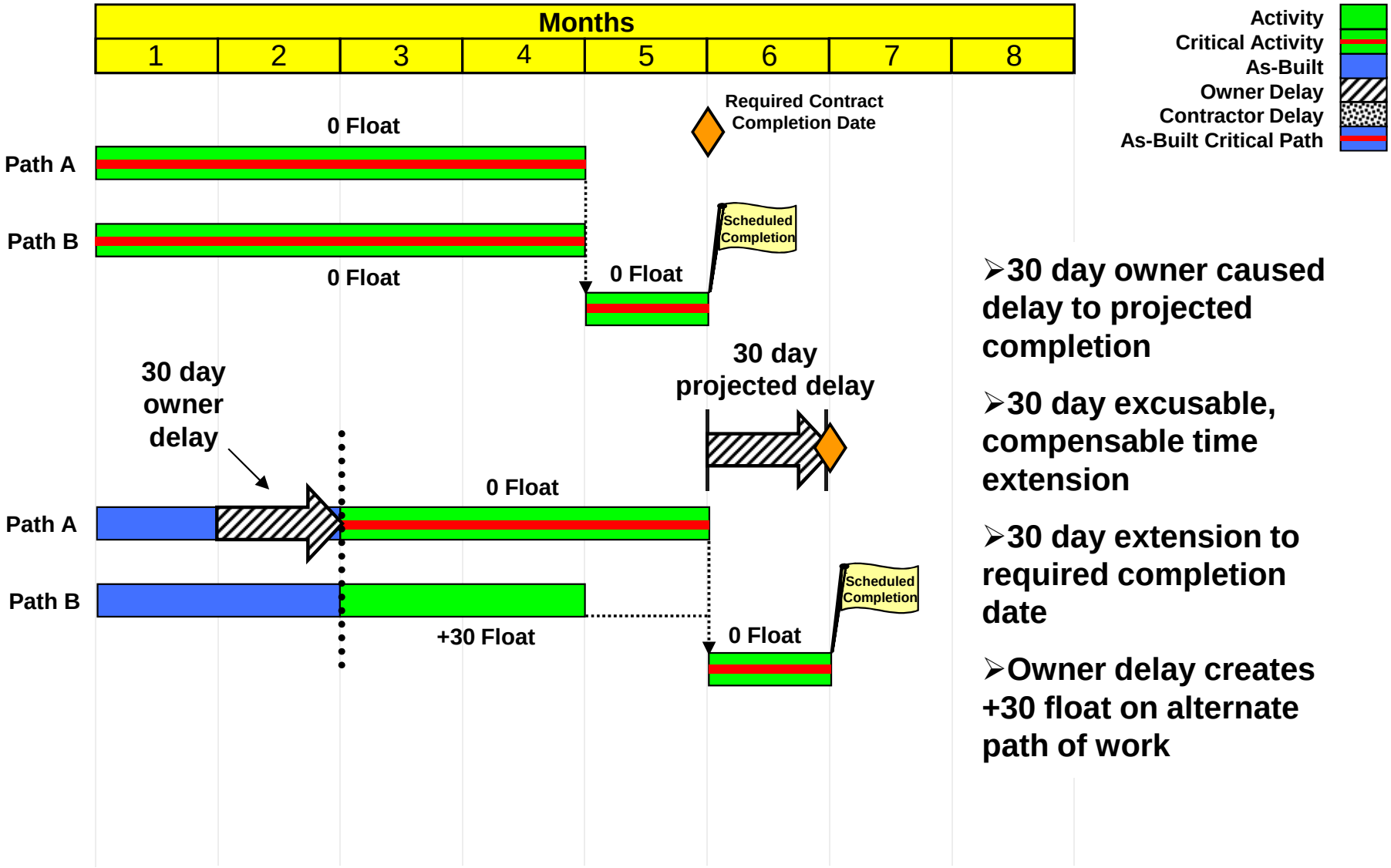


Concurrent Delay - Continued

Pacing

- Adjust pace of work to match delay
- Defense to alleged concurrency
- Contemporaneous records

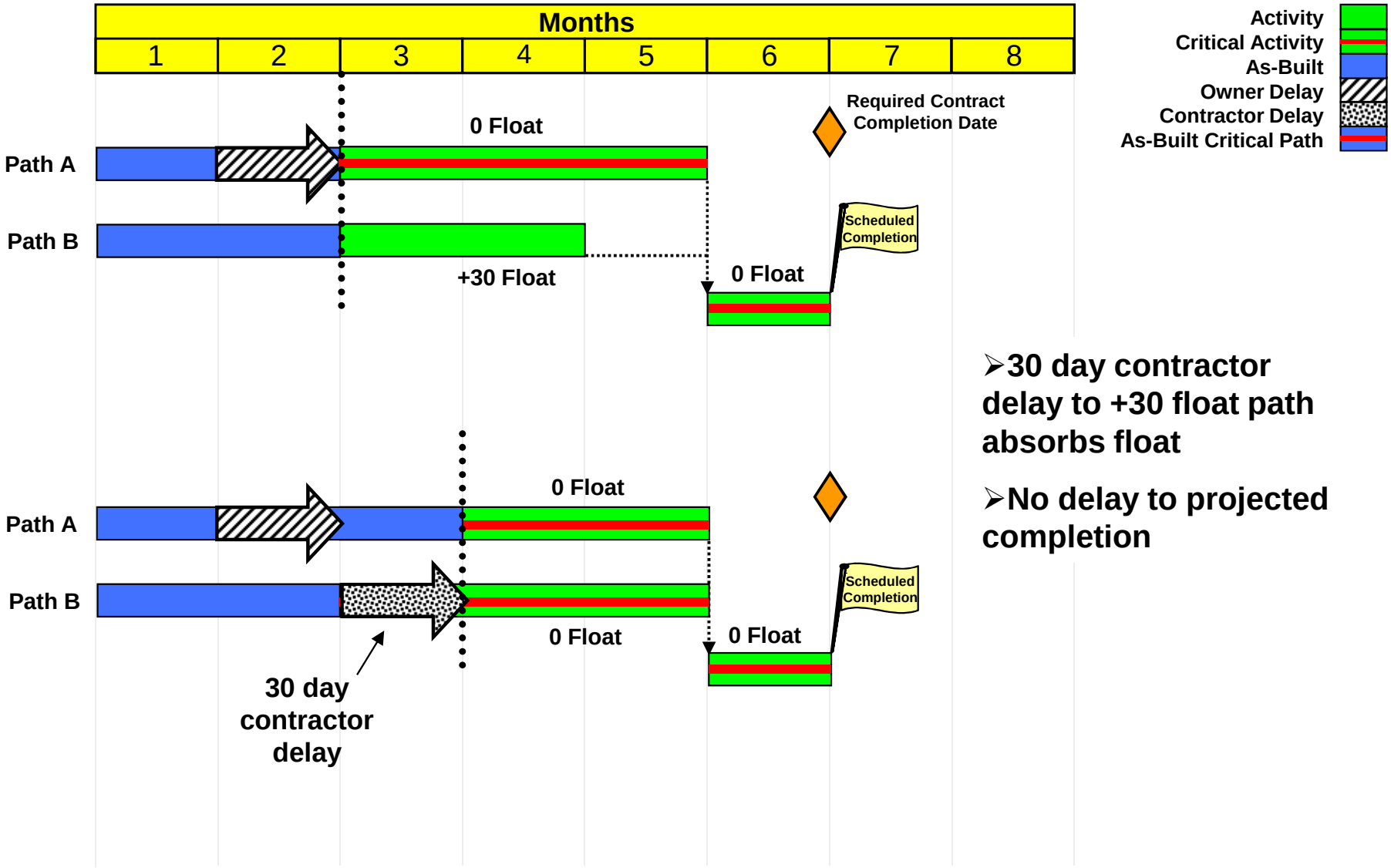
Pacing Delay



- 30 day owner caused delay to projected completion
- 30 day excusable, compensable time extension
- 30 day extension to required completion date
- Owner delay creates +30 float on alternate path of work

Figure 3-8

Pacing Delay (cont'd)



- 30 day contractor delay to +30 float path absorbs float
- No delay to projected completion

Figure 3-9



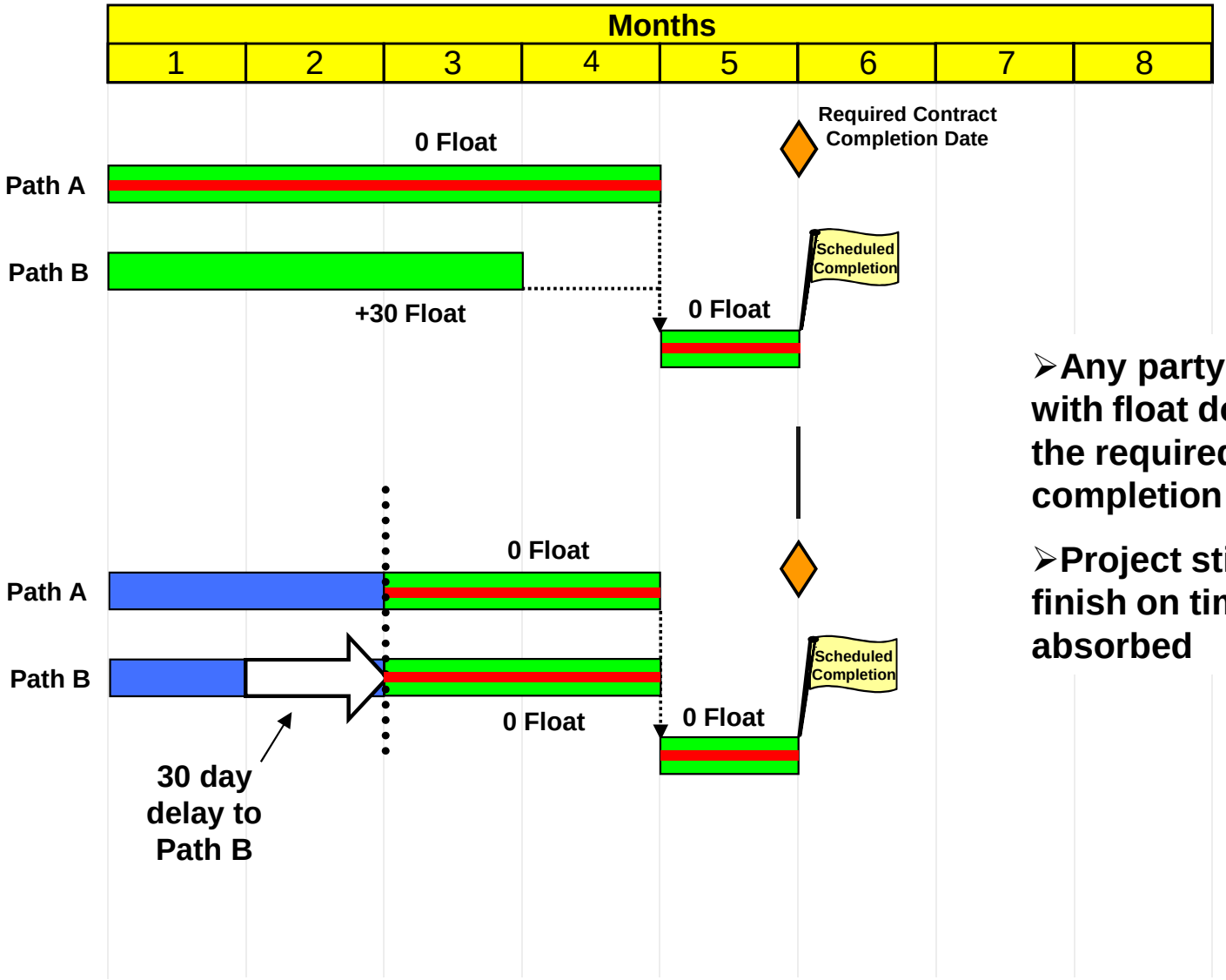
Delay Absorbing Float

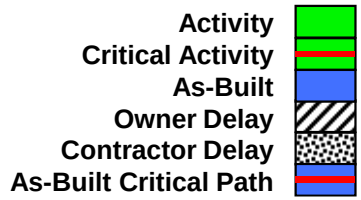
- **Float Definition:** The amount of time by which an activity can be delayed without affecting the project's completion date. *See Blinderman Constr. Co., Inc. v. U.S.*, 39 Fed. Cl. 529, 579-580 (1997).

- An activity that has "float" is not on the project's critical path.

- **Two Types**: Free Float & Total Float

Non-critical Delay Absorbing Float





- Any party delay to activity with float does not impact the required contract completion date
- Project still scheduled to finish on time until all float absorbed

Figure 3-1

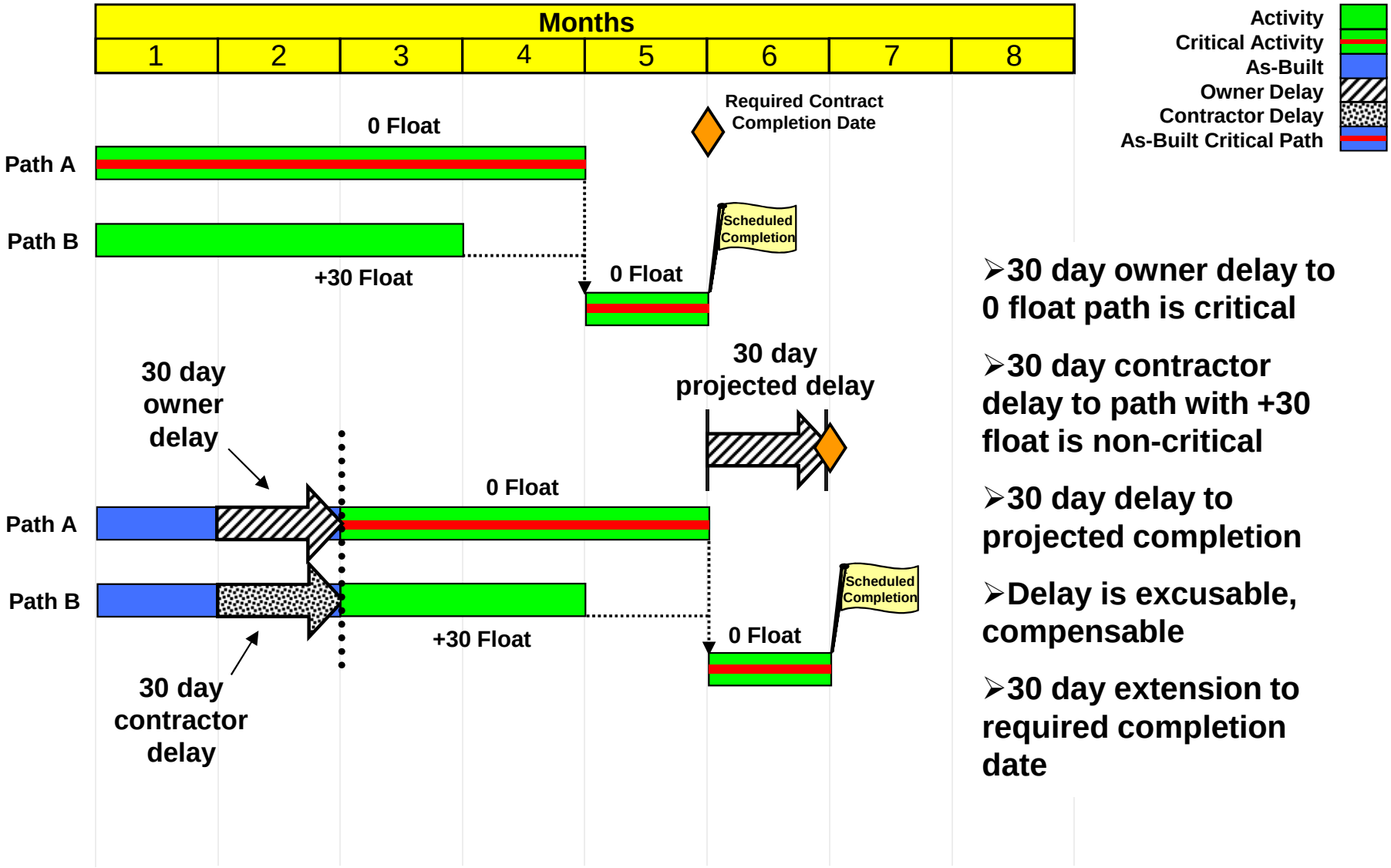


Allocating Ownership of Float

- Unless otherwise provided in the contract, float belongs to the to the project and either party may consume that float without liability to the other on a first come, first served basis. *See Weaver-Bailey Contractors, Inc. v. U.S.*, 19 Cl.Ct. 474, 481-482 (1990).

- Critical to update the schedule in regular intervals in order to use it as a time management tool and to analyze time impacts.

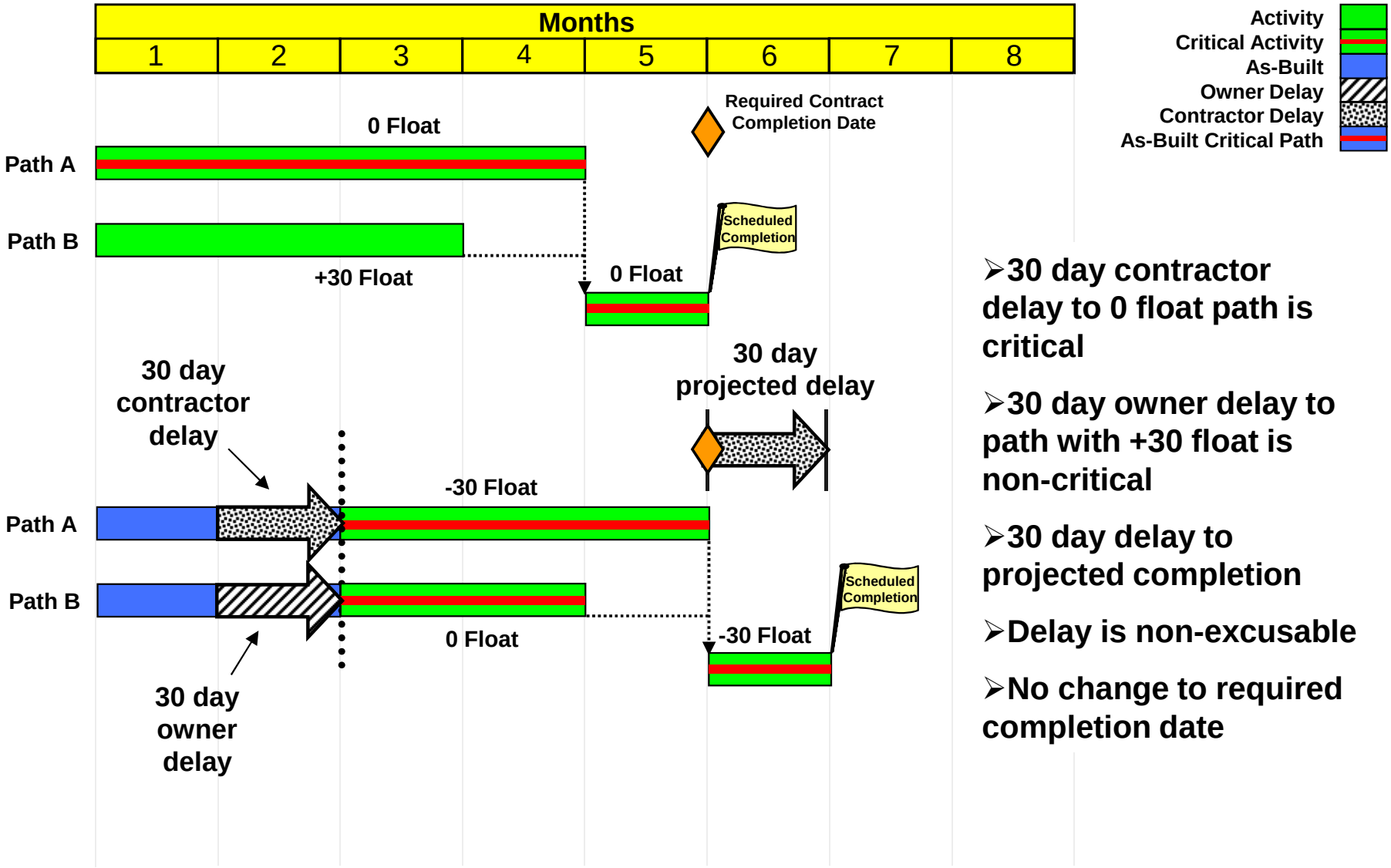
Critical v Non-critical Delays



- 30 day owner delay to 0 float path is critical
- 30 day contractor delay to path with +30 float is non-critical
- 30 day delay to projected completion
- Delay is excusable, compensable
- 30 day extension to required completion date

Figure 3-10

Critical v Non-critical Delays



- 30 day contractor delay to 0 float path is critical
- 30 day owner delay to path with +30 float is non-critical
- 30 day delay to projected completion
- Delay is non-excusable
- No change to required completion date

Figure 3-11

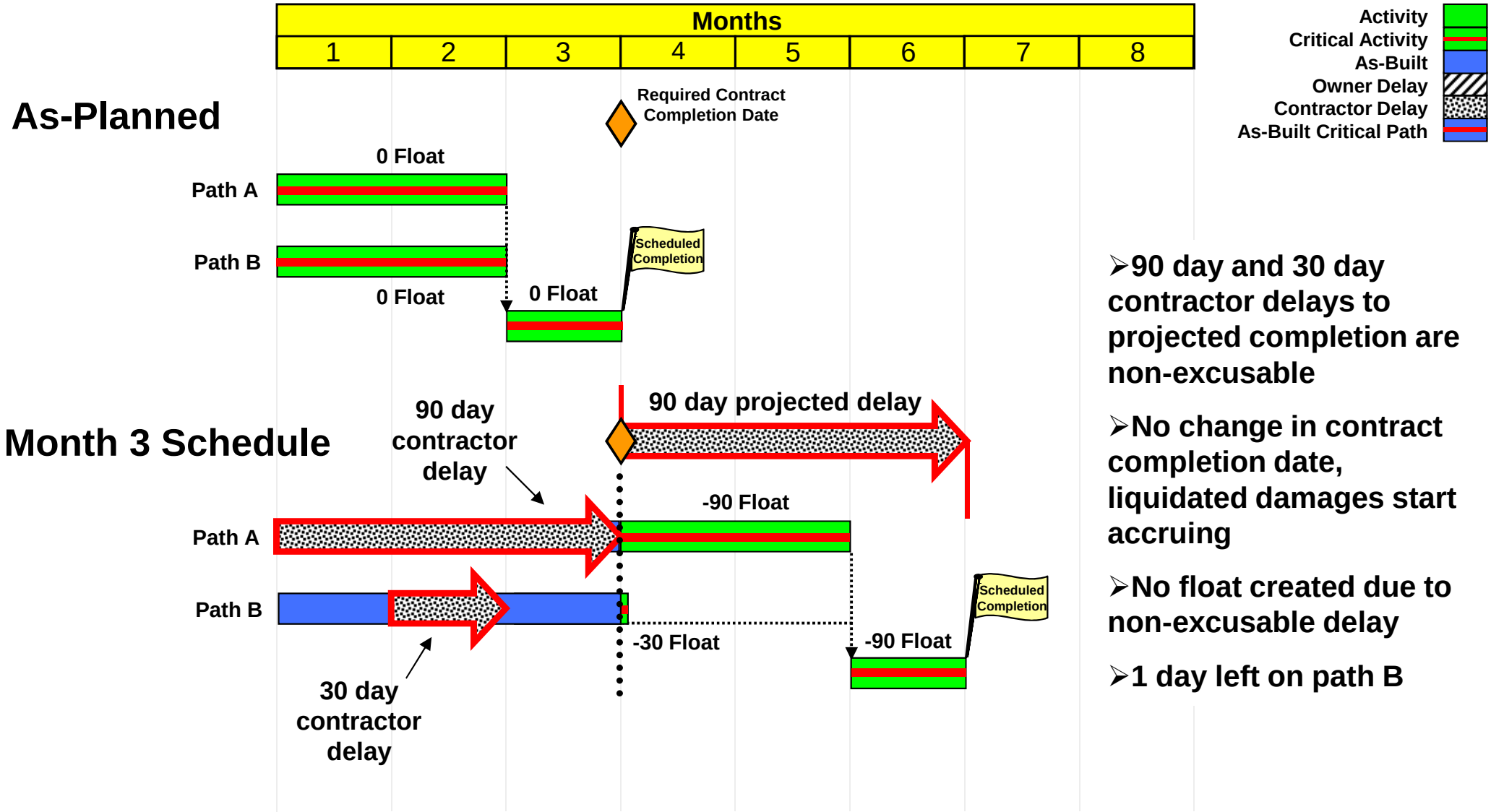


Concurrent Delay – Continued

Offsetting Delay

- Not on longest path
- No available float
- Offsets LDs

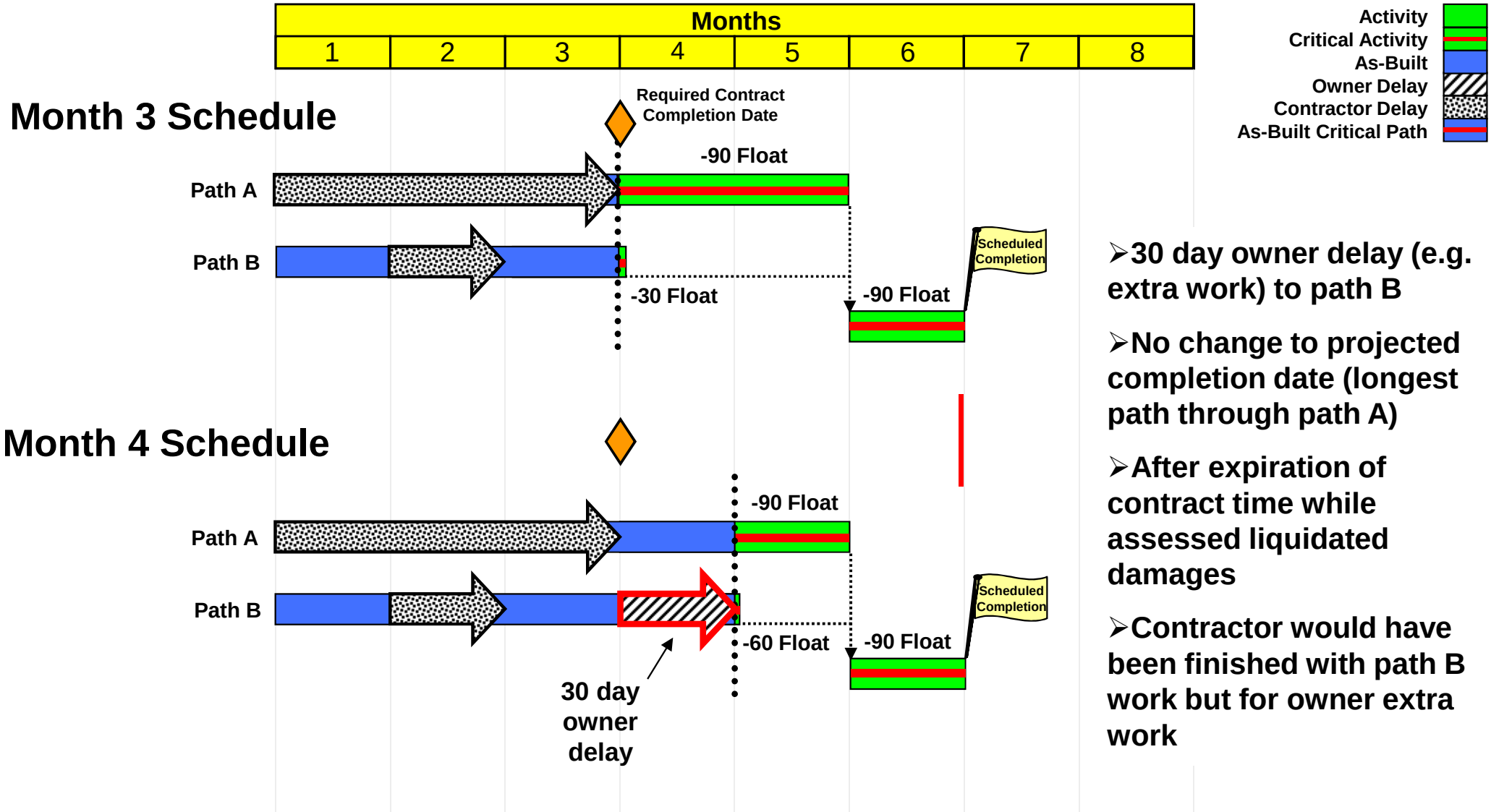
Offsetting Delay



- 90 day and 30 day contractor delays to projected completion are non-excusable
- No change in contract completion date, liquidated damages start accruing
- No float created due to non-excusable delay
- 1 day left on path B

Figure 3-12

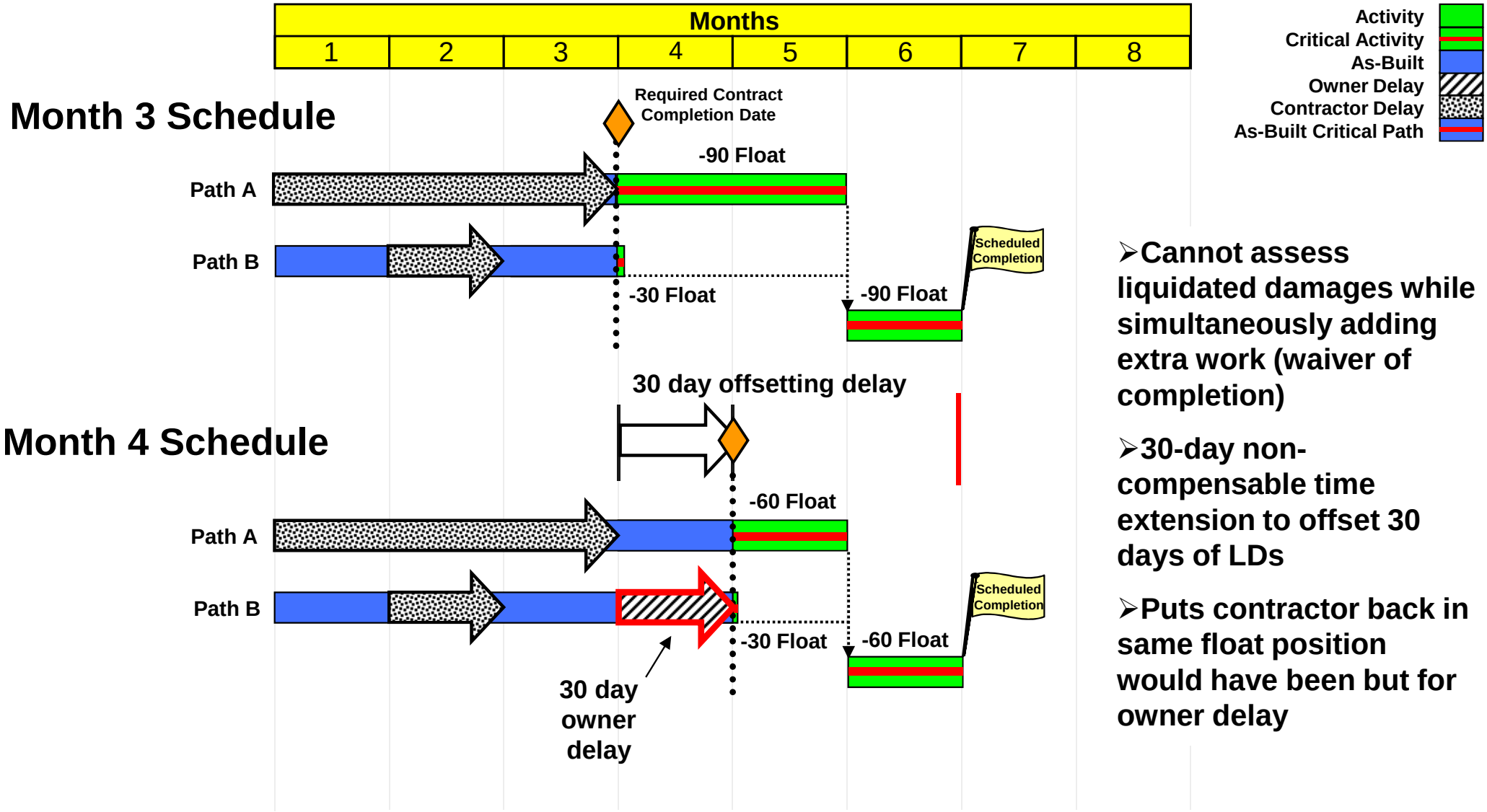
Offsetting Delay



- 30 day owner delay (e.g. extra work) to path B
- No change to projected completion date (longest path through path A)
- After expiration of contract time while assessed liquidated damages
- Contractor would have been finished with path B work but for owner extra work

Figure 3-13

Offsetting Delay



- Cannot assess liquidated damages while simultaneously adding extra work (waiver of completion)
- 30-day non-compensable time extension to offset 30 days of LDs
- Puts contractor back in same float position would have been but for owner delay

Figure 3-14

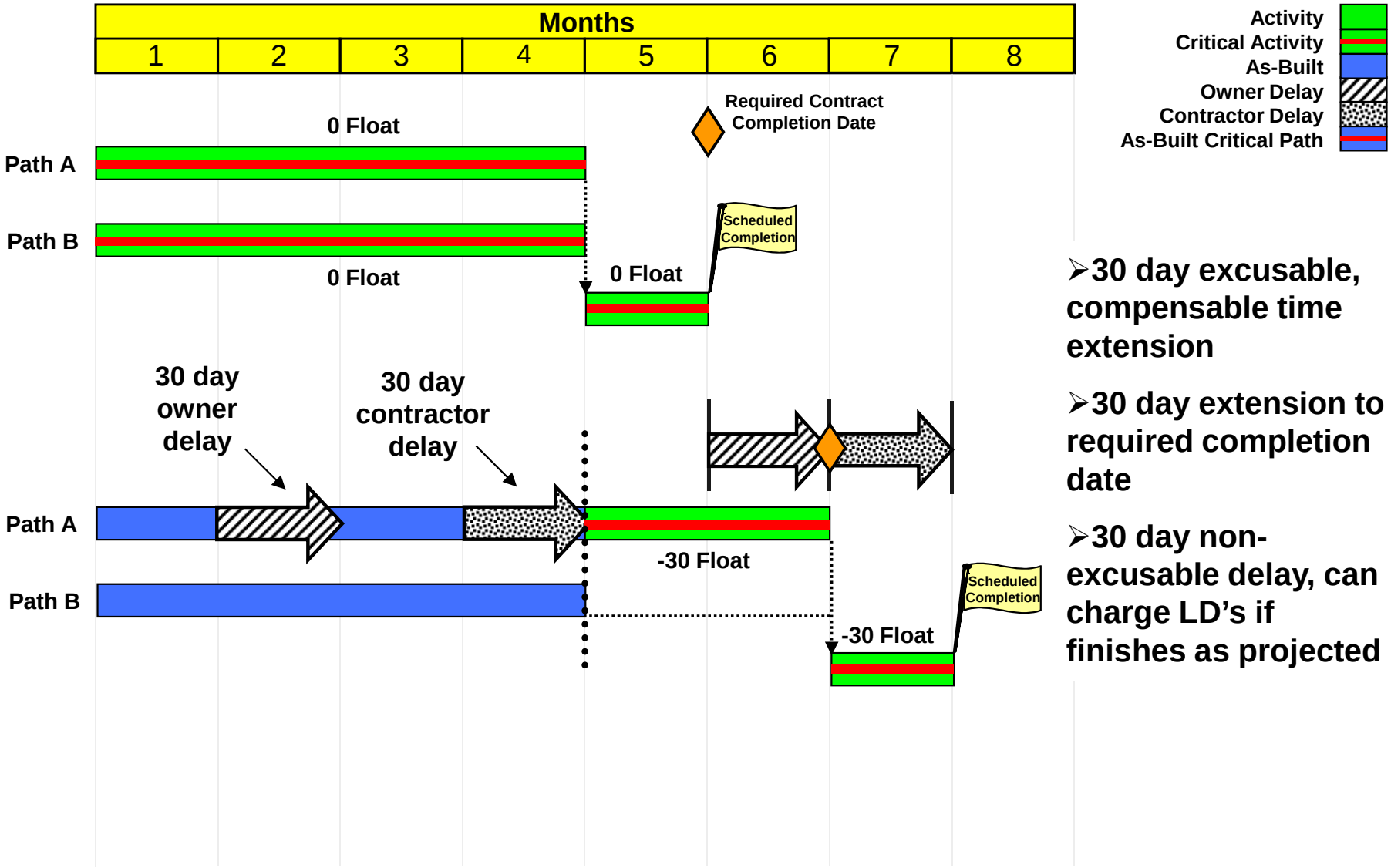


Concurrent Delay – Continued

Apportionment

- Original rule: Nullification
  - *See Acme Process Equipment Co. v. U.S.,* 171 Ct. Cl. 324 (1914)
- Trending: segregating and apportioning sequential delays
  - *See eg Utley-James, Inc.*, GSBCA No. 5370, 85-1 BCA ¶17816 (1984), aff'd 14 Cl. Ct. 804 (1988)

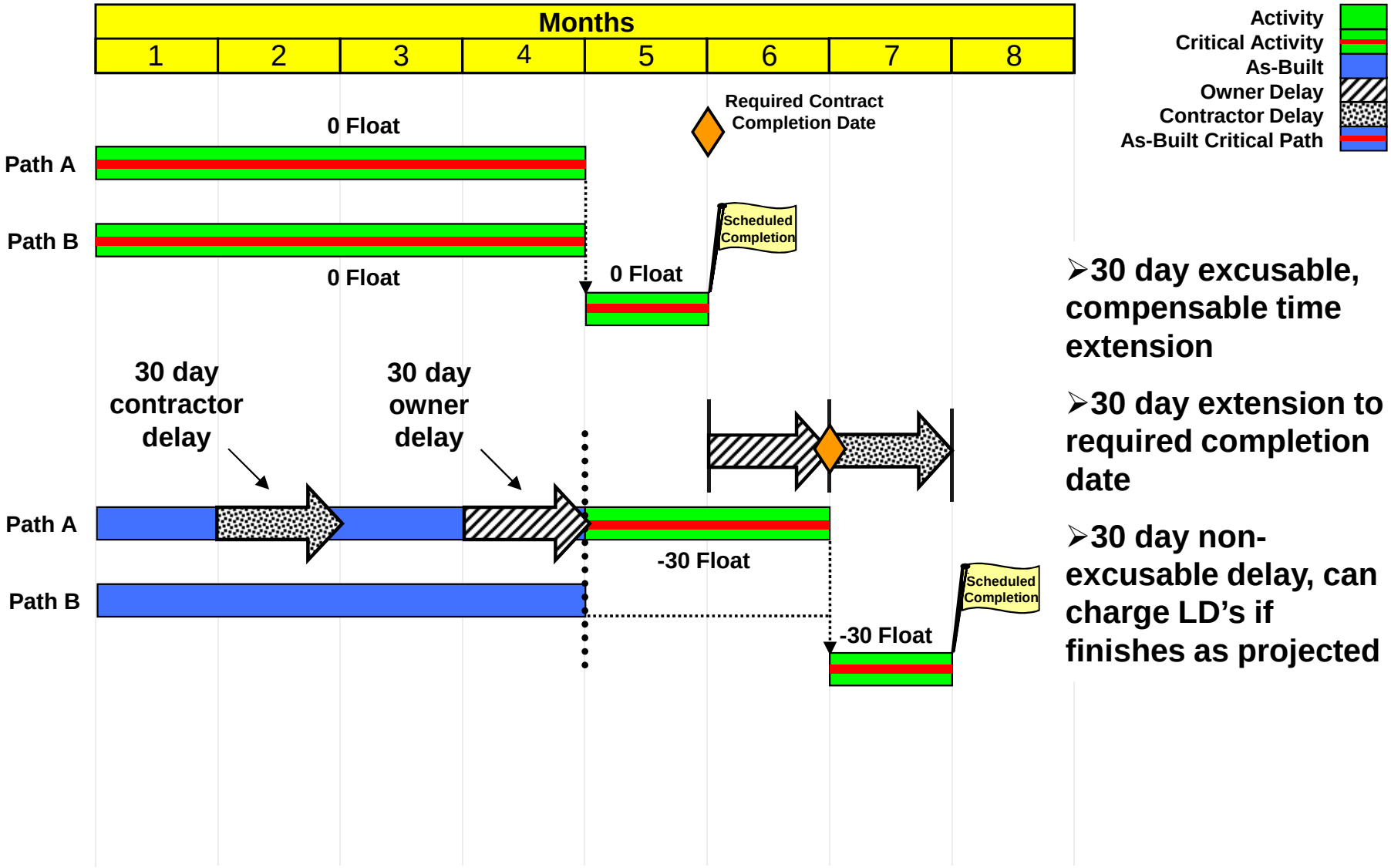
Apportioned Delays (owner then contractor)



- 30 day excusable, compensable time extension
- 30 day extension to required completion date
- 30 day non-excusable delay, can charge LD's if finishes as projected

Figure 3-15

Apportioned Delays (contractor then owner)



- 30 day excusable, compensable time extension
- 30 day extension to required completion date
- 30 day non-excusable delay, can charge LD's if finishes as projected

Figure 3-16



Delay Damages

- REA vs. Claim
- Mitigation
- Types of Delay Damages
- Disruption vs. Delay
- LDs
- Proof



Owner Damages

- Liquidated damages ***or***;
- Actual Damages such as:
  - Lost revenues due to delayed occupancy
  - Increased engineering & inspection costs
  - Increased financing costs
  - Interest



Contractor Damages

- Labor
  - Escalation and premiums
  - inefficiencies
- Equipment
- Extended field office overhead
- Unabsorbed home office overhead
- Material
- Interest
- Loss of profits
- Loss of bonding capacity

CONSTRUCTION COST ELEMENTS

	TOTAL COST					NET PROFIT
	DIRECT COST			OVERHEAD (OH)		
	LABOR		EQUIP-MENT	MATERIAL	DIRECT OH	INDIRECT OH	
	DIRECT LABOR • Craft Labor • Supervision *Labor & burdens typically 30-40% of total cost*	**PAYROLL BURDENS** • Fringe Benefits • Insurance & Taxes *Burdens typically 80-120% of direct labor*	**CATEGORY** • Leased • Owned	**FACTORS** • Direct Material • Sales Tax • Shipping & Handling •Storage *Material typically 15-30% of direct cost*	**GENERAL CONDITIONS** • On-Site Staff • On-Site Facilities • Permits & Fees *Based on anticipated project duration*	**HOME OFFICE OVERHEAD** • General & Administrative • Sales & Marketing *Indirect OH and profit typically 10-20% of direct cost and direct OH*	*Profit typically 5-10% of total cost*
DAMAGES							
DELAY	Escalation		Standby	Escalation	**Extended Performance**		
DISRUPTION	**Lost Productivity / Efficiency**						
ACCELERATION	**Additional Resources / Inefficiency**			Expediting	Add'l staff		

Figure 4-1



Recovery of Overhead – Cont'd

- Field Office Overhead,
  - also referred to as extended general conditions
  - jobsite overhead costs such as project supervision, management, engineering, secretarial assistance, temporary field office trailers, electric and telephone bills, clean-up and other miscellaneous expenses.

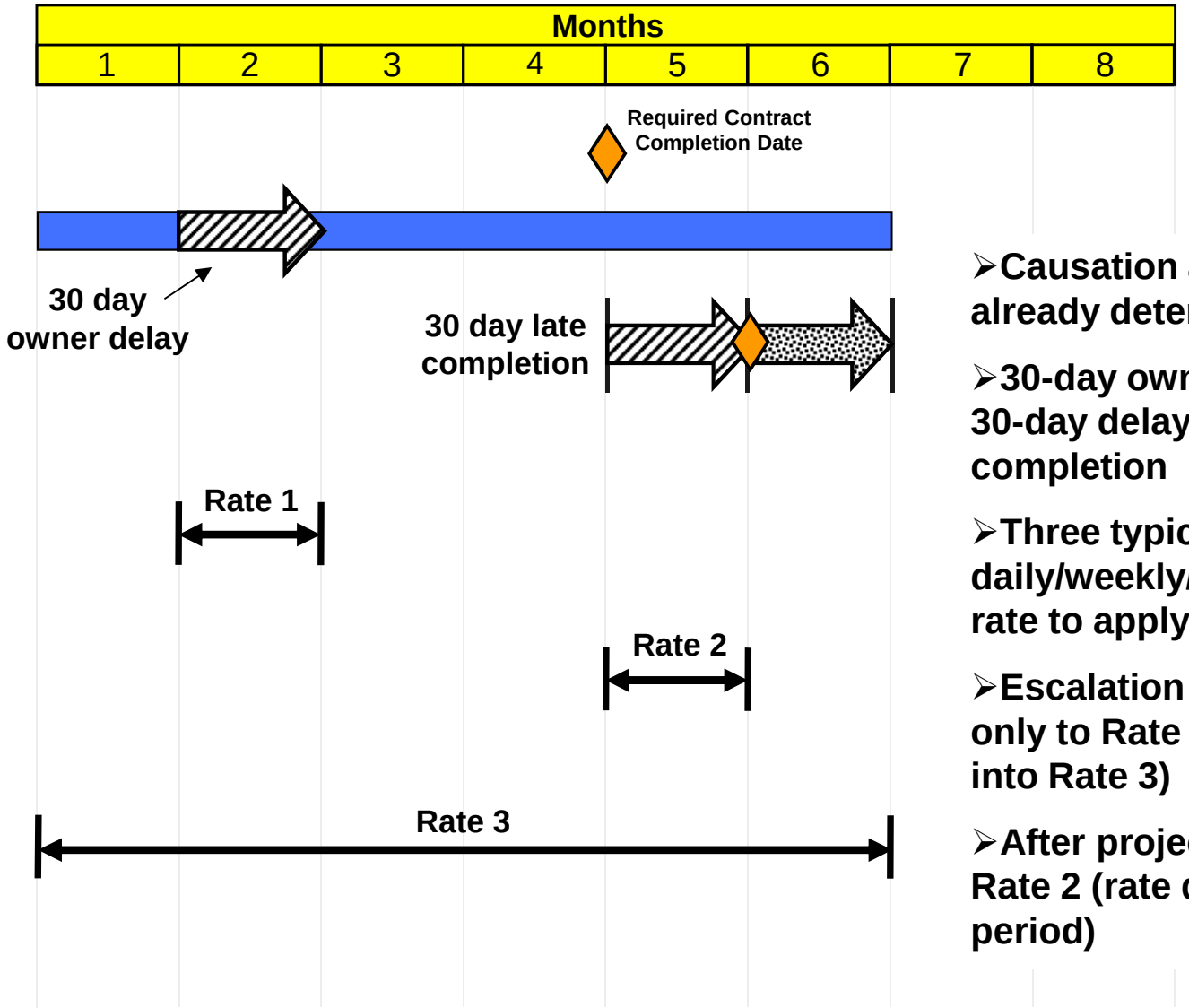
- *See Clark Concrete Contractors*, 99-1 BCA ¶ 30,280 at 149,755-56; see also 48 C.F.R. § 31.105(d)(3).

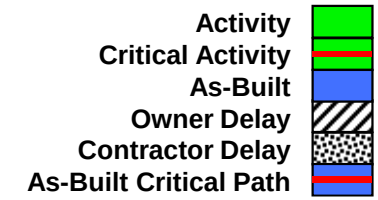


Field Office Overhead

- Allocable as either direct or indirect costs.
- FAR 31.105(d)(3) provides that field overhead is allowable as direct or indirect costs, provided the accounting practice used is in accordance with the contractor's established and consistently followed cost accounting practices for all work.
- *Per Diem* Rate v. Percentage Mark-Up for changes that do not extend the schedule.

Direct Overhead Damage Rate: Equal Length

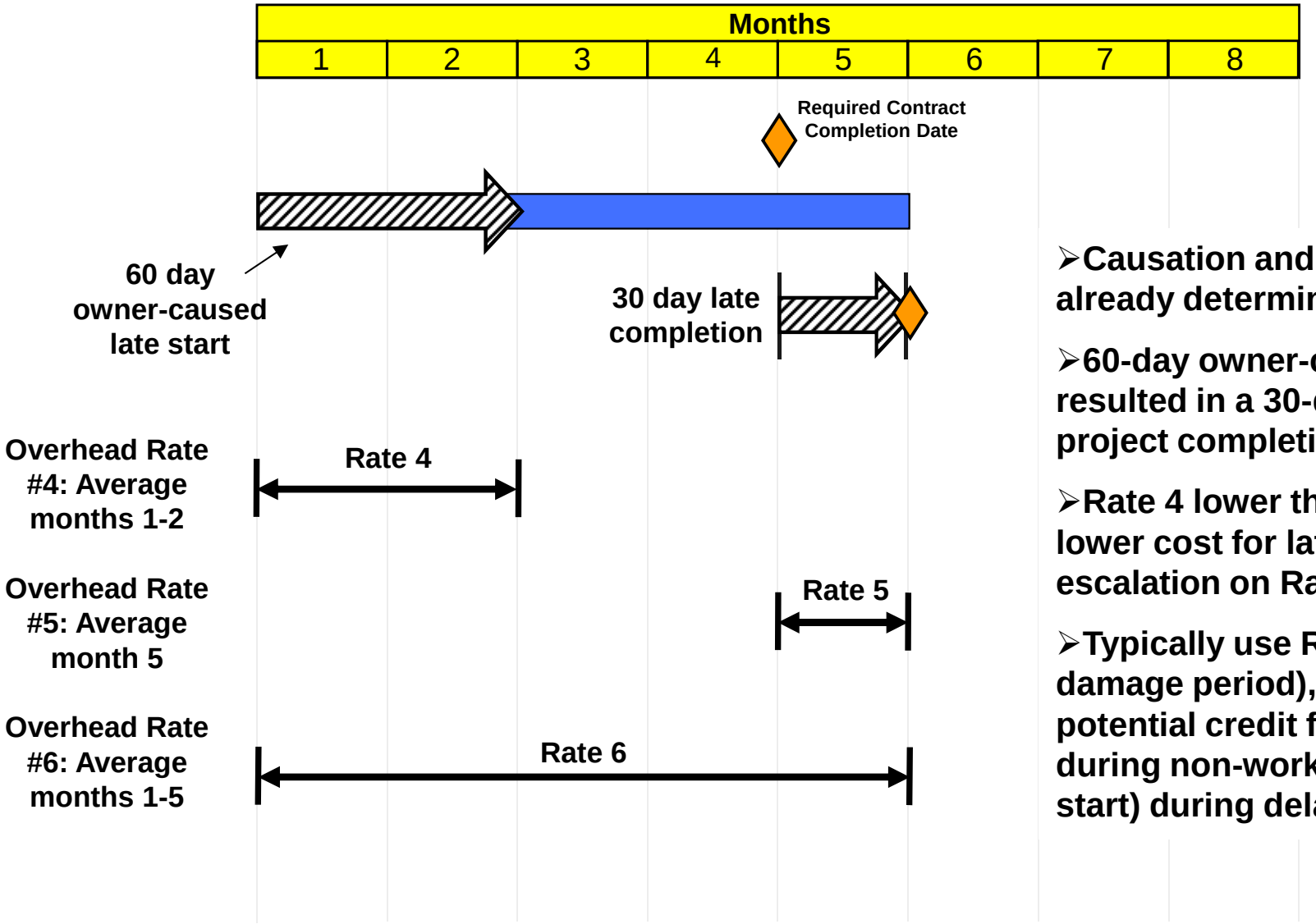


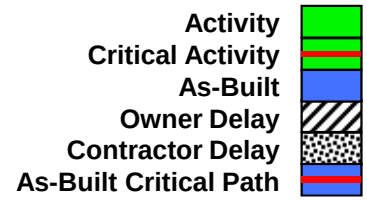


- Causation and entitlement already determined
- 30-day owner delay caused 30-day delay to project completion
- Three typical options for daily/weekly/monthly overhead rate to apply to delay period
- Escalation typically applied only to Rate 2 (some blended into Rate 3)
- After project typically use Rate 2 (rate during damaged period)

Figure 4-2

Direct Overhead Damage Rate: Low Early Rate

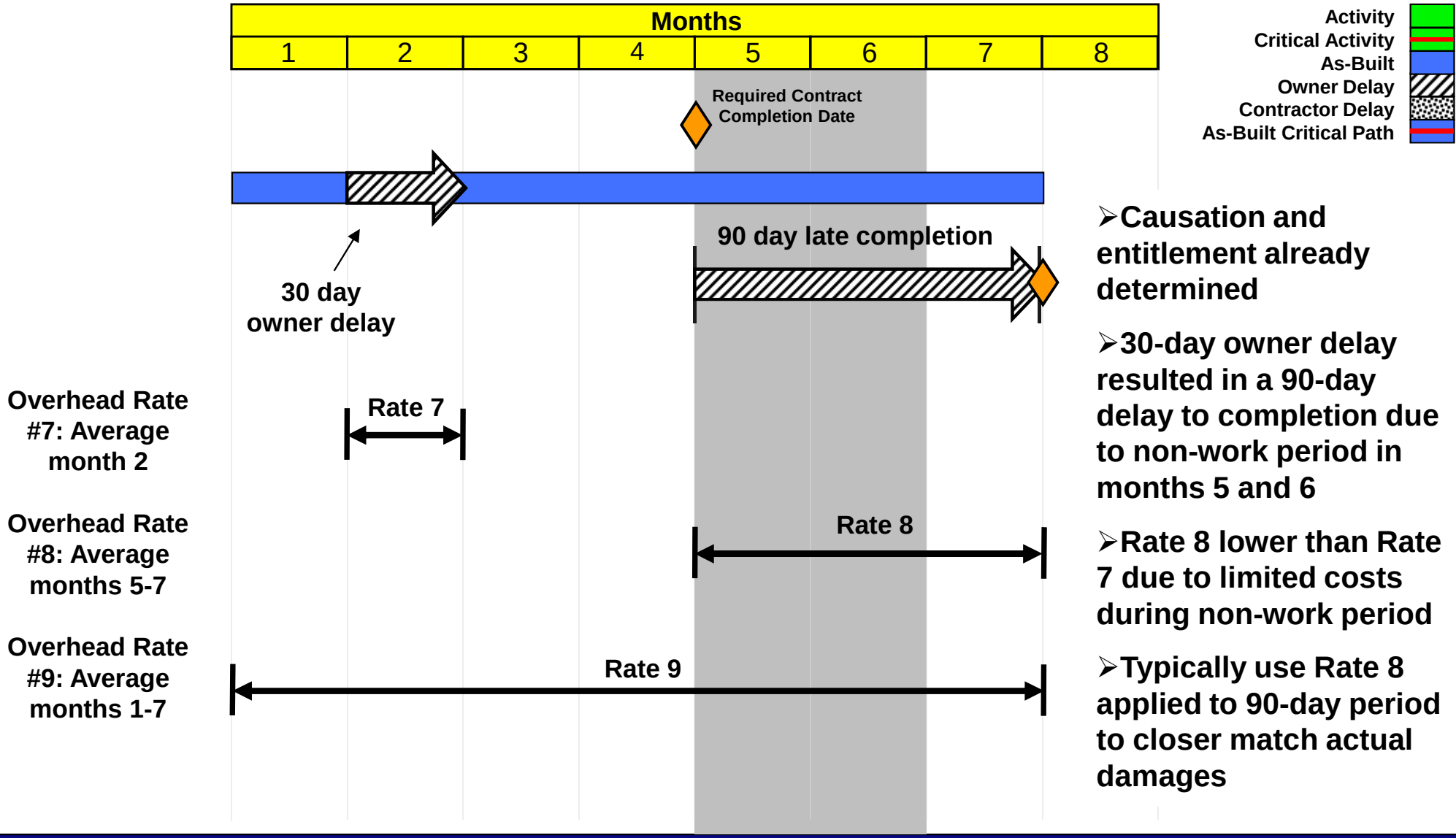




- Causation and entitlement already determined
- 60-day owner-caused late start resulted in a 30-day delay to project completion
- Rate 4 lower than Rate 5 due to lower cost for late start and escalation on Rate 5
- Typically use Rate 5 (in damage period), but with potential credit for lower rate during non-work period (late start) during delay cause

Figure 4-3

Direct Overhead Damage Rate: Low Late Rate



- Causation and entitlement already determined
- 30-day owner delay resulted in a 90-day delay to completion due to non-work period in months 5 and 6
- Rate 8 lower than Rate 7 due to limited costs during non-work period
- Typically use Rate 8 applied to 90-day period to closer match actual damages

Figure 4-4



Recovery of Overhead

- Home Office Overhead
  - indirect costs
  - expended for the benefit of the business as a whole
  - Includes administrative staff salaries, accounting & payroll services, general insurance, office supplies, telephone charges, depreciation, taxes and utility costs.



The *Eichleay* Formula

1. $\frac{\text{Total Contract Billings}}{\text{Total Billings f/ Cont. Period}}$ X Total Home Office OH for Cont. Period

   = OH Allocable to Contract

2. $\frac{\text{Allocable OH}}{\text{Total Days of Performance}}$ = Daily Cont. OH

3. Daily Cont. OH X Days of Delay

   = Amount Recoverable



Government Defenses to *Eichleay*

1) The Standby Requirement: The Government required the contractor to standby during a government caused delay of indefinite duration; and

2) The Replacement Work Requirement: While, and as a result of standing by, the contractor was unable to take on other work.

See Interstate General Gov't Contractors v. West, 12 F.3d 1053 (Fed.Cir. 1993)



Government Defenses to *Eichleay*

Once the contractor satisfies those requirements, the burden shifts back to the Government to prove:

1) That it was not impractical for the contractor to obtain “replacement work” during the delay, or
2) That the contractor’s inability to obtain such work, or to perform it, was not caused by the Government’s suspension



P.J. Dick, Inc. v. Principi, 324 F.3d 1364 (Fed. Cir. 2003)

Court determined that in order to meet the standby requirement, the contractor must show:

1) The Gov't caused delay was not only substantial, but was of indefinite duration;
2) During the delay, the contractor was required to resume work on the contract at full speed, as well as immediately, and
3) Work on much, if not all of the contract was suspended due to the delay.



Disruption vs. Delay

- Disruption
  - Increased labor and equipment due to loss of efficiency
- Delay
  - Increased labor and equipment due to extended time for performance



Proving Damages

- Total Cost
- Modified Total Cost
- Estimated “would have cost”
- Actual cost



Contractual & Other Legal Limitations to Recovery

- Notice Provisions
- No-Damages for Delay Clauses
- Concurrent Delay
- Float Allocation Provisions
- Waiver/Release
  - Change Orders
  - AIA A201 Waiver of Consequential Damages
- Trade to Trade Provisions



No-Damages-for-Delay Clauses

<u>Majority View</u>:

- Because no-damages-for-delay clauses are exculpatory, in that they insulate bad actors from otherwise culpable conduct, most courts have adopted a policy of strict construction in determining whether to enforce a particular clause.

- *Traveler's Casualty & Surety Co. v. Dormitory Authority-State of New York*, 735 F.Supp.2d 42 (S.D.N.Y. 2010); *See* Chapter 5, page 257.



No-Damages-for-Delay Clauses

<u>Majority View</u>: Enforceable, but a contractor may recover despite the clause provided that the delay:

1) Was of a kind not contemplated by the parties,
2) Was such as to amount to an abandonment of the contract,
3) Was the result of fraud, bad faith or arbitrary action,
4) Was the result of active interference with the contractor's work on the part of the owner, or
5) Was unreasonable



No-Damages-for-Delay Clauses

<u>Recent Trend</u>: Several states have enacted legislation that invalidates the enforcement of no-damages-for-delay clauses in private as well as public contracts.

Example: "any clause that purports to waive, release, or extinguish the rights of a contractor … to damages … arising out of an unreasonable delay… is void and unenforceable." Wash. Rev. Code § 4.24.360 (1998)



J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009 (Nev. May 2005)*

- At the time of the contract, Nevada had not recognized any of the federal exceptions;
- Court reversed trial court that refused to give proposed jury instruction;
- Court recognized three exceptions based on the implied covenant of good faith & fair dealing;
- Nevada Revised Statute §108.2453 (Oct. 1, 2003) includes an exceptions for delays not contemplated by the parties, but appears to make them cumulative.



Jackson Constr. Co., Inc. v. United States, *62 Fed.Cl. 84 (Sept. 15, 2004)*

- COFC held that executed change orders barred a contractor's claims for early completion delay and for cumulative impact of numerous changes;
- "It is agreed that this adjustment constitutes full compensation . . . for all costs, including extended overhead . . . attributable to the change order for delays related thereto, and for performance of the change within the time frame stated."
- Court based its decision on the doctrine of accord and satisfaction; Rejected contractor's notations.



Claims Process

Two Takeaways:

- Develop contemporaneous schedules
- Track costs

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