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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Inside This Issue

Environmental Concerns 2009

The complexity of environmental concerns and regulations seems to grow on a daily basis. Keeping up-to-date in even a few areas of environmental concern would require a great deal of technical knowledge going beyond the required marketing and negotiation expertise of real estate licensees. Under Wis. Stat. § 452.23(4), real estate licensees "shall exercise the degree of care expected to be exercised by a reasonably prudent person who has the knowledge, skills and training required for licensure as a broker or salesperson" when inspecting or investigating a property or disclosing a property condition in a real estate transaction. Accordingly, real estate licensees are not required to be environmental experts.

Licensees are not expected to have technical backgrounds, but a competent licensee may be expected to be aware of community-wide environmental conditions such as high levels of contaminants in specific community water supplies or chemical seepage from a local landfill. A competent licensee may also be expected to identify potential environmental issues in the information disclosed by the property owner, such as the presence of an abandoned underground fuel oil tank or crumbling furnace duct insulation.

Once a potential environmental problem has been identified, a licensee is not expected to conduct technical testing and investigative studies. Rather, Wis. Admin. Code § RL 24.07(3) indicates that it is competent practice for a licensee to make timely written disclosure of the information suggesting the possibility of the potential environmental concern to the parties. In addition, the licensee should recommend that the parties obtain expert assistance to investigate the situation, professionally inspect the property and/or conduct any needed testing. Party consultation with qualified third-party experts is invaluable and should be strongly recommended. Finally, the licensee may draft appropriate inspection, testing and investigation contingences if directed by the parties. Licensees should not hesitate to refer the parties to an environmental attorney for assistance in drafting the offer when there are significant environmental problems such as hazardous materials or groundwater contamination because there may be numerous laws and liability concerns to address.

This *Legal Update* discusses issues concerning the new Department of Commerce rules for underground storage tanks (USTs) and aboveground storage tanks (ASTs), the new Department of Health Services rules for activities disturbing asbestos or materials suspected to contain asbestos, radium in drinking water, nitrates in drinking water, Wisconsin Spill Law, methamphetamine labs and Chinese drywall. This issue does not address lead-based paint (LBP), an environmental issue once again coming to the forefront, because it was discussed in the October 2008 *Legal Update*, "Lead-Based Paint Renovations, Repairs and Painting," online at www.wra.org/LU0810, and it will be discussed again in Wisconsin REALTORS® Association publications once the Wisconsin DHS amends its

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rules to incorporate provisions consistent with the U.S. Enivronmental Protection Agency's Lead Renovation, Repair and Painting Rule.

This issue includes Legal Hotline questions and answers and practice tips for REALTORS® to assist members with practice issues, as well as sources for additional information that may be provided to clients and customers. Even though some of this information is technical in nature, it is being provided so that REALTORS® will have a better understanding of the environmental issues they may encounter in their real estate practices. This information will enable members to make a more informed and immediate response to the environmental situations they encounter.

The first section on USTs and ASTs reviews the new state regulations pertaining to the registration, operations, and maintenance and removal of USTs and ASTs.

USTs and ASTs

DComm has repealed and recreated Wis. Admin. Code Chapter 10 regulating USTs and ASTs effective February 1, 2009. While most of the resulting changes apply to commercial tanks, there also have been revisions to the provisions applicable to residential and farm tank systems. Because of these changes, REALTORS® should proceed cautiously when using old materials from the WRA or DComm Web site because they may not be entirely accurate until updated by DComm.

Mishandling any UST and AST problems affecting a property may have substantial effects on the transaction and the parties. The environmental, safety, economic and legal concerns involved with USTs can impact homeowners, buyers, lenders, real estate agents and the community at large. Potentially at stake are soil and groundwater contamination; potential fire risk and tank collapse; and the cost of UST system installation, maintenance, soil testing, UST removal and contamination cleanup.

Tank Registration

Wis. Admin. Code § Comm 10.140 requires that all new and existing storage tanks storing regulated petroleum products such as fuel oil and gasoline be registered with DComm. All USTs must be registered. However, registration is no longer required for ASTs with a capacity of less than 1,100 gallons that are farm tanks or used to store heating oil or used oil for consumptive use on the property. The owner of land where unregistered tanks are discovered, including any that are permanently closed, must register the tanks with DComm within 15 days of discovery.

A registration form may be obtained at: http://commerce.wi.gov/ER/ER-BST-FM-Comm10Forms.html. DComm does not charge a fee for registration and it maintains a state storage tank database at http://commerce.wi.gov/ER/ER-EN-tanks-info.html.

Tank Permits

Wis. Admin. Code § Comm 10.145 provides that all in-use and temporarily-out-of-service storage tanks, whether new or existing, that are used to store a regulated substance must have a permit to operate from DComm, except for ASTs, farm and residential USTs that have a capacity of less than 1,100 gallons and are used for storing motor fuel, and USTs storing heating oil for consumptive use on the premises.

> **REALTOR® Practice Tips:** Most residential and farm ASTs will not need to be registered unless they hold 1,100 gallons or more. ASTs and most residential and farm USTs do not require tank permits.

Change of Ownership

Wis. Admin. Code § Comm 10.150 provides that an individual or company

taking ownership of property with a registered storage tank shall notify DComm of the change of ownership within 15 business days of completing the real estate transaction. The ownership change notification shall be on form ERS–7437, ERS–8731 or ERS–10861E, as provided by DComm, and shall include all of the following:

(a) The name and address of the new owner and of a local contact person.

(b) The date the documents evidencing the property transfer are executed.

(c) The name of the previous owner.

(d) The address of all locations included in the real estate transaction that have tanks subject to DComm registration requirements.

All tank records shall be transferred to the new owner, and the authorized agent or DComm shall inspect the tank system and dispensing system before the new owner puts the tank system into service. This is a new requirement that the rules say will apply to all USTs and to any ASTs over 1,100 gallons. However, DComm has indicated to the WRA that DComm does not intend to enforce this pre-transfer inspection requirement with regard to residential tanks and will change the code to reflect this during the upcoming months. The tank inspection requirement was originally intended to apply to all tanks, including residential tanks, in order to ensure that a new property owner would not be purchasing a leaking tank and the resulting financial clean-up responsibility and burden. However, it became evident to DComm that enforcing the inspection requirement on residential tanks would not be practical; unfortunately, the code was far enough along in the development process that the language could not be changed or clarified.

Contact information for the local authorized agents may be found at http://commerce.wi.gov/php/er-lpolists/lpo_agency_list.php and http://commerce.wi.gov/php/er-lpolists/lpo_contacts_list.php.

REALTOR® Practice Tips: For all transactions with non-residential USTs and ASTs over 1,100 gallons, promptly contact DComm local program operator and arrange for required UST inspection so that the buyer may close and use the fuel without disruption. Be aware that § Comm 10.150(5) on its face would require a pre-closing inspection for residential tanks, but that DComm has indicated it will not enforce the inspection requirement in residential transactions.

Heating Fuel Storage Basics

Wis. Admin. Code § Comm 10.310 applies to any new or existing AST or UST that is used to supply liquid fuel to a heating device used for space heating, processing or manufacturing when the fuel is consumed on the premises where stored. Tanks used to store heating fuel shall be installed by or under the supervision of a certified installer. § Comm 10.310 provides that heating oil UST systems that have a capacity of 4000 gallons or less must have:

(a) A vent whistle or equivalent means of overfill protection.

(b) Corrosion protection that complies with § Comm 10.520 except for tanks installed before November 1, 1994. These are lengthy technical requirements and those with questions should contact a DComm representative (www.commerce.state.wi.us/ER/ER-BST-StaffStateMap.html).

(c) Precision tightness testing every two years or leak detection in accordance with § Comm 10.510. Leak detection is not required for tanks that have a capacity of less than 1,100 gallons and are located on farm premises or at private residences.

Aboveground Tank Marking

All ASTs, whether new or existing, except at refineries or at marine, pipeline or transport terminals shall have attached the wording "FLAMMABLE—KEEP FIRE AWAY." Wis. Admin. Code § Comm 10.400(7) provides that the wording shall be clearly visible and written in letters of a contrasting color at least 5 inches high with a minimum stroke width of 1 inch. For an AST with a capacity up to 5,000 gallons, the label must be visible from 75 feet and the label must be at least 5 inches by 5 inches.

Spill and Overfill Prevention Requirements

All heating fuel ASTs, whether new or existing, shall comply with the following § Comm 10.300(3) requirements:

(a) The fill opening shall be provided with spill containment.

(b) If the fill opening is located outdoors, the opening shall be located in a watertight enclosure of noncombustible construction.

(c) 1. If the fill point is remote from the tank or if the delivery person cannot readily observe the tank gauge, an overfill alarm shall be provided at the fill point.

2. The alarm shall be readily audible or visible at the fill point and shall alert the delivery person when the tank is 90 percent full.

3. All overfill alarms shall be labeled as such.

All heating fuel UST systems, whether new or existing, shall meet the following § Comm 10.505(2) requirements:

1. A liquid-tight containment system with a minimum capacity of 5 gallons shall be provided on top of the tank where connections are made for product fill piping, except the 5-gallon minimum does not apply to containment that was installed before February 1, 2009.

2. The basin shall be equipped with either a push-to-drain system that

directs spilled product into the tank, or a mechanism to pump product out of the basin.

3. Storage tank overfill prevention equipment shall be provided that will (a) automatically shut off the flow into a tank when the tank is no more than 95 percent full and (b) alert the transfer operator when the tank is no more than 90 percent full by restricting the flow into the tank or triggering a high-level alarm. Retrofit equipment is available that complies with these requirements and that can be installed in a tank without removing pavement. The contents of the delivery hose should be drained into the tank after an automatic shut-off valve closes. Existing UST systems shall comply with this requirement by February 1, 2011.

All new and existing spill and overfill protection shall be maintained to perform as originally intended.

Prior to delivery, the operator of the fuel delivery equipment that is transferring the product shall ensure that the volume available in the tank is greater than the volume of product to be transferred to the tank. The transfer operation shall be monitored constantly by the operator of the delivery equipment so as to prevent overfilling and spilling. Fuel delivery persons must immediately inform the owner or operator of any spilling or overfilling that occurs during the delivery procedure and that may result in or be a release. The owner or operator is required to report, investigate and clean up any spills and overfills as described in §§ Comm 10.575-10.585. Releases that must be reported to the Department of Natural Resources at 1-800-943-0003 include contaminated soils or free product; dissolved phase product or vapors in soils, basements, sewer or utility lines, or in surface water or groundwater either at the tank site or in the surrounding area; and spills or overfills. See the Spill Law information beginning on Page 13 of this *Update* or visit http://dnr.wi.gov/org/aw/rr/spills for further information.

Tank System Closure

All ASTs and USTs are required to be rendered safe in some manner when no longer in use. Prior to December 1960, the code allowed "abandonment" of USTs in place by filling with water. Between December 1960 and August 1971, the code allowed "abandonment" in place by filling with an inert solid. Since April 1991, the code has prohibited "closure in place" with very limited exceptions (see § Comm 10.560(2)(e)).

UST Closures

At least five business days before beginning permanent closure of a tank system, the owner or operator shall notify the authorized agent or DComm of the intended closure on form ERS–9198.

To permanently close a UST system, § Comm 10.560 provides that the owner or operator shall have the tank and piping emptied and cleaned by removing all liquids and accumulated sludge, and shall remove the tank and piping from the site. Tanks that are removed shall be scrapped unless reused. Individuals cleaning tanks or removing tanks or portions of tank systems must be certified. When a UST is closed, or when a previously closed tank is removed, the owner shall have a revised tank registration (form ERS–7437) and part A of the DComm tank-system service and closure assessment report (form ERS–8951) completed and submitted to DComm within 21 business days of closure or removal.

§ Comm 10.560(2)(e) provides that UST systems may be closed in-place by filling with an inert, solid material, after emptying and cleaning, if the authorized agent or DComm determine, upon written request from the owner or operator, that one or more of the following conditions exist:

1. Excavation would impact the structural integrity of an adjacent building or structure.
2. Overhead utilities at a commercial site pose a safety hazard.
3. Excavation would impact adjacent transformers or substations.
4. Unauthorized encroachment would occur onto neighboring property under different ownership.
5. The tank location is inaccessible to necessary equipment.
6. Excavation would result in the destruction of mature trees.
7. Excavation would encroach upon a public way.
8. Excavation would necessitate the disconnection or relocation of underground utilities.

Closing a tank in-place does not exempt the tank from tank-system site assessment requirements. A tank-system site assessment by a certified tank-system site assessor is required upon closure of the following tanks only if there is a suspected or obvious release:

(a) Tanks that have a capacity of less than 4,000 gallons and stored heating oil for consumptive use on the premises.

(b) Tanks located at a private residence or on a farm premises that have a capacity of less than 1,100 gallons and stored fuel for dispensing into motorized vehicles.

An "obvious release" means there is an indication of a release, and there is both environmental evidence, such as soil discoloration, observable free product or odors – and a known source, such as a tank or piping with cracks, holes or rust plugs, or leaking joints. A "suspected release" means that either:

(a) there is an indication that a tank system has leaked, such as inventory losses; observable free product or evidence of free product in

secondary containment at dispensers, submersible pumps or spill buckets; petroleum odors; or leak detection alarm system activation, but there is no observable environmental evidence of a release, or

(b) there is observable environmental evidence of a release, such as soil discoloration or free product, but the source is unknown.

Any tank-system site assessment shall be performed after notifying the authorized agent or DComm but before installing a new system or backfilling the tank basin and the piping trenches. DComm and the DNR share jurisdiction over tank closures and tank-system site assessments. The DNR must be notified if a release is discovered.

The owner or operator of any UST that was closed before September 1, 1971, without removing the tank from the site but by filling the tank with water, shall bring the closed system into compliance with current closure requirements within a time period established by DComm on a case-by-case basis. When directed by DComm, the owner or operator of a UST closed in place before December 1, 1988, shall have the UST removed in accordance with current closure requirements. Empty or improperly closed or abandoned tanks that do not meet current closure requirements must be permanently closed in accordance with current standards. Tanks that are abandoned with or without product shall be permanently closed within 60 days of being abandoned or discovered.

REALTOR® Practice Tips: REALTORS® and consumers should be aware that real estate transactions may trigger the requirement to close and remove any USTs previously filled with water or inert solids and closed in place using current standards.

AST Closures

Removing Heating Oil AST from Service

When a heating oil AST (considered to include basement tanks) is removed from service for any reason other than immediate repair or replacement, § Comm 10.351 provides that either the tank and all connected piping, including the vent and fill piping, shall be emptied, cleaned and removed from the premises, or the following procedure shall be observed:

1. The tank and all connected piping shall be emptied and purged of all vapors.
2. If the tank is not removed, the tank vent shall be left intact and open.
3. If the fill pipe is not removed, it shall be filled to the top with concrete and capped.
4. Any piping that is not removed, other than a tank vent, shall be capped or otherwise sealed.

A person who is under contract with the owner to remove a heating oil AST or to place a heating oil AST out of service shall comply with these requirements. Certified personnel are not required for tank cleaning and tank removal at one- and two-family dwellings (aboveground or in basements). The owner is responsible for compliance if the owner does not engage a contractor to perform these tasks.

The owner shall provide written notice to the current heating oil vendor within seven days after removing the heating oil AST or placing it out of service. If there is a scheduled delivery in less than seven days, notification may be given verbally provided it is followed by written notification within seven days after verbal notification.

AST Closure

The requirements for closure of ASTs are the same as the requirements for closure of USTs except for the following § Comm 10.460 standards:

- Certified persons are not required to clean and remove heating fuel tanks at one- and two-family dwellings that are located aboveground or in the basement, nor to clean and remove field-erected tanks or tanks holding substances other than petroleum.
- All closed ASTs not immediately removed from the site shall have the word "CLOSED" and the date of final closure permanently marked on the exterior tank wall, at least 3 feet above grade, with lettering at least 3 inches high.
- When an AST is closed, a revised tank registration (form ERS–8731) and part A of a tank-system service and closure assessment report (form ERS–8951) shall be completed and submitted to DComm within 21 business days of closure.
- ASTs that have a capacity of less than 5,000 gallons are exempt from tank-system site assessment requirements unless a suspected or obvious release is present.

REALTOR® Practice Tips: Closures of basement heating oil tanks and residential heating oil ASTs do not require a certified remover and the tank need not be removed from the site. All USTs, however, must be closed by a certified remover and the tank must be removed from the premises.

REALTOR® Practice Tips: Until DComm finishes fine-tuning the new UST/AST rules and updates its Web site materials, REALTORS® and consumers may be best-served by always contacting DComm staff and asking what is required in a particular situation rather than attempting to interpret the 65 pages of new chapter Comm 10 rules.

Legal Hotline Questions and Answers – USTs and ASTs

A listed parcel has two USTs that have been abandoned for at least 20 years. There is no record of registration. What is the broker's responsibility?

An out-of-service UST used for storing heating oil, or an out-of-service underground storage tank of 1,100 gallons or less used for storing motor fuel for non-commercial purposes is required by Wisconsin law to be registered and closed (removed or closed in place) by a certified tank professional.

The best thing to do if an abandoned UST is discovered is to call a certified tank remover. The certified UST remover can give estimates for the work needed to be done to comply with UST regulations, handle the notifications, registration and other paperwork required, remove and properly dispose of the UST, and generally see that the job is done properly.

If the UST is removed without complying with UST regulations, licensees will generally be obligated to disclose this fact to all parties pursuant to § RL 24.07(2), and buyer financing may be jeopardized without expert confirmation that there was no leakage or contamination from the improperly removed UST. See the resources at www.commerce.wi.gov/ER/ER-BST-Closure.html.

Although the law requires the abandoned UST to be permanently removed/closed, there is no legal impediment to the sale if the UST is not removed prior to closing. The buyer purchasing the property may be in violation of the law, as was the seller, for having an abandoned UST on the premises. However, most buyers are reluctant to close on the property before the UST is removed. These buyers are concerned about the substantial cleanup costs they could face if the UST is removed after the closing and soil or groundwater contamination is discovered. For these same reasons, many lenders will not give buyers loans unless the abandoned UST is removed prior to closing.

The broker is working with a client who the broker believes took out a UST without using a certified remover. The sellers are going to disclose this to the potential buyer. What are the ramifications to the new owners if the prior owner did not properly remove the UST?

The DComm UST Closure page (http://commerce.wi.gov/ER/ER-BST-Closure.html) indicates that:

"I was not aware of the rules and had my tank removed by a contractor who is not certified. What do I need to do to satisfy the requirements?"

"The remover must complete the Removal Checklist (ERS-8951) and the owner must complete the tank inventory form (ERS-7437). Both forms must be submitted to Commerce along with a letter explaining the circumstances. Upon review of all information submitted, Commerce will determine if the removal and documentation are satisfactory. A site assessment may be ordered to satisfy the closure, in the case where it would not have been required if procedures under the rule had been complied with."

"With a site assessment, soil samples from the tank bed are collected by a Certified Site Assessor following Wisconsin DNR protocol. The results of soil sample analysis will determine if further investigation of site contamination is necessary."

"The property owner of record at the time the noncompliance becomes a regulatory issue is responsible for compliance and environmental remediation. Legal action against the previous owner by the current owner may be an option to recover costs."

Visit the DComm Web site at http://commerce.wi.gov/ER/ER-BST-Closure.html and http://commerce.wi.gov/ER/ER-BST-ResTk.html for further information.

A listed property has a 250-gallon UST. Is this exempt from removal?

All USTs with a capacity of 60 or more gallons are subject to Ch. Comm 10 and the rules requiring removal of abandoned tanks. See the DComm Underground Storage Tank Closure page at http://commerce.wi.gov/ER/ER-BST-Closure.html.

Is an LP tank on a property that is aboveground considered a UST, which would be related to the UST contingency in the offer?

No, LP tanks are not regulated as USTs. Tanks used to store Liquid Petroleum Gas (LP or LPG), commonly referred to as propane, are not regulated by the Comm 10 rules, as are tanks storing liquid petroleum products such as gasoline or heating oil. Presently, neither aboveground nor underground LP tanks are required to be registered or permitted by DComm. However, local ordinances may be more restrictive.

CASE LAW: ***Nischke v. Farmers & Merchants Bank & Trust***, 187 Wis. 2d 96 (Ct. App. 1994). Damages for Leaking UST.

An oil company installed a UST and pump on the Nischke farm in return for the owner's promise to buy all of her gas from the oil company. The oil company borrowed money from the bank and gave a security interest in its assets, including the UST, as collateral. The oil company later defaulted on its loan to the bank and transferred all of the secured property to the bank in lieu of foreclosure. The bank informed the owner, Nischke, that it was taking over the UST that the owner had stopped using several years before. The bank failed in its efforts to sell the UST.

Five years later, Nischke began to notice her water smelled and tasted like gas. The DNR confirmed UST leakage and groundwater contamination, advised her to stop consuming the water, and advised her she was legally obligated under the Wisconsin Spill Statute to conduct a site investigation and, if necessary, remediate the problem.

Nischke sued the bank for negligence, alleging that the bank, as secured creditor, had dominion and control over the UST and consequently had the duty to protect against resulting dangerous conditions. The jury awarded Nischke $250,000, the costs of remediation, but the trial court judge reduced the damages to $49,000, representing the resulting reduction in property value.

The Court of Appeals concluded that the bank possessed and controlled the UST as a mater of law. The bank consequently owed Nischke a duty of care while in possession of the UST, which included the duty to protect her from dangerous conditions arising from the UST. With respect to damages, the Court of Appeals noted that the general rule in Wisconsin is that a property owner's damages are the lesser of the cost of repair or the property's diminished value. If, however, repair is mandatory, the owner may be compensated for carrying out the required activities. The investigative and remedial measures Nischke was obligated to perform under the Spill Statute were found to qualify for this exception. Thus, the remedial costs were held to be the proper measure of damages in this case.

UST/AST Resources

- DComm has a Real Estate Agent's Web page regarding USTs and ASTs at www.commerce.state.wi.us/ER/ER-BST-RealEstatePage.html. This page provides links and information associated with storage tank regulations specifically for real estate professionals.
- Commerce tank staff by county: visit http://commerce.wi.gov/ER/ER-BST-StaffStateMap.html and click on your county for the contact information appropriate to the property location.
- AST/UST tank specialist districts and contact information may also be viewed at http://commerce.wi.gov/ER/pdf/bst/Forms_FM/ER-BST-Fm-9687TankerMap.pdf.
- Storage Tank database: http://commerce.wi.gov/ER/ER-EN-tanks-info.html.
- UST/AST forms: http://commerce.wi.gov/ER/ER-BST-FM-Comm10Forms.html.
- Certified Tank Contractors listings: http://apps.commerce.state.wi.us/SB_Credential/SB_CredentialApp.
- Wis. Admin. Code Chapter 10 (repealed and recreated effective February 1, 2009: http://commerce.wi.gov/ER/pdf/bst/CommCodes10_5_2_48/ER-BST-Comm10_Effect_02_09.pdf.

REALTOR® Resource Page: This resource page includes information about USTs and ASTs under

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Wisconsin law as well as links to *Legal Update*s, DR Hot Tips, DComm UST resources and Storage Tank Bureau staff contact information. Visit www.wra.org/UST.

Wisconsin Asbestos Rules

The newly revised asbestos rule in Wis. Admin. Code Chapter DHS 159, effective May 1, 2009, affects many different workers in Wisconsin including roofing, siding and window contractors; insulation and weatherization contractors; flooring contractors; general and demolition contractors; rental property owners and maintenance workers; and anyone else who disturbs materials containing asbestos, in addition to certified asbestos workers and supervisors. Asbestos is found in many building products including transite or cementious siding, floor tiles, acoustic ceiling tiles, sheet flooring, mastic, slate or transite roofing, spray-on ceilings and fire-proofing, blown-in or vermiculite insulation, window glazing, caulk, duct wrap, pipe insulation, and plasters and wallboard joint compounds. See the "Is Asbestos in Your Home?" diagram at http://dnr.wi.gov/air/pdf/AsbestosColor.pdf.

Specifically, Wis. Admin. Code § DHS 159.02(1) indicates that the new DHS asbestos rules apply to "any person that performs, claims to perform, offers to perform, supervises, or offers to supervise an asbestos abatement activity or asbestos management activity, as an individual or company."

Under § DHS 159.04 (4), an asbestos abatement activity is defined as any activity that disturbs asbestos-containing material or suspect asbestos-containing material, including the repair, enclosure, encapsulation or removal of such material, and any air sampling or air monitoring conducted in association with the activity. It also includes the repair, operation, service, maintenance, renovation or demolition of any part of a structure or building where asbestos-containing material or suspect asbestos-containing material is present, including the set up of work-site containment, clean-up and loading out of asbestos-containing material for disposal. Air sampling or air monitoring may be conducted before, during or after the activity to determine that the containment area is intact or that clean-up is complete and the containment area can be disassembled.

Asbestos-Containing Material

Asbestos-containing material (ACM) is (1) material or product containing more than 1 percent of asbestos, and (2) material meeting the definition of suspect ACM. Suspect ACM means (1) vermiculite insulation, unless a recommended EPA sampling and analysis protocol specific to vermiculite insulation proves that it does not contain asbestos, and (2) any untested materials used in or on building components with the exception of metal, glass, wood and fiberglass. Everything else is suspect ACM unless tested and found to not contain more than 1 percent asbestos. There is no EPA protocol for sampling and analyzing vermiculite insulation at this time, so it is assumed to contain asbestos.

REALTOR® Practice Tips:
Vermiculite insulation is assumed to be ACM unless proven otherwise in accordance with EPA-recommended sampling and analysis protocols specific to vermiculite insulation. At this time, there is no EPA guidance for sampling and testing vermiculite insulation for the presence of asbestos fibers. Therefore, vermiculite insulation must be treated as ACM. This may necessitate the use of certified asbestos workers for projects disturbing or impacting insulation.

For purposes of the DHS asbestos rules, all suspect ACM is treated as ACM. The EPA describes the acceptable method of identifying ACM, which uses polarized light microscopy (PLM). If the asbestos content of friable ACM is less than 10 percent, as determined by a method other than point counting by PLM, EPA requires the asbestos content to be verified by point counting using PLM.

REALTOR® Practice Tips:
For purposes of the DHS asbestos rules, all materials except metal, glass, wood and fiberglass, and materials shown to not contain more than 1 percent asbestos through testing, are treated as ACM.

Wis. Admin. Code § DHS 159.04(9) defines an "asbestos management activity" to mean an inspection for ACM, including collecting material samples, the design of an asbestos abatement activity or school asbestos response action, or the development of an asbestos management plan. An asbestos inspection means any activities undertaken to specifically determine the presence or location of, or assess the condition of ACM or suspect ACM, by visual or physical examination or by collecting material samples. It includes the re-inspection of known or suspect ACM that has been previously identified.

Asbestos Credentials

An individual may be credentialed as an asbestos supervisor, asbestos worker, asbestos inspector, asbestos management planner, asbestos project designer, exterior asbestos supervisor or exterior asbestos worker. The training for some of these credentials is relatively extensive, running up to five days for an asbestos supervisor. There are also required annual refresher courses running from a few hours up to a full day.

An individual conducting a regulated asbestos activity shall protect the health and safety of occupants, visitors, and persons outside the regulated area by using engineering controls and work practices that prevent

the release of asbestos fibers into the air outside of the regulated area. For asbestos abatement activities involving the exterior of a structure, an individual shall use engineering controls that prevent debris and fibers from entering the interior of the structure. For all regulated asbestos activities, an individual shall follow any other applicable work practice standards and protocols under local ordinance or state or federal statutes or regulations.

An individual shall be associated with a certified asbestos company by ownership, contract or employment before the individual may perform, supervise or offer to perform or supervise a regulated asbestos activity. There must be one asbestos supervisor on site at all times; certified workers may not work without direct supervision.

Exterior asbestos workers and supervisors perform, or oversee or direct the performance of, asbestos abatement activities involving only non-friable ACM that remains non-friable on the exterior or building envelope of a structure or building. If asbestos work conducted from the exterior of a building penetrates the building envelope, then it is no longer exterior asbestos work and may not be performed by an exterior asbestos company, supervisor or worker. For work to be considered exterior asbestos work, 1) the material must be non-friable and remain non-friable throughout the project, 2) the asbestos work is performed only from and on the outside of the building and 3) no air exchange may occur between the interior and exterior of the building. For window work to be considered exterior work, an impermeable barrier needs to be placed behind the window opening on the interior of the building before work starts to maintain complete separation of interior and exterior spaces

Friable ACM means ACM that, when dry, can be crumbled, pulverized or reduced to powder by hand pressure, including previously non-friable ACM when that material is damaged to the extent that when dry it may be crumbled, pulverized or reduced to powder by hand pressure.

Exceptions to Certification

Individual certification is not required under any one of the following conditions:

1. **Homeowner.** An asbestos abatement activity or asbestos management activity is performed by the owner on his or her own single-family, non-rental residential property that is occupied or intended to be occupied solely by the owner's family.
2. **Operations and Maintenance Work.** An asbestos abatement activity involves only operations and maintenance work that disturbs or incidentally removes no more ACM than would fit in a single glove bag or disposal bag no larger than 60 inches by 60 inches properly filled and sealed, is work that is non-repetitive and is not a series of small jobs that if performed sequentially would require certification, and is conducted by an individual or individuals with documented proof of completing at least a 16–hour operations and maintenance training course as prescribed by the EPA
3. **Backhoe Operator.** An individual operates a motorized vehicle to demolish or remove a facility when ACM is allowed to remain.

Consequences for Rental Property Owners

By way of an example of what these new DHS asbestos rules mean, take the case of a rental property owner or an apartment management company. The new rules affect renovations and repairs conducted at the rental properties.

Many building materials may contain asbestos, such as slate shingles, floor tiles, blown-in insulation, or window glazing and caulk. These and other similar materials must be tested or assumed to contain asbestos before disturbing or removing. If the apartment renovations or maintenance activities include disturbing, replacing or removing any of these known or suspect materials in any type of building, the rental owner or management company must be a certified asbestos company and use only workers certified in asbestos abatement or hire a certified asbestos company to remove these materials.

When is Certification Not Required?

If the work involves only building operations and maintenance activities that remove no more asbestos-containing or suspect material than would fit in one disposal bag no larger than 60 inches by 60 inches properly filled and sealed, the rental property owner or property management company and any person who will do this work must complete at least a 16-hour asbestos operations and maintenance training course, but certification is not required.

Suspect materials must be treated as asbestos-containing unless sampled, tested and proven not to be asbestos-containing. To test suspect materials, a certified asbestos inspector would need to sample the suspected asbestos materials, except that certified exterior asbestos supervisors may sample materials on building exteriors for projects they are conducting.

For a list of certified asbestos contractors, visit www.dhs.wisconsin.gov/asbestos/AsbCompanies/Companyindex.htm.

Legal Hotline Questions and Answers – Asbestos

The buyer has placed an offer on a commercial property with an Environmental Evaluation/ Inspection Contingency per the WB-15 Commercial Offer to Purchase. The buyer's inspection report states, "Ducting has insulation that resembles asbestos. Recommend having tested." The buyer wants the materials removed from the property at the

owner's expense. Does the buyer have the right to test for asbestos given the environmental contingency? If the asbestos test is allowed and found to be positive for asbestos, is containment a valid option instead of removal?

Authorization for testing requires a separate testing contingency because the Environmental Evaluation/ Inspection contingency does not provide the buyer the right to conduct testing of the property. Thus, the parties may wish to amend the offer to include an asbestos-testing contingency. Asbestos cannot be identified simply by looking at it unless it is labeled, so the only way to be certain is to get a sample analyzed. Even if a subsequent test showed the substance is asbestos, the seller may not be required to repair or remove the asbestos depending on the circumstances. Generally, undisturbed asbestos that is in good condition will not release asbestos fibers and may best be handled by leaving it alone. Problems with friable or damaged asbestos may be treated by either repair or removal. Repair usually consists of sealing or covering the asbestos material. See *Legal Update 01.04*, "Environmental Update 2001," at www.wra.org/LU0104, the EPA asbestos page at www.epa.gov/asbestos or contact the local health department for further information about asbestos.

The home inspection reveals that the insulation in the attic appears to contain vermiculite. The home inspector cites the EPA Web site, which states that vermiculite may contain asbestos. The buyer requests that the seller pay for the insulation to be tested and, if asbestos is found, that the seller pay for removal of the asbestos. What is the seller's legal obligation and, if this deal falls through, what, if anything, is the seller obligated to disclose?

Under the newly revised asbestos rules in Wisconsin that went into effect on May 1, 2009, vermiculite insulation is assumed to be ACM unless proven otherwise in accordance with EPA-recommended sampling and analysis protocols specific to vermiculite insulation. At this time, the EPA has not yet published official guidance for sampling and testing vermiculite insulation for the presence of asbestos fibers. Therefore, vermiculite insulation must be treated as ACM. This may necessitate the use of certified asbestos workers for any projects disturbing or impacting the insulation. Information about the new asbestos rules and certification requirements for asbestos workers is found at www.dhs.wisconsin.gov/asbestos.

Given the apparent presence of insulation containing vermiculite, the seller should amend the Real Estate Condition Report (RECR) for subsequent transactions to include the information the seller now knows from the home inspection report. If the seller does not disclose to buyers, that task may fall to the real estate licensee.

An agent arguably should disclose the features potentially containing asbestos (insulation apparently containing vermiculite) as information suggesting the possibility of material adverse facts and direct the parties to the appropriate experts for further information and investigation. Wis. Admin. Code § RL 24.07(3) states that a licensee will be practicing competently if the licensee makes timely written disclosure of the information suggesting the material adverse fact to all parties to the transaction, recommends the parties obtain expert assistance to inspect or investigate for the possible material adverse fact and, if directed by the parties, drafts appropriate inspection or investigation contingencies. The duty to disclose has priority over any duty owed to the client.

Whether the presence of vermiculate insulation, which is presumed to contain asbestos, constitutes a fact a licensee needs to disclose as a material adverse fact is a judgment that only the licensee can make after considering all of the facts and circumstances in the situation. If the agent, as a competent licensee, knows that this fact: (1) has a significant adverse affect on the value of the property, (2) significantly reduces the structural integrity of the property, (3) presents a significant health risk to the occupants of the property, or (4) is information that indicates that a party to the transaction is not able to or does not intend to meet his or her obligations under the contract, then the issue constitutes an adverse fact. If a party to the transaction were to so indicate, or if a competent licensee would generally recognize that this fact is of such importance that it would affect a reasonable party's decision to enter into a contract or would affect the party's decision about the terms of the contract, the fact is both adverse and material. If the fact is both adverse and material, then Wis. Admin. Code § RL 24.07(2) requires the licensee to timely disclose the fact in writing to all parties to the transaction, even if the client would direct the licensee not to disclose.

For further discussion of vermiculite insulation containing asbestos, review Pages 13-15 of *Legal Update 01.04*, "Environmental Update 2001," at www.wra.org/LU0104, and visit www.epa.gov/asbestos/pubs/verm.html.

Asbestos Resources

- Wisconsin Asbestos page: http://dhs.wisconsin.gov/asbestos/index.htm.
- EPA Asbestos information: www.epa.gov/asbestos.
- Wis. Admin. Code Chapter DHS 159 (repealed and recreated effective May 1, 2009): www.legis.state.wi.us/rsb/code/dhs/dhs159.pdf.
- Asbestos in Vermiculite Insulation – Human Health Hazards fact sheet: http://dhs.wisconsin.gov/eh/HlthHaz/PDF/Vermiculite.pdf.

Radium in Water

Radium is a naturally occurring radioactive metal that is usually found at low levels in soil, rock, water and plants. Groundwater, which moves slowly through the pores or cracks in underground layers of rock, dissolves minerals as it travels. Where the rock contains significant amounts of radium and the groundwater moves at a slow enough rate, the water can pick up higher amounts of radium.

In Wisconsin, most of the community water supplies that exceed the radium standard draw water from a deep sandstone aquifer and are located in a narrow band that stretches from Green Bay to the Illinois state line. In addition, a few high radium levels have been found in groundwater from sandstone formations in west central Wisconsin and in granite formations in north central Wisconsin. In all cases, the radium was there long before the first well was drilled.

What are the health risks from radium?

There is no immediate health risk from drinking water contaminated with levels of radium found in Wisconsin groundwater, but use of water with high radium over a lifetime can increase the risk for contracting bone cancer. The EPA estimates that long-term consumption of water containing 5 pCi/l (picocuries per liter) of radium will cause 44 added cancer deaths for every million people exposed. The risk doubles to 88 per million at 10 pCi/l, triples to 132 at 15 pCi/l, etc.

What is the drinking water standard for radium?

The state and federal drinking water standard has been established at five pCi/l for the combined total of two forms of radium: Radium-226 and Radium-228. The standard applies to levels in the water distribution system, as determined quarterly and averaged over a one-year period.

How do community systems handle the issue of radium in drinking water?

All community water systems must be monitored for radioactivity. Each community that exceeds the drinking water standard for radium must determine the best remedy for its situation. Corrective methods may include obtaining a new water source, blending water from more than one source or removing radium by treatment. Where possible, a source of treated surface water or groundwater with lower radium content, drawn from a different geologic formation, can replace or be mixed with an existing source.

Systems unable to use these options will have to remove radium by treatment. The most inexpensive treatment method is likely to be synthetic zeolite ion exchange such as that used in home water softeners. This water softening process generally removes about 90 percent of the radium. However, the resulting increased sodium levels (typically around 10 percent) from the ion exchange process are a concern to some people, particularly those on low-salt diets. All treatment processes produce wastewater and solid waste (sludge) containing radium in varied concentrations that must be disposed of properly.

Where should a buyer go for information about the drinking water quality of a public water system?

If a homebuyer wants information about the drinking water quality at a property served by a public water system, the buyer may be referred to the Community Confidence Report (CCR) resources. The buyer must have the exact name of the community water utility in order to obtain a CCR. REALTORS® may wish to keep the current CCRs for the public water systems serving their market area on hand for the convenience of their customers. As the official report regarding local public water quality, they are well suited for use in making disclosures to clients and customers.

Steps for retrieving a CCR can be found at http://dnr.wi.gov/org/water/dwg/ccr/ccr_instructions.htm.

The name and contact information for the local DNR water specialist may be obtained at http://dnr.wi.gov/org/water/dwg/county.htm or by calling the central office at 608-266-0821. EPA information about CCRs can be found at www.epa.gov/safewater/ccr/index.html.

What about private wells?

Generally, private wells are not drilled into the deeper geologic formations containing higher concentrations of radium. Nevertheless, radium has been found in a small number of private wells. Concerned owners whose wells have not been tested can contact their regional DNR office, which may be able to estimate groundwater radioactivity levels from previous well samplings.

Legal Hotline Questions and Answers – Radium in Water

Information on radium in water supplies has recently been in the local papers. Apparently tests on the municipal water in the broker's market show unsafe levels of radium. Where does the broker get more information and what disclosure duties does the broker have?

Wisconsin real estate license law recognizes the ability of real estate licensees to distribute government agency reports to satisfy a licensee's disclosure duties. Assuming that a licensee had knowledge of hazardous levels of contaminants in a municipal water supply, a licensee may satisfy the licensee's duty to disclose the hazardous condition by distributing a Consumer Confidence Report or municipal water quality report from the DNR. An advantage of distributing a government agency report is that this method of disclosure complies with the statutory guidelines provided by Wis.

Stat. § 452.23(2)(b). A licensee also avoids liability arising out of his or her attempt to restate a technical report for written disclosure to a consumer.

These reports may be used in a variety of ways. Once the seller receives a CCR, the seller may wish to check "yes" and "See expert's report" at question C 15 of the RECR and then attach the report to the RECR.

A good overview of drinking water issues in Wisconsin can be found at www.dnr.state.wi.us/org/water/dwg/priweltp.htm. The licensee may refer the parties to the DNR for more information relating to radium in water.

An agent closed on a property with an escrow agreement between the sellers and the buyers calling for a radium test to be conducted. The buyer and the seller agreed that if the radium levels were unacceptably high, the recommended remedy of a water softener with a zeolite ion exchange would be acceptable. The seller escrowed $1,500 toward the water test and the purchase of a water softener, if required. This escrow agreement does not specifically state that 5.0 pCi/l is the EPA standard for radium. The buyer has since decided that he should have a reverse osmosis device. Will this agreement sufficiently address the situation?

An escrow agreement should always state specific standards. However, since the level will likely be over 5.0 pCi/l, in the agent's estimation, there should not be much disagreement that the level is unacceptably high. The agreement described by the agent is clear that a water softener should then be provided by the seller. The buyer's desire for a reverse osmosis device is outside of the agreement.

Radium in Drinking Water Resources

- DNR radium in drinking water information: www.dnr.state.wi.us/org/water/dwg/pubs/radium.pdf and www.dnr.state.wi.us/org/water/dwg/radium.htm.
- EPA radium resources: www.epa.gov/radiation/radionuclides/radium.html and www.epa.gov/safewater/radionuclides/basicinformation.html.
- For an EPA overview of drinking water issues, read "Water on Tap: What You Need to Know," available in English, Spanish and Chinese at www.epa.gov/safewater/wot/index.html.
- EPA Office of Ground Water & Drinking Water Consumer Information site: www.epa.gov/safewater/consumerinformation/index.html.

Nitrate in Water

Nitrate (NO_3) is a water-soluble molecule made up of nitrogen and oxygen. Nitrate is a natural constituent of plants and is found in vegetables at varying levels depending on the amount of fertilizer applied and on other growing conditions.

High levels of nitrates in drinking water pose a serious health threat for infants less than six months of age. Infants who are fed water or formula made with water that is high in nitrate can develop a condition that doctors call methemoglobinemia. The condition is also called "blue baby syndrome" because the skin appears blue-gray or lavender in color. This color change is caused by a lack of oxygen in the blood. Infants suffering from blue baby syndrome need immediate medical care because the condition can lead to coma and death if not treated promptly. Although no confirmed cases of blue baby syndrome have been associated with nitrate in breast milk, it may be advisable for nursing women to avoid drinking water that contains more than 50 milligrams per liter nitrate-nitrogen.

Nitrate Levels in Drinking Water

Nitrate testing is recommended for all wells and is essential for wells serving infants under six months of age. State and federal laws set the maximum allowable level of nitrate-nitrogen in public drinking water at 10 milligrams per liter (10 parts per million).

Water naturally contains less than 1 milligram of nitrate per liter and is not a major source of exposure.

Higher levels indicate that the water has been contaminated. Common sources of nitrate contamination include fertilizers, animal wastes, septic tanks, municipal sewage treatment systems and decaying plant debris. The ability of nitrate to enter well water depends on the type of soil and bedrock present, and on the depth and construction of the well.

Recommendations

If the nitrate levels are more than 10 milligrams per liter (mg/l), the following actions are recommended:

- Do not give the water to infants less than six months of age or use the water to prepare infant formula.
- Avoid drinking the water on a daily basis during pregnancy.
- Do not attempt to remove the nitrate by boiling the water. This will only concentrate the nitrate, making levels even higher.
- Identify the nitrate source and take action to reduce contamination. Remedial actions may include reducing fertilizer use, improving manure handling methods, pumping septic tanks or upgrading wells.

Legal Hotline Questions and Answers – Nitrate in Water

The offer to purchase included the Addendum B standard safe water test contingency (for Coliform/E coli only). Although the plumber who was hired by the sellers was told to test for only Coliform/E coli, he made a mistake and had the nitrate level tested as well. The test results have come back bacteriologically safe; however, the nitrate level was more than 15 parts per million (over the 10 parts per million maximum recommended

by the EPA). The broker assumes that the sellers will now need to disclose this to the buyer since it is now a known defect. However, if the buyer requests it, do the sellers then have the responsibility to remedy the issue since it was unknown at the time the offer was written? Or, since the issue was not part of the original offer, would it be the buyer's responsibility?

Wis. Stat. § 709.035 requires the sellers to amend the RECR prior to the acceptance of a contract if the sellers obtain information or become aware of any condition that would change a response on their RECR. The sellers may choose to attach a copy of an inspection report or test results to the RECR to accomplish disclosure for future transactions. If the sellers amend the RECR for this transaction, it would give the buyer the right to rescind the offer to purchase.

If the seller does not amend the RECR, the broker in the transaction has a duty to disclose material adverse facts to the parties, in writing and in a timely manner. If the sellers fail to disclose the nitrate test results, the licensee is required to disclose material adverse facts. The broker may refer to *Legal Update 02.12*, available online at www.wra.org/LU0212 and on ZipForm, for a sample material adverse fact disclosure letter.

The presence of the higher nitrate level may be treated as a mutual mistake of fact because neither party apparently was aware of this at the time when the offer was written and accepted. When both parties are mistaken as to a basic factual assumption on which the contract was made and the mistake has a material effect on their performances, the contract is voidable by the party adversely affected. Under this theory, both parties must have been mistaken. A mistake by only one of the parties makes a contract voidable only if the party who causes the mistake has reason to know the other party is proceeding based on that mistake. The mistake must be based upon a past or present fact.

Nitrate in Drinking Water Resources

- DNR *Nitrate in Drinking Water* brochure: http://dnr.wi.gov/org/water/dwg/pubs/nitrate.pdf.
- DNR Nitrate information: http://dnr.wi.gov/org/water/dwg/nitrate.htm.
- CDC Nitrate and Drinking Water from Private Wells: www.cdc.gov/ncidod/dpd/healthywater/factsheets/pdf/nitrate.pdf.
- Tests for Drinking Water from Private Wells: http://dnr.wi.gov/org/water/dwg/pubs/TestsForWell.pdf.

Spill Law

The Spill Law, found in Wis. Stat. § 292.11 (www.legis.state.wi.us/statutes/Stat0292.pdf), requires that a person who possesses or controls a hazardous substance or who causes the discharge of a hazardous substance shall immediately notify the DNR of any discharge not exempted by the statute. The DNR has a 24-hour toll-free number for reporting spills: 1-800-943-0003.

In addition, those same persons must take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state. Wis. Admin. Code Chapter NR 706, online at www.legis.state.wi.us/rsb/code/nr/nr706.pdf, is the administrative rule that further defines notification requirements.

If a responsible party is unable or unwilling to provide adequate response, the DNR has the authority to identify, locate, monitor, contain, remove or dispose of the hazardous substance, or take any other emergency action that it deems appropriate under the circumstances. In addition, the department may enter any property, premises or place at any time for the purpose of taking removal or other emergency action if the entry is necessary to prevent increased damage to the air, land or waters of the state. Notice is not required if the delay would result in imminent risk to public health, safety or the environment. The DNR can then seek cost recovery for costs incurred to provide those services.

In order to help implement this law, the DNR spills program was established to provide technical assistance and support within the agency and to those outside the agency. Each DNR region has a spill coordinator (http://dnr.wi.gov/org/aw/rr/spills/coordinators.pdf) specifically trained to help responsible parties, response agencies and other DNR staff when a spill occurs. These same spill coordinators are also available to work with specific parties in establishing spill prevention programs.

In order to determine whether you have a hazardous substance spill that requires immediate notification, you must ask yourself the following three questions: 1) is the substance spilled a hazardous substance, 2) has it been released to the environment, and 3) are there statutory or rule exemptions that apply to this situation?

Hazardous Substances

Wis. Stat. § 292.01(5) defines a hazardous substance as "any substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illnesses or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives as determined by the department."

This definition suggests that a hazardous substance can be anything, depending on the nature of the release. The question you really need to ask yourself is how much was released and into what environment. The rule of thumb used by many is if you have to think about whether it needs to be reported, it probably does. Remember, reporting spills never gets you into trouble, only failure to report does. Whether the spilled hazardous substance is heating oil or gasoline, or something unusual like corn, butter and/or manure that flows toward a stream, pickle juice spilled on the ground, or even mercury spilled in a classroom, DNR staff will tell you if your specific incident does not meet the criteria of a reportable spill at the time that you report it. To help clarify what spills are reportable, statutory exemptions as well as "de-minimis" exemptions have been established.

A hazardous substance that is released into a secondary containment structure, completely contained and can be recovered with no discharge to the environment is not "discharged" as that term is used in the Spill Law. Only discharges to the environment require notification to the DNR.

De Minimis Exemptions

The following discharges need not be reported to the DNR spill hotline:

1. Discharges of petroleum compounds if you spill:

   • Gasoline or another petroleum product that is completely contained on an impervious surface.

   • Less than 1 gallon of gasoline on a pervious surface or if it runs off an impervious surface.

   • Less than 5 gallons of other petroleum products on a pervious surface or if it runs off an impervious surface.

2. Discharges of agrichemical compounds if the amount discharged:

   • Is less than 250 pounds of a dry fertilizer.

   • Is less than 25 gallons of a liquid fertilizer.

   • When diluted as indicated on the pesticide label would cover less than one acre of land if applied according to label instructions for pesticides registered for use in Wisconsin.

3. Federal reportable quantities:

   • If the amount discharged is less than the federal reportable quantity.

Spill Law Case Law

In ***State v. Chrysler Outboard Corp.***, 219 Wis.2d 130, 580 N.W.2d 203 (1998), the state of Wisconsin sued a manufacturer of outboard marine engines under the Solid Waste Law (see Wis. Stat. § 289.05 and related provisions) and the Spill Law (Wis. Stat. § 292.11) for the dumping of manufacturing waste.

Chrysler owned and operated an outboard marine engine manufacturing plant in Hartford, Wisconsin, from 1965 to 1984. The manufacturing process generated waste paints, oils and solvents, some of which contained hazardous substances. For approximately six months in 1970, Chrysler contracted with a construction and demolition business to remove the waste, contained in 55-gallon drums, from the Hartford plant for disposal. The waste was hauled to a disposal site where the disposal business dumped the drums and other rubbish and covered the area with fill. The drums were discovered in 1992. Testing revealed that the hazardous wastes from the drums discharged into the ground, resulting in a plume of groundwater chlorinated solvent contamination at least one-half mile long.

The Spill Law, in Wis. Stat. § 292.11(3), provides that, "Persons having possession of or control over a hazardous substance being discharged, or who cause a hazardous discharge, shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from any discharge to the air, lands or waters of this state."

Chrysler argued that the Spill Law did not apply to them based on the court's decision in ***State v. Mauthe***, 123 Wis.2d 288, 366 N.W.2d 871 (1985). In that case the DNR discovered hazardous substance spills near the site that had been used by Wisconsin Chromium Corporation for chrome electroplating. Tests at and adjacent to the site revealed extensive hexavalent chromium contamination of the soil and groundwater. The court rejected the argument that the Spill Law definition of "discharge" required some kind of human activity that results in contaminant seepage. The court concluded that "discharge" encompasses inactive waste sites from which hazardous substances are flowing, and that although he did not cause the hazardous substance spill, the property owner, Mauthe, could be held responsible for remediation of the spill because he owned the property where contamination was occurring. Chrysler contends that the rationale of ***Mauthe*** does not apply to Chrysler since Mauthe had actual possession or control of the land while Chrysler has never owned, possessed or controlled their disposal site.

The court disagreed because the Spill Law imposes liability on "[p]ersons having possession of or control over a hazardous substance being discharged, or who cause a hazardous discharge ...." (emphasis added). The state does not seek remediation and penalties from Chrysler because it possessed or controlled the hazardous substance after 1978, but because Chrysler caused a hazardous discharge after the Spill Law took effect.

Accordingly, Chrysler was compelled to complete remediation of their disposal site, conduct an investigation to determine the location of any and all other unlicensed sites in Wisconsin at which its solid and hazardous wastes

from its Hartford, Wisconsin, plant were disposed and submit both the results of that investigation and, if necessary, a remediation plan to the DNR.

Legal Hotline Questions and Answers – Spill Law

The broker just received a call on a resort where the broker knows there were small fuel tanks, both aboveground and buried. It burned down in 1985 and sold to a private party and then it was sold again. If there is contamination, who is responsible for clean-up?

Although the primary responsibility for contamination remediation resides with the property owner, allocation of costs and fees may be attributable to past owners depending on the facts and circumstances. Legal counsel specializing in environmental law should be consulted. The parties to a transaction may, with the help of legal counsel, contract to investigate and allocate risk and liability.

Spill Law Resources

- DNR Spills Web page: http://dnr.wi.gov/org/aw/rr/spills/index.htm#fact.
- Clean-up Process for contaminated soils and groundwater: http://dnr.wi.gov/org/aw/rr/cleanup/index.htm.

Meth Labs

Methamphetamine (meth) is a man-made amphetamine, produced and sold illegally in the form of pills, powder or chunks. Common street names for methamphetamine include: speed, crank, ice, glass and crystal. According to the Wisconsin Department of Justice, the incidence of meth production in meth labs is relatively low in Wisconsin when compared to other states, but it is on the rise. The U.S. Drug Enforcement Agency says clandestine meth labs have been discovered in 46 states.

Although the ingredients used to produce meth are readily available products, the chemical "cooking" process to make meth may release toxic gases and residual hazardous waste materials in the lab and throughout the building. There have been reported cases of illness resulting from lab residue and some reports of structural property damage have been documented. The Department of Public Health recommends that environmental companies that specialize in hazardous material cleanup undertake any meth lab remediation.

Homemade meth is produced in makeshift labs set up in homes, apartments, hotel rooms, mobile homes or other buildings. Meth residues, left behind by sellers who manufactured the toxic drug, is an increasing problem for home buyers.

The following are signs that meth may have been manufactured in a property:

- Yellow discoloration on walls and other surfaces.
- Taped off fire detectors.
- Symptoms such as burning eyes, an itchy throat or a metallic taste in the mouth while in the property.
- Strong odors similar to solvent, cat urine or ammonia.
- Presence of security cameras or other surveillance equipment.

Buyers should not rely on the sellers' assurances or an inspection by someone who is not knowledgeable because suing after the fact is unlikely to net results. The seller will be either long gone or in jail, experts say.

Because of the potential health implications, REALTORS® generally should disclose the current or prior presence of a meth lab on the premises as information suggesting the possibility of a material adverse fact and recommend that the parties obtain expert assistance to inspect or investigate.

Legal Hotline Questions and Answers – Meth Labs

A listing broker is listing a property that was used as a methamphetamine lab. The owner is going to throw out contaminated materials and have the entire house cleaned and repainted according to the county health department requirements. What must be disclosed to buyers?

Short-term exposure to high concentrations of chemical vapors in a functioning meth lab can cause severe health problems or even death. For this reason, meth "cookers," their families and first responders are at highest risk of acute health effects including lung damage and chemical burns to different parts of the body. Unsuspecting people can also touch residues of meth and have symptoms similar to those experienced by meth users. This contamination needs to be cleaned up, and any sanitation, electrical and other safety hazards must be addressed.

Once the main chemicals related to the former lab have been removed, the health department is typically called in to assess the property for hazards and long-term exposure risks from residual chemicals. The DNR also may be called in to assess any environmental impacts from chemical spills or improper waste disposal. The broker should see if any reports from these agencies are available to use as a disclosure document. There are no pre-determined, acceptable levels of clean up inside a building or home for the many chemicals associated with meth labs. Thus, testing can be done after clean up, but at this time the Department of Health and Family Services does not recommend it.

If, however, the seller does not disclose the property's history and the steps taken for remediation of the property, REALTORS® generally should disclose this in writing as information suggesting the possibility of a material adverse fact.

Meth Lab Resources

- DHS Cleaning Up Hazardous

Chemicals Meth Labs fact sheet: http://dhs.wisconsin.gov/eh/ChemFS/pdf/MethFS.pdf.

- Minnesota Methamphetamine and Meth Lab information: www.health.state.mn.us/divs/eh/meth.
- Cleaning up Former Methamphetamine Labs: www.kci.org/meth_info/meth_cleanup.htm.
- National Association of REALTORS® *Field Guide to Meth Labs*: www.realtor.org/libweb.nsf/pages/fg324.

Chinese Drywall

Chinese drywall is drywall manufactured in China. The problems stem from the fact that they apparently used fly ash, which is a by-product of burned coal (produced in large volumes during the generation of electricity). The issue with the Chinese drywall, from a homeowner's point of view is not so much the chemicals that are trapped between the paper, although that may be of concern to installers and demolition crews, but the off-gassing of the sulfur-based compounds in the drywall. In fact, it is reported that the first signs of Chinese drywall are the odor and the failure of the air conditioning system caused by chemical pitting in the copper coils. People have reported respiratory problems, headaches and more severe symptoms. Epidemiological studies have been started. At present, there is no U.S. standard for the manufacture of drywall.

During normal times, drywall used in the U.S. is manufactured in the U.S., Canada and Mexico. However, when a hurricane-driven demand spike overlaid a housing boom, a drywall shortage resulted. Knauf Plasterboard, a German brand owned by Knauf International GmbH, imported Chinese-manufactured drywall. At present, there is no hard evidence that Knauf supplied "private label" drywall for retailers to resell under their own brand. About 60 percent of Chinese drywall apparently entered through ports in Florida between 2004 and 2008. It has been used to a large extent in the southeastern part of the U.S. Although there is a watchdog report of it having been used in 41 states, there is good information that it was installed in homes in Alabama, Arizona, California, Florida, Louisiana, Mississippi, Nevada, New Jersey, Ohio, Texas, Virginia, Washington, Wisconsin and Wyoming.

The Chinese drywall releases airborne sulfur-based gases. The concentrations appear to increase in hot and humid environments. Like with mold, people living in houses containing Chinese drywall have reported increased asthma attacks, coughing, dizziness, fatigue, headaches, irritated eyes, nausea, sinus problems and sneezing. Copper is quickly turned black by the sulfur-based gases that emanate from Chinese drywall.

The easiest method to check in a general manner for Chinese drywall is to smell the house – a rotten egg (sulfur) smell is a good indication that there could be a problem. People have also compared the smell to that made by lighting a match or from fireworks. Look for the word Knauf on drywall that has not been painted. This may be as easy as looking at unpainted drywall in the garage or as difficult as lifting (with a gloved hand) then looking under insulation in the attic. While in the basement look where copper piping leads into wall cavities. Black copper is a good indication that sulfur-based gasses have contacted it. These are only observations that may be reported so that further investigation may be pursued and are not determinative on their own.

Chinese Drywall Resources

- U.S. Consumer Product Safety Commission: www.cpsc.gov/info/drywall/index.html and www.doh.state.fl.us/environment/community/indoor-air/status0709.pdf.
- U.S. Centers for Disease Control: www.cdc.gov/nceh/drywall/docs/Drywall_for_Healthcare_Providers.pdf.
- Florida Department of Health: www.doh.state.fl.us/environment/community/indoor-air/drywall.html.

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