

ENVIRONMENTAL CONSIDERATIONS IN RESIDENTIAL TRANSACTIONS



PRESENTED BY NICHOLAS M. WARD-WILLIS, ESQ.
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Potential Environmental Issues

- Radon
- Mold
- Drinking Water Contamination
- Dams
- Illegal Sewer Connection
- Wetlands
- Asbestos
- Lead Paint
- Oil Tanks
- PFOA
- Clean Fill?
- Climate Change
- Off-Site Issues

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Why Was This House Demolished?



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A Little Work On The Side

- Port Refinery EPA Superfund Site in Rye Brook, NY
- 1990's \$6.4 MM to remove 6,500 tons of soil
- Garage demolished, 8 backyards ripped up
- 2004 – EPA spends additional \$7 MM
- Resident repackaging mercury shipped from around the country in his garage

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Is Client The Proud Owner Of A Dam?



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Dam It!

- When a Regulated Dam is sold or otherwise transferred, both the Seller (or Transferor) and the Buyer (or Transferee) must submit one or more “Property Transfer Notices.” See, 6 NYCRR Subpart 673.11.

Privately Owned Dams In NY

New York State has at least 5,352 functioning dams, 861 of which are owned or co-owned by local governments.

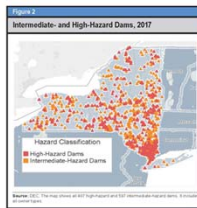


Figure 3
New York Dams by Hazard Classification and Owner Type, 2017

| | Local Government Owner | Other Owner | Total |
|--|------------------------|--------------|--------------|
| High-Hazard Dams | | | |
| Number of Dams | 213 | 184 | 407 |
| Percentage of High-Hazard Dams | 52.3% | 47.7% | 100.0% |
| Intermediate-Hazard Dams | | | |
| Number of Dams | 179 | 418 | 597 |
| Percentage of Intermediate-Hazard Dams | 30.0% | 70.0% | 100.0% |
| Low-Hazard Dams | | | |
| Number of Dams | 480 | 3,873 | 4,353 |
| Percentage of Low-Hazard Dams | 11.0% | 89.0% | 100.0% |
| Total | 861 | 4,475 | 5,336 |
| Percentage of Dams | 15% | 85% | 100% |

Source: ESD. Only 100% of the New York State Dams (approximately 3000) are classified. Many dams have more than one owner. This table excludes 1,317 Dams that are owned by other types of entities.

2 Dam Infrastructure: Understanding and Managing the Risks

Property Transfer Notices

1. Notice that a Dam Exists on the Property.
Provide prior to Buyer signing contract.
2. Notice of Turnover of Records Concerning the Dam. Provide no later than closing.
3. Notice of Sale/Transfer of the Dam.
Provide to DEC and municipality no later than closing.

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- Property Transfer Notices must be submitted for a dam that:
 - (i) has an Intermediate Hazard (Class B) designation
 - (ii) High Hazard (Class C) designation
 - (iii) meets the dam safety permit size threshold (i.e., certain height and/or impoundment)

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Dam Classifications!

- (1) Class "A" or "Low Hazard" dam: A dam failure is unlikely to result in damage to anything more than isolated or unoccupied buildings, etc.
- (2) Class "B" or "Intermediate Hazard" dam: A dam failure may result in damage to isolated homes, etc., Loss of human life is not expected.

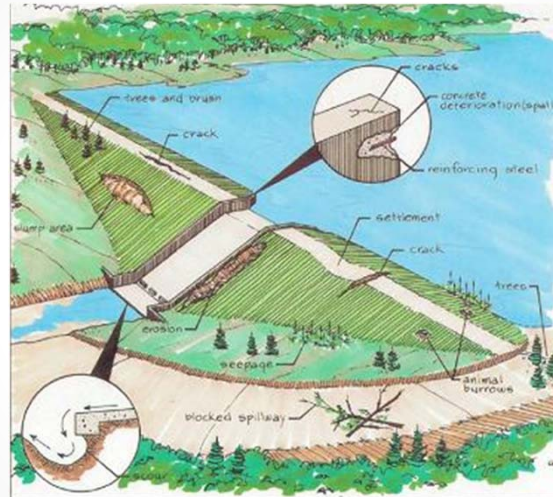
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Dam Classifications!

- (3) Class "C" or "High Hazard" dam: A dam failure may result in widespread or serious damage to home(s), etc. ... such that the loss of human life or widespread substantial economic loss is likely.
- (4) Class "D" or "Negligible or No Hazard" dam: A dam that has been breached or removed, or has failed or otherwise no longer materially impounds waters, or a dam that was planned but never constructed. Class "D" dams are considered to be defunct dams posing negligible or no hazard.

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Dam Issues!



Potential problem indicators for a dam, photo courtesy of British Columbia Dam Safety Guidelines (from NYSDEC web site)

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Managing The Risk

- Unusual for a residential property to include a Dam, but does occur.
- Ask Client
- Review Survey
- Inquire with NYSDEC
- Existence of Dam is obvious – difficult to allege fraud

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Radon

- Radioactive gas from the natural breakdown of uranium in soil and rock
- Typically moves up through the ground to the air above and into your home through cracks and other holes in the foundation.
- Radon is the second leading cause of lung cancer in the US

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Who Has Radon?

- EPA – 7% of homes nationwide have elevated levels. Higher in New York.
- Cortlandt County – 68% of homes tested and reported to DOH
- Chemung County – 55%
- Onondaga County – 47%
- Erie County – 22%
- Monroe County – 17%

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Radon

- NYSDOH and EPA use 4 picoCuries (pCi) per liter as recommended mitigation level
- DOH maintains online database of submitted radon tests in NY from 1987-2016
- EPA has a comprehensive Radon webpage

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DOH Radon Test Database

| County | Town/Village/City | Test Location in Home | # of Homes Tested | Mean | <4pCi/L | % of all | ≥4 and <20pCi/L | % of all | ≥20pCi/L | % of all |
|-------------|-------------------|-----------------------|-------------------|------|---------|----------|-----------------|----------|----------|----------|
| NICHARA | SOMERSET | Basement | 7 | 1.31 | 7 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| NICHARA | SOMERSET | 1st Floor | 2 | 0.37 | 2 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| WESTCHESTER | SOMERS | Basement | 74 | 2.76 | 51 | 68.9% | 22 | 29.7% | 1 | 1.4% |
| WESTCHESTER | SOMERS | 1st Floor | 28 | 1.37 | 22 | 78.6% | 6 | 21.4% | 0 | 0.0% |

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- Charcoal canister – DOH says 20% accuracy
- DOH recommends rely on average of two charcoal canister measurements
- Consider using continuous electronic radon monitors
- FHA mortgagees required to provide form recommending home inspection and radon testing (Form HUD-92564-CN)

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NYS Regulations

- NY does not require radon testers or mitigation contractors to be certified
- Radon samples must be tested in state-certified labs
- 10 NYCRR 16.130 requires testing firm to advise customer where result exceeds 20 pCi to contact DOH for further assistance
- 10 NYCRR 16.130 requires companies to report radon testing and number of homes mitigated

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- New homes in Towns of Lima and Caledonia in Livingston County required to be built “radon resistant.”
- Mitigate by installation of active or passive subslab depressurization system (pipes under the slab)
- Costs - \$1,000 to \$5,000

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Managing The Risk

- Was testing done correctly?
- If FHA loan, did Bank provide required notice?
- If mitigation required, is contract clear as to whether mitigation system is active or passive?

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Lead Paint – Chip off The Old Block



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Lead Paint

- Residential Lead-Based Paint Hazard Reduction Act of 1992
- Applies to homes built before 1978
- Seller required to disclose knowledge
- Buyer has 10 days to order test
- Must provide Buyer with “Protect Your Family From Lead Paint in the Home” pamphlet

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Managing The Risk

- Concern is exposure – eating lead based paint or breathing air during demolition work
- Lead paint on a wall generally not a risk
- Areas of chipped paint – windows, doors, door frames, molding, etc. are at risk

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Lead Paint

- Owner aware of lead paint, provided Niagara County broker with test results. First buyer backs out when aware of results. Second buyer told by broker that Seller had no knowledge. Closed April, 2014. New owner's child diagnosed with lead poisoning in Sept. 2015. *USA v. Walck, Case No. 1:17-mj-01103*
- 2017 – Real estate agent pled guilty in federal court for failing to disclose an inspection report which disclosed existence of lead paint. Fined \$1,000 and paid restitution of \$53,326. Civil lawsuit.

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- Section 1018(b)(3) of the Lead Paint Act further provides that “[a]ny person who knowingly violates the provisions of this section shall be jointly and severally liable to the purchaser or lessee in an amount equal to three times the amount of damages incurred by such individual.”
- This allows an aggrieved purchaser or lessee the opportunity to seek direct compensation from a seller, lessor or their agent and receive treble damages.
- Section 1018(b)(4) also allows the court “...to award court costs, reasonable attorney’s fees, and expert witness fees to a prevailing plaintiff.”

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Managing the Risk

- Make sure clients aware of rights and obligations
- Make sure all parties and brokers sign Lead Paint Disclosure Form
- Make sure you review form with Buyer and Buyer receives pamphlet
- When representing Seller, ask if they have report or any knowledge
- Only applies to homes built before 1978

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Asbestos – Your Friable Friend?



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Pipe Wrap




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Some examples
of Asbestos



Vermiculite

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Asbestos

- Found in:
 - roofing and siding shingles
 - Insulation
 - Vinyl floor tiles
 - Pipe Insulation
 - Furnaces and gaskets
- Good resources on DOH and EPA website

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Asbestos

- Federal Asbestos Law does not regulate inspection, repair or removal in single family homes
- Asbestos removal in SFH regulated by NYS Asbestos Law
- NYS Labor Law §900-910
- 12 NYCRR 56 – There are numerous New York regulations on asbestos including license requirements, air sample testing, survey planning and design, background air sampling, work area preparation, asbestos abatement, final cleaning and clearing procedures, waste removal from site, special projects an miscellaneous.

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Asbestos

- Workers required to be licensed and trained
- Homeowner (not home) exempt from licensing and training requirements, but must follow disposal requirements

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- Asbestos Abatement Contractors required to be licensed by NYSDOL – list on website
- Homeowner can remove, but its not a DIY job
- If friable or blown in insulation, remove
- Inspector may determine its encapsulated and poses no risk
- Typical abatement in basement - \$5,000
- Avoid conflict of interest
(Inspector/Abatement)

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Managing The Risk

- If discovered and required to be abated, make sure contract requires compliance with DOL Law and regulations.
- Require separate Inspector and Abatement company.

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Emerging Contaminants

- PFAS Compounds (PFOA & PFOS)
- 1,4-dioxane

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Managing the Risk

- If house on potable water and within one mile of airport, fire station, gas station consider testing for PFOA due to use of fire fighting foam
- If potable well, was it tested for emerging contaminants

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Clean Fill – Is It?

- Scheme whereby haulers offer free fill to homeowner owners seeking to obtain suitable fill for leveling or adjusting the grade of properties
- "As the saying goes: A deal too good to be true probably is," said DEC Commissioner Basil Seggos. "Landowners should be skeptical and ask tough questions when a contractor offers to provide fill material at no charge. This so-called 'clean fill' is sometimes mixed together with solid waste from construction sites and landowners could find their properties burdened with contaminated material."

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Clean Fill – Is It?

2018 - Operation TrashNet on Long Island and in the Mid-Hudson Valley:

- Over 550 total tickets issued and charges filed
- More than 170 tickets issued for alleged unlawful disposal of solid waste
- More than 40 trucking companies allegedly identified
- 81 new illegal dumping sites uncovered
- 26 trucks seized and impounded
- 53 search warrants executed

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DEC Tips

- Look at the fill material as it is received. It should consist of natural soil, sand, gravel, or rock with no non-soil constituents (see below), and should be free of petroleum or any other odors;
- Check to ensure the fill material is free of regulated wastes such as concrete, brick, asphalt, asbestos, drywall, plaster, roofing materials, wood, metal, tiles, paint chips, ash, slag, coal, pieces of particle boards, carpet, petroleum-contaminated soil, and other contaminated materials.

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DEC Tips

- If material originates in New York City, the homeowner/generator must notify the respective DEC Regional Offices in Stony Brook and New Paltz five days prior to receiving the material about its placement.
- Homeowners should request that the generator provide them with documentation regarding the generating site location-and fill characteristic information. Make sure that the section for the Qualified Environmental Professional is signed and includes contact information.
- Copies of the Notification of Fill Material Transport form are available on DEC's website.

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DEC Tips

- Each load that originates in New York City must also have a complete and accurate tracking document to identify the source of fill material. Copies of this form (Part 360 Series Waste Tracking Document - Construction and Demolition Debris) are available on DEC's website. Homeowners should request a completed copy of this document for their records from the transporter.
- If the generator and/or contractor cannot provide copies of the Notification of Fill Material Transport and Part 360 Series Waste Tracking Document, the homeowner should refuse the shipment;
- Homeowners should only accept fill material from one source at a time; If the load is bigger than 10 cubic yards and is generated in New York City, ensure the truck delivering fill material is in possession of a valid Part 364 Waste Transporter Registration or Permit.

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Managing The Risk

- Not a typical issue in a transaction. Might arise if new owner constructs an addition and finds C&D debris.
- If a contract for new construction, consider language that fill brought onto property be clean fill in accordance with NYSDEC Part 360 Regulations.

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Mold

Attempt to hide musty odor...



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There is no mold here I guarantee
it just sign the contracts already...



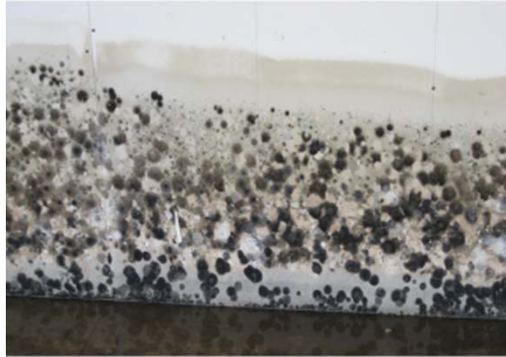
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Has musty smell in basement,
gets water only in bad storms.....



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Mold

Mold is a multi-cellular fungus, similar to mushrooms and yeast. Mold can be different colors, and look fuzzy, slimy, or powdery. It often has a musty odor when present in large amounts.

Mold requires three things to grow:

- water/moisture,
- organic food source (paper, fabric, sheetrock, etc.), and
- proper temperature.

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Mold

The presence of mold means there is too much moisture. Moisture problems can be caused by:

- plumbing leaks
- leaking roofs or windows
- high humidity
- flooding
- condensation due to poor ventilation or insulation

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NYS Mold Law

- Adopted in 2016 – Article 32 of NYS Labor Law (Sections 930-948)
- Adopted after Hurricane Sandy
- Designed to ensure that only licensed persons and/or businesses engage in mold assessment and/or remediation perform the work
- Establish a baseline of required training
- Requires:
 - 1) Training
 - 2) Licensing
 - 3) Minimum Work Standard
- Apply Cable to Areas greater than 10 square feet to be remediated

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Mold Training

- Contractors required to obtain appropriate training prior to being licensed to perform mold assessment, remediation or abatement services.
- Training courses are divided into three categories:
 - Mold Assessor –32 hours
 - Remediation Contractor –24 hours
 - Abatement Worker –16 hours

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Exemptions

- A residential property owner who performs mold inspection, assessment, remediation, or abatement on his or her own property;
- There are 3 other exemptions, but not relevant to single family homes (government owned properties, employees of owners or property managers of apartment buildings and commercial properties).

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Mold Assessor License

- Who is required to obtain a Mold Assessor License?
- Any business that:
 - a) engages in mold assessment on a project;
 - b) advertises that it is a mold assessment company, or
 - c) holds itself out as a mold assessment company.
- Any individual who inspects or assesses property for the purpose of discovering:
 - a) mold,
 - b) conditions that facilitate mold, and/or
 - c) any conditions that indicate they are likely to encourage mold

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Mold Remediation Contractor License

Who is required to obtain a Mold Remediation Contractor License?

- Any business engaged in mold remediation.
- This license is typically for individual who is the owner or Designated license holder on behalf of the mold remediation company.

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- **Mold Abatement Worker Supervisor License**

Who is required to obtain a Mold Abatement Worker Supervisor License?

- Individuals who draft Mold Remediation Work Plans and serve as mold site or project supervisors.
- These are typically individuals who are employees of a mold remediation company.

- **Mold Abatement Worker License**

Who is required to obtain a Mold Abatement Worker License?

- Individuals who engage in mold abatement.

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Prohibitions

- No licensee shall perform both mold assessment and mold remediation on the same property.
- No person shall own an interest in both the licensee who performs mold assessment services and the licensee who performs mold remediation services on the same property.
- NYSDOL website has a search tool for licensed Mold Contractors.

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Mold Sampling - False

NYS DOL FAQ:

Does a mold assessor need to perform sampling as part of an assessment?

No. In most cases, air sampling and mold testing are not necessary. There are no national or state standards for “safe” levels of mold. Mold spores are a natural part of the environment and are always in the air and on surfaces. A thorough visual inspection is the most important step to identify mold problems and determine cleanup strategies. Before contractors perform any sampling or testing, ask what type of sampling or testing they wish to perform, why it is necessary, and what it will show that is not already known.

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Mold Remediation Plans

- Two Types:
 - 1) Mold Remediation Plan – prepared by Mold Assessor
 - 2) Mold Remediation *Work* Plan – prepared by Mold Remediator
- Mold Assessor must provide a written report.

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Mold Remediation Plan

- Mold Assessor to Prepare Mold Remediation Plan.
- Labor Law §945:
 - Mold Remediation Plan to include:
 1. Rooms and areas where work is to be performed
 2. Estimated quantities of materials to be cleaned or removed
 3. The methods to be used for each type remediation in each type of area
 4. The type of PPE (Personal Protection Equipment) to be supplied by the Remediator for use by the licensed abatement workers
 5. Proposed clearance procedures and criteria for each type of remediation in each type of area

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Mold Remediation Plan

6. How to notify building occupants,
7. Estimated cost and estimated time to complete project,
8. Identify the underlying source of the moisture and a recommendation as to the type of contractor needed to fix the problem, and
9. Conduct post-abatement assessment and issue notice of completion.

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Mold Remediation Work Plan

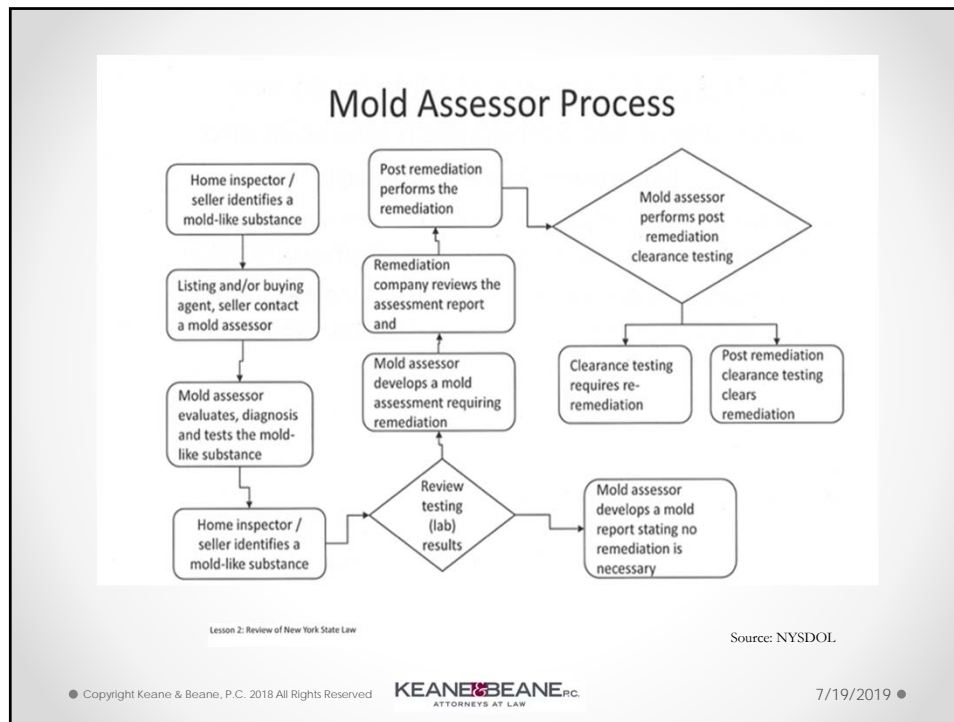
- Remediation contractor prepares Work Plan and performs work. Requirements in Labor Law §946.
- Section 947 governs post-remediation assessment and clearance:
 - Performed by Mold Assessor, not Mold Remediator
 - Does not have to be “Clearance Samples”
 - Has underlying cause of mold been remediated?
 - DOL has an online complaint form

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Post Remediation and Assessment

- Work area free from all visible mold
- All work completed and meets clearance criteria specified in Plan
- Post-remediation assessment shall, to the extent feasible, determine that the underlying cause of the mold has been remediated so that it is reasonably certain that the mold will not return from that remediated area. If it has been determined that the underlying cause of the mold has not been remediated, the mold assessment licensee shall make a recommendation to the client as to the type of contractor who could remedy the source of the mold or the moisture causing the mold.
- A mold assessment licensee who determines that remediation has been successful shall issue a written passed clearance report to the client at the conclusion of each mold remediation project.

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Mold – Home Inspectors

- Persons who conduct home inspections as part of potential real estate transactions must be licensed as a “Mold Assessor” if their inspections include an assessment of mold conditions in the home or property in question.
- Labor Law §930(4). As used in this article:
 4. "Mold assessment" means an inspection or assessment of real property that is designed to discover mold, conditions that facilitate mold, indication of conditions that are likely to facilitate mold, or any combination thereof."
- “§931. Licensing requirements. 1. It shall be unlawful for any contractor to engage in mold assessment on a project, or to advertise or hold themselves out as a mold assessment contractor unless such contractor has a valid mold assessment license issued by the commissioner.”

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Mold Case Law

- *Gabberty v. Pisarz*, 10 Misc. 2d 1010 (Nassau Cty, 2005)
- *Corcoran v. Giampetruzzi*, 29 Misc. 3d 1217 (Nassau Cty, 2010)
- *Kazmark v. Wasyl*, 167 AD3d 1386 (Third Dept. 2018)

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Managing the Risk

- If mold discovered and remediation required, Buyer should require compliance with Article 32.
- Require NYS DOL licensed companies.
- Require copies of Mold Remediation Plan and Mold Remediation Work Plan.
- Require clearance samples and proof of post abatement assessment.
- Require proof that cause of mold has been corrected.

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Drinking Water

- Some counties require private wells to be tested upon the signing of a contract of sale.
- Copies of written results to be provided to Buyer, Seller, County Health Department.
- Typically tests for bacteria, lead, heavy metals, VOC's, semi-VOC's, pesticides.
- If an exceedance of water quality standards, Seller can correct or cancel contract.
- Upon closing, provide affidavit of compliance filed with County.
- Test adequate for one year.

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Drinking Water

- Rockland County – Chapter 389
- Westchester County – Local Law 7 of 2007
- Suffolk County - Chapter 840
- East Fishkill - Chapter 189
- Fishkill – Chapter 11
- Wappinger – Chapter 234

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Tips On Oil Tanks

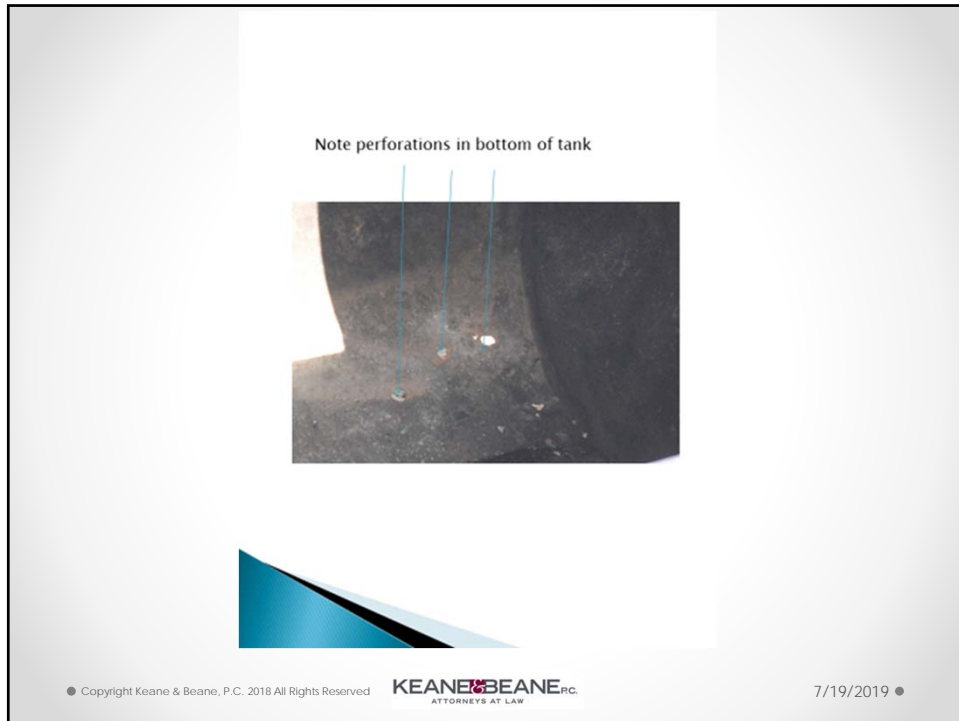
- Storage on Property of more than 1,100 gallons in one or more tanks of petroleum products subjects Property to NYSDEC Petroleum Bulk Storage Program.
- Check NYSDEC Spill Incident Database for open spills.
- Can search by street name.
- Search back to 1978.
- NYSDEC does not issue No Further Action Letters or Closure Letter. Confirm Spill Number has been closed.
- What to do if prior owner abandoned tank in place?

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There is no hole on the tank
I am using the same amount
of oil !!



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Reporting Requirements

- See attached Keane & Beane, P.C., *Summary of New York Spill Reporting and Initial Notification Requirements*.
- Due to the complexity of the regulations and situations which multiple laws and regulations can apply, the Department of Environmental Conservation (DEC) recommends that *anyone with knowledge, report the discovery of any contamination or a release to the NYS Spill Hotline (1-800-457-7362) as soon as possible*.
- Some examples of what substances must be reported:
 - Spill of petroleum
 - Release of hazardous wastes in transport
 - Release of radioactive materials
 - Release of any hazardous substance

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Requirement of Notification

17 NYCRR 32.3

Any person responsible for causing a discharge which is prohibited by section 173 of the Navigation Law shall immediately notify the department, but in no case later than two hours after the discharge. In addition, the owner or operator of any facility from which petroleum has been discharged in violation of section 173 of the Navigation Law, and any person who was in actual or constructive control of such petroleum immediately prior to such discharge, shall immediately give the department the notification required by this Part unless such owner, operator or person has adequate assurance that such notification has already been given.

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Managing the Risks Preservation of Evidence

- If condition discovered after sale, put seller and brokers on written notice ASAP
- Offer opportunity to inspect prior to remediation
- Document conditions
- Preserve Evidence

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Spoliation

“When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation.” *Horace Mann Ins. Co. v. E.T. Appliances, Inc.*, 290 A.D.2d 418, 736 N.Y.S.2d 79 (2d Dep't 2002); *Squitieri v. City of New York*, 248 A.D.2d 201, 202, 669 N.Y.S.2d 589 (1st Dept 1998).

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Spoliation

Under New York law, sanctions for spoliation “are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in accident before adversary has opportunity to inspect them.” *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 666 N.Y.S.2d 609 (1st Dep’t 1997).

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Spoliation

New York Courts have reasoned that it would be manifestly unfair to require a defendant “which was not even a party at the time crucial evidence was lost, to defend an action when such loss has fatally compromised its ability to defend.” *Kirkland*, 236 A.D.2d at 173 (finding “dismissal to be a viable remedy for the loss of a ‘key piece of evidence’”).

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Who Gets Blamed?

- Inspector/Consultant Liability
- Broker Liability
- Attorney Liability

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THANK YOU

QUESTIONS?

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