



# Natural Resource Issues in Modern Real Estate Deals

South Dakota Real Estate Commission  
David L. Ganje, Ganje Law Offices



# Overview

- **Natural Resources Issues in Modern Real Estate Deals**
  - Terminology in Natural Resources
  - Buying and Selling Dirty Property
- **Identifying & Assessing Environmental Risks in Real Estate Transactions**
  - Identifying the Risks
  - Due Diligence
- **Real Estate Contracts**
  - Contracts, Covenants and Carve-outs
  - Drafting provisions to protect against risk and future liability
- **Concepts & Terms in the world of Mitigating & Managing Contamination**

# David L. Ganje

- David L. Ganje is a commercial law and commercial litigation attorney and also maintains a natural resources practice.
- He has grounded his legal experience as a practicing attorney, a former commodity arbitrator, a member of the board of directors of an S&L and an adjunct professor to hone his skills in these areas of practice.
- Born and raised in Aberdeen, South Dakota, David handles matters related to mineral law, oil and gas law, energy law and water law in his natural resources practice. The practice includes representation before local and federal regulatory bodies.
- In his commercial law and commercial litigation practice, David represents businesses and individuals in transactional and business litigation matters as well as serving as local counsel for individuals and institutions.
- In the transactional arena, Ganje provides confidential legal analysis and opinions and counsel in commercial and natural-resources acquisition and sale agreements as well as due diligence representation as both lead counsel and co-counsel.
- David represents clients in the sale and purchase of business interests, legal and title examinations, banking law matters and related financing transactions.



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# Natural Resources Issues in Modern Real Estate Deals



# Terminology

- Air Quality
- Brownfield Site
- Building Contamination
- CERCLA
- EPA
- Green Buildings



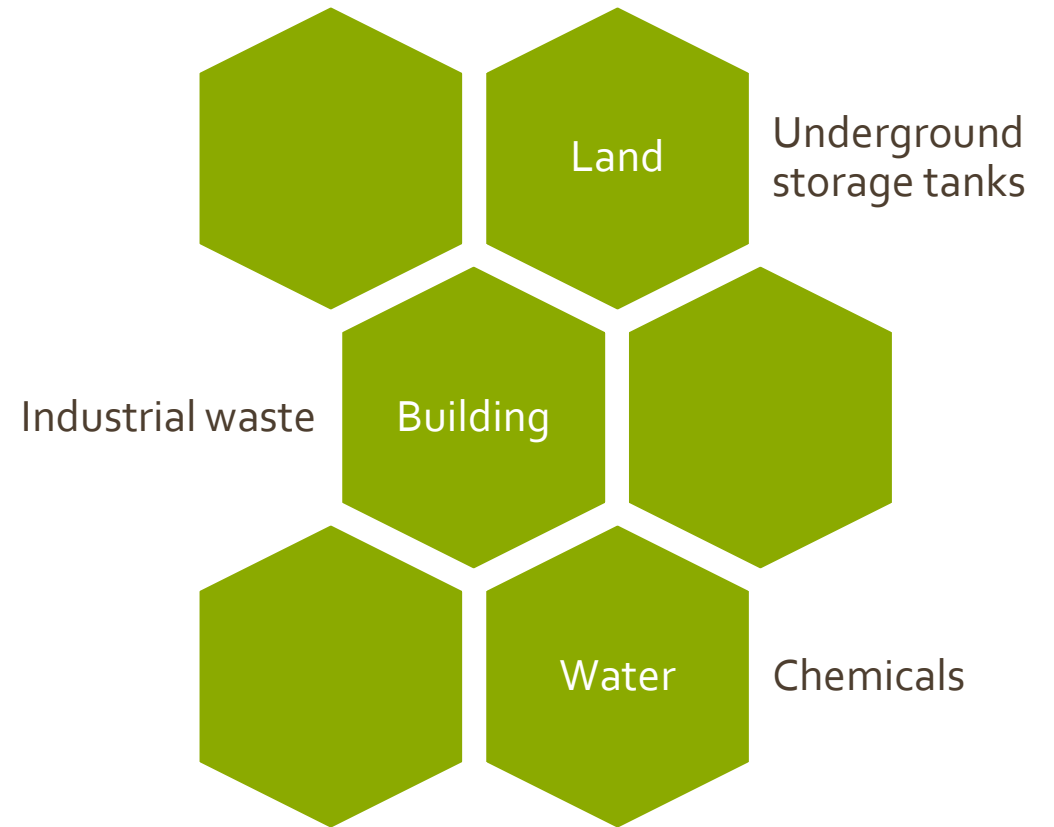
# Terminology

- Groundwater Contamination
- Natural Resources
- RCRA
- Remediation
- Soil Contamination
- Storage Tanks



# Buying and Selling Dirty Property

- Environmental issues may arise in all types of real estate transactions.
- Managing the risks is almost always possible with the proper investigate, communication, and mitigation planning.
- Identifying the risks is the biggest challenge.



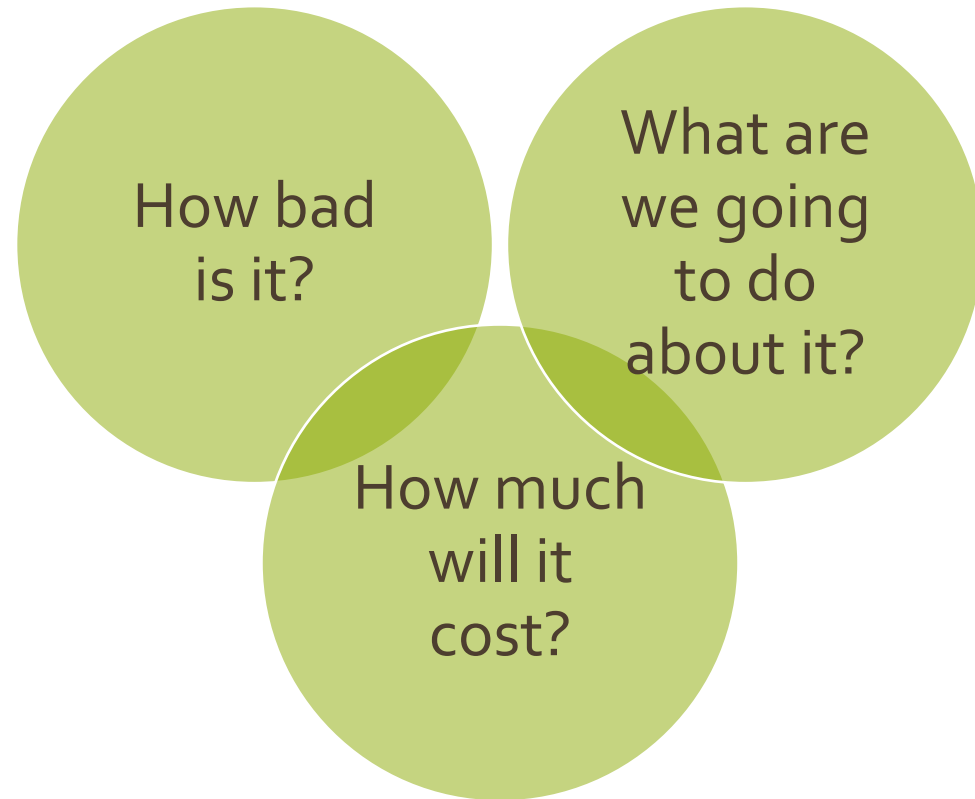
# FIDUCIARY DUTIES OF SOUTH DAKOTA REAL ESTATE BROKERS

- Loyalty
- Obedience
- **Disclosure**
- Confidentiality
- **Reasonable Care and Diligence**
- Accounting



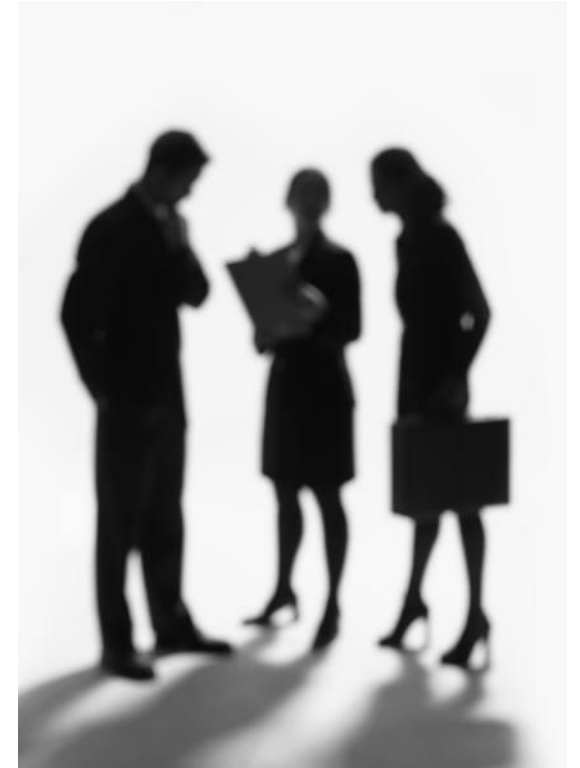
# Communicating about environmental conditions and risks to Buyers

- Be clear about what the problem is
- Discuss alternative solutions
- Use the right language
- Be specific about the resolution



# Real Estate Broker Disclosure Laws and Regulations

- SDCL 43-4-44 requires brokers to use a prescribed form for the property condition disclosure statement required of sellers of residential real property.
- SDCL 36-21A-133 states a licensee acting as a seller's or landlord's agent may disclose any confidential information about the client if failure to disclose the information would constitute misrepresentation.
- SDCL 36-21A-134 and 36-21A-138 requires that a licensee shall provide disclosure of all adverse material facts known by the licensee to any customer. A "Customer" is defined as any party to a real estate transaction who does not have an agency relationship with a licensee.



# Natural Resources Laws and Regulations

- Natural Resource issues which may impact real estate transactions in South Dakota are governed by a myriad of Codified Laws (SDCL) and Administrative Rules (SDAR).
- Examples
  - SDCL 34A-12 (and SDAR 74:34)
    - Reporting of Discharges of regulated substances.
  - SDCL 34A-13 (and SDAR 74:32)
    - Abandoned underground storage tank removal project.
  - SDCL 43-30A-2
    - Abandoned mineral interests.





# Identifying & Assessing Environmental Risks in Real Estate Transactions

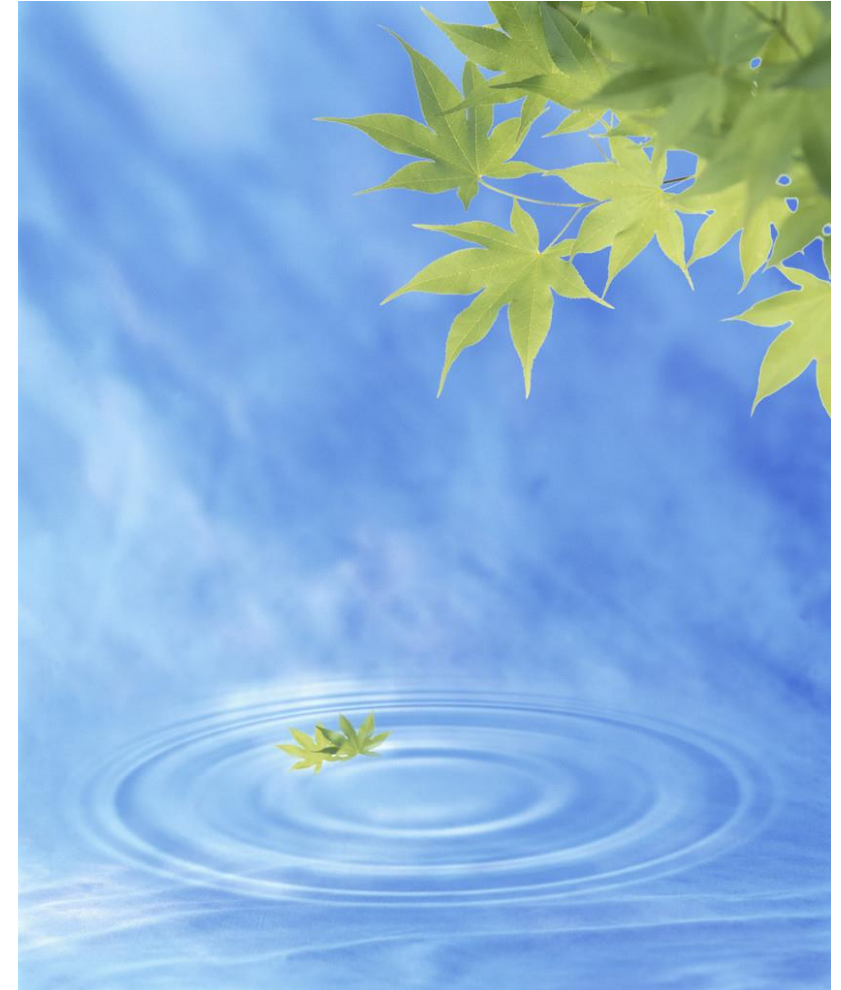
# Identifying the Risks

- Commercial and Industrial Sites
  - Groundwater Contamination
  - Underground Storage Tanks
  - Waste Disposal Sites
  - Brownfield Sites



# Groundwater Contamination

- Common Sources
  - Underground Fuel Storage Tanks
  - Run Off from Industrial and Commercial Activities
  - Run Off from Waste Disposal Sites
  - Chemical Spills
  - Natural-gas Drilling
  - Copper Mining
  - Uranium Mining
  - Oil Shale Exploration
  - Hydraulic Fracturing
  - Coal Mining and Processing




# Underground Storage Tanks

- Located throughout state on commercial, agricultural and residential sites
  - Pose danger of leaking due to oxidation and corrosion
  - Source of ground and groundwater contamination
- Underground storage tanks are commonly found in:
    - Gas stations/auto repair shops
    - Residential properties using heating oil
    - Farms
    - Dry cleaners
    - Chemical storage or process waste plants
    - Food processing plants
    - Wood treatment, paper mills
    - Printing/chemical plants
    - Paint manufacturers
    - Military bases and airports



# DENR's On-Line Storage Tank Database

- Searchable database of over 4,000 tanks located throughout the state
- Underground and above ground tanks
- Searchable by property address, owner name, city, and county
- [http://denr.sd.gov/des/gw/tanks/Searchable\\_tank\\_database.aspx](http://denr.sd.gov/des/gw/tanks/Searchable_tank_database.aspx).


On-line Storage Tank Information

FACILITY # 
[Click Here to Search](#)
|< < > >|
[Refresh List](#)
This is an UST facility

**GENERAL INFORMATION** Record 2 of 4442 records found.

OWNER INFORMATION					FACILITY INFORMATION				
Name	<input type="text" value="JEFF NIELSEN"/>				Name	<input type="text" value="TOTAL STOP FOOD STORE"/>			
Address	<input type="text" value="100 EAST MAIN STREET"/>				Address	<input type="text" value="HWY 262 AND 4TH AVE"/>			
City	<input type="text" value="CANISTOTA"/>				City	<input type="text" value="EMERY"/>			
State	<input type="text" value="SD"/>	Zip	<input type="text" value="57012"/>		State	<input type="text" value="SD"/>	Zip	<input type="text" value="57332"/>	
Phone	<input type="text" value="605-296-2400"/>				Phone	<input type="text" value="605-449-4755"/>			
County	<input type="text" value="MCCOOK"/>				County	<input type="text" value="HANSON"/>			

**ADDITIONAL INFORMATION**

Owner Type	<input type="text" value="Active Facility Mom &amp; Pop Facility"/>			Latitude	<input type="text" value="43.601904"/>		
DENR Master ID #	<input type="text"/>			Longitude	<input type="text" value="-97.623033"/>		
Contact at Facility Location	<input type="text" value="SHARON WEELDREYER"/>			Method Code	<input type="text" value="GPSN83NA"/>		
				Accuracy	<input type="text" value="3"/>		
				Reference	<input type="text" value="W/I PROPERTY BOUNDARY"/>		

**TANK INFORMATION**

FACILITY # 34-00009										FACILITY HAS 4 TANKS.			
Tank #	Status	Product	Capacity	Age	Construction	Piping Material	Piping Type	Tank RD	Piping RD	Spill Protection	Overfill Protection	Inspected	Citation
1	Current	Gasoline	8000	1999	Cath. Steel	Fiberglass	Pressure	Auto Gauging		Catchment Basin	Ball Float Valves	SB 6/13	
2	Current	Gasoline	10000	1999	Cath. Steel	Fiberglass	Pressure	Auto Gauging		Catchment Basin	Ball Float Valves	SB 6/13	
3	Current	Diesel	3000	1999	Cath. Steel	Fiberglass	Pressure	Auto Gauging		Catchment Basin	Ball Float Valves	SB 6/13	
4	Current	Diesel	5000	1999	Cath. Steel	Fiberglass	Pressure	Auto Gauging		Catchment Basin	Ball Float Valves	SB 6/13	

[Click Here to Search](#)
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[Tank Section](#) | [DENR Home](#) | [State Home](#)

If you have any questions, please contact [Naver Syed](#) at (605) 773-3296



# Abandoned Tank Removal Project

- The DENR has authority to remove tanks certain tanks
  - Abandoned petroleum and waste oil tanks located at gas stations
  - Abandoned waste oil tanks located at commercial motor fuel vendors
  - Abandoned petroleum tanks located at noncommercial operations
- Compensation under the Petroleum Release Compensation Fund (PRCF)
- [http://denr.sd.gov/des/gw/TankYank/Program\\_Summary.aspx](http://denr.sd.gov/des/gw/TankYank/Program_Summary.aspx).



Tank Removal from Lodgepole, SD

Photo Courtesy of SD DENR

# Waste Disposal Sites



- Contamination Risks
  - Garbage
  - Tires
  - Construction Debris
  - Contaminated Soils
  - Sludge
  - Chemicals
  - Oil and Gas

# Brownfield Sites

- Land that is available for reuse and redevelopment, but.....
- Contaminated by:
  - Environmental spills
  - Leaking underground storage tank
  - Abandoned construction debris
  - Industrial waste



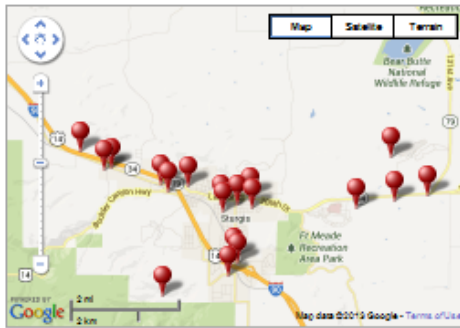
# Risks Associated with Brownfield Sites

- Cleanup Costs: There may be liability to the government for site clean-up, damages, fines and penalties
- Development Obstacles: There is a risk land may not be able to be used or developed as planned
- Funding Challenges: The presence of contamination may make it difficult to obtain financing for development
- Future Sales: The presence of contamination may make the property more difficult to resell in the future
- Migration of Contamination: Site contamination may migrate to adjacent property, water or groundwater. There is potential liability to neighbors injured by using contaminated water or whose property values have decreased because of the contamination.

# SD Environmental Event/Spills Database

- Searchable by:
  - Site Name or Responsible Party
  - Reported Date
  - Address
  - County, City
  - Site Type (Aquifer, Brownfield, Former Land Fill, Clandestine Drug Lab, Oil Field)
  - Spill Category (Petroleum, Oil, Chemical, Agri Chem)
  - Specified distance from a latitude/longitude point
- <http://denr.sd.gov/des/gw/Spills/dbspillsearch.aspx>

Search Results for South Dakota Environmental Events/Spills



Sites shown on the map represent the records listed below. If necessary, use the link(s) below the following table to update the sites on the map.

Sort by  [Download Data](#)

ID No.	Site	City	Location	Reported	Site Type	Status	
2013.134	Deadman Canyon Training Area - SOARNG	Sturgis	Deadman Canyon	7/5/2013	Federal	Open	<a href="#">Map</a>
2013.135	Glencoe Firing Range - SOARNG	Sturgis	Glencoe Road	7/5/2013	Federal	Open	<a href="#">Map</a>
2013.051	Hydraulic Oil Spill - Black Hills Power	Sturgis	1200 Whitewood Service Road	4/15/2013	Other(See Case File)	Closed	<a href="#">Map</a>
2011.134	Sturgis Credit Union Site (since 1990)	Sturgis	1102 Junction Avenue	7/19/2011	Other(See Case File)	No Further Action	<a href="#">Map</a>
2010.099	CERCLIS - Ft. Meade Landfill	Sturgis	Ft. Meade Landfill	8/14/2010	CERCLIS	No Further Action	<a href="#">Map</a>
2009022.000	Clean ATP - SO DOT Shop	Sturgis	1100 Otter Road	11/18/2009	ATP	Closed	<a href="#">Map</a>
2008.102	Transport Event - Hydraulic Oil Spill	Sturgis	I-90 Westbound near Meade/Laurence Co. Line	7/23/2008	Non-Aquifer	Closed	<a href="#">Map</a>
2005.196	I-90 East, MW 35 Diesel spill	Sturgis	NE ditch of east bound lane MW35	10/13/2005	Other(See Case File)	Closed	<a href="#">Map</a>
2005.087	Contaminated Soils - Tank Autopsy Program	Sturgis	2221 Labelle Street	5/13/2005	Non-Aquifer	Closed	<a href="#">Map</a>
2005.059	Structure Fire - CMW @ Valley Implant	Sturgis	SW @ Hwy 34 & Hwy 75 N	4/6/2005	Non-Aquifer	Closed	<a href="#">Map</a>
2004.133	Common Cents - Nozzle Spill	Sturgis	2421 S. Junction Street	8/3/2004	Non-Aquifer	Closed	<a href="#">Map</a>
2004.134	Contaminated Soils - 8th Century property - Sturgis	Sturgis	842 Short Track Road	7/20/2004	Other(See Case File)	Closed	<a href="#">Map</a>

# Search Results for the City of Sturgis

- 91 Reported events
- July, 1978 to July 2013

## Search Results for South Dakota Environmental Events/Spills

- Spill in City of Garreston, Minnehaha County
- Overfill of an Above Ground Storage Tank at Eastern Farmers Coop
- 115 gallons of Diesel and Water



If the pin is not visible on the map, there are some records without specific location information.

<b>ID No.</b>	<b>Site Name:</b>	<b>Responsible Party:</b>	<b>Status:</b> Open
2013.020	AST Overfill at Eastern Farmers Coop	CHS Transportation	<b>Spill Date:</b> 02/06/2013
			<b>Material:</b> Diesel/Water
			<b>Amount:</b> 115 gallons
<b>County:</b>	<b>Street/Location:</b>	<b>City:</b>	<b>Zip Code:</b>
Minnehaha	AST Bulk Facility, NW at Granite & Depot	Garretson	57030
<b>Approx Lat/Long:</b> 43.715175, -96.504675			
<b>Additional Spill Information:</b>			
<b>Spill Category:</b>	<b>Spill Source:</b>	<b>Site Type:</b>	<b>Property Type:</b>
Petroleum	Aboveground Storage Tank	Other(See Case File)	Commercial
<b>Date Reported:</b>	<b>Date Closed:</b>	<b>Clean Letter Date:</b>	<b>Spill Consultant:</b>
2/6/2013			
			<b>Staff Reviewer:</b> RL

# Residential Real Estate

- Required structural disclosures that may indicate an environmental issue include:
  - Water Penetration Problems
  - Water Damage Repairs
  - Cracked Walls or Floors
  - Rook Leakage
  - Insulation
  - Fire/Smoke Damage
  - Sewer Blockage or Backup
  - Sewer Drainage, Leakage or Runoff into Adjoining lakes, stream or waterway
- Catch-all disclosure:
  - “Any Material Facts or Problems that have not been disclosed on this form”



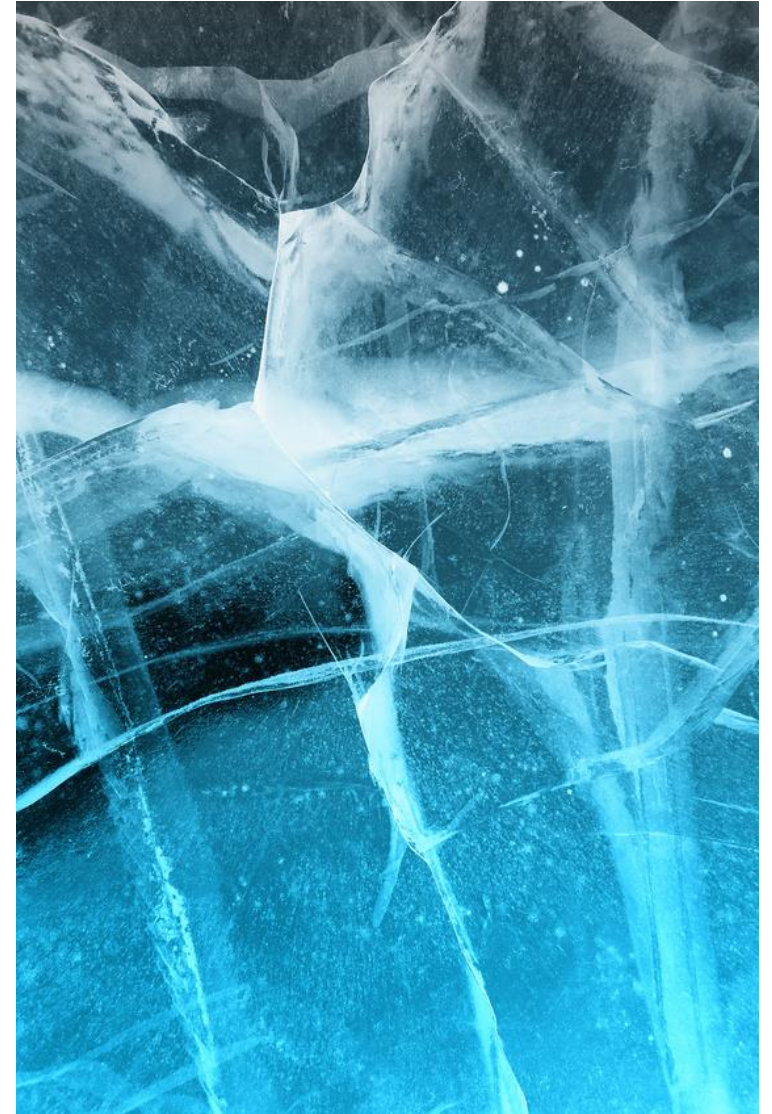


# Specific Hazardous Conditions and Tests Performed Required to be Disclosed

- Methane Gas
- Lead Paint
- Radon Gas (House)
- Radon Gas (Well)
- Radioactive Materials
- Landfill, Mineshaft
- Expansive Soil
- Mold
- Toxic Materials
- Urea Formaldehyde Foam Insulations
- Asbestos Insulation
- Buried Fuel Tanks
- Chemical Storage Tanks
- Fire Retardant Treated Plywood
- Production of Methamphetamines

# Water Law

- Water Rights: A Mix of Riparian Rights and Prior Appropriation
- General Surface and Ground Water
- Water Rights on Federally Reserved Lands
- Irrigation Water Permits



# Questions and Answers ?

