

# Lead Pipes and Poor Water Quality

Cori Lamont | February 03, 2017

## What are your disclosure obligations?



Lead is most dangerous to children under the age of 6. The impact of lead poisoning to this group includes learning disabilities, hearing loss and violent behavior.

While the most common and biggest source of lead poisoning comes from deteriorating lead-based paint, lead-tainted water has recently taken a bit of the spotlight. Flint, Michigan, recently became the poster community for poor water quality and the devastation and havoc poor water quality can reap on citizens' health and safety.

In the middle to the end of 2016, a flurry of discussions was brought forth in a variety of local Wisconsin municipalities regarding lead in water and/or lead pipes. For illustration, the city of Lake Mills was put on notice in February 2016 by the Wisconsin Department of Natural Resources for violation of Wisconsin's safe drinking water rules; and as of late December 2016 into early January 2017, the city of Milwaukee was looking at passing an ordinance that would address the replacement of lead pipes utilized in providing drinking water to homes and businesses. According to the U.S. Environmental Protection Agency, the top five Wisconsin counties with the greatest number of lead service lines include Kenosha, Manitowoc, Marathon, Milwaukee and Racine. For more information, see the chart within the WisconsinWatch.org article, "Failure at the Faucet: Wisconsin

must do more to protect residents from lead in drinking water, DNR and Milwaukee leaders agree," at [wisconsinwatch.org/2016/09/wisconsin-must-do-more-to-protect-residents-from-lead-in-drinking-water-dnr-and-milwaukee-leaders-agree](http://wisconsinwatch.org/2016/09/wisconsin-must-do-more-to-protect-residents-from-lead-in-drinking-water-dnr-and-milwaukee-leaders-agree).

## Disclosure

Disclosure of water quality issues, such as lead in drinking water or a community being in violation of Wisconsin's safe drinking water rules, may require disclosure by a seller or licensee. Licensees are required to disclose known material adverse facts and information suggesting material adverse facts. See Wis. Admin. Code § REEB 24.07(1) – (3) and Wis. Stat. § 452.133(1)(c). See the gray boxes on the next page for these specific statute and rule references.

Real estate firms and agents are not required to investigate independently whether a property has poor water quality or lead pipes. When taking a listing, a licensee conducts a competent, diligent inspection of the property and asks the seller for a written report regarding property conditions. The seller will be responsible for his or her disclosures or for the failure to disclose.

Scenario	Disclosure
Listing agent has confirmation from the city that the lateral pipes running to the property are made of lead.	Arguably a material adverse fact that must be disclosed.
Listing agent has knowledge of testing results from a deal that fell apart during the time of the agent's listing that demonstrated unsafe levels of lead in the water.	Arguably a material adverse fact that must be disclosed.
Known test results for surrounding or adjacent properties demonstrate unsafe levels of lead in the water.	Arguably information suggesting a material adverse fact that must be disclosed.
A news article or well-publicized local government proposition that the community in which a property is located is discussing the need to replace older lead laterals due to general concerns about possible lead contamination and possible responsibility by the property owners to pay the replacement costs.	Arguably a possible material adverse fact or information suggesting a material adverse fact that likely should be disclosed.
Stories about Flint, Michigan, or some other nearby community that has experienced a lead contamination problem.	Arguably not a material adverse fact and probably does not need to be disclosed.

The licensee then compares the seller's disclosures with the licensee's observations or other information known to the licensee from sources such as an expert or government agency report. If the seller's disclosure is incomplete, inaccurate or inconsistent with the licensee's observations and information, the licensee may prepare a written material adverse fact disclosure letter to make a disclosure of items that are material adverse facts or information suggesting material adverse facts.

The WRA created the "Disclosures Regarding Water Quality Issues" document to assist in guiding real estate licensees about their potential disclosure obligations. See page 16 for a link to this document as well as other state resource documents. The new water quality disclosure document provides a variety of scenarios and a discussion as to whether a disclosure is required. See below.

These disclosures should be factual in nature and may include copies of or links to expert or government information or reports. This licensee's duty to disclose trumps any request by the seller not to disclose. The licensee and firm may use the WRA's Disclosure of Material Adverse Fact (WRA-DMAF) form found in zipForm.

## Purchasing a property

The only way to confirm if a property has lead in its water is to test the water. The WB-11 Residential Offer to Purchase does not include a testing contingency. The majority of local board and/or company addenda include a testing contingency specific to water as well as the WRA's Addendum B to the Offer to Purchase. The Addendum B contingency addresses private wells and would need to be modified to provide for a municipal water source.

As a reminder, in October 2014, Wis. Admin. Code Chap. NR 812 rules were revised to require any property that has a well inspection is also required to have the well water tested for coliform bacteria, arsenic and nitrate. However, the requirement does not include lead as one of the substances to be tested when the well inspection occurs. Therefore lead would have to be added as part of its well water testing contingency. See Debbi Conrad's article, "Contingency Craftmanship," on page 16 for more information relating to the importance of drafting an enforceable contingency.

## Wis. Admin. Code § REEB 24.07 (1) Inspection and Disclosure Duties

### (1) INSPECTION OF REAL ESTATE

(a) General requirement. A licensee, when engaging in real estate practice which involves real estate improved with a structure, shall conduct a reasonably competent and diligent inspection of accessible areas of the structure and immediately surrounding areas of the property to detect observable, material adverse facts. A licensee, when engaging in real estate practice which involves vacant land, shall, if the vacant land is accessible, conduct a reasonably competent and diligent inspection of the vacant land to detect observable material adverse facts.

(b) Listing firm. When listing real estate and prior to execution of the listing contract, a licensee shall inspect the real estate as required by sub. (1), and shall make inquiries of the seller on the condition of the structure, mechanical systems and other relevant aspects of the property as applicable. The licensee shall request that the seller provide a written response to the licensee's inquiry.

(c) Other licensees. Licensees, other than listing firm, shall inspect the real estate as required by sub. (1) prior to or during the showing of the property, unless the licensee is not given access for a showing.

(2) DISCLOSURE OF MATERIAL ADVERSE FACTS. A licensee may not exaggerate or misrepresent facts in the practice of real estate. A licensee, when engaging in real estate practice, shall disclose to each party, in writing and in a timely fashion, all material adverse facts that the licensee knows and that the party does not know or cannot discover through a reasonably vigilant observation, unless the disclosure of the material adverse fact is prohibited by law. This provision is not limited to the condition of the property, but includes other material adverse facts in the transaction.

Note: Certain "material adverse facts", as defined in s. REEB 24.02 (12), may not be disclosed by law. For example, unless specifically authorized by a seller, a licensee may not disclose to a potential buyer the actual minimum sales price the seller will accept. See s. 452.133 (1) (d), Stats.

(3) DISCLOSURE OF INFORMATION SUGGESTING MATERIAL ADVERSE FACTS. A licensee, when engaging in real estate practice, who becomes aware of information suggesting the possibility of material adverse facts to the transaction, shall be practicing competently if the licensee discloses to the parties the information suggesting the possibility of material adverse facts to the transaction in writing and in a timely fashion, recommends the parties obtain expert assistance to inspect or investigate for possible material adverse facts to the transaction, and, if directed by the parties, drafts appropriate inspection or investigation contingencies.

This provision is not limited to the condition of the property, but includes other material adverse facts to the transaction, including but not limited to defects and conditions included within the report form under ss. 703.33 and 709.03, Stats. A licensee is not required to retain third party inspectors or investigators to perform investigations of information suggesting the possibility of a material adverse fact to the transaction.

## Wis. Stat. § 452.133 Duties of licensees

(1) DUTIES TO ALL PARTIES TO A TRANSACTION. A firm providing brokerage services to a party to a transaction owes all of the following duties to the party:

(c) The duty to timely disclose in writing all material adverse facts that the firm knows and that the party does not know or cannot discover through reasonably vigilant observation, unless the disclosure of a material adverse fact is prohibited by law.

## WRA resources

- The new “Disclosure Regarding Water Quality Issues” PDF: [www.wra.org/WaterDisclosurePDF](http://www.wra.org/WaterDisclosurePDF).
- The water disclosure document is also available on the WRA’s Disclosure Resource page: [www.wra.org/Disclosure](http://www.wra.org/Disclosure).
- May 2010 *Legal Update*, “Lead-based Paint in Target Housing”: [www.wra.org/LU1005](http://www.wra.org/LU1005).

## DNR resources

- “Drinking Water and Lead” DNR information page: [dnr.wi.gov/topic/DrinkingWater/lead.html](http://dnr.wi.gov/topic/DrinkingWater/lead.html).
- “Look Up Drinking Water Data” DNR information page: [dnr.wi.gov/topic/DrinkingWater/QualityData.html](http://dnr.wi.gov/topic/DrinkingWater/QualityData.html).
- A consumer may contact the municipality or visit its website to obtain the Consumer Confidence Report (CCR). Information about the CCR is also available on the DNR’s CCR webpage: [dnr.wi.gov/topic/drinkingwater/ccr.html](http://dnr.wi.gov/topic/drinkingwater/ccr.html).

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