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## LIABILITY FOR INCORRECT ASBESTOS TESTING

In March of this year the Wisconsin Supreme Court in State of Wisconsin v. Harenda Enterprises, Inc., 2008 WI 16, 746 N.W.2d 25, held that the national and state standard on asbestos testing required the inspection company to determine the asbestos content of each layer of multi-layered materials, and the company could not average asbestos content of all layers. The case centered on the question of the proper method for testing materials to determine whether they constituted asbestos-containing material under the Wisconsin Administrative Code § NR 447.02 and 40 C.F.R. Pt. 763, Subpt. E., App. E, § 1.7.2.1. The circuit court held in favor of the state and imposed civil penalties and surcharges on Harenda in connection with Harenda's contract to inspect the Milwaukee Auditorium for possible asbestos-containing material. The Court of Appeals reversed, and upon the filing of a petition for review, the Wisconsin Supreme Court reversed the Court of Appeals and reinstated the judgment of the circuit court in favor of the state.

Asbestos was one of the first pollutants designated as hazardous under the Clean Air Act. Wisconsin DNR is authorized by the Wisconsin Statutes to promulgate rules implementing clean air standards consistent with Chapter 285 of the Wisconsin Statutes and the federal Clean Air Act. The DNR promulgated rules set forth in Chapter NR 447 which require owners and operators to inspect facilities prior to demolition or renovation. If such an inspection reveals enough asbestos, the notification and abatement requirements of NR 447 apply. There is strict liability for violation of the rules.

Chapter NR 447 is patterned after the National Emissions Standards for Hazardous Air Pollutants published by the United States Environmental Protection Agency. Under NR 447 and federal standards, asbestos-containing material is defined as material that contains more than 1% asbestos. The rule describing the proper way to analyze a multi-layered sample includes the

following instructions:

“When discrete strata are identified, each is treated as a separate material so that fibers are first identified and quantified in that layer only, and then the results for each layer are combined to yield an estimate of asbestos content for the whole sample.”

Confusion arose over the meaning of certain clarifications issued by EPA as to whether averaging or dilution by combining layers of asbestos-containing material with nonasbestos-containing material was allowed.

After several tests of the walls of the auditorium’s second floor bowl area, state laboratory analysis concluded that four of the state’s ten samples taken from the walls were multi-layered samples containing a single layer of material with 1% asbestos or more, but with an overall asbestos content of less than 1%. Since the demolition of the disputed area had already been undertaken by a contractor without complying with Chapter NR 447 asbestos abatement regulations, the state, upon the request of DNR, filed a complaint against Harenda alleging that material from the disputed area contained a sufficient amount of asbestos-containing material for it to be considered regulated. It alleged that Harenda was liable for violations of NR 447. The state and Harenda entered into a stipulation agreeing that if Harenda was liable, it would owe \$37,138.50 in penalties and surcharges, that Harenda was subject to NR 447, and that the asbestos testing was accurate.

Before the circuit court, the state moved for summary judgment, arguing that the state had met its burden showing that the asbestos-containing material was stripped or removed without complying with NR 447. Harenda appealed and the Wisconsin Court of Appeals determined that the state’s interpretation of the federal regulations, which was based upon the clarifications of the rule issued by USEPA was inconsistent with the plain language of the federal regulations, and reversed the judgment of the circuit court. Reviewing the Court of Appeals decision, the

Wisconsin Supreme Court reversed the Court of Appeals, holding that the clarifications issued by USEPA regarding federal standards for asbestos testing which instructed that each layer of multi-layered materials was to be tested separately for asbestos content and that the percentage of asbestos for the layers could not be averaged were interpretive rules and constituted a reasonable interpretation of the standard for asbestos testing. While Harenda argued that the clarifications issued by USEPA requiring separate testing of each layer for asbestos content were invalid because they were not promulgated pursuant to the Federal Administrative Procedures Act, the Supreme Court rejected that argument and distinguished interpretive rules from legislative rules issued by a federal agency. The Supreme Court accepted the federal agency's characterization of its actions as interpretations and gave deference to the EPA's views.

The decision is a reminder that federal statutes that set forth strict environmental standards are interpreted and strictly applied by both the state and federal governments under both state and federal administrative rule-making powers. Professional engineers and contractors may face strict liability for erroneous application of the rules to a given project involving building demolition or renovation and can subject them to strict liability damages. A professional engineer is professionally required to correctly specify the proper testing protocol for itself or for contractors.