

Wetlands Mitigation

Continued from Page 3

gation under the Clean Water Act § 404 regulatory program: "Compensating for Wetland Losses Under the Clean Water Act, National Academy of Science, National Research Council" (June 2001) ("NAS report"). Upon a review of the wetlands regulatory scheme and the mitigation program, the NAS report concluded that:

- The goal of no net loss of wetlands is not being met by the mitigation program;
- Wetlands should be evaluated on a watershed basis and that the automatic requirement of on-site mitigation should be reevaluated;
- Compliance/performance requirements have not been adequately monitored or enforced;
- Support for regulatory decisions is inadequate; and
- Third-party mitigation strategies offer some advantages over mitigation by permittee.

The Corps of Engineers strongly agreed with the NAS report's emphasis on a watershed approach for issuing permits and requiring mitigation. The Corps also agreed with the conclusion that mitigation banks and in-lieu fee approaches to mitigation are often better than case specific onsite mitigation. Additionally, the Corps committed to improve its permit conditions to ensure that they are understandable and will result in mitigation that offsets the functional loss of wetlands.

On Oct. 31, subsequent to the NAS report, the Corps issued Regulatory Guidance Letter No. 01-1 to address the report's recommendations. The regulatory guidance letter provided that:

- The Army should take an "ecosystem approach" to the formulation of compensatory mitigation;
- Future projects will undergo a comparison of "credits and debits" of wetland values;
- Upland areas and preservation areas may garner credit if they augment the value of a mitigation project;
- Mitigation projects should be

developed as part of a "watershed/holistic" approach where a variety of resource types are protected by the project; and

- Off-site mitigation may be preferable due to hydrologic alterations and development on-site.

Additionally, the guidance letter provided increased wetlands project management and assessment requirements.

Proposed Legislation

In an effort to codify the present mitigation guidance, a bill was introduced into the House of Representatives titled the American Wetland Restoration Act (H.R. 1474). The bill was referred to the Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment and was the subject of hearings on Sept. 20. The bill sets forth many of the requirements of the 1995 Mitigation Guidance regarding the approval of mitigation banks and follows the suggestions of the NAS Report regarding assessment and

monitoring of wetlands projects.

A Holistic Approach

By allowing a holistic approach to mitigation, the Corps' Oct. 31 guidance repeals one of the long-standing commandments of wetlands mitigation. Applicants no longer must labor to squeeze the most wetland value out of nearby sites, but instead may consider compensating for wetlands value within a watershed-wide ecosystem. This broader perspective will not only make selection and implementation of compensatory wetlands projects simpler and cheaper, it will allow a greater return in terms of wetlands values since resources may be focused where they have the greatest impact.

The ability to dedicate resources based primarily on value, rather than on proximity, will become increasingly more important as the NAS and GAO recommendations are observed and the Corps is pushed to become more accountable for the performance of mitigation projects.



TOXIC TORTS

Mold Litigation—It's Not Asbestos Déjà Vu All Over Again

By Kurtis B. Reeg

The plaintiffs' personal injury bar keeps "genetically reengineering" tort and related law and mining new claims. Mold is one of the latest in a long list of subject matters that has reached the courts (and the popular press) as another evil to be eradicated by the judicial process. One need only consider the likes of coal dust, silicosis, asbestos and lead to visualize where this current trickle of cases may lead us. Yet, although mold may take on the pomp of asbestos litigation, it may end up without much circumstance, like electromagnetic field (EMF) litigation.

Kurtis B. Reeg is a partner at Kohn, Shands, Elbert, Gianoulakis & Giljum, LLP, in St. Louis, Mo. Telephone: (314) 241-3963.

There are many different types of mold. Molds are a kind of fungus that usually reproduce via spores. Most of the recent litigation rage emanates from the division of fungi known as *Amastigomycota* because the mycotoxin (poison)-producing molds which are commonly found indoors come from classes of molds from this division.¹

There are a wide range of fungal mycotoxins.² Most toxic tort litigators have heard of some of them: aflatoxins from *Aspergillus flavus* that caused the 1960s' "Turkey X Disease" outbreak; ochratoxin A from *Penicillium* which has been implicated in Balkan nephropathy;³ and the T-2 toxin from *Fusarium* that is thought to have wiped out 10 percent of the Russian population after World War II.⁴

Mold Litigation

The animal studies regarding the effects of mycotoxin exposure far outweigh the number of human studies. Most of the animal studies relate to exposure by ingestion rather than inhalation.⁵ But most indoor residential and commercial air quality and mold exposure cases appearing in the courts relate to inhalation, not ingestion or dermal exposure.

How Did This Get Started?

There are reports of a nexus between mold mycotoxins and human health effects, engendered by the plaintiff-oriented "experts" writing articles, penning reports, and attempting to testify in cases.

In the 1990s, when reports of Cleveland child idiopathic pulmonary hemorrhage and hemosiderosis (IPH) associated with *Stachybotrys chartarum*, also known as *Stachybotrys atra*, were published and then reported in the popular press,⁶ people became alarmed. However, when the Centers for Disease Control and Prevention (CDC) and other examiners delved more deeply, tested and controlled for testing methods (blind versus nonblind) and other risk factors such as environmental and family history, smoking and other chemical exposures, the results became so questionable that the CDC rejected and withdrew the study.⁷

Nevertheless, the dam had broken. Then came the various cases involving courthouses, assisted living facilities, airport police departments and the rest. Of course, a \$32 million Texas verdict in a bathroom mold case (despite the plaintiffs' experts being disqualified) helped fuel the fire of concern and litigation. *Ballard v. Fire Insurance Exchange*, No. 99-0525 (Texas Dist. Ct. Travis Cty. 2001). EPA itself published "Mold Remediation in Schools and Commercial Buildings," EPA 402-K-01-001, in March 2001.

If the government is concerned, should defense attorneys be?

The answer is no, and there are

several reasons for this.

Mold Is Naturally Occurring— There Is No Defendant to Serve

Because mold is a naturally occurring phenomenon, most defendants should have a pretty straightforward defense. Even though asbestos, sand and lead (to name but a few) are also the products of nature and they resulted in loads of liability for defendants, mold is different. Plaintiffs will argue that defendants somehow permitted the right conditions to breed or produce more than the normal amount of mold, but the human intervention surrounding asbestos and the like is a far cry from that involved with mold.

Asbestos is found in rocks and in the ground. But even the evolving liability of W.R. Grace surrounding the environmental contamination in Libby, Mont., is the result of humankind's intervention with the asbestos, which Grace and others took from the ground and refined into products. Vermiculite was expanded and its tremolite contamination fell to the ground. The asbestos placed into the Zonolite products also fell to the ground and blew around the Libby community. Additionally, Grace is alleged to have known about the contamination for many years but did not report and failed to take the proper precautions against its spread, or so the government (and others) say. The same logic attaches to lead paint and the like. While a duty-to-warn case may present a context for potential liability, even in an indoor mold setting, this is a far cry from mold just growing naturally. With doors and windows open in a house, people and pets tracking it indoors, and mold counts on allergy indexes published in the daily paper and on television weather reports, its ubiquitous nature should not even be lost on a plaintiff-oriented jury.

Mold Is Everywhere— There Is No Zero Level of Mold

Mold makes up about 25 percent of the world's biological mass, according to Dr. Ron Gots of the International Center for Toxicology

and Medicine in Rockville, Md. On Sept. 25, in a presentation in St. Louis, he stated that his review of the available literature indicates that in the 600 or so homes and 60 to 70 commercial buildings reported in the available literature, there are an average of 800 colony-forming units of mold per location, with ranges from 200 to 2,000. Outdoors, the average range is 10,000 colony-forming units per unit measure. So no one can suggest that someone is at fault if he or she does not maintain a zero mold level; there is and can be no such thing. Defendants should not be found liable in such a context.

Science and Medicine Will Not Support Causation

A rat is not a person, and ingestion by an animal does not automatically translate into a disease by inhalation in a human. We know this from the parameters of legitimate epidemiological studies. While animal testing can be used for modeling and comparison, the differences in species, the flight and other dynamics of mold spores, and the focus of high-level exposures in animal studies make the literature speculative at best.⁸

There are no well-established or defined studies of the effects of mold exposure on human health, a fact that many plaintiffs' "experts" dispute—but many of these have been tossed out after *Daubert* challenges and hearings. Nevertheless, the *Ballard* judge's exclusion of the testimony of seven experts (two-page order, May 9, Mealey's Doc. No. 42-010606-102) did not prevent the jury from making an outrageous award, which has now resulted in the introduction of legislation in Texas proposing to cap homeowner liability insurance payments for mold at \$5,000.

Where Do We Go From Here?

What is needed is a major effort by both corporate and insurance groups and governments to analyze the methodology and develop better guidelines for cleaning and testing, and for conducting legitimate studies

Continued on Page 6

Mold Litigation

Continued from Page 5

on human health effects. Industrial hygienists, restoration contractors and government and research groups need to focus on analysis of available technology to set the appropriate bars on remediation. For example, some contend that bleach, while a major cleaning and remediation technique, may actually break down the spore membranes but not kill all the mycotoxins, thereby permitting them to spread more than if they had not been touched in the first instance. (The effect can be analogized to the encapsulation theory of asbestos—it is better to leave the asbestos alone if it is not friable than it is to abate it, which results in massive release of fibers into the air.) Some controlled lab work should answer many of these questions.

In the meantime, the defense bar (at clients' urging) should use *Daubert* to reject the junk science being propagated by both uninformed and adversarial "experts." The sensational media stigmatize certain events and environments; jurors are sensitized to these issues. It is imperative that defense counsel employ various techniques, ranging from *Daubert* hearings to pre- and post-voir dire scientific and medical tutorials discussed in the Jury Trial Innovations Manual published by the National Center for State Courts, to permit only cases based on legitimate science to be aired in court.

With a keen eye and a spirited defense, mold should not become another threat to corporate America and its insurers. The EMF scare taught us that this can and should be done. Asbestos has taught us what can happen if the defense community and its clients become complacent or take the short view of litigation and the costs of a spirited defense. Mold should not be déjà vu all over again.

(1) Alexopoulos, C.J. and Mims, C.W., "Introductory Mycology," 3d ed. John Wiley & Sons, New York (1979).

(2) D'Mello, J.P., "Handbook of Plant and Fungal Toxicants." CRC Press, Boca Raton, Fla. (1997).

(3) Ciegler, A. and Bennett, J.W., "Mycotoxins and Mycotoxicoses." Bio-Science 30: 512-515 (1980).

(4) Linsell, C.A., "The Mycotoxins and Human Health Hazards." Pure & Appl. Chem. 49: 1765-1769 (1977).

(5) Hayes, A.W., "Mycotoxins: A Review of Biological Effects and Their Role in Human Diseases." Clin. Toxicol. 17: 45-83 (1980).

(6) Centers for Disease Control and Prevention, "Acute Pulmonary Hemorrhage/Hemosiderosis Among Infants—Cleveland, January 1993-November 1994." MMWR 43: 881-883 (1994); Dearborn, D.G.; Infeld, M.D.; Smith, P.G., et al., "Update: Pulmonary

Hemorrhage/Hemosiderosis Among Infants—Cleveland, Ohio, 1993-1996." MMWR 46: 33-35 (1997); Squires, S., "Fungus Tied to Deaths of Cleveland Infants." The Washington Post, Feb. 11, p. 7 (1997).

(7) CDC, "Update: Pulmonary Hemorrhage/Hemosiderosis Among Infants—Cleveland, Ohio, 1993-1996." MMWR 49: 180-184 (2000).

(8) See Robbins, C.A., Swenson, L.J., Nealley, M.L., Gots, R.E., et al., "Health Effects of Mycotoxins in Indoor Air: A Critical Review," Occup. & Environ. Hyg. 15: 773, 775-777 (2000).

Case Notes

CERCLA

➤ Passive Migration of Contaminant Not a 'Release' Under CERCLA

CERCLA. The current owner of property used for a mobile home park sued the former owners, the former operator of petroleum production facilities on the site, and local governmental entities for reimbursement of costs incurred removing hazardous material from property, bringing claims under federal environmental statutes and state common law. The en banc U.S. Court of Appeals for the Ninth Circuit held that the gradual passive migration of contamination through soil that allegedly took place during the former owners' ownership of property was not a "disposal" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *Carson Harbor Village, Ltd. v. Unocal Corp.*, Nos. 98-55056, 98-55107, 98-55210, 98-55213, 98-55215 and 98-55422 (9th Cir Oct. 24).

At issue was whether a former owner was a responsible party under CERCLA by virtue of owning the property during "disposal" of a hazardous substance. Plaintiff argued that, although the former owners were unaware of substances in the ground, the leaching/passive migration of such substances during former owner's tenure constituted a disposal. The Ninth Circuit rejected this view, noting that:

we hold that the gradual passive migration of contamination through the soil that allegedly took place during the Partnership

Defendants' ownership was not a "discharge, deposit, injection, dumping, spilling, leaking, or placing" and, therefore, was not a "disposal" within the meaning of § 9607(a)(2). The contamination on the property included tar-like and slag materials. The tar-like material was highly viscous and uniform, without any breaks or stratification. The slag material had a vesicular structure and was more porous and rigid than the tar-like material. There was some evidence that the tar-like material moved through the soil and that lead and/or TPH may have moved from that material into the soil. If we try to characterize this passive soil migration in plain English, a number of words come to mind, including gradual "spreading," "migration," "seeping," "oozing," and possibly "leaching." But certainly none of those words fits within the plain and common meaning of "discharge, . . . injection, dumping, . . . or placing." 42 U.S.C. § 6903(3). Although these words generally connote active conduct, even if we were to infuse passive meanings, these words simply do not describe the passive migration that occurred here.

Three judges on the panel dissented, countering with their own "plain meaning" argument that passive migration should be deemed a disposal for purposes of CERCLA.

CLEAN WATER ACT
➤ NYC Water Supply Needs CWA