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Upcoming Events

Environmental Law Section Luncheon

January 11, 2002
12:00 p.m.
Swissotel Atlanta
Guest Speaker:
John Hennelly, Esq.
Assistant Attorney General
Georgia Department of Law

Who's Who (and What's What) in Region 4's Environmental Accountability Division

By Richard E. Glaze, Jr., Regional Criminal Enforcement Counsel, EPA Region 4

The Environmental Accountability Division of EPA Region 4 ("EAD") is a product of a reorganization that took effect in 1996. This new division combined the Region's legal office, formerly known as the Office of Regional Counsel, with a technical support arm, which is divided into an enforcement and compliance assistance targeting branch and the Office of Environmental Assessment. This article describes the functions and purposes of the various EAD offices.

The Director of EAD is Phyllis Harris, who was Regional Counsel when the division was created. In addition to the added responsibilities of division director, Ms. Harris retained the title and duties of Regional Counsel. Reporting to Ms. Harris are Bill Anderson, the Associate Division Director for Legal Support, and Bruce Miller, Associate Division Director for Technical Support.

The supervisors of EAD's six legal "offices" report to Bill Anderson. Three CERCLA offices, recently increased from two, handle Superfund issues, including removal and remedial enforcement actions and cost recovery litigation (in tandem with the Department of Justice). The CERCLA office managers are Richard Leahy, David Clay, and Suzanne Rubini. The Region recently appointed Rudy Tanasejovich as the CERCLA senior attorney. The senior attorney works on special projects in support of the CERCLA offices, acts as a liaison with headquarters and is available to mentor new CERCLA attorneys, as needed. CERCLA offices are no longer divided along geographical lines. Instead, cases are assigned based on available personnel.

The Office of RCRA and Federal Facilities Legal Support is supervised by Anne Heard. In addition to RCRA and federal facilities, this office handles the Underground Storage Tank program and Oil Pollution Act matters.

The Office of Air, Toxics, and General Law Legal Support handles matters involving the Clean Air Act, TSCA, EPCRA, FIFRA and AHERA. This office also advises the Region on grants, contracts and personnel matters. The supervisor of this office is Angela Blackwell.

Mary Wilkes supervises the Office of Water Legal Support. In addition to Clean Water Act matters, this office handles Safe Drinking Water Act cases, including underground injection control matters. The office also assists Regional water programs with a variety of water-related matters, including TMDLs, public water supply, water quality and water-related NEPA issues.

EAD recently paired each CERCLA office with one of the regulatory offices to enable attorneys in each of the paired offices to do cross-media work. As currently planned, approximately 75% of an attorney's work will come from the office to which the attorney is assigned for supervisory purposes. The remaining 25% will be assigned from the office with which his office is paired. This change was implemented to allow more attorneys

Message From the Chair

The Environmental Law Section completed its activities for the year in grand fashion with the 2001 Georgia Environmental Conference at the Sheraton Colony Square Hotel in Atlanta on November 6. Over 150 people attended the Conference, which the Georgia Industry Environmental Coalition co-sponsored. The Conference featured a luncheon address by Ben Porter, Chair of the Environmental Protection Committee of the Board of Natural Resources. The Conference also included a legislative and regulatory forecast and panels on statewide and regional water planning, hazardous waste developments, power plant development in Georgia, and recent issues in clean air act permitting and enforcement. I want to thank Terry Snell, Paul Sims, Larry Neal, and Debbie Phillips of GIEC, Scott Coulter of ICLE, and Anne Hicks of the Section for their hard work in helping put together this year's Conference.

As mentioned in my recent email, based upon input from Section members, the Section plans to establish an award to honor the late Jean Tolman. We have decided to create a committee that will determine the criteria for recipients of the award, the process for choosing award recipients, how often the award will be given, and other rules and guidelines for the award. If you have any interest in serving on the committee, or have any ideas concerning the award, please let Anne or me know.

I wish to formally recognize next year's Section officers. Serving next year with Chair Anne Hicks will be Peyton Nunez (Chair-Elect), Susan Richardson (Secretary), Jeff Dehner (Treasurer), and Ann Marie Stack (Member at Large). The Section will be in very good hands next year, and I invite all Section members to participate in what will certainly be an exciting year.

I also want to thank this year's officers for their contributions to the Section. It was a pleasure to serve with Anne Hicks, Peyton Nunez, David Moore, and Darren Meadows, all of whom worked hard assisting in the planning and execution of this year's events, particularly our annual summer seminar, and provided me with valuable advice throughout the year.

I hope to see you at our annual luncheon at the Midyear Meeting on January 11, 2002!

Mold: The Fourth Wave?

By Chintan K. Amin and W. Scott Laseter, Kilpatrick Stockton LLP

INTRODUCTION - A Wave Theory for Environmental Issues

The major environmental issues impacting the real estate and lending community over the last thirty years appear as a series of waves. The first was the wave of asbestos suits that swept across the country in the early 1970s. The hysteria surrounding asbestos caused governments to spend billions of dollars removing asbestos-containing building materials from the nation's schools, despite the paucity of evidence that even a single child actually contracted an asbestos-related disease. Many industrial giants and formerly solid insurance companies tumbled into insolvency, and virtually everyone involved in real estate had some experience with expensive asbestos abatement efforts. In retrospect, the asbestos problem was grossly overblown and most sophisticated businesspeople now understand that asbestos can be managed in place safely without resort to expensive abatement projects.

The second wave swelled in the 1980s and involved leaking underground storage tanks ("LUSTs"). Unlike asbestos, LUSTs did cause considerable environmental damage to a wide variety of properties. While the initial reaction was panic, over time sophisticated investors have learned to deal with LUST problems with considerably more aplomb than they might have 20 years ago. Thus, it is now rare for a transaction to collapse over a LUST issue, and significant liability associated with LUST sites beyond the costs of clean up is uncommon.

The third wave involved dry cleaners and related contamination. This wave appears to have crested in the late 1990s, although dry cleaner contamination continues to be a major concern, especially in transactions involving older retail properties. In many cases dry cleaning operations present more genuinely difficult environmental and regulatory challenges than asbestos or LUSTs ever did. Like asbestos and LUSTs, however, the initial hysteria caused the costs of dealing with dry cleaner issues to skyrocket. As real estate professionals have grown more sophisticated about the problems, the costs required to deal with them have begun to come back to earth, although the threat of both significant clean up costs and third party liabilities remains very real in many jurisdictions.

THE GATHERING WAVE - News About Mold

In Cleveland, Ohio in the mid-1990s, a number of infants fell victim to an unusual form of lung bleeding, diagnosed by doctors as "acute idiopathic pulmonary hemorrhage."¹ Follow-up studies co-sponsored by the U.S. Centers for Disease Control and Prevention suggested a link between these babies' symptoms and a latent environmental condition in their homes.² Earlier this summer in Portland, Maine, officials closed an elementary school after tests showed the presence of the same environmental condition in the building.³ Similarly, in Eugene, Oregon earlier this year, a family donated their home to the local fire department to burn to the ground for firefighter training

¹ *Mold that Closed City's Jack School a Persistent Threat*, PORTLAND PRESS HERALD (Maine), Aug. 23, 2001, at A1.

² *Id.*

³ *Id.*

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to handle “cross media” cases.

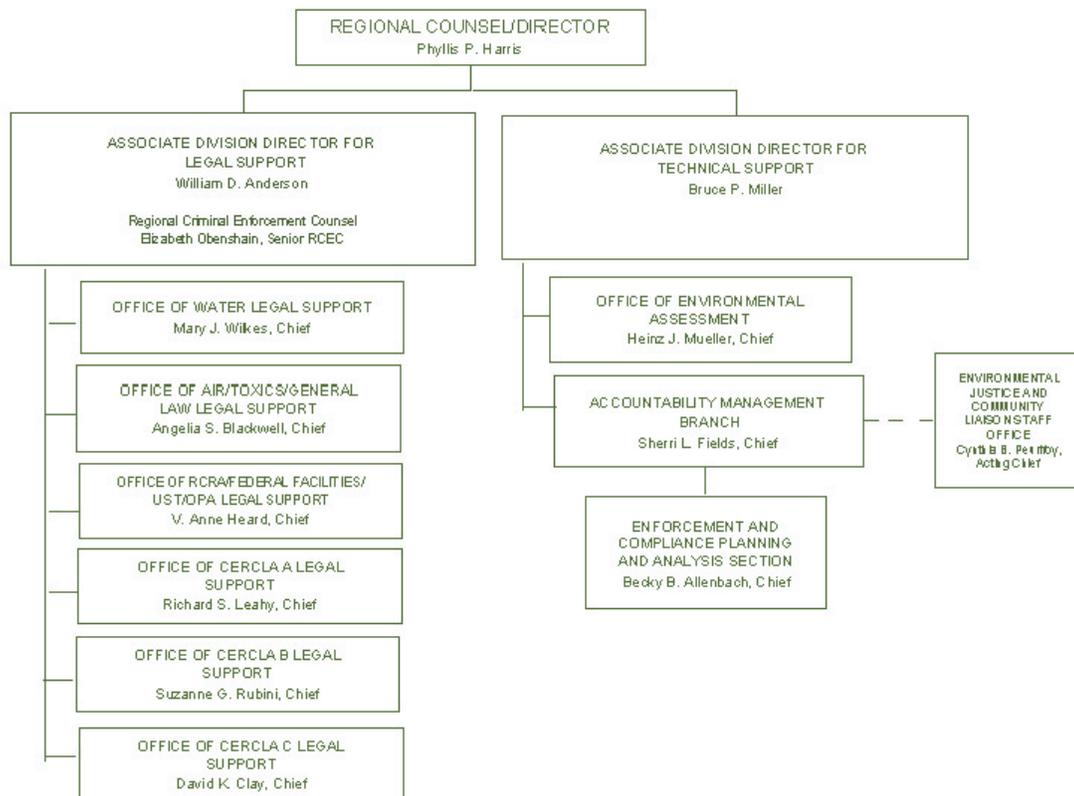
Region 4's three Regional Criminal Enforcement Counsel are supervised by Bill Anderson, the Associate Division Director for Legal Support. These attorneys work with the Criminal Investigation Division and the Department of Justice (the Environmental Crimes Section as well as U.S. Attorneys offices) in the investigation and prosecution of federal environmental crimes. The Senior RCEC is Elizabeth Obenshain.

The Associate Division Director for Technical Support manages the Office of Environmental Assessment and the Accountability Management Branch. The former implements the environmental assessment programs for which the Region is responsible, including reviewing the environmental impact statements required under NEPA and Section 309 of the Clean Air Act, and conducting or supporting the assessments undertaken by the Region. This office also advises EAD on risk management, risk assessment and toxicology matters.

The Accountability Management Branch develops targeting strategies for enforcement and establishes enforcement and compliance assistance priorities. These strategies and priorities are incorporated into the annual Memorandum of Agreement with EPA headquarters. The Enforcement and Compliance Planning and Analysis Section of this branch provides the technical expertise that forms the basis for much of the enforcement and compliance assistance targeting. This section also coordinates media-specific compliance assistance and multimedia enforcement actions with the other divisions of the Region. The chief of this section is Becky Allenbach.

Also part of the Accountability Management Branch, the Environmental Justice and Community Liaison Staff Office oversees Region 4's Environmental Justice activities. This office provides outreach services to communities that, primarily because of past poverty or discrimination, live in locations that are disproportionately affected by actual or threatened environmental impacts. The office also raises awareness of environmental justice issues and works with other federal state and local agencies to address disproportionate impacts. The acting manager of the Environmental Justice Office is Cynthia Puerifoy.

The organization of EAD is summarized on the organizational chart below. Additional information can be found on Region 4's web site at: <http://www.epa.gov/region4/ead/>. ■



Mold: The Fourth Wave?

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because exorcising this problem from the home would have been cost-prohibitive.⁴

The environmental condition at the heart of these stories is the fungus commonly known as mold. Although molds breed in “cool, dark places,” they don’t shy away from warm (and sometimes even dry) states. Microbiologist Dr. Chester Leathers of Arizona State University states that even in his part of the country, “[a] lot of people are suffering from indoor air pollution” resulting from mold infestation.⁵ The San Antonio Express-News recently reported about a Texas judge who suffered severe health effects from a reaction to the mold that had infested her house.⁶ In Lubbock, Texas, a potentially toxic mold forced 19 families to evacuate their homes and move into a Residence Inn motel. The cost to rid one family’s 2,800 square foot home of the problem was \$58,000.⁷

Of course, mold infestation is not limited to single family or even residential buildings. Like the Portland elementary school, larger buildings suffer from mold infestation as well. Black mold was found in the Lubbock County, Texas sheriff’s office in April of this year and in a day-care center being built for children of employees of the U.S. Senate in Washington, DC. Mold problems have been found in countless other public-sector and commercial buildings, as well. And most experts say that we are only on the leading edge of the wave of discoveries of mold infestation in structures. Thus, as one Texas attorney put it, when all is said and done, remediation and litigation costs could far outstrip similar costs related to asbestos.⁸

Predicting the next major wave of environmental issues is partly an exercise in speculation. However, the emerging media and plaintiffs’ bar attention to indoor air issues in general and mold in particular have clearly grown to more than a ripple. Further, following the apparent trend, some public health experts claim that mold may actually pose more serious risks to humans than any of the three major waves discussed above. [Chintan: based on your later conclusions (i.e., no real scientific evidence that mold can cause serious health problems), do you think we should tone this sentence down a bit? Maybe, “some people believe that mold may actually pose . . . ? see change, good point] As such, real estate and lending professionals might be well advised to begin examining their evacuation routes in the event that mold becomes another environmental tidal wave.

EXAMINING THE PROBLEM

The Biology and Toxicology of Mold

Like mushrooms and yeast, molds are fungi.⁹ They are generally microscopic and live on plant or animal matter, subsisting off of the carbon contained in that matter. Molds have even been known to colonize dead and decaying organic matter, including textiles, leather, wood and paper. Molds prefer cool, damp and dark conditions for growth and are often found in homes that have suffered water infiltration and in areas of high humidity. Mold often appears as discoloration, ranging from off-white to orange to black, on surfaces like walls, ceilings and ductwork.

Unlike animals, molds reproduce asexually by broadcasting spores into the air. Mold spores are microscopic and extremely lightweight, allowing them to travel long distances. Once these spores land, they can remain inert for long periods of time, waiting for ideal conditions to begin growing. Once it encounters the appropriate conditions, the mold begins growing and producing more spores.

Health Effects of Mold

Molds may cause adverse health effects in people in two ways, via their spores and by a release of toxins.¹⁰ In heavily infested buildings, the indoor air might contain several thousand mold spores per cubic meter of air. Under normal conditions, that number would only be a few hundred spores per cubic meter. The elevated level of spores found in infested buildings can produce allergic reactions in humans, including minor symptoms, like sneezing, runny noses, eye irritation and other symptoms of “hay fever.” Some attribute more intense reactions, including serious respiratory problems requiring hospitalization, fever, shortness of breath or lung infections, to mold infestation. However, these more severe health effects have not been conclusively linked to mold. In fact, in the case of those afflicted infants from Cleveland, peer-review of those CDC-sponsored studies concluded that the attribution of the symptoms to mold was not scientifically defensible.

Some molds produce mycotoxins, natural organic compounds that initiate a toxic response in vertebrates. The primary mode of human exposure to these toxins is inhalation of indoor air. Toxin producing molds, particularly *Stachybotrys chartarum* or “black

⁴ Mary Umberger, *What will Mold Cost Us? It’s a Growing Factor in Buying, Selling Homes*, CHI. TRIB., July 22, 2001, at 1.

⁵ Art Thompson, *Mesa Microbiologist: It’s Not the Smog, It’s the Mold*, THE ARIZ. REPUBLIC, April 7, 2001, at 1.

⁶ Susan Yerkes, *Readers Express Growing Concerns over Fungus*, SAN ANTONIO EXPRESS-NEWS, March 11, 2001, at 03H.

⁷ Betsy Blaney, *Black Mold Forces Families Out of Homes in Lubbock*, HOUSTON CHRON., May 20, 2001, at 35.

⁸ Yerkes, *supra* note 6, at 03H.

⁹ See generally, NATIONAL MULTI HOUSING COUNCIL, MOLD IN APARTMENT BUILDINGS 4-7 (2001).

¹⁰ See generally, *id.* at 8.

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mold,” have stolen most of the media spotlight because a wide range of symptoms have been blamed on them. These toxins have been linked to white blood cell depletion in laboratory animals. White blood cell depletion can result in lowered immune-system strength in exposed individuals, resulting in secondary infections. Other toxins can result in inflammations of the mucous membrane and hypersensitivity pneumonitis. Symptoms linked to mold-produced toxins include headache, dizziness, dermatitis, and diarrhea. Of course, science is conflicted over whether the symptoms exhibited by lab animals translate into human symptoms.

Also, some molds can themselves cause primary infections in exposed individuals. Although most healthy individuals would not be affected by these “opportunistic fungal pathogens,” infections are a concern in some populations. For example, people undergoing bone-marrow transplants or chemotherapy, or those with HIV/AIDS or other immune deficiency conditions may be at higher risk for infection. Finally, those with asthma or other respiratory illnesses may be especially suspect to mold infestation.

These suspected adverse health effects are steadily receiving more attention from the media.¹¹ As media coverage increases, we can be assured that attention from other quarters will follow. Already, home inspectors and real estate appraisers are becoming more sensitive to the issue. Environmental firms are designing, producing and marketing “do-it-yourself” test kits. And finally, as discussed in greater detail below, plaintiffs’ attorneys are beginning to take notice.

How does Mold Impact Buildings?

As mentioned, molds prefer cool, damp environments for growth and reproduction.¹² There are a number of sources for humidity in public and commercial buildings, including HVAC systems, bathrooms and kitchens, sewer systems, faulty plumbing, faulty roofs and flooding. Air conditioners remove moisture from the air while cooling it and therefore seem an unlikely source for mold. But often the ductwork and conduits channeling the cool air through the building produce surface condensation. The condensation on the ductwork provides an ideal surface for mold propagation: cool, damp and usually dark. Moreover, the blowing air can transport mold spores and the mold itself around a building.

Kitchens and bathrooms present another potential location for mold growth. These areas are among the most humid parts of building. These naturally damp conditions are compounded if there is faulty plumbing in the room. Leaks can cause significant

water damage to wood and other organic building materials. As noted, damp organic materials provide the ideal food for mold and the fungus tends to thrive on water damaged building materials. Thus, addressing water damage from leaky pipes can go a long way towards limiting mold infestation.

Finally, molds tend to prosper in basements of commercial buildings. These areas are often inundated by water from heavy rain events and rising water tables. Similarly, above-grade areas recently damaged by flooding can be fertile breeding grounds for mold infestation.

FIXING THE PROBLEM

Controlling moisture levels in a building is key to controlling mold and preventing mold infestation.¹³ During humid months, experts recommend running the air conditioner because of its dehumidifying effects, though care should be taken to prevent the formation of condensation on HVAC ducts. In kitchens and bathrooms, experts recommend the installation of exhaust fans to provide ventilation and air exchange, using paints containing mold inhibitors and using mold-killing cleaners. Experts also recommend quickly finding and fixing leaks in plumbing and roofs, and assessing affected areas for their potential to attract mold. Finally, if impacts to the HVAC system are suspected, air duct cleaning may be an option.

Earlier this year, EPA published a fairly comprehensive guidance document for mold remediation projects.¹⁴ The guidance document is 50 pages long and contains many options based on a number of contingencies, which evidences the difficulty in assessing and eliminating mold problems. Important considerations include the total square footage affected and the types of surfaces affected. Mold can be cleaned up using typical household disinfectants or chlorine bleach solutions. While many state agencies recommend this method for smaller affected areas, EPA instead recommends a combination of wet vacuuming the surfaces, applying a detergent-water solution and HEPA vacuuming. In extreme circumstances, depending on the material impacted and the extent of the impacts, EPA also recommends removing and discarding damaged materials.

Costs for mold cleanup are increased further because workers may need to wear personal protective equipment, including skin and eye protection to protect against the disinfectants and respiratory protection. EPA recommends using full protection, such as a full-face, powered, air-purifying respirator, for areas where high

¹¹ See, e.g., *Umberger*, *supra* note 5, at 1.

¹² See generally, INDOOR AIR DIVISION, OFFICE OF AIR AND RADIATION, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MOLD REMEDIATION IN SCHOOLS AND COMMERCIAL BUILDINGS 2-3 (2001), available at <http://www.epa.gov/iaq/molds/index.html> (hereinafter “MOLD REMEDIATION MANUAL”).

¹³ See generally, *id.* at 4-10.

¹⁴ MOLD REMEDIATION MANUAL, *supra*. Note 12.

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DNR Establishes Stakeholder Group to Address Public Participation Issues

By Julie V. Mayfield, Director, Turner Environmental Law Clinic, Emory University School of Law

In response to a directive by the Department of Natural Resources Board in May 2001, DNR Commissioner Lonice Barrett has created a stakeholder committee to address public participation problems and issues that exist throughout all of DNR's divisions. This group, which is representative of a range of interests, including conservation groups, local governments, industry, and most divisions of DNR, will gather for several day-long facilitated meetings to address a wide range of issues concerning DNR's interaction and communication with the public. The committee is made up of 25 members, 15 of whom represent interests outside DNR. A full list of the committee members appears below.

The directive from the Board came in response to a memo to the Board from the Turner Environmental Law Clinic and the Georgia Center for Law in the Public Interest, submitted on behalf of the Upper Chattahoochee Riverkeeper and the Georgia River Network, that highlighted several specific public participation problems within EPD. Commissioner Barrett, however, decided to expand the committee to address these issues in all of DNR's divisions, not just within EPD.

The committee has met twice, first on September 24, 2001 and again on October 29. Gail Cowie, from the Carl Vinson Institute of Government at the University of Georgia, is facilitating the meetings. At the first meeting, each committee member voiced his or her personal goals for the committee's work. One of the most common goals was that the committee create policies that ensure uniformity across DNR divisions in order to eliminate differing expectations or requirements. Another shared goal was that DNR work to break down the many communication barriers - some real, some perceived - between it and the public in order to foster more open, two-way communication and to make DNR and its information more accessible to the average citizen. Several committee members also expressed their desire that DNR involve the affected public much earlier in the decision-making process in order to foster cooperation and an honest exchange of information in order to promote sound decision-making.

The committee then determined that its overall goal should be to improve public participation processes in order to help DNR do a better job of serving the public. The group agreed that it would work toward developing a list of recommended policies, processes, and procedures that would apply department-wide and would be taken to the Board of Natural Resources for its review. The group also recognized that all of its recommended policies, processes, and procedures must be able to be implemented in order to be effective, and the group agreed to develop and recommend implementation strategies where necessary. It is unclear at this point how many of these practices DNR will be able to implement simply by changing internal policies or whether rule changes will also be required.

At the committee's second meeting, the group launched into the work by first identifying those specific DNR actions or activities around which public involvement is desired or important. The committee identified ten such actions, some of which were regulatory in nature and some of which were non-regulatory. The regulatory actions were rulemaking, enforcement, and final decisions that allow activities to occur. This last category would include such actions as issuing permits and licenses, making grants, providing incentives, and providing certifications for federal and other state agencies. In the non-regulatory category, the committee identified the following DNR activities that could involve participation by the public: budgeting, strategic planning within each DNR division, proposing legislation, developing internal policies that do not rise to the level of formal rules, providing the public access to documents held by DNR, acquiring land, and resource management.

The committee then chose two of these issues, rulemaking and access to documents, and discussed what was working and what needed improvement in each of these areas. The participants found that several aspects of public involvement in rulemaking worked well, including the rulemaking notice mailing lists, the fact that most DNR divisions place the rulemaking notice, the proposed rule, and a synopsis of the rule on the web; and that some divisions make good use of stakeholder groups to help draft rules.

Regarding those aspects of rulemaking that should be improved to invite more or better public involvement, the stakeholder recommendations included the need for:

- better identification of affected communities and stakeholders;
- better use of stakeholder groups to help draft rules;
- a longer public involvement and evaluation period of a draft rule before it goes into final form for a vote before the Board of Natural Resources;

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- an opportunity for the Board to hear public comments at various public meetings instead of just at Board meetings; and
- better response from DNR to comments and suggestions made by stakeholders.

Regarding the public's access to documents, committee members stated that several aspects of that process worked, including that DNR documents are generally easily available to the public, that the DNR staff is often helpful and friendly, and that the web is helpful for several kinds of documents. The committee members also found need for improvement, including the following:

- the agency should adopt a strong philosophy that public participation is valuable and welcome;
- the website should be further improved and should be able to be updated more easily and quickly by DNR staff;
- the agency should be more flexible in how it responds to requests for documents, including sending documents by mail, email, or fax;
- copy costs should be more flexible, being reduced or eliminated for some groups;
- the agency should do a better job of identifying stakeholders and affected communities and disseminating important information to them;
- the agency should better organize its files and educate its administrative staff concerning the location of all the files on an issue or facility; and
- DNR should make the documents under consideration by the Board of Natural Resources and the Board's meeting minutes available earlier.

At the next meeting, the committee will begin discussing other items from the list of ten DNR regulatory and non-regulatory actions that involve the public, conducting a similar analysis of what works and what should be improved. The committee will then begin to address solutions to these all of problems.

It is still unclear how long it will take to address all of the identified actions in this manner. The committee has agreed to meet for at least three months, at which time it will assess its progress and decide whether to continue its work, disband, or recommend an alternative way to address these issues. ■

Committee Members:

Paul Brockington, Brockington & Associates

Steve Burch, Georgia Outdoor News

Tom Gehl, Georgia Municipal Association

Win Hill, Environmental Advisory Council

James Holland, Altamaha Riverkeeper

Ross King/Chris DeVinney, Association of County Commissioners of Georgia

Stephen Lofton, Georgia Chamber of Commerce

Julie Mayfield, Turner Environmental Law Clinic

Jerry McCollum, Georgia Wildlife Federation

Tavia McCuean, The Nature Conservancy

Betty Sleeth, Homebuilders Association of Georgia

Jim Stokes, Alston & Bird LLP

Justine Thompson, Georgia Center for Law in the Public Interest

Bryan Tolar, Georgia Agribusiness Council

Connie Tucker, Southern Organizing Committee for Economic and Social Justice

Connie Wiggins, Environmental Advisory Council

Connie Bell, DNR Real Estate Division and Georgia Greenspace Program

David Benoist, DNR Support Division

Beth Brown, DNR Wildlife Resources Division

Richard Cloues, DNR Historic Preservation Division

Bob Donaghue, DNR Pollution Prevention Assistance Division

Phil Flourney/Kevin Brady, DNR Coastal Resources Division

Doralyn Kirkland, DNR, Environmental Protection Division

John Walden, DNR Executive Legal Assistant

David Word, DNR Environmental Protection Division

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concentrations of mold spores are likely, such as areas with extensive impacts. In concert with respirators, EPA suggests the use of disposable protective clothing. Finally, in certain cases, EPA recommends the use of containment, which could range from limited containment of affected areas to full containment of whole floors or buildings.

LIABILITY

There are very few statutes, regulations or ordinances specifically addressing mold issues, although proposed legislation is being considered in a number of states. California has comprehensive legislation pending,¹⁵ and San Francisco has added mold to the list of nuisances under its health code.¹⁶ Texas is investigating the promulgation of voluntary guidelines.¹⁷ Maryland will also adopt regulations to protect workers from mold-related illnesses within a year.¹⁸ However, now that mold infestation is receiving publicity from the media and from health care professionals, plaintiffs' attorneys are also paying close attention. Several documented settlements and judgments should open the eyes of property owners. In May of this year, the Delaware Supreme Court upheld a \$1 million verdict against a landlord resulting from alleged mold problems. In Texas, more than 70 families are suing builders and synthetic stucco manufacturers, alleging that the stucco trapped moisture, contributing to mold infestation. Alex Robertson, a California attorney, claims to have over 1,000 mold-related cases in the pipeline. Earlier this year, the Texas Bar Association sponsored a conference entitled "Mold, Mildew and Sick Building Issues." Also in Texas, a court has held an insurance company liable for \$32 million in a bathroom mold case.

Plainly, property owners can be targets for suits arising out of mold problems claiming personal injury by tenants and their employees. In many states, landlords of residential property have a common law or statutory duty to repair. Breach of this duty could

result in liability for mold infestation. Further, if commercial leases allocate repair responsibility for exterior structures to the landlord, a commercial landlord could conceivably be held responsible for failure to maintain a leaking roof resulting in mold infestation. Additionally, office and hotel owners or operators could obviously face claims if tenants, employees or guests have acute reactions to mold. Other potential defendants include contractors, building material manufacturers and installers. These groups could be liable on theories ranging from negligence to products liability. Further, building owners could come against them for contribution when the owners themselves are held liable for mold problems.

CONCLUSION

Mold and indoor air quality issues loom on the horizon as the next wave of environmental and toxic tort issues. While the ripples of the first few lawsuits have just started to lap against the shore, larger swells may be on the way. Mold's ubiquity adds to the possibility of future litigation, because the pool of people potentially exposed is enormous. And because the health effects are unknown and appear to not fall into any sort of pattern, predicting the results of litigation will be difficult. Further, cleanup of mold contamination is fairly involved and expensive. Thus, when the tidal wave of mold and indoor air issues hits, attorneys need to be prepared to advise their clients on options to ride out the storm. ■

¹⁵ See A.B. 284, 2000-2001 Leg. Sess. (Cal. 2001); S.B. 732, 2000-2001 Leg. Sess. (Cal. 2001).

¹⁶ Ordinance 010269 (nuisance code revision), City and County of San Francisco (June 2001).

¹⁷ TEX. HEALTH AND SAFETY CODE, Tit. 5, Ch. 385.

¹⁸ MD. CODE ANN. Ch. 591.

¹⁹ *New Haverford Partnership v. Stroot*, 772 A.2d 792 (Del. 1999).

²⁰ Yerkes, *supra*, note 7, at 03H.

²¹ *Ballard v. Fire Ins. Exch.*, No. 99-0525 (Tex. Dist. Travis County 2001), cited in Kurtis B. Reeg, *Mold Litigation – It's Not Asbestos Déjà vu All Over Again*, 17 ENVTL. COMPLIANCE AND LITIG. STRATEGY 4 (2001).

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