

TOXIC MOLD- The Contaminant Du Jour

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Toxic mold and other indoor air quality concerns have become a hot-button issue for thousands of people and, depending on your position, either an immense headache or opportunity for lawyers, environmental consultants, and health care professionals. Mold contamination has been discovered in water-damaged structures across the nation and have become associated with significant health effects (respiratory, digestive, dermatological, and neurological illnesses) and foul odors. This area was begging for legislation.

Prior to this year, no state statutes directly applied to mold disclosure or cleanup issues. This lack of law has led to substantial confusion and a lack of objective standards for what could be a serious problem. On January 1, 2002, the Toxic Mold Protection Act (SB 732) (Health & Safety Code § 26100 et seq.) came into effect. The new law provides guidelines for mold remediation, public education materials, and disclosure requirements. The legislation requires the California Department of Health Services (DHS) to report back to the legislature by July 1, 2003 on various tasks created by the statute. However, almost all measures in the statute are contingent on state funding.

For example, the law calls for the creation of a task force to advise DHS on development of permissible exposure limits to mold; standards for assessment of molds in indoor environments; standards for assessment of molds in special indoor environments -- hospitals, child care facilities, and nursing homes; and standards for mold remediation.

By July 1, 2003, DHS must consider the feasibility of adopting permissible exposure limits to indoor molds. Further, if the DHS creates permissible exposure limits (PELs) for certain types of molds, and PELs must be reviewed and revised at least once every 5 years. In addition, DHS must develop and adopt: (1) assessment standards for mold in indoor environments, (2) public education materials and resources regarding health effects, prevention, identification and remediation, and (3) public agency contact information.

Perhaps most importantly, the new law creates disclosure obligations for known or suspected mold contamination. The disclosure provisions are as follows:

- a. No statutory disclosure obligation to tenants or buyers until at least 6 months after DHS adopts PELs and assessment/remediation guidelines. Earliest will be January 2004.
- b. No affirmative duty created to conduct air or surface tests.

- c. For both commercial and residential structures, if PELs and remediation standards created, then:
- (1) As soon as practical before transfer of title, seller must disclose to prospective buyers known presence of all molds exceeding PELs.
 - (2) No disclosure duty if remediation completed in accord with remediation standards anticipated to be created by July 1, 2003.
 - (3) In commercial structures, landlord must disclose to existing tenants as soon as reasonably practical and, for prospective tenants, as soon as practicable prior to signing lease.
 - (4) For existing tenants,
 - (c) No disclosure if proper remediation previously completed.
 - (d) No education pamphlet required -- education pamphlet required in residential setting.

Further, regardless of whether PELs are created, commercial or industrial tenants who know of mold, or are informed of mold presence, or of chronic water intrusion or flood, must inform landlord in writing of suspected mold "within a reasonable period of time." If the landlord is responsible for maintenance, tenant must make space available for landlord's assessment and remediation. If the tenant is responsible for maintenance, tenant must correct the condition in compliance with lease. Although somewhat unclear, a provision of the new law (Health & Safety Code § 26143) may even require commercial and industrial landlords who know or have knowledge of mold to assess the presence of mold or condition likely to result in the presence of mold and conduct necessary remedial action "within a reasonable period of time." This provision cannot become effective until at least July 2003.

However, two important points remain despite these onerous requirements: (1) nothing in the new law affects existing law -- i.e., disclosure obligations apply to facts materially affecting the value and desirability of property, and (2) the new law can only be implemented to the extent that DHS determines that funds are available. In light of the current state budget crisis, some of these provisions may never become effective.

Stay tuned.