

Our Legal Reality



Keeping an Eye on Mold (Part 2) by Kent J. Pagel

Mold can be found almost anywhere and can grow on virtually any substance, provided moisture is present. Several lumber associations are knowledgeable on this topic, including the American Forest & Paper Association's (AF&PA's) American Wood Council (AWC), the Western Wood Products Association (WWPA), the Canadian Wood Council (CWC), and the Southern Pine Council (SPC). Surface molds, which can come from a variety of sources including airborne spores, feed off of the sugars and starches readily available in wood. Thus mold can and will occur naturally on lumber under certain conditions, normally due to the presence of moisture in or on the wood and warm temperatures. Therefore, component manufacturers and lumber dealers must realize that all lumber and wood components are susceptible to mold growth.

However, component manufacturers, as well as distributors of lumber and lumber related products, have no economically feasible way of determining whether the lumber they receive from their suppliers has mold or the signs of mold. Nor do they have the expertise or the resources to conduct inspections of the trusses or lumber they sell. Furthermore, for these groups to agree to inspect or test would be contrary to the recommendations of the EPA, which has reported that state health agencies and experts do not recommend testing to determine if there is a mold problem. Mold sampling can also be expensive and requires special equipment and trained technicians to acquire reliable samples and test results. Additionally, there are essentially no standards for judging what is an acceptable concentration of mold. Lastly, no regulations exist for mold contaminant removal.

Assuming that all molds could be determined through some kind of comprehensive, thorough and cost effective process, AF&PA's AWC has published that all mold spores cannot be permanently eradicated by cleaning or disinfecting. While such cleaning can remove spores present at the time, it will generally not protect surfaces against mold spores that arrive after cleaning.

COMPONENT MANUFACTURER RECOMMENDATIONS

I have not yet seen or heard of a component manufacturer or lumber dealer involved in construction defect litigation where mold on lumber was the primary issue raised.

I do expect to see such cases filed in the future; no differently than I expect to see component manufacturers sued where defects are asserted even though the real problems experienced have nothing to do with the design or manufacturing of the products sold by them.

What we are seeing currently, however, is an increasing number of requests by builders for component manufacturers and lumber dealers to inspect all components or framing lumber supplied for “potential signs of any kind of mold problems prior to shipment.” These same customers have suggested that they also expect any components or lumber that may in the future contain mold to be replaced or remediated at the supplier's sole cost and expense. As you consider the long-term liabilities that exist by agreeing to comply with such requests, keep in mind that replacement and remedial charges can become quite high especially if the materials are already installed.

When faced with a request by a customer regarding mold, the first inclination of most component manufacturers and lumber dealers is to request support or an agreement from lumber producers. To date, as far as I know, most lumber producers either directly or indirectly disclaim any liability for the negative effects of the emergence of mold and disclaim any duty to inspect, mitigate or remove mold from framing lumber. Those lumber producers not disclaiming this responsibility are simply not announcing any kind of position with respect to mold on lumber. Thus, it does not appear that lumber producers will offer component manufacturers or lumber dealers much, if any, relief in response to requests from builders and contractors. In my opinion, this effectively leaves component manufacturers and lumber dealers with only the following options:

DO NOT agree with the manner in which some customers choose to place additional responsibility on you regarding inspecting or remediating for mold. Customers need to understand that you will only work with them in proactive ways to avoid mold growth, but that for the reasons I have stated, you will not agree to the unreasonable conditions that they may seek to impose.

DO consider developing an internal company policy of visually inspecting all lumber materials at the time they are received, at the time a bundle is opened, at the time lumber is culled and cut, at the time trusses are fabricated, and at the time the trusses leave your yard. Inspect for obvious conditions of age discoloration, excess moisture and mold or mildew growth. It is prudent to inspect, as you may be able to return discolored lumber before it is used in manufacturing. It is, however, unreasonable in my opinion for customers to impose conditions on you that you are delivering mold-free lumber and that such lumber will remain mold-free.

DO place all incoming lumber materials under or behind materials in inventory and already in place. All bundles should be dated for inventory verification purposes. A “first-in first-out” approach should be utilized for inventory to ensure proper inventory rotation. All lumber materials that are pulled for use should be verified as being the earliest bundle date.

DO deliver strictly in accordance with a customer's request. All specific unloading instructions requested by the customer should be followed so as to minimize complaints that the components or lumber delivered was unloaded in such a way as to enable mold growth.

DO respond to customer requests regarding mold. In the event any component or lumber is found to be questionable by the customer or the customer's framing crew, a representative from your company should visit the jobsite if for no other reason than to educate and instruct.

DO take action as a chapter or as a group of members in a particular geographic market.

- Hold a meeting of member manufacturers to discuss mold issues.
- Consider issuing a letter to customers from your WTCA chapter stating: (a) that the component industry disclaims any responsibility to inspect lumber to determine if mold exists; (b) that the component industry disclaims responsibility from the negative effects that mold may cause trusses and components if a home is not properly constructed and mold is not properly abated; and (c) that the component industry disclaims any responsibility to remove, replace or remediate lumber at the jobsite that may contain mold, whether before or after installation. ([See below for an example](#) of this type of letter sent out by the members of the Greater Chicago Area Truss Manufacturers Association.)

DO take action with respect to your customer contracts and review of project specifications. It is important that you review your standard terms and conditions of sale and all customer contracts that you may sign to properly disclaim responsibility regarding mold on lumber. You must also carefully review project specifications (to the extent such specifications become part of or incorporated into the customer contracts that you enter into) and not accept responsibility that may be assigned relating to mold, mildew or staining of lumber contained within the manufactured products that you sell. Consider the following terms to add to your standard terms and conditions of sale or to the customer contracts that you enter into (although it is recommended that you consult with your attorney on the language that is most appropriate for your company):

Seller's warranty shall exclude losses caused by mold, mildew and stain on the materials supplied by Seller; AND/OR

Buyer assumes all risks and liabilities for any mold, mildew and stain on the materials supplied by Seller; AND/OR

It is outside Seller's scope of work to inspect, remove or remediate the materials furnished with respect to mold or mildew; AND/OR

Seller disclaims any liability for the negative effects of the emergence of mold or mildew, and disclaims any duty to undertake any action to inspect, mitigate or remove mold and mildew from the materials supplied by Seller.

The goal to be attained by the component manufacturer and lumber dealer is to avoid succumbing to the builder's demands for providing mold-free lumber, replacing lumber that has mold or stains on it, and/or remediating mold/stained lumber. Of course, should any component manufacturer choose to provide its customers with mold-free products or some kind of mold-free service, this may be possible in the marketplace. The key is to get properly paid for this product or service if you decide on this business strategy.

Example of letter sent out by the members of the Greater Chicago Area Truss Manufacturers Association regarding mold:

To: Builders and Contractors Purchasing Wood Trusses and Related Components

Date: October 2001

Re: Mold and Mildew on Structural Wood Components

It is common for the lumber we use in wood trusses and components to develop surface molds and mildew during transit or storage prior to use. Often this process accelerates and manifests itself during the warm summer months.

Since molds come from spores that float in the air, they are ever present in our daily life. As such, it is impossible to control mold when wood has a higher than normal moisture content. These molds only affect the surface of the lumber and do not cause any structural performance degradation. Once the moisture content of the lumber reaches 20 percent or less, all mold growth ceases.

Most homes are built to prevent moisture infiltration. If built to code, the inside of the home (including the interior spaces and the building cavities) will stay dry enough to stop mold spores from becoming active. Normally, structural components installed in a properly built and ventilated structure will air dry below 20 percent moisture content in 10 days to 2 weeks and reach an atmospheric equilibrium of 8 to 12 percent within the first heating or cooling season.

The emergence of mold on framing lumber is a naturally occurring process. Therefore, our customers should be aware that we will disclaim any obligation to undertake an inspection to determine if molds exist. We will furthermore disclaim any liability for the negative effects of the emergence of mold on wood trusses and components, and will disclaim any duty to replace, remove or remediate any framing lumber at a jobsite that may contain mold.

Please contact your supplier for additional discussion on this topic. The members of the Greater Chicago Chapter stand behind the content of this letter.

Sincerely,

The Members of the Greater Chicago Area Truss Manufacturers Association

Kent. J. Pagel is the president and senior shareholder of Pagel, Davis & Hill, a Professional Corporation, and serves as outside national counsel for WTCA.

WTCA and STCA have developed fact sheets on mold that have been published as

part of WTCA's Truss Technology in Building series and STCA's Steel Components in Construction series. For more information, visit the products sections of the web sites for these organizations: www.woodtruss.com and www.steeltruss.org.

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