

# The Arnold Law Practice

## News From the Practice

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### **\$10 Million for Orphan UST Site Cleanups**

The State Water Board set up the Orphan Site Cleanup Account (OSCA) and will be taking applications for grants as late as July 2007. The OSCA established a \$10 million fund to reimburse owners who cleanup petroleum contamination from Underground Storage Tanks (USTs) on Brownfield sites. Do you meet the requirements to get money?

- Do you own an eligible property, such as a "Brownfield" site; is your property contaminated with petroleum from an UST?
- Have you started a cleanup of contamination on the property?
- Are you a "responsible party;" did you cause or contribute to the contamination on the site?
- Is your site an orphan; are you unable to find a "responsible party" to pay for the cleanup?

*If you think you might be eligible to receive funds, call the Arnold Law Practice for further advice.*

### **News From The Arnold Law Practice**

Our very own Jim Arnold was...

- Nominated to the International Who's Who of Environmental Lawyers of 2006, and
- Quoted in the Jan. 2006 edition of ESA Report advising purchasers of former gas stations to "consider using risk management tools like indemnities from sellers, guarantees from contractors, and cost-cap insurance to minimize their exposure to liability for the costs of remediating MTBE and other contamination from USTs."

### **Naturally Occurring Asbestos - Developers and Owners Beware**

Researchers at the prestigious UC Davis have linked malignant mesothelioma (a cancer associated with exposure to asbestos) to living near sources of naturally occurring asbestos ("NOA"). The researchers found that people living near NOA have a 6.3% higher chance of developing mesothelioma. And, the danger increases with daily exposure. Each year, as many people die from mesothelioma as they do from "second hand smoke."

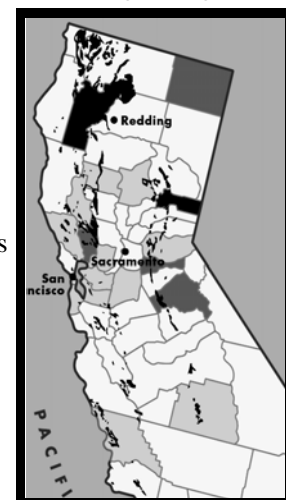
Why should developers and property owners be concerned? The mountains of Northern and Central California have a great deal of NOA (it's found in 44 of 58 of California's counties). As more and more vacation homes are built in the California foothills, more and more roads, subdivisions, and schools are being built in areas with large deposits of NOA. When rocks containing asbestos fibers are crushed, asbestos is released into the air. Inevitably, dust is kicked up and we breathe in these asbestos fibers.

USEPA has already been investigating NOA exposures in El Dorado County (Placerville to South Lake Tahoe). In 2005, USEPA, the California Department of Toxic Substances Control, and the US Agency for Toxic Substances and Disease Registry studied NOA dust and found possibly dangerous levels in playgrounds and other public areas. USEPA spent \$2.5 million cleaning up NOA in public and school areas in El Dorado after field tests showed 90% of surrounding communities had asbestos dust. DTSC has recommended re-paving highways and surfacing gravel roads. And, people have walked away from homes (and mortgages) when they learned large deposits of NOA lay underneath.

Regulatory agencies believe there is no safe level of asbestos exposure for human beings. Increasingly, state and local governments are regulating construction to control NOA impacts. In NOA areas, the California Air Resources Board requires special construction techniques for roads, including maintenance, dust control and air monitoring. Also, California agencies require consideration of NOA impacts in reviews of projects according to California's NEPA, the California Environmental Quality Act ("CEQA"). Projects must evaluate health effects and avoid and control NOA exposures.

The NOA problem extends beyond California. In Fairfax County, Virginia, developers proposing projects on soils with high levels of NOA must develop a plan to prevent migration of asbestos off the property and submit that plan to the County Health Department. Plans must include dust control, air monitoring, and disposal measures for contaminated soil.

The UC Davis report on the health effects of NOA can be read at: <http://www.ucdmc.ucdavis.edu>



Map of NOA in California, shaded areas indicate high levels of natural asbestos.

## THE ARNOLD LAW PRACTICE

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**The Arnold Law Practice represents business owners** in multi-defendant litigation with claims of groundwater pollution by drycleaning practices, USTs, waste disposal practices, OSHA penalty issues, claims against environmental consultants as to site audits, Fish & Game civil penalty proceedings, condemnation of portions of business for road expansion, failure of seller to disclose buried contamination, compliance with air pollution control laws, civil penalties from air quality management districts, spill response claims, toxics reporting and disclosure requirements, UST closure laws.

**The Arnold Law Practice represents individuals** in state and federal courts in a variety of lawsuits, including complaints for specific performance of real estate contracts, quiet title, defending permits issued by the National Marine Fisheries Service, defending and prosecuting construction claims, breach of contract, negligence, fraud, property trespass and damages, and related matters.

**The Arnold Law Practice associates with specialized counsel** in complex real estate closings, estate and trust planning, partition actions involving contamination, and transfers of real estate with indemnities and cleanup rights under the California UST Fund.

## The Lesson of *Carson Harbor Village*

**First you get an environmental lawyer, and then you do the cleanup.**

Before you spend money cleaning up that contaminated property, take a look at the January 2006 decision in *Carson Harbor Village v. County of Los Angeles*.

*The lesson? Don't expect to get reimbursed for a cleanup, unless you plan it out with legal counsel.*

Here, a mobile home park operator cleaned up a wetlands, but it couldn't get the courts to require an oil company to pay. The reason? The mobile home park operator failed to follow the 300 pages of technical rules in the USEPA's national contingency plan ("NCP"). And, no amount of "after the fact lawyering" could cure this fundamental flaw.

January's decision by the 9<sup>th</sup> Circuit Court of Appeals is the latest in a long story. Ten years ago, the plaintiff found tar and slag in wetlands on the property, with high levels of lead. He spent \$285,000 to remove over 1,000 tons of contaminated material.

In 1997, Carson Harbor sued Unocal for cleanup costs, claiming Unocal was a "responsible party" under the private cleanup sections of the Comprehensive Environmental Responsibility, Compensation and Liability Act (CERCLA). The federal trial judge threw out the case. Carson Harbor won an appeal and the trial judge reconsidered the case. The trial judge looked at whether Carson Harbor conducted the cleanup "consistent with" the EPA's rules for the NCP. Again, the trial court dis-

missed the case, and Carson Harbor appealed. This time Carson Harbor wasn't as lucky, and the 9<sup>th</sup> Circuit agreed with the trial court's dismissal.

The 9<sup>th</sup> Circuit reminded us of some important requirements for those who sue for cleanup costs under the private party sections of CERCLA. Carson Harbor's cleanup failed to meet two key requirements of the NCP. First, it didn't consider enough alternatives to its consultants' recommended cleanup plan. Second, it didn't involve the community when preparing the cleanup plan, including notifying the public and allowing them to comment on the proposed plan. (The oversight by the California Regional Water Board was not a substitute for public participation – because it was only "minor and ministerial.")

Carson Harbor's cleanup was typical of many cleanups in California. Normally, the Department of Toxic Substances Control (DTSC) or the Regional Water Quality Control Boards supervise cleanups. The agencies typically review cleanup plans submitted by a property owner, but rarely require consideration of alternatives or "NCP-style" public participation.

*The moral of the story is....  
hire the attorney, then do the cleanup.*