

The Arnold Law Practice

News From the Practice

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Enforcement Penalties Paid in 2003

California EPA reports that California agencies collected a lot of penalties in 2003:

- Air Pollution Control Districts — \$17.5 Million
- Air Resources Board — \$11.2 Million
- Local agencies (CUPAs) for hazwaste — \$2.5 Million
- State Water Resources Control Board — \$3.7 Million
- Dep't of Toxic Substances Control — \$2.3 Million
- Dep't of Pesticide Regulation (DPR) — \$978 Thousand
- County Agricultural Commissioners — \$669 Thousand
- Integrated Waste Management Board — \$73 Thousand

“These numbers will increase because agencies must self-fund with fees & fines.”

Road & Access Law

We have represented clients with many public and private road and access matters over the last 30 years. Jim Arnold is speaking this month in three Northern California cities on:

- √ *creating and using public roads*
- √ *abandoning and vacating public roads and private easements*
- √ *gaining access to roads.*

For more information contact us.

Is the Government Dealing Itself a “Get Out of Jail Free” Card in Superfund Cases?

The Supreme Court in 2004 in *Aviall v. Cooper Industries* overturned 20 years of claims and settlements in Superfund cases. The Court ruled that unless you are sued, you shouldn't do a Superfund cleanup. *Why?* The Court ruled that until you are sued you cannot force other responsible parties to contribute by using Section 113(f)(1) of CERCLA. Many, many cleanups of complicated sites have been done by “PRP Committees” after USEPA and others issued cleanup demands to them. PRP Committees use Section 113 to force other contributors to help pay for cleanup.

Some federal courts think Section 107(a) of CERCLA allows an alternative way to force contribution. Only a few federal appeals courts have ruled on using Section 107. The U.S. Ct. of Appeals for the First Circuit (Boston) decided before *Aviall* that Section 107 could not be used. The Second Circuit (New York) recently disagreed and will let PRPs use Section 107. *Consolidated Edison Co. v. UGI Utilities Inc.*

What has happened in the Ninth Circuit — the federal appeals court for California and the Pacific Far West?

In 1997, the Ninth Circuit Court of Appeals (San Francisco) ruled that Section 107 includes an implied right of contribution. After *Aviall*, federal courts in California have issued conflicting opinions whether Section 107 still provides a right to contribution. Two federal judges in Sacramento and two in San Francisco ruled that Section 107 gives a right to sue for contribution. Three federal judges in Los Angeles said Section 107 does not. The Ninth Circuit has consolidated for appeal one of the Sacramento cases and one of the Los Angeles cases.

The government filed recently filed a legal brief against Section 107 contribution. Many commentators feel the U.S. is trying to get around the waiver of sovereign immunity Congress put into CERCLA. *The issue is significant for two reasons.* First, many believe the U.S. has over \$300 billion in cleanup liabilities for federal properties. Second, *the U.S. may be attempting an “end run” around all of its Superfund liabilities, because if USEPA doesn't sue for cleanups, the U.S. military won't have to help pay for them.*

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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, breach of contract, adverse possession, negligence, fraud, property trespass and damages, *etc.*

The Arnold Law Practice represents business owners who are food processors, petroleum fuel distributors, computer manufacturers, cell phone importers, banks, real estate developers, and others in wastewater discharge matters; questions as to UST compliance (and UST Fund reimbursements); Phase I and II Environmental Site Assessments; civil penalty proceedings with USEPA, Air Quality agencies, California Fish & Game, the State and Regional Water Quality Control Boards and local health departments; redevelopment issues with cleanups and “sign-offs;” condemnations of businesses and roads; questions of disclosure and reporting of buried contamination; compliance with Prop. 65 and how to interpret the California Rigid Plastic Packaging Law.

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.

**Get Ready for “Vapor Intrusion” —
Another Environmental Issue With Real Estate**

What is “Vapor Intrusion”?



Vapor intrusion is a broad new topic for enforcement and for due diligence in real estate transactions. Vapor intrusion occurs when airborne chemicals seep from soils into buildings.

USEPA published a study in 2002 that identified vapor intrusion as a problem. In 2004 and 2005, the California Department of Toxic Substances Control (DTSC) took a hard look at the problem. Earlier this year, DTSC presented a “decision tree analysis” for this new exposure pathway.

As a result, regulatory agencies in California are not accepting USEPA Region 9 “preliminary remediation goals” (PRGs) to set screening levels — nor for cleanup levels. And, agencies are reportedly reopening sites where remedial action has been completed. Owners are being required to install engineering controls and, in some cases, record deed restrictions (aka institutional controls). Retro-fitting can include enhanced ventilation, sealing processes, and the like.

“...the indoor air pathway, which is not incorporated in the U.S. EPA [PRGs) can be a significant contributor...”
Patty Yong-Kim, et al., DTSC, March 2006

**Why & How to Handle
“Vapor Intrusion” Questions**



How are *vapor intrusion* issues arising (excuse the pun)? The *vapor intrusion* problem issues show up: (1) when buyers and lenders do environmental due diligence, (2) when owners and developers go for approvals for redevelopment of contaminated properties, (3) when agencies hire more personnel and focus on getting old gas station sites closed, (4) when workers get sick from fumes, etc., and (5) county health departments work with District Attorneys to prosecute cases where responsible parties fail to take corrective action.

Vapor intrusion problems are handled by:

1. Find out if there really is a problem — by checking the data and the standards that are being applied.
2. Understand the “how and why” of the “standards” for vapor intrusion.
3. Get legal counsel with experience in the 5 ways “vapor intrusion” issues show up.