The Arnold Law Practice

News From the Practice

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California's Environmental Covenant Applies to Residual Contamination

As with a lot of things, California does not "follow the pack." It either leads, or heads off in its own direction. So, California has not adopted the Uniform Environmental Covenants Act, but has its own law. The Uniform Act has been adopted by many states to provide legal authority for "deed restrictions" to control exposures to residual contamination.

California's law OKs enforceable land use covenants that bind all successive owners — even though there is no property that is "benefited." Civ. Code §1471, Health & Safety Code §25222.1 & 25202.5(a). In fact, California DTSC will not certify the completion of a cleanup with residual contamination unless this environmental covenant is recorded with a deed pursuant to 22 CCR §67391.1. In this way, the DTSC has the authority to enforce restrictions on uses and activities on property.

Jim Arnold Re-Elected Secretary of the ABA Section of Environment, Energy, & Resources

It happened at the Annual Meeting of the ABA in Honolulu. Jim says he appreciates the honor of participating in the premier forum for lawyers working in environmental, energy, and resources law. In the past year, the Section has taken up such issues such as environmental law and Katrina cleanups, nano-technology, invasive species, and renewable energy.

CERCLA — Contribution Rights Continue to Be a Primary Concern

Jim Arnold presented an update on CERCLA and Brownfields law at the Fall Meeting of the ABA Section of Environment, Energy, & Resources in San Diego in early October. The presentation was part of the "Basic Practice Series" launched by the 10,000 member Section at the Meeting.

"As we know, the Supreme Court's *Aviall* decision in 2004 rejected contribution claims under CERCLA §113 for cleanups, unless the claimant was already being sued. *Aviall* has slowed CERCLA cleanups while the U.S. appeals courts decide if CERCLA 107 contribution claims can still be made." Jim said. "The *Aviall* decision prompts a practical business question: ***'Why spend real dollars to clean up unless and until the government sues you — and unless and until you can get others to share the costs?'***"

So far, the 2d Circuit US Court of Appeals (NYC) in the *Consolidated Edison* case and the 8th Circuit (St. Louis) in the *Atlantic Research* case have found an alternative right to contribution in §107 of CERCLA. However, the 3rd Circuit (Philadelphia) in the *DuPont* case has decided to stick with the Supreme Court's "strict construction" views of CERCLA and has rejected §113 contribution claims.

Federal courts from San Diego to Boise, Idaho have come down on both sides of the issue — does §107 authorize lawsuits for contribution? The 9th Circuit has several consolidated cases on appeal, and the parties are filing their briefs.

Meanwhile, the U.S. Supreme Court is deciding whether to accept an appeal (a petition for certiorari) of the *Consolidated Edison* decision. The Supremes have asked the U.S. to file a brief explaining its views on whether §107 allows contribution claims in lawsuits to recover cleanup costs.

The Aviall decision is a "watershed in environmental law." And, as Westerners know, "There is no future in living in the past."

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Three Decades of Environmental Law

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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.

RECENT REPORTS AND INFORMATION

The Problem With the "Undead" — UST Cases Are Re-Opened

"Underground storage tanks are leaking toxic chemicals into groundwater in every California county. According to state records, there are 934 open cases of tanks contaminating groundwater Los Angeles County. San Diego County has 744 open groundwater cases, Orange County has 686, Alameda County has 586 and San Mateo County has 513. Among cities, San Jose has 236 open cases of tanks leaking to groundwater, San Diego has 190, Santa Rosa has 171, Los Angeles has 168 and Oakland has 154. …Nearly all (99 percent) of the contaminants leaking from underground storage tanks are petroleum products and include gasoline, jet fuel, hydrocarbons, paint thinner and waste oil…."

Uncontrolled LUSTs, Report, Environmental Working Group, (2000), at p. 15. http://www.ewg.org/reports_content/lusts/lust.pdf

A Word to the Wise: *Six years after the Uncontrolled LUSTs report, California enforcement is increasing for old UST sites — and the UST Fund is rejecting more claims where owners bought contaminated properties.*

Cutting Off a Landowner's Well Is Not a Compensable Taking

An Imperial Valley farming company was stopped from drilling a well on its property. The appeals court ruled that because water was available from other wells owned by the company, restrictions imposed by a county do not amount to a regulatory taking. *Allegretti & Co. v. Imperial County (March 28, 2006).*

HEADS UP ALERT!!
If you are a California property owner, you need to watch out for "*Section 13267 Orders*." The State's Regional Water Boards can issue these Orders to force you to install monitoring wells – even if your land is polluted by someone else. And, Section 13268 of the Water Code allows the State to impose penalties ranging from administrative penalties of $1,000 *per day* to lawsuits for $25,000 per day for "*knowing*" violations.

NOTE: The Arnold Law Practice has some new people! Craig Garrity graduated from the University of Santa Clara Law School in 1987; Tony Ruch graduated from Lewis & Clark in Portland, Oregon last year; and Carol Rothstein was in the Boalt Hall U.C. class of '89. Craig and Carol are of counsel, and Tony is an associate of The Practice.