

# The Arnold Law Practice

## News from the Practice

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### Lessons From The Savings And Loan Melt Down

The savings and loan meltdown in the late 1980s and early 1990s resulted from risky real estate lending. Underwriting (or gauging risk) loans secured by mortgages on real property depends on the accuracy of the information about the real property. The so-called low cost “competitive” providers of appraisal services, environmental due diligence” (such as “Phase Is”), structural engineers, and others, are pushed to report “no concerns” with properties. It is sort of like your kids taking a bath; when the water drains out of the tub, all sorts of forgotten toys show up. After the savings and loan melt down, standards were refined for appraisals and for environmental “due diligence.” For instance, Congress amended CERCLA in 1986 to add a defense for “innocent purchasers” who did “all appropriate inquiry.” Prudent lenders welcomed this requirement so the potential risk for cleanups in collateralized property they accepted would be understood. After all, a property owner may have difficulty paying back a loan if he or she is spending all of their cash on cleaning up toxics. And, unlike title insurance, the insurance companies could not figure out how to evaluate the risk from toxics cleanups, at least until the Brownfields Act amendments in 2002.

### Recent “Doings” At T.A.L.P.

Jim Arnold has been invited to speak at the inaugural Alumni Athenaeum of Claremont McKenna College at Beaver Creek, Colorado in July 2009. Jim will be speaking about the development of environmental law over his 35 year legal career. (He may also resume his fly fishing career, begun many years ago in the Owens Valley of California.) To register as a “friend of Jim” see “<https://online.cmc.edu/NetCommunity/SSLPage.aspx?pid=836&srcid=227>”

“The News From the Practice” has been commended for interesting and timely information about developments in environmental law in California.

Tom Pacheco has recently joined The Arnold Law Practice. Tom retired from the U.S. Department of Justice with experience in appeals, land use, private and public water rights, and streets and rights of way.

We recently visited the FPL Energy LLC High Winds site in Birds Landing, California. The site is in the Montezuma Hills in Solano County near the California Delta. Constant winds flow over the Hills from the Pacific Ocean, the San Francisco and Suisun Bays, and into the Central Valley. “One man’s fog is another’s wind energy farm” is the result. Surprisingly, Texas has more wind energy production than California (this is probably not surprising to folks in the other 48 states).



### Fuel Company Owners May Need Cash From Their Christmas Gifts

The day after Christmas, the California Court of Appeal told two officers of a gas station company that they owe \$2.49 million in civil penalties. Why are they personally liable and what did they do? First, the Court of Appeal formally adopted the federal and common law rule about “responsible corporate officer” (the “RCO Rule”). Second, their company played “rope a dope” with the State while 3,000 gallons of gasoline leaked into the ground and water table. This decision is a stark reminder to anyone connected with gas station properties that California’s UST law (Section 25299, Health & Safety Code) holds corporate officers liable, along with their company, for failures to respond to government demands to investigate and clean up gasoline leaks. *People v. Roscoe*, No. C055801 (3d DCA, Dec. 26, 2008). This decision appears to be the first time that a California appeals court has formally adopted the RCO rule for gasoline leaks.



## Dry Cleaner Properties And "VI"

The recent *People v. Roscoe* decision shows why dealing with contamination

in a gas station property is a good idea, particularly to avoid a nasty post-Christmas surprise. The recently issued ASTM Vapor Intrusion Standard suggests that prudent people will carefully deal with "vapor intrusion" or "VI." Most people dealing with commercial property are learning about "vapor intrusion" from dry cleaner and gas station activities. Banks are tightening up lending standards, and are beginning to require "VI" investigation in addition to "Phase Is". The new VI standard published by the American Society of Testing and Materials was necessary because of ambiguities in the Phase I requirements in ASTM E1527-05. This new standard for "due diligence" is ASTM E2600. It is *not included* in a standard Phase I. So far, we have seen serious issues with vapor intrusion from former dry cleaner properties (perchloroethylene or PCE or PERC) and from former gas station properties (benzene and toluene). The only "good news" in this latest "*plague*" on the commercial viability of property is that "lead" is not a chemical of concern in "vapor intrusion."

*Comments? We would appreciate your comment on our newsletter. Please email us at [comments@arnoldlp.com](mailto:comments@arnoldlp.com)*

## California Budget Is In The Trauma Center; UST Fund Gets The Flu



The California UST Fund was recently extended to 2012. The bad news? The Fund hasn't been receiving as much cash because of less gasoline sales, so it has put a moratorium on new letters of commitment and paying some reimbursement claims.

Shortfall in revenues means delays in letters of commitment and reimbursement payments.

## "Three Decades Of Environmental Law"

Jim recently completed his 20th year on the Executive Committee of the Environmental Law Section of the Bar Association of San Francisco, and his 35th year in the leadership of the Section of Environment of the American Bar Association. His first lawsuit was in federal court in Baltimore, where the question was whether a scenic easement agreement could be enforced in order to preserve the view from George Washington's home at Mt. Vernon. His latest lawsuit was in state court in Stockton, California. The question was rights to abandoned real estate near a railroad. A good result was reached in each case for his clients.

### The Arnold Law Practice Three Decades of Environmental Law

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**The Arnold Law Practice** represents companies and individuals in brownfields redevelopment litigation with claims of pollution, USTs, waste disposal practices, Prop. 65, claims as to site audits, Fish & Game civil penalty proceedings, condemnation for road expansion, failures 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, and UST closure and UST Fund matters.

**The Arnold Law Practice** represents companies and individuals in state and federal courts in a variety of lawsuits, including civil penalty claims as to permits, complaints for specific performance of real estate contracts, waste water treatment issues, 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.

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