

The Arnold Law Practice

News from the Practice

Volume 9, Issue 4

June 2009

California UST Fund Running on Empty

Ron Duff, the head of the California UST Fund described the current crisis at a March meeting of the Groundwater Resources Association. The UST Fund has suspended many claims and many reimbursement payments. Why? Its funding has dropped from \$250 million in 2007 to \$230 million this year. A new claim is filed for each one that is closed. Regulators in every one of the 58 counties (and fire departments) and the 9 regional water quality boards (a) are not consistent, and (b) do not consider costs vs. benefit of fuel leak cleanup steps. As a result, work on cleanups is slowing down and property owners and gas station operators are shouldering heavier burdens.

CORE Environmental Foundation has been attending the State Water Board's hearings to reform the UST Fund and the UST Cleanup Program. To find out more about CORE and how you can join, contact us at jarnold@arnoldlp.com.



California Supreme Court Supports Policyholders Who Act to Prevent Pollution Injury

The Stringfellow Acid Pits near Riverside, California continue to generate insurance law. In a recent case, the California Supreme Court looked at an insurance policy owned by the State when it ran this hazardous waste dump. The policy had a



(Pyrite Creek, CA)

“pollution exclusion.” But there was an exception to the exclusion of coverage – if the pollution was “sudden & accidental.” California has occasional “monsoon rain” events. This one was almost two feet of rain (20”). The dump’s retention dam was going to fail, so the State’s managers sent 1 million gallons of contaminated water into a normally dry Pyrite Creek. The 30 million gallons of waste in the dump were kept behind the dam. But, the cleanup cost \$500 million. The State sued the insurance companies. The Supreme Court ruled that the 1 million gallons was “sudden & accidental” because the insurance covers damages resulting from an action taken to prevent a covered source of injury from occurring. In addition, it is the insurance carriers that must prove how much of an indivisible amount of damages is within the coverage of the insurance. *State v. Allstate Ins. Co.*, No. S149988 (March 9, 2009)

We at The Arnold Law Practice have represented private clients in insurance coverage matters involving pollution since the late 1980s. Our attorneys have represented clients in every U.S. court of appeals.



Prop. 65 Tuna Case: Mother Nature’s Mercury Doesn’t Require a Warning

The State sued a canner of tuna because there was no Proposition 65 warning about the methylmercury on cans of the fish. The canner argued that to apply the Prop. 65 “safe harbor” limit on mercury, one must first deduct the level of “naturally occurring” methylmercury in the fish. When “Mother Nature’s” mercury is deducted, the remaining mercury is not above the Prop. 65 warning limit. (Prop. 65 chemicals are those that are “known” to cause cancer, birth defects, and reproductive harm.) *People v Tri-Union Seafoods, LLC*, No. A116792.

Comments? We would appreciate your comment on our newsletter. Please email us at comments@arnoldlp.com

Prop. 65 Spreads to Rest of U.S.

We have been representing clients in Prop. 65 lawsuits since the early 1990s; we have taught about the unique aspects of Prop. 65 to the American Law Institute and to the ABA Section of Environment; and we have counseled a wide range of clients in industry and property management.

Now, the U.S. Consumer Product Safety Improvement Act of 2008 is applying the “son of Prop. 65” to toys with leaded paint and “phthalates” (DBPs, a plasticizer in films, paints, and caulk). Like Prop. 65, the 2008 Act sets a limit on lead (90 ppm) and bans DBPs. The Act also puts the burden of proof on manufacturers and importers to certify the lead limit and the absence of DBPs.



Quick Enviro-Quiz

Used oil from one oil change can contaminate how much fresh water?

- a. none
- b. 100 gallons
- c. 10,000 gallons
- d. 1 million gallons

(The answer is d.)

Used oil from one oil change can contaminate 1 million gallons of fresh water - a year's supply for 50 people! Safe recycling of your used motor oil is easy. More information? Call 1-800-CLEAN UP.

From “Brownfields Development” to “Mothballs.”

Today, contamination is “just one more problem” for property owners. Cleanups that might have been completed in the past – but were not --- are now prevented by the recession from. Meanwhile, neighbors and regulators may find more contamination or cleanup standards may change. As a result, legal counsel and environmental consultants are being asked to find ways to “mothball” properties; in other words, to maintain cash flows if rents are coming in, and control but not necessarily cure contamination issues. Lenders and Brownfields insurers are even more cautious as they wait for the “bottom” in the real estate values. As a result, any properties are going to sit and wait for some time.

Some relief may be possible. For instance, The Arnold Law Practice recently got a default judgment against suspended, but not dissolved corporations, for (a) all past and future costs of cleanup, (b) attorneys fees and (c) an order assigning rights to insurance and government cleanup programs.



California has had about 15,000 leaking USTs since 1998.

The Arnold Law Practice Three Decades of Environmental Law

225 Bush Street, 16th Floor
San Francisco, CA 94104

Phone: 415-439-8831

Fax: 925-284-1387

Website: www.arnoldlp.com

Email: jarnold@arnoldlp.com



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.

DISCLAIMER: This newsletter is for informational purposes only and does not constitute legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. Readers should not act on this information without seeking legal counsel. © 2009 James R. Arnold The Arnold Law Practice.