FINAL
STATEMENT OF REASONS
22 CALIFORNIA CODE OF REGULATIONS DIVISION 2

Section 12401. Discharge of Water Containing a Chemical At Time of Receipt

The Safe Drinking Water and Toxic Enforcement Act of 1986 (Health and Saf. Code § 25249.5, et seq.)(hereinafter the "Act") was adopted as an ititiative statute at a general election on November 4, 1986. The Act prohibits any person in the course of doing business from knowingly discharging or releasing a chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where it passes or probably will pass into a source of drinking water.

Health and Safety Code section 25249.12 authorizes agencies designated to implement the Act to adopt regulations as necessary to conform with and implement the provisions of the Act and to further its purpose. The Health and Welfare Agency ("Agency") has been designated the lead agency for the implementation of the Act.

On October 16, 1987, the Agency issued a notice of proposed rulemaking advising that the Agency intended to adopt a regulation implementing the terms "discharge or release." (R-85-87), along with two other regulations related to the Act. (R-86-87, R-87-87) Pursuant to such notice, on December 3, 1987, a public hearing was held to receive public comments on the proposed regulation (R-85-87)(hereinafter the "December 3 proposal"), and two other proposed regulations. Sixty-eight pieces of correspondence commenting on the regulations were received, and twenty-one additional documents were submitted during the hearing. Of these 87 documents, 34 contained comments regarding the December 3 proposal.

On June 15, 1988, the Agency issued a Notice of Public Availability of Changes to Proposed Regulations Regarding the Safe Drinking Water and Toxic Enforcement Act of 1986 (R-85-87)("June 15 proposal"). The notice afforded interested parties the opportunity to provide to the Agency their post-hearing comments on proposed modifications to proposed sections 12401 of Title 22 of the California Code of Regulations (formerly proposed as section 401 of Title 26 of the California Administrative Code) during a 15-day comment period. The comment period closed July 5, 1988. Twenty-six pieces of post-hearing correspondence were received. Five of these documents contained comments regarding the modifications made by the June 15 proposal.

On August 24, 1988, the Agency issued a second Notice of Public Availability of Changes to Proposed Regulations Regarding the

Safe Drinking Water and Toxic Enforcement Act of 1986 (R-85-87)(August 24 proposal). The notice afforded interested parties the opportunity to provide to the Agency their comments on proposed modifications to proposed sections 12401 made in response to the post-hearing comments received during the first 15-day comment period. The second comment period was also open for 15 days. The comment period closed September 12, 1988. Four pieces of correspondence were received. Two of these documents contained a comment regarding the modifications made by the August 24 proposal.

This final statement of reasons sets forth the reasons for the final language adopted by the Agency for section 12401, and responds to the objections and recommendations submitted regarding the December 3 proposal and the subsequent proposed modifications. The rulemaking file submitted with the final regulation and the final statement of reasons is the complete rulemaking file for R-85-87, R-86-87, and R-87-87. Therefore, the rulemaking file contains material not relevant to this regulation. This final statement of reasons cites only the relevant material. Comments regarding R-87-87, dealing with "clear and reasonable warnings" under the Act will be addressed in a separate final statement of reasons. R-86-87, which would have addressed issues of exposure, will not be adopted by the Agency. That proposal has been superseded by a new proposal issued May 20, 1988.

The Safe Drinking Water and Toxic Enforcement Act of 1986 (Act) provides that no person in the course of doing business shall knowingly discharge or release any chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water. The phrase "discharge or release any chemical" could refer to any act by a person which causes or probably will cause a chemical to pass into drinking water, and thus apply whenever a chemical is found in the effluent of a covered business, regardless of its source.

The apparent intent of the Act, however, is to make persons doing business civilly liable where the presence of a chemical in their discharge or release or a source of drinking water is the result of their own actions. The Argument in Favor of Proposition 65 in the voter's pamphlet for the November 1986 election repeatedly stated:

> "Our present toxic laws aren't tough enough. Despite them, <u>polluters contaminate</u> our drinking water . . .
>
> * * * * * * * * * * *
>
> "Effectively, [the Act] tells businesses: <u>Don't put these chemicals</u> into our drinking water supplies.
>
> * * * * * * * * * * *

> "These new laws will not take anyone by surprise. They apply only to businesses that know they are putting one of the chemicals out into the environment . . . ." (Emphasis added.)

Similarly, the Rebuttal to the Argument Against Proposition 65 stated:

> "The big oil and chemical companies are leading the opposition - because they know they would be forced to stop dumping extremely dangerous chemicals into your drinking water.
>
> * * * * * * * * * *
>
> "Proposition 65 simply says that businesses shouldn't put chemicals that are scientifically known to cause cancer, or birth defects, into your drinking water." (Emphasis added.)

Thus, the people apparently intended the Act to apply where the acts of a covered business cause a significant amount of a listed chemical to be present in a source of drinking water.

Subsection (a)

The purpose of subsection (a) is to clarify that, to the extent that a person in the course of doing business can show that the listed chemical emitted was received in water from a (1) public water system, (2) a commercial supplier of water or (3) a source in compliance with all primary drinking water standards where the chemical is a result of treatment to achieve such compliance, the discharge prohibition of the Act does not apply.

By law, drinking water must meet certain standards, usually requiring treatment. The treatment methods employed by public water systems and other providers of drinking water may result in carcinogenic by-products. Businesses generally have little choice but to use this drinking water. Inasmuch as (1) public water systems are not prohibited under the Act from discharging such water to its customers (Health & Safety Code § 25249.11(b)), (2) chemicals in water from such systems may have been added to make such water potable, and (3) businesses may have no other source of water and no means to re-treat the water received to eliminate listed chemicals, it would make little sense to make businesses face civil liability for disposing of that water. Therefore, businesses may use and dispose of such water, even though the chemicals may pass into a source of drinking water.

As originally proposed in section 401, subsection (a) would have provided:

> (a) Whenever a person in the course of doing business receives water containing a chemical or chemicals known to the State to cause cancer or reproductive toxicity

from a public water system as defined in Section 4010.1 of the Health and Safety Code, and does not add a chemical or chemicals to the water, causing the water to enter any source of drinking water or onto or into land is not a "discharge" or "release" with the meaning of the Act.

One commentator recommended that the phrase "person in the course of doing business" be amended to read "person otherwise responsible for the discharge or release of a listed chemical." (Exh. 8, p. 1) This recommendation is apparently intended to clarify that persons receiving chemicals in water are not responsible for them even though that water and the chemicals are subsequently discharged. This recommendation was accepted in the June 15 proposal.

As originally proposed, the regulation referred to the word "chemical" in both the singular and plural forms. Upon further consideration, the Agency has determined that the repetitive references to "chemical or chemicals" are unnecessary. Thus, the June 15 proposal deleted the plural use of the word "chemical."

One post-hearing commentator recommended the reinsertion of a reference to "chemicals", on the ground that without such reference section 12401 may be construed to apply only where one listed chemical is in the water received. (P-7, p.4) It proposed that section 12401 should apply whenever water a business receives water containing "one or more listed chemicals". They further proposed that subsection (a) be amended to apply whenever a business does not add "any listed chemicals", noting that subsection (b) already refers to "any listed chemical" and pointing out that these subsections should be consistent.

The Agency believes that reference to the singular alone is sufficient to convey the intent of this section to apply to any water received from specified sources regardless of the number of listed chemicals contained in that water. It appears unlikely that a court would strictly construe "water containing a listed chemical" so as to preclude section 12401's application to water containing more than one chemical. Therefore, the Agency has concluded that specific plural references are unnecessary.

As originally proposed, the application of section 401, subsections (a) and (b) would have ended if the business added a chemical or chemicals. Thus, a business would have responsibility or liability for a chemical even if it was received in water, if the business added a chemical prior to discharge. This restriction arose out of the very limited purpose intended for this regulation; to permit person receiving water from public water systems to use that water without fear of liability, but not to permit other discharges.

Several commentators recommended that the references to "chemical or chemicals" be preceded by the word "listed." (C-1, p.1; Exh. 13, p.2; Exh. 14; p.3; Exh. 15, p. 14, Exh. 16, p. 4; Exh. 19,

p. 2; C-29, p.1; C-36, p.2; C-44; C-63, p. 3.) The June 15 proposal responded by adding the word "listed" before "chemical" throughout the regulation. Thus, subsection (a) would have applied whenever a business receives water "containing a listed chemical", and does not add "a listed chemical."

Several of the commentators urging the addition of the word "listed" specifically requested its placement as a qualifier to the phrase "does not add a chemical". Although the Agency's June 15 proposal adopted this approach, the Agency subsequently determined that making the availability of this exemption conditional upon the addition of listed chemicals raised some significant problems, and did not resolve others. Many industry representatives have contended that it is impossible to receive water and discharge it without adding at least one molecule of a listed chemical from the water delivery system itself. The consequence of adding any amount of a listed chemical is the loss of the exemption. Thus, under the original and the June 15 proposals, it might have been impossible for most businesses to avoid responsibility for chemicals received in water from public water systems. (Exh. 14, p. 3; Exh. 15, p. 16; Exh. 16, p. 4; C-5, p. 2)

Further, the phrase "add a listed chemical" may not include precursors of listed chemicals. Thus, a business could add an unlisted chemical to water which is recognized to produce a listed chemical as a by-product, but not be responsible for any discharge under the Act. There was also some question whether the term "add" included increases in the concentration of a chemical in water resulting from evaporation. (C-5, p. 2; P-7, p.3)

There were several suggested solutions to these problems. Some commentators suggested that the condition regarding the addition of chemicals apply only if the amount added to the water by the person is significant. (Exh. 1, p. 1; Exh. 14, p. 3; C-24, p. 1; C-27, p. 1; P-13, p. 2) This would permit the discharge of not only the chemicals already in the water received, but a significant amount of chemicals, before there is any "discharge" at all. Further, this would do nothing about the problem of responsibility for chemicals already in the water when more than a significant amount is added.

Two commentators recommended that the phrase "does not increase the quantity" replace the term "add." (Exh. 20, p. 3; C-49) This may have addressed the problem of precursor chemicals, but it would continue the potential that a person could be liable for chemicals which it received in the water.

Two commentators proposed a new subsection providing that, where a listed chemical is added, there is a discharge or release only with regard to the added amount. (C-5, p. 2; P-7, p. 2) However, this also would not address the problem of precursor chemicals.

One commentator recommended rewording so that the level added is

no more than the level in the water supply. (C-66, p. 3) It is unclear, however, whether the "level in the water supply" refers to the water supply generally, or the water received. If the former, it is not clear at what point the level in the water supply would be determined. If the latter, does this mean that no amount should be added, or that the amount in the water received may be doubled?

One commentator recommended that chemicals added to treat water to water quality standards be excepted from the condition in the regulation regarding the addition of chemicals, since section 64401 of Title 22 of the California Code of Regulations requires such treatment. (C-20, p.2) This, too, would not solve the problem presented by the condition itself, that the addition of any amount of a chemical could result in the loss of the exemption. Further, section 64401 applies to public water systems, which aren't covered by the Act.

Similar problems were presented in section 12503 (22 C.C.R. § 12503), which deals with exposure to water received from specified sources. They were resolved by providing that, to the extent that the person can show that the listed chemical was contained in the water received from the specified sources, no "exposure" occurs. All references to "adding" chemicals were deleted. The Agency has concluded that a similar approach should be used for discharges. It eliminates the addition of chemicals as a condition to the exemption. It makes businesses responsible only for those chemicals which were not received in the water. It avoids the problem of precursors by removing references to the addition of "listed chemicals." It removes any ambiguity arising out of the term "add." Further, it makes the drinking water exemptions consistent for both the discharge prohibition and the warning requirement.

Accordingly, the August 24 proposal amended proposed section 12401, subsections (a) and (b) to provide that whenever a person receives water from one of the sources identified in those sections, the person does not "discharge or release" within the meaning of section 25249.5 to the extent that the person can show that the listed chemical was contained in the water received.

Three commentators objected that subsection (a) originally would have applied only to water received from public water systems, arguing that it would be appropriate to cover other commercial and treated drinking sources to the extent that the chemicals in question are strictly the result of treatment for the purpose of meeting legal drinking water standards. (Exh. 8, p. 1-8; Exh. 20, p. 3; Exh. 21) Public water systems are required to treat water, and are not prohibited under the Act from discharging chemicals to drinking water (Health & Safety Code § 25249.11(b)). It is reasonable that businesses which have little choice but to use drinking water in the course of doing business not face civil liability for disposing of that water. Since commercial suppliers of water are subject to the same water quality requirements as public water systems, and since it would make

little sense to forbid businesses to discharge into a "source of drinking water" water which complies with all the standards necessary to be used as drinking water, this recommendation was accepted in the June 15 proposal.

One commentator recommended that the regulation clarify whether a food processor which operates its own public water system is an "entity in its operation of a public water system" within the meaning of section 25249.11 (b) and, thus, exempt from the Act. (Exh. 15, p. 17) Section 25249.11 (b) excludes from the meaning of "person in the course of doing business" only entities in their operation of a public water system. It does not appear to completely exclude an entity from the Act simply because part of its business involves the operation of a system. Therefore, to the extent that the processor operates a public water system it is an "entity in its operation of a public water system" exempt from the Act, the rest of its food processing operations would be subject to the Act. A food processor receiving water from its own public water system may discharge that water without liability to the extent that it can show that the chemical was contained in the water received. The food processor would be responsible under the Act for any other chemicals in the water, and for any other discharge. The language of the Act appears to be sufficient, and regulatory elaboration appears to be unnecessary.

One commentator recommended that, in addition to public water systems, this subsection should apply to water received from a waste water treatment plant as defined in Water Code and meeting requirements in the Water Code. (C-2, p. 4) This commentator uses reclaimed water received from a public water system to water cemetery grounds. Reclaimed water is defined as water which, as a result of treatment of domestic wastewater, is suitable for certain uses. (22 C.C.R. § 60301) Generally speaking, it has been treated to remove solids, sedimentation and pathogenic organisms. (Id.) Such water generally is not treated to remove listed chemicals. The purpose of this regulatory subsection is to permit the discharge of water subject to established drinking water standards. It does not appear that reclaimed wastewater meets such standards. Therefore, excluding reclaimed water from consideration as a "discharge or release" would be inconsistent with the purpose of this regulation. However, the Agency recognizes that there is a strong public policy favoring the use of reclaimed water for a variety of non drinking uses, and does not believe that the public, in adopting the Act, intended to prohibit the use of such water. The Agency will consider this issue for possible future regulatory action.

Two commentators objected that clause (3) of this subsection is limited to chemicals in the water as a result of treatment. They contend that water containing naturally occurring chemicals which complies with primary standards should also be covered. (P-13, p. 2; P-14) Subsection (b)(3) is purposefully intended to have very limited application. Like subsection (a)(1) and (a)(2), the intent is to permit the discharge of only good quality water.

Hence, the water must comply with primary drinking water standards. The limitation that the chemical be the result of treatment is another means of furthering this purpose. To remove this limitation would permit the discharge of even poor quality water to any source of drinking water. Therefore, it was not adopted.

Two commentators objected to the approach of subdivision (b), complaining that the regulation should define what is, rather than what is not, a discharge or release. Both recommended that the Agency use existing federal and state law as a basis for implementing the Act. (Exh. 14, p. 2, C-53, p. 1) However, it is not clear that the Act is intended to operate within the limitations established for other regulatory schemes. The terms "discharge" and "release" in the Act are potentially very broad in their scope. The regulations implementing the Federal Water Pollution Control Act (40 C.F.R. §400 et seq.) do not define the term "discharge" alone. Rather, the term defined is "discharge of pollutants", which refers to the addition of pollutants from any point source to navigable waters or the ocean. The term "point source" refers to any discernible, confined and discrete conveyance.

The apparent intent of the Act is to restrict discharges from conveyances and other sources as well. Further, the purpose of the Act is to protect sources of drinking water, whether or not navigable. Thus, the federal statute appears to be more limited than the Act. Accordingly, it would be inappropriate to interpret "discharge or release" on the basis of this federal scheme.

With regard to state laws, it should be noted that the preamble to the Act finds that state government agencies have failed to provide the people with adequate protection. Therefore, any acceptance of existing state schemes as a basis for implementation should be made cautiously. At this time, the Agency is not prepared to accept such schemes for this purpose.

One such commentator requested that "discharge or release" be defined to mean the "introduction into the environment of a listed chemical" by adding it to air, water, soil or land, except for certain applications of pesticides and disinfectants. (C-53, p.4; see also Exh. 16, p. 5) A similar comment suggested the exemption from the discharge prohibition of acts in compliance with "good manufacturing practices." This would apply the same definition to both the term "discharge" and the term "release." Had this been intended in the Act, only one term or the other would have been used in the Act. Also, limiting "discharge" or "release" to the introduction of a listed chemical would preclude the application of the Act to precursor chemicals which, when added to water, result in the formation of listed chemicals in the water.

As for the suggested exception of pesticides, there appears to be no basis for this proposal in the Act or the legislative history

surrounding its adoption. The ballot arguments specifically mention the town of McFarland, California, the site of a cancer cluster popularly believed to be the result of pesticide use in the area. The Argument Against Proposition 65 stated:

> "Many common fertilizers, weed and pest control materials - perfectly safe when properly used - would be effectively banned for most farmers . . . ."

It further pointed out that there were laws already on the books governing pesticides, such as the Pesticide Contamination Prevention Act, suggesting that this Act is unnecessary. The fact that the voters adopted the initiative despite this knowledge is strong evidence of their intent that the Act apply to such chemicals. Accordingly, if a listed chemical is an ingredient in a pesticide, then the discharge or release of the pesticide is subject to the operative provisions of the Act.

As for disinfectants and "good manufacturing practices," the Agency believes that it is a reasonable limitation upon such practices that the water discharged not pose a significant risk. The Agency will be proposing that the "no significant risk" levels for water be set at the levels otherwise imposed upon water by maximum contaminant levels, action levels, and levels set by the water boards. Therefore, this recommendation was not adopted.

This same commentator suggested that the definition of "discharge or release" incorporate factors which would cause a chemical to move toward a source of drinking water. (C-53, p.2) In a similar vein, two commentators recommended that the introduction by a business of a chemical into a treatment works, or any of its conveyances, does not constitute a discharge or release under the Act. (Exh. 16, p. 4; T 113:14-25) These issues have already been addressed in the definition of "Discharge or Release Into Water or Onto or Into Land" (22 C.C.R. § 12201, subd. (e)(6)).

One commentator recommended that discharges or releases to any person exempt from the Act, such as publicly owned treatment works, waste disposal facilities and water reclamation districts, also be exempt from the Act. (Exh. 15, p. 15) As indicated above, the issue of discharges into treatment works has already been addressed in other regulations. The issue of discharges into waste disposal facilities has also been addressed. (22 C.C.R. § 12201, subd. (e)(5)) Neither of these regulations were adopted on the basis that the treatment works or waste disposal facilities are themselves exempt from the Act.

The purpose of this subsection is to permit the discharge of water of predictable quality <u>received from</u> certain entities which the voters determined should be exempt from the discharge prohibition, or their equivalent. In other words, it permits the discharge of the same water received. It was not intended to permit any discharge regardless of its quality <u>to</u> any public entity. To do so might be an unwarranted and unauthorized

extension of the exemption given to public entities.

Another commentator urged that this regulation exempt from the discharge prohibition discharges not under the control of the business. (T 113:14-25) To the extent that a discharge is accidental, this issue has already been addressed in section 12201, subsection (d).

One commentator, an association representing treatment works operators, recommended that this regulation be worded to apply to publicly owned treatment works. (C-33, p. 3) This request arose out of the stated intention of the State Water Resources Control Board (SWRCB) to apply levels of "no significant risk" under the Act to publicly owned treatment works. Thus, such treatment works would become subject to the Act's discharge limitations, even though they are exempt from the Act. This issue, however, should be resolved through the SWRCB, not through this regulation.

One commentator recommended that the regulation be modified to exclude from "discharge or release" any discharge or release from swimming pools, spas, hot tubs, other therapeutic waters, fountains, ponds, amusement parks lagoons or transport rides, on the ground that such water is received from treatment works which treat their water to comply with maximum contaminant levels, that most such facilities are exempt from the Act anyway. (C-14) To the extent that the water discharged from such facilities also complies with primary drinking water standards for the chemical received, subsection (b) of this regulation would permit discharge of the water. Therefore, the proposed modification does not appear to be necessary.

Several commentators recommended that the regulation clarify whether a discharge containing a chemical as a result of washing food is subject to the Act. (C-16, p.2; C-44; P-13, p. 3; P-14) The Agency views the term discharge or release as having a broad scope, and believes that such clarification is unnecessary.

Subsection (b)

Subsection (b) would provide that a person who receives water from a source other than a source specified in subsection (a) does not "discharge or release" within the meaning of the Act when transferring that water into water or onto or into land to the extent that the person can show that the listed chemical was contained in the water received. The provision is subject to two conditions: (1) the water must be returned to the same source of water supply, or (2) the water transferred must meet all primary drinking water standards for the listed chemical or contain less than a significant amount of the chemical where no primary drinking water standard has been established for it.

As originally proposed, subsection (b) provided:

> (b) Whenever a person in the course of doing business

receives water containing a chemical or chemicals known to the State to cause cancer or reproductive toxicity, from a source other than a public water system as defined in Section 4010.1 of the Health and Safety Code, and does not add any chemicals to the water, causing the water to enter a source of drinking water water or onto or into the land is not a "discharge" or "release" within the meaning of the Act, provided that:

(1) The water is returned to the same source of water supply or a source in hydraulic continuity with such source, or

(2) The water meets all primary drinking water standards for the chemical or chemicals and where there is no primary drinking water standard established for a chemical, the water shall not contain a significant amount of the chemical, or

(3) The movement of the water is in conformity with the Porter-Cologne Water Quality Control Act.

Several of the comments received regarding subsection (a) were intended to apply to subsection (b) as well. These comments have been addressed in the discussion of subsection (a). The issues raised regarding subsection (b) and discussed in relation to subsection (a) include (1) the deletion of "in the course of doing business" and its replacement with "otherwise responsible for the discharge or release," (2) the elimination of plural references to "chemical" (P-7, p. 4), (3) addition of the word "listed" before the reference to chemicals received from a source, and (4) the elimination of the condition that the person "not add any listed chemical to the water" and its replacement with the qualification to this section that a person may be relieved from liability only "to the extent that the person can show that the listed chemical was contained in the water received." (C-1, p. 1; Exh. 13, p. 2; Exh. 14, p. 3; Exh. 15, p. 16; Exh. 16, p. 4; Exh. 19, p. 2; Exh. 20, p. 4; C-20, p. 2; C-27, p. 1; C-29, p. 1; C-36, p. 2; C-44; C-53, p. 5; C-63, pp. 3-5; C-66, p. 2) Interested persons are referred to that discussion.

One post-hearing commentator recommended that the language following the reference to sources of water other than the sources identified in subsection (a), and preceding subparagraphs (b)(1) and (b)(2) be reversed for the sake of clarity. (PH2-4) However, the Agency believes that the provision is clear as written, and perceives no advantage to the proposed modification. Therefore, no further change was made.

The June 15 proposal made subsection (a) apply to chemicals in water received from commercial suppliers of drinking water and other specified sources of water, in addition to public water systems. However, the June 15 proposal did not change the application of subsection (b) to chemicals in water from a source

other than a public water system. The Agency has concluded that subsection (b) should be conformed to subsection (a). This conclusion finds support in the recommendation of the parties which urged the expansion of subsection (a). Those commentators recommended that subsection (a) apply to a listed chemical obtained "from a source other than one specified in (a)." (Exh. 8, p. 2) Consistent with this recommendation, the August 24 proposal amended subsection (b) to apply to water containing a listed chemical "from a source other than a source specified in subdivision (a)."

Originally, subsection (b)(1) contained the condition that the water received must be returned to the same source of water supply or a source in hydraulic continuity. The term "hydraulic continuity" was specifically objected to as vague, ambiguous and overbroad (C-1, p. 1; Exh. 20, p. 4; C-29, p. 1), and it was eliminated from proposed amendments jointly submitted by two commentators. (Exh. 8, p. 2) The term "hydraulic continuity" is also used in section 12201, subsection (e)(2), which addresses the phrase "probably will pass into a source of drinking water" (Health & Saf. Code § 25249.5). That regulation has been the subject of continuing objections on similar grounds that the term is vague and overbroad.

The Agency has concluded that the term "hydraulic continuity" may be overly broad. It has determined that the term should be deleted from the regulations. Accordingly, the June 15 proposal deleted term from section 12401, subsection (b). This represents the first step in the process of removing that term from the regulations entirely.

One commentator objected that subsection (b)(1) would require that water be returned to the same place from which it was extracted, pointing out that there may be a number of beneficial reasons for discharge elsewhere. (T 13:25-14:6) Similarly, one commentator suggested that the regulation preserve the "cascading uses" of condensed geothermal steam. (C-48, p. 3) However, one purpose of this subsection is to protect sources of drinking water from degradation by the introduction of water from other sources. These suggestions may run contrary to that purpose. Therefore, the Agency has not accepted them in the regulation.

Two commentators jointly recommended that the condition in subsection (b)(1) apply when the water is returned to "substantially the same source and at substantially the same concentration as that at which it was obtained." (Exh. 8, p. 2) Their proposed statement of reasons would have defined "substantially the same location" as a location which is not only in physical proximity to the location from which the substance was obtained, but which is also is composed of the same medium (e.g., soil, water) as the location from which the substance was obtained, and which will not result in any substantial change in the amount of a listed chemical which passes or probably will pass or in the speed with which such chemical passes or probably will pass to a source of drinking

water in comparison with the original location.

The Agency intends to accomplish the same objective, but believes that requiring the water to be returned to the same source of water supply is a more appropriate expression of that intent. The phrase is not as limited as a reference to location, avoids the need for a lengthy definition of the word "substantial", and prevents discharges that will degrade sources of drinking water. Therefore, the reference to the "same source of water supply" in subsection (b)(1) has been retained.

Under proposed subsection (b)(2), a discharge of water received from any source will not give rise to liability under the Act to the extent that the water contained a listed chemical upon receipt and the concentration of the chemical is less than a significant amount or is below the maximum contaminant level.

One commentator recommended that subsection (b)(2) be amended to provide that the "water supply" meet all primary standards, etc. (Exh. 16, p. 4) However, the intended purpose of this subsection is to make certain that the water discharged is of sufficient quality that other sources won't be contaminated by the listed chemical. Further, such an amendment would make this provision duplicative of subsection (a)(3), which is designed to permit the discharge of water meeting certain standards upon receipt. Accordingly, this recommendation was not adopted.

Two commentators recommended the deletion of the reference to primary drinking water standards on the ground that the Act applies only to significant amounts. (Exh. 15, p. 15; T 113:6-13) Removal of this reference, however, would mean that, for chemicals subject to primary standards, the level in the water could not exceed a significant amount and this might afford less guidance to persons trying to determine what level in water received may later be discharged.

One commentator recommended that the conjunctive "and" in subsection (b)(2) be changed to "or". (C-25, p. 5) This recommendation was accepted.

One commentator objected that a farmer will have no way of knowing the chemical content of water it receives, and therefore subsection (b)(2) imposes a regulatory burden upon the farmer contrary to the "knowing" requirement of the Act. (C-36, p. 3) This provision does not alter the requirement in Health and Safety Code section 25249.5 that a discharge be "knowing." In order to be liable, a farmer's discharge must still be a "knowing" one.

One commentator recommended that the condition in subsection (b)(2) read, "the water contains listed chemicals in the same amounts as when received whether or not there are drinking water standards." (C-38, p.2) This would do nothing, however, to assure that good quality water sources would not be degraded by transfers from poor quality sources. Therefore, this

recommendation was not adopted.

One commentator recommended clarification about what is a "significant amount." (C-1, p. 1) Under the Act, the term "significant amount" is already defined. (Health & Saf. Code § 25249.11(c)) Further elaboration appears to be unnecessary.

One commentator recommended that subsection (b)(3) be expanded to include any appropriate statute in addition to the Porter-Cologne Water Quality Control Act. (Exh. 1, p. 1) One commentator objected that the disjunctive "or" preceded subsection (b)(3), observing that this has the effect of exempting all discharges and releases that are in conformity with the Porter-Cologne Water Quality Control Act. (Exh. 20, p. 3) The original proposal did not apply where a chemical was added by the person, even if the discharge was in conformity with Porter-Cologne. Thus, the original proposal would not have exempted most discharges, and the Agency does not entirely agree with this assessment. Nevertheless, one purpose of subsection (b)(3) was to ensure that transfers of water between water bodies did not degrade the quality of the receiving body. Upon further consideration, it was determined that this purpose would be better served if the conjunctive "and" preceded subsection (b)(3). It was the intention to include this amendment in the June 15 proposal.

The June 15 proposal inadvertently omitted this amendment. Similar objections to the disjunctive "or" were received as post-hearing comments. (P-2; P-22, p. 2) The Agency further considered its intended amendment, determined that subsection (b)(3) should be deleted entirely, and the August 24 proposal deleted this language.

One commentator objected to this deletion on the ground that the December 3 and June 15 proposals would have excluded cleanups conducted under the authority of a Regional Water Quality Control Board or the U.S. Environmental Protection Agency from the discharge prohibition of the Act. (PH2-1) As indicated, post, neither the Act nor the regulation intend to impede cleanups of contaminated water, but the Agency believes that the regulation already addresses the issue of cleanups in subsections (b)(1) and (b)(2). Further, subsection (b)(3) was overly broad, and might have permitted other kinds of discharge which could degrade the quality of drinking water sources. Therefore, subsection (b)(3) was deleted.

One commentator, which apparently treats water for consumption by its employees and visitors, objected that subsection (b) would not exempt discharges of water received from a source other than a municipal water system. (C-30, p. 5) This commentator appears to have read the term "public water system" too narrowly. The meaning of that term is specified by the reference in the regulation to section 4010.1 of the Health and Safety Code. Section 4010.1 defines "public water system" as "a system for the provision of piped water to the public for human consumption which has five or more service connections or regularly serves an

average of at least 25 individuals daily at least 60 days out of the year. . . ." This does not apply only to municipally operated systems. It applies to any system making piped water available to the public and serving 25 individuals or more. This could include systems set up by employers to serve their employees and visitors.

One commentator recommended the addition of the following language:

> "Nothing in [this section] should be construed to alter or limit any legal obligation otherwise required by any applicable water quality law, regulation, permit or order." (Exh. 7, p. 3)

Health and Safety Code section 25249.13 contains a similar provision. It provides that nothing in the Act shall alter or diminish any legal obligation otherwise required in common law or by statute or regulation. The apparent purpose is to preserve the protections afforded by other law in addition to the requirements of the Act. The language recommended for the regulation, however, would appear to make any applicable water quality law, regulation, permit or order supersede the requirement in the regulation. This does not appear to be consistent with the purpose of section 25249.13. Further, the regulation does not impose any requirements. Instead, it provides relief from liability for certain discharges. Thus, nothing in this section would alter or limit any other legal requirement, and the proposed language would apparently have no effect. Accordingly, this proposal was not adopted.

One commentator recommended clarification that water brought to the surface and then reinjected is exempt under this section. (C-29, p. 1) Another commentator requested the same clarification specifically with regard to geothermal operations. (C-38, p. 1) Such clarification does not appear to be necessary. The section clearly provides that if water is received from any source and returned to the same source of water supply, the person has no liability to the extent that the chemicals were contained in the water received.

Three commentators recommended that this subsection exclude discharges and releases which are part of, result from, or are residual to cleanup actions. (Exh. 2, p. 1-2; Exh. 20, p. 3; C-63, p. 3-4)) It was not the intent of the voters adopting the Act that the discharge prohibition impede actions to clean polluted ground or surface waters. The arguments surrounding the adoption of the Act make repeated references to businesses which "put" or "dump" toxic chemicals into sources of drinking water, and claim that the Act would "[k]eep these chemicals out of our drinking water." The Act does not appear to have been intended to apply where a business is attempting to get these chemicals out of our drinking water.

In adopting this regulation, it is the intention of the Agency

that ground and surface water cleanups not be impeded. One intended purpose of subsection (b) was to address the problem of cleanups. Under this provision, discharges from cleanup operations would not create liability under the Act where the water (1) would be returned to the same source from which it was drawn, or (2) would be treated to acceptable levels prior to discharge. These assumptions do not appear to have been challenged. Accordingly, no more specific language appears to be necessary.

One commentator objected that the regulation would require every receiver of water to test the water received and the water discharged. (C-20, p. 1) This section would relieve the business from liability for chemicals received in water. Without this regulation, a business could be held liable for those chemicals upon discharge of the water, and might need to analyze its discharge even though it added nothing to the water. Thus, this regulation relieves such businesses of the need to test either its discharge or the water received. Where a businesses does add or increase the amount of a listed chemical to water received, it may under the regulation need to test its discharge, but might need to do so under the Act anyway. If the listed chemical added or increased in quantity is also in the water received, then the business could test the amount in the water received and offset that amount against the increased quantity. Since the alternative is responsibility for all amounts of the chemical in the water discharged, the Agency has concluded that occasional need to test water received is not unreasonable.

One commentator objected that this proposal may not cover its geothermal energy production operations. (C-21, p. 3) The purpose of this proposal, however, is not to exempt any particular industry. The Act may not apply to this business operation anyway. This commentator claims that it receives water from an irrigation district and injects it into a geothermal reservoir. The discharge prohibition applies only to discharges or releases which pass or probably will pass into a source of drinking water. By Resolution 88-63 the State Water Resources Control Board adopted a policy which would exclude as a "source of drinking water" ground water regulated as a geothermal energy producing source. The geothermal reservoir in this case is allegedly separate from any source of drinking water. Accordingly, there may be no discharge into a source of drinking water and the Act may not apply to this operation.

Subsection (c)

Subsection (c) provides that stormwater runoff, such as rainwater or snowmelt, from a place of doing business is not a "discharge" or "release" within the meaning of the Act except to the extent that the presence of a chemical in the runoff results directly and immediately from the business activities conducted at the place. The operation of parking lots, such as for customers or employees, is not considered a business activity for purposes of this subsection. Thus, the runoff of chemicals resulting from

the parking of automobiles in a parking lot or garage does not give rise to liability under the Act.

Originally, subsection (c provided:

> (c) Stormwater runoff from a place of doing business containing a chemical or chemicals, the presence of which is not the direct and immediate result of the primary business activities conducted at the place from which the runoff flows, is not a "discharge" or "release" within the meaning of the Act.

Several of the comments received regarding subsection (a) were applicable to subsection (c) as well. These comments have been addressed in the discussion of subsection (a). The issues raised regarding subsection (c) and discussed in relation to subsection (a) include (1) the elimination of plural references to "chemical", and (2) the addition of the word "listed" before the reference to chemicals (C-1, p. 1; Exh. 13, p. 2; Exh. 15, p. 16; Exh. 16, p. 4; Exh. 19, p. 2; Exh. 20, p. 4; C-20, p. 2; C-25, p. 2; C-29, p. 1; C-36, p. 2; C-44; C-53, p. 5; C-63, p. 5; C-66, p. 2) Interested persons are referred to that discussion.

Two commentators objected to subsection (c) on the ground it seemed ineffective and ambiguous as to its coverage and allocation of the burden of proof. (Exh. 20, p. 4; Exh. 21, p. 7 They jointly proposed a complete rewrite of the subsection (c) that would have exempted discharges or releases of stormwater runoff provided that the discharge or release did not contain a listed chemical that was the direct result of: (a) past or present production or industrial activities at industrial plants or associated areas on the premises, with specific inclusions, (b) past or present storage or disposal of listed chemicals (Exh 21, but not Exh. 20, recommended that this be limited to listed chemicals "regulated under other laws.") or (c) parking lots (Exh. 20, but not Exh. 21 recommended this inclusion.).

These commentators apparently perceived two advantages to the language they offered. First, their proposal would specifically state that if the runoff contains chemicals resulting directly from past or present activities, it is not exempt. Second, their proposal would include activities which are not "primary" business activities.

Greater specificity whether past and present activities control the applicability of this exemption does not appear to be necessary. The fact that a chemical is contained in runoff implies that the activity causing the chemical to be present preceded the accumulation of precipitation into runoff. As for the phrase "primary business activities", the term "primary" has been eliminated. This term was originally introduced as a means of distinguishing between providing parking lots and other more business-related activities. However, the use of this term might inadvertently have permitted runoff from a number of "secondary" activities other than parking lots. Since parking lots have been

addressed elsewhere, the term "primary" was omitted.

Several commentators recommended that runoff from parking lots not be treated as a discharge or release. (Exh. 1, pp. 1-2; Exh. 9, p. 4; Exh. 15, p. 17; Exh. 21) As indicated above, the Agency intended in its original proposal that parking lots would receive separate treatment, but the language selected was too broad. Further, businesses providing parking facilities for their employees, customers and visitors apparently desired a more direct statement about their liability for those facilities.

It does not appear that the voters, when adopting the Act, intended that a business be liable for providing them with a place to park their automobiles while conducting their daily activities. Many automobiles leak fluids which probably contain listed chemicals onto the surfaces of driveways, streets and parking lots. These listed chemicals are often washed away with the next rains. The leakage is not the fault of the businesses with parking lots. These cars will leak, whether or not parking lots are provided, on streets and driveways not subject to the Act. Making businesses responsible for this chemical runoff may simply cause businesses to close available parking, forcing patrons and employees to park on the street. There the cars will continue to leak, but no liability would attach.

Accordingly, the Agency has concluded that making businesses liable for parking lots would not further the purposes of the Act, and the June 15 proposal expressly provided that, for purposes of subsection (c), business activities does not include parking lots. One commentator objected on the ground that businesses should be responsible for the cleanup of their own private property, including parking lots. (C-49, p. 2; P-2) For the reasons given above, the Agency does not conclude, with regard to parking lots, that this was the intent of the Act.

One commentator objected that the exemption for runoff is limited to parking lots, arguing that runoff is not attributable to activities of the business. (P-13, p. 2; P-14) The focus of the regulation, however, is the chemical contained in the runoff, which is attributable to activities of the business. In the case of parking lots, as explained above, the relationship between the activity of the business and the presence of the chemical is minimal, and the purpose of the Act would not be realized by its application to parking lots. In other circumstances, the same conclusion cannot be drawn.

One commentator recommended that the Agency clarify that this subsection applies to runoff from adjacent property which is discharged by the downgradient property owner. (C-24, p. 1) Such clarification does not appear to be necessary. Stormwater is exempt to the extent that chemicals contained in it are not the result of business activities conducted "at the place from which the runoff flows." If runoff from adjacent property containing a listed chemical crosses the property of a downgradient business, the Agency intends that the downgradient business not be liable,

except to the extent that it contributes to the chemical burden of the water.

One commentator recommended that the regulation exempt stormwater runoff from the warning requirement. (C-27, p. 2) Such a modification, however, would be outside the scope of this regulation. If necessary, the Agency will address this issue in a separate regulatory action.

One commentator recommended that, in the case of emissions to air, the regulation should apply only if the business knows that the runoff of air emissions will pass into water or land and probably will pass to a source of drinking water. (C-30, p. 6) Section 12201, subsection (d) defines the term "knowingly" to refer to knowledge of the discharge of a listed chemical. Section 12201, subsection (e)(3) of these regulations provides that "discharge or release into water or onto or into land" includes a discharge or release to air that is directly and immediately deposited into water or onto land. In order for there to be knowledge that a listed chemical emitted into the air is being discharged in runoff, there may need to be knowledge that the emission is directly and immediately deposited onto the land. However, knowledge that the chemical will pass or probably will pass into a source of drinking water is not required.

One commentator recommended an amendment which would add after the word "flows", the phrase "or of precipitation mixing with natural geologic materials." (C-62, p. 2) "Natural geologic materials" appears to mean simply that the materials are of natural origin. It apparently would make no difference that the materials are no longer in their natural condition or location due to mining or other operations.

However, where impermeable or solid rock formations are cut or mined and the material exposed to the elements, the results may be several and significant. Where previously water could not pass through the material, it now passes freely. Where previously only the relatively small surface of the formation would contact percolating water, now water comes into contact with a vastly greater surface area. Where previously the movement of substances may have been confined by the geologic formation, now the movement is as unrestricted as the flow of the runoff. Quite recently, newspaper articles have discussed the mercury contamination now believed to be the result of old mining operation. Some of these operations are superfund sites. In light of the broad purpose of the Act to protect water quality from the activities of covered businesses, there appears to be no basis for adopting language which might exclude mining or other excavations of geologic formations from the discharge prohibition.

Subsection (d)

This subsection provides that the movement of naturally occurring chemicals resulting from the application, unavoidable runoff, or

percolation of agricultural irrigation water is not a "discharge" or "release" within the meaning of the Act. The term "naturally occurring chemicals" is defined to mean chemicals present in the soil solely as a result of natural geologic processes.

Subsection (d) was added by the June 15 proposal in response to comments received. Several commentators had recommended that the presence of naturally occurring chemicals in agricultural irrigation waters employed on crops not be considered a discharge or release. (C-25, p. 5; C-36, p. 2; C-44, p. 2) Two proposed the following language:

> "The movement or introduction of naturally occurring chemicals during the application, unavoidable runoff, or percolation of agricultural irrigation water is not a discharge or release within the meaning of Health and Safety Code section 25249.5."

The June-15 proposal adopted this language for the most part, eliminating only the words "or introduction," because it could include chemicals introduced as soil amendments or economic poisons which are arguably "naturally occurring." The limited purpose of this subsection is to permit the application of irrigation water and avoid liability for some resulting movement of naturally occurring chemicals in the soil.

The August 24 proposal changed the word "during" to the phrase "as the result of". The word "during" relates to time. The phrase "as a result of" relates to cause, and the intent of the Agency was to refer to the cause of chemical movement.

One commentator objected to this subsection (P-2), and another commentator recommended that the regulation clarify what is "unavoidable runoff." (P-22) Both were apparently concerned that the term might not include deliberate runoff through the drainage of "tiled" fields. The Agency has concluded that such clarification is unnecessary. The term "unavoidable" plainly means "not able to be avoided" (Houghton Mifflin, American Heritage Dictionary, Second College Ed., 1982, p. 1314) and speaks for itself. As it is used in this regulation, it is intended to modify only the word "runoff," and refers to runoff unable to be avoided.

Two commentators recommended the deletion of the word "unavoidable" and its replacement with the term "normal," on the ground that this would make clear that growers need not take extraordinary measures to avoid runoff. (P-13, p. 2; P-14) The term "normal," however, might raise several questions. Would it include runoff only where normal amounts of water are applied? Would it depend upon soil conditions? What standard would be applied to determine what is "normal runoff"? This recommendation was not adopted.

These same commentators recommended that the definition of

"naturally occurring chemicals" be amended to read: "those chemicals present in the soil that are not the result of known human activity." (P-13, p. 2, P-14) The definition in the regulation was adopted to achieve consistency with the definition of "naturally occurring" in section 12501 (dealing with exposure to foods). In light of the requirement of regulatory consistency, this recommendation was not adopted.

Throughout the adoption process of this regulation, the Agency has considered the alternatives available to determine which would be more effective in carrying out the purpose for which the regulation is proposed, or would be as effective and less burdensome to affected private persons than the proposed regulation. The Agency has determined that no alternative considered would be more effective than, or as effective and less burdensome to affected private persons than, the adopted regulations.

The Agency has determined that the regulation imposes no mandate on local agencies or school districts.

AMENDMENT TO FINAL STATEMENT OF REASONS
22 CALIFORNIA CODE OF REGULATIONS DIVISION 2

Section 12401. Discharge of Water Containing a Chemical At Time of Receipt

Add a new paragraph to page 4, prior to the first full paragraph:

One commentator requested a definition of "source of drinking water." (Exh. 1, p. 2.) This definition is not necessary because this term is already adequately defined in the Act at Health and Safety Code section 25249.11, subsection (d), and any further definition could cause unnecessary confusion. The designations in the regional water quality control plans mentioned in the Act provide sufficient guidance on which specific bodies of waters are protected under the Act.

Add to page 13, first full paragraph, prior to the last sentence beginning with "Therefore, . . . ":

The intent of the Act is to protect the State's drinking water supplies from contamination, including sources of drinking water which are already contaminated from any further degradation so that these sources may in the future be cleaned up and used as drinking water. The indiscriminate addition of contaminated water from a contaminated source into a "more contaminated" source could cause further problems with the recipient source of drinking water by expanding the size of the contaminated plume. If the quality of the recipient water is so poor that the regional water quality control has not designated it as a source of drinking water (see Health and Saf. Code § 25249.11, subd. (d)), then discharges to that body of water would not be subject to the Act.

Add to the first line of page 17 before "parking lot": customer or employee.

Add the following after the second sentence of the last paragraph on page 17:

Subsection (c) provides that stormwater runoff containing a listed chemical is not a "discharge" or "release" to the extent that the presence of the chemical is not the direct and immediate result of the business activities conducted at the site of the runoff. The requirement of "direct and immediate" is necessary so that the business activity in question is reasonably proximate to the runoff which actually deposits the chemical into water or onto land. Even if a listed chemical produced by a business activity is not instantly washed into the ground after it is produced, the deposit of the chemical is still "direct and immediate" if the business activity was reasonably proximate to the runoff.

Add the following at the end of the fourth paragraph on page 18 beginning with "One . . .":

For example, this consideration is not applicable to business activities which can be controlled or curtailed by the business in question. Where parking lots are used for vehicles owned or operated by the business, or garages are used by the business for auto repair or maintenance purposes, the business is responsible for the resulting runoff.

Add the following new paragraphs to page 20, following the fourth line:

The Agency has concluded that the intent of the Act is to focus on chemicals used or produced during business activities over which the business has control. The act of irrigation, by its very nature, results in the movement of water over land for the purpose of providing needed moisture to plants. The soils in which plants are grown contain chemicals, some of which are listed for purposes of the Act, but which are ubiquitous in nature and are not necessarily the result of human activities. Hence, some of these same chemicals may be dislodged or otherwise liberated from the soils in which they exist and move with the irrigation water as the water flows across and into the soil.

The Act addresses the actions of persons in the course of doing business which result in discharges or releases of chemicals that cause cancer or reproductive toxicity into drinking water. As noted previously, on pages 2 and 3 of this Statement of Reasons, the Argument in Favor of Proposition 65 and the Rebuttal to the Argument Against Proposition 65 in the voter's pamphlet for the November 1986 election emphasized the actions of businesses that are "putting . . . chemicals out into the environment," or that are "dumping extremely dangerous chemicals" into the drinking water.

The Agency has concluded that chemicals that are naturally occurring in agricultural soils, where they are as a result of natural geologic processes does not mean that the chemicals were "put out into the environment," nor were those that were moved by the action of irrigation water "dumped." The presence of natural chemicals moved from the soil by irrigation water appears to the Agency to be the result of passive movement beyond the control of the person who irrigates, and not the result of business activities intended to be covered by the voters.

The Agency intends this section to apply only to the movement of naturally occurring chemicals in soils that exist in an agricultural setting. The movement of soil-derived chemicals in runoff water from the other settings such as mining operations do not come under this provision.

The Agency views this distinction to be important and necessary: the tilling of soils for agricultural purposes is primarily a preparatory operation to ready soils for the planting of crops. The overall redistribution of geological soil types is minimal.

Mining operations, on the other hand, exist in areas where geologic considerations result in specific activities which seek to change the distribution of the minerals in the soil. In fact the reason for mining is to remove the mineral of interest from its original location. Hence, minerals that are in high concentrations at depths below the earth's surface are taken to the surface itself, and may result in higher concentrations of certain chemicals subject to the Act in surface locations were runoff may result in discharges of releases of those chemicals into sources of drinking water. Whether any prohibition of discharge would be required would depend upon the concentration of chemical in or on the soil, its chemical and physical form, the concentration in any runoff, and whether said runoff would reach any source of drinking water.