FINAL
STATEMENT OF REASONS
22 CALIFORNIA CODE OF REGULATIONS DIVISION 2

Article 4. Discharges

Section 12403. Discharges From Hazardous Waste Facilities

The Safe Drinking Water and Toxic Enforcement Act of 1986 (Act) was adopted as an initiative measure (Proposition 65) by California voters on November 4, 1986. The Act imposed new restrictions on the use and disposal of chemicals which are known to the State to cause cancer or reproductive toxicity.

Part of the Act specifically prohibits persons in the course of doing business (as defined) from knowingly discharging or releasing such chemicals into the environment in a manner so that such chemicals pass or probably will pass into any source of drinking water (Health & Saf. Code, § 25249.5). (Unless otherwise specified, all statutory section references are from the Health and Safety Code.)

Violations of this prohibition can result in civil penalties of up to $2,500 per violation per day (§ 25249.7). Legal action to impose these penalties can be brought by the Attorney General, a district attorney, certain city attorneys or, under specified circumstances, any person "in the public interest" (§ 25249.7).

Chemicals subject to this discharge/release prohibition are set forth on a list which was first issued on February 27, 1987, and which is periodically revised (§ 25249.8). Since the discharge/release prohibition takes effect 20 months after the chemical involved first appears on the list, the initial list of chemicals became subject to this prohibition on October 27, 1988 (§ 25249.9).

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.

Procedural Background

Effective October 27, 1988, the Agency adopted on an emergency basis section 12403 of Title 22 of the California Code of Regulations. Pursuant to Government Code section 11346.1, those emergency regulations have been readopted twice so as to remain in effect.

On May 26, 1989, the Agency issued a notice of emergency rulemaking advising that the Agency intended to adopt permanently a slightly modified version of section 12403 (low-level radioactive waste facilities were added to the list of facilities covered by the regulation) of Title 22 of the California Code of Regulations. Notices were also issued that the Agency intended to adopt or amend two other regulations implementing the Act. Pursuant to such notices a public hearing was held on July 25, 1989, to receive public comments on the proposed regulations, including section 12403. Out of 18 pieces of correspondence received commenting on the regulations and 1 additional document submitted at the hearing, 4 contained comments regarding section 12403.

Purpose of Final Statement of Reasons

This final statement of reasons sets forth the reasons for the final language adopted by the Agency for section 12403 and responds to the objections and recommendations submitted regarding that section. Government Code section 11346.7, subsection (b)(3) requires that the final statement of reasons submitted with an amended or adopted regulation contain a summary of each objection or recommendation made regarding the adoption or amendment, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. It specifically provides that this requirement applies only to objections or recommendations specifically directed at the Agency's proposed action or to the procedures followed by the Agency in proposing or adopting the action.

Some parties included in their written or oral comments remarks and observations about these regulations or other regulations which do not constitute an objection or recommendation directed at the proposed action or the procedures followed. Also, some parties offered their interpretation of the intent or meaning of the proposed regulation or other regulations, sometimes in connection with their support of or decision not to object to the proposed action. Again, this does not constitute an objection or recommendation directed at the proposed action or the procedures followed. Accordingly, the Agency is not obligated under Government Code section 11346.7 to respond to such remarks in this final statement of reasons. Since the Agency is constrained by limitations upon its time and resources, and is not obligated by law to respond to such remarks, the Agency has not responded to these remarks in this final statement of reasons. The absence of response in this final statement of reasons to such remarks should not be construed to mean that the lead agency agrees with them.

Specific Findings

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 was 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 persons than, the adopted regulation.

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

Rulemaking File

The rulemaking file submitted with the final regulation and this final statement of reasons is the complete rulemaking file for section 12403. However, because regulations other than section 12403 were also the topic of the public hearing on July 25, 1989, the rulemaking file contains some material not relevant to section 12403. This final statement of reasons cites only the relevant material. Comments regarding the regulations other than section 12403 discussed at the July 25, 1989, hearing have been or will be discussed in separate final statements of reason.

Necessity for Adoption of Regulation

The Agency has determined that it is necessary to interpret, clarify, and make specific section 25249.5 of the Act with regard to businesses which operate disposal facilities or sites handling solid waste, hazardous waste, or low-level radioactive waste. The regulation adopted by the Agency provides a rebuttable presumption that, for purposes of section 25249.5, a discharge or release of a listed chemical from one of these facilities or sites probably will not pass into any source of drinking water.

To qualify for this presumption, the operator of the facility or site would need to show that it is subject to and an in compliance with state or federal statutes, regulations, permits, and orders adopted to avoid contamination of surface or groundwater. This presumption may be rebutted by any admissible evidence. Subsection (b) provides an example of what the Agency considers to be an example of what evidence should be sufficient to rebut the presumption and thereafter cause the enforcement action to proceed without utilizing this presumption.

The premise underlying the proposed regulation is that the types of facilities and sites covered by this regulation are already heavily regulated by state and federal law. These laws are, to a significant degree, similar to the goal of section 25249.5, which is to avoid contamination of drinking water. If these facilities or sites are subject to and in compliance with laws and standards designed to avoid drinking water contamination, then the intended result of avoiding such contamination will be presumed. However, if it can be shown that surface or groundwater contamination nevertheless has occurred at the facility or site, or has occurred at similar facilities or sites under similar circumstances, then the presumption provided by the proposed regulation would not be available.

This regulation is necessary in order to recognize that solid waste, hazardous waste, and low-level radioactive waste operations are already heavily regulated by federal and state law and these types of businesses are in need of increased clarity with regard to how Proposition 65 applies to their activities. This regulation is also necessary in order to give prosecutors uniform standards to apply. Uniform standards are especially important since lawsuits under the Act may be brought by the Attorney General, district attorneys, certain city attorneys and, under certain circumstances, any person in the public interest.

The facilities and sites to which this regulation may be applied need to know in what way the Act may apply to their activities. The specific standards adopted in this regulation will facilitate compliance with the Act by persons in the course of doing business and will also serve to minimize the possibility of different and conflicting interpretations of the Act by those who enforce and interpret its provisions. Since a wide range of persons may initiate litigation under the Act, the potential for conflicts and confusion in the enforcement of the Act is great. Uniform statewide standards for determining how the Act may apply to persons in the course of doing business will minimize this potential. Prosecutors can more easily and uniformly determine whether or not compliance has been achieved and businesses can limit changes to their business operations to those necessary to comply.

Scope of Presumption

It is the intent of the Agency that the presumption set forth in subsection (a) of this regulation be applied only to a very specific type of operation and only within a very narrowly defined set of circumstances.

One way that the proposed regulation helps to ensure a very narrow scope of application is by way of its specific statutory references which define the type of operations covered by the regulation. In addition, the Agency intends that the presumption of "probably will not pass" set forth in this regulation be available only if the facility/site has secured, and is properly operating under, all required permits or licenses. Thus, the regulation also requires the operator of the facility or site in question to show that it is ". . . subject to and in compliance with requirements of state or federal statutes, regulations, permits, and orders adopted to avoid contamination of surface or groundwater . . . ."

Two commentors felt that the presumption was not authorized under the Act and, as a result, the Agency lacked the legal authority to adopt such a presumption (C-8 page 1, incorporating by reference comments made in C-9 pages 3, 25-27, tables 1-6; C-13 pages 1-2). These commentors felt that the Agency was basing the presumption upon pre-existing federal and state legal requirements which had proven to be inadequate and that this

proven inadequacy had in part been the reasons why the voters passed a more stringent law, Proposition 65.

These commentors appear to be mistakenly assuming that the presumption allowed by this regulation is available even when the waste facility/site in question has actually discharged a listed chemical into a source of drinking water. A "discharge" under the Act occurs only when the listed chemical has actually passed into a source of drinking water or, in the absence of such proof, that the chemical "probably will pass" into a source of drinking water. The presumption allowed by this regulation is potentially available only when the chemical has not passed into a source of drinking water.

Therefore, this regulation starts with the requirement that the listed chemical in question has not been shown to have passed into a source of drinking water. If the chemical in question has passed, then this regulation can never apply.

It should also be noted that the presumption is expressly rebuttable. If it is shown that despite compliance with all applicable requirements, the chemical probably will pass into a source of drinking water, then the presumption afforded by this regulation is not available. If the presumption is not available, then the trier of fact (the judge or jury) would weigh the evidence without resorting to the presumption. (See discussion following under "Rebutting the Presumption."

One of the two commentors mentioned above stated in the alternative that, if it were indeed true that compliance with other federal and state laws adopted to avoid drinking water contamination would also meet the goals of Proposition 65, then there would be no necessity for adopting a regulation such as section 12403 (C-13 page 2). This comment appears to be based upon the same erroneous assumption as discussed above. This regulation does not consider compliance with applicable federal and state laws to automatically constitute compliance with Proposition 65. The regulation merely provides a presumption that, absent evidence to the contrary, a waste facility/site (as defined) which is being operated in compliance with all other applicable requirements shall initially be entitled to a presumption that listed chemicals are probably not passing into a source of drinking water.

This commentor stated that the regulation also should contain an express requirement that the referenced federal or state laws be adequate (C-13 page 3). Such a change is unnecessary because the presumption is not available where there is evidence that compliance with these requirements failed to prevent drinking water contamination.

This commentor also stated that the reference in the regulation to "state or federal" should be changed to "state and federal" (C-13 page 3). This commentor also felt that this provision was ambiguous as to which state or federal requirements are involved

because the definition depends upon the intent underlying the particular requirements and whether the intent was to avoid contamination of drinking water (C-13 page 3). The precise language from the regulation to which the commentor refers is ". . . requirements of state or federal statutes, regulations, permits and orders adopted to avoid contamination of surface or groundwater . . ." The Agency does not consider this clause to be ambiguous and the intent that the referenced standards be those which relate to the avoidance of drinking water contamination seems clear. It also seems quite clear that "or" does not imply that compliance with just state or just federal laws would be sufficient. As a result, the Agency has made no change in this language.

One commentor felt that the presumption should be available to persons other than just the operator of the facility. This commentor recommended that the phrase ". . . operator of the facility or site . . . " should be replaced with "the person otherwise responsible for a discharge or release from the facility or site" (C-12 page 2). The Agency disagrees. Since it is the operation of the facility or site about which the regulation is concerned, it would be inappropriate for someone other than the operator to be given such a presumption.

This same commentor stated that the Agency had intended the regulation to apply to any facility which handled hazardous waste materials but that the Agency had used statutory references which could be mistakenly interpreted as excluding from the regulation all those except facilities/sites which are engaged in the final disposition of the wastes. It was therefore recommended that the regulation be modified by changing the statutory reference to one which includes facilities which, for example, treat, store or recycle waste materials (C-12 page 1).

The Agency consciously intended to avoid the broad scope of application suggested by this commentor. Since waste materials which are in transit or which are being treated or recycled are subject to a multitude of possible hazards and accidents, a presumption such as the one set forth in this regulation cannot be justified. Only a final disposition type facility/site is designed with long-term environmental isolation, stability and safety in mind and is thus the only type for which the Agency believes a presumption of this type is appropriate. Temporary storage facilities, transfer facilities, treatment or recycling facilities are not subject to the same regulatory constraints as are final disposition facilities.

Two commentors felt that the presumption allowed by this regulation violated the Act because it shifted the burden of proof from dischargers back to the public/government (C-8 pages 1-2, incorporating by reference comments from C-9 pages 3, 14-15; C-13 pages 1-2). These commentors apparently misunderstand how the Act is structured.

The plaintiff in a discharge enforcement action under the Act must prove that the defendant discharged a listed chemical and that it either passed or probably will pass into a source of drinking water. The defendant in such an enforcement action has the option of introducing his or her own evidence to counter the plaintiff's case on any or all of the elements listed in the preceding sentence.

For example, the defendant could admit that a discharge occurred involving a listed chemical but that it was more likely than not that the chemical would not get into drinking water. The defendant does not have the burden of proof on that issue, he or she merely has the option of introducing evidence to counter the plaintiff's case.

The defendant has the option of not introducing any evidence while the plaintiff has the burden to provide sufficient evidence to prove the above stated elements of the case, not to merely allege them. The only burden of proof which is on the defendant in a Proposition 65 case is when he or she is attempting to establish that a discharge, release, or exposure for which he/she was responsible did not involve a significant amount of the listed chemical.

This regulation does nothing more than describe a situation which, if proven, would give the defendant the benefit of a rebuttable presumption on the issue of "probably will pass."

Rebutting the Presumption

The ". . . probably will not pass . . ." presumption (allowed by subsection (a) of the regulation) may be rebutted by any admissible evidence (subsection (b)). The example set forth in subsection (b) of the regulation is intended by the Agency to serve as an illustration of one approach to rebutting the presumption. The example is:

> "[C]ompliance with the same or substantially the same requirements of state or federal statutes, regulations, permits and orders adopted to avoid contamination of surface or groundwater has failed to prevent surface or groundwater contamination at similar facilities or sites under similar circumstances."

The example given is expressly written so that other possible approaches towards rebutting the presumption also may be followed.

The various components of the subsection (b) illustration are also significant because they provide guidance in evaluating other approaches towards rebutting the subsection (a) presumption. For example, the reference to ". . . compliance with the same or substantially the same requirements of state or federal statutes, regulations, permits, and orders . . ."

(emphasis added) recognizes that two similar types of waste disposal facilities/sites may be required to follow somewhat different disposal procedures due to varying local geology. Therefore, two different facilities/sites can be initially considered for comparison only if the requirements applicable to both are "substantially the same."

Another component of the illustration extends this principle of comparing similar situations. Requiring evidence about ". . . similar facilities or sites under similar circumstances . . ." relates not only to the type of operation that is the source of the comparison but also to the facts surrounding the contamination which occurred.

Although section 25249.5 of the Act applies only to a discharge or release which involves a listed chemical, the illustration in the proposed regulation applies to any surface or ground water contamination, not just those involving listed chemicals. As a result, evidence that a contaminating substance has passed into surface or groundwater may serve as the basis for a conclusion that a path of leakage is present and that a listed chemical could follow that same path.

One commentor felt that the rebuttal provision, and the example listed therein, would allow the first discharge from such a waste facility/site to escape liability under the Act (C-13 page 3). This commentor was apparently under the mistaken impression that this regulation is a complete exemption from liability under the Act unless and until there is evidence of prior failure at the same or similar facility or site.

As discussed earlier, this regulation does not even apply if there has actually been a discharge which has passed or probably will pass into a source of drinking water. Thus, the first facility or site which has been proven to have committed a discharge which passed or probably will pass into a source of drinking water would serve as evidence to rebut the subsection (a) presumption for all similar facilities or sites under similar circumstances as described in subsection (b).

This same commentor also felt that the definition of a similar facility, similar site, and similar circumstances is problematic and will lead to considerable ambiguity and litigation (C-13 page 3). The Agency disagrees that the provision is ambiguous. However, the language is intentionally broad and flexible so that problems which may arise at facilities or sites which are similar will prevent the inappropriate use of an evidentiary presumption. Having the language any more specific would be counter-productive to the interests of protecting the public because it would be more difficult to rebut the presumption. The commentor's concern about the language leading to litigation is misplaced because the entire purpose of the regulation is to provide for an evidentiary presumption in the litigation context.

Another commentor felt that the language of the subsection (b) example was ambiguous in that it would allow comparisons with a facility or site other than the one in question (C-12 page 2). This is exactly the result which the Agency intended and it is therefore unnecessary to modify the language.

One commentor suggested that the statement of reasons for this regulation be augmented by adding language that would state that detection of a listed chemical in a waste facility/site monitoring well would not, by itself, be considered as a discharge so long as the facility/site was following all required responses to the initial detection and that those responses were working (C-6 page 3). The Agency has decided not to add such clarifying language because the situation described by this commentor is within the jurisdiction of the State Water Resources Control Board and its statutory/regulatory oversight of such facilities and sites. It would therefore be inappropriate for the Agency to, in effect, interpret legal requirements over which it has no authority.