

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

ENDORSED FILED

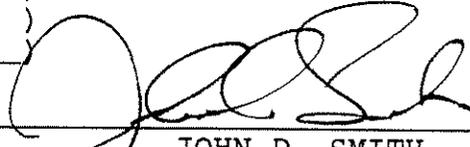
IN THE OFFICE OF

In re:)
Request for Regulatory) 1988 OAL Determination No. 15
Determination filed by) [Docket No. 87-021]
the California Hazardous)
Substances Council con-) September 6, 1988
cerning the State Water)
Resources Control Board's) Determination Pursuant to
memorandums of January 21,) Government Code Section
1987 and March 26, 1987;) 11347.5; Title 1, California
and the California Region-) Code of Regulations,
al Water Quality Board's) Chapter 1, Article 2
memorandum of April 22,)
1987, all concerning)
closure of surface)
impoundments containing)
hazardous wastes¹)

SEP 6 4 30 PM 1988

MARION FONG EU
SECRETARY OF STATE
OF CALIFORNIA

Determination by:



JOHN D. SMITH

Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney
Craig Tarpenning, Senior Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether or not memorandums from the State Water Resources Control Board and the California Regional Water Quality Control Board (San Francisco Bay Region) concerning the closure of surface impoundments containing hazardous waste are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that some of the provisions contained in the memorandums are "regulations" required to be adopted in compliance with the Administrative Procedure Act, and that some are not. The memorandums are regulatory in three areas: (1) where one requires the removal of all hazardous sludges and certain contaminated earthen liners by statutory deadlines, (2) where one provides that a number of closure activities can qualify as "preparations for post-closure maintenance" and need not be completed by the removal deadlines and (3) where an attachment specifies tasks and time schedules for certain activities in order to meet the removal deadlines. However, the provisions describing the "cease discharge" requirement with respect to the removal deadlines are not regulatory in that they reflect the only legally tenable interpretation of the Toxic Pits Cleanup Act of 1984.

9

THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether memorandums of the State Water Resources Control Board (State Board) and California Regional Water Quality Control Board, San Francisco Bay Region, (Regional Board) concerning the closure of surface impoundments containing hazardous wastes are "regulations" as defined in Government Code section 11342, subdivision (b), and therefore violate Government Code section 11347.5, subdivision (a).⁴

THE DECISION ^{5,6,7,8}

OAL finds that:

- I. The provisions contained in the memorandum from the Executive Director of the State Board (Challenged Document 2) requiring the removal of all hazardous sludges and certain contaminated earthen liners by the deadlines specified in the Act (1) are subject to the rulemaking requirements of the Administrative Procedure Act ("APA"),⁹ (2) are "regulations" as defined in the APA, and (3) are therefore in violation of Government Code section 11347.5, subdivision (a).
- II. The provisions contained in the opinion memorandum of the Senior Staff Counsel for the State Board (Challenged Document 3) providing that certain closure activities may continue after the deadline for cessation of "discharge" and could qualify as "preparations for post-closure maintenance" (1) are subject to the rulemaking requirements of the APA, (2) are "regulations" as defined in the APA, and (3) are therefore in violation of Government Code section 11347.5, subdivision (a).
- III. The provisions contained in an attachment to Challenged Document 3 containing "tasks and time schedules" in order to meet the "cease discharge" deadlines of the Act (1) are subject to the rulemaking requirements of the APA, (2) are "regulations" as defined in the APA, and (3) are therefore in violation of Government Code section 11347.5, subdivision (a).
- IV. The provisions contained in all three memorandums describing the "cease discharge" requirements and the deadlines imposed in the Act are not "regulations" in that they reflect the only legally tenable "interpretation" of the requirements contained in the Act.

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The position of State Engineer was created in 1878 to investigate problems of irrigation, drainage and navigation of rivers.^{10,11} Water control grew and changed in succeeding years to keep pace with the burgeoning needs and technology of a more complex society. The present State Water Resources Control Board was created by the Legislature in 1967 by combining the State Water Rights Board and the State Water Quality Control Board into one body.^{12,13}

Although the Board is divided into two statutory divisions, water rights and water quality, there are also additional administratively created divisions. The Board's powers include, among other things, water quality control.

Water Code section 13001 provides in pertinent part:

"It is the intent of the Legislature that the state board and each regional board shall be the principal state agencies with primary responsibility for the coordination and control of water quality" [Emphasis added.]

Authority 14

Water Code section 179 provides:

"The board succeeds to and is vested with all of the powers, duties, purposes, responsibilities, and jurisdiction vested in the Department and Director of Public Works, the Division of Water Resources of the Department of Public Works, the State Engineer, the State Water Quality Board, or any officer or employee thereof, under Division 2 (commencing with Section 1000), except Part 4 (commencing with Section 4000) and Part 6 (commencing with Section 5900) thereof; and Division 7 (commencing with Section 13000) of this code, or any other law which permits or licenses to appropriate water are issued, denied, or revoked or under which the functions of water pollution and quality control are exercised." [Emphasis added.]

Water Code section 1058 provides:

"The board may make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties under this code."

Applicability of the APA to Agency's Quasi-Legislative Enactments

Water Code section 185 provides:

"The Board shall adopt rules for the conduct of its affairs in conformity, as nearly as practicable, with the provisions of [the APA]." [Emphasis added.]

In addition, the APA applies to all state agencies, except those "in the judicial or legislative departments."¹⁵ Since the Board is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.¹⁶

General Background

To facilitate understanding of the issues presented in this proceeding, we discuss pertinent statutory history as well as the facts and circumstances giving rise to the present Determination.

In 1984, the Legislature enacted the Toxic Pits Cleanup Act of 1984 ("Act" or "TPCA"), which was codified in Health and Safety Code sections 25208 through 25208.17. The Legislature found that discharges of liquid hazardous waste or hazardous wastes containing free liquids pose a serious threat to the quality of the waters in California and that reports indicated that hazardous waste contamination from surface impoundments was migrating to domestic drinking water supplies.¹⁷ The Legislature also found that under existing federal and state law, the storage of hazardous wastes in existing ponds had not been required to meet the same requirements as new impoundments, such as double liners, leachate¹⁸ collection, and leak detection and that synthetic liners, clay liners, and combinations thereof impeded, but did not eliminate, leachate from surface impoundments migrating into the surrounding environment.¹⁹ The Act established a program intended to insure that existing surface impoundments were either made safe or were closed.²⁰

On or about April 22, 1987, the Regional Board sent a memorandum to facilities regulated under the Act advising them that "all free liquids or hazardous wastes containing free liquids must be removed from TPCA surface impoundments by the legislated deadlines of July 1, 1988 or January 1, 1989 . . ." and that these " . . . stringent tasks and deadlines require that facilities begin actively moving toward closure." The memorandum went on to announce a meeting " . . . to discuss the issues and present our views on how the TPCA will be implemented." The memorandum had attached to it an opinion from counsel of the State Board

regarding the meaning of the term "discharge" in the Act and a memorandum from the State Board to the regional boards concerning compliance with the Act.

On July 9, 1987, the Assembly Rules Committee submitted a request for legislative priority review²¹ to OAL questioning the clarity of section 2582 of Title 23 of the California Code of Regulations. This regulation, concerning surface impoundment closure requirements, had been previously adopted by the State Board. On October 7, 1987, OAL issued an order to show cause in connection with this priority review request.

A Request for Determination was filed with OAL on October 30, 1987, concerning the memorandum issued by the Regional Board dated April 22, 1987, along with the attached opinion and memorandum issued by the State Board. The Requester is the California Hazardous Substances Council.

The Requester contends that the opinion and memorandums " . . . constitute new regulations as defined in Government Code [section] 11342(b)" and that they " . . . have not been adopted as a regulation and filed with the Secretary of State pursuant to the Administrative Procedure Act"22

On January 5, 1988, the State Board submitted to OAL its return to the order to show cause of October 7, 1987, asserting that section 2582 of Title 23 was clear and did not apply to facilities at which hazardous wastes might be discharged.²³

On March 4, 1988, OAL issued its decision concerning the priority review request of July 9, 1987. OAL ordered the repeal of Section 2582 of Title 23 unless the State Board amended the reference citation to the regulation by replacing Section 13172 of the Water Code with an appropriate statutory citation which would more clearly reflect that the regulation did not apply to Class I facilities. The State Board submitted such a change to OAL shortly thereafter and section 2582 was not repealed.

On July 18, 1988, the Requester submitted a request to OAL that certain documents forwarded to OAL during the priority review proceeding and the "State Water Resources Control Board and Regional Water Quality Control Boards regulatory programs" be added to its Request for Determination submitted to OAL on October 30, 1987. This request is hereby denied.²⁴

On August 1, 1988, the State Board submitted to OAL its Response to the Request for Determination of October 30, 1987. The contents of the Response are discussed below.

Challenged Documents

Before beginning the discussion of dispositive issues, it is important that the items challenged are clearly identified. There are three documents that are the subject of this Determination:

Challenged Document 1

Memorandum from the Regional Board, dated April 22, 1987, to "Facilities Regulated Under TPCA, the Toxic Pits Cleanup Act of 1984". The subject of this memorandum is "TPCA Implementation Meeting-April 29, 1987".

Challenged Document 2

Memorandum from James L. Easton, Executive Director of the State Board, dated March 26, 1987, to "All Regional Board Executive Officers." The subject of this memorandum is "PROCEDURES TO COMPLY WITH THE 'CEASE DISCHARGE' REQUIREMENT IN THE TOXIC PITS CLEANUP ACT (TPCA)." This memorandum includes an attachment which provides a "TASK AND TIME SCHEDULE FOR COMPLIANCE WITH THE 'CEASE DISCHARGE' DEADLINE OF TPCA."

Challenged Document 3

Memorandum opinion from Craig M. Wilson, Senior Staff Counsel of the State Board, dated January 21, 1987, to Randeale Kanouse, Chief, Office of Legislative and Public Affairs. The subject of this memorandum is the "DEFINITION OF 'DISCHARGE' IN THE TOXIC PITS CLEANUP ACT."

II. DISPOSITIVE ISSUES

There are two main issues before us:²⁵

- (1) WHETHER THE CHALLENGED DOCUMENTS CONTAIN "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
 - (2) WHETHER THE CHALLENGED DOCUMENTS CONTAIN PROVISIONS WHICH FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.
- A. FIRST, WE INQUIRE WHETHER THE CHALLENGED DOCUMENTS CONTAIN "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the informal rule adopted by the agency either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

Analysis of Challenged Documents

Challenged Document 1: The Regional Board Announcement

1. Does Challenged Document 1 Contain Standards of General Application or a Modification or Supplement to Such Standards?

The answer is "yes."

Challenged Document 1 refers to enclosures (Challenged Documents 2 and 3) and states that:

"In the context of TPCA, 'cease discharge' has been interpreted by State Board legal counsel to mean that all free liquids or hazardous wastes containing free liquids must be removed from TPCA surface impoundments by the legislated deadlines of July 1, 1988 or January 1, 1989 depending on the site.

These stringent tasks and deadlines require that facilities begin actively moving toward closure."
[Emphasis added.]

The memorandum states that these issues and others, including the implementation by the Regional Board, should be discussed. The memorandum gives the time and place for a meeting " . . . to discuss the issues and present our views on how the TPCA will be implemented."

In its Response to this Request for Determination, the State Board asserts that none of the challenged documents were intended to be "legally binding." The Response states that Challenged Document 1 " . . . merely sets up a meeting to discuss how the TPCA will be implemented."

However, Challenged Document 1 does more than schedule a meeting to discuss the Act. Challenged Document 1 sets forth an "interpretation" of the term "cease discharge" with respect to the requirements for removal of liquid hazardous wastes and hazardous wastes containing free liquids from surface impoundments. It thereafter provides that these " . . . stringent tasks and deadlines require that facilities begin actively moving toward closure." (Emphasis added.) Whether or not an agency action is regulatory in nature hinges on the effect and impact on the public--not on the agency's characterization.²⁶ An owner of a Class I facility who received Challenged Document 1 in the mail most certainly understood the requirements for removal of hazardous wastes specified therein to be mandatory in nature.

Also, for an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²⁷ We infer from the record before us that the requirements referred to above apply to all persons similarly situated and thus are standards of general application.

2. Does Challenged Document 1 Implement, Interpret or Make Specific the Law Enforced or Administered by the Agency?

The answer to this question is "no."

In its Response to the Request for Determination, the State Board asserts that none of the challenged documents implement, interpret, or make specific any part of the Act, but rather restate and analyze its requirements. The Response asserts that the Act is itself clear, specific and unambiguous in articulating requirements discussed in the challenged documents, which do not add to or modify any requirements contained in the Act.

In general, if the agency does not add to, interpret, or modify the statute, it may legally inform interested parties in writing of the statute and "its application." Such an enactment is simply "administrative" in nature, rather than "quasi-judicial" or "quasi-legislative."

If, however, the agency makes new law, i.e., supplements or "interprets" a statute or other provision of law, such activity is deemed to be an exercise of quasi-legislative power. Quasi-legislative power is conferred by statute, either expressly or impliedly.²⁸

"In rulemaking, an agency is often free to interpret a statute or another regulation in such a way as to impose an additional requirement on the regulated public. By contrast, in applying a statute or regulation, an agency has much less latitude." [Emphasis added.]²⁹

Fundamental to the issue of whether or not provisions contained in the challenged documents supplement or interpret the law enforced or administered by the agency, is whether or not the law involved needs such further supplementation or interpretation. In a previous Determination we stated:

"If a rule simply applies an existing constitutional, statutory or regulatory requirement that has only one legally tenable 'interpretation,' that rule is not quasi-legislative in nature--no new 'law' is created."³⁰ [Emphasis added.]

Therefore, if the requirements in the Act relevant to the challenged documents can only be read one way, then those same requirements, if included in the challenged documents, are no more than restatements of the law. For this reason, the Act itself must be examined to determine whether the requirements contained in the challenged documents are also present in the Act.

Health and Safety Code section 25208.4 provides in subdivision (a) that:

"Notwithstanding any other provision of law, unless granted an exemption pursuant to subdivision (b) or Section 25208.13, a person shall not discharge liquid hazardous wastes or hazardous wastes containing free liquids into a surface impoundment after June 30, 1988, if the surface impoundment, or the land immediately beneath it, contains hazardous wastes and is within one-half mile upgradient from a potential source of drinking water."

"A person who owns a surface impoundment which meets the conditions specified in this subdivision shall close the impoundment." [Emphasis added.]

Health and Safety Code section 25208.5 provides in subdivision (a) that:

"Unless granted an exemption pursuant to subdivision (c) or Section 25208.13, on or after January 1, 1989, no person shall discharge any liquid hazardous waste or hazardous wastes containing free liquids into a surface impoundment, unless the surface impoundment is double lined, as specified in subdivision (b), equipped with a leachate collection system, and groundwater monitoring is conducted, in accordance with the federal Resource Conservation and Recovery Act of 1976, the regulations and guidance documents adopted pursuant thereto, and the regulations adopted by the state board and the department." [Emphasis added.]

Health and Safety Code section 25208.2, subdivision (f), defines "Discharge" to mean:

". . . to place, dispose of, or store liquid hazardous wastes or hazardous wastes containing free liquids into or in a surface impoundment owned or operated by the person who is conducting the placing, disposal, or storage." [Emphasis added.]

The Request for Determination asserts that:

"Because the definition of discharge in the Toxic Pits Cleanup Act includes 'storage', several ambiguities exist that would not otherwise require interpretation. But for the inclusion of storage, the Toxic Pits Cleanup Act would simply require cessation of further disposal of hazardous waste into the impoundment. However, the inclusion of storage raises the question of what else must be done to comply with the Toxic Pits Cleanup Act. Does the act require the completion of the closure procedures or does it require something less than that? If the liquid in the liquid hazardous waste or in the hazardous waste containing free liquids is being

evaporated, treated, or removed in some other fashion does that constitute treatment within the meaning of Health and Safety Code section 25123.5? Or does it constitute storage within the meaning of Health and Safety Code section 25123 which is to be stopped by the dates set out in the Toxic Pits Cleanup Act?"³¹

In determining whether Challenged Document 1 is interpreting, implementing, or making specific the Act, or merely restating it, we must determine whether the term "discharge" as used in Health and Safety Code sections 25208.4 and 25208.5 applies to all containment of liquid hazardous wastes and hazardous wastes containing free liquids. If "discharge" does so apply, the provision in Challenged Document 1 requiring removal of the wastes is merely restating existing statutory requirements and need not be adopted as a regulation.

It is well recognized that when the language of a statute is clear and unambiguous, there is no need for statutory construction. In construing an ambiguous statute, a court must ascertain the intent of the Legislature so as to effectuate the purpose of the law. All other rules of statutory construction must yield to this controlling principle. The California Supreme Court has stated:

"Once a particular legislative intent has been ascertained, it must be given effect "even though it may not be consistent with the strict letter of the statute." [Citation] . . . " . . . The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.""³² [Emphasis added.]

"The cardinal principal of statutory construction is that, absent a single meaning of the statute apparent on its face, we must give it an interpretation based upon the legislative intent with which it was passed, and where the Legislature has expressly declared its intent, we must accept the declaration. [Citation.]"³³ [Emphasis added.]

With respect to meaning of the word "discharge" as used in Health and Safety Code Sections 25208.4 and 25208.5, we look first to language in the Act itself. The operative provisions of the Act are preceded by an express declaration of intent by the Legislature. Health and Safety Code section 25208.1 provides:

"The Legislature finds and declares as follows:

(a) Discharges of liquid hazardous wastes or hazardous wastes containing free liquids into lined or unlined ponds, pits, and lagoons pose a serious threat to the quality of the waters of the state.

(b) Recent reports indicate that hazardous waste contamination from surface impoundments is migrating to domestic drinking water supplies and threatening the continued beneficial uses of the state's ground and surface waters, air, and environment.

(c) Under the federal Resources Conservation and Recovery Act of 1976 (42 U.S.C. sec. 6901 et seq.), and under state regulations, the storage of hazardous wastes in existing ponds has not been required to meet the same requirements as new impoundments, such as double liners, leachate collection, and leak detection.

(d) Recent studies have found that synthetic liners, clay liners, and combinations, including clay and synthetic liners, impede but do not eliminate, leachate from surface impoundments migrating into the surrounding environment.

(e) It is in the public interest to establish a continuing program for the purpose of preventing contamination from, and improper storage, treatment, and disposal of, liquid hazardous wastes or hazardous wastes containing free liquids in surface impoundments. It is the intent of the Legislature, in enacting this article, to establish a program that will ensure that existing surface impoundments are either made safe or are closed, so that they do not contaminate the air or waters of the state, and so that the health, property, and resources of the people of the state are protected." [Emphasis added.]

It is clear from this express declaration by the Legislature that the problem exists whenever liquid hazardous wastes or hazardous wastes containing free liquids are contained in existing surface impoundments, regardless of the purpose for which the waste is held. It is also clear from this declaration, in subdivision (e), that the Legislature intended the Act to prevent contamination from such wastes whenever contained in existing surface impoundments.

Even assuming that the intent is not evident within the Act itself, this intent is apparent from documentation relied upon by the Legislature in enacting the Act. The staff analysis prepared for the Assembly Committee on Consumer Protection and Toxic Materials' hearing of April 24, 1984 describes the effect of proposed Health and Safety Code section 25208.4 as follows:^{34, 35}

"Prohibits the use of a surface impoundment, after June 30, 1986, if it, or the land beneath it, (1) contains hazardous waste and (2) is located within one half mile upgradient of a source of water suitable for domestic or

municipal use or a useable underground source of drinking water." [Emphasis added.]

Once again, no distinction is made as to whether or not the regulated substance is present on the premises for treatment purposes.

It must also be noted that Legislative intent should be gathered from the whole act rather than from isolated parts or words.³⁶ All provisions of a statute should be construed together, significance being given when possible to each word, phrase, sentence and part of the act in pursuance of the legislative purpose.³⁷ In one provision of the Act, treatment is mentioned in the context of another "discharge" deadline imposed in Health and Safety Code section 25208.4. Health and Safety Code section 25208.16, subdivision (a), provides in part:

"A person may apply to the regional board for an exemption from paragraph (2) of subdivision (c) of Section 25208.4 for a surface impoundment into which restricted hazardous wastes which do not contain cyanide wastes or polychlorinated biphenyls (PCBs) . . . are discharged for the purpose of onsite temporary storage and treatment by filing an application with the regional board. [Emphasis added.]

Subdivision (c)(2) of Health and Safety Code section 25208.4 provides in part:

"(c) Notwithstanding any other provision of law, a person shall not do either of the following, unless granted an exemption pursuant to Section 25208.13 or 25208.16, or unless the person is granted a variance for the discharge of a restricted hazardous waste pursuant to subdivision (d) by the department:

. . .

(2) On or after January 1, 1986, discharge any restricted hazardous waste, not otherwise specified in paragraph (1), into a surface impoundment." [Emphasis added.]

It is apparent then that the use of the word "discharge" in subdivision (c) of Health and Safety Code section 25208.4 is intended to include "temporary storage and treatment," since a limited exception is carved out of this "discharge" prohibition for "temporary storage and treatment" of certain substances by Health and Safety Code section 25208.16, subdivision (a). Obviously, if the prohibition against "discharge" in Health and Safety Code section 25208.4, subdivision (c)(2), does not encompass temporary storage and

treatment, there would have been no need for the exception provided by the Legislature in Health and Safety Code section 25208.16, subdivision (a). If the intent then of the Legislature in using the term "discharge" in Health and Safety Code section 25208.4, subdivision (c)(2) is to include temporary storage and treatment, one must presume that the Legislature intended the same meaning for the term "discharge" when used in subdivision (a) of the same section and in Health and Safety Code section 25208.5, the statutory provisions at issue herein.

Under the above stated rules of construction, we conclude that the provision in Challenged Document 1 informing the reader of the meaning of "cease discharge" is the only reasonable "interpretation" of the Act. We conclude that Challenged Document 1 is not in violation of Government Code section 11347.5 because it includes this information.

Challenged Document 2: The State Board Memorandum

1. Does Challenged Document 2 Contain Standards of General Application or a Modification or Supplement to Such Standards?

The answer is "yes."

Challenged Document 2 is a memorandum from the Executive Director of the State Board to all regional board executive officers. The Requester refers to the following provisions in the memorandum in its Request for Determination:

1. "For the purposes of TPCA, discharge to an impoundment can be considered to have ceased if:

All liquid hazardous wastes are removed by the statutory deadline, and

All hazardous wastes containing free liquids are removed by the statutory deadline."

2. "For practical reasons, the second condition requires that all hazardous sludges be removed from the impoundment by the deadline."
3. "If a contaminated earthen liner contains sufficient quantities of hazardous constituents to be considered hazardous waste, that liner should be removed by the deadline."
4. "Also, given in Attachment 2 is a list of tasks and a time schedule for compliance with the 'cease discharge' deadline of the TPCA."

In its Response to this Request for Determination, the State Board asserts that Challenged Document 2 is not a standard of general application because it was not intended to govern future State Board decisions and was directed only to staff. However, as previously discussed under Challenged Document 1, whether or not an agency action is regulatory in nature hinges on the effect and impact on the public rather than the agency's characterization. In this case, Challenged Document 2 was distributed to the regulated public along with Challenged Document 1. An owner of a surface impoundment who received Challenged Document 2 in the mail most certainly understood the provisions in the memorandum, listed in numbers 1 through 3 above, to be mandatory if his or her facility contained such materials. This may also be true of provision number 4.

Provision number 4 of Challenged Document 2, cited above, refers the reader to an attachment (Attachment 2) which contains time schedules for certain tasks to be completed for (1) a "standard closure procedure" and (2) in order to meet the "cease discharge" deadlines in the Act. For example, under the "cease discharge" time schedule, plans for the removal of liquids and sludges are due "5/15/87" and hydrogeological assessment reports (HARs) are to be submitted by "fall 1987." We are unable to determine from the record before us whether or not the Regional Board has required such plans and reports to be submitted by the deadlines specified in Attachment 2. Since the Regional Board in fact distributed Attachment 2 to the regulated public, we will assume for the purposes of this Determination that the Regional Board has required plans and reports to be submitted pursuant to Attachment 2. If this is the case, Attachment 2 clearly contains standards of general application. According to the California Court of Appeal, the establishment of a time deadline for the performance of acts or submission of documents constitutes a "standard" within the meaning of the Administrative Procedure Act.³⁸

2. Does Challenged Document 2 Implement, Interpret or Make Specific the Law Enforced or Administered by the Agency?

The answer to this question is in part "yes," and in part "no."

1. "For the purposes of the TPCA, discharge to an impoundment can be considered to have ceased if:

All liquid hazardous wastes are removed by the statutory deadline, and

All hazardous wastes containing free liquid are removed by the statutory deadline."

With respect to this provision in Challenged Document 2, the answer is "no." This recitation of the meaning of "cease discharge" is substantially the same as that given in Challenged Document 1 and is merely a restatement of existing statutory requirements. For more on this point, see the discussion of this issue in this Determination under Challenged Document 1.

2. "For practical reasons, the second condition requires that all hazardous sludges be removed from the impoundment by the deadline."
3. "If a contaminated earthen liner contains sufficient quantities of hazardous constituents to be considered a hazardous waste, that liner should be removed by the deadline."

With respect to provisions numbers 2 and 3 in Challenged Document 2, cited above, the answer is "yes." As previously discussed, the Act precludes the discharge of "liquid hazardous wastes or hazardous wastes containing free liquid" after specified dates, with certain exceptions. The Act makes no specific reference to hazardous sludges or contaminated earthen liners in this regard, nor does it include definitions of these terms which might have described these materials as always containing liquid hazardous wastes or free liquid. In fact, the term "sludge" is defined by regulation and, as defined, includes "solid" wastes.³⁹ This being the case, Sections 25208.4, subdivision (a), and 25208.5, subdivision (a), of the Act appear to only require the removal of hazardous sludges and contaminated earthen liners by the deadlines if they contain liquid hazardous wastes or consist of hazardous wastes containing free liquids. As such, provisions numbers 2 and 3 go beyond a mere restatement of the Act since they require the removal of all hazardous sludges and sufficiently contaminated earthen liners by the deadlines contained in the Act, regardless of whether liquid hazardous wastes or free liquids are present.⁴⁰

The State Board's response to the Request is that these provisions merely restate statute and that the removal of hazardous sludges and contaminated earthen liners is " . . . required by [Health and Safety Code] Section 25208.2 (d)." Health and Safety Code section 25208.2, subdivision (d), is susceptible to a reading which only requires removal of sludges and liners by the deadline when liquid hazardous wastes or hazardous wastes containing free liquids are present.

Health and Safety Code section 25208.2 provides the definitions for the Act. Subdivision (d) of this section provides:

"'Close the impoundment' means the permanent termination of all hazardous discharge operations at a waste management unit and any operations necessary to prepare that waste management unit for postclosure maintenance which are conducted pursuant to the federal Resource Conservation and Recovery Act of 1976 (42 U.S.C. Sec. 6901 et seq.), and the regulations adopted by the state board and the department concerning the closure of surface impoundments."

In fact, neither the federal regulations adopted to implement the federal Resource Conservation and Recovery Act of 1976, nor the existing regulations of the State Department of Health Services, preclude, in all circumstances, contaminated sludges and liners from remaining at a surface impoundment at time of closure. Specifically, both sets of regulations permit surface impoundments to retain " . . . waste residues, contaminated containment system components (liners, etc.), contaminated subsoils and structures and equipment contaminated with waste and leachate . . . " at closure if certain conditions are met.⁴¹ The elimination of free liquids or solidification of the wastes and waste residues is the first condition listed under both sets of regulations.

- 4. "Also given on Attachment 2 is a list of tasks and a time schedule for compliance with the 'cease discharge' deadline of TPCA."

Provision number 4, cited above, refers the reader to Attachment 2 which provides a "task and time schedule" for (1) "standard closure procedure" and (2) compliance with the "cease discharge" deadlines of the Act. Since this "task and time schedule" is not present in the Act itself, provisions in Attachment 2 clearly "implement, interpret or make specific" the Act.

Challenged Document 3: The Staff Counsel Opinion

- 1. Does Challenged Document 3 Contain Standards of General Application or a Modification or Supplement to Such Standards?

The answer to this question is "yes."

Challenged Document 3 is an opinion memorandum from staff counsel for the State Board to its Office of Legislative and Public Affairs. The Requester refers to the following provisions in the Challenged Document 3 in its Request for Determination:

- 1. "Unless the discharger gets an exemption under Section 25208.4 or Section 25208.5 or both, the discharger will have to remove all liquid hazardous

wastes and hazardous wastes which could contain free liquids from surface impoundments by the prescribed deadlines . . . "

- 2. "This does not mean that impoundments must be completely 'closed' by the deadline.

. . .

Other closure activities, including removal of liner materials, and installation of any required cover, surface drainage features or post-closure monitoring facilities could qualify as preparations for post-closure maintenance."

For the reasons discussed under Challenged Documents 1 and 2, we conclude that Challenged Document 3 contains standards of general application.

- 2. Does Challenged Document 3 Implement, Interpret or Make Specific the Law Enforced or Administered by the Agency?

The answer to this question is in part "yes," and in part "no."

- 1. "Unless the discharger gets an exemption under Section 25208.4 or Section 25208.5 or both, the discharger will have to remove all liquid hazardous wastes and hazardous wastes which could contain free liquids from surface impoundments by the prescribed deadlines "

With respect to this provision in Challenged Document 3, the answer is "no." This provision merely restates the only reasonable "interpretation" of the prohibitions contained in Sections 25208.4 and 25208.5 of the Health and Safety Code. For more on this, please see the discussion under Challenged Document 1 in this Determination.

- 2. "This does not mean that impoundments must be completely 'closed' by the deadline.

. . .

Other closure activities, including removal of liner materials, and installation of any required cover, surface drainage features, or post-closure monitoring facilities could qualify as preparations for post-closure maintenance."

With respect to provision number 2 in Challenged Document 3, the answer is "yes."

The State Board's Response to the Request for Determination concerning provision number 2 in Challenged Document 3 states simply that the provision ". . . does not add or in any way modify any requirement not already unambiguously stated in the TPCA." However, the Response does not go on to specify where in the Act these requirements are spelled out. In fact, the Act fails to specify that the activities described in provision number 2 above need not be completed by the removal deadlines and may be considered "preparations for post-closure maintenance." As such, provision number 2 of Challenged Document 3 interprets the Act by specifying closure activities, such as the removal of contaminated earthen liners, which fall into the category of "preparations for post-closure maintenance."

WE THEREFORE CONCLUDE THAT:

- (1) THE PROVISIONS IN ALL THREE CHALLENGED DOCUMENTS WHICH DESCRIBE THE EFFECT OF THE "CEASE DISCHARGE" REQUIREMENT WITH RESPECT TO THE DEADLINES IMPOSED BY THE ACT FOR THE REMOVAL OF LIQUID HAZARDOUS WASTES AND HAZARDOUS WASTES CONTAINING FREE LIQUIDS ARE NOT REGULATORY,
- (2) THE PROVISIONS IN CHALLENGED DOCUMENT 2 WHICH REQUIRE THE REMOVAL OF ALL HAZARDOUS SLUDGES AND CERTAIN CONTAMINATED EARTHEN LINERS BY THE DEADLINES SPECIFIED IN THE ACT ARE REGULATORY,
- (3) THE PROVISIONS IN CHALLENGED DOCUMENT 3 WHICH SPECIFY CLOSURE ACTIVITIES WHICH NEED NOT BE COMPLETED BY THE DEADLINES IMPOSED BY THE ACT AND WHICH QUALIFY AS "PREPARATIONS FOR POST-CLOSURE MAINTENANCE" ARE REGULATORY, AND
- (4) THE PROVISIONS IN ATTACHMENT 2 WHICH SPECIFY "TASKS AND TIME SCHEDULES" FOR COMPLIANCE WITH THE ACT ARE REGULATORY.

B. SECOND, WE INQUIRE WHETHER THE REGULATORY PROVISIONS IN THE CHALLENGED DOCUMENTS FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, certain uses of forms⁴²--are not subject to procedural requirements of the APA.⁴³ We need not reach any conclusion regarding the applicability of recognized general exceptions to APA requirements with respect to the portions of the challenged documents which are not regulatory.

However, none of the recognized exceptions (set out in note 43) apply to the provisions in Challenged Documents 2 and 3 which have been found to be regulatory. Additionally, the State Board did not assert in its Response to this Request for Determination that any exceptions apply to its requirements.

III. CONCLUSION

For the reasons set forth above, OAL finds that:

- I. The provisions contained in Challenged Document 2 (numbers 2 and 3) which require the removal of all hazardous sludges and certain contaminated earthen liners by the deadlines specified in the Act and the provisions contained in Challenged Document 3 (number 2) which provide that certain closure activities may continue after the removal deadlines and could qualify as "preparations for post-closure maintenance" and the provisions contained in Attachment 2 specifying tasks and time schedules for compliance with the removal deadlines (1) are subject to the rulemaking requirements of the APA; (2) are "regulations" as defined in the APA; and (3) are therefore in violation of Government Code section 11347.5, subdivision (a).

- II. The provisions contained in all three Challenged Documents (quoted provision for Challenged Document 1 and provisions number 1 for Challenged Documents 2 and 3) which describe the effect of the "cease discharge" requirement with respect to the deadlines imposed by the Act for removal of liquid hazardous wastes and hazardous wastes containing free liquids are not "regulations."

DATE: September 6, 1988

Debra M. Cornejo
 for: HERBERT F. BOLZ
 Coordinating Attorney

Craig Tarpinning
 CRAIG TARPENNING
 Senior Staff Counsel

Rulemaking and Regulatory
 Determinations Unit⁴⁴
 Office of Administrative Law
 555 Capitol Mall, Suite 1290
 Sacramento, California 95814
 (916) 323-6225, ATSS 8-473-6225
 Telecopier No. (916) 323-6826

- 1 This Request for Determination was filed by Gene Livingston, Esq., Livingston and Mattesich, 1130 K Street, Suite 250, Sacramento, CA 95814, (916) 442-1111, representing the California Hazardous Substances Council. The State Water Resources Control Board was represented by Staff Counsel, Jorge A. Leon, 901 P Street, Sacramento, CA 95814, (916) 322-5942.

- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n.5, 211 Cal.Rptr. 758, 764, n.5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were

"merely an internal enforcement and selection mechanism.")

Readers aware of additional "underground regulations" decisions--published or unpublished--are invited to furnish the Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index (see note 43, infra).

- 3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121, subdivision (a), provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the Act." [Emphasis added.]

- 4 Government Code section 11347.5 (as amended by Stats. 1987, ch. 1375, sec. 17) provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

5 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "shall . . . [m]ake its determination available to . . . the

courts." (Emphasis added.)

6 Note concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments. The comment submitted by the affected agency is referred to as the "response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point in its response and to permit OAL to devote its resources to analysis of truly contested issues.

In the matter at hand, a comment ("Information Submittal") from Robert C. Thompson, Graham and James, One Maritime Plaza, Third Floor, San Francisco, CA 94111, representing the City of Hollister, was received by OAL on July 18, 1988. The State Water Resources Control Board submitted a Response to the Request for Determination on August 1, 1988. Both were considered in making this Determination.

7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subdivision (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

8 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on p. 1.

9 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

10 For detailed history, see "California Water Law In Perspective," Gavin M. Craig, West's Ann. Water Code (1971 ed.), pp. LXV-CVIII.

- 11 Statutes, 1877-78, chapter 429.
- 12 Statutes, 1967, chapter 284; Water Code, article 3, chapter 2, division 1.
- 13 "California Water Law In Perspective," supra, note 10 at pp. XCII-XCV.
- 14 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 15 Government Code section 11342, subdivision (a). See Government Code sections 11343 and 11346. See also 27 Ops.Cal.

Atty.Gen. 56, 59 (1956).

- 16 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
- 17 Health and Safety Code section 25208.1, subdivisions (a) and (b).
- 18 Health and Safety Code section 25208.2, subdivision (n), provides:

"'Leachate' means any fluid, including any constituents in the liquid, that has percolated through, migrated from, or drained from, a hazardous waste management unit." [Emphasis added.]
- 19 Health and Safety Code section 25208.1, subdivisions (c) and (d).
- 20 Health and Safety Code section 25208.1, subdivision (e).
- 21 Government Code Section 11340.15 (any standing, select or joint committee of the Legislature may request OAL to review any existing regulation(s) for compliance with the standards of Government Code section 11349.1).
- 22 Request for Determination, Docket No. 87-021, p.7.
- 23 See sections 2531 and 2580, Title 23, California Code of Regulations.
- 24 Once a request for determination has been accepted by OAL, OAL regulations do not allow additional challenged rules (not contained in the original request) to be added thereto. See 1986 OAL Determination No. 7 (Department of Food and Agriculture, September 24, 1986, Docket No. 86-003), California Administrative Notice Register 86, No. 41-Z, October 10, 1986, p. B-14.

"Pursuant to the AB 1013 procedural regulations, requestors may not add additional challenged rules to their request once that request has been accepted by OAL. Title 1 CAC sections 122 (a)(3); 121 (b); 123. For

instance, once OAL has accepted a request concerning agency A's Widget Management Manual, the requestor may not a month later add to the earlier-filed request a second challenged rule, such as agency A's Blackacre Policy Manual. If the requestor wishes to challenge the second manual, he or she should file a new request pursuant to Title 1 CAC section 122. . . ." [1987 OAL Determination No. 4 (Division of Labor Standards Enforcement, March 25, 1987, Docket No. 86-010), California Administrative Notice Register 87, No. 15-Z, May 15, 1987, p. B-27.]

Section 123 of Title 1 of the California Code of Regulations provides in pertinent part:

"All requests for determination which meet the standards of Section 122 of these regulations shall be considered by the office in the order in which they are received."

In this regard, please note that section 122, subdivision (a)(3), of Title 1 of the California Code of Regulations requires that all requests for determination include:

"A copy of the state agency rule which is the subject of the request or a factual description of the rule and its application to the person making the request or other affected persons;"

The Requester's follow-up submittal of July 18, 1988 requests a determination on:

" . . . the State Water Resources Control Board and the Regional Water Quality Control Boards regulatory programs . . ."

and

" . . . the rules contained in the previously filed documents in this matter, and the rules filed during the pendency of the Legislative Priority Review undertaken as Docket 87-1, and those documents filed herein . . ."
[Emphasis added.]

Please note that pursuant to section 122, subdivision (a)(3), cited above, if a copy of the rule is not provided, the Requester must provide OAL with a factual description of the rule and its application to the Requester. The California Hazardous Substances Council is requested to identify the "state agency rules" which are the subject of the requested determination since a host of documents is referred to in the "request" including correspondence from private persons and legal briefs submitted during the legislative priority review

proceeding. No further action will be taken on the additional material enclosed with the California Hazardous Substances Council's letter of July 18, 1988 until the above-requirements are complied with.

- 25 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; type-written version, notes pp. 1-4.
- 26 See 1987 OAL Determination No. 10 (Dept. of Health Services, August 6, 1987, Docket no. 86-016), California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. B-63; 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, pp. B-31--B-43; 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, pp. B-18--B-34; 1986 OAL Determination No. 6 (Bay Conservation and Development Commission, September 3, 1986, Docket No. 86-002), California Administrative Notice Register 86, No. 38-Z, September 19, 1986, pp. B-18--B-35.
- 27 Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
- 28 1986 OAL Determination No. 8 (Department of Food and Agriculture, October 15, 1986, Docket No. 86-004), California Administrative Notice Register 86, No. 41-Z, October 31, 1986, p. B-21; Government Code section 11342.2; Title 1, California Code of Regulations, section 14 (a)(2).
- 29 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, p. B-31; typewritten version, p. 9.
- 30 1986 OAL Determination No. 4 (State Board of Equalization, June 25, 1986, Docket No. 85-005) California Administrative Notice Register 86, No. 28-Z, July 11, 1986, p. B-15, typewritten version, p. 12.

- 31 Request for Determination, Docket No. 87-021, pp. 3-4.
- 32 Friends of Mammoth v. Board of Supervisors of Mono County (1972) 8 Cal.3d 247, 259, 104 Cal.Rptr. 761, 769.
- 33 Tyrone v. Kelley (1973) 9 Cal.3d 1, 10-11, 106 Cal.Rptr. 761, 767.
- 34 The staff analysis is contained in an undated document prepared for the Committee hearing scheduled for April 24, 1984.
- 35 "When determining the legislative purpose behind a statutory amendment, courts may properly rely not only upon its legislative history but also upon committee reports." (Smith v. Rhea (1977) 72 Cal.App.3d 361, 369, 140 Cal.Rptr. 116, 120.)
- "
- "Statements in a report of a legislative committee concerning the object and purposes of a proposed amendment which parallel a reasonable interpretation of the amendment should be followed." (Beltone Electronics Corp. v. Superior Court (1978) 87 Cal.App.3d 452, 455, 151 Cal.Rptr. 109, 110, footnote 1.)
- 36 Mazza v. Austin (1938) 25 Cal. App. 2d 85, 76 P. 2d 533; Marrujo v. Fidelity and Casualty Co. (1977) 71 Cal.App.3d 972, 138 Cal.Rptr. 220.
- 37 Select Base Materials, Inc. v. Board of Equalization (1959) 51 Cal.2d 640, 335 P.2d 672; Moyer v. Workmans' Compensation Appeals Board (1973) 10 Cal.3d 268, 110 Cal.Rptr. 144.
- 38 City of San Marcos v. California Com'n, Dept. of Transp. (1976) 60 Cal.App.3d 383, 405, 131 Cal.Rptr. 804, 818.
- 39 Both section 260.10 of Title 40 of the Code of Federal Regulations and section 66193 of Title 22 of the California

Code of Regulations define "sludge" to mean:

"any solid, semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant or air pollution control facility exclusive of the treated effluent from a waste-water treatment plant."

40 We note the possibility that provisions numbers 2 and 3 of Challenged Document 2 may have been intended to describe only those sludges and earthen liners which contain liquid hazardous wastes or hazardous wastes containing free liquids. However, if so, this is not reflected in the words chosen in these provisions and OAL is obligated to make its determination based on the provisions as they are in fact worded.

41 Section 264.228, subdivision (a), of Title 40 of the Code of Federal Regulations provides in part:

"At closure, the owner or operator must:

(1) Remove or decontaminate all waste residues, contaminated containment system components (liners, et.), contaminated subsoils, and structures and equipment contaminated with waste and leachate, and manage them as hazardous waste unless section 261.3 (d) of this chapter applies; or

(2)(i) Eliminate free liquids by removing liquid wastes or solidifying the remaining wastes and waste residues;

. . . ."

Sections 67288 and 67316 of Title 22 of the California Code of Regulations have similar provisions which state:

"(a) Except as provided in subsection (b) of this section, at closure, the owner or operator shall remove or decontaminate all waste residues, contaminated containment system components (liners, etc.), contaminated subsoils and structures and equipment contaminated with waste and leachate . . . and manage them as hazardous waste. If hazardous constituents from contaminated subsoil at the facility can pose a significant hazard to public health or environmental quality by moving through soil or emitting toxic or flammable gas or vapor, and cannot reasonably be expected to decompose to a form that is not hazardous material, before closing the facility the operator shall remove all subsoil which contains waste contaminants."

"(b) If it is demonstrated to the satisfaction of the Department that nonliquid hazardous waste or contaminated subsoil can remain at a closed surface impoundment without posing a significant hazard to water quality, public health, . . . the operator may leave such material at the surface impoundment . . . if the operator stabilizes it or mixes it with soil, so that it will not: . . . drain the liquid it contains under conditions it will encounter during and after closure . . . In such a case, the operator may close the site . . . if the operator demonstrates to the satisfaction of the Department that such material will decompose to a form that is [not hazardous]. Otherwise, the operator shall compact the liner material, settled solids, precipitate and other solids containing hazardous waste of hazardous material and shall:

(1) Eliminate free liquids by removing liquid wastes or solidifying the remaining wastes and waste residues;

. . . . "

42 See the 1987 OAL Determination No. 16 (Board of Behavioral Science Examiners, December 4, 1987, Docket No. 87-005) California Regulatory Notice Register 88, No. 1-Z, January 1, 1988, pp. 73-79, n. 20, wherein the background to the use of forms by state government is discussed, including the legislative history of the APA forms provision, pertinent case law and legislative intent.

43 The following provisions of law may also permit rulemaking agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:

- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally

throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.) The Determination Index, as well as an order form for purchasing copies of individual determinations, is available from OAL, 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8 473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$50.

44 We wish to acknowledge the substantial contribution of Unit Legal Assistant Annemarie H. Starr in the preparation of this Determination.