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SECRETARY OF STATE
OF CALIFORNIA

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by J. H. Baxter & Company regarding standards used by the State Water Resources Control Board and the Regional Water Quality Control Board, North Coast Region, in administering the "Toxic Pits Cleanup Act"[1]	1990 OAL Determination No. 1 [Docket No. 89-007] January 22, 1990 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2

Determination by:

JOHN D. SMITH
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney
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Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not certain standards used by the State Water Resources Control Board and the Regional Water Resources Control Board, North Coast Region, in administering the "Toxic Pits Cleanup Act" constitute "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the challenged standards are not "regulations" required to be adopted in compliance with the Administrative Procedure Act.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested[3] to determine[4] whether or not certain standards used by the State Water Resources Control Board and the Regional Water Resources Control Board, North Coast Region, are "regulations" required to be adopted pursuant to the Administrative Procedure Act.[5]

THE DECISION [6,7,8,9,10]

OAL finds that:

(1) standards adopted by the Water Resources Control Board and the Regional Water Resources Control Boards are generally required to be adopted pursuant to the Administrative Procedure Act ("APA");

(2) the standards adopted by the Boards--i.e., pertaining to the meaning of the terms "discharge" and "free liquids" with respect to the application of the Toxic Pits Cleanup Act--do not fall within the meaning of a "regulation" as defined in Government Code section 11342, subdivision (b); and

(3) therefore, the standards do not violate Government Code section 11347.5, subdivision (a).

REASONS FOR DECISION

I. AGENCY; AUTHORITY; BACKGROUND

Agency

The State Water Resources Control Board (the "State Board") and the California Regional Water Quality Control Boards (the "Regional Boards") are "the principal state agencies with primary responsibility for the coordination and control of water quality. . . ."[11] The State Board sets policy for and coordinates the statewide program for water quality control for all the waters of the state.[12],[13] A Regional Board administers the statewide program for water quality control within each of the State's nine designated geographical regions.[14],[15] The State Board and the Regional Boards are in the Resources Agency,[16] a part of the executive branch of the State government.

Authority [17]

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 Control 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 under which permits or licenses to appropriate water are issued, denied, or revoked or under which the functions of <u>water pollution and quality control</u> 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."

Water Code section 13222 provides:

> "Pursuant to such guidelines as the state board may establish, each regional board shall adopt regulations

to carry out its powers and duties under [Division 7 WATER QUALITY]."

Background

To facilitate better understanding of the issues presented in this determination, we set forth the following facts.

In 1984, the Legislature enacted the Toxic Pits Cleanup Act of 1984 ("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.[18] The Legislature also found (1) 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, leachate[19] collection, and leak detection and (2) that synthetic liners, clay liners, and combinations thereof impeded, but did not eliminate, leachate from surface impoundments migrating into the surrounding environment.[20] The Act established a program intended to insure that existing surface impoundments were either made safe or were closed.[21]

J. H. Baxter & Company ("Requester") owns and operates a wood preserving facility located within the territorial jurisdiction of the Regional Water Resources Control Board, North Coast Region ("Regional Board").[22] By notice, dated May 27, 1987, the Requester was asked to pay fees under the TPCA for certain containment units on its premises. The Requester paid the fees under protest and thereafter submitted a letter to the Regional Board outlining reasons why TPCA should not apply. The Requester's letter was the subject of an "Interoffice Communication," dated October 8, 1987, between members of the Regional Board staff.[23] That memorandum was released to the Requester approximately seven months later in connection with a Cease and Desist Order issued on June 23, 1988.

The "Interoffice Communication" stated in part:

> "A June 16, 1987 memorandum from Jennings to Vaughn re Riverbank discusses the applicability of TPCA to pits which have not directly received discharges after the enactment of TPCA. Jennings indicates that the term discharge encompasses the continuing effects of past disposal practices where wastes remained in the impoundment after the enactment of TPCA:

"'In his letter, Captain Jarvis claims that TPCA is not a retroactive statute. Section 11 of the Health and Safety Code, however, states that the use of the present tense in the code ". . . includes the past and future tenses. . . ." Thus, it appears that the term "discharge" is intended to apply to past acts. It is not necessary to determine whether the statute has retroactive effect, however, because the term "discharge" encompasses the continuing effects of past disposal practices.'

". . .

"It is not necessary that the free liquids be hazardous wastes themselves, merely free liquids in contact with hazardous wastes. (In fact, the free liquids probably are hazardous in themselves, once rainwater has solubilized some of the waste solids.) Further in a memorandum of March 24, 1987 from Jennings to Gold re Brown & Bryant, the discussion involves the applicability of TPCA to a surface impoundment containing solid hazardous waste as soon as the impoundment receives water from precipitation or infiltration:

"'Your letter states that rainfall entering the impoundments did not constitute "free liquids" under TPCA because it never combined with the solid hazardous wastes contained therein. "Free liquids" are defined in Section 25208.2(i) as "liquids which readily separate from the solid portion of a hazardous waste under ambient temperature and pressure." Thus, it is clear that the liquid need not be at a hazardous level to constitute a "free liquid." In fact, in the memorandum you cite in support of your argument, Edward C. Anton clearly states that rainfall into a surface impoundment does cause application of TPCA:

"'"'Discharge' means to place, dispose, <u>or store</u> 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" . . . . This definition means that a surface impoundment containing hazardous liquid wastes, or hazardous waste containing free liquids, which were not hazardous when initially discharged, but became hazardous due to evaporation, is covered by the TPCA when the wastes reach hazardous levels. Similarly, <u>a surface</u>

> impoundment containing solid hazardous waste is covered by TPCA as soon as it receives water from precipitation or infiltration, flooding, etc. This means that a surface impoundment that is being closed (i.e., that is not receiving additional wastes), but that contains residual solid hazardous wastes, must comply with the TPCA as soon as it receives a liquid. For example, a surface impoundment that is not receiving discharges but contains residual solid hazardous wastes is subject to the TPCA when liquid enters it.' [Emphasis in original; footnote omitted.]

"While it is theoretically possible that a solid hazardous waste would be totally insoluble and therefore incapable of combining in any way with rainwater, that possibility would be remote and difficult to prove. According to the State Water Resources Control Board's technical staff, solid hazardous wastes, when in contact with rainwater, will combine to some degree. In addition, the head created by the water will cause downward migration. Thus, as a general rule, the State Board has concluded that a surface impoundment containing solid hazardous waste is covered by TPCA 'as soon as it receives water from precipitation.' In the absence of clear evidence that the solid waste contained in Brown & Bryant's impoundments is insoluble and did not combine with rainwater since the effective date of TPCA, I conclude that the rainfall did become free liquid within the meaning of the Act." [Emphasis added; footnote omitted.][24]

On April 12, 1989, the Requester (through counsel) submitted a Request for Determination to OAL. The Requester argues that "the memorandum released to [him] indicates that the Regional Board has adopted through the use of internal memoranda certain standards or policies that it is applying generally in the administration of TPCA." Specifically, the Requester objects to the expanded definition of two key terms under TPCA--"discharge" and "free liquids."[25] The Requester asks that OAL find that these standards (used by both the State Board and the Regional Board in administering TPCA) constitute "regulations" as defined in the APA.

II. ISSUES

Before turning to the dispositive issues of this Determination, we shall address the contentions raised in the Regional Board's Response concerning limitations on the

Request for Determination and the exercise of quasi-judicial power.

Limitations on the Request for Determination

The Regional Board points out that the only memorandum that has been provided to OAL is the "Interoffice Communication," dated October 8, 1987, which was submitted with the Request for Determination. The Regional Board notes that even if the Requester had subsequently provided OAL with additional memoranda from the State Board or the Regional Board, such additional memoranda would not be subject to review under the present Request for Determination.[26]

The Regional Board apparently views the present Request as one which seeks a Determination as to whether or not the "Interoffice Communication" is a "regulation" under the APA.[27] The Request, however, is not so narrow. The Request stated:

> "[Requester] seeks a determination by [OAL] that certain standards used by [the State Board] and the [Regional Board] in administering the [TPCA] . . . constitute regulations as defined in the [APA], ... Specifically, the Boards have improperly expanded the definition of two key terms under TPCA: 'discharge' and 'free liquids.'" [Footnotes omitted; emphasis added.][28]

The Requester did not simply challenge the Regional Board's "Interoffice Communication," but instead challenged standards used by both the State Board and the Regional Board which are in part reflected by that memorandum. As the Request for Determination was submitted under penalty of perjury, we resolve any doubts in favor of the Requester and will assume for purposes of this Determination that the standards described by the Requester do exist and are being used by the State Board and the Regional Board in administering TPCA.

Quasi-judicial Action

The Regional Board contends that the "Interoffice Communication," did not stem from the exercise of its quasi-legislative powers and thus is not subject to OAL review. It characterizes the "Interoffice Communication" as "an internal analysis of the case, which was one of the components leading to . . . [quasi-judicial] action."[29] According to the Regional Board:

> "[T]he memorandum contained an analysis of the specific factual circumstances at the site and constitutes one

> staff member's efforts to apply the law to the facts. The Regional Board could have disagreed with the staff's analysis and application to the facts, and, had [the Requester] appealed this matter to the State Board or to the court, it may have convinced either of those bodies to find for [the Requester]." [Footnotes omitted.][30]

We agree that the "Interoffice Communication" directly addressed the Requester's claim that his containment units were not subject to TPCA. That memorandum responded to the specific issues raised in the Requester's letter to the Regional Board. In doing so, however, the memorandum referred to general rules apparently followed by both the State Board and the Regional Board.

For instance, the referred to "memorandum of March 24, 1987 from Jennings to Gold re Brown & Bryant" indicates that the State Board, as a general rule, concludes that a surface impoundment containing solid hazardous waste is covered by TPCA as soon as it receives rainwater. The "Interoffice Communication," in turn, reflects that the Regional Board follows that view.

In the words of the Regional Board:

> "The ['Interoffice Communication'] concludes that, under TPCA, a 'discharge' of liquid hazardous wastes or hazardous wastes containing free liquids to a surface impoundment may occur even though new hazardous wastes are not placed in the impoundment after the effective date of TPCA. The memorandum also states that 'free liquids' may constitute rainwater which mixes with solid hazardous waste." [Footnotes omitted; emphasis added.][31]

While the application of the above-stated standards ("challenged rules") to the facts reflected in the "Interoffice Communication" may be quasi-judicial in nature,[32] the establishment of the standards themselves is unquestionably a quasi-legislative act.[33]

We now proceed with our Determination by turning to the three main issues before us:[34]

(1) WHETHER THE APA IS APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE STATE AND REGIONAL BOARDS.

(2) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(3) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE STATE AND REGIONAL BOARDS.

The APA generally applies to all state agencies, except those in the "judicial or legislative departments."[35] Since neither the State Board nor the Regional Board is in the judicial or legislative branch of state government, we conclude that APA rulemaking requirements generally apply to both Boards.[36]

In addition, Title 23, California Code of Regulations, section 649, subsection (a) and section 649.1, concerning rulemaking proceedings by the State and Regional Boards, specifically require "regulations" to be adopted pursuant to the APA:

> "649. Scope.
>
> > "(a) 'Rulemaking proceedings' shall include any hearings designed for the adoption, amendment, or repeal of any rule, regulation, or standard of general application, which implements, interprets or makes specific any statute enforced or administered by the State and Regional Boards."[37] [Emphasis added.]
>
> "649.1. Rulemaking Proceedings.
>
> > "Proceedings to adopt regulations, including notice thereof, shall, as a minimum requirement, comply with all applicable requirements established by the Legislature (Government Code Section 11340, et seq.) [the APA]. This section is not a limitation on additional notice requirements contained elsewhere in this chapter." [Emphasis added.]

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "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, 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 [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 challenged rule either

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

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

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

The answer to the first part of the inquiry is "yes." 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.[38] As previously discussed, the "Interoffice Communication" is directed to the Requester. However, the challenged rule contained therein--i.e., (1) discharge" of hazardous waste containing free liquids can occur even though no new hazardous wastes has been placed in the surface impoundment after the effective date of TPCA and (2) "free liquids" may constitute rainwater which mixes with hazardous wastes--is generally applicable. The two-part challenged rule is meant to apply to all surface impoundments subject to TPCA.

The answer to the second part of the inquiry, however, is "no."

In its Response to the Request for Determination, the Regional Board asserts that even assuming the "Interoffice Communication" constitutes a quasi-legislative action, OAL has already concluded that the memorandum's analysis of the terms "discharge" and "free liquids" are the only tenable interpretations possible and thus do not constitute a "regulations." The Regional Board cites to 1988 OAL Determination No. 15 ("1988 OAL D-15")[39] in support of that claim.

"DISCHARGE"

In 1988 OAL D-15, OAL was asked to determine, among other things, whether or not a document which interpreted the term "cease discharge" with respect to the requirements under TPCA ("Challenged Document 1") was a "regulation" within the meaning of the APA. Challenged Document 1 stated in part:

> "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."[40]

In reaching our decision, we stated:

> "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.[41]
>
> > "'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.][42]
>
> "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.'[43] [Emphasis added.]

"Therefore, if the requirements in [TPCA] 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, [TPCA] 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.]
>
> ". . .
>
> "In determining whether Challenged Document 1 is interpreting, implementing, or making specific [TPCA], 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 clear from [an] 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 . . . that the Legislature intended [TPCA] to prevent contamination from such wastes whenever contained in existing surface impoundments.
>
> ". . .
>
> "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 [TPCA]. We conclude that Challenged Document 1 is not in violation of Government Code section 11347.5 because it includes this information."
>
> [Emphasis added.]

As we have previously concluded, TPCA was intended to prevent contamination of hazardous wastes whenever contained in existing surface impoundments. The notion that a "discharge" of liquid hazardous wastes or hazardous wastes

containing free liquids to a surface impoundment may occur even though no new hazardous wastes are placed in the impoundment after the effective date of TPCA is not novel; it reflects the only tenable interpretation of the law.[44] As such, it is not a "regulation" within the meaning of the APA

"FREE LIQUIDS"

The Regional Board argues that although the term "free liquids" was not specifically addressed in 1988 OAL D-15, that Determination nonetheless upheld a memorandum which interpreted that term in the same manner as the "Interoffice Communication." Since our previous Determination did not directly analyze that term, our review of the term will be one of first impression.

In evaluating whether the State and Regional Board's explanation of "free liquids"--i.e., that rainwater which mixes with solid hazardous waste may constitute free liquids--is an interpretation or a restatement of the law, we turn to the rules of statutory construction.

It is well recognized that when the language of a statute is clear and unambiguous, there is no need for statutory interpretation. 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.'"[45] [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.]"[46] [Emphasis added.]

With respect to meaning of the term "free liquids" as used in Health and Safety Code Sections 25208.4 and 25208.5, we look first to the language in TPCA itself. The operative provisions of TPCA 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 <u>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</u>. It is the intent of the Legislature, in enacting this article, to <u>establish a program that will ensure that existing surface impoundments are either made safe or are closed</u>, 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.]

As concluded in 1988 OAL D-15, this express declaration shows that the Legislature intended TPCA to prevent contamination from liquid hazardous wastes or hazardous wastes containing free liquids <u>whenever</u> contained in existing surface impoundments. That finding guides our analysis of the term "free liquids."

Neither the State Board nor the Regional Board has adopted the view that rainwater falling into a surface impoundment, by itself, constitutes a free liquid. Instead, the Boards indicate that rainwater falling into a surface impoundment

becomes a "free liquid" only if it mixes with solid hazardous wastes contained therein. The obvious concern caused by such a mixture is the possibility of downward migration of hazardous wastes resulting in the contamination of drinking water.[47] It is unquestionable that the Legislature had this concern in mind when prohibiting the discharge of hazardous wastes or hazardous wastes containing free liquids whenever contained in existing surface impoundments.

Health and Safety Code section 25208.2, subdivision (i), states:

> "'Free liquids' means liquids which readily separate from the solid portion of a hazardous waste under ambient temperature and pressure."[48]

While we lack scientific knowledge in this area, it seems apparent to us that rainwater which mixes with hazardous waste could be readily separated from the solid portion of the hazardous waste under ambient temperature and pressure. Such rainwater, therefore, would constitute a "free liquid" under Health and Safety Code section 25208.2, subdivision (i).

This view is entirely consistent with the Legislative intent behind TPCA. In our opinion, any other interpretation of the term "free liquids" would be contrary to the letter and spirit of TPCA.[49]

WE THEREFORE CONCLUDE THAT THE CHALLENGED DEFINITIONS FOR "DISCHARGE" AND "FREE LIQUIDS" ARE NOT "REGULATIONS" AND THUS ARE NOT SUBJECT TO THE REQUIREMENTS OF THE APA.

In light of this conclusion, it is unnecessary for OAL to reach the issue of whether the challenged rules fall within any established exception to APA requirements.

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) standards adopted by the Water Resources Control Board and the Regional Water Resources Control Boards are generally required to be adopted pursuant to the Administrative Procedure Act ("APA");

(2) the standards adopted by the Boards--i.e., pertaining to the meaning of the terms "discharge" and "free liquids" with respect to the application of the Toxic Pits Cleanup Act--do not fall within the meaning of a "regulation" as defined in Government Code section 11342, subdivision (b); and

(3) therefore, the standards do not violate Government Code section 11347.5, subdivision (a).

DATE: January 22, 1990

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1. The Request for Determination was filed by Kenneth Sylva, Esq., of Weintraub, Genshlea, Hardy, Erich & Brown (2535 Capitol Oaks Drive Sacramento, California 95833, (916) 648-9400) on behalf of J. H. Baxter & Company. The Regional Water Resources Control Board, North Coast Region, was represented by Elizabeth Miller Jennings, Senior Staff Counsel at the State Water Resources Control Board, (Paul R. Bonderson Building, 901 P Street, P.O. Box 100 Sacramento, California 95801, (916) 322-3405. The State Water Resources Control Board (taking the position that it is not a party to the present Determination) was not represented.

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.

   In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

   Since August 1989, the following authorities have come to light:

   > Los Angeles v. Los Olivas Mobile Home P. (1989) 213 Cal.App.3d 1427, 262 Cal.Rptr. 446, 449, citing Jones v. Tracy School Dist. (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved) the Second District Court of Appeal refused to defer to the administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in an internal memorandum rather than in an administrative regulation adopted after notice and hearing.

   Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations

Index.) Readers are also encouraged to submit citations to California Attorney General opinions addressing APA compliance issues.

3. Government Code section 19572 provides:

> "Each of the following constitutes cause for discipline of [a state] employee:
>
> ". . . .
>
> "Unlawful retaliation against any other state officer or employee or member of the public who in good faith reports, discloses, divulges, or otherwise brings to the attention of, the Attorney General, or any other appropriate authority, any facts or information relative to actual or suspected violation of the law of this state or the United States occurring on the job or directly related thereto." [Emphasis added.]

4. Title 1, California Code of Regulations ("CCR") (formerly known as California Administrative Code), section 121, subsection (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 [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

5. Government Code section 11347.5 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.]

6. 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, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

7. 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 on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) 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 and to permit OAL to devote its resources to analysis of truly contested issues.

On October 30, 1989, attorney Kenneth Sylva submitted a public comment on behalf of J. H. Baxter & Company entitled "Supplement to Request for Determination." The Response of the North Coast Regional Water Quality Control Board, was received on November 13, 1989.

Both the Supplement and Response were considered in rendering this Determination.

8. 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, subd. (b)) 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.)

9. 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 the first page of this Determination.

10. 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.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for $3.00.

11. Water Code section 13001.

12. "'Waters of the state' means any water, surface or underground, including saline waters within the boundaries of the state." Water Code section 13050, subdivision (e).

13. Water Code sections 13000, 13140.

14. See Water Code section 13000.

15. Water Code section 13200.

16. Water Code section 13100, Government Code section 12805.

17. 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. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public 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.)

18. Health and Safety Code section 25208.1, subdivisions (a) and (b).

19. 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.]

20. Health and Safety Code section 25208.1, subdivisions (c) and (d).

21. Health and Safety Code section 25208.1, subdivision (e).

22. Water Code section 13200, subdivision (a), provides:

> "North Coast region . . . comprises all basins including Lower Klamath Lake and Lost River Basins draining into the Pacific Ocean from the California-Oregon state line southerly to the southerly boundary of the watershed of Estero de San Antonio and Stemple Creek in Marin and Sonoma Counties."

23. The "Interoffice Communication," from Susan Warner to Frank Reichmuth and Bonnie Wolstoncroft, addressed the "[a]ssessment of the October 1, 1987, letter from Hayes re Baxter and applicability of TPCA."

24. "Interoffice Communication," pp. 2, 5-6.

25. As we were requested to review standards defining the terms "discharge" and "free liquids," our review of the "Interoffice Communication" was restricted to these matters. This Determination will not preclude the Requester from challenging in future requests any other standard or rule that may be reflected in the submitted memorandum.

26. Response, pp. 3-4.

27. Response, p. 1.

28. Request, p. 1.

29. Response, p. 6.

30. Response, p. 7.

31. Response, p. 8.

32. See Water Code sections 13301, 13320 and 13330.

33. "The California Supreme Court has stated that quasi-judicial actions are characterized by the application of rules to the peculiar facts of an individual case, while quasi-legislative actions involve the formulation of a general policy intended to govern future decisions. (Pacific Legal Foundation v. California Coastal Commission (1982) 33 Cal.3d 158, 168, 188 Cal.Rptr. 104.)" (Response, p. 6.)

34. 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); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

35. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

36. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

37. Subsection 649(a) specifically refers to regulations adopted to implement statutes administered by regional boards. In fact, a specific part of the CCR has been reserved for such regulations. For instance, Title 23, CCR, chapter 4, subchapter 1 is reserved for regulations adopted by the San Francisco Bay Regional Water Quality Control Board.

38. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

39. 1988 OAL Determination No. 15 (State Water Resources Control Board, September 2, 1988, Docket No. 87-021), CRNR 88, No. 38-Z, September 16, 1988, p. 3004.

40. 1988 OAL D-15, p. 8.

41. 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).

42. 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.

43. 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.

44. The New Jersey cases cited by the Requester do not support the claim that "a present release of liquid hazardous waste into a surface impoundment is a prerequisite to TPCA applicability." (Request, pp. 8-9; Supplement, pp. 5-6.) Those cases do not pertain to TPCA. Instead, they relate to the interpretation of the term "discharge" under New Jersey's 1976 "Spill Act" (N.J.S.A. 58:10-23.11, et seq., L. 1976, c. 141.)

The definition of "discharge" under the "Spill Act" is:

> ". . . any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State, or into waters outside the jurisdiction of the State, when damage may result to the lands, waters or natural resources within the jurisdiction of the State;"

The critical distinction between the Spill Act's definition of "discharge" and TPCA's definition of "discharge," lies in the omission of the word "storage." (We note that one of the cases cited by the Requester also pertains to New Jersey's Water Pollution Control Act of 1977 ("WPCA" - N.J.S.A. 58:10A-1 et seq., L. 1977, c. 74). The definition of "discharge under WPCA likewise lacks the word "storage.")

The Requester of 1988 OAL D-15 stated:

> "'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 <u>further</u> disposal of hazardous waste into the impoundment. . . ." [Emphasis added.] (1988 OAL D-15, p. 10)

In addition to the difference in New Jersey's (Spill Act) and California's (TPCA) statutory definition of the term "discharge," we further note the difference in the states' statutory schemes. The Spill Act states in part:

> "The Legislature finds and declares that the discharge of petroleum products and other hazardous substances within or outside the jurisdiction of this State constitutes a threat to the economy and environment of this State. <u>The Legislature intends by the passage of this act to exercise the powers of this State to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances, by requiring the prompt containment and removal of such pollution and substances</u>, and to provide a fund for swift and adequate compensation to resort businesses and of certain persons under contract with the State or federal government for claims or actions resulting from the provision of services to mitigate or clean up a release or discharge of hazardous substances." [Emphasis added.] (N.J.S.A. 58:10-23.11a.)

The Legislative intent behind the Spill Act differs from that of TPCA. With respect to TPCA, we have previously indicated on page 12 of 1988 OAL D-15 that, the Legislature declared its intent to prevent contamination from hazardous wastes and hazardous wastes containing free liquids <u>whenever</u> contained in existing surface compounds." [Emphasis added.] The same cannot be said with respect to the New Jersey Spill Act.

45. <u>Friends of Mammoth v. Board of Supervisors of Mono County</u> (1972) 8 Cal.3d 247, 259, 104 Cal.Rptr. 761, 769.

46. <u>Tyrone v. Kelley</u> (1973) 9 Cal.3d 1, 10-11, 106 Cal.Rptr. 761, 767.

47. The Requester argues that the Regional Board has expanded the above-quoted definition to include rainfall if it comes into contact with contaminated soil. The Requester asserts that the effect of that interpretation is that the discharge of solid hazardous waste would now trigger jurisdiction under TPCA, a result not intended by the Legislature. We must disagree.

As reflected in Health and Safety Code section 25208.1, a principal purpose of TPCA is to prevent the migration of hazardous waste to drinking water supplies. Accordingly, TPCA prohibits the discharge of liquid hazardous wastes or hazardous wastes containing free liquids. It is true that the statutory language does not prohibit the discharge of solid hazardous waste itself. However, as the Legislature was concerned with the downward migration of such waste into drinking water supplies, and since no such migration could have occurred without a liquid median, it was not necessary to specifically preclude the discharge of solid hazardous waste. As noted by the Regional Board, the use of the terms "liquid hazardous waste" and "hazardous wastes containing free liquids" indicates that the free liquids do not themselves need to be a hazardous waste. It is sufficient that the free liquid be soluble with hazardous waste in order to trigger coverage under TPCA.

48. Title 23, California Code of Regulations, section 2601, defines "free liquid" as follows:

> " . . . liquid which readily separates from the solid portions of waste under ambient temperature and pressure. Free liquids are not present when a 100 milliliter representative sample of the waste can be completely retained in a standard 400 micron conical point filter for 5 minutes without loss of any portion of the waste from the bottom of the filter (or an equivalent test approved by DHS)"

49. Our independent research for case authority pertaining to the term "free liquids" disclosed the federal district court case of U.S. EPA v. Environmental Waste Control, Inc. (N.D.Ind. 1989) 710 F.Supp. 1172. Although neither the Requester nor the Regional Board cited to U.S. EPA, we shall nonetheless discuss that case for the sake of thoroughness.

U.S. EPA arose from an action brought by the Environmental Protection Agency against owners and operators ("EWC") of a hazardous waste disposal site for violations of the Resource Conservation and Recovery Act ("RCRA") and its implementing regulations. The court in U.S. EPA declared, "[t]he case involves several issues of law on which no court has ruled before." (Id., at p. 1178.) One of the numerous claims against EWC was that EWC's landfill received many loads containing free liquids in violation of 42 U.S.C. section 6924, subdivision (c) and 40 C.F.R. section 265.314, subsections (b) and (c). Both the federal statute and the regulation prohibited the placement of bulk or noncontainerized liquid hazardous waste or free liquids containing hazardous waste (whether or not adsorbents have been added) in any landfill after November 8, 1985. The facts

of the case showed that uncontainerized rainwater falling into truck beds carrying hazardous wastes had been placed in the landfill after that date. The facts also revealed that there was some evidence that the landfill's handling of the rainwater was found to be acceptable by EPA.

In finding in favor of EWC on this claim, the court stated:

> ". . . although neither the statute nor the regulation would seem to allow landfills to accept non-containerized free liquids after November 8, 1985 (and Mr. Foster testified to events that occurred in 1988), the meaning of 'free liquids' presents some ambiguity. 40 C.F.R. [section] 260.10 defines 'free liquids' as liquids which readily separate from the solid portion of a waste under ambient temperature and pressure. That rainwater in the bed of a truck transporting hazardous waste constitutes a 'free liquid' is not readily apparent from that definition. The statement of an unidentified mid-level EPA official is hardly entitled to the full weight of the deference a court is to pay to the interpretation of a statute or regulation by the agency charged with its enforcement . . . but the EPA offered no challenge to that construction.
>
> "In light of the ambiguity of the regulation defining 'free liquids' and the slight evidence concerning the EPA's interpretation of that term as excluding rainwater in truckbeds to the extent 42 U.S.C. [section] 6924(c) and 40 C.F.R. [section] 265.314(b) otherwise would forbid a hazardous waste facility from accepting such loads after November 8, 1985, the court concludes that [it] has not [been] shown that EWC violated these provisions by accepting such truckloads in 1988."
>
> [Emphasis added.] (Id., at p. 1239.)

We note that the definition for "free liquids" in 40 C.F.R. section 260.10 is identical to that contained in Health and Safety Code section 25208.2, subdivision (i). We also note that rainwater falling into the bed of a truck transporting hazardous waste appears to be analogous to rainwater falling into containment units holding hazardous wastes. At first blush, therefore, it would seem that the holding in U.S. EPA is directly applicable to the present Determination--i.e., as evidence of a possible interpretation that rainwater which mixes with solid hazardous waste does not constitute "free liquids" under TPCA. On closer examination, however, we find that U.S. EPA is inapposite.

As indicated on pages 14 and 15 of the Determination, the definition of "free liquids" must be construed with reference to the entire statutory scheme of which it is a part. (Bowland v. Municipal Court (1976) 18 Cal.3d 479, 489.)

Although U.S. EPA hinted at a possible interpretation of "free liquids" which differs from that followed by the State and Regional Boards, that court had viewed the term under RCRA, not TPCA. The fact that the definition of "free liquids" under both schemes is identical, therefore, is not determinative.

Some differences between the two statutory schemes are apparent. For instance, 40 C.F.R. section 260.10 (cited in U.S. EPA to analyze RCRA provisions) states in part:

> "'Discharge' or 'hazardous waste discharge' means the accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of hazardous waste into or on any land or water."

The TPCA definition of "discharge" is:

> ". . . to place, dispose of, or store liquid hazardous wastes or hazardous wastes containing free liquids into or in a surface impoundment . . ." [Emphasis added.] (Health and Safety Code section 25208.2, subdivision (f).)

Only the TPCA definition contains the word "store." As indicated in 1988 OAL D-15, the word "store" in the definition of "discharge" is significant to the meaning of TPCA--i.e., that it prohibits against all present and future discharges of hazardous wastes and hazardous wastes containing free liquids. (The RCRA statute and related regulation (42 U.S.C. section 6924(c) and 40 C.F.R. section 265.314(b)) analyzed in U.S. EPA did not prohibit the "discharge" of liquid hazardous wastes and hazardous wastes containing free liquids into surface impoundments; they prohibited the "placement" of free liquids into landfills.)

Another notable distinction between RCRA and TPCA is recognized in the introductory provision of TPCA itself. Health and Safety Code section 25208.1 provides:

> "The Legislature finds and declares as follows: . . .
>
> "(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. . . ."

Such a statement implies that TPCA was intended to be more stringent than RCRA. It also reflects that the legislative intent behind TPCA was different from that of RCRA.

Since U.S. EPA dealt with the interpretation of "free liquids" under RCRA instead of TPCA, application of that decision to the present Determination would be inappropriate. We give that case no weight.

50. We wish to acknowledge the substantial contribution of Unit Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.