

UNIVERSITY OF CALIFORNIA

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April 3, 1987

DIRECTOR ROGIN *11/4/87*

Coordination & Review

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RECEIVED

Proposition 65, the Safe Drinking Water and Toxic Enforcement Act, was passed by California voters in last November's election. While the Act is not generally applicable to the University, Section 4 of the Act establishes reporting requirements that do affect University employees. The Act adds Section 25180.7 to the Health and Safety Code, subjecting "designated employees," as defined by the Political Reform Act, to these reporting requirements (although the matter is not a conflict of interest issue).

A copy of the Act is enclosed. By virtue of being a designated employee, you are subject to the reporting requirements specified in Section 4 of the Act. Please read Section 4 carefully so that you are aware of its requirements.

Also enclosed, for your information, is a copy of a January 13, 1987 communication from General Counsel Holst to Assistant Vice President Lewis, which comments on the reporting requirements of the Act.

R. W. Brady
Ronald W. Brady

Enclosures

**SAFE DRINKING WATER AND TOXIC
ENFORCEMENT ACT OF 1986**

SECTION 1. The people of California find that hazardous chemicals pose a serious potential threat to their health and well-being, that state government agencies have failed to provide them with adequate protection, and that these failures have been serious enough to lead to investigations by federal agencies of the administration of California's toxic protection programs. The people therefore declare their rights:

(a) To protect themselves and the water they drink against chemicals that cause cancer, birth defects, or other reproductive harm.

(b) To be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm.

(c) To secure strict enforcement of the laws controlling hazardous chemicals and deter actions that threaten public health and safety.

(d) To shift the cost of hazardous waste cleanups more onto offenders and less onto law-abiding taxpayers.

The people hereby enact the provisions of this initiative in furtherance of these rights.

SECTION 2. Chapter 6.6 (commencing with Section 25249.5) is added to Division 20 of the Health and Safety Code, to read:

CHAPTER 6.6.

**SAFE DRINKING WATER AND TOXIC
ENFORCEMENT ACT OF 1986**

25249.5. Prohibition On Contaminating Drinking Water With Chemicals Known to Cause Cancer or Reproductive Toxicity. No person in the course of doing business shall knowingly discharge or release a chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water, notwithstanding any other provision or authorization of law except as provided in Section 25249.9.

25249.6. Required Warning Before Exposure To Chemicals Known to Cause Cancer Or Reproductive Toxicity. No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.

25249.7. Enforcement.

(a) Any person violating or threatening to violate Section 25249.5 or Section 25249.6 may be enjoined in any court of competent jurisdiction.

(b) Any person who has violated Section 25249.5 or Section 25249.6 shall be liable for a civil penalty not to exceed \$2500 per day for each such violation in addition to any other penalty established by law. Such civil penalty may be assessed and recovered in a civil action brought in any

court of competent jurisdiction.

(c) Actions pursuant to this section may be brought by the Attorney General in the name of the people of the State of California or by any district attorney or by any city attorney of a city having a population in excess of 750,000 or with the consent of the district attorney by a city prosecutor in any city or county having a full-time city prosecutor, or as provided in subdivision (d).

(d) Actions pursuant to this section may be brought by any person in the public interest if (1) the action is commenced more than sixty days after the person has given notice of the violation which is the subject of the action to the Attorney General and the district attorney and any city attorney in whose jurisdiction the violation is alleged to occur and to the alleged violator, and (2) neither the Attorney General nor any district attorney nor any city attorney or prosecutor has commenced and is diligently prosecuting an action against such violation.

25249.8. List Of Chemicals Known to Cause Cancer Or Reproductive Toxicity.

(a) On or before March 1, 1987, the Governor shall cause to be published a list of those chemicals known to the state to cause cancer or reproductive toxicity within the meaning of this chapter, and he shall cause such list to be revised and republished in light of additional knowledge at least once per year thereafter. Such list shall include at a minimum those substances identified by reference in Labor Code Section 6382(b)(1) and those substances identified additionally by reference in Labor Code Section 6382(d).

(b) A chemical is known to the state to cause cancer or reproductive toxicity within the meaning of this chapter if in the opinion of the state's qualified experts it has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive toxicity, or if a body considered to be authoritative by such experts has formally identified it as causing cancer or reproductive toxicity, or if an agency of the state or federal government has formally required it to be labeled or identified as causing cancer or reproductive toxicity.

(c) On or before January 1, 1989, and at least once per year thereafter, the Governor shall cause to be published a separate list of those chemicals that at the time of publication are required by state or federal law to have been tested for potential to cause cancer or reproductive toxicity but that the state's qualified experts have not found to have been adequately tested as required.

(d) The Governor shall identify and consult with the state's qualified experts as necessary to carry out his duties under this section.

(e) In carrying out the duties of the Governor under this section, the Governor and his designates shall not be considered to be adopting or amending a regulation within the meaning of the Administrative Procedure Act as defined in Government Code Section 11370.

25249.9. Exemptions from Discharge Prohibition.

(a) Section 25249.5 shall not apply to any discharge or release that takes place less than twenty months subsequent to the listing of the chemical in question on the list required to be published under subdivision (a) of Section 25249.8.

(b) Section 25249.5 shall not apply to any discharge or release that meets both of the following criteria:

(1) The discharge or release will not cause any significant amount of the discharged or released chemical to

diver toxicity into the consumer product in question.

25249.12 Implementation. The Governor shall designate a lead agency and such other agencies as may be required to implement the provisions of this chapter including this section. Each agency so designated may adopt and modify regulations, standards, and permits as necessary to conform with and implement the provisions of this chapter and to further its purposes.

25249.13 Preservation Of Existing Rights, Obligations, and Penalties. Nothing in this chapter shall alter or diminish any legal obligation otherwise required in common law or by statute or regulation, and nothing in this chapter shall create or enlarge any defense in any action to enforce such legal obligation. Penalties and sanctions imposed under this chapter shall be in addition to any penalties or sanctions otherwise prescribed by law.

SECTION 3. Subdivision (d) of Section 25189.5 of the Health and Safety Code is amended to read:

(d) The court shall also impose upon a person convicted of violating subdivision (b) or (c) a fine of not less than five thousand dollars (\$5,000) or more than ~~one hundred thousand dollars (\$50,000)~~ *one hundred thousand dollars (\$100,000)* for each day of violation except as further provided in this subdivision. If the act which violated subdivision (b) or (c) caused great bodily injury or caused a substantial probability that death could result, the person convicted of violating subdivision (b) or (c) may be punished by imprisonment in the state prison for up to 36 months, in addition to the term specified in subdivision (b) or (c), and may be fined up to two hundred fifty thousand dollars (\$250,000) for each day of violation.

SECTION 4. Section 25180.7 is hereby added to the Health and Safety Code as follows:

(a) Within the meaning of this section, a "designated government employee" is any person defined as a "designated employee" by Government Code Section 82019, as amended.

(b) Any designated government employee who obtains information in the course of his official duties revealing the illegal discharge or threatened illegal discharge of a hazardous waste within the geographical area of his jurisdiction and who knows that such discharge or threatened discharge is likely to cause substantial injury to the public health or safety must, within seventy-two hours, disclose such information to the local Board of Supervisors and to the local health officer. No disclosure of information is required under this subdivision when otherwise prohibited by law, or when law enforcement personnel have determined that such disclosure would adversely affect an ongoing criminal investigation, or when the information is already general public knowledge within the locality affected by the discharge or threatened discharge.

(c) Any designated government employee who knowingly and intentionally fails to disclose information required to be disclosed under subdivision (b) shall, upon conviction, be punished by imprisonment in the county

jail for not more than one year or by imprisonment in state prison for not more than three years. The court may also impose upon the person a fine of not less than five thousand dollars (\$5000) or more than twenty-five thousand dollars (\$25,000). The felony conviction for violation of this section shall require forfeiture of government employment within thirty days of conviction.

(d) Any local health officer who receives information pursuant to subdivision (b) shall take appropriate action to notify local news media and shall make such information available to the public without delay.

SECTION 5. Section 25192 of the Health and Safety Code is amended to read:

25192. (a) All civil and criminal penalties collected pursuant to this chapter or Chapter 6.6 (commencing with Section 25249.5) shall be apportioned in the following manner:

(1) Fifty percent shall be deposited in the ~~Hazardous Waste Control Account~~ *Hazardous Substance Account* in the General Fund.

(2) Twenty-five percent shall be paid to the office of the city attorney, city prosecutor, district attorney, or Attorney General, whichever office brought the action, or in the case of an action brought by a person under subdivision (d) of Section 25249.7 to such person.

(3) Twenty-five percent shall be paid to the department and used to fund the activity of the local health officers officer to enforce the provisions of this chapter pursuant to Section 25180. If investigation by the local police department or sheriff's office or California Highway Patrol led to the bringing of the action, the local health officer shall pay a total of forty percent of his portion under this subdivision to said investigating agency or agencies to be used for the same purpose. If more than one agency is eligible for payment under this provision, division of payment among the eligible agencies shall be in the discretion of the local health officer.

(b) If a reward is paid to a person pursuant to Section 25191.7, the amount of the reward shall be deducted from the amount of the civil penalty before the amount is apportioned pursuant to subdivision (a).

(c) Any amounts deposited in the Hazardous Substance Account pursuant to this section shall be included in the computation of the state account rebate specified in Section 25347.2.

SECTION 6. If any provision of this initiative or the application thereof is held invalid, that invalidity shall not affect other provisions or applications of the initiative which can be given effect without the invalid provision or application, and to this end the provisions of this initiative are severable.

SECTION 7. To further its purposes this initiative may be amended by statute, passed in each house by a two-thirds vote.

SECTION 8. This initiative shall take effect on January 1, 1987.

enter any source of drinking water.

(2) The discharge or release is in conformity with all other laws and with every applicable regulation, permit, requirement, and order.

In any action brought to enforce Section 25249.5, the burden of showing that a discharge or release meets the criteria of this subdivision shall be on the defendant.

25249.10 Exemptions from Warning Requirement.

Section 25249.6 shall not apply to any of the following:

(a) An exposure for which federal law governs warning in a manner that preempts state authority.

(b) An exposure that takes place less than twelve months subsequent to the listing of the chemical in question on the list required to be published under subdivision (a) of Section 25249.8.

(c) An exposure for which the person responsible can show that the exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer, and that the exposure will have no observable effect assuming exposure at one thousand (1000) times the level in question for substances known to the state to cause reproductive toxicity, based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for the listing of such chemical pursuant to subdivision (a) of Section 25249.8. In any action brought to enforce Section 25249.6, the burden of showing that an exposure meets the criteria of this subdivision shall be on the defendant.

25249.11 Definitions.

For purposes of this chapter:

(a) "Person" means an individual, trust, firm, joint

stock company, corporation, company, partnership, and association.

(b) "Person in the course of doing business" does not include any person employing fewer than ten employees in his business; any city, county, or district or any department or agency thereof or the state or any department or agency thereof or the federal government or any department or agency thereof; or any entity in its operation of a public water system as defined in Section 4010.1.

(c) "Significant amount" means any detectable amount except an amount which would meet the exemption test in subdivision (c) of Section 25249.10 if an individual were exposed to such an amount in drinking water.

(d) "Source of drinking water" means either a present source of drinking water or water which is identified or designated in a water quality control plan adopted by a regional board as being suitable for domestic or municipal uses.

(e) "Threaten to violate" means to create a condition in which there is a substantial probability that a violation will occur.

(f) "Warning" within the meaning of Section 25249.6 need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided that the warning accomplished is clear and reasonable. In order to minimize the burden on retail sellers of consumer products including foods, regulations implementing Section 25249.6 shall to the extent practicable place the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller, except where the retail seller itself is responsible for introducing a chemical known to the state to cause cancer or reproduc-

Please Refer to
File No.

January 13, 1987

ASSISTANT VICE PRESIDENT LOWELL N. LEWIS
Agriculture and Natural Resources

Re: Proposition 65 - Illegal Discharge of Hazardous
Waste - Reporting Obligation of Designated
Employees

Dear Lowell:

This responds to your memorandum of November 11, 1986, requesting our advice on those provisions of Proposition 65 adopted by the voters at the November general election which require reporting of hazardous waste discharges (Health & Saf. Code, § 25180.7).

1. The Reporting Requirement of Health and Safety Code
Section 25180.7

Section 25180.7 reads as follows:

"(a) Within the meaning of this section, a 'designated government employee' is any person defined as a 'designated employee' by Government Code section 82019, as amended.

"(b) Any designated government employee who obtains information in the course of his official duties revealing the illegal discharge or threatened illegal discharge of a hazardous waste within the geographical area of his jurisdiction and who knows that such discharge or threatened discharge is likely to cause substantial injury to the public health or safety must, within seventy-two hours, disclose such information to the local Board of Supervisors and to the local health officer. No disclosure of information is required under this subdivision when otherwise prohibited by law, or when law enforcement personnel have determined that such disclosure would adversely affect an ongoing criminal investigation, or when the information is already general public knowledge within the locality affected by the discharge or threatened discharge.

"(c) Any designated government employee who knowingly and intentionally fails to disclose information required to be disclosed under subdivision (b) shall, upon conviction, be punished by imprisonment in the county jail for not more than one year or by imprisonment in state prison for not more than three years. The court may also impose upon the person a fine of not less than five thousand dollars (\$5000) or more than twenty-five thousand dollars (\$25,000). The felony conviction for violation of this section shall require forfeiture of government employment within thirty days of conviction.

"(d) Any local health officer who receives information pursuant to subdivision (b) shall take appropriate action to notify local news media and shall make such information available to the public without delay."

2. What University Officials Are Subject to the Reporting Requirement?

Under subdivision (a) all University employees who are designated in the University's Conflict of Interest Code are subject to the reporting obligation of section 25180.7. Within the Division of Agriculture and Natural Resources, the persons holding the following positions are designated employees:

Vice President-Agriculture and Natural Resources;

Assistant Vice President-Agriculture and Natural Resources and Director-Agricultural Experiment Station;

Assistant Vice President and Director-Cooperative Extension;

Director-Administrative Services;

Director-Agricultural Field Stations;

Director-Natural Reserve System and Special Assistant to the Vice President;

County Directors; and

Manager-ANR Publications.

3. What Must Be Reported?

The measure provides reporting of: (1) "the illegal discharge or threatened illegal discharge" (2) "of a hazardous waste"

(3) where the designated official "knows that such discharge or threatened discharge is likely to cause substantial injury to the public health or safety"

A. What Is A Discharge?

This is one of the serious ambiguities in the measure. The substantive prohibitions of Proposition 65 deal with discharges into water or a source of drinking water. However, the language of the proposition does not limit the reporting requirements to discharges of a type which violate the substantive prohibitions. University Counsels Woods and Dorinson have recently attended an environmental law seminar sponsored by the law firm of Pillsbury, Madison & Sutro where Assemblywoman Sally Tanner indicated that legislation will be introduced to remedy some of the ambiguities and defects in the measure, and we hope that some clarification of the term "discharge" will be included. Until then, however, the most prudent course of action would be to assume that the term "discharge" includes all kinds of discharges, i.e., those into the air and onto the ground as well as into drinking water.

B. What Is An "Illegal Discharge"?

Here, again, the measure gives no indication as to whether the "illegal" discharges referred to are those made illegal by Proposition 65, or refer more broadly to discharges made illegal under other state and federal laws and regulations. Until this matter is clarified, it would also be prudent to assume that any discharge of a substance reasonably believed to be hazardous waste is illegal either by virtue of Proposition 65 or other federal or state law and should be reported unless it is clear the discharge is lawful.^{1/} The federal and state laws regulating

^{1/} The federal and state laws regulating the discharge of hazardous substances, and which generally require permits from regulatory agencies for discharges of hazardous materials into the air, land, or into water or a watercourse, are: (1) federal: (a) Clean Water Act (33 U.S.C. § 1151 et seq.), (b) Clean Air Act (42 U.S.C. § 7401 et seq.), (c) Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.), (d) Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 et seq.), (e) Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. § 135 et seq.), and (f) Rivers and Harbors Act (33 U.S.C. § 401 et seq.); (2) California: (a) Porter-Cologne Water Quality Control Act (Cal. Water Code, § 13000 et seq.), (b) Air Pollution Laws (Cal. Health & Saf. Code, § 42300 et seq.), (c) Hazardous Waste

hazardous materials and which are potentially implicated by the reporting obligation of Proposition 65 do not distinguish between an intentional or an inadvertent discharge, i.e., a discarding or a spill. Because Proposition 65 is concerned only with hazardous "waste" (see below), it would appear to require reporting only of intentional discharges. Here again, however, if there is doubt as to whether the discharge was intentional or unintentional, a report should be filed.

C. What Is A Hazardous Waste?

"Waste" is defined by Health and Safety Code section 25124 as:

"(a) Any material for which no use or reuse is intended and which is to be discarded.

"(b) Any recyclable material.

"(c) Any material which poses a threat to public health or the environment and which meets either, or both, of the following conditions:

----- "(1) Is mislabeled or is not adequately labeled, unless the material is correctly labeled or adequately labeled within 10 days after the material is discovered to be mislabeled or inadequately labeled.

"(2) Is packaged in deteriorated or damaged containers, unless the material is contained in sound or undamaged containers within 96 hours after the containers are discovered to be deteriorated or damaged."

"Hazardous waste" is defined by section 25117 as:

"[A] waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may either:

"(a) Cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

(1/ continued)

Control Law (Cal. Health & Saf. Code, § 25100 et seq.), and (d) Underground Storage of Hazardous Substances Law (Cal. Health & Saf. Code, § 25280 et seq.).

"(b) Pose a substantial present or potential hazard to human health or environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

"Unless expressly provided otherwise, the term 'hazardous waste' shall be understood to also include extremely hazardous waste."

Given these definitions, we must assume that any hazardous substance is a hazardous waste.

4. What Are the Exceptions to Reporting?

The measure does not require reporting if disclosure is "otherwise prohibited by law." I am not certain what, if any, disclosures of hazardous waste would be legally prohibited. I doubt this provision has much, if any, operative effect.

The measure also would permit a "designated official" to avoid disclosure "when law enforcement personnel have determined that such disclosure would adversely affect an ongoing criminal investigation, . . ." I expect that most designated officials would go ahead and report a violation unless there was some strong reason to suspect that such a disclosure would affect an ongoing criminal investigation. Where such an affect is confirmed, it would probably be a good idea to write to the law enforcement personnel involved confirming that no disclosure is being made for this reason.

Finally, no disclosure is required where "the information is already general public knowledge within the locality affected by the discharge or threatened discharge." It is difficult to know how a public official would measure the "general public knowledge" of a hazardous waste discharge. However, I assume that if the matter has already come to the attention of the Board of Supervisors and the local health officer, and/or has been published in the local media, general public knowledge would be assumed. There would seem to be no reason not to on the side of caution and report discharges where there is any doubt as to the general public knowledge.

5. -- Do the Substantive Discharge Prohibitions Apply to the University?

Proposition 65 exempts the state from its substantive provisions prohibiting discharges into drinking water or its sources. Therefore, University employees acting in the course and scope of their employment are not now subject to such requirements.

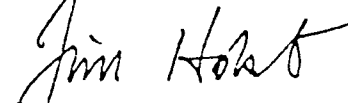
ASSISTANT VICE PRESIDENT LOWELL N. LEWIS

January 13, 1987

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We will continue to monitor the situation and keep you up to date on legislation and judicial rulings. Please let University Counsels Woods or Dorinson know if we can be of further assistance at this time.

Sincerely,


James E. Holst
General Counsel

soc

cc: S. A. Arditti
W. B. Baker
R. W. Brady
K. R. Farrell
D. P. Gardner

bcc: D. A. Dorinson
G. Morrison
G. R. Woods

JEH:DAD:GM