



1-1-1982

Environmental Protection

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Recommended Citation

University of the Pacific; McGeorge School of Law, *Environmental Protection*, 13 PAC. L. J. 699 (1982).

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Environmental Protection

Environmental Protection; Hazardous Substance Account, Hazardous Substance Tax Law

Health and Safety Code §§25300, 25301, 25310, 25312, 25313, 25315, 25316, 25317, 25320, 25321, 25322, 25323, 25324, 25325, 25326, 25330, 25331, 25332, 25333, 25340, 25341, 25342, 25343, 25344, 25345, 25346, 25347, 25348, 25350, 25351, 25352, 25353, 25354, 25355, 25356, 25357, 25358, 25360, 25361, 25362, 25363, 25364, 25365, 25366, 25370, 25371, 25372, 25373, 25374, 25375, 25376, 25377, 25378, 25379, 25380, 25381, 25382, 25395 (new); §25186 (amended); Revenue and Taxation Code §§43001, 43002, 43003, 43004, 43005, 43006, 43007, 43008, 43009, 43010, 43011, 43012, 43051, 43052, 43101, 43102, 43151, 43152, 43153, 43154, 43155, 43156, 43157, 43201, 43202, 43203, 43204, 43251, 43301, 43302, 43303, 43304, 43305, 43306, 43307, 43350, 43351, 43352, 43401, 43402, 43411, 43412, 43413, 43414, 43421, 43422, 43423, 43431, 43432, 43433, 43434, 43441, 43442, 43443, 43444, 43445, 43446, 43451, 43452, 43453, 43454, 43455, 43456, 43471, 43472, 43473, 43474, 43475, 43476, 43477, 43478, 43481, 43491, 43501, 43502, 43503, 43504, 43505, 43506, 43551, 43552, 43601, 43602, 43603, 43604, 43605, 43606, 43607 (new).

SB 618 (Carpenter); STAS. 1981, Ch 756

Pursuant to the requirements of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980¹ (hereinafter referred to as the federal act), the California Legislature has enacted the Carpenter-Presley-Tanner Hazardous Substance Account Act to establish the Hazardous Substance Account (hereinafter referred to as the state account).² The state account provides funds to meet the state matching fund requirements of the federal act,³ clean up hazardous waste disposal sites,⁴ and reimburse the state for all costs of removal⁵

1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, — STAT. — (codified at 42 U.S.C. §§9601-9657). *See id.* §9604(c)(3) (the federal act requires the state to provide 10% matching funds).

2. *See* CAL. HEALTH & SAFETY CODE §§25301(c), 25330. *See also id.* §25331 (the state account may sue and be sued in its own name).

3. *See id.* §§25301(c), 25351(b).

4. *See id.* §25114 (definition of disposal site). *See also id.* §25356.

5. *See id.* §25323 (definition of removal).

and remedial action⁶ incurred in response to the release⁷ or threatened release of a hazardous substance.⁸ The state account requires each person who disposes⁹ of hazardous waste¹⁰ to report the total amount of hazardous and extremely hazardous waste¹¹ disposed of each year.¹² In addition, the state must initiate recovery actions against persons determined to be liable for the costs incurred by the state account.¹³ Chapter 756 also establishes the Hazardous Substances Tax Law¹⁴ to generate funds for the state account by imposing a tax on all persons who dispose of hazardous or extremely hazardous waste in the state.¹⁵ The Hazardous Substance Tax Law establishes procedures for determining,¹⁶ redetermining,¹⁷ collecting,¹⁸ and refunding taxes,¹⁹ and imposes penalties for violations of its provisions.²⁰ Finally, Chapter 756 creates the Hazardous Substance Compensation Account²¹ to compensate persons for out-of-pocket medical expenses and lost wages or business income incurred as a result of an exposure to the release of a hazardous substance.²²

Reporting Hazardous Waste

The Hazardous Substance Account is funded in part²³ by a tax imposed on all persons who disposed of, or submitted for disposal, hazardous waste or extremely hazardous waste in the state.²⁴ Chapter 756 requires these persons to report to the State Board of Equalization (hereinafter referred to as the Board), on or before March 1 of each year (1) the total amount of hazardous waste and extremely hazardous waste disposed of, or submitted for disposal, in the state during the preceding year,²⁵ (2) the total amount of hazardous waste and ex-

6. *See id.* §25332 (definition of remedial action).

7. *See id.* §§25320, 25321 (definition of release). *See also id.* §§25325, 25326.

8. *See id.* §§25351(d), 25316, 25317 (definition of hazardous substance).

9. *See id.* §25113 (definition of disposal).

10. *See id.* §25117 (definition of hazardous waste).

11. *See id.* §25115 (definition of extremely hazardous waste).

12. *See id.* §25342.

13. *See id.* §§25360-25366.

14. *See* CAL. REV. & TAX CODE §43001.

15. *See id.* §43052; CAL. HEALTH & SAFETY CODE §§25330(d), 25342, 25345.

16. *See generally* CAL. REV. & TAX. CODE §§43151-43251, 43350-43352.

17. *See generally id.* §§43301-43307.

18. *See generally id.* §§43401-43446.

19. *See generally id.* §§43451-43491.

20. *See generally id.* §§43601-43607.

21. CAL. HEALTH & SAFETY CODE §25371.

22. *See id.* §§25301(b), 25375.

23. *See id.* §§25330(a), (b), (c), (f), 25343, 25360, 25380 (the Hazardous Substance Account is also funded by moneys obtained by the state in recovery actions, fines and civil penalties, interest earned upon the money in the account, and moneys received from the federal government).

24. *See id.* §§25330(d), 25342, 25345.

25. *See id.* §25342(b), (c).

tremely hazardous waste disposed of, or submitted for disposal, when the federal regulation of these wastes has been suspended by the Solid Waste Disposal Act,²⁶ and (3) the total amount of waste that was transferred to a surface impoundment in the state for the purpose of reducing the water content of the waste.²⁷ Any person who fails to file the report with the Board is liable for a civil penalty of up to \$500 for each day the violation continues.²⁸ In addition, knowing failure to file the report is punishable by a fine not to exceed \$25,000 for each day of violation, by imprisonment in the county jail for up to one year, or both.²⁹

Determining the Tax

Chapter 756 exacts a tax upon each ton of waste, or each fraction of a ton, specified in the report.³⁰ A disposer of hazardous waste has until March 1 of each year to file with the Board a tax return, in a form prescribed by the Board, for the preceding year, and has until July 1 of the same year to pay the tax.³¹ Chapter 756 requires the Board, upon the failure of a disposer to file a return or upon the filing of a deficient return, to estimate the amount of hazardous waste disposed of by the disposer during the period covered by the tax return.³² Based upon this estimate, the Board must determine the amount of tax owing and impose an interest rate of one percent per month for the period between the date the tax return was due and the date of payment.³³ In addition, if the Board's determination was precipitated by a failure to file a return, a penalty equal to ten percent of the amount of tax determined will be assessed.³⁴ If the failure to file or deficiency of the tax return was due to negligence or intentional disregard, an additional penalty of ten percent of the amount determined by the Board will be added.³⁵

26. See Solid Waste Disposal Act, PUB. L. NO. 94-580, 90 STAT. — (codified at 42 U.S.C. §§6901-6986 (1976)); CAL. HEALTH & SAFETY CODE §25342(a).

27. See CAL. HEALTH & SAFETY CODE §25342(a). See also *id.* §25342(d) (the total amount of hazardous waste or extremely hazardous waste that was disposed of from the extraction, beneficiation, and processing of ores and minerals must be reported).

28. *Id.* §25343.

29. *Id.*

30. See *id.* §25345(a).

31. See *id.* §43152. See also *id.* §§43154, 43155 (the Board may extend the time for making a return or paying a tax for a period not to exceed one month; if a tax is not paid within the time prescribed, a penalty of 10% of the amount of the tax due shall be added).

32. See *id.* §§43201, 43251 (the Board is to base its estimate upon any information available to it).

33. See *id.* (These sections allow the Board to make more than one determination and to offset overpayments for a period against underpayments for another period and against interest and penalties on the underpayments).

34. See *id.* §43251.

35. See *id.* §§43201, 43251.

Furthermore, if the failure to file or deficiency of the tax return was due to fraud or an intent to evade the tax, an additional penalty of 25% of the amount determined will be collected.³⁶ Chapter 756 requires the Board to serve written notice of the estimate and determination to the disposer.³⁷

A disposer who fails to file a tax return is subject to a civil fine not to exceed \$500 for each day the return is not filed.³⁸ In addition, any disposer who *knowingly* fails to file a return is subject to a fine not to exceed \$25,000 per day, or imprisonment in the county jail for a period not to exceed one year, or both.³⁹ Furthermore, any disposer who refuses to furnish any return, supplemental return, or other data required by the Board, is guilty of a misdemeanor and is subject to a fine not to exceed \$500.⁴⁰ Chapter 756 also provides that any person who knowingly or willfully files a false tax return is guilty of a misdemeanor punishable by a fine not less than \$100 nor more than \$1,000, or by imprisonment in the county jail for not less than one month nor more than six months, or both.⁴¹ The same penalty will be imposed on any person who (1) fails to keep records prescribed by the Board, (2) refuses to allow the Board to make any inspection or examination of records, (3) fails to preserve records for inspection, or (4) alters, cancels, or obliterates entries in records for the purpose of falsifying the records.⁴² Any person who willfully evades, or attempts to evade or defeat the payment of a hazardous waste tax is guilty of a felony and will be punished by a fine not to exceed \$5,000, or by imprisonment for not less than one year nor more than five years, or both.⁴³ Finally, Chapter 756 allows the State Director of Health Services to suspend or revoke a disposer's registration or permit⁴⁴ for a violation of any provision of the Hazardous Substance Tax Law.⁴⁵

Chapter 756 allows any disposer, or any person directly interested, to petition the Board for a redetermination of any amount of tax deter-

36. *See id.*

37. *See id.* (Notice should be placed in a sealed envelope, with postage paid, addressed to the disposer at the address as it appears in the Board's records. In lieu of mailing, notice may be served personally by delivery to the disposer.).

38. *See id.* §43601(a).

39. *See id.*

40. *See id.* §43602.

41. *See id.* §43603.

42. *Id.*; *see id.* §43502.

43. *Id.* §§43604, 43606. *See also id.* §43605 (any person convicted for a violation of any provision of Part 22 of the Revenue and Taxation Code for which no penalty is specifically provided is guilty of a misdemeanor and is subject to a fine of not more than \$500, or imprisonment in the county jail for not more than six months, or both).

44. *See* CAL. HEALTH & SAFETY CODE §25142 (a permit is necessary in order to handle, store, use, process, or dispose of hazardous waste).

45. *See id.* §25186(a)(6).

mined by the Board within thirty days after service of notice of the determination.⁴⁶ The petition must be in writing and state the grounds that support it.⁴⁷ No petition for redetermination will be accepted or considered, however, if the petition is founded upon the grounds that the State Director of Health Services has erroneously determined that any substance is a hazardous or extremely hazardous waste.⁴⁸ The order or decision of the Board upon the petition for redetermination will become final thirty days after service of notice.⁴⁹

Chapter 756 authorizes the Board to determine the amount of tax due from a disposer if it believes that the collection of the tax will be jeopardized by delay.⁵⁰ The determination becomes final, and the tax becomes immediately due and payable, ten days after the disposer receives notice of the determination unless the disposer files a petition for redetermination within the ten-day period.⁵¹ This petition for redetermination must be accompanied with a deposit of security in an amount deemed necessary by the Board to ensure compliance with the provisions of Chapter 756.⁵² Moreover, the security may be sold by the Board at a public sale if necessary to recover an amount due.⁵³ In addition, Chapter 756 allows the disposer to apply for an administrative hearing to (1) establish that the determination is excessive,⁵⁴ (2) prevent the sale of the security because a sale would result in irreparable injury to the person,⁵⁵ (3) request release of all or part of the security,⁵⁶ or (4) request a stay of collection activities.⁵⁷ The application for a hearing must be filed within thirty days after receipt of notice of the Board's determination, be in writing, and state the factual and legal grounds that support it.⁵⁸

Collecting the Tax

Under Chapter 756, the Board may bring any legal action that is

46. See CAL. REV. & TAX CODE §43301 (failure to file within the 30 day period allows the amount due to become final); §§43201, 43307 (procedures for giving notice).

47. See *id.* §43302 (the petition may be amended at any time prior to the date on which the Board makes its decision).

48. See *id.* §43301 (any appeal of the determination of whether a substance is a hazardous or extremely hazardous waste must be made with the Director).

49. See *id.* §43305.

50. See *id.* §43350.

51. See *id.* §§43350, 43351.

52. See *id.* §43351.

53. *Id.* (notice of the sale may be served personally or by mail upon the person who deposited the security).

54. *Id.* §43352(a).

55. *Id.* §43352(b).

56. *Id.* §43352(c).

57. *Id.* §43352(d).

58. *Id.*

necessary to collect a tax required to be paid.⁵⁹ When a tax is not paid when due, the Board may seek a judgment against the delinquent disposer in the amount of the tax, interest, and penalties due.⁶⁰ Upon receipt of a judgment, the amount of the tax, interest, and penalties due becomes a perfected and enforceable state tax lien upon the real property of the disposer.⁶¹ The state tax lien has the force, effect, and priority of a judgment lien and will continue for ten years from the time the judgment is recorded unless released or otherwise discharged.⁶²

Chapter 756 permits the Board to issue a warrant for the enforcement of any liens and for the collection of any unpaid tax.⁶³ In addition, if a disposer fails to pay a tax that is due and payable, the Board may seize any real or personal property of the disposer and sell the property, or a sufficient portion of it, at a public auction to pay the amount due.⁶⁴ The Board must mail written notice of the intended sale to the delinquent disposer and any other person who has an interest in the property at least ten days before the date of the sale.⁶⁵ The notice must contain a statement of the amount of taxes, penalties, and costs due, and a statement that unless the amount is paid on or before the time fixed in the notice, the property will be sold.⁶⁶ The Board must return any excess monies obtained at the auction to the delinquent disposer and obtain a receipt.⁶⁷

Chapter 756 allows the Board to give notice within three years after the due date of a tax payment to all persons who possess or control any credits or other personal property that belong to the delinquent disposer, or who owe debts to the disposer.⁶⁸ Upon receiving the notice, these persons may not transfer or make any other disposition of the credits, personal property, or debts in their possession or control without the consent of the Board or until sixty days elapse after receipt of the notice, whichever occurs first.⁶⁹ If the person transfers or disposes of any credit, personal property, or debt during the sixty-day period, without the Board's consent the person will be liable for any indebted-

59. *See id.* §43401 (upon the Board's request, the Attorney General must bring these actions).

60. *Id.* §43411.

61. *See id.* §§43412, 43413(a).

62. *Id.* §43412; *see id.* §43413(a), (b).

63. *See id.* §43421.

64. *Id.* §43431 (in addition, the penalties imposed for delinquency and all costs that have been incurred on account of the seizure and sale are recoverable).

65. *Id.* §43432.

66. *Id.* (the notice also must contain a description of the property to be sold, and the name of the delinquent disposer).

67. *Id.* §43434.

68. *Id.* §43441.

69. *Id.* §43442.

ness due under Chapter 756 from the delinquent disposer whose delinquency initially caused the notice to be sent.⁷⁰

Overpayments and Refunds

If the Board determines that any tax, penalty, or interest has been erroneously or illegally collected or computed, or has been paid more than once, the Board must, after receiving the approval of the State Board of Control, refund the excess amount to the person who paid the tax.⁷¹ Chapter 756 provides that, with one exception,⁷² no refund will be allowed three years after the fifteenth day of the calendar month following the close of the period for which the overpayment was made unless the person seeking the refund files a claim with the Board within the three year period.⁷³ The Board must serve written notice of its action to the claimant within thirty days after disallowing a claim.⁷⁴ The claimant may bring an action against the Board for the recovery of the whole or any part of the amount of the disallowed claim but must do so within ninety days after receipt of the notice of the Board's action upon the disallowed claim.⁷⁵ Failure to bring suit or action within the ninety-day period constitutes a waiver of all demands against the state arising from any alleged overpayments.⁷⁶ Finally, Chapter 756 allows the Board to cancel any illegal determination of a tax less than \$5,000;⁷⁷ the Board must receive the approval of the State Board of Control to cancel an illegal determination of a tax that exceeds \$5,000.⁷⁸

Hazardous Substance Account and Recovery Actions

The Hazardous Substance Account is established to provide funds to

- (1) meet the state matching fund requirements of the federal act,⁷⁹
- (2) reimburse all costs of removal and remedial action incurred by the

70. *Id.* §43444.

71. *Id.* §43451 (the Board need not obtain the approval of the State Board of Control for amounts less than \$5,000).

72. *See id.* §§43204, 43452(b).

73. *Id.* §43452(a); *see id.* §43452(d) (no claim will be accepted by the Board if based upon the grounds that the substance taxed was improperly or erroneously determined to be a hazardous or extremely hazardous waste).

74. *Id.* § 43454; *see id.* §43201.

75. *Id.* §43473. *See also id.* §43474 (failure of the Board to mail notice of its action within six months after the claim was filed allows the claimant to consider the claim disallowed for purposes of bringing suit to recover the claim).

76. *Id.* §43475.

77. *See id.* §43491.

78. *See id.*

79. CAL. HEALTH & SAFETY CODE §§25301(c), 25351(d). *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, PUB. L. NO. 96-510, — STAT. — (codified at 42 U.S.C. §§9601-9657).

state in response to the release or threatened release of a hazardous substance,⁸⁰ (3) take immediate corrective action necessary to remedy or prevent an imminent substantial danger to the public health or the environment caused by the release or threatened release of a hazardous substance,⁸¹ and (4) clean up hazardous waste disposal sites identified and prioritized by the State Department of Health Services as requiring remedial action.⁸² Chapter 756 requires the state to recover any costs incurred by the state account from the person or persons determined to be liable for those costs.⁸³ In addition, the state must recover the administrative cost of the State Department of Health Services in an amount equal to 10% of the costs incurred, or \$500, whichever is greater.⁸⁴ Any party found liable need only pay a portion of the costs if that party establishes by a preponderance of the evidence that only a portion of the costs incurred by the state account are attributable to that party's actions.⁸⁵ Chapter 756 prohibits any indemnification, hold harmless, conveyance, or similar agreement from relieving a party of liability to the state.⁸⁶ Additionally, Chapter 756 provides that an entry of judgment against a party will not bar future action by the state against any other person later discovered also to be liable for the costs incurred by the account.⁸⁷ Finally, Chapter 756 does not authorize the recovery of costs incurred as a result of any release of a hazardous substance authorized or permitted by state or federal law.⁸⁸

Compensation

Chapter 756 establishes the Hazardous Substance Compensation Account to provide compensation for victims who suffer losses as a result of exposure to the release of a hazardous substance.⁸⁹ All uninsured out-of-pocket medical expenses for up to three years from the beginning of treatment and 80% of all uninsured actual lost wages not to exceed \$15,000 per year for three years are to be compensated.⁹⁰ These losses, however, must be proven to have been proximately caused by

80. CAL. HEALTH & SAFETY CODE §25351(d).

81. *Id.* §25354(a).

82. *See id.* §25356.

83. *Id.* §25360.

84. *Id.*

85. *Id.* §25363(a) (subsection (b) provides that if the jury finds the evidence to be insufficient to establish each party's portion of the costs, then the court must apportion the costs among the defendants according to equitable principles).

86. *Id.* §25364 (this section does not, however, bar these types of agreements).

87. *Id.* §25365.

88. *Id.* §25366(b).

89. *See id.* §§25301(b), 25375.

90. *Id.* §25375(a), (b) (claims based on long term exposure to air pollutants are not compensable).

the release of a hazardous substance.⁹¹ Chapter 756 allows any person to apply for compensation for a loss caused by the release of a hazardous substance if the source of the release or the identity of the party liable for the release is unknown or cannot with reasonable diligence be determined⁹² or if the loss is not compensable because there is no liable party or the judgment received could not be satisfied in whole or in part.⁹³

To be compensated, a claimant must file a claim with the State Board of Control that includes a sworn verification that the claim is being made to the best of the claimant's knowledge⁹⁴ and a full description⁹⁵ of the release alleged to have caused the claimant's injury or damages.⁹⁶ Any person who knowingly gives, or causes to be given, any false information on a claim is subject to a fine of up to \$5,000, or imprisonment for up to one year, or both.⁹⁷ Chapter 756 prohibits any claim from being presented later than three years from the date of discovery or from January 1, 1982, whichever is later.⁹⁸

Chapter 756 requires the State Board of Control to render all decisions granting or denying compensation in writing within ninety days of submission of a claim, unless all the parties agree in writing to an extension of time, and to notify all appropriate parties of the decision.⁹⁹ All decisions are considered a final agency action for the purpose of judicial review.¹⁰⁰ Compensation of any loss pursuant to Chapter 756 allows the state to acquire, by subrogation, the rights of the claimant to recover the loss from the party determined to be liable for the release.¹⁰¹ Finally Chapter 756 prohibits any compensation, decision, or settlement from being admissible as evidence of any issue of law or fact

91. *Id.*

92. *Id.* §25372(a).

93. *Id.* §25372(b).

94. *Id.* §25373(a).

95. *See id.* §25373(b) (the description must be supported by appropriate evidence from government agencies).

96. *Id.* §25373(b). *See also id.* §25373(c), (d), (e) (the claim must also include the claimant's income for the three years preceding the date of the claim, certification of the dates and places of claimant's residence, and medical history, for the five years preceding the date of the claim).

97. *Id.* §25373(f).

98. *Id.* §25376. *See also id.* §§25377, 25378 (nothing in Chapter 756 requires the pursuit of any other claim as a condition precedent to any remedy provided by this Chapter. Compensation provided pursuant to this Chapter precludes indemnification or reimbursement from any other source, and indemnification or reimbursement from any other source precludes compensation pursuant to this Chapter).

99. *Id.* §25374.

100. *Id.*

101. *Id.* §25380 (upon the request of the Board, the Attorney General is to commence an action to recover any amount paid in compensation for any loss against the parties determined to be liable to the claimant).

in any proceeding.¹⁰²

Conclusion

Chapter 756 creates the Hazardous Substance Account,¹⁰³ the Hazardous Substance Compensation Account,¹⁰⁴ and the Hazardous Substance Tax Law.¹⁰⁵ The Hazardous Substance Account, established to meet the state matching fund requirements of the Federal Act,¹⁰⁶ is funded in part by a tax on every person who disposes of hazardous waste in the state.¹⁰⁷ Chapter 756 authorizes the state to initiate recovery actions to recover costs incurred by the state account from the persons determined to be liable.¹⁰⁸ The Hazardous Substance Compensation Account is established to compensate individuals for medical and income-related costs suffered as a result of exposure to a release of hazardous substances.¹⁰⁹ The Hazardous Substance Tax Law provides procedures for determining, redetermining, collecting and refunding the taxes imposed to fund the Hazardous Substance Account.¹¹⁰ Finally, Chapter 756 provides fines and penalties for violations of its provisions.¹¹¹

102. *Id.* §25379.

103. *See id.* §25330.

104. *See id.* §25371.

105. *See* CAL. REV. & TAX. CODE §43001.

106. *See* CAL. HEALTH & SAFETY CODE §§25301(c), 25351(b).

107. *See id.* §§25330(d), 25342, 25345; CAL. REV. & TAX. CODE §43052.

108. *See* CAL. HEALTH & SAFETY CODE §§25360-25366.

109. *See id.* §§25301(b), 25375. *See generally id.* §§25370-25382.

110. *See* CAL. REV. & TAX. CODE §§43151-43434.

111. *See id.* §§43155, 43156, 43201, 43251, 43601-43607; CAL. HEALTH & SAFETY CODE §§25186, 25343, 25373(f).

Environmental Protection; hazardous waste—preemption of local regulations, statute of limitation for hazardous waste control actions

Code of Civil Procedure §338 (amended); Government Code §66796.695 (new); §66796 (amended); Health and Safety Code §§25146, 25146.5, 25147, 25147.5, 25148, 25148.5, 25149, 25149.5, 25149.6, 25149.7 (new).

SB 501 (Boatwright); STATS. 1981, Ch 244

Support: Department of Finance; Department of Health Services; Monsanto Company; League of California Cities; Southern California Association of Governments

Opposition: City of West Covina

AB 1976 (Young); STATS. 1981, Ch 494
Support: Department of Health Services

In recognition of the decline in the number of existing hazardous waste facilities¹ and the concern that any decrease in the number of existing facilities will encourage the illegal disposal of hazardous waste,² the Legislature enacted Chapter 244 to retain an adequate number of existing facilities³ and to prevent the arbitrary closure of these facilities by local governments.⁴ Chapter 244 provides that, with limited exceptions⁵ and contrary to a 1974 Attorney General Opinion,⁶ it is not the intent of the Legislature to preempt local land use regulation of existing hazardous waste facilities.⁷ The limited exceptions provide, however, that no local government⁸ or enforcement agency⁹ may take any action¹⁰ that would prohibit or unreasonably regulate the operation of, or the disposal,¹¹ treatment,¹² or recovery of resources from hazardous or solid wastes¹³ at existing facilities.¹⁴ Chapter 244 allows an existing facility to be closed if, after public notice and a hearing, the Director of Health Services determines that the operation of the facility may present an imminent and substantial danger to the environment and the public health.¹⁵

Prior to the enactment of Chapter 494, it was not clear whether the statute of limitations for a suit arising under the provisions of the Hazardous Waste Control Law¹⁶ or the Porter-Cologne Water Quality

1. See CAL. HEALTH & SAFETY CODE §§25146, 25148 (definition of existing hazardous waste facility).

2. See *id.* §§25117 (definition of hazardous waste), 25146.5(c), (d).

3. See *id.* §25146.5(a).

4. See generally CAL. GOV'T CODE §66796(e) (no enforcement agency may unreasonably regulate these facilities); CAL. HEALTH & SAFETY CODE §25149 (no city, county, or district may unreasonably regulate these facilities).

5. See CAL. HEALTH & SAFETY CODE §25149.

6. See 57 OP. ATT'Y GEN. 159 (1974) (the Attorney General concluded that the Hazardous Waste Control Law preempts local regulations relating to the disposal of hazardous and extremely hazardous waste).

7. CAL. HEALTH & SAFETY CODE §§25147, 25149 (exceptions are to provisions expressly provided in this section).

8. See *id.* §25149 (any city or county, whether chartered or general law, or district).

9. See CAL. GOV'T CODE §66714.3 (definition of enforcement agency).

10. See CAL. HEALTH & SAFETY CODE §25149 (any action includes enacting, issuing, enforcing, suspending, revoking, or modifying any ordinance, regulation, law, license, or permit). See also CAL. GOV'T CODE §66796(e).

11. See CAL. HEALTH & SAFETY CODE §25113 (definition of disposal).

12. See *id.* §25123.5 (definition of treatment).

13. See *id.* §25148.5 (definition of solid waste).

14. *Id.* §25149 (nothing in this section authorizes an operator of a facility to violate any term or condition of a local use permit or any other provision of law not in conflict with this section).

15. *Id.*

16. See generally *id.* §§25100-25240; 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 508 (1973).

Control Act,¹⁷ which regulates the control of water quality in California, was one or three years.¹⁸ The length of the statute of limitations depended on whether the suit was construed as an action brought upon a statute for a forfeiture or penalty,¹⁹ or as an action brought upon a liability created by a statute, other than a forfeiture or penalty.²⁰ Chapter 494 clarifies this ambiguity by expressly providing that the statute of limitations for hazardous waste or water quality control actions is three years.²¹ The cause of action will not have accrued, however, until the State Department of Health Services, the State Water Resources Control Board, or a regional water quality control board discover the facts constituting the grounds for commencing the action.²²

17. See generally CAL. WATER CODE §§13000-13998.

18. See letter from Attorney General Deukmejian to Members of the Assembly Committee on Consumer Protection and Toxic Materials, May 12, 1981 (concerning the statute of limitations for hazardous waste and water quality control actions) (copy on file at the *Pacific Law Journal*). Compare CAL. CIV. PROC. CODE §338(1) with *id.* §340(2).

19. See CAL. CIV. PROC. CODE §340(2) (provides a one year statute of limitations); letter from Attorney General Deukmejian to Members of the Assembly Committee on Consumer Protection and Toxic Materials, May 12, 1981 (one federal court construed the suit in this manner).

20. See CAL. CIV. PROC. CODE §338(1) (provides a three year statute of limitations); letter from Attorney General Deukmejian to Members of the Assembly Committee on Consumer Protection and Toxic Materials, May 12, 1981 (state trial courts have generally construed the suit in this manner).

21. CAL. CIV. PROC. CODE §338(9).

22. *Id.*

Environmental Protection; air pollution civil penalties

Health and Safety Code §§42402, 42403, 42405 (amended).

AB 2000 (Sher); STATS. 1981, Ch 1127

Support: Bay Area Air Quality Management District, South Coast Air Quality Management District

Consistent with the legislative determination that vigorous enforcement of state and local air pollution regulations is important in providing cleaner air to citizens of California,¹ Chapter 1127 establishes new guidelines for the enforcement of state and local air pollution regulations.² Existing law provides that any person who violates any rule or regulation of an Air Pollution Control District³ or State Air Resources Board⁴ prohibiting air pollution or who discharges air contaminants that cause injury to a considerable number of persons, business or

1. See CAL. STATS. 1981, c. 1127, §1, at —.

2. See CAL. HEALTH & SAFETY CODE §§42402, 42403, 42405.

3. See *id.* §40000.

4. See *id.* §39500.

property,⁵ or that are of a certain darkness,⁶ is liable for a civil penalty not to exceed \$500 for each day the violation occurs.⁷ In furthering the Legislature's express intent to vigorously enforce air pollution regulations,⁸ Chapter 1127 increases the civil penalty for violations of these regulations to not more than \$1,000 for each day of violation.⁹

In determining the amount of this penalty, existing law requires the court to take into consideration all relevant circumstances surrounding the violation including the extent of harm caused, the nature and persistence of the problem, the length of time over which the violation occurs, and any corrective action taken by the defendant.¹⁰ Chapter 1127 adds three circumstances for the court to consider: (1) the frequency of past violations,¹¹ (2) the record of maintenance,¹² and (3) the unproven or innovative nature of control equipment.¹³ In addition, the agencies that will enforce these provisions are encouraged not to impose a civil penalty for violations falling within the range of error set by the Air Resources Board.¹⁴ The enforcing agencies are encouraged by Chapter 1127 to adopt guidelines to carry out this intent.¹⁵

Prior law provided that a violator must intentionally or negligently discharge air contaminants to incur a civil penalty, and the burden of proving the intentional or negligent nature of the act is upon the plaintiff.¹⁶ Chapter 1127 switches the burden of proof on the issue of the nature of the act by requiring the defendant to allege and establish by affirmative defense that the violation was *not* the result of an intentional or negligent act.¹⁷

5. *See id.* §41700.

6. *See id.* §41701 (Ringleman Chart provides guide for determining darkness).

7. *See* CAL. STATS. 1979, c. 239, §6, at 495 (amending CAL. HEALTH & SAFETY CODE §42402). *See also* CAL. HEALTH & SAFETY CODE §42403 (persons who may bring this type of action).

8. *See* CAL. STATS. 1981, c. 1127, §1, at —.

9. *See* CAL. HEALTH & SAFETY CODE §42402(a).

10. *See id.* §42403(a)-(c), (g).

11. *Id.* §42403(d).

12. *Id.* §42403(e).

13. *Id.* §42403(f).

14. *See* CAL. STATS. 1981, c. 1127, §1, at —. *See also* CAL. HEALTH & SAFETY CODE §39601(a) (State Board shall adopt the standards).

15. *See* CAL. STATS. 1981, c. 1127, §1, at —.

16. *See* CAL. STATS. 1979, c. 239, §6, at 495-96. *See also* Assemblyman Byron D. Sher, Press Release, September 11, 1981 (copy on file at the *Pacific Law Journal*).

17. *See* CAL. HEALTH & SAFETY CODE §42402(b). *See also* Assemblyman Byron D. Sher, Press Release, September 11, 1981.

