

DATE: April 30, 1986

TO: Michael A. Burner, Battalion Chief, Fire
Department
FROM: City Attorney
SUBJECT: State Hazardous Materials Disclosure Law
(Assembly Bill No. 2185)

This memorandum will formally answer the issues you raised in your memorandum of February 14, 1986. We have previously addressed these issues at a conference on February 19, 1986 at which the provisions of Assembly Bill No. 2185 were analyzed. This bill added sections 25500 through 25521 to the Health and Safety Code pertaining to Commercial Handling and Release of Hazardous Materials.

Certain features of this legislation would allow municipal governments to inspect commercial facilities handling hazardous materials and to require inventories to be kept and plans to be adopted which would allow for emergency response. This legislation is similar to the CEDMAT Program adopted by the City in sections 55.88.101 through 55.88.106 of the San Diego Municipal Code.

In response to your first question, Health and Safety Code section 25503(e)(1) provides that an administering agency shall submit a plan to conduct on-site inspections of business that are subject to the Chapter. The extent of the inspection is not set forth. You asked whether the inspection requirements should be of an extensive nature or of a cursory nature, opining that a uniform statewide standard would preclude a business from relocating to a less restrictive jurisdiction. We would observe that an administering agency is free to adopt whatever plan it deems advisable to accomplish the object of this legislation. Of necessity, the plan should be thorough enough to satisfy the Office of Emergency Services pursuant to section 25503(d).

Your second question asked whether the amount of hazardous material handled by a business on an aggregate basis included

hazardous waste. The answer is that the "aggregate," under section 25503.5(b)(2), includes both. Section 25501(j) defines "hazardous material" to include "hazardous substances, hazardous waste, and any material which a handler business or the administering agency has a reasonable basis for believing that it would be injurious to the health and safety of persons" "Hazardous waste" is then defined by section 25501(l) to refer to "hazardous wastes" as defined in sections 25115, 25117 and 25316 of the Health and Safety Code. In turn, those sections provide a

definition which refers to the risk of death, disabling injury or serious illness that results from human exposure to the substances. Therefore, in computing the amounts of hazardous material that require compliance with the act, the administering agency is to look at substances which in any form or composition possess the requisite degree of toxicity.

Your third question is directed to whether the inventory report required under section 25509(a) includes all hazardous substances regardless of individual amount. The answer is yes. Section 25503.5(b)(2) provides that a business is exempt from the business plan requirements if it handles less than "500 pounds, 55 gallons, or 200 cubic feet . . . for compressed gas, in the aggregate at any one time in a month, of a product or formulation containing a hazardous material" The "business plan" consists of the inventory required under section 25509 and certain other information. (See, section 25504.) A business is required to submit an "inventory" of hazardous materials by section 25508 unless it is exempted from the business plan requirements.

To read the sections together leads to the conclusion that once the business inventory exceeds the required amounts, then all hazardous substances, regardless of individual quantity, must be reported.

Finally, you ask whether sections 25514 and 25515, which provide for penalties for various violations, preempt local law pertaining to local penalties and local recovery of court costs. The answer to that question is resolved by section 25500, which provides that:

The Legislature declares that, in order to protect the public health and safety and the environment, it is necessary to establish business and area plans relating to the handling and release or threatened release of hazardous materials. The establishment of minimum statewide standards for these plans is

a statewide concern. Basic information on the location, type, quantity, and the health risks of hazardous materials handled, used, stored, or disposed of in the state, which could be accidentally released into the environment, is not now available to firefighters, health officials, planners, public safety officers, health care providers, regulatory agencies, and other interested persons. The information provided by business and area plans is

necessary in order to prevent or mitigate the damage to the health and safety of persons and the environment from the release or threatened release of hazardous materials into the workplace and environment.

The Legislature further finds and declares that this chapter does not occupy the whole area of regulating the inventorying of hazardous materials and the preparation of hazardous materials response plans by businesses and the Legislature does not intend to preempt any local actions, ordinances, or regulations which impose additional or more stringent requirements on businesses which handle hazardous materials. Thus, in enacting this chapter, it is not the intent of the Legislature to preempt or otherwise nullify any other statute or local ordinances containing the same or greater standards and protections.

It is clear that local governments are free to set up stricter standards and requirements and that the state legislation creates a uniform minimum requirement in the absence of local legislation.

Sections 25514 and 25515 create civil liability for any person or business which violates the provisions of sections 25503.5 thru 25505 and sections 25508 thru 25510, and criminal liability for violating section 25507 relating to release of a hazardous material.

Civil liability under section 25514 attaches when a business that is not exempted fails to prepare and file a business plan and inventory and to periodically review the plan and inventory. Criminal liability attaches to any business, whether exempted or not, that fails to report a release or threatened release of a

hazardous material to the administering agency; it is not the release itself, but the failure to report that is determinative of the violation.

However, while sections 25514 and 25515 each provide that a violator of those sections is also liable to an agency for increased costs for responding to emergencies at that location if the violation significantly contributed to the costs of the response, those sections do not preclude local cost recovery programs that are not dependent upon whether or not the business was in violation of state law. Further, sections 25514 and 25515 also allow cost recovery for cleanup and disposal of any

hazardous materials, although it is not clear that such recovery only exists when there is a violation, or whether it exists where there is no violation but the material must be disposed of regardless.

San Diego Municipal Code section 66.0201 provides as follows:

Any person who spills, deposits or abandons any matter whether intentionally or unintentionally on any highway or public or private property so as to impede or impair the normal use thereof or so as to create a condition which requires the property to be cleaned or cleared shall, in addition to any other penalty, be liable for the payment of the cost of any and all expense necessary to clean or clear the property of such matter and restore the property to its natural or former condition.

This section makes a depositor of "matter" strictly liable for costs of cleanup. This section has been successfully used by the Fire Department in the past as the basis for recovering cleanup costs for hazardous materials spills. Since this is a more stringent requirement imposed by a local ordinance, we see no basis for concluding that it has been preempted by sections 25514 and 25515.

Should you have further questions or concerns, please contact the undersigned.

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By

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Deputy City Attorney

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