

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION	:	No. 83-813
	:	
of	:	<u>DECEMBER 27, 1983</u>
	:	
JOHN K. VAN DE KAMP	:	
Attorney General	:	
	:	
Rodney O. Lilyquist	:	
Deputy Attorney General	:	
	:	

THE HONORABLE J. STEPHEN PEACE, MEMBER, CALIFORNIA STATE ASSEMBLY, has requested an opinion on the following question:

May funds in the Hazardous Substance Account be used to remove pollutants in a river in California where the river and its pollutants originate in a foreign country?

CONCLUSION

Funds in the Hazardous Substance Account may be used to remove pollutants in a river in California where the river and its pollutants originate in a foreign country.

ANALYSIS

The New River originates in Mexico and flows northward through Mexicali, Calexico, Seeley, and Brawley, and finally into the Salton Sea. The Salton Sea is an inland body of water providing significant fishing and recreational facilities in Southern California.

The New River has chronic and serious pollution problems. Various toxic substances contaminate the river from sources within Mexico. The question presented for analysis is whether funds in the Hazardous Substance Account may be used to remove the pollutants.¹ We conclude that they may.

Among the purposes of the Carpenter-Presley-Tanner Hazardous Substance Account Act (Health & Saf. Code, §§ 25300-25395)² (hereafter "Act") is the establishment of "a program to provide for response authority for releases of hazardous substances, including spills and hazardous waste disposal sites that pose a threat to the public health or the environment" (§ 25301, subd. (a)). The program is administered by the Director of the State Department of Health Services (hereafter "Department"). (§§ 25312, 25313, 25330.)

Section 25351 provides in part:

"[M]oneys in the state account may be expended by the director, upon appropriation by the Legislature, for the following purposes:

"....."

"(d) For reimbursement of all costs of removal and remedial action incurred by the state, or by any local agency with the approval of the director, in response to a release or threatened release of a hazardous substance to the extent the costs are not reimbursed by the federal act.

"....."³

¹ The question concerns the use of the funds in California. We do not address the matter of using such funds in areas outside the state.

² All references hereafter to the Health and Safety Code are by section number only.

³ "'[R]emoval' includes the cleanup or removal of released hazardous substances from the environment or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage which may otherwise result from a release or threatened release" (§ 25323.) "'[R]emedial action' includes those actions which are consistent with a permanent remedy, that are taken instead of, or in addition to, removal actions in the event of a release or threatened release

Section 25352 states:

"Money deposited in the state account may also be appropriated by the Legislature to the department on a specific site basis for the following purposes:

"(a) For all costs incurred in restoring, rehabilitating, replacing, or acquiring the equivalent of, any natural resource injured, degraded, destroyed, or lost as a result of any release of a hazardous substance, to the extent the costs are not reimbursed pursuant to the federal act and taking into account processes of natural rehabilitation, restoration, and replacement.

"(b) For all costs incurred in assessing short-term and long-term injury to, degradation or destruction of, or any loss of any natural resources resulting from a release of a hazardous substance, to the extent that the costs are not reimbursed pursuant to the federal act. . . ."

Significantly, the Legislature has established for the Department certain "criteria for the selection and for the priority ranking of sites for remedial action" by specifying that "pertinent factors . . . shall include, but are not limited to, potential hazards to public health and environment, the risk of fire or explosion, toxic hazards, and the criteria established pursuant to Section 105 (8) of the federal act (42 U.S.C. § 9605(8))." (§ 25356, subd. (a).)

The federal criteria mentioned in section 25356 for the Department to consider are:

". . . relative risk or danger to public health or welfare or the environment, in the judgment of the President, taking into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, State preparedness to assume State costs and responsibilities, and other appropriate factors." (42 U.S.C. § 9605(8).)

We have found no provision of state or federal law that prohibits the Department from placing the New River on the site selection priority list. No statutory

of a hazardous substance into the environment" (§ 25322.) "'Release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." (§ 25320.)

requirement is made that the pollutants originate within the state or within the United States. As long as the effects of the pollution are within California, they may be assessed and a remedial program instituted to correct them.

We recognize that the Department has a legal duty to recover the moneys it expends under the Act from persons who are responsible for the release of the hazardous substances. Section 25360 states:

"Any costs incurred and payable from the state account shall be recovered by the department from the liable person or persons. In addition, such person or persons shall be liable to the department for administrative costs in an amount equal to 10 percent of the reasonable cost actually incurred, or five hundred dollars (\$500), whichever is greater. The amount of cost determined pursuant to this section shall be recoverable in a civil action. Nothing in this section shall deprive a party of any defense he or she may have. Moneys recovered by the department pursuant to this section shall be deposited in the state account."

While it may be difficult for the Department to recover its costs "from the liable person or persons" located in a foreign country, we do not believe that such recovery is impossible or that the possibilities of recovery must be assured before moneys may be expended. The certainty of recovery is not one of the factors among the criteria for site selection specified in section 25356 or the federal law.

We also note that industries in California are a source of the funds in the Hazardous Substance Account. Section 25330 provides:

"There is in the General Fund a Hazardous Substance Account which shall be administered by the director. In addition to any other moneys appropriated by the Legislature to the account, the following amounts shall be deposited in the account:

"(a) All moneys recovered by the state account pursuant to Section 25360.

"(b) Any moneys recovered by the State Board of Control pursuant to Section 25380.

"(c) Any fines or civil penalties collected pursuant to Section 25343.

"(d) The taxes collected pursuant to Article 4 (commencing with Section 25340).

"(e) Any interest earned upon money deposited in the state account.

"(f) Any moneys received from the federal government pursuant to the federal act."

Section 25360 has previously been quoted. Section 25380 authorizes the State Board of Control to be subrogated to the rights of those persons compensated from account funds for injuries resulting from the release of hazardous substances. Section 25343 imposes a fine or penalty upon those persons who fail to file a report concerning the disposal of hazardous waste within California as required by section 25342. Sections 25340-25348 impose a tax upon each ton of hazardous waste reported under section 25342. Consequently, industries that dispose of hazardous substances within California may "contribute" in various ways to the funds in the Hazardous Substance Account.

Nevertheless, neither section 25356 nor the federal law requires that moneys in the Hazardous Substance Account be used only for remedial actions made necessary by those who have been subject to the fines, penalties, taxes, or recovery actions of sections 25340-25380. Such is not one of the criteria for site selection expressly established by the Legislature.

On the other hand, while the Department may place the New River on the site selection priority list, it is under no legal compulsion to do so. The Legislature has authorized the Department to exercise its discretion in the selection process. The criteria set forth in section 25356 are not the exclusive factors for the Department to consider, since the statute contains the phrase "shall include, but are not limited to" The federal law also authorizes administrative flexibility by referring to "other appropriate factors." (42 U.S.C. § 9605(8).)

With respect to the New River, several "other appropriate factors" may preclude its placement upon the site selection priority list. Besides the issues of recovery of funds expended and the California sources of the funds, the Department may determine that effective treatment requires the remedial action to take place where the pollution originates. Because of the international aspects of the pollution problem, the Department may consider the federal government, either through the Environmental Protection Agency or the International Boundary and Water Commission or both, as the appropriate party for assuring that the remedial action is undertaken. We note in this regard that on August 14, 1983, President Reagan and President de la Madrid signed an "Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection

and Improvement of the Environment in the Border Area." Although very general in context, the agreement is significant in naming the Environmental Protection Agency as the coordinating agency for the United States in dealing with trans-border pollution problems. The Department may also find other enforcement actions more effective than use of the Act's provisions in dealing with the New River contamination.

Returning to the question posed, we conclude generally that funds in the Hazardous Substance Account may be used to remove pollutants in a river in California where the river and its pollutants originate in a foreign country.
