STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of ZOECON CORPORATION For Review of Order No. 85-67 of the California Regional Water Quality Control Board, San Francisco Bay Region. Our File No. A-397.	ORDER NO. WQ 86-2

BY THE BOARD:

On May 15, 1985, the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Board) adopted waste discharge requirements (Order No. 85-67) for a five-acre industrial site in East Palo Alto. Both Zoecon Corporation, the current owner of the property, and Rhone-Poulenc, Inc., a former owner of the site, were named as dischargers in the requirements. On June 14, 1985, the State Board received a petition from Zoecon Corporation (petitioner) asserting that Zoecon was improperly named as a discharger in the order.

I. BACKGROUND

Before discussing the issue raised on appeal, it is helpful to briefly review the history of the site.

Prior to 1926, the property in question was occupied by Reed Zinc Company whose activities are unknown. From 1926 to 1964 the site was occupied by Chipman Chemical Company for the production and formulation of pesticides and herbicides including sodium arsenite compounds. In 1964, Rhodia Inc. acquired Chipman and its operations. In 1971 the Chipman operation was shut

down and the following year the property was sold to Zoecon Corporation. Rhodia subsequently changed its name to Rhone-Poulenc, Inc. in 1978. Zoecon has occupied the site from 1972 to the present for the purpose of formulating and manufacturing insect control chemicals.

Sodium arsenite was formulated by Chipman and Rhodia in an underground tank located along a railroad spur. Some of the wastes from this process were disposed of in a shallow sludge pond located on the northeast portion of the property. Contaminated surface runoff from the site has discharged and still poses a potential to discharge onto adjoining land including a non-tidal marsh.

Zoecon Corporation contends that the chemicals used in their manufacturing and formulating operations are unrelated to the contaminants found on the site. Chipman Chemical Company and Rhodia, Inc. are known to have produced arsenical pesticides at that site and the Regional Board found that they are the probable source of the contaminants found in the soil and ground water both onsite and on adjacent properties. Zoecon Corporation has legal title to the site where the contaminants are concentrated however and the Regional Board therefore concluded that the petitioner has certain legal responsibility for any investigation or remedial action.

In fact, initial site investigations were conducted in 1981 by Zoecon. They revealed heavy metal contamination of the soil and ground water (including arsenic, lead, cadmium, selenium and mercury) in excess of background levels. The Regional Board adopted a cleanup and abatement order and several subsequent revisions to it, requiring both Rhone-Poulenc, Inc. and Zoecon Corp. to determine the lateral and vertical extent of heavy metals and organic compounds in the soil and ground water both on and off-site. The

cleanup and abatement order also required the dischargers to submit and implement remedial measures to mitigate the contamination.

The two companies did not recommend similar mitigation alternatives since they have differing opinions about the appropriate level of cleanup. Therefore, the waste discharge requirements do not require the implementation of a specific mitigation plan but, instead, establish a required level of clean up.

II. CONTENTIONS AND FINDINGS

1. Contention: Petitioner contends that it cannot be classified as a "discharger" under applicable sections of the Water Code because Zoecon never discharged, deposited or in any way contributed to the contamination of the property.

Finding: Waste discharge requirements were adopted by the Regional Board pursuant to Water Code §13263(a) which states, in pertinent part, that "the regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge or material change therein...." Petitioner argues that there is no factual or legal basis for the contention that there is an ongoing "discharge" of waste at the site such that waste discharge requirements may be issued.

Factually, petitioner argues that the soil and ground water contamination is in a relatively steady state due to the low mobility characteristic of arsenic in soils. Petitioner also points out that one consultant has estimated that at current flow rates it will take 1,000 years for the contaminated ground water to discharge to San Francisco Bay which is

about 2,000 feet west of the site.[1] Even if this calculation is accurate, such movement of contamination, albeit slow, is still a discharge to waters of the state that must be regulated. In addition, ground water quality in the shallow zone has been degraded and existing and potential beneficial uses of currently uncontaminated ground water in the vicinity of the site within the shallow and deep aquifers could be adversely affected if the spread of contamination remains uncontrolled. Therefore, we must conclude that there is an actual movement of waste from soils to ground water and from contaminated to uncontaminated ground water at the site which is sufficient to constitute a "discharge" by the petitioner for purposes of Water Code §13263(a).

We note also that although the petitioner argues that the contamination is in a relatively steady state, the petitioner's suggested remedial action plan actually calls for the excavation of all on-site soils having arsenic concentrations in excess of 500 ppm and the installation of a ground water extraction and treatment system to remove contaminants from the shallow ground water aquifer. This remedial plan, which is more stringent in its recommendations than the one proposed by Rhone-Poulenc, supports our contention that a discharge is continuing to occur which must be abated.

Petitioner cites U. S. v. Occidental Petroleum Corp., Civ. No. S-79-989 MLS (E.D. Cal. 1980) in support of its argument that the term "discharge" as used in the Porter-Cologne Act is the act of depositing a contaminant and not the continuous leaching of the contaminant into ground water. We note, first of all, that this case has no value as precedent. It is an unpublished

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decision and could not be cited or relied on in a court of law. (Cal. Rules of Court, Rule 977.) In addition, it is a federal, as opposed to California, court decision. Furthermore, the situation reviewed in that case is not analogous to the issue before us today. In the Occidental Petroleum case, the court was construing Water Code §13350 which concerns the imposition of penalties rather than the initial issuance of waste discharge requirements. Finally, unlike the situation in the Occidental Petroleum case, here the waste discharge requirements were imposed on Zoecon not because it had "deposited" chemicals on to land where they will eventually "discharge" into state waters, but because it owns contaminated land which is directly discharging chemicals into water. For all of these reasons, we decline to follow the reasoning of this case.

Petitioner also relies on the California Superior Court opinion in People ex rel. Younger v. Superior Court 16 Cal.3d 34, 127 Cal.Rptr. 122 (1976). We do not find this decision, however, to be inconsistent with the Regional Board's determination that property owner is a discharger for purposes of issuing waste discharge requirements when wastes continue to be discharged from a site into waters of the state. In Younger the Court was concerned with the proper interpretation of Water Code §13350(a)(3), which imposes a $6,000 per day penalty for each day in which a deposit of oil occurs. The Court held that this section imposes liability for each day in which oil is deposited in the waters of the state, not for each day during which oil remains in the water. In reaching this conclusion, the Court placed great reliance upon the

fact that Harbors and Navigation Code §151[2] provides an adequate remedy for the cost of oil spill cleanup. The Court surmised, therefore, that the purpose of §13350(a)(3) was not to address the concerns of the State regarding the problems engendered by the size of an oil spill, the length of time the spill persists, or the costs of cleanup, but rather to provide an effective deterrent to those individuals who continuously cause oil spills. (Id., 16 Cal.3d at 44.)

Water Code §13263(a) speaks to the issue of prescribing requirements for a "proposed discharge, existing discharge, or material change therein." Civil penalties are not at issue in the case before us today. An enforcement action is not being taken and there is no provision analogous to the Harbors and Navigation Code section relied on for the reasoning in the Younger case. The Younger case dealt simply with the issue of imposing liability for each day in which oil remains in waters of the state and as such is clearly distinguishable from the issue before us now. Finally, the Younger case interprets the word "deposit" as used in Water Code §13350(a)(3). The petitioner seems to imply that this term is synonymous with the word "discharge" as used in Water Code §13263(a) which we are considering today. Yet Water Code §13350(a)(2) speaks to causing or permitting waste to the "deposited" where it is "discharged" into the waters of the state. Clearly, the words must mean different things or the Legislature would not have used both terms in §13350(a)(2).

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[2] Under this section, any person who intentionally or negligently causes or permits any oil to be deposited in waters of the state is liable for a maximum civil penalty of $6,000 and for all actual damages, in addition to the reasonable costs actually incurred in abating or cleaning up the oil deposit.

We note that the petitioner cites an Attorney General's opinion defining "discharge" which arose from problems at abandoned mines in the State (26 Ops.Atty.Gen. 88, Opinion No. 55-116, (1955)). Petitioner argues that the decision is not on point because the conditions factually are quite different than in this instant case. The reasoning of the Opinion nonetheless is consistent with our conclusions herein. We note also that the opinion states:

> "In the case of harmful drainage from inoperative or abandoned mines, the dischargers are the persons who now have legal control of the property from which such drainage arises. If the fee of the land where the mine is located is owned separately from the mineral rights, both the owner of the mineral rights in whose tunnels and shafts or dumps the water has picked up the material which has tainted it, and the owner of the fee from whose land the tainted water is permitted to pour out, are dischargers within the contemplation of the Dickey Act. By failing to take action which is within their legal power to halt the defilement of the drainage or to render it harmless by treatment before it departs their property, both are responsible for the deleterious discharge. It is immaterial that the mining operations may have terminated before either purchased his present interest because the discharge for which they are accountable is the existing and continuing drainage from their holdings, not the now discontinued mining." (Id. at p. 90-91.)

This is consistent with the conclusion in 27 Ops.Atty.Gen. 182 Opinion No. 55-236 (1956) regarding issuance of waste discharge requirements for inactive, abandoned or completed operations. The opinion concluded:

> "The person upon whom the waste discharge requirements should be imposed to correct any condition of pollution or nuisance which may result from discharges of the materials discussed above are those persons who in each case are responsible for the current discharge. In general, they would be the persons who presently have legal control over the property from which the harmful material arises, and thus have the legal power either to halt the escape of the material into the waters of the State or to render the material harmless by treatment before it leaves their property. Under this analysis, the fact that the persons who conducted the operations which originally produced or exposed the harmful material have left the scene does

not free from accountability those permitting the existing and continuing discharge of the material into the waters of the State." (Id. p. 185.)

Although both of these opinions interpret the Dickey Water Pollution Act which has been superseded by the Porter-Cologne Act, the relevant wording and intent of the statutes remains the same. In fact, in 63 Ops.Atty.Gen. 51, 56 (1980), it states:

> "The legislative history of the Porter-Cologne Act clearly indicates that the previous Attorney General opinions on dirt run-off, mine tailing run-off and the responsibility of the present owner were intended to be incorporated in the definition of 'waste' under the Porter-Cologne Act."[3]

2. Contention: The petitioner also argues that is is inequitable to impose requirements on Zoecon when the actual discharger is known and capable of performing the clean up.

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[3] Section 36 of the bill that enacted the Porter-Cologne Act (Stats. 1969, Ch. 482) provided:

> "This act is intended to implement the legislative recommendations of the final report of the State Water Resources Control Board submitted to the 1969 Regular Session of the Legislature entitled 'Recommended Changes in Water Quality Control', prepared by the Study Project-Water Quality Control Program."

The cited report contained the following comment, at page 24 of Appendix A to the report, about the definition of waste in Water Code Section 13050(d):

> "It is intended that the proposed definition of waste will be interpreted to include all the materials, etc. which the Attorney General has interpreted to be included in the definitions of 'sewage', 'industrial waste', and 'other waste' [under the Dickey Act]."

Even without this indication of legislative intent to adopt specific opinions of the Attorney General as part of legislation, under general rules of statutory construction, it is presumed that an interpretation of a statute in an opinion of the Attorney General has come to the attention of the Legislature, and if that interpretation were contrary to the intent of the Legislature, the Legislature would have adopted corrective language in amendments on the subject. (California Correctional Officers' Assn. v. Board of Administration (1978) 76 Cal.App.3d 786, 794.)

Finding: We hasten to point out that neither the waste discharge requirements nor this order speak to the issue of apportioning responsibility between Zoecon and Rhone-Poulenc for the clean up of the site. There are other forums that provide a more appropriate setting for the resolution of that matter. In fact, we understand that Zoecon has initiated legal action in San Mateo Superior Court to get Rhone-Poulenc to compensate Zoecon for the damages and to declare Rhone-Poulenc responsible for the contamination.[4] In addition, liability will be apportioned among all potentially responsible parties as part of the Department of Health Services' development of a remedial action plan. (Health & Safety Code §25356.3)

Issues regarding indemnity, the application of the doctrine of caveat emptor[5] or possible misrepresentation at the time of the sale of the property can not, and should not, be resolved by this Board. However, we do want to point out that we disagree with the petitioner's contention that as a policy matter requiring a present landowner to share responsibility for discharges of waste that began under a prior owner will undercut efforts to promote prompt disclosure and clean up of contaminated sites. The petitioner argues that this will encourage dischargers to conceal their actions in order to shift responsibility on to innocent purchasers of contaminated property. On the

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[4] Reporter's Transcript, California Regional Water Quality Control Board, San Francisco Bay Region, Proceedings Regarding Rhone-Poulenc and Zoecon Corporation - Waste Discharge Requirements, May 15, 1985, Page 29; Zoecon Corp. v. Rhone-Poulenc, Inc., Cal. Superior Court, County of San Mateo, No. 260687.

[5] Under the general rule of caveat emptor (let the buyer beware) in the absence of an express agreement, the vendor of land is not liable to his vendee for the condition of the land existing at the time of transfer.

contrary, we believe that our determination that present property owners are also responsible for waste discharges will encourage potential buyers to more thoroughly examine the condition of property which they may acquire. Zoecon states that it purchased the property in 1972 and conducted an environmental audit of it in 1980. If the audit had taken place prior to the purchase of the property, it is most probable that this matter would not be before us today.

In addition, the petitioner characterizes itself as the "mere landowner" in the situation. Yet it is this very role that puts Zoecon in the position of being well suited to carrying out the needed onsite cleanup. The petitioner has exclusive control over access to the property. As such, it must share in responsibility for the clean up.

Petitioner's final argument concerns the alleged inequity in imposing waste discharge requirements on the basis of site ownership when the actual discharger is known and can perform the clean up. Zoecon cites State Dept. of Environmental Protection v. Exxon, 376 A.2d 1339 (NJ Superior Court, Chancery Division 1977). We do not speak here to that Court's application of New Jersey statutes since we question the comparability to the California statutory scheme. We do note however that the New Jersey court's conclusion regarding application of the common law nuisance doctrine would probably not be applied by a California court. This is because California Civil Code §3483 provides that every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by a former owner, is liable therefore in the same manner as the one who first created it.[6]

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[6] Common law governs in California only to the extent that it has not been modified by statute. [Victory Oil Co. v. Hancock Oil Co. 125 Cal.App.2d 222, 229, 270 P2d 604 (1954)]

We find that our decision today is in many ways analogous to our long standing policy of naming a landlord in waste discharge requirements if necessary and appropriate to the circumstances before the Regional Board. This is consistent with the recent trend in California cases that is contrary to the traditional rule of landlord's nonliability subject to certain exceptions. In Rowland v. Christian (1968) 69 C.2d 108, 70 Cal.Rptr. 97, 443 P.2d 651, California repudiated the traditional classification of duties governing the liability of an owner or possessor of land and substituted the basic approach of foreseeability of injury to others. See, e.g. 3 Witkin, Summary of California Law (8th Ed. 1980 Supp.) Section 453A, Uccello v. Laudenslayer (1975) 44 Cal.App.3d 504, 118 Cal.Rptr. 741.

The court in Uccello held that an enlightened public policy requires that a landlord owes a duty of care to correct a dangerous condition created by a tenant, where the landlord has actual knowledge of the condition and an opportunity and the ability to obviate it. "To permit a landlord in such a situation to sit idly by in the face of the known danger to others must be deemed to be socially and legally unacceptable." (44 Cal.App.3d at 513.)

For all of the above reasons, we conclude that the petitioner is a discharger of waste who was appropriately named in the Regional Board's waste discharge requirements.

3. Contention: Petitioner argues that it has been unconstitutionally denied due process and equal protection of the law in that it is the only property owner named as a discharger despite the fact that adjacent properties are also contaminated.

Finding: Unrefuted testimony before the Regional Board indicates that the vast majority of the contaminated area is now owned by Zoecon. A

small portion of the contaminants have migrated off the site onto adjacent properties. Given the magnitude of the contamination found on the five-acre site which is the subject of the waste discharge requirements relative to the amount of contaminants on adjacent property, we find that it was appropriate for the Regional Board to exercise its discretion pursuant to Water Code §13269 and not issue waste discharge requirements for adjacent property at this time. We note that such a waiver of requirements may be terminated at any time. If additional fact finding should reveal more extensive off-site contamination, the Regional Board should, of course, reconsider its decision to waive requirements for adjacent properties.

III. CONCLUSIONS

After review of the record and consideration of the contentions of the petitioner, and for the reasons discussed above, we conclude:

Zoecon Corporation was properly named as a discharger in Order No. 85-67 (Waste Discharge Requirements for Rhone-Poulenc, Inc. and Zoecon Corporation, East Palo Alto, San Mateo County) by the California Regional Water Quality Control Board, San Francisco Bay Region.

IV. ORDER

IT IS HEREBY ORDERED THAT the petition is denied.

CERTIFICATION

The undersigned, Executive Director of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on February 20, 1986.

Aye: Raymond V. Stone
Darlene E. Ruiz
E. H. Finster
Eliseo M. Samaniego
Danny Walsh

No: None

Absent: None

Abstain: None

Raymond Walsh

Raymond Walsh
Interim Executive Director

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I. BACKGROUND

Before discussing the issue raised on appeal, it is helpful to briefly review the history of the site.

Prior to 1926, the property in question was occupied by Reed Zinc Company whose activities are unknown. From 1926 to 1964 the site was occupied by Chipman Chemical Company for the production and formulation of pesticides and herbicides including sodium arsenite compounds. In 1964, Rhodia Inc. acquired Chipman and its operations. In 1971 the Chipman operation was shut

down and the following year the property was sold to Zoecon Corporation. Rhodia subsequently changed its name to Rhone-Poulenc, Inc. in 1978. Zoecon has occupied the site from 1972 to the present for the purpose of formulating and manufacturing insect control chemicals.

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II. CONTENTIONS AND FINDINGS

1. Contention: Petitioner contends that it cannot be classified as a "discharger" under applicable sections of the Water Code because Zoecon never discharged, deposited or in any way contributed to the contamination of the property.

Finding: Waste discharge requirements were adopted by the Regional Board pursuant to Water Code §13263(a) which states, in pertinent part, that "the regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge or material change therein...." Petitioner argues that there is no factual or legal basis for the contention that there is an ongoing "discharge" of waste at the site such that waste discharge requirements may be issued.

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about 2,000 feet west of the site.[1] Even if this calculation is accurate, such movement of contamination, albeit slow, is still a discharge to waters of the state that must be regulated. In addition, ground water quality in the shallow zone has been degraded and existing and potential beneficial uses of currently uncontaminated ground water in the vicinity of the site within the shallow and deep aquifers could be adversely affected if the spread of contamination remains uncontrolled. Therefore, we must conclude that there is an actual movement of waste from soils to ground water and from contaminated to uncontaminated ground water at the site which is sufficient to constitute a "discharge" by the petitioner for purposes of Water Code §13263(a).

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Issues regarding indemnity, the application of the doctrine of caveat emptor[5] or possible misrepresentation at the time of the sale of the property can not, and should not, be resolved by this Board. However, we do want to point out that we disagree with the petitioner's contention that as a policy matter requiring a present landowner to share responsibility for discharges of waste that began under a prior owner will undercut efforts to promote prompt disclosure and clean up of contaminated sites. The petitioner argues that this will encourage dischargers to conceal their actions in order to shift responsibility on to innocent purchasers of contaminated property. On the

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[4] Reporter's Transcript, California Regional Water Quality Control Board, San Francisco Bay Region, Proceedings Regarding Rhone-Poulenc and Zoecon Corporation - Waste Discharge Requirements, May 15, 1985, Page 29; Zoecon Corp. v. Rhone-Poulenc, Inc., Cal. Superior Court, County of San Mateo, No. 260687.

[5] Under the general rule of caveat emptor (let the buyer beware) in the absence of an express agreement, the vendor of land is not liable to his vendee for the condition of the land existing at the time of transfer.

contrary, we believe that our determination that present property owners are also responsible for waste discharges will encourage potential buyers to more thoroughly examine the condition of property which they may acquire. Zoecon states that it purchased the property in 1972 and conducted an environmental audit of it in 1980. If the audit had taken place prior to the purchase of the property, it is most probable that this matter would not be before us today.

In addition, the petitioner characterizes itself as the "mere landowner" in the situation. Yet it is this very role that puts Zoecon in the position of being well suited to carrying out the needed onsite cleanup. The petitioner has exclusive control over access to the property. As such, it must share in responsibility for the clean up.

Petitioner's final argument concerns the alleged inequity in imposing waste discharge requirements on the basis of site ownership when the actual discharger is known and can perform the clean up. Zoecon cites State Dept. of Environmental Protection v. Exxon, 376 A.2d 1339 (NJ Superior Court, Chancery Division 1977). We do not speak here to that Court's application of New Jersey statutes since we question the comparability to the California statutory scheme. We do note however that the New Jersey court's conclusion regarding application of the common law nuisance doctrine would probably not be applied by a California court. This is because California Civil Code §3483 provides that every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by a former owner, is liable therefore in the same manner as the one who first created it.[6]

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[6] Common law governs in California only to the extent that it has not been modified by statute. [Victory Oil Co. v. Hancock Oil Co. 125 Cal.App.2d 222, 229, 270 P2d 604 (1954)]

We find that our decision today is in many ways analogous to our long standing policy of naming a landlord in waste discharge requirements if necessary and appropriate to the circumstances before the Regional Board. This is consistent with the recent trend in California cases that is contrary to the traditional rule of landlord's nonliability subject to certain exceptions. In Rowland v. Christian (1968) 69 C.2d 108, 70 Cal.Rptr. 97, 443 P.2d 651, California repudiated the traditional classification of duties governing the liability of an owner or possessor of land and substituted the basic approach of foreseeability of injury to others. See, e.g. 3 Witkin, Summary of California Law (8th Ed. 1980 Supp.) Section 453A, Uccello v. Lauderslayer (1975) 44 Cal.App.3d 504, 118 Cal.Rptr. 741.

The court in Uccello held that an enlightened public policy requires that a landlord owes a duty of care to correct a dangerous condition created by a tenant, where the landlord has actual knowledge of the condition and an opportunity and the ability to obviate it. "To permit a landlord in such a situation to sit idly by in the face of the known danger to others must be deemed to be socially and legally unacceptable." (44 Cal.App.3d at 513.)

For all of the above reasons, we conclude that the petitioner is a discharger of waste who was appropriately named in the Regional Board's waste discharge requirements.

3. Contention: Petitioner argues that it has been unconstitutionally denied due process and equal protection of the law in that it is the only property owner named as a discharger despite the fact that adjacent properties are also contaminated.

Finding: Unrefuted testimony before the Regional Board indicates that the vast majority of the contaminated area is now owned by Zoecon. A

small portion of the contaminants have migrated off the site onto adjacent properties. Given the magnitude of the contamination found on the five-acre site which is the subject of the waste discharge requirements relative to the amount of contaminants on adjacent property, we find that it was appropriate for the Regional Board to exercise its discretion pursuant to Water Code §13269 and not issue waste discharge requirements for adjacent property at this time. We note that such a waiver of requirements may be terminated at any time. If additional fact finding should reveal more extensive off-site contamination, the Regional Board should, of course, reconsider its decision to waive requirements for adjacent properties.

III. CONCLUSIONS

After review of the record and consideration of the contentions of the petitioner, and for the reasons discussed above, we conclude:

Zoecon Corporation was properly named as a discharger in Order No. 85-67 (Waste Discharge Requirements for Rhone-Poulenc, Inc. and Zoecon Corporation, East Palo Alto, San Mateo County) by the California Regional Water Quality Control Board, San Francisco Bay Region.

IV. ORDER

IT IS HEREBY ORDERED THAT the petition is denied.

CERTIFICATION

The undersigned, Executive Director of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on February 20, 1986.

Aye: Raymond V. Stone
Darlene E. Ruiz
E. H. Finster
Eliseo M. Samaniego
Danny Walsh

No: None

Absent: None

Abstain: None

Raymond Walsh

Raymond Walsh
Interim Executive Director