

# IBM leak decision criticized

## Failure to prosecute is 'wrong message'

By Michael Dorgan  
Mercury News Oakland Bureau  
2-22-85

Environmentalists charged Thursday that a state water board has sent notice to industry that it is all right to pollute Bay Area waters.

"Here we have a state agency telling the largest computer company in the world with one of the largest toxic waste spills in the world that it will not have to pay any penalties," said Ted Smith, chairman of the Silicon Valley Toxics Coalition. "That's the wrong message to get out."

Smith was referring to the San Francisco Bay Regional Water Quality Control Board's decision Wednesday not to ask the state attorney general to prosecute IBM for discharging chemicals at its South San Jose plant.

By a 4-3 margin, the board backed a recommendation by agency executive officer Roger James, who argued that prosecution of IBM despite its multimillion-dollar cleanup effort would discourage other companies from cooperating with the agency in the cleanup of future spills.

Smith, whose coalition has rallied public support for more stringent pollution standards, says the board's vote ruined an opportunity for the state to collect millions of dollars in penalties, which he said could have been used to mitigate the effects of the spill.

He said the vote not only reduced the amount of compensation from IBM, which has spent about \$34 million on cleanup and prevention measures over the last four years, but compromised the board's integrity. According to Smith, the reasoning behind the vote runs counter to the premise of regulatory agencies: that undesired behavior is discouraged by punishing those who practice it.

"It's the opposite of the argument you always hear in how to deter anti-social conduct in other areas," he said. "I don't know why the opposite should apply to corporate behavior."

According to Gene Munger, a spokesman for Shell Oil Co., the opposite doesn't always apply to corporations. Munger noted that a chemical spill at Shell's Martinez complex was referred to the attorney general last June by the same water board even though Shell, like IBM, had made a strong case that the discharge was not deliberate or due to negligence.

"They said, 'Willful or unlawful, we're going to cite

*Continued from Page 1B*  
you and refer you to the attorney general," Munger recalled.

Munger said he was not familiar enough with the details of the IBM case to speculate on whether the water board was using more than one set of criteria or referrals to the attorney general. However, he said Wednesday's vote reinforced his feeling that "life's not fair."

Shell was one of five companies whose cases were referred to the attorney general last year by the San Francisco regional board. Another was the Pacific Refining Co. of Hercules. Allan Wheeler, a senior engineer for Pacific, said he, too, sensed a double standard.

"It certainly does seem surprising" that his company would be referred for prosecution while IBM was not, Wheeler said. "There are a lot of inconsistencies."

Among those most troubled by the alleged inconsistencies is water board member Marion Otsea, who voted Wednesday to refer the IBM case to the attorney general. She said Thursday she thinks the board hired its responsibility.

"Anybody else who incurs a violation of a permit or degradation of a water supply gets referred," she said. "I could not see the difference between IBM and

Michael Belliveau, research director of Citizens for a Better Environment, a nationwide group that focuses on urban pollution problems, said his organization is considering appealing the regional board's vote to the state water board.

"Basically, they sent a message to the (industrial) community that they can contaminate water and not be penalized," Belliveau said. The argument that referral would have reduced future cooperation "doesn't hold water."

H. Ray Kerby, IBM's manager for environmental programs, does not agree. He said in an interview that "each case must be decided on its own merit," and that in the case of IBM, the board made the correct decision.

Kerby has some support for that position even among those who last month opposed the water board's decision to accept IBM's cleanup plan, which was criticized by environmentalists because it allowed low levels of toxins — including 1,1,1 trichloroethane (TCA) and Freon 113 — to remain in the water supply.

Santa Clara County Supervisor Susanne Wilson, who sponsored a county board resolution to appeal the acceptance of the cleanup plan, said Thursday her opposition to the cleanup plan does not mean she thinks IBM should be prosecuted for the leak.

Wilson said she thinks the board was appropriately influenced by IBM's "exemplary" cleanup efforts to date, and that it would be a mistake to interpret its vote as a "reluctance to fine people."

"The message to industry should be that they should clean up, but woe to those who would not," she said.