BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Petition of SANTA CLARA RANCHES *for Redetermination Under the Hazardous Substances Tax Law*

Appearances:

For Petitioner:	J. W. Gibbons President
For Department of Health Services:	Bryce Caughey Staff Attorney
For Department of Special Taxes & Operations, State Board of Equalization:	E. V. Anderson Special Taxes Administrator Janet Vining Staff Counsel

MEMORANDUM OPINION

This opinion considers the merits of a petition for redetermination of a Hazardous Waste Generator Fee in the amount of $10,780 which was heard and taken under consideration by the Board on August 13, 1991 in Torrance, California.

Petitioner owns real property which was contaminated over a number of years by a leaking gasoline tank located on the property. Petitioner was held responsible as the generator for the generator fee imposed for the subsequent removal and disposal of the contaminated soil.

The period of liability in this case was July 1, 1987 through June 30, 1988. The fee was based on the removal of over 480 tons of contaminated soil from the site in fiscal year 1987–1988. The applicable generator fee category was 250 to 2,499.9 tons. (Health and Safety Code section 25205.5(b)(5).)

The issues raised by the petition are:

(1) For purposes of the fee imposed on generators of hazardous waste by Health and Safety Code section 25205.5, is the waste generated at the time of removal of the contaminated soil constituting the waste, or over the time period during which the contamination occurs.

(2) Was the fee schedule for fiscal year 1987–1988 arbitrary, irrational, and discriminatory.

Petitioner argues that the hazardous waste which resulted from the gasoline which leaked into the soil was not generated in fiscal year 1987–1988; rather, it was generated as the leakage of gasoline occurred over a number of years. The Department of Health Services (now the Department of Toxic Substance Control) contends that waste was generated when the contaminated soil was excavated, and the volumes of waste excavated determined the amount of the generator fee.

Health and Safety Code, Chapter 6.5 (commencing with § 25100) of Division 20, provides generally for the control of hazardous waste, and delegates to the Department the authority to promulgate regulations for the enforcement of the provisions of the code. (See §§ 25141 and 25150 of the Health and Safety Code.) Pursuant to that authority, the Department has promulgated extensive regulations in Title 22 of the California Code of Regulations (CCR).

Article 9 of Title 22 lists wastes and materials the Department has determined to be hazardous (including gasoline; § 66680(d)). In addition, Article 11 of Title 22 sets forth criteria to be used in determining whether a waste is hazardous. Section 66680 mandates that any waste which is listed in Article 9, or which satisfies any of the criteria of hazardous waste presented in Article 11, must be handled in accordance with the Department's regulations.

When petitioner in this case excavated the contaminated soil, petitioner produced waste within the meaning of Health and Safety Code sections 25120 and 25124. Under Title 22, CCR section 66305, it is the waste producer's responsibility to determine if the waste is to be classified as hazardous waste pursuant to Article 9 and Article 11 of Title 22. Once classified as hazardous by the producer, the waste must be managed pursuant to the Department's regulations. Thus, when the petitioner in this case excavated the contaminated soil, classified it as hazardous and reported it to the Department on a hazardous waste manifest, as required under Title 22, CCR Section 66480, the petitioner became a regulated generator. Pursuant to Health and Safety Code section 25205.5(b), a regulated generator is required to pay the fee for the amount of waste generated.

Health and Safety Code section 25205.1(f) defined a ''generator'' in fiscal year 1987–1988, ''as a person who generates volumes of hazardous waste on or after July 1, 1986. . . .'' Title 22, CCR section 66078 defines ''generator'' as ''. . . any person, by site, . . . *whose act first causes* a hazardous waste to become subject to regulation.'' (Emphasis added.) Thus, for the purpose of the generator fee calculation, the petitioner became a generator when the hazardous waste was removed from its point of origin and manifested because it is at that time that the waste became subject to regulation. Petitioner's act of excavating and manifesting the contaminated soil was the act which first caused the hazardous waste to become subject to regulation. The statutory and regulatory scheme support the Department's contention that petitioner became a generator in this case when the waste was excavated. It is to be noted that the purpose of the fee is to provide funds for regulation by the State. Accordingly, the law provides that the act which causes regulation to begin is the act which is subject to the fee. It is not the leaking of the contaminant into the soil, but rather the management of the soil after excavation which incurs State cost.

The position that generation takes place when the contaminated soil was removed and not over the period when the contamination occurred, is consistent with 40 CFR section 264.114 which provides that a person removing waste during the closure of a hazardous waste management unit becomes a ‘‘generator’’ of hazardous waste.

The Board finds that hazardous waste was generated within the meaning of Health and Safety Code sections 25205.1 and 25205.5 at the time petitioner excavated and manifested the contaminated soil which constitutes the hazardous waste. Petitioner was a generator and was therefore required to pay the fee pursuant to Health and Safety Code section 25205.5(b) for the amount of waste generated in fiscal year 1987–1988.

Petitioner contends that the fee schedule for the fiscal year 1987–1988 was arbitrary, irrational, and discriminatory. Petitioner states the fee schedule favors the large-scale, ongoing producers of hazardous waste to the disadvantage of the one-time small generator.

The fee schedule established by the Legislature is based on the generation of the amount of waste over an annual period. If a small company generates the same amount of waste at a site as a large company under the fee schedule, they both pay the same fee for that period regardless of the company’s size. Therefore, any generator of waste which comes within a specific fee category will pay the corresponding fee under the law relevant to fiscal year 1987–1988.

A legislative act would be required to amend the law to address petitioner’s concern. An administrative agency has no power to declare a statute unenforceable, or refuse to enforce a statute, on the grounds of unconstitutionality unless an appellate court has made a final determination that such statute is unconstitutional under section 3.5 of Article III of the California Constitution. The fee schedule under Health and Safety Code section 25205.5 has not been held unconstitutional by an appellate court; therefore, the administrative agencies charged with the enforcement of the statute may not refuse to enforce it.

For the reasons expressed in this opinion, the petition for redetermination in the amount of $10,780 is redetermined without adjustment.

Done at Sacramento, California, this 10th day of December 1991.

Brad Sherman, Chairman
Matt Fong, Member
Windie Scott, Member
William Bennett, Member
Attested by: Burton W. Oliver, Executive Director