

Mr. Robert M. Frank  
Excise Tax Unit

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Janet Vining  
Legal

Residential Hazardous Waste

This is in response to your memorandum of November 13, 1989, in which you request an opinion concerning Section 66470(e) of the Department of Health Services' regulations. This section concerns hazardous waste produced incidental to owning and maintaining a residence.

The taxpayer, \_\_\_\_\_, of \_\_\_\_\_, California, wished to remove the roof of his house. Since the roof contained asbestos, \_\_\_\_\_ contracted with a qualified firm to remove it and properly dispose of the asbestos. The contractor advised \_\_\_\_\_ to send DOHS copies of the hazardous waste manifests on which the asbestos was transported.

Sandra Goode-Riedel, of DOHS's Manifest Unit, wrote to \_\_\_\_\_, informing him that all manifests must contain an identification number which identifies the generator of the waste for reporting and fee requirements, and that the Board of Equalization collects the associated fees. Goode-Riedel noted that DOHS has established a particular identification number for persons removing hazardous waste from a residential home, and that this ID number exempts the homeowners from the generator reporting and fee requirements. Goode-Riedel stated: "Whoever obtained the ID number for your removal did not properly identify the situation. Therefore, you are not required to pay any fees to the BOE." \_\_\_\_\_ forwarded a copy of DOHS's letter to the Board.

Section 25205.5(a) of the Health and Safety Code requires that "[e]very generator of hazardous waste, in the amounts specified in subdivision (b), shall pay the Board a fee for each generator site for each calendar year, or portion thereof." The Health and Safety Code includes no exemption from the generator fee for individuals who dispose of household

hazardous waste; however, no generator fee is due from a person who generates less than five tons of hazardous waste per year per site.

Article 6 of Title 22 of the California Code of Regulations addresses the "Requirements for Generators of Hazardous Waste". The article generally refers to manifesting requirements, and there is no discussion of the generator fee. Section 66470(e) states "[t]his article does not apply to generators handling only hazardous waste produced incidental to owning and maintaining their own place of residence (e.g., household hazardous waste is exempt.)" Although Section 66470(e) exempts generators of household hazardous waste from the manifesting requirements, DOHS apparently still requires the waste to be transported on a manifest (as described in Goode-Riedel's letter), but assigns the generator a special identification number. Section 66470(e) does not exempt the generators of household hazardous waste from the generator's fee.

I spoke with Dink Mather of DOHS concerning this matter, and she sent me a copy of an opinion she requested from DOHS's Toxics Legal Office. The opinion, however, is not very helpful, since it concludes that two positions are legally supportable. DOHS's attorney asserts that the fee could be considered waived because Section 66470(e) exempts generators of household hazardous waste from all requirements set forth in California's toxic waste laws (a position that the manifest unit clearly has not followed). The attorney also states that the fee could be considered due either because, while the homeowner is exempt, the contractor who removed the asbestos is not, or because the removal of asbestos is not the type of household maintenance contemplated by the regulation.

I disagree with the Toxic Legal Office's opinion. Section 66470(e) of DOHS's regulations applies only to the requirements of Article 6 of Title 22. Since that article makes no reference to the generator fee, Section 66470(e) cannot waive the statutory requirement that the fee be paid. I also disagree with the position that the contractor who removed the asbestos is liable for the fee. The contractor only "generated" the waste at the request of, and pursuant to an agreement with, the homeowner. To say that a contractor that picks up or cleans up hazardous waste is also the generator of the waste would have a far-reaching impact on how the hazardous waste fees are assessed, and would have little real meaning in this instance, since the contractor would simply pass on the obligation to the homeowner.

I conclude that an individual who generates hazardous waste incidental to owning and maintaining a place of residence

is subject to the generator fee imposed by Section 25205.5 of the Health and Safety Code. However, it is apparent that even the type of household maintenance at issue here (the removal of a roof) would not produce the requisite five tons of waste that must be generated per site per year before the fee is due. Nevertheless, the generator should report the amount of waste to the Board on the appropriate forms.<sup>1/</sup>

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<sup>1/</sup> It should be noted that persons who dispose of more than 500 pounds of hazardous waste per year must pay the land disposal fee (Health and Safety Code Section 25174.1) and Superfund tax (Health and Safety Code Section 25345). Again, it appears that the removal of the roof did not generate enough hazardous waste to necessitate payment of the disposal fees.