

M e m o r a n d u m

To: Diana Campos - MIC:57
Environmental Fees Division

Date: December 13, 1995

From: Janet Vining
Legal Division

Subject:

After our meeting with representatives of the _____ Company ("_____"), you requested an opinion concerning the appropriate statute of limitations for issuing a notice of determination to _____ for the hazardous waste facility fee for fiscal year 1990-91 and calendar years 1991 through 1993. For the reasons set forth below, we conclude that, if no return has been filed, the statute of limitations for issuing a notice of determination for fiscal year 1990-91 will expire April 1, 1999. In addition, we conclude that the statute of limitations for issuing a determination for any of the subsequent calendar years is three years from the date when the annual facility fee was due, if a return was filed, or eight years from that date if no return was filed.

_____ stated that its pond became subject to regulation under the federal Resource Conservation and Recovery Act in 1990, and it thereafter submitted a RCRA Part A and Part B application to the U.S. Environmental Protection Agency. The Department of Toxic Substances Control (the "Department") asserts that _____ thereby obtained interim status by operation of law. The Board sent _____ returns for the 1994 and 1995 facility fee. The unit covered by the Part A and Part B applications is no longer in operation.

During fiscal year 1990-91, Revenue and Taxation Code Section 43152.8(a) required the Department to notify the Board of the issuance of a hazardous waste facility permit to any facility operator, who had not previously been granted interim status, within 30 days after the facility permit issued. Section 43152.8(b) required the Board, upon such notification, to submit a bill to the newly-identified facility for the hazardous waste fees, which were then due and payable within 30 days. Revenue and Taxation Code Section 43202 states that "every notice of a determination of an additional amount due shall be given within three years after the date when the amount should have been paid or the return was due, or within three years after the return was filed, whichever period expires

later. In the case of failure to make a return, the notice of determination shall be mailed within eight years after the date the report or return was due.”

filed its Part A application in fiscal year 1990-91, and received interim status by operation of law that same fiscal year. While Revenue and Taxation Code Section 43152.8 required the Department to advise the Board of the issuance of a new hazardous waste facilities permit, it made no mention of interim status. However, even assuming that Section 43152.8 required the Department to advise the Board of the granting of interim status to a facility, there was no requirement that the Board issue a bill to a newly-identified facility within any specific period of time. Section 43152.8 only required that a facility that received such a bill pay it within 30 days. Section 43202's statute of limitations on sending a notice of determination begins to run from the date a "report or return" is due. Assuming that the date a facility fee "report or return" is due to be the date the payment is due (since, until the second half of 1991, returns were not utilized in the administration of this fee), the statute of limitations did not begin to run until 30 days after the bill was sent. As there was no specific period within which the Board was required to send the bill, the statutory period for issuing a notice of determination for a facility newly-permitted in fiscal year 1990-91 appears to be open-ended. I found no statutory or case law to suggest that a statute of limitations should be created where one does not exist.

However, Revenue and Taxation Code Section 43202 provides a general statute of limitations for the issuance of notices of determinations concerning hazardous waste fees, including the facility fee. For fiscal year 1990-91, that statute of limitations expires April 1, 1994 if a return was filed, and April 1, 1999 if no return was filed. While it is clear that statutes of limitations are products of legislative authority and control (Zastrow v. Zastrow (1976) 61 C.A.3d 710) and an administrative agency cannot create statutes of limitations where none exist, case law also indicates that statutes of limitation are favored in the law (McGee v. Weinberg (1979) 97 C.A.3d 798; City and County of San Francisco v. Workmen's Compensation Appeals Board (1969) 269 C.A.2d 382). Statutes of limitations further an important public policy by eliminating stale claims and insuring that claims are heard while evidence is still fresh.

Therefore, for sound policy reasons, I conclude that, if a notice of determination for a facility fee did not issue during 1990-91 for a facility newly-identified or newly-permitted during that fiscal year, then the applicable statute of limitations for issuing such a notice of determination is set forth in Revenue and Taxation Code Section 43302.

, also presented a novel argument concerning calendar years 1991 through 1993. Effective July 1, 1991, Revenue and Taxation Code Section 43152.6 required every facility operator subject to the facility fee to "file an annual return on the forms provided

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by the board". This language differs from other sections of the Hazardous Substances Tax Law, which require that persons paying other hazardous waste fees file an annual return on forms "prescribed" by the Board (see, e.g., Rev. & Tax. Code Sections 43151, 43152.7, 43152.9, and 43152.11). Based on this discrepancy in the Revenue and Taxation Code provisions, _____ argues that a facility operator is not liable for the facility fee unless and until the Board sends the operator a facility fee return.

_____ 's argument is not convincing. Liability for the facility fee is established by Health and Safety Code Section 25205.2(a), which states that each operator of a facility shall pay a facility fee for each reporting period based on the size and type of the facility. Revenue and Taxation Code Section 43053 states that the fee imposed pursuant to Health and Safety Code Section 25205.2 will be administered and collected by the Board in accordance with Part 22, Division 2 of the Revenue and Taxation Code. Part 22 provides specific due dates for the facility fee and facility fee prepayment in Revenue and Taxation Code Sections 43152.6 and 43152.12, respectively.

The version of Revenue and Taxation Code Section 43152.6 relied on by _____ was added in 1991, when the facility fee changed from a fiscal-year fee to a calendar-year fee. Nothing in the legislative history of the adoption of that section suggests that the Legislature intended such a far-reaching change as _____ argues. The liability for the facility fee is established by the facility meeting the requirements of the Health and Safety Code, not by an administrative act of the Board.¹

If you have any further questions regarding this matter, please feel free to call me.



JV/wk

cc: Jeff George
Mary Armstrong
Dennis Mahoney, Dept. of Toxic Substances Control
Marilee Hanson, Dept. of Toxic Substances Control

¹ I note that Revenue and Taxation Code Section 43152.12 requires that the facility fee prepayment be "accompanied by a return in a form prescribed by the board." Thus, _____ 's argument would lead to the incongruous result of a facility being responsible to report and pay the facility fee prepayment whether the Board sent it the form or not, but only responsible for payment of the final facility fee payment if the Board sent the facility a return.