

Memorandum

TO : Mr. Robert M. Frank
Excise Tax Unit

Date : August 25, 1989

From : Janet Vining
Tax Counsel

Subject: Taxability of Intermediate Cover

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AUG 28 1989

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This is in response to your May 16, 1989 memorandum requesting an opinion concerning whether intermediate cover placed on landfills is subject to the new fee imposed by the Solid Waste Disposal Site Cleanup and Maintenance Fee Law.

Section 66799.49 of the Government Code requires that every operator of a solid waste landfill pay an annual fee to the Board of Equalization on all solid waste "disposed at each disposal site." The fee is established by the Board of Equalization and is based on the amount, by weight, of solid waste "handled at each disposal site."

California's Solid Waste Management Board has adopted regulations which set minimum standards for the handling and disposal of solid waste. (See Cal. Admin. Code, tit. 14, ch. 3.) In order to prevent the propagation of flies and rodents, to control landfill fires, and to prevent the creation of nuisances, at least six inches of compacted cover material must be placed on all surfaces of a Group I and II landfill (now classified as Class III waste, generally including municipal garbage).¹ If the landfill accepts 50 tons or more of waste per day, this "periodic cover" must be applied daily. Section 17682 sets forth a schedule for the application of periodic cover on landfills which accept less than 50 tons of

¹ The Waste Management Board's regulations contain definitions of numerous classifications of waste, including refuse (combustible, non-combustible, residential, and street), waste (institutional, liquid, putrescible, bulky, industrial, and infectious), garbage, rubbish, and litter. I will be content to use the generic term "waste."

waste a day. The Solid Waste Management Board may consider applications for different cover and compaction requirements for special landfill operating practices.

Section 17684 of the regulations requires the application of 12 inches of "intermediate cover" at a site where no more waste will be accepted for six months. When a landfill is closed, Section 17685 requires that two feet of "final cover" be applied. "Final cover" is defined in Section 17685 as cover material "of a quality suitable for the intended reuse of the site." However, regulations adopted by the Water Resources Control Board require that four feet of final cover be applied, and this more stringent requirement is followed instead.

An alternative form of landfill management is described in Section 17683 of the regulations, which sets forth performance standards that may be used in lieu of Section 17682's cover requirements if the landfill operator gives the Solid Waste Management Board 30 days' notice of its intent to use the standards. The performance standards require that the landfill be checked often for flies, rats, odor (through air collection and testing), litter and fire hazard. If the performance standards are met, the landfill operator may cover any refuse from the previous day with new refuse, or six inches of "compacted soil suitable for the purpose." (Section 17683(e)(1)). The regulation sets forth certain limits on the square footage of exposed refuse permitted in the "dry season" and "wet season." If a landfill operator fails to meet any of the performance standards for three consecutive weeks, the cover requirements of Section 17682 must be followed for the next three consecutive weeks, and the landfill operator may then choose to return to the performance standards. The standards were adopted pursuant to Government Code Section 66770.5. John Bell, of the Solid Waste Management Board's Enforcement Division, informed me that ten sites in the state currently continue to use this option, even though the enabling legislation was repealed in 1984.

Certain landfills are exempt from permit and cover requirements. These landfills accept an insignificant amount of waste and pose no significant threat to health, safety and the environment, and the exemption is not against the public interest. (See Section 18215.)

"Cover material" is defined in Section 17225.16 of the regulations as:

...soils or other material suitable for use
in covering compacted solid wastes in a

disposal site. A material is suitable for use as a cover material if it will serve, when properly used, as a barrier to:

- (a) the emergence or attraction to the landfill of flies, rodents, or other vectors;
- (b) the progress of fires within the landfill;
- (c) The escape of odor; and
- (d) excess infiltration of surface water runoff.

Landfill operators purchase about 75% of the dirt used as cover and obtain the remainder from contractors and others who bring dirt to the landfill for disposal. The landfill operators sometimes waive their "tipping fee" (disposal charge) on dirt which is brought to the site for disposal but is retained for use as cover. John Bell indicated that the purchase of dirt for cover is one of the most expensive aspects of operating a landfill, and many alternative types of cover are being used or investigated. Waivers or permission to use alternative forms of cover can be granted by the Solid Waste Management Board, or any of the 120 local agencies that enforce the Board's standards, for experimental purposes or based on financial difficulties. In addition, waivers for some types of cover have been made where the cover was being used when the original permit to operate the landfill was obtained.

The experimental types of cover currently in use, pursuant to a local or state waiver, include drilling muds mixed with silicon and cement, drilling muds mixed with sewer sludge, and auto shredder fluff mixed with soil.

The Solid Waste Disposal Site Hazard Reduction Act contains no reference to cover. Government Code Section 66799.49 simply states that every operator of a solid waste landfill required to have a permit must pay an annual fee on "all solid waste disposed at each disposal site," and that the fee is based on the amount of "solid waste handled" at each site. No fee is due on recycled materials and inert waste removed from the waste stream and not disposed of in the landfill (Government Code Section 66799.49(d)), but it appears that the fee must be paid on all "solid waste" that is placed in the landfill, or even handled at the landfill. Cover material is handled at and goes into the landfill, and is not

specifically exempted from consideration in assessing the fee. Therefore, it should be included in calculating the fee unless we conclude that cover material is not, in fact, "solid waste."

"Solid waste" is defined very broadly in Government Code Section 66719 to be:

...all putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances, manure, vegetable or animal solid and semisolid wastes, and other discarded solid and semisolid wastes.
(Emphasis added.)

Section 66719's definition of "solid waste," while broad, carries a common-sense connotation: waste is something that is thrown out or discarded because it has ceased to be of any use to the owner, or because it is the by-product of some process but not useful in itself. Current landfill management practices present a spectrum of types of cover material which might or might not logically be considered waste. On one extreme is clean dirt which is purchased specifically for the purpose of complying with the Solid Waste Management Board's cover requirements. At the other extreme is fresh waste which is used to cover old waste by a landfill operator who has opted to follow the performance standards. The grey area in between includes cover made of mixtures of materials, some more wastelike than others. It requires little imagination to conclude that fresh purchased dirt used for cover is not waste, while new waste is. It is the grey area that presents the problems, where, for example, auto shredder fluff (probably waste) is mixed with soil (probably not).

I would conclude that any material which is placed on the landfill as cover in order to comply with the Solid Waste Management Board's requirements, as set forth in Sections 17582 (periodic cover), 17684 (intermediate cover) and 17685 (final cover) of the Board's regulations, should not be considered "solid waste" and therefore should not be included in the weight used to calculate the fee. Whatever the composition of the material, it is not thrown away or discarded, but is applied to the landfill for a specific purpose, i.e., to control the spread of flies, rodents, fires, odor and surface water runoff. Although some of the cover materials may contain elements that would be considered waste in another context,

they are not waste when applied in an approved use as cover. The Solid Waste Management Board regulates the operation of landfills and, if a cover material is inappropriate and adds to the solid waste problem rather than serving to contain it, the Board can take the necessary action to bring the landfill into conformity with the Board's standards.

This interpretation of the solid waste disposal site cleanup and maintenance fee law avoids several potential problems. If the decision whether to include cover material in the weight used for the fee was based on the composition of that material, the Board of Equalization would have to determine what material should be included, and under what circumstances. For example, the Board might decide that any cover material containing a certain percentage of non-dirt, wastelike materials should be included. Or, the Board might specify the types of non-dirt materials which could be used without becoming part of the fee assessment (for example, concrete might be acceptable, while sewer sludge would not be). Whatever its decision, the Board would have to adopt very clear guidelines for the landfill operators, and subject those operators to detailed and difficult record-keeping requirements. Audit procedures would also be problematic, since the cover materials in question might be buried under several layers of waste and other cover.

The Board of Equalization might also decide to take into consideration the circumstances under which the cover material was obtained. For example, dirt purchased by the landfill operator might not be considered in the fee, while dirt acquired from a contractor (who intended to dump the dirt at the landfill) would be, since it is "waste" from the contractor's point of view. This approach would also create audit problems, because it involves the contractor's mental state (i.e., did the contractor bring the dirt to the landfill site to dispose of it or to sell it to the landfill operator).

Finally, John Bell informed me that, probably due to the expense of acquiring sufficient cover material, a large number of landfills are regularly out of compliance with the Board's cover requirements. Including the weight of the cover material in the fee determination could exacerbate this problem, rather than further the legislative goal of containing and eliminating problems at landfills.

For all the above reasons, I conclude that material applied as landfill cover in a use approved by the Solid Waste

Management Board is not to be included in the weight upon which the solid waste disposal fee is based.²

Janet Vining

JV:wak
1473C

cc: Mr. Gary J. Jugum
Mr. Donald J. Hennessy
Mr. E. L. Sorensen, Jr.
Mr. Gordon P. Adelman
Ms. Michele Hicks
Mr. E. V. Anderson

²However, new waste that is applied to old waste by a landfill using the performance standards set forth in Section 17683 is solid waste and should be included in the weight upon which the fee is based. Section 17683 does not approve an alternate form of cover as much as it exempts a landfill from the cover requirements when certain conditions are met.