

Mr. David McKillip
Environmental Fees Unit

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Janet Vining
Legal

Regulatory Exemption from Activity Fee

This is written in response to your September 17, 1990 memorandum concerning Section 66565(g) of Title 22 of the California Code of Regulations. In that section, the Department of Health Services has provided an exemption from the variance application fee imposed in Section 25205.7(g) of the Health and Safety Code. You question DOHS's authority to establish such an exemption by regulation, and ask if the exemption applies only to those applications submitted and approved on or after March 2, 1990, the operative date of the regulation.

Section 66565 et seq. of DOHS's regulations creates a blanket regulatory exemption for certain transporters and generators described as milkrun, emergency response incident, PCB waste, consolidation and small load, if they meet all the general requirements set forth in Section 66565, and the specific requirements set forth in Sections 66566 through 66569.5 for the different types of transporters. Subsection (g) of Section 66565 states "Any transporter applying for and receiving an exemption under this article shall, for purposes of that application, be exempt from the variance fee prescribed in subdivision (g) of Health and Safety Code Section 25205.7, provided such exemption is specifically requested in the application and specifically authorized by the Department."

Regulation Section 66565 was first proposed by DOHS in September of 1989. The statement of reasons accompanying the proposed regulation indicated that DOHS has issued variances to the listed types of transporters on a routine basis, since the hazardous waste activity involved was insignificant. The variances were generally issued to transporters serving their own facilities or small quantity customers. DOHS asserted that adoption of a regulation would standardize specific operating practices then in effect for issuing variances to such transporters, and thus reduce the administrative burden on both DOHS and the transporters.

Subsection (g) of Section 66565 did not appear in the initial version of the regulation, or in subsequent revisions. It first appeared in the final version of the regulation, dated December 13, 1989. The final statement of reasons, dated December 22, 1989, indicated that the opportunity to apply for an exemption from the variance application fee was "being extended to these transporters in order to reduce the financial burden, which it is anticipated will encourage the safe management of these small quantities of hazardous waste." The regulation became effective March 2, 1990.

Section 25205.7(a) of the Health and Safety Code states "[T]he Board shall assess a fee for any application for a ... variance ... issued by the department pursuant to this chapter or the regulations adopted pursuant to this chapter." Subsection (g) states: "A person submitting a request for a variance shall pay ... eight hundred dollars (\$800) for a variance from the requirements for hazardous waste haulers imposed by this chapter"

Section 25143 of the Health and Safety Code permits DOHS to grant a variance from any of the requirements of Chapter 6.5 of the Health and Safety Code ("Hazardous Waste Control") for the management of a hazardous waste if certain conditions apply. For example, DOHS must find that the hazardous waste is a non-RCRA waste, and that either the hazardous waste management activity poses an insignificant potential hazard to human health and safety, and the environment, or the management of the hazardous waste is regulated by another governmental agency in a manner that ensures it will not pose a substantial potential hazard to human health and safety, and the environment.

In the recordkeeping file of Regulation 66565, DOHS cited Health and Safety Code Section 25143 as its authority for adopting a blanket exemption. DOHS takes the position that Section 25143 allows it to grant a variance from any of the requirements of Chapter 6.5, including any fees imposed in that chapter. (Chapter 6.5 contains the statutory provisions imposing all the hazardous waste fees collected by the Board except the activity oversight fees and, until last legislative session, the Superfund tax.) However, DOHS acknowledges that any variance, including a variance from a fee, can only be granted if the conditions listed in Section 25143 are met. Section 25143(b) states that DOHS may grant a variance "only upon receipt of a variance application containing sufficient information to enable the department to determine if all the conditions required by Section 25143 are satisfied." Thus, Section 66565(g) requires that a transporter who wishes to be exempt from the variance fee imposed in Health and Safety Code Section 25205.7(g) must

specifically request such an exemption, and it must be authorized by DOHS.

Section 25143 provides DOHS with broad power to grant exemptions, including exemptions from any of the fees imposed in Chapter 6.5. DOHS has carefully drafted Regulation 66565, including the availability of an exemption from the variance application fee, to comply with the requirements of Section 25143. I believe that, in so doing, DOHS has acted pursuant to the authority granted to it by the Legislature.

You question whether the exemption provided in Regulation Section 66565(g) applies only to those applications submitted and approved on or after the operative date of the regulation. However, as discussed above, Section 66565(g) does not create an exemption, but provides certain transporters an opportunity to apply for a variance from the fee imposed in Health and Safety Code Section 25205.7(g) at the same time the transporters apply for an exemption from regulation. Prior to the adoption of Regulation 66565, transporters had the right to apply for a variance from regulation or from the variance application fee, and DOHS had the authority to grant such variances. Regulation Section 66565(g) simply standardized these applications.

Therefore, the Board should recognize an exemption from the fee imposed in Health and Safety Code Section 25205.7(g) where such exemption has specifically been requested from and authorized by DOHS, whether that authorization occurred before or after March 2, 1990.

Effective January 1, 1991, the variance from the fee requirement for qualified transporters and generators will be codified at Health and Safety Code Section 25205.7(g)(3), which was added last legislative session by AB 2794. Section 25205.7(g)(3) states: "Any variance granted pursuant to Article 6.6 (commencing with Section 66565) of Chapter 30 of Division 4 of Title 22 of the California Code of Regulations is not subject to a fee under this section."

Janet Vining

JV:wk
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- cc: Mr. E. V. Anderson
Mr. Robert M. Frank
Mr. Gary J. Jugum
Mr. Donald J. Hennessy
Mr. Gordon Adelman