

Mr. Robert M. Frank
Excise Tax Division

May 10, 1990

Janet Vining
Legal

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Remediation (No Account Number)

This memorandum is in response to yours of November 22, 1989, in which you pose several questions concerning the disposition of contaminated soil. I will only address the issues involving (). Before we take action concerning the remediation, I will draft a letter to DOHS discussing the "disposal" involved in that project.

uses aeration to render contaminated soil nonhazardous. In this process, the soil is tilled regularly, causing volatile compounds, such as gasoline, to release into the air. The release would occur naturally, but the tilling speeds it up. Eventually, the concentration of hazardous components, such as gasoline, is reduced to the point where the soil is no longer hazardous.¹ DOHS considers aeration to be a form of treatment. While it has been argued that merely leaving gasoline-contaminated soil on the ground is also a form of treatment, since the gasoline naturally evaporates, DOHS has rejected this position.

Recyclable materials are defined in Section 25120.5 of the Health and Safety Code to include hazardous wastes that are capable of being recycled, and recycled materials are defined in Section 25121 as materials which are used or reused, or reclaimed. Until October 2, 1989, "used or reused materials" were defined as "those which are processed to recover a usable product, or which are regenerated" (Section 25120.1). Both definitions were removed by AB 1847 (Chapter 1436, effective

¹ The release of the hazardous material into the air, however, is of concern to the air pollution control agencies.

October 2, 1989). Since the soil at issue in the example is processed to recover a usable product, it is probably "reclaimed material", at least as that term was previously defined.

Section 25143.2 of the Health and Safety Code (also amended in 1989 by AB 1847), creates a broad exemption from regulation for recyclable materials which are shown to be recycled by any of several listed methods. However, subsection (e) of Section 25143.2 states that recyclable materials are hazardous wastes and subject to full regulation if the materials are "used in a manner constituting disposal, or used to produce products that are applied to the land including, but not limited to, materials used to produce a fertilizer, soil amendment, agricultural mineral, or an auxiliary soil and plant substance."

Dirt which is aerated and then applied as groundcover, or moved, aerated, and left in place as road cover, is recycled. However, because it is applied to the land, the soil would not be exempt from regulation under Section 25143.2, and any applicable fees would apply. Section 25205.5(e) of the Health and Safety Code (as amended in 1989 by SB 475), states: "[a]ny hazardous materials which are recycled, and used onsite, and are not transferred offsite, are not hazardous wastes" for purposes of assessing a generator fee. The language used in Section 25205.5(e) is more general than that in Section 25143.2. Thus, recyclable hazardous waste which does not qualify for the exemption in Section 25143.2 might, nonetheless, not be included in determining whether a generator fee is due.

If hazardous waste, in the form of contaminated soil, is recycled (whether after treatment, such as aeration, or not), and is reused onsite, the amount of such waste would not be included in determining whether a generator fee is due. If the waste is treated and reused, rather than disposed of, neither of the disposal fees (Health and Saf. Code §§ 25174.1 and 25345) would apply.

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