

Memorandum

To : E. L. Sorensen, Jr.
Chief Counsel

Date: November 24, 1992

From : Janet Vining
Tax Counsel

Subject: **Liability of Department of Defense and Other Federal Entities for the Hazardous Waste Fees**

This memorandum will set forth our opinion concerning several questions involving the applicability of the hazardous waste fees to the federal government. Based on the precedent set forth herein, we have determined that (1) federal entities are not subject to the Superfund tax for any period or the land disposal fee for periods after September 29, 1989, (2) federal entities are not subject to the hazardous waste fees for periods prior to January 1, 1991, and (3) federal entities are not subject to the interest and penalties imposed by the Hazardous Substances Tax Law. Del Anderson has advised the United States Air Force, Navy, and Marines of these positions, and those Departments have begun to pay the hazardous waste fees accordingly.

The hazardous waste fees are imposed in Chapters 6.5 and 6.8 of the Health and Safety Code and are based on the generation, disposal, and other handling or management of hazardous waste in the state. Certain of the fees are deposited in the Hazardous Waste Control Account and are used by the Department of Toxic Substances Control (the "Department") and other agencies to regulate the management of hazardous waste, while other fees are deposited in the Hazardous Substance Account and are used to cleanup sites contaminated with hazardous waste.

The Superfund Tax and Land Disposal Fee

The Superfund tax, imposed by Health and Safety Code Section 25345, was repealed effective January, 1991. The tax, which was paid per ton of hazardous waste disposed of or submitted for disposal, was deposited in the Hazardous Substance Account (Rev. & Tax. Code § 43552). The land

disposal fee, imposed by Health and Safety Code Section 25174.1 (previously 25174) is also paid per ton of hazardous waste disposed of or submitted for disposal. Until September 29, 1989, the land disposal fee was deposited in the Hazardous Waste Control Account (Rev. & Tax. Code § 43551). After that date, the land disposal fee was deposited in the Hazardous Substance Account (Stats. 1989, Ch. 1032).

Federal entities have long argued that the federal government is immune from taxation by the State of California, and that the hazardous waste fees constitute impermissible taxes. This argument is most persuasive concerning the fees which are deposited in the Hazardous Substance Account, including the Superfund tax for all periods and the land disposal fee for periods after September 29, 1989.

In *Massachusetts v. United States* (1978) 435 U.S. 444, the U. S. Supreme Court set forth a three-prong test for determining whether an imposition is a fee, as opposed to a tax. An assessment against the federal government is constitutionally permissible if it (1) does not discriminate against interstate commerce, (2) is based on a fair approximation of use of the system, and (3) is structured to produce revenues that will not exceed the total cost to the government of the benefits to be supplied. The second prong -- that the imposition must be based on a fair approximation of the use of the system by the regulated community -- is common in cases discussing the difference between taxes and fees. While taxes may be imposed regardless of any benefit bestowed on the taxpayer by the government, fees are usually paid by members of a community which will receive benefits not shared by other member of society.

The fees which are deposited in the Hazardous Substance Account will probably fail the three-prong test of *Massachusetts v. U.S.*, primarily because of this second prong. The Hazardous Substance Account funds are used to pay for clean-up activities at contaminated sites. Generally, the Department may not expend funds from this account for a removal action with respect to a hazardous waste release site owned or operated by the federal government (Health & Saf. Code § 25353(a)). It is difficult to assert that fees paid by the federal government which are placed in the Hazardous Substance Account are a fair approximation of the benefit it will receive from that account. Therefore, such impositions are more likely taxes, which cannot be imposed on federal entities.

It should be noted that at least two federal district courts have interpreted a section of the federal Resource Conservation and Recovery Act to provide a complete waiver of sovereign immunity concerning impositions made by a state as part of its hazardous waste control program, whether they are taxes or fees, as long as the impositions are state "requirements ... respecting control and abatement of solid waste or hazardous waste disposal..." (Title 42, United States Code, Section 6961; *U. S. v. South Coast Air Quality Management Dist.*, 748 F. Supp. 732 (C.D. Cal. 1990; *State of Maine v. Department of Navy*, 702 F. Supp. 322 (D. Me. 1988)).

However, a more recent federal district court case held that a state may impose hazardous waste fees on the federal government only if they meet the *Massachusetts v. U.S.* test (*New York St. Dept. of Env. Cons. v. Dept. of Energy*, 772 F. Supp. 91 (N.D. N.Y. 1991)). In addition, recent U.S. Supreme Court decisions (see discussion of interest and penalties, *infra*), suggest that the Court will apply a rigorous test to determine whether Congress has waived the federal government's sovereign immunity.

Based on the above discussion, it is our opinion that the federal government is immune from imposition of the Superfund tax for any periods and the land disposal fee for periods after September 29, 1989.

Periods prior to January 1, 1991

The Health and Safety Code definition of "person", which appears in Section 25118, specifically includes the "federal government or any department or agency thereof". The Revenue and Taxation Code provisions that govern the Board's administration of the hazardous waste fees program include a different definition of "person", which includes the state, counties, cities, and other subdivisions of the state, as well as "any other group or combination acting as a unit." (Rev. & Tax. Code § 43006). There is, however, no specific mention of the federal government.

In 1991, the Legislature amended the definition of "person" in the Revenue and Taxation Code to include the "United States and its agencies and instrumentalities" (Stats. 1990, Ch. 1268).

We must determine whether the Legislature intended to impose the hazardous waste fees on the federal government

before January, 1991. Unfortunately, the application of basic rules of statutory construction does not provide a conclusive answer. One line of cases, which follows the "plain meaning" rule, holds that the court is bound by the language used in definitions (*Great Lake Properties, Inc. v. City of El Segundo* (1977) 19 C.3d 152. In addition, where words are defined in two different ways, it is presumed that the Legislature intended two different results (*Bott v. American Hydrocarbon Corp.*, 458 F.2d 229 (5th Cir. 1972)). An application of the "plain meaning" rule suggests that the Legislature did not intend that the federal government pay the hazardous waste fees until January, 1991, when the Revenue and Taxation Code definition of "person" was amended.

A competing rule of statutory construction holds that legislation must be read as an "organic whole", and statutory language must be viewed in the context of the whole of which it is a part (*Stanford v. Commissioner of Internal Revenue*, 297 F.2d 198 (9th Cir. 1961)). Statutes should be given a reasonable and common sense construction, in accordance with their apparent intention and purpose (*State Compensation Insurance Fund v. Industrial Accident Commission* (1961) 56 C.2d 681). Reading the hazardous waste law as a whole, it appears that the Legislature intended the federal government to be subject to all the requirements of the Health and Safety Code, including the payment of the hazardous waste fees that fund the Department's regulatory program.

We conclude that the federal government was not subject to the hazardous waste fees until the Revenue and Taxation Code definition of "person" was amended in January, 1991. In support of this position, we note that, where doubt exists as to the construction of a tax statute, the doubt is resolved in favor of the taxpayer (*Gould v. Gould* (1917) 245 U.S. 151). In addition, the Legislature's action in amending the definition of "person" in 1991, without any accompanying explanatory language, suggests that the Legislature intended to make a change in the current law. In other words, if the Legislature had already imposed the hazardous waste fees on the federal government, there would have been no need to change the Revenue and Taxation Code definition.

Interest and Penalties

The Revenue and Taxation Code imposes interest and penalties for the late payment of the hazardous waste fees (Sections 43156, 43155 and 43306). In *Library of Congress v.*

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Tommy Shaw (1986) 478 U.S. 310 and *United States Department of Energy v. Ohio, et al.* (1992) ____ U.S. ____, 112 S.Ct. 1627, 118 L.Ed.2d 255, the U. S. Supreme Court decided that the federal government's sovereign immunity from the imposition of interest and penalties, respectively, must be waived by Congress expressly, separate from any waiver of immunity from lawsuits. In *United States Department of Energy v. Ohio, et al.*, the Court found that Congress had not waived the federal government's immunity from penalties involving failure to comply with federal or state hazardous waste laws. In *New York State Department of Environmental Conservation v. U.S. Department of Energy*, 772 F.Supp. 91 (N.D. N.Y. 1991), a federal district court, relying on the *Library of Congress* case, made a similar finding concerning the federal government's immunity from the imposition of interest.

Based on the above-cited U.S. Supreme Court precedent, it is our opinion that the federal government is immune from the imposition of interest and penalties for the late payment of hazardous waste fees.

If you have any questions, or would like to discuss this matter, please let me know.

Janet Vining

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Memorandum

To : Burton W. Oliver
Executive Director

Date: November 24, 1992

From : E. L. Sorensen, Jr.
Chief Counsel

Subject: **Liability of Department of Defense and Other Federal Entities for the Hazardous Waste Fees**

At several recent meetings, we have discussed the issue of the liability of the Departments of the Air Force and the Navy, as well as other federal agencies, for the hazardous waste fees. Over the past years, numerous meetings have been held with representatives of the Department of Toxic Substances Control, the Air Force, and the Navy to discuss the difficult legal issues involved in applying the hazardous waste fees to federal entities. Based on analysis of the issues by my staff, we have been able to finally resolve this issue.

The attached memorandum outlines the Legal Division's opinion concerning the liability of the federal government for these fees. For the reasons set forth in the memo, the Legal Division has determined that: (1) federal entities are not subject to the Superfund tax for any period or the land disposal fee for periods after September 29, 1989, (2) federal entities are not subject to the hazardous waste fees for periods prior to January 1, 1991, and (3) federal entities are not subject to the interest and penalties imposed by the Hazardous Substances Tax Law.

Del Anderson has advised the United States Air Force, Navy and Marines of these positions. Those Departments, whose accounts represent the largest portion of fees potentially due from the federal government, have begun to pay the hazardous waste fees accordingly. All the parties involved in the lengthy process of resolving the issues involving the federal government are very pleased with the outcome, and are pledged to continue in the spirit of cooperation in the future.

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Attachment

cc: E. V. Anderson
Larry Augusta
Janet Vining

