

Memorandum

To : Robert O'Neill
Environmental Fees Division (MIC:57)

Date: August 19, 1993

From : Janet Vining
Senior Tax Counsel

Subject: **Impact of Federal Facilities Compliance Act on
Penalties Imposed on Federal Government**

I am writing in response to your May 12, 1993 memorandum concerning whether, in light of the recent passage of the Federal Facilities Compliance Act (Public Law 102-386), the penalties imposed in Revenue and Taxation Code Sections 43155, 43156, and 43306 for the late payment of hazardous waste fees apply to federal agencies and instrumentalities. Based on my review of the new federal act, I conclude that federal agencies and instrumentalities are now liable for such penalties.

Section 6961 of Title 42 of the United States Code requires all federal departments, agencies and instrumentalities which manage hazardous waste to comply with all federal, state, interstate, and local substantive and procedural requirements respecting the control and abatement of hazardous waste disposal and management, including the payment of reasonable service charges.

Last year, Congress passed the Federal Facilities Compliance Act (Public Law 102-386), which amended Section 6961, effective October 6, 1992, to specify that the "substantive and procedural requirements" referred to include

... all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief,

administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge).

Section 6961 was also amended to clarify that "reasonable services charges" include

... fees or charges assessed in connection with the processing and issuance of permits, renewals of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program.

In a memo issued last fall, we expressed our opinion that the federal government was immune from the imposition of interest and penalties for the late payment of hazardous waste fees. This position was based on several U.S. Supreme Court cases which held that the federal government's sovereign immunity from the imposition of interest and penalties must be expressly waived by Congress. Specifically, in United States Department of Energy v. Ohio, the Supreme Court found that Section 6961 was not an express waiver of the federal government's immunity from penalties involving failure to comply with federal or state hazardous waste laws.

The legislative history concerning the Federal Facilities Compliance Act indicates that Congress amended Section 6961 to address cases like United States Department of Energy v. Ohio and to clarify that its original intent in adopting Section 6961 was to waive federal immunity from penalties:

In the Committee's view the language of the existing law was sufficiently clear to waive federal sovereign immunity for all provisions of solid and hazardous waste laws, including the imposition of criminal fines, civil or administrative penalties and all other sanctions. Thus, this legislation reaffirms existing law, and applies to all actions of the federal government, past and present, which are subject to solid or hazardous waste laws.

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The amendments to Section [6961] contained in this bill simply reaffirm in more explicit language the original intent of Congress that federal facilities be subject to all of the same substantive and procedural requirements, including enforcement requirements and sanctions, such as civil penalties, that state and local governments and private companies are subject to. The Committee intends for this legislation to overturn any court decisions which have restricted in any fashion the waiver of sovereign immunity provided in Section [6961].

Based on the recent amendments to Section 6961, and the above-cited legislative history, it is our opinion that the federal government, its departments, agencies and instrumentalities, are now subject to the penalties imposed in the Revenue and Taxation Code for the late payment of the hazardous waste fees.

I recommend that you inform the federal departments and agencies subject to the hazardous waste fees that they can request an extension of time in which to file the fees if it would be difficult to do so by the statutory due date. The amendments to Section 6961 did not specifically waive federal immunity from the imposition of interest, and it remains our position that the federal entities are not subject to interest on late-paid hazardous waste fees.

Please contact me if you have any questions or I can be of further assistance.

Janet Vining wk

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cc: Mr. Stephen Rudd (MIC:57)
Mr. David McKillip (MIC:57)
Mr. Larry Augusta
Mr. Dennis Mahoney, Dept. of Toxic Substances Control