

Mr. Gary J. Jugum

July 12, 1989

Janet Vining

This matter involves the imposition of a generator fee on Mr. and Mrs. [redacted] of [redacted], California.

After purchasing a new home in 1971, the [redacted] discovered that a 250-gallon tank had been installed on their property and used by the previous owners until the 1970's. Since the tank was leaking and had contaminated the surrounding soil, the County of Ventura ordered the [redacted] to remove the tank and clean up the soil. The [redacted] contracted and paid for the removal and disposal of the tank and 460 tons of contaminated soil during June and July 1988. The cost of the cleanup was approximately \$105,000, paid entirely by the [redacted].

Excise Tax determined that the [redacted] were not liable for any disposal fees, either under the Hazardous Waste Control Account legislation or California Superfund legislation. However, Excise Tax determined that the [redacted] were responsible for the generator fee for fiscal years 1987/88 and 1988/89 in the amounts of \$[redacted] and \$[redacted], respectively.

On [redacted], Mrs. [redacted] wrote to the Board requesting reconsideration of the imposition of generator fees. The [redacted] apparently also contacted the Department of Health Services, although there is no copy of any such correspondence in the Board's files. On [redacted], C. Davis Willis, Deputy Director of DOHS's Toxic Substances Control Division, sent Mr. and Mrs. [redacted] a letter ostensibly granting them a variance from the generator fee requirement, pursuant to Health and Safety Code Section 25143(a)(2)(A) and (B). The letter simply states:

"Hazardous waste was generated by the removal of an old underground gasoline storage tank and surrounding soil that had become contaminated

with gasoline due to tank leakage. According to our records this property was purchased in 1971. The gasoline tank was used by the former owners only and leakage occurred from 1930-1965 when the tank was in use. The Department finds that in the unique circumstances of this case, removal of the tank and contaminated soil under county supervision is insignificant as a potential hazard. "

DOHS's letter grants a variance effective June through July, 1988.

Any person or entity that creates or handles toxic or hazardous substances is potentially liable for one or more of the following fees and taxes: (1) the disposal fee (Health and Safety Code, Section 25174); (2) the Superfund tax (Health and Safety Code section 25345); (3) the facility fee (Health and Safety Code Section 25205.2); and (4) the generator fee (Health and Safety Code section 25205.5). The Revenue and Taxation Code directs the Board of Equalization to collect all four fees. (See Sections 43051, 43052, and 43053.)

In a March 31, 1989 memo to Ed King, Herm Rosenblatt concluded that the persons who were not liable for the disposal fee or the Superfund requirement. Section 25345.3(c) of the Health and Safety Code specifies that:

"On and after July 1, 1984, persons responsible for a release of hazardous waste, which has been removed or remedied before January 1, 1990, pursuant to a remedial plan issued pursuant to Section 25356.1, are not subject to the requirements of Sections 25342 and 25345, and the hazardous waste so removed is not subject to the fee specified in Section 25174, with respect to that removal or remedial action, if the original release did not result from willful misconduct by the responsible persons. "

The gasoline tank cleanup was completed between July 1, 1984, and January 1, 1989, and the leakage was not the result of any willful misconduct by the persons responsible. However, the persons who did not seek approval of a remedial plan, as required in Section 25356.1, before excavating the tank. This fact should not, however, remove the persons from coverage under Section 25345.3(c), since Section 25356.1 contains an exception to the remedial plan requirement. Section 25356.1(g) states that a remedial action plan is not

required if (1) the remedial action is taken to "prevent, minimize, or mitigate damage that may otherwise result from a release or threatened release of a hazardous substance"; (2) the total cost of the removal action is less than \$250,000, and (3) DOHS determines that the removal action has adequately abated the hazardous conditions at the site. The tank cleanup meets all three requirements, and the [redacted] are therefore entitled to be relieved of the disposal fee and Superfund requirement, even though they did not seek approval of a remedial action plan.

Excise Tax did, however, assess a generator fee against the [redacted]. Section 25205.5(a) of the Health and Safety Code states, in part, that "...every generator of hazardous waste ... shall pay the board a fee for each generator site for each calendar year ..." "Generator" is defined broadly in Section 25205.1(e) as "a person who generates volumes of hazardous waste on or after July 1, 1988 ... at an individual site commencing on or after July 1, 1988, and who has not paid a hazardous waste facility fee for that same individual site." The leakage of gas and removal of contaminated soil generated 320 tons of contaminated waste, and the [redacted] are clearly a "generator" required to pay the fee pursuant to Section 25205(a).

Section 25143 of the Health and Safety Code allows the Department of Health Services to grant a variance "from one or more of the requirements of [Chapter 6.5] or the regulations adopted pursuant to [Chapter 6.5] for the management of a hazardous waste" if all the following conditions are met: (1) the hazardous waste is not regulated by federal hazardous waste management statutes, or a waiver has been granted pursuant to such statutes; (2) DOHS finds that the hazardous waste or hazardous waste activity is insignificant or unimportant as a potential hazard to human health and safety and the environment, or the waste or activity is sufficiently regulated by another governmental agency; and (3) the variance is granted in accordance with Section 25143. DOHS can grant a variance only upon receipt of a proper variance application, and the variance so granted must include the name of the producer of the waste, a description of the waste, the time period during which the variance is effective, a description of the statutory requirements waived by the variance, and any conditions or limitations placed on the variance. (Section 25143(b)).

It is not clear from the Board's file what sort of application the [redacted] made for a variance. The Department of Health Service's response, while brief, does meet the requirements of Section 25143(a) and (b). However, Section 25143, as relied upon by DOHS, did not become effective until September of 1988,

after the had already completed the cleanup of their property. The previous statutory language is even more general than that contained in the 1988 amendment. Prior Section 25143 simply stated that: "Pursuant to regulations adopted by [DOHS], the provisions of [Chapter 6.5] may be waived by [DOHS] for any waste which [DOHS] determines is insignificant or unimportant as a potential hazard ..."

It is not clear whether the Legislature contemplated the fees imposed on persons and entities involved in hazardous waste activities as part of the "provisions" or "requirements ... for the management of a hazardous waste" which DOHS may waive pursuant to Section 25143. Section 25117.2 defines "hazardous waste management" to be the "transportation, transfer, recycling, recovery, disposal, handling, processing, storage, and treatment of hazardous waste", and makes no mention of the attendant fees. It cannot, therefore, be presumed that DOHS has the authority to waive the payment of the various fees established by the Health and Safety Code and collected by the Board pursuant to the Revenue and Taxation Code.

DOHS does, however, have the authority to grant a variance from any statutory requirements concerning the management of toxic and hazardous waste. Since the fees the Board is empowered to collect were established to fund both the regulation of hazardous waste management activities and the actual cleanup of hazardous waste sites, it would be inappropriate to assess a fee where DOHS has determined that, due to the circumstances, the situation is not important or hazardous enough to warrant regulation.

I would therefore conclude that the Board should not collect a generator fee from the based on the leaking gasoline storage tank they removed from their property.

JV:jb

cc: Mr. E. L. Sorensen, Jr.
Mr. Gordon P. Adelman