

Memorandum

To : David McKillip
Environmental Fees Division (MIC:57)

Date: January 28, 1994

From : Janet Vining

Subject: Additional SB 922 Changes

This memorandum addresses the remaining issues raised in your November 10, 1993 memo to Larry Augusta, and supplements my January 13, 1994, memo to you.

1. Section 25205.1(o)(1) defines disposal to exclude land treatment. Should this section be applied retroactively to allow facilities exemptions even if their permits stated "disposal"?

It is our position that the definition of disposal that now appears in Health and Safety Code Section 25205.1(o)(1) is a clarification of existing law rather than a change in law, and therefore applies to all outstanding cases.

Prior to the effective date of SB 922, neither the Health and Safety Code nor the Revenue and Taxation Code specified whether land treatment was a form of treatment or disposal. That issue was the subject of a hearing before the Board in the cases. At the hearing, the Department of Toxic Substances Control and Board staff argued that Chevron's activity constituted disposal, based on the existing statutory definition of "disposal" and the fact that ()'s sites were permitted as disposal facilities. () argued that the activity came within the existing statutory definition of "treatment", and that its sites were treatment facilities because no hazardous waste would remain there after closure. The Board had not yet issued a decision in the () cases when SB 922 went into effect.

As there was no clear statutory or regulatory guidance concerning the proper classification of a facility which engaged in land treatment, we believe that it is reasonable to apply the definition the Legislature added in SB 922 to resolve outstanding cases.

2. Section 25205.2(e) states if activity took place before July 1, 1986 and the fee was not paid before January 1, 1994, they are not subject to facility fees. Can we interpret this to mean if the activity only took place before July 1, 1986?

In interpreting statutes, the courts have often held that a statute should be given a reasonable and common sense construction, in accordance with the Legislature's apparent purpose and intention. Statutory language should be interpreted in such a manner as will promote rather than defeat the objection and policy of the law. See, for example, Firemen's Fund Ins. Co. v. Security Pac. Nat. Bank (1978) 85 Cal.App.3d 797.

Given the overall scheme for imposing the facility fee that the Legislature adopted in SB 922, it is our position that it is reasonable to interpret Section 25205.2(e) to mean that the activity only took place before July 1, 1986.

4. Could you provide us with your opinion of the meaning of the phrase "decision of the Board of Equalization" in Section 25205.2(f). Does it mean elected members or staff?

It is our position that the phrase "decision of the Board of Equalization", as that term is used in Section 25205.2(f), refers to a redetermination issued by Board staff concerning a petition for redetermination. The redetermination constitutes a decision of the Board regardless of whether the petition was heard by the five-member Board.

The term "decision" is not defined in the Revenue and Taxation Code, and appears in only two sections -- 43302 and 43305. Both these sections are in Article 4, Chapter 3, Part 22, Division 2 of the Code, which addresses the filing of petitions for redetermination and the issuance of redeterminations. Both Section 43302 and 43305 make reference to the Board's issuance of an "order or decision" upon a petition for redetermination. Based on these statutory references, we conclude that the Legislature intended a "decision of the Board of Equalization" to mean the Board's decision on a petition for redetermination.

Therefore, the only feepayers who are possibly eligible to receive refunds pursuant to Section 25205.2(f) are those who received notices of determination and filed timely petitions for redetermination, since those are the only feepayers who

have paid pursuant to a "decision of the Board of Equalization".

7. Section 25205.2(g) provides "Facility operators who treated, stored, or disposed of hazardous waste on or after July 1, 1986, shall be subject to the provisions of this section which were in effect prior to January 1, 1994, as to payments which their operators made prior to January 1, 1994. The operators shall be subject to subdivision (d) as to any other liability for the facility fee."

How are we to handle partial payments? For instance, a facility makes a 1992 prepayment return as a small storage facility in the amount of \$11,421 and does not pay the final return. They have not stored or treated waste since 1990. They were a small treatment facility and had SB 922 not passed we would say they are mini treatment since they are not certified closed (fee due \$11,421). Should we accept the payment as payment of the entire mini treatment fee and no money is to be refunded, or should we consider the prepayment to be paid in error since it was not paid for the mini category and allow them the exemption from the fee provided in SB 922 and refund the entire amount, or as a third option allow half of the prepayment as payment of the prepayment of the mini treatment facility fee due which would not be refundable, but the other half could be refunded as paid in error?

SB 922 added Section 25205.2(g) to the Health and Safety Code, which states that facility operators are subject to the old provisions of the law as to payments made prior to January 1, 1994, and are subject to the new provisions of the law (specifically, Section 25205.2(d)), as to any other liability for facility fees.

It is our position that, where a facility fee prepayment has been made, the reporting period can be "split" for purposes of applying Section 25205.2(g). Therefore, in the fact situation you described, the operator would not be liable for the second installment of the 1992 facility fee because the facility had not treated or stored waste since 1990. In addition, the operator would not be eligible for a refund of the first installment of the 1992 facility fee, which was due as paid under the previous provisions of the law.

9. Section 25205.12 exempts facilities that clean and recycle underground tanks. Would facilities that also clean aboveground tanks be precluded from taking this exemption?

Section 25205.12 specifically exempts facilities that clean and recycle excavated underground storage tanks from the facility fee "with regard to these activities". Therefore, if a facility engages in any other activity (for example, cleaning and recycling aboveground storage tanks), the facility is not exempt from the fee.

This approach is consistent with the statute and with our treatment of the exemption for facilities which operate pursuant to permit by regulation, conditional authorization, and conditional exemption. If the facility operation includes activities that are not covered by one of these programs, then the operator may be liable for the full facility fee.

10. Section 25205.21 provides a reduced fee for government agencies that were disposal facilities and have not disposed of waste at the facility. In some cases, section 25205.2 and possibly other sections could exempt facilities like these totally. Would this provision override the other exemptions and subject these local facilities to this fee provided for in 25205.21?

Section 25205.21 sets forth a "maximum" facility fee to be paid by a disposal facility operator which is a government agency, for any reporting period in which the facility did not dispose of hazardous waste. Since the section establishes a "maximum" facility fee, it is our position that other sections of the Health and Safety Code that totally exempt any such facility from the payment of the facility fee would apply.

11. Section 25205.22 provides that facilities are considered the generators of non-RCRA waste imported into California for purposes of payment of the generator fee. It also states "... no generator fee shall be assessed for non-RCRA hazardous waste imported prior to January 1, 1994". Since this is referring to a new fee on facilities, does this also carry over to the generator of the waste for periods prior to January 1, 1994 and accordingly no generator fee is due on generators of waste exported to California?

While the exemption for imported waste in Section 25205.22 is ambiguous, it is our position that the Legislature intended to exempt from the generator fee all non-RCRA hazardous waste imported into California prior to January 1, 1994. Therefore, neither the generator that generated such waste nor the facility that received it is responsible for the payment of the fee.

Prior to January 1, 1994, the generator fee was imposed only on the generator of the waste, and not on the facility receiving it. Therefore, it would have been unnecessary to state that no generator fee was due from the facility for waste imported prior to January 1, 1994. The more logical reading of Section 25205.22 is that the Legislature intended to remove such imported non-RCRA waste from the reach of the generator fee altogether.

12. Would it be possible to get your opinion on the terms "generated in another cleanup, removal, and remediation of a hazardous substance" in Section 25359.8? Does this refer to only unexpected releases of hazardous substances or any type of cleanup? Would hazardous waste generated in the cleanup of a facility's processing equipment be considered a cleanup for purposes of this section? Would a refinery performing routine cleanups from spills at loading facilities qualify?

A general law of statutory construction provides that, where general words follow the enumeration of particular classes of persons or things, the general words should be construed as applicable only to persons or things of the same general nature or class as those enumerated. The courts have reasoned that, if the Legislature intended general words to be used in their unrestricted sense, it would not have first listed specific things or classes. Scally v. Pacific Gas & Electric Co. (1972) 23 Cal.App.3d 806.

It is, therefore, our opinion that the words "cleanup, removal and remediation", as used in Section 25359.8, are intended to refer to types of cleanup activities similar to the other activities mentioned in Section 25359.8, i.e., remedial actions, removal actions, and corrective actions, taken pursuant to Chapters 6.5, 6.7, 6.75, and 6.8.

14. Could non-RCRA mining waste or categories other than RCRA generated in a cleanup be subject to the \$12.00 rate?

By the terms of the statute, the rate set forth in Section 25359.8 applies "[N]otwithstanding any other provision of law." It is, therefore, our opinion that the Section 25359.8 rate applies to any non-RCRA waste generated in a cleanup, whether that waste is mining waste or any of the other categories of waste identified in Section 25174.6.

15. The revision of credits taken against the generator fees for fees paid to local agencies (Revenue and Taxation Code Section 43152.7) causes timing problems. Some local fees are due on the fiscal year basis, whereas the generator fee is due on the calendar year. Do the revisions to this section allow for splitting fiscal year local payments to amounts in the respective calendar year?

Without further guidance from the Legislature, it is our opinion that Board staff can make an administrative decision concerning the application of Section 43152.7. Splitting the fiscal year payments between the two calendar years is certainly one alternative. However, I suggest that you consider proposing a legislative change to address this problem.

Please let me know if you have any questions, or wish to discuss these matters further.

Janet Veruing

JV:wk

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