

CONFIDENTIAL: ATTORNEY-CLIENT PRIVILEGE

Memorandum

To : David McKillip
Environmental Fees Section

Date: March 4, 1993

From : Janet Vining
Tax Counsel

Subject:

I am writing in response to your September 29, 1992 memorandum concerning the Department of Toxic Substances Control's position on the applicability of the land disposal fee and Superfund tax to certain activities of Resources (). I apologize for the delay in responding to your request. For the reasons set forth below, I conclude that the Board should follow the Department's interpretation, and, therefore, does not owe the land disposal fee or Superfund tax concerning its closure activities.

operated a hazardous waste disposal facility which consisted of numerous disposal units, including a landfill and several surface impoundments. The facility is currently undergoing closure, and the closure activities include removing the contents of the surface impoundments, plus contaminated sub-soils, and placing the wastes in or around the landfill. The surface impoundments contained RCRA waste.

In a memorandum dated January 24, 1992, I concluded that, based on the definitions of "disposal" in Health and Safety Code Sections 25113 and 25341 (now repealed), 's actions subjected it to both the land disposal fee and Superfund tax. In April 1992, I wrote to Department Director William Soo Hoo, asking for the Department's opinion concerning the applicability of the land disposal fee and Superfund tax to 's activities.

Soo Hoo responded in September 1992. He explained that, beginning in early 1988 and continuing until August 1990, closed approximately 50 unlined surface impoundments at its facility. During the closure process, liquids were removed from the ponds and either sprayed for dust suppression, or solidified and placed into the active hazardous waste

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landfills at the facility. Sludge and residues remaining in the pond bottoms, along with soils from beneath the ponds, were excavated and placed in the same landfill. The purpose of the excavation was to remove soils that had been contaminated by the contents of the surface impoundments. In all but a few instances, surface layers of soil were removed until clean soil was reached.

The Department's legal staff and management concluded that is not liable for payment of the land disposal fee or Superfund tax as a result of its hazardous waste management activities, as defined in Health and Safety Code Section 25117.2, provided that the disposal occurred into an authorized hazardous waste disposal unit within the same hazardous waste facility and the facility owner or operator can demonstrate that disposal fees have already been paid. You asked us to comment on the Department's position.

I contacted Pete Peterson of the Department's legal staff, who provided me with some of the background for the Department's decision. First, Peterson agreed that, under a strict application of the Health and Safety Code definitions of "disposal", 's closure activities constituted a disposal, and could be subject to the fee and tax. However, Peterson noted that 's closure plan, which it submitted when it filed its permit application, anticipated the excavation and disposal of the soils surrounding the unlined ponds.

The Department reasoned that application of the land disposal fee and Superfund tax to 's activities would place an unfair burden on disposal facilities, such as , which had operated for years before the adoption of California's hazardous waste regulatory scheme. Such facilities are often required to engage in extensive excavation activities in order to close in a manner that protects human health and safety and the environment.

While a straightforward application of the statutory definitions of "disposal" leads to the conclusion I reached in my memorandum, the Department's analysis places 's actions in a larger context and asks whether the closure activity which took place at the facility is the type of activity the Legislature intended to be included when it imposed the disposal fee and Superfund tax. The Department determined that the Legislature did not intend to impose the fee and tax where waste was accepted for disposal at a facility in an authorized manner, subject to all appropriate fees, and

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the waste was later moved to an authorized location at the same site as part of a closure plan.

Given the Department's analysis, it is immaterial whether the disposal site operator originally paid the fees, as long as all appropriate fees were paid concerning hazardous waste accepted at the facility for disposal. The Department has interpreted the law such that the activities simply do not constitute a disposal which is subject to the land disposal fee or Superfund tax.

I note that the Interagency Memorandum of Agreement between the Board and the Department, which is nearing completion, was developed to structure the resolution of conflicting interpretations of the hazardous waste fee law. The current draft of the agreement provides that, prior to the Board's issuance of a notice of determination, the Department may advise the Board concerning any novel application of the hazardous waste fee law, and the Board will apply the Department's interpretation.

Since no notice of determination has been sent to concerning the closure activities, and since the application of the land disposal fee and Superfund tax to hazardous waste excavated during closure activities at a hazardous waste landfill requires a new interpretation of the law, I suggest that we follow the intent of the Interagency Memorandum of Agreement and act in accordance with the position expressed in Mr. Soo Hoo's September 1992 letter.

Please contact me if you have questions or would like to discuss this matter further.

Janet Vining

JV:wk

cc: Mr. E. V. Anderson
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