

Mr. Robert M. Frank
Environmental Fees Unit

February 28, 1990

Janet Vining
Legal

Facility Fee Petitions

On December 18, 1989, you sent me a copy of Dave McKillip's December 12 memo to you, and requested that I comment on whether the Board should bill two facility fees for a single fiscal year when there is a change in ownership.

Section 25205.2 of the Health and Safety Code requires that "...each operator of a facility shall pay a facility fee for each state fiscal year, or any portion thereof, to the board based on the size and type of the facility..." The Department of Health Services is required to notify the Board of all known facility operators, and also to notify the Board within 30 days if an operator is issued a permit or grant of interim status. The facility fee is paid in two installments, due October 1 and April 1. (Rev. & Tax. Code § 43152.6.)

The statutory language makes clear that the operator owes the facility fee even if the facility does not operate for the entire fiscal year. The use of the term "each operator" suggests that the Board could, for example, bill three separate facility fees if a treatment facility were operated jointly by three individuals. However, the Board has not followed this interpretation of the statute, and to do so would result in greatly disparate fees being paid for similar facilities.

An operator of a hazardous waste facility might transfer ownership and/or operation of the facility to an entity or individual during the fiscal year. A reasonable interpretation of Section 25205.2 would require that only one facility fee be paid per facility per year, regardless of the change in operators.

The facility fee is imposed in Article 9.1 of Chapter 6.5 of the Health and Safety Code, which also covers the generator fee. A "generator" is defined in Section 25205.1(e) as a person "...who has not paid a hazardous waste facility fee for that same individual site", suggesting that the facility fee should be associated with the site itself, rather than the

operator. In addition, the payment of the fee on a yearly basis, with two installments on October 1 and April 1, also suggests that one fee is to be paid per facility per year.

I spoke with Dink Mather of the Department of Health Services, and she agreed that the statutory scheme requires that one facility fee be paid for each facility per year, regardless of a change in owner or operator. Dink indicated that she is in the process of obtaining information from the local enforcement agencies concerning the procedures followed when a new operator takes over an existing facility. The Health and Safety Code allows DOHS to charge a fee of \$1,500 to modify a permit (§ 25205.7(j)(2)). That fee may be higher if DOHS's regulations require public notice and public comment before the modification is effective. DOHS can thus be compensated for the staff time required to process the permit modification.

The only situation that would warrant imposition of a second facility fee would be where a facility is transferred and then operated on an entirely new basis. For example, if a disposal facility is closed, and a new treatment facility begins operation at the same site, the new facility would be required to file a permit application with DOHS. The new facility would also be responsible for a facility fee. In this example, the disposal facility would pay an entire facility fee, no matter when during the year it ceased operation (see, however, Health & Saf. Code § 25205.2(c), which sets forth circumstances under which a closed facility does not have to pay the fee). Even if the facility closed before the second installation of the fee was due, it would still be responsible for both payments. The new treatment facility would also pay an entire facility fee, regardless of when it began operating during the fiscal year.

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