

Mr. Robert M. Frank
Excise Tax Unit

September 29, 1989

Janet Vining
Legal

Cleanup by Landlord of Tenant's Contamination

This is in response to your memorandum of August 11, 1989, concerning a landlord's claim that he is exempt from hazardous waste fees associated with the cleanup of property contaminated by a tenant.

On December 8, 1988, [redacted], representing [redacted], wrote to the Board in response to [redacted]'s registration for hazardous substance excise taxes.¹ [redacted] asserted that Mr. [redacted] was not the generator of certain waste material, and that the removal and disposal of contaminants from storm drains at the property was due to the tenant's negligence, and was beyond [redacted]' control. Ms. [redacted] further stated that a lawsuit is currently pending between the State of California and the previous tenant for violation of Section 5650(b) of the California Fish & Game Code.² Finally, Ms. [redacted] asserted that the property owner is exempt from registration with the Board.

[redacted] also wrote to the Board on behalf of [redacted], Inc., and enclosed the letter from [redacted].

1/ The relationship between [redacted] and [redacted] is not clear. It appears that [redacted], Inc. may be the current tenant at the property, but I will assume that either [redacted] or [redacted] is the owner.

2/ Section 5650(b) makes it unlawful to deposit any "refuse, liquid or solid, from any refinery, gas house, tannery, distillery, chemical works, mill or factory of any kind" in a place where it can pass into the waters of the state.

Investments. Mr. C. [redacted] asserted that "storm drain cleanups" is exempt from any hazardous waste fees.

[redacted] and Mr. [redacted] seek an exemption from the disposal fees imposed by Section 25174.1 and Section 25345 of the Health and Safety Code and the generator fee imposed by Section 25205.5 of the Health and Safety Code.

Health and Safety Code Section 25174.7 states that:

(a) The fees provided for in Sections 25174.1, 25174.6 [which describes the appropriate land disposal fee for different classes of hazardous waste], and 25205.5 do not apply to any of the following:

(1) Hazardous wastes which result when a state or local agency, or its contractor, removes or remedies a release of hazardous waste caused by another person. This paragraph applies to all acts performed by a state or local agency, or its contractor, on or after July 1, 1984.

(2) Hazardous wastes generated or disposed of by state or local agencies operating a household hazardous waste collection program

Since neither [redacted] or [redacted] is a state or local agency, no exemption from the land disposal fee or generator fee is available under Section 25174.7. In fact, the language of Section 25174.7 reinforces the conclusion that it is appropriate to require the payment of a generator fee when a landlord cleans up contamination caused by a tenant. A tenant might argue that he or she could not be found to have "generated" any hazardous waste by simply cleaning up waste generated by another person, such as the previous tenant. However if the Legislature intended such an interpretation of the "generation" of hazardous waste, then there would have been no need to include a reference to Section 25205.5 in the exemption provided in Section 25174.7. In other words, if state and local agencies are specifically exempted from the generator fee when they remove or remedy a release of hazardous waste caused by another person, then everyone else is required to pay the generator fee when they remove or remedy such a release of hazardous waste. [redacted] must, therefore, pay the generator fee concerning any hazardous waste generated by the cleanup of the storm drains.

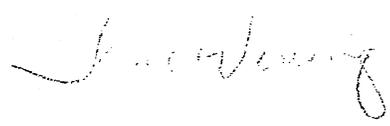
Section 25345.3 states that:

(a) Any person, or the person's contractor, which removes or remedies a release, by another person, of hazardous waste is not subject to the requirements of Sections 25342 and 25345 with respect to that removal or remedial action.

* * *

(c) On and after July 1, 1984, persons responsible for a release of hazardous waste, which has been removed or remedied before September 30, 1990, pursuant to a remedial action 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 25174.1, with respect to that removal or remedial action, if the original release did not result from willful misconduct by the responsible persons.

If _____ and _____ cleaned up a release of hazardous waste caused by another person, then the above-quoted section provides that they are exempt from payment of the Superfund tax (Section 25345) for the disposal of the waste generated by the cleanup. If the conditions of the cleanup meet the requirements of Section 25345.3(c), then _____ and _____ would also be exempt from the land disposal fee (Section 25174.1). The procedure for preparation and approval of a remedial action plan is detailed in Section 25356.1 of the Health and Safety Code. Section 25356.1(g)(2) states that a remedial action plan is not required when certain conditions are met (for example, where the total cost of the removal action is less than \$250,000). If the cleanup activity undertaken by _____ and _____ meets all the requirements of Section 25356.1(g)(2), the land disposal fee imposed by Section 25174.1 would not be due, as long as the original release of hazardous waste did not result from the willful misconduct of the previous tenant.



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