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#### Exemptions-GA-Consent

A feepayer who conducts remedial action as a result of a consent decree with the U.S. Environmental Protection Agency (EPA) does not thereby become an agent of the EPA and does not qualify for the exemption from the land disposal fee and generator fee for a government agency cleaning up a release of waste caused by another person (Health and Safety Code section 25174.7(a)). 1/24/95

## Memorandum

To: Stephen R. Rudd  
Environmental Fees Division (MIC: 57)

Date: January 24, 1995

From: Cynthia Spencer-Ayres  
Staff Counsel

Subject: **Claim for Refund**

I am responding to your memorandum to Janet vining dated December 8, 1994, regarding the above-referenced matter.

The feepayer requests a claim for refund in the amount of \$599,545 for disposal fees paid to the State Board of Equalization for the (redacted) environmental site remediation. The feepayer's claim is based on an exemption under Health and Safety Code (H&SC) section 25174.7(a) (1).

Based on the response below, the claim for refund must be denied because the feepayer does not meet the criteria for the exemption under H&SC section 25174.7(a) (1).

H&SC section 25174.7(a) (1), operative January 1, 1993 to December 31, 1993, provides in relevant part:

“(a) the fees provided for in sections 25174.1 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, 1994.”  
(Emphasis added.)

(This version of the statute is applicable to the time period in question since the disposal fees under section 25174.1 were paid for the period July 1, 1993 through December 31, 1993.)

You indicated in your memo that the feepayer was identified as the responsible party required to clean-up the site and the EPA had oversight of the project. The feepayer agreed under a consent decree to perform specified remedial action under the direction and supervision of the EPA and the EPA, in turn, agreed not to sue the feepayer if the remediation of the site was satisfactorily completed. The feepayer mistakenly asserts that it was the contractor of the EPA for purposes of the remediation of the site because it was under the direction and supervision of the EPA.

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Based on the information provided by the feepayer, there is no evidence that the consent decree re-characterized or changed the role of the feepayer from a responsible party to a contractor or that the obligations of the responsible party were transferred to the EPA. The EPA's role continued to be that of a regulatory agency overseeing the satisfactory completion of the remediation project. The feepayer did not perform services as a contractor on behalf of the EPA and the EPA did not receive any benefits from the feepayer under the consent decree. Therefore, the feepayer does not come within the exemption under H&SC section 25174.7(a) (1). It is noted that, while the feepayer cannot eliminate its liability by contract and remains liable to the government, it may allocate costs through contractual arrangements amongst other responsible parties to reduce liability.

We conclude that H&SC section 25174.7(a) (1) is not applicable to the facts of this case because the feepayer, rather than a state or local agency, removed or remedied a release of hazardous waste, and the feepayer was not a contractor providing services on behalf of the EPA. Thus, the feepayer, as the responsible party, does not qualify for an exemption from disposal fees under H&SC section 25174.7(a) (1) for the period July 1, 1993, through December 31, 1993, and the claim for refund should be denied.

Cynthia Spencer-Ayres

CSA:es

Cc: Mr. Lou Feletto (MIC: 57)  
Mr. Larry Augusta  
Ms. Janet Vining

Mr. Dennis Mahoney  
Dept. of Toxic Substances Control  
400 P Street  
P.O. Box 806  
Sacramento, CA 95812-0806