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Determinations – DTSC Settlement Agreements

A settlement agreement between a feepayer and DTSC provided that the feepayer would apply for a variance from DTSC's closure requirements within one year of the signing of the agreement, and that the feepayer could void the agreement if DTSC denied the variance. The Board will not initiate any adjustment of the feepayer's liability in the Board's records until the agreement can no longer be voided by either the DTSC or the feepayer. All terms of a settlement agreement must be met before the original assessment or return payment can be adjusted to reflect the final agreement. 2/06/96.

Memorandum

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

Date: February 6, 1996

From: Janet Vining
Legal Division

Subject: **Request for Legal Opinion #95-10**

I am writing in response to your November 9, 1995 request for an opinion concerning the settlement agreement between the Department of Toxic Substances Control (the "Department") and (redacted). For the reasons set forth below, we conclude that the Board should not adjust (redacted)'s liability until the agreement can no longer be voided; that is, in one year if (redacted) has not submitted a variance request to the Department, or, if such a request is submitted and denied, sixty days from the date of the denial if (redacted) does not notify the Department of its intent to void the settlement agreement. In addition, the parties can modify the settlement agreement rather than void it, and, if a modification is made, the new language should be reviewed to determine when the liability can be adjusted.

The dispute involves the hazardous waste facility fee for 1986-87 through 1991. According to the settlement agreement, (redacted) operates hazardous waste disposal facilities in (redacted) (the "(redacted) facility") and (redacted) (the "(redacted) facility"). The (redacted) facility received non-RCRA wastes prior to March 15, 1985 and, since that date, has not received any hazardous waste except asbestos waste and infectious waste. (Redacted) argued that it never owed the facility fee for the (redacted) facility because (1) the facility was included in a variance from the permit requirements that the Department issued to the (redacted) facility in August, 1985, and (2) the facility formally closed in 1987 and its closure was approved by the Central Valley Regional Water Quality Control Board. The Department responded that the (redacted) facility was not included in the (redacted) facility variance, and the (redacted) facility has not satisfied the Department's closure requirements.

The settlement provides that the State will not refund or give credit for any facility or generator fees paid by (redacted) for the (redacted) and (redacted) will not be liable for any additional facility or

Stephen R. Rudd
February 6, 1996
Page 2

generator fees for that facility. (Redacted) agrees that, within one year of the signing of the settlement agreement, it will apply for a variance from the Department's closure requirements based on its position that the Regional Water Quality Control Board's oversight of the closure of the (redacted) was adequate.

The settlement agreement further provides that (redacted) may void the agreement if the Department denies the variance application. (Redacted) must notify the Department of its intent to void the agreement within sixty days of the denial, unless (redacted) and the Department agree to a longer period. Finally, the agreement contains the following language: "If the agreement is voided, any applicable statute of limitations for obtaining or denying relief from fees will be tolled for the period between the date the agreement is executed and the date it is voided." As an alternative to voiding the agreement, (redacted) and the Department can agree to modify it.

On October 19, 1995, the Department forwarded the settlement agreement to the Board, asking that the Board "adjust (redacted) liability accordingly."

Your memo notes that the Environmental Fees Division does not take action on a hazardous waste liability which is the subject of a settlement agreement between the Department and the feepayer until the agreement can no longer be voided. This is a prudent policy, since, once the Board's redetermination becomes final, the Board could not reissue the underlying determination if the feepayer failed to satisfy the terms of the settlement.

While (redacted)'s agreement to toll the statute of limitations might be construed as a voluntary waiver of the statute, since such a waiver is provided for in Revenue and Taxation Code Section 43204, the law does not authorize the Department to waive the statutory limitation on (redacted)'s ability to file a petition or claim for refund. However, any discussion of tolling the statute of limitations because of the settlement agreement appears unnecessary in this matter, since the Board already billed all appropriate periods, and (redacted) already filed petitions and claims concerning all relevant periods.

Despite the Department's request, (redacted)'s liability should not be "adjusted" until the settlement agreement can no longer be voided by either the Department or (redacted). We therefore recommend that you postpone taking any action concerning liabilities addressed in the settlement agreement until (1) (redacted) files or fails to file, its variance application; (2) the Department approves the application, or denies it and (redacted) voids the agreement; or (3) the parties agree to a modification of the settlement.

Stephen R. Rudd
February 6, 1996
Page 3

Please feel free to contact me if you have additional questions or would like to discuss this memo.

Janet Vining

JV:es

Cc: Mr. David McKillip (MIC: 57)
Mr. Jeff George (MIC: 57)
Ms. Carol Reisinger (MIC: 57)
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Mr. Dennis Mahoney, Dept. of Toxic Substances Control