

**This document has been retyped from an original copy.
Original copies can be provided electronically by request.**

Responsible-Excavation of Contaminated Soil

The excavation of contaminated soil is the first act which causes hazardous waste to become subject to regulation. The contaminated soil itself is not waste until it is excavated. Accordingly the person performing the excavation or contracting for the excavation is liable for the generator fee regardless of who caused the soil to become contaminated. 7/1/93.

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition for)	
Redetermination Under the)	DECISION AND RECOMMENDATION
Hazardous Substances Tax Law of:)	
)	
(Redacted))	No. (Redacted)
(Redacted))	
(Redacted))	
)	
<u>Petitioner</u>)	

The Appeals conference in the above-referenced matter was held by John Frankot, Staff Counsel, on (redacted), in Ventura, California.

Appearing for Petitioner: Appearance waived

Appearing for the Department of Toxic Substances Control (DTSC):	Position Paper submitted by Bryce Caughey, Staff Attorney
---	--

Appearing for the Environmental Fees Division, State Board of Equalization (EFD):	No Appearance
---	---------------

Protested Item(s)

The liability is:	FEES
Annual Generator Fee for the period 7/1/87 to 6/30/88 based on 114.75 tons of hazardous waste (soil contaminated with oil) generated. CAT: 50.0 to 249.9 tons	\$ (redacted)

Petitioner's Contention

Petitioner contends that he was not the person responsible for the contamination of the soil and is thus not liable for the fee in question.

Summary

The fee in this case is for generating about 115 tons of hazardous waste (contaminated soil) from property in (redacted), California. The site is currently owned by petitioner and may have previously been or is now the location of a gasoline service station. Petitioner's response to the Board's fee determination notes that (redacted) has informed petitioner of three other possible sources of contamination and that legal action has been initiated to inform these other sources of their liability.

On June 3, 1988, petitioner signed five Uniform Hazardous Waste Manifests (manifests) in the space on the manifest form provided for the certification signature of the generator of the material being consigned by the manifest. The manifests identified the material being consigned as contaminated soil from site clean ups. In total, the manifests consigned about 85 cubic yards of contaminated soil. Petitioner does not dispute the above quantities or the fact that the waste is hazardous.

Petitioner contends that since he did not create the contamination, he should not be liable for fees for cleaning up the contamination.

Analysis and Conclusions

Section 25205.5 of the Hazardous Substances Tax Law imposes an annual fee (generator fee) on every generator of hazardous waste. The fee is based on a set of ranges of weight of hazardous waste generated.

On December 10, 1991, the Board ruled in the published Santa Clara Ranches case:

"Health and Safety code Section 25205.1(f) defined a 'generator' in fiscal year 1987-1988, 'as a person who generates volumes of hazardous waste on or after July 1, 1985....' Title 22, CCR section 66078 defines 'generator' as '...any person, by site, ... whose act first causes a hazardous waste to become subject to regulation.' (Emphasis added). Thus, for the purpose of the generator fee calculation, the petitioner became a generator when the hazardous waste was removed from its point of origin and manifested because it is at that time that the waste became subject to regulation.

Petitioner's act of excavating and manifesting the contaminated soil was the act which first caused the hazardous waste to become subject to regulation. The statutory and regulatory scheme support the Department's contention that petitioner became a generator in this case when the waste was excavated. It is to be noted that the purpose of the fee is to provide funds for regulation by the State. Accordingly, the law provides that the act which causes regulation to begin is the act which is subject to the fee. It is not the leaking of the contaminant into the soil, but rather the management of the soil after excavation which incurs State cost.

"The position that generation takes place when the contaminated soil was removed and not over the period when the contamination occurred, is consistent with 40 CFR section 264.114 which provides that a person removing waste during the closure of a hazardous waste management unit becomes a 'generator' of hazardous waste.

"The Board finds that hazardous waste was generated within the meaning of Health and Safety Code sections 25205.1 and 25205.5 at the time petitioner excavated and manifested the contaminated soil which constitutes the hazardous waste. Petitioner was a generator and was therefore required to pay the fee pursuant to Health and Safety Code section 25205.5(b) for the amount of waste generated in fiscal year 1987-88."

In accordance with this ruling, petitioner is a generator for purposes of the Hazardous Substances Tax Law.

Section 25323.5 defines "responsible party" or "liable person" as those persons described in 42 United States Code (U.S.C.) Section 9607(a). That federal statute defines persons who are liable for the cost of the removal or remedial action to include, among others, the "...the owner or operator...of a facility,". 42 U.S.C. Section 9601(9) (B) broadly defines facility to include "any site or area where a hazardous substance has been deposited, disposed of, stored or otherwise come to be located." Since petitioner was the owner of the site on which the contaminated soil was located at the time it was excavated, petitioner is the person responsible for removal or remedial action costs under 42 U.S.C. Section 9607(a). Consequently, petitioner is a responsible party under Section 25323.5. Thus under both state and federal law, property owners whose sites are contaminated with hazardous waste are required to clean up the contamination and are also legally responsible for the costs of necessary removal or remedial action.

The exemption under Section 25345.3 (repealed) is not available to petitioner. This exemption applied only to disposal fees, not generator fees. Assuming that other parties released the subject contamination, this exemption would not apply to petitioner in any case. Thus, there is no provision in the law to exempt petitioner for the subject generator fees even if the release was by another party.

In view of the foregoing, there is no basis upon which to recommend an adjustment of the determination.

Recommendation

Redetermine without adjustment.

John Frankot, Staff Counsel

(Redacted)
Date