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Variations Generator Fee

A variance exempts a feepayer from the facility fee only. The feepayer may still be held liable for the generator fee since it is not paying a facility fee. 10/17/90.

Mr. David McKillip
Environmental Fees Unit

October 17, 1990

Janet Vining
Legal

Re: (Redacted)

This is in response to your August 23, 1990 memorandum concerning wastewater treatment plant operated by (redacted), Inc.

In April of 1988, DOHS granted (redacted) a variance from the hazardous waste facility permit requirement for its Milpitas facility. Thereafter, (redacted) continued to be billed for, and paid, a facility fee for the (redacted) site. In October 1989, (redacted) filed a claim for refund of those facility fees. On August 1, 1990, the State Board of Equalization informed (redacted) that its claim for refund had been approved for the period July 1, 1988 to June 30, 1989. However, the 1987-88 facility fee was properly paid, since the variance was granted during that fiscal year, and there is no statutory provision for prorating the fee.

Your question is whether (redacted) is subject to the generator fee for the wastewater treated and released from its plant while the variance is in effect.

The variance issued by DOHS describes the operation of (redacted)'s batch neutralization and chlorine reduction treatment system at the Milpitas site. The water treated is wastewater, which consists of rainwater run-off and process waters generated from spillage resulting from repackaging and bottlewashing operations for acids, bases, and chlorine. The average amount of waste treated per month varies from 102,000 to 146,000 gallons. The wastes flow through one of five new double-contained sumps, and are then batch treated in two 3,100 gallon tanks by neutralization and chlorine reduction. Two additional 13,000 gallon tanks are used to store rainwater run-off and occasionally process waters prior to treatment. The San Francisco Bay-Regional Water Quality Control Board and the City of Milpitas have authorized (redacted) to discharge the treated wastewater to Berryessa Creek and to the local sanitary sewer.

The variance issued by DOHS specifically states that it does not relieve (redacted) from any requirements imposed on generators of hazardous wastes.

An exemption from the generator fee appears in Section 25205.5(e) of the Health and Safety Code, which states that “[A]ny hazardous materials which are recycled, and used onsite, and are not transferred offsite, are not hazardous waste for purposes of this section.” A previous version of this section referred to waste recycled “as part of the line of production”. The contaminated wastewater generated by (redacted) is not recycled, but treated and disposed of, and therefore does not come within the exemption set forth in Section 25205.5(e) in either its current form or previous form.

A more basic question, however, is whether the contaminated water is a hazardous waste, since it is no longer hazardous when it is released to the creek or sewer.

“Waste” is defined in Section 25124 of the Health and Safety Code as:

- (a) . . . any discarded material that is not excluded by this chapter or by regulations adopted pursuant to this chapter.
- (b) A discarded material is any material which is any of the following:
 - (1) Relinquished, as specified in subdivision (c).
 - (2) Recycled, as specified in subdivision (d).
 - (3) Considered inherently wastelike, as specified in the regulations adopted by the department.
- (c) A material is a waste if it is relinquished by being any of the following:
 - (1) Disposed of.
 - (2) Burned or incinerated.
 - (3) Accumulated, stored, or treated, but not recycled, before, or in lieu of, being relinquished by being disposed of, burned, or incinerated.
- (d) A material is a waste if it is recycled, or accumulated, stored, or treated before recycling, . . .

The definition of “waste” in effect from the beginning of 1988 to October 1989 was substantially the same, except that the term “abandoned” was used instead of “relinquished”. Prior to 1988, “waste” was defined as:

- (a) Any material for which no use or reuse is intended and which is to be discarded.

(b) Any recycled material

However, the pre-1988 definition of “waste” is not relevant here, since (redacted) properly paid a facility fee for fiscal year 1987-88, and thus could not be subject to the generator fee until calendar year 1988.

The wastewater (redacted) treats and then discharges to Berryessa Creek or the local sanitary sewer comes within the current definition of “waste”. It is a discarded material because it is relinquished by being treated before being disposed of, and it is not excluded by statute or regulation.

The definition of “waste in Section 25124 of the Health and Safety Code tracks the definition found in the EPA’s regulations (see 40 C.P.P. 261.2). Section 261.4 of Title 40 of the Federal regulations states that certain materials which are discharged into a sewer system are not solid wastes. However, a comment included with the section specifies that the section does not exclude industrial wastewaters while they are being collected, stored, or created before discharge.

I conclude that (redacted), Inc. is a generator of hazardous waste at its (redacted) plant. Specifically, (redacted) generates wastewater contaminated with acids, bases, and chlorine. Since (redacted) has a variance from the facility permit requirements and does not pay a facility fee, it is subject to the generator fee imposed by Section 25205.5 of the Health and Safety Code for generation of the contaminated wastewater which is treated and then discharged.

Janet Vining

JV:wk
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cc: Mr. E. V. Anderson
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