



<u>Account No.</u>	<u>Period</u>	<u>Category</u>	<u>Amount</u>
	7/1/88-6/30/89	Petition	\$
	7/1/89-6/30/90	Petition	
	7/1/90-6/30/91	Late Protest	
	7/1/87-6/30/88	Petition	
	TOTAL		\$1

Contentions

Petitioner contends that:

1. Petitioner should be classified as a small storage facility.
2. Petitioner qualifies for a variance which would exempt petitioner from being regarded as a treatment facility.
3. Even if petitioner is not regarded as qualifying for a variance, the treatment process should be exempt under the permit-by-rule program.

Summary

Petitioner is a subsidiary of [redacted] Company. It operates in more than 30 states, including several locations in California. The facility involved with these protests is located in [redacted]. The primary activity at this location is the transfer of industrial chemicals received in bulk by railroad tank car into 55-gallon drums or smaller containers. A small amount of blending is also done. Petitioner generates waste which consists primarily of line flush. Line flush is liquid which is run through transfer lines to flush out the residue from the liquid previously run through the lines.

Petitioner obtained an Interim Status Document (ISD) on July 30, 1982. Interim Status is a category in which facilities which were in existence on November 19, 1980 may continue to operate without a permit or a variance.

Petitioner operates a 1,500-gallon precast monolithic sump neutralization pit. The tank is used to neutralize inorganic acid and base washings prior to discharge into a municipal treatment system. It handles more

than 1,000 pounds and less than 1,000 tons of hazardous waste per month. Disposal is made offsite. The materials remain on petitioner's facilities for no more than 90 days prior to disposal.

In November 1980, petitioner filed a Federal Resources Conservation and Recovery Act (RCRA) application for a permit in which petitioner stated that it treated 400,000 pounds of hazardous waste per year. In March 1983, petitioner filed a revised RCRA application stating that it planned to treat 310 tons per year of hazardous waste. On July 25, 1984, petitioner requested that its application be suspended. Processing of the application was suspended and no permit was issued. The ISD remained in effect. In May 1990, the RCRA data base identified petitioner as a generator, a transporter, and a treatment, storage and disposal facility. In December 1989, petitioner applied for a variance for the neutralization pit. As of the date of the hearing, no variance had been issued. Petitioner was notified on August 13, 1990 that variances were not being granted at that time to facilities subject to regulation under its upcoming "permit-by-rule" program. That program has not as yet been implemented. A variance would have exempted petitioner from being regarded as a facility for purposes of the fee.

The Department (formerly the Department of Health Services) regarded petitioner as the operator of a small treatment facility and determinations were issued with fees based on that classification. Petitioner timely petitioned for redetermination for the fiscal years ending in 1988, 1989 and 1990. Petitioner filed a petition for redetermination for the fiscal year ending in 1991, but it was not timely. This petition was accepted, however, as a late protest.

Petitioner states that while it did file an application to store hazardous waste and was thereby issued an ISD, the facility was never used for storage of hazardous waste nor in a manner that a permit or ISD was required. A permit or ISD is required only if onsite-generated waste is stored for more than 90 days or offsite-generated waste is stored for more than 10 days. Petitioner intended, at the time of its application for the ISD, that it would handle customer-generated waste at its facility. However, the City of \_\_\_\_\_ refused to issue a conditional use permit; thus, petitioner never handled offsite-generated waste. Petitioner concludes, therefore, that it does not operate a facility within the meaning of the Health and Safety Code.

Petitioner states that, although it filed an application for a variance in December 1989, no formal denial was ever issued by the Department. Petitioner states that it contacted the Department by telephone in August 1990 and was informed that the permit-by-rule procedure would supplant the variance procedure. Nevertheless, the permit-by-rule procedure has not yet been implemented. This leaves petitioner in the position of not being able to obtain a variance for several years while a substitute procedure was not available. Petitioner is being punished economically because of the Department's failure to adopt a procedure in a timely manner.

Petitioner states that its facility qualifies for either a variance or operation under the proposed permit-by-rule procedure. This would make petitioner liable only for generator fees rather than for facility fees. As supporting evidence that this facility would qualify for the variance or permit-by-rule procedure, petitioner points out that it operates an essentially identical facility in California which obtained a variance in the early 1980s and is operating under the variance.

The Department and petitioner entered into an agreement in August 1980 whereby petitioner is regarded as a treatment facility.

The Department points out that it has the authority to grant and deny variances. If RCRA exempts a practice from its permitting requirements, the Department may grant a variance. Merely qualifying for a variance is not sufficient, however. The variance must actually be granted by the Department. Even if a variance had been granted, petitioner would be liable for fees for the 1987-88 fiscal year because the variance procedures were not in effect at that time. The fees for 1988-89 and for 1989-90 would still be due because the variance application was made in December 1989. Any variance granted would be effected only for the following fiscal year. Since the permit-by-rule process has not been adopted, petitioner cannot claim exemption under that process. The Department also contends that petitioner's late filing of the petition for redetermination for the 1990-91 fiscal year precludes the granting of any relief for that year.

Petitioner also operates a pilot treatment system which includes a refrigerated vapor extraction system, a groundwater treatment system, and free product recovery system. On March 31, 1989, petitioner received a variance for this system. The variance expired one year after its

issuance and has not been renewed. The Department believes that the system was operated in the 1990-91 fiscal year. This provides a further basis for petitioner's liability for that fiscal year.

Petitioner states that its preliminary plan for the pilot treatment system included product recovery and vapor condensation which would trigger the imposition of fees. Since the startup of the system, no activities requiring a permit had been carried out and none are planned for the future. Petitioner does not regard the operation of the system as treatment of hazardous waste. The contamination cannot be traced to a spill or a residue of a spill of individual products listed in 40 CFR 261.33.

The Department contends that the pilot treatment facility system extracts groundwater and treats it and that this activity is sufficient to require a permit even if no product recovery or vapor condensation is carried out. The Department also contends that petitioner's application for a National Pollution Discharge Elimination System permit for this system listed numerous substances in 40 CFR 261.33 and also in Title 22 California Code of Regulations Section 66261.33. The Department also questions how these contaminants got into the groundwater other than by a spill or residue from a spill.

Petitioner states that its variance for the system expired March 31, 1990 and that it applied for a renewal on April 27, 1990. Thus, there was only a 27-day period between the expiration of the variance and the application for renewal. The facility may not have operated during this period. The renewal was denied because of the Department's plans to operate on the permit-by-rule system. Petitioner contends that because it was initially granted a variance, there was no basis for denying the renewal and petitioner should be treated as though the renewal had been granted.

#### Analysis and Conclusions

Section 25205.2 of the Health and Safety Code imposes a facility fee which is in addition to the disposal fee on every operator of a facility based on the size and type of the facility. Section 25205.1 of the Health and Safety Code provides in pertinent part of subdivision (b):

"'Facility' means any structure, and all contiguous land, used for the treatment, transfer, storage, resource recovery, disposal, or recycling of hazardous waste, which has been issued a permit or a grant of

interim status by the department pursuant to Article 9 (commencing with Section 25200) or which is operated in such a manner that the facility is required to obtain a permit or grant of interim status."

Section 25117.1 of the Health and Safety Code provides:

"'Hazardous waste facility' means all contiguous land and structures, other appurtenances, and improvements on the land used for the treatment, transfer, storage, resource recovery, disposal, or recycling of hazardous waste. A hazardous waste facility may consist of one or more treatment, transfer, storage, resource recovery, disposal, or recycling hazardous waste management units, or combinations of these units."

Section 25123.5 of the Health and Safety Code provides:

"'Treatment' means any method, technique, or process which changes or is designed to change the physical, chemical, or biological character or composition of any hazardous waste or any material contained therein, or removes or reduces its harmful properties or characteristics for any purpose."

Petitioner's neutralization pit was used to treat hazardous waste because it was intended to change the chemical composition of hazardous waste and to remove or reduce its harmful properties or characteristics. Petitioner's operation of the neutralization pit was therefore the operation of a hazardous waste facility. As the operator of the hazardous waste facility, petitioner is liable for the facility fee unless there is an applicable exclusion.

Section 25143 of the Health and Safety Code provides that under specified conditions, the Department may grant a variance from the requirements of management of hazardous waste. This provision became effective July 1, 1987. Section 25205.2 of the Health and Safety Code provides in subdivision (c) that a variance shall be effective as an exclusion from the facility fee for the fiscal year following the fiscal year in which it was granted. Since petitioner

applied for a variance in December 1989, the variance would have been effective only after July 1, 1990. The three petitions for fiscal years prior to that date should therefore be denied because of petitioner's failure to apply for a variance for those years.

The question with respect to the 1990-91 fiscal year is whether it is within the power of the Board to decide that the Department should have issued a variance for that period and to apply the fee as though the Department had issued the variance. For reasons discussed below, I conclude that the Board does not have this power.

The statute specifically gives the Department the power to grant variances. The power is discretionary; that is, the Department is not required to issue variances. While I regard the procedures of the Department to be faulty in that it ceased issuing variances before it had a replacement system in operation, that is a matter for an appeal internal to the Department or, in the alternative, a matter for judicial relief. There is nothing in the law that authorizes the Board to grant the variance. The evidence strongly indicates that petitioner qualifies for a variance, but a variance is supposed to be based on scientific judgment. The requisite expertise is located in the Department, not the Board. The Board's authority is limited to questions related to application of the fee. It does not extend to scientific judgments. I conclude that the petition for the 1990-91 fiscal year should be denied on the basis that petitioner did not hold a variance for that year.

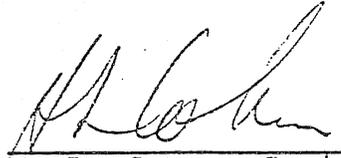
The above conclusions were based solely on petitioner's operations of the neutralization pit. It is not necessary, therefore, to reach any conclusion with respect to petitioner's pilot treatment system.

The Department has also questioned the authority of the Board to grant relief on late protests. Section 43301 of the Revenue and Taxation Code provides that if a petition for redetermination is not filed within 30 days after the determination is issued, the amount determined becomes final. Section 43303 of the Revenue and Taxation provides that if a petition for redetermination is filed timely, the Board shall grant a hearing to the person making the request. Under the statute, the Board is not required to grant hearings for late protests. It has, however, long been the practice of the Board to grant hearings on late protests in appropriate circumstances with respect to the sales and use tax and the

various excise taxes. The sales and use tax and excise tax statutes respecting hearings are the same as the above-cited sections. Accordingly, I conclude that while the Board is not required to grant hearings on late protests, it has the discretionary authority to do so in order to assure that any tax collected is not in excess of the amount due.

Recommendation

Deny the petitions and the late protest.



H. L. Cohen, Senior Staff Counsel

Date

JA