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#### Hazmat Asbestos

Asbestos which is contained in buildings which are to be demolished is not waste while the buildings are standing and is not hazardous unless it is friable. Demolition serves to make the asbestos both waste and hazardous and thus subject to fees. 8/25/89.

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#### Definition of Hazardous Waste Release

This is in response to your July 12, 1989, memorandum concerning what constitutes a release of hazardous waste. Your question arose in the context of the (redacted)'s removal of asbestos from property acquired from a third party. Specifically, the Redevelopment Agency acquired six properties, demolished the improvements on the properties, and removed over 25 tons of "friable asbestos in a state of releasing to the atmosphere." The Redevelopment Agency asserts that Section 25174.7 of the Health and Safety Code exempts it from paying the hazardous waste generator fee required by Section 25205.5.

Several definitions set forth in the Health and Safety Code are relevant to an analysis of the action taken by the Redevelopment Agency. Health and Safety Code Section 25124 defines "waste" as:

- (a) ...any discarded material that is not excluded by this chapter, by regulation adopted pursuant to this chapter, or by a variance issued pursuant to this chapter.
- (b) A discarded material is any material which is any of the following:
  - (1) Abandoned, as specified in subdivision (c)...
  - (3) Considered inherently waste like, as specified in regulations adopted by the department...
- (c) A material is a waste if it is abandoned 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 abandoned by being disposed of, burned or incinerated.

The Redevelopment Agency purchases a property with the intention of demolishing the buildings and other improvements on the property. A very broad interpretation of the Health and Safety Code definition of “waste” could include those buildings and improvements, since they are “abandoned” in the sense that they are accumulated or stored before being disposed of through demolition. (See Section 25124(c) (3)). The buildings, however, continue to have some potential use. Once the Redevelopment Agency purchases the property, it could decide to renovate and use the buildings. The buildings are not discarded, abandoned, or inherently waste like until they are actually demolished, and are therefore not “waste” until that time. Materials which are an integral part of the buildings and improvements, such as asbestos used in the construction, would also not be “waste” until demolition occurs.<sup>1</sup>

Section 25117 of the Health and Safety Code defines “hazardous waste” as:

...a waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may either:

- (a) Cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.
- (b) Pose a substantial present or potential hazard to human health or environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

The Department of Health Service’s regulations state that asbestos is only considered a hazardous material when it is in a “friable”(readily crumbled or brittle), finely divided or powdered state. (Cal. Admin. Code, tit. 22, § 66699.) Therefore, asbestos would not be a hazardous waste unless it meets the

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<sup>1</sup> In his April 6, 1989 letter to the Board, (Redacted), for the (Redacted), indicated that, in addition to asbestos, the properties can contain petroleum waste and open containers of household toxic materials. Unlike the asbestos, these substances are already wastes at the time the Redevelopment Agency takes title to the property.

definition of waste in Section 25124 of the Health and Safety Code, and it is in the state or condition set forth in Section 66699 of DOHS's regulations.

The asbestos at issue here, contained in buildings which are to be demolished by the Redevelopment Agency, is not waste while the buildings are standing and is not hazardous unless it is friable. Demolition serves to make it both waste and hazardous, and hence subject to the attendant fees. The act of demolition generates hazardous waste, and the Redevelopment Agency must therefore pay the generator fee required by Section 25205.5 of the Health and Safety Code, as well as the disposal fee (Section 25174) and Superfund tax (Section 25345).

The Redevelopment Agency asserts that Health and Safety Code Section 25174.7 exempts it from paying the generator fee. Section 25164.7 states that:

- (a) The fees provided for in Sections 25174, 25174.6 and 25205.5<sup>2</sup> 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...

The terms "release," "remedy" and "removal" are defined in statutory sections pertaining to the Hazardous Substances Account. Health and Safety Code Section 25320 defines a "release" as "...any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." Section 25322 defines a "remedy" or "remedial action" as:

- (a) Those actions which are consistent with a permanent remedy, that are taken instead of, or in addition to, removal actions in the event of a release or threatened release of a hazardous substance into the environment...
- (b) Those actions which are necessary to monitor, assess, and evaluate a release or a threatened release of a hazardous substance...

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<sup>2</sup> Although this section refers to the disposal fee as well as the generator fee, the Redevelopment Agency's letter makes no mention of the disposal fee, and it is not clear whether the Agency paid that fee directly to the Board or reimbursed the disposal site where the asbestos was taken. The Agency's letter also does not mention the Superfund tax required to be paid pursuant to Section 25345. Section 25344.3 contains language similar to Section 25174, and waives the Superfund tax with respect to any removal or remedial action concerning a hazardous waste release caused by another person. The interpretation of Section 25174.6 contained in this memo also applies to Section 25345.3.

Section 23523 defines “remove” or “removal” as including “the cleanup or removal of released hazardous substances from the environment or taking of such other action as may be necessary to prevent, minimize, or mitigate damage which may otherwise result from a release or threatened release.”

As noted above, asbestos is not hazardous unless it is friable, and that condition would also constitute a “release” of hazardous waste, since the friable asbestos fibers are emitted into the environment. It is possible that a building would contain some asbestos that is intact and therefore not waste and not hazardous, and some asbestos that is friable and therefore hazardous waste. Only the portion of the asbestos that was friable would be considered a “release” of hazardous waste.

However, an important question concerning the Redevelopment Agency’s exemption claim is whether the demolition of a building containing asbestos (friable or not) can be considered a removal or remedying of a release of hazardous waste. The definitions of “remove” and “remedy” contained in the Health and Safety Code suggest taking action which is necessary to abate a danger created by the release or threatened release of hazardous waste. In the case at hand, the demolition of the buildings caused a release of hazardous waste (asbestos), and the Redevelopment Agency remedied and removed the release when it submitted the asbestos for disposal. Even if some of the asbestos in the buildings was friable, and could constitute a “release” of hazardous waste caused by the previous owners, any appropriate remedy or removal action concerning that release would have focused on the portion of the building containing the asbestos. The asbestos could have been removed, or perhaps covered, and the building would continue to serve a function. Although it is unlikely that all the asbestos in all the buildings was friable, even this scenario could have been remedied by less than total demolition.

The Redevelopment Agency’s letter indicates that it acquires property and demolishes buildings in order to provide land for development, and not to abate dangers to the environment caused by friable asbestos. The Redevelopment Agency cannot, therefore, claim the exemption afforded in Section 25174.7, and must pay the appropriate generator (Section 25205.5) and disposal fees (Sections 25174 and 25345) based on the asbestos removed from the demolished building.

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