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Hazmat Oil and Water Mixture

A mixture of oil and water which results from pumping well water which coincidentally passes through an oil bearing strata, and which is hazardous pursuant to criteria developed by the Department of Toxic Substances Control, is a hazardous waste regardless of the fact that the water is pumped for agricultural purposes. 11/6/90.

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

APPEALS UNIT

| In the Matter of the Petition for | ) | HEARING |
| --- | --- | --- |
| Redetermination Under the | ) | DECISION AND RECOMMENDATION |
| Hazardous Substances Tax Law of: | ) | |
| | ) | |
| (Redacted) | ) | No. (Redacted) |
| | ) | |
| Petitioner | ) | |

The above-referenced matter came on regularly for hearing before Hearing Officer Cynthia Spencer-Ayres on (redacted) in Bakersfield, California.

| | |
| --- | --- |
| Appearing for Petitioner: | Mr. (Redacted) |
| Appearing for the Department of Business Taxes: | Waived appearance |
| Appearing for the Department of Health Services: | Mr. Ramon Perez<br>Attorney at Law |

Protested Item

The protested tax liability for the period July 1, 1987 through June 30, 1988, is based on the generation of “oil and water” as a hazardous waste. The generator fee is for the category of 5.1 to 49.9 tons in the amount of $ (redacted).

Petitioner’s Contentions

1. Petitioner contends that it is a farming operation and not a generator of hazardous waste.

2. Petitioner contends that due to a misunderstanding, the “oil and water” substance was manifested as hazardous waste when, in fact, it was merely crude oil and fresh water. The substance should be considered exempt crude oil.

Summary

Petitioner is engaged in farming operations with properties in several counties including (redacted) County. The farming operation pertinent to this case is an orange grove.

Petitioner contends that crude oil is produced at the orange grove site as a consequence of pumping well water which coincidentally passes through oil bearing strata. As is common farming practice, the water is pumped into a pond from the well for irrigation purposes and the result is that the crude oil mixed with the well water. The crude oil gradually collects on the surface of the pond which contributes about one barrel of oil per month. Over time, the oil is removed from the pond. Petitioner argues that crude oil is not a hazardous waste, unless it is indeed a waste. In this case, the oil is crude oil and "is not a waste, but a useable product, albeit unwanted." Petitioner states further that oil skimmed from sumps used in oil production is not a waste. The petitioner contends that it did not understand the regulations of the California Division of Oil and Gas, Regional Water Quality Control Board, and the Department of Fish and Game governing screening of sumps, but the problem has since been solved.

The petitioner contends it is a farming operation and has no influence on the influx of oil into the water. This being the case, it is not a generator of hazardous waste because it is not in the business of producing waste. Furthermore, the petitioner states that the oil should have been handled as crude oil and not sent to a waste treating plant and manifested as a hazardous waste. Petitioner states this farming operation has been going on for many years prior to this instance of disposing of the oil and it unwittingly labelled it as a hazardous waste. Due to a misunderstanding, the load of "oil and water" was manifested as hazardous waste when, in fact, it was merely crude oil and fresh water.

Therefore, to sum up petitioner's position, the substance which resulted from the pumping of the water should be considered crude oil which is not a hazardous waste. The accumulation of oil on the irrigation pond is not the result of a process. Manifesting the substance as a "waste" was a one-time occurrence and was done in error.

Petitioner was sent a Notice of Determination on April 22, 1988, where a generator fee was imposed for the period July 1, 1987 through June 30, 1988. The generator fee was based on the generation of hazardous waste of an "oil and water" mixture and the fee category was established to be 5.1 to 49.9 tons in the amount of (redacted).

Department of Health Services (DHS) contends that the "oil and water" mixture is a hazardous waste. The first argument presented is that Health and Safety Code section 25117 is the statutory definition for what constitutes a hazardous waste. The mixture is identified by a listing under Title 22, California Administrative Code (now California Code of Regulations (CCR)) section 66680(e). The second argument presented is that the substance constitutes a waste because it was removed from the premises in order to be discarded. When the substance was manifested, which is a method of keeping track of hazardous waste in the state, it became a waste and the petitioner became subject to the generator fee. Therefore, the state claims there are two bases upon which the substance is considered a waste: (1) it is identified as a waste under the departmental regulations and, (2) it was discarded. DHS further contends that petitioner is a "producer" which means a generator of waste. If producing a waste, petitioner must be regulated in which generator fee attaches.

DHS noted that the (redacted) Refinery treatment facility received petitioner's waste where it was treated. In said treatment of an oil and water emulsion, the oil floats and some emulsion is taken as an oil field product. This does not constitute aa hazardous waste. If petitioner had performed the same process on site, it would not have been considered a hazardous substance.

The State Board of Equalization, Excise Tax Division, Environmental Fees Unit, (Board) contends petitioner is a generator of hazardous waste pursuant to section 25205.1 of the Health and Safety Code. The DHS Uniform Hazardous Waste Manifest System shows waste generations in excess of 5.1 tons for the fiscal year ended June 30, 1988. The Board contends that Title 22, CCR section 66078 defines a generator as, "any person, by site, whose act or process produces Hazardous Waste identified or listed in article 9 or 11 of this chapter or whose act first causes a Hazardous Waste to become subject to regulations." Title 22, CCR section 66680(e) lists "oil and water" as a hazardous waste. Therefore, petitioner is a generator of hazardous waste, and subject to the generator fee pursuant to Health and Safety Code section 25205.5

## Analysis and Conclusions

The question presented for resolution is whether "crude oil and water" mixture is a hazardous waste that must be regulated. Since petitioner alleges that the "oil and water" mixture is not a hazardous waste, we are here concerned with the resolution of several questions. The first question for resolution is whether the material is a waste. If the answer is in the affirmative, we proceed to the second question for resolution which is whether the waste is listed generically in Title 22, CCR section 66680(e). If the answer again is in the affirmative, the third question for resolution is, does the generator wish to declassify the waste pursuant to Title 22, CCR 66305. If the waste is not to be declassified, the overall analysis is that the waste is hazardous.

## The Applicable Law

As noted at the outset, the State[1] relies upon section 25117, 25205.1 and 25205.5 of the Health and Safety Code, as well as sections 66078 and 66680(e) of the California Code of Regulations, in urging that petitioner generated hazardous waste and is subject to the generator fee.

The main provisions to be considered herein are as follows:

Health and Safety Code section 25124 provides:

"'Waste' means any of the following:

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[1]When referring to the DHS and the Board collectively, they will be referred to as the "State."

(a) Any material for which <u>no use</u> or <u>reuse is intended</u> and which is to be discarded.

(b) Any recyclable material." (Emphasis added.)

Health and Safety Code section 25316 provides:

"'Hazardous substance' means:

(a) Any hazardous waste or extremely hazardous waste as defined by sections <u>25117</u> and 25115 respectively, unless expressly excluded." (Emphasis added.)

At the time of the events in this case, Health and Safety Code section 25117 provided:

"'Hazardous waste' means a <u>waste</u> or combination of wastes, which because of its quantity or concentration, or physical, chemical, or infectious characteristics, may either -

(b) Pose a substantial present or potential hazard to human <u>health</u> or <u>environment</u> when improperly treated, stored transported, or disposed of, or otherwise managed . . . ." (Emphasis added.)

Health and Safety Code section 25140. Listing of hazardous wastes provides in relevant part:

"The department shall prepare, adopt and may revise when appropriate, <u>a listing of the wastes which are determined to be hazardous,</u> and a listing of the waste which are determined to be extremely hazardous." (Emphasis added.)

The regulatory provision which interprets and makes this statute specific is Title 22, CCR, Article 9. Hazardous Wastes and Hazardous Materials. Section 66680. Lists of Chemical Names and Common Names. Insofar as relevant to this petition, section 66680 provided as follows during the period of time in issue:

"(a) A <u>waste</u> that meets the definition of hazardous waste presented in <u>section 25117</u> of the Health and Safety Code <u>or</u> <u>satisfies any of the criteria of hazardous waste presented in Article 11 of this chapter shall be considered a hazardous waste whether or not the waste is cited in this Article.</u> Such a waste shall be handled and disposed of according to the provisions of this chapter.

* * * *

“(c) The potential hazardous property of a material cited in the List of Chemical Names for the List of Common Names is indicated in the list as follows:

(T) Toxic, (C) Corrosive, (F) Ignitable, (R) Reactive. . . .”

* * * *

“(e) List of Common Names. In this subsection a dagger denotes the common name of a waste which comes under the provisions of this chapter if it contains a hazardous material.”

* * * *

“Oil and water (T).” (Emphasis added.)

Health and Safety Code section 25141 provides:

> “The department shall develop and adopt by regulation criteria and guidelines for the identification of hazardous wastes and extremely hazardous wastes.” (Emphasis added.)

The regulatory provision which interprets and makes this statute specific is Title 22, CCR, Article 11. Criteria for identification of hazardous and extremely hazardous wastes, section 66693. Applicability of Hazardous Waste Criteria.

The potentially hazardous characteristic of the “oil and water” mixture under Article 9 is “toxicity.” Insofar as relevant to this petition, Title 22, CCR section 66693 provides in relevant part:

> “Any waste which is hazardous pursuant to any of the criteria set forth in this article is a hazardous waste and shall be managed in accordance with the provisions of this chapter.” (Emphasis added.)

Title 22, CCR section 66696 provides the specific toxicity criteria relevant to the “oil and water” mixture.

Title 22, CCR section 66300 (California Definition of a Hazardous Waste) provides in relevant part:

“(a) . . . , all provisions of this chapter shall apply to the management of any liquid, semi-solid, solid, or gaseous waste which conforms to the definition of hazardous waste in section 25117 of the Health and Safety Code including but not limited to the following:

(1) Waste which is hazardous pursuant to any criterion in Article 11 of this chapter and consists of or contains hazardous material cited in Article 9 of this chapter, . . . ." (Emphasis added.)

Title 22, CCR section 66305. Classification of a Waste as Hazardous or Nonhazardous.

"(a) A waste must be classified a hazardous waste if it is within the scope of section 66300 and

(1) it is hazardous pursuant to any criterion of Article 11, or

(2) it otherwise meets the definition of a hazardous waste in section 25117 of the Health and Safety Code, and no person shall deviate from the provisions of this chapter in the management of a hazardous waste. . . .

"(b) It shall be the waste producer's responsibility to determine if the waste is classified as a hazardous waste pursuant to section 66305(a). If the producer determines that the waste is hazardous, the waste shall be managed pursuant to the provisions of this chapter. If the producer determines that the waste is nonhazardous, the producer, except as provided for in section 66305(e), may either proceed to manage the waste as nonhazardous or apply to the department for concurrence with the nonhazardous determination through the notification procedure set forth in section 66305(c) before managing the waste as nonhazardous." (Emphasis added.)

With this statutory and regulatory background in mind, we conclude that the "crude oil and water" mixture, generated as the result of petitioner's action of pumping well water for its farming operation, is a hazardous waste under the circumstances of this case. Therefore, three questions are presented for resolution.

I. Is the Material a Waste

We first consider whether the "oil and water" mixture is a waste. Petitioner argues that crude oil is not a hazardous waste unless it is indeed a waste.

A waste is any solid, liquid, or contained gaseous material that one no longer uses, and either recycle, throw away, or store until one has enough to treat or to dispose. In response to petitioner's contention, we conclude that crude oil mixed with water comes clearly within the definition of "waste" which was in effect at the time of the events in this case under Health and Safety Code section 25124.

The ”oil and water” mixture is a liquid that petitioner did not use or reuse and it was discarded. Petitioner concedes the point that the oil was unwanted.

When petitioner packaged the “oil and water” for transportation off the site and had it manifested, it became a discarded waste. The manifest is a tracking document which is a method that DHS uses to keep track of the hazardous waste in the state. Health and Safety Code section 25160 (a) provides that, “a manifest shall only be used for the purposes specified in this chapter, including but not limited to, identifying materials which the person completing the manifest reasonably believes are hazardous waste.” (Emphasis added.) Petitioner completed the manifest which clearly identified the materials as a hazardous waste. We do not conclude that the waste in issue was hazardous simply because it was accepted on a hazardous waste manifest. The waste was treated as hazardous by the state because it is defined as such in California law.

Petitioner further contends that its case deals with merely crude oil which is excluded as a hazardous substance. Health and Safety Code section 25317 provides in relevant part that:

> “‘Hazardous substance’ does not include:
>
> (a) Petroleum, including crude oil or any fraction thereof which is not otherwise specially listed or designated as a hazardous substance in subdivisions (a) to (f) inclusive, of section 25316. . . .” (Emphasis added.)

It is noted that the “oil and water” mixture comes within subdivision (g) of section 25316 which provides “any hazardous waste . . . as defined by section 25117 and 25115, respectively, unless expressly excluded.” (Emphasis added.) The “oil and water” mixture coms within the statutory definition of hazardous waste under section 25117 because it poses a potential hazard to human health or environment and is expressly included within the Health and Safety Code section 25140 listing of hazardous waste.

It is concluded that under the facts of this case, petitioner is a farming operation and not a petroleum refinery where certain petroleum refinery wastes would be removed from the definition of hazardous substance.

## II. Whether the Waste is Listed

We next consider whether the waste is listed generically in Title 22, CCR section 66680(e). There are two ways a waste may be brought into the hazardous waste regulatory system: listing and identification through characteristics. Generally, wastes have been listed because they either exhibit one of the characteristics (ignitable, corrosive, reactive, or toxic) or contain any number of toxic constituents that have been shown to be harmful to health and the environment. Even if a waste does not appear on one of the lists, it is considered hazardous if it has one or more of the following characteristics: ignitable

(easily combustible or flammable); corrosive (dissolves metals, other materials, or burns the skin); reactive waste (unstable or undergoes rapid or violent chemical reaction with water or other materials; and toxic (contains high concentrations of heavy metals or specific pesticides that could be release into groundwater.)[2]

Under California law, a waste is classified as hazardous if it is one (or contains one) of over 700 chemicals specifically listed in the California Code of Regulations or, if it is reactive ignitable, corrosive, or toxic. The regulations promulgated by the DHS contain a list of hundreds of materials designated as potentially hazardous, and include mathematical formulas and scientific standards by which hazardous materials are identified. (Cal. Code Regs. Title 22, sections 66680 – 66723.) The "oil and water" mixture is specifically listed under Title 22, CCR section 66680(e) and the potential hazardous property is its toxicity.

The Legislature expressed its intent to protect public health and environmental quality by establishing regulations for the handling, treatment, recycling and disposing of hazardous wastes, and granted to the department the authority to implement such a program. (Health and Saf. Code, section 25101.) The Legislature defined hazardous waste (Health and Saf. Code, section 25117) and directed the DHS to prepare a list designating wastes which are hazardous and to adopt by regulation "criteria and guidelines for the identification of hazardous wastes." (Health and Saf. Code sections, 25140 and 25141.) This is a reasonable grant of power to an administrative agency, providing adequate standards for administrative application of the statutory scheme. (People v. Wright, 30 Cal. 3d at 713.) The standards for determining hazardous waste were established by DHS as authorized by the Legislature and the "oil and water" mixture is specifically included. We, therefore, conclude the "oil and water" mixture is a hazardous waste based on two criteria: one, it is specifically listed as hazardous in Article 9 and Article 11 of the CCR and second, it was discarded.

A closely related issue is petitioner contends it is not a "generator" of hazardous waste. The position espoused by petitioner is that it is only a farming operation and not a business which generates waste. The "oil and water" mixture is not the result of a process.

In this regard, a determination must be made whether petitioner comes within the definition of a "generator." Insofar as relevant to this petition, Health and Safety Code section 25205.1(f) provided that:

> "'Generator' means a person who generates volumes of hazardous waste on or after July 1, 1986, in those amounts specified in subdivision (b) of section 25205.5 at an individual site commencing on or after July 1, 1986, and who does not own or generate a hazardous waste facility at that same individual site."

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[2] EPA, "understanding the Small Quantity Generator Hazardous Waste Rules: A Handbook for Small Business," September 1986.

Title 22, CCR section 66078 provides:

> "'Generator' means any person, by site, whose act or process produces hazardous waste identified or listed in Article 9 or 11 of this chapter or whose act first causes a hazardous waste to become subject to regulation." (Emphasis added.)

We have looked at the statutory and regulatory definitions of the word "generator." We now turn to the word "generator" and look at it from its ordinary meaning. The term ordinarily means "the act or process of bringing into being; origination; production." The word "production" means "the act or process of producing." (Webster's New World Dictionary, Third College Edition, pgs. 562 1074 respectively.) The facts are clear that petitioner was the producer and thus the generator of the waste material. The "oil and water" combination, is a hazardous waste contrary to petitioner's assertion. As such, petitioner is a "producer" which means any person who generates a waste material. (Health and Saf. Code, sections 25120; Title 22, CCR section 66164 "producer" means a generator.)

Thus, the essence of the answer is simple: Inasmuch as Health and Safety Code section 25205.5, upon which the regulations are predicted, the word "generator" for purposes of the generator fee calculation means when the hazardous waste is removed/discarded. This conclusion is also bolstered by 40 Code of Federal Regulations (CFR) section 264.114 as pertinent herein because it links the term "generation" to removal of hazardous waste. This section provides in relevant part:

> "By removing any hazardous wastes or hazardous constituents during partial and final closure, the owner and operator may become a generator of hazardous waste and must handle that waste in accordance with all applicable requirements. . . ." (Emphasis added.)

The language demonstrates that generation takes place when the hazardous waste is removed. This federal regulation finds applicability in this case under Health and Safety Code section 25159.5(b). This section provides that, until final authorization is received from the Environmental Protection Agency (EPA), all regulations of the federal Resource Conservation and Recovery Act (RCRA) shall be deemed to be the regulations of the DHS. Thus, the provisions herein cited stand for the proposition that petitioner was a "generator" of waste during the period in question.

## III. Was the Waste Declassified

We last consider whether the generator wished to declassify the waste pursuant to Title 22, CCR section 66305. There is no evidence that petitioner requested to declassify the substance as nonhazardous. Furthermore, from the facts presented, the petitioner does not appear to come within any exemption, exclusion, or variance which would change the analysis of this case.

Thus, petitioner generated a waste which was generically listed in Title 22, CCR section 66680(e) and the waste was not declassified. Therefore, the conclusion reached is that the waste was hazardous and the petitioner was the generator.

We agree with the petitioner that the accumulation of oil on the pond surface is not the result of a process. We assert that the accumulation of the oil is the direct consequence of petitioner's act of pumping the well water, although the end result was not intended – "oil and water" mixture. The specific language of section 66680(e) leaves no room for a different interpretation. Contrary to petitioner's assertion, since the "oil and water" combination in issue is specifically listed as a hazardous waste it must be treated as such. Since it is a hazardous waste and was discarded, it must be regulated and managed as a waste pursuant to Title 22, CCR section 66305(a) and (b). Thus, the generator fee, which was designed to reflect the regulatory burden posed by generators, clearly applies in this case.

Petitioner handled ad removed the hazardous waste from its site when it manifested the waste. As a result of pumping well water, it generated waste that could cause soil and water contamination if not handled and disposed of carefully. Thus, petitioner's activities should have been or were regulated by the DHS listing of wastes and criteria and guidelines for the identification of hazardous and extremely hazardous wastes. Thus, any waste which conforms to any of the department's criteria must be handled, stored, used, processed, and disposed of in accordance with permits, orders, and requirements issued or promulgated by the department. (50 Cal. Jur 3d Sections 148-149, pgs. 146-157.)

Petitioner contends the oil should have been handled as crude oil, not sent to a waste treating plant, and not manifested as a hazardous waste. Petitioner has since taken steps to resolve the problem and is apparently adhering to regulations from other agencies regarding the screening of sumps. Petitioner now proposes to handle this situation as an oil field problem by constructing a 500 barrel wash tank on an elevated pad next to the pond like a wash tank in an oil operation to receive the produced water before it is discharged to the pond. This device would then collect the oil and keep the pond clean. Oil could be sold periodically as it builds up in the tank. Petitioner indicated oil will be removed from the pond by a vacuum truck and the oil dumped into a production tank. Following installation of the tank, the ponds will be drained and cleaned before being put back in service. It is noted this procedure was not used during the period of time at issue in this case. If this procedure had been utilized, petitioner would not have a hazardous substance.

In our view of the statutory and regulatory scheme as a whole, we must therefore conclude that the "oil and water" mixture at issue is a regulated hazardous waste under the laws of California. This conclusion is also bolstered by the administrative construction of Health and Safety Code sections 25140 (added stats. 1972, Ch.1236, section 1, operative July 1, 1973) and 25141 (added stats. 1977, Ch. 1039, section 13) over a decade where regulations were adopted under the Administrative Procedure Act.

Recommendation

Redetermine without adjustment.

______________________________________ (Redacted)
CYNTHIA SPENCER-AYRES, Hearing Officer Date