Intent of Operator to Remove Waste from Site

The intent of the operator of a hazardous waste facility to remove the hazardous waste at some indefinite time in the future does not form a basis for classifying the facility as a storage facility if the present operation is actually disposal. 9/21/93.

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Late Protest and the Petition for Redetermination Under the Hazardous Substances Tax Law of:	))))	DECISION AND RECOMMENDATION
REDACTED	))))	Nos. REDACTED
Petitioner	)	

The Appeals conference in the above-referenced matters was held by Senior Staff Counsel H. L. Cohen on REDACTED in Oakland, California.

Appearing for Petitioner: REDACTED

Appearing for the Department of Toxic Substances Control (DTSC): Ms. Orchid Kwei, Staff Counsel

Appearing for the Environmental Fees Division of the Board: Ms. Carol Reisinger, Senior Tax Auditor

Protested Items

The liability is:

Hazardous Waste Disposal Facility Fee,

(Late Protest)	7/1/89-6/30/90	REDACTED
(Petition)	7/1/90-6/30/91	REDACTED
	Total	REDACTED

Contention

Petitioner contends that it is no longer a hazardous waste disposal facility and should be classified as a small storage facility.

Summary

In 1968 petitioner constructed six solar evaporation ponds at its plant in REDACTED California, for use in the treatment and storage of aqueous waste streams. The ponds were lined and were equipped with leachate collection systems. Treatment was accomplished through solar and wind action which caused the water component of the waste stream to evaporate leaving hazardous waste residues. The residues were allowed to remain in the ponds pending closure of the ponds. Petitioner states that the ponds had a projected life of 20-25 years.

Petitioner was issued a Hazardous Waste Facility Permit on September 20, 1983. Petitioner planned either to incinerate the residue from the ponds on site or to remove the residue for disposal off-site when the ponds were closed.

Because of a change in the law in 1987, petitioner was required to close four of the six ponds by July 1, 1988 and the other two by January 1, 1989. Petitioner decided to close the ponds in place. Accordingly, a closure plan was submitted to DTSC on November 1, 1987. The plan was submitted to the Regional Quality Control Board (RWQCB), DTSC, and the Federal Environmental Protection Agency (EPA). RWQCB approved the plan by letter dated April 28, 1988. DTSC and EPA approved the plan in a joint letter dated September 27, 1988. On May 10, 1990 petitioner certified to the three agencies that the closure was complete.

Petitioner states that it has objected since 1986 to being classified as a disposal facility. It nevertheless paid the fees for 1986-87, 1987-88, and 1988-89. Beginning with the 1989-90 period, when the disposal facility fees increased substantially, petitioner refused to pay disposal facility fees and paid only the lower storage facility fees.

Petitioner contends that it is not subject to any facility fee for any period beginning after June 30, 1990 because it closed the ponds under an approved closure plan and submitted certification of closure on May 10, 1990.

Petitioner also contends that its solar ponds are not disposal facilities. Since hazardous waste remains at the sites they are storage facilities. Petitioner cites 45 Fed. Reg. 33068 (May 19, 1990) which reads:

> "A surface impoundment used for waste treatment from which the emplaced waste and waste residue is to be removed before closure of the impoundment for purposes of these regulations is not both a treatment and a disposal facility but rather only a treatment facility. That does not mean it might not be disposing of wastes within the meaning of that term in Section 1004 (3) of RCRA, it merely means that EPA for purposes of reference in these regulations will call it a treatment facility."

Petitioner contends that for a surface impoundment such as its solar ponds the essential distinction between classification as a treatment facility and classification as a disposal facility is the intent of the operator during the operation of the surface impoundment. Since petitioner, during the operation of the ponds, did not intend to leave any hazardous waste in place after closure, it did not operate a disposal facility. Petitioner cites Title 22, Section 66265.228 (a) as allowing companies which close surface impoundments which were used for storage or treatment either to remove all hazardous waste or to leave the hazardous waste in place and cap the site. Petitioner cites Section 66265.110 (b) as providing that closing a surface impoundment in place does not convert a treatment facility into a disposal facility.

DTSC points out that petitioner's application for a facility permit indicated that petitioner planned to dispose of hazardous waste. Accordingly, the permit authorized disposal. DTSC also states that, despite the certification which was submitted, petitioner did not close the facility in accordance with the approved closure plan. Therefore the fees are due for both periods in question.

Petitioner contends that the technical aspects of closure were properly executed and that although it failed to issue timely certain required notices, the paperwork aspect should be disregarded since the failures to issue the notices did not endanger the environment.

Analysis and Conclusions

Section 25205.2 of the Health and Safety Code in the form in effect from September 26, 1988 to June 30, 1991 provides in subdivision (c) that a person who is in a closure period is not subject to fees for any fiscal year following the fiscal year in which the facility has completed all activities necessary for DTSC to approve closure, including but not limited to, submittal of a certification that those activities are completed to DTSC. There are two elements in this exemption from fees: completion of closure activities and certification of closure to DTSC. In the case of REDACTED, the Board concluded that approval of the certification is not required. The Board is planning to issue a published opinion in that matter.

While it is not necessary in order for petitioner to be relieved of fees for DTSC to formally accept certification, it is necessary that the closure be carried out in accordance with the approved closure plan. While some of the requirements for paperwork may be viewed as being not of substance, DTSC has contended that the closure has not been physically carried out in accordance with the closure plan. That is a technical and scientific matter. Only DTSC has the necessary technical capability to evaluate the effectiveness of the closure. Accordingly, it is petitioner's burden to convince DTSC that closure was properly carried out. The Board has no capability to determine this. If closure was properly carried out no fee is due for fiscal year 1990-91.

Section 25113 of the Health and Safety Code defines “disposal” as follows:

"(a) 'Disposal' means either of the following:

> (1) The discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste so that the waste or any constituent of the waste is or may be emitted into the air or discharged into or on any land or waters, including groundwaters, or may otherwise enter the environment."

Section 25123 defines "storage" as the holding of hazardous waste for a temporary period.

Section 25123.5 defines "treatment" as follows:

> "'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 process did not change the physical, chemical, or biological character of the hazardous waste, nor did it reduce its harmful properties. The process was not, therefore, treatment.

Petitioner's initial intent was to hold the hazardous waste for a period of 20-25 years. I do not regard this as a temporary period. The process was therefore not storage.

Petitioner was authorized to dispose of hazardous waste at its site. That authorization alone is sufficient to cause petitioner to be regarded as a disposal site, however, we are not limited to what petitioner was authorized to do. Petitioner discharged, deposited, dumped, or placed hazardous waste on land. In essence, it abandoned the waste. That constitutes disposal under the statute. Petitioner's contention that its later plan to remove the hazardous waste should place petitioner in the storage category is without merit. New technology and changes in the law can readily change how a facility operator plans to handle its waste. The application of fees must be certain in the period in which the fees are due and cannot depend on what may occur in the future.

Petitioner is correct in stating that Regulation 66265.228 (a) permits an operator of a surface impoundment to remove the hazardous waste or to seal it. However, petitioner did not actually remove the hazardous waste and the closure plan did, in fact, provide for sealing. Sealing a site is the end requirement for a disposal facility, not a storage facility. I interpret this regulation as permitting alternate methods such that an initial permit could be for either storage or disposal but could not be indefinite from the time of initiation. The regulation also provides for alternate methods for assuring that the site is ultimately rendered safe.

In summary, the late protest, covering the 1989-90 fiscal year should be denied.

Recommendation

Deny the late protest. Deny the petition unless petitioner can demonstrate to DTSC that closure was carried out in accordance with the approved closure plan. Petitioner should be allowed 90 days from the date this report is transmitted to accomplish this.

	REDACTED
H. L. COHEN, SENIOR STAFF COUNSEL	DATE