

By Thomas W. Casparian

# Good Deed Punished

Those who clean up toxic waste on their property may be saddled with a 'generator' tax by the state.

**T**he Belmont School firestorm has turned property owners' attention once again to the enormous expense of remediating environmental hazards. Federal and state laws require the property owner to mitigate any such dangerous conditions, often at great expense. The owner bears the full expense of remediation, even where the property is contaminated by previously latent hazardous waste caused decades ago by prior owners of the property of which the current owner has no knowledge.

Discovery of toxic matter — by government inspection, good-faith investigation and even erosion — is common in Southern California, where residential and commercial developments sit atop what were once petroleum fields, refineries and other former industrial sites.

Of course, once the toxic waste is removed, it must be disposed of. Disposal of such waste is highly regulated and requires the property owner first to obtain an identification number from the California Department of Toxic Substances Control, and then to complete a Uniform Hazardous Waste Manifest to enable the department to track the transportation and disposal of the waste or contaminated soil.

However, the department, pursuant to Health and Safety Code Section 25205.5, will then impose a stiff "generator fee" and waste-reporting surcharge, essentially a tax paid to the Board of Equalization, on those who complete the manifest. A landowner who cleans up contamination caused decades ago by an unknown prior owner might be shocked to find himself labeled a hazardous-waste generator and then taxed as such. Yet, under Section 25205.1(e), anyone who properly obtains an identification number and completes a manifest for the removal of the waste is included within the definition of "generator."

Two published memorandum-opinions of the Board of Equalization — *Douglas C. Elliott*, No. HG HQ 36-034374-010 (March 9, 1994) and *Santa Clara Ranches*, No. HF HQ 36-026193-010 (Dec. 10, 1993) — examined cases wherein ground soil was contaminated by underground tanks that had leaked many years previously.

When the contamination was discovered, the petitioners in the two cases — who had no idea at purchase that the properties even contained underground tanks — properly excavated the contaminated soil. They similarly argued they were not the generators of waste, as they had done nothing to create it. The board found, however, that the soil was not "waste" when it was still in the

ground; rather, it was the act of excavating that converted it to waste.

Once the petitioners excavated the contaminated soil and classified it as hazardous, as they were required to do, they became generators. (Health and Safety Code Section 25174.7 exempts state agencies from generator fees regarding sites they directly clean up.) In other words, one who contaminates the soil is not a hazardous-waste generator and is not taxed, but one who cleans it up is.

Continued to hold that any person whose act first causes hazardous waste to become subject to regulation — that is, any person who excavates it and removes it — was a generator of hazardous waste under the applicable statute and regulations, and also found that the contaminated soil excavated by the petitioner was clearly hazardous waste.

Yet, the board further decided that the Legislature did not intend that innocent landowners should be held liable for intervening criminal acts of third parties.

Because the contamination of the soil had not resulted from the "normal or anticipated usage of the ... site," the generator fee did not apply. Thus, the board concluded, entities that are responsible for the cleanup of contaminated soil resulting from vandalism are "not the generator[s] of the contaminated soil" and thus not subject to the generator tax.

The decision in *Howard Pump* is not necessarily inconsistent with those in *Douglas C. Elliott* and *Santa Clara Ranches*. The three decisions can be reconciled despite their apparently divergent treatment of innocent landowners. Theoretically, at least, the owners of the properties in the latter two cases could have determined the prior owners and uses of the property prior to purchasing the land to determine if any latent contamination might exist. The risk of becoming a generator runs with the land and will attach to any owner with such constructive knowledge of the land's prior owners and uses. When contamination is not caused by normal or anticipated usage, but rather by an intervening third-party act, no constructive knowledge can be imputed and no liability ever attaches to the land.

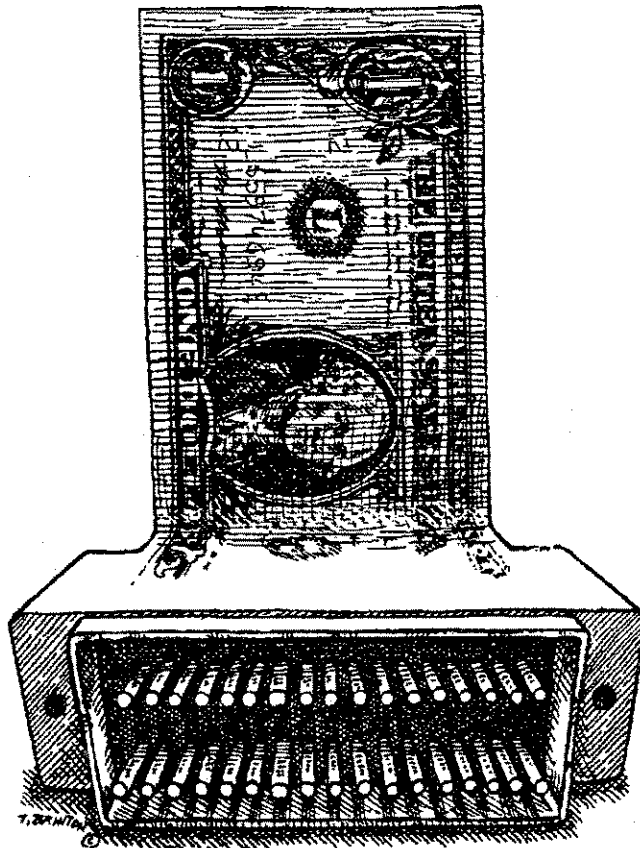
This analysis, which must follow to avoid any inconsistency among the decisions, may provide a reasonable middle-ground in which some landowners will not be taxed due to the acts of others. Arguably, under *Howard Pump*, a landowner who remediates an environmental hazard will not be taxed if he can prove that the contamination did not result from the normal or anticipated use of the property.

Presumably, whenever the likelihood of hazardous waste is not apparent upon an inspection of the prior ownership and uses of the land, and a search of prior owners would not reveal possible uses that could

result in contamination, the contamination did not result from normal or anticipated use, and the generator fee will not apply.

In fact, in a recent unpublished decision brought upon a petition in which those factors were present, the board found the property owner was not liable for the generator fee.

In that case, the property owner removed soil contaminated by material that was apparently waste product from an oil refinery. Analysis showed the waste was approximately 50 years old. No record



However, a little-known decision by the board may offer hope to some landowners who find themselves taxed as waste generators after having already borne the expense of a cleanup. In *Howard Pump*, No. HG HQ 36-023449-010, 020 (March 9, 1994), vandals apparently opened the valve of a fuel storage tank, causing the contents to contaminate the ground. The petitioner hired a firm to clean up the site. Contaminated water and soil were removed to a disposal site, and a generator tax was imposed.

Upon a petition for redetermination, the board con-

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owner of the prior 75 years had been engaged in petroleum refining, although that industry had been common in the area. The most logical conclusion was that the material had been illegally dumped by a third party. Thus, neither the current nor past landowners' use of the land caused the contamination.

In fact, the inequity of assessing a generator fee in that case was even stronger than in *Howard Pump* because the petitioner was not engaged in a use of the site where contamination was likely, if not normal and anticipated, as was the *Howard Pump* petitioner, who was drilling oil on his property. Accordingly, under the principles enunciated in *Howard Pump*, no tax liability was imposed.

Interestingly, in that case, department staff contended *Howard Pump* is no longer applicable law because the statutory definition of generator has been amended. The department argued that pursuant to Section 25205.1(e) as applied in *Howard Pump*, it was possible to conclude that a party may identify itself as the "generator" on the manifest, but not be considered a generator for purposes of fee liability.

The department concluded that the current definition of generator, however, precludes whoever is identified as the generator on the manifest from being

found not liable for the fee, because the current version of Section 25205.1(e) states: "A generator includes, but is not limited to, a person who is identified on a manifest as the generator and whose identification number is listed on that manifest, if that identifying information was provided by that person or by an agent or employee of that person."

However, the department's argument does not withstand scrutiny. First, an examination of the legislative counsel's digest, examining SB922 from 1993, which added the language upon which the department relied, gives absolutely no indication of an intent to change the law. Second, the Legislature could not have had any intent to overrule *Howard Pump* with the added language, because the statute was amended prior to the decision in *Howard Pump* — although the former version was applied in *Howard Pump* because the cleanup occurred prior to the amendment.

Third, and most important, the department's argument rests entirely on the presumption that the board's reasoning in *Howard Pump* relied on examination or construction of the then-applicable statutory definition of generator. Because the statutory definition of generator has been changed and now literally includes a petitioner such as that in *Howard Pump*, the department argued, *Howard Pump* must no longer be applicable law.

However, a quick reading of *Howard Pump* shows

that the board engaged in no examination or construction of the technical definition of "generator." To the contrary, the board noted the prior definition of "generator" read: "a person who generates volumes of hazardous waste ... at an individual site," and the department's regulations further defined a generator as "any person, by site, whose act or process produces hazardous waste ... or whose act first causes a hazardous waste to become subject to regulation."

The board did not deny that those definitions of generator literally would include the *Howard Pump* petitioner. Rather, it found that the Legislature did not intend the tax to apply to one who technically was a generator, but became one only because of an intervening criminal act.

Although the board implicitly rejected the argument that *Howard Pump* was no longer applicable, the decision was not published and the department may again attempt to make the argument. Any landowner saddled with an expensive cleanup of his land, nevertheless, would be well-advised to investigate the source of the contamination and history of the prior uses of the property in order to demonstrate that he and the prior owners were victims of an illegal or a tortious third-party act. Such investigation could save the current landowner from having to pay a very expensive tax as a hazardous-waste generator. ■