



Initial Statement Of Reasons

Unified Program Single Fee System For State Agencies

Department Reference Number: R-2005-18
Office of Administrative Law Notice File Number: Z-

EFFORT TO AVOID DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS

These regulations will make permanent regulations that the California Environmental Protection Agency (Cal/EPA) adopted under emergency rulemaking on September 26, 2005. They will also make amendments that Cal/EPA deems advisable now that it has had an opportunity to observe how the emergency regulations function in practice. These regulations implement Health and Safety Code section 25404.5, which requires each Certified Unified Program Agency (CUPA) to establish a single fee system sufficient to pay the CUPA's reasonable and necessary costs. Section 25404.5 also requires the Secretary of Cal/EPA (Secretary) to establish the amount to be paid when the Unified Program Agency is a state agency. The Secretary must act to establish a single fee system now because the Department of Toxic Substances Control (DTSC) has recently been designated to serve as the Unified Program Agency for two counties that have declined to become CUPAs.

These regulations do not restrict, expand, or change DTSC's authority to enforce laws for the purpose of environmental protection. Rather, they only establish a methodology for funding activities that DTSC will engage in under existing authority. Federal regulations are silent on the subject of funding mechanisms for environmental functions of state and local agencies, except insofar as the federal government may provide grants or matching funds. In other respects, state and local agencies are free to establish their own funding sources. The activities that are within DTSC's jurisdiction as a designated Unified Program Agency do not receive federal grants or matching funds. Therefore, there is no possibility of any conflict with federal law.

STUDIES RELIED ON

No studies were conducted or necessary.

ALTERNATIVES CONSIDERED

Chosen alternative: Cal/EPA selected the alternative that fulfills its mandate to collect fees in an amount sufficient to fund the reasonable and necessary costs of the designated agency's CUPA activities. By setting forth a methodology that allows the fees to fluctuate up or down depending on DTSC's costs for

performing particular activities, the regulations ensure that the revenue will be sufficient to cover costs, but will not exceed costs. The proposed methodology guarantees that fees paid by businesses within the regulated jurisdictions will be strictly used only to fund CUPA-related activities within those jurisdictions.

Do nothing. Cal/EPA rejected this alternative because it would violate Health and Safety Code section 25404.5, subdivision (a)(2)(B), which requires the Secretary to establish the amount to be paid when the Unified Program Agency is a state agency.

Allow the Secretary to set the fee each year according to general guidelines, but without a specified methodology. Cal/EPA rejected this alternative because it would invest the Secretary with discretion to establish a rule of general application, and thus create a strong risk that the annual fee schedule would be an “underground regulation.” Also, there was concern that, without a specified methodology, fee-setting would be very subjective and thus open to constant dispute.

Fund CUPA activities from alternative funding sources. Actually, the regulation does allow for alternative funding sources to be used insofar as they are permissible by law, such as cost recoveries, penalties, and subsidies from the Rural CUPA Reimbursement Account. These alternative sources will be applied towards the reasonable and necessary costs to reduce the amount of fees. However, these sources will almost certainly be insufficient to cover all reasonable and necessary costs of operating the CUPA program. Cal/EPA is aware of no local CUPA in California that funds its program without fees on the regulated businesses. Nor can Cal/EPA look to DTSC’s other accounts to fund CUPA activities. DTSC’s primary accounts, the Toxic Substances Control Account (Health & Saf. Code § 25173.6) and the Hazardous Waste Control Account (Health & Saf. Code § 25174), are already designated for specific purposes. DTSC’s primary accounts do not contain authority for expenditures on the functions of a CUPA, with the exception of granting authorization to hazardous waste facilities.

DETAILED STATEMENT OF REASONS

Finalize Section 15241 of Article 5 of Part II Chapter 1:

Cal/EPA is proposing to take section 15241, which is currently in place as an emergency regulation, and make it final. This will be done to implement and make specific Health and Safety Code section 25404.5, subdivision (a)(2)(B), which requires the Secretary to establish a unified fee when the Unified Program Agency is a state agency. It does so by providing a methodology for setting the fee for the support of CUPA activities in counties for which DTSC has been designated to act as the CUPA.

Subsection (a) affirms the purpose of the regulation by requiring the Secretary to set the fee. It also assures that the Secretary will base the fee on fair and objective criteria by requiring him or her to rely upon data that sets forth the reasonable and necessary costs of implementing the CUPA program.

Subsection (b) makes certain that the Secretary will have the necessary information to make an informed determination as to the fee amounts. It requires the designated agency to annually submit data on the reasonable and necessary costs to carry out its responsibilities. Because funding must be obtained to cover the costs of bad debts and uncollected fees, subsection (b) clarifies that these losses will be included among the reasonable and necessary costs.

Subsection (c) caps the amount of the fee at a level that will recover the designated agency's "net costs" (defined in section 15242 as projected costs to administer the program, minus revenue from alternative sources). It also divides the fee into a "program element fee" and a "flat fee." The program element fee amount will be based on the type of activity in which the regulated entity engages. By differing among the activities, the program element fee reflects that some activities require more regulatory oversight than others, and that persons who typically cause the designated agency to incur fewer costs should pay lower fees. On the other hand, the flat fee recognizes that the designated agency incurs some administrative overhead expenses that cannot be attributed to particular activities. By combining the two concepts, subsection (c) makes the single fee strike a balance between the alternatives of a fee that is based solely on the type of activity and a fee that is exactly the same regardless of the activity. Subsection (c) also states that the fee will be assessed if the regulated business is subject to the CUPA's jurisdiction during the reporting period or any portion thereof. By this, it clarifies that the fee will not be pro-rated for a business that operates during only part of the reporting period. Pro-ration is not called for, because a business that operates during only part of the year will not necessarily receive fewer inspections or cause DTSC to incur lower costs than a business that operates during the entire year. Finally, subsection (c) provides that the annual reporting period will correspond to the state's fiscal year. This provision establishes the simplest rule for budgetary planning purposes, and expressly states the reporting period so there will be no uncertainty.

Subsection (c) (1), explains how Cal/EPA will calculate the program element fee. It will multiply a base rate (defined in section 15242 as the workload standard to complete a program element task) by the hourly fee (defined in section 15242 as the designated agency's hourly labor charge). For example, if the workload standard is four hours, and the hourly fee is \$100, the program element fee will be \$400. Because some businesses may engage in more than one regulated activity, this paragraph clarifies that, in such cases, the program fee for all such activities will be combined. The fees are combined because, by engaging in multiple program elements, a business incurs a higher level of regulatory oversight.

Subsection (c) (1) (A) clarifies the program element fee by listing the program elements, which are based on the CUPA responsibilities identified in Health and Safety Code section 25404, subdivision (c). Businesses that fall within the same program element may vary widely in their costs of regulation due to differences in their size or type of authorization. Therefore, to take this variance into account, this paragraph authorizes the Secretary to establish sub-categories within certain program elements. In contrast, typically there is minimal extra regulatory cost associated with having more than one type of tiered permit (for example, having both permit by rule and conditional authorization). Therefore, for businesses with more than one tiered permit, the fee is capped at the amount for the highest permit tier.

Subsection (c) (1) (B) exempts businesses from the program element fee once they have filed the appropriate documents for permanent tank closure. These businesses will, however, be subject to DTSC's costs for closure activities. This means, first, that if there is no significant regulatory activity, the tank will not be subject to either fees or cost recovery, and, second, if DTSC does engage in oversight of the closure activities, the business will not be unfairly assessed for both fees and costs.

Subsection (c), paragraph (2), explains how Cal/EPA will calculate the flat fee. It will take the designated agency's net costs, subtract all program element fee receipts, and divide the result by the total number of regulated businesses. This will guarantee that all businesses will contribute equally to cover reasonable and necessary costs that are not covered by the program element fee or other funding sources.

Subsection (d) affirms that the Secretary or designated agency will continue to assess the annual state surcharge. By so stating, it prevents any misperception that the annual fee might be intended to take the place of the surcharge. By separate regulation (Cal. Code Regs., tit. 27, § 15240), the Secretary determines the amount of the surcharge, which is assessed on each person regulated by any CUPA in order to cover the necessary and reasonable costs of various state agencies (including Cal/EPA, DTSC, Office of Emergency Services, Water Resources Control Board, and Fire Marshal) in overseeing the CUPA programs statewide. Because the surcharge does not cover DTSC's costs associated with its role as the Unified Program Agency in specified counties, it is necessary to assess both the surcharge and the fee assessed under section 15241.

Subsection (e) provides details about how the fees will be assessed. First, it clarifies that the purchaser of a business will not be liable for a fee if the previous owner paid the fee during the same reporting period. This clarification is advisable because changes in the business's owner or operator, with nothing further, typically cause DTSC to incur minimal additional costs. Second,

subsection (e) specifies that the fee category (small, medium, or large) for persons with tanks will be based on total capacity of all tanks at a site, not on the number of individual tanks. This recognizes that the agency's regulatory burden is determined more by total tank capacity than by the number of individual units.

Subsection (f) provides essential details about the billing process. First, it provides that the Secretary or designated agency may specify the fee's due date. This gives the Secretary flexibility to have the designated agency send out the billings when they are fully prepared and accurate. Second, it provides that the due date will be not less than thirty days from the billing date. This ensures that the regulated businesses will have a reasonable amount of time to do the administrative work necessary to process their payments. Third, it allows for the fee to be assessed in more than one billing, as a precaution in case a business is found to have additional program elements after the initial billing has gone out. Fourth, this subsection imposes a penalty of ten percent on late billings. This penalty provision is modeled on a rule the Legislature has established for billings by the State Board of Equalization (Rev. & Tax. Code § 43155). Incurring a penalty provides an incentive for feepayers to submit their payments in a timely manner. Fifth, this subsection imposes interest that will accrue monthly on unpaid bills. This interest provision is also modeled on a rule that the Legislature has established for billings by the State Board of Equalization (Rev. & Tax. Code § 43156). Based on the time-value of money, interest compensates the designated agency for the time in which it does not have the use of revenues to which it is entitled. Sixth, this subsection allows the Secretary or the designated agency to waive the penalty or interest. Waiver of the penalty or interest is based on equitable considerations, as it recognizes that there may be extraordinary circumstances when the lateness of the payment is not the regulated business's fault. Seventh, this subsection specifies that mere disagreement with the assessment is not reasonable grounds for waiving penalties or interest. This is intended to make sure that the waiver only takes place in atypical situations, and does not become so commonplace that the penalty and interest provisions serve little or no purpose. Finally, this subsection gives direction on how a person should seek relief of interest or penalty assessments, so that the members of the regulated community can understand how to proceed if they believe they should not be responsible for the lateness of the payment.

Subsection (g) addresses refunds of money that were paid in response to billings that were subsequently determined to have been erroneous. If the erroneous billing was through no fault of the person who receives the refund, then the payment should be returned with interest that reflects the time-value of money. The regulation provides, however, that there will be no interest if the erroneous billing was based on incorrect information provided by the person who receives the refund. Under such circumstances, the person will still receive his or her money back, but the elimination of interest provides an incentive for members of

the regulated community to report accurately. Finally, this subsection establishes a one-year statute of limitations for refund requests. Cal/EPA believes that a year is more than sufficient time for a person to determine whether a billing appears to be erroneous and request a refund.

Subsection (h) allows the Secretary or the designated agency to suspend a regulated business's right to conduct an activity for which the fee has not been paid, and to take an enforcement action for operating during the suspension or for failing to pay the fee. This provision is essential for the effectiveness and enforcement of this regulation. Unlike the state taxing agencies (the Board of Equalization and the Franchise Tax Board), the designated agency does not have authority to attach assets for non-payment of fees without prior consent of a court. Seeking court approval would often not be cost-effective for smaller fees. Therefore, the designated agency's only means to enforce fee collection is to rely upon the existing authority that it uses to enforce violations of the environmental law. This remedy is intended only for persons who knowingly disregard their obligations, not for people who inadvertently neglect to pay their fees, or who have unresolved, good-faith disagreements about their billings. Therefore, thirty days notice of the suspension is required in order to allow the person an opportunity to correct any deficiency before the suspension takes effect. Also, the suspension is stayed for persons filing an appeal, in order to encourage members of the regulated community to follow correct procedures if they disagree with the billing. The thirty days notice will also allow ample time for filing an appeal, since the appeal can be filed merely by submitting in writing the reason for the disagreement.

Subsection (i) recognizes that workload standards and hourly rates may change. This subsection, therefore, requires the Secretary to review the fees annually and to revise them if necessary. Revisions are limited to once per fiscal year so that all members of the regulated community will be subject to the same billing rate in a reporting period. Provisions for notice, comment, and publication are set forth in order to protect the public's right to know how the fees are calculated, and to provide input.

Subsection (j) authorizes the Secretary or the designated agency to recover the cost of non-recurring activities. This subsection recognizes that some members of the regulated community may require assistance that exceeds the routine monitoring and inspection services that are available to all members of the regulated community. This assistance may cause the designated agency to incur significant costs. Rather than passing the expense along to persons who did not enjoy the benefit of those services, this subsection confirms that DTSC may recover its costs. This alternative funding source will help reduce the size of the flat fee and the program element fee.

Subsection (k) helps assure the equity and accuracy of the fee assessments by establishing a due process mechanism for a person to dispute the fee. The due

process procedures contain elements designed to make them as fair, efficient, and economical as possible. First, this subsection provides that the person must submit a petition in writing that states the specific grounds for the petition. This will help staff that evaluates the petition to efficiently focus on the relevant issues. This provision is modeled after a similar requirement for petitions to the State Board of Equalization (Rev. & Tax. Code § 43302). Second, this subsection provides that the petition must be submitted within one year after the person is notified of the fee assessment. Cal/EPA believes that one year is more than sufficient time for a person to determine whether a billing appears to be erroneous and to file a petition. Third, this subsection provides that a hearing will only take place if the matter cannot be resolved informally, because an attempt at informal resolution should always be made to save time and expense for all parties. Fourth, because some matters may not be resolved informally, this subsection provides that the executive officer of the designated agency will designate a hearing officer. Fifth, this subsection provides that the hearing officer may not be in a supervisory or subordinate position to any person involved in making the initial determination. By this, Cal/EPA hopes to avoid both the reality and the appearance that the hearing officer's decision could be influenced by a supervisor's feelings of loyalty to a subordinate, or by a subordinate's tendency to follow the lead of a supervisor. Sixth, this subsection provides that the hearing may be conducted from remote locations using modern technology, so that the expense of travel will not deter persons from disputing their fee assessments. Seventh, this subsection provides that all relevant evidence is admissible, in order to ease the burden on persons who do not have legal counsel and are unfamiliar with courtroom standards for admissibility. This will also make it possible for the executive officer to appoint someone without a legal background as the hearing officer. Finally, this subsection states that the hearing officer makes the final decision, in order to clarify the point at which the appeal comes to an end.

Finalize Section 15242 of Article 5 of Part II of Chapter 1

Cal/EPA is proposing to take section 15242, which is currently in place as an emergency regulation, and make it final. Section 15242 consists primarily of definitions of terms that appear in the preceding section. These definitions are essential to the efficient implementation of the fee program, because section 15241 contains several terms that are not defined elsewhere in law and have no adequate dictionary meanings. Cal/EPA has determined that inserting all these definitions within the text of section 15241 itself would make that regulation cumbersome and confusing. Thus, a separate regulation is needed for defining terms. Section 15242 also contains fee exemptions in one subsection. The

exemptions are placed in section 15242, rather than in section 15241, to allow section 15241 to read more smoothly, and because the exemptions have a similar effect as definitions by taking certain persons out of the regulation's coverage.

Subsection (a) defines "base rate", a term that is used in section 15241, subsection (b) (1), to mean an estimate of the amount of time the designated agency needs to complete a program element task for each jurisdiction. This estimate can be obtained from records of field inspections. Without this definition, it would be unclear how to calculate the program rate.

Subsection (b) defines "business" and "regulated business", terms that are used in section 15241, subsections (c), (e), and (h), by referencing the existing definition in section 15110 of the same title. This is intended to create consistency in the meaning of terms for CUPA regulation. Also, it was necessary to define "business" and "regulated business" to encompass the person who owns the business, in order to clarify that the owner would be liable for the fee. The definition contained in section 15110 defines "business" to include a "person", and thereby satisfies this purpose.

Subsection (c) defines "generator" by referencing the existing definition in section 66260.10 of title 22. This is intended to create consistency in the meaning of terms for environmental regulation. However, there are some people who satisfy the existing definition of "generator" but do not fall within the regulatory jurisdiction of the CUPA. To clarify that these people will not be subject to the fee, subsection (c) expressly exempts them. Also, subsection (c) provides that the fee will not be assessed on persons who are currently exempt from the generator fee (which is a different fee than the one established by these regulations) under two sections of the Health and Safety Code. These two sections generally waive fees for government agencies when they operate programs to protect the environment. Subsection (c) establishes a similar waiver, out of respect for the Legislature's decision to alleviate the burden of environmental fees under these circumstances.

Subsection (d) defines "hourly fee", a term used in section 15241, subsection (c) (1), to mean the designated agency's hourly labor charge, and explains how that hourly charge will be determined. Without this definition, it would be unclear how to calculate the program element fee. This definition establishes that portion of the net costs used to calculate the program element fee will be 80 percent. This means that the remaining 20 percent of net costs will be apportioned evenly among all businesses as the flat fee. Twenty percent was chosen as a reasonable approximation of the fixed administrative costs that can be equally attributed to all program elements without regard to the level of regulatory oversight.

Subsection (e) defines “net costs”, a term that is used in section 15241, subsection (c), first paragraph, and subsection (c) (2), to mean the costs to administer the Unified Program minus various alternative funding sources. Without this definition, it would be unclear how much revenue Cal/EPA is expected to raise from the annual fee. By deducting alternative funding sources from the net costs, this subsection helps hold down the size of the annual fee. Subsection (e) also provides that any surplus or deficit will be rolled over into the next fiscal year. This provision is necessary in order to stay within the statutory mandate to collect fees up to, but no more than, the amount that is necessary to cover the necessary and reasonable costs of administering the CUPA. It will also enable Cal/EPA to return any surpluses to the regulated community in the form of comparatively lower fees the following year.

Subsection (f) defines “non-recurring activities”, a term that is used in section 15241, subsection (j), by giving examples of activities that the CUPA would not perform routinely for a regulated business, but might perform occasionally and thereby incur significant one-time costs. The definition also expressly excludes the activities that the CUPA does perform routinely that are covered by the program element fee and the flat fee. Without this definition, it would be unclear what activities are subject to cost recovery.

Subsection (g) defines “site”, a term that is used in section 15241, subsection (e), to mean property owned by the same person that is either contiguous or satisfies the meaning of “on site” in title 22 of the California Code of Regulations. Without this definition, it would be unclear how to assess the fee for storage tanks. The citation to title 22 is intended to simplify the law by avoiding conflicts in regulatory definitions.

Subsection (h) defines “tank”, a term that is used in section 15241, subsections (c) (1) (A), (c) (1) (B), and (e), to mean a storage tank or group of storage tanks. The reference to a “group of tanks” affirms that the fee for this program element is based on the total volume of storage capacity at one site, not on the number of individual storage units. Total volume was selected as the way to determine size because, on average, it has more bearing on the level of regulatory oversight than the number of individual units.

Subsection (h) (1) (2) and (3) defines “large”, “medium”, and “small” storage tanks. These terms are used in section 15241, subsection (c) (1) (A). Without these definitions, it would be unclear how to assess the fee for storage tank

usage. The “cut-offs” between small and medium, and between medium and large, are intended to make clear distinctions so that persons who typically require less oversight will pay lower fees.

Subsection (i) provides meanings for terms used in section 15241 that are not otherwise defined in section 15242. It cites to existing legal definitions in order to simplify the law by avoiding conflicts in legal meanings. As a precaution against the unlikely event that a conflict occurs among the definitions cited by this subsection, it establishes a hierarchy of definitions. Definitions that apply to the statutes that specifically govern CUPA administration prevail over all others. These are followed by regulatory definitions that apply to CUPA administration, statutory definitions that apply to the regulation of hazardous waste, and finally, by regulatory definitions that apply to the regulation of hazardous waste. These are definitions that some segments of the regulated community should already be familiar with, so using the same definitions will help them to understand the regulation.