



# California Environmental Protection Agency

Air Resources Board • Department of Pesticide Regulation • Department of Toxic Substances Control  
Integrated Waste Management Board • Office of Environmental Health Hazard Assessment  
State Water Resources Control Board • Regional Water Quality Control Boards



Linda S. Adams  
Secretary for  
Environmental Protection

Arnold Schwarzenegger  
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May 17, 2007

Mr. Taylor S. Carey  
Deputy Attorney General  
Post Office Box 944255  
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Subject: OPINION NO. 07-312

Dear Mr. Carey:

This is in response to the March 20, 2007 letter to Don A. Johnson, Assistant Secretary, California Environmental Protection Agency (Cal/EPA), from Rodney O. Lilyquist, Senior Assistant Attorney General, requesting our views on the following question:

Is the California Department of Transportation obligated to pay fees adopted by a certified unified program agency (Health & Saf. Code § 25404.5; Cal. Code Regs., tit. 27, § 15210) under the Unified Hazardous Waste and Hazardous Materials Regulatory Program?

Enclosed is a copy of a memorandum to me from Dennis H. Mahoney, Senior Staff Counsel, Department of Toxic Substances Control. The views expressed in that opinion represent the views of Cal/EPA, the Department of Toxic Substances Control, and the State Water Resources Control Board.

We hope that these comments will be helpful to you in responding to this request for an opinion of the Attorney General. Should you or other members of your office have any questions, or require further elaboration on the views expressed, please feel free to contact me at (916) 327-5719.

Very truly yours,

Steve Koyasako  
Acting Deputy Secretary for Law Enforcement and Counsel

Enclosure

Mr. Taylor S. Carey  
May 17, 2007  
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cc: Mr. Rodney O. Lilyquist  
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Arnold Schwarzenegger  
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### MEMORANDUM

TO: Steve Koyasako  
Acting Deputy Secretary for Law Enforcement and Counsel  
California Environmental Protection Agency

VIA: Elizabeth Yelland  
Chief Counsel  
Office of Legal Counsel *E. Yelland*

FROM: *Dennis H. Mahoney*  
Dennis H. Mahoney  
Senior Staff Counsel  
Office of Legal Counsel

DATE: May 14, 2007

SUBJECT: ATTORNEY GENERAL'S REQUEST FOR COMMENTS ON CUPA FEE  
ISSUE

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You asked the Department of Toxic Substances Control (DTSC) for a response to a solicitation for comments from Rodney O. Lilyquist, Senior Assistant Attorney General. Mr. Lilyquist asked for comments on a request for a legal opinion from Mono County Counsel Marshall Rudolph. DTSC's comments are stated below, in the form of a legal opinion.

#### QUESTION

Is the California Department of Transportation (CalTrans) obligated to pay the single fee adopted by a certified unified program agency (CUPA) (Health and Saf. Code § 25404.5; Cal. Code Regs., tit. 27, § 15210) under the Unified Hazardous Waste and Hazardous Materials Regulatory Program?

#### OPINION

In the absence of an express exemption by the individual CUPA, CalTrans is obligated to pay the single fee adopted by a CUPA, with the exception of the portion of the fee that supports the aboveground tank program element.

## ANALYSIS

The Unified Hazardous Waste and Hazardous Materials Management Regulatory Program is a regulatory system whereby certain functions that would otherwise be the responsibility of various public agencies are instead consolidated under a single agency, known as the "Certified Unified Program Agency" or "CUPA". (Health & Saf. Code § 25404.) This consolidation provides the regulated parties with the convenience of dealing with a single governmental source for multiple purposes. A local agency, such as a city or a county, may become a CUPA by applying for, and receiving, certification from the California Environmental Protection Agency (Cal/EPA). (Health & Saf. Code § 25404.3.) If no local agency for a geographic area applies for certification, Cal/EPA designates a state agency to act as the CUPA. (Health & Saf. Code § 25404.3, subd. (f)(2)(A).)<sup>1</sup>

Cal/EPA provides the following description:

"The Unified Program is implemented at the local level by 85 government agencies certified by the Secretary of Cal/EPA. These Certified Unified Program Agencies (CUPAs) have typically been established as a function of a local environmental health or fire department." (Cal/EPA Webpage, [www.calepa.ca.gov](http://www.calepa.ca.gov), Unified Program Home Page.)

To fund the administration of the CUPAs, the Legislature, in Health and Safety Code section 25404.5, subd. (a)(1), required each CUPA to "institute a single fee system." The Legislature further provided:

"The governing body of the local certified unified program agency shall establish the amount to be paid by each person regulated by the unified program at a level sufficient to pay the necessary and reasonable costs incurred by the certified unified program agency . . . ." (Health & Saf. Code § 25404.5, subd. (a)(2)(A).)

In the present case, the CUPA in Mono County is attempting to determine whether CalTrans, as a regulated entity, is subject to the single fee authorized by section 25404.5. Neither section 25404.5, nor any of the surrounding statutes, contain an express exemption for CalTrans. Therefore, there is no plausible argument that, on the face of the legislative scheme that governs CUPAs, CalTrans has a broad exemption

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<sup>1</sup> The California Department of Toxic Substances Control has been designated to act as the CUPA in two counties, Imperial and Trinity. All other CUPAs are local agencies.

from liability.<sup>2</sup> Furthermore, the general body of state law that governs the administration, powers, and duties of CalTrans does not establish any tax or fee exemption that, even arguably, might excuse CalTrans from paying the CUPA fee. (Government Code §§ 14000 – 14557.1.) It is assumed, therefore, that the question is not specific to CalTrans, but rather asks whether there is some broader immunity for this type of fee, under constitutional or statutory law, that governs all or most state agencies, including but not limited to CalTrans.

Governmental entities do enjoy certain privileges in the area of taxation. Of greatest significance, governmental entities are exempt from the property tax under both state constitutional and statutory law. (Cal. Const., art. XIII, § 3, subd. (a); Rev. & Tax. Code § 202.) Governmental entities are also exempt from taxes on “personal property.” (Rev. & Tax. Code § 202.5.) The statute that guides the CUPAs in developing their fee systems is not conducive to funding the programs through taxes on real or personal property. Section 25404.5, subdivision (a)(4) suggests, rather, that “the amount to be paid by a person regulated by the unified program may be adjusted to account for the differing costs of administering the unified program with respect to that person’s regulated activities.” This indicates that the fees should be based, at least approximately, on the type and level of service, not on the value of real or personal property.

Accordingly, the constitutional and statutory property tax exemptions do not lead to any broad immunity for governmental entities from all CUPA fees.<sup>3</sup>

The remaining source of government immunity from a broad scope of fees is Government Code section 6103, which will be the subject of the remainder of this analysis.

Government Code section 6103 provides:

**“Neither the state nor any county, city, district, or other political subdivision, nor any public officer or body, acting in his official capacity on behalf of the state, or any county, city, district or other political subdivision, shall pay or deposit any fee for the filing of any document or paper, for the performance of any official service, or for the filing of any stipulation or**

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<sup>2</sup> By this, it is meant only that there is no exemption on the face of the CUPA law that pertains specifically to CalTrans or to state agencies. This does not preclude the possibility that there may be one or more exemptions that CalTrans could qualify for, if it meets the necessary conditions, on the same basis that privately-owned entities can qualify for the same exemption.

<sup>3</sup> The possibility cannot be ruled out that, among the more than eighty CUPA fee structures, there could be an assessment that would qualify as a property tax, but that determination would need to be addressed on a case-by-case basis.

agreement which may constitute an appearance in any court by any other party to the stipulation or agreement." (Emphasis added.)

Thus, the issue is whether the payment of CUPA fees constitutes payment for an official service from which public agencies are exempt under section 6103.

While section 6103 states a general rule that public agencies are exempt from fees for official services performed by other public agencies, there are numerous exceptions to this rule. In particular, Government Code sections 6103.1 through 6103.12, inclusive, identify several fees with the notation "Section 6103 does not apply." Furthermore, an exception to section 6103 does not require a specific reference to that section. It is sufficient if the statute that authorizes the fee states that the fee applies to public or government agencies. For example, the courts found that school districts were subject to a fee for using a city landfill when the authorizing statute stated simply: "The board may collect compensation from private or public entities for the right to dump . . . ." (*Anaheim City School District v. County of Orange* (1985) 164 Cal. App. 3d 697, 702.)

In examining the CUPA fee to determine whether its authorizing statute supersedes section 6103, a unique feature of the CUPA fee must be taken into account. The single CUPA fee is assessed in lieu of other statutory fees. The services that are now provided by the CUPAs had previously been provided by state and local agencies. When the Legislature consolidated these services under the jurisdiction of a single, unified agency in each city or county, it provided that the services would henceforth be funded by the single CUPA fee instead of by the several fees that had previously funded each service individually. Health and Safety Code section 25404.5, subdivision (a) (1), states:

"Each certified unified program agency shall institute a single fee system, which shall replace the fees levied pursuant to sections 25201.14 and 25205.14 . . . and which shall also replace any fees levied by a local agency pursuant to Section 25143.10, 25287, 25513, and 25535.2, or any other fee levied by a local agency specifically to fund the implementation of the provisions specified in subdivision (c) of Section 25404. Notwithstanding sections 25143.10, 25143.10, 25205.14, 25287, 25513, and 25535.2, a person who complies with the certified unified program agency's 'single fee system' shall not be required to pay any fee levied pursuant to these sections . . . ."

Section 25404.5 thus makes it abundantly clear that the CUPA fee is levied in the place of other fees. The CUPA fee funds the same programs as these other fees (insofar as these programs or a portion of them are listed in subdivision (c) of the same section), and double-collection is prohibited; i.e., payment of the CUPA fee relieves the regulated entity from the obligation to pay the original fees that were superseded. This raises the

question of whether public entities that were required to pay these other fees are thereby also required to pay the CUPA fees.

In analyzing this question, general principles of statutory construction must be considered.

When construing a statute, one "seeks to determine and give effect to the intent of the legislative body." (*People v. Braxton* (2004) 34 Cal. 4<sup>th</sup> 798, 810.) Also, one must "consider the consequences that might flow from a particular construction and should construe the statute so as to promote rather than defeat the statute's purpose and policy." (*People ex rel. Dept. of Conservation v. El Dorado County* (2005) 36 Cal. 4<sup>th</sup> 971, 993.)

Furthermore,

" . . . courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.' [Citation.] In the end, we 'must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]' [Citation.]" (*Torres v. Parkhouse Tire Service Inc.* (2001) 26 Cal. 4<sup>th</sup> 995, 1003.)

Finally, another important rule to take into account is the well-established principle that:

" . . . we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*People v. Thomas* (1992) 4 Cal. 4<sup>th</sup> 206, 211.)

In this case, section 25404.5 should not be construed in isolation, but rather must be construed in the context of the entire statutory scheme, which includes that group of statutes that authorize the fees that the single CUPA fee replaces. The Legislature made it clear why it established a new fee and simultaneously prohibited the further collection of the old fees. The new fee was intended to "replace" the old ones, and was to fund the same services, the difference being that these services would henceforth be provided by a single agency rather than by multiple agencies.

The legislative purpose is best realized by making the entities that were subject to the prior fees liable for the portion of the new single fee that replaces the superseded fees. Indeed, where the fee will be put to the same use, it would be at best a strange or mischievous result, and at worst an absurd one, if the transfer of fee-setting authority to

the CUPAs caused some regulated parties to avoid their liability even though they continued to receive equivalent services. If the Legislature intended public agencies to pay the superseded fees, it is reasonable to conclude that it also intended them to pay the single CUPA fee. The public policy involved—i.e., to defray expenses by having the regulated entity pay the costs of the regulation—did not change; it is identical for both the old and the new fees.

But the question of whether public entities were subject to the superseded fees can be resolved only by a case-by-case examination of the fee for each CUPA function.

*a) Hazardous Waste Facility and Generator Regulation.*

The first two fees that were superseded by the single fee are the fees that were authorized by Health and Safety Code, division 20, chapter 6.5, sections 25201.14 and 25205.14. These fees support certain hazardous waste permitting and generator inspection functions previously conducted by the Department of Toxic Substances Control (DTSC), and now performed by the CUPAs under section 25404, subdivision (c)(1).<sup>4</sup> There is no doubt that public agencies are subject to these fees. Government Code 6103.10 provides:

“Section 6103 does not apply to any fee or charge required to be paid to the State Director of Health Services or to the State Board of Equalization pursuant to Chapter 6.5 (commencing with section 25100) of...Division 20 of the Health and Safety Code....”<sup>5</sup>

Public agencies are thus subject to the portion of the fee that is collected to cover CUPA hazardous waste authorization and generator services. These services are assigned to the CUPAs under section 25404(c)(1). The functions listed therein are all hazardous waste control functions that are governed by chapter 6.5 and are or were within DTSC's jurisdiction. Section 6103.10 made it clear that the intent of the Legislature was that public agencies would pay applicable fees for the support of any hazardous waste control function authorized under chapter 6.5.

The third fee that is superseded by the single CUPA fee is the fee that was authorized under Health and Safety Code section 25143.10, subdivision (b). This authorizing statute gave local agencies the option of adopting an ordinance to help pay for the

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<sup>4</sup> To be subject to the fee authorized by section 25205.14, one need only be a “person”, while to be subject to the fee authorized by section 25201.14, one must be a “generator.” “Generator,” however, has been defined by regulation to mean a “person.” (22 Cal. Code Regs. § 66260.10.) In turn, a “person” includes, among other entities, “any city, county, district, commission, the state or any department, agency, or political subdivision thereof.” (Health & Saf. Code § 25118.)

<sup>5</sup> The pertinent functions of the Department of Health Services have been taken over by the Department of Toxic Substances Control as the successor agency. (Health & Saf. Code § 58004.)

expenses associated with certain regulation of hazardous recyclable materials. There is no specific CUPA program element that expressly addresses this particular form of regulation to the exclusion of others. Rather, section 25404, subdivision (c)(1) encompasses the regulation of hazardous waste recycling along with other forms of hazardous waste treatment authorized and funded under chapter 6.5. As discussed above, Government Code section 6103.10 (*supra*) expressly excludes this type of activity from the public agency immunity that would otherwise apply under section 6103.

*b) Underground Tank Regulation.*

The fourth fee that is replaced by the single CUPA fee is the fee that is authorized under section 25287. This section appears in chapter 6.7 (§ 25280 et seq.) of division 20 of the Health and Safety Code, concerning regulation of underground storage tanks. The section requires that "a fee shall be paid to the local agency by each person who submits an application for a permit to operate an underground storage tank or to renew or amend a permit."<sup>6</sup> Significantly, subdivision (a) of this section provides: "The governing body may provide for the waiver of fees when a state or local government agency makes an application for a permit to operate or an application to renew a permit."

In granting local agencies the option of waiving the underground storage tank fee for state or local government agencies, the Legislature made an unmistakable inference that, in the absence of a waiver, the fee is due from these agencies. Following the guidance of *Anaheim City School District v. County of Orange* (*supra*, 164 Cal. App. 3d 697), this creates an exception to the public agency immunity under Government Code section 6103, without regard to whether the statute expressly references section 6103. The fee that was previously collected under section 25287 went to support functions relating to underground storage tank regulation that have now been assumed by the CUPAs under Health and Safety Code section 25404, subdivision (c)(3). These functions require the CUPA to administer the requirements of chapter 6.7 concerning underground storage tanks. Thus, the portion of the CUPA fee that supports these activities is payable by state and local agencies, unless the CUPA exercises its option to waive the fee.

*c) Business Plan Regulation.*

The fifth fee that is superseded by the single CUPA fee is the fee that is authorized under Health and Safety Code section 25513, relating to fees for the support of review and enforcement of business plans. This section provides in pertinent part:

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<sup>6</sup> A "person", for purposes of section 25287, includes, among other entities, "any city, county, district, the state...any department or agency of this state." (Heath & Saf. Code § 25281, subd. (f).)

"Each administering county or city may . . . . adopt a schedule of fees to be collected from each business required to submit a business plan . . . . The governing body may provide for the waiver of fees when a business, as defined in Section 25501.4, submits a business plan."

It is only a certain type of "business" that, at the local agency's option, may qualify for a waiver; e.g., the type of business that is defined in section 25501.4. In turn, this section provides:

" . . . . 'business' also includes all of the following:

"(a) The federal government, to the extent authorized by federal law.

"(b) Any agency, department, office, board, commission, or bureau of state government...."

"(c) Any agency, department, office, board, commission, or bureau of a city, county or district."

Again, by granting the collecting agencies the option to exempt governmental agencies, the Legislature established that, in the absence of such an exemption, the fee is due from governmental agencies.

Administration of business plans is assigned to the CUPAs by Health and Safety Code section 25404 subdivisions (c)(4) and (c)(6). The portion of the CUPA fee that supports these activities is exempt from Government Code section 6103, unless the CUPA grants a waiver.

*d) Cal ARP Regulation.*

Sixth, and finally, section 25404.5 also provides that the CUPA fee will supersede the fee that is assessed pursuant to Health and Safety Code section 25535.2.

Section 25535.2 was repealed. (Stats. 1996, ch. 715, A.B. 1889.) The code section that currently bears that number has nothing to do with fees. To determine the legislature's intent, it is necessary to examine the language of section 25535.2 as it existed when section 25404.5 was enacted.

At that time, former section 25535.2 provided in pertinent part:

"Each administering agency may...adopt a schedule of fees to be collected from each business which may be required to submit an RMPP [Risk Management and Prevention Program] pursuant to this article which is within its jurisdiction.

The governing body may provide for the waiver of fees when a business, as defined in Section 25501.4, submits an RMPP.”

Again, there is language providing local agencies with the option of waiving fees for the particular type of business that is defined in Health and Safety Code section 25501.4 (*supra*), which means a federal, state, or local agency. Thus the Legislature has again demonstrated its intent that governmental agencies would be subject to the fee, unless there was an express waiver.

The fee that was authorized by former section 25535.2 supported the Risk Management and Prevention Program, also called the California Accidental Release Program (Cal ARP) (California Code of Regulations, title 27, section 15241, subdivision (c)(1)(A).) The administration of Cal ARP is assigned to the CUPAs by Health and Safety Code section 25404, subdivision (c)(5). Thus, this portion of the CUPA program was funded by a fee that governmental agencies were required to pay, unless they obtained a waiver.

*e) Aboveground Tank Regulation.*

The final Unified Program element is unlike the others. Health and Safety Code section 25404, subdivision (c)(2), directs the CUPAs to administer the “requirements of subdivision (c) of Section 25270.5 for the owners and operators of aboveground storage tanks to prepare a spill prevention control and countermeasure plan.” Section 25404.5 does not state that the CUPA fee will supersede any fee that had previously supported the aboveground storage tank program, and there is no express statement by the Legislature that governmental agencies are expected to pay a fee for the support of this program. Therefore, government agencies should be exempt, under Government Code section 6103, from any fee for the support of this particular program element, or from a pro-rated share of the CUPA fee representing the percentage of the fee that goes to the support of this program.

## CONCLUSION

By express declaration of the Legislature, governmental agencies were subject to fees for the support of five of the six identified elements in the Unified Program before these elements were assigned to the CUPAs. These program elements include hazardous waste control programs, underground storage tank regulation, business plans, Cal ARP plans, and business plan implementation that relates to Fire Code requirements. It would be most consistent with the intent of the Legislature, and most in harmony with related law, if governmental agencies continue to be liable for the support of these CUPA functions.

Steve Koyasako  
May 14, 2007  
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In summary, public agencies are subject to the single CUPA fee, insofar as this fee funds programs that public agencies were required to support prior to the time the CUPAs assumed jurisdiction and the single fee superseded the several fees. This encompasses all CUPA program elements except aboveground tank regulation.

If you have any questions, you may contact me at (916) 324-0339 or [dmahoney@dtsc.ca.gov](mailto:dmahoney@dtsc.ca.gov).