



Linda S. Adams
*Secretary for
Environmental Protection*

California Environmental Protection Agency

Unified Program Bulletin

0809-01
Revised

DATE: September 25, 2009
TO: All Certified Unified Program Agencies
FROM: Unified Program Section
SUBJECT: Department of Defense Facility Fee Payment Guide

Background

Certified Unified Program Agencies (CUPAs) are required to use a Single Fee System to assess and collect fees from regulated facilities, including those owned by the federal government. The Single Fee System encompasses several local government environmental fees and state surcharge fees. Some federal facilities refuse to pay some these fees and some of the state surcharge fees based on a legal doctrine called sovereign immunity. Derived from the concept that the sovereign can do no wrong, the federal government claims that "there can be no legal right against the authority that makes the law on which the right depends." (*Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).) The federal government thus refuses to be subject to state taxes, regulations, and the institution of civil suits against itself unless it has provided express consent. This consent must be enacted by Congress in federal statute to "waive sovereign immunity" for a given program.

It is undisputed that Congress has clearly waived sovereign immunity for the Underground Storage Tank (UST), Aboveground Storage Tank (AST), Hazardous Waste Management (HWM) and Accidental Release Prevention (Cal/ARP) programs and has directed agencies of the federal government to pay applicable fees. Fees associated with these programs are now being paid by federal agencies within California and are not in dispute.

For the Business Plan and California Fire Code (CFC) programs, the Department of Defense (DoD) has asserted there is no clear waiver of sovereign immunity in federal law. Payment of fees associated with these programs by DoD has been disputed and most DoD facilities have refused to pay these fees. The State of California asserts that DoD facilities are subject to fees associated with the Business Plan and Fire Code program because the waiver of sovereign immunity for the other programs is broad enough to cover these programs. Regulations and requirements concerning hazardous material reporting and management, including requirements for the payment of fees, is defined in California Health and Safety Code (HSC), section 25500 et seq., and the California Code of Regulations (CCR) title 27, section 15210. See Attachment 1 for additional detail on program authorities.

Business Plan and California Fire Code Program Dispute Resolution

On March 30, 2009 the Department of Defense (DoD) Regional Environmental Center (REC) for U.S. EPA Region 9 submitted a formal position to Cal/EPA covering Cal/EPA's regulatory authority regarding oversight and the subsequent assessment of fees at DoD facilities for the state's Business Plan and California Fire Code programs. DoD restated its ongoing position that Executive agencies are not legally authorized to expand the scope of sovereign immunity waivers beyond that which Congress has directed, which includes payment of fees. They further stated that DoD is not able to enter into any cooperative administrative agreements that would resolve the differences between federal and state regulatory authorities to provide for hazardous materials inventory reporting and emergency response planning to address the federal and State programs.

Cal/EPA has determined the following course of action for Cal/EPA and CUPAs that currently regulate DoD facilities in which a federally owned and operated DoD facility challenges the state's and local government authority to regulate them under the Business Plan and California Fire Code programs:

1. Cal/EPA will require federal DoD facilities that contest the state's authority regarding compliance with the Business Plan and California Fire Code programs to provide the CUPA a written declaration to that fact. Cal/EPA accepts DoD's March 30, 2009, letter, subject: California Business Plan Program, as meeting this requirement.
2. Upon receiving written declaration from a federal DoD facility, the CUPA will notify the facility that they shall be removed from the program oversight for business plan activities and their UPCF permit will be modified accordingly. A written declaration may be a notice of refusal to pay fees based on the lack of a waiver of sovereign immunity.
3. The CUPA shall submit notification to Cal/EPA Unified Program Section that the CUPA is revising the scope of its local program to remove the DoD facility from the Business Plan and California Fire Code program oversight. Attachment 2 provides a submittal form available for use by the CUPA.
4. Cal/EPA will notify U.S. EPA Region IX of DoD facilities that are not covered as part of the State's hazardous material reporting and management programs and request that U.S. EPA assume responsibility for the oversight of those facilities for compliance with federal law.
5. Cal/EPA will post on the Unified Program web site a list of those DoD facilities that are not covered by the Business Plan and California Fire Code programs as public information.

While this bulletin is in effect Cal/EPA will not find a CUPA deficient in program implementation for failure to collect the associated program and general oversight surcharge fees from DoD facilities that dispute the state's authority to regulate the Business Plan and California Fire Code programs and that are in accordance with the provisions above. CUPAs must continue to enforce HWM, UST, CalARP and AST programs under the Unified Program at DoD facilities and to take appropriate action to collect environmental program and surcharge fees.

Don Johnson
Assistant Secretary
Local Programs and Emergency Response

Attachments (2)

Attachment 1

Hazardous Waste Management (RCRA)

- Authority: “Federal Facility Compliance Act of 1992,” amending 42 U.S.C. § 6961 to waive sovereign immunity after *Dept. of Energy v. Ohio*, 503 U.S. 607 (1992).
 - Makes federal facilities “engaged in the management or disposal of solid waste or hazardous waste” subject to all state and local requirements, including, but not limited to, “all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations.”
- This waives immunity for:
 - CUPA fees
 - Injunctions and Coercive Sanctions
 - Penalties

Underground Storage Tanks (UST)

- Authority: “Energy Act of 2005” amending 42 U.S.C. § 6991f, Federal Facilities, to read in part, as follows: “The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge).”
- Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government having jurisdiction over any underground storage tank shall be subject to, and comply with, all federal, state, interstate, and local requirements, applicable to such tank, both substantive and procedural, in the same manner, and to the same extent, as any other person is subject to such requirements, including payment of reasonable service charges.
- Waives immunity for:
 - CUPA fees (reasonable service charges)
 - Injunctions and Coercive Sanctions
 - Penalties

Aboveground Petroleum Storage Tanks (AST)

- Authority: Clean Air Act (42 U.S.C. § 7401), and Clean Water Act (42 U.S.C. § 311). Implementing regulations are found in both 40 and 29 C.F.R. At the state level, the California Aboveground Petroleum Storage Act, to the extent involving discharges to navigable waters, and Articles 79 and 80 of the Uniform Fire Code are applicable, since these standards contain requirements for the control of water pollution from aboveground tanks.
- Waives immunity for:
 - CUPA fees (reasonable service charges)
 - Injunctions and Coercive Sanctions
- Does not waive immunity for penalties

Risk Management Plan (RMP)

- Authority: Clean Air Act (42 U.S.C. § 7418). (See *Cal. ex rel. Sacramento Metro. Air Quality v. U.S.*, 215 F.3d 1005, 1010-1011 (9th Cir. 2000); *U.S. v. Tennessee Air Pollution Control Board*, 185 F.3d 529 (6th Cir. 1999).)
- Waives sovereign immunity for violations of state and local air laws
 - Precludes removal to federal court when the action is based solely on state or local law. (42 U.S.C. § 7604(e).)
 - Waives immunity for:
 - Fees
 - Injunctions
 - Penalties

Hazardous Materials Management Regulatory Program (HMRMP) and California Fire Code (CFC)

- Authority: EPCRA (waiver in dispute),
 - There is no express waiver of sovereign immunity in the federal statutes governing HMRMP or CFC. There is an argument; however, that the RCRA waiver could be applied to HMRMP/CFC since it should be applicable to “any activity resulting, or which may result, in the disposal of hazardous waste”. However DoD argues that this is not clear and unambiguous.
 - If the RCRA waiver is allowed, immunity would be waived for CUPA fees, injunctions, and penalties. This analogy has not been tested in court.
- California Health and Safety Code section 25501.4: “Notwithstanding subdivision (d) of Section 25501, ‘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, including, but not limited to, the campuses of the California Community Colleges, the California State University, and the University of California.
 - (c) Any agency, department, office, board, commission, or bureau of a city, county or district.”
- This means that governmental agencies including, but not restricted to, cities, counties, state agencies, military bases, and special districts are all now required to comply with HSC, chapter 6.95, Business Plan requirements including completion and submittal of Business Plans.
- In addition, HSC § 5503.8(a) states that “any business not subject to subdivision (a) of Section 25503.5 which is required to submit chemical inventory information pursuant to Section 11022 of Title 42 of the United States Code, as that section reads on January 1, 1989, or as it may be subsequently amended, shall establish and implement a business plan in accordance with Section 25503.5 and Section 25505.”

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”. (HSC § 25404.)

Certified Unified Program Agency (CUPA) Fees and Options for Relief

The following table defines federal obligations based on waivers of sovereign immunity. Where immunity is waived, federal facilities are required to pay the fees, penalties and or comply with an enforcement order. In the absence of an expressed waiver, it had been argued in the past that federal facilities are also accountable for other Unified Program single fee elements, as well as for the State Surcharge.

Program	Federal Authority	Corresponding California Law	Immunity waived for:		
			CUPA Fees	Injunctive Relief	Civil Penalties
HW (RCRA)	42 USC §6961	HSC §25180	Yes	Yes	Yes
UST's	42 USC §6991f	HSC §25299	Yes	Yes	Yes
AST	Clean Water ACT (42 USC §311) Clean Air Act (42 USC §7401)	HSC §25270	Yes	Yes	No
HMRRP (same for CFC)	EPCRA	HSC §25509	Disputed	Disputed	Disputed
RMP	Clean Air Act 42 USC §7418(a)	HSC §25531	Yes	Yes	Yes
State Surcharge		CCR Title 27 §15240	Yes*		

In state fiscal year 2007/08, the General Oversight surcharge was \$24.00 per regulated business. Of that amount, a total of \$4.32 supported the Fire Code, Above Ground Tank and Business Plan programs, which are a portion of the fees which federal facilities dispute payment based upon waivers of sovereign immunity. Commencing in state fiscal 2009/2010, AB 2286 authorizes an increase to \$49.00 a year for a period of three (3) years to fund local electronic automation implementation grants. Of the \$25.00 increase, one-third, or \$8.33, is identified as supporting business plan and CFC reporting requirements.

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**CUPA Notification to Cal/EPA for Removal of Federal DoD Facilities
from the Business Plan and California Fire Code Program Oversight.**

The DoD federal facilities listed below formally contest the state's regulatory authority under the state's Business Plan and California Fire Code program. These facilities have been removed from the Business Plan program oversight under the CUPAs Unified Program Consolidated Permit. They will continue to be regulated under the HWM, UST, CalARP and AST programs.

CUPA: _____

CUPA Program Manager: _____
(Print Name)

Effective date: _____

Facility Name:

Army Navy Marine Corps Air Force Coast Guard Other

Location Address:

City:

Zip Code:

Facility Name:

Army Navy Marine Corps Air Force Coast Guard Other

Location Address:

City:

Zip Code:

Facility Name:

Army Navy Marine Corps Air Force Coast Guard Other

Location Address:

City:

Zip Code:

Facility Name:

Army Navy Marine Corps Air Force Coast Guard Other

Location Address:

City:

Zip Code:

Facility Name:

Army Navy Marine Corps Air Force Coast Guard Other

Location Address:

City:

Zip Code:

Facility Name:	
Army <input type="checkbox"/> Navy <input type="checkbox"/> Marine Corps <input type="checkbox"/> Air Force <input type="checkbox"/> Coast Guard <input type="checkbox"/> Other <input type="checkbox"/>	
Location Address:	
City:	Zip Code:
Facility Name:	
Army <input type="checkbox"/> Navy <input type="checkbox"/> Marine Corps <input type="checkbox"/> Air Force <input type="checkbox"/> Coast Guard <input type="checkbox"/> Other <input type="checkbox"/>	
Location Address:	
City:	Zip Code:
Facility Name:	
Army <input type="checkbox"/> Navy <input type="checkbox"/> Marine Corps <input type="checkbox"/> Air Force <input type="checkbox"/> Coast Guard <input type="checkbox"/> Other <input type="checkbox"/>	
Location Address:	
City:	Zip Code:
Facility Name:	
Army <input type="checkbox"/> Navy <input type="checkbox"/> Marine Corps <input type="checkbox"/> Air Force <input type="checkbox"/> Coast Guard <input type="checkbox"/> Other <input type="checkbox"/>	
Location Address:	
City:	Zip Code:
Facility Name:	
Army <input type="checkbox"/> Navy <input type="checkbox"/> Marine Corps <input type="checkbox"/> Air Force <input type="checkbox"/> Coast Guard <input type="checkbox"/> Other <input type="checkbox"/>	
Location Address:	
City:	Zip Code:
Facility Name:	
Army <input type="checkbox"/> Navy <input type="checkbox"/> Marine Corps <input type="checkbox"/> Air Force <input type="checkbox"/> Coast Guard <input type="checkbox"/> Other <input type="checkbox"/>	
Location Address:	
City:	Zip Code:

Submit this form by e-mail to Mr. Jim Bohon at jbohon@calepa.ca.gov or fax to (916) 322-5615. Please call Cal/EPA Unified Programs at (916) 327-5097 if further information is required.