CalEPA
California Environmental Protection Agency

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Unified Program Guidance UP-26-01 USE OF SINGLE FEES AND ADMINISTRATIVE PENALTIES

The purpose of this guidance is to clarify how single fees and administrative penalties must be used.

FEE ACCOUNTABILITY PROGRAM AND SINGLE FEE SYSTEM

Health and Safety Code section 25404.5, subdivision (c) requires Certified Unified Program Agencies (CUPAs) "to implement a fee accountability program designed to encourage more efficient and cost-effective **operation of the program for which the single fee and surcharge are assessed**."

The Fee Accountability Program must be implemented before the institution of the single fee system and the assessment of the surcharge. (Health & Saf. Code, § 25404.5, subd. (c).) The single fee "shall be based on the following factors associated with the cost of implementing and maintaining the Unified Program: (i) Operating costs as determined by Section 15220; and (ii) Consolidated fees from Section 15210(a)." (Cal. Code Regs., tit. 27, § 15210, subd. (b)(2)(D).) Operating costs include:

- "Direct program expenses including durable and disposable equipment."
- "Indirect program expenses including overhead for facilities and administrative functions."

(Cal. Code Regs., tit. 27, § 15220, subds. (a)(1)(C) & (D).)

The CUPA is required to review its Fee Accountability Program on an annual basis, which may require the adjustment of the single fee. (Cal. Code Regs., tit. 27, § 15220, subd. (a)(2).)

Health and Safety Code section 25404.5, subdivision (a) requires a CUPA to institute a single fee system that has been established by the governing body of the local CUPA. The single fee system established by the governing body identifies "the amount to be paid by each person regulated by the unified program under the single fee system at a level sufficient to pay the **necessary and reasonable costs** incurred by the certified unified program agency, and by any participating agency…" (Health & Saf. Code, § 25404.5, subd. (a)(2)(A); emphasis added.)

The Unified Program is a fee-based program; all fees that are collected by the CUPA must only be used for the intended purpose (i.e., costs related to implementing the Unified Program). The collected fees cannot be placed into the general fund or other non-Unified Program specific departmental account to cover the costs of other local purposes and programs. For example, the fees cannot be used to:

- Cover the direct or indirect expenses of other non-Unified Programs.
- Offset budget shortfalls for other non-Unified Programs.

Unified Program single fees (CUPA funds) that have been collected (including any surplus funds) cannot be placed, transferred, or "swept" into the general fund or other departmental accounts at year-end or any other time to cover the costs of other local purposes and programs.

Placing, transferring, or sweeping single fees that have been collected (including any surplus funds) into the general fund or other non-Unified Program specific departmental account to cover the costs of other local purposes and programs interferes with the statutorily mandated purpose for which the fees were collected and may convert the fees into unlawful taxes. (Cal. Const., art. 13C, § 1, subd. (e); Cal. Farm Bureau Fed'n v. State Water Res. Control Bd., 51 Cal. 4th 421, 437.) "[A] fee may be charged by a government entity so long as it does not exceed the reasonable cost of providing services necessary to regulate the activity for which the fee is charged. A valid fee may not be imposed for unrelated revenue purposes…An excessive fee that is used to generate general revenue becomes a tax." (Cal. Farm Bureau Fed'n v. State Water Res. Control Bd., 51 Cal. 4th 421, 437-438.)

When Unified Program positions become vacant or are eliminated, the resulting salary savings represent fees that were collected to support the Unified Program that are no longer needed for their original staffing purpose. Because the fees are imposed to pay for the "necessary and reasonable" costs incurred by the CUPA and by any PA to implement the Unified Program, the associated fees are restricted and cannot be diverted to general purposes. Accordingly, any salary savings should remain with the Unified Program to support the implementation of the Unified Program. As part of the annual Fee Accountability Program review process, and as required by California Code of Regulations, title 27, section 15220, subdivision (a)(2), the CUPA (or governing body of the CUPA) shall compare the "actual operating costs…with [t]he fee schedule established by the governing body of the CUPA; and [t]he actual single fee amount billed and collected." "[A]s needed based on annual review of the Fee Accountability Program[,]" the fee amount can be adjusted to reflect the reduction of staffing costs. (Cal. Code Regs., tit. 27, § 15220, subd. (a)(3).) This process ensures that the single fee system remains calibrated to the actual "necessary and reasonable costs" of administering the Unified Program, as required by statute, while preventing restricted fees that have been collected for the Unified Program from being used to subsidize unrelated government activities or otherwise serving as a source of general government funding.

CalEPA strongly encourages CUPAs to establish local fees to pay for the "necessary and reasonable" costs incurred by the CUPA and PA, if applicable, to implement the Unified Program. Failure to assess local fees, or the assessment of fees that are insufficient to pay for the "necessary and reasonable" costs to implement the Unified Program, may provide regulated businesses with an economic benefit over other regulated businesses in the state. This may result in the potential for significant inequities. For example, this may result in inequitable cross-subsidization, whereby fees collected for one Unified Program element are used to support the implementation of other Unified Program element(s), rather than funding each Unified Program element in proportion to its actual cost.

Failure to use the single fees in accordance with the statutory mandate (i.e., that the fees are to be used to cover the "necessary and reasonable" costs to implement the Unified Program) may subject the local agency or individual to negative media attention and the erosion of public confidence, investigations, audits, and civil and criminal liability.

FORMAL ENFORCEMENT: ADMINISTRATIVE PENALTIES

Health and Safety Code section 25404.1.1, subdivision (a) authorizes each UPA that "determines that a person has committed, or is committing, a violation of any law, regulation, permit, information request, order, variance, or other requirement that the UPA is authorized to enforce or implement pursuant to…[Health and Safety Code, division 20,] chapter [6.11], the UPA may issue an administrative enforcement order [(AEO)] requiring that the violation be corrected and imposing an administrative penalty" for violations of the following Unified Program elements:

- Aboveground Petroleum Storage Act (APSA),
- California Accidental Release Prevention (CalARP),
- Hazardous Materials Release Response Plans, more commonly known as "Hazardous Materials Business Plans (HMBPs),"

- Hazardous Waste Generator and Onsite Hazardous Waste Treatment, and
- Underground Storage Tanks (USTs).

UPAs do not have the authority to issue AEOs to address violations of the Hazardous Materials Management Plans and Hazardous Materials Inventory Statements.

Health and Safety Code section 25404.1.1, subdivision (i) states **"[a]ll administrative penalties collected from actions** brought by a UPA pursuant to this section shall be paid to the UPA that imposed the penalty, and **shall be deposited into a special account that shall be expended to fund the activities of the UPA** in enforcing this chapter [(Health and Safety Code, division 20, chapter 6.11)]." (Emphasis added.)

A definition for "special account" is not provided. In layman's terms the phrase means that the money is set aside and can only be expended for the listed purposes and in this case "to fund the activities of the UPA in enforcing this chapter." CalEPA recommends that an account is set up solely for the purpose of receiving and tracking administrative penalties. This will help to ensure no commingling of funds and that the funds are used for the stated statutory purpose.

The Legislature has made it abundantly clear that administrative penalties that are collected must be expended to fund the activities of the UPA in enforcing Health and Safety Code, division 20, chapter 6.11. **The use of administrative penalties for anything other than funding the activities of the UPA in enforcing Health and Safety Code, division 20, chapter 6.11 is a violation of state law and specifically a violation of Health and Safety Code section 25404.1.1, subdivision (i). Failure to use the money in accordance with the statute may subject the local agency or individual to negative media attention and the erosion of public confidence, investigations, audits, and civil and criminal liability.**

Although the Legislature clearly stated that administrative penalties can only be expended to fund the activities of the UPA in enforcing Health and Safety Code, division 20, chapter 6.11, the Legislature did not provide any guidance about the meaning of the phrase "activities of the UPA in enforcing this chapter." CalEPA Unified Program understands that UPAs have used the administrative penalties for the following purposes: training for Unified Program staff, one-time purchase of tablet computers, vehicles, or other equipment used by staff to implement the Unified Program. **Administrative penalties cannot be placed in the general fund to cover the costs of other local purposes and programs outside the scope of the Unified Program.**

Please direct all questions regarding this guidance to John Paine, Unified Program Manager, at 916-327-5092 or John.Paine@calepa.ca.gov.

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