



Gavin Newsom
Governor

Jared Blumenfeld
Secretary for Environmental Protection

March 19, 2019

Alfredo Estrada Jr., Chief
Imperial County Fire Department
1078 Dogwood, Suite 105
El Centro, CA 92243-2839

Dear Chief Estrada:

Re: NOTICE OF INTENT TO DENY THE IMPERIAL COUNTY FIRE DEPARTMENT
APPLICATION TO BECOME THE CERTIFIED UNIFIED PROGRAM AGENCY
(CUPA) FOR IMPERIAL COUNTY

Please find enclosed the subject Notice of Intent executed by the Secretary for Environmental Protection, Jared Blumenfeld. The Notice states all of the reasons for CalEPA's intent to deny the CUPA application.

Pursuant to Section 15160, subdivision (f), of Title 27 of the California Code of Regulations, the Imperial County Fire Department has thirty days from receipt of this Notice to respond to the deficiencies in the application and the reasons for denial of the application specified herein. Your Department may also request a second public hearing at which the Secretary shall hear the applicant's responses to the reasons specified in this Notice of Intent to deny the application.

Please contact me if you have any questions regarding the Notice of Intent or the appeal process.

Sincerely,
(Original signed by: GREGORY E. VLASEK)

Gregory E. Vlasek
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Enclosure

**NOTICE OF INTENT TO DENY IMPERIAL COUNTY FIRE
DEPARTMENT APPLICATION TO BECOME THE CERTIFIED UNIFIED
PROGRAM AGENCY FOR IMPERIAL COUNTY**

On August 31, 2018, the Imperial County Fire Department (ICFD) submitted an application to the Secretary for Environmental Protection (Secretary) to become the Certified Unified Program Agency (CUPA) for Imperial County. On October 26, 2018, the Secretary determined that the application contained all required components and that it was complete pursuant to Section 15160, subdivision (a)(1), of Title 27 of the California Code of Regulations.

Following determination that the application was complete, and in accordance with Section 15160, subdivision (b) of Title 27 of the California Code of Regulations, the Secretary requested comments and recommendations on the application from the directors of each state Unified Program agency, or their designees.¹ The Department of Toxic Substances Control (DTSC), the Office of the State Fire Marshall and the State Water Resources Control Board provided comments on the application. The Secretary also held a public hearing on the application in El Centro, California on December 13, 2018, at which 17 members of the public provided comments. The Secretary has received over 90 letters regarding the application from members of the public and governmental and non-governmental organizations.

After consideration of the application, comments and recommendations received from the state Unified Program agencies, comments made at the December 13, 2018 public hearing, and letters received from members of the public and governmental and non-governmental organizations, I am issuing this Notice of Intent to deny the application for all of the reasons set forth below.

BACKGROUND AND PERTINENT LEGAL CRITERIA

In January 1994, California established the Unified Hazardous Waste and Hazardous Material Management Regulatory Program (Unified Program). The Unified Program consolidates six hazardous materials environmental program elements into one regulatory program. The Unified Program consolidates six hazardous materials environmental program elements into one regulatory program. The six programs include the hazardous material business plan program, hazardous

¹ The state Unified Program agencies are the Department of Toxic Substances Control, the Office of the State Fire Marshall, the State Water Resources Control Board and the Governor's Office of Emergency Services.

material release prevention program, hazardous waste generator and on-site treatment program, hazardous materials management plan and inventory statement program, underground storage tank program and aboveground petroleum storage tank program.

When the Unified Program was established, the Imperial County Public Health Department was performing the regulatory functions of the hazardous materials programs that are encompassed by the Unified Program. In 2004, when state law required local jurisdictions to apply to become a certified Unified Program agency, Imperial County was one of only two counties in California that declined to submit an application for certification. Imperial County indicated in a 2004 letter to the California Environmental Protection Agency (CalEPA) that the Unified Program was an unfunded state mandate and that it did not have the financial resources to undertake responsibility for its administration. The letter also expressed concern about establishing a fee structure for businesses that would be sufficient to fund the Unified Program and the state surcharge that funds CalEPA oversight of the Unified Program.

Following the County's notification that it did not intend to submit an application for certification, the Secretary certified DTSC as the Imperial County CUPA. DTSC has been the Imperial County CUPA since 2005. CalEPA's most recent evaluation of DTSC's Imperial County CUPA found that it is meeting all Unified Program standards and is in good standing as a CUPA. DTSC has not requested decertification as the Imperial County CUPA.

The criteria for the Secretary to use to evaluate applications to become a CUPA are set forth in section 15170 of Title 27 of the California Code of Regulations. The criteria include the following:

- Adequacy of education, training and experience to implement the Unified Program;
- Adequacy of proposed resources to implement the Unified Program;
- The proposed time allocation requirements for local staff;
- Adequacy of staff and supervisory personnel to manage the single fee system, surcharge and accountability system;
- Adequacy of the number of proposed support staff, both technical and non-technical, to perform all program elements;
- Contacts and working relationships with local prosecution and law enforcement agencies, including strike force memberships;

- Proposed budget resources and funding mechanisms;
- Past performance of the applicant agency in implementing hazardous waste programs;
- Adequacy of proposed record keeping and accounting systems;
- Identified adverse impacts on the county, with particular consideration by the Secretary of written comments and comments received at the public hearing on the application;
- The possibility of fragmentation of the Unified Program between jurisdictions;
- Countywide coordination and consistency;
- Documentation of authority to implement program elements;
- Whether the Program will be fully operational no later than one year after certification.

There are no statutory or regulatory criteria for the Secretary to decertify a CUPA that is in good standing. Instead the Unified Program regulations, at section 15320 of Title 27, provide a process for the Secretary to issue a notice of intent to withdraw certification or to enter into a Program Improvement Agreement with a CUPA that is not adequately implementing the Unified Program.

REASONS FOR DENIAL OF APPLICATION

I. INCONSISTENCIES AND DEFICIENCIES IN APPLICATION

Although the application was determined to be complete because it contained all required components of a Unified Program agency certification application, CalEPA and the state Unified Program agencies have identified numerous inconsistencies and deficiencies in the substantive information in the application, all of which provide a basis for denial of the application. The comments on the application provided by state Unified Program agencies, which include descriptions of inconsistencies and deficiencies in the application, are attached to this Notice and incorporated into the Notice by this reference. Inconsistencies and deficiencies in the application include the following:

A. Staff Training and Technical Expertise

The application notes the types, timeframe, and scope of training required to be completed by ICFD staff, along with plans to implement training for new ICFD

hires. However, Title 27, Section 15170, subdivision (a)(1), requires the Secretary to consider as part of the certification process whether staff of an agency applying to become a CUPA possess the level of education, training, and expertise required by Unified Program regulations. As identified by each reviewing state Unified Program agency and CalEPA, the application does not identify any current ICFD staff who meet the Title 27 requirements for education, training and staff expertise.

B. Organization Chart, Staffing Issues, and Fee Accountability

There are a significant number of inconsistencies in the application regarding the number, titles, organization and time allocations of required CUPA staff, which are all pertinent to the Secretary's evaluation of the application pursuant to Section 15170, subdivision (a)(2), of Title 27. For example, the organization chart in the application identifies four CUPA inspectors, one supervisor, one office technician/accountant, and another office technician as necessary to implement the Unified Program. However, other areas of the application indicate that there will be nine full-time equivalent CUPA positions, including an administrative support position, at least five inspectors and one program supervisor.

It appears from the application that the applicant intends to use ICFD staff who are currently performing administrative support work for ICFD to also perform administrative support work for the CUPA; however, the application fails to provide an explanation of how current ICFD staff will assume additional CUPA duties and also continue to perform their current ICFD duties. The application similarly states that approximately 700 fire code inspections are currently conducted annually, but it does not clarify whether ICFD personnel who conduct those inspections will also be conducting CUPA inspections, and if so, how ICFD intends to combine the inspections in a manner that would ensure compliance with Unified Program inspection requirements.

C. Implementation Timeline

Section 15170, subdivision (15), of Title 27 requires the Secretary to consider if a program applying for certification will be fully operational no later than one year after certification. The implementation plan in the application indicates the CUPA will be at full implementation within twelve months of certification; however, elsewhere in the application, there are references to a 24-month timeline for implementation.

Though a transition plan is not a required element of an application, the reviewing state Unified Program agencies have expressed concerns that the applicant plans to use resources of the existing DTSC Imperial County CUPA for staff training and implementation of its program, without having consulted with or obtained the agreement of DTSC regarding those plans. It is not clear how the applicant intends to assume duties from DTSC, nor is there clarity in the amount of time the applicant needs for completion of the transition to full implementation. The implementation timeline chart also fails to include or address a transitional enforcement plan.

D. Draft Ordinance

The draft ordinance provided in the application is in need of significant revision as it has many sections that are either missing, incorrect, or unclear. Moreover, several sections are inconsistent with state law. As an example, draft ordinance section 2018-08(c) provides that primary and secondary levels of containment are required for all new storage facilities intended for the storage of hazardous materials which are liquids or solids at standard temperature and pressure, unless exempted by the Fire Chief or a designee appointed by the Fire Chief. The section conflicts with Chapter 6.7 of the Health and Safety Code and Title 23 of the California Code of Regulations, which require primary and secondary containment for underground storage tanks constructed after January 1984 and do not authorize exemptions. Additional deficiencies in the draft ordinance are set forth in the attached state Unified Program agency comments on the ICFD application, which are attached and incorporated herein by reference.

E. Permitting

The application contains inconsistencies and inaccuracies regarding permit issuance, permit cycles, permit revocation, and permit information. Several required elements are missing from the sample consolidated permit provided in the application, including the California Environmental Reporting System (CERS) identification number, tank identification number, permit conditions, and UST monitoring requirements. Permit expiration dates, permit cycles, and procedures for permit modifications are either unclear or are in conflict with other parts of the application.

F. Fee Determination and Cost Calculation

The methods for determining fees described in the application do not reflect the actual listed fee amounts. For example, the application indicates Underground Storage Tank (UST) program fees will be scaled according to volume and the number of hours necessary to inspect a facility. However, the fees identified in the proposed fee schedule do not reflect volume as a consideration in determining the fee. The cost calculation methods used in the application contain numerous inconsistencies, making clear interpretation of the methods to be used to determine fees impossible.

G. Inspection & Enforcement Plan

Several program requirements are missing from the proposed Inspection & Enforcement Plan, including provisions for the receipt, investigation, and enforcement of complaints. Relative to the Underground Storage Tank (UST) program, the application indicates inspection personnel shall verify functionality of leak detection equipment during the annual compliance inspection, when inspection personnel should instead witness functionality testing performed by a UST Technician as part of annual monitoring certification. The Inspection & Enforcement Plan does not identify how inspection personnel are to conduct an inspection when an annual monitoring certification is not witnessed.

The application also states that the applicant *may* initiate enforcement if a person or business has committed or is committing a violation of any law regulation, permit, information request, order or other requirement that ICFD will be authorized to enforce. The California Code of Regulations, at section 15200(a)(d) of Title 27, requires that a CUPA, as part of its Inspection and Enforcement Plan, have a description of a graduated series of enforcement actions that the CUPA *shall* initiate based on the severity of the violation.

H. Identity of Administering Agency

The application refers to multiple agency names as the applicant. The following are used to identify the implementing agency: ICFD, ICFD and the Office of Emergency Services, designated officer, and the CUPA. The application also states that the Imperial County Board of Supervisors authorized ICFD and the Office of Emergency Services to apply for certification. However, the Board of Supervisors Minute Order attached to the application only authorizes submission of an application for certification to CalEPA without specification of the particular agency in the County authorized to submit the application.

I. Implementation History

The application provides only a very short section on the applicant's implementation history for relevant and related program experience. The section describes the applicant's history with regard to conducting fire code inspections; however, there is a lack of any detailed information regarding the applicant's enforcement action history and experience, its history and experience in the implementation of other state programs, and its budgetary information related to its program experience. The application does not provide sufficient information to satisfy the requirements of Section 15170, subdivision (a)(4) of Title 27.

II. Other Matters

A. Public Comments on the Application

The Secretary received written and oral comments in support of and opposed to granting the application. Of significance, none of the comments received by the Secretary include any criticism, express or implied, of DTSC's implementation of the Unified Program in Imperial County.

The majority of written and oral comments in support of certifying ICFD as the Imperial County CUPA were from local agricultural and business interests and members of the public associated with those interests. The majority of written correspondence to the Secretary in support of the application are what appear to be form letters.

The written and oral comments in support of the application emphasize the need for local control of the Unified Program. The form letter submitted by multiple Imperial County residents and businesses states that certification of ICFD as the CUPA will result in a "joint collaborative effort" between ICFD, the Imperial County Environmental Health Department, the Imperial County Agricultural Commissioner and the Imperial County Air Pollution Control District, including more effective record keeping by all of these entities. Neither the form letter nor the application provide any details regarding how this "joint collaborative effort" would be implemented if the applicant were to be certified as the Imperial County CUPA.

The form letter sent to the Secretary also includes the statement that certification of ICFD as the Imperial County CUPA will "remove state financial and staff burdens and eliminate the duplication of inspection services." There is no explanation of

the state financial and staff burdens that will be removed if ICFD is certified as the CUPA, or of what inspection services are currently duplicated in Imperial County. These statements, coupled with the lack of an explanation of what the “joint collaborative efforts” with other County agencies will be and the uncertain and contradictory statements in the application about CUPA staffing, create a concern that the Unified Program could be inappropriately consolidated with other, distinct and different environmental regulatory programs. Such a merger would violate Unified Program inspection and enforcement requirements, dilute the effectiveness of the program and compromise the protection of public health, safety and the environment.

Written and oral comments in opposition to certifying ICFD as the Imperial County CUPA emphasize the importance of the Unified Program in safeguarding public health, safety and the environment. These comments also consistently question the commitment of the County and its local agencies to environmental protection, and suggest there are conflicts of interest between the County and regulated entities in the County. Commenters cited specific instances of alleged mismanagement of environmental regulation by local Imperial County agencies, including concerns about the County’s approach to environmental justice and environmental enforcement.

The concerns expressed about the County’s approach to environmental enforcement are reflected in the experience of the CalEPA Environmental Justice Task Force in its recent Imperial County Initiative. The Task Force met with hostility from members of the Board of Supervisors at the inception of the Initiative simply because CalEPA staff met with environmental justice advocates in the County before discussing the Initiative with local officials. Additionally, during the Initiative a member of the Board of Supervisors made an announcement in the local newspaper that enforcement inspections would be taking place in the County. The same member of the Board of Supervisors confirmed at the public hearing on the application that he made the public announcement of impending regulatory inspections during the Initiative so local businesses could be “watchful of their records and storage.” He also stated that he “would do it again.” The statement conflicts with CalEPA’s Unified Program Inspection Guidance (2008) which provides that regulatory inspections should not be announced in advance. The goal of an inspection is to determine compliance with regulatory requirements in the usual course of business. Compliance with regulatory requirements, including the Unified Program requirements, is required at all times and not only in anticipation of an announced inspection.

Public comments received regarding the application, including comments submitted in support of the application, raise serious concerns about: (1) the County's approach to environmental protection and enforcement; (2) its understanding that the Unified Program is a state program, an important component of which is state oversight of its implementation throughout the state; and (3) whether the applicant, who is subject to direction from the Board of Supervisors, will carry out all Unified Program requirements as required by law.

The comment by a member of the Board of Supervisors at the public hearing on the application public announcement of regulatory inspections during the CalEPA Initiative, and statements made by a member of the Board of Supervisors in a public comment on the application that he would announce inspections conducted pursuant to a multi-agency initiative again, is also a factor in the decision to deny the application pursuant to Section 15170, subdivision(a)(F), of Title 27, which requires consideration of working relationships with local prosecutors and law enforcement agencies, including "strike force memberships."

B. Lack of Authority to Decertify DTSC as the Imperial County CUPA

In 2004, when the state requested Imperial County to submit an application to become the Imperial County CUPA, the County declined to submit an application. That resulted in certification of DTSC as the Imperial County CUPA, and DTSC continues to satisfactorily perform its Unified Program obligations. DTSC has not requested to be decertified as the Imperial County CUPA, and, indeed, has submitted comments citing deficiencies and inconsistencies in the application.

While Title 27 provides a process, at Section 15160, subdivision (d)(2), for decertifying a CUPA program that is not adequately implementing the Unified Program, there is no authority to decertify DTSC, which is in good standing as the Imperial County CUPA, by granting the application.

RIGHT TO APPEAL

Pursuant to Section 15160, subdivision (f), of Title 27 of the California Code of Regulations, the applicant has 30 days from receipt of this Notice of Intent to deny to respond to the deficiencies in the application and the reasons for denial of the application specified herein. The applicant may also request a second public

hearing at which the Secretary shall hear the applicant's responses to the reasons specified in this Notice of Intent to deny for denial of the application.

Dated: March 19, 2019

(Original signed by: JARED BLUMENFELD)
Secretary for Environmental Protection