

MEMORANDUM

TO: Jared Blumenfeld
Secretary for Environmental Protection

THROUGH: Christina Morkner Brown
Deputy Secretary for Law Enforcement and Counsel

FROM: Greg Vlasek
Assistant Secretary
Local Program Coordination and Emergency Management

DATE: August 1, 2019

SUBJECT: RECOMMENDATION ON IMPERIAL COUNTY FIRE DEPARTMENT'S REVISED CUPA APPLICATION AND APPEAL

INTRODUCTION

On May 6, 2019, Imperial County Fire Department (ICFD) submitted an appeal of the Notice of Intent (NOI) to deny its application to become the Certified Unified Program Agency (CUPA) for Imperial County. The State Department of Toxic Substances Control (DTSC) has served as the certified Imperial County CUPA since 2005. The appeal included a response to the reasons for the denial and a revised application addressing many of the deficiencies and inconsistencies detailed in the NOI. ICFD also requested a second public hearing. CalEPA accepted the appeal and the revised application, and held a second public hearing in El Centro, California on July 17, 2019.

CalEPA staff reviewed the appeal and revised application, and solicited comments from the State Unified Program agencies.¹ Staff's review finds that ICFD addressed many, but not all, of the deficiencies identified in the initial application. Some of the outstanding concerns are relatively minor and can be resolved. However, there remain several significant unresolved deficiencies with ICFD's application that CalEPA previously documented in the NOI:

- Lack of inspector experience and training specific to the Unified Program;
- Lack of experience with graduated enforcement of Unified Program elements, and with local program graduated enforcement in general. County personnel express a clear preference for compliance over enforcement that raises concerns about excessive leniency;
- Lack of a precedent and regulatory mechanism for replacing a CUPA in good standing with an

¹ DTSC, State Water Resources Control Board (SWRCB) and the Office of the State Fire Marshal (CAL FIRE-OSFM) provided comments. The Governor's Office of Emergency Services (CalOES) did not comment. The comments are included in Attachment 1 and are incorporated by reference.

inexperienced CUPA;

- Very little evidence of past cooperation between ICFD and DTSC that would facilitate a transition of jurisdiction.

Some of these deficiencies can be attributed to the fact that the enabling statutes and regulations were designed for initial certification of CUPAs prior to 1997. The statutes and regulation do not anticipate a local agency pursuing CUPA certification after the initial certification period when another agency has assumed the CUPA responsibilities. There is no statutory provision for establishing a replacement CUPA where a CUPA in good standing already exists. There is also no precedent for such a change of jurisdiction, which could be instructive in fostering cooperation between ICFD and DTSC.

Notwithstanding these facts, ICFD contends that the Secretary has implied authority over the Unified Program and CUPA certification beyond the express authorities in the statute and regulations. ICFD has stated that it is resolute in pursuing CUPA certification. County officials have also stated that ICFD will seek a legislative or executive remedy if the Secretary denies this or future applications.

RECOMMENDATION

After considering the appeal, the revised application, comments made at the July 17, 2019 hearing, and all comment letters received, staff recommends the Secretary deny ICFD's appeal and deny its application to become the certified CUPA for Imperial County at this time. Staff's findings supporting the denial are detailed in the Discussion section below.

However, given the original legislative intent that the Unified Program be delegated to local entities for inspection, compliance, and enforcement, with State oversight, staff further recommends the Secretary direct or encourage DTSC to negotiate and enter a 'participating agency agreement' with ICFD in accordance with Health and Safety Code (H&S Code) section 25404.3, within 180 days. A participating agency agreement would allow ICFD to demonstrate, and DTSC to assess, ICFD's capability to develop and implement a CUPA program for one or more Unified Program elements. Staff recommends the agreement be for two years minimum, with a review and assessment by DTSC and CalEPA after two years (California Code of Regulations (CCR), title 27, §15330, subd. (a)(2).) Staff recommends a participating agency agreement assign the hazardous material business plan (HMBP) program element² to ICFD and one or more of the following program elements, in descending order:

- Aboveground petroleum storage tank program,
- Accidental release prevention (CalARP) program
- Hazardous waste generator and onsite treatment program,
- Underground storage tank program.

² For purposes of this agreement, the HMBP (under CalOES) and HMIS (under OSFM) elements should be considered as a single element.

BACKGROUND

A. Regulatory Requirements

The regulations adopted to implement the Unified Program (CCR, title 27, § 15720) set the criteria for the Secretary to evaluate a CUPA certification application. CalEPA staff, in consultation with the State Unified Program agencies, used these criteria to assess ICFD's initial application and revised application. The criteria include:

- 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 operational no later than one year after certification.

B. ICDF's Application and Secretary's NOI

ICFD submitted an application to the Secretary to become the CUPA for Imperial County on August 31, 2018. On October 26, 2018, the Secretary determined that the application contained all required components and that it was complete pursuant to CCR, title 27, section 15160, subd. (a)(1). In accordance with CCR, title 27, section 15160, subd. (b), the Secretary requested comments and recommendations on the application from the directors of each State Unified Program agency, or their designees.³ The Secretary also held a public hearing on the application in El Centro, California on December 13, 2018. After considering 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

³ 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.

organizations, the Secretary issued a NOI on March 19, 2019 (Attachment 2). The NOI, issued in accordance with the certification application process specified in CCR, title 27, section 15160, detailed a number of deficiencies and inconsistencies, which demonstrated the insufficiency of ICFD's application and capability to meet the regulatory expectations and the criteria above for certification as a CUPA. There were nine specific areas of deficiency identified in the NOI:

Staff Training and Technical Expertise – Unified Program regulations require the Secretary to consider whether staff of an agency applying to become a CUPA possess the level of education, training, and expertise required by Unified Program regulations. The application did not identify any current ICFD staff who meet the requirements for education, training, and staff expertise. ICFD provided general plans for staff recruiting and training, but not a definitive or proactive approach to obtain or expedite training.

Organization Chart, Staffing Issues, and Fee Accountability – The application contained a number of significant inconsistencies in organizational and staffing plans that precluded a meaningful workload analysis and fee accountability demonstration.

Implementation Timeline – The application inconsistently cited the implementation timeline as either 12 or 24 months. The regulation requires the program be fully operational no later than one year after certification. The implementation timeline chart also failed to include or address a transitional enforcement plan.

Draft Ordinance – The required draft ordinance to implement the local program was based on an outdated template and was therefore incomplete and inaccurate.

Permitting – The permitting process description provided was inadequately detailed and did not include instructions on the use of the state reporting system (CERS) as required.

Fee Determination and Cost Calculation – The cost calculation methods used in the application contain numerous inconsistencies, making clear interpretation of the methods to be used to determine fees impossible.

Inspection & Enforcement Plan – The area of enforcement generally was cited as particularly problematic in both the application and the related public testimony. The proposed I&E plan was insufficiently detailed and did not convey an understanding of State expectations for graduated enforcement. Several references in the application suggested that ICFD's enforcement of State Unified Program laws and regulations was discretionary ("may" vs. "shall" enforce). The NOI also noted public comments about the County's alleged general mismanagement of environmental enforcement and official's unwillingness to cooperate with a State enforcement project.

Identity of Administering Agency – The application contained confusing and unacceptable references to multiple County agencies that would have role responsibilities in supporting ICFD's implementation of the CUPA.

Implementation History – The implementation history for similar local environmental and health programs was very slim and not sufficiently persuasive of the County's competency to implement the

more complex Unified Program.

C. ICFD's Appeal of the NOI

Upon receipt of the NOI, ICFD submitted a response, dated May 6, 2019, in the form of an 11-page letter to the Secretary with 16 pages of direct responses to State agency comments and a revised application to address many of the noted deficiencies. The appeal letter highlighted a number of areas where Imperial County and its agencies have been successfully entrusted with federal and State delegated programs (e.g. air pollution control, public health, solid waste, drinking water) and have participated in environmental coalitions that it claims have built successful bridges to the community. The letter included a legal interpretation to support its position that the Secretary has authority to certify ICFD as a CUPA. CalEPA's Unified Program evaluation and oversight staff reviewed the revised ICFD application and noted both improvements and continuing deficiencies as detailed in the Discussion section below.

With its appeal and revised application, ICDF also submitted a request for a second public hearing in accordance with CCR, title 27, section 15160, subdivision (f)(3). CalEPA conducted the second public hearing in El Centro, California on July 17, 2019. Thirty-eight parties testified at the hearing. CalEPA also accepted written comments on the revised application until July 31, 2019. Twenty-nine parties submitted written comments.

The Secretary received written and oral comments in support of and opposed to granting the application. A majority of the written and oral comments received following the appeal are in support of certifying ICFD as the Imperial County CUPA. At the hearing, thirty-seven witnesses spoke in favor of the ICFD application; one witness spoke in opposition. Twenty-two of twenty-nine letters or emails received following the hearing are in favor of the ICFD application. Supporters of the application are primarily local agricultural and business interests and members of the public associated with those interests. A number of municipal and county government agencies and districts also commented in favor of an ICFD CUPA, as did 56th District State Assemblyman Eduardo Garcia (D-El Centro.)

The written and oral comments from supporters of the application emphasize their good working relationships with ICFD and other County agencies, and cite a need or desire for local control of the Unified Program. Several of the private party comment letters were form letters of the same nature as those described in the NOI, and raise the same concern about an uninformed presumption of interagency collaboration with the Unified Program. Of significance, none of the additional comments received by the Secretary since the ICFD appeal include criticism of DTSC's implementation of the Unified Program in Imperial County.

Written and oral comments in opposition to certifying ICFD as the Imperial County CUPA continue to 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 business 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 planning and development, permitting, environmental justice, and environmental enforcement. None of the opposing comments cited problems or alleged

mismanagement by ICFD, rather they are directed at the County's overall environmental management.

Public comments received regarding the revised application provide a strong showing by local businesses and local government agencies in support of an ICFD CUPA that will emphasize compliance and education over enforcement. In contrast, some public comments, including some comments submitted in support of the application, continue to raise serious concerns about: (1) the County's overall 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.

DISCUSSION

A. Staff Finds the Revised Application Remains Deficient

ICFD's revised application addresses many of the deficiencies and inconsistencies identified in the NOI, as summarized below. However, significant deficiencies remain in several key areas:

- ICFD lacks management and inspector experience and training specific to the Unified Program.
- There is very little evidence of past cooperation between ICFD and DTSC that would facilitate a transition of jurisdiction.
- The Unified Program lacks a precedent and regulatory mechanism for replacing a CUPA in good standing with an inexperienced CUPA.

A summary of staffs' findings related to each problem area identified in the NOI is as follows:

1. Staff Training and Technical Expertise

The Secretary is required to consider whether staff of an agency applying to become a CUPA possesses the level of education, training, and expertise required by Unified Program regulations. (CCR, title 27, § 15170, subd. (a)(1).) The initial application did not identify any current ICFD staff who meet the requirements for education, training and staff expertise.

ICFD's appeal states that CCR, title 27, section 15170, subd. (a)(1) does not specify that existing staff must meet the education, training and expertise requirements. ICFD states its view is consistent with the historical certification of CUPAs in the 1990's and 2000's where staff may have had some training in some, but not all, program elements. The revised application (page 18) states that upon certification, ICFD will hire additional staff that will undergo an intense training program anticipated to take 12 weeks that will cover all of the CUPA required training identified in the application.

Staff finds the appeal and revised application does not adequately address the staff training and technical expertise deficiencies. The regulations require existing ICFD staff to meet education, expertise, and training requirements. Furthermore, CCR, title 27, section 15150, subd. (e)(7) requires the application for certification include "adequate information to determine that the applicant agency and any proposed PAs meet education, expertise and training requirements specified in sections

15260 and 15270.” ICFD’s revised application does not include this information for the Secretary to evaluate this requirement.

Additionally, the revised application (page 72), at the first paragraph under “Education Requirements (Based on title 27)” states:

“The Department’s education experience requirements for existing staff and new hires is either a bachelor’s degree in environmental science, physical science, engineering science, industrial hygiene, chemistry, geology or a related field, or two years of experience in hazardous material management.”

This statement is inconsistent with the education requirement in CCR, title 27, section 15260, subd. (a)(1)(A)(iii), which states:

“Qualifying experience in hazardous materials management, regulation, analysis, or research; environmental research, monitoring, surveillance or enforcement; or resource recovery may be substituted for the required education, on the basis of one year of qualifying experience for 15 units of college course work authorized pursuant to paragraph (a)(1)(A)(i), for up to a maximum of 15 units.”

Therefore, the education requirements may not be met with just two years of experience in hazardous material management.

2. Organization Chart, Staffing Issues, and Fee Accountability

ICFD’s August 2018 application contained a significant number of inconsistencies regarding the number, titles, organization and time allocations, which are all pertinent to the Secretary’s evaluation of the application pursuant to CCR, title 27, section 15170, subdivision (a)(2). Additionally, there was no explanation of how current ICFD staff would assume additional CUPA duties while continuing to perform their current ICFD duties.

In the revised application, ICFD corrected inconsistencies and typographical errors, and made all staffing references consistent. ICFD revised all inconsistent agency titles in the application. The applicant agency is now referred to consistently as “Imperial County Fire Department” or “ICFD.” The inconsistent proposed CUPA positions in the “Imperial County Fire Department CUPA Organizational Chart” and “Fee Accountability Program” sections have been revised and now consistently note seven proposed CUPA staff in the application.

According to ICFD’s NOI response letter, ICFD intends to hire new staff to fill all seven proposed CUPA staff positions upon certification. No current ICFD staff will assume additional CUPA duties. To alleviate training and expertise gaps in transition, ICFD states it would welcome opportunities to transition qualified DTSC staff to ICFD. The revised application’s proposed staffing plan adds seven new positions, including: four Inspectors; one Supervisor, one Office Specialist – Financial; and one Office Technician-Administrative. Upon certification, ICFD states it will hire individuals to fulfill these new positions, and that ICFD is committed to providing current DTSC staff the opportunity to apply for these positions with the intent of hiring qualified applicants.

In its comments on the revised application, DTSC expressed ongoing concern with the personnel aspect of the application based on the statement, “The current two ICFD inspectors are not part of the proposed dedicated CUPA staff but will assist and compliment (sic) the CUPA inspectors when needed.” The concern is that if the non-CUPA inspectors are not considered part of the CUPA program, they may not be adequately trained for the inspections and administrative tasks assigned.

Workload analysis and fee accountability problems still require correction. The revised application (at page 66, Table 3. - Time Allocation of Staff) still contains incorrect and unclear calculations. The total inspection hours for the Hazardous Material Management Plan (HMMP) and Hazardous Materials Release Response Program (HMRRP) elements, total enforcement hours for the HMMP, and total permit hours for the Underground Storage Tank (UST) and Aboveground Petroleum Storage Tank (APSA) Programs are not correct because data was not correctly calculated. Additionally, the total hours noted for each CUPA activity, except training, were incorrect. The number of total hours for CUPA activities indicates enough hours for 17.6 staff (based on the standard of 1776 hours per year per staff). ICFD proposes to hire only seven staff to perform all CUPA activities, so ICFD is either short by 10.6 staff or the time allocations are incorrect.

3. Implementation Timeline

The implementation plan timeline in the August 2018 application was inconsistent throughout the document. Some references indicated the CUPA would be at full implementation within twelve months of certification, consistent with Unified Program requirements for new CUPAs; however, elsewhere there were conflicting references to a 24-month timeline for implementation. There were few milestones by which specific progress could be predicted or measured. State Unified Program agencies also commented on the initial application’s statement that ICFD planned to use DTSC resources for transitional staff training and implementation of its program, without having consulted with or obtained the agreement of DTSC regarding those plans. It was not clear how or on what schedule ICFD intended to assume duties from DTSC.

In the May 2019 appeal letter and revised application, ICFD corrects the conflicting proposals by establishing a clear 12-month transition timeline (Chart 1. – page 18). The timeline provides milestones for initiating key functions such as hiring, training, inspecting, and permitting. Transition of inspections and enforcement from DTSC would be phased, depending on the timing of ICFD readiness.

DTSC’s comments on the revised application expresses ongoing concern about ICFD’s ability to affect a complete transition within 12 months without DTSC’s explicit support, noting that the ICFD application still does not provide details on developing its own enforcement program. The implementation timeline and accompanying narrative also fail to include or address a transitional enforcement plan.

DTSC also commented that the Implementation Timeline revisions are insufficient. Specifically, the Applicants claim that the “details of the transfer of programs will be addressed in a Transition Plan that will be developed once certified” is problematic to DTSC. Additionally, DTSC is concerned who will be conducting program business while the ICFD’s staff is attending the 12 week training program.

ICFD's appeal letter (pages 5-6) states it is open to opportunities to hire qualified DTSC staff into ICFD, or to have DTSC CUPA staff assist in training ICFD, if DTSC is willing. ICFD states that if it is certified as the Imperial CUPA, it anticipates that a mutually acceptable agreement with DTSC will be developed necessitating DTSC to continue conducting inspections during the CUPA transition. ICFD states it remains committed to developing a detailed transition plan after it is certified by CalEPA, and that preparing a detailed transition plan in advance of certification is not practical because the degree of DTSC cooperation is unknown. ICFD states that it will include an interim inspection and enforcement plan with phased implementation in the transition plan (page 16-17). Staff agrees with ICFD that it is impractical to fully develop a transition plan absent a determination of certification. Staff cannot discern from the appeal letter or the application what communication has occurred between ICFD and DTSC; we assume little to none. If the Secretary were to certify the ICFD CUPA application, a degree of cooperation consistent with DTSC resources should be assumed.

4. Draft Ordinance

The draft ordinance provided in the August 2018 application required significant revisions because many sections were either missing, incorrect, or unclear. Several sections were inconsistent with State law.

In its appeal, ICFD noted that the draft ordinance submitted was obtained from and based on an ordinance currently in place in another California county, which was selected because of its detail. In the revised application, State agency comments have been taken into consideration and addressed. ICFD states it commits to providing all Unified Program agencies sufficient time to review the current draft ordinance and any future revisions prior to adoption by the Imperial County Board of Supervisors. ICFD is also willing to make other changes as necessary, including adopting a model ordinance.

CalEPA staff finds the revised draft ordinance acceptable. CalEPA staff notes that, while the local ordinance is not essential to enforcing State-required standards, the ordinance should be consistent with State statute and regulations. Staff notes that the draft ordinance Section 2018-56, regarding the Unified Program facility permit incorrectly cites CCR, title 27, section 15100 for the requirement for permits to be "consolidated as a Unified Program facility permit." The correct citation is CCR, title 27, section 15190 that requires the "CUPA to consolidate the permits issued under the Unified Program utilizing the Unified Program facility permit."

5. Permitting

The August 2018 application contained inconsistencies and inaccuracies regarding permit issuance, permit cycles, permit revocation, and permit information. Several required elements were 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 were unclear or in conflict with other parts of the application.

In the revised application, ICFD corrected proposed permitting process information. The Sample Consolidated Permit now includes the CERS identification number, tank identification number, permit conditions, UST monitoring requirements, permit expiration dates, permit cycles, and procedures for permit modifications.

Minor editorial changes are still needed in the permit review procedures and the sample consolidated permit application form:

- The ICFD application “D. Permit Review System” (pages 19-20) contains incorrect information. The section “New Business or Revised Permit” contains the incorrect instruction, “1) Permit application completed by facility on CERS” and should be reworded. The permit application is not completed in CERS. Information to complete the permit application process is submitted in CERS.
- The “Sample Consolidated Permit” in revised Application Attachment 3 contains incorrect program element information. In the list of programs on the permit, the “Area Plans for Hazardous Materials Emergencies” is listed when the Area Plan is not a Unified Program element and should be removed. An Area Plan is developed and maintained by the CUPA, not a regulated business.

6. Fee Determination and Cost Calculation

In the August 2018 application, the methods for determining fees described in the application did not reflect the actual listed fee amounts. The use of tank, waste or material volume for calculating fees was inconsistent. For example, the application indicated UST program fees would 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 contained numerous inconsistencies, making clear interpretation of the methods used to determine fees impossible.

ICFD’s revised application clarifies the methods for determining fees. Clarifications include the reference to volume in determining UST fees being removed, and noting that the method by which the fees are calculated will be by multiplying the average inspection time for specific program elements and the applicable ICFD hourly rate.

Staff finds that minor edits are still needed in the “Methods for Determining Fees” (Application page 64-65):

- ICFD does not identify what the fees for Tank Repair covers. Proper assessment of fees requires identification of services included.
- ICFD revised the section so that volume is no longer a factor for determining fees for the HMBP, Hazardous Waste generator (HWG), and UST Programs. However, the application still indicates APSA Program fees (page 65 – Item 7) will be scaled according to volume. Fees identified in the proposed fee schedule do not reflect volume as a consideration in determining the APSA fee.

Additionally, ICFD revised the "Budget Adequacy/Annual Funding" section removing the problematic phrase regarding the "cost recovery of 80% of the UPA enforcement related costs." This removal alleviates previous confusion about the use of enforcement funds to fund program costs. The sentence states, "The balance of the program costs will be fully funded from user fees." This sentence is improved; however, it can be more accurate by stating, "Unified Program costs will be fully funded by fee collected from regulated businesses."

7. Inspection & Enforcement (I&E) Plan

Several significant program requirements were missing from the proposed I&E Plan in the August 2018 application, including provisions for the receipt, investigation, and enforcement of complaints. The I&E Plan also did not identify how UST inspection personnel would be able to conduct a thorough compliance inspection when an annual monitoring certification was not witnessed.

The August 2018 application also stated in a number of contexts 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. Based on CalEPA enforcement guidance, these are circumstances in which enforcement of State laws is considered mandatory rather than discretionary.

In response, ICFD's revised application expanded and clarified the discussion of enforcement plans, notably adding an acceptable process for following up on complaints and further details on a graduated enforcement process. A section for complaint receipt, investigation, and enforcement has been added to the application.

The section regarding UST inspections has been clarified to reflect that UST inspections will be conducted at the time of the annual monitoring certification to ensure thorough UST system inspections. It states that inspection staff will witness the functionality testing performed by a UST technician as part of the annual monitoring certification. References to "may" with respect to initiating enforcement action have been changed to "shall."

Staff finds that further edits or additions are still needed in the I&E Plan:

- UST Red Tag procedures were not revised and remain less stringent than H&S Code requirements.
- DTSC finds the I&E Plan section incorrect or lacking in the following areas:
 - Procedure for closing a complaint
 - Description of the graduated series of enforcement
 - Provisions for ensuring ICFD has sampling capability
 - No discussion related to reviewing DTSC's Hazardous Waste Tracking System (HWTS) database prior to an inspection in the Pre-inspection Procedures
 - Inspection Follow-up: H&S Code section 25299 is cited as appropriate hazardous waste enforcement. This section is for UST enforcement, not hazardous waste
 - Outdated penalty matrix.

- DTSC notes the I&E Plan “Frequency of Inspections” table (page 25) inaccurately lists the inspection frequency for tiered permit facilities to be “Within 2 years then every 3 years.” Per H&S Code section 25201.4, subsection (b), inspection frequency for tiered permit facilities is “[i]nitial inspection within two years of notification and every three years thereafter.”
- OSFM finds an instance on page 34 that still states, “In the event of continued noncompliance, a formal enforcement action (Administrative Enforcement Order) *may* be initiated if deemed appropriate” in a context where enforcement should be considered mandatory.
- The application states that DTSC would provide backstop enforcement of hazardous waste laws. While DTSC possesses authority for statewide enforcement cases, it would no longer have any authority to enforce the elements of the Unified Program if DTSC is no longer the CUPA.

More detailed discussions of deficiencies in the I&E Plan and other aspects of the revised ICFD application can be found in the State agencies’ comments that are attached to this report and incorporated by reference.

8. Identity of Administering Agency

The August 2018 application referred to multiple agency names as the applicant. The following were used to identify the implementing agency: ICFD, ICFD and the Office of Emergency Services, designated officer, and the CUPA. The application also stated 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 authorized submission of an application for certification to CalEPA, without specification of the particular agency in the County authorized to submit the application.

ICFD’s revised application corrected this inconsistency and now states that the applicant is the Imperial County Fire Department, also referred to as “ICFD.” The Imperial County Board of Supervisors authorization was further clarified in a resolution adopted by the Board of Supervisors on April 23, 2019. Staff finds the applicable ICFD revisions to the application acceptable.

9. Implementation History

The August 2018 application provided only a very short section on ICFD’s implementation history for relevant and related program experience. The section described the applicant’s history with regard to conducting fire code inspections; however, there was a lack of any detailed information regarding the ICFD’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. CalEPA deemed this insufficient information to satisfy the certification requirement of CCR title 27 Section 15170 subd.(a)(4).

ICFD’s revised application added supporting explanations regarding its experience, and that of other Imperial County agencies, in implementing other delegated state regulatory programs under the State Fire Code and H&S Code as evidence of its ability to effectively execute state programs.

CCR, title 27, section 15150, subdivision (e)(15) requires the following in an applicant's program implementation history summary:

1. A list of the Unified Program elements that have been managed by the applicant agency and PAs for the past three years.
2. A summary of inspections and enforcement activities within the scope of the Unified Program, undertaken within the past three years, including types and numbers of inspections conducted and enforcement actions handled.

ICFD's history of implementing and enforcing the California Fire Code, H&S Code and any other local, State, and federal standards or regulatory programs do not meet the above program requirements. This is an application criteria for which Unified Program regulation explicitly requires a statement of experience that ICFD does not and cannot have without prior inspection and enforcement history with the Unified Program.

CalEPA staff notes that CCR, title 27, section 15170 subd.(a)(4) directs the Secretary to evaluate "[p]ast performance of the applicant agency and its proposed PAs in implementing hazardous material and hazardous waste management programs." CalEPA staff believes the Secretary, therefore, may consider relevant experience directly related to hazardous material and hazardous waste elements of the Unified Program. For ICFD, this could include hazardous materials inspections under its Fire Code jurisdiction.

B. Staff Recommends Establishing ICFD as a Participating Agency

Staff recommends the Secretary direct or encourage DTSC to negotiate and enter a 'participating agency agreement' with ICFD in accordance with H&S Code, section 25404.3, within 180 days. Establishing ICFD as a Unified Program participating agency (PA) for two years offers several advantages. It enables ICFD to demonstrate a commitment to developing its Unified Program inspection, compliance, enforcement and administration capabilities, but with limited and manageable responsibilities. It gives DTSC and CalEPA the ability to closely review ICFD's performance and require course corrections or to withdraw PA status as appropriate. Establishing a PA to perform part of a CUPA's responsibilities for one or more of the six Unified Program elements has numerous longstanding precedents. Currently there are twenty-four PAs participating in the Unified Program in support of their local CUPAs.

Historically, a PA was established by arrangement with a CUPA because it had preexisting expertise in one or more Unified Program elements that superseded those of the CUPA. In this case, ICFD does not have that preexisting expertise, but it would be afforded the opportunity to develop it through a PA agreement. Staff believes that 180 days is a reasonable lead time for DTSC and ICFD to reach a PA agreement, acquire training in the necessary program elements, and submit an application to the Secretary.

A founding principle of the Unified Program is stated in H&S Code, section 25404 subd.(d):

“To the maximum extent feasible within statutory constraints, the secretary shall consolidate, coordinate and make consistent these requirements of the unified program with other requirements imposed by other federal, state, regional or local agencies upon facilities regulated by the unified program.”

Arguments may be made for and against staff's recommendation in applying this principle to the Imperial County CUPA. Creating a new PA under an existing CUPA in good standing does not, in a strict sense, *consolidate* regulatory oversight within a single agency; it does the opposite. However, by giving ICFD the opportunity to demonstrate Unified Program capability, with the possible outcome of a future transition of CUPA jurisdiction to ICFD, the Secretary signals a move toward *consistency* with 56 of 58 California counties that locally manage their own CUPAs. Staff believes that the Secretary's discretion in this matter should ultimately favor statewide consistency and encourage all counties to maintain robust programs that enforce state laws while remaining sensitive to local economic, public health, and environmental needs.

CONCLUSION

Staff recommends the Secretary deny ICFD's appeal and deny its application to become the certified CUPA for Imperial County because staff identified several remaining deficiencies in the application. However, given the original legislative intent that the Unified Program be delegated to local entities, and ICFD and the County's stated intention to continue to pursue certification applications, staff recommends DTSC negotiate a PA agreement with ICFD. This approach is respectful of the Unified Program's original design for local agency implementation, gives ICFD a fair opportunity to develop its capabilities in a way to address the identified deficiencies, and addresses stated concerns by some public commenters about potential leniency in ICFD's compliance and enforcement practices.

If the Secretary denies ICFD's application without direction to DTSC to develop a PA, the State agencies suggested options to help improve any future ICFD application, including:

- ICFD can proactively obtain training for current personnel ahead of any future certification application through available classroom and online training and by participating in the annual CUPA Training Conference.
- ICFD can consult with knowledgeable CUPAs other than DTSC Imperial County CUPA to improve their organizational and procedural plans, workload analyses, fee calculations, etc.

Attachments:

1. State Agency Comments on the ICFD Revised Application for CUPA Certification
Department of Toxic Substances Control
CAL FIRE Office of the State Fire Marshal
State Water Resources Control Board

2. CalEPA Notice of Intent to Deny the Application of Imperial County Fire Department for CUPA Certification - March 19, 2019

Attachment 1.

State Agency Comments on the ICFD Revised Application for CUPA Certification

Department of Toxic Substances Control
CAL FIRE Office of the State Fire Marshal
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Attachment 2.

CalEPA Notice of Intent to Deny the Application of Imperial County Fire Department for CUPA Certification

March 19, 2019