

August 23, 2021

Unified Program Guidance Letter 21-01

OVERSIGHT SURCHARGE ADJUSTMENTS FOR FEDERAL FACILITIES NOT WAIVING SOVERIGN IMMUNITY FOR HAZARDOUS MATERIALS BUSINESS PLAN PROGRAM AND CALIFORNIA FIRE CODE

To: Certified Unified Program Agencies

Background

Certified Unified Program Agencies (CUPAs) are required to assess and collect all applicable portions of the Unified Program State Surcharge from regulated facilities including those owned and operated by the federal government. The State Surcharge is part of each CUPA's Single Fee System and remitted to the state quarterly. The State Surcharge consists of five components: Oversight, Underground Storage Tank (UST), Aboveground Petroleum Storage Act (APSA), California Accidental Release Prevention (CalARP) and Petroleum Refinery Safety. The Secretary for Environmental Protection establishes and maintains the State Surcharge amounts to cover the necessary and reasonable costs of the state agencies with Unified Program responsibilities. The Oversight surcharge component covers the costs incurred by the California Environmental Protection Agency (CalEPA), the Department of Toxic Substances Control (DTSC), CalEPA concerning the Hazardous Materials Business Plan Program (HMBP), and the Office of the State Fire Marshal (OSFM) concerning the applicable sections of the California Fire Code (CFC).

Some federal facilities have expressed their inability to pay any local single fees and the state surcharges associated with the HMBP program and applicable sections of the CFC based on a legal doctrine called sovereign immunity. In 2009, the Department of Defense (DOD) Regional Environmental Center (REC) for U.S. EPA Region IX submitted a formal position to CalEPA concerning CalEPA's regulatory authority regarding oversight and the subsequent assessment of fees at DOD facilities for the California's HMBP program and Fire Code. DOD restated its ongoing position that federal 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. This assertion applies to all federal agencies in addition to the DOD. For the HMBP Program and the CFC, the federal government has asserted there is no clear waiver of sovereign immunity in federal law. It is undisputed that Congress has clearly waived sovereign immunity for the UST, APSA, HWG and CalARP programs and has directed agencies of the federal government to pay applicable fees to local and state agencies. Fees associated with these programs are currently paid by federal agencies within California and are not in dispute.

Resolution

For federal facilities that do not waive sovereign immunity for the HMBP program and the CFC, the Oversight surcharge component of the State Surcharge will be reduced to \$73.74.

- Effective June 25, 2021, the Oversight surcharge is \$84.00 per regulated business per year. Of that amount, \$27 is for the CERS NextGen project that will be assessed on all regulated businesses, including federal facilities. Of the remaining \$57, \$10.26 supports the HMBP program and the CFC. Therefore, \$10.26 is deducted from the \$84 Oversight surcharge, resulting in a \$73.74 Oversight surcharge for federal facilities not waiving sovereign immunity for the HMBP program and the CFC.

CalEPA has determined the following course of action for CalEPA and CUPAs that regulate federal facilities that do not waive sovereign immunity for the HMBP program and CFC.

1. Federal facilities to provide the CUPA with a written declaration of a notice of exemption to pay fees based on the lack of a waiver of sovereign immunity.
2. Upon receiving the written declaration from a federal facility, the CUPA will notify the facility that they will be removed from the local program oversight for HMBP program activities and the applicable sections of the CFC.
3. The CUPA will accept any HMBP submission to CERS from a federal facility not waiving sovereign immunity and will add the following comment:
“This submittal is ‘accepted’ in accordance with Unified Program Guidance Letter (**UP 21-01**). The submittal is not reviewed for completeness by the (UPA name) as there is no requirement in law to review and to validate this data. Neither the (CUPA name) nor CalEPA attests to the completeness or validity of the information. The chemical inventory submission does not relieve the facility from emergency planning efforts with police, fire, hospitals, emergency service providers and local emergency responders or agencies.”
4. The CUPA shall submit notification form (Attachment 1) to CalEPA Unified Program that the CUPA is revising the scope of its local program to remove the federal facility from the HMBP program and CFC oversight. A copy of the federal facilities written declaration shall be submitted with the notification form.
5. CalEPA will notify U.S. EPA Region IX of federal facilities that are not covered as part of California’s HMBP program and CFC, requesting that U.S. EPA assume responsibility for the oversight of those facilities for compliance with federal law.
6. CalEPA will post on the Unified Program web site a list of those federal facilities not covered by the California HMBP program and CFC.
7. The CUPA will adjust the Oversight surcharge component for a federal facility not waiving sovereign immunity for the HMBP program and the CFC from \$84 to \$73.74.

CalEPA will not find a CUPA deficient in program implementation for failure to collect the associated local and general oversight surcharge fees from federal facilities that dispute the state’s authority to enforce the HMBP program and CFC and that are in accordance with provisions above. CUPAs will continue to enforce HWM, UST, CalARP, and AST programs at federal facilities and to take appropriate action to collect local Unified Program and surcharge fees.

Please direct all questions and concerns to John Paine, Unified Program Manager, at 916-327-5092 or john.paine@calepa.ca.gov.

A handwritten signature in cursive script that reads "Jason Boetzer".

Jason Boetzer
Assistant Secretary for Local Program Coordination and Emergency Response

Attachment 1 – Notification Form