Filed 2/9/04

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MORNING STAR COMPANY, Plaintiff and Appellant, v. STATE BOARD OF EQUALIZATION et al., Defendants and Respondents.	C033758 (Super. Ct. No. 98AS03539)

APPEAL from a judgment of the Superior Court of Sacramento County, John R. Lewis, Judge. Affirmed.

Law Office of Brian C. Leighton and Brian C. Leighton; Richard Todd Luoma for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Timothy G. Laddish, Assistant Attorney General, Lawrence K. Keethe, Amy J. Winn and Molly K. Mosley, Deputy Attorneys General, for Defendants and Respondents.

Plaintiff Morning Star Company (Morning Star) appeals from the judgment that denied it a refund of the environmental fees imposed on it by the State Board of Equalization (SBE) to fund the costs of the removal and disposition of hazardous material

as required by federal law. (Health & Saf. Code, § 25205.6 et seq.)[1]

The fees are paid by corporations engaging in business activities covered under a "schedule of [Standard Industrial Classification] codes" (SIC codes) which the Department of Toxic Substances Control (DTSC) must provide the SBE for business activities it determines involve the generation, storage or use of hazardous material. The SIC codes classify businesses by the type of economic activity conducted and cover the entire range of economic activities. The SBE collects a fee from each corporation at a rate based on the number of employees, if 50 or more.

"Hazardous material" is defined as any substance which poses a potential hazard to human health or the environment if spilled, disposed or otherwise released into the workplace or environment and includes "hazardous waste" and substances classified and listed under other environmental statutes and regulations. (§ 25501, subds. (o), (p), (q) and (s).)

The DTSC provided SBE with all of the SIC codes covered by section 25205.6 on the view that all of the covered business activities involve the use of common products that contain hazardous material, such as computer monitors and fluorescent light bulbs.

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[1] A reference to a section is to the Health and Safety Code unless otherwise designated.

Morning Star is a California corporation that supplies workers for the tomato processing industry. A hazardous material fee was paid to the SBE on its behalf for the years 1993 to 1996. It filed a claim for refund with the SBE that was denied. It filed this action seeking to overturn the SBE determination and to obtain a declaration that DTSC's decision to submit all of the SIC codes to SBE violated the Administrative Procedure Act (Gov. Code, § 11340 et seq; hereafter APA) and the federal and state constitutions.[2]

The parties brought cross-motions for summary judgment. The defendants asserted 56 statements of undisputed fact, including that fluorescent light bulbs and cathode ray tubes contain hazardous material. Morning Star objected to three of them on the ground the Morning Star Packing Company, a subsidiary, was not a corporation but did not deny it was a corporation within the SIC codes which cover business activities that generate, store or use hazardous material. Morning Star did not object to deposition testimony that virtually all California corporations use hazardous material.

The trial court entered judgment in favor of defendants. This appeal followed.

We will affirm the judgment on the ground the DTSC's factual assumption, made incident to its enforcement of section

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[2] No issues concerning the form of the action or Morning Star's standing to challenge the validity of the DTSC action are tendered in this appeal.

25205.6, that business activities within all of the SIC codes involve the use of hazardous material is not a regulation subject to the APA. We also decide the DTSC decision does not violate the federal and state constitutions.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. Statutory Framework

Section 25205.6 is the state's financial response to the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 under which "the state is obligated to pay specified costs of removal and remedial actions carried out pursuant" to the Act. (§ 25205.6, subd. (f).) The fees must be deposited in a Toxic Substances Control Account to pay the costs of disposing of and remediating the effects of hazardous waste. (§ 25173.6, subd. (b).)

The Legislature enacted section 25205.6 in 1989 and amended it numerous times, most recently in 2001.[3] It currently provides in pertinent part:

> "(a) On or before November 1 of each year, the department [DTSC] shall provide the board [SBE] with a schedule of [SIC] codes that consists of the types of corporations that use, generate, store, or conduct activities in this state related to hazardous materials, as defined in Section

[3] The amendments do not affect the analysis of the law as applied to this case and we refer to the statutes by their current designation.

25501, including, but not limited to, hazardous waste."

A "SIC Code" is "the identification number assigned by the Standard Industrial Classification Code to specific types of businesses." (§ 25501, subd. (u).)[4] It is a system for classifying businesses by the type of economic activity conducted and is intended to cover the entire field of economic activities. SIC codes classify businesses in major groups by a two-digit SIC Code, industry groups by a three-digit SIC code, or industries by a four-digit SIC code, depending on the level of detail most appropriate. (U. S. Office of Management and Budget, Standard Industrial Classification Manual (1987) p. 28) (SIC Manual); *National Mining Assn. v. United States Environmental Protection Agency* (D.C. Cir. 1995) 59 F.3d 1351, 1355, fn. 6.) Section 25205.6 contains only one exception to the inclusion of corporations within the SIC codes, nonprofit residential care facilities. (Subd. (g).)

A corporation covered by a SIC code sent by the DTSC to the SBE must pay an annual fee measured by the number of its employees, if 50 or more. (§ 25205.6, subd. (b).) The fee ranges from $200 for corporations with 50 to 75 employees to $9,500 for corporations with more than 1,000 employees. (*Ibid.*) The purpose of the fee is to raise revenue to pay the "costs of

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[4] The Standard Industrial Classification Manual, dated 1987, states "The Standard Industrial Classification (SIC) is a system for classifying establishments by type of economic activity." (SIC Manual, p. 23.)

removal and remedial actions" involving hazardous waste required by the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (40 U.S.C. § 9601 et seq). (§ 25205.6, subd. (f).)

Section 25205.6, subdivision (a) applies to any SIC code which "consists of the types of corporations that use, generate, store, or conduct activities in this state related to hazardous materials . . . ."[5] The term "generate" is used throughout the toxic law to apply to the production of hazardous waste. It applies to generators of large amounts of hazardous waste and to generators of small amounts of waste, including "[r]esidential households which generate household hazardous waste . . . ." (§ 25218.) In the regulations implementing the definition of hazardous waste "generate" means to produce hazardous waste whether or not the generator knows its hazardous nature. California Code of Regulations, title 22, sections 66260.10 and 66273.9 define "'Generator' or 'Producer' [as] any person, by site, whose *act* or process produces hazardous waste . . . ." (See also § 66261.10, subd. (a)(1)(B),(a)(2)(A) & (B), fn. 8, italics added.)

The definition of "hazardous materials" is taken from the statutes which regulate the handling and disposal of hazardous

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[5] Whenever we use the phrase "use hazardous material" we also include the terms generate, store, or conduct activities related to hazardous materials.

substances, including hazardous waste (§ 25500 et seq.), and refers to:

> "any material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant present or potential hazard to human health and safety or to the environment if released into the workplace or the environment. 'Hazardous materials' include, but are not limited to, hazardous substances, hazardous waste, and any material which a handler or the administering agency has a reasonable basis for believing that it would be injurious to the health and safety of persons or harmful to the environment if released into the workplace or the environment." (§ 25501, subd. (o).)

The term "Release" is broadly defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, unless permitted or authorized by a regulatory agency." (§ 25501, subd. (s).) Thus, a hazardous material is any substance which poses a potential hazard to human health or the environment if released by accident or other manner into the workplace or environment.[6]

This general definition is augmented by the categorical inclusion of "hazardous substances [and] hazardous waste" (§ 25501, subd. (o)), and by the incorporation of substances

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[6] The definition necessarily includes material within a container for it is measured by the "potential" hazard to human health if "released" (say) by spilling, leaking or disposing into the environment. (§ 25501, subds. (o) and (s).)

identified under other environmental statutes and regulations. They include "hazardous substance," as "listed pursuant to Title 49 of the Code of Federal Regulations" (§ 25501, subd. (p)(3)), "hazardous waste," as listed pursuant to sections 25115, 25117 and 25316 (subd. (g)), and substances for which a producer must file a Material Safety Data Sheet (MSDS) (Lab. Code, §§ 6374, 6380; Cal. Code Regs., tit. 8, § 339) pursuant to the Hazardous Substances Information and Training Act (Lab. Code, § 6360 et seq.).[7]

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[7] Section 25501 defines "hazardous substance" and "hazardous waste" as follows:

"(p) 'Hazardous substance' means any substance or chemical product for which one of the following applies:

"(1) the manufacturer or producer is required to prepare a MSDS for the substance or product pursuant to the Hazardous Substances Information and Training Act (Chapter 2.5 (commencing with Section 6360) of Part 1 of Division 5 of the Labor Code) or pursuant to any applicable federal law or regulation.

"(2) The substance is listed as a radioactive material in Appendix B of Chapter 1 of Title 10 of the Code of Federal Regulations, maintained and updated by the Nuclear Regulatory Commission.

"(3) The substances listed pursuant to Title 49 of the Code of Federal Regulations [substances designated as hazardous materials for purposes of transportation].

"(4) The materials listed in subdivision (b) of Section 6382 of the Labor Code [human or animal carcinogens, water or air pollutants with human health risks as designated by the Environmental Protection Agency, airborne chemical contaminants as designated by the Occupational Safety and Health Standards Board, pesticides with health risks as designated by the Director of Pesticide Regulation, substances for which an information alert has been issued]."

In particular, "hazardous waste" is defined by the DTSC pursuant to its regulatory authority under sections 25117 and 25141. (§§ 25501, subd. (q), 25117, subd. (a)(2), 25141; Cal. Code of Regs., tit. 22, § 66261.1 et seq.) Section 66261.10, adopted in 1991, defines hazardous waste in principal part as a waste that "pose[s] a substantial present or potential hazard to human health or the environment when it is improperly treated, stored, transported, disposed of or otherwise managed . . . ." (Cal. Code Regs., tit. 22, § 66261.10, subd. (a)(1)(B), (a)(2)(B).)[8] "'Waste' means any discarded material of any form . . . ." (§ 66261.2, subd. (a); Health & Saf. Code, § 25124.)[9]

There are numerous other provisions of law which apply the hazardous waste definitions to common substances including section 25215.1 (lead acid batteries), enacted in 1988, and section 25218.1 (household hazardous waste), enacted in 1993.

"(q) 'Hazardous waste' means hazardous waste, as defined by Sections 25115 [extremely hazardous waste], 25117 [hazardous waste], and 25316 [hazardous substance]."

[8] "[H]azardous waste" includes any waste which "pose[s] a substantial or potential hazard to human health or the environment when it is improperly treated, stored, transported, disposed of or otherwise managed" as measured by a standardized test "or reasonably detected by generators of waste through their knowledge of their waste." (§ 66261.10, subds. (a)(1)(B),(a)(2)(B).)

[9] Since 1991 the DTSC has specifically regulated spent lead-acid storage batteries removed from motor vehicles" (Cal. Code Regs., tit. 22, § 66266.81), and since 2000 has specifically regulated cathode ray tubes and lamps, including fluorescent light bulbs. (§§ 66273.1, 66273.9.)

Since 2002 the curbside collection of fluorescent light tubes four feet or greater in length has been prohibited. (§ 25218.5, subd. (d)(5).)

The Legislature was informed as early as 1994, in the course of its adoption of the exception for nonprofit residential corporations in section 25205.6, subdivision (g), that common substances, such as fluorescent light bulbs, are within the definition of hazardous material. The staff report to the Senate Committee on Appropriations concerning the 1994 amendments says that "[i]n enacting the environmental fee . . . the Legislature authorized an assessment on all corporations with more than 50 employees. The purpose was to generate funding for the activities of the [DTSC], broaden the base of fees which support hazardous waste control activities and call attention to the fact that virtually *all* corporations, in some way, contribute to the *generation* of hazardous materials and hazardous waste [,] *e.g., fluorescent lights contain mercury*, solvents are used in everything from computers to the adhesives which hold down carpets, etc." (Sen. Com. on Appropriations, Rep. on Assem. Bill No. 3540 (1993-1994 Reg. Sess.) Aug. 15, 1994, p. 1; italics added.)

B. The Undisputed Facts

This case arises from the granting of defendants' motions for summary judgment.

"The purpose of a summary judgment proceeding is to permit a party to show that material factual claims arising from the

pleadings need not be tried because they are not in dispute." (*Andalon v. Superior Court* (1984) 162 Cal.App.3d 600, 604-605; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381 (FPI).) "'The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues: the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings.'" (*FPI*, *supra*, at p. 381.) "The role of the pleadings in measuring materiality is supplemented by rules directly applicable to a summary judgment proceeding. The parties must submit 'separate statements' identifying each of the material facts in dispute with reference to the supporting evidence. (Code Civ. Proc. § 437c, subd. (b).)" (*Id.* at p. 382.)

The material facts are not in dispute. The defendants submitted a statement of undisputed facts which asserted 56 facts, only three of which, concerning the corporate status of its subsidiary, the Morning Star Packing Company, were denied by Morning Star. The defendants also submitted documents and deposition testimony which are not in dispute. We set forth only the facts sufficient for the resolution of the issues tendered.

Since the enactment of section 25205.6 in 1989 the DTSC has submitted an annual schedule to the SBE that includes every two-digit SIC code, except the exempt non-corporate category of private households (SIC code 88) and, since a 1994 amendment

(§ 25205.6, subd. (g)), the exempt category of nonprofit corporate residential care facilities (SIC code 8361) (SIC Manual, at p. 230.)

The DTSC says it cannot conceive of a California business, particularly one employing more than 50 employees, that would not use, generate, store, or conduct activities in California that involved the use of hazardous material. For this reason it has concluded that it is not significant which code is assigned to a particular corporation or the amount of hazardous material the corporation generates.

The SBE limits its review of feepayer protests to whether the feepayer (1) is within an SIC code on the list provided by the DTSC, (2) is a corporation, and (3) has 50 or more employees. In 1998, Morning Star paid SBE $4,604.42 for the balance owing for fees assessed under section 25205.6 for the years 1993 through 1996. SBE informed Morning Star that an additional amount of $157.50 was owing for interest and Morning Star paid that amount. Morning Star filed a claim with the SBE for a refund of these amounts. The claim was denied on the recommendation of the SBE tax counsel following an "appeals conference on July 24, 1996."

Morning Star is a corporation within the SIC codes.[10] It employed eight full-time employees who worked in an office

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[10] While the DTSC does not categorize individual corporations as within a SIC code, the SBE did so for Morning Star in response to an earlier fee protest. The SBE determined Morning

located in Woodland and 90 year-round personnel, the majority of whom worked at tomato paste factories under lease arrangements with the operating companies. In the spring, Morning Star hired some 200 employees to drive tomato trucks to processors. During the tomato processing season, Morning Star employed some 260 cannery workers.

At its Woodland location, Morning Star used common office products that contain hazardous material, including: (1) a copy machine, computer printers and fax machines that contain toner; (2) computer monitors and a television that contains a cathode ray tube, that in turn contains lead; (3) fluorescent light bulbs and thermostats that contain mercury; (4) fluorescent light ballasts and capacitors in a microwave that may contain PCBs; and (5) a refrigerator that contains chlorofluorocarbons and typically contains used oil mixed with refrigerant employed as lubricating oil in the compressor.

The trial court granted the defendants' summary judgment, on the basis inter alia of the undisputed declaration of Peter J. Wood, a Senior Hazardous Substances Scientist, that "virtually all corporations are engaged in activities related to hazardous materials because they use copiers, computers, fluorescent bulbs and other modern business equipment."

Star operated Farm Labor Contractors (SIC code 0761) and Farm Management Services establishments (SIC code 0762), both of which are included on the DTSC schedule of SIC codes eligible for the fee.

II
The DTSC View That All Business Activities with the SIC Codes Involve the Use of Hazardous Material Is Not a Regulation Subject to the APA

Morning Star makes the bare claim that it does not use, generate or store hazardous material on the basis of the general definition of hazardous material in section 25501 but it does not dispute the categorical inclusion within the definition of common items such as computer monitors and fluorescent light bulbs. Nor does it challenge the SIC code classification system or dispute that it is a corporation within the category of business activities that involve the generation, storage or use of hazardous material and that it uses such material itself.

Since the record is undisputed that Morning Star is within the provisions of section 25205.6, we affirm the SBE's denial of Morning Star's claim for a refund of the environmental fees it paid for the years 1993-1996.

Nonetheless, Morning Star seeks a declaration that the DTSC view that all business activities covered by the SIC codes involve the generation, storage, or use of hazardous material is void as an underground regulation subject to the APA. It also challenges the constitutionality of section 25205.6.

A.

At issue is the nature of the task assigned the DTSC by section 25205.6 in carrying out the mandate that it identify and send the relevant SIC codes to the SBE for use in assessing a

fee to fund the costs of the removal and disposition of hazardous material as required by federal law.

The APA establishes a procedure for public notice, comment, hearing, filing, review and approval that state agencies must follow in adopting a regulation. (Gov. Code, §§ 11346.2, 11346.4, 11346.5, 11346.8, 11346.9, 11347.3, 11349.1, 11349.3; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568 (*Tidewater*); *Kings Rehabilitation Center, Inc. v. Premo* (1999) 69 Cal.App.4th 215, 217.) The failure to comply with the APA procedures in adopting a regulation voids the regulation. (Gov. Code, § 11340.5; *Tidewater, supra,* 14 Cal.4th at p. 570; *Kings Rehabilitation, supra,* 69 Cal.App.4th at p. 217.)[11] The APA applies "to the exercise of any quasi-legislative power conferred by any statute . . . ." (Gov. Code, § 11346.)[12] It also applies to administrative rules which interpret a statute. (*Tidewater, supra.*)[13] As to both, it provides that "[n]o

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[11] If a void regulation has been correctly applied in an adjudicative proceeding, the application remains valid notwithstanding that the regulation was not promulgated as required by the APA. (See *Tidewater, supra*, 14 Cal.4th at p. 577.) Accordingly, Morning Star is not entitled to a refund of the fees it paid no matter what the outcome of the APA claim.

[12] If an agency does not have the quasi-legislative authority to adopt a regulation, any action it takes is challengeable on that ground and not on the ground that its action violates the notice and comment provisions of the APA.

[13] "Unlike quasi-legislative rules, an agency's interpretation does not implicate the exercise of a delegated lawmaking power; instead, it represents the agency's view of the statute's legal

state agency shall issue, utilize, enforce, or attempt to enforce . . . a regulation" without complying with the APA's notice and comment provisions. (Gov. Code, § 11340.5, subd. (a).) A "Regulation" is defined as "every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . ." (§ 11342.600.)[14]

The dispositive issue concerns the meaning of "Regulation." The APA does not apply to the *enforcement* of an *existing* statute or regulation, regardless that it involves an interpretation, unless the means of enforcement is set out by an agency in a new rule of general application.

Tidewater, supra, involved a "written enforcement policy" of the Industrial Welfare Commission, which interpreted an existing wage order and replaced case-by-case adjudication. (14 Cal.4th at p. 562.) The court held that "[a] written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency

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meaning and effect, questions lying within the constitutional domain of the courts." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.)

14 Section 11342.600 defines the term "Regulation" as:

"every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

will decide future cases is essentially legislative in nature even if it merely interprets applicable law." (*Id.* at pp. 574-575.) *Tidewater* distinguished case-by-case adjudication on the ground that "interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases." (*Tidewater, supra,* 14 Cal.4th at p. 571.)[15] "[T]he agency must intend its rule to apply generally, rather than in a specific case." (*Ibid.*)

Tidewater used the term adjudication to mean the application of an existing rule in a specific case, rather than as equivalent to a quasi-adjudicative proceeding. As support for its view *Tidewater* relied upon four cases, two of which did not involve a quasi-adjudicative proceeding.[16] *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303 at pages 309-310, arose on a petition (treated as in mandate) by farm workers to review a decision of the California Division of Industrial Safety that "it has no authority [under an existing regulation] to ban the short-handled hoe as an 'unsafe hand tool' . . . ." (*Carmona*, *supra*, at p. 308, fn. 4.) The agency claimed its interpretive decision was a quasi-legislative act subject to the

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[15] It also distinguished advice letters. (14 Cal.4th at p. 576.)

[16] In two cases the interpretive issue arose in a quasi-adjudicative proceeding. (*Bendix Forest Products Corp. v. Division of Occupational Saf. & Health* (1979) 25 Cal.3d 465, 471; *Taye v. Coye* (1994) 29 Cal.App.4th 1339, 1345.)

rule making provisions of the APA. (*Id.* at p. 309.) The court rejected the claim because "the agency did not request the promulgation of a new regulation directed at the use of the short-handled hoe, but instead sought enforcement of the *existing* regulation . . . ." (*Ibid.*) "[T]he relief sought by petitioners . . . was the *enforcement* of 'the regulation that is on the books' and not the establishment of a new safety order." (*Ibid;* fn. omitted, italics added.) It asked for a factual determination that the short-handled hoe was unsafe as that term was used in an existing regulation.

Similarly, there was no quasi-adjudication in *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, at pages 25-28, also relied upon by *Tidewater*. In *Aguilar* employees sought review of a municipal court judgment which denied them the recovery of unpaid wages after the Department of Industrial Relations, Division of Labor Standards Enforcement, denied their claims.

Carmona says the interpretation of the existing language of a statute or regulation in the course of its enforcement does not come within the purview of the APA. *Tidewater* holds that the interpretation of the existing language of a statute or regulation by means of a written policy of enforcement does come within the purview of the APA.[17] The distinction lies in the

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[17] *Tidewater* disagrees with *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 252-253, and *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968,

difference between a rule adopted by an agency and its application. As noted above, a regulation requires a formal action of some kind by the agency to promulgate a standard of general application "to implement, interpret, or make specific the law enforced by it . . . or to govern its procedure." (See the cases cited by *Tidewater*: *Ligon v. State Personnel Bd.* (1981) 123 Cal.App.3d 583 [memorandum of policy for treating out-of-class assignments]; *People v. French* (1978) 77 Cal.App.3d 511, 519 [checklist for use in administering intoxilyzer test]; *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 501 [informational bulletin defining terms and creating rebuttable presumption].)[18]

This case is analogous to *Carmona*. In carrying out the mandate of section 25205.6 in sending the SIC codes to the SBE,

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978-979, which held the enforcement of an existing regulation was not a regulation, because in each case the interpretation was promulgated as a written policy.

[18] In one case a nonwritten policy was held to be a regulation because it covered a circumstance not addressed by an existing statute or regulation and did not involve an interpretation. (See, e.g., *Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114 [policy of choosing most closely related classification for determining prevailing wages not addressed in the statute or regulations].)

Tidewater apparently miscited as policies held to be regulations, *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 375, [contractual pooling procedure for the allocation of tax revenues "is not a regulation"], and *Faulkner v. Cal. Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324, [resolutions of toll bridge authority approving construction of bridge are not of general application and therefore are not regulations].)

the DTSC did no more than apply the section to carry out its obligation under the statute. Its action was specific to the task imposed. Although the DTSC determination to send the SBE all, instead of some, of the SIC codes rests on the view that hazardous material includes common substances such as computer monitors and fluorescent light bulbs, it did not adopt a written policy that set forth that interpretation. In applying the definition the DTSC assumed that business enterprises in all of the applicable SIC codes in fact used such substances, an assumption which is fully supported by this record.

As noted, a SIC code does not refer to an individual business as such but classifies a business entity by the "type" of economic activity in which the entity is generally engaged. Whether a corporation is within section 25205.6 requires a determination that businesses of that "type" generally use hazardous material.

Nonetheless, Morning Star claims the DTSC action violates the APA because the DTSC sent the SBE all of the SIC codes referred to by section 25205.6, rather than some. It believes the mere breadth of the DTSC decision is what makes it a regulation. That is not the case.

Whether one or more of the SIC codes is sent to the SBE by the DTSC, the decision is the same - whether the type of business activity referred to by the code in fact involves the generation, use or storage of hazardous material. The DTSC's view that all modern business activities involve the use,

generation or storage of hazardous material simply involves a factual application of section 25205.6 to the activities of modern business establishments.[19]

III
The Hazardous Material Fee
Is A Tax Imposed to Raise Revenue

Morning Star's equal protection and substantive due process claims are predicated on the view the fees Morning Star was charged were invalid regulatory fees because it was not permitted to show the fee was not reasonably related to the regulatory purposes of the act. We disagree.

Morning Star relies on cases which distinguish between taxes and regulatory fees for the purpose of determining whether a fee exacted by a County, City or Special District required a two-thirds vote of the electorate pursuant to Article XIIIA of the California Constitution.[20] That, of course, is not the issue

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[19] The argument that a knowledgeable Legislature would have said more simply that all corporations are subject to a hazardous material fee is belied by the legislative record. As noted above, the Legislature was informed as early as 1994, in the course of its adoption of the exception for nonprofit residential corporations in section 25205.6, subdivision (g), that common substances, such as fluorescent light bulbs, are within the definition of hazardous material. The Legislature frequently has been told that section 25205.6 applied to all corporations. (See also, Sen. Com. on Environmental Quality, Rep. on Sen. Bill No. 660 (1997-1998 Reg. Sess.) September 10, 1997; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 2240 (1997-1998 Reg. Sess.).)

[20] Morning Star, for example, cites to *Pennell v. City of San Jose* (1986) 42 Cal.3d 365. But *Pennell* concerned whether fees exacted under a local rent control ordinance were regulatory

in this case. A local entity is not involved and, in any event, there is no dispute that the hazardous material act was passed by a two-thirds vote of the Legislature.

Nevertheless, we turn to those cases to determine the definitional question whether the assessment is a fee or a tax and conclude that it is a tax. Regulatory fees are imposed under the state's police power rather than its taxing power, and must bear a reasonable relationship to the fee payer's burdens on or benefits from the regulatory activity. (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874-878.) A tax, on the other hand, may be imposed upon a class that may enjoy no direct benefit from its expenditure and is not directly responsible for the condition to be remedied. (*Carmichael v. Southern Coal Co.* (1937) 301 U.S. 495, 521-522 [81 L.Ed. 1245, 1260-1261]; *Leslie's Pool Mart, Inc. v. Department of Food and Agriculture* (1990) 223 Cal.App.3d 1524, 1543.)

The assessments imposed by section 25205.6 are taxes "if revenue is the primary purpose, and regulation is merely incidental . . . ." (*Sinclair Paint Co., supra,* 15 Cal.4th at p. 880.) Fees on the other hand, are "'"charged in connection

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fees and therefore not a special tax subject to the two-thirds vote requirement imposed on municipal corporations by Proposition 13. The case does not concern the relationship of a regulatory fee to substantive due process. (See also *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264.) "Special taxes must be distinguished from regulatory fees imposed under the police power, which are not subject to the constitutional provision." (*Id.* at p. 281.)

with regulatory activities . . . [and] do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes." [Citations.]'" (*Id.* at p. 876, quoting *Pennell v. City of San Jose, supra,* 42 Cal.3d at p. 375, which quotes *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659-660.)

In *Sinclair Paint Co.*, the court concluded that an assessment imposed pursuant to the Childhood Lead Poisoning Prevention Act of 1991 on manufacturers and other persons whose industry or products contributed to environmental lead contamination, were regulatory fees imposed under the state's police power. (15 Cal.4th at p. 875.) In so holding, the court considered a number of factors. Under the Act, the prevention program was supported entirely by the fees collected under the act, the fees were imposed to mitigate the actual and anticipated adverse effects of the fee payers' operations, and the amount of the fees were required to bear a reasonable relationship to those adverse effects. (*Id.* at p. 876.) Persons able to show that their industry did not contribute to the contamination or that their product did not result in quantifiable contamination were exempt from paying the fees. (*Id.* at p. 871.) "Moreover, imposition of 'mitigating effects' fees in a substantial amount (Sinclair allegedly paid $97,825.26 in 1991) also 'regulates' future conduct by deterring further manufacture, distribution, or sale of dangerous products, and by

stimulating research and development efforts to produce safer or alternative products." (*Id.* at p. 877.)

By contrast, section 25205.6, subdivision (f) makes plain the purpose of the assessment is to raise sufficient revenues to fund the purposes of subdivision (b) of section 25173.6 as well as to fulfill the state's federal obligation under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 "to pay specified costs of removal and remedial actions carried out pursuant to" the federal Act. Section 25173.6, subdivision (b) authorizes the appropriation of funds for a wide range of remedial purposes unrelated to the activity for which the fee is charged. The amount of the assessment does not bear a reasonable relationship to the adverse effects of the contamination generated by the payer and therefore has no regulatory deterrent effect.

In sum, the purpose of the assessment imposed pursuant to section 25205.6 is to raise revenue to pay for a wide range of governmental services and programs relating to hazardous waste control. It is therefore a tax. The environmental fee charged Morning Star is not regulatory because it does not seek to regulate the use of hazardous material but to raise money for its disposal.

IV

Constitutional Claims

Morning Star claims the assessment under section 25205.6 violates its right to equal protection, substantive and

procedural due process, and to just compensation under the takings clause. Having determined that section 25205.6 imposes a tax, we reject these claims under the deferential standard of review used to assess the constitutionality of a tax.

A. Equal Protection and Substantive Due Process

Morning Star claims the hazardous material tax is unconstitutional because it is not related to ends which are served by the legislation.

"'It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation . . . . [I]nequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation. [Citations.]'" (*Stevens v. Watson* (1971) 16 Cal.App.3d 629, 633, quoting *Carmichael v. Southern Coal & Coke Co.*, *supra,* 301 U.S. at pp. 509-510 [81 L.Ed. at p. 1253].)

The rational basis test is used for both equal protection analysis involving economic legislation (*Swoap v. Sup. Court* (1973) 10 Cal.3d 490, 504; *County of Los Angeles v. Patrick* (1992) 11 Cal.App.4th 1246, 1252) and substantive due process analysis. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 863; *City of San Jose v. Donohue* (1975) 51 Cal.App.3d 40, 45.) We therefore treat the two claims as one. (See *Cohan v. Alvord* (1984) 162 Cal.App.3d 176, 186; *Minnesota v. Clover Leaf*

Creamery Co. (1981) 449 U.S. 456, 470, fn. 12 [66 L.Ed.2d 659, 673.)

Morning Star asserts that imposing the tax only on corporations employing 50 or more persons bears no rational relationship to the goal of placing the costs of disposal on those who create the problem. We disagree.

The legislative choices over the methods to implement its programs are not so limited. The Legislature is given broad power to determine the best methods to carry out its programs. The Legislature need only make statutory classifications that are rationally related to a reasonably conceivable legislative purpose. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 644-651.)

The stated purpose of the hazardous material law is to raise revenue to fund the state's hazardous material and hazardous waste programs. The taxing of corporations with 50 or more employees, as a general measure of the size of the corporation and its use of hazardous material, is manifestly rationally related to that of funding the disposal of hazardous material. A distinction between the taxation of corporations and individuals is broadly permissible.

To impose on the State the task and costs of relating the disposal fee to each corporation by the amount of hazardous material used would eviscerate the program. As with other taxes, the Legislature only generally need relate the subject of the taxes with the purpose to be served. It has done so in this case.

B. Procedural Due Process

"[P]rocedural due process applies when a person's liberty or property interests may be curtailed by an adjudicatory or quasi-adjudicatory action. [Citation.] However, when legislation is enacted, procedural due process does not guarantee the affected person a right to a hearing, even though the legislation may have a severe impact on the person or the person's property." (*California Gillnetters Assoc. v. Dept. of Fish and Game* (1995) 39 Cal.App.4th 1145, 1160.) In the context of a tax levy, procedural due process is satisfied if notice and an opportunity to question the validity or the amount of the tax is provided at some stage in the proceeding. (*Cohan v. Alvord, supra,* 162 Cal.App.3d at p. 185.)

As we have concluded in Part II, the determination at the heart of Morning Star's complaint, that all corporations use hazardous materials, is a factual application of a legislative determination. Thus, Morning Star's entitlement to procedural due process is limited and it has received all the process it is due. It filed a claim for refund with the SBE and participated in an oral appeals conference at which it had a right to an attorney and the opportunity to inform the SBE of any applicable statutory exemption, an overpayment, its corporate status, or the number of its employees. (See Rev. & Tax. Code, §§ 43054 and 43519; Cal. Code Regs., tit. 18, § 5070 et seq.)

C. Takings Clause[21]

The Takings Clause of the Fifth Amendment to the United States Constitution forbids the taking of private property for public use without just compensation. The clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States* (1960) 364 U.S. 40, 49 [4 L.Ed.2d 1554, 1561.) While the takings clause is particularly protective of real property against physical occupation or invasion (*Ehrlich v. City of Culver City, supra,* 12 Cal.4th at p. 875; see also *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419 [73 L.Ed.2d 868]), the imposition of a fee or tax is subject to lesser protection. (See *Ehrlich, supra,* at pp. 876, 881.)

Moreover, the power to tax generally does not violate the takings clause. (See *Penn Cent. Transp. Co. v. New York City* (1978) 438 U.S. 104, 124 [57 L.Ed.2d 631 ["government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example" where the government may adversely affect recognized economic values "without paying for every such change in the

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[21] It is unclear whether Morning Star's takings claim is based upon the California Constitution (Cal. Const., art. I, § 19) or the United States Constitution. (U.S. Const., 5th Amend.) Nevertheless, with an exception not here relevant, the two clauses are construed congruently. (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 664.)

general law."].) A tax does not constitute a Fifth Amendment taking unless it is so "arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property . . . ." (*Brushaber v. Union Pac. R. Co.* (1916) 240 U.S. 1, 24-25 [60 L.Ed. 493, 504].) Indeed, the courts have stated that if a tax does not violate due process, "'"it would be surprising indeed to discover" the challenged statute nonetheless violated the Takings Clause.'" (*Quarty v. United States* (9th Cir. 1999) 170 F.3d 961, 969, quoting *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.* (1993) 508 U.S. 602, 641 [124 L.Ed.2d 539, 576].)

Morning Star cites no cases holding that imposition of a tax is a taking, nor does it contend the tax at issue here is an arbitrary confiscation of property. Accordingly, because we have determined the assessment at issue is a tax that is rationally related to the legitimate purposes of the statute, we reject Morning Star's takings claim.

Disposition

The judgment is affirmed.

BLEASE, J.

We concur:

SCOTLAND, P. J.

DAVIS, J.