No. S123481

IN THE
Supreme Court of the State of California

THE MORNING STAR COMPANY,

Plaintiff/Petitioner,

v.

STATE BOARD OF EQUALIZATION and

DEPARTMENT OF TOXIC SUBSTANCE CONTROL,

Defendants/Respondents.

After Decision by the Court of Appeal Third Appellate District No. C033758
Sacramento County Superior Court No. 98AS03539
The Honorable John R. Lewis, Judge

BRIEF FOR PETITIONER

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ISSUES PRESENTED FOR REVIEW

Section 25205.6 of the California Health & Safety Code imposes a fee for the regulation and remediation of hazardous materials. The fee is imposed only on corporations with 50 or more employees, with rates increasing with the number of employees. The fee is not imposed on any other form of business enterprise, such as partnerships, LLPs, or sole proprietorships, and is not imposed on corporations having fewer than 50 employees. Despite the law's further requirement that the Department of Toxic Substance Control ("DTSC") annually adopt a schedule of the particular types of businesses – using Standard Industrial Classification ("SIC") codes – to which the fee should apply, the DTSC adopted a rule, without inquiry into the nature or involvement with hazardous materials of particular categories of corporations and without following APA procedures, that *all* corporations generated hazardous materials and consequently annually adopts a schedule of SIC codes encompassing

essentially every type of corporation for purposes of applying the fee. The issues presented by this petition are:

1. Whether the DTSC's determination that *all* corporations with 50 or more employees use hazardous materials within the purpose of § 25205.6, and its adoption of a schedule of SIC codes covering all businesses, constitute rules, regulations, or standards of general application subject to the requirements of the APA.

2. Whether the hazardous-materials fee is a "regulatory fee" or a "tax" for purposes of equal protection and due process analysis under the state and federal Constitutions.

3. Whether the hazardous-materials fee, however categorized, violates federal and state equal protection and due process protections where:

> (A) the allocation of the fee among corporations of 50 or more employees has no connection to and is out of all proportion with the nature of the businesses, the magnitude of their use, generation, or disposal of hazardous materials, or the costs they impose on society or the DTSC in connection with hazardous material regulation and remediation; and
>
> (B) the fee discriminates among businesses based on the irrelevant criteria of their number of employees and their corporate or non-corporate form of organization.

Respondents, in their Answer to the Petition for Review, rephrased the issues as follows:

> (1) did DTSC's literal enforcement of the statute violate the requirements of the California [APA]; (2) does the statute – enacted and amended by a two-thirds majority – impose a "regulatory fee" subject to the more stringent requirements of article XIII A of the

California Constitution and resulting case law; and (3) does the tax classification – virtually all corporations employing 50 or more persons – violate constitutional rights to equal protection and due process?

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case involves a challenge to the hazardous-materials fee imposed on certain corporations by California Health & Safety Code § 25205.6, and the rules concerning implementation of that fee adopted by respondents the Department of Toxic Substance Control ("DTSC") and the State Board of Equalization ("SBE").[1] Petitioner paid the hazardous-materials fee under protest, sought and was denied a refund of that fee, and then brought this action claiming that the fee and its implementation by respondents violated the equal protection and due process requirements of the United States and California Constitutions, U.S. CONST., amend. 14; CAL. CONST. art. I §§ 7, 15, art. IV § 16(a), and the California Administrative Procedures Act, CAL. GOV. CODE § 11340, *et seq.* ("APA").

B. PROCEEDINGS BELOW

Morning Star is a California corporation with over 50 employees that leases workers to other companies. In March 1998 it paid under protest a hazardous-material fee to respondent SBE for the years 1993 to 1996. It thereafter filed an administrative claim for a refund, which was denied. In July 1998 Morning Star filed this action in Superior Court for a refund and

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[1] All statutory citations hereinafter will refer to the California Health & Safety Code unless otherwise noted.

for a declaration that respondent DTSC's determination to submit essentially all of the SIC codes to SBE, and hence to subject all corporations with 50 or more employees to the hazardous-materials fee, violated the APA and the due process and equal protection guarantees of the federal and state Constitutions.

After answers to the complaint and discovery, the parties filed cross-motions for summary judgment. In August 1999, The Superior Court denied Morning Star's motion and granted summary judgment for respondents. Morning Star timely appealed.

C. DISPOSITION IN THE COURT OF APPEAL

On February 9, 2004, The Court of Appeal affirmed.

Regarding Morning Star's claim that the DTSC, without complying with the APA, adopted a rule of general applicability that all corporations used hazardous materials and hence that each year it would include all SIC codes in the schedule sent to the SBE for purposes of collecting the hazardous-materials fee, the Court of Appeal held that such a determination was not a "regulation" subject to the APA. It instead concluded that "DTSC did no more than apply [§ 25205.6] to carry out its obligation under the statute" and its determination applicable to all businesses "simply involves a factual application of section 25205.6 to the activities of modern business establishments." Opinion at 20-21 (attached hereto as an Appendix).

The court also rejected Morning Star's claim that the DTSC's indiscriminate inclusion of all SIC codes in the schedule it forwarded to the SBE, and hence its failure to take into account the different natures of the businesses required to pay the fee and the significance (or lack thereof) of

the risk posed by any of the products or materials used by such businesses, unconstitutionally failed to correlate the fee with the hazardous-materials burden imposed by such businesses. The court instead held that the hazardous-materials fee was a "tax" rather than a "regulatory fee," that as a tax it should be evaluated under a more lenient constitutional standard, and that it satisfied such a lenient standard. Opinion at 21-25.

Finally, the court rejected Morning Star's claim that application of the hazardous-materials fee only to corporations with more than 50 employees but not to corporations with fewer employees or to non-corporate business entities regardless of size was irrational and hence unconstitutional. Instead, the court held that the 50-or-more-employees distinction, "as a general measure of the size of the corporation and its use of hazardous material, is manifestly rationally related to [the purpose] of funding the disposal of hazardous material," and, somewhat off point, a "distinction between the taxation of corporations and individuals is broadly permissible." Opinion at 26.

The Court of Appeal decision became final on March 10, 2004, and Morning Star timely filed its Petition for Review in this Court. On April 28, 2004, this Court granted the Petition for Review.

FACTS

Section 25205.6 of the Health and Safety Code establishes a mechanism for imposing fees on a limited group of businesses for the purpose of supporting various regulatory and remedial activities relating to

hazardous materials, including hazardous wastes. That section, as amended,[2] provides in relevant part:

> **§ 25205.6. Identification codes (SIC or NAICS); fee; state payment for removal and remedial action**
>
> (a) On or before November 1 of each year, the [DTSC] shall provide the [SBE] with a schedule of 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 25501, including, but not limited to, hazardous waste. The schedule shall consist of identification codes from one of the following classification systems, as deemed suitable by the department:
>
> (1) The Standard Industrial Classification (SIC) system established by the United States Department of Commerce.
>
> (2) The North American Industry Classification System (NAICS) adopted by the United States Census Bureau.
>
> (b) Each corporation of a type identified in the schedule adopted pursuant to subdivision (a) shall pay an annual fee, which shall be set at two hundred dollars ($200) for those corporations with 50 or more employees, but less than 75 employees, [and progressively increasing to] … nine thousand five hundred dollars ($9,500) for those corporations with 1,000 or more employees.
>
> (c) The fee imposed pursuant to this section shall be paid by each corporation that is identified in the schedule adopted pursuant to subdivision (a) … and shall be deposited in the Toxic Substances Control Account. The revenues shall be available, upon appropriation by the Legislature, for the purposes specified in subdivision (b) of Section 25173.6.

Subsection (f) provides that the fees "are intended to provide sufficient revenues to fund the purposes of [§ 25173.6(b)], including appropriations in

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[2] Although the statute has been amended since the filing of the complaint in this case, those amendments are not material to the issues presented and hence, for convenience, the current rather than the former version of the statute will be used throughout this brief.

any given fiscal year of [$3,300,000] to fund the state's obligation pursuant to" § 104(c)(3) of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9604(c)(3). That subsection also provides a process for the DTSC to recommend, and the Legislature to consider, increases in the fee rates if needed to fund a greater CERCLA obligation. A final subsection (g), added by amendment, expressly exempts from the fee certain nonprofit corporations described by SIC Code 8361, which provide residential care to children, the elderly, and special-needs persons.

The term "hazardous material" used in § 25205.6(a), and defined at § 25501(o), means:

> 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.

The purposes of the hazardous-materials fee is expressly set out in the statute itself – the fee must be used to fund the Toxic Substances Control Account, and may only be used for the hazardous-materials related regulatory and remedial purposes specified in § 25173.6(b). In addition to funding the State's remedial obligations under CERCLA, other purposes for which the funds may be used include activities relating to: the Carpenter-Pressly-Tanner Hazardous Substances Account Act, § 25300, *et seq.*; the California Expedited Remedial Action Reform Act of 1994, § 25396, *et seq.*; the Unified Hazardous Waste and Hazardous Materials Management Regulatory Program, § 25404, *et seq.*; the DTSC's

responsibilities in connection with hazardous materials releases connected with railroad accidents; DTSC's Human and Ecological Risk Division, the Hazardous Materials Laboratory, the Office of Pollution Prevention and Technology Development, and the Office of Environmental Health Hazard Assessment; the purchase of hazardous substance response equipment and preparations; and the payment of hazardous substance remediation and oversight. § 25173.6(b)(1)-(14).

The regulatory and remedial purposes of the fee are confirmed by the legislative history of the law. For example, the legislative analysis of Bill SB 475, from which § 25205.6 derives, describes the purposes of the fee as follows:

> Broadening the base. The established disposal, facility, and generator fees have supported the entire budget for the State's hazardous waste program. *The rationale has always been that the entities which handle hazardous waste and those which are responsible for hazardous substance releases should pay for state efforts to regulate the handling of hazardous waste and to clean up the releases* to protect the general public and the environment.
>
> * * *
>
> This proposal … generally "broadens the base" of funding support for state hazardous waste programs. It does so by fixing the fees at existing levels (allowing them to increase only by the rate of inflation), by establishing a new environmental fee on corporations which conduct activities related to hazardous materials, and by appropriating $10 million from the general fund for the fiscal year 1989-90.

[CT 1051] (Analysis by the Assembly Committee on Environmental Safety and Toxic Materials) (emphasis added).

The Health and Welfare Agency, which was involved in developing the legislation, similarly recognized that the purpose of the fee was to place

a "greater emphasis on cost recovery from responsible parties," and described the Bill as imposing

> a set of fees on *responsible parties* to pay for the cost incurred by the State in performing a variety of clean-up and regulatory oversight activities. … The environmental fee is *to be levied against specific corporations* (by [SIC] codes) which "use, generate, store or conduct activities related to hazardous materials, including hazardous waste."

[CT 1082] (Letter to Gov. Deukmejian, July 13, 1989, urging governor to sign the bill) (emphasis added). The agency continued by noting that "the legislation provides increased incentives for cost recovery activities with a greater share of the program costs borne by responsible parties." *Id*.; *see also* [CT 211] (SBE letter to Morning Star, May 21, 1997) (the fee under § 25205.6 "is an assessment by a regulatory agency to cover the cost of the regulation").

Following the adoption of § 25205.6, the DTSC undertook to "adopt" a schedule of SIC codes as required by subsection (b). But rather than engage in the analysis of SIC business categories plainly contemplated by the statute, DTSC took the lazy way out and, ignoring APA procedures, determined that *all* businesses, regardless of their type or operations, used, generated, stored, or conducted activities related to hazardous materials. It construed the definition of hazardous materials as "broad enough to include many materials commonly found in the workplace," including "ink, toner, fluid, heavy metals on circuit boards inside computers, cleaning substances, mercury and polychlorinated biphenyl's ballasts in fluorescent light bulbs," as well as "lead batteries, oil, and fuel" associated with motor vehicles used by most businesses "to receive or deliver goods and services." [CT 210-11]. Given that sweeping construction of hazardous materials, and notwithstanding the wild discrepancies among businesses regarding the

types and extent of supposedly hazardous materials used, the DTSC has each year adopted and forwarded to the SBE a schedule containing virtually all of the SIC codes for use in applying the environmental fee.[3]

Notwithstanding the DTSC's indiscriminate inclusion of all SIC codes in the schedule to be applied for corporations with 50 or more employees, those companies required to pay the fee still constitute only 5% of all business entities in California. [CT 1187] (DTSC Task Force Report, Jan. 1997) (24,000 corporations, constituting 5% of all businesses, paid the 1994 environmental fee).

Morning Star is a California corporation that employs people to provide full-time and seasonal labor in the agricultural field by leasing those employees to other companies in the processed tomato business. Morning Star's own activities consist only of standard office functions involved in coordinating such leasing arrangements. [CT 242] It operates from a modest office having eight administrative employees using no more than the ordinary accoutrements of such an office, including telephones, computers, printers and fax machines, lights, pens, a microwave, and a refrigerator. [CT 241-42] Morning Star, however, does not use a materially greater amount of such mundane office products than any other business entity, including business entities with fewer than 50 employees and business entities organized in a non-corporate form. And it "uses" orders of magnitude less of any supposedly hazardous materials than business entities involved in manufacturing, selling, or otherwise handling

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[3] The only exceptions to the SIC schedule are for nonprofit corporations providing certain types of residential care, excluded by statute as described *supra* at 6, and for private households (SIC Code 88), which are not corporations. [CT 29]

goods such as batteries, light bulbs, medical supplies, computers, and automobiles. Morning Star has nothing whatsoever to do with hazardous wastes or hazardous materials as those terms are reasonably understood.

Despite those undisputed facts, Morning Star was assessed, and paid under protest, the hazardous materials fee. [CT 226] Following payment of the fee, Morning Star promptly filed an administrative claim for a refund. That claim was rejected. [CT 209, 237] According to the DTSC, even the mundane office supplies used by Morning Star constitute hazardous materials within the definition of the statute, and consequently Morning Star, as well as every other business in California, "uses" hazardous materials within the meaning of § 25205.6. [CT 210-11]

ARGUMENT

By adopting, in a summary and unreviewed fashion, the interpretation that even the most mundane items constitute hazardous materials, that *all* corporations with 50 or more employees, regardless of the nature of their operations, use such materials, and hence that all must pay the hazardous-materials fee, the DTSC has excised the last remaining glimmer of sense from a statute that was already grossly and irrationally under-inclusive. The combination of a wildly over-inclusive interpretation applied within such an under-inclusive statute not only lacks any reasonably conceivable connection to the statutory purpose of tying the support for hazardous-materials programs to those responsible for such materials (with the attendant equitable and regulatory goals implied therein), it actually undermines the *statutory* goal. It does so by destroying any incentive to act responsibly with regard to hazardous-materials use. That such a bizarre application of an already questionable statutory scheme occurred without even the minimum procedural protections of the APA

simply heightens the offense. Had the DTSC followed proper procedures and received the input required by the APA, perhaps it could have avoided compounding the statute's existing problems. Instead, having taken the quick and easy way out, it added yet another layer of irrationality to the statute and made the statutory classifications themselves even less sensible than they were to begin with.

This Court should reverse the decision of the Court of Appeal and find that the DTSC's interpretation of § 25205.6 constituted a regulation subject to, but not issued in compliance with, the APA and that the classifications in both the DTSC's interpretation and in the statute itself violate due process and equal protection.

I. THE DTSC'S DETERMINATIONS REGARDING THE SCOPE OF HAZARDOUS MATERIALS AND THE SCHEDULE OF COMPANY TYPES THAT USE SUCH MATERIALS WERE "REGULATIONS" SUBJECT TO THE APA.

One of the primary functions of administrative agencies is to investigate and set standards in complex areas of the law at a level of detail that the Legislature has neither the capacity nor the expertise to address.

> "[L]egislative bodies have neither the resources nor the expertise to deal adequately with every minor question potentially within their jurisdiction. 'Even a casual observer of governmental growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs …. [F]rom necessity, if for no better grounded reason, it has become increasingly imperative that many Quasi legislative and Quasi judicial functions … are intrusted to departments, boards, commissions, and agents."

Kugler v. *Yokum* (1968) 69 Cal.2d 371, 383, 71 Cal. Reptr. 687. Subject to broad goals and criteria established by the Legislature, agencies are

expected and required to add the necessary detail to allow laws to operate rationally in the real world.[4] Given such quasi-legislative functions by agencies, however, the Legislature has imposed, through the APA, GOV'T CODE §§ 11340 *et seq.*, a set of procedural requirements to ensure that such administrative conduct in fact involves the appropriate detailed inquiry and the rational conclusions and results expected.[5] Far more than a set of mere technicalities, the APA stands as the primary assurance that agencies delegated a portion of legislative authority reach their decisions and impose their standards consistent with the goals and limitations of the relevant legislation, thus maintaining legislative supremacy and a healthy separation of powers. It also provides a valuable means of public input into the regulatory process and hence some "security against bureaucratic tyranny." *Tidewater Marine Western, Inc.* v. *Bradshaw* (1996) 14 Cal.4th 557, 569, 59 Cal. Rptr.2d 186.

When agencies adopt "regulations," the APA imposes a series of requirements involving public notice, an explanation of the proposed action, public comment and the possibility of a hearing, and review by the Office of Administrative Law. GOV'T CODE §§ 11343, 11346.4, 11346.5,

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[4] *See also Mistretta* v. *United States* (1989) 488 U.S. 361, 372 ("in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives"); *Opp Cotton Mills, Inc.* v. *Administrator, Wage and Hour Div. of Dept. of Labor* (1941) 312 U.S. 126, 145 ("In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy").

[5] *Cf. Nightlife Partners, Ltd.* v. *City of Beverly Hills* (2003) 108 Cal. App.4th 81, 91, 133 Cal. Rptr.2d 234 ("provisions of the APA are helpful as indicating what the Legislature believes are the elements of a fair and

11346.7, 11346.8(a), 11346.14, 11346.53, 11346.55. The APA also provides for judicial review of an agency's adoption of a regulation, with the requirement that the agency action be supported by substantial evidence. GOV'T CODE § 11350.

The "regulations" subject to such procedures are broadly defined as "every rule, regulation, order, or standard of general application" by any state agency "to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." GOV'T CODE § 11342.600; *Grier* v. *Kizer* (1990) 219 Cal. App.3d 422, 438, 440, 268 Cal. Rptr. 244. The APA provides further substance to the term "regulation" in provisions addressing the validity of "regulations to implement, interpret, makes specific *or otherwise carry out* the provisions of" a statute, GOV'T CODE § 11342.2 (emphasis added), and setting forth the purpose of the APA as being "to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations," which are contextually described as including, but not limited to, "the exercise of any quasi-legislative power conferred by any statute." GOV'T CODE § 11346. No state agency may "issue, utilize, enforce, or attempt to enforce … a regulation" without complying with the APA's requirements. GOV'T CODE § 11340.5(a).

In *Tidewater*, this Court set out a basic two-part test for determining when agency action constitutes a regulation for APA purposes:

> First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a

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carefully thought out system of procedure" in the context of a due process challenge to administrative hearings not subject to the APA).

> certain class of cases will be decided. …. Second, the rule must "implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure."

14 Cal.4th 557, 571, 59 Cal. Rptr.2d 186 (citations omitted). Under that simple test, the DTSC's broad interpretation of what constitute hazardous materials, its general determination that *all* businesses use hazardous materials, and its annual adoption of a schedule of SIC codes for general application to California corporations constitute regulations, *i.e.*, "standards of general application" adopted to implement, interpret and make specific the requirements of § 25205.6.

That the DTSC's determinations are intended to apply generally can be seen in the fact that a company's inclusion in a listed SIC code is dispositive of the issue of whether that company, or that class of companies, "uses" hazardous materials. As the Court of Appeal recognized, 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." Opinion at 12. There is no opportunity to raise an individualized challenge based on the nature of the company itself or even the nature of the category of companies encompassed by a particular SIC code. *See* Opinion at 12 (rejecting procedural due process challenge because Morning Star had no right to an adjudication regarding hazardous-materials use). The DTSC's decision to list essentially all SIC codes thus "declares how a certain class of cases will be decided," governs all potential challenges by any corporation within the listed codes, and is not limited to any specific case. *Tidewater*, 14 Cal.4th at

571, 59 Cal. Rptr.2d 186. [6] Whether a company is thus of a type that uses hazardous materials is not, and cannot be, the subject of an adjudication because it is predetermined by the DTSC's regulatory decision. The all-inclusive schedule of SIC codes and the determinations used to support it thus declare how numerous classes of cases will be decided and constitute rules of general application satisfying the first element of the *Tidewater* test for a regulation.

The schedule of SIC codes and the administrative determinations embodied therein likewise satisfy the second element of the *Tidewater* test in that they "implement, interpret, or make specific the law enforced or administered by" respondents. The scheduling of all SIC codes reflects two essential determinations by the DTSC: First, that the various and sundry materials found in standard consumer and business products constitute "hazardous materials" within the scope of the statue; and second, that all businesses therefore "use" hazardous materials within the meaning of the statute.

Both of those determinations certainly "implement" the far more general standards contained in § 25205.6 and the incorporated definition of hazardous materials from § 25501. They likewise "interpret" and "make specific" what constitute hazardous materials in the first place, necessarily deciding (without a cogent explanation or record) that even the *de minimis* quantities of substances found in light bulbs, computers, and other office

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[6] Other Courts of Appeal likewise have recognized the straight-forward notion of what it means for an agency determination to be of "general application" and hence a regulation subject to the APA. *See, e.g.*, *California Advocates for Nursing Home Reform* v. *Bonta* (2003) 106 Cal. App.4th 498, 130 Cal. Rptr.2d 823 (finding numerous policies interpreting or implementing statutes and regulations to be regulations).

products pose a "significant present or potential hazard to human health and safety," § 25501(o), despite their minimal quantities and concentrations, and despite their physical and chemical characteristics of being encapsulated in other products such that they pose little or no danger even if "released" into the workplace or the environment.

Similarly, the determination that a business using ordinary consumer or office products as a whole in the precise same way as any other consumer is thus "using" the supposedly hazardous materials themselves is far from self-evident from the text of the statute. While the manufacturer that creates such products or equipment may well "use" hazardous materials incorporated therein, it does not inevitably follow that the ultimate consumers of the final product likewise "use" any such hazardous materials. *Cf. Bailey* v. *United States* (1995) 516 U.S. 137, 145, 147-48 (discussing meaning of word "use" in connection with firearms, noting that it depends on context, and holding that "use" requires active employment). The U.S. Occupational Health and Safety Administration ("OSHA"), for example, in interpreting a rule requiring employers to communicate information regarding hazardous substances in the workplace provides an exemption for "consumer products when used as a consumer would use them … in a manner comparable to normal conditions of consumer use." OSHA, Hazard Communication, Final Rule, 52 Fed. Reg. 31852, 31862 (Aug. 24, 1987); *see also* 29 CFR § 1910.1200(b)(6)(v) & (c) (exemption for and definition of "Article" as manufactured end products which under normal conditions of use does not release more than very small quantities, e.g., minute or trace amounts of a hazardous chemical … and does not pose a physical hazard or health risk to employees"). Such a sensibly limited construction of what it means to use hazardous materials is likewise well within the parameters of § 25205.6. In selecting instead an expansive

construction of the "use" of hazardous materials, the DTSC thus interpreted and made specific a statute that could just as readily been interpreted otherwise. Such a quasi-legislative interpretation, embodied, *inter alia*, in the all-inclusive schedule of SIC codes, is a regulation subject to the APA.

Notwithstanding the seemingly plain application of the APA to the actions of the DTSC, the Court of Appeal rejected Morning Star's APA claim and held that the DTSC's determination was not a "rule, regulation, or standard of general application" subject to the APA. Instead it concluded that "DTSC did no more than apply [§ 25205.6] to carry out its obligation under the statute. … 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." Opinion at 20-21.

Both the reasoning and the result from the Court of Appeal are erroneous and should be reversed.

First, the court's novel standard that an agency determination could not be a regulation when the agency is "carry[ing] out its obligation under the statute," Opinion at 20, makes absolutely no sense. Every administrative agency promulgating rules, regulations, or standards acts in fulfillment of a statutory directive. Indeed, if the DTSC were *not* acting pursuant to statutory guidance, it would be exercising unlawfully delegated powers. *Kugler*, 69 Cal.2d at 375-76, 71 Cal. Reptr. 687. By treating compliance with any statutory duties as a mere *ministerial* act in a case like this, the Court of Appeal turned administrative law on its head. Under the court's standard, so long as an agency is fulfilling its statutory directive, regardless of how much discretion or quasi-legislative authority that directive delegates, it can defend any non-compliance with the APA on the

absurd ground that it was merely doing what was required of it by statute. Such a meaningless standard ignores the very nature of most statutory directives to agencies.

What is important is not that the agency has been directed to do *something* by the Legislature, but rather whether it has been asked to exercise "quasi-legislative" judgment *within* the statutory bounds and does so by making determinations that will apply to multiple parties, *i.e.*, with a standard of general application. That is precisely what the DTSC did in connection with the hazardous-materials fee. The agency has rendered decisions regarding both the nature of hazardous materials and their use and the selection of SIC codes that applied to *all* corporations of 50 or more employees. Each year those determinations are embodied in the formal schedule of SIC codes "adopted" by the DTSC and forwarded to the SBE. The agency has thus adopted regulations subject to the APA.

Second, respondents, in their Answer to the Petition for Review, at 4-5, have attempted a strategic retreat from the Court of Appeal's standard by suggesting that § 25205.6 left them no discretion whatsoever and that their only lawful option was to issue an all-inclusive schedule of SIC codes. While the absence of discretion did not form the basis for the decision below, the APA itself does contain an exception to its rule-making procedures for a "regulation that embodies the only legally tenable interpretation of a provision of law." CAL. GOV'T CODE § 11340.9(f). The court below, however, made no finding that the DTSC's current interpretation was the *only* permissible interpretation of the law and the facts, and respondents do not come anywhere close to satisfying such exception.

The notion that § 25205.6 requires, as a matter of law, that the DTSC schedule essentially *all* SIC codes is amply belied by the statute. For example, the statute requires the DTSC to create and forward to the SBE "a schedule of codes, that consists of the types of corporations that use, generate, store, or conduct activities in this state related to hazardous materials." § 25205.6(a); *see also* § 25205.6(b) (applying fee to "[e]ach corporation *of a type identified in the schedule adopted* pursuant to subdivision (a)") (emphasis added). Both the language and the grammar of that requirement leave no doubt that the Legislature understood and intended that less than *all* corporations used hazardous materials and tasked the DTSC with *distinguishing* among corporations according to industrial classification. Such intent is reflected in the phrase "the types of corporations that use" hazardous materials, which necessarily implies that some "types" of corporations do *not* use such materials.[7]

Similarly, the statutory requirement that the DTSC repeat the process "each year" makes plain that the Legislature expected the schedule to change over time, as different SIC codes were included or excluded

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[7] The language "corporations that use" hazardous materials is a restrictive or defining phrase isolating a *subset* of all corporations, not merely a descriptive phrase applicable to all corporations. Compare the sentence "You can borrow the bicycle *that* is out front," which defines which bicycle may be borrowed and distinguishes it from other possible bicycles, with the sentence "You can borrow the bicycle, *which* is out front," which merely describes the location of the bicycle, the identity of which is already understood. The Legislature having thus enumerated a subset of corporations that can be included on the SIC schedule necessarily implied the existence of a subset of corporations that would be *excluded* from the schedule. *See United States* v. *Lopez* (1995) 514 U.S. 549, 553 (noting that even for broadly enumerated powers, the "'enumeration presupposes something not enumerated'") (quoting *Gibbons* v. *Ogden* (1824) 9 U.S. (Wheat.) 1, 195).

according to changes in industry use of hazardous materials. The entirety of § 25205.6(a) simply makes no sense, and would be rendered a nullity, under the DTSC's interpretation that it has no discretion. Had that been the Legislature's intent, it would simply have said that the fee would be imposed on *all* corporations, without the need for meaningless intervening steps by the DTSC. The DTSC's nullifying construction of the actual language thus violates the fundamental principle of statutory interpretation that all words in a statute should be given meaning. *Grogan-Beall* v. *Ferdinand Roten Galleries, Inc.* (1982) 133 Cal. App.3d 969, 979, 184 Cal. Rptr. 411 ("Interpretive constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided.")

The definition of hazardous materials likewise affords the DTSC considerable room for discretion and judgment. For example, § 25501(o) defines a hazardous material as one 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." Surely the determination of what constitutes a "significant" hazard, and what circumstances present *de minimis* potential risks, calls for the exercise of quasi-legislative judgment and administrative expertise, which is precisely why the DTSC was inserted into the process at all. *See also id*. (including materials for which the 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 ") (emphasis added).[8] Had the legislature indeed made the unyielding determination that

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[8] DTSC's wildly overbroad reading of the definition of hazardous materials as *necessarily* including even *de minimis* quantities of mundane products makes no sense and would ultimately define essentially every substance in the world as a "hazardous material." Indeed, considered without any

every business uses hazardous substances sufficient to subject them to the fee, there would have been no need whatsoever even to refer to the definition of hazardous materials or to ask the DTSC to determine which companies use such materials.[9]

The legislative history of § 25205.6 confirms the discretion given by the plain language of the statute. For example, the Health and Welfare Agency noted that the fee "is to be levied against *specific* corporations (by [SIC] codes)," rather than against *all* corporations. [CT 1082] (emphasis added). Likewise, the repeated references to imposing the fee on "responsible" parties in the legislative analysis of the bill, *see supra* at 8-9, confirm that the Legislature intended the fee to be tailored to some reasonable determination about which companies indeed bore such responsibility and which did not. There is no point in targeting such responsibility if the Legislature had already preemptively determined, as the DTSC claims, that every conceivable human activity uses hazardous materials and hence *everyone* is responsible.

Elementary principles of statutory interpretation thus demonstrate the Legislature's intent that the DTSC would exercise quasi-legislative

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judgment regarding the significance of the risk, even ordinary *water* constitutes a hazardous material. Such an absurdly broad reading renders the definition meaningless. That "hazardous materials" was defined at all suggests that there must be some materials that are *not* hazardous.

[9] It is precisely because adopting a schedule of SIC codes involves complex issues that it was delegated to the DTSC. And the resolution of such issues necessarily calls for the developed record and explanation that comes from compliance with APA procedure and the ensuing judicial review under a substantial evidence standard. Gov't Code § 11350. The Court of Appeal's casual affirmation of the DTSC's substantive determinations regarding hazardous materials and the inclusion of all SIC codes was made without such a record and according to no recognizable standard of evidence.

judgment, both in the application of the hazardous-materials definition and in the scheduling of SIC codes.[10] Once the agency's discretion is recognized, the remainder of the APA analysis is essentially unassailable. Given the plain expectation that the DTSC would exercise quasi-legislative judgment in the performance of its duties, DTSC's determinations regarding which SIC codes to include in the schedule constitute regulations subject to, but that have failed to comply with, the APA.

Third, the Court of Appeal's conclusion that DTSC's determinations "simply involve[] a factual application of section 25205.6 to the activities of modern business establishments," Opinion at 21, not only ignores the quasi-legislative discretion delegated the DTSC in selecting SIC codes for inclusion on the schedule, but also ignores clear case law holding that the application of statutory principles to the facts on the ground, when done in a manner that will have general application, still constitutes the adoption of a regulation. *20th Century Ins. Co.* v *Garamendi*, (1994) 8 Cal.4th 216, 278-79, 32 Cal. Rptr.2d 807. In excluding "factual application" from its definition of regulatory action, the Court of Appeal perhaps assumed – without the benefit of an administrative record – that there was only one conceivable factual conclusion that could be reached. But that assumption

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[10] Respondents' claim that the Legislature did not intend the DTSC to "waste its time and millions of taxpayer dollars in pointless public hearings," Answer to Petition for Review at 5, merely displays contempt for APA proceedings, exaggeration of the costs of DTSC's doing its job, and a misunderstanding of the proper purposes to which its time should be devoted. What the Legislature surely did not intend was for the DTSC to perform the pointless role of a *scribe*, copying over a predetermined list of SIC codes and mailing it to the SBE. *That* would indeed have been a waste of the vaunted expertise of an administrative agency.

is simply false and would seem to obviate the need for having delegated the task to an administrative agency in the first place.

Such determinations of administrative, rather than adjudicative, facts "implement" and "carry out" a statutory scheme just as surely as do broadly applicable legal or policy determinations. And the DTSC's determinations make "more specific" the general guidance provided by the Legislature as to the nature of hazardous materials and the general absence of guidance regarding what constitutes the use of such materials. Because any factual determinations embodied in the interpretation or implementation of the statute were made controlling on all businesses within the *categories* of the SIC codes, and indeed to the entire class of "business establishments" in general, they are of general application and hence regulatory in nature.

Fourth, the failure to follow APA requirements in this case is particularly troubling given that the DTSC seems to have ignored the requirements and the purposes of the statute, and any sensible notion of economics, in reaching its sweeping conclusions. As noted above, *supra* at 7-9, the purpose of the law was to spread the regulatory and remedial burden to those "responsible" for hazardous waste releases and cleanup obligations. Such a straight-forward "you break it, you buy it" approach serves both the equitable function of allocating administrative and remedial costs to those who impose such costs, and the regulatory function of discouraging businesses from "breaking it," *i.e.*, from using hazardous materials.

The statute's requirement that the DTSC *select* from among the panoply of SIC codes when creating its schedule, and include the codes for *specific types* of corporations, likewise strongly suggests that the Legislature intended some reasoned distinctions to be drawn among

businesses *potentially* covered by § 25205.6 and that such distinctions further the statute's purposes of more accurately apportioning responsibility. But, having lumped all businesses into a single category unrelated to differences in business types, the DTSC has rendered meaningless the use of SIC codes as contemplated by the statute and undermined the intended connection between responsibility for the problem and support for the solution.

Those and similar issues are precisely the type of matters that would have been aired and explored under the required APA procedures, but which were overlooked and immunized from review when the DTSC took the lazy way out and refused to take a hard look at the task it was given. Such short-circuiting of the very analysis directed by the Legislature is the inevitable consequence of ignoring the APA's safeguards for administrative conduct and smacks of the "bureaucratic tyranny" the APA was designed to deter. *Tidewater*, 14 Cal.4th at 569, 59 Cal. Rptr.2d 186.

The complex issues involved in selecting a schedule of SIC codes fairly scream for the developed record and explanation that comes from compliance with APA procedure and the ensuing judicial review. Given the thousands of corporations now subject to the hazardous-materials fee, and the substantial proportion of them, including Morning Star itself, that have at best a tenuous and *de minimis* connection to the problems created by genuinely hazardous materials, it is especially important that the DTSC's decisions regarding the SIC schedule be made in a manner compliant with the APA. The Court of Appeal's holding that the APA did not apply in this case should be reversed.

II. THE HAZARDOUS-MATERIALS FEE IS A REGULATORY FEE, NOT A TAX.

As a precursor to its constitutional analysis, the Court of Appeal held that the hazardous-waste fee at issue in this case was a "tax" and that while regulatory fees under the State's police power "must bear a reasonable relationship to the fee payer's burdens on or benefits from the regulatory activity," a tax 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." Opinion at 22. It subsequently used its characterization of the fee as a "tax" to minimize the degree of constitutional scrutiny it applied. Opinion at 25 ("Having determined that section 25205.6 imposes a tax, we reject [Morning Star's constitutional] claims under the deferential standard of review used to assess the constitutionality of a tax.").

In considering how to characterize the exaction at issue in this case, it is helpful to keep in mind the salutary purposes of rational basis scrutiny under equal protection and due process. As this Court recognized in *Hayes* v. *Wood* (1979) 25 Cal.3d 772, 786-87, 160 Cal. Rptr. 102, the "constitutional bedrock" and animating purpose of equal protection's requirement for a rational relationship "have never found clearer expression than the words of Justice Robert Jackson":

> "I regard it as a salutary doctrine" Justice Jackson stated, "that cities, states and the federal government must exercise their power so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a

> few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

Id. at 786-87 (quoting *Railway Express Agency* v. *New York* (1949) 336 U.S. 106, 112-13 (Jackson, J., concurring)). In fulfillment of that purpose, federal and California equal protection jurisprudence require that "at a minimum, 'persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'" *Brown* v. *Merlo* (1973) 8 Cal.3d 855, 861, 106 Cal. Rptr. 388.

> As the United States Supreme Court recently phrased the federal constitutional standard: "The Equal Protection Clause ... den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. *A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike*.'"

Id. (citations omitted) (emphasis added by this Court). Substantive due process likewise requires a "'reasonable relation to a proper legislative purpose.'" *Kavanau* v. *Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 771, 66 Cal. Rptr.2d 672 (citations omitted).

While there are cases suggesting some additional leniency with regard to tax classifications, *see* Opinion at 25, to the extent that those cases make sense, they would have to turn on some unique aspect of the taxing power as distinct from the police power. One possibility is that where the primary or only purpose of an exaction is to raise general and unrestricted revenues to fund the multiplicity of government operations, the "legislative purpose" cannot be narrowed to any particular goal but rather encompasses

all of the goals of government, and hence what a classification must relate to is very broad indeed. Exercises of the police power, by contrast, are used to accomplish specific policy goals and thus the purposes of the law can be identified and narrowed more readily and improper discrimination more readily identified. Exercises of the police power likewise can pose a greater and more immediate threat to the interests or liberties of citizens than broad-based taxes, and hence they also raise a more pressing need to be scrutinized for the arbitrary application of state power.[11] Those principles drive the need to carefully distinguish between regulatory fees and taxes to the extent differential constitutional scrutiny is to be applied.

The issue whether a particular exaction is a "tax" or a "regulatory fee" most often arises in cases under Article XIII A of the California Constitution, requiring that tax increases be adopted by a 2/3s super-majority. As the parties and the court below recognized, the cases distinguishing between taxes and fees for Article XIII A purposes are instructive for the proper classification of the fee in this case. Indeed, given the similar need in both contexts to distinguish between government

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[11] Even where certain exactions might be called "taxes," petitioner disputes the propriety of affording them the more lenient approach taken by some cases. Such reduced scrutiny would be particularly inappropriate for "taxes" that nonetheless sought to use their classifications to accomplish substantive policy goals or, as in this case, where the funds are earmarked for a specific set of programs rather than to provide for the government's general revenue. Such so-called taxes have the same essential qualities as many other exercises of the police power, and may be even more invidious because they may be more difficult for the public to monitor. While it is one thing to take a more flexible approach where the *only* purpose of a tax is to raise general revenue, where tax classifications are used as a substitute for the police power, this Court can and should be more diligent in ensuring that the classification is rationally related to the narrower policy goals being advanced.

revenue-generating efforts and exercises of the police power, cases under Article XIII A are quite appropriate benchmarks to use in this case.

The leading case regarding the tax/fee distinction is *Sinclair Paint Co.* v. *State Bd. Equalization* (1997) 15 Cal.4th 866, 64 Cal. Rptr.2d 447, in which this Court considered a fee imposed on manufacturers and others contributing to environmental lead contamination, and used for evaluation, screening and medical follow-up of children with potential lead poisoning.

In *Sinclair*, this Court considered whether the fee at issue fell within the "recognized category" of non-tax exactions constituting "*regulatory fees* imposed under the police power, rather than the taxing power." 15 Cal.4th at 875, 64 Cal. Rptr.2d 447 (emphasis in original). This Court set forth the criteria for identifying regulatory fees, stating that such fees are those "[1] charged in connection with regulatory activities [2] which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [3] which are not levied for unrelated revenue purposes." *Id*. at 876, 64 Cal. Rptr.2d 447 (citations and quotation marks omitted)). "[W]hether impositions are 'taxes' or 'fees' is a question of law for the appellate courts to decide on independent review of the facts." *Id*. at 874, 64 Cal. Rptr.2d 447.

Applying those criteria, this Court held that the statute at issue "imposes bona fide regulatory fees." *Id*. at 877, 64 Cal. Rptr.2d 447.

> [The statute] requires manufacturers and other persons whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating the adverse health effects their products created in the community. Viewed as a "mitigating effects" measure, it is comparable in character to similar police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations.

Id.; *see also id*. (statutes "calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts" are "regulatory" in nature). Rejecting the further argument that the State lacked authority to impose such "industry-wide 'remediation fees,'" this Court also held that "the police power is broad enough to include mandatory remedial measures to mitigate the *past, present, or future* adverse impact of the fee payer's operations, at least where, as here, the measure requires a causal connection or nexus between the product and its adverse effects." *Id*. at 877-78, 64 Cal. Rptr.2d 447 (emphasis in original). This Court thus reversed the grant of summary judgment for the fee-payer, and remanded for further proceedings on the factual elements of the test it had adopted. *Id*. at 881, 64 Cal. Rptr.2d 447. This Court further noted that the fee-payer would also "have the opportunity to try to show that no clear nexus exists between its products and childhood lead poisoning, or that the amount of the fees bore no reasonable relationship to the social or economic 'burdens' its operations generated," thus challenging either the validity under the police power of the law as applied to Sinclair, or establishing Sinclair's entitlement to an exemption. *Id*.

Applying the *Sinclair* criteria to this case, there can be no serious dispute that the hazardous-materials fee is a regulatory fee rather than a tax. The Court of Appeal, however, reached a contrary conclusion. In finding that the hazardous-materials fee was a tax, the court argued that

> 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.

Opinion at 24 (emphasis added). Discussing *Sinclair* and its predecessors, the court further argued that § 25205.6(f) "makes plain the purpose of the assessment is to raise sufficient revenues to fund the purposes of [§ 25173.6(b)] as well as to fulfill the state's federal obligation under" CERCLA and that § 25173.6(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." *Id*.

The approach applied by the court for classifying taxes and regulatory fees does considerable violence not only to the constitutional safeguards of due process and equal protection, but also to the standards for applying, or not applying, the additional constitutional requirements for tax increases.

First, the hazardous-materials fee is charged "in connection with" hazardous materials regulation and remediation, thus satisfying the first element of the *Sinclair* test. This Court in *Sinclair* squarely held that fees imposed on manufacturers and others requiring them to "bear a fair share of the cost of mitigating the adverse health effects their products created in the community" constituted "bona fide regulatory fees," 15 Cal.4th at 877; *see also California Ass'n of Professional Scientists* v. *Department of Fish & Game* (2000) 79 Cal. App.4th 935, 94 Cal. Rptr.2d 535 (applying *Sinclair*). Such burden-bearing by responsible parties for the cost of mitigating the harms from hazardous materials is precisely the purpose of the hazardous-materials fee at issue here.

The Court of Appeal's contrary reasoning, by its own terms and under even a cursory reading of *Sinclair*, is simply incoherent. After noting

that the hazardous-materials fee was imposed in order "to pay for a wide range of governmental services and programs *relating to hazardous waste control*," the court instantly reached the contradictory conclusion that the funds derived from the fee may be spent on a "wide range of remedial purposes *unrelated* to the activity for which the fee is charged." Opinion at 24 (emphasis added). It is difficult to imagine how those two statements can co-exist in the same opinion, much less the same paragraph.

The "activity" for which the hazardous-materials fee is charged is the "use, generat[ion], stor[age], or conduct [of] activities in this state related to hazardous materials." § 25205.6(a). The money is then required to be "deposited in the Toxic Substances Control Account," and may thereafter be used only "for the purposes specified in subdivision (b) of Section 25173.6." § 25205.6(c). As described above, *supra* at 7-8, each and every one of those purposes involves the regulation and remediation of hazardous materials and thus is directly and unequivocally *related* to the use, generation, storage and conduct of activities relating to hazardous materials – *i.e.*, the activities for which the fee was imposed.[12]

Second, the fee does "not exceed the reasonable cost" of the regulation and remediation for which it is charged, and respondents have never contended otherwise. In fact, the statute itself specifies that the fees are intended to provide sufficient funding for the activities detailed therein,

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[12] Indeed, even respondents necessarily have admitted that the sole use of the hazardous materials fee is for the "DTSC to fund hazardous waste and hazardous materials programs." Answer at 2. They have made no attempt to defend the contradictory and erroneous assertion by the court below that the fee is used to fund "a wide range of remedial purposes *unrelated* to the activity for which the fee is charged." Opinion at 24 (emphasis added); *see* Petition at 20-21 (discussing contradictory findings by court below).

and may not be raised except through the Legislature upon a showing of increased need from those programs, and in an amount necessary to fund the State's increased obligations. § 25205.6(f).

Third, the fee is not "levied for *unrelated* revenue purposes." Indeed, the aggregate amount of the fee is tailored precisely to, and may not be used for any purposes other than, the funding of programs for regulating or mitigating the effect of hazardous materials. Insofar as the fee raises revenue in the general sense – as does any fee, by definition – that revenue is not for any *unrelated* purpose, but is used exclusively for the *related* purposes already described.

The legislative history amply confirms the relation between the imposition of the fee and the regulation and remediation of hazardous materials. The legislative analysis of the bill from which § 25205.6 derives was unambiguous in declaring that the "rationale has always been that the entities which handle hazardous waste and those which are responsible for hazardous substance releases should pay for state efforts to regulate the handling of hazardous waste and to clean up the releases." [CT 1051]. The Health and Welfare Agency similarly described the purpose as "cost recovery from responsible parties," and recognized that the fees were earmarked "to pay for the cost incurred by the State in performing a variety of clean-up and regulatory oversight activities." [CT 1082]; *see also id.* ("the legislation provides increased incentives for cost recovery activities with a greater share of the program costs borne by responsible parties").

Indeed, respondent SBE itself has admitted the relation between the fee and its regulatory purpose. *See* [CT 211] (SBE letter to Morning Star, May 21, 1997) (the fee under § 25205.6 "is an assessment by a regulatory agency to cover the cost of the regulation"); *see also* Answer to Petition for

Review at 2 (fees "fund hazardous waste and hazardous materials programs"). Given the plain purpose of the fee, it is impossible to distinguish *Sinclair*'s holding that "bona fide regulatory fees" include those that require manufacturers and others to "bear a fair share of the cost of mitigating the adverse health effects their products created in the community." 15 Cal.4th at 877. That is precisely the purpose of the fee in this case, and the hazardous-materials fee thus satisfies *Sinclair*'s three-part test for identifying a regulatory fee rather than a tax.

In their Answer to the Petition for Review, at 7, respondents looked to Morning Star's equal protection challenges and suggested that because the fee lacks any rational relation to its manifest and express purposes, it is not a fee but a tax. There are several problems with that approach.

First, *Sinclair's* three-part test distinguishing taxes from regulatory fees does not turn on whether the fee is allocated properly among prospective fee-payers, but merely on the overall purpose and use of the fee and the relationship between the total amount of the fee and the identified regulatory purpose. Whether a fee is well or poorly allocated among potential fee-payers is immaterial to whether it is targeted for a specific purpose and whether it is raising revenues unrelated to that purpose. The discussion in *Sinclair* regarding a "nexus" between the burdens imposed by the fee payer and the amount of the fee paid was addressing the fees validity under the police power and the possibility of an exemption under the terms of the particular fee in question, not the definitional issue of whether it was a tax or a regulatory fee. *See* 15 Cal.4th at 877-78, 881, 64 Cal. Rptr.2d 447.

Second, even if there were some "nexus" element to the *definition* of a regulatory fee in order to prevent the Legislature from raising revenues

from persons without any connection to the claimed regulatory purposes, that element would be applied at the level of the *statute* itself, and in this case the statute would satisfy the requirement. The deficiencies identified in § 25205.6 itself, are that it excludes non-corporate businesses and it excludes companies with fewer than 50 employees, *i.e.*, it is grossly *under*-inclusive. That type of defficiency is certainly an equal protection and due process concern, in that it is a classic means of the legislature avoiding the "political retribution" that would come from applying the fee to the *entire* class of similarly situated businesses, but it certainly is not indicative of an attempt to raise *extra* revenues unrelated to the purpose of the fee. It is only where the legislature makes the fee over-broad that one could infer that it was actually seeking revenue rather than pursuing a claimed regulatory purpose. In this case there is nothing to suggest that the lack of a rational connection between the classifications made and the undoubted purpose of the law is indicative of a tax rather than simply an unconstitutional regulation.

Third, while the fee as applied within the outer bounds of the statute is indeed overbroad in charging corporations like Morning Star that have no reasonable relation to hazardous materials, *that* over-breadth is attributable to the DTSC's failure to conduct a cogent and discriminating analysis of the SIC codes and the hazardous materials burden imposed by each type of business. But DTSC's failure to fulfill the reasonable expectations of the Legislature that it would tailor the fee through the selection of appropriate SIC codes does not convert what is otherwise a regulatory fee into a tax. Given the DTSC's discretion in compiling the SIC schedule, *supra* at 2-6, the Legislature certainly *intended* that the imposition of the fee would be tailored to the purposes of the law. That the DTSC failed to implement such tailoring, or that the tailoring envisioned was inadequate for equal

protection requirements, does not alter the fundamental *purpose* of the law and cannot alter the proper categorization of legislative acts. If it were otherwise, a laws categorization, and hence its validity under Article XIII A could fluctuate with the administrative winds. Such a result would make no sense. Furthermore, the statutory limitations on the total amount of the fee and the requirement that it be spent exclusively on hazardous-materials programs rebut any inference of revenue-raising that might be drawn from administrative over-breadth.

Finally, an unconstitutional regulatory fee – *i.e.*, one that cannot satisfy the "reasonable relationship" test – is not, *ipso facto* a tax subject to a more lenient test. Rather, it is an *invalid* regulatory fee. Respondents' contrary suggestion that invalid fees are magically reconceptualized as valid taxes is nothing short of bizarre. It would indeed be a wonder that the consequence of a regulatory fee *failing* the rational relationship test under due process and equal protection would be to convert the fee into a tax subject to *lesser* equal protection scrutiny. That is mere sophistry and a truly novel assault on equal protection jurisprudence.

Allowing such an arbitrary and plastic categorization of various fees – "regulatory fees" if they can pass the ordinary equal protection scrutiny, "taxes" and a more lenient equal protection standard if they can't survive ordinary scrutiny – ignores uniform principles for distinguishing taxes from regulatory fees and promotes precisely the type of *ad hoc* decision-making that undermines public confidence in the judiciary. The heads-the-government-wins-tails-the-citizens-lose approach offered by respondents would selectively free the government from either the constraints of Article XIII A or from the equal protection and due process clauses, as the case may require, and would make it impossible for ordinary citizens to have any faith in the courts to fairly redress their grievances.

The proper resolution in this case is to apply the uniform requirements of *Sinclair*, reject the flawed reasoning of respondents and the court below, and hold that the hazardous-materials fee in this case is not a tax, but rather a regulatory fee, subject to the serious and genuine inquiry it deserves under due process and equal protection.

III. THE HAZARDOUS-MATERIALS FEE VIOLATES EQUAL PROTECTION AND DUE PROCESS BY IRRATIONALLY DISTINGUISHING AMONG BUSINESSES AND BY BEING WHOLLY UNRELATED TO THE NATURE OF THE BUSINESSES OR THE PURPOSES OF THE LAW.

The hazardous materials-fee as applied by respondents makes several classifications that violate the constitutional demands of equal protection and substantive due process. First, by statute it can apply only to corporations, not to any other form of business enterprise. Second, by statute it cannot apply to any businesses with less than 50 employees, regardless of the nature of such business or the hazardous-materials burden it imposes. Third, by regulation it applies to essentially all corporations with 50 or more employees, regardless of any rational connection between such corporations and the purposes of the statute. Those classifications are, respectively, so grossly under-inclusive, under-inclusive, and over-inclusive that they violate the equal protection and due process provisions of the California and United States Constitutions.

As described in the previous section, the fundamental requirement of equal protection and due process, even under rational basis scrutiny, is that legislative classifications must "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Brown*, 8 Cal.3d at 861, 106 Cal. Rptr. 288 (citations and quotation marks omitted). Such requirement serves the vital

purpose of ensuring that political checks on government remain effective by not allowing "'officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.'" *Hayes*, 25 Cal.3d at 787, 160 Cal. Rptr. 102 (quoting Justice Jackson) (citation omitted).

When measuring government action against those constitutional requirements, equal protection requires "'a serious and genuine judicial inquiry into the correspondence between [a legislative] classification and the legislative goals.'" *Newland* v. *Board of Governors* (1977) 19 Cal.3d 705, 711, 139 Cal. Rptr. 620 (internal citation omitted). And it prohibits legislative classifications, such as those at issue here, that are "grossly overinclusive" or "underinclusive." *Brown*, 8 Cal.3d at 877 & n. 17, 106 Cal. Rptr. 388. As this Court explained, government may not single-out a group for regulation "wholly at its whim" but rather its "decision as to where to 'strike' must have rational basis in light of the legislative objectives." *Hayes*, 25 Cal.3d at 790-91. And *Warden* v. *State Bar* (1999) 21 Cal.4th 628, 647, 88 Cal. Rptr.2d 283, 297, confirms that while the rational basis test is generally deferential to reasonably conceivable legislative justifications of a classification, it is not a paper tiger, but continues to require the "serious and genuine judicial inquiry" described in earlier cases. The U.S. Supreme Court similarly has held that a "state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Center* (1985) 473 U.S. 432, 446-447.[13]

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[13] Furthermore, equal protection under the California Constitution, like California's free speech protections, appears to, and should, provide even greater protection than its federal counterpart. *See Warden,* 21 Cal.4th at 661, *et. seq.*, 88 Cal. Rptr.2d at 307, *et seq*. (Brown, J., dissenting).

Substantive due process under the state and federal Constitutions likewise "prevents government from enacting legislation that is 'arbitrary' or 'discriminatory' or lacks 'a reasonable relation to a proper legislative purpose.'" *Kavanau* v. *Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 771, 66 Cal. Rptr.2d 672 (citations omitted); *Morgan* v. *City of Chino* (2004) 115 Cal. App.4th 1192, 9 Cal. Rptr.3d 784, 788 (same).

Having concluded that the hazardous-materials fee was a tax rather than a regulatory fee, the Court of Appeal applied what it viewed as an especially "deferential standard of review used to assess the constitutionality of a tax." Opinion at 25. Reflecting the overly deferential standard it was applying, the court disposed of Morning Star's equal protection and due process claims with barely the waive of a hand:

> 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 [the purpose] of funding the disposal of hazardous material. A distinction between the taxation of corporations and individuals is broadly permissible.

Opinion at 26. The court further suggested that to require the State to actually relate the fee to the hazardous-material burden imposed by particular corporations "would eviscerate the program." *Id*.

The Court of Appeal's casual disregard for the inequalities and irrationalities of the hazardous-materials fee is troubling, incorrect, and should be reversed. Under an appropriately "genuine" inquiry, the Court of Appeal's analysis of the substantive distinctions in the hazardous-materials fee is wholly inadequate. The vital purposes of equal protection and due process cannot be served by the ephemeral scrutiny applied by the Court of Appeals. Indeed, such a non-existent hurdle would "open the door to

arbitrary action" and the unjust laws that would surely follow such immunity from judicial scrutiny.

First, the decision to include all SIC codes is irrational. The DTSC's inclusion of *all* SIC codes in its schedule is grossly over-inclusive in treating materially different companies the same, which is an inequality in its own right. Given the legislative purpose of having responsible parties bear their share of the burden of hazardous materials, and given the statute's express directive that DTSC *select* types of companies from the list of SIC codes, the DTSC's refusal to take into account material differences among various types of businesses is arbitrary and capricious.

The Court of Appeal's suggestion that it would be impossible to evaluate each *individual* business misses the point, and ignores the fact that the Legislature in fact directed the DTSC to review businesses by SIC *category*. While a meaningful review of SIC codes in order to distinguish different business types may well be beyond the reasonable capacity of the Legislature, such inquiries are precisely the reason we have administrative agencies in the first place. That the DTSC was unwilling to get its hands dirty and hence chose indiscriminate over-inclusion as the easy way out hardly constitutes a rational basis for such over-inclusion. It will always be less convenient to follow the Constitution; to make rational choices rather than simplistic ones. But in this case such inconvenience is a minor price to pay and will not even remotely overwhelm the purposes of the law. In fact, more accurately tailoring the fee to those genuinely responsible for hazardous wastes will *further* the purposes of the law by giving business groups an incentive to promote best practices within their SIC category in the prospect of being removed from the schedule in a subsequent annual review. Such an approach is far more consonant with the structure of § 25205.6 than is the DTSC's blunderbuss approach that only creates

incentives to fire employees above the magic number 50 or to abandon the corporate form.

By refusing to draw distinctions between differently situated corporations, and by doing so in a manner that not only fails to correlate with the legislative purpose but is in fact inimical to that purpose, the DTSC has failed to base its classification on "some ground of difference having a fair and substantial relation to the object of the legislation," *Brown*, 8 Cal.3d at 861, 106 Cal. Rptr. 288, and hence violates the federal and California Constitutions.[14]

Second, the distinction between corporations and other business enterprises is grossly underinclusive and lacks any rational relation to the purposes of § 25205.6. The hazardous-materials impact and responsibility of a business has absolutely nothing to do with its legal form, and hence, again, lacks any "fair and substantial relation to the object of the legislation." *Id*. Section 25205.6 thus defies the requirement that the law evince "some rationality in the nature of the class singled out." *Rinaldi* v. *Yeager* (1966) 384 U.S. 305, 308-309.

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[14] In evaluating administrative actions, such as in this case, it would not be appropriate to speculate on any hypothetical alternative purposes the DTSC might claim to be the basis for its classification. While legislatures are not required to create a record justifying their decisions, and thus may receive the benefit of any reasonably credible purpose for their classifications, agencies are not possessed of such full legislative authority and generally are required to justify their decisions through a record and limited to the justifications proffered. Agency classifications therefore should be measured against the purposes reflected in the legislative guidelines validating the delegation of authority in the first place, or according to their *actual*, not merely conceivable, reasoning. Anything less would subvert the basic premises of the non-delegation doctrine and of administrative law in general.

Such under-inclusiveness is highlighted by DTSC's claim that all businesses in California – regardless of legal form – use, generate, store, or conduct activities relating to hazardous materials, making it virtually impossible to imagine how the distinction based on incorporation is related to the purposes of the law. The sheer absurdity of the classification can be seen by the fact that the San Francisco 49ers, owned by a corporation, must pay the fee, while the Oakland Raiders, owned by a partnership, are not required to pay the fee. Similarly, the professional services firm Watson Wyatt & Company, with offices in Los Angeles, San Francisco, San Diego, and Irvine is a corporation, while one of its main competitors in the field, PricewaterhouseCoopers, with offices in the same cities plus Sacramento and San Jose is a collection of Limited Liability Partnerships.[15] Similarly situated consulting firms, law firms, and other major employers likewise vary in their legal form and hence will likewise be covered or not under § 25205.6 without any rational basis in the purposes of the law. Far from being limited examples from the margin of the law, there are literally thousands of non-corporation businesses that employ in excess of fifty persons, that are materially indistinguishable from businesses that are covered, but that are not required to pay the environmental fee. [CT 244; CT 133-160]. Many of those businesses will be identically situated to Morning Star or other corporations that have no genuine connection to hazardous materials other than through the attenuated reasoning of the DTSC. Still more are likely to have a substantially *greater* hazardous-materials impact insofar as their businesses make genuine use of such materials, such as in the case of auto-repair operations, hardware stores, or

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[15] www.watsonwyatt.com/investors/holdings.asp (viewed May 28, 2004); www.pwcglobal.com/extweb/pwclocations.nsf/ViewLocByCityDisplay/United~States~of~America~US~ENG~YH (viewed May 28, 2004).

manufacturing and retail operations for the very same mundane office items that Morning Star uses only incidentally. Not only will the classification in those cases fail to have a rational basis in the purposes of the law, it will in fact be *antithetical* to those purposes by excluding businesses with far greater responsibility for hazardous materials and including those with considerably less responsibility.

The Court of Appeal had no explanation or defense for this aspect of the classification. Instead it merely observed, without citation or explanation, that it was "broadly permissible" to distinguish between individuals and corporations. Opinion at 26. While such a distinction may be defensible in some instances – given that individuals are indeed different from businesses for many purposes – that has absolutely nothing to do with distinctions *among* business enterprises themselves. Partnerships and other business forms are not analogous to individuals in this context. They operate for-profit enterprises, deduct their business expenses under the same rules as all other businesses, can limit their liability through the LLP form, can encourage investment through a general/limited partner structure, and otherwise are indistinguishable from corporations in any way that is meaningful in the hazardous-materials context. The Court of Appeal's off-point assertion regarding differential treatment of individuals thus is completely insufficient to sustain the challenged classification.

Respondents' further suggestion, Answer to Petition for Review at 9, that Morning Star's position somehow challenges the differences in income taxation between corporations and partnerships, simply illustrates how badly they miss the point. The ordinary taxation of business entities is indeed designed to raise revenue rather than to accomplish any particular regulatory or remedial purpose. Given the revenue function of such taxes, it is not surprising that they would vary according to the means by which

businesses raise capital, generate income, and distribute their earnings. Two businesses engaged in precisely the same substantive activity – running a football team, for example – can have very different financial accounting and control structures.

While those differences are sufficient to allow different methods of ordinary taxation, they have absolutely nothing to do with the hazardous-materials impact of the substantive operations themselves, and hence have nothing to do with the purposes of the hazardous-materials fee. Indeed, while partnerships and corporations are treated differently for income and similar taxes, they are treated the same for license fees, permit fees, and even property taxes. All of those fees relate to the operations, not the form, of the business, and are paid by the business enterprise itself and not, in the case of partnerships, paid at the individual level. In fact, other hazardous-materials fees themselves recognize that corporate form has nothing to do with the burdens associated with hazardous materials. For example, the hazardous waste "facilities fee" set out in § 25205.2 applies to each operator of "any units or other structures, and all contiguous land, used for the treatment, storage, disposal, or recycling of hazardous waste," § 25205.1(b), and does not mention any exemption based on non-corporate form. Likewise, "generator" is defined as a "a person who generates hazardous waste at an individual site," CAL. HEALTH & SAFETY CODE § 25205.1(e), and is not limited to corporations. Given the legislative purposes of hazardous-materials regulations and fees, distinguishing among businesses based on corporate form makes no more sense than applying the fee only to companies whose names began with the letters "H" and "M."

Third, yet another example of irrationality is § 25205.6's reliance on the number of employees as the basis for applying and raising the fee. Once again, such a criterion has nothing to do with a business' hazardous-

materials impact, especially when companies with wildly different operations are lumped together into an indiscriminate category of hazardous-materials "users." A 40-person hardware store with modern electronic cash registers, computer accounting, and inventory systems undoubtedly uses just as many computers, printers, faxes, light bulbs, and other ordinary business products as does any other modern business and certainly far more than Morning Star does in its 8-person office. But such a hardware store also stores and sells numerous florescent light bulbs, power tools, motorized lawn and yard equipment, motor oil, insecticides, drain cleaner, and any number of other types of goods containing hazardous materials. Such an operation is excluded from the fee despite having a connection to hazardous materials that is orders of magnitude greater than Morning Star's connection. Similar points could be made about gas stations, electronics manufacturers, auto dealers, light-bulb or battery manufacturers, paint stores, furniture makers, photocopy stores, office supply manufacturers or dealers, or, for that matter, virtually any business that either sells or services any of hundreds of everyday products. Any such business, regardless of the number of employees, will have a far greater hazardous-materials impact than does Morning Star, which does little more than paperwork for leasing out employees to other companies. Yet thousands of such businesses are excluded from paying the hazardous-materials fee. Such a result goes well beyond arbitrary and is in fact utterly antithetical to the purposes of the law.

The Court of Appeal's bare assertion that the number of employees is a reasonable proxy for a company's size and use of hazardous materials is pure speculation that is belied by the examples given above. Had the DTSC actually conducted the analysis expected of it and scheduled only those SIC codes of businesses having a genuine and significant connection

to hazardous materials, *then* the proxy of employees and size might have served as a rough approximation *within* such categories of the relative impact of a company. For example, if DTSC had only scheduled codes for heavy industries, manufacturing, hospitals, and the like, then it might be fair to assume that companies with more employees will engage in more production, make more goods, or treat more patients using medical supplies, and thus use more hazardous materials associated with such operations. But in those examples, the very operations of the business and the jobs of the employees affirmatively employ hazardous materials as part of the production process. But having taken an absurdly expansive view of which companies use hazardous materials, and hence lumped together wildly disparate businesses in a single classification, the use of employees as a proxy for impact loses all meaning because the supposed "use" of such materials is not related to the production process and thus does not vary with the number of employees the way it might in a manufacturing plant. Morning Star could have a thousand employees and it still would not deal with as much hazardous material as an exempt 40-person company manufacturing batteries, or acetone, or any number of other products.[16]

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[16] An analogous situation would be a requirement that persons who own pets must obtain a license for "each pet" and pay a license fee that would be used to fund animal control departments, veterinary services, and humane society activities. The per-household total for such fee, if limited to dogs, cats, and similarly situated animals, would sensibly vary in proportion to the number of pets. But if an agency were to decide that ant farms were included in the definition of pets and assessed the fee for *each ant* in the ant farm, that overbroad interpretation of "pets" would render the otherwise sensible per-animal fee irrational. So too with the interaction between the DTSC's over-broad definition of hazardous-materials use and the statute's classification based on number of employees.

The combination of the classifications based on size and corporate form leads to the bizarre situation that, despite DTSC's contention that *all* businesses use hazardous materials contained in everyday goods, only 5% of all businesses in California paid the hazardous waste fee in 1994. [CT 1187] (DTSC Task Force Report, Jan. 1997). That such a small percentage of businesses pay the fee notwithstanding DTSC's view that all businesses use hazardous materials certainly highlights the discriminatory nature of the fee. In fact, it seems a paradigm example of what equal protection requirements were designed to prevent: the selective imposition of the burdens of legislation on a narrow group in order to avoid what Justice Jackson described as the political "retribution" that would arise if the fee were imposed more generally.

Overall, the classifications used in applying the hazardous-materials fee are so utterly arbitrary and without relation to the purposes of the law that they cannot pass constitutional muster. This Court should hold that the hazardous-materials fee violates equal protection and due process and thus is invalid.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeal.

Respectfully Submitted,

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May 28, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of May, 2004, I caused a copy of the foregoing Brief for Petitioner to be served by Overnight Federal Express, postage pre-paid, on:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Petitioner complies with the 14,000 word type-volume limitation of Appellate Rule 29.1(c)(1) in that it contains 13,276 words, excluding the table of contents, table of authorities, statement of issues, certificates of counsel, and the attached Court of Appeal opinion. The number of words was determined through the word-count function of Microsoft Word XP. Counsel agrees to furnish to the Court an electronic version of the brief upon request.

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APPENDIX

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.