



**STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS**

Date Amended:	05/24/04	Bill No:	SB 391
Tax:	Pesticide Fee	Author:	Florez and Escutia
Board Position:		Related Bills:	SB 1168 (Ortiz)

This analysis will only address the bill's provisions that impact the Board.

BILL SUMMARY

This bill would impose a pesticide fee on the first point of sale on the following:

- Manufacturers and other persons who directly produce any pesticide for application in this state.
- Any business or person who is in non-retail business and who distributes within this state any pesticide for application in this state.

The Office of Environmental Health Hazard Assessment (Office) would be authorized to collect the pesticide fees or may contract with the State Board of Equalization (Board) or another state department or agency for collection of the fees due.

Summary of Amendments

The previous version of this bill did not impact the Board.

ANALYSIS

Current Law

Environmental Fee

Under existing law, Section 25205.6 of the Health and Safety Code provides that corporations in industry groups that use, generate, store, or conduct activities in this state related to hazardous materials pay an annual fee to the Board. This environmental fee is based on the number of employees employed by a corporation in the state during the previous calendar year.

The annual fee is paid to the Board and deposited into the state's Toxic Substances Control Account.

Disposal Fee

Under current law, Section 25174.1 of the Health and Safety Code requires each person who disposes of hazardous waste in this state to pay a disposal fee at a rate based on the type of waste disposed. Each operator of an authorized hazardous waste facility at which hazardous wastes are disposed is required to collect a disposal fee from any person submitting hazardous waste for disposal and transmit the fees to the Board for deposit into the Hazardous Waste Control Account in the General Fund.

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Generator Fee

Section 25205.5 of the Health and Safety Code requires every generator of hazardous waste to pay a fee for each generator site for each calendar year unless the generator has paid a facility fee or received a credit, as specified, for each specific site for the calendar year for which the generator fee is due.

Facility Fee

Under existing law, Section 25205.2 of the Health and Safety Code provides that each operator of a facility shall pay a facility fee for each reporting period to the Board based on the size and type of the facility. Pursuant to Section 25205.4, the fee to be paid by a large offsite treatment facility for the 1998, 1999 and 2000 reporting periods is equal to 2.25 times the base facility rate. Beginning with the 2001 reporting period, the fee increased to equal three times the base facility rate.

The facility fee is paid to the Board and deposited into the Hazardous Waste Control Account in the General Fund.

Proposed Law

This bill would add Chapter 3.5 (commencing with Section 105230) to Part 5 of Division 103 of the Health and Safety Code, known as the **Pesticide Drift Exposure Prevention and Response Act**.

Among other things, this bill would impose a pesticide fee on the first point of sale on all of the following:

- Manufacturers and other persons who directly produce any pesticide for application in this state.
- Any business or person who is in non-retail business and who distributes within this state any pesticide for application in this state.

This bill would prohibit any fee from being assessed upon a party if that party demonstrates to the Office's satisfaction that the party merits an exemption because the party's conduct did not contribute in any manner to the toxic effects of pesticide drift exposure.

Fee Rate

The Office, in consultation with the Department of Pesticide Regulation, would establish by regulation an appropriate fee schedule to be assessed on manufacturers and distributors.

The annual fee assessment would be adjusted by the Office to reflect the increase in the annual average of the California Consumer Price Index, as recorded by the Department of Industrial Relations, for the most recent year available.

The fees would be assessed on the basis of a pesticide's present responsibility for the toxic affects of pesticide drift exposure, to the maximum extent practicable. No fee would be assessed upon any retailer of pesticides.

The adoption, amendment, or repeal of a regulation for implementing the Pesticide Drift Exposure Prevention and Response Act, including, but not limited to, fee assessment and collection, including subsequent amendments or adjustments, would be deemed to be emergency regulations, as described. Regulations adopted, amended, or repealed would be exempted from the rulemaking provisions of the Administrative Procedure Act.

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However, upon adoption, the regulation, amendment or repeal would be required to be filed with the Secretary of State and printed in the California Code of Regulations.

Beginning January 1, 2008, and every three years thereafter, the Office would be required to conduct a review to determine the appropriate levels for assessing the pesticide fee.

Collection of the Pesticide Fee

This bill would authorize the Office to collect the toxic chemical fee or would authorize that agency to contract with the Board or another state department or agency for collection of the proposed fees due.

Fiscal Provisions

This bill would establish the Pesticide Drift Exposure Prevention and Response Fund (Fund) within the State Treasury. All fees collected would be deposited in the Fund, as follows:

- From all fees collected, an amount necessary to fully reimburse all claims for emergency response and health care provider services as determined by the Office would be deposited annually into the Medical Reimbursement Account, which this bill would be create within the Fund. The amount deposited into the Medical Reimbursement Account would be required to exceed a percentage, not yet specified, of the total fees collected annually.
- From all fees collected, an amount necessary to fully reimburse all state and local agencies from public education and health care provider education and training activities and other program, administrative, and compliance costs, as described, would be deposited annually into the Education and Administration Account, which this bill would create within the Fund. The amount deposited into the Education and Administration Account would be required to exceed a percentage, not yet specified, of the total fees collected annually.

Unless otherwise specified, all moneys in the Fund would be continuously appropriated to the Office for the purposes of the Pesticide Drift Exposure Prevention and Response Act.

This Office would be prohibited from collecting fees in excess of the amount reasonably anticipated by the Office to fully implement the Pesticide Drift Exposure Prevention and Response Act. This bill would also cap the amount of fees collected by the Office each fiscal year, however that amount is not yet specified in the bill.

This bill also provides legislative intent language for subsequent legislation to appropriate and to deposit into the Education and Administration Account an amount, not yet specified, from the General Fund to the Controller. Those moneys would be used for allocation as loans, to the Office, for the purposes of adopting regulations to establish the fee schedule and startup costs related to implementing the provisions of this bill. It would also be the Legislature's intent that the Office fully repay the amount of that loan with interest at the pooled money investment rate, from fees collected.

The bill would become effective January 1, 2005.

COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the author and is intended to ensure that the victims of pesticide drift exposure receive immediate, comprehensive, and respectful attention during and following pesticide drift exposure incidents.

2. **The Board could not administer a new fee program with a January 1, 2005, effective date without risk to its Revenue Database Consolidation (RDC) Project.** Since April 2004 and running through the remainder of the 2004 calendar year, the Board is implementing the RDC project. The RDC project involves extensive changes to the Integrated Revenue Information System (IRIS), the Board's primary tax administration system. The RDC project implementation and stabilization efforts will occupy significant Board staff resources for the rest of 2004.

In addition, the Board is currently in the process of developing, testing and implementing technology changes related to new legislatively mandated programs enacted in 2002 and 2003. This effort has been included in the multi-year, multi-phase RDC project and will be on-going through the end of 2004.

Since this bill would create a new fee program as of January 1, 2005, programming to the Board's computer system would be required at the end of 2004, which is during the final stages of the RDC Project. Making any modifications at the end of the system development would put the Board's RDC project, including the programming for the new legislatively mandated programs, at substantial risk. Because of this risk, the Board can not add a new tax or fee program to its system until early 2005. It is therefore suggested that the bill be amended to make the fee operative no earlier than **July 1, 2005**, if it is anticipated that the Office would contract with the Board for the collection of this fee.

3. **The Board would require the necessary funding to administer the pesticide fee.** In funding state agencies, the Administration and the Legislature have not provided budget dollars to support the actual agency payroll costs (for example, workers compensation costs, merit salary adjustments, and collective bargaining requirements are not fully funded in the annual budget process). The Administration and the Legislature expect state agencies to keep positions vacant or delay hiring staff in order to save dollars to meet these unfunded payroll costs.

To be able to promptly hire staff or to recruit from outside the Board's operations, the bill should be amended to provide funding to fully support the actual costs of a position if it is anticipated that the Office would contract with the Board to collect the proposed fee.

4. **Could the state require out-of-state manufacturers to remit a pesticide fee?** Various Supreme Court cases have focused on states' ability to impose the use tax on out-of-state firms making sales to in-state customers. In 1967 the Supreme Court ruled in *National Bellas Hess, Inc. v. Illinois Department of Revenue*, 386 U.S. 753 (1967), that a firm that has no link to a state except mailing catalogs to state residents and filling their orders by mail cannot be subject to that state's sales or use tax. The Court ruled that these mail order firms lacked substantial physical presence, or nexus, required by the Due Process Clause and the Commerce Clause of the United States Constitution.

* to SB 1049 (Water Rights Fee), AB 71 (Cigarette and Tobacco Products Licensing Act), and SB 1701 (Alternative Cigarette and Tobacco Stamps)

In the 1977 case of Complete Auto Transit, Inc. v. Brady (1977) 430 U.S. 274 {51 L.Ed.2d 326, 97 S.Ct. 1076} the Court articulated that, in order to survive a Commerce Clause challenge, a tax must satisfy a four part test: 1) it must be applied to an activity with a substantial nexus with the taxing State, 2) it must be fairly apportioned, 3) it does not discriminate against interstate commerce, and 4) it must be fairly related to the services provided by the State.

North Dakota enacted anti-National Bellas Hess legislation with the expressed purpose of creating nexus with mail order firms selling to consumers in the state, in an attempt to compel out-of-state retailers to collect the use tax on mail order sales and test the continuing validity of the National Bellas Hess decision. The statute was challenged, and in 1992 the Supreme Court issued a ruling in Quill Corporation v. North Dakota (1992) 504 U.S. 298. The Court in Quill applied the Complete Auto Transit analysis and held that satisfying due process concerns does not require a physical presence, but rather requires only minimum contacts with the taxing state.

Thus when a mail-order business purposefully directs its activities at residents of the taxing state, the Due Process Clause does not prohibit the state's requiring the retailer to collect the state's use tax. However, the Court held further that physical presence in the state was required for a business to have a "substantial nexus" with the taxing state for purposes of the Commerce Clause. The Court therefore affirmed that in order to survive a Commerce Clause challenge, a retailer must have a physical presence in the taxing state before that state can require the retailer to collect its use tax.

Based on the above cases, it is questionable whether the state could require an out-of-state manufacturer that produces pesticides for application in this state, who has no physical presence in California, to remit a fee.

5. **Suggested amendments.** The following amendments are suggested to clarify the intent of the measure:
- This bill should be amended to provide that if the Office elects to contract with the Board to collect the fee, the Board shall collect the fee in accordance with the Fee Collection Procedures Law. The Fee Collection Procedures Law contains "generic" administrative provisions for the administration and collection of fee programs to be administered by the Board. The Fee Collection Procedures Law was added to the Revenue and Taxation Code to allow bills establishing a new fee to be collected by the Board to reference this law, thereby only requiring a minimal number of sections within the bill to provide the necessary administrative provisions. Among other things, the Fee Collection Procedures Law includes collection, reporting, refund and appeals provisions, as well as provides the Board the authority to adopt regulations relating to the administration and enforcement of the Fee Collection Procedures Law.
 - This bill should specify the annual due date for the fee.
 - It should be clarified whether the feepayers would self report the amount of the fee due or receive a determination (a bill) for the amount of the fee.
 - It is suggested that the bill be amended to authorize the payment of refunds for overpayment of the fees and specifically provide for reimbursement to whichever agency or person is responsible for collecting the fee.
 - Among the referenced terms that should be defined are terms such as "person", "sale", "manufacturer", "non-retail business", "party", "retailer" and "distributes".

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- In its current form, the bill would not impose a fee on pesticides under certain circumstances. For example, the fee would not apply where an out-of-state manufacturer sells outside the state and ships pesticides into this state to a person that sells such products at retail. Likewise, the proposed fee also would not apply to pesticides that are purchased outside the state from an out-of-state seller by a person in this state if that person does not subsequently distribute the pesticide (i.e., the person applies the toxic chemicals to their land as a pesticide). The bill should be amended to revise the imposition of the fee if the author intends for the fee to apply under such circumstances.
- This bill generally provides that no fee would be assessed upon a party if that party can demonstrate to the Office's satisfaction that the party merits an exemption because the party's conduct did not contribute in any manner to the toxic effects of pesticide drift exposure. However, it is not clear how such an exemption would apply to a feepayer that has already been assessed for the fee. For example, could the feepayer obtain a refund if an exemption is approved after the feepayer was assessed and paid the toxic chemical fee?

Board staff is available to work with the author's office in drafting appropriate amendments.

6. **Related legislation.** Senate Bill 1168 (Ortiz) would impose a toxic chemical fee on the first point of sale on manufacturers and other persons who directly produce any toxic chemical or any business or person who is in non-retail business and who distributes within the state any toxic chemical, as specified. The CalEPA would be authorized to collect the toxic chemical fee or may contract with the Board or another state department or agency for collection of the fees due.

COST ESTIMATE

The provisions of this bill would authorize the Office to contract with the Board to perform collection functions related to the pesticide fee. The Board would be reimbursed by the Office for its preparation and ongoing costs to administer the fee.

If the Office were to contract with the Board to collect the proposed fee, the Board would incur substantial costs associated with the workload to adequately develop and administer this new fee program. This workload would include registering fee payers, developing computer programs, mailing and processing returns and payments, conducting audits, developing regulations, training staff, and answering inquiries from the public. A cost estimate of the new workload is pending.

REVENUE ESTIMATE

This measure does not specify the amount of the pesticide fee. Accordingly, a revenue estimate could not be prepared.

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