STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS

Date Amended:	**05/04/04**	Bill No:	**SB 1168**
Tax:	**Toxic Chemical Fee**	Author:	**Ortiz**
Board Position:		Related Bills:	

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

BILL SUMMARY

This bill 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.

Summary of Amendments

The amendments since the last analysis add an operative date of January 1, 2006, for the Healthy Californians Biomonitoring Program and delete the language that would have capped the amount of the fee established by the California Environmental Protection Agency (CalEPA).

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.

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.

This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the Board's formal position.

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 8 (commencing with Section 105440) to Part 5 of Division 103 of the Health and Safety Code, known as the **Healthy Californians Biomonitoring Program**.

Among other things, this bill would impose a toxic chemical fee on the first point of sale to fully support the Healthy Californians Biomonitoring Program based on all of the following:

- Manufacturers and other persons who directly produce any toxic chemical, as defined.
- Any business or person who is in non-retail business and who distributes within the state any toxic chemical, as defined.

The CalEPA would establish by regulation an appropriate fee schedule to be assessed on manufacturers, importers, and distributors.

The fees would be assessed on the basis of a manufacturer's or person's present responsibility for environmental toxic chemical contamination, to the maximum extent practicable. No fee would be assessed upon any retailer of products containing toxic chemicals.

The annual fee assessment would be adjusted by the State Department of Health Services (DHS) and CalEPA 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 adoption, amendment, or repeal of a regulation for fee assessment and collection, including subsequent amendments or adjustments, would be exempted from the rulemaking provisions of the Administrative Procedure Act. However, upon adoption, the regulation would be required to be filed with the Secretary of State and printed in the California Code of Regulations.

This bill would prohibit any fee from being assessed upon a party if that party demonstrates to the CalEPA's satisfaction, or the CalEPA determines that a party should not be assessed, after providing scientific, academic, and peer reviewed research, that the party merits an exemption because the party's conduct did not contribute in any manner to the toxic chemical contamination, or the toxic chemical does not currently result in quantifiably persistent human toxic chemical exposure.

Beginning January 1, 2009, and every three years thereafter, the CalEPA would be required to conduct a review to determine the appropriate levels for assessing the toxic chemical fee.

COLLECTION OF THE TOXIC CHEMICAL FEE

This bill would authorize the CalEPA to collect the toxic chemical fee or would authorize that agency to contract with the Board or another party for collection of the fees due.

This bill would also require the CalEPA to collect the toxic chemical fee or an entity that the CalEPA contracts with in accordance with Part 22 (commencing with Section 43001) of Division 2 of the Revenue and Taxation Code.

FISCAL PROVISIONS

The fees would be deposited in the Healthy Californians Biomonitoring Fund (Fund), which this bill would establish in the State Treasury. Unless otherwise specified, moneys in the Fund would be continuously appropriated to CalEPA for, and expended for, the purposes of the Healthy Californians Biomonitoring Program.

This bill would require that the fees collected and the earnings therefrom to be used solely for the purposes of biomonitoring, as provided. The CalEPA would not be allowed to collect fees in excess of the amount reasonably anticipated by the CalEPA to fully implement the Healthy Californians Biomonitoring Program. Also, the CalEPA would not be allowed to:

- Spend more than it collects from the fees and the earnings for implementation purposes including repayment of startup loans, or
- Collect more than ten million dollars ($10,000,000) in fees, as adjusted.

This bill provides the Legislature's intent, in subsequent legislation, to appropriate and to deposit into the Fund, the sum of one million five hundred thousand dollars ($1,500,000) from the General Fund to the Controller. Those moneys would be used for allocation as loans, to the DHS, 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 DHS fully repay the amount of that loan with interest at the pooled money investment rate, from fees collected within that same fiscal year as appropriated so as to yield a revenue-neutral appropriation.

Costs associated with administration of the program could not exceed 15 percent of the entire amount deposited into the Fund in any fiscal year.

The bill would become operative January 1, 2006.

Background

In 2003, Senator Ortiz introduced SB 689, which would have implemented the Healthy Californians Biomonitoring Project. To fund the newly established Healthy Californians Biomonitoring Project, that bill would have imposed an additional excise tax on cigarettes of 0.05 mills ($0.0005) per cigarette, or $0.01 per package of 20, and imposed an equivalent compensating floor stock tax, operative January 1, 2004. However, that measure failed to pass its house of origin by the constitutional deadline.

COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by The Breast Cancer Fund and Commonweal and is intended to provide a better understanding of the relationship between environmental toxins and the increasing incidence of disease. The sponsors contend that a better understanding of this relationship could potentially save the state substantial dollars each year in health care costs spent treating disease.

2. **Summary of amendments.** The May 4, 2004, amendments add an operative date of January 1, 2006, for the Healthy Californians Biomonitoring Program and delete the language that would have capped the amount of the fee established by the CalEPA.

   The **April 28, 2004**, amendments update the criteria in order to add additional chemicals to the toxic chemical list and require the CalEPA to conduct a review to determine the appropriate levels for assessing the toxic chemical fee, as specified.

   The **April 15, 2004**, amendments revise the imposition of the toxic chemical fee, change the basis for the annual fee adjustment, and make other technical corrections.

   The **April 12, 2004**, amendments modify the list of chemicals that are toxic chemicals and revise incorrect references to the DHS to refer instead to the CalEPA.

   The **March 17, 2004**, amendments gutted the introduced version of the bill to revise, in part, the imposition of the toxic chemical fee.

3. **The language designating the CalEPA to collect the fee is contradictory and confusing.** In its current form, the bill provides in Section 105455(c) that the CalEPA "may collect the fees imposed *pursuant to this section* or may contract with the State Board of Equalization or another party for collection of fees due *under this section*".

   However, there are no fees imposed in Section 105455. Therefore, the reference to "this section" is an improper reference. In addition, while Section 105455(c) appears to give some discretion to the CalEPA to choose the agency to collect fees, Section 105457 directs that collection of the fee shall be collected "…in accordance with Part 22 (commencing with Section 43001) of Division 2 of the Revenue and Taxation Code." That Revenue and Taxation Code reference applies to collections by the Board. Thus, the bill would actually require the Board to collect the fee.

   It should also be noted that the collection provisions referenced pertain to collections by the Board for the Department of Toxic Substances Control (DTSC) under the Hazardous Substances Tax Law. Section 105457(a) should be amended to provide that if the CalEPA 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.

4. **The Board would require the necessary funding to administer the toxic chemical 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 DTSC will contract with the Board to collect the proposed fee.

5. **Appropriation amount may need to be revised.** This bill states that it is the intent of the Legislature, in subsequent legislation, to appropriate $1.5 million from the General Fund to the Controller for allocation as loans to the DHS for the purposes of adopting regulations to establish the fee schedule and startup costs related to implementing this measure. It also states that it is the intent of the Legislature that the DHS repay the amount of this loan with interest at the pooled money investment rate from fees collected.

   The Board's administrative start-up costs, if the DHS were to contract with the Board to collect the proposed fees, are currently unknown. Once the administrative start-up costs are determined, the bill may need to be amended to reflect that amount in addition to the DHS's costs related to adopting regulations to establish the fee schedule.

6. **Cost cap could be problematic**. Section 105458(b) provides that the costs associated with administration of the program shall not exceed 15 percent of the entire amount deposited into the fund in any fiscal year. The bill further provides that in no fiscal year shall the DHS collect more than ten million dollars ($10,000,000) in fees, as specified.

   However, it is not clear what is meant by "administration of the program." For example, does the cost cap apply to the administration of the *entire* Healthy Californians Biomonitoring Program or only to the collection and administration of the toxic chemical fee? The author may wish to clarify this ambiguity.

   Assuming that the 15 percent cap <u>only</u> applies to the collection and administration of the proposed fee and not to the entire Healthy Californians Biomonitoring Program, the most the DHS or other entity contracted to collect the fee could be reimbursed would be no more than $1,500,000 annually. Since the Board has not yet estimated the implementation and administration costs, it is not known at this time if the cost cap would provide the Board with sufficient funding to administer the fee if the DHS were to contract with the Board for the collection of the fee.

7. **Suggested amendments.** The following amendments are suggested to clarify the intent of the measure:

   - The bill should be consistent with respect to the basis of the fee and upon whom the fee is imposed. For example, Section 105451 states that any manufacturer or person who is responsible for either producing or distributing the chemicals shall pay the fees assessed. However, Section 105454 would impose a fee on the first point of sale, in part, 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. The bill should also clarify how the fee would apply to products sold after being recycled or reclaimed.

   - In its current form, the bill would not impose the fee on toxic chemicals under certain circumstances. For example, the fee would not apply where an out-of-state manufacturer sells outside the state and ships toxic chemicals into this state to a person that sells such products at retail. Likewise, the proposed fee also would not apply to toxic chemicals 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 toxic chemical (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.

   - Among the referenced terms that should be defined are terms such as "person", "sale", "manufacturer", "non-retail business", "party", "retailer products" and "distributes".

   - It is not clear that the proposed fee could be imposed upon chemicals later determined by the DHS and the CalEPA to be toxic chemicals.

     In its current form, the bill provides that the fee would be imposed on all of the following:

     1. Manufacturers and other persons who directly produce any toxic chemical set forth in this chapter.
     2. Any business or person who is in non-retail business and who distributes within the state any toxic chemical listed in this chapter.

     While the bill provides that additional chemicals could be added to the list if certain criteria are met, those chemicals are not "set forth in this chapter". Furthermore, there is no requirement that the addition of chemicals to the list be made in accordance with the regulation adoption requirements of the Administrative Procedures Act.

   - 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.

- It is not clear as to how the fee would apply to mixtures containing the listed chemicals. Would the fee apply only to the chemicals in their raw state? Or would the fee also apply to mixtures containing the listed chemicals? For example, many of the chemicals listed are combined with additives and then sold as a name brand product.
- This bill generally provides that no fee would be assessed upon a party if that party can demonstrate to the CalEPA that their conduct did not contribute in any manner to the toxic chemical contamination, or the toxic chemical does not currently result in quantifiably persistent human toxic chemical 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.

COST ESTIMATE

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

If the CalEPA 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 toxic chemical fee. Accordingly, a revenue estimate could not be prepared.

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