
SENATE COMMITTEE ON ENVIRONMENTAL QUALITY

Senator Allen, Chair

2021 - 2022 Regular

Bill No: AB 1024
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Version: 6/16/2021
Urgency: No
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Hearing Date: 6/28/2021
Fiscal: Yes

SUBJECT: Hazardous substances: correction and remedial actions: milestones and contracting

DIGEST: Requires the Department of Toxic Substances Control (DTSC) to establish performance milestones and post on its internet website easily accessible information about cleanups of hazardous substances released into the environment carried out or overseen by the department, as specified.

ANALYSIS:

Existing law:

- 1) Creates the Hazardous Waste Control Law (HWCL), which authorizes DTSC to regulate the management of hazardous waste in California. (Health and Safety Code (HSC) § 25100 et. seq.)
- 2) Establishes the Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA) program to provide for response authority for releases of hazardous substances, including spills and hazardous waste disposal sites, that pose a threat to public health or to the environment. (HSC § 25300 et seq.)
- 3) Appropriates \$176,600,000 from the Toxic Substances Control Account (TSCA) to DTSC and to be available for expenditure through June 30, 2018. Makes these moneys available for any of the following: activities related to the cleanup and investigation of properties contaminated with lead in the communities surrounding Exide; job training activities related to the cleanup and investigation of the properties contaminated with lead in the communities surrounding Exide; and, actions taken to pursue all available remedies against potentially responsible parties, including, but not limited to, cost recovery actions against entities that are potentially responsible, for the costs related to the cleanup and investigation of properties contaminated with lead in the communities surrounding Exide. (AB 118, Santiago, Chapter 10, Statutes of 2016)

- 4) Authorizes a loan from the General Fund to the TSCA under DTSC for activities relating to the investigation and cleanup of properties around Exide. Requires that all funds recovered from the potentially responsible parties be used to repay the loan made pursuant to SB 93. Authorizes the Director of the Department of Finance (Director), if the amount of moneys received from the cost recovery efforts is insufficient to fully repay the loan made pursuant to SB 93, to forgive any remaining balance if, at least 90 days before forgiving any balance, the Director submits a notification to the Joint Legislative Budget Committee. (SB 93, De León, Chapter 9, Statutes of 2016)

This bill:

- 1) Requires DTSC, when conducting a cleanup of hazardous substances released into the environment, to incorporate fixed-price contracting to protect against high costs and to ensure the best value pricing for the department, whenever feasible.
- 2) For cleanups of hazardous substances released into the environment carried out or overseen by DTSC, requires the department to:
 - a) Establish performance milestones to ensure that the cleanups are performed at the appropriate pace; and
 - b) Post on its internet website easily accessible information about the cleanups, including all of the following:
 - i) The address of the site at which the cleanup is taking place;
 - ii) The nature of the contamination;
 - iii) The proposal to clean up the contamination, when available;
 - iv) The estimated or actual time for review of the cleanup proposal
 - v) Performance milestones; and
 - vi) A link to cleanups in the department's EnviroStor database.
- 3) Requires moneys recovered by DTSC from responsible parties relating to the former Exide Technologies facility in the City of Vernon, California, be used to repay the sources of state funding for costs incurred in the cleanup of contaminated sites near that former Exide Technologies facility.

Background

- 1) *Regulation of hazardous waste.* The Hazardous Waste Control Law (HWCL) implements and enforces federal hazardous waste law in California and directs DTSC to oversee and implement the state's HWCL. Any person who stores, treats, or disposes of hazardous waste must obtain a permit from DTSC. The HWCL covers the entire management of hazardous waste, from the point the

hazardous waste is generated, to management, transportation, and ultimately disposal into a state or federal authorized facility.

- 2) *Carpenter-Presley-Tanner Hazardous Substances Account Act (HSAA)*. State law provides DTSC with general administrative responsibility for overseeing the state's responses to spills or releases of hazardous substances, and for hazardous waste disposal sites that pose a threat to public health or the environment. DTSC uses the HSAA for cleanup of contaminated sites and the HWCL for the regulation of hazardous waste sites. The HSAA provides DTSC with the authority, procedures, and standards to investigate, remove, and remediate contamination at sites; to issue and enforce a removal or remedial action order to any responsible party; and, to impose administrative or civil penalties for noncompliance with an order. Federal and state law also authorizes DTSC to recover costs and expenses it incurs in carrying out these activities.
- 3) *Lead*. Lead has been listed under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) requirements as a substance that can cause reproductive damage and birth defects since 1987 and has been on the list of chemicals known to cause cancer since 1992. According to the Office of Environmental Health Hazard Assessment, lead has multiple toxic effects on the human body. Decreased intelligence in children and increased blood pressure in adults are among the more serious non-carcinogenic effects. There is no level of lead that has been proven safe, either for children or for adults. Exposure to lead is a significant health concern, especially for young children and infants whose growing bodies tend to absorb more lead than the average adult.
- 4) *Exide*. Exide, headquartered in Georgia, is a worldwide producer, distributor, and recycler of lead acid batteries. In 2000, Exide purchased a facility—first opened in 1922—in an industrialized area in the City of Vernon, a few miles southeast of downtown Los Angeles, and operated the facility until its closure in 2015. The facility occupies 15 acres in a heavily industrial region with surrounding residential areas. Facility operations included recycling lead-bearing scrap materials obtained from spent lead-acid batteries. The facility processed about 25,000 batteries a day, providing a source of lead for new batteries. This facility operated under an interim status permit for more than 30 years. During that time, inspectors documented more than 100 violations, including lead and acid leaks, an overflowing pond of toxic sludge, enormous cracks in the floor and hazardous levels of lead in the soil outside. Over the course of decades of operation, the facility polluted the soil beneath it with high levels of lead, arsenic, cadmium, and other toxic metals. It also

contaminated groundwater, released battery acid onto roads, and contaminated homes and yards in surrounding communities with lead emissions.

In November of 2014, DTSC announced an enforcement order against Exide's Vernon facility because of the emission of airborne lead contamination, as well as on site contamination. The order required, among other things, that the company sample the soil for lead contamination and undertake the cleanup of contaminated properties in an initial assessment area in nearby residential neighborhoods. In March 2015, DTSC informed Exide that its hazardous waste permit application would be denied, and Exide permanently closed the facility.

- 5) *Investigation of contamination and beginning of cleanup near Exide.* In August 2015, the Legislature and the Governor approved \$7 million of emergency funding to test up to 1,500 residential properties, parks, schools, and daycare centers in the community surrounding the Vernon Exide facility; develop a comprehensive cleanup plan; and, begin cleanup of the highest priority sites based on the degree of lead contamination and other exposure factors.

On April 20, 2016, Governor Edmund G. Brown signed Assembly Bill 118 (Santiago, Chapter 10, Statutes of 2016) and Senate Bill 93 (De León, Chapter 9, Statutes of 2016) to appropriate \$176.6 million of the state's General Fund to DTSC to expedite residential sampling and cleanup in communities within a 1.7-mile area surrounding the former Exide battery recycling facility in Vernon, California. The 1.7-mile area surrounding Exide is designated as the Preliminary Investigation Area (PIA). The funding made available for DTSC would enable them to clean up approximately 2,500 of the highest priority properties within 1.7 miles of the facility over a two-year period. The highest priority properties were determined to be those with the highest levels of lead in soil and greatest risk of exposure.

On December 8, 2016, DTSC released the Final Exide Closure Plan and Final Environmental Impact Report. The Final Exide Closure Plan describes how the hazardous waste management units at Exide will be decontaminated and removed in a manner that is protective of public health and the environment. The plan incorporates many of the recommendations submitted by the community during the public engagement process.

- 6) *Cleanup activities to date:* As of March 19, 2021, DTSC had completed cleanup at 2,407 parcels using 26 cleanup crews. There are a total of 10,161 parcels within the PIA and of that total DTSC has sampled 8,606 parcels and of

the 9,050 properties it has permission to sample. DTSC is in the process of contracting for the sampling of parcels it has permission to sample but has not yet sampled.

- 7) *Funding provided for Exide cleanup to date.* In order to expedite the cleanup of contamination in the residential neighborhoods surrounding Exide to address the public health threats posed, the Legislature has provided approximately \$269 million for cleanup and enforcement activities including 1) \$7 million in emergency funding the Legislature provided in 2015-16 to sample up to 1,500 residential properties around the Exide facility; develop a comprehensive cleanup plan; and, begin cleanup of the 50 highest-priority properties based on the extent of lead contamination and the potential for exposure; 2) AB 118, (Santiago, Chapter 10, Statutes of 2016) and SB 93 (de León, Chapter 9, Statutes of 2016) provided a one-time \$176.6 million General Fund loan to TSCA for Exide-related cleanup of residential properties; 3) in 2019-20, the Legislature approved a loan of \$24.5 million from the General Fund to the Toxic Substances Control Account to complete cleanup activities at residences, schools, parks, day care centers, and child care facilities near Exide; and, 4) in 2019-20, the Legislature approved a loan of \$50 million one-time General Fund to the Toxic Substances Control Account to accelerate the cleanup of additional properties within 1.7 miles of Exide.

This year, the Governor's 2021-22 budget includes a \$31.4 million loan from the General Fund for DTSC to finish cleaning up lead contamination at the 3,200 high-risk properties identified around the former Exide Technologies facility. Building on that amount, the May Revision proposes an additional \$291 million General Fund over three years, to clean up additional properties with specified lead contamination levels near the former Exide facility in the City of Vernon. To date, the state has provided over \$251 million General Fund for residential cleanup and other costs associated with Exide.

- 8) *Exide Bankruptcy.* Exide filed its third bankruptcy petition on May 19, 2020, and following the federal bankruptcy court's approval on October 20, 2020, Exide's assets were liquidated. On October 26, 2020, Exide transferred title of the Vernon Plant to the trustee for the Exide Vernon Environmental Response Trust, a trust created pursuant to Exide's Fourth Amended Bankruptcy Plan. The trustee is required to implement closure activities and corrective action at the Vernon Plant, but the trustee has insufficient resources to complete these actions. The state continues to monitor the progress of the facility closure. In the event that the trust funds are fully expended, the May Revision proposes \$132 million one-time General Fund to continue cleanup at the facility under the management of the trustee.

- 9) *Recent audit of DTSC's cleanup activities near Exide.* On October 27, 2020, the California State Auditor released an audit of the steps taken by DTSC to identify and remove lead contamination from more than 10,000 properties surrounding a former lead battery recycling facility in Vernon, California. According to the state auditor,

"Despite the importance of removing lead contamination, we found that DTSC's cleanup efforts are behind schedule.

"We are particularly concerned that DTSC has not removed contaminated soil from a total of 31 school, childcare facility, and park properties even though it had available options for cleaning those sites. This is troubling because the children who may frequent these locations are at particularly high risk from the negative health effects of lead. Additionally, DTSC is behind schedule in its effort to clean 3,200 of the most contaminated properties. DTSC estimated it could clean these properties by June 2021. However, it has not cleaned properties at its expected pace and recently slowed its cleanup pace further due to a dispute with a contractor. At its current pace, DTSC will not finish cleaning the most contaminated properties until more than one year after the expected completion date. Finally, after DTSC finishes cleaning these 3,200 properties, an estimated 4,600 properties will remain contaminated and DTSC has not established a timeline or strategy to clean those properties.

"Furthermore, the cleanup project is likely to cost hundreds of millions of dollars more than the State has provided DTSC to date. The State has provided DTSC about \$250 million to clean the 3,200 most contaminated properties. We estimate that by the time DTSC spends all of this funding, 269 of these properties will still be contaminated. The department's poor cost estimation and cost overruns by one of its contractors have contributed to DTSC spending more than expected to clean the contamination. At current spending rates, we estimate that DTSC will need about \$390 million more than it has been allocated to date to completely clean all 7,800 contaminated properties. Although the State expected it would recover its costs from Exide, in October 2020 a federal court approved a bankruptcy settlement that leaves significant questions about the State's ability to obtain reimbursement for the cleanup."

- 10) *Audit recommendations.* According to the audit:

"To ensure that it has sufficient funding to clean up all lead contaminated properties in the cleanup site, DTSC should do the following:

"Identify the full amount of funding it needs to complete the cleanup of the 3,200 most contaminated properties and the remaining 4,600 contaminated properties. It should submit a request for funding in time for spring 2021 budget discussions that includes a range of funding options that spans from funding for the full cleanup to funding for only a portion of the remaining contaminated properties.

"Immediately revise its cost estimation methods to encompass the factors that it now knows will affect its overall costs. If needed, it should contract for expertise in determining accurate and complete estimates of the remaining cleanup cost.

"To protect against the unsustainably high costs it has incurred thus far in the cleanup project, DTSC should structure its future cleanup contracts to at least partially incorporate fixed prices.

"To ensure its ability to clean as many lead-contaminated properties as possible in a timely manner, DTSC should immediately begin soliciting an additional contractor to clean properties within the cleanup site. It should include performance standards for the pace of cleanup in its existing and future cleanup contracts.

"To ensure that the public and policy makers have the information they need to make informed decisions, DTSC should, by no later than April 2021, identify and publicize a date by which it expects to complete cleanup for all properties that meet or exceed the standard for lead contamination of 80 ppm identified in DTSC's cleanup plan. It should post this information on its website and, at least every six months, publish an update that indicates whether it is on track to meet that expected completion date based on its rate of progress."

On October 7, DTSC responded that it concurs with the recommendations in the audit report and has started to implement some and will implement all of the audit's recommendations.

- 11) *State will pursue responsible parties.* Exide, and any other responsible party, is legally responsible to clean up all of the properties that were contaminated by its operations. AB 118 included language that DTSC must take actions to pursue all available remedies against potentially responsible parties, including,

but not limited to, cost recovery actions against entities that are potentially responsible for the costs related to the cleanup and investigation of properties contaminated with lead in the communities surrounding Exide.

On December 14, 2020 DTSC filed litigation against prior owners and operators of the former Exide Technologies smelter in Vernon. The lawsuit seeks to hold these polluters accountable for reimbursement of costs the state has shouldered to investigate and clean up the site and surrounding area from contamination. It also asks the court to require defendants to investigate and clean up the remaining contamination. Several companies that sent or transported large amounts of hazardous materials to the facility for disposal or treatment are also included as defendants in the Federal lawsuit.

Additionally, DTSC recently appealed the October 2020 bankruptcy court's ruling that allowed Exide to walk away from its responsibility to safely close the facility and clean up the toxic contamination. DTSC maintains its claim that Exide is responsible in its appeal of the bankruptcy court's ruling.

- 12) *Why contracting changes are being pursued in AB 1024.* The author of AB 1024 is also the Legislator who requested the audit of DTSC's cleanup near Exide. Given the delays and cost overruns cited in the audit, AB 1024 is incorporating several of the audit's recommendations in order to reduce the likelihood of delays and cost overruns on future cleanups projects overseen by DTSC.

Comments

- 1) *Purpose of Bill.* According to the author, "Exide's pollution is one of the gravest environmental disasters in California's history. Exide polluted the homes of nearly 100,000 children and families and then shifted the cost to clean up Exide's mess onto the taxpayers. This is one of the most repugnant examples of corporate greed in recent memory. Further, the Department of Toxic Substances Control's blundering oversight of the Exide cleanup resulted in more delays, more costs, and, ultimately, more exposure to lead for California's most vulnerable families.

"AB 1024 would institute necessary transparency and accountability measures for the Department to prevent a botched cleanup oversight from ever happening again. These measures will give the public clear notice and expectations for all cleanups overseen by DTSC so that our communities can begin to recover from years of environmental degradation."

Related/Prior Legislation

AB 1462 (Santiago, 2019) would have appropriated one hundred million dollars (\$100,000,000) from the state General Fund to DTSC for activities related to accelerating the investigation and cleanup of homes and communities within a 1.7 mile radius of Exide. This bill was held on the suspense file in the Assembly Appropriations Committee.

AB 2189 (Santiago, 2018) would have extended the expenditure deadline from June 30, 2018, to June 30, 2021, for DTSC to cleanup properties contaminated with lead near Exide and appropriate \$12 million to DTSC for the investigation and cleanup of parkways near Exide. This bill was held on the suspense file in the Senate Appropriations Committee.

AB 118 (Santiago, Chapter 10, Statutes of 2016) appropriated \$176.6 million to DTSC to use for activities related to the cleanup and investigation of properties contaminated with lead in the communities surrounding Exide.

SB 93 (de León, Chapter 9, Statutes of 2016) amended the 2015-2016 Budget Act to include a new transfer of funds to address urgent cleanup of lead contamination in the communities surrounding Exide.

SOURCE: Author

SUPPORT:

Afscme, Afl-cio
California State Council of Service Employees International Union (seiu California)
International Union of Operating Engineers, Local 12
Liuna Local 300
Los Angeles County Board of Supervisors
Sierra Club - Long Beach Area Group
State Building and Construction Trades Council of Ca
United Food and Commercial Workers, Western States Council

OPPOSITION:

None received

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