
SENATE COMMITTEE ON ENVIRONMENTAL QUALITY

Senator Allen, Chair

2021 - 2022 Regular

Bill No: SB 42
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Version: 12/7/2020
Urgency: No
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Hearing Date: 4/26/21
Fiscal: Yes

SUBJECT: Department of Toxic Substances Control: Board of Environmental Safety

DIGEST: This bill would establish a Board of Environmental Safety within the Department of Toxic Substances Control (DTSC).

ANALYSIS:

Existing law:

- 1) Requires DTSC to enforce the standards within the Hazardous Waste Control Law (HWCL) and the regulations adopted by DTSC pursuant to the HWCL. (Health and Safety Code Section (HSC) § 25180)
- 2) Authorizes DTSC to deny, suspend, or revoke any permit, registration, or certificate applied for, or issued pursuant to HWCL. (HSC § 25186)
- 3) Authorizes DTSC to issue permits for the use and operation of one or more hazardous waste management units at a facility that meets the standards adopted pursuant to the HWCL. (HSC § 25200 (a))
- 4) Requires DTSC to impose conditions on each permit specifying the types of hazardous wastes that may be accepted for transfer, storage, treatment, or disposal. (HSC § 25200 (a))
- 5) Establishes, pursuant to the Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA), a program to provide for response authority for releases of hazardous substances, including spills and hazardous waste disposal sites that pose a threat to the public health or the environment. (HSC § 25300 et seq.)
- 6) Creates, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a Federal "Superfund" to clean up uncontrolled or abandoned hazardous waste sites, as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment.

Provides the United States Environmental Protection Agency (US EPA) with the authority to seek out those parties responsible for any release and assure their cooperation in the cleanup. (42 United States Code (U.S.C.) § 9601 et seq.)

This bill:

- 1) Establishes a Board of Environmental Safety (Board) within DTSC and requires the Board to conduct no fewer than 6 public meetings per year.
- 2) Specifies that Board members be appointed by the Governor and not be subject to confirmation by the Senate.
- 3) Prescribes the membership of the five-member Board, including:
 - a) Requiring four members possess expertise in one of the following areas: public health; environmental science, environmental law, or cumulative impact assessment and management;
 - b) Requiring one Board member be selected from the public.
- 4) Specifies the Board's responsibilities, including the following functions:
 - a) Hear and decide appeals of hazardous waste facility permit decisions;
 - b) Provide opportunities for public hearings on individual permitted or remediation sites;
 - c) Provide direction to DTSC, including evaluating alternatives and developing recommendations to the director of DTSC for hazardous waste management in the state;
 - d) Review and approve the director's annual priorities, including clear performance metrics for each of DTSC's programs; and
 - e) Develop a multiyear schedule for discussion of long-term goals for topics, including improvements to:
 - i) The efficiency of DTSC's hazardous waste facility permitting process;
 - ii) DTSC's ability to meet its duties and responsibilities;
 - iii) The site mitigation program and how the cleanup of contaminated properties is prioritized; and
 - iv) DTSC's implementation of its enforcement activities.
- 5) Establishes an office of the ombudsman within the Board to receive complaints and suggestions from the public, evaluate complaints, report findings and make recommendations to the director and the Board, and provide assistance to the public when appropriate.

- 6) Requires the director of DTSC, or a designee, to present and respond to the Board on any issue or item brought before the Board by the public, ombudsman, or a Board member.
- 7) Requires the Board to prepare an annual review of DTSC's performance, including, but not limited to, the director, and provide the review to the Secretary of CalEPA.

Background

- 1) *California Hazardous Waste Control Law (HWCL)*. HWCL is the state's program that 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. 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) *DTSC's hazardous waste management permitting program*. DTSC is responsible for administering the hazardous waste facility permitting program established under HWCL and the federal Resource Conservation and Recovery Act (RCRA). The core activities of the permitting program include: review of RCRA and non-RCRA hazardous waste permit applications to ensure safe design and operation; issuance and denial of operating permits; issuance of post-closure permits; approval and denial of permit modifications; issuance and denial of emergency permits; review and approval of closure plans; oversight of approved closure plans; and, providing public involvement on issues related to permitted facilities.
- 3) *DTSC's hazardous waste management enforcement program*: DTSC's inspection and enforcement responsibilities include its delegated authority under RCRA, California's HWCL, and state laws pertaining to toxics in packaging, toxic substances in consumer products, and disposal of universal wastes such as electronic waste. Core activities of DTSC's hazardous waste management program include: routine compliance inspections, which involve review of submitted data and reports as well as physical observation, testing, and evaluation of regulated facilities; and targeted compliance inspections, which involve review of specific units or processes in response to focused concerns or to inform permitting decisions, as well as analysis of current and historical compliance to inform those decisions.

- 4) *The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*. CERCLA, or Superfund, provides a Federal "Superfund" to clean up uncontrolled or abandoned hazardous waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment. Through CERCLA, the US EPA was given authority to seek out those parties responsible for any release and assure their cooperation in the cleanup. The US EPA cleans up orphan sites when potentially responsible parties cannot be identified or located, or when they fail to act.
- 5) *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. Additionally, DTSC ensures that the state meets the federal requirements that California pay 10 percent of cleanup costs for federal Superfund sites and 100 percent of the operation and maintenance costs after cleanup is complete. 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 laws also authorize DTSC to recover costs and expenses it incurs in carrying out these activities.
- 6) *Recent criticism of DTSC*. Over the past decade or so, DTSC has received complaints from the public about its permitting program and held meetings with the public, the regulated community, and stakeholders to identify and understand concerns about its permitting program. Community groups that live near hazardous waste facilities are concerned that DTSC is not properly enforcing state and federal law and allowing facilities to operate with an expired permit or have numerous violations of state law and regulation. Additionally, the regulated community is concerned about the length of time it takes DTSC to process a permit, with processing a permit extending years beyond the expiration date of their permit, as well as the costs associated with processing a permit.
- 7) *Legislative Oversight*. Over the last five years, the Legislature has conducted numerous hearings on DTSC's internal controls, its business practices, and its basic statutory obligations. In those hearings, the budget and policy committees have evaluated the following four main areas: (1) reviewing and monitoring the department's strategic plan and reorganization; (2) auditing cost recovery at the department; (3) providing

staffing to improve permit backlogs and business operations; and, (4) improving enforcement at the department.

Numerous statutory changes have been made to clarify and strengthen DTSC's statutes to help DTSC better achieve its mandates, and budget augmentations have been made to give DTSC resources to reduce backlogs and address outstanding programmatic failings. However, many of the underlying concerns about transparency, accountability, and long-term stability of DTSC programs remain.

- 8) *DTSC Independent Review Panel (IRP)*. In 2015, the Legislature passed and the Governor signed SB 83 (Budget Committee, Chapter 24, Statutes of 2015), which established within DTSC a three-member IRP to review and make recommendations regarding improvements to DTSC's permitting, enforcement, public outreach, and fiscal management. The statute stipulates that IRP membership shall be comprised of a community representative, a person with scientific experience related to toxic materials, and a local government management expert. Pursuant to SB 83, the IRP was authorized until January 1, 2018. Over the course of its term, the IRP conducted 24 public meetings and released 11 progress and annual reports. On January 8, 2018 the IRP released its final report and recommendations concluding: "The Department has implemented, or is working on, most of the IRP's recommendations and has achieved, or partially achieved, many of the IRP's suggested performance metrics. However, there is more work to be done. In the absence of the IRP, the Governor and the Legislature should consider a DTSC governing board or other structural change to enhance transparency and accountability and regularly monitor the status of the IRP-suggested recommendations and performance metrics, as well as DTSC's ongoing initiatives and decision-making."
- 9) *Funding sources for DTSC*. DTSC's funding comes primarily from the Hazardous Waste Control Account (HWCA) and the Toxic Substances Control Account (TSCA). The most recent Governor's Budget shows a budget of approximately \$345 million in the current year, with the largest expenditures from the TSCA (approximately \$114 million, which includes \$64.2 million for the Exide Project), General Fund (\$78 million), HWCA (\$51.1 million), and federal funds (\$33.4 million).

TSCA is a repository for revenues from cost recovery, penalties, interest, and the Environmental Fee. HWCA revenues are derived from fees paid by various hazardous waste generators, transporters, and facilities. They were last amended in statute in 1998 or earlier. The fees include:

- a. Generator (45 percent of total), Disposal (10 percent), and Facility fees (9 percent). The Generator, Disposal, and some Facility Fees are subject to an annual CPI and are collected by the California Department of Tax and Fee Administration.
- b. EPA ID Verification (9 percent) and Manifest fees (4 percent): these fees are the same rate as when they were established, are not adjusted for inflation and are collected by DTSC.

HWCA also receives a small Transportable Treatment Unit fee (CPI adjusted) and the Permitting Fee-for-Service. HWCA receives revenue from cost recovery activities.

HWCA has been operating with a structural deficit for at least the last six years. Revenues available to TSCA to support current service levels have decreased in recent years, largely as a result of increasing costs for National Priority List (Superfund sites) and state orphan sites, which are funded by an annual transfer out of TSCA to the Site Remediation Account. HWCA would have had a negative fund balance in 2019-20 without the \$27.5 million General Fund backfill to maintain current service levels. TSCA would have incurred a deficit in 2020-21 without the General Fund backfill of \$7.8 million; HWCA received a backfill of \$19.5 million in 2020-21. The 2021-22 Governor's Budget proposes General Fund backfills of \$22.5 million for HWCA and \$13 million for TSCA. (These are not loans.)

A number of factors contribute to the operating structural deficit in both accounts. They include increasing legislative mandates, an outdated fee structure that no longer corresponds to the proportion of waste generated or disposed, increasing costs relating to the state obligated cost share for National Priority List sites, and a backlog of unresolved response costs worth approximately \$67.1 million at over 1,600 cleanup sites over a 25-year period.

- 10) *Legislative Analyst's Office (LAO) Comments:* SB 42 is identical to the governance reform proposal contained in the 2020-21 Governor's Budget. On February 25, 2020, the LAO provided the following comments on that proposal:

"Concept of Establishing a Board Has Merit. A board that holds regular public meetings could improve transparency and allow the public and stakeholders a regular venue to raise issues and discuss their concerns. The board structure could also help to promote greater accountability by requiring the DTSC director to regularly report on the department's progress towards meeting outcome goals."

“Board Could make DTSC’s Programs More Effective. Some elements of the proposal could make DTSC’s programs more effective and result in the public receiving improved services. In particular, the proposals to require that the board (1) review and approve the director’s annual priorities for each program and (2) provide the Secretary of CalEPA with an annual performance review appear to be directed towards improving the department’s performance.”

“New Structure Would Improve Accountability. The addition of the board would result in a government structure where the Legislature and the public could more easily identify the persons responsible for managing DTSC’s programs and hold them accountable. Annual goal setting, long-term goal setting, and an annual performance review of DTSC by the board would establish a public process for identifying performance issues, determining who is responsible for them, and measuring the department’s progress towards addressing them. The creation of an ombudsman who would receive complaints from the public, render assistance, and make recommendations to the board and the director would increase the department’s accountability by creating an additional forum for the public to voice its concerns. In addition, providing a public hearing forum to appeal departmental permit decisions could result in a more transparent appeals process.”

- 11) *Other DTSC Reform Proposals.* In February, the Governor proposed, as part of his 2021-22 Budget, trailer bill language that would establish a Board of Environmental Safety within DTSC, restructure and increase charges that support the HWCA, and restructure and increase the tax that supports the TSCA.

The Governor's budget also includes \$300 million in one-time General Fund resources to support brownfield cleanups and investigations across the state. Of this amount, \$220 million would be for DTSC to investigate and clean up various projects where no financially viable responsible party can be found, \$76 million would be to establish a new competitive grant program to investigate and clean up brownfield sites, and \$4 million would be for establishing a new workforce development program. The Administration has indicated that it views funding for this proposal as contingent upon the enactment of the Governor's governance and fiscal reform package. Budget actions on these matters are pending.

AB 1 (Garcia) is a reintroduction of AB 995 (Garcia, 2020), which passed this Committee last year. AB 1 creates the Board of Environmental Safety within

the CalEPA to provide policy direction to and oversight of DTSC and raises and recasts existing fees within the Hazardous Waste Control Account (HWCA). This bill is pending before the Assembly Environmental Safety and Toxic Materials Committee.

Comments

1) *Purpose of Bill.* According to the author, “SB 42 ensures lasting accountability and transparency within DTSC by creating the California Toxic Substances Board. This board will oversee the responsibilities of the current DTSC and provide general policy direction. The Board will have five members appointed by the Governor and each will possess qualifications in environmental law and science. Over the last several years, DTSC has been criticized across the state for neglected permitting, cleanup and cost recovery and financial management activities.

“Most notably, the Exide facility in the City of Vernon had a hazardous waste facility permit that languished in continued status for nearly 30 years with numerous permit violations. This failure to complete the permitting process came at the price of decades-long severe, on-going and highly toxic lead pollution of the surrounding community and ultimately resulted in the closure of the facility. The Exide facility is just one of numerous sites that have drawn public attention and legislative scrutiny to DTSC.

“In 2015, an Independent Review Panel (IRP) was established with the purpose to review and make recommendations regarding improvements to DTSC’s permitting, enforcement, public outreach, and fiscal management. To increase accountability, the IRP recommended the creation of a board to decide on hazardous waste facility permits that DTSC does not timely process, provide improved oversight, and other structural changes.

“A common thread the legislature has seen over the past few years – from the Independent Review Panel and numerous stakeholders – is an acknowledgement that the legislature needs to get the department’s oversight and programs in order. Unfortunately, there seems to have been a lot of discussion and minor actions taken with questionable corresponding improvements. Accountability and transparency are imperative to address these issues. This is in the best interest of both the people of California, our local communities, and those DTSC regulates. SB 42 creates the Board to oversee DTSC as recommended by the IRP.”

- 2) *Part of the Puzzle.* Effective regulation of hazardous waste is essential for the protection of public health and the environment. Over the last several years, there has been a number of internal and external efforts to improve DTSC's ability to adequately meet its core mission and statutory mandates. Despite these efforts, the Department continues not to meet public expectations, especially in regards to clean-up and permitting activities.

The establishment of a Board could provide strategic guidance for DTSC, which the IRP found to be lacking and a board structure would bring some transparency to DTSC's decision-making process. Holding public meetings to discuss regulatory work, the status of cleanup sites, or why a permit decision has been delayed for a decade or longer will at least provide stakeholders with access to information they otherwise would not have.

DTSC's difficulties are a result of multiple factors, though undoubtedly a major factor is the shortage of funding in both HWCA and TSCA. The fees that feed into these funds have not been adjusted for over 20 years and do not reflect significant program expansions and new mandates. Both HWCA and TSCA are in need of funding from the General Fund in order to backfill the deficit. Absent any changes, both accounts will continue to need funding from the General Fund to stay balanced. However, by doing so, the state would continue to subsidize fee payers with taxpayer dollars.

The creation of a Board in and of itself is not going to resolve the many longstanding operational shortfalls at DTSC. To position the department for success, comprehensive reform is needed – this includes fiscal reform of both HWCA and TSCA. Arguably, additional programmatic controls are also needed to address the permit backlogs and the deficient financial assurances currently in place.

As mentioned above, both the Administration and Assemblymember Garcia have reintroduced governance and fiscal reforms proposals, through the 2021-22 Budget and legislation. As the author continues negotiations with the Administration and the Assembly on marrying these proposals, *the Committee may wish to direct the author to ensure that Senate policy and budget committee, as well as leadership staff continue to be included in discussions.*

- 3) *Board Appointment Provisions.* SB 42 proposes that all five Board members be appointed by the Governor, without making them subject to Senate confirmation.

The Committee may wish to direct the author to allow for the Senate and

Assembly to each appoint one member to the Board and require the Governor's three appointments be subject to Senate confirmation. The author should also consider adding further clarity to the Board appointments as follows:

- a. Specify which category of appointee the Senate and the Assembly should have and consider a rotation of these categories;*
- b. Clarify whether the Senate is to fill a vacancy left by the Governor and the Speaker, or just the Governor's vacancy; and*
- c. Identify which category of appointment shall get the shorter initial term.*

Related/Prior Legislation

AB 1 (Garcia) creates the Board of Environmental Safety within the CalEPA to provide policy direction to and oversight of DTSC and raises and recasts existing fees within the Hazardous Waste Control Account (HWCA). This bill is pending before the Assembly Environmental Safety and Toxic Materials Committee.

AB 995 (Garcia, 2020) would have created the Board of Environmental Safety within the CalEPA to provide policy direction to and oversight of DTSC and would have raised and recast existing fees within HWCA. This bill was vetoed by the Governor.

AB 2094 (Kalra, 2018) would have required DTSC to, on or before January 1, 2021, adopt regulations establishing inspection frequencies for permitted hazardous waste treatment, storage, and disposal facilities; hazardous waste generators; and, transporters. This bill was held in the Senate Appropriations Committee.

AB 2345 (Reyes, 2018), as it was heard before the ESTM Committee, would have made statutory changes to improve the process for the permitting of hazardous waste facilities. This bill was later amended to require the California Energy Commission to require each large electrical corporation to establish a tariff or tariffs that provide for bill credits for electricity generated by eligible renewable generating facilities and exported to the electrical grid. This bill was held in Senate the Rules Committee.

AB 2606 (Fong, 2018) would have required DTSC to process a hazardous waste facility renewal permit in an expedited manner if DTSC determines certain conditions apply. This bill was held in the Senate Appropriations Committee.

AB 248 (Reyes, 2017) would have made statutory changes to improve the permitting process for hazardous waste facilities. This bill was vetoed by the Governor.

AB 1179 (Kalra, 2017) would have required DTSC to, on or before January 1, 2020, adopt regulations establishing inspection frequencies for permitted hazardous waste treatment, storage, and disposal facilities and for hazardous waste generators and transporters. This bill was vetoed by the Governor.

SB 774 (Leyva, 2017) as it was heard before the ESTM Committee, would have created the California Toxic Substances Board within DTSC to provide oversight of California's hazardous waste management and the remediation of contaminated sites. This bill was later amended to require the California State University Trustees to oversee a competitive process to award funds to the Wildland and Wildland Urban Interface Wildfire Research Grant Program and appropriate \$5 million from the General Fund to the Trustees in order to oversee the program. This bill was vetoed by the Governor.

SB 812 (De León, 2014) would have modified the permitting process and public participation requirements for hazardous waste facilities. Would have established a Bureau of Internal Affairs to oversee DTSC and investigate departmental misconduct and a DTSC Citizen Oversight Committee to receive and review allegations of misconduct. This bill was vetoed by the Governor.

SOURCE: Author

SUPPORT:

California Product Stewardship Council

OPPOSITION:

None received

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