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*Assembly
California Legislature*

**ASSEMBLY COMMITTEE ON
ENVIRONMENTAL SAFETY
AND TOXIC MATERIALS**

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AGENDA

Tuesday, March 10, 2020
1:15 p.m. -- State Capitol, Room 444

HEARD IN SIGN-IN ORDER

1. A.B. 1919 Bauer-Kahan. Pesticides: enforcement actions: civil penalty: judicial review.
2. A.B. 2060 Holden. Drinking water: pipes and fittings: lead content.
3. A.B. 2104 C. Garcia. Lead-acid batteries: Lead-Acid Battery Recycling Facility Investigation and Cleanup Program. (Proposed Consent)



Date of Hearing: March 10, 2020

ASSEMBLY COMMITTEE ON ENVIRONMENTAL SAFETY AND TOXIC MATERIALS
Bill Quirk, Chair
AB 1919 (Bauer-Kahan) – As Introduced January 13, 2020

SUBJECT: Pesticides: enforcement actions: civil penalty: judicial review

SUMMARY: Authorizes the Department of Pesticide Regulation (DPR) to initiate and maintain enforcement actions and to levy civil penalties for specified pesticide use violations. Specifically, **this bill:**

- 1) Authorizes the director of DPR (director) to initiate and maintain enforcement actions for pesticide use violations specified in this bill.
- 2) Authorizes the director to levy the civil penalty described in this bill, or to refer any of the violations specified in the bill to the proper enforcement agency, including to the district attorney of the county in which the violations occurred or to the Attorney General.
- 3) Authorizes the director to initiate and maintain enforcement actions and to levy civil penalties, including referral to the proper enforcement agencies, if the director determines that a violation of specified pesticide use statutes and implementing regulations meet any of the following criteria:
 - a) The violation was committed in multiple jurisdictions;
 - b) The violation involves a priority investigation involving human or environmental health effects, as defined in the 2005 Cooperative Agreement, or subsequent modifications to that agreement, among DPR, the California Agricultural Commissioners and Sealers Association, and the United States Environmental Protection Agency (USEPA), Region 9; or,
 - c) The violation is not appropriate to be enforced by a County Agricultural Commissioner (CAC) because the county lacks resources to pursue the violation; county enforcement would raise a conflict of interest; the violator is located outside of the county; or, the county has determined it is not appropriate for the county to enforce the violation.
- 4) Authorizes the director to levy a civil penalty of not more than \$25,000 for each violation.
- 5) Provides that before a civil penalty is levied, the person charged with the violation shall be given a written notice of the proposed action, including the nature of the violation and the amount of the proposed penalty.
- 6) Provides that a notice of the proposed action that is sent by certified mail to the last known address of the person charged shall be considered received even if delivery is refused or the notice is not accepted at that address.
- 7) Provides that the person charged shall have the right to request a hearing within 20 days after receiving notice of the proposed action.

- 8) Provides that, if a hearing is requested, notice of the time and place of the hearing shall be given at least 10 days before the date set for the hearing.
- 9) Provides that before the hearing, the person charged shall be given an opportunity to review the director's evidence.
- 10) Provides that at the hearing, the person shall be given the opportunity to present relevant evidence.
- 11) Provides that if a hearing is not requested, the director may take the action proposed without a hearing.
- 12) Provides that if the person against whom the director levied a civil penalty requested and appeared at a hearing, the person may seek judicial review, as specified, of the director's decision within 30 days of the date of the decision.
- 13) Authorizes the director, or his or her representative, after exhaustion of any administrative or judicial review procedures provided in this bill, to file a certified copy of a final decision of the director that orders the payment of a civil penalty and, if applicable, any related judgement or order that denies a petition for writ of administrative mandamus, with the clerk of the superior court of any county.
- 14) Provides that the clerk shall immediately enter a judgement in conformity with the decision or order.
- 15) Prohibits the clerk of the superior court from charging a fee for the performance of any official service required in connection with the entry of judgment pursuant to this bill.
- 16) Requires that any money recovered under the provisions of this bill be paid to the investigating CAC to reimburse the cost of the investigation with the remainder going into the Department of Pesticide Regulation Fund for use by DPR, upon appropriation, to administer agricultural chemicals, livestock remedies, and commercial feeds (pesticides) law and pest control operations law.
- 17) Specifies that the provisions of this bill shall apply only to violations that occur on or after January 1, 2021.
- 18) Authorizes DPR to adopt regulations to implement and enforce the provisions of this bill.
- 19) Makes other conforming changes.

EXISTING LAW:

- 1) Provides that in all cases where provisions of the Food and Agriculture Code (FAC) place joint responsibility for the enforcement of laws and regulations on the director and the CAC, the CAC shall be responsible for local administration of the [pesticide] enforcement program.

Provides that the director shall be responsible for overall statewide enforcement and shall issue instructions and make recommendations to the CAC. (FAC § 2281)

- 2) Provides that every person who violates any provision of the pesticides division of the FAC relating to pesticides, with a few exceptions, or any regulation issued pursuant to those provisions, is guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than \$500 nor more than \$5,000, or by imprisonment of not more than six months, or by both the fine and imprisonment. Provides that upon a second or subsequent conviction of the same violation, a person shall be punished by a fine of not less than \$1,000 nor more than \$10,000, or by imprisonment of not more than six months, or by both the fine and imprisonment. Provides that each violation constitutes a separate offense. (FAC § 12996 (a))
- 3) Provides that if the offense referenced above involves an intentional or negligent violation that created or reasonably could have created a hazard to human health or the environment, the convicted person shall be punished by imprisonment in a county jail not exceeding one year or in the state prison or by a fine of not less than \$5,000 nor more than \$50,000, or by both the fine and imprisonment. (FAC § 12996 (b))
- 4) Provides that any person who is found in violation of any provision of the pesticides division of the FAC or any regulation related to pesticides that results in illness or injury requiring emergency medical transport or immediate medical treatment of any individual in a nonoccupational setting from any pesticide used in the production of an agricultural commodity, shall be liable to the individual harmed or to the medical provider for the immediate costs of uncompensated medical care from acute injuries and illnesses of the exposed individual. (FAC § 12997.5)
- 5) Provides that any person who violates the pesticides division of the FAC relating to pesticides or structural pest control devices, or any regulation issued pursuant to those provisions, is liable civilly in an amount not less than \$1,000 nor more than \$10,000 for each violation. Provides that any person who commits a second or subsequent violation that is the same as or similar to a prior violation, or whose intentional violation resulted or reasonably could have resulted in the creation of a hazard to human health or the environment or in the disruption of the market of the crop or commodity involved, is liable civilly in an amount not less than \$5,000 nor more than \$25,000 for each violation. (FAC § 12998)
- 6) Authorizes the director of DPR, in lieu of civil prosecution, to levy a civil penalty of not more than \$5,000 for each violation against a person who violates specified sections of the FAC relating to, among other things, the Healthy Schools Act, structural pest control, pesticide sales, pesticide licensing fraud, and pesticide registration. (FAC § 12999.4(a))
- 7) Authorizes the CAC, in lieu of civil prosecution by the director, to levy a civil penalty of not more than \$1,000 against a person violating specified provisions of law or regulations relating to, among other things, pest control operations, pesticides and worker safety, use of restricted materials, pesticide recommendations and usage requirements, carbon monoxide pest control devices, or structural pest control devices. (FAC § 12999.5 (a))
- 8) Provides that any violation of the above specified statutes and regulations determined by the CAC to be a Class A violation as defined in the California Code of Regulations (i.e. a serious

violation that caused a health, property, or environmental hazard) is subject to a fine of not more than \$5,000 for each violation. (FAC § 12999.5 (a))

- 9) Sets up a process of notice, hearing, and appeal that CACs must follow when levying a civil penalty against a person violating pesticide use law. (FAC § 12999.5 (b- f))
- 10) Defines a Class A violation as one of the following: a violation that caused a health, property, or environmental hazard; a violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects, and the CAC determines specified aggravating circumstances support elevation to Class A; or, a violation of a lawful order of the CAC issued pursuant to specified sections of law. (3 Cal Code of Regulations 6130 (b)(1))

FISCAL EFFECT: Unknown.

COMMENTS:

Need for the bill: According to the author, "Improper application of pesticides can cause significant harm to agricultural communities and their workers. Illegal uses of pesticides has caused numerous illness to farmworkers in the fields and have severe public health concerns for families living adjacent to the fields being treated. Currently, the penalty amount is woefully inadequate to address what the Department of Pesticide Regulation (DPR) calls a 'priority incident'...

Additionally, pesticides do not know county or agricultural lines. When an improper application of pesticides results in the toxins drifting across jurisdictions, it is important that DPR have the authority to support the County Agricultural Commissioners (CAC) by providing them resources to enforce State law...

AB 1919 is intended to strengthen CAC's and DPR's pesticide enforcement ability by increasing fines from \$5,000 to \$25,000 – to target the bad actors and help protect farm workers and agricultural communities."

Pesticide use enforcement authority: In California, federal, state, and local governmental entities all have roles in pesticide use enforcement. The USEPA sets minimum pesticide use standards and delegates pesticide enforcement authority to the states. State law designates DPR as the agency responsible for delivering an effective statewide pesticide regulatory program in California. The Legislature has also delegated pesticide use enforcement authority to County Agricultural Commissioners (CACs). DPR describes that it works in partnership with the CACs by planning and developing adequate county pesticide use enforcement programs; evaluating the effectiveness of the local programs; and, ensuring that corrective actions are taken in areas needing improvement. CACs enforce state pesticide laws and regulations in agricultural, structural, and nonagricultural use settings in all 58 counties.

While DPR currently has the authority to administratively enforce violations related to pesticide registration, sale, illegal residue, and licensing fraud, the local CACs maintain the statutory authority to administratively enforce pesticide *use* violations.

This bill will additionally authorize DPR to bring administrative enforcement actions, in accordance with specified procedural and other requirements, for specified pesticide use violations. These violations include those that are committed in multiple jurisdictions; that are not an appropriate matter to be enforced by a CAC (due to a lack of resources, conflict of interest, the violator is located outside the county, or other factors that the CAC determines is inappropriate); or, that involve a priority investigation, as defined, involving human or environmental health effects.

Administrative pesticide use enforcement-- civil penalty authority: Since the mid-1980s, CACs have held the statutory authority to levy civil penalties for pesticide use violations. The initial penalty authority capped penalties at \$500 per violation. In 1989, the Legislature raised the maximum civil penalty amount that a CAC could levy for pesticide use violations to \$1,000. Then in 2000, SB 1970 (Costa, Chapter 806, Statutes of 2000) authorized DPR to administratively enforce specified, more serious pesticide use violations with a penalty of up to \$5,000 per violation. The \$5,000 penalty cap was a five-fold increase over the penalty amount CACs could levy at the time. In 2002, the Governor signed AB 947 (Jackson, Chapter 457, Statutes of 2002) into law to raise the maximum civil penalty per violation that a CAC could levy for a pesticide use violation to \$5,000, which created an equal penalty limit to that granted to DPR for more serious violations. It appears that because the CACs and DPR could, at the time, levy equal penalties for pesticide use violations, the Legislature allowed the California Food and Agricultural Code (FAC) provisions that authorized DPR to levy civil penalties for pesticide use violations to sunset.

This bill would reinstate the sunsetted FAC provisions that granted DPR discretionary authority to administratively enforce specified, typically serious, pesticide use violations. It sets the maximum penalty per violation that DPR can levy for specified violations at \$25,000, which is, as it was in SB 1970, five times the penalty that CACs can levy.

It should be noted that the maximum penalty amounts for pesticide use violations in California haven't increased in 20 years, since the enactment of SB 1970 in 2000. Related provisions of the law haven't been updated since 2002, with AB 947. Additionally, should this bill be enacted, the maximum civil penalty amounts for the pesticide use violations delineated in the bill, while increasing over current amounts, are lower than maximum penalty amounts that entities within the California Environmental Protection Agency can levy for violations of other environmental laws. For example, maximum penalties under the federal Clean Air Act are currently \$101,439 per day per violation, maximum penalties under the federal Clean Water Act are \$55,800 per day per violation, and maximum penalties for violations of hazardous waste control law are \$70,000 per day per violation.

California growers have, over the decades, made significant investments to reduce incidents of environmental and human harm related to pesticide use. The intent of this bill is to provide an additional means for counties and the state to work together to enforce serious pesticide use violations. The reinstated enforcement authority for DPR and the increase in the current maximum civil penalty for these serious pesticide use violations is intended to serve as a deterrent for violators of the law and therefore support the vast majority of growers who have invested in human health and environmental protections at their facilities.

Criminal prosecution for pesticide use violations: Statute delineates penalty amounts and terms of imprisonment for criminal violations of pesticide law. For example, for an offense that

involves an intentional or negligent violation that created or reasonably could have created a hazard to human health or the environment, the convicted person may be punished by imprisonment in a county jail not exceeding one year or in the state prison or by a fine of not less than \$5,000 nor more than \$50,000, or by both the fine and imprisonment. The CACs and DPR do not have the authority to bring criminal actions.

Recent priority investigations: As defined in the 2005 Cooperative Agreement among DPR, the California Agricultural Commissioners and Sealers Association, and USEPA Region 9, priority investigations include serious pesticide incidents, such as those causing death, serious injury, or illness, or any single injury or illness episode involving five or more persons; contamination of a drinking water supply affecting 10 or more households; contamination of air resulting in issuance of a recommendation by a representative of a legally authorized agency to evacuate five or more people; contamination of land or soil resulting in 1/2 acre or more not usable for intended purposes for one year or more; non-target animal and wildlife mortality that exceeds specified levels; or, damage to any property, equipment, or livestock (including bees) that is estimated to represent a \$20,000 loss, or 20% crop yield loss.

This bill authorizes DPR to impose a civil penalty for pesticide use violations that involve a priority investigation involving human health or environmental health effects.

DPR compiled the following table of priority investigations from 2012-2019, which helps provide a better understanding of the potential scope of the bill. Please note that while incidents of self-harm are considered priority investigations, they will not be referred to DPR to bring administrative enforcement actions.

Year	Human (accidental exposures)	Human (self-harm, intentional ingestion)	Other (report of loss, wildlife, environmental)	Total	Total resulting in enforcement actions
2012	47	21	9	77	20
2013	40	15	8	63	21
2014	67	42	16	125	24
2015	61	16	12	89	21
2016	59	7	15	81	21
2017	53	15	20	88	22
2018	56	12	9	77	19*
2019	54	10	15	79	7*

*Includes investigations with pending enforcement actions. Because the 2 year statute of limitation for many of these cases has not expired, more enforcement actions may ultimately be taken for violations occurring in 2018 – 2019.

According to DPR's statistics, during the years of 2012-2019 there were 541 priority investigations reported, excluding incidents of self-harm. One hundred and fifty-five of those investigations have resulted in an enforcement action by CACs so far. Based on the average number of priority investigations resulting in an enforcement action from 2012-17, we can

anticipate that, should this bill be enacted, roughly 22 priority investigations per year could meet the criteria for DPR involvement. However, the actual number of cases handled by DPR is likely to be lower since CACs will continue to also handle priority investigations, as appropriate.

Policy considerations:

- 1) The 2005 Cooperative Agreement among DPR, the California Agricultural Commissioners and Sealers Association, and USEPA Region 9 breaks down the definition of priority investigation effects criteria into three main categories: human effects, environmental effects, and economic loss. Economic loss is defined as "damage to any property, equipment, or livestock (including bees) that is estimated to represent a \$20,000 loss, or 20% crop yield loss." AB 1919 authorizes DPR to bring enforcement action for pesticide use violations relating to a priority investigation involving human or environmental health effects, but not economic effects. As this bill moves through the process, the author may wish to consider including economic effects as priority investigation effects criteria over which DPR has enforcement authority.
- 2) Currently, almost all pesticide use enforcement in California is carried out at the administrative level by the CACs. DPR maintains oversight authority for the state's pesticide program and works in collaboration with CACs to ensure an effective enforcement regime. This bill would reinstate DPR's discretionary authority to administratively enforce specified, typically serious, pesticide use violations. As this bill moves through the process, the author may wish to consider including language in the bill requiring communication or collaboration between DPR and CACs when DPR takes pesticide use enforcement action.

Recent related legislation: AB 1419 (Quirk, 2017) would have authorized DPR to initiate and maintain enforcement actions and to levy civil penalties for specified pesticide use violations. This bill failed passage on the Assembly floor.

Double referral: Should AB 1919 pass the Assembly Committee on Environmental Safety and Toxic Materials, it will be referred to the Assembly Committee on Judiciary.

Arguments in support: According to Californians for Pesticide Reform, "We are writing in support of AB 1919, which would further deter bad acting pesticide applicators by increasing maximum enforcement fines for incidents that threaten their workers and surrounding communities... Priority Incidents, as defined by Department of Pesticide Regulation (DPR), are when there is a negligent use of pesticides that result in the agent coming into contact with humans – for example: farm workers in the field or a pesticide drift incident which creates a public health risk for surrounding communities. AB 1919 will increase the maximums on enforcement fines for priority incidents from \$5,000 to \$25,000. Additionally, this bill will allow DPR to work in collaboration and assist the County Agricultural Commissioners to investigate incidents that occur across different counties or jurisdictional lines... AB 1919 updates a statute that has not been touched in almost 20 years."

Arguments in opposition: According to a coalition of agricultural entities, "AB 1919 would provide [DPR] with the ability to pursue a pesticide use investigation and enforcement action, rather than the County Agricultural Commissioner, without meaningful consultation with the County Agricultural Commissioner(s) with jurisdiction. To resolve this concern, we request Section 12999.6(b) be amended to include the County Agricultural Commissioner in the

determination if a violation meets the criteria outlined in the bill... AB 1919 would also increase the potential fine threshold for any violation from \$5,000 to \$25,000. The current enforcement structure, which is applied statewide and has been carefully reviewed before being put into regulations, gives discretion for the County Agricultural Commissioner to impose penalties commensurate with the nature of the violation, consider intent and pursue criminal actions for willful and egregious instances. Criminal penalties for first-time offenders can be as much as \$5,000 and require a 6-month jail sentence. If a violation is intentional or negligent, creates a reasonable hazard to human health or the environment, penalties can be stacked to be more than \$50,000 per violation. Second and repeat violations can also be as much as \$10,000 to \$25,000 per violation and require jail time. To this end, the existing civil and criminal penalties are more than appropriate. Therefore, we request the fine threshold specified in Section 12999.6(c)(1) not be changed and remain as stated in existing law."

REGISTERED SUPPORT / OPPOSITION:

Support

Californians for Pesticide Reform
California Rural Legal Assistance Foundation
Natural Resources Defense Counsel

Opposition

Almond Alliance of California
Association of California Egg Farmers
California Agricultural Commissioners & Sealers Association
California Association of Wheat Growers
California Association of Winegrape Growers
California Bean Shippers Association
California Citrus Mutual
California Cotton Ginners and Growers Association
California Farm Bureau Federation
California Fresh Fruit Association
California Grain and Feed Association
California Pear Growers Association
California Seed Association
California State Floral Association
California Warehouse Association
Grower-shipper Association of Central California
Pacific Egg & Poultry Association
Western Agricultural Processors Association
Western Growers Association
Western Plant Health Association

Analysis Prepared by: Shannon McKinney / E.S. & T.M. /

Date of Hearing: March 10, 2020

ASSEMBLY COMMITTEE ON ENVIRONMENTAL SAFETY AND TOXIC MATERIALS

Bill Quirk, Chair

AB 2060 (Holden) – As Introduced February 4, 2020

SUBJECT: Drinking water: pipes and fittings: lead content

SUMMARY: Requires end use plumbing fixtures to meet a performance standard to meet conditions for "lead free." Specifically, **this bill:**

Requires any pipe, pipe or plumbing fitting or fixture, solder, or flux, with respect to end-use devices, sold as "lead free" to be not more than one microgram of lead ($\mu\text{g/L}$) for test statistic Q or R calculated in accordance with section B.8.9 of NSF International/American National Standards Institute (ANSI) Standard 61 and NSF International/ANSI Standard 61 certified, until NSF International adopts an equal or more stringent standard.

EXISTING LAW:

- 1) Prohibits, under the federal Safe Drinking Water Act (SDWA), the use of pipe, any pipe or plumbing fitting or fixture, solder, or flux that is not lead free in any public water system or facility providing drinking water. (Public Law 116–92 §1417)
- 2) Prohibits the use of any pipe, pipe or plumbing fitting or fixture, solder, or flux that is not "lead free" in the installation or repair of any public water system or any plumbing in a facility providing water for human consumption. (Health & Safety Code (HSC) § 116875(a))
- 3) Defines "lead free" as not containing more than 0.2 percent lead when used with respect to solder and flux and not more than a weighted average of 0.25 percent lead when used with respect to the wetted surfaces of pipes and pipe fittings, plumbing fittings, and fixtures. (HSC § 116875(e))
- 4) Requires all pipe, pipe or plumbing fittings or fixtures, solder, or flux to be certified by an independent ANSI accredited third party, including, but not limited to, NSF International, as being in compliance with this law. (HSC § 116875(g)(1))
- 5) Requires the certification described above to, at a minimum, include testing of materials in accordance with the protocols used by the Department of Toxic Substances Control (DTSC) in implementing Article 10.1.2 (commencing with Section 25214.4.3) of Chapter 6.5 of Division 20. (HSC § 116875(g)(2)(A))

FISCAL EFFECT: Unknown.

COMMENTS:

Need for the bill: According to the author, "We all expect the water we drink to keep us healthy and not make us sick. California has progressively been working to reduce residents' exposure to lead. Yet lead is still leaching into drinking water through faucets, fixtures, and other end use plumbing devices during the curing process which can last for weeks. We can fix this by

requiring all faucets/fixtures and other end-use devices to leach as little lead as possible and third party testing demonstrates that this standard can be met."

Lead: Lead has been listed under California's Proposition 65 since 1987 as a substance that can cause reproductive damage and birth defects, and has been listed as a chemical known to cause cancer since 1992. Lead exposure and lead poisoning are also associated with cognitive and other health impacts, especially to children, that appear irreversible. There is no level of lead that has been proven safe, either for children or for adults.

Lead in water: Concern about lead in drinking water has heightened since the Flint, Michigan water crisis, and, in fact, some of the most prevalent sources of lead in drinking water are from pipes, fixtures, and associated hardware from which the lead can leach. According to *Lead in Drinking Water and Human Blood Levels in the United States*, published by the National Center for Environmental Health in 2012, nearly all lead in users' tap water does not come from the primary water source or from the municipal treatment plant, but is a result of corrosion resulting from materials containing lead coming into contact with water after it leaves the treatment plant. Lead can enter a building's drinking water by leaching from lead service connections, from lead solder used in copper piping, and from brass fixtures.

The amount of lead in tap water can depend on several factors, including the age and material of the pipes, concentration of lead in water delivered by the public utility, and corrosiveness of the water.

Lead in plumbing: Beginning January 1, 2010, California law (AB 1953, Chan, Chapter 853, Statutes of 2006) banned for sale and use any pipe, pipe or plumbing fitting, or fixture intended to convey or dispense water for human consumption through drinking or cooking that is not "lead free."

That law defines "lead free" as not more than 0.2 percent lead when used with respect to solder and flux, not more than a weighted average of 0.25 percent when used with respect to the wetted surfaces of pipes and pipe fittings, plumbing fittings, and fixtures, and not more than 8 percent when used with respect to pipes and pipe fittings (HSC § 116875(e)-(f)).

This applies to kitchen faucets, bathroom faucets, and any other end-use devices intended to convey or dispense water for human consumption through drinking or cooking. However, service saddles, backflow preventers for non-potable services such as irrigation and industrial uses, and water distribution main gate valves that are two inches in diameter and larger are excluded.

The federal SDWA, which defines "lead free" with the same metrics as California law, prohibits the "use of any pipe, any pipe or plumbing fitting or fixture, any solder, or any flux, after June 1986, in the installation or repair of (i) any public water system; or (ii) any plumbing in a residential or non-residential facility providing water for human consumption, that is not lead free."

AB 2060 proposes to require end-use plumbing devices, such as faucets, fixtures, and water fountains to meet a performance standard to comply as "lead free." This performance standard will prevent the sale in California of end-use devices that leach more than one µg/L of lead after a three week curing process.

Third party certification: The federal and California "lead free" plumbing requirements have been incorporated into the ANSI standard issued by NSF International as NSF/ANSI 61.

NSF is an independent, not-for-profit organization that develops consensus national standards, and provides product inspection, testing, and certification. To address contamination in drinking water, the United States Environmental Protection Agency contracted with NSF in 1985 to lead a consortium of public and private partners (PPP) to develop health-based product standards for products that could be used in public drinking water supplies. These standards were developed as American National Standards using the principles required under the essential requirements of the ANSI.

The efforts of the PPP led to the 1988 release of NSF/ANSI 60 and NSF/ANSI 61 and a related conformity assessment program to certify that products meet the standards' requirements.

NSF is the entity that currently certifies faucets as meeting state and federal plumbing standards. Current law requires all pipe, pipe or plumbing fittings or fixtures, solder, or flux to be certified by an independent ANSI accredited third party, including, but not limited to, NSF International, as being in compliance with the "lead free" standard (HSC § 116875(g)(1)).

This ANSI standard limits the amount of impurities that individual products can introduce into a home's water supply for potable water contact, including lead and other metals, volatile organic chemicals, phthalates, and bisphenol A. Products covered by this standard include faucets, pipe, drinking water fountains, water meters, and water storage tanks. That standard also sets a limit of five $\mu\text{g/L}$ lead leaching in overnight samples from end-use devices over the first three weeks of use. The leaching limit is based on a specific protocol in NSF/ANSI 61.

NSF/ANSI 61 Section 9 certifies lead leaching from end-use devices (i.e., components within the last 1 L of water) using an evaluation criterion known as the "Q statistic," which must be less than five $\mu\text{g/L}$ for faucets. This statistic is the calculation of the upper 90% confidence interval of the 75th percentile, and is used to translate the component's lead contribution to a 1 L sample. The Q statistic calculation is described in-depth in the NSF/ANSI standard.

Although the ANSI 61 accreditation standard itself prohibits certified faucets from leaching more than five $\mu\text{g/L}$ lead, California law does not express a lead leaching standard. State law only limits the amount of lead that can be in the water-touching metal of faucets and fixtures. As a result, state enforcement actions, such as faucet testing, do not address the lead-leaching rates of faucets sold in California.

"Lead free" does not mean lead free: California's "lead free" plumbing statute reduced the allowable amount of lead in plumbing fixtures, but still allows for lead, which can, and does, leach into the water.

Consumers are unaware that lead-free devices leach any lead – and many would be shocked to learn the faucets leach so much lead – especially in the first few weeks of use.

On April 25, 2018, NSF International released a report, *Analysis of lead extraction results obtained during Q statistic evaluations on devices submitted as 'lead free'; under NSF/ANSI 61*, which provided data on 692 plumbing products (which included approximately 500 faucets) that had been submitted to NSF for certification since 2011 as "lead free."

The report found that 73% of faucets leach one $\mu\text{g/L}$ or less. That indicates more than a quarter of the faucets on the market that meet California's "lead free" plumbing standard are leaching lead into the drinking water, but it also means nearly two-thirds of the faucets on the market today would meet the performance standard proposed by this bill.

Unfortunately, there currently is no easy way to identify these "lower lead" models as the manufacturers do not make their Q values public. Additionally, NSF did not test every single individual end-use device; rather, it tested "families" of products with similar or common materials or components that can be covered by the testing, so even NSF cannot provide information on each end-use device's Q value if it is lower than five $\mu\text{g/L}$.

Efforts to test lead in drinking water: Given the impacts of lead on children, California has made it a priority in recent years to address lead in drinking water by testing the taps at institutions that cater to children.

In 2017, AB 746 (Gonzalez, Chapter 746, Statutes of 2017) was enacted to require community water systems that serve a schoolsite built before January 1, 2010, to test for lead in the potable faucets of the schoolsite on or before July 1, 2019. Concurrently, the State Water Resources Control Board (State Water Board) required approximately 1,200 community water systems to test the drinking water for lead at any school that requested it.

Furthermore, in 2018, the Legislature enacted AB 2370 (Holden, Chapter 676, Statutes of 2018) to require the state to test drinking water at all licensed childcare centers and recommended remediation strategies if lead is detected, including faucet replacement. Last year, Budget Act of 2019-20 included \$5 million to start that testing process ahead of AB 2370 implementation given the fact lead exposure to babies and toddlers is the most critical.

Under the proposed AB 2370 sampling protocols, there is a five parts per billion (ppb) lead action level, and a requirement that all test results – with detections down to 1 ppb – be reported. (Please note that 1 ppb \neq 1 $\mu\text{g/L}$. Both are very low thresholds for lead in drinking water, but are not the same measurement.)

Results from water testing at schools: There are approximately 9,000 K-12 schools in California serving more than six million school-age children, and more than 600,000 California children are enrolled in 10,500 licensed child care centers.

The AB 746 testing was completed in July 2019, and the data show that approximately 18% of K-12 public school campuses found at least one faucet that dispensed lead containing 5 ppb lead or more. (Many schools that tested their drinking water did not test all of the drinking water fountains or faucets of potable water, so there could be a greater percentage of schools with lead contaminated drinking water.) The testing at childcare centers has not yet commenced, but there is concern the results could mirror what we are seeing at schools.

The timing of AB 2060 is relevant; when lead is found in drinking water, faucets tend to carry the majority of the blame for the lead exposure, and are also one of the easiest things to remediate. However, if a significant portion of the "lead free" faucets on the market are leaching lead, then any remediation at a school or childcare center to replace a faucet will be for naught.

Goals to reduce lead in drinking water: The American Academy of Pediatrics (AAP) recommends that drinking water in public schools should not exceed one $\mu\text{g/L}$ lead.

Specifically, the AAP is calling for state and local governments to take steps to ensure that the water lead concentrations at school water fountains do not ever exceed one µg/L.

At an October 2019 public hearing, the State Water Board agreed to adopt a goal of reducing lead in childcare centers' drinking water to no more than 1 ppb. The State Water Board's decision represents the toughest action in the country to date on this issue.

Members of the State Water Board did not vote to approve the health-protective lead goal during the meeting but did instruct its staff to include it in the recommendations and protocols the State Water Board will send to the Department of Social Services, which oversees licensed childcare centers and will administer the lead testing program pursuant to AB 2370.

The State Water Board reaffirmed that 1 ppb goal in a November 2019 guidance document, *Guidance for Sampling Lead in Drinking Water at Licensed Child Day Care Centers*. The document stated that reducing lead in drinking water is a critical step to reducing children's overall lead exposure and, although zero lead is the ideal, the State Water Board recommends DSS to adopt a goal of reducing lead in licensed childcare centers drinking water to more than 1ppb.

AB 2060 would effectively codify a performance standard in addition to the existing content standard to would require end-use devices to leach less than one µg/L helping the state meeting those drinking water goals.

California has progressively worked to reduce residents' lead exposure. It has been a leader on reducing lead from plumbing fixtures. Environmental Defense Fund and Environmental Working Group, cosponsors of AB 2060, state that the bill continues that effort but ensures fixtures that people drink water from leach much lower amounts of lead and enables schools and child care facilities in particular to replace problem fixtures with ones that deliver safe water.

Time is of the essence: As mentioned, ensuring end-use devices with a Q 1 statistic are available is time sensitive given the remediation efforts at schools and child care centers, but manufacturers will need time to certify their products as meeting the standard before they can be sold, and NSF will need the time to review, test, and certify each individual product.

Furthermore, the NSF Joint Committee on Drinking Water Additives designed a task group in November 2018 to consider revising the NSF/ANDI 61 to include a new voluntary requirement for lead release in plumbing devices. The group has met and twice voted against lowering the standard from five µg/L to one µg/L, but continues to discuss the merits of the lowered standard, and the introduction of AB 2060 may have ignited renewed interest to move forward with adopting the lower standard. NSF writes that there has been growing consensus to make any new requirement mandatory (like the bill proposes). However, to allow time for manufacturers to comply with a more stringent standard, NSF would provide an effective date of January 1, 2024, for all plumbing fixtures, not just end-use devices, to meet a Q 1 value. If the NSF task group recommends, and then NSF adopts the lower standard, NSF would allow manufacturers to voluntarily certify their products as meeting the one µg/L standard before the 2024 deadline.

Plumbing Manufacturers International (PMI), which represents manufacturers of 90% of the United States' plumbing products with more than 150 brands, is supportive of the standard being lowered to 1 µg/L lead, but would prefer to see the implementation timeframe for that codified standard be modeled after the implementation timeframe of the original law to provide

sufficient time for manufacturers to design and manufacture compliant products, obtain certification, and provide them to market. AB 1953 was enacted in 2006, but allowed three years for the new "lead free" standard to go into effect on January 1, 2010. Similarly, the timeline NSF is proposing is January 1, 2024, for all fixtures to comply with a 1 µg/L lead standard.

The author may wish to continue working with PMI to establish timelines that work for the impending remediation efforts at schools and child care centers while allowing manufacturers time to comply with the yet to be determined certification protocols for a lower Q value.

Technical amendments: NSF pointed out that the correct vernacular should be "endpoint devices," not "end-use devices." NSF also states that because the NSF/ANSI 61 is continuously updated, the reference in the bill should be "the appropriate section of the NSF/ANSI/61 used to calculate the statistics Q and R." As the author continues to work with NSF and PMI on implementation timing, he may wish to consider these technical amendments and whether they may be appropriate.

REGISTERED SUPPORT / OPPOSITION:

Support

Environmental Working Group (Cosponsor)
Environmental Defense Fund (Cosponsor)
Alliance of Nurses for Healthy Environments
Breast Cancer Prevention Partners
California League of Conservation Voters
California Public Interest Research Group (CALPIRG)
Center for Environmental Health
Clean Water Action
Coalition of California Welfare Rights Organizations
Families Advocating for Chemical and Toxics Safety
Friends Committee on Legislation of California
Smart Oakland
Western Center on Law and Poverty

Opposition

None received.

Analysis Prepared by: Paige Brokaw / E.S. & T.M. /

Date of Hearing: March 10, 2020

ASSEMBLY COMMITTEE ON ENVIRONMENTAL SAFETY AND TOXIC MATERIALS

Bill Quirk, Chair

AB 2104 (Cristina Garcia) – As Amended March 4, 2020

SUBJECT: Lead-acid batteries: Lead-Acid Battery Recycling Facility Investigation and Cleanup Program

SUMMARY: Makes changes to the Lead-Acid Battery Recycling Facility Investigation and Cleanup (LABRIC) Program under the Lead-Acid Battery Recycling Act (Act) of 2016. Expands requirements for the Department of Toxic Substances Control (DTSC) to receive and respond to information provided by the public and authorizes additional time for DTSC to complete an investigation or renew an investigation if provided new information.

EXISTING LAW:

Pursuant to the Act (Health & Safety Code (HSC) § 25215, et seq):

- 1) Requires, on and after April 1, 2017, until March 31, 2022, a California Battery Fee of \$1 to be imposed on a person for each replacement lead-acid battery purchased from a dealer. Requires, on and after April 1, 2022, the amount of the California Battery Fee to increase to \$2. (HSC § 25215.25)
- 2) Allows an out-of-state lead-acid battery manufacturer, not subject to the Manufacturer Battery Fee, to pay the fee on behalf of an importer and claim the associated credits to offset potential hazardous waste liability. Requires the California Department of Tax and Fee Administration (CDTFA) to report to the Legislature relating to out-of-state manufacturers who opted to pay the Manufacturer Battery fee. (HSC § 25215.3)
- 3) Requires, until April 1, 2022, each manufacturer to remit to the CDTFA a \$1 Manufacturer Battery Fee for each lead-acid battery sold at retail to a person in California. Requires, on and after April 1, 2022, the Manufacturer Battery Fee to increase to \$2. (HSC § 25215.35)
- 4) Requires all California Battery Fee and Manufacturer Battery Fee revenues be remitted to the CDTFA for administration of the fee and the remainder to be deposited into the Lead-Acid Battery Cleanup Fund (Fund). Moneys in the Fund shall be expended to perform cleanup, remedial action, removal, monitoring, or other response actions to address contamination directly attributable to releases from a facility known to have been a lead-acid battery recycling facility. (HSC § 25215.5)
- 5) Requires DTSC to establish a LABRIC Program to identify areas of the state eligible for expenditure of moneys from the Fund. Requires proposed designations to include explanations and documentation relied upon during investigation. Requires the LABRIC program to provide public notice of an investigation or site evaluation and accept public comment. (HSC § 25215.51)

FISCAL EFFECT: Unknown.

COMMENTS:

Need for the bill: According to the author,

"AB 2153 (Chapter 666, Statutes of 2016) was signed in to law by Governor Brown. This law reallocates a fee already imposed on all car batteries to fund the cleanup of contamination caused by lead acid batteries throughout the state. At the point of sale, \$1 from the consumers' deposit will go to the cleanup fund. Manufacturers will also pay a \$1 fee on all batteries sold in the state. On April 1, 2022 the Consumer fee will go up to \$2, and the Manufacture fee will sunset.

AB 142 (Chapter 860, Statutes of 2019) was signed in to law by Governor Newsom. This measure removed the April 1, 2022 sunset from the manufacturer battery fee, and increased the manufacturer battery fee from \$1 to \$2 to match the consumer fee. This will help bring relief to these affected communities and ensure funding solutions to a major long-term problem.

Since the bill was signed in to law the Department of Toxic Substance Control (DTSC) has been working on regulations to implement the testing and cleanup of possible sites and technical problems have been identified."

Lead: Lead is a toxic metal that does not break down in the environment and accumulates in the human body. Lead and lead compounds have had numerous industrial and commercial uses, including in the production of batteries and ammunition and as additives to paints and caulking. Exposure to lead can lead to a number of health problems, including: behavioral problems, learning disabilities, joint and muscle weakness, anemia, organ failure, and even death. Lead has been listed under California's Proposition 65 since 1987 as a substance known to the state of California that can cause reproductive damage and birth defects and has been on the list of chemicals known to cause cancer since 1992.

Due to these health risks, state and federal governments have passed laws and regulations to reduce human exposure to lead. As a result of these changes in statute, leaded gasoline in automobiles has been phased out; lead solder in cans has been eliminated; lead-based paint for consumer uses, such as housing, has been banned; lead-based paint abatement activities in housing and other buildings is required; and, people are encouraged to recycle batteries, including lead-acid batteries.

Lead-acid batteries: Lead-acid batteries are used in vehicles, motorized equipment, and as backup power. The lead-acid battery market in the United States was valued at more than \$9.9 billion in 2018, and is expected to grow with increased demand for use in electric vehicles and energy storage. Lead-acid batteries constitute an important contributor to lead in the environment. Statute prohibits the disposal of lead-acid batteries at a solid waste facility, or on or in any land, surface waters, watercourses, or marine waters (HSC § 25215.2). It also requires retailers to accept the trade-in of a spent lead-acid battery by a consumer upon purchase of a new one (HSC § 25215.3).

Lead-acid battery recycling facilities, or secondary lead smelters, bring with them the potential for threats to public health from lead poisoning. The recycling process includes: crushing the batteries, draining the sulfuric acid, and smelting the remaining lead material in large furnaces. The furnaces require extensive air pollution control systems to meet current air pollution control

requirements. However, some of these secondary lead smelters operated for more than 50 years, before any air pollution control requirements existed, without controls. DTSC estimates that each of these older smelters emitted one ton of lead particles into the air each hour. The particles would land on nearby residential properties, potentially mixing with lead dust from automobile exhaust, lead based paint residues, and lead from other industrial operations.

As a result, there is historical pollution from lead-acid battery smelters all around California that needs to be cleaned up to protect the public from the known and irreparable dangers of lead.

Lead-Acid Battery Recycling Act: The LABRIC Program was established pursuant to Assembly Bill 2153 (C. Garcia, Chapter 666, Statutes of 2016), which became the Lead-Acid Battery Recycling Act (Act) of 2016. The Act has been subsequently amended pursuant to Assembly Bill 142 (C. Garcia, Chapter 860, Statutes of 2019).

Beginning on or after April 1, 2017, a fee is imposed on a manufacturer for each lead-acid battery sold at retail to a person in California, or that is sold to a dealer, wholesaler, distributor, or other person for retail sale in California. The Manufacturer Battery Fee and California Battery Fee on lead-acid batteries sold in the state are deposited into the Fund created by the Act. The Fund is a dedicated source to pay for cleanup of the Exide battery recycling site in Vernon, California, and at other contaminated former lead-acid battery recycling sites. There was a question of whether the Act applied to secondary lead smelters. AB 142 narrowed the definition of "lead-acid battery recycling facility" to exclude any facility designed and operated for the primary purpose of recovering lead from materials other than used lead-acid batteries. The Act also provides that manufacturers paying the Manufacturer Battery Fee receive a one-time credit equal to the amount each manufacturer has paid against any future judgement of legal responsibility for a share of those cleanup costs.

Exide Technologies: The Exide Technologies (Exide) battery recycling facility in Vernon, California recycled lead from used automotive batteries and other sources. The facility could process about 25,000 automotive and industrial batteries per day, providing a source of lead for new batteries. 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 March, 2015, Exide was forced to close the facility for good and, under a state agreement with DTSC, set aside \$7.7 million in emergency funding to test homes and other structures around the facility for pollution resulting from the facility.

Properties up to 1.3 and 1.7 miles away from the facility are impacted by Exide's lead contamination, which amounts to upwards of 10,000 properties. According to DTSC, cleaning each home costs between \$68,000 and \$83,000 depending on the contractor, an increase from the anticipated cost per property. DTSC has sampled 8,555 properties to-date; 90% of the properties tested have exceeded the screening level of 80 parts per million (ppm) for lead and will require remediation. As of February 2020, 1,676 properties have been cleaned up. Removing lead-contaminated soil from thousands of homes surrounding Exide could result in the most extensive cleanup of its kind in California and will be among the largest cleanup ever conducted in the nation.

On April 20, 2016, Governor Jerry Brown signed AB 118 (Santiago, Chapter 10, Statutes of 2016) and SB 93 (De León, Chapter 9, Statutes of 2016), appropriating a \$176.6 million loan from the General Fund (GF) to the Toxic Substances Control Account (TSCA) to enable DTSC

to test properties, schools, daycare centers, and parks in the 1.7 mile radius and remove contaminated soil at the properties that have the highest lead levels and greatest potential exposure to residents. AB 2153 authorized use of the fee revenues in the Fund to fill that gap and repay the state loan (HSC § 25215.59) while providing an ongoing source of funds to address lead contamination from lead-acid battery recycling facilities. AB 142 specified that the repayment of the \$176.6 million GF loan or any other loan provided to DTSC to clean up the Exide remediation site will not be paid back until the cleanup of Exide and all other areas of the state contaminated by lead-acid batteries is completed (HSC § 25215.5). The 2018-19 Budget Act included \$6.5 million for the testing and remediation of parkways. The 2019-20 Budget Act included \$74.5 million for a one-time basis to accelerate the cleanup of additional properties within the 1.7 mile radius and cover the increased cost of cleanup.

DTSC evaluation of lead-acid battery recycling facility sites: According to DTSC's first report to the Legislature in February 2018, DTSC worked with the U.S. Environmental Protection Agency Region 9 (EPA Region 9) to evaluate 39 former lead smelter sites identified from a comprehensive review of site investigation and cleanup records maintained by EPA Region 9 and DTSC. Based on an initial review, DTSC selected 18 potentially contaminated sites for more thorough assessment to determine if further actions were needed to protect public health. DTSC also evaluated areas around these sites to assess potential health impacts to schools, parks, and residential properties. Based on their assessment, DTSC prioritized four of the 18 sites for investigation and potential remedial action, and began evaluation for these sites in January 2019. Evaluation recommendations include performing sampling in the community to determine the nature and extent of contamination from the smelter facilities, and performing removal action if required. While AB 2153 requires DTSC to report to the Legislature annually on the implementation of the Act, a report has not been released since the 2018 report.

The LABRIC Program is required to provide public notice of the initiation of an investigation or site evaluation of an area suspected to have been contaminated by a lead-acid battery recycling facility (HSC § 25215.51). AB 2104 sets a time limit of 90 days from the time a public notice is issued for DTSC to receive public comments and requires DTSC to respond to comments before completing an investigation. If, within two years since the public notice DTSC is unable to designate a site as contaminated from a lead-acid battery recycling facility, the public notice is considered withdrawn and the investigation is no longer authorized. AB 2104 prolongs the time that DTSC can extend this deadline from three months to up to one year in three month intervals and provides an exception to these time limits if DTSC determines new evidence warrants renewed investigation.

DTSC developed a draft framework for the LABRIC Program presented at two public meetings in the summer of 2018 proposing to consider additional information on lead hazards in areas with contamination from lead-acid battery recycling facilities, including elevated blood lead levels in children, housing stock that contains lead-based paint, and other sources of lead emissions to enhance evaluation and prioritization. The Act requires DTSC to investigate and respond to information provided by the public that may suggest an area was not contaminated by a lead-acid battery recycling facility. AB 2104 explicitly requires DTSC to investigate and respond to information from the public suggesting other sources may be responsible for the lead contamination.

Related legislation:

- 1) AB 2677 (Santiago). Creates a community liaison position in the California Environmental Protection Agency to conduct community outreach and disseminate information relating to cleanup of the lead contamination in the areas surrounding Exide. This bill is scheduled to be heard in the Assembly Environmental Safety and Toxic Materials Committee on March 24, 2020.
- 2) AB 142 (C. Garcia, Chapter 860, Statutes of 2019). Amended the Act to increase the Fee to \$2 and made other changes to the Act.
- 3) AB 1462 (Santiago, 2019). Would have transferred \$100 million from the GF to TSCA and appropriated the funds to DTSC for activities related to accelerating the investigation and cleanup of Exide. The bill was held on suspense in the Assembly Appropriations Committee.
- 4) AB 1663 (C. Garcia, 2017). Would have amended the Act to clarify provisions related to an out-of-state lead-acid battery manufacturer's financial responsibilities. The bill was later amended with unrelated content.
- 5) AB 2153 (C. Garcia, Chapter 666, Statutes of 2016). Enacted the Act.

REGISTERED SUPPORT / OPPOSITION:

Support

None received.

Opposition

None received.

Analysis Prepared by: Rachel Silvern / E.S. & T.M. /

