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REVISED INITIAL STATEMENT OF REASONS
DISASTER VICTIMS HAZARDOUS WASTE FEE EXEMPTION
Department of Toxic Substances Control Reference Number: R-2011-05
Office of Administrative Law Notice File Number: Z-2012-0328-01

DETAILED STATEMENT OF THE SPECIFIC PURPOSE AND RATIONALE

Health and Safety Code section 25174.7(a)(1) exempts a government agency, or its contractors, from hazardous waste disposal fees and generator fees for removal or remediation of hazardous waste as a result of a release caused by another person. The fee exemption has not been extended to private firms engaged in cleanup activities as a result of a release caused by another person. However, in 1996 (A.B. 645) the Legislature expressed an intent to provide some form of fee relief to private parties by adding Health and Safety Code section 25205.5.1. The Bill authorizes the Department of Toxic Substances Control (DTSC) to adopt regulations to exempt victims of disaster from hazardous waste disposal and generator fees imposed pursuant to sections 25174.1 and 25205.5.

Accordingly, DTSC proposes to adopt regulatory section 66269.2 Disaster Victims Hazardous Waste Fee Exemption, to exempt private party disaster victims from having to pay state hazardous waste generator and disposal fees. To qualify for an exemption, the hazardous waste must have been generated as a result of a disaster in a geographical area identified in a state of emergency proclamation by the Governor due to fire, flood, storm, earthquake, riot, or civil unrest. The hazardous waste must also be disposed of within 365 days from the initial disaster proclamation date.

ECONOMIC IMPACT ANALYSIS (per Gov. Code sec. 11346.3(b))

This rulemaking will exempt all victims of disaster, including affected businesses, not just government agencies and its contractors, from paying hazardous waste disposal and generator fees under certain qualifying circumstances. The rulemaking would therefore help to promote fairness and minimize the negative economic impact on businesses that a disaster might otherwise cause. To the extent this proposal has an economic impact, that impact is a favorable one.

Creation or Elimination of Jobs within California

This rulemaking would exempt all victims of disaster from paying hazardous waste disposal and generator fees under certain qualifying circumstances. In adopting Section 66269.2 into the California Code of Regulations, Title 22, Division 4.5, Chapter 19, DTSC has made the assessment that no jobs in California will be created or eliminated.

Creation of New Businesses or Elimination of Existing Businesses within California

This rulemaking would exempt all victims of disaster from paying hazardous waste disposal and generator fees under certain qualifying circumstances and does not result in the creation or elimination of businesses in California.

Expansion of Current California Businesses

This rulemaking would exempt all victims of disaster from paying hazardous waste disposal and generator fees under certain qualifying circumstances and does not result in the expansion or elimination of existing businesses in California.

Anticipated Benefits

The proposed regulation would allow all victims of disaster, including affected businesses, not just government agencies and its contractors, to be exempt from paying hazardous waste disposal and generator fees under certain qualifying circumstances. Without adoption of an implementing regulation, victims of major disasters are required to pay state generator and disposal fees for removal of hazardous wastes generated as a result of disasters. These fees are costs added to the other unavoidable losses suffered by the victims as a result of the disaster. The proposed regulatory action will not benefit the health and welfare of California residents, worker safety, and the state's environment. The proposed regulatory action will, as described above, benefit all victims of disaster by exempting them from paying hazardous waste disposal and generator fees under certain qualifying circumstances. Since the legislature has expressed its intent to extend a fee exemption to disaster victims, DTSC deems it equitable and necessary to promulgate this regulation to exempt effected businesses from paying disposal and generator fees as described in Health & Safety Code section 25205.5.1.

REPORTS RELIED ON

DTSC has relied upon the Economic and Fiscal Impact Statement (STD. 399) in proposing the regulatory action.

REASONABLE ALTERNATIVES CONSIDERED

DTSC determined that no reasonable alternative considered or otherwise identified and brought to the attention of DTSC would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The creation of the regulation assists victims of disaster by providing authority to make the exemption available to them. This regulation essentially adopts statutory language from Health and Safety Code Section 25205.5.1 to new regulation Section 66269.2 of the California Code of Regulations, title 22, division 4.5, chapter 19.

EVIDENCE SUPPORTING A DETERMINATION THAT THE PROPOSAL WILL HAVE NO ADVERSE ECONOMIC IMPACT ON BUSINESS

DTSC has made a determination that the proposed regulation will not have a significant statewide adverse economic impact directly affecting businesses, including the ability to compete with businesses in other states. Since the regulation exempts victims of disasters, in certain qualifying circumstances, from paying hazardous waste disposal and generator fees, it will instead reduce the negative economic impact on businesses that a disaster might otherwise cause.

DUPLICATION OR CONFLICTS WITH FEDERAL REGULATIONS

As the federal government does not impose hazardous waste disposal and generator fees, this regulation is not based on, identical to, or to conflict with any federal regulations.

DETAILED STATEMENT OF REASONS

Section 66269.2(a)(4): This section is added to both clarify and limit the legislature's statement in subsection (b) of Health and Safety Code section 25205.5.1 that the hazardous waste is generated "as a result of the disaster." In practice, the Department of Toxic Substances Control often finds that immediately following a disaster, removal and disposal of hazardous waste that is generated as a result of the disaster is usually the highest priority by emergency response teams and local first responders. It is DTSC's belief that this immediate clean-up is what the legislature was aiming at in adopting Health and Safety Code section 25205.5.1 in order to assist victims with the initial aftermath of a disaster and allow them to return to normal and safe living conditions. This is evidenced by the legislature's tie of the fee exemption to an emergency proclamation issued by the Governor. The proclamation is intended to mitigate the effects of the emergency by alleviating actual and threatened damage due to the emergency and to provide supplemental services and equipment to restore service and to provide for the health and safety of the citizens of the affected area. (See the California Emergency Services Act, Government Code sections 8625-8629). However, in thinking the statement through that hazardous waste generated "as a result of the disaster" is eligible for the disposal and generator fee exemptions it became evident that sometimes after an area is affected by a disaster, the rebuilding of the area may not occur until several years later. This means that even years later, if a home or business building destroyed by a disaster was being demolished and/or rebuilt and the home or business had asbestos in the original building materials that needed to be disposed of as hazardous waste, one could argue that the disposal and rebuilding would not need to occur except as a result of the disaster. DTSC does not believe that this much later disposal of hazardous waste arguably resulting from the disaster is what the legislature sought to mitigate by adopting the statute allowing immediate relief to victims of disaster in an emergency.

DTSC also recognizes that under Government Code section 8629, the Governor shall proclaim the termination of a state of emergency at the earliest possible date that conditions warrant or, in the alternative, by concurrent resolution of the Legislature declaring it at an end. In that sense, DTSC could tie the end of the availability of the disaster victim fee relief to the termination of the state of emergency. However, upon

research by DTSC, it was discovered that termination of the state of emergency is not always accomplished by the Governor's Office or the Legislature and/or that the information on when the termination of the state of the emergency occurred is not easily and readily available to the public.

In choosing a 365 day (one year) time period to allow for the fee exemption for disaster victims for removal of hazardous waste as a result of the disaster, DTSC is being generous in allowing ample time for removal of hazardous waste resulting from the disaster while at the same time recognizing the fact that a time for allowance of the fee exemptions needs some sort of limit in order to remain within the original intent of the purpose of the exemption – which is to provide immediate relief to disaster victims.

DTSC also recognizes that due to the nature of some after-disaster cleanups, a one year period is a reasonable amount of time to allow for disposal of the hazardous waste. For instance, in the 2008 Marek Wildfire which was declared a state of emergency, fire damage to a company that stored a used tire business inventory outdoors caused hazardous waste to contaminate the soil. Immediately following the disaster, the burnt tires were disposed of as hazardous waste. However, the resulting cleanup of soil contaminated by the burnt tires occurred sometime later, but within the first six months following the disaster. This subsequent cleanup of contaminated soil would normally result in the imposition of disposal and generator fees. However, it still seems directly connected enough in time that it should be included under the fee exemptions for disaster victims. Therefore, DTSC proposes that a 365 day (one year) time limit from the date an emergency proclamation was first issued by the Governor for the pertinent disaster seems reasonable and necessary.

For the reasons stated above, DTSC's imposition of a time limit of 365 days (one year) from the date an emergency proclamation was first issued comports with reason and is consistent with the Legislature's intent in giving DTSC leeway in setting conditions or limitations on eligibility for the fee exemptions for disaster victims as evidenced by subdivision (d) of Health and Safety Code section 25205.5.1 which gives DTSC authority to impose "any other condition or limitation on eligibility specified by the department."

Section 66269.2(b): The State Board of Equalization (BOE) oversees the collection and administration of the fees and taxes imposed by the Department of Toxic Substances Control (DTSC) under Chapter 6.5 (commencing with Section 25100) and Chapter 6.8 (commencing with Section 25300), respectively, of Division 20 of the Health and Safety Code. BOE does so through the enactment of Part 22 of Division 2 of the Revenue and Taxation Code (commencing with section 43001). The short title of Part 22 is referred to as the "Hazardous Substances Tax Law." The hazardous waste disposal fee imposed pursuant to Health and Safety Code section 25174.1 and the hazardous waste generator fee imposed pursuant to Health and Safety Code section 25205.5 are both subject to administration and collection by BOE through all of the provisions in Part 22 of Division 2 of the Revenue and Taxation Code (sections 43001-43651).

BOE is sometimes directed to issue refunds on the taxes and fees it collects for DTSC, if directed to do so by DTSC. (See, Revenue and Taxation Code section 43152.16 which allows refunds in some instances for fees imposed pursuant to Health and Safety Code section 25205.5, the generator fee). However, BOE's ability to issue refunds is sometimes contingent on whether or not DTSC certifies that funds for the refunds are available. (See Revenue and Taxation Code section 43152.16(d)). Additionally, if any fee or tax amount has been illegally determined, either by the person filing a return with BOE for DTSC's taxes or fees or by BOE, then BOE shall certify the amount determined to be in excess of the amount legally due and the person against whom the determination was made, and authorize the cancellation of the amount upon the records of BOE. Thus, illegally determined amounts must be certified in order to authorize the cancellation of the amount due in BOE's records. (See Revenue and Taxation Code section 43491). This same certification requirement applies to allow BOE to issue a claim for refund for amounts of tax, penalty or interest that have been erroneously or illegally collected or computed. (See, Revenue and Taxation Code section 43451). Therefore, in adopting subdivision (b) of the Section 66269.2 regulation which allows an exemption from the disposal fee applicable through Chapter 6.5 of the Health and Safety Code, BOE must include language requiring the person claiming such fee exemption to certify their eligibility for such exemption.

Section 66269.2(c): Generator fees are based upon a self-reporting method which is subject to audit by BOE through DTSC's Hazardous Waste Tracking System as reported on manifests. This subdivision of the regulation explains that the generator would simply exempt waste meeting the disaster victim criteria from their calculation of the fees due. Thus, there are no "claims for exemption" to be submitted by the fee payer. Instead, the generator would not include the hazardous waste resulting from a disaster in their calculation of generator fees due for that year when they file a return.