

## Initial Statement of Reasons

### Title 17, California Code of Regulations, Division 1, Chapter 6 Childhood Lead Poisoning Prevention Act, Fee Assessment

#### **PUBLIC PROBLEM, ADMINISTRATIVE REQUIREMENTS, OR OTHER CONDITION OR CIRCUMSTANCE THE REGULATION IS INTENDED TO ADDRESS:**

To fund activities under the Childhood Lead Poisoning Prevention Act of 1991 (CLPP Act; Health and Safety Code Sections 105275 *et seq.*), a fee is imposed upon *"manufacturers and other persons ...that were formerly and/or are presently engaged in the stream of commerce of lead or products containing lead, or who are otherwise responsible for identifiable sources of lead..."*

*In part*, the Act directs the Department of Public Health<sup>1</sup> ("CDPH" or "Department") to adopt regulations: (1) identifying the entities that meet the statutory definition of who is to pay the fee ("manufacturers and other persons" responsible for current and/or historic environmental lead contamination in California); (2) establishing the mechanism and formula for determining those fees, including the amount to be paid by each entity; (3) determining whether responsibility for payment of a CLPP fee is to be transferred from one entity to another, and; (4) determining whether a party, who has been assessed a fee, does not in fact meet the applicable definition of who is to be assessed the fee (referred to in the statutes and regulations as an "exemption").

CDPH adopted the initial CLPP regulations in 1992, adopted the "exemption" regulations in 1994, and in 2002, modified the 1992 regulations in connection with how much each fee payer is assessed each year. While most of the CDPH

---

<sup>1</sup> Effective July 1, 2007, the California Department of Health Services was split into two separate agencies, the Department of Health Care Services, and the Department of Public Health. This split was effected by the passage of S.B. 162, Chapter 241, Statutes of 2006. The subject of this proposed regulatory package was assigned in that legislation to the Department of Public Health.

decisions/determinations in connection with the fees have been made under specific/express provisions of the CLPP statutes or regulations, some determinations and processes of CDPH have been done through interpretations (made by CDPH) of those express provisions. Such interpretations are part of the administrative pattern and practice which the Department now proposes to adopt as express provisions of the applicable regulations. Since the proposed changes to the CLPP regulations do not create any new standards and practices, but merely would codify the Department's pattern and practice, these proposed regulations are specifically intended to have retroactive effect, so that previous CDPH decisions and its current practices are not affected or called into question.

One specific CDPH interpretation that the proposed regulations would convert to an express provision relates to statements contained in a Decision and Recommendation (D&R) issued 10/6/06 by the State Board of Equalization Appeals Division. That D&R concluded that the decision of CDPH (to transfer CLPP fees to the new owner of a gasoline refinery) was based upon an interpretation by CDPH of its regulations, and that the CDPH interpretation instead needed to be adopted as an express provision of the regulations. <sup>2</sup>

As discussed above, this regulatory action simply codifies current long-standing practices and interpretations of the CLPP regulations made by CDPH. Conversely, this regulatory action in no way alters the current long-standing method by which the Department determines who is assessed a fee under the CLPP Act, nor how the fee is calculated. Likewise, these proposed regulations would not change the current amount of each fee assessment, and any transfer of liability to the

---

<sup>2</sup> The copy of this decision cannot be further identified, because of the restrictions imposed pursuant to Rev. & Tax. Code section 43651, which states that:

“[i]t shall be unlawful for the board, the department, or any person having administrative duty under this part to make known, in any manner whatever, the business affairs, operations, or any other information pertaining to a taxpayer which is submitted to the board in a report or return required by this part...”

As a result, the copy of that decision, included in the rule-making file, has been redacted to remove the identity of the feepayer, and other account and dollar information that cannot by law be disclosed.

purchaser of an entity that is assessed a CLPP fee would not involve any net increase, just a transfer from seller to buyer.

### **Specific Purpose of this Regulation**

The purpose of this rulemaking is to amend and adopt Sections 33001 through 33060 of Title 17, California Code of Regulations, concerning assessing fees upon industries responsible for environmental lead contamination. This regulatory action clarifies the current long-standing practice of the Department with regard to fee liability in instances where the business assets associated with environmental lead contamination have been transferred from one business entity to another. This regulation does not increase or decrease the total amount of fees to be assessed, and therefore it is revenue neutral.

### **Necessity**

These regulations are necessary to ensure that:

- (1) the health, safety, and general welfare of Californians is preserved by continuing to provide adequate funding for Childhood Lead Poisoning Prevention activities to: prevent current and future sources of childhood lead poisoning; conduct surveillance; and address surveillance sources found.
- (2) the Department is in compliance with the legislative mandates specified in Health and Safety Code Sections 105310 and 124165.

### **Proposed Amendments**

Section 33007. It was necessary to define "Department" to avoid unnecessary and repetitive language in regulation. Due to the passage of S.B. 162, Chapter 241, Statutes of 2006, the subject of this proposed regulatory package was assigned in that legislation to the Department of Public Health and the proposed amendment to this section reflects that assignment.

Section 33010. It was necessary to define "historically associated", and the Department implemented this concept (back in 1994) in part by setting forth a non-exclusive list of examples of situations to which the concept of "historically associated" applies. As described in the Final Statement of Reasons for the 1994 exemption regulations, "Due to the myriad of ways by which business entities can re-organize, consolidate, split, divest, or otherwise alter technical business relations, it is impossible and unwise to attempt to define this term with an exclusive list of possibilities." The regulation would be amended to clarify that acquisition of significant operating assets, such as a trademark, a factory or a refinery, can establish a significant relationship between business entities. This amendment would codify current long-standing Department interpretation and practice, and thus it is specifically intended to have retroactive effect, such that prior Department decisions are not brought into question.

Section 33020. This regulation, first enacted in 1992, sets forth the formula by which the fee assessed upon architectural coating distributors is calculated. This section would be amended to clarify a perceived ambiguity (noted in the D&R described above) in the method by which fees are calculated. This amendment would clarify that the fees assessed on each architectural coatings distributor are based upon the 1978 distributions of architectural coatings attributed to any and all business operations for which the architectural coatings distributor is currently responsible. This amendment would clarify the regulation by more completely describing the method of estimation presently employed by the Department, and thus it is specifically intended to have retroactive effect, such that prior decisions are not brought into question.

Section 33025. This regulation, first enacted in 1992, sets forth the formula by which the fee assessed upon motor vehicle fuel distributors is calculated. This

section would be amended in response to comments (contained in the D&R described above) identifying a perceived ambiguity in the method by which fees are calculated. This amendment would clarify that the fees assessed on each motor vehicle fuel distributor are based upon the 1991 distributions of motor vehicle fuel attributed to any and all business operations for which the motor vehicle fuel distributor is currently responsible. This amendment would clarify the regulation by more completely describing the method of estimation presently employed by the Department, and thus it is specifically intended to have retroactive effect, such that prior Department decisions are not brought into question.

Section 33030. This regulation, first enacted in 1992, sets forth the formula by which the fee assessed upon facilities reporting releases of lead into the ambient air is calculated. This regulatory amendment would make technical changes in order to more completely reflect the method by which lead emissions are reported by the United States Environmental Protection Agency. The EPA reports emissions of lead and emissions of lead compounds separately. This amendment would clarify that fees attributable to releases of lead into ambient air are based on the sum of reported releases of lead and lead compounds. This regulatory amendment would specify that facilities will be assessed fees for all reported releases of lead into ambient air, including in instances where a facility has halted operations during the span of time between when the releases were reported and when the releases are assessed. It would also correct a typographical error in the current regulations, correcting "Superfunds" to read "Superfund"

Section 33040. This regulation, first enacted in 1994, sets forth the application process whereby fee payers can request exemption from the fees. This section reflects the provisions of Health and Safety Code section 105310(d) which identifies criteria for exemption from the fees. This regulatory amendment would make certain technical changes in order to reduce the

burden on fee payers seeking exemption from the fees. For example, the proposed amendment would remove the requirement that an applicant for exemption provide information on what lead ingredients were purchased from whom, because it can be extremely difficult for the applicant to produce this information, and the information is not necessary to the determination of whether an exemption is warranted. Also, this regulatory amendment would remove the requirement that a business entity granted an exemption must re-apply for exemption annually. That requirement would be replaced by the express provision that the Department will reexamine a granted exemption if issues arise as to whether the exemption is appropriate to continue. This regulatory amendment would also update an obsolete address where applications are to be filed. The regulatory amendment capitalizes the first word in paragraph (b)(2) making the format consistent throughout the section.

Section 33060. It is necessary to more clearly and completely describe the process whereby fee payers can apply for a determination that another business entity is currently responsible for payment of the applicant's fee. Such determinations have to date been made under the rubric of existing Regulation Section 33040, but the Department has decided that issues of "historically associated" are better handled by establishing a separate regulation dedicated to such determinations. This proposed regulation would clarify that the Department determines whether two business entities are historically associated, with the result that the assessed CLPP fee should be transferred from the one entity to the other. The proposed regulation would clarify that the Department will make this determination based on the best available information, and even in instances where no application has been filed seeking a determination e.g. the Department itself learns of a sale of a fee-paying entity). This proposed regulation would identify the documentation that a fee payer seeking a determination under this section would submit to the Department. This proposed regulation would clarify the long-standing practice and interpretation of the Department, and thus it is specifically intended to

have retroactive effect, such that prior Department decisions are not brought into question.

## **STATEMENT OF DETERMINATIONS**

### **A. ALTERNATIVES CONSIDERED**

The Department of Public Health (Department) has determined that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulations.

### **B. LOCAL MANDATE DETERMINATION**

The Department has determined that the proposed action would not impose a mandate on local agencies or school districts, nor are there any costs for which reimbursement is required by Part 7 (commencing with section 17500) of Division 4 of the Government Code.

### **C. ECONOMIC IMPACT STATEMENT**

The Department has made an initial determination that the proposed action would not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

The Department has determined that the proposed action would not significantly affect the following:

- (1) The creation or elimination of jobs within the State of California.
- (2) The creation of new businesses or the elimination of existing businesses within the State of California.
- (3) The expansion of businesses currently doing business within the State of California.

### **D. EFFECT ON SMALL BUSINESSES**

The Department determined that the proposed action would affect small businesses.

### **E. HOUSING COSTS DETERMINATION**

The Department has made the determination that the proposed action would have no impact on housing costs.