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AB-2893 Department of Toxic Substances Control: enforcement. (2015-2016)

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Assembly Bill No. 2893

CHAPTER 145

An act to amend Sections 25185.6, 25358.1, 25358.2, and 25390.5 of the Health and Safety Code, relating to hazardous materials.

[Approved by Governor August 19, 2016. Filed with Secretary of State August 19, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2893, Committee on Environmental Safety and Toxic Materials. Department of Toxic Substances Control: enforcement.

(1) The Hazardous Waste Control Law authorizes the Department of Toxic Substances Control and authorized local enforcement officers and agencies to require specified persons to furnish and transmit certain information relating to the person's ability to pay for or perform a response action, and further authorizes those entities to require any person who has information regarding another person's activities that relate to the ability of the person to pay for or perform a response action to also furnish and transmit the information. Existing law makes those provisions applicable only if there is a reasonable basis to believe that there has been or may be a release or threatened release of a hazardous substance and only for the purpose of determining how to finance a response action or otherwise for the purpose of enforcing the Hazardous Waste Control Law. A violation of the Hazardous Waste Control Law is a crime.

This bill would make those provisions applicable also if there is a reasonable basis to believe that there has been or may be a release or threatened release of hazardous wastes or hazardous material and also for the purpose of determining how to finance a corrective action.

(2) Existing law authorizes an officer or employee of the department and specified other persons to require any person who has or may have information relevant to specified matters relating to the release of hazardous substances to furnish and transmit that information. Existing law authorizes the department to disclose trade secrets received by the department pursuant to the Hazardous Waste Control Law only under specified circumstances.

This bill would require the person required to furnish and transmit the information to pay for any costs of photocopying and transmitting the information. The bill would limit the disclosure by the department of information, including trade secrets, received by the department pursuant to these provisions of the Hazardous Waste Control Law, specifying the parties to whom that disclosure is proper and requiring the disclosures be in connection with the department's responsibilities under that law. The bill would require this information to be made available to governmental agencies for use in making studies and for use in judicial review or enforcement proceedings involving the person furnishing the information. The bill would make conforming and other nonsubstantive changes. Because the bill's provisions would expand the scope of a crime, the bill would impose a state-mandated local program.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 25185.6 of the Health and Safety Code is amended to read:

25185.6. (a) (1) The department or a local officer or agency authorized to enforce this chapter pursuant to subdivision (a) of Section 25180, in connection with any action authorized by this chapter, may require any of the following persons to furnish and transmit, upon reasonable notice, to the designated offices of the department or the local officer or agency any existing information relating to hazardous substances, hazardous wastes, or hazardous materials:

(A) Any person who owns or operates any hazardous waste facility.

(B) Any person who generates, stores, treats, transports, disposes of, or otherwise handles hazardous waste.

(C) Any person who has generated, stored, treated, transported, disposed of, or otherwise handled hazardous waste.

(D) Any person who arranges, or has arranged, by contract or other agreement, to store, treat, transport, dispose of, or otherwise handle hazardous waste.

(E) Any person who applies, or has applied, for any permit, registration, or certification under this chapter.

(2) (A) The department, or a local officer or agency authorized to enforce this chapter pursuant to subdivision (a) of Section 25180, may require a person described in paragraph (1) to furnish and transmit, upon reasonable notice, to the designated offices of the department or the local officer or agency, any information relating to the person's ability to pay for, or to perform, a response or corrective action.

(B) This paragraph applies only if there is a reasonable basis to believe that there has been or may be a release or threatened release of a hazardous substance, hazardous wastes, or hazardous material, and only for the purpose of determining under this chapter how to finance a response or corrective action or otherwise for the purpose of enforcing this chapter.

(b) (1) The department may require any person who has information regarding the activities of a person described in subparagraphs (A) to (E), inclusive, of paragraph (1) of subdivision (a) relating to hazardous substances, hazardous wastes, or hazardous materials to furnish and transmit, upon reasonable notice, that information to the designated offices of the department.

(2) (A) The department may require any person who has information regarding the activities of a person described in subparagraphs (A) to (E), inclusive, of paragraph (1) of subdivision (a), relating to the ability of the person described in those subparagraphs to pay for, or to perform, a response or corrective action, upon reasonable notice, to furnish and transmit that information to the designated offices of the department.

(B) This paragraph applies only if there is a reasonable basis to believe that there has been or may be a release or threatened release of a hazardous substance, hazardous wastes, or hazardous material, and only for the purpose of determining under this chapter how to finance a response or corrective action or otherwise for the purpose of enforcing this chapter.

(c) Any person required to furnish information pursuant to this section shall pay any costs of photocopying or transmitting this information.

(d) When requested by the person furnishing information pursuant to this section, the department or the local officer or agency shall follow the procedures established under Section 25173.

(e) If a person intentionally or negligently fails to furnish and transmit to the designated offices of the department or the local officer or agency any existing information required pursuant to this section, the department may issue an order pursuant to Section 25187 directing compliance with the request.

(f) The department may disclose information submitted pursuant to this section to authorized representatives, contractors, or other governmental agencies only in connection with the department's responsibilities pursuant to this chapter. The department shall establish procedures to ensure that information submitted pursuant to this section is used only in connection with these responsibilities and is not otherwise disseminated without the consent of the person who provided the information to the department.

(g) The department may also make available to the United States Environmental Protection Agency any and all information required by law to be furnished to that agency. The sharing of information between the department and that agency pursuant to this section does not constitute a waiver by the department or any affected person of any privilege or confidentiality provided by law that pertains to the information.

(h) A person providing information pursuant to subdivision (a) or (b) shall, at the time of its submission, identify all information that the person believes is a trade secret. Any information or record not identified as a trade secret is available to the public, unless exempted from disclosure by other provisions of law. For purposes of this subdivision, "trade secret" is defined as in Section 25173.

(i) Notwithstanding Section 25190, a person who knowingly and willfully disseminates information protected by Section 25173 or procedures established by the department pursuant to Section 25173 shall, upon conviction, be punished by a fine of not more than five thousand dollars (\$5,000), imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

SEC. 2. Section 25358.1 of the Health and Safety Code is amended to read:

25358.1. (a) The department, a representative of the department, or any person designated by the director may take the actions specified in this section only if there is a reasonable basis to believe that there has been or may be a release or threatened release of a hazardous substance, and only for the purpose of determining under this chapter the need for a response action, the choosing or taking of a response action, or otherwise for the purpose of enforcing this chapter.

(b) Any officer or employee of the department, a representative of the director, or a person designated by the director may require any person who has or may have information relevant to any of the following matters to furnish the information, upon reasonable notice:

(1) The identification, nature, and quantity of materials that have been, or are, generated, treated, stored, or disposed of at a hazardous substance release site or that have been, or are, transported to a hazardous substance release site.

(2) The nature or extent of a release or a threatened release of a hazardous substance at, or from, a hazardous substance release site.

(3) The ability of a person to pay for or to perform a response action, consistent with subsection (e) of Section 104 of the federal act (42 U.S.C. Sec. 9604(e)).

(c) Any person required to furnish information pursuant to this section shall pay any costs of photocopying or transmitting the information.

(d) A person who is required to provide information pursuant to subdivision (b) shall, in accordance with subdivision (i), allow the officer, employee, representative, or designee, upon reasonable notice and at reasonable times, to have access to, and copy, all records relating to the hazardous substances for purposes of assisting the department in determining the need for a response action.

(e) Any officer or employee of the department, representative of the director, or person designated by the director may, in accordance with subdivision (i), enter, at reasonable times, any of the following properties:

(1) Any nonresidential establishment or other place or property where any hazardous substances may be, or have been, produced, stored, treated, disposed of, or transported from.

(2) Any nonresidential establishment or other place or property from which, or to which, a hazardous substance has been, or may have been, released.

(3) Any nonresidential establishment or other place or property where a hazardous substance release is, or may be, threatened.

(4) Any nonresidential establishment or other place or property where entry is needed to determine the need for a response action, or the appropriate remedial action, to effectuate a response action under this chapter.

(5) Any residential place or property that, if it were a nonresidential establishment or other place or property, would otherwise meet the criteria described in paragraphs (1) to (4), inclusive, if the department, representative, or person designated by the director is able to establish, based upon reasonably available evidence, that hazardous substances have been released onto or under the residential place or real property and if entry is made only at reasonable times and after reasonable notification to the owners and occupants.

(f) Any officer or employee of the department, representative of the director, or person designated by the director may, in accordance with subdivision (i), carry out any of the following activities:

(1) Inspect and obtain samples from any establishment or other place or property specified in subdivision (e) or from any location of any suspected hazardous substance.

(2) Inspect and obtain samples of any substances from any establishment or place or property specified in subdivision (e).

(3) Inspect and obtain samples of any containers or labeling for the suspected hazardous substances, and samples of the soil, vegetation, air, water, and biota on the premises.

(4) Set up and maintain monitoring equipment for the purpose of assessing or measuring the actual or potential migration of hazardous substances.

(5) Survey and determine the topographic, geologic, and hydrogeologic features of the land.

(6) Photograph any equipment, sample, activity, or environmental condition described in paragraphs (2) to (5) inclusive.

(g) (1) If photographs are to be taken pursuant to paragraph (6) of subdivision (f), the department shall do all of the following:

(A) Comply with all procedures established pursuant to subdivision (b) of Section 25358.2.

(B) Notify the person whose facility is photographed prior to public disclosure of the photographs.

(C) Upon the request of the person owning the facility, submit a copy of any photograph to the person for the purpose of determining whether trade secret information, as defined in Section 25358.2, or facility security, would be revealed by the photograph.

(2) "Disclosure," as used in Section 25358.2, for purposes of this paragraph, does not include the review of the photograph by a court of competent jurisdiction or by an administrative law judge. A court or judge may review the photograph in camera.

(h) An officer, employee, representative, or designee who enters a place, establishment, or property pursuant to this section shall make a reasonable effort to inform the owner or the owner's authorized representative of the inspection and shall provide split samples to the owner or the representative upon request.

(i) If the owner or the owner's authorized representative does not voluntarily grant access to a place, establishment, or property pursuant to this section, the officer, employee, representative, or designee shall first obtain a warrant pursuant to Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure. However, if there is an emergency posing an immediate threat to public health and safety, the officer, employee, representative, or designee may enter the place, establishment, or property without the consent of the owner or owner's authorized representative and without the issuance of a warrant.

(j) The department may disclose information submitted pursuant to this section to authorized representatives, contractors, or other governmental agencies only in connection with the department's responsibilities pursuant to this chapter. The department shall establish procedures to ensure that information submitted pursuant to this section is used only in connection with these responsibilities and is not otherwise disseminated without the consent of the person who provided the information to the department.

(k) The department may also make available to the United States Environmental Protection Agency any information required by law to be furnished to that agency. The sharing of information between the department and that agency pursuant to this section does not constitute a waiver by the department or of any affected person of any privilege or confidentiality provided by law that pertains to the information.

(l) The department, and any person authorized by the department to enter upon any lands for the purpose of taking a response action pursuant to this chapter, shall not be held liable, in either a civil or criminal proceeding, for trespass or for any other acts that are necessary to carry out the response action.

SEC. 3. Section 25358.2 of the Health and Safety Code is amended to read:

25358.2. (a) "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information that is not patented, that is known only to certain individuals within a commercial concern who are using it to fabricate, produce, develop, or compound an article of trade or a service having commercial value, and that gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

(b) The department shall establish procedures to ensure that trade secret information is utilized by the department only in connection with the responsibilities of the department pursuant to this chapter and is not otherwise disseminated without the consent of the person who provided the information to the department. However, any information shall be made available to

governmental agencies for use in making studies and for use in judicial review or enforcement proceedings involving the person furnishing the information.

(c) Any person providing information pursuant to subdivision (b) of Section 25358.1 shall, at the time of its submission, identify all information that the person believes is a trade secret. Any information or record not identified as a trade secret is available to the public, unless exempted from disclosure by other provisions of law.

(d) Any person who knowingly and willfully disseminates information protected by this section or procedures established by the department pursuant to subdivision (b) shall, upon conviction, be punished by a fine of not more than five thousand dollars (\$5,000), imprisonment in the county jail not to exceed one year, or by both that fine and imprisonment.

SEC. 4. Section 25390.5 of the Health and Safety Code is amended to read:

25390.5. For the purposes of this article, the orphan share shall be determined in the following manner:

(a) The orphan share shall be expressed as a percentage in multiples of five, up to, and, including, but not greater than, 75 percent.

(b) The potentially responsible party filing a claim for reimbursement of the orphan share shall provide the administrator of the fund with a written potentially responsible party search report that shall include a list of all potentially responsible parties identified for the site, the factual and legal basis for identifying those parties, and a proposed orphan share percentage. The potentially responsible party shall also provide the administrator with the factual documentation necessary to support the proposed orphan share percentage.

(c) Upon receipt of the information required by subdivision (a), the administrator of the fund shall invite all identified potentially responsible parties and the department and the regional board to submit any additional information relating to the proposed orphan share percentage or to the list of identified potentially responsible parties.

(d) The administrator of the fund, in consultation with the department or the regional board, shall determine a final orphan share percentage based on the volume, toxicity, and difficulty of removal of the contaminants contributed to the site by the party or parties responsible for the orphan share. The administrator shall determine the orphan share timely and efficiently and is not required to precisely determine all relevant factors, as long as the determination is generally equitable. In addition, the administrator may consider the results of any apportionment or allocation conducted by voluntary arbitration or mediation or by a civil action filed by a potentially responsible party, or any other apportionment or allocation decision that is helpful when determining the orphan share percentage.

(e) A potentially responsible party shall not assert, and the administrator of the fund shall not determine, that the orphan share percentage includes the share of liability attributable to a potentially responsible party's acts that occurred before January 1, 1982, unless that share of responsibility is attributable to a person who is defunct or insolvent.

(f) In determining the orphan share percentage under this section, the administrator of the fund may perform any of the activities authorized in subdivisions (b) and (d) of Section 25358.1.

(g) The administrator of the fund shall issue all orphan share percentage determinations in writing, with notification to all appropriate parties. The decision of the administrator with respect to either apportionment or payment of claims is a final agency action for the purposes of judicial review of the decision by any party to the proceedings resulting in the decision; however, judicial review of the administrator's decision is limited to a showing of fraud by a party submitting information under this subdivision. The administrator shall be represented by the Attorney General in any action brought under this article.

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.