

GOVERNOR'S VETO
AB 246 (Papan)
As Enrolled September 12, 2023
2/3 vote

SUMMARY

Prohibits, commencing January 1, 2025, a person from manufacturing, distributing, selling, or offering for sale in the state any menstrual products that contain regulated perfluoroalkyl and polyfluoroalkyl substances (PFAS).

The Senate Amendments:

- 1) Delete the provisions in the bill that authorized the Attorney General (AG), a city attorney, a county counsel, or a district attorney to levy a civil penalty not to exceed \$5,000 for a first violation and not to exceed \$10,000 for each subsequent violation.
- 2) Authorize, instead of the provisions above, the AG in the name of the people of the state, a district attorney, a city or county attorney, a county counsel, or a city prosecutor to bring actions pursuant to the provisions of the bill.
- 3) Provide that a person or entity who violates the provisions of the bill is liable for a civil penalty not to exceed \$10,000 per day for each violation.
- 4) Provide that the civil penalty may be assessed and recovered in a civil action brought in any court of competent jurisdiction.
- 5) Require, in assessing the amount of a civil penalty for a violation of the provisions of this bill, the court to consider all of the following:
 - a) The nature and extent of the violation;
 - b) The number of, and severity of, the violation;
 - c) The economic effect of the penalty on the violator;
 - d) Whether the violator took good faith measures to comply with the provisions of this bill and when these measures were taken;
 - e) The deterrent effect that the imposition of the penalty would have on both the violator and the regulated community as a whole; and,
 - f) Whether there were contributing environmental factors about which a reasonable person knew or should have known.
- 6) Require that civil penalties collected pursuant to the provisions of this bill be paid to the office of the city or county attorney, city prosecutor, county counsel, district attorney, or AG, whichever office brought the action.

Governor's Veto Message

This bill would prohibit, by 2025, the manufacture, distribution, or sale of menstrual products that contain intentionally added perfluoroalkyl or polyfluoroalkyl substances (PFAS) at a certain concentration level, as well as limit, by 2027, the concentration of total organic fluorine in menstrual products.

This is one of three single-product chemical bans passed by the Legislature this year that attempt to address serious concerns with the presence of PFAS in consumer products. These bills do not identify or require any regulatory agency to determine compliance with, or enforce, the proposed statute.

While I strongly support the author's intent and have signed similar legislation in the past, I am concerned that this bill falls short of providing enhanced protection to California consumers due to lack of regulatory oversight. Previously enacted single-product chemical bans, which also lack oversight, are proving challenging to implement, with inconsistent interpretations and confusion among manufacturers about how to comply with the restrictions.

In order to instill consumer confidence and effectively address public health and environmental concerns, I am directing the Department of Toxic Substances Control to engage with the author and the Legislature and consider alternative approaches to regulating the use of these harmful chemicals in consumer products.

COMMENTS

Perfluoroalkyl and polyfluoroalkyl substances (PFAS): Per- and polyfluorinated substances (PFASs) are a large group of synthetic, highly fluorinated substances that have been widely used in industrial and consumer applications for their heat, water, and lipid resistance properties for more than seven decades. PFAS are long-lasting chemicals that break down very slowly over time. PFAS are ubiquitous, and researchers have found PFAS in indoor and outdoor environments, plants, soil, food, drinking water, wildlife, companion animals, production animals, and humans at locations across the nation and around the globe. Scientific studies have shown that exposure to some PFAS may be linked to harmful health effects in humans and animals. More than 9,000 PFAS chemicals are included in the United States Environmental Protection Agency's (USEPA's) Master List of PFAS Substances.

Exposure to PFAS: The main route of exposure to PFAS is through ingestion of contaminated food or liquid (accounting for up to half of total exposure), and through inhalation and ingestion of contaminated indoor air and dust. Food can become contaminated with PFAS through contaminated soil and water used to grow the food, food packaging containing PFAS, and equipment that uses PFAS during food processing. Some foods, such as fish, meat, eggs and leafy vegetables, may contain PFAS due to bioaccumulation and crop uptake. Studies have shown that PFAS can transfer from pregnant mothers to their fetuses via the placenta during gestation, as well as transfer from nursing mothers to their infants via breastfeeding. Dermal exposure is also possible when people touch products treated with PFAS, such as carpets or clothing. Young children may be susceptible to higher levels of exposure than adults because they ingest more dust containing PFAS and mouth PFAS-treated consumer products. Workers, such as carpet installers, carpet cleaners, firefighters, and workers in furniture, furnishings, outdoor clothing, and carpet stores, may also experience above average PFAS exposure levels.

Exposure to PFAS in drinking water is an escalating concern due to the persistence of PFAS chemicals in the environment and their tendency to accumulate in groundwater.

Hazard traits of PFAS: An intrinsic property of PFAS is the extreme environmental persistence of either the individual compounds or their degradation products or both, resulting in their classification as "forever chemicals." Most PFAS are mobile in environmental media such as air and water, and thus are widespread in living organisms and the environment. Several PFAS bioaccumulate significantly in animals or plants and emerging evidence points to their phytotoxicity, aquatic toxicity, and terrestrial ecotoxicity.

According to the US EPA, current peer-reviewed scientific studies have shown that exposure to certain levels of PFAS may lead to: reproductive effects such as decreased fertility or increased high blood pressure in pregnant women; developmental effects or delays in children, including low birth weight, accelerated puberty, bone variations, or behavioral changes; increased risk of some cancers, including prostate, kidney, and testicular cancers; reduced ability of the body's immune system to fight infections, including reduced vaccine response; interference with the body's natural hormones; and, increased cholesterol levels and/or risk of obesity.

Regulating PFAS as a class: The Department of Toxic Substances Control has adopted a rationale for regulating PFAS chemicals as a class, concluding, "it is both ineffective and impractical to regulate this complex class of chemicals with a piecemeal approach." This rationale was presented in the February, 2021, *Environmental Health Perspectives* article, "Regulating PFAS as a Chemical Class under the California Safer Consumer Products Program," which states, "The widespread use, large number, and diverse chemical structures of PFAS pose challenges to any sufficiently protective regulation, emissions reduction, and remediation at contaminated sites. Regulating only a subset of PFAS has led to their replacement with other members of the class with similar hazards, that is, regrettable substitutions... Regulating PFAS as a class is thus logical, necessary, and forward-thinking."

PFAS in menstrual products: In the United States, approximately 72.7 million women are of reproductive age (15 - 49). During the reproductive stage of their lives, people who menstruate rely on a diverse range of menstrual products, from tampons to pads to menstrual cups to period underwear. To illustrate the prevalence of PFAS in menstrual products, the author of the bill points to tests on menstrual products commissioned by the consumer watchdog site, Mamavation, and Environmental Health News. Conducted at US EPA-certified laboratories between 2020 and 2022, the tests detected organic fluorine, a marker for PFAS, in several menstrual products. For example, 22% of the 23 tampon products tested had indications of PFAS, including two products advertised as "organic." Forty eight percent of 46 different sanitary pads, panty liners, and incontinence pads tested had indications of PFAS, including several products marketed as "organic" and "natural." Sixty-five percent of period underwear products tested, and 57% of the period underwear brands tested, had detectable levels of fluorine present. Exposure to PFAS through menstrual products is particularly concerning because the vagina is an extremely vascular area and dermal exposure in the vaginal area is often higher than other places of the body. Additionally, people using menstrual products are of reproductive age, thus exposure could potentially impact unborn children as well as the person using the product.

This bill: This bill prohibits, commencing January 1, 2025, a person from manufacturing, distributing, selling, or offering for sale in the state any menstrual products that contain regulated

Enforcement: Like this bill, most of the state's chemical prohibition bills were placed in what is sometimes referred to as the "orphan codes." In these code sections, no state agency is designated to provide oversight of the provisions of the law. As a result, there is no compliance program, no guidance for manufacturers seeking to comply with these laws, no related information for consumers, and no state entity investigating complaints, testing products for compliance, or bringing enforcement actions against violators.

This bill: This bill provides the AG and other government attorneys with the authority to levy a civil penalty, as specified, not to exceed \$10,000 per day for each violation of the provisions of the bill. These penalty provisions are in addition to the AG's existing authority to enforce this, and related product safety statutory provisions, such as through the Unfair Competition Law.

According to the Author

"These once ubiquitous, forever compounds have been linked to health problems, including breast and other cancers, hormone disruption, kidney and liver damage, thyroid disease, developmental harm, and immune system disruption. The presence of PFAS in menstrual products contributes to existing gender health inequities as exposure to PFAS is almost unavoidable. In a recent study, 48% of sanitary pads, incontinence pads, and panty liners tested were found to contain PFAS, as were 22% of tampons. Additionally, menstrual products have shown higher levels of PFAS than the levels found in tap water.

AB 246 takes a critical step towards protecting women's health and reducing the amount of PFAS in the environment by eliminating polyfluoroalkyl substances (PFAS) from menstrual products. California's pursuit for gender equity and clean drinking waters requires action to ensure that feminine hygiene products are safe, clean and free from forever chemicals. With viable alternatives available, there is no longer a good rationale for their use in menstrual products. Women's health must be prioritized over the use of these unnecessary chemicals. It's past time to protect women and our environment."

Arguments in Support

California Water Service (Cal Water) argues in support of this bill, "Each year, we invest hundreds of millions of dollars into our water systems to ensure we continue to deliver a reliable supply of high-quality drinking water. We continue monitoring our water sources for PFAS and are taking action where needed. From removing water supply sources from service to constructing new water treatment facilities, Cal Water has worked diligently to ensure the safety of the drinking water we provide to our customers... In the coming years, substantial amounts of money will be spent to treat drinking water that has already been tainted with PFAS. Those efforts will be for naught if we don't stop manufacturing these harmful chemicals and allow them to contaminate water supplies. AB 246 builds off the good work the state has done in banning certain products that contain PFAS and will help ensure that limited resources for cleanup and treatment are not wasted and, more importantly, protect California's drinking water supplies."

Arguments in Opposition

A group of stakeholders take an "opposed unless amended position" and argue, "As currently proposed, AB 246 creates significant compliance challenges for manufacturers of these covered products distributed across the North American marketplace, and it also creates new liabilities for PFAS contamination that is NOT intentionally added to a finished product. Collectively, our manufacturers do not intentionally add PFAS to serve any functional or technical effect in

menstrual products... However, AB 246 intends to include PFAS not intentionally added to a menstrual product in instances where the presence of the substance is at the level of 10 parts per million (PPM), as measured in total organic fluorine. While manufacturers fully intend to comply with these prohibitions on intentionally added PFAS and understand the elevated exposure pathway menstrual products pose in use, unavoidable trace quantities of a chemical may be present. Trace quantities could be present in impurities in natural or synthetic ingredients, recycled content, manufacturing processes and equipment, and potentially through the distribution and storage of a product... The challenge of unintentional PFAS contamination is that it may extend beyond what a manufacturer can control. PFAS are ubiquitous, as they are detected in air emissions, wastewater, soils, surface water, and groundwater and can also be found with no apparent source."

FISCAL COMMENTS

This bill has little to no fiscal impact to the state and therefore meets the conditions of Senate Rule 28.8.

VOTES

ASM ENVIRONMENTAL SAFETY AND TOXIC MATERIALS: 8-0-1

YES: Lee, Hoover, Arambula, Bauer-Kahan, Connolly, McKinnor, Pacheco, Zbur

ABS, ABST OR NV: Ta

ASM APPROPRIATIONS: 14-0-2

YES: Holden, Bryan, Calderon, Wendy Carrillo, Dixon, Mike Fong, Hart, Lowenthal, Papan, Pellerin, Robert Rivas, Sanchez, Weber, Wilson

ABS, ABST OR NV: Megan Dahle, Mathis

ASSEMBLY FLOOR: 70-0-10

YES: Addis, Aguiar-Curry, Alanis, Alvarez, Arambula, Bains, Bauer-Kahan, Bennett, Berman, Boerner, Bonta, Bryan, Calderon, Juan Carrillo, Wendy Carrillo, Cervantes, Chen, Connolly, Davies, Dixon, Flora, Mike Fong, Gabriel, Garcia, Gipson, Grayson, Haney, Hart, Holden, Hoover, Irwin, Jackson, Jones-Sawyer, Kalra, Lee, Low, Lowenthal, Maienschein, Mathis, McCarty, McKinnor, Muratsuchi, Stephanie Nguyen, Ortega, Pacheco, Papan, Pellerin, Petrie-Norris, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Sanchez, Santiago, Schiavo, Soria, Ting, Valencia, Villapudua, Wallis, Ward, Weber, Wicks, Wilson, Wood, Zbur, Rendon

ABS, ABST OR NV: Megan Dahle, Essayli, Vince Fong, Friedman, Gallagher, Lackey, Jim Patterson, Joe Patterson, Tom Wardron

SENATE FLOOR: 34-0-6

YES: Allen, Alvarado-Gil, Archuleta, Ashby, Atkins, Becker, Blakespear, Bradford, Caballero, Cortese, Dodd, Durazo, Eggman, Glazer, Gonzalez, Hurtado, Laird, Limón, McGuire, Menjivar, Min, Newman, Ochoa, Bohn, Padilla, Portantino, Roth, Rubio, Skinner, Smallwood-Cuevas, Stern, Umberg, Wahab, Weber, Wilk

ABS, ABST OR NV: Dahle, Grove, Jones, Nguyen, Niello, Seyarto

ASSEMBLY FLOOR: 71-0-9

YES: Addis, Aguiar-Curry, Alanis, Alvarez, Arambula, Bains, Bauer-Kahan, Bennett, Berman, Boerner, Bonta, Bryan, Calderon, Juan Carrillo, Wendy Carrillo, Cervantes, Chen, Connolly, Davies, Dixon, Mike Fong, Friedman, Gabriel, Garcia, Gipson, Grayson, Haney, Hart, Holden, Hoover, Irwin, Jackson, Jones-Sawyer, Kalra, Lee, Low, Lowenthal, Maienschein, Mathis, McCarty, McKinnor, Muratsuchi, Stephanie Nguyen, Ortega, Pacheco, Papan, Pellerin, Petrie-Norris, Quirk-Silva, Ramos, Rendon, Reyes,

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UPDATED

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