

SENATE ENVIRONMENTAL QUALITY COMMITTEE: 7-0, 5/9/11

AYES: Simitian, Strickland, Blakeslee, Hancock, Kehoe, Lowenthal, Pavley

SUBJECT: Solid waste: enterprises: contracts

SOURCE: California Refuse Recycling Council, Republic Services, Waste Management

**DIGEST**: This bill prohibits the enforcement of an indemnity obligation that requires a SW enterprise to defend and hold harmless the local agency in connection with the local agency's imposition of fees, charges, levies, exactions, or assessments that are found by final judgment of a court to have been imposed in violation of Article XIII C or XIII D of the CA Constitution or that require a SW enterprise to refund certain fees. This bill becomes operative on July 1, 2012, and is not retroactive.

**ANALYSIS**: Existing law:

1. AB 939 (PRC Sec. 40000 et seq.): Contains requirements relating to an indemnity obligation due to a local agency's failure to establish and maintain a SRRE, and to meet SW diversion requirements (Section 40059.1).
2. Sets numerous requirements relating to indemnity (Civil Code Section 2772 et seq.). Indemnity is "a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person."
3. Under Articles XIII C and XIII D of the CA Constitution, sets various requirements relating to assessments, fees, and taxes enacted by voter approved **Proposition 218** (November 5, 1996, election) and **Proposition 26** (November 2, 2010, election).

**This bill**, under AB 939:

1. **Defines "indemnity obligation"** to mean an indemnity obligation directly or indirectly related to a local agency's failure to obtain voter or property owner approval that may be required by Articles XIII C or D of the CA Constitution if that indemnity obligation is expressly assumed by or imposed upon the SW enterprise, including by "ordinance, contract, franchise, license, permit, or other entitlement or right, for the benefit of a local agency."
2. **Requires an indemnity obligation to be null and void, and not enforceable**, if it:
  - A. Requires a SW enterprise to defend and hold harmless the local agency in connection with the local agency's imposition of fees, charges, levies, exactions, or assessments that are found by final judgment of a court to have been imposed in violation of Articles XIII C or XIII D of the CA Constitution.
  - B. Requires a SW enterprise to refund those same fees to its customers if the fees are collected on behalf of the local agency by the SW enterprise and have been remitted by the SW enterprise to the local agency.
3. Requires an indemnity obligation to be subject to the above null and void provision if it meets either of the following conditions:
  - A. The indemnity obligation is authorized or required by a provision, term, condition, or requirement contained in an ordinance, contract, franchise, license, permit, or other entitlement or right adopted, entered into, issued, or granted by a local agency for SW handling services.
  - B. The indemnity obligation is authorized or required in a request for bids or proposals in connection with a contract or franchise specified above.
4. Provides that provisions of this bill are not subject to waiver.
5. Provides that **this bill cannot be intended to do any of the following**:
  - (a) Add to or expand local agency authority to determine aspects of SW collection and handling;
  - (b) Alter the authority of business entities to collect or process materials that are not SW; or
  - (c) Determine whether or not a fee, levy, assessment, or exaction requires voter or property owner approval by Articles XIII C or XIII D of the CA Constitution.
6. This bill's provisions are operative and enforceable only on and after July 1, 2012.

## Comments

### Previous attempts by solid waste interests to seek indemnification restrictions:

**SB 1179** (Polanco), 1997-98 Session, set restrictions on the enforceability of an indemnity obligation for SW collection. Governor Wilson vetoed the bill, noting that "To assert that SW management enterprises cannot indemnify losses based upon their own breach without the state's intervention to negotiate the terms of the agreement is ludicrous on its face." According to this veto message, "When government ventures into the arena of contractual negotiations it is generally to protect an obviously disadvantaged party. In this instance it appears that the state is being asked to protect the industry from itself. Indeed there is significant evidence that the industry is responsible for the proliferation of waste diversion indemnification agreements. Various solid waste management providers have offered to indemnify prospective clients to gain an advantage in a competitive marketplace."

**SB 1340** (Polanco), Chapter 987, Statutes of 1998, set requirements relating to an indemnity obligation due to a local agency's failure to establish and maintain a SRRE, and meet SW diversion requirements. The bill prohibited an indemnity obligation from being enforceable against a SW enterprise until the local agency has affirmatively sought in good faith, all administrative relief or demonstrates good cause for not pursuing that administrative relief. However, any penalty must be apportioned in accordance with the percentage of fault of the local agency and the SW enterprise. The bill addressed court interpreter compensation issues when approved by the Senate, and these provisions were stricken in the Assembly where the indemnification issues were added.

SUPPORT:(Verified 5/18/11)California Refuse Recycling Council (co-source); Republic Services (co-source); Waste Management (co-source); Inland Empire Disposal Association; LA County Waste Management Association; Solid Waste Association of OC

ARGUMENTS IN SUPPORT: The author is concerned that since passage of Proposition 218 and Proposition 26 local agencies may require that "SW handling firms indemnify these local agencies if their franchises and other fees are successfully challenged in court. As a matter of public policy indemnity should not be provided for unlawful conduct."

The author is responding to this concern by requiring an indemnity obligation to be null and void, and not enforceable, if it either (1) requires a SW enterprise to defend and hold harmless the local agency in connection with the local agency's imposition of fees, charges, levies, exactions, or assessments that are found by a court to have been imposed in violation of Articles XIII C or XIII D of the CA Constitution; or (2) requires a SW enterprise to refund fees to its customers if the fees are collected on behalf of the local agency by the SW enterprise and have been remitted by the SW enterprise to the local agency.

"SB 841 is consistent with existing policy underlying PRC section 40059.1, which establishes reasonable limits on the form of indemnity obligations local agencies can require from their solid waste franchisees. Furthermore, SB 841 does not affect a local agencies right to impose fees on waste haulers."