Office of the City Manager

ACTION CALENDAR
September 17, 2013
*(Continued from July 16, 2013)*

To: Honorable Mayor and Members of the City Council

From: Christine Daniel, City Manager

Submitted by: Eric Angstadt, Director, Planning and Development
Jane Micallef, Director, Health, Housing & Community Services

Subject: Reducing Exposure to Anthropogenic Mercury

## RECOMMENDATION

Adopt a Resolution recommending that dentists in Berkeley take specific actions to reduce the use of dental amalgam and educate the public on its risks and benefits; continue education on reducing the exposure dental amalgam and other sources of anthropogenic mercury within the City; distribute the Resolution to the City's state and federal representatives and other cities in Alameda County; and write letters to the U.S. Food and Drug Administration, the National Institute of Health, and the World Health Organization regarding the need for more research on dental amalgam and support for phasing down its use whenever possible.

## FISCAL IMPACTS OF RECOMMENDATION

The fiscal impacts for the City are minimal — writing letters, distributing the Resolution, and posting documents received on dental amalgam to the City web pages.

The incremental cost for dentists if they follow the City's recommendations would be the minor expense associated with preparation and administration of information leaflet and Dental Materials Fact Sheet prior to placement of each dental amalgam.

## CURRENT SITUATION AND ITS EFFECTS

On October 2, 2012, the City Council requested that the Community Health Commission (CHC) and Community Environmental Advisory Commission (CEAC) research major sources of anthropogenic mercury in the environment and strategies used by other municipalities to reduce its use, consult with the dental community regarding mercury in dental amalgams, and return to Council with a draft resolution regarding this pollutant including recommendations for reduction of use within the City of Berkeley.

The CHC and CEAC reports are attached. Staff concurs with most of the Commissions' recommendations; however, as described in more detail below, the Commissions' recommendations to require specific actions by local dentists is preempted by state law. The attached resolution incorporates key points from the Commissions' resolutions, but

changes the language from “requires” to “urges”. In addition, while staff supports the CEAC recommendation to “continue educating the public” on these issues, the resolution recommended by staff limits the education to posting of arguments from both sides to City’s web pages. Staff is not qualified to educate the public or dentists on medical or dental procedures.

Additional information follows in regard to the issue of requiring certain actions per the Commissions’ reports vs. recommending per the City Manager report. Mercury exhibits developmental toxicity in humans and is listed in Prop 65. State law does not require dentists to post Proposition 65 warning signs if they have less than 10 employees. Most dental offices do not meet this threshold and are therefore exempted from the posting requirement. The California Dental Association strongly encourages offices with less than 10 employees to post the restorative materials notice sign.

Business and Professions Code Section 460 provides that the City may not “prohibit a healing arts professional licensed with the state… from engaging in any act or performing any procedure that falls within the professionally recognized scope of practice of that licensee.” In addition, Section 1648.10 requires the Dental Board of California (DBC) to develop and distribute a fact sheet concerning the use of amalgam, and Section 1648.15 requires dentists to provide that fact sheet to all new patients, and to patients of record prior to performing dental restoration work. (This is the “Dental Materials Fact Sheet” that is referenced in the accompanying report from the CEAC.) Section 1648.15 specifically provides that: “The dentist needs to provide the fact sheet to each patient only once pursuant to the previous requirements of this section.”

The new requirements proposed by the CEAC mandating posting of Proposition 65 warning signs and additional provision of the Dental Materials Fact Sheet proposed by both commissions are contrary to and, therefore, preempted by these provisions. Similarly, the proposal by the CHC to require obtaining specific written informed consent prior to performing dental restoration is preempted by Section 460, as is the CHC proposal to include specific wording in the written consent.

Dental offices that violate Section 1648.15 are subject to state sanctions by DBC. However DBC’s enforcement is complaint-driven and concern has been expressed that, as a result, enforcement may be less effective than it should be. Concern has also been expressed that Proposition 65 warning signs may not be posted in some offices where they should be posted because there is no clear definition as to who should be counted as an “employee” for purposes of Proposition 65 as opposed to an independent contractor.

## BACKGROUND

The California Proposition 65 (Safe Drinking Water and Toxic Enforcement Act of 1986) requires businesses to notify the public if chemicals they handle can cause cancer or birth defects. Businesses with less than 10 employees and government agencies are exempt from Proposition 65’s warning requirements. Most dental offices in Berkeley do

not have 10 or more employees and are exempt. The City can encourage these offices to provide Notice, but cannot force them to comply.

The Dental Board of California (DBC) administers the Dental Practices Act (Business and Professions Code Division 2, Chapter 4, Sections 1600 *et seq.).* The DBC requires all dentists to provide a fact sheet on dental materials before providing dental restorative work on a patient for the first time.

In lieu of adopting a City Ordinance which is precluded by state codes, the public has channels to impose proper application of existing state codes:

- Failure to post a Proposition 65 placard can be communicated to California OEHHA at (916)445-6900 or file an electronic complaint at http://oag.ca.gov/prop65/60-day-notice-search

- Dental offices which fail to provide each new client and first time amalgam recipient with a fact sheet should be reported to the DBC at (877) 729-7789 or email dentalboard@dca.ca.gov or file with the California Department of Consumer Affairs at https://www.dca.ca.gov/webapps/cru/gencomplaint.php

RATIONALE FOR RECOMMENDATION
The City is precluded by state laws from requiring stricter compliance with Proposition 65 and Business and Professions Act.

ALTERNATIVE ACTIONS CONSIDERED
None

CONTACT PERSON
Nabil Al-Hadithy, Secretary CEAC, (510) 981 7460
Janet Berreman, Health Officer, Secretary CHC, (510) 981 5301

Attachment:
1: Resolution

RESOLUTION NO. ##,###-N.S.

REDUCING EXPOSURE TO ANTHROPOGENIC MERCURY

WHEREAS, the City of Berkeley is charged with protecting the public health and welfare of its residents; and

WHEREAS, the City of Berkeley has adopted the precautionary principle, where threats of serious or irreversible damage to people or nature exist, lack of full scientific certainty about cause and effect shall not be viewed as sufficient reason for the City to postpone measures to prevent the degradation of the environment or protect human health; and

WHEREAS, the U.S. Food and Drug Administration's (FDA) most recent labeling instructions to dentists on amalgam state that "very limited to no clinical information is available regarding long-term health outcomes in pregnant women and their developing fetuses, and children under the age of six, including infants who are breastfed"; and

WHEREAS, on average about 50% of cavities restored are filled with dental amalgam containing mercury; and

WHEREAS, the scientific debate continues on whether this mercury in dental amalgam poses a risk to the population; and

WHEREAS, the Community Health Commission (CHC) and Community Environmental Advisory Commission (CEAC) researched major sources of anthropogenic mercury in the environment and strategies used by other municipalities to reduce its use, consulted with the dental community regarding mercury in dental amalgams, and recommended strategies for reduction of use within the City of Berkeley.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that, as recommended by the Community Health Commission, dentists practicing in Berkeley are urged to:

1. Avoid or limit use of mercury dental amalgam.
2. Obtain documented informed consent from the patient before placement of each dental amalgam.
3. Follow applicable regulations regarding dental amalgam practices and separators preventing mercury from reaching the environment.

BE IT FURTHER RESOLVED that, as recommended by the Community Environmental Commission, the City:

1. Request that the standard Proposition 65 labels or posters be posted in all dental offices regardless of the number of employees, and provide the Dental Board of California's Dental Materials Fact Sheet at each dental amalgam application;
2. Request that dental offices provide the Dental Board of California's Dental Materials Fact Sheet at each dental amalgam application

3. Request and strongly encourage that the DBC update the Dental Materials Fact Sheet "Facts about Fillings" (Dental Board of California, 2004, http://www.dbc.ca.gov/formspubs/pub_dmfs2004.pdf) to convey new scientific information on the absence of proof of safety for dental amalgam in susceptible subpopulations such as children and women who may become pregnant and request the DBC to remind dentists of their legal obligation to provide the fact sheet to new patients and to patients considering initial restorative treatment options;
4. Write letters to the Food and Drug Administration (FDA)and the National Institute of Health (NIH) to request that they close specific knowledge gaps in the field of dental amalgam by soliciting and reviewing peer-reviewed scientific papers that address each specific issue that the 2010 FDA panel requested specific research on regarding mercury and dental amalgam;
5. Write a letter to support the efforts of the United Nations Environment Programme to negotiate a global, legally binding instrument on mercury that will encompass all products and uses;
6. Write a letter to the World Health Organization (WHO) pledging to support the WHO's strategies to phase down the use of dental mercury whenever possible;
7. Direct staff to provide copies of this resolution to the city's state and federal representatives and to the other cities in Alameda County with a request that they use their authority to take the necessary steps to phase-down the use of mercury in dentistry;
8. Direct staff to educate the community about strategies by posting documents received that address risks and benefits of dental amalgam.
9. Direct staff to continue to educate the community on ways to minimize other sources of mercury in their bodies from fish and shellfish consumption, and proper disposal of batteries, fluorescent lights, and other mercury-containing household hazardous waste. This will be achieved by posting documents on the benefits and risks of dental amalgam to the City's web pages, by continuing to post recommendations at the Marina about risks of mercury in fish, by continuing to inspect industry and train them on proper management and disposal of universal wastes including fluorescent bulbs, mercury filling waste, monitors, batteries etc.
10. Encourage dentists practicing in Berkeley to limit use of mercury dental amalgam by posting to the web page and providing the leaflets to dentists through the regular communications and inspections of dental offices as required by Berkeley Municipal Code Title 15.