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**SENATE COMMITTEE ON ENVIRONMENTAL QUALITY**

**Senator Allen, Chair**

**2021 - 2022 Regular**

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**Bill No:** AB 1897

**Author:** Wicks

**Version:** 4/27/2022

**Hearing Date:** 6/22/2022

**Urgency:** No

**Fiscal:** Yes

**Consultant:** Eric Walters

**SUBJECT:** Nonvehicular air pollution control: civil penalties: refineries

**DIGEST:** This bill increases the maximum civil penalty applicable to a refinery, as defined, for the initial date of an air pollution violation to \$30,000, or \$100,000 for a second violation within 12 months. It also requires civil penalties above the cost of prosecution to be expended to mitigate the effect of air pollution in communities affected by the violation.

**ANALYSIS:**

Existing federal law:

- 1) Defines, under Title V of the federal Clean Air Act, major stationary sources as those sources with a potential to emit that exceeds a specified threshold of air pollutants per year and creates an operating permits program for those sources, and specified other sources, to be implemented by state and local permitting authorities.

Existing state law:

- 2) Requires air districts to adopt and enforce rules and regulations to achieve and maintain state and federal ambient air quality standards in all areas affected by non-vehicular emission sources under their jurisdiction. (Health and Safety Code (HSC) § 40000 et seq.)
- 3) Generally prohibits a person, except as specified, from discharging air contaminants or other material that cause injury, detriment, nuisance, or annoyance or endanger the comfort, repose, health or safety to any considerable number of persons, or to the public, or that cause, or have a tendency to cause, injury or damage to a business or property. (HSC § 41700)
- 4) Authorizes the governing board or the hearing board of an air district, after notice and a hearing, to issue an order for abatement whenever it finds that any person is constructing or operating any article, machine, equipment, or other

contrivance without a required permit, or is in violation of any order, rule, or regulation prohibiting or limiting the discharge of air contaminants into the air. (HSC § 42300 et seq.)

- 5) Deems any person who violates air pollution laws, rules, regulations, permits, or orders of the Air Resources Board (ARB) or of a district, including a district hearing board, as specified to be guilty of a misdemeanor and subject to specified fines, imprisonment in the county jail for not more than six months, or both. (HSC § 42400 et seq.)
- 6) Prescribes maximum civil penalty amounts for violations as follows (HSC § 42400 et seq.):
  - a) Strict liability: \$5,000, \$10,000 or \$15,000 per day, depending on specified circumstances. Penalties in excess of \$5,000 permit an affirmative defense that the violation was caused was not intentional or negligent. The \$15,000 level applies when a violation causes actual injury to a considerable numbers of persons or the public.
  - b) Negligent: \$25,000 per day, or \$100,000 if the violation causes great bodily injury or death.
  - c) Knowing: \$40,000 per day, or \$250,000 if the violation causes great bodily injury or death.
  - d) Willful and intentional: \$75,000 per day.
  - e) Willful, intentional, or reckless: \$125,000 per day for a person, or \$500,000 for a corporation, if the violation results in an unreasonable risk great bodily injury or death. \$250,000 for a person, or \$1,000,000 for a corporation, if the violation causes great bodily injury or death.
  - f) Intentional falsification of a required document: \$35,000.
- 7) Requires the maximum penalties in effect January 1, 2018 to increase annually based on the California Consumer Price Index. ( HSC § 42411)
- 8) Specifies that the recovery of certain civil penalties precludes prosecution for the same offense. (HSC § 42400.7)
- 9) Requires that, in determining the amount of penalty assessed, that the extent of harm, nature and persistence of violation, length of time, frequency of past violations, the record of maintenance, the unproven nature of the control equipment, actions taken by the defendant to mitigate the violation and the financial burden to the defendant be taken into consideration. (HSC § 42400.8)

10) Establishes the Air Pollution Control Fund within the General Fund to act as a depository for penalties and fees collected on vehicular and nonvehicular air pollution control sources, and to be available ARB to carry out its duties and functions. (Chapter 1063, Statutes of 1976)

This bill:

- 1) Increases the maximum civil penalty applicable to a refinery for discharging air pollutants in violation of Section 41700, without regard to intent or injury, from \$10,000 per day to \$30,000 for the initial date of the violation, or \$100,000 for the initial date of a second violation within 12 months, subject to the following conditions:
  - a) The discharge is from a Title V source that is a refinery, as defined;
  - b) The discharge results in a disruption to the community, as specified;
  - c) The discharge contains or includes one or more toxic air contaminants;
  - d) These higher civil penalties apply only to the initial date of a violation, unless the violation causes great bodily injury or death. Otherwise, any additional dates of violation are subject to existing civil penalties;
  - e) The higher civil penalties do not apply if the violation is caused by unforeseen and unforeseeable criminal acts, acts of war, acts of terrorism, or civil unrest; and
  - f) Requires civil penalties collected pursuant to this bill above the costs of prosecution to be expended to mitigate the effects of air pollution in communities affected by the violation.

## Background

- 1) *Penalties for violating air pollution standards.* California's non-vehicular air pollution statutes provide for civil penalties for violations of air pollution standards. Penalties are assessed based on the number of days of violation and the intent of the violator. In the absence of evidence to indicate negligence or worse (i.e., knowledge and failure to correct or willful and intentional behavior), civil penalties are assessed at penalty ceilings for the strict liability classification, where the violation is found to occur but districts need not establish knowledge, negligence, intent or injury. No minimum penalty is required, leaving the amount prosecuted at the discretion of the air district. Offenses are most often prosecuted under the strict liability standard, which is generally capped at \$10,000 per day. However, when districts seek more than \$5,000 per day, an affirmative defense that the act was not intentional or negligent is allowed.

In 2017, AB 617 (C. Garcia), Chapter 136, Statutes of 2017, increased the basic

strict liability penalty cap from \$1,000 per day to \$5,000 per day (accounting for 42 years of inflation since the limits were established in 1975). AB 617 also added an inflation adjustment for all civil penalties, with the amounts in effect in 2018 as the baseline.

According to the Bay Area Air Quality Management District (BAAQMD), large facilities, by virtue of total permitted emissions of criteria and toxic pollutants, generally fall under the \$10,000 penalty cap, except under certain circumstances, such as proven negligent or willful and intentional behavior. Penalties for violating air quality regulations and permits are supposed to act as a meaningful deterrent to encourage proper operation and reporting, which prevent unregulated releases of air pollutants.

- 2) *Air Pollution Control Fund.* The Air Pollution Control Fund (APCF) fund was created to act as a depository for penalties and fees collected on vehicular and nonvehicular air pollution control sources. The money in the fund is intended to be available to ARB to carry out its duties and functions. According to the Manual of State Funds, the major revenues for the APCF are penalties paid by manufacturers or distributors of motor vehicles for violations of regulations, cargo tank certification and direct import vehicle certification fees, penalties for violation of abatement orders and regulations, and various fees imposed on non-vehicular sources of air emissions.

According to the latest fund condition statement from the 2022-23 budget, the APCF currently has a balance of roughly \$228 million. It has brought in roughly \$175 million in revenue each of the last two years, primarily from regulatory fees and penalty assessments. It is largely used for “state operations” and “local assistance”, which account for 41% and 53% of APCF expenditures, respectively.

## Comments

- 1) *Purpose of Bill.* According to the author, “In recent years, there has been a significant decline at oil refineries in overall compliance with air quality requirements and increases in flaring events that release toxic air contaminants into neighboring communities. Refinery flaring events can result in shelter-in-place notifications, school closures, and increased visits to health care facilities for medical care. AB 1897 significantly raises the civil penalty ceilings for refineries violating air quality standards when a discharge results in a severe disruption to the community. Refineries must be held more accountable when they pollute the air. The consequences for serious air quality violations must be

severe enough to deter a discharge before it occurs.”

- 2) *Cost of doing business.* In the Bay Area, refineries are some of the largest sources of criteria pollutants and toxic air contaminants, and overall compliance with air quality permit requirements at the five Bay Area refineries has declined precipitously in recent years, with significant increases in flaring events, Title V permit condition deviations, and Notices of Violation (NOVs). This has resulted in increased exposure in refinery communities to toxic air contaminants, and increasing shelter-in-place notifications, school closures, and visits to health care facilities for medical care. Yet despite the disruption to these communities, air districts are generally limited to a penalty ceiling of \$10,000 per violation, which by some accounts seems to be a minor cost of doing business rather than acting as a deterrent to future violations.
- 3) *Where does the money go?* As introduced, AB 1897 required any moneys collected pursuant to the increased penalty to be expended in support of air quality programs. Amendments taken in the Assembly further focused that provision to require civil penalties collected (above the costs of prosecution) to be expended to mitigate the effects of air pollution in the communities affected by the violation.

Regarding penalty funds more generally, HSC § 42405 prescribes where penalty funds are deposited:

- a) When the Attorney General brings an action on behalf of a district, the penalty collected is split 50/50 between the district and the General Fund.
  - b) When the Attorney General brings an action on behalf of ARB, the entire penalty collected goes to the General Fund.
  - c) When the action is brought by the district itself, or by a district attorney, the entire penalty collected goes to the district.
- 4) *Consequences for ARB.* As described in the background, the APCF collects and expends hundreds of millions of dollars annually, much of it from the collection of penalties. Previous amendments to this bill were made to address concerns about “lawful air district expenditure” encompassing uses of the penalty funds that would not redress harms suffered by communities. However, it does not seem to be the intent of those amendments to also limit the discretion of ARB in its use of APCF moneys.

***The committee may wish to consider amending the measure to ensure the provision directing use of penalty funds applies only to the applicable air district.***

- 5) *Chaptering issue.* Both this bill and AB 2910 (Santiago) increase maximum civil penalties for air pollution violations, and both amend HSC § 42402, as well as subsequent penalty sections.
- 6) *Committee amendments. Staff recommends the committee adopt the bolded amendments contained in comment 4 above.*

**Related/Prior Legislation**

AB 2910 (Santiago, 2022) increases maximum civil penalties for air pollution violations, including tripling the lowest penalty caps for strict liability. AB 2910 is currently before this committee.

AB 617 (C. Garcia, Chapter 136, Statutes of 2017), among other things, increased air district criminal and civil strict liability penalty limits from \$1,000 to \$5,000 per day, adjusting for inflation since the limits were enacted in 1975, and required both ARB and air district maximum penalties to be inflation-adjusted annually going forward.

SB 691 (Hancock, 2013) authorized a civil penalty of up to \$100,000 against a person who emits a discharge from a Title V source if the discharge results in a severe disruption to the community, the discharge contains one or more toxic air contaminants, and 100 or more people are exposed. SB 691 was held on the Assembly Floor without a vote.

**SOURCE:** Bay Area Air Quality Management District

**SUPPORT:**

350 Bay Area Action  
American Lung Association in California  
Breathe California  
Coalition for Clean Air  
Community Action to Fight Asthma  
Contra Costa County  
Environmental Justice League  
South Coast Air Quality Management District

**OPPOSITION:**

California Chamber of Commerce  
California Council for Environmental & Economic Balance (CCEEB)  
California Manufacturers & Technology Association

Coastal Energy Alliance  
Council of Business & Industries of West Contra Costa County  
Industrial Association of Contra Costa County  
Western States Petroleum Association

**ARGUMENTS IN SUPPORT:** According to the Coalition for Clean Air, “Dangerous chemicals are an inherent part of the oil refining process. At the most extreme, an uncontrollable release of a chemical like hydrofluoric acid (such as what nearly happened at the Torrance Refinery in 2015) can jeopardize hundreds of thousands of people. Though a catastrophic release has not occurred, communities near refineries experience smaller, frequent toxic releases that, while not immediately fatal still harm human health. Neighborhoods near refineries often rank among the most toxic in the state, and nearly all have elevated cancer risks. Sadly, most of these communities are comprised of low-income earners and people of color.

“Despite this inherent danger, a toxic release at a refinery is treated no differently than a toxic release from any other stationary source. As a result, a toxic release at a refinery that is not rooted in negligence, willfulness or a failure to act would only result in a penalty ranging from \$5,000-15,000. Such a small penalty has no practical deterrence considering that the oil industry is among the most profitable industries in the world.

“To address this, AB 1897 would create a new civil penalty of up to \$30,000 for a toxic release at a refinery that results in a severe disruption in the community and the exposure of twenty-five (25) or more people. Further, this bill would also create a new \$100,000 civil penalty if a subsequent toxic release at the refinery occurs within twelve months. Though these amounts are still relatively low, they are an improvement over the currently authorized penalties.”

**ARGUMENTS IN OPPOSITION:** According to the California Council for Environmental & Economic Balance, “AB 1897 proposes penalties on violations that have already been increased, and indexed for inflation, in the companion bill to the legislation that extended the Cap-and-Trade Program during a prior legislative session. Maximum penalties assessed by the state board or a district pursuant to AB 617 (Chapter 136, Statutes of 2017) as of January 1, 2018, shall be increased annually based on the California Consumer Price Index as compiled and reported by the Department of Industrial Relations.

“CCEEB members recognize the valuable role that incentive-based compliance programs play in meeting air quality objectives and protecting public health. However, CCEEB does not support the unsubstantiated assertion that increased

penalties will improve compliance and reduce accidental releases. We are concerned that increasing penalties could unduly punish facilities for implementing critical process safety measures. We are also concerned that the new penalty ceiling amounts strongly encourage districts to disregard cooperative, incentive-based compliance programs in favor of more dollar-based and revenue-generating penalties.”

**-- END --**