

Date of Hearing: April 18, 2022

ASSEMBLY COMMITTEE ON NATURAL RESOURCES

Luz Rivas, Chair

AB 1897 (Wicks) – As Amended April 7, 2022

SUBJECT: Nonvehicular air pollution control: refineries: penalties

SUMMARY: 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.

EXISTING LAW:

- 1) 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.
- 2) 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 (Section 41700 of the Health and Safety Code).
- 3) 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.
- 4) 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.
- 5) Prescribes maximum civil penalty amounts for violations as follows:
 - 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 of 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.
- 6) Requires the maximum penalties in effect January 1, 2018 to increase annually based on the California Consumer Price Index.
 - 7) Specifies that the recovery of certain civil penalties precludes prosecution for the same offense.
 - 8) 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.
 - 9) 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.

THIS BILL 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:

- 1) The discharge is from a Title V source that is a refinery, defined as an establishment that is located on one or more contiguous or adjacent properties that produces gasoline, diesel fuel, aviation fuel, lubricating oil, asphalt, petrochemical feedstock, or other similar product through the processing of crude oil or alternative feedstock, redistillation of unfinished petroleum derivatives, cracking, or other processes.
- 2) The discharge results in a disruption to the community, including, but not limited to, residential displacement, shelter in place, evacuation, or destruction of property.
- 3) The discharge contains or includes one or more toxic air contaminants.
- 4) 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.
- 5) 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.

- 6) Requires civil penalties collected pursuant to this bill to be expended in support of air quality programs, including, but not limited to, programs to research or mitigate the effects of air pollution in communities affected by the violation.

FISCAL EFFECT: Non-fiscal

COMMENTS:

- 1) **Background.** 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 (Cristina Garcia), Chapter 136, Statutes of 2017, increased the basic strict liability penal 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.

For most facilities, whether they are larger Title V facilities or smaller non-Title V facilities, the \$10,000 ceiling has provided credible deterrence. However, there is a small subset of violations occurring at the largest facilities, refineries, for which the \$10,000 ceiling is inadequate based on the impacts that their violations can have on the surrounding community. These are events that result in “shelter in place” recommendations from local officials, public complaints of poor air quality, odors, and nuisance, cancellation of outdoor events, and upticks in visits to health care facilities by residents. In these situations, a facility can receive a \$10,000 penalty, but this penalty bears no relation to the disruption caused by their activities in the nearby community. It also likely provides no real incentive to prevent similar future occurrences.

- 2) **Author’s statement:**

Decline in overall compliance with air quality requirements and significant increases in flaring events have resulted in increased exposure in refinery communities to toxic air contaminants. AB 1897 raises the penalty ceiling for refineries for violations in which a discharge results in a severe disruption to the community. Penalties are a component in the regulatory framework to ensure that refinery facilities are deterred from taking

measures that delay or defer maintenance, and raising this penalty ceiling provides a disincentive for poor operation and overreliance on safety equipment.

- 3) **What are penalty funds used for?** Section 42405 of the Health and Safety Code 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.

Under current law, penalty funds secured by a district may be used for any lawful air district expenditure. This broad discretion over penalty funds may give rise to a concern that penalty funds will not be used to redress the harms suffered by the communities affected by a violation.

This bill requires civil penalties collected pursuant to the bill to be expended in support of air quality programs, including, but not limited to, programs to research or mitigate the effects of air pollution in communities affected by the violation. This language is a nice gesture, but still gives a district broad discretion, as the use of funds is neither limited to mitigation nor the affected community.

The author and the committee may wish to consider amending the bill to require penalty funds collected, above the costs of prosecution, be used to mitigate air pollution in the community or communities affected by the violation.

- 4) **Related legislation.** AB 2910 (Santiago), which is pending in this committee, increases maximum civil penalties for air pollution violations, including tripling the lowest penalty caps for strict liability. AB 2910 conflicts with AB 1897 because both bills amend Section 42402 of the Health and Safety Code, as well as subsequent penalty sections (42402.1, 42402.2 and 42402.3).
- 5) **Prior legislation.** AB 617 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.

- 6) **Double referral.** This bill has also been referred to the Assembly Judiciary Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Bay Area Air Quality Management District (sponsor)
350 Bay Area Action
American Lung Association in California
Breathe California
Coalition for Clean Air
Contra Costa County
Environmental Justice League
South Coast Air Quality Management District

Opposition

California Council for Environmental & Economic Balance (CCEEB)
Western States Petroleum Association

Analysis Prepared by: Lawrence Lingbloom / NAT. RES. /