

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 1897 (Wicks)
Version: June 23, 2022
Hearing Date: June 28, 2022
Fiscal: Yes
Urgency: No
ME

SUBJECT

Nonvehicular air pollution control: civil penalties: refineries

DIGEST

This bill imposes civil penalties for toxic air contaminant discharges by refineries, as defined, of a maximum of \$30,000 for an initial violation and a maximum of \$100,000 for a subsequent violation, as specified.

EXECUTIVE SUMMARY

In an effort to increase compliance with air quality requirements and decrease flaring events that release toxic air contaminants into local neighborhoods, this bill provides for increased civil penalties on specified refineries. The civil penalties are a maximum of \$30,000 for an initial toxic air contaminant discharge if the discharge meets other criteria, for example, the discharge must result in a disruption to the community, as defined. The bill provides for a civil penalty of up to \$100,000 for a second toxic air contaminant discharge, as specified, within one year and provides that civil penalties assessed by a district above the costs of prosecution shall be used to mitigate air pollution in the community or communities affected by the violation. Additionally, the bill provides that a prevailing plaintiff may recover their actual costs of investigation, expert witness fees, and reasonable attorney's fees.

The bill is sponsored by the Bay Area Air Quality Management District and supported by the Contra Costa County Board of Supervisors, American Lung Association, Community Action to Fight Asthma, Coalition for Clean Air, and other groups that advocate for breathable air and environmental justice. The bill is opposed by the California Chamber of Commerce, California Manufacturers & Technology Association, Coastal Energy Alliance, Industrial Association of Contra Costa County, and Western States Petroleum Association who oppose the bill's 200 percent penalty increase, the singling out of refineries, and setting what they assert is unclear criteria for determining a violation. The bill passed out of the Senate Environment Quality Committee with a 5-2 vote. If the bill passes out of this Committee it will next be heard in the Senate Appropriations Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that in order to coordinate air pollution control activities throughout the state, and to ensure that the entire state is, or will be, in compliance with air quality standards, the Air Resources Control Board must do all of the following:
 - a) review regional air quality management attainment plans to determine whether the plans will achieve and maintain the state's ambient air quality standards by the earliest practicable date;
 - b) review the rules and regulations and programs submitted by the regional air quality management districts to determine whether they are sufficiently effective to achieve and maintain the state ambient air quality standards; and
 - c) review the enforcement practices of the regional air quality management districts and other local agencies delegated authority by regional air quality districts to determine whether reasonable action is being taken to enforce their programs, rules, and regulations. (Health and Saf. Code § 41500.)
- 2) Provides that a regional air quality management district board may establish, by regulation, a permit system that requires, except as otherwise provided, that before any person builds, erects, alters, replaces, operates, or uses any article, machine, equipment, or other contrivance which may cause the issuance of air contaminants, the person obtain a permit to do so from the air pollution control officer of the district. (Health and Saf. Code § 42300.)
- 3) Requires a permit system established pursuant to 2) to do all of the following:
 - a) ensure that the article, machine, equipment, or contrivance for which the permit was issued does not prevent or interfere with the attainment or maintenance of any applicable air quality standard;
 - b) prohibit the issuance of a permit unless the air pollution control officer is satisfied, on the basis of criteria adopted by the district board, that the article, machine, equipment, or contrivance will comply with all applicable orders, rules, and regulations of the district and of the state board in accordance with state law;
 - c) prohibit the issuance of a permit to a Title V source if the Administrator of the Environmental Protection Agency objects to its issuance in a timely manner as provided in Title V;
 - d) provide that the air pollution control officer may issue to a Title V source a permit to operate or use if the owner or operator of the Title V source presents a variance exempting the owner or operator from any rule or regulation of the district, or any permit condition imposed, or presents an abatement order that has the effect of a variance and that meets all of the requirements of this part pertaining to variances, and the requirements for the issuance of permits to operate are otherwise satisfied;

- e) require, upon annual renewal, that each permit be reviewed to determine that the permit conditions are adequate to ensure compliance with, and the enforceability of, district rules and regulations applicable to the article, machine, equipment, or contrivance for which the permit was issued which were in effect at the time the permit was issued or modified, or which have subsequently been adopted and made retroactively applicable to an existing article, machine, equipment, or contrivance, by the district board and, if the permit conditions are not consistent, require that the permit be revised to specify the permit conditions in accordance with all applicable rules and regulations; and
 - f) provide for the reissuance or transfer of a permit to a new owner or operator of an article, machine, equipment, or contrivance, as specified. (Health and Saf. Code § 42301.)
- 4) Provides that any person who violates the law regarding non-vehicular air pollutants or any rule, regulation, permit, or order of the state board or of a district, including a district hearing board, inclusive, is guilty of a misdemeanor and is subject to a fine of not more than five thousand dollars (\$5,000) or imprisonment in the county jail for not more than six months, or both. (Health and Saf. Code § 42400.)
- 5) Provides that notwithstanding 4) recovery of civil penalties pursuant to specified non-vehicular air pollution statutes precludes prosecution and that when a district refers a violation to a prosecuting agency, the filing of a criminal complaint is grounds requiring the dismissal of any civil action brought for the same offense. (Health and Saf. Code § 42400.7.)
- 6) Provides that a person who violates the law regarding non-vehicular air pollution, or a rule, regulation, permit, or order of a district, including a district hearing board, or of the state board is strictly liable for a civil penalty of not more than five thousand dollars (\$5,000), as specified. (Health and Saf. Code § 42402 (a).)
- 7) Provides that the penalties in 6) may increase to not more than fifteen thousand dollars (\$15,000) if the health and safety of a considerable number of persons or the public is at risk. (Health and Saf. Code § 42402 (c).)
- 8) Provides that a person who negligently emits an air contaminant in violation of the law regarding non-vehicular air pollution statutes or a rule, regulation, permit, or order of the state board or of a district, including a district hearing board, pertaining to emission regulations or limitations is liable for a civil penalty of not more than twenty-five thousand dollars (\$25,000). (Health and Saf. Code § 42402.1 (a).)
- 9) Provides that if a negligent emission pursuant to 8) causes great bodily injury, as defined, to a person or that causes the death of a person, is liable for a civil penalty of not more than one hundred thousand dollars (\$100,000). (Health and Saf. Code § 42402.1 (b).)

- 10) Provides that a person who emits an air contaminant in violation of the law regarding non-vehicular air pollution, or a rule, regulation, permit, or order of the state board or of a district, including a district hearing board, pertaining to emission regulations or limitations, and who knew of the emission and failed to take corrective action, within a reasonable period of time under the circumstances, is liable for a civil penalty of not more than forty thousand dollars (\$40,000). (Health and Saf. Code § 42402.2 (a).)
- 11) Provides that a person who emits an air contaminant in violation of the law regarding non-vehicular air pollution, or a rule, regulation, permit, or order of the state board or of a district, including a district hearing board, pertaining to emission regulations or limitations that results in great bodily injury, and who knew of the emission and failed to take corrective action within a reasonable period of time under the circumstances, is liable for a civil penalty of not more than two hundred fifty thousand dollars (\$250,000). (Health and Saf. Code § 4202.2 (b).)
- 12) Provides that a person who willfully and intentionally emits an air contaminant in violation of the law regarding non-vehicular air pollution or a rule, regulation, permit, or order of the state board, or of a district, including a district hearing board, pertaining to emission regulations or limitations, is liable for a civil penalty of not more than seventy-five thousand dollars (\$75,000). (Health and Saf. Code § 42402.3 (a).)
- 13) Provides that a person who willfully and intentionally, or with reckless disregard for the risk of great bodily injury, as defined, or death of, a person, emits an air contaminant, as specified, that results in an unreasonable risk of great bodily injury to, or death of, a person, is liable for a civil penalty of not more than one hundred twenty-five thousand dollars (\$125,000), and that if the violator is a corporation, the maximum penalty may be up to five hundred thousand dollars (\$500,000). (Health and Saf. Code § 42402.3 (b).)
- 14) Provides that a person who willfully and intentionally, or with reckless disregard for the risk of great bodily injury, as defined, or death of, a person, emits an air contaminant, as specified, that actually results in great bodily injury to, or death of, a person, is liable for a civil penalty of not more than two hundred fifty thousand dollars (\$250,000), and if the violator is a corporation, the maximum penalty may be up to one million dollars (\$1,000,000). (Health and Saf. Code § 42402.3 (c).)
- 15) Provides that the civil penalties prescribed in specified Health and Safety Code sections 39674, 42401, 42402, 42402.1, 42402.2, and 42402.3 shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, or by the attorney for any district in which the violation occurs in any court of competent jurisdiction. (Health and Saf. Code § 42403 (a).)

- 16) Provides that in determining the amount assessed, the court, or in reaching any settlement, the district, shall take into consideration all relevant circumstances, including, but not limited to, the following: the extent of harm caused by the violation; the nature and persistence of the violation; the length of time over which the violation occurs; the frequency of past violations; the record of maintenance; the unproven or innovative nature of the control equipment; any action taken by the defendant, including the nature, extent, and time of response of the cleanup and construction undertaken, to mitigate the violation, and the financial burden of the defendant. (Health and Saf. Code § 42403 (a).)
- 17) Federal law, pursuant to Section V of the Clean Air Act, defines a “major source” of pollution as a stationary source that is either:
 - a) located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants; or
 - b) any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant. (42 U.S Code Section 7661.)

This bill:

- 1) Provides that a person is liable for a civil penalty of not more than \$30,000 if the person violates Health and Safety Code Section 41700 and all of the following occur: the discharge is from a Title V source that is a refinery, as defined; the discharge results in a disruption to the community, including, but not limited to, residential displacement, shelter in place, evacuation, or destruction of property; and the discharge contains or includes one or more toxic air contaminants, as identified by the state board pursuant to Health and Safety Code Section 39657.
- 2) Provides that a person shall be liable for a civil penalty of not more than \$100,000 for a second discharge that meets all of the criteria in 1) above and occurs within 12 months of a prior discharge where all of the criteria in 1) were met.
- 3) Provides that a civil penalty described in 1) shall apply on the initial date of a violation, except as specified.
- 4) Specifies that if a violation continues to occur subsequent to the initial date of the violation, the civil penalty described in Health and Safety Code Sections 42402, 42402.1, 42402.2, or 42402.3 shall apply to those subsequent days.
- 5) Specifies that the civil penalty created by this bill (the maximum of \$30,000 and subsequent maximum of \$100,000) shall not apply if the violation is caused by unforeseen and unforeseeable criminal acts, acts of war, acts of terrorism, or civil unrest.

- 6) Provides that the civil penalties collected by a district pursuant to 1) and 2) above the costs of prosecution shall be expended to mitigate the effects of air pollution in communities affected by the violation.
- 7) Specifies that the civil penalties described in 1) and 2) shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by a district attorney, or by the attorney for the district in which the violation occurs in a court of competent jurisdiction.
- 8) Provides that in determining the amount of the civil penalty assessed in 1) and 2), the court, or in reaching a settlement agreement, the district shall take into consideration all relevant circumstances, as specified, including but not limited to, the following: the extent of harm caused by the violation; the nature and persistence of the violation; the length of time over which the violation occurs; the frequency of past violations; the record of maintenance; the unproven or innovative nature of the control equipment; action, if any, taken by the defendant, including the nature, extent, and time of response of the cleanup and construction undertaken, to mitigate the violation; and the financial burden to the defendant.
- 9) Provides that in any action brought pursuant to this article, a prevailing plaintiff may recover its actual costs of investigation, expert witness fees, and reasonable attorney's fees.

COMMENTS

1. Author statement

The author writes:

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.

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 seems to be a minor cost of doing business rather than acting as a deterrent to future violations.

2. The bill applies a particular civil penalty to specified refineries toxic air contaminant discharge

This bill increases the maximum civil penalty that can be applied to specified refineries for a discharge that results in a disruption to the community, as defined, and contains or includes one or more toxic air contaminants, as specified. The maximum civil penalty of \$30,000 applies for the first violation and a maximum of \$100,000 for a second violation that occurs within a year and meets the other specified criteria.

The bill is opposed by the California Chamber of Commerce, California Manufacturers & Technology Association, Coastal Energy Alliance, Industrial Association of Contra Costa County, and Western States Petroleum Association who oppose the bill's 200 percent penalty increase, the singling out of refineries, and setting what they assert is unclear criteria for determining a violation.

The Coalition for Clean Air, in support of this bill, highlights the need for the bill:

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.

Those in opposition to the bill are concerned about one industry being singled out and write:

Under current law, the penalty structure applies equally to all Title V sources that commit air violations. AB 1897 singles out refineries and creates a different penalty structure. This bill sets a precedent that penalties for similar air pollution violations can be differentiated simply by the facility type. Under this approach, other similarly permitted Title V facilities may likewise be singled out sector by sector. There is no public policy rationale for singling out refineries, or any other Title V facility, for different treatment for identical incidents.

3. The civil penalties apply to refineries when there is a toxic air contaminant discharge and that discharge results in a disruption to the community, including, but not limited to, residential displacement, shelter in place, evacuation, or destruction of property

The civil penalties that apply to refineries pursuant to this bill are not applied every time there is a discharge by a refinery. In order to recover penalties against the refinery due to a discharge, the discharge must be a toxic air contaminant discharge and also result in a disruption to the community. Opponents of the bill have expressed concern that the establishment of a civil penalty for a discharge that “results in a disruption to the community, including, but not limited to, residential displacement, shelter in place, evacuation, or destruction of property” is overly vague. Specifically, they complain that the phrase “including, but not limited to” leaves them unable to determine when they might be liable for discharging toxic air contaminants into communities. The phrase “including, but not limited to” is used abundantly in state law; a search of a legal database shows it is used 8,123 times. The California Supreme Court has also provided clear guidance as to how the phrase should be interpreted: as an enlarging phrase, while using the provided examples as guideposts for what else might be included.¹ This approach comports with the doctrines of *ejusdem generis* and *noscitur a sociis* by treating the examples provided as effectively cabining the otherwise-open-ended “but not limited to” phrasing.² Accordingly, here, the examples provided of what constitutes community disruption also serve to establish the general types of community disruption caused by the release of toxic air contaminants.

Additionally, in determining the amount of the civil penalty assessed, the court, or in reaching a settlement agreement, the district *shall* take into consideration all relevant circumstances, including but not limited to, the following: the extent of harm caused by the violation; the nature and persistence of the violation; the length of time over which the violation occurs; the frequency of past violations; the record of maintenance; the unproven or innovative nature of the control equipment; action, if any, taken by the defendant, including the nature, extent, and time of response of the cleanup and construction undertaken, to mitigate the violation; and the financial burden to the defendant.

¹ See *People v. Arias* (2008) 45 Cal.4th 169, 182.

² See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1390-1391.

SUPPORT

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

OPPOSITION

California Council for Environmental and Economic Balance
California Chamber of Commerce
California Manufacturers & Technology Association
Coastal Energy Alliance
The Industrial Association of Contra Costa County
Western States Petroleum Association

RELATED LEGISLATION

Pending Legislation: AB 2910 (Santiago, 2022) increases already existing civil penalties imposed on non-vehicular, stationary source air polluters, and provides that more of the penalty funds be used to mitigate air pollution in the communities that are actually affected by the violations. AB 2910 is set for a hearing in this Committee on the same day as this bill.

Prior Legislation: AB 617 (Garcia, Ch. 136, Stats. 2017) Required the ARB to improve air pollution data collection and reporting; required expedited pollution control retrofit of large stationary sources; increased penalties for air pollution violations; required enhanced air pollution monitoring; required ARB to adopt a statewide emissions reduction strategy targeting pollution-burdened communities; and required ARB and air districts to implement community emissions reduction programs.

PRIOR VOTES:

Senate Environmental Quality Committee (Ayes 5, Noes 1)
Assembly Floor (Ayes 41, Noes 25)
Assembly Appropriations Committee (Ayes 12, Noes 4)
Assembly Judiciary Committee (Ayes 7, Noes 2)
Assembly Natural Resources Committee (Ayes 8, Noes 2)
