

Date of Hearing: April 25, 2023

ASSEMBLY COMMITTEE ON JUDICIARY
Brian Maienschein, Chair
AB 1465 (Wicks) – As Amended March 16, 2023

SUBJECT: NONVEHICULAR AIR POLLUTION: CIVIL PENALTIES

KEY ISSUE: SHOULD SPECIFIED CIVIL AND ADMINISTRATIVE PENALTIES IMPOSED ON HYDROCARBON REFINERIES, AS DEFINED, BE TRIPLED WHEN THE REFINERY RELEASES TOXIC AIR CONTAMINANTS?

SYNOPSIS

California has some of the most stringent air pollution laws in the nation. Nonetheless, unhealthy air quality continues to plague the state, especially in majority minority neighborhoods located near heavily industrialized areas. In recent years, it has become abundantly clear that the existing civil penalty structure designed to deter unlawful emissions of hazardous pollutants is not serving as a sufficient deterrent to unlawful releases of hazardous pollutants into the environment. This problem appears to be particularly acute as it pertains to California's oil and gas refining industry.

Seeking to ensure that the penalties associated with unlawful emissions of air contaminants are no longer treated as the cost of doing business, this bill would triple the level of potential civil penalties imposed on refineries for violating six provisions of existing law related to air quality. Nothing in the bill would otherwise alter the existing procedural rules for seeking these civil penalties or alter the existing law related to the distribution of penalty proceeds.

This bill is sponsored by the Bay Area Air Quality Management District who note that refineries are frequent violators of existing air quality laws, and that refinery violations are often some of the most disruptive to the adjacent communities. This bill is opposed by the Western States Petroleum Association who object to singling out refineries for the enhanced penalties and not applying the bill to all potential polluters. This measure was previously heard and approved by the Committee on Natural Resources by a vote of 8-3.

SUMMARY: Provides for treble damages to be imposed on a refinery that violates the existing law's prohibition on discharging quantities of air contaminants or other material that cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public. Specifically, **this bill:**

- 1) Defines a "refinery" to mean 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) Permits the civil or administrative penalties provided for in Health and Safety Code Section 42402 through 42402.5, related to unlawful discharges or air contaminants, to be tripled if both of the following occurs:

- a) The discharge is from a refinery that is also deemed a Title V pollution source under federal law; and
- b) The discharge contains or includes one or more toxic air contaminants, as identified by the California Air Resources Control Board as a toxic air contaminant.

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;
 - 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 Safety Code Section 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 Safety Code Section 42300.)
- 3) Prohibits a person from discharging from any source whatsoever quantities of air contaminants or other material that cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or that endanger the comfort, repose, health, or safety of any of those persons or the public, or that cause, or have a natural tendency to cause, injury or damage to business or property. (Health and Safety Code Section 41700.)
- 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 ten thousand dollars (\$10,000) or imprisonment in the county jail for not more than six months, or both. (Health and Safety Code Section 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 Safety Code Section 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 ten thousand dollars (\$10,000), as specified. (Health and Safety Code Section 42402 (b).)
- 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 Safety Code Section 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 Safety 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 Safety Code Section 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 Safety Code Section 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 Safety Section 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 Safety Code Section 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 Safety Code Section 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 Safety Code Section 42402.3 (c).)

- 15) Provides that a person who knowingly and with intent to deceive, falsifies any document required to be kept pursuant to existing air quality laws, or any rule, regulation, permit, or order of the state board or of a district, including a district hearing board, is liable for a civil penalty of not more than thirty-five thousand dollars (\$35,000). (Health and Safety Code Section 42402.4.)
- 16) Provides that in addition to any civil and criminal penalties prescribed in the non-vehicular air pollution laws, an air district may impose administrative civil penalties, not to exceed five hundred dollars (\$500) for a violation of the rules governing non-vehicular air pollution, or any order, permit, rule, or regulation of the state board or of a district, including a district hearing board inclusive, if the district board has adopted rules and regulations specifying procedures for the imposition and amounts of these penalties. (Health and Safety Code Section 42402.5.)
- 17) Requires the California Air Resources Board to by regulation, designate any substance that is listed as a hazardous air pollutant, as specified in federal law, as a toxic air contaminant. (Health and Safety Code Section 39657 (b).)
- 18) Specifies the allocation of recovered civil penalties for actions related to unlawful releases of air contaminants. (Health and Safety Code Section 42405.)
- 19) Federal law, pursuant to Title V of the Clean Air Act, defines a “major source” of pollution as an 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.C. Section 7661.)
- 20) Federal law, pursuant to the Clean Air Act, lists several dozen chemical compounds determined to be a hazardous air pollutant. (42 U.S.C. Section 7412 (b).)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: California law provides several tiers of penalties for entities found to have unlawfully emitted pollutants into the air. Despite the diversity of penalties provided by law, regulators frequently opt to utilize strict liability penalties for unlawful emissions of hazardous pollutants, which are capped at \$10,000 per violation. The author and proponents of this measure note that for many large-scale industrial operations, these penalties are so low that they are now viewed as little more than the cost of doing business. The author contends that this is especially true for large hydrocarbon refineries. Accordingly, this bill seeks to adopt a refinery-specific penalty regime for unlawful emissions of toxic air contaminants. In support of the bill, the author states:

AB 1465 triples civil penalties for refineries who violate air quality standards.

At oil refineries in recent years, there has been a precipitous decline in compliance with air quality requirements, coupled with increases in flaring events that release toxic air contaminants into neighboring communities. Refinery flaring can result in shelter-in-place notifications, school closures, and a surge of visits to health care facilities for medical care.

In the Bay Area, refineries are some of the largest sources of air pollutants. Specifically in my district, increased flaring events have led to incidents that have negatively impacted health of the community, including schools in the surrounding areas.

Serious disruptions caused by flaring or similar pollution discharges at a refinery are occurring far too often. Refineries must be held more accountable when they pollute the air. The consequences for air quality violations must be severe enough to deter a discharge before it occurs, so refineries don't simply treat fines for causing community disruption as an acceptable cost of doing business.

Existing law provides for three tiers of penalties for unlawful air pollutant emissions from non-vehicular sources. California has some of the strictest air quality and emission rules in the nation. These rules typically break down along two types of requirements: (1) rules regarding mobile sources, like vehicles, and (2) rules regarding stationary sources of pollution including refineries, factories, and other fixed industrial sites. This bill implicates stationary sources, specifically refineries. The existing rules break down penalties for non-vehicular stationary sources into three basic categories: strict liability violations; negligent violations; and violations stemming from knowing or willful violations of existing laws against unlawful emissions of pollution. Depending on the type of violation and scope of the harm caused, existing law provides for violations between \$5,000 and \$1,000,000.

Despite the potential for significant penalties, in practice, most liability imposed on non-vehicular sources of pollution apply the strict-liability penalties that are capped at a \$10,000 per violation. The common utilization of the strict-liability penalties stems from the difficulty in proving negligence or other intent, and the fact that the regularity of occurrences of relatively minor offenses for which an operator may be held strictly liable makes utilizing this method of enforcement a more efficient use of government resources.

Given that most air pollution penalties are strict liability violations, industrial entities too frequently treat these penalties as the cost of doing business. As noted, due to the ease of prosecution and frequency of basic violations of the existing air pollution laws, the proponents of this measure note that far too many operators treat these fines as little more than the cost of doing business. For example, oil refineries in the Bay Area cities of Martinez and Richmond are frequent violators of existing air quality laws. (Shomik Mukherjee, *Air quality board requires Richmond, Martinez refineries to drastically cut air pollution*, S.J Mercury News (Jul 21, 2021) available at: <https://www.mercurynews.com/2021/07/21/oil-refineries-will-be-forced-to-reduce-pollution-bay-area/>.) Although most of the emissions may be relatively minor, several have produced significant impacts on the local neighborhoods, and regardless of size of any individual release, the health impact to people living near these facilities compounds over time.

This bill. As noted above, many air districts seek to impose strict-liability penalties for efficiency. However, a set of six code sections dealing with unlawful emissions applies significantly higher penalties if an agency can demonstrate that the emitter acting in a knowing,

willful, intentional, or reckless manner when causing a violation of the law that resulted in the omission. In order to boost enforcement of these enhanced penalties, this bill would triple the level of permissible recovery if the air district sought the civil penalties from a refinery that discharges quantities of air contaminants or other material that cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, in violation of existing law. This bill defines “refineries” as an entity that qualifies under Title V of the federal Clean Air Act and 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, as specified. This bill does not specify how penalty monies are to be distributed, thus reverting to the default allocation in existing law.

Existing law delineates the allocation of civil penalties for violations of clean air laws. Given the various state and local regulators authorized to bring legal actions to punish those who pollute California’s air quality, the existing law specifies how penalties recovered from polluters are divided. Pursuant to Health and Safety Code Section 42405 if the Attorney General brings an action on behalf of an air district the state’s General Fund and the district split the recovery. If the Attorney General files suit on behalf of the California Air Resources Board than all recoveries are sent to the General Fund. Finally, if a local public prosecutor brings the suit on behalf of the air district, the local district keeps the entirety of the recovery. Nothing in the existing law directs how local agencies are to spend the recovery. Given that this bill is silent on how the additional recoveries authorized by this measure are to be allocated, the above described scenarios will dictate.

This measure is narrower version of similar measure from last session, but lacks some very helpful penalty apportionment provisions. Last year this Committee heard and approved AB 1897 (Wicks, 2022). As it passed this Committee that bill also sought to increase penalties against air polluters, particularly large refineries in the Bay Area. However, that measure contained key provisions that this measure does not. First, that bill provided for a prevailing government agency to seek attorney’s costs and fees, thus providing more of the penalty money to be utilized to remedy harms. Secondly, that bill, in light of the cost recovery provisions, directed that the penalty revenue must be directed to the communities impacted by the emission of illegal air pollutants. Unfortunately controversy arose between the penalty revenue provisions of that bill and those contained in a companion measure AB 2910 (Santiago, 2022), and a difference of opinion within the air quality management community. While this Committee would contend that the cost recovery and penalty allocation provisions of AB 1897 are preferable, the Committee also recognizes this bill seeks to serve as a deterrent just as much as it seeks to punish bad actors. Accordingly, while the author should certainly entertain adopting provisions similar to those in AB 1897, the Committee is not requiring any amendments to this measure.

This bill is unlikely to violate the constitutional protections for due process or equal protection. This measure is opposed by the Western States Petroleum Association. Among other concerns they contend that the bill, by singling out refineries, violations both their due process and equal protection rights. As it pertains to due process, it should be noted that nothing in this changes any procedural elements of an air quality case. This bill simply increases penalties. Under this bill, refineries would still be entitled to their day in court, all evidentiary protections of existing law, and applicable provisions of the Code of Civil Procedure that guide current

litigation in this area. Accordingly, there is no clear issue related to due process raised by this bill.

As it pertains to claims that this bill violates equal protection rules by singling out refineries for enhanced penalties, the argument again does not appear to hold significant legal weight. This Committee has found no case law, nor has the opposition highlighted any case law, indicating that oil refiners are a protected class. Accordingly, a rational basis analysis would apply when weighing any claims of unfair or inequitable treatment under the law. A rational basis analysis requires the government to justify a law with a, "reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons" and that such policies must have, "a rational relationship to a legitimate governmental purpose." (*Romer v. Evans* (1996) 517 U.S. 620, 635.) Thus the Legislature must have a legitimate purpose for singling out refineries for higher penalties for violating air quality rules. Indeed, one exists. As noted above refineries, especially those in the Bay Area, are responsible for a disproportionate level of the violations of air quality laws. Given the number and continuing pattern of violations, it would appear the existing law is not sufficiently deterring misconduct. This bill would increase the penalties on refiners to enhance the deterrence to violating air quality laws and putting communities at risk, which appears to be a wholly legitimate use of legislative authority.

ARGUMENTS IN SUPPORT: This bill is sponsored by the Bay Area Air Quality Management District who notes that refineries are some of the largest sources of air pollution in the region. In support of this bill they write:

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.

AB 1465 triples the civil penalty ceiling at refineries for violations in which a discharge contains toxic air contaminants. In the above case under strict liability provisions, the current \$10,000 penalty ceiling would rise to \$30,000.

AB 1465 does not mandate \$30,000 civil penalties for violations meeting the above requirements but rather works in conjunction with existing state law (HSC Section 42403), which provides guidance for penalties assessed by a court or through a settlement.

ARGUMENTS IN OPPOSITION: This measure is opposed, unless amended, by the Western States Petroleum Association. The focus of their concerns on this bill's singling out of the refining industry for enhanced penalties. They write:

Under current law, the penalty structure applies equally to all Title V sources that commit air violations. AB 1465 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 of identical incidents. Maintaining the existing penalty structure is important to ensure air pollution violations of similar magnitude and severity are not treated differently because of the type of facility that committed the violation. AB 1465 also raises serious legal questions of equal protection and due process especially given that impacts of an air pollution violation would likely be the same on air quality, but the treatment and penalties applied would be based off of facility type.

REGISTERED SUPPORT / OPPOSITION:**Support**

Bay Area Air Quality Management District (sponsor)

Opposition

Western States Petroleum Association (unless amended)

Analysis Prepared by: Nicholas Liedtke / JUD. / (916) 319-2334