AMENDED IN SENATE JUNE 14, 2010

AMENDED IN SENATE MARCH 15, 2010

AMENDED IN SENATE JULY 1, 2009

AMENDED IN SENATE JUNE 25, 2009

AMENDED IN ASSEMBLY JUNE 1, 2009

AMENDED IN ASSEMBLY APRIL 13, 2009

california legislature—2009–10 regular session

ASSEMBLY BILL No. 846

Introduced by Assembly Member Torrico

February 26, 2009

An act to add Section 12999.7 to the Food and Agricultural Code, to add Sections 25196.5 and 42402.6 to the Health and Safety Code, to add Section 6437 to the Labor Code, and to add Section 13363 to the Water Code, relating to civil and administrative penalties.

legislative counsel's digest

AB 846, as amended, Torrico. State agencies: civil and administrative penalties.

The Administrative Procedure Act contains provisions governing the conduct of administrative adjudication for state agencies.

This bill would require the Director of Pesticide Regulation, the Department of Toxic Substances Control, the State Air Resources Board, the Department of Industrial Relations, and the State Water Resources Control Board to update the maximum and minimum amounts of specified civil and administrative penalties for inflation or deflation using the Consumer Price Index, as provided. The bill would require~~,~~

~~if an administrative or civil penalty below the maximum monetary level authorized pursuant to those provisions is sought,~~ that the penalty be assessed, at a minimum, at a level that recovers non-de minimis economic benefits, *as defined,* derived by the violator, except as specified. Because local air districts, county agricultural commissioners, and unified program agencies would be subject to this requirement, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. This act shall be known, and may be cited, as the California Civil Penalties Inflation Supplement and Enforcement Act of 2010.

SEC. 2. Section 12999.7 is added to the Food and Agricultural Code, to read:

12999.7. (a) (1) The director shall update, by February 15, 2011, and on January 1 every four years thereafter, all civil and administrative penalties imposed pursuant to this article, Section 14027, and Article 5 (commencing with Section 11891) of Chapter 4 of Division 6 to adjust the maximum and minimum amounts specified in those provisions for inflation or deflation, as established by the amount by which the Consumer Price Index for the month of June of the year prior to the adjustment exceeds, or is less than, the Consumer Price Index for June of the calendar year in which legislation was last enacted establishing or amending the amount of the penalty.

(2) The amount of any penalties determined pursuant to this subdivision shall be rounded as follows:

(A) To the nearest multiple of ten dollars ($10) in the case of a penalty less than or equal to one hundred dollars ($100).

(B) To the nearest multiple of one hundred dollars ($100) in the case of a penalty greater than one hundred dollars ($100) but less than or equal to one thousand dollars ($1,000).

(C) To the nearest multiple of one thousand dollars ($1,000) in the case of a penalty greater than one thousand dollars ($1,000) but less than or equal to ten thousand dollars ($10,000).

(D) To the nearest multiple of five thousand dollars ($5,000) in the case of a penalty greater than ten thousand dollars ($10,000) but less than or equal to one hundred thousand dollars ($100,000).

(E) To the nearest multiple of ten thousand dollars ($10,000) in the case of a penalty greater than one hundred thousand dollars ($100,000) but less than or equal to two hundred thousand dollars ($200,000).

(F) To the nearest multiple of twenty-five thousand dollars ($25,000) in the case of a penalty greater than two hundred thousand dollars ($200,000).

(3) Inflation adjustments made pursuant to this subdivision shall be exempt from the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) (1) If the director or a commissioner seeks to impose an administrative or civil penalty ~~below the maximum monetary level authorized~~ pursuant to this article, Section 14027, or Article 5 (commencing with Section 11891) of Chapter 4 of Division 6, as adjusted by subdivision (a), the director or a commissioner shall calculate, and make express findings concerning, the non-de minimis economic benefits, if any, derived by the violator from the acts that constitute the violation. At a minimum, liability shall be assessed at a level that recovers those economic benefits, unless the director or a commissioner makes express findings that document that good faith efforts to comply or inability to pay justify a reduction and that the liability assessed will maintain the deterrent effect of the penalty. *The amount of economic benefits shall be calculated using the BEN automated tool developed by the United States Environmental Protection Agency. If use of that tool is determined not to be practical, another equally reliable means of determining the amount of economic benefits shall be used.*

(2) As used in this subdivision, the following terms have the following meanings:

(A) "De minimis" means an economic benefit that is likely to be small, and substantially disproportionate resources would be required to determine the amount and assess the penalty above that amount. The director or a commissioner may adopt rules and regulations to determine specific de minimis categories.

~~(B) "Economic benefit" means the benefit to the violator from delaying or avoiding costs associated with compliance. "Economic benefit" also means profits from illegal activities, including, but not limited to, activities undertaken without a permit required by law to engage in the activity.~~

(B) (i) "Economic benefit" means the benefit to the violator from delayed costs or avoided costs associated with compliance, including, but not limited to, operating and maintenance costs for pollution control equipment and annual periodic costs including the cost of leasing monitoring equipment. "Economic benefit" also means profits from illegal activities, including, but not limited to, activities undertaken without a permit required by law to engage in the activity.

(ii) "Avoided costs," as used in this subparagraph, means those expenditures that the violator did not and will not make. The economic benefit of avoided costs are the amounts of return on the unspent moneys that reasonably could have been realized by the violator during the period of noncompliance and the present value of the avoided costs.

(iii) "Delayed costs," as used in this subparagraph, means those expenditures that have been deferred by the violator's failure to comply, but that will be paid by the violator in the same or greater amounts. The economic benefit of delayed costs are the amounts of return on the unspent moneys that reasonably could have been realized by the violator during the period of noncompliance.

(3) This subdivision does not affect the other enforcement options available to the director or a commissioner, including settlements.

(c) The director shall report to the Legislature on the implementation of this section.

SEC. 3. Section 25196.5 is added to the Health and Safety Code, to read:

25196.5. (a) (1) The department shall update, by February 15, 2011, and on January 1 every four years thereafter, all civil and administrative penalties imposed pursuant to this chapter to adjust the maximum and minimum amounts specified in this chapter for inflation or deflation, as established by the amount by which the Consumer Price Index for the month of June of the year prior to the adjustment exceeds, or is less than, the Consumer Price Index for June of the calendar year in which legislation was last enacted establishing or amending the amount of the penalty.

(2) The amount of any penalties determined pursuant to this subdivision shall be rounded as follows:

(A) To the nearest multiple of ten dollars ($10) in the case of a penalty less than or equal to one hundred dollars ($100).

(B) To the nearest multiple of one hundred dollars ($100) in the case of a penalty greater than one hundred dollars ($100) but less than or equal to one thousand dollars ($1,000).

(C) To the nearest multiple of one thousand dollars ($1,000) in the case of a penalty greater than one thousand dollars ($1,000) but less than or equal to ten thousand dollars ($10,000).

(D) To the nearest multiple of five thousand dollars ($5,000) in the case of a penalty greater than ten thousand dollars ($10,000) but less than or equal to one hundred thousand dollars ($100,000).

(E) To the nearest multiple of ten thousand dollars ($10,000) in the case of a penalty greater than one hundred thousand dollars ($100,000) but less than or equal to two hundred thousand dollars ($200,000).

(F) To the nearest multiple of twenty-five thousand dollars ($25,000) in the case of a penalty greater than two hundred thousand dollars ($200,000).

(3) Inflation adjustments made pursuant to this subdivision shall be exempt from the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) (1) If the department or a unified program agency seeks to impose an administrative or civil penalty ~~below the maximum monetary level authorized~~ pursuant to this chapter, as adjusted by subdivision (a), the department or unified program agency shall calculate, and make express findings concerning, the non-de minimis economic benefits, if any, derived by the violator from the acts that constitute the violation. At a minimum, liability shall be assessed at a level that recovers those economic benefits, unless the department or unified program agency makes express findings that document that good faith efforts to comply or inability to pay justify a reduction and that the liability assessed will maintain the deterrent effect of the penalty. *The amount of economic benefits shall be calculated using the BEN automated tool developed by the United States Environmental Protection Agency. If use of that tool is determined not to be practical, another equally reliable means of determining the amount of economic benefits shall be used.*

(2) As used in this subdivision, the following terms have the following meanings:

(A) "De minimis" means an economic benefit that is likely to be small, and substantially disproportionate resources would be required to determine the amount and assess the penalty above that amount. The department or a unified program agency may adopt rules and regulations to determine specific de minimis categories.

~~(B) "Economic benefit" means the benefit to the violator from delaying or avoiding costs associated with compliance. "Economic benefit" also means profits from illegal activities, including, but not limited to, activities undertaken without a permit required by law to engage in the activity.~~

(B) (i) "Economic benefit" means the benefit to the violator from delayed costs or avoided costs associated with compliance, including, but not limited to, operating and maintenance costs for pollution control equipment and annual periodic costs including the cost of leasing monitoring equipment. "Economic benefit" also means profits from illegal activities, including, but not limited to, activities undertaken without a permit required by law to engage in the activity.

(ii) "Avoided costs," as used in this subparagraph, are those expenditures that the violator did not and will not make. The economic benefit of avoided costs are the amounts of return on the unspent moneys that reasonably could have been realized by the violator during the period of noncompliance and the present value of the avoided costs.

(iii) "Delayed costs," as used in this subparagraph, are those expenditures that have been deferred by the violator's failure to comply, but that will be paid by the violator in the same or greater amounts. The economic benefit of delayed costs are the amounts of return on the unspent moneys that reasonably could have been realized by the violator during the period of noncompliance.

(3) This subdivision does not affect the other enforcement options available to the department or a unified program agency, including settlements.

(c) The department shall report to the Legislature on the implementation of this section.

SEC. 4. Section 42402.6 is added to the Health and Safety Code, to read:

42402.6. (a) (1) The state board shall update, by February 15, 2011, and on January 1 every four years thereafter, all civil and administrative penalties imposed pursuant to this division to adjust the maximum and minimum amounts specified in this division for inflation or deflation, as established by the amount by which the Consumer Price Index for the month of June of the year prior to the adjustment exceeds, or is less than, the Consumer Price Index for June of the calendar year in which legislation was last enacted establishing or amending the amount of the penalty.

(2) The amount of any penalties determined pursuant to this subdivision shall be rounded as follows:

(A) To the nearest multiple of ten dollars ($10) in the case of a penalty less than or equal to one hundred dollars ($100).

(B) To the nearest multiple of one hundred dollars ($100) in the case of a penalty greater than one hundred dollars ($100) but less than or equal to one thousand dollars ($1,000).

(C) To the nearest multiple of one thousand dollars ($1,000) in the case of a penalty greater than one thousand dollars ($1,000) but less than or equal to ten thousand dollars ($10,000).

(D) To the nearest multiple of five thousand dollars ($5,000) in the case of a penalty greater than ten thousand dollars ($10,000) but less than or equal to one hundred thousand dollars ($100,000).

(E) To the nearest multiple of ten thousand dollars ($10,000) in the case of a penalty greater than one hundred thousand dollars ($100,000) but less than or equal to two hundred thousand dollars ($200,000).

(F) To the nearest multiple of twenty-five thousand dollars ($25,000) in the case of a penalty greater than two hundred thousand dollars ($200,000).

(3) Inflation adjustments made pursuant to this subdivision shall be exempt from the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) (1) If the state board or a district seeks to impose an administrative or civil penalty ~~below the maximum monetary level authorized~~ pursuant to this division, as adjusted by subdivision (a), the state board or district shall calculate, and make express findings concerning, the non-de minimis economic benefits, if any, derived by the violator from the acts that constitute the violation. At a minimum, liability shall be assessed at a level that recovers those economic benefits, unless the state board or district makes express findings that document that good faith efforts to comply or inability to pay justify a reduction and that the liability assessed will maintain the deterrent effect of the penalty. *The amount of economic benefits shall be calculated using the BEN automated tool developed by the United States Environmental Protection Agency. If use of that tool is determined not to be practical, another equally reliable means of determining the amount of economic benefits shall be used.*

(2) As used in this subdivision, the following terms have the following meanings:

(A) "De minimis" means an economic benefit that is likely to be small, and substantially disproportionate resources would be required to determine the amount and assess the penalty above that amount. The state board or a district may adopt rules and regulations to determine specific de minimis categories.

~~(B) "Economic benefit" means the benefit to the violator from delaying or avoiding costs associated with compliance. "Economic benefit" also means profits from illegal activities, including, but not limited to, activities undertaken without a permit required by law to engage in the activity.~~

(B) (i) "Economic benefit" means the benefit to the violator from delayed costs or avoided costs associated with compliance, including, but not limited to, operating and maintenance costs for pollution control equipment and annual periodic costs including the cost of leasing monitoring equipment. "Economic benefit" also means profits from illegal activities, including, but not limited to, activities undertaken without a permit required by law to engage in the activity.

(ii) "Avoided costs," as used in this subparagraph, are those expenditures that the violator did not and will not make. The economic benefit of avoided costs are the amounts of return on the unspent moneys that reasonably could have been realized by

the violator during the period of noncompliance and the present value of the avoided costs.

(iii) "Delayed costs," as used in this subparagraph, are those expenditures that have been deferred by the violator's failure to comply, but that will be paid by the violator in the same or greater amounts. The economic benefit of delayed costs are the amounts of return on the unspent moneys that reasonably could have been realized by the violator during the period of noncompliance.

(3) This subdivision does not affect the other enforcement options available to the state board or a district, including settlements.

(c) The state board shall report to the Legislature on the implementation of this section.

SEC. 5. Section 6437 is added to the Labor Code, to read:

6437. (a) (1) The department shall update, by February 15, 2011, and on January 1 every four years thereafter, all civil and administrative penalties imposed pursuant to this part to adjust the maximum and minimum amounts specified in this part for inflation or deflation, as established by the amount by which the Consumer Price Index for the month of June of the year prior to the adjustment exceeds, or is less than, the Consumer Price Index for June of the calendar year in which legislation was last enacted establishing or amending the amount of the penalty.

(2) The amount of any penalties determined pursuant to this subdivision shall be rounded as follows:

(A) To the nearest multiple of ten dollars ($10) in the case of a penalty less than or equal to one hundred dollars ($100).

(B) To the nearest multiple of one hundred dollars ($100) in the case of a penalty greater than one hundred dollars ($100) but less than or equal to one thousand dollars ($1,000).

(C) To the nearest multiple of one thousand dollars ($1,000) in the case of a penalty greater than one thousand dollars ($1,000) but less than or equal to ten thousand dollars ($10,000).

(D) To the nearest multiple of five thousand dollars ($5,000) in the case of a penalty greater than ten thousand dollars ($10,000) but less than or equal to one hundred thousand dollars ($100,000).

(E) To the nearest multiple of ten thousand dollars ($10,000) in the case of a penalty greater than one hundred thousand dollars ($100,000) but less than or equal to two hundred thousand dollars ($200,000).

(F) To the nearest multiple of twenty-five thousand dollars ($25,000) in the case of a penalty greater than two hundred thousand dollars ($200,000).

(3) Inflation adjustments made pursuant to this subdivision shall be exempt from the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) (1) If the division seeks to impose an administrative or civil penalty ~~below the maximum monetary level authorized~~ pursuant to this part, as adjusted by subdivision (a), the division shall calculate, and make express findings concerning, the non-de minimis economic benefits, if any, derived by the violator from the acts that constitute the violation. Notwithstanding any other provision of law, at a minimum, liability shall be assessed at a level that recovers those economic benefits, unless the division makes express findings that document that good faith efforts to comply or inability to pay justify a reduction and that the liability assessed will maintain the deterrent effect of the penalty. *The amount of economic benefits shall be calculated using the BEN automated tool developed by the United States Environmental Protection Agency. If use of that tool is determined not to be practical, another equally reliable means of determining the amount of economic benefits shall be used.*

(2) As used in this subdivision, the following terms have the following meanings:

(A) "De minimis" means an economic benefit that is likely to be small, and substantially disproportionate resources would be required to determine the amount and assess the penalty above that amount. The division may adopt rules and regulations to determine specific de minimis categories.

~~(B) "Economic benefit" means the benefit to the violator from delaying or avoiding costs associated with compliance. "Economic benefit" also means profits from illegal activities, including, but not limited to, activities undertaken without a permit required by law to engage in the activity.~~

(B) (i) "Economic benefit" means the benefit to the violator from delayed costs or avoided costs associated with compliance, including, but not limited to, operating and maintenance costs for pollution control equipment and annual periodic costs including the cost of leasing monitoring equipment. "Economic benefit"

also means profits from illegal activities, including, but not limited to, activities undertaken without a permit required by law to engage in the activity.

(ii) "Avoided costs," as used in this subparagraph, are those expenditures that the violator did not and will not make. The economic benefit of avoided costs are the amounts of return on the unspent moneys that reasonably could have been realized by the violator during the period of noncompliance and the present value of the avoided costs.

(iii) "Delayed costs," as used in this subparagraph, are those expenditures that have been deferred by the violator's failure to comply, but that will be paid by the violator in the same or greater amounts. The economic benefit of delayed costs are the amounts of return on the unspent moneys that reasonably could have been realized by the violator during the period of noncompliance.

(3) This subdivision does not affect the other enforcement options available to the division, including settlements.

(c) The department shall report to the Legislature on the implementation of this section.

SEC. 6. Section 13363 is added to the Water Code, to read:

13363. (a) (1) The state board shall update, by February 15, 2011, and on January 1 every four years thereafter, all civil and administrative penalties imposed pursuant to this division or pursuant to Section 25270.12, 25299, or 25299.76 of the Health and Safety Code to adjust the maximum and minimum amounts specified in those provisions for inflation or deflation, as established by the amount by which the Consumer Price Index for the month of June of the year prior to the adjustment exceeds, or is less than, the Consumer Price Index for June of the calendar year in which legislation was last enacted establishing or amending the amount of the penalty.

(2) The amount of any penalties determined pursuant to this subdivision shall be rounded as follows:

(A) To the nearest multiple of ten dollars ($10) in the case of a penalty less than or equal to one hundred dollars ($100).

(B) To the nearest multiple of one hundred dollars ($100) in the case of a penalty greater than one hundred dollars ($100) but less than or equal to one thousand dollars ($1,000).

(C) To the nearest multiple of one thousand dollars ($1,000) in the case of a penalty greater than one thousand dollars ($1,000) but less than or equal to ten thousand dollars ($10,000).

(D) To the nearest multiple of five thousand dollars ($5,000) in the case of a penalty greater than ten thousand dollars ($10,000) but less than or equal to one hundred thousand dollars ($100,000).

(E) To the nearest multiple of ten thousand dollars ($10,000) in the case of a penalty greater than one hundred thousand dollars ($100,000) but less than or equal to two hundred thousand dollars ($200,000).

(F) To the nearest multiple of twenty-five thousand dollars ($25,000) in the case of a penalty greater than two hundred thousand dollars ($200,000).

(3) Inflation adjustments made pursuant to this subdivision shall be exempt from the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) (1) If the state board, a regional board, or a unified program agency seeks to impose an administrative or civil penalty ~~below the maximum monetary level authorized~~ pursuant to this division or pursuant to Section 25270.12, 25299, or 25299.76 of the Health and Safety Code, as adjusted by subdivision (a), the state board, a regional board, or a unified program agency shall calculate, and make express findings concerning, the non-de minimis economic benefits, if any, derived by the violator from the acts that constitute the violation. At a minimum, liability shall be assessed at a level that recovers those economic benefits, unless the state board, a regional board, or a unified program agency makes express findings that document that good faith efforts to comply or inability to pay justify a reduction and that the liability assessed will maintain the deterrent effect of the penalty. This subdivision does not affect the requirement to recover economic benefits from a violator, imposed pursuant to subdivision (e) of Section 13385. *The amount of economic benefits shall be calculated using the BEN automated tool developed by the United States Environmental Protection Agency. If use of that tool is determined not to be practical, another equally reliable means of determining the amount of economic benefits shall be used.*

(2) As used in this subdivision, the following terms have the following meanings:

(A) "De minimis" means an economic benefit that is likely to be small, and substantially disproportionate resources would be required to determine the amount and assess the penalty above that amount. The state board, a regional board, or a unified program agency may adopt rules and regulations to determine specific de minimis categories.

~~(B) "Economic benefit" means the benefit to the violator from delaying or avoiding costs associated with compliance. "Economic benefit" also means profits from illegal activities, including, but not limited to, activities undertaken without a permit required by law to engage in the activity.~~

(B) (i) "Economic benefit" means the benefit to the violator from delayed costs or avoided costs associated with compliance, including, but not limited to, operating and maintenance costs for pollution control equipment and annual periodic costs including the cost of leasing monitoring equipment. "Economic benefit" also means profits from illegal activities, including, but not limited to, activities undertaken without a permit required by law to engage in the activity.

(ii) "Avoided costs," as used in this subparagraph, are those expenditures that the violator did not and will not make. The economic benefit of avoided costs are the amounts of return on the unspent moneys that reasonably could have been realized by the violator during the period of noncompliance and the present value of the avoided costs.

(iii) "Delayed costs," as used in this subparagraph, are those expenditures that have been deferred by the violator's failure to comply, but that will be paid by the violator in the same or greater amounts. The economic benefit of delayed costs are the amounts of return on the unspent moneys that reasonably could have been realized by the violator during the period of noncompliance.

(3) This subdivision does not affect the other enforcement options available to the state board, a regional board, or a unified program agency, including settlements.

(c) Except as provided in subdivision (k) of Section 13350 and paragraph (2) of subdivision (n) of Section 13385, and in Sections 25270.12, 25299, and 25299.50 of the Health and Safety Code, proceeds from the implementation of subdivision (a) shall be deposited in the Clean Water Civil Penalty Inflation Account, which is hereby created in the General Fund, to be expended, upon appropriation by the Legislature, consistent with Section 13441. "Proceeds" as used in this subdivision means the amount of the penalty imposed and collected that is above the amount that was authorized before the maximum penalty was first adjusted pursuant to subdivision (a).

(d) The state board shall report to the Legislature on the implementation of this section.

SEC. 7. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

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