

AMENDED IN ASSEMBLY APRIL 23, 2009

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

ASSEMBLY BILL

No. 914

Introduced by Assembly Member Logue
(Principal coauthor: Assembly Member Gilmore)

February 26, 2009

An act to amend Section 13385 of the Water Code, relating to water quality.

LEGISLATIVE COUNSEL'S DIGEST

AB 914, as amended, Logue. Mandatory minimum civil penalties: publicly owned ~~treatment works~~ *facilities*.

(1) Under existing law, the State Water Resources Control Board and the California regional water quality control boards prescribe waste discharge requirements in accordance with the federal Clean Water Act and the Porter-Cologne Water Quality Control Act (state act). The state act, with certain exceptions, imposes a mandatory minimum penalty of \$3,000 for each serious waste discharge violation, as defined, or for certain other described violations if those violations occur 4 or more times in any period of 6 consecutive months, as prescribed. The state act authorizes the state board or a regional board to elect to require a publicly owned treatment works (POTWS) serving a small community, *as defined*, in lieu of assessing the mandatory minimum penalty against that POTWS, to spend an equivalent amount towards the completion of a compliance project proposed by that POTWS if certain requirements are met.

This bill would authorize the state board or a regional board to ~~assess a penalty against a POTWS serving a small community that is less than the mandatory minimum penalty if the amount of the penalty reflects~~

~~a consideration of the size of the community being served by the POTWS, the affordability of the penalty, and the impact of the water quality violation.~~ *elect to require a publicly owned facility serving a small community, in lieu of assessing the mandatory minimum penalty against that facility, to spend an equivalent amount towards the completion of a compliance project proposed by that facility if certain requirements are met. The bill would define a “publicly owned facility serving a small community” to mean a public entity, including a POTWS, or a public drinking water system whether privately or publicly owned, serving a population of 20,000 persons or fewer or a rural county, with a financial hardship, as specified.*

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

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

- 1 SECTION 1. Section 13385 of the Water Code is amended to
- 2 read:
- 3 13385. (a) Any person who violates any of the following shall
- 4 be liable civilly in accordance with this section:
- 5 (1) Section 13375 or 13376.
- 6 (2) Any waste discharge requirements or dredged or fill material
- 7 permit issued pursuant to this chapter or any water quality
- 8 certification issued pursuant to Section 13160.
- 9 (3) Any requirements established pursuant to Section 13383.
- 10 (4) Any order or prohibition issued pursuant to Section 13243
- 11 or Article 1 (commencing with Section 13300) of Chapter 5, if the
- 12 activity subject to the order or prohibition is subject to regulation
- 13 under this chapter.
- 14 (5) Any requirements of Section 301, 302, 306, 307, 308, 318,
- 15 401, or 405 of the Clean Water Act, as amended.
- 16 (6) Any requirement imposed in a pretreatment program
- 17 approved pursuant to waste discharge requirements issued under
- 18 Section 13377 or approved pursuant to a permit issued by the
- 19 administrator.
- 20 (b) (1) Civil liability may be imposed by the superior court in
- 21 an amount not to exceed the sum of both of the following:
- 22 (A) Twenty-five thousand dollars (\$25,000) for each day in
- 23 which the violation occurs.

1 (B) Where there is a discharge, any portion of which is not
2 susceptible to cleanup or is not cleaned up, and the volume
3 discharged but not cleaned up exceeds 1,000 gallons, an additional
4 liability not to exceed twenty-five dollars (\$25) multiplied by the
5 number of gallons by which the volume discharged but not cleaned
6 up exceeds 1,000 gallons.

7 (2) The Attorney General, upon request of a regional board or
8 the state board, shall petition the superior court to impose the
9 liability.

10 (c) Civil liability may be imposed administratively by the state
11 board or a regional board pursuant to Article 2.5 (commencing
12 with Section 13323) of Chapter 5 in an amount not to exceed the
13 sum of both of the following:

14 (1) Ten thousand dollars (\$10,000) for each day in which the
15 violation occurs.

16 (2) Where there is a discharge, any portion of which is not
17 susceptible to cleanup or is not cleaned up, and the volume
18 discharged but not cleaned up exceeds 1,000 gallons, an additional
19 liability not to exceed ten dollars (\$10) multiplied by the number
20 of gallons by which the volume discharged but not cleaned up
21 exceeds 1,000 gallons.

22 (d) For purposes of subdivisions (b) and (c), “discharge”
23 includes any discharge to navigable waters of the United States,
24 any introduction of pollutants into a publicly owned treatment
25 works, or any use or disposal of sewage sludge.

26 (e) In determining the amount of any liability imposed under
27 this section, the regional board, the state board, or the superior
28 court, as the case may be, shall take into account the nature,
29 circumstances, extent, and gravity of the violation or violations,
30 whether the discharge is susceptible to cleanup or abatement, the
31 degree of toxicity of the discharge, and, with respect to the violator,
32 the ability to pay, the effect on its ability to continue its business,
33 any voluntary cleanup efforts undertaken, any prior history of
34 violations, the degree of culpability, economic benefit or savings,
35 if any, resulting from the violation, and other matters that justice
36 may require. At a minimum, liability shall be assessed at a level
37 that recovers the economic benefits, if any, derived from the acts
38 that constitute the violation.

39 (f) (1) Except as provided in paragraph (2), for the purposes of
40 this section, a single operational upset that leads to simultaneous

1 violations of more than one pollutant parameter shall be treated
2 as a single violation.

3 (2) (A) For the purposes of subdivisions (h) and (i), a single
4 operational upset in a wastewater treatment unit that treats
5 wastewater using a biological treatment process shall be treated
6 as a single violation, even if the operational upset results in
7 violations of more than one effluent limitation and the violations
8 continue for a period of more than one day, if all of the following
9 apply:

10 (i) The discharger demonstrates all of the following:

11 (I) The upset was not caused by wastewater treatment operator
12 error and was not due to discharger negligence.

13 (II) But for the operational upset of the biological treatment
14 process, the violations would not have occurred nor would they
15 have continued for more than one day.

16 (III) The discharger carried out all reasonable and immediately
17 feasible actions to reduce noncompliance with the applicable
18 effluent limitations.

19 (ii) The discharger is implementing an approved pretreatment
20 program, if so required by federal or state law.

21 (B) Subparagraph (A) only applies to violations that occur
22 during a period for which the regional board has determined that
23 violations are unavoidable, but in no case may that period exceed
24 30 days.

25 (g) Remedies under this section are in addition to, and do not
26 supersede or limit, any other remedies, civil or criminal, except
27 that no liability shall be recoverable under Section 13261, 13265,
28 13268, or 13350 for violations for which liability is recovered
29 under this section.

30 (h) (1) Notwithstanding any other provision of this division,
31 and except as provided in subdivisions (j), (k), and (l), a mandatory
32 minimum penalty of three thousand dollars (\$3,000) shall be
33 assessed for each serious violation.

34 (2) For the purposes of this section, a “serious violation” means
35 any waste discharge that violates the effluent limitations contained
36 in the applicable waste discharge requirements for a Group II
37 pollutant, as specified in Appendix A to Section 123.45 of Title
38 40 of the Code of Federal Regulations, by 20 percent or more or
39 for a Group I pollutant, as specified in Appendix A to Section

1 123.45 of Title 40 of the Code of Federal Regulations, by 40
2 percent or more.

3 (i) (1) Notwithstanding any other provision of this division,
4 and except as provided in subdivisions (j), (k), and (l), a mandatory
5 minimum penalty of three thousand dollars (\$3,000) shall be
6 assessed for each violation whenever the person does any of the
7 following four or more times in any period of six consecutive
8 months, except that the requirement to assess the mandatory
9 minimum penalty shall not be applicable to the first three
10 violations:

11 (A) Violates a waste discharge requirement effluent limitation.

12 (B) Fails to file a report pursuant to Section 13260.

13 (C) Files an incomplete report pursuant to Section 13260.

14 (D) Violates a toxicity effluent limitation contained in the
15 applicable waste discharge requirements where the waste discharge
16 requirements do not contain pollutant-specific effluent limitations
17 for toxic pollutants.

18 (2) For the purposes of this section, a “period of six consecutive
19 months” means the period commencing on the date that one of the
20 violations described in this subdivision occurs and ending 180
21 days after that date.

22 (j) Subdivisions (h) and (i) do not apply to any of the following:

23 (1) A violation caused by one or any combination of the
24 following:

25 (A) An act of war.

26 (B) An unanticipated, grave natural disaster or other natural
27 phenomenon of an exceptional, inevitable, and irresistible
28 character, the effects of which could not have been prevented or
29 avoided by the exercise of due care or foresight.

30 (C) An intentional act of a third party, the effects of which could
31 not have been prevented or avoided by the exercise of due care or
32 foresight.

33 (D) (i) The operation of a new or reconstructed wastewater
34 treatment unit during a defined period of adjusting or testing, not
35 to exceed 90 days for a wastewater treatment unit that relies on a
36 biological treatment process and not to exceed 30 days for any
37 other wastewater treatment unit, if all of the following requirements
38 are met:

39 (I) The discharger has submitted to the regional board, at least
40 30 days in advance of the operation, an operations plan that

1 describes the actions the discharger will take during the period of
2 adjusting and testing, including steps to prevent violations and
3 identifies the shortest reasonable time required for the period of
4 adjusting and testing, not to exceed 90 days for a wastewater
5 treatment unit that relies on a biological treatment process and not
6 to exceed 30 days for any other wastewater treatment unit.

7 (II) The regional board has not objected in writing to the
8 operations plan.

9 (III) The discharger demonstrates that the violations resulted
10 from the operation of the new or reconstructed wastewater
11 treatment unit and that the violations could not have reasonably
12 been avoided.

13 (IV) The discharger demonstrates compliance with the
14 operations plan.

15 (V) In the case of a reconstructed wastewater treatment unit,
16 the unit relies on a biological treatment process that is required to
17 be out of operation for at least 14 days in order to perform the
18 reconstruction, or the unit is required to be out of operation for at
19 least 14 days and, at the time of the reconstruction, the cost of
20 reconstructing the unit exceeds 50 percent of the cost of replacing
21 the wastewater treatment unit.

22 (ii) For the purposes of this section, “wastewater treatment unit”
23 means a component of a wastewater treatment plant that performs
24 a designated treatment function.

25 (2) (A) Except as provided in subparagraph (B), a violation of
26 an effluent limitation where the waste discharge is in compliance
27 with either a cease and desist order issued pursuant to Section
28 13301 or a time schedule order issued pursuant to Section 13300,
29 if all of the following requirements are met:

30 (i) The cease and desist order or time schedule order is issued
31 after January 1, 1995, but not later than July 1, 2000, specifies the
32 actions that the discharger is required to take in order to correct
33 the violations that would otherwise be subject to subdivisions (h)
34 and (i), and the date by which compliance is required to be achieved
35 and, if the final date by which compliance is required to be
36 achieved is later than one year from the effective date of the cease
37 and desist order or time schedule order, specifies the interim
38 requirements by which progress towards compliance will be
39 measured and the date by which the discharger will be in
40 compliance with each interim requirement.

1 (ii) The discharger has prepared and is implementing in a timely
2 and proper manner, or is required by the regional board to prepare
3 and implement, a pollution prevention plan that meets the
4 requirements of Section 13263.3.

5 (iii) The discharger demonstrates that it has carried out all
6 reasonable and immediately feasible actions to reduce
7 noncompliance with the waste discharge requirements applicable
8 to the waste discharge and the executive officer of the regional
9 board concurs with the demonstration.

10 (B) Subdivisions (h) and (i) shall become applicable to a waste
11 discharge on the date the waste discharge requirements applicable
12 to the waste discharge are revised and reissued pursuant to Section
13 13380, unless the regional board does all of the following on or
14 before that date:

15 (i) Modifies the requirements of the cease and desist order or
16 time schedule order as may be necessary to make it fully consistent
17 with the reissued waste discharge requirements.

18 (ii) Establishes in the modified cease and desist order or time
19 schedule order a date by which full compliance with the reissued
20 waste discharge requirements shall be achieved. For the purposes
21 of this subdivision, the regional board may not establish this date
22 later than five years from the date the waste discharge requirements
23 were required to be reviewed pursuant to Section 13380. If the
24 reissued waste discharge requirements do not add new effluent
25 limitations or do not include effluent limitations that are more
26 stringent than those in the original waste discharge requirements,
27 the date shall be the same as the final date for compliance in the
28 original cease and desist order or time schedule order or five years
29 from the date that the waste discharge requirements were required
30 to be reviewed pursuant to Section 13380, whichever is earlier.

31 (iii) Determines that the pollution prevention plan required by
32 clause (ii) of subparagraph (A) is in compliance with the
33 requirements of Section 13263.3 and that the discharger is
34 implementing the pollution prevention plan in a timely and proper
35 manner.

36 (3) A violation of an effluent limitation where the waste
37 discharge is in compliance with either a cease and desist order
38 issued pursuant to Section 13301 or a time schedule order issued
39 pursuant to Section 13300 or 13308, if all of the following
40 requirements are met:

1 (A) The cease and desist order or time schedule order is issued
2 on or after July 1, 2000, and specifies the actions that the discharger
3 is required to take in order to correct the violations that would
4 otherwise be subject to subdivisions (h) and (i).

5 (B) The regional board finds that, for one of the following
6 reasons, the discharger is not able to consistently comply with one
7 or more of the effluent limitations established in the waste
8 discharge requirements applicable to the waste discharge:

9 (i) The effluent limitation is a new, more stringent, or modified
10 regulatory requirement that has become applicable to the waste
11 discharge after the effective date of the waste discharge
12 requirements and after July 1, 2000, new or modified control
13 measures are necessary in order to comply with the effluent
14 limitation, and the new or modified control measures cannot be
15 designed, installed, and put into operation within 30 calendar days.

16 (ii) New methods for detecting or measuring a pollutant in the
17 waste discharge demonstrate that new or modified control measures
18 are necessary in order to comply with the effluent limitation and
19 the new or modified control measures cannot be designed, installed,
20 and put into operation within 30 calendar days.

21 (iii) Unanticipated changes in the quality of the municipal or
22 industrial water supply available to the discharger are the cause
23 of unavoidable changes in the composition of the waste discharge,
24 the changes in the composition of the waste discharge are the cause
25 of the inability to comply with the effluent limitation, no alternative
26 water supply is reasonably available to the discharger, and new or
27 modified measures to control the composition of the waste
28 discharge cannot be designed, installed, and put into operation
29 within 30 calendar days.

30 (iv) The discharger is a publicly owned treatment works located
31 in Orange County that is unable to meet effluent limitations for
32 biological oxygen demand, suspended solids, or both, because the
33 publicly owned treatment works meets all of the following criteria:

34 (I) Was previously operating under modified secondary
35 treatment requirements pursuant to Section 301(h) of the Clean
36 Water Act (33 U.S.C. Sec. 1311(h)).

37 (II) Did vote on July 17, 2002, not to apply for a renewal of the
38 modified secondary treatment requirements.

39 (III) Is in the process of upgrading its treatment facilities to
40 meet the secondary treatment standards required by Section

1 301(b)(1)(B) of the Clean Water Act (33 U.S.C. Sec.
2 1311(b)(1)(B)).

3 (C) The regional board establishes a time schedule for bringing
4 the waste discharge into compliance with the effluent limitation
5 that is as short as possible, taking into account the technological,
6 operational, and economic factors that affect the design,
7 development, and implementation of the control measures that are
8 necessary to comply with the effluent limitation. For the purposes
9 of this subdivision, the time schedule may not exceed five years
10 in length, except that the time schedule may not exceed 10 years
11 in length for the upgrade described in subclause (III) of clause (iv)
12 of subparagraph (B). If the time schedule exceeds one year from
13 the effective date of the order, the schedule shall include interim
14 requirements and the dates for their achievement. The interim
15 requirements shall include both of the following:

16 (i) Effluent limitations for the pollutant or pollutants of concern.

17 (ii) Actions and milestones leading to compliance with the
18 effluent limitation.

19 (D) The discharger has prepared and is implementing in a timely
20 and proper manner, or is required by the regional board to prepare
21 and implement, a pollution prevention plan pursuant to Section
22 13263.3.

23 (k) (1) In lieu of assessing all or a portion of the mandatory
24 minimum penalties pursuant to subdivisions (h) and (i) against a
25 publicly owned ~~treatment works~~ *facility* serving a small
26 community, the state board or the regional board may elect to
27 require the publicly owned ~~treatment works~~ *facility* to spend an
28 equivalent amount towards the completion of a compliance project
29 proposed by the publicly owned ~~treatment works~~ *facility*, if the
30 state board or the regional board finds all of the following:

31 (A) The compliance project is designed to correct the violations
32 within five years.

33 (B) The compliance project is in accordance with the
34 enforcement policy of the state board, excluding any provision in
35 the policy that is inconsistent with this section.

36 (C) The publicly owned ~~treatment works~~ *facility* has prepared
37 a financing plan to complete the compliance project.

38 ~~(2) Notwithstanding subdivision (h) or (i), the state board or a~~
39 ~~regional board may assess a penalty that is less than the mandatory~~
40 ~~minimum penalty set forth in those subdivisions against a publicly~~

1 ~~owned treatment works serving a small community, if the amount~~
2 ~~of the penalty reflects a consideration of the size of the community~~
3 ~~being served by the publicly owned treatment works, the~~
4 ~~affordability of the penalty, and the impact of the water quality~~
5 ~~violation.~~

6 ~~(3)~~

7 (2) For the purposes of this subdivision, “a publicly owned
8 ~~treatment works facility~~ serving a small community” means a
9 ~~publicly owned treatment works serving a population of 10,000~~
10 ~~persons or public entity, including a publicly owned treatment~~
11 ~~works, or a public drinking water system whether privately or~~
12 ~~publicly owned, serving a population of 20,000 persons or fewer~~
13 or a rural county, with a financial hardship as determined by the
14 state board after considering such factors as median income of the
15 residents, rate of unemployment, or low population density in the
16 service area of the publicly owned ~~treatment works facility~~.

17 (l) (1) In lieu of assessing penalties pursuant to subdivision (h)
18 or (i), the state board or the regional board, with the concurrence
19 of the discharger, may direct a portion of the penalty amount to
20 be expended on a supplemental environmental project in
21 accordance with the enforcement policy of the state board. If the
22 penalty amount exceeds fifteen thousand dollars (\$15,000), the
23 portion of the penalty amount that may be directed to be expended
24 on a supplemental environmental project may not exceed fifteen
25 thousand dollars (\$15,000) plus 50 percent of the penalty amount
26 that exceeds fifteen thousand dollars (\$15,000).

27 (2) For the purposes of this section, a “supplemental
28 environmental project” means an environmentally beneficial project
29 that a person agrees to undertake, with the approval of the regional
30 board, that would not be undertaken in the absence of an
31 enforcement action under this section.

32 (3) This subdivision applies to the imposition of penalties
33 pursuant to subdivision (h) or (i) on or after January 1, 2003,
34 without regard to the date on which the violation occurs.

35 (m) The Attorney General, upon request of a regional board or
36 the state board, shall petition the appropriate court to collect any
37 liability or penalty imposed pursuant to this section. Any person
38 who fails to pay on a timely basis any liability or penalty imposed
39 under this section shall be required to pay, in addition to that
40 liability or penalty, interest, attorney’s fees, costs for collection

1 proceedings, and a quarterly nonpayment penalty for each quarter
2 during which the failure to pay persists. The nonpayment penalty
3 shall be in an amount equal to 20 percent of the aggregate amount
4 of the person's penalty and nonpayment penalties that are unpaid
5 as of the beginning of the quarter.

6 (n) (1) Subject to paragraph (2), funds collected pursuant to
7 this section shall be deposited in the State Water Pollution Cleanup
8 and Abatement Account.

9 (2) (A) Notwithstanding any other provision of law, moneys
10 collected for a violation of a water quality certification in
11 accordance with paragraph (2) of subdivision (a) or for a violation
12 of Section 401 of the Clean Water Act (33 U.S.C. Sec. 1341) in
13 accordance with paragraph (5) of subdivision (a) shall be deposited
14 in the Waste Discharge Permit Fund and separately accounted for
15 in that fund.

16 (B) The funds described in subparagraph (A) shall be expended
17 by the state board, upon appropriation by the Legislature, to assist
18 regional boards, and other public agencies with authority to clean
19 up waste or abate the effects of the waste, in cleaning up or abating
20 the effects of the waste on waters of the state or for the purposes
21 authorized in Section 13443.

22 (o) The state board shall continuously report and update
23 information on its Internet Web site, but at a minimum, annually
24 on or before January 1, regarding its enforcement activities. The
25 information shall include all of the following:

26 (1) A compilation of the number of violations of waste discharge
27 requirements in the previous calendar year, including stormwater
28 enforcement violations.

29 (2) A record of the formal and informal compliance and
30 enforcement actions taken for each violation, including stormwater
31 enforcement actions.

32 (3) An analysis of the effectiveness of current enforcement
33 policies, including mandatory minimum penalties.

34 (p) The amendments made to subdivisions (f), (h), (i) and (j)
35 during the second year of the 2001–02 Regular Session apply only
36 to violations that occur on or after January 1, 2003.