

AMENDED IN ASSEMBLY MARCH 8, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 640

Introduced by Assembly Member Logue

February 16, 2011

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

LEGISLATIVE COUNSEL'S DIGEST

AB 640, as amended, Logue. Water discharges: mandatory minimum civil penalties.

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, and for certain other described violations if those violations occur 4 or more times in any period of 6 consecutive months.

The state act authorizes the state board or a regional board, in lieu of assessing all or a portion of the mandatory minimum penalties against a publicly owned treatment works (POTW) that serves a small community, to elect to require that POTW to spend an equivalent amount toward the completion of a compliance project. The state act defines a POTW that serves a small community to mean, in pertinent part, a POTW serving a community of 10,000 persons or fewer.

This bill would expand that definition to include a POTW serving a community of 20,000 persons or fewer. The bill also would authorize the state board or a regional board to waive specified penalties for late

payment and nonpayment of civil liabilities and civil penalties for a POTW that is subject to the compliance project provisions.

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) A person who violates any of the following is liable
4 civilly in accordance with this section:
5 (1) Section 13375 or 13376.
6 (2) A waste discharge requirement 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) A requirement established pursuant to Section 13383.
10 (4) An order or prohibition issued pursuant to Section 13243 or
11 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) A requirement of Section 301, 302, 306, 307, 308, 318, 401,
15 or 405 of the federal Clean Water Act (33 U.S.C. Sec. 1311, 1312,
16 1316, 1317, 1318, 1341, or 1342), as amended.
17 (6) A requirement imposed in a pretreatment program approved
18 pursuant to waste discharge requirements issued under Section
19 13377 or approved pursuant to a permit issued by the 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.
24 (B) If there is a discharge, any portion of which is not
25 susceptible to cleanup or is not cleaned up, and the volume
26 discharged but not cleaned up exceeds 1,000 gallons, an additional
27 liability not to exceed twenty-five dollars (\$25) multiplied by the
28 number of gallons by which the volume discharged but not cleaned
29 up exceeds 1,000 gallons.
30 (2) The Attorney General, upon request of a regional board or
31 the state board, shall petition the superior court to impose the
32 liability.

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

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

7 (2) If there is a discharge, any portion of which is not susceptible
8 to cleanup or is not cleaned up, and the volume discharged but not
9 cleaned up exceeds 1,000 gallons, an additional liability not to
10 exceed ten dollars (\$10) multiplied by the number of gallons by
11 which the volume discharged but not cleaned up exceeds 1,000
12 gallons.

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

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

30 (f) (1) Except as provided in paragraph (2), for the purposes of
31 this section, a single operational upset that leads to simultaneous
32 violations of more than one pollutant parameter shall be treated
33 as a single violation.

34 (2) (A) For the purposes of subdivisions (h) and (i), a single
35 operational upset in a wastewater treatment unit that treats
36 wastewater using a biological treatment process shall be treated
37 as a single violation, even if the operational upset results in
38 violations of more than one effluent limitation and the violations
39 continue for a period of more than one day, if all of the following
40 apply:

- 1 (i) The discharger demonstrates all of the following:
- 2 (I) The upset was not caused by wastewater treatment operator
- 3 error and was not due to discharger negligence.
- 4 (II) But for the operational upset of the biological treatment
- 5 process, the violations would not have occurred nor would they
- 6 have continued for more than one day.
- 7 (III) The discharger carried out all reasonable and immediately
- 8 feasible actions to reduce noncompliance with the applicable
- 9 effluent limitations.
- 10 (ii) The discharger is implementing an approved pretreatment
- 11 program, if so required by federal or state law.
- 12 (B) Subparagraph (A) only applies to violations that occur
- 13 during a period for which the regional board has determined that
- 14 violations are unavoidable, but in no case may that period exceed
- 15 30 days.
- 16 (g) Remedies under this section are in addition to, and do not
- 17 supersede or limit, any other remedies, civil or criminal, except
- 18 that no liability shall be recoverable under Section 13261, 13265,
- 19 13268, or 13350 for violations for which liability is recovered
- 20 under this section.
- 21 (h) (1) Notwithstanding any other provision of this division,
- 22 and except as provided in subdivisions (j), (k), and (l), a mandatory
- 23 minimum penalty of three thousand dollars (\$3,000) shall be
- 24 assessed for each serious violation.
- 25 (2) For the purposes of this section, a “serious violation” means
- 26 any waste discharge that violates the effluent limitations contained
- 27 in the applicable waste discharge requirements for a Group II
- 28 pollutant, as specified in Appendix A to Section 123.45 of Title
- 29 40 of the Code of Federal Regulations, by 20 percent or more or
- 30 for a Group I pollutant, as specified in Appendix A to Section
- 31 123.45 of Title 40 of the Code of Federal Regulations, by 40
- 32 percent or more.
- 33 (i) (1) Notwithstanding any other provision of this division,
- 34 and except as provided in subdivisions (j), (k), and (l), a mandatory
- 35 minimum penalty of three thousand dollars (\$3,000) shall be
- 36 assessed for each violation if the person does any of the following
- 37 four or more times in any period of six consecutive months, except
- 38 that the requirement to assess the mandatory minimum penalty
- 39 shall not be applicable to the first three violations:
- 40 (A) Violates a waste discharge requirement effluent limitation.

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

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

3 (D) Violates a toxicity effluent limitation contained in the
4 applicable waste discharge requirements where the waste discharge
5 requirements do not contain pollutant-specific effluent limitations
6 for toxic pollutants.

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

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

12 (1) A violation caused by one or any combination of the
13 following:

14 (A) An act of war.

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

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

22 (D) (i) The operation of a new or reconstructed wastewater
23 treatment unit during a defined period of adjusting or testing, not
24 to exceed 90 days for a wastewater treatment unit that relies on a
25 biological treatment process and not to exceed 30 days for any
26 other wastewater treatment unit, if all of the following requirements
27 are met:

28 (I) The discharger has submitted to the regional board, at least
29 30 days in advance of the operation, an operations plan that
30 describes the actions the discharger will take during the period of
31 adjusting and testing, including steps to prevent violations and
32 identifies the shortest reasonable time required for the period of
33 adjusting and testing, not to exceed 90 days for a wastewater
34 treatment unit that relies on a biological treatment process and not
35 to exceed 30 days for any other wastewater treatment unit.

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

38 (III) The discharger demonstrates that the violations resulted
39 from the operation of the new or reconstructed wastewater

1 treatment unit and that the violations could not have reasonably
2 been avoided.

3 (IV) The discharger demonstrates compliance with the
4 operations plan.

5 (V) In the case of a reconstructed wastewater treatment unit,
6 the unit relies on a biological treatment process that is required to
7 be out of operation for at least 14 days in order to perform the
8 reconstruction, or the unit is required to be out of operation for at
9 least 14 days and, at the time of the reconstruction, the cost of
10 reconstructing the unit exceeds 50 percent of the cost of replacing
11 the wastewater treatment unit.

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

15 (2) (A) Except as provided in subparagraph (B), a violation of
16 an effluent limitation where the waste discharge is in compliance
17 with either a cease and desist order issued pursuant to Section
18 13301 or a time schedule order issued pursuant to Section 13300,
19 if all of the following requirements are met:

20 (i) The cease and desist order or time schedule order is issued
21 after January 1, 1995, but not later than July 1, 2000, specifies the
22 actions that the discharger is required to take in order to correct
23 the violations that would otherwise be subject to subdivisions (h)
24 and (i), and the date by which compliance is required to be achieved
25 and, if the final date by which compliance is required to be
26 achieved is later than one year from the effective date of the cease
27 and desist order or time schedule order, specifies the interim
28 requirements by which progress towards compliance will be
29 measured and the date by which the discharger will be in
30 compliance with each interim requirement.

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

35 (iii) The discharger demonstrates that it has carried out all
36 reasonable and immediately feasible actions to reduce
37 noncompliance with the waste discharge requirements applicable
38 to the waste discharge and the executive officer of the regional
39 board concurs with the demonstration.

1 (B) Subdivisions (h) and (i) shall become applicable to a waste
2 discharge on the date the waste discharge requirements applicable
3 to the waste discharge are revised and reissued pursuant to Section
4 13380, unless the regional board does all of the following on or
5 before that date:

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

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

22 (iii) Determines that the pollution prevention plan required by
23 clause (ii) of subparagraph (A) is in compliance with the
24 requirements of Section 13263.3 and that the discharger is
25 implementing the pollution prevention plan in a timely and proper
26 manner.

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

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

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

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

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

13 (iii) Unanticipated changes in the quality of the municipal or
14 industrial water supply available to the discharger are the cause
15 of unavoidable changes in the composition of the waste discharge,
16 the changes in the composition of the waste discharge are the cause
17 of the inability to comply with the effluent limitation, no alternative
18 water supply is reasonably available to the discharger, and new or
19 modified measures to control the composition of the waste
20 discharge cannot be designed, installed, and put into operation
21 within 30 calendar days.

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

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

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

31 (III) Is in the process of upgrading its treatment facilities to
32 meet the secondary treatment standards required by Section
33 301(b)(1)(B) of the federal Clean Water Act (33 U.S.C. Sec.
34 1311(b)(1)(B)).

35 (C) (i) The regional board establishes a time schedule for
36 bringing the waste discharge into compliance with the effluent
37 limitation that is as short as possible, taking into account the
38 technological, operational, and economic factors that affect the
39 design, development, and implementation of the control measures
40 that are necessary to comply with the effluent limitation. Except

1 as provided in clause (ii), for the purposes of this subdivision, the
2 time schedule shall not exceed five years in length.

3 (ii) (I) For purposes of the upgrade described in subclause (III)
4 of clause (iv) of subparagraph (B), the time schedule shall not
5 exceed 10 years in length.

6 (II) Following a public hearing, and upon a showing that the
7 discharger is making diligent progress toward bringing the waste
8 discharge into compliance with the effluent limitation, the regional
9 board may extend the time schedule for an additional period not
10 exceeding five years in length, if the discharger demonstrates that
11 the additional time is necessary to comply with the effluent
12 limitation. This subclause does not apply to a time schedule
13 described in subclause (I).

14 (iii) If the time schedule exceeds one year from the effective
15 date of the order, the schedule shall include interim requirements
16 and the dates for their achievement. The interim requirements shall
17 include both of the following:

18 (I) Effluent limitations for the pollutant or pollutants of concern.

19 (II) Actions and milestones leading to compliance with the
20 effluent limitation.

21 (D) The discharger has prepared and is implementing in a timely
22 and proper manner, or is required by the regional board to prepare
23 and implement, a pollution prevention plan pursuant to Section
24 13263.3.

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

33 (A) The compliance project designed to correct the violations
34 within five years.

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

38 (C) The publicly owned treatment works has prepared a
39 financing plan to complete the compliance project.

~~(2) Expenditures toward a compliance project required pursuant to paragraph (1) may include capital and noncapital costs of compliance.~~

~~(3)~~

(2) For the purposes of this subdivision, “a publicly owned treatment works serving a small community” means a publicly owned treatment works serving a population of 20,000 persons or fewer or a rural county, with a financial hardship as determined by the state board after considering such factors as median income of the residents, rate of unemployment, or low population density in the service area of the publicly owned treatment works.

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

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

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

(m) (1) The Attorney General, upon request of a regional board or the state board, shall petition the appropriate court to collect any liability or penalty imposed pursuant to this section. Except as provided in paragraph (2), a person who fails to pay on a timely basis any liability or penalty imposed under this section shall be required to pay, in addition to that liability or penalty, interest, attorney’s fees, costs for collection proceedings, and a quarterly nonpayment penalty for each quarter during which the failure to pay persists. The nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of the person’s penalty and

1 nonpayment penalties that are unpaid as of the beginning of the
2 quarter.

3 (2) A regional board or the state board may elect to waive the
4 penalties for late payment and nonpayment pursuant to paragraph
5 (1) for a publicly owned treatment works that is subject to
6 subdivision (k).

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

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

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

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

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

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

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

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