

AMENDED IN ASSEMBLY APRIL 18, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 2179

Introduced by Assembly Member Allen

February 23, 2012

An act to amend Section 309 of, to repeal Sections 500, 2580, 2581, and 2584 of, and to repeal and add Sections 2582 and 2583 of, the Fish and Game Code, relating to fish and game.

LEGISLATIVE COUNSEL'S DIGEST

AB 2179, as amended, Allen. Fish and game: enforcement and penalties.

Existing law authorizes the Fish and Game Commission, or any person appointed by the commission, to conduct a hearing, to cause the deposition of witnesses, as prescribed, and to compel the attendance of witnesses and the production of documents and papers, in accordance with certain requirements.

This bill would eliminate the prohibition that the commission not revoke or suspend any license or permit until specified regulations have been adopted and approved, as specified. This bill would also eliminate the provision that any deliberation conducted by the commission, or conducted by any person appointed by the commission to conduct a hearing, is required to be conducted pursuant to the law governing administrative adjudication.

Existing law requires the commission to adopt guidelines, by regulation, to assist the director and the department in ascertaining the amount of specified civil penalties, as prescribed.

This bill would repeal these provisions.

Existing law permits the Department of Fish and Game to impose civil liability upon any person for specified acts with prescribed exceptions done for profit or personal gain, for unlawfully exporting, importing, possessing, receiving, or transporting in interstate commerce any container or package containing any bird, mammal, amphibian, reptile, or fish, or any endangered or threatened species, or any fully protected bird, mammal, or fish unless the container is marked as prescribed, and for any unlawful failure or refusal to maintain any records or paperwork as required. Under existing law, the department may assess a civil penalty of not more than \$10,000 for each bird, mammal, amphibian, reptile, or fish, or for each endangered or threatened species, or each fully protected bird, mammal, or fish unlawfully taken, possessed, transported, imported, received, purchased, acquired, or sold, in addition to any other applicable penalty. Existing law also requires the department to consult with the district attorney in the jurisdiction where a violation is alleged to have occurred, and before proceeding with a civil action, to seek the concurrence of the Attorney General, as described. Existing law permits the Director of Fish and Game to issue a complaint to any person on whom a civil penalty may be imposed, in accordance with specified provisions, and requires a referee or hearing board, as provided for, to conduct any required hearing.

This bill would repeal these provisions. This bill would instead permit the department to impose administrative civil penalties not to exceed \$20,000 ~~or deny, suspend, or revoke any license, permit or other entitlement issued by the department to~~ *and determined as prescribed,* upon any person who has violated any provision of the code or regulations adopted pursuant to the code. This bill would require, prior to the imposition of administrative penalties ~~or any revocation or suspension,~~ a person to be given a written notice of the proposed action. This bill would require a person ~~denied a license, permit, or other privilege, or~~ who receives notice of a proposed penalty, ~~revocation, or suspension,~~ to have the right to request a hearing before the department in accordance with specified procedures. This bill would permit the department to take the action proposed without a hearing if a hearing is not requested. This bill would permit a party ordered to pay an administrative penalty ~~or whose license, permit, or other privilege is denied, suspended, or revoked~~ and who appeared at a hearing to appeal to the ~~commission~~ *director*, as prescribed. This bill would ~~permit a review of a decision of the commission, as specified.~~ *permit a person*

served with a copy of an order setting the amount of a civil penalty to file with the superior court a petition for a writ of mandate for review of the order, as specified. This bill would permit the department to file a certified copy of the final decision that directs payment of an administrative penalty and, if applicable, any order that denies a petition for a writ of administrative mandamus with the clerk of the superior court of any county, would require the clerk to enter judgment, and would prohibit the clerk from charging fees for the performance of any official service required in connection with this entry of judgment. This bill would require any administrative penalties received pursuant to these provisions to be deposited into the Fish and Game Preservation Fund.

Existing law, the California Public Records Act, requires any public record of a state or local agency to be open to inspection at all times during office hours of the agency and, upon request, a copy shall be made promptly available to any person upon payment of copying costs. The act makes certain records exempt from disclosure.

This bill would, after all appeals are final, provide that records of the appeal to the director are public records, as defined by the act.

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 309 of the Fish and Game Code is
- 2 amended to read:
- 3 309. The commission or any person appointed by it to conduct
- 4 a hearing may, in any investigation or hearing, cause the deposition
- 5 of witnesses, residing within or without the state, to be taken in
- 6 the manner prescribed by law for deposition in civil actions in the
- 7 superior courts of this state under Title 4 (commencing with Section
- 8 2016.010) of Part 4 of the Code of Civil Procedure, and may
- 9 compel the attendance of witnesses and the production of
- 10 documents and papers. The commission shall adopt regulations
- 11 that afford procedural and substantive due process to any person
- 12 whose license or permit is subject to revocation or suspension by
- 13 the commission.
- 14 SEC. 2. Section 500 of the Fish and Game Code is repealed.
- 15 SEC. 3. Section 2580 of the Fish and Game Code is repealed.
- 16 SEC. 4. Section 2581 of the Fish and Game Code is repealed.

1 SEC. 5. Section 2582 of the Fish and Game Code is repealed.

2 SEC. 6. Section 2582 is added to the Fish and Game Code, to
3 read:

4 2582. (a) The department may impose administrative civil
5 penalties not to exceed twenty thousand dollars (\$20,000), ~~or deny,~~
6 ~~suspend, or revoke any license, permit, or other entitlement issued~~
7 ~~by the department to~~ upon any person who has violated any
8 provision of this code or implementing regulations adopted
9 pursuant to this code. Except as provided in Section 2583, the
10 proceedings for all hearings conducted by the department shall be
11 conducted in accordance with Chapter 5 (commencing with Section
12 11500) of Part 1 of Division 3 of Title 2 of the Government Code.
13 The department shall have all of the powers granted in that chapter.
14 *The monetary amounts shall be levied in an amount that is*
15 *considered to be adequate to deter repeated offense of the illegal*
16 *activity and shall include consideration of the nature,*
17 *circumstances, extent, and gravity of the prohibited acts committed*
18 *and the degree of culpability of the violator, including lesser*
19 *penalties for acts which have little significant effect upon the*
20 *resources and greater penalties for acts which may cause serious*
21 *injury to the resources. The civil penalty for a violation punishable*
22 *as an infraction shall not exceed an amount higher than the*
23 *criminal penalty authorized in statute.*

24 (b) Notwithstanding subdivision (a), any person who, for
25 personal profit or gain, violates this code or any regulation
26 adopted to carry out this code, including, but not limited to,
27 violations of Section 12012 or 12013, and with the exercise of due
28 care, should have known that the birds, mammals, amphibians,
29 reptiles, or fish, or the endangered or threatened species, or the
30 fully protected birds, mammals, or fish were taken, possessed,
31 transported, imported, received, purchased, acquired, or sold in
32 violation of, or in a manner unlawful under this code, may be
33 assessed a civil penalty. The civil penalty imposed under this
34 chapter by the department shall not be more than ten thousand
35 dollars (\$10,000) for each bird, mammal, amphibian, reptile, or
36 fish, or for each endangered or threatened species, or each fully
37 protected bird, mammal, or fish unlawfully taken, possessed,
38 transported, imported, received, purchased, acquired, or sold.
39 This civil penalty may be in addition to any other penalty, civil or
40 criminal, provided in this code or otherwise by law.

SEC. 7. Section 2583 of the Fish and Game Code is repealed.

SEC. 8. Section 2583 is added to the Fish and Game Code, to read:

2583. (a) Prior to the imposition of administrative penalties ~~or any revocation or suspension of a license, permit, or other privilege,~~ under Section 2582, a person shall be given a written notice of the proposed action that includes the basis for the action. A person who ~~is denied a license, permit, or other privilege, or who~~ receives notice of a proposed penalty, ~~revocation, or suspension,~~ shall have the right to request a hearing before the department within ~~20~~ 30 days after receiving the denial or notice of the proposed action. A notice of the proposed action that is sent by certified mail to the last known address of the person against whom the action is proposed shall be considered received even if delivery is refused or the notice is not accepted at that address.

(b) If a hearing is requested within ~~20~~ 30 days of receipt of the notice of the proposed action, notice of the time and place of the hearing shall be given at least 10 days before the date set for the hearing. A deferral of the hearing shall be granted upon reasonable cause, not to exceed 20 days from the date of the original hearing date.

(c) (1) At the hearing, the person shall be given an opportunity to present any evidence or argument on his or her own behalf. *Oral testimony may be given by telephone in lieu of attending a hearing. This testimony shall be recorded and made part of the record. Recorded testimony shall be kept for 180 days or until the judgment is final. A transcription shall be provided to a party upon payment of a reasonable fee for the cost of obtaining the transcript.*

(2) *The department shall take into consideration the nature of the violation, the circumstances, extent, and gravity of the prohibited acts committed, the degree of culpability of the violator, and, in deliberation, the department shall take into consideration acts that have little significant effect upon resources and acts that have more significant effect upon resources.*

(2) (3) If at the hearing the person is ordered to pay an administrative penalty ~~or has his or her license, permit, or other privilege denied, suspended, or revoked,~~ the person may appeal to the ~~commission~~ director within ~~10~~ 30 days of mailing or personal service of the department's decision.

1 (d) If a hearing is not requested in a timely manner, the
2 department may take the action proposed without a hearing.

3 (e) The following shall apply to an appeal to the ~~commission~~
4 ~~pursuant to paragraph (2) of subdivision (c)~~ director:

5 (1) The appeal shall be in writing and signed by the appellant
6 or his or her authorized agent and shall state the grounds for the
7 appeal.

8 (2) Any party, at the time of filing the appeal or within 10 days
9 of the filing, may present written evidence and a written argument
10 to the secretary.

11 (3) The ~~commission~~ director may grant oral arguments upon
12 application made at the time written arguments are made.

13 (4) If an application to present an oral argument is granted,
14 written notice of the time and place for the oral argument shall be
15 given at least 10 days prior to the date set for the oral argument.
16 This time requirement may be changed upon agreement between
17 the commission and the person appealing. *Oral testimony may be*
18 *given by telephone in lieu of attending a hearing. This testimony*
19 *shall be recorded and made part of the record. Recorded testimony*
20 *shall be kept for 180 days or until the judgment is final. A*
21 *transcription shall be provided to a party upon payment of a*
22 *reasonable fee for the cost of obtaining the transcript.*

23 (5) The ~~commission~~ director shall decide the appeal based on
24 any oral or written arguments, briefs, and evidence received. *The*
25 *department shall take into consideration the nature of the violation,*
26 *the circumstances, extent, and gravity of the prohibited acts*
27 *committed, the degree of culpability of the violator, and, in*
28 *deliberation, the department shall take into consideration acts that*
29 *have little significant effect upon resources and acts that have*
30 *more significant effect upon resources.*

31 (6) The ~~commission~~ director shall render a written decision
32 within 45 days of the date of the appeal, or within 15 days of the
33 date of oral arguments. A copy of the ~~department's~~ director's
34 decision shall be delivered or mailed to the appellant.

35 (7) The ~~commission~~ director may sustain the decision, modify
36 the decision by reducing the amount of the penalty levied, or
37 reverse the decision.

38 ~~(8) A review of the commission's decision may be sought by~~
39 ~~the person against whom the penalty was levied pursuant to Section~~
40 ~~1094.5 of the Code of Civil Procedure.~~

1 (8) Within 30 days after service of a copy of an order setting
2 the amount of the civil penalty, any person so served may file with
3 the superior court a petition for a writ of mandate for review of
4 the order. In all proceedings pursuant to this paragraph, the court
5 shall exercise its independent judgment on the evidence in the
6 whole record. The filing of a petition for a writ of mandate shall
7 not stay any other civil or criminal action.

8 (f) The records of the appeal pursuant to subdivision (e), after
9 all appeals are final, are public records, as defined in subdivision
10 (e) of Section 6252 of the Government Code.

11 (g) After completion of the review procedure provided in this
12 section, the department may file a certified copy of the final
13 decision that directs payment of an administrative penalty and, if
14 applicable, any order that denies a petition for a writ of
15 administrative mandamus, with the clerk of the superior court of
16 any county. Judgment shall be entered by the clerk in conformity
17 with the decision or order. No fees shall be charged by the clerk
18 of the superior court for the performance of any official service
19 required in connection with the entry of judgment pursuant to this
20 section.

21 (h) Any administrative penalties received pursuant to this section
22 shall be deposited in the Fish and Game Preservation Fund.

23 SEC. 9. Section 2584 of the Fish and Game Code is repealed.