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AMENDED IN SENATE AUGUST 8, 2012

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AMENDED IN ASSEMBLY MAY 25, 2012

AMENDED IN ASSEMBLY APRIL 26, 2012

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CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 2179

Introduced by Assembly Member Allen

February 23, 2012

An act to amend and repeal Sections 500, 2580, and 2584 of, to amend, add, and repeal Sections 2582 and 2583 of, and to amend, repeal, and add Section 309 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, until January 1, 2018, 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, until January 1, 2018, 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 make these provisions inoperative until January 1, 2018.

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 make these provisions inoperative until January 1, 2018. This bill would instead permit the department to impose administrative civil penalties, determined as prescribed, upon any person who has violated any provision of the Fish and Game Code or regulations adopted pursuant to the code *that are subject to prescribed civil penalties*. This bill would require the department to adopt regulations ~~that include a fee schedule~~ to provide guidance in assessing these civil penalties. This bill would require, prior to the imposition of

administrative penalties, a person to be given a written notice of the proposed action. This bill would require a person who receives notice of a proposed penalty 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 person to appeal to the director if administrative penalties are imposed upon that person, as prescribed. This bill would 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. This bill would repeal these provisions as of January 1, 2018.

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 be made promptly available to any person upon payment of copying costs. The act makes certain records exempt from disclosure.

This bill would, until January 1, 2018, and 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. (a) The commission or any person appointed by it to
- 4 conduct a hearing may, in any investigation or hearing, cause the
- 5 deposition of witnesses, residing within or without the state, to be
- 6 taken in the manner prescribed by law for deposition in civil actions
- 7 in the superior courts of this state under Title 4 (commencing with

1 Section 2016.010) of Part 4 of the Code of Civil Procedure, and
2 may compel the attendance of witnesses and the production of
3 documents and papers. The commission shall adopt regulations
4 that afford procedural and substantive due process to any person
5 whose license or permit is subject to revocation or suspension by
6 the commission.

7 (b) This section shall remain in effect only until January 1, 2018,
8 and as of that date is repealed, unless a later enacted statute, that
9 is enacted before January 1, 2018, deletes or extends that date.

10 SEC. 2. Section 309 is added to the Fish and Game Code, to
11 read:

12 309. (a) The commission or any person appointed by it to
13 conduct a hearing may, in any investigation or hearing, cause the
14 deposition of witnesses, residing within or out of the state, to be
15 taken in the manner prescribed by law for deposition in civil actions
16 in the superior courts of this state under the Civil Discovery Act
17 (Title 4 (commencing with Section 2016.010) of Part 4 of the Code
18 of Civil Procedure), and may compel the attendance of witnesses
19 and the production of documents and papers. The commission
20 shall adopt regulations that afford procedural and substantive due
21 process to any person whose license or permit is subject to
22 revocation or suspension. Except upon conviction of a violation
23 of this code or a regulation adopted pursuant to this code relating
24 to the licensed or permitted activity and notwithstanding any other
25 provision of this code, the commission shall not revoke or suspend
26 any license or permit until the regulations required by this section
27 have been adopted and approved by the Office of Administrative
28 Law pursuant to Chapter 3.5 (commencing with Section 11340)
29 of Part 1 of Division 3 of Title 2 of the Government Code.

30 (b) Any deliberation conducted by the commission, or conducted
31 by any person appointed by the commission to conduct hearings,
32 is deemed to be a proceeding required to be conducted pursuant
33 to Chapter 5 (commencing with Section 11500) of Part 1 of
34 Division 3 of Title 2 of the Government Code or similar provision,
35 within the meaning of paragraph (3) of subdivision (c) of Section
36 11126 of the Government Code.

37 (c) This section shall become operative on January 1, 2018.

38 SEC. 3. Section 500 of the Fish and Game Code is amended
39 to read:

1 500. (a) The commission shall, by regulation, adopt guidelines
2 to assist the director and the department in ascertaining the amount
3 of civil penalties to be imposed pursuant to Section 2582 or 2583.
4 The guidelines may include monetary amounts or ranges of
5 monetary amounts that the commission finds are adequate to deter
6 illegal actions and partially compensate the people of California
7 for losses to the fish and wildlife resources from illegal transactions
8 described in Section 2582 or 2583 for profit or personal gain.

9 (b) If the violation involves birds, mammals, amphibians,
10 reptiles, or fish with a value in the aggregate of less than four
11 hundred dollars (\$400) and involves only the transportation, taking,
12 or receipt of fish or wildlife taken or possessed in violation of this
13 code, the guidelines shall provide that the civil penalty shall not
14 exceed the maximum criminal fine provided by law for the
15 violation in this code or ten thousand dollars (\$10,000), whichever
16 is less. For purposes of this section, "value" means the retail market
17 value if a market value exists, the potential monetary gain to the
18 accused or, for commercial species, the established retail market
19 value.

20 (c) The guidelines shall include consideration of the nature,
21 circumstances, extent, and gravity of the prohibited acts committed,
22 and the degree of culpability of the violator, including lesser
23 penalties for acts which have little significant effect upon the
24 resources and greater penalties for acts which may cause serious
25 injury to the resources.

26 (d) Nothing in this chapter or in Chapter 6.5 (commencing with
27 Section 2580) of Division 3 shall be used to establish a monetary
28 value for fish or wildlife resources in connection with any
29 development, project, or land or water use plan or activity as
30 permitted by any federal, state, or local governmental activity.
31 This chapter does not apply to any action brought to recover civil
32 damages under Section 2014.

33 (e) This section shall become inoperative on January 1, 2013,
34 and shall become operative on January 1, 2018.

35 SEC. 4. Section 2580 of the Fish and Game Code is amended
36 to read:

37 2580. (a) The definitions in this section govern the construction
38 of this chapter.

(1) “Qualified hearing officer” means an attorney admitted to the State Bar of California who is knowledgeable in fish and wildlife law.

(2) “Transport” means to move, convey, carry, or ship by any means, or to deliver or receive for the purpose of movement, conveyance, carriage, or shipment.

(b) This section shall become inoperative on January 1, 2013, and shall become operative on January 1, 2018.

SEC. 5. Section 2582 of the Fish and Game Code is amended to read:

2582. (a) The department may impose civil liability upon any person pursuant to this chapter for any of the following acts done for profit or personal gain:

(1) Unlawfully export, import, transport, sell, possess, receive, acquire, or purchase, or unlawfully assist, conspire, or aid in the importing, exporting, transporting, sale, possession, receiving, acquisition, or purchasing of, any bird, mammal, amphibian, reptile, or fish which are taken or possessed in violation of this code or the regulations adopted pursuant to this code.

(2) Unlawfully export, import, transport, sell, possess, receive, acquire, or purchase, or unlawfully assist, conspire, or aid in the importing, exporting, transporting, sale, possession, receiving, acquisition, or purchasing of any plants, insects, or other species listed pursuant to the California Endangered Species Act (Chapter 1.5 (commencing with Section 2050)), which are taken or possessed in violation of this code or the regulations adopted pursuant to this code.

(3) Unlawfully export, import, transport, sell, possess, receive, acquire, or purchase any bird, mammal, amphibian, reptile, or fish, or any endangered or threatened species, or any fully protected bird, mammal, or fish which has been taken, possessed, transported, or sold in violation of this code or the regulations adopted pursuant to this code.

(4) Unlawfully possess any bird, mammal, amphibian, reptile, or fish, or any endangered or threatened species, or any fully protected bird, mammal, or fish which has been taken, possessed, transported, or sold in violation of this code or any regulations adopted pursuant to this code within the maritime and territorial jurisdiction of the state or within the portions of the special maritime jurisdiction of the United States upon which the State of

1 California exercises concurrent jurisdiction, either by statute,
2 deputization, or by contract with the United States.

3 (5) Having exported, imported, transported, sold, purchased, or
4 received any bird, mammal, amphibian, reptile, or fish, or any
5 endangered or threatened species, or any fully protected bird,
6 mammal, or fish, unlawfully make or submit any false record,
7 account, label, or identification thereof.

8 (6) Attempt to commit any unlawful act, or unlawfully attempt
9 to commit any act, described in paragraphs (1) to (5), inclusive.

10 (b) The department may impose civil liability upon any person
11 pursuant to this chapter for unlawfully exporting, importing,
12 possessing, receiving, or transporting in interstate commerce any
13 container or package containing any bird, mammal, amphibian,
14 reptile, or fish, or any endangered or threatened species, or any
15 fully protected bird, mammal, or fish unless the container or
16 package has previously been plainly marked, labeled, or tagged
17 in accordance with this code and the regulations adopted pursuant
18 to this code.

19 (c) The department may impose civil liability upon any person
20 pursuant to this chapter for any unlawful failure or refusal to
21 maintain any records or paperwork as required by this code.

22 (d) This section shall become inoperative on January 1, 2013,
23 and shall become operative on January 1, 2018.

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

26 2582. (a) The department may impose administrative civil
27 penalties upon any person who has violated any provision of this
28 code or implementing regulations adopted pursuant to this code
29 *that are subject to civil penalties pursuant to Section 747 of Title*
30 *14 of the California Code of Regulations*. Penalties imposed
31 pursuant to this subdivision shall not exceed those penalties
32 established in Section 747 of Title 14 of the California Code of
33 Regulations. Except as provided in Section 2583, the proceedings
34 for all hearings conducted by the department pursuant to this
35 section shall be conducted in accordance with Chapter 4.5
36 (commencing with Section 11400) of Part 1 of Division 3 of Title
37 2 of the Government Code. The department shall have all of the
38 powers granted in that chapter. The monetary amounts shall be
39 levied in an amount that is considered to be adequate to deter
40 repeated offense of the illegal activity and shall include

1 consideration of the nature, circumstances, extent, and gravity of
2 the prohibited acts committed and the degree of culpability of the
3 violator, including lesser penalties for acts that have little
4 significant effect upon the resources and greater penalties for acts
5 that may cause serious injury to the resources. The civil penalty
6 for a violation punishable as an infraction shall not exceed an
7 amount higher than the criminal penalty authorized in statute.

8 (b) Notwithstanding subdivision (a), any person who, for
9 commercial or financial purposes, or for profit or personal gain,
10 violates this code or any regulation adopted to carry out this code,
11 including, but not limited to, violations of Section 12012 or 12013,
12 and with the exercise of due care, should have known that the
13 birds, mammals, amphibians, reptiles, or fish, or the endangered
14 or threatened species, or the fully protected birds, mammals, or
15 fish were taken, possessed, transported, imported, received,
16 purchased, acquired, or sold in violation of, or in a manner unlawful
17 under this code, may be assessed a civil penalty. The civil penalty
18 imposed under this subdivision by the department shall not exceed
19 ten thousand dollars (\$10,000) for each bird, mammal, amphibian,
20 reptile, or fish, or for each endangered or threatened species, or
21 each fully protected bird, mammal, or fish unlawfully taken,
22 possessed, transported, imported, received, purchased, acquired,
23 or sold. This civil penalty may be in addition to any other penalty,
24 civil or criminal, provided in this code or otherwise by law.

25 (c) The department shall adopt regulations ~~that include a fee~~
26 ~~schedule~~ to provide guidance in assessing a civil penalty pursuant
27 to this section.

28 (d) This section shall remain in effect only until January 1, 2018,
29 and as of that date is repealed, unless a later enacted statute, that
30 is enacted before January 1, 2018, deletes or extends that date.

31 SEC. 7. Section 2583 of the Fish and Game Code is amended
32 to read:

33 2583. (a) Except as provided in subdivision (b), any person
34 who violates this code or any regulation adopted to carry out this
35 code, and, with the exercise of due care, should have known that
36 the birds, mammals, amphibians, reptiles, or fish, or the endangered
37 or threatened species, or the fully protected birds, mammals, or
38 fish were taken, possessed, transported, imported, received,
39 purchased, acquired, or sold in violation of, or in a manner unlawful
40 under, this code, may be assessed a civil penalty. The civil penalty

1 imposed under this chapter by the department shall not be more
2 than ten thousand dollars (\$10,000) for each bird, mammal,
3 amphibian, reptile, or fish, or for each endangered or threatened
4 species, or each fully protected bird, mammal, or fish unlawfully
5 taken, possessed, transported, imported, received, purchased,
6 acquired, or sold. This civil penalty may be in addition to any other
7 penalty, civil or criminal, provided in this code or otherwise by
8 law.

9 (b) No civil penalties shall be imposed under this chapter until
10 the guidelines for the imposition of the penalties are adopted by
11 the commission pursuant to Section 500.

12 (c) This section shall become inoperative on January 1, 2013,
13 and shall become operative on January 1, 2018.

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

16 2583. (a) Prior to the imposition of administrative penalties
17 pursuant to Section 2582, a person shall be given a written notice
18 of the proposed action that includes the basis for the action. A
19 person who receives notice of a proposed penalty shall have the
20 right to request a hearing before the department within 60 days
21 after receiving the notice of the proposed action. A notice of the
22 proposed action that is sent by certified mail to the last known
23 address of the person against whom the action is proposed shall
24 be considered received even if delivery is refused or the notice is
25 not accepted at that address.

26 (b) If a hearing is requested within 60 days of receipt of the
27 notice of the proposed action, notice of the time and place of the
28 hearing shall be given at least 10 days before the date set for the
29 hearing. A deferral of the hearing shall be granted upon reasonable
30 cause, not to exceed 20 days from the date of the original hearing
31 date.

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

1 (2) The hearing officer shall take into consideration the nature
2 of the violation, the circumstances, extent, and gravity of the
3 prohibited acts committed, the degree of culpability of the violator,
4 and the effect of the violation upon natural resources.

5 (3) The hearing officer shall issue a written decision within 30
6 days after the hearing. If administrative penalties are imposed upon
7 a person, that person may appeal to the director within 30 days of
8 mailing or personal service of the department's decision.

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

11 (e) The following shall apply to an appeal to the director:

12 (1) The appeal shall be in writing and signed by the appellant
13 or his or her authorized agent and shall state the grounds for the
14 appeal.

15 (2) Any party, at the time of filing the appeal or within 10 days
16 of the filing, may present written evidence and a written argument
17 to the director.

18 (3) The director may grant oral arguments upon application
19 made at the time written arguments are made.

20 (4) If an application to present an oral argument is granted,
21 written notice of the time and place for the oral argument shall be
22 given at least 10 days prior to the date set for the oral argument.
23 This time requirement may be changed upon agreement between
24 the parties and the director. Oral testimony may be given by
25 telephone in lieu of attending a hearing. This testimony shall be
26 recorded and made part of the record. Recorded testimony shall
27 be kept for 180 days or until the judgment is final. A transcription
28 shall be provided to a party upon payment of a reasonable fee for
29 the cost of obtaining the transcript.

30 (5) The director shall decide the appeal based on any oral or
31 written arguments, briefs, and evidence received. The director
32 shall take into consideration the nature of the violation, the
33 circumstances, extent, and gravity of the prohibited acts committed,
34 the degree of culpability of the violator, and the effect of the
35 violation upon natural resources.

36 (6) The director shall render a written decision within 45 days
37 of the date of the appeal or within 15 days of the date of oral
38 arguments. A copy of the decision shall be delivered or mailed to
39 the appellant.

1 (7) The director may sustain the hearing officer's decision,
2 modify the decision by adjusting the amount of the penalty levied,
3 or reverse the decision.

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

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

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

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

26 (i) For purposes of this section, "director" means the Director
27 of Fish and Game or a deputy director designated by the Director
28 of Fish and Game to hear an appeal on his or her behalf.

29 (j) This section shall remain in effect only until January 1, 2018,
30 and as of that date is repealed, unless a later enacted statute, that
31 is enacted before January 1, 2018, deletes or extends that date.

32 SEC. 9. Section 2584 of the Fish and Game Code is amended
33 to read:

34 2584. (a) Upon an actionable violation, the department shall
35 consult, as to the appropriate civil or criminal remedy, with the
36 district attorney in the jurisdiction where the violation was alleged
37 to have occurred. Before proceeding with a civil action, the
38 department shall seek the concurrence of the Attorney General.

(b) The director shall appoint a qualified referee or hearing board, composed of one or any combination of the following persons:

(1) A qualified hearing officer, as defined in subdivision (a) of Section 2580.

(2) A retired judge of the superior court who is knowledgeable in fish and wildlife law.

(3) A qualified neutral referee, appointed upon petition to the superior court in which the violation was alleged to have occurred.

(c) The director, after investigation of the facts and circumstances, may issue a complaint to any person on whom a civil penalty may be imposed pursuant to Section 2582 or 2583. The complaint shall allege the acts or failures to act that constitute a basis for a civil penalty and the amount of the proposed civil penalty. The complaint shall be served by personal service or certified mail and shall inform the person so served that a hearing shall be conducted within 60 days after the person has been served, unless the person waives the right to a hearing. If the person waives the right to a hearing, the department shall issue an order setting liability in the amount proposed in the complaint. If the person has waived the right to a hearing or if the department and the person have entered into a settlement agreement, the order shall be final.

(d) Any hearing required under this section shall be conducted by a referee or hearing board according to the procedures specified in Sections 11507 to 11517, inclusive, of the Government Code, except as otherwise provided in this section. In making a determination, the hearing officer may consider the records of the department in the matter, the complaint, and any new facts brought to his or her attention by that person. The hearing officer shall be the sole trier of fact as to the existence of a basis for liability under Section 2582 or 2583. The hearing officer shall make the determination of the facts of the case and shall prepare and submit the proposed decision, including recommended penalty assessment, to the director for his or her review and assistance in the penalty assessment process.

(e) The director may assess the civil penalty, and may reduce the amount, or not impose any assessment, of civil penalties based upon the nature, circumstances, extent, and gravity of the prohibited acts alleged, and the degree of culpability of the violator; or the director may enter into a settlement agreement with the person in

1 the best interests of the state or confirm the amount of civil
2 penalties contained in the complaint. If the director reduces the
3 amount of the civil penalty, does not impose the civil penalty, or
4 enters into a settlement agreement, the director shall seek the
5 recommendation of the hearing officer and enter into the records
6 of the case the reasons for that action, including the hearing
7 officer's recommendation. The decision of the director assessing
8 the civil penalty is final. The proposed decision is a public record
9 and shall be served upon the person. The director may approve the
10 proposed decision in its entirety, or the director may reduce the
11 proposed penalty and adopt the balance of the proposed decision.

12 (f) Upon the final assessment of the civil penalty, the department
13 shall issue an order setting the amount of the civil penalty to be
14 imposed. An order setting civil liability under this section becomes
15 effective and final upon the issuance thereof, and payment shall
16 be made within 30 days of issuance. Copies of the order shall be
17 served by personal service or by certified mail upon the person
18 served with the complaint and upon other persons who appeared
19 before the director and requested a copy. Copies of the order shall
20 be provided to any person within 10 days of receipt of a written
21 request from that person.

22 (g) Within 30 days after service of a copy of an order setting
23 the amount of the civil penalty, any person so served may file with
24 the superior court a petition for a writ of mandate for review of
25 the order. In all proceedings pursuant to this subdivision, the court
26 shall exercise its independent judgment on the evidence in the
27 whole record. The filing of a petition for a writ of mandate shall
28 not stay any other civil or criminal action.

29 (h) The records of the case, after all appeals are final, are public
30 records, as defined in subdivision (d) of Section 6252 of the
31 Government Code.

32 (i) This section shall become inoperative on January 1, 2013,
33 and shall become operative on January 1, 2018.