

## BILL ANALYSIS

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Date of Hearing: April 1, 2013

ASSEMBLY COMMITTEE ON NATURAL RESOURCES  
Wesley Chesbro, Chair  
AB 976 (Atkins) - As Amended: March 19, 2013SUBJECT : Coastal resources: California Coastal Act of 1976:  
enforcement: penaltiesSUMMARY : Authorizes the Coastal Commission (Commission), by majority vote and at a duly noticed public hearing, to impose an administrative civil penalty on a person who intentionally and knowingly violates the California Coastal Act (Coastal Act).EXISTING LAW : Pursuant to the Coastal Act:

- 1) Requires any person seeking to perform any development in the coastal zone to first obtain a coastal development permit (CDP).
- 2) Authorizes the Commission's executive director to issue an ex parte cease and desist order if he or she determines that someone is undertaking or threatening to undertake an activity that requires a CDP or that may be inconsistent with a previously issued permit. Before issuing the ex parte cease and desist order, the executive director is required to give oral and written notice. The order is valid for 90 days from the date of issuance.
- 3) Authorizes the Commission, after a public hearing, to issue a cease and desist order if it determines that someone is undertaking or threatening to undertake an activity that requires a CDP or that may be inconsistent with a previously issued permit.
- 4) Authorizes the Commission to issue a restoration order if it finds that development has occurred without a CDP and the development is causing continuing resource damage.
- 5) Requires the Commission's executive director to record a notice of violation with a county recorder if (1) he or she has determined that real property has been developed in violation of the Coastal Act, (2) a notice of intention to record a notice of violation was mailed, and (3) the owner of the property failed to object to the notice or the owner of

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the property objected and the Commission found, after a hearing, that a violation has occurred.

- 6) Authorizes a superior court to impose civil penalties between \$500 and \$30,000 on any person in violation of the Coastal Act. If a person intentionally and knowingly violates the Coastal Act, additional civil penalties between \$1,000 and \$15,000 may be imposed for each day in which the violation persists.
- 7) Requires any funds derived from penalties associated with a violation of the Coastal Act to be deposited in the Violation Remediation Account of the Coastal Conservancy Fund and used to carrying out the Coastal Act, when appropriated by the Legislature.

THIS BILL :

- 1) Authorizes the Commission, by majority vote and at a duly noticed public hearing, to impose an administrative civil penalty on a person who intentionally and knowingly violates the Coastal Act. The penalty may be in an amount not to exceed 75 percent of the amount that a court can impose for the same violation.
- 2) In determining the amount of civil liability, requires the Commission to take into account the following factors:
  - a) The nature, circumstance, extent, and gravity of the violation;
  - b) Whether the violation is susceptible to restoration or other remedial measures;
  - c) The sensitivity of the resource affected by the violation;

- d) The cost to the state of bringing the action; and
- e) With respect to the violator, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic profits, if any, resulting from, or expected to result as a consequence of, the violation, and such other matters as justice may require.

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- 3) Prohibits a person from being subject to both administrative civil liability imposed by the Commission and monetary civil liability imposed by the superior court for the same act or failure to act. In the event that a person who is assessed a penalty under this section fails to pay the administrative penalty, otherwise fails to comply with a restoration or cease and desist order issued by the Commission in connection with the penalty action, or challenges any of these actions by the Commission in a court of law, the Commission may maintain an action or otherwise engage in judicial proceedings to enforce those requirements and the court may grant any relief as provided under this chapter.
- 4) If a person fails to pay an administrative civil penalty imposed by the Commission, authorizes the Commission to record a lien on the person's property in the amount of the penalty assessed by the Commission. This lien shall have the force, effect, and priority of a judgment lien.
- 5) States that it is not the intent of the Legislature that unintentional, minor violations that only cause de minimis harm should lead to civil penalties, if the violator has acted expeditiously to correct the violation.
- 6) Does not apply the bill's administrative civil penalty provisions to a local government, a special district, or an agency thereof when acting in a legislative or adjudicative capacity.
- 7) Requires all funds derived from penalties associated with a violation of the Coastal Act to be deposited in the Coastal Act Services Fund, until appropriated by the Legislature, for the purpose of carrying out the Coastal Act.

FISCAL EFFECT : Unknown

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COMMENTS :

1) Should the Commission have administrative penalty authority?

As stated by Commission staff, penalties are a critical component of all environmental statutes and are the primary means to persuade would-be violators to comply with the law. The deterrent component of any regulatory scheme is important, particularly for environmental laws. A credible threat of penalties to prevent violations in the first place can greatly increase the ability of an environmental agency to obtain voluntary compliance, and greatly increase its ability to protect the environment.

While the Commission has the authority to seek civil penalties in court, staff claims that it is infrequently done, citing the very slow, expensive, and resource-intensive process. Commission staff provided committee staff with a breakdown of cases filed by the Commission to enforce Commission-issued orders since 2003. There were only four cases, with at least half of these cases each accruing more than \$100,000 in costs to the Attorney General's Office. These costs do not reflect the entire cost of litigation to the state, and in particular do not include Commission staff or attorney time. Moreover, the penalties are relatively low compared to the litigation

costs. For example, three of the four cases were settled, generating a total of \$425,000 in penalties. The fourth case is pending, but has already cost more than \$100,000 in Attorney General services.

Even the Legislative Analyst's Office (LAO) has chimed in on the issue. In its 2008-2009 and 2011-12 budget analysis, the LAO recommended that the Commission be granted administrative civil penalty authority. The LAO highlighted the cumbersome process that "results in few fines and penalties issued by the commission due to the high cost of pursuing enforcement through the courts."

This bill's proposal and the LAO's recommendations are not novel concepts. Several environmental state agencies have been able to evade costly litigation through their administrative penalty authority. For example, agencies such as the San Francisco Bay Conservation and Development Commission (BCDC), the State Water Resources Control Board (and regional boards), State Lands Commission, Department of

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Fish and Wildlife, California Energy Commission, Department of Forestry and Fire Protection, Department of Toxic Substances Control, Department of Resources Recycling and Recovery, and regional air districts all have administrative civil penalty authority, at least for certain issue. BCDC's authority to regulate development along San Francisco Bay serves as the best analog to the work of the Commission. Using its civil penalty authority, BCDC has been successful at discouraging and resolving the vast majority of violations without resorting to expensive and time consuming litigation. Supporters of this bill argue that that "the state's coastal resources are no less important or worthy of protection" than the resources that these other agencies protect.

2)How due process is protected.

Opponents of the bill argue that the imposition of monetary penalties should remain with the judicial branch. Among other things, the opponents believe that "an individual facing potentially significant fines and penalties should be afforded due process through the judicial system where witnesses must be qualified to testify and are sworn in, testimony is taken, witnesses are cross-examined, rebuttal is allowed, and no time restrictions are imposed, all before a judge."

It is unclear whether the opponents are unaware of the "Administrative Adjudication Bill of Rights" found in section 11425.10 Government Code, et seq. These statutes provide specific due process protections when an agency conducts an adjudicative proceeding. For example, these protections require that the adjudicative function of the agency be separated from the investigative, prosecutorial, and advocacy functions within the agency; that the presiding officers be subject to disqualification for bias, prejudice, or interest; and that ex parte communications be restricted. Additionally, the Government Code provides very specific procedural rules to ensure a fair adjudication and the Code of Civil Procedure (section 1094.5) provides a process to appeal an agency's decision to a court.

3)Bill is tailored to address intentional violations.

The scope of the bill is limited to people who intentionally and knowingly violate the Coastal Act. The Commission cannot use this bill to penalize unintentional violations that cause

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de minimis harm.

4)Coastal Conservancy (Conservancy) Funding Issue.

Existing law requires the Commission to deposit fines and penalties moneys it receives into the Violation Remediation Account (VRA) of the Coastal Conservancy Fund. Fines and penalties are deposited in the fund and expended by the Conservancy when appropriated by the legislature in a manner to remedy adverse impacts of Coastal Act violations. Specifically, the funds are used to assure acceptance and long-term management of public accessways and conservation easements by public agencies and nonprofit organizations and,

where feasible, at locations where Coastal Act violations have obstructed these goals. A 1986 memorandum of understanding (MOU) identified potential uses of VRA funds, which staffs of both the Commission and the Conservancy have agreed will provide the most meaningful remediation of Coastal Act violations and will support Coastal Act policies and objectives to which both agencies are committed. This MOU was recently updated in 2012.

This bill requires that all fines and civil penalties be deposited in the Coastal Act Services Fund. This amendment will deprive the Conservancy of the funding it currently receives through the VRA. The author and the committee may wish to amend the bill so the VRA continues to receive funds to support projects such as projects that address issues related to Coastal Act violations.

5) Previous Legislation. This bill is a re-introduction of AB 226 (Ruskin) from 2009 and SB 588 (Evans) from 2011. AB 226 passed the Assembly Natural Resources Committee and the Assembly Floor, but was "gutted and amended" on the Senate Floor. No legislative action was taken on SB 588 after the Senate Natural Resources and Water Committee passed the bill.

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REGISTERED SUPPORT / OPPOSITION :

Support

California Coastkeeper Alliance  
California Coastal Protection Network  
California Native Plant Society  
Environmental Defense Center  
Heal the Bay  
North County Watch  
Planning and Conservation League  
Sierra Club California  
Surfrider Foundation  
The Wildlands Conservancy

Opposition

American Council of Engineering Companies of California  
California Apartment Association  
California Association of Realtors  
California Aquaculture Association  
California Building Industry Association  
California Business Properties Association  
California Cattlemen's Association  
California Chamber of Commerce  
California Citrus Mutual  
California Construction and Industrial Materials Association  
California Farm Bureau Federation  
California Fisheries and Seafood Institute  
California Independent Petroleum Association  
California Sea Urchin Commission  
California Travel Association  
California Wetfish Producers Association  
Nisei Farmers League  
Western Agricultural Processors Association  
Western States Petroleum Association

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