

1 SB181
2 126883-1
3 By Senator Marsh
4 RFD: Judiciary
5 First Read: 08-MAR-11

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8 SYNOPSIS: Currently, the Alabama Department of
9 Environmental Management administers, regulates,
10 and enforces environmental laws of the state,
11 including the issuance of a range of civil
12 penalties for certain violations.

13 This bill would delete the minimum penalty
14 amounts issued by the department and would provide
15 for appeal of orders of the commission to the
16 Alabama Court of Civil Appeals.

17
18 A BILL
19 TO BE ENTITLED
20 AN ACT

21
22 To amend Section 22-22A-5, Code of Alabama 1975,
23 relating to civil penalties assessed by law for violations of
24 state environmental protection laws and orders; to delete the
25 minimum penalty amounts.

26 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

1 Section 1. Section 22-22A-5, Code of Alabama 1975,
2 is amended to read as follows:

3 "§22-22A-5.

4 "In addition to any other powers and functions which
5 may be conferred upon it by law, the department is authorized
6 beginning October 1, 1982 to:

7 "(1) Administer appropriate portions of Sections
8 9-7-10 through 9-7-20, which relate to permitting, regulatory
9 and enforcement functions; administer and enforce the
10 provisions and execute the functions of Chapter 28 of this
11 title; Chapter 22 of this title; Article 2 of Chapter 23 of
12 this title; Chapter 30 of this title; appropriate portions of
13 Article 1 of Chapter 27 of this title; Sections 22-24-1
14 through 22-24-11; Sections 22-25-1 through 22-25-15; and
15 Sections 22-36-1 through 22-36-10.

16 "(2) Acting through the Environmental Management
17 Commission, promulgate rules, regulations and standards in
18 order to carry out the provisions and intent of this chapter;
19 provided, however, that prior to the promulgation of any state
20 primary or secondary drinking water standard governed by
21 Sections 22-23-30 through 22-23-53 or any regulations dealing
22 with hazardous wastes governed by Sections 22-30-1 through
23 22-30-24, the department shall receive the approval of the
24 State Board of Health. The State Board of Health shall provide
25 the department a response to its request for approval within
26 60 days of receipt of such request unless such other time is

1 mutually agreed upon by the department and the State Board of
2 Health.

3 "(3) Acting through the Environmental Management
4 Commission, adopt and promulgate rules, regulations and
5 standards for the department, and to develop environmental
6 policy for the state.

7 "(4) Consistent with the provisions in subsection
8 22-22A-4(n), serve as the State Agency responsible for
9 administering federally approved or federally delegated
10 environmental programs.

11 "(5) Serve as the state's clearinghouse for
12 environmental data. The clearinghouse shall be developed in
13 coordination and cooperation with other governmental data
14 collection and record keeping systems to provide for an
15 inventory, and for the cataloguing and dissemination of
16 environmental information.

17 "(6) Report, as appropriate, to the Governor and to
18 the Legislature on the programs and activities of the
19 department and to recommend needed changes in legislation or
20 administrative practice.

21 "(7) Develop, conduct and disseminate education and
22 training programs. Pursuant to this authority, the department
23 shall establish a citizens' advisory committee to provide
24 input into such education and training programs.

25 "(8) Enter into agreements and contracts, where
26 appropriate, with other state agencies, the federal government

1 or private individuals, in order to accomplish the purposes of
2 this chapter.

3 "(9) Establish and maintain regional or field
4 offices in order to provide more effective and efficient
5 services to the citizens of the state.

6 "(10) Issue, modify, suspend or revoke orders,
7 citations, notices of violation, licenses, certifications or
8 permits.

9 "(11) Hold hearings relating to any provision of
10 this chapter or relating to the administration thereof.

11 "(12) Enforce all provisions of this chapter and all
12 provisions of law identified in subdivision (1) of this
13 section and to file legal actions in the name of the
14 department and to prosecute, defend or settle actions brought
15 by or against the department or its agents. The Attorney
16 General shall represent the department in any and all legal
17 actions brought by the department to enforce any provisions of
18 this chapter; provided however, that if, within a reasonable
19 time after the department refers the matter to him, he fails
20 to file any such action, then the department may commence
21 appropriate legal action. Nothing in this subdivision shall be
22 construed so as to impair the authority of the Attorney
23 General to independently enforce the provisions of this
24 chapter.

25 "(13) When necessary to achieve conformance with
26 Sections 9-7-10 through 9-7-20, acquire fee simple or less
27 than fee simple, interest in land, water and other property

1 under the procedures of Title 18 or other means; provided,
2 however, that such power shall not apply to property and
3 interest therein which is devoted to public use.

4 "(14) Apply for, where appropriate, accept, receive
5 and administer grants or other funds or gifts from public and
6 private agencies, including the federal government, for the
7 purpose of carrying out any of the functions, purposes or
8 provisions of this chapter or any of the functions or
9 provisions transferred to the department by this chapter.

10 "(15) Employ such professional, technical, clerical
11 and other workers including attorneys and special counsel, and
12 such consultants as are necessary and within available funds
13 to carry out the purposes of this chapter.

14 "(16) Adopt rules and regulations relating to
15 charging and collecting fees sufficient to cover the
16 reasonable anticipated costs to be incurred by the department
17 and directly related to the issuance, reissuance, modification
18 or denial of any permit, license, certification or variance,
19 such fees to include, but not be limited to, the reasonable
20 anticipated cost of the examination and processing of
21 applications, plans, specifications or any other data and any
22 necessary public hearings and investigations; provided,
23 however, that nothing in this subdivision shall be construed
24 as modifying or affecting the provisions of Section 22-24-5. A
25 schedule of estimated reasonable anticipated costs shall be
26 appended to rules and regulations with the understanding that
27 fees may be higher or lower on a case-by-case basis.

1 "(17) In addition to any other remedies provided by
2 law, recover in a civil action from any person who has
3 violated, or threatens to violate, any provision of this
4 chapter, or any provision of law identified in subdivision (1)
5 of this section, or any rule or regulation promulgated
6 thereunder, or any order, or condition of any permit, license,
7 certification or variance issued by the department pursuant
8 thereto, the actual costs reasonably incurred by the
9 department to prevent, minimize or abate any adverse effect on
10 air, land or water resources which results or may result from
11 such violation. Such civil actions may be filed in the circuit
12 court of the county in which the defendant resides or does
13 business, or in which the violation or threatened violation
14 occurs or in which the adverse effect occurs.

15 "(18)a. Issue an order assessing a civil penalty to
16 any person who violates any provision of law identified in
17 subdivision (1) of this section, any rule, regulation or
18 standard promulgated by the department, any provision of any
19 order, or any condition of any permit, license, certification
20 or variance issued by the department, provided however, that
21 no such order shall be issued to a person:

22 "1. If a civil action to recover a penalty for such
23 violation has been commenced against such person as provided
24 in paragraph b. of this subdivision.

25 "2. For any violation at a coal mining operation
26 regulated under Sections 9-16-70 through 9-16-107 or Title V
27 of Public Law 95-87, 30 U.S.C. § 1251-1279.

1 "3. If an order assessing a civil penalty for such
2 violation has been issued to such person pursuant to
3 subdivision (2) of subsection 22-28-23(b).

4 "4. Who is a responsible corporate officer subject
5 to a civil action for the recovery of a penalty under
6 paragraph b. of this subdivision.

7 "The department shall commence enforcement action
8 under this paragraph by notifying the person subject thereto
9 in writing of the alleged violation and affording the person
10 an opportunity for an informal conference with the director or
11 his or her designated representative concerning the alleged
12 violation and any proposed order. The informal conference
13 shall not be subject to the procedures for hearings under
14 Section 22-22A-7. Before issuing any consent or unilateral
15 order under this section, the department shall cause public
16 notice to be published for one day in a newspaper of general
17 circulation in the area where the alleged violation occurred
18 and on the website of the department for the duration of the
19 comment period; provided, however, that unavailability of the
20 website during the comment period shall not affect the
21 validity of an order issued under this paragraph. The notice
22 shall reasonably describe the nature and location of the
23 alleged violation and the amount of civil penalty proposed,
24 contain a summary of any proposed corrective measures, provide
25 instructions for obtaining a copy of the proposed order, and
26 indicate that persons may submit written comments to the
27 department and request a hearing on the proposed order within

1 30 days of the first date of publication. The department may
2 hold a hearing if the information submitted in support of the
3 request is material and if a hearing may clarify one or more
4 issues raised in the written comments. If the department
5 grants a request for a hearing, the department shall provide
6 written notice of the time, date, and location of the hearing
7 by regular mail at least 20 days prior to the hearing to all
8 persons subject to the proposed order and all persons who
9 submitted written comments on the proposed order that contain
10 a current return address. At any such hearing, the department
11 shall provide a reasonable opportunity for persons subject to
12 the proposed order and persons who submitted written comments
13 on the proposed order to be heard and to submit information to
14 the director or his or her designated representative,
15 provided, however, that the hearing shall not be subject to
16 the procedures for hearings under Section 22-22A-7, or
17 practices or procedures governing public hearings. The
18 department shall also accept additional written comments from
19 any interested party that are received on or before the date
20 of the hearing. After consideration of written comments, any
21 information submitted at the hearing, if one was held, and any
22 other publicly available information, the department may issue
23 the order as proposed, issue a modified order, or withdraw the
24 proposed order. Any order issued under this paragraph shall
25 include findings of fact relied upon by the department in
26 determining the alleged violation and the amount of the civil
27 penalty and shall be served on persons subject to the order in

1 the manner provided for service of process in the Alabama
2 Rules of Civil Procedure. Upon issuance of an order, the
3 department shall also provide written notice of the order by
4 regular mail to each person who submitted written comments on
5 the proposed order that contain a current return address. The
6 notice shall reasonably describe the nature and location of
7 the alleged violation and the amount of civil penalty, contain
8 a summary of any required corrective measures, provide
9 instructions for obtaining a copy of the order, and indicate
10 that persons who submitted written comments on the proposed
11 order may, within 30 days of the issuance of the order,
12 request a hearing on the order before the Environmental
13 Management Commission in accordance with Section 22-22A-7.
14 Where the department has issued an order finding that a
15 violation has occurred and assessing a civil penalty, the
16 person subject thereto shall, unless the department and that
17 person agree on a different schedule, pay the penalty in full
18 within 45 days after issuance of such order unless any person
19 has filed a timely request for a hearing to contest the
20 issuance of such order in accordance with Section 22-22A-7, in
21 which case the penalty assessed in the order as approved or
22 modified by the Environmental Management Commission shall,
23 unless the department and that person agree on a different
24 schedule, be paid in full within 30 days after the order is
25 approved or modified by the Environmental Management
26 Commission or, if an appeal thereof is taken to circuit court,
27 within 42 days after the court affirms the order as approved

1 or modified by the Environmental Management Commission. Civil
2 penalties assessed in an order under this paragraph and not
3 paid as provided herein may be recovered in a civil action
4 brought by the department in the Circuit Court of Montgomery
5 County or the county in which the defendant does business.

6 "b. Commence a civil action in the circuit court of
7 the county in which the defendant or any material defendant
8 resides or does business or in which the violation occurred to
9 recover a civil penalty from such person for any violation of
10 any provision of law identified in subdivision (1) of this
11 section, any rule, regulation or standard promulgated by the
12 department, any provision of any order or any condition of any
13 permit, license, certification or variance issued by the
14 department, provided however, that no such civil action may be
15 commenced against a person if an order assessing a civil
16 penalty for such violation has been issued to such person
17 under paragraph a. of this subdivision. Whenever such person
18 is a corporation and the violation is of a provision of law in
19 Chapter 22 of this title, or any rule, regulation or standard
20 promulgated by the department thereunder, or any provision of
21 any order or any condition of any permit, license,
22 certification or variance issued by the department thereunder,
23 the same civil penalties that may be imposed upon a person
24 under this subdivision may be imposed upon the responsible
25 corporate officers in a civil action. Any person having an
26 interest which is or may be adversely affected may intervene
27 as a matter of right in any civil action commenced under this

1 paragraph. The Attorney General may also commence a civil
2 action under this paragraph.

3 "c. Any civil penalty assessed or recovered under
4 paragraph a. or b. of this subdivision shall not ~~be less than~~
5 ~~\$100.00~~ or exceed \$25,000.00 for each violation, provided
6 however, that the total penalty assessed in an order issued by
7 the department under paragraph a. of this subdivision shall
8 not exceed \$250,000.00. Each day such violation continues
9 shall constitute a separate violation for purposes of this
10 subdivision. In determining the amount of any penalty,
11 consideration shall be given to the seriousness of the
12 violation, including any irreparable harm to the environment
13 and any threat to the health or safety of the public; the
14 standard of care manifested by such person; the economic
15 benefit which delayed compliance may confer upon such person;
16 the nature, extent and degree of success of such person's
17 efforts to minimize or mitigate the effects of such violation
18 upon the environment; such person's history of previous
19 violations; and the ability of such person to pay such
20 penalty. Civil penalties may be assessed under this
21 subdivision for any violation occurring within two years prior
22 to the date of issuance of an order under paragraph a. of this
23 subdivision or commencement of such civil action under
24 paragraph b. of this subdivision. All civil penalties
25 recovered under this subdivision by the department or Attorney
26 General shall be deposited into the State Treasury to the
27 credit of the General Fund, except that portion which

1 represents the reasonable costs incurred by the department or
2 Attorney General to recover such penalties which shall be
3 deposited to the credit of the operating fund of the
4 department or Attorney General, whichever incurred such costs.

5 "(19) Commence a civil action in the circuit court
6 of the county in which the defendant or any material defendant
7 resides or does business or in which the threatened or
8 continuing violation of any provision of law identified in
9 subdivision (1) of this section, any rule, regulation or
10 standard promulgated by the department, any provision of any
11 order, or any condition of any permit, license, certification
12 or variance issued by the department. The Attorney General or
13 district attorney having jurisdiction in the circuit, county
14 or territory in which the threatened or continuing violation
15 occurs may also commence a civil action to enjoin such
16 violation. In any such action, any person having an interest
17 which is or may be adversely affected may intervene as a
18 matter of right.

19 "(20) Perform any other duty or take any other
20 action necessary for the implementation and enforcement of
21 this chapter."

22 Section 2. This act shall become effective
23 immediately following its passage and approval by the
24 Governor, or its otherwise becoming law.