

Calif. Bill Paves Way For More Fines Over Coastal Violations

By **Erin Coe**

Law360, San Diego (September 09, 2013, 11:16 PM ET) -- California lawmakers are considering a bill that would empower the state's Coastal Commission to issue civil penalties for coastal law violations without first having to go to court, and lawyers say it could encourage the agency to impose more fines by shifting the burden of initiating court proceedings to property owners.

On a 21-17 vote, the state Senate floor on Friday approved A.B. 976, which would give the commission the ability to administratively levy penalties against property owners who engage in unauthorized development, damage environmentally sensitive habitats and commit other violations of the state's Coastal Act. Although the Senate's amendments to the measure didn't gain enough votes to pass the state Assembly floor Monday, the bill remains eligible for reconsideration this week.

The commission already has broad authority over activities by individuals and entities that own, operate or seek to develop property on the state's coastline, and this measure would add greater heft to its powers, according to Brian Fish, a McKenna Long & Aldridge LLP partner.

"The commission is a largely independent body that has a lot of influence over what happens in the coastal zone, directly and indirectly," he said. "This bill would give them even greater influence."

Under existing law, the Coastal Commission has to go through the California Attorney General's Office to pursue fines in court, but the agency claims it rarely takes this route because the process is so slow and expensive. It has taken only four alleged violators to court in the past 10 years, and its current backlog of more than 1,800 unresolved violations continues to grow because offenders know it lacks the tools to enforce compliance, according to the bill's author, Assembly Majority Leader Toni Atkins, D-San Diego.

The new bill seeks to bring the commission in line with other environmental watchdogs, like the State Water Resources Control Board and the Department of Fish and Wildlife, that have administrative civil penalty authority.

Atkins says the measure, which is sponsored by the Sierra Club California and the Planning and Conservation League, is intended to give the commission the ability to enforce against intentional violations of the Coastal Act.

But Duncan Joseph Moore, a Latham & Watkins LLP partner, says allowing the commission to skip the judicial process and impose penalties without judicial review would put new burdens on property owners, who would bear the onus of filing suit if they disagreed with its penalties.

"Instead of the government having to prove a violation and the penalty it assessed in court, now property

owners would have to prove the absence of a violation or the unreasonableness of a penalty, shifting the burden from the government to private property owners,” he said.

This could increase the number of fines the agency imposes, according to Moore.

“By making the process to impose penalties easier, there certainly is a reasonable possibility that you’ll see more fines being imposed,” he said.

The legislature plans to keep an eye on how the new procedure would affect the number of enforcement actions and amount of penalties assessed. The bill would give the commission new penalty powers for a limited time — until January 2019 — and require it to provide a report on its implementation.

“The legislature is essentially giving the commission a trial period,” Moore said.

The bill also puts some limits on the Coastal Commission’s proposed fine authority. It would bar the commission from assessing a fine if the property owner corrects the violation within 30 days of receiving notice or if the owner can fix the violation without undertaking additional development that requires a Coastal Act permit.

Civil penalties would be assessed for each day the violation persists, but the law caps this at five years. In addition, the fine amount imposed could not exceed 75 percent of the \$30,000 maximum civil penalty per violation per day that may be imposed in the superior court.

Still, Moore says, these caps are not significant limitations.

The measure has drawn opposition from several business groups, including the California Chamber of Commerce, the Western States Petroleum Association, and the California Manufacturers and Technology Association.

Opponents claim the commission has failed to show it lacks the authority to pursue ongoing, egregious violations. They also argue the measure would strip alleged violators of the due process afforded by the courts and hand sweeping authority to the commission.

“The legislation is written very broadly to allow the commission few limits on its discretion on when to impose a fine,” Fish said. “If the commission thinks an issue should be decided in a certain way, this measure gives it greater leverage to implement that vision. But considering how broad its jurisdiction already is, the question is whether that is appropriate.”

The California Coastal Commission, which was formed in 1972, has existed for decades without the authority to levy fines, according to Jocelyn Thompson, an Alston & Bird LLP partner.

“This is not the time, as we are just emerging from a record recession, to expand the commission’s jurisdiction even farther,” she said.

If A.B. 976 were signed into law, it could prompt other state agencies that currently have to pursue fines through the attorney general to seek similar enforcement powers, according to Moore.

“This legislation essentially makes a pilot program for the Coastal Commission, and those other agencies that do not have these powers will be looking at that,” he said.

--Editing by Kat Laskowski.