S T A T E   O F   N E W   Y O R K

1696

2009-2010 Regular Sessions

I N A S S E M B L Y

January 9, 2009

Introduced by M. of A. ENGLEBRIGHT, COOK, V. LOPEZ -- Multi-Sponsored by -- M. of A. COLTON, DINOWITZ, GUNTHER, HEASTIE, MAYERSOHN, McENENY, SWEENEY -- read once and referred to the Committee on Environmental Conservation

AN ACT to amend the environmental conservation law, in relation to environmental benefit projects in lieu of civil penalties

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The environmental conservation law is amended by adding a new section 71-0520 to read as follows:

S 71-0520. ENVIRONMENTAL BENEFIT PROJECTS IN LIEU OF CIVIL PENALTIES.

1. FOR PURPOSES OF THIS SECTION, THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS:

A. "ECONOMIC BENEFIT OF NONCOMPLIANCE" SHALL MEAN THAT PORTION OF THE CIVIL PENALTY WHICH INCLUDES THE ECONOMIC GAIN TO THE RESPONDENT RESULTING FROM ITS FAILURE TO COMPLY WITH THE APPLICABLE STANDARDS, CALCULATED FROM THE FIRST DAY OF VIOLATION AND INCLUDES THE PRESENT VALUE OF AVOIDED CAPITAL AND OPERATION COSTS AND PERMANENTLY AVOIDED COSTS WHICH WOULD HAVE BEEN EXPENDED IF COMPLIANCE HAD OCCURRED WHEN REQUIRED.

B. "ENVIRONMENTAL BENEFIT PROJECT" OR "PROJECT" SHALL MEAN A PROJECT IN LIEU OF FULL PAYMENT OF CIVIL PENALTIES UNDERTAKEN BY A VIOLATOR THAT IS INTENDED TO COMPENSATE FOR A VIOLATION OR CONTRAVENTION OF APPLICABLE STANDARDS.

C. "GRAVITY COMPONENT" SHALL MEAN THAT PORTION OF THE CIVIL PENALTY WHICH REFLECTS THE SERIOUSNESS OF A VIOLATION, CALCULATED ON THE BASIS OF THE POTENTIAL AND ACTUAL HARM CAUSED BY THE VIOLATION, AND THE VALUE OF THE NATURAL RESOURCE DAMAGES, IF THE VIOLATOR IS NOT REPAIRING THE HARM.

2. THE COMMISSIONER SHALL NOT ENTER INTO ANY AGREEMENT OR ADMINISTRATIVE ORDER WHICH PROVIDES FOR A PARTIAL SETTLEMENT OF CONDITIONS IN THE

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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FORM OF ANY ENVIRONMENTAL BENEFIT PROJECT IN LIEU OF THE PAYMENT OF CIVIL PENALTIES UNLESS ALL OF THE FOLLOWING CONDITIONS ARE MET:

A. THE RESPONDENT DOES NOT HAVE A RECORD OF SIGNIFICANT OR REPEATED NONCOMPLIANCE OR RECALCITRANCE;

B. THE VIOLATION WAS NOT COMMITTED INTENTIONALLY, KNOWINGLY OR RECKLESSLY, OR WITH ANY OF THE CULPABLE MENTAL STATES DEFINED IN SECTION 15.05 OF THE PENAL LAW;

C. THE VIOLATION DID NOT RESULT IN A THREAT TO PUBLIC HEALTH OR CAUSE GRAVE OR SERIOUS ENVIRONMENTAL HARM;

D. THE RESPONDENT SHALL, IN GOOD FAITH, UNDERTAKE ALL NECESSARY STEPS TO PROMPTLY CORRECT THE VIOLATION;

E. PROJECTS SHALL BE INITIATED IN ADDITION TO ALL REGULATORY COMPLIANCE OBLIGATIONS AND SHALL BE DESIGNED TO PROVIDE AN ENVIRONMENTAL BENEFIT BEYOND THE BENEFITS OF FULL COMPLIANCE;

F. PROJECTS CANNOT BE ACTIVITIES OTHERWISE REQUIRED BY LAW OR ALREADY OBTAINABLE UNDER THE DEPARTMENT'S AUTHORITY;

G. ALL VIOLATIONS SHALL BE CORRECTED TO ENSURE COMPLIANCE WITH APPLICABLE ENVIRONMENTAL LAW AND REGULATIONS, AND RESPONDENTS SHALL NOT BE GIVEN ADDITIONAL TIME TO CORRECT VIOLATIONS IN ORDER TO COMPLETE A PROJECT;

H. PROJECTS SHALL NOT BE MEASURES WHICH THE RESPONDENT WOULD HAVE UNDERTAKEN ANYWAY WITHIN THE NEXT FIVE YEARS;

I. PROJECTS SHALL BE DESIGNED TO PROVIDE A DISCERNIBLE BENEFIT TO THE ENVIRONMENT RATHER THAN TO THE RESPONDENT;

J. TO ENSURE THAT THE DETERRENT EFFECT OF A SETTLEMENT IS ACHIEVED, SETTLEMENTS INVOLVING A PROJECT SHALL INCLUDE A PAYABLE PENALTY COMPONENT;

K. THE PROJECT IS WITHIN THE CAPABILITY OF THE DEPARTMENT TO REVIEW AND MONITOR, AND SHALL YIELD BENEFITS SIGNIFICANT ENOUGH TO JUSTIFY DEPARTMENT OVERSIGHT; AND

L. A PROJECT CAN NEITHER BE USED TO COVER ADMINISTRATIVE COSTS OF THE DEPARTMENT NOR AS A REVENUE GENERATING MECHANISM FOR THE DEPARTMENT.

3. ENVIRONMENTAL BENEFIT PROJECTS SHALL MEET THE FOLLOWING CRITERIA:

A. THE PROJECT SHALL, TO THE EXTENT PRACTICABLE, BE LOCATED WITHIN THE COUNTY WHERE THE VIOLATION OCCURRED, WITHIN TWENTY-FIVE LINEAR MILES OF SITE OF THE VIOLATION;

B. AN ENVIRONMENTAL RESTORATION PROJECT SHALL GO BEYOND REPAIRING THE DAMAGE CAUSED BY THE VIOLATION TO ENHANCE THE CONDITION OF THE ECOSYSTEM OR GEOGRAPHIC AREA ADVERSELY AFFECTED;

C. A POLLUTION PREVENTION PROJECT SHALL SUBSTANTIALLY REDUCE OR PREVENT THE GENERATION OR RELEASE OF POLLUTANTS THROUGH SOURCE REDUCTION;

D. A RISK REDUCTION PROJECT SHALL DEVELOP AND IMPLEMENT RISK MANAGEMENT OR ACCIDENT PREVENTION/EMERGENCY PLANNING PROGRAMS WHICH PROVIDE PROTECTION IN EXCESS OF INDUSTRY STANDARDS AND EXISTING OR FUTURE REGULATORY REQUIREMENTS; AND

E. AN ENVIRONMENTAL EDUCATION PROJECT SHALL, TO THE EXTENT PRACTICABLE, BE DIRECTED TOWARD UNDERSTANDING THE NATURE OF THE INDUSTRY WHICH HAS CAUSED THE VIOLATION, HOW THE VIOLATION IMPACTED THE COMMUNITY AND WAYS IN WHICH THE COMMUNITY CAN BECOME MORE VIGILANT IN MONITORING ENVIRONMENTAL INSULTS AND VIOLATIONS.

4. AN ENVIRONMENTAL BENEFIT PROJECT SHALL NOT INCLUDE THE FOLLOWING:

A. A CONTRIBUTION TO ENVIRONMENTAL RESEARCH AT A COLLEGE OR UNIVERSITY;

B. A PROJECT, THOUGH BENEFICIAL TO THE IMPACTED LOCAL GOVERNMENT, UNRELATED TO ENVIRONMENTAL PROTECTION;

C. STUDIES OR ASSESSMENTS WITHOUT A COMMITMENT TO IMPLEMENT THE RESULTS;

D. PERFORMANCE OF PROJECTS BY A THIRD PARTY UNLESS SUCH PARTY IS REQUIRED TO IMPLEMENT THE PROJECT SPECIFIED IN THE SETTLEMENT DOCUMENT; OR

E. PUBLIC EDUCATION PROJECTS.

5. SETTLEMENTS WHICH CONTAIN A PROJECT SHALL CONTAIN:

A. A PAYABLE PENALTY COMPONENT WHICH FULLY RECOVERS THE ECONOMIC BENEFIT OF NONCOMPLIANCE TO THE RESPONDENT;

B. A PAYABLE PORTION OF THE GRAVITY COMPONENT OF THE PENALTY; AND

C. A WRITTEN STATEMENT SIGNED BY THE RESPONDENT WHICH CONFIRMS THAT THE RESPONDENT WILL NOT DEDUCT THE COST OF THE PROJECT FROM ITS TAXES. IF THE SETTLEMENT DOES NOT INCLUDE SUCH A STATEMENT, THE GRAVITY COMPONENT OF THE PENALTY MUST BE ADJUSTED TO REFLECT THE TAX BENEFIT.

6. ALL PROJECTS FACTORED INTO PENALTY CALCULATIONS SHALL BE PERFORMED PURSUANT TO LEGALLY ENFORCEABLE COMPLIANCE SCHEDULES WHICH:

A. ACCURATELY AND COMPLETELY DESCRIBE THE PROJECT, DETAIL THE ACTIONS TO BE PERFORMED, AND PROVIDE RELIABLE AND OBJECTIVE MEANS TO VERIFY THAT THE COMPLIANCE SCHEDULED HAS BEEN ADHERED TO;

B. HAVE ENFORCEABLE MILESTONE IMPLEMENTATION SCHEDULES; AND

C. OBLIGE THE RESPONDENT TO SUBMIT PERIODIC REPORTS TO THE DEPARTMENT DESCRIBING COMPLIANCE WITH THE TERMS OF THE PROJECT.

7. ALL PROJECTS SHALL BE SUBJECT TO THE FOLLOWING NOTICE AND APPROVAL CONDITIONS:

A. NOTICE OF THE PROPOSED SETTLEMENT OR ORDER, INCLUDING A DESCRIPTION OF THE PROJECT AND THE PAYABLE PENALTIES, SHALL BE PUBLISHED IN THE ENVIRONMENTAL NOTICE BULLETIN AND AT LEAST ONE NEWSPAPER IN GENERAL CIRCULATION IN THE AREA WHERE THE VIOLATIONS OCCURRED, AT LEAST FORTY-FIVE DAYS BEFORE THE SETTLEMENT OR ORDER IS EXECUTED;

B. THE ATTORNEY GENERAL SHALL REVIEW AND APPROVE THE SETTLEMENT OR ADMINISTRATIVE ORDER; AND

C. WHENEVER THE RESPONDENTS PUBLICIZE THE PROJECT OR PROJECT RESULTS, THE RESPONDENT SHALL ACKNOWLEDGE THAT THE PROJECT WAS PERFORMED AS PART OF THE RESOLUTION OF AN ENFORCEMENT ACTION BROUGHT BY THE DEPARTMENT.

S 2. This act shall take effect immediately.