

7558

I N S E N A T E

June 4, 2012

Introduced by Sen. ALESi -- read twice and ordered printed, and when printed to be committed 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:

- 1 Section 1. The environmental conservation law is amended by adding a
2 new section 71-0520 to read as follows:
3 S 71-0520. ENVIRONMENTAL BENEFIT PROJECTS IN LIEU OF CIVIL PENALTIES.
4 1. FOR PURPOSES OF THIS SECTION, THE FOLLOWING TERMS SHALL HAVE THE
5 FOLLOWING MEANINGS:
6 A. "ECONOMIC BENEFIT OF NONCOMPLIANCE" SHALL MEAN THAT PORTION OF THE
7 CIVIL PENALTY WHICH INCLUDES THE ECONOMIC GAIN TO THE RESPONDENT RESULT-
8 ING FROM ITS FAILURE TO COMPLY WITH THE APPLICABLE STANDARDS, CALCULATED
9 FROM THE FIRST DAY OF VIOLATION AND INCLUDES THE PRESENT VALUE OF
10 AVOIDED CAPITAL AND OPERATION COSTS AND PERMANENTLY AVOIDED COSTS WHICH
11 WOULD HAVE BEEN EXPENDED IF COMPLIANCE HAD OCCURRED WHEN REQUIRED.
12 B. "ENVIRONMENTAL BENEFIT PROJECT" OR "PROJECT" SHALL MEAN A PROJECT
13 IN LIEU OF FULL PAYMENT OF CIVIL PENALTIES UNDERTAKEN BY A VIOLATOR THAT
14 IS INTENDED TO COMPENSATE FOR A VIOLATION OR CONTRAVENTION OF APPLICABLE
15 STANDARDS.
16 C. "GRAVITY COMPONENT" SHALL MEAN THAT PORTION OF THE CIVIL PENALTY
17 WHICH REFLECTS THE SERIOUSNESS OF A VIOLATION, CALCULATED ON THE BASIS
18 OF THE POTENTIAL AND ACTUAL HARM CAUSED BY THE VIOLATION, AND THE VALUE
19 OF THE NATURAL RESOURCE DAMAGES, IF THE VIOLATOR IS NOT REPAIRING THE
20 HARM.
21 2. THE COMMISSIONER SHALL NOT ENTER INTO ANY AGREEMENT OR ADMINISTRA-
22 TIVE ORDER WHICH PROVIDES FOR A PARTIAL SETTLEMENT OF CONDITIONS IN THE
23 FORM OF ANY ENVIRONMENTAL BENEFIT PROJECT IN LIEU OF THE PAYMENT OF
24 CIVIL PENALTIES UNLESS ALL OF THE FOLLOWING CONDITIONS ARE MET:
25 A. THE RESPONDENT DOES NOT HAVE A RECORD OF SIGNIFICANT OR REPEATED
26 NONCOMPLIANCE OR RECALCITRANCE;

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

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1 B. THE VIOLATION WAS NOT COMMITTED INTENTIONALLY, KNOWINGLY OR RECK-
2 LESSLY, OR WITH ANY OF THE CULPABLE MENTAL STATES DEFINED IN SECTION
3 15.05 OF THE PENAL LAW;
4 C. THE VIOLATION DID NOT RESULT IN A THREAT TO PUBLIC HEALTH OR CAUSE
5 GRAVE OR SERIOUS ENVIRONMENTAL HARM;
6 D. THE RESPONDENT SHALL, IN GOOD FAITH, UNDERTAKE ALL NECESSARY STEPS
7 TO PROMPTLY CORRECT THE VIOLATION;
8 E. PROJECTS SHALL BE INITIATED IN ADDITION TO ALL REGULATORY COMPLI-
9 ANCE OBLIGATIONS AND SHALL BE DESIGNED TO PROVIDE AN ENVIRONMENTAL BENE-
10 FIT BEYOND THE BENEFITS OF FULL COMPLIANCE;
11 F. PROJECTS CANNOT BE ACTIVITIES OTHERWISE REQUIRED BY LAW OR ALREADY
12 OBTAINABLE UNDER THE DEPARTMENT'S AUTHORITY;
13 G. ALL VIOLATIONS SHALL BE CORRECTED TO ENSURE COMPLIANCE WITH APPLI-
14 CABLE ENVIRONMENTAL LAW AND REGULATIONS, AND RESPONDENTS SHALL NOT BE
15 GIVEN ADDITIONAL TIME TO CORRECT VIOLATIONS IN ORDER TO COMPLETE A
16 PROJECT;
17 H. PROJECTS SHALL NOT BE MEASURES WHICH THE RESPONDENT WOULD HAVE
18 UNDERTAKEN ANYWAY WITHIN THE NEXT FIVE YEARS;
19 I. PROJECTS SHALL BE DESIGNED TO PROVIDE A DISCERNIBLE BENEFIT TO THE
20 ENVIRONMENT RATHER THAN TO THE RESPONDENT;
21 J. TO ENSURE THAT THE DETERRENT EFFECT OF A SETTLEMENT IS ACHIEVED,
22 SETTLEMENTS INVOLVING A PROJECT SHALL INCLUDE A PAYABLE PENALTY COMPO-
23 NENT;
24 K. THE PROJECT IS WITHIN THE CAPABILITY OF THE DEPARTMENT TO REVIEW
25 AND MONITOR, AND SHALL YIELD BENEFITS SIGNIFICANT ENOUGH TO JUSTIFY
26 DEPARTMENT OVERSIGHT; AND
27 L. A PROJECT CAN NEITHER BE USED TO COVER ADMINISTRATIVE COSTS OF THE
28 DEPARTMENT NOR AS A REVENUE GENERATING MECHANISM FOR THE DEPARTMENT.
29 3. ENVIRONMENTAL BENEFIT PROJECTS SHALL MEET THE FOLLOWING CRITERIA:
30 A. THE PROJECT SHALL, TO THE EXTENT PRACTICABLE, BE LOCATED WITHIN THE
31 COUNTY WHERE THE VIOLATION OCCURRED, WITHIN TWENTY-FIVE LINEAR MILES OF
32 SITE OF THE VIOLATION;
33 B. AN ENVIRONMENTAL RESTORATION PROJECT SHALL GO BEYOND REPAIRING THE
34 DAMAGE CAUSED BY THE VIOLATION TO ENHANCE THE CONDITION OF THE ECOSYSTEM
35 OR GEOGRAPHIC AREA ADVERSELY AFFECTED;
36 C. A POLLUTION PREVENTION PROJECT SHALL SUBSTANTIALLY REDUCE OR
37 PREVENT THE GENERATION OR RELEASE OF POLLUTANTS THROUGH SOURCE
38 REDUCTION;
39 D. A RISK REDUCTION PROJECT SHALL DEVELOP AND IMPLEMENT RISK MANAGE-
40 MENT OR ACCIDENT PREVENTION/EMERGENCY PLANNING PROGRAMS WHICH PROVIDE
41 PROTECTION IN EXCESS OF INDUSTRY STANDARDS AND EXISTING OR FUTURE REGU-
42 LATORY REQUIREMENTS; AND
43 E. AN ENVIRONMENTAL EDUCATION PROJECT SHALL, TO THE EXTENT PRACTICA-
44 BLE, BE DIRECTED TOWARD UNDERSTANDING THE NATURE OF THE INDUSTRY WHICH
45 HAS CAUSED THE VIOLATION, HOW THE VIOLATION IMPACTED THE COMMUNITY AND
46 WAYS IN WHICH THE COMMUNITY CAN BECOME MORE VIGILANT IN MONITORING ENVI-
47 RONMENTAL INSULTS AND VIOLATIONS.
48 4. AN ENVIRONMENTAL BENEFIT PROJECT SHALL NOT INCLUDE THE FOLLOWING:
49 A. A CONTRIBUTION TO ENVIRONMENTAL RESEARCH AT A COLLEGE OR UNIVERSI-
50 TY;
51 B. A PROJECT, THOUGH BENEFICIAL TO THE IMPACTED LOCAL GOVERNMENT,
52 UNRELATED TO ENVIRONMENTAL PROTECTION;
53 C. STUDIES OR ASSESSMENTS WITHOUT A COMMITMENT TO IMPLEMENT THE
54 RESULTS;

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

4 E. PUBLIC EDUCATION PROJECTS.

5 5. SETTLEMENTS WHICH CONTAIN A PROJECT SHALL CONTAIN:

6 A. A PAYABLE PENALTY COMPONENT WHICH FULLY RECOVERS THE ECONOMIC BENE-
7 FIT OF NONCOMPLIANCE TO THE RESPONDENT;

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

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

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

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

18 B. HAVE ENFORCEABLE MILESTONE IMPLEMENTATION SCHEDULES; AND

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

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

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

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

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

33 S 2. This act shall take effect immediately.