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Seigfried, Sokola, Townsend

HOUSE OF REPRESENTATIVES
153rd GENERAL ASSEMBLY

HOUSE BILL NO. 210
AS AMENDED BY
HOUSE AMENDMENT NO. 1

AN ACT TO AMEND TITLES 3, 7, AND 16 OF THE DELAWARE CODE RELATING TO THE ENVIRONMENT.

WHEREAS, the Delaware General Assembly seeks to modernize penalties imposed on commercial polluters; and

WHEREAS, the General Assembly sees the need to divert a higher percentage of fines collected to impacted communities; and

WHEREAS, some commercial heavy industrial polluters are chronic violators who engage in a pattern of wilful neglect or reckless disregard of the permits or regulatory programs of the Delaware Department of Natural Resources and Environmental Control.

NOW, THEREFORE:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 2. Amend § 6005, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 6005. Enforcement; civil and administrative penalties; expenses.

(a) The Secretary shall enforce this chapter.

(b) Whoever violates this chapter or any rule or regulation duly promulgated thereunder, or any condition of a permit issued pursuant to § 6003 of this title, or any order of the Secretary, shall be punishable as follows:

(1) If the violation has been completed, by a civil penalty imposed by Superior Court of not less than ~~\$1,000~~ \$5,000 nor more than ~~\$10,000~~ \$40,000 for each completed violation. Each day of continued violation shall be considered as a separate violation. The Superior Court shall have jurisdiction of a violation in which a civil penalty is sought. If the violation has been completed and there is a substantial likelihood that it will reoccur, the Secretary may also seek a permanent or preliminary injunction or temporary restraining order in the Court of Chancery.

(3) In ~~his or her~~ the Secretary's discretion, the Secretary may impose an administrative penalty of not more than ~~\$10,000~~ \$40,000 for each day of violation. Prior to assessment of an administrative penalty, written notice of the

Secretary's proposal to impose such penalty shall be given to the violator, and the violator shall have 30 days from receipt of said notice to request a public hearing. ~~Any~~ A public hearing, if requested, right of ~~appeal~~ appeal, and judicial appeal shall be conducted pursuant to §§ 6006-6009 of this title. Assessment of an administrative penalty shall be determined by the nature, circumstances, extent and gravity of the violation, or violations, ability of violator to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation and such other matters as justice may require. Simultaneous violations of more than 1 pollutant or air contaminant parameter or of any other limitation or standard imposed under this chapter shall be treated as a single violation for each day. In the event of nonpayment of the administrative penalty after all legal appeals have been exhausted, a civil action may be brought by the Secretary in Superior Court for collection of the administrative penalty, including interest, attorneys' fees and costs, and the validity, amount and appropriateness of such administrative penalty shall not be subject to review.

(d) Any expenses and ~~75~~ 60 percent of civil or administrative penalties collected by the Department under this section are hereby appropriated to the Department to carry out the purposes of this chapter; however any expenditure or transfer must be approved by the Director of the Office of Management and Budget and the Controller General. The Department shall submit quarterly reports on the progress of the expenditures and/or projects. All expenditures must be recommended by the Department and approved by the Secretary. All penalty funds will be deposited in the Penalty Fund Account. All of the penalty fund expenditures made by the Department of Natural Resources and Environmental Control shall be reported annually to the Joint Finance Committee in the Department's annual budget presentation. Included in this presentation shall be an explanation of the process used to select the recipients of penalty fund money.

Section 3. Amend § 6013, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 6013. Criminal penalties.

(h) Whoever violates this chapter, or any rule or regulation promulgated thereunder, or any rule or regulation in effect as of July 26, 1974, or any permit condition, or any order of the Secretary, shall:

(1) For the first conviction, be fined ~~not less than \$100 nor more than \$500~~ for each day of violation;

(2) For a subsequent conviction for the same offense within a 10-year period, be fined ~~not less than \$500 nor more than \$1,500~~ \$5,000 for each day of violation; and

(3) In addition to the penalties provided in paragraphs (h)(1) and (h)(2) of this section, if the offense involves the failure to acquire a permit as required under this chapter, the offender shall be assessed the cost of the permit, plus a 25 percent surcharge, in addition to the fine.

(4) No less than 40 percent of penalties collected under paragraphs (h)(1), (h)(2), and (h)(3) of this section must be deposited in the Community Environmental Project Fund established in § 6042 of this title. The remaining 60 percent of criminal penalties collected under this paragraph must be appropriated to the Department.

Section 4. Amend § 6205, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 6205. Enforcement.

(a) Any person who violates a provision of this chapter or any rule or regulation promulgated thereunder shall be liable in any court of competent jurisdiction for a civil penalty of not less than ~~\$1,000~~ \$5,000 nor more than ~~\$10,000~~ \$40,000 for each day of violation. Any civil penalties collected under this section are hereby appropriated to the Department to carry out the purposes of this chapter.

Section 5. Amend § 6309, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 6309. Enforcement.

(b) In lieu of the compliance order procedures in subsection (a) of this section, any person who violates a provision of this chapter, any condition or limitation in a transfer facility approval or permit issued pursuant to this chapter, any variance condition or limitation, any rule or regulation or any order of the Secretary shall be liable for a civil penalty of not less than ~~\$1,000~~ \$5,000 nor more than ~~\$25,000~~ \$40,000 for each day of violation. The Superior Court shall have jurisdiction of offenses under this subsection.

Section 6. Amend § 7108, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 7108. Enforcement; investigations; injunctive relief.

(h) Whoever violates this chapter or any rule or regulation duly promulgated thereunder, or any variance or temporary emergency variance issued pursuant to this section or § 7109 of this title or any cease and desist order of the Secretary, shall be punished by a fine of not less than ~~\$25~~ \$250 nor more than ~~\$500~~ \$2,500 for each violation. Each day of violation shall be considered as a separate violation. Any court of competent jurisdiction shall have jurisdiction of offenses under this subsection.

(i) Any person who willfully or negligently violates this chapter or any rule or regulation duly promulgated thereunder, or any variance or temporary emergency variance or any cease and desist order of the Secretary shall be punished by a penalty of not less than ~~\$500~~ \$1,000 nor more than ~~\$3,000~~ \$10,000 for each day of such violation. The Superior Court shall have jurisdiction of offenses under this subsection.

Section 7. Amend § 7904, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows and by redesignating accordingly:

§ 7904. Permit modification, suspension, denial, revocation and chronic violator status.

(a) A “chronic violator” is a regulated party that has demonstrated an inability or unwillingness to comply with 1 or more of the Department’s regulatory programs.

(4) a. ~~The~~ Environmental Appeals Board, as established by § 6007 of this title, is granted jurisdiction to hear and determine the issues presented in an administrative complaint from the Secretary on chronic violator status, on such notice as is legally required. The Board shall have discretion in determining the procedures for the hearing process, provided that:

~~a.~~ 1. All parties to the complaint may appear personally or by counsel before the ~~Board~~; Board.

~~b.~~ 2. The Board shall provide a reasonable opportunity for discovery of the factual and legal contentions of the ~~parties~~; parties.

~~c.~~ 3. All parties to the complaint may produce any competent evidence in their behalf, although the Board may exclude any evidence that is plainly irrelevant, immaterial, insubstantial, cumulative or unduly repetitive, and may limit unduly repetitive proof, rebuttal ~~and cross-examination~~; and cross-examination.

~~d.~~ 4. The burden is on the complaining party to prove that the regulated party is a chronic violator and that the administrative actions and penalties sought are supported by a preponderance of the evidence before the Board.

b. The Board's order on chronic violator status shall contain findings of fact and conclusions of law based on the record, which shall include but not be limited to: notices and other underlying procedural documents; a transcript of the hearing; documents entered at the hearing; and documents relied upon in deciding chronic violator status. ~~Persons or facilities determined to be chronic violators~~ Either party may appeal the Board's decision, or any part of its order, to the Superior Court under § 6009 of this title.

(b) One or more of the factors to be considered in determining whether a regulated party has engaged in a pattern of wilful neglect or reckless disregard of the permits or regulatory programs of the Department shall include:

(1) The nature and extent of the harm caused or ~~threatened~~; threatened.

(2) The impact on the integrity of regulatory ~~programs~~; programs.

(3) Duration of noncompliance, including without limitation the duration of the violations and the duration over which violations have continued to ~~occur~~; occur.

(4) Number of violations of a similar ~~nature~~; nature.

- (5) Total number of violations of all ~~types~~; types.
- (6) Economic benefit or harm attributable to violations and ~~none compliance~~; noncompliance.
- (7) Relationship and relevance of violations to activity for which permit is ~~sought~~; sought.
- (8) ~~The state of mind of the violator~~;
- (9) (8) The actions of new owners or managers, where ownership or management has changed at the ~~facility~~; facility.
- (10) (9) Actions taken or not taken to prevent, mitigate or respond to harm caused or threatened by the ~~violation~~; violation.
- (11) (10) Whether any or all of the violations were self-reported within 15 consecutive days after the date of ~~discovery~~; discovery.
- (12) (11) The amount of an illegal release of a pollutant in proportion to the amount legally authorized to be released, if ~~any~~; any.
- (13) (12) Whether the regulated party has adequately capitalized, funded or modernized its operations, maintenance, mechanical integrity efforts, training programs and or risk management reviews so that compliance with the Department's regulatory programs can be reasonably ~~expected~~; expected.
- (14) (13) Whether the regulated party has used recognized and generally accepted good engineering and other related professional practices established within the regulated party's field or industry so that compliance with the Department's regulatory programs can be reasonably ~~expected~~; expected.
- (15) (14) The size, scope and complexity of operations and the number of facilities located in the State.
- (15) Whether any violation constitutes a High Priority Violation according to the United States Environmental Protection Agency.

Section 8. Amend § 7906, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 7906. Penalties for chronic violators.

In addition to other applicable enforcement provisions contained in relevant sections of chapters covered by § 7901(b) of this title, the Secretary is authorized to impose an administrative penalty of up to ~~\$10,000~~ \$40,000 per day for each violation against any regulated party that is determined to be a chronic violator in accordance with the provisions of § 7904(a) of this title, provided that simultaneous violations of more than 1 pollutant or air contaminant parameter or of any other limitation or standard may be treated as separately punishable violations within each day, and multiple, intermittent violations of a single pollutant or air contaminant parameter or any other limitation or standard may be treated as separately

punishable violations within each day. Any administrative penalties collected by the Department under this section are hereby appropriated pursuant and subject to the procedures and requirement of § 6005(d) of this title.

Section 9. Amend § 9109, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 9109. Enforcement.

(h) In any action brought under subsection (e) of this section for a refusal to comply with an order, the person found responsible shall be liable for payment of:

(1) An amount at least equal to, but not greater than 3 times the amount of, any remedial costs incurred by the State as a result of the person's refusal to comply; and

(2) A civil penalty of up to ~~\$10,000~~ \$40,000 per day for each day the person refuses to comply. For purposes of determining a civil penalty, the period of noncompliance shall be deemed to commence on the day of the Secretary's decision and continue until full compliance with the terms of the order is achieved.

Section 10. Amend § 6042, Title 7 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 6042. Civil and administrative penalties; Community Environmental Project Fund.

(b) The Fund shall consist of ~~25~~ 40 percent of all civil or administrative penalties collected by the Department pursuant to § 4015, § 6005, § 6205, § 6617, § 7011, § 7108, § 7214, § 7906, § 9109, or § 9111 of this title. ~~Twenty-five~~ Forty percent of such civil and administrative penalties are hereby appropriated to the Fund, subject to the requirements of this section.

(d) The Secretary, after consultation with the Community Involvement Advisory Council, shall give priority to Community Environmental Projects which benefit communities that are most impacted by specific infraction(s) or violation(s). Specifically, the ~~Secretary, at his or her discretion,~~ Secretary shall determine whether a proposed Project is located within ~~the watershed or airshed adversely affected by a~~ two-mile radius of the violation or infraction as part of the evaluation process. The Secretary shall ensure that records identify the location of each civil or administrative penalty. The Secretary shall make eligible communities aware of the Community Environmental Project Fund. No provision of this section shall be construed to require the Department to expend funds from the Fund in the absence of a suitable Project within the community where the violation or infraction occurred. The Secretary may also determine that the requirements of this subsection cannot practicably be met with respect to expenditures from the Fund associated with a penalty from a facility or location because such amount is insufficient or too large to be an appropriate expenditure. The expenditure of

funds required under this subsection may be waived by the Secretary, with the concurrence of the Director of the Office of Management and Budget and Controller General.

Section 11. Amend § 1301, Title 16 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1301. Pollution of streams supplying drinking water; nuisance; penalty; abatement; jurisdiction.

(a) No person shall cast, put, place, discharge in or permit or suffer to be cast, put, placed, discharged in or to escape into any running stream of water within the limits of this State, from which stream the inhabitants of any borough, town or city within this State are supplied wholly or in part with water for and as drink or beverage, any dye-stuffs, drugs, chemicals or other substance or matter of any kind whatsoever whereby the water so supplied as and for a drink or beverage is made and becomes noxious to the health or disagreeable to the senses of smell or taste.

(b) Whoever violates subsection (a) of this section shall be fined not less than ~~\$1,000~~ \$5,000 nor more than ~~\$5,000~~; \$15,000.

Section 12. This Act is known as the Pollution Accountability Act.