

ASSEMBLY, No. 233

STATE OF NEW JERSEY

Introduced Pending Technical Review by Legislative Counsel

PRE-FILED FOR INTRODUCTION IN THE 1996 SESSION

By Assemblyman GARCIA and Assemblywoman GILL

1 AN ACT concerning the posting of bonds for violations of the "Water
2 Pollution Control Act" and amending P.L.1977, c.74 and P.L.1991,
3 c.8.

4

5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:

7

8 1. Section 10 of P.L.1977, c.74 (C.58:10A-10) is amended to read
9 as follows:

10 10. a. Whenever the commissioner finds that any person is in
11 violation of any provision of this act, he shall:

12 (1) Issue an order requiring any such person to comply in
13 accordance with subsection b. of this section; or

14 (2) Bring a civil action in accordance with subsection c. of this
15 section; or

16 (3) Levy a civil administrative penalty in accordance with
17 subsection d. of this section; or

18 (4) Bring an action for a civil penalty in accordance with
19 subsection e. of this section; or

20 (5) Petition the Attorney General to bring a criminal action in
21 accordance with subsection f. of this section.

22 Use of any of the remedies specified under this section shall not
23 preclude use of any other remedy specified.

24 In the case of one or more pollutants for which interim enforcement
25 limits have been established pursuant to an administrative order,
26 including an administrative consent order, by the department or a local
27 agency, the permittee shall be liable for the enforcement limits
28 stipulated therein.

29 b. Whenever the commissioner finds that any person is in violation
30 of any provision of this act, he may issue an order (1) specifying the
31 provision or provisions of this act, or the rule, regulation, water
32 quality standard, effluent limitation, or permit of which he is in

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

1 violation, (2) citing the action which caused such violation, (3)
2 requiring compliance with such provision or provisions, and (4) giving
3 notice to the person of his right to a hearing on the matters contained
4 in the order.

5 c. The commissioner is authorized to commence a civil action in
6 Superior Court for appropriate relief for any violation of this act or of
7 a permit issued hereunder. Such relief may include, singly or in
8 combination:

9 (1) A temporary or permanent injunction;

10 (2) Assessment of the violator for the reasonable costs of any
11 investigation, inspection, or monitoring survey which led to the
12 establishment of the violation, and for the reasonable costs of
13 preparing and litigating the case under this subsection;

14 (3) Assessment of the violator for any reasonable cost incurred by
15 the State in removing, correcting or terminating the adverse effects
16 upon water quality resulting from any unauthorized discharge of
17 pollutants for which the action under this subsection may have been
18 brought;

19 (4) Assessment against the violator of compensatory damages for
20 any loss or destruction of wildlife, fish or aquatic life, or other natural
21 resources, and for any other actual damages caused by an unauthorized
22 discharge;

23 (5) Assessment against a violator of the actual amount of any
24 economic benefits accruing to the violator from a violation. Economic
25 benefits may include the amount of any savings realized from avoided
26 capital or noncapital costs resulting from the violation; the return
27 earned or that may be earned on the amount of avoided costs; any
28 benefits accruing to the violator as a result of a competitive market
29 advantage enjoyed by reason of the violation; or any other benefits
30 resulting from the violation.

31 Assessments under paragraph (4) of this subsection shall be paid to
32 the State Treasurer, except that compensatory damages shall be paid
33 by specific order of the court to any persons who have been aggrieved
34 by the unauthorized discharge. Assessments pursuant to actions
35 brought by the commissioner under paragraphs (2), (3) and (5) of this
36 subsection shall be paid to the "Clean Water Enforcement Fund,"
37 established pursuant to section 12 of P.L.1990, c.28 (C.58:10A-14.4).

38 d. (1) (a) The commissioner is authorized to assess, in
39 accordance with a uniform policy adopted therefor, a civil
40 administrative penalty of not more than \$50,000.00 for each violation
41 and each day during which such violation continues shall constitute an
42 additional, separate, and distinct offense. Any amount assessed under
43 this subsection shall fall within a range established by regulation by the
44 commissioner for violations of similar type, seriousness, and duration.
45 The commissioner shall adopt, by regulation, a uniform assessment of
46 civil penalties policy by January 1, 1992.

1 (b) In adopting rules for a uniform penalty policy for determining
2 the amount of a penalty to be assessed, the commissioner shall take
3 into account the type, seriousness, including extent, toxicity, and
4 frequency of a violation based upon the harm to public health or the
5 environment resulting from the violation, the economic benefits from
6 the violation gained by the violator, the degree of cooperation or
7 recalcitrance of the violator in remedying the violation, any measures
8 taken by the violator to avoid a repetition of the violation, any unusual
9 or extraordinary costs directly or indirectly imposed on the public by
10 the violation other than costs recoverable pursuant to paragraph (3) or
11 (4) of subsection c. of this section, and any other pertinent factors that
12 the commissioner determines measure the seriousness or frequency of
13 the violation, or conduct of the violator.

14 (c) In addition to the assessment of a civil administrative penalty,
15 the commissioner may, by administrative order and upon an
16 appropriate finding, assess a violator for costs authorized pursuant to
17 paragraphs (2) and (3) of subsection c. of this section.

18 (2) No assessment shall be levied pursuant to this subsection until
19 after the discharger has been notified by certified mail or personal
20 service. The notice shall include a reference to the section of the
21 statute, regulation, order or permit condition violated; a concise
22 statement of the facts alleged to constitute a violation; a statement of
23 the amount of the civil penalties to be imposed; and a statement of the
24 party's right to a hearing. The ordered party shall have 20 days from
25 receipt of the notice within which to deliver to the commissioner a
26 written request for a hearing. After the hearing and upon finding that
27 a violation has occurred, the commissioner may issue a final order
28 after assessing the amount of the fine specified in the notice. If no
29 hearing is requested, then the notice shall become a final order after
30 the expiration of the 20-day period. Payment of the assessment is due
31 when a final order is issued or the notice becomes a final order.

32 (3) If a civil administrative penalty imposed pursuant to this
33 subsection is not paid within 30 days of the date that the penalty is due
34 and owing, and the penalty is not contested by the person against
35 whom the penalty has been assessed, or the person fails to make a
36 payment pursuant to a payment schedule entered into with the
37 department, an interest charge shall accrue on the amount of the
38 penalty due and owing from the 30th day after the date on which the
39 penalty was due and owing. The rate of interest shall be that
40 established by the New Jersey Supreme Court for interest rates on
41 judgments, as set forth in the Rules Governing the Courts of the State
42 of New Jersey.

43 (4) The authority to levy a civil administrative penalty is in addition
44 to all other enforcement provisions in this act, and the payment of any
45 assessment shall not be deemed to affect the availability of any other
46 enforcement provisions in connection with the violation for which the

1 assessment is levied. Any civil administrative penalty assessed under
2 this section may be compromised by the commissioner upon the
3 posting of a performance bond by the violator, or upon such terms and
4 conditions as the commissioner may establish by regulation, except
5 that the amount compromised shall not be more than 50% of the
6 assessed penalty, and in no instance shall the amount of that
7 compromised penalty be less than the statutory minimum amount, if
8 applicable, prescribed in section 6 of P.L.1990, c.28 (C.58:10A-10.1).
9 In the case of a violator who is a local agency that enters into an
10 administrative consent order, the terms of which require the local
11 agency to take prescribed measures to comply with its permit, the
12 commissioner shall have full discretion to compromise the amount of
13 penalties assessed or due for violations occurring during a period up
14 to 24 months preceding the entering into the administrative consent
15 order; except that the amount of the compromised penalty may not be
16 less than the statutory minimum amount, if applicable, prescribed in
17 section 6 of P.L.1990, c.28 (C.58:10A-10.1). A civil administrative
18 penalty assessed against a local agency for a violation of an
19 administrative consent order may not be compromised by more than
20 50% of the assessed penalty. In no instance shall the amount of a
21 compromised penalty assessed against a local agency be less than the
22 statutory minimum amount, if applicable, prescribed in section 6 of
23 P.L.1990, c.28 (C.58:10A-10.1). The commissioner shall not
24 compromise the amount of any component of a civil administrative
25 penalty which represents the economic benefit gained by the violator
26 from the violation.

27 (5) [A person, other than a local agency, appealing a penalty
28 assessed against that person in accordance with this subsection,
29 whether contested as a contested case pursuant to P.L.1968, c.410
30 (C.52:14B-1 et seq.) or by appeal to a court of competent jurisdiction,
31 shall, as a condition of filing the appeal, post with the commissioner
32 a refundable bond or other security approved by the commissioner, in
33 the amount of the civil administrative penalty assessed. If the
34 department's assessed penalty is upheld in full or in part, the
35 department shall be entitled to a daily interest charge on the amount
36 of the judgment from the date of the posting of the security with the
37 commissioner and until paid in full. The rate of interest shall be that
38 established by the New Jersey Supreme Court for interest rates on
39 judgments, as set forth in the Rules Governing the Courts of the State
40 of New Jersey. In addition, if the amount of the penalty assessed by
41 the department is upheld in full in an appeal of the assessment at an
42 administrative hearing or at a court of competent jurisdiction, the
43 person appealing the penalty shall reimburse the department for all
44 reasonable costs incurred by the department in preparing and litigating
45 the imposition of the assessment, except that no litigation costs shall
46 be imposed where the appeal ultimately results in a reduction or

1 elimination of the assessed penalty.] (Deleted by amendment, P.L. ____,
2 c. __) (now before the Legislature as this bill)

3 (6) A civil administrative penalty imposed pursuant to a final order:

4 (a) may be collected or enforced by summary proceedings in a
5 court of competent jurisdiction in accordance with "the penalty
6 enforcement law," N.J.S.2A:58-1 et seq.; or

7 (b) shall constitute a debt of the violator or discharger and the civil
8 administrative penalty may be docketed with the clerk of the Superior
9 Court, and shall have the same standing as any judgment docketed
10 pursuant to N.J.S.2A:16-1; except that no lien shall attach to the real
11 property of a violator pursuant to this subsection if the violator posts
12 a refundable bond or other security with the commissioner pursuant to
13 an appeal of a final order to the Appellate Division of the Superior
14 Court. No lien shall attach to the property of a local agency.

15 (7) The commissioner shall refer to the Attorney General and the
16 county prosecutor of the county in which the violations occurred the
17 record of violations of any permittee determined to be a significant
18 noncomplier.

19 e. Any person who violates this act or an administrative order
20 issued pursuant to subsection b. or a court order issued pursuant to
21 subsection c., or who fails to pay a civil administrative penalty in full
22 pursuant to subsection d., or to make a payment pursuant to a payment
23 schedule entered into with the department, shall be subject upon order
24 of a court to a civil penalty not to exceed \$50,000.00 per day of such
25 violation, and each day's continuance of the violation shall constitute
26 a separate violation. Any penalty incurred under this subsection may
27 be recovered with costs, and, if applicable, interest charges, in a
28 summary proceeding pursuant to "the penalty enforcement law"
29 (N.J.S.2A:58-1 et seq.). In addition to any civil penalties, costs or
30 interest charges, the court, in accordance with paragraph (5) of
31 subsection c. of this section, may assess against a violator the amount
32 of any actual economic benefits accruing to the violator from the
33 violation. The Superior Court shall have jurisdiction to enforce "the
34 penalty enforcement law" in conjunction with this act.

35 f. (1)(a) Any person who purposely, knowingly, or recklessly
36 violates this act, and the violation causes a significant adverse
37 environmental effect, shall, upon conviction, be guilty of a crime of the
38 second degree, and shall, notwithstanding the provisions of subsection
39 a. of N.J.S.2C:43-3, be subject to a fine of not less than \$25,000 nor
40 more than \$250,000 per day of violation, or by imprisonment, or by
41 both.

42 (b) As used in this paragraph, a significant adverse environmental
43 effect exists when an action or omission of the defendant causes:
44 serious harm or damage to wildlife, freshwater or saltwater fish, any
45 other aquatic or marine life, water fowl, or to their habitats, or to
46 livestock, or agricultural crops; serious harm, or degradation of, any

1 ground or surface waters used for drinking, agricultural, navigational,
2 recreational, or industrial purposes; or any other serious articulable
3 harm or damage to, or degradation of, the lands or waters of the State,
4 including ocean waters subject to its jurisdiction pursuant to P.L.1988,
5 c.61 (C.58:10A-47 et seq.).

6 (2) Any person who purposely, knowingly, or recklessly violates
7 this act, including making a false statement, representation, or
8 certification in any application, record, or other document filed or
9 required to be maintained under this act, or by falsifying, tampering
10 with, or rendering inaccurate any monitoring device or method
11 required to be maintained pursuant to this act, or by failing to submit
12 a monitoring report, or any portion thereof, required pursuant to this
13 act, shall, upon conviction, be guilty of a crime of the third degree, and
14 shall, notwithstanding the provisions of subsection b. of
15 N.J.S.2C:43-3, be subject to a fine of not less than \$5,000 nor more
16 than \$75,000 per day of violation, or by imprisonment, or by both.

17 (3) Any person who negligently violates this act, including making
18 a false statement, representation, or certification in any application,
19 record, or other document filed or required to be maintained under
20 this act, or by falsifying, tampering with, or rendering inaccurate any
21 monitoring device or method required to be maintained pursuant to
22 this act, or by failing to submit a discharge monitoring report, or any
23 portion thereof, required pursuant to this act, shall, upon conviction,
24 be guilty of a crime of the fourth degree, and shall, notwithstanding
25 the provisions of subsection b. of N.J.S.2C:43-3, be subject to a fine
26 of not less than \$5,000 nor more than \$50,000 per day of violation, or
27 by imprisonment, or by both.

28 (4) Any person who purposely or knowingly violates an effluent
29 limitation or other condition of a permit, or who discharges without a
30 permit, and who knows at that time that he thereby places another
31 person in imminent danger of death or serious bodily injury, as defined
32 in subsection b. of N.J.S.2C:11-1, shall, upon conviction, be guilty of
33 a crime of the first degree, and shall, notwithstanding the provisions
34 of subsection a. of N.J.S.2C:43-3, be subject of a fine of not less than
35 \$50,000 nor more than \$250,000, or, in the case of a corporation, a
36 fine of not less than \$200,000 nor more than \$1,000,000, or by
37 imprisonment or by both.

38 (5) As used in this subsection, "purposely," "knowingly,"
39 "recklessly," and "negligently" shall have the same meaning as defined
40 in N.J.S.2C:2-2.

41 g. All conveyances used or intended for use in the purposeful or
42 knowing discharge, in violation of the provisions of P.L.1977, c.74
43 (C.58:10A-1 et seq.), of any pollutant or toxic pollutant are subject to
44 forfeiture to the State pursuant to the provisions of P.L.1981, c.387
45 (C.13:1K-1 et seq.).

46 h. The amendatory portions of this section, as set forth in

1 P.L.1990, c.28 (C.58:10A-10.1 et al.), except for subsection f. of this
2 section, shall not apply to violations occurring prior to July 1, 1991.
3 (cf: P.L.1990, c.28, s.5.)

4

5 2. Section 5 of P.L.1991, c.8 (C.58:10A-10.8) is amended to read
6 as follows:

7 5. a. [A person appealing a civil administrative penalty or
8 assessment levied in accordance with section 2 of P.L.1991, c.8
9 (C.58:10A-10.5), whether contested as a contested case pursuant to
10 P.L.1968, c.410 (C.52:14B-1 et seq.) or by appeal to a court of
11 competent jurisdiction, shall, as a condition of filing the appeal, post
12 with the delegated local agency a refundable bond, or other security
13 approved by the delegated local agency, in the amount of the civil
14 administrative penalty or assessment levied pursuant to a civil
15 administrative hearing. If the civil administrative penalty or
16 assessment is upheld in whole or in part, the delegated local agency
17 shall be entitled to a daily interest charge on the amount of the
18 judgment from the date of the posting of the security with the
19 commissioner until that amount is paid in full. The rate of interest
20 shall be that established by the New Jersey Supreme Court for interest
21 rates on judgments, as set forth in the Rules Governing the Courts of
22 the State of New Jersey.] Deleted by amendment, P.L. , c.) (now
23 before the Legislature as this bill)

24 b. A person who is assessed a civil administrative penalty, or is
25 subject to an assessment levied pursuant to section 2 of P.L.1991, c.8
26 (C.58:10A-10.5), and fails to contest or to pay the penalty or
27 assessment, or fails to enter into a payment schedule with the
28 delegated local agency within 30 days of the date that the penalty or
29 assessment is due and owing, shall be subject to an interest charge on
30 the amount of the penalty or assessment from the date that the amount
31 was due and owing. The rate of interest shall be that authorized
32 pursuant to subsection a. of this section.

33 c. Any person who fails to pay a civil administrative penalty or
34 assessment, in whole or in part, when due and owing, or who fails to
35 agree to a payment schedule therefor, shall be subject to the civil
36 penalty provisions of subsection e. of section 10 of P.L.1977, c.74
37 (C.58:10A-10).

38 d. A civil administrative penalty or assessment imposed pursuant
39 to a final order:

40 (1) may be collected or enforced by summary proceeding in a court
41 of competent jurisdiction in accordance with the "penalty enforcement
42 law," (N.J.S.2A:58-1 et seq.); or

43 (2) shall constitute a debt of the violator, and the civil
44 administrative penalty may be docketed with the clerk of the Superior

1 Court, and shall have the same standing as any judgment docketed
2 pursuant to N.J.S.2A:16-1.
3 (cf: P.L.1991, c.8, s.5.)

4

5 3. This act shall take effect immediately.

6

7

8

STATEMENT

9

10 This bill removes the requirement in the “Water Pollution Control
11 Act,” P.L.1977, c.74 (C.58:10A-1 et seq.), that a person appealing a
12 civil administrative penalty assessed against that person, whether
13 contested as a contested case pursuant to P.L.1968, c.410 (C.52:14B-
14 1 et seq.) or by appeal to a court of competent jurisdiction, must, as
15 a condition of filing the appeal, post with the Commissioner of
16 Environmental Protection a refundable bond or other security
17 approved by the commissioner, in the amount of the civil
18 administrative penalty assessed. The bill also removes a similar
19 requirement for cases enforced by delegated local agencies.

20 In St. James v. Department of Environmental Protection and
21 Energy, 275 N.J. Super. 342 (App. Div. 1994), the court held that
22 implementation by the Department of Environmental Protection of the
23 current statutory provision requiring deposit of a proposed penalty as
24 a precondition to obtaining a hearing violates constitutional due
25 process.

26

27

28

29

30 Removes requirement that security be posted by person appealing
31 water pollution penalty.