



Thinking Globally, Acting Locally

The New Jersey Department of Environmental Protection's Municipal Ticketing Program

by Jeffrey S. Widmayer and Mark S. Heinzelmann

A gas station owner receives a ticket in the mail from the local municipal court. It cites a violation of an environmental regulation and orders him to appear in court. Perplexed, he seeks legal advice. What has happened?

This article will provide some background information about the New Jersey Department of Environmental Protection's (DEP's) expanded Municipal Ticketing Program.

The DEP's Site Remediation Program initiated its expanded Municipal Ticketing Program to promote quick and efficient compliance with New Jersey's environmental remediation statutes and regulations while preserving agency and judicial resources. Under the program, code enforcement officials within the Site Remediation Program issue tickets for a defendant's failure to remediate discharges of hazardous substances

in accordance with the regulations promulgated pursuant to the New Jersey Spill Compensation and Control Act.¹

When a defendant is willing to correct a violation, the matter may be resolved through the execution of an administrative consent order, in which the defendant agrees to fully conduct the remediation and pay a negotiated penalty. In this manner, most matters are resolved within months. Less commonly, when the parties are not agreeable to settlement, the matters proceed to a hearing before a municipal court judge, at the conclusion of which the judge may assess a penalty.

History of the Program

The DEP has a long history of enforcement in municipal courts. For years, with the aid of the Division of Law, it has locally prosecuted violations of New Jersey's fish and wildlife regulations. Until recently, the DEP's Site Remediation Pro-

gram had not explored the option of filing municipal court actions. In the summer of 2014, acknowledging its past success in municipal court and the need for an efficient enforcement alternative, the DEP began a new municipal court initiative by filing several pilot cases in Ocean Township, Asbury Park, and Middlesex Borough. These complaints, and all subsequent complaints filed by the DEP, were for a Spill Act responsible party's failure to hire a licensed site remediation professional (LSRP) to remediate a discharge of a hazardous substance.² Responsible parties have thus far included owners and operators of contaminated properties such as gas stations, dry cleaners, industrial sites and garages.

Following its success in the above jurisdictions, the DEP expanded the program statewide and has issued tickets in municipalities as far north as Haworth Borough, Bergen County, and as far south as Bridgeton, Cumberland County. The DEP continues to issue tickets for, primarily, failure to remediate (*i.e.*, failing to hire an LSRP). But according to Assistant Director for Site Remediation Enforcement Kevin Kratina, the DEP has recently resolved to expand the program to include several other Spill Act violations, particularly failure to submit remediation documents, including initial receptor evaluations, site investigation reports, and remedial investigation reports.

Advantages of the Municipal Ticketing Program

The Municipal Ticketing Program offers several advantages to the DEP over more traditional enforcement options. For failure to remediate a contaminated site, the DEP has historically exercised its authority to issue an administrative order and notice of civil administrative penalty assessment (AONOCAPA) to a responsible party. As the regulated community is aware, AONOCAPAs, unless settled, can take

months to proceed through the hearing process in the New Jersey Office of Administrative Law. Litigation costs for both the DEP and defendants can be high in these proceedings, and the resulting penalties can be three to five times higher than settlements resulting from municipal court actions.

The Municipal Ticketing Program, through streamlined municipal court proceedings, can achieve a resolution more quickly and efficiently than traditional modes of enforcement. Once complaints are issued, defendants receive a short, simple ticket in the mail that succinctly states the relevant violation and provides a court date. Two to six weeks after issuance of a ticket, municipal courts will schedule a first appearance, at which the parties will appear before a local municipal court judge who will often suggest early settlement. Either through a hearing or settlement, the DEP can typically resolve cases within six months of issuance of a ticket.

Statutory Authority

The DEP's authority to bring a civil penalty action in municipal court is established by the Spill Act, which imposes liability on any person who has intentionally or unintentionally discharged hazardous substances in New Jersey or who is "in any way responsible" for those hazardous substances.³ New Jersey courts have determined that the inclusion of the term "in any way responsible" in the Spill Act imposes liability on a purchaser of contaminated property, even if that person was not directly involved in the discharge and/or did not own the property at the time the discharge occurred.⁴

Spill Act responsible parties have an affirmative obligation to perform certain tasks at property where a discharge of a hazardous substance has occurred. Since the enactment of the Site Remediation Reform Act in 2009,⁵ as well as related

amendments to the Brownfield and Contaminated Site Remediation Act,⁶ these obligations normally start with the report of a discharge to the DEP hotline, followed by submission of a confirmed discharge notification form. A responsible party must then hire an LSRP, who will oversee the performance of the remediation.⁷ The statutory obligation to hire an LSRP, among others, is memorialized in the DEP's environmental regulations.⁸

The DEP has a range of options when a responsible party violates the Spill Act or any environmental regulation. It may bring an action in superior court for injunctive and monetary relief, it may issue an AONOCAPA, or it may bring a penalty action.⁹ In a penalty action, a responsible party is subject to a penalty of up to \$50,000 per day for each day its violation continues, and the DEP may recover that penalty in a summary proceeding before a local municipal court (or in the New Jersey Superior Court).¹⁰ Penalty actions in municipal court proceed summarily under the Penalty Enforcement Law so long as the penalty statute permits municipal court proceedings, as does the Spill Act.¹¹

Municipal Court Procedure

When a client arrives in a practitioner's office with a municipal court ticket and a file containing correspondence from the DEP's Site Remediation Program, it may contain notices of violation, compliance assistance letters, or a directive to remediate the hazardous substance. The client may inform the practitioner that he or she has received several telephone calls from the DEP. The client, nevertheless, has failed to remediate the discharge of a hazardous substance in accordance with the DEP's rules and regulations.

Upon issuance of the ticket, the DEP refers the matter to the Division of Law for assignment to a deputy attorney general. The deputy will send a letter brief to

the municipal judge describing the violation and the applicable law. The deputy will also send a letter to the responsible party or his or her attorney explaining the violation and the possibility of settlement through early compliance.

In response to the DEP's complaints, defendants may appear *pro se* or through an attorney. Generally, corporations are required to retain legal counsel.¹² In the case of an individual who fails to appear in response to a complaint, the municipal court judge can issue a bench warrant. In the case of a corporate defendant failing to appear, a hearing may be held *in absentia*.¹³

In most cases, defendants quickly come into compliance by hiring an LSRP to oversee the remediation. The defendant and the DEP may then enter into an administrative consent order through which the defendant agrees to complete the remediation under specifically enumerated deadlines, and pay a negotiated penalty. Under these circumstances, the DEP will withdraw its ticket when the defendant pays the agreed-upon penalty.

If attempts at settlement fail, the matter will proceed to a hearing before the municipal court judge. These hearings are summary proceedings under the Penalty Enforcement Law, and formal discovery is usually not conducted. If any discovery is required, it is generally limited. The DEP will either provide a copy of its file to the defendant, or the defendant will conduct an Open Public Records Act review of the file at the DEP's headquarters in Trenton. A deputy will present the case in place of the municipal prosecutor under the authority granted by New Jersey Court Rule 7:8-7.¹⁴ The court will hear testimony on any factual issues and consider any documentary evidence it deems relevant.¹⁵

As in most civil matters, the DEP's burden of proof in civil penalty actions is by a preponderance of the evidence.¹⁶ At the completion of the hearing, the municipal court judge will determine

whether the DEP has met its burden to show that a regulatory violation has occurred. If so, the judge will impose a penalty under the authority granted by the Spill Act.¹⁷ If the DEP obtains a judgment in its favor, it will be docketed in the superior court as a judgment lien against all real and personal property of the defendant. Any penalty judgments rendered by the municipal court are subject to *de novo* review before the superior court, Law Division.¹⁸

Conclusion

Between April 2014 and February 2016, the DEP filed 35 complaints in Mercer, Monmouth, Camden, Essex, Bergen, Middlesex, Union, Passaic, Hudson and Cumberland counties. The program has been highly successful, with a compliance rate of approximately 80 percent. Negotiated penalties have ranged from \$1,500 to \$12,500, depending on the circumstances. When cases go to a hearing, municipal court judges have, in certain instances, awarded the full regulatory penalty. In the event that a practitioner has a client who receives a municipal court ticket, the attorney should contact the deputy attorney general assigned to the case to discuss the factual basis of the matter and options for resolution.

The DEP plans, in the near future, to continue to expand the program, and it may begin ticketing for violations of any regulatory deadline. Through this program, the DEP hopes to continue to swiftly effectuate the cleanup of contaminated sites across New Jersey in order to protect public health and the environment. ☺

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ENDNOTES

1. N.J.S.A. 58:10-23.11 *et seq.*
2. See N.J.A.C. 7:26C-2.3(a).
3. N.J.S.A. 58:10-23.11g(c)(1).
4. See N.J.S.A. 58:10-23.11g(c)(3) and (d)(5); see also *New Jersey Schs. Dev. Auth. v. Marcantune*, 428 N.J. Super. 546, 558-61 (2012), *certif. denied*, 213 N.J. 535 (2013).
5. N.J.S.A. 58:10C-1 to -29.
6. N.J.S.A. 58:10B-1 to -31.
7. See N.J.S.A. 58:10B-1.3.
8. N.J.A.C. 7:26C-2.3(a).
9. N.J.S.A. 58:10-23.11u(a).
10. N.J.S.A. 58:10-23.11u(d).
11. N.J.S.A. 2A:58-11; N.J.S.A. 58:10-23.11u(d).
12. See R. 7:6-2 (a)(2).
13. See *id.*
14. R. 7:8-7 provides that the "Attorney General may appear in any municipal court in any action on behalf of the State and conduct the prosecution either on the court's request or on the request of the respective public official."
15. N.J.S.A. 2A:58-11.
16. *Dep't of Conservation and Econ. Dev. v. Scipio*, 88 N.J. Super. 315, 322 (App. Div. 1965), *certif. denied*, 45 N.J. 598 (1965).
17. N.J.S.A. 58:10-23.11u(d).
18. R. 4:74-2 to -3.