



New Jersey Department of Environmental Protection Amends Rules that Address the Processing of Damage Claims Pursuant to the Spill Compensation and Control Act

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The New Jersey Spill Compensation Fund (“the Spill Fund”) was established in 1976 when the State Legislature enacted the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. (“the Spill Act”), which prohibits the discharge of petroleum and other hazardous substances and provides for the cleanup and removal of such discharges. The purpose of the Spill Fund is to provide “swift and adequate” compensation to persons damaged by the discharge of hazardous substances. See N.J.S.A. 58:10-23.11a. These damages include all cleanup and removal costs, and all direct and indirect damages arising in connection with a discharge of a hazardous substance. Spill Fund revenues are generated primarily from a tax on the initial transfer of each barrel of petroleum and other hazardous substances from major facilities. See N.J.S.A. 58:10-23.11h. Other sources include interest earned on Spill Fund monies, penalties collected for violations of the Spill Act, and cost recovery on cleanup actions. See N.J.S.A. 58:10-23.11i.

In January 1993, New Jersey Department of Environmental Protection (“NJDEP”) adopted rules, located at N.J.A.C. 7:1J, to provide guidance for how Spill Fund claims are processed. These rules specify the procedures for the entire claim process, including: the original filing of the claim; the initial acceptance or denial of the claim by the Spill Fund administrator; administrative closure of the claim; claim settlement negotiations between the claimant and potentially responsible parties; settlement negotiations between the claimant and the Spill Fund; and arbitration of claims. These rules, however, were scheduled to sunset on August 4, 2008, pursuant to the provisions of Executive Order No. 66 (1978) and N.J.S.A. 52:14B-5.1, meaning they would need to be readopted to continue to be effective. The expiration date was extended by 180 days and on January 23, 2009, (then Acting) Commissioner Mark N. Mauriello re-adopted these rules, effective on January 31, 2009, with amendments that became effective on March 2, 2009.

A summary of some of the proposed amendments follows:

N.J.A.C. 7:1J-1.4. The definition of “applicable contaminant standard” no longer references the maximum contaminant level established under the State and Federal drinking water quality standards. Instead, it utilizes the remediation standard developed pursuant to the Remediation Standards rules at N.J.A.C. 7:26D and site specific remediation standards that are developed pursuant to the remediation standards provision of the Brownfield and Contaminated Site Remediation Act (“the Brownfield Act”) at N.J.S.A. 58:10B-12, for any particular hazardous substance. The applicant contaminant standard is used in determining the nature and extent of damage caused by a discharge. The Remediation Standards rules are based on more current toxicity information and testing methods than the drinking water standards previously utilized.

N.J.A.C. 7:1J-1.4. A definition for “point-of-entry water treatment system” or “POET” was added because the NJDEP added rule provisions specific to Spill Fund claims for POETs. A POET is a water treatment system used to remove contaminants from the water entering a structure from a potable well.

N.J.A.C. 7:1J-1.4. The definition for “Water Supply System Claim,” or “WSSC” was amended to make it clear that the operation, maintenance and monitoring costs for a water system that was installed with Spill Fund monies are not eligible for compensation from the Spill Fund. In NJDEP’s rule proposal, it claimed that the Spill Fund does not pay claims for operation, maintenance and monitoring costs of water supply systems because the water purveyors already bill their customers for this work. See 40 N.J.R. 5102 (September 15, 2008).

N.J.A.C. 7:1J-1.7. This section adds provisions concerning the electronic submission of invoices for costs related to the installation and maintenance of POETs and for analytical monitoring data generated for those systems.

N.J.A.C. 7:1J-2.2(b). This section requires the Spill Fund administrator to prioritize two types of claims: those for potable water restoration and vapor intrusion mitigation at residential properties, and at schools and child care facilities, over other claims made.

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N.J.A.C. 7:1J-2.5(c). This section provides that on or after the effective date, *i.e.*, March 2, 2009, the purchaser of a property on which a POET has been installed and maintained at the expense of the Spill Fund may not make a claim for compensation from the Fund for ongoing POET operation, monitoring and maintenance costs. This section also requires that the seller of property on which a POET has been installed and maintained at the expense of the Fund notify NJDEP in writing that the property has been sold within thirty days of a binding contract of sale. In NJDEP's rule proposal, it claimed that it was proposing this amendment because it considers the installation of a POET to be the remediation of a contaminated potable well. See 40 N.J.R. 5103 (September 15, 2008).

N.J.A.C. 7:1J-3.4(a)2ii and (b)2ii. The phrase "or future demand" is added to ensure that the calculation of a Spill Fund Claims Area ("SFCA") does not include areas planned for future development. In NJDEP's rule proposal, it stated that the purpose of the water supply alternative analysis is to evaluate the cost of a water system that will be used in place of residential wells in an SFCA. An SFCA serviced by residential wells must not include water for use in fire protection or extra capacity for future expansion because these uses are eligible for compensation from the Spill Fund. Since the Spill Fund covers the cost of a water line for replacing contaminated drinking water from individual wells, neither fire flow nor future growth should be included in the replacement cost. See 40 N.J.R. 5103 (September 15, 2008).

N.J.A.C. 7:1J-3.4(c). This section changes the method of calculating eligible compensation from the Spill Fund for water lines for a WSSC. The amendment limits the eligible cost of water lines to those that consist only of either six or eight inch diameter pipes. In its rule proposal, NJDEP stated that based on its experience with installing waterlines, six to eight inch pipes are sufficiently large to supply water to WSSC areas without accounting for fire flow and future development. See 40 N.J.R. 5103 (September 15, 2008). If a claimant wants to install a larger sized pipe to allow for fire protection or future expansion, the claimant can pay the difference in the cost of the larger water line.

N.J.A.C. 7:1J-3.5(e) adds that the installation of a water meter is eligible for Spill Fund compensation.

N.J.A.C. 7:1J-3.10 provides that, as a condition of receiving compensation from the Spill Fund for an alternate water supply, the administrator shall require a claimant to seal his or her private well within sixty days after the connection to a water supply system. This rule previously allowed the administrator to require this condition; now it is required and sets forth a time frame within which it must be accomplished.

N.J.A.C. 7:1J-4.2(e) states that NJDEP will not approve claims for property value diminution if the Spill Fund has already paid for the installation and maintenance of a POET or a water line connection at property that is the subject of the claim. In its rule proposal, NJDEP explained that this new subsection was being proposed because once a claimant's property receives a POET, NJDEP considers the damage caused to the potable well to have been remediated and the claimant made whole. NJDEP does not consider a property with a POET or a water line connection to continue to be damaged. See 40 N.J.R. 5104 (September 15, 2008). This subsection also denies a property diminution claim if the claimant declined NJDEP's offer to install a POET or provide a water line connection.

The Spill Fund is an important resource and source of relief to those innocent parties affected by the discharge of hazardous substances, *e.g.*, properties that have a contaminated drinking water supply. The above rules are important because they provide claimants with a specific procedure for making a claim against the Spill Fund, allowing it to operate more efficiently.

If you would like more information concerning the Spill Fund, please contact Jennifer L. Cordes, Esq. at 609.989.5027 or jcordes@sternslaw.com.