

**CHAPTER 1J**

**PROCESSING OF DAMAGE CLAIMS PURSUANT  
TO THE SPILL COMPENSATION AND  
CONTROL ACT**

**Authority**

N.J.S.A. 13:1D-9 and 58:10-23.11 et seq.

**Source and Effective Date**

R.2003 d.327, effective August 4, 2003.  
See: 35 N.J.R. 543(a), 35 N.J.R. 3611(a).

**Chapter Expiration Date**

In accordance with N.J.S.A. 52:14B-5.1c, Chapter 1J, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, expires on January 31, 2009. See: 40 N.J.R. 5101(a).

**Chapter Historical Note**

Chapter 1J, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, was adopted as R.1993 d.2, effective January 4, 1993. See: 24 N.J.R. 1255(a), 25 N.J.R. 68(a).

Pursuant to Executive Order No. 66(1978), Chapter 1J, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, was readopted as R.1998 d.67, effective December 23, 1997. See: 29 N.J.R. 4365(a), 29 N.J.R. 4594(a), 30 N.J.R. 336(b). Chapter 1J, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, expired on June 21, 2003.

Chapter 1J, Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, was adopted as new rules by R.2003 d.327, effective August 4, 2003. See: Source and Effective Date.

**Law Review and Journal Commentaries**

How to Obtain Public Funds for Private Cleanup. Daniele Cervino. 139 N.J.L.J. No. 8, S8 (1995).

Spill Fund Claims Eligibility and Arbitration. Mark D. Oshinskie, 154 N.J.L.J. 256 (1998).

**CHAPTER TABLE OF CONTENTS**

**SUBCHAPTER 1. GENERAL PROVISIONS**

- 7:1J-1.1 Scope
- 7:1J-1.2 Construction and applicability
- 7:1J-1.3 Severability
- 7:1J-1.4 Definitions
- 7:1J-1.5 Delegation
- 7:1J-1.6 Signatures; certifications
- 7:1J-1.7 Notices and other communications
- 7:1J-1.8 Computation of time

**SUBCHAPTER 2. CLAIMS GENERALLY**

- 7:1J-2.1 Persons who may submit a claim
- 7:1J-2.2 Provisions applicable to all claims
- 7:1J-2.3 Burden of proof
- 7:1J-2.4 Damages actually incurred; mitigation
- 7:1J-2.5 Overlapping claims
- 7:1J-2.6 Waiver of damages not set forth in claim
- 7:1J-2.7 Claims by responsible parties or by owners or occupants of property from which discharge has emanated
- 7:1J-2.8 Administrative closure of claims

**SUBCHAPTER 3. WATER SUPPLY SYSTEMS CLAIMS**

- 7:1J-3.1 Eligibility of water supply systems claims for compensation
- 7:1J-3.2 Spill Fund claims area
- 7:1J-3.3 Most cost-effective environmentally sound alternative
- 7:1J-3.4 Reductions in costs eligible for compensation if alternative water supply actually constructed exceeds requirements for provision of adequate alternative water supply
- 7:1J-3.5 Other reductions in amount eligible for compensation from Fund
- 7:1J-3.6 Delineation of Spill Fund Claims Area (SFCA)
- 7:1J-3.7 Currently known extent of ground water pollution
- 7:1J-3.8 Most probable pollution migration zone
- 7:1J-3.9 Cost of obtaining estimate by Department consultant of amount eligible for compensation
- 7:1J-3.10 Sealing of well

**SUBCHAPTER 4. PROPERTY VALUE DIMINUTION  
CLAIMS**

- 7:1J-4.1 Extent of eligibility
- 7:1J-4.2 Requirements for eligibility
- 7:1J-4.3 Appraisal of subject property
- 7:1J-4.4 Valuation of claim
- 7:1J-4.5 Evidence of good faith sale
- 7:1J-4.6 Settlement based upon legal inability to sell the subject property
- 7:1J-4.7 Settlement when emergency relocation is necessary
- 7:1J-4.8 Contract for sale of property entered into before filing of claim
- 7:1J-4.9 Suspension of claims

**SUBCHAPTER 5. EMERGENCY RESPONSE CLAIMS BY  
LOCAL UNITS**

- 7:1J-5.1 Eligibility of emergency response claims for compensation
- 7:1J-5.2 Procedure for making emergency response claim
- 7:1J-5.3 Processing of emergency response claims
- 7:1J-5.4 Notice to potentially responsible parties
- 7:1J-5.5 Eligible costs

**SUBCHAPTER 6. CLAIMS PROCEDURES**

- 7:1J-6.1 Time for filing of claims
- 7:1J-6.2 Submission of claim
- 7:1J-6.3 Contents of claim
- 7:1J-6.4 Amendment of claim
- 7:1J-6.5 Consent to inspection
- 7:1J-6.6 Notice of Intent to Deny; Denial
- 7:1J-6.7 Communication with claimant or representative
- 7:1J-6.8 Relaxation of procedural requirements
- 7:1J-6.9 Remediation of discharge which is subject of claim

**SUBCHAPTER 7. SETTLEMENT OF CLAIMS BETWEEN  
CLAIMANT AND POTENTIALLY RESPONSIBLE  
PARTIES**

- 7:1J-7.1 Notice of claim to potentially responsible party
- 7:1J-7.2 Settlement negotiations
- 7:1J-7.3 Effect of settlement between claimant and potentially responsible party

**SUBCHAPTER 8. SETTLEMENT OF CLAIMS BETWEEN  
CLAIMANT AND FUND**

- 7:1J-8.1 Request for payment upon failure to identify or settle with potentially responsible party
- 7:1J-8.2 Contest of validity or amount of claim
- 7:1J-8.3 Settlement offer by the administrator
- 7:1J-8.4 Action on administrator's settlement offer

## SUBCHAPTER 9. BOARDS OF ARBITRATION

- 7:1J-9.1 Convening a board of arbitration
- 7:1J-9.2 Notice of arbitration
- 7:1J-9.3 Membership of Board
- 7:1J-9.4 Jurisdiction over all claims related to discharge
- 7:1J-9.5 Class actions
- 7:1J-9.6 Administrative conference, preliminary hearing, and mediation conference
- 7:1J-9.7 Discovery
- 7:1J-9.8 Prehearing requirements
- 7:1J-9.9 Conduct of hearing
- 7:1J-9.10 Consent to service of process
- 7:1J-9.11 Evidence
- 7:1J-9.12 Subpoenas; witnesses
- 7:1J-9.13 Inspections and investigations by the Board
- 7:1J-9.14 Submission of briefs
- 7:1J-9.15 Default
- 7:1J-9.16 Decisions of the board; award; payment of claim
- 7:1J-9.17 Waiver of hearing
- 7:1J-9.18 Variance from procedural requirements
- 7:1J-9.19 Extensions of time
- 7:1J-9.20 Expedited procedures
- 7:1J-9.21 Waiver of rules
- 7:1J-9.22 Interpretation and application of rules
- 7:1J-9.23 Copies of papers for judicial proceedings
- 7:1J-9.24 Exculpation of arbitrators

## SUBCHAPTER 1. GENERAL PROVISIONS

## 7:1J-1.1 Scope

This chapter constitutes the rules of the Department concerning the processing of all claims under the Act for damages resulting from the discharge of a hazardous substance or a threatened discharge of a hazardous substance.

## 7:1J-1.2 Construction and applicability

(a) This chapter shall be construed liberally to permit the Department and the administrator to fulfill their statutory functions. This chapter shall be construed in conformity with, and not in derogation of, the Act.

(b) This chapter shall apply to the processing of all claims which have not been paid, settled or denied on or before the operative date of this chapter, notwithstanding the date upon which any such claim was filed with the Department.

## Case Notes

Prior to adoption of statutory amendment to Spill Compensation and Control Act, transferee of property was not legally obligated to make diligent inquiry in advance of acceptance of transfer in order to be absolved from statutory responsibility for environmental cleanup costs, and to extent that administrative regulations were inconsistent with Spill Act as it existed prior to that amendment, they were inoperative as to transfers made prior to amendment's effective date. *Marsh v. New Jersey Spill Compensation Fund and Environmental Claims Admin.*, 286 N.J.Super. 620, 670 A.2d 67 (A.D.1996).

Spill Compensation and Control Act strict liability provision only applies to prospective spills, except for Department of Environmental Protection cleanup and removal costs; discharge defined. *Atlantic City*

*Municipal Utilities Authority v. Hunt*, 210 N.J.Super. 76, 509 A.2d 225 (App.Div.1986).

Remedy under Spill Compensation Fund requires evidence that discharge of hazardous materials occurred after effective date of Spill Compensation and Control Act. *Bayonne Industries, Inc. v. Spill Compensation Fund*, 96 N.J.A.R.2d (EPE) 365.

Spill Compensation Fund is not liable for damages resulting from spill that occurred prior to Spill Act's effective date. *Herz v. Environmental Claims Administration*, 96 N.J.A.R.2d (EPE) 71.

## 7:1J-1.3 Severability

If any subchapter, section, subsection, provision, clause, or portion of this chapter, or the application thereof to any person, is adjudged unconstitutional or invalid by a court of competent jurisdiction, such judgment shall be confined in its operation to the subchapter, section, subsection, provision, clause, portion, or application directly involved in the controversy in which such judgment shall have been rendered and it shall not affect or impair the remainder of this chapter or the application thereof.

## 7:1J-1.4 Definitions

The following words and terms, when used in this chapter, shall have the following meanings:

"Act" means the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq.

"Administrator" means the chief executive of the Fund.

"Affected area" means, with respect to a water supply system claim, the area within or outside the Spill Fund Claims Area for which the Department has determined, pursuant to the Safe Drinking Water regulations set forth at N.J.A.C. 7:10, that the existing source of potable water is unsuitable for human consumption due to a discharge.

"Applicable contaminant standard" means, for any particular hazardous substance, the maximum contaminant level for that hazardous substance (if any) established under N.J.A.C. 7:10 and 40 CFR Part 141. If no maximum contaminant level has been established for a particular hazardous substance under those regulations, "applicable contaminant standard" means the "applicable remediation standard" as defined under N.J.A.C. 7:26E.

"Board" means a Board of Arbitration convened by the administrator pursuant to N.J.A.C. 7:1J-9.1.

"Claim" means a claim for damages filed with the Department for recovery from the Fund. The claim includes all documents submitted under this chapter in support of the claim, including without limitation any amendments thereto under N.J.A.C. 7:1J-6.4.

"Claimant" means the person filing a claim.

"Cleanup and removal costs" means all costs associated with a discharge, incurred by the State, or its political subdivisions, or their agents, or any person with written approval from the Department, in: the removal or attempted removal of a hazardous substance; or the taking of reasonable measures to prevent or mitigate damage to the public health, safety, or welfare, including, but not limited to, public and private property, shorelines, beaches, surface

waters, water columns and bottom sediments, soils and other affected property, including wildlife and other natural resources, and shall include costs incurred by the Department for the indemnification and legal defense of contractors pursuant to the Act, subject to the appropriation by law of moneys from the General Fund to the Fund to defray these costs.

"Covenant not to sue" means a document defined as such pursuant to the Department Oversight of the Remediation of Contaminated Sites Rules, N.J.A.C. 7:26C.

"Damages" means all cleanup and removal costs and all direct and indirect damages actually incurred, no matter by whom sustained, arising in connection with a discharge of a hazardous substance, or in connection with a threatened discharge, which costs and damages include, but are not limited to, the following:

1. The cost of restoring, repairing or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, repaired or replaced, and any reduction in value of such property caused by such discharge in comparison with its value absent the discharge;
2. The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge;
3. Loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge, provided that such loss or impairment exceeds 10 percent of the amount which the claimant derives, based upon income or business records, exclusive of other sources of income, from activities related to the particular real or personal property or natural resources damaged or destroyed by such discharge during the week, month or year for which the claim is filed;
4. Loss of tax revenue by a state or local government for a period not to exceed one year, due to damage to real or personal property proximately resulting from a discharge (which one-year period, in the case of lost real property tax revenue, commences on the effective date of the first reduction in the assessed value of real property for damage proximately resulting from the discharge);
5. Interest on loans obtained or other obligations incurred by a claimant for the purpose of ameliorating the adverse effects of a discharge pending the payment or settlement of a claim;
6. Such sums as may be necessary to reimburse a local unit for costs incurred in an emergency response action taken to prevent, contain, mitigate, cleanup or remove a discharge or threatened discharge of a hazardous substance; and
7. Costs for legal services necessary for remediating contamination, including attorney's fees for contracting or obtaining permits, drawing of ordinances, acquisition of land and rights of way, drawing and administering construction contracts, and for legal work connected with necessary financing for the construction by a municipal utility authority of a new water system. Damages do not include costs normally associated with the listing, sale and transfer of property which is the subject of a claim.

"Department" means the New Jersey Department of Environmental Protection.

"Discharge" means any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of a hazardous substance into the waters or onto the lands of the State, or into waters outside the jurisdiction of the State when damage may result to the lands, waters or natural resources within the jurisdiction of the State.

"Discovery" means the time at which the claimant discovers, or by the exercise of reasonable diligence and intelligence should have discovered, that he or she has incurred damages.

"Emergency response action" means those activities conducted by a local unit to clean up, remove, prevent, contain or mitigate a discharge that poses an immediate threat to the environment or to the public health, safety or welfare.

"Emergency response claim" means a claim by a local unit for reimbursement of costs incurred in an emergency response action.

"Engineering controls" means any physical mechanism defined as such pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E.

"Fund" means the New Jersey Spill Compensation Fund established pursuant to the Act.

"Government entity" means a governing body, department, agency, authority or any other unit of any Federal, State, county or local government or governments, including without limitation a municipal utilities authority.

"GPD" means gallons per day.

"GPM" means gallons per minute.

"Ground water" means the portion of water beneath the land surface that is within the zone of saturation (below the water table) where the pore spaces are filled with water.

"Hazardous substance" means any substance defined as such under the Discharges of Petroleum and Other Hazardous Substances regulations, N.J.A.C. 7:1E-1.7.

"Institutional controls" means a mechanism defined as such pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E.

"Local unit" means any county or municipality, or any agency or other instrumentality thereof, or a duly incorporated volunteer fire, ambulance, first aid, emergency, or rescue company or squad.

"Most probable ground water flow direction" means the most probable direction of ground water flow within the Spill Fund Claims Area, as determined by the Department.

"Most probable pollutant transport rate" means the most probable rate at which each hazardous substance present in ground water in a concentration exceeding the applicable contaminant standard or other applicable maximum level will be transported within the ground water flow regime, as calculated by the Department pursuant to N.J.A.C. 7:1J-3.8(c).

"Natural resources" means all land, fish, shellfish, wildlife, biota, air, waters and other such resources owned, managed, held in trust or otherwise controlled by the State.

"No further action letter" means a letter as defined as such pursuant to the Department Oversight of the Remediation of Contaminated Sites Rules, N.J.A.C. 7:26.

"Notice of Intent to Deny," or "NOI," means a notice issued by the administrator to a claimant pursuant to N.J.A.C. 7:1J-6.6, notifying the claimant that the claimant's claim lacks sufficient information to support a determination that the claim is eligible for compensation from the Fund.

"Person" means any public or private corporations, companies, associations, societies, firms, partnerships, joint stock companies, individuals, the United States, the State of New Jersey and any of its political subdivisions or agents.

"Potable water" means drinking water, water for other personal uses, and water for purposes requiring a supply of water which the Department determines is suitable for human consumption pursuant to the Safe Drinking Water regulations set forth at N.J.A.C. 7:10. "Potable water" does not include water for use in firefighting or for agricultural purposes.

"Potentially responsible party" means any person who may have discharged a hazardous substance from which a claim arises, or may be responsible in any way for any hazardous substance from which a claim arises, including, without limitation, any of the following:

1. Any person whose act or omission results or has resulted in a discharge;
  2. Each owner or operator of any land, facility, vehicle or vessel from which a discharge has occurred;
  3. Any person who owns or controls any hazardous substance which is discharged;
  4. Any person who has directly or indirectly caused a discharge;
  5. Any person who has allowed a discharge to occur;
- or

6. Any person who brokers, generates or transports the hazardous substance discharged.

"Pre-Act discharge" means a discharge of a hazardous substance which occurred before April 1, 1977.

"Private water purveyor" means a water purveyor which is not a government entity. The term "private water purveyor" does not include a municipal utilities or county utilities authority organized pursuant to N.J.S.A. 40:14B.

"Spill Fund Claims Area," or "SFCA," means the geographic area delineated by the Department pursuant to N.J.A.C. 7:1J-3.6.

"Subject property" means property which is the subject of a claim.

"Threatened discharge" means any of the following circumstances with respect to a hazardous substance:

1. A hazardous substance which has not been discharged from a grounded or disabled vessel, if the Department determines that such removal is necessary to prevent an imminent discharge of such hazardous substance; or

2. A hazardous substance which has not been discharged, if the Department determines that such substance is not satisfactorily stored or contained and said substance possesses any one or more of the following characteristics:

i. Explosiveness;

ii. High flammability;

iii. Radioactivity;

iv. Chemical properties which in combination with any discharged hazardous substance at the same storage facility would create a substantial risk of imminent damage to public health or safety or imminent and severe damage to the environment;

v. Is stored in a container from which its discharge is imminent as a result of contact with a hazardous substance which has already been discharged and such additional discharge would create a substantial risk of imminent damage to public health or safety or imminent and severe damage to the environment; or

vi. High toxicity and is stored or being transported in a container or motor vehicle, truck, railcar or other mechanized conveyance from which its discharge is imminent as a result of the significant deterioration or the precarious location of the container, motor vehicle, truck, railcar or other mechanized conveyance, and such discharge would create a substantial risk of imminent damage to public health or safety or imminent and severe damage to the environment.

"Useful storage capacity" means that portion of a water storage facility capable of meeting the distribution system pressure requirements contained in N.J.A.C. 7:10-11.7(c) and 7:19-6.7.

"Water purveyor" means a person which owns, operates, manages or controls a water supply system, plant or equipment.

"Water Supply System Claim," or "WSSC," means a claim (whether asserted by a water purveyor or any other person) for compensation for construction and ancillary costs associated with providing an alternative supply of water required because of damage to an existing supply of water caused by a discharge of a hazardous substance.

Amended by R.1998 d.67, effective January 20, 1998.

See: 29 N.J.R. 4365(a), 29 N.J.R. 4594(a), 30 N.J.R. 336(b).

Amended "Applicable containment standard", "Damages", "Person", "Potable water", and added paragraph 7 to "Damages".

Amended by R.1999 d.91, effective March 15, 1999.

See: 30 N.J.R. 4157(a), 31 N.J.R. 763(a).

Inserted "Covenant not to sue", "Engineering controls", "Institutional controls" and "No further action letter".

#### **Case Notes**

One-year limitations period for spill fund claims brought by township municipal utilities authority did not begin until authority actually expended the water line extension costs for which it sought reimbursement; inasmuch as no costs were actually incurred by authority until payment was authorized, discovery of authority's damages coincided with the date the governing body authorized payment of the expenditure. *Lacey Mun. Utilities Authority v. New Jersey Dept. of Environmental Protection*, 312 N.J.Super. 298, 711 A.2d 932 (N.J.Super.A.D. 1998).

Purchasers not entitled to attorney fees; sellers owned property when fuel oil tank leaked. In *Matter of Spill Compensation and Control Act Claim of Thomas*, 93 N.J.A.R.2d (EPE) 79.

#### **7:1J-1.5 Delegation**

The administrator may delegate administrative, supervisory, or investigatory authority to members of the Department's staff. The administrator may enter into contracts on behalf of the Fund or the Department for the performance of services ancillary to the powers and duties of the administrator under the Act, including, but not limited to, the performance of claims adjustment services.

#### **7:1J-1.6 Signatures; certifications**

(a) All claims, and all affidavits required under this chapter, shall be signed by the claimant and notarized, as follows:

1. If the claimant or affiant is a corporation, the claim or affidavit shall be signed by a person authorized by a resolution of the claimant's board of directors to sign the document in question. The claimant or affiant shall submit with the document a copy of the resolution of the claimant's board of directors authorizing the person to sign the document. The copy of the resolution shall be certified as a true copy by the secretary of the corporation.

2. If the claimant or affiant is a partnership, the claim or affidavit shall be signed by a general partner of the partnership.

3. If the claimant or affiant is a sole proprietorship, the claim or affidavit shall be signed by the proprietor of the proprietorship.

4. If the claimant or affiant is a municipality, local unit, State, Federal or other public agency, the claim or affidavit shall be signed by a principal executive officer of such entity, the ranking elected official of such entity, or the designee of such principal executive officer or ranking elected official. If the claim or affidavit is signed by a designee, the claimant shall submit with the claim or affidavit a copy of the document authorizing the designee to sign the claim or affidavit.

5. If the claimant or affiant is a natural person, the claim or affidavit shall be signed by the claimant or affiant, provided however, that if the claimant or affiant is a minor, is incompetent as defined under New Jersey law, or is deceased, the claim or affidavit shall be signed by the claimant's parent, guardian, executor, or court appointed representative, as applicable.

(b) All claims, and all affidavits required by this chapter, shall contain the following certification, signed by the person required to sign the claim or affidavit:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted herein and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, to the best of my knowledge, I believe the information submitted is true, accurate and complete. I am aware that there are significant civil penalties for knowingly submitting false, inaccurate or incomplete information, and that I am committing a crime in the fourth degree if I make a written false statement which I do not believe to be true. I am also aware that if I knowingly direct or authorize the violation of any statute, I am personally liable for penalties."

Amended by R.1998 d.67, effective January 20, 1998.

See: 29 N.J.R. 4365(a), 29 N.J.R. 4594(a), 30 N.J.R. 336(b).

In (b), added language detailing criminal liability for false statements.

#### **7:1J-1.7 Notices and other communications**

All claims, notices, requests and other communications required or permitted under this chapter shall be given in writing and sent by certified mail, return receipt requested or by other means which provides a receipt showing the date of mailing and the date of delivery. All such communications sent to the Department by certified mail shall be sent to the following address:



Department of Environmental Protection  
Environmental Claims Administration  
PO Box 028  
Trenton, New Jersey 08625-0028

All such communications sent to the Department by means for which a street address is required by the carrier shall be sent to the following address:

Department of Environmental Protection  
Environmental Claims Administration  
401 East State Street  
Trenton, New Jersey 08609

All such communications to the claimant shall be sent to the mailing address set forth in the claim under N.J.A.C. 7:1J-6.3(a)3, unless the claimant directs otherwise under N.J.A.C. 7:1J-6.7.

Amended by R.1998 d.67, effective January 20, 1998.  
See: 29 N.J.R. 4365(a), 29 N.J.R. 4594(a), 30 N.J.R. 336(b).

#### 7:1J-1.8 Computation of time

(a) In computing any period of time fixed by or under this chapter, the day of the act or event from which the designated period begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor legal holiday.

(b) In computing any period of time fixed by or under any provision of this chapter, "days" shall mean calendar days, unless the provision specifies working days.

### SUBCHAPTER 2. CLAIMS GENERALLY

#### 7:1J-2.1 Persons who may submit a claim

Any person claiming to have incurred damages may submit to the Department a claim for such damages. No subrogee or assignee of a person who has incurred damages may submit a claim. No claim by a subrogee or assignee of a person who has incurred damages shall be eligible for compensation from the Fund.

#### 7:1J-2.2 Provisions applicable to all claims

The provisions of N.J.A.C. 7:1J-1, 2, 6, 7, 8 and 9 are applicable to all claims made pursuant to this chapter, including without limitation water supply system claims pursuant to N.J.A.C. 7:1J-3, and property value diminution claims pursuant to N.J.A.C. 7:1J-4. The provisions of N.J.A.C. 7:1J-1, 2 and 6 are applicable to emergency response claims by local units pursuant to N.J.A.C. 7:1J-5; the provisions of N.J.A.C. 7:1J-7, 8 and 9 are not applicable to emergency response claims by local units pursuant to N.J.A.C. 7:1J-5.

#### 7:1J-2.3 Burden of proof

No claim shall be eligible for compensation from the Fund unless the claimant shows by a preponderance of the evidence that the claim satisfies all requirements for eligibility under the Act and this chapter, and that the amount of the claim correctly reflects and is reasonable in relation to the damages which the claimant has sustained.

#### Case Notes

Substantial evidence supported arbitrator's determination that groundwater contamination was caused by discharge from underground gas tanks occurring after effective date of Spill Compensation and Control Act (Spill Act), thus entitling township water utility to reimbursement from Spill Compensation Fund for extending water service to contaminated areas; tanks were installed eleven years before effective date of Spill Act, tanks were relined, indicating leakage, nine years after effective date of Spill Act, contamination was detected in year tanks were relined, and travel time from tanks to contaminated wells was 368 days. *Lacey Municipal Utilities Authority v. New Jersey Dept. of Environmental Protection*, 848 A.2d 843.

#### 7:1J-2.4 Damages actually incurred; mitigation

(a) A claim shall not be eligible for compensation from the Fund unless the claimant has actually suffered the damages which are the subject of the claim. A claim shall be ineligible for compensation from the Fund to the extent that the damages which are the subject of the claim are contingent or speculative.

(b) A claim shall be ineligible for compensation from the Fund to the extent that the claimant has received compensation from any other source for damages which are the subject of the claim. The claimant shall exercise best efforts to obtain compensation from any other source from which compensation is reasonably likely to be available, including, without limitation, insurance policies, court awards, contractual rights, grants or other financial assistance from the Hazardous Discharge Site Remediation Fund, N.J.S.A. 58:10B-4, the Petroleum Underground Storage Tank Remediation, Upgrade and Closure Fund, N.J.S.A. 58:10A-37.3 and any other remedies provided under statutory or common law (including, without limitation, remedies with respect to a potentially responsible party under N.J.A.C. 7:1J-7). In determining the amount of the award, if any, the administrator shall reduce the award by the amount of compensation already received by the claimant for the damage which is the subject of the claim. The administrator may suspend processing of any claim pending the completion of the claimant's efforts to obtain compensation from such other sources.

(c) The claimant shall exercise reasonable diligence and ordinary care to mitigate or to prevent the damages by the claimant from increasing or being aggravated. Additional damages that are the result of claimant's failure to mitigate damages shall not be eligible for compensation from the Fund.

(d) A claim shall not be eligible for compensation from the Fund if the claimant knew or should have known at the time of purchase that the property which is the subject of the claim is contaminated or otherwise impacted by a discharge of hazardous substances.

(e) A claim shall be eligible for compensation from the Fund only to the extent that the claim is for costs associated with remediation which the Department has determined to

be an environmentally sound means of ameliorating the damages resulting from a discharge, and cost effective. Environmentally sound remediation is remediation conducted in accordance with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. To determine if the remediation is cost-effective, the Department shall consider initial capital costs, 20-year operation and maintenance costs, monitoring costs, reliability and feasibility of implementation.



Amended by R.1998 d.67, effective January 20, 1998.  
See: 29 N.J.R. 4365(a), 29 N.J.R. 4594(a), 30 N.J.R. 336(b).  
Amended (b) and (c) and added new (d) and (e).  
Amended by R.1999 d.91, effective March 15, 1999.  
See: 30 N.J.R. 4157(a), 31 N.J.R. 763(a).

In (b), inserted references to court awards, and to grants or other financial assistance from the Hazardous Discharge Site Remediation Fund and the Petroleum Underground Storage Tank Remediation, Upgrade and Closure Fund in the second sentence.

**Case Notes**

Lack of due diligence following conversion from oil to gas precluded owners from obtaining compensation for discharge from leaking oil tank. *Katz v. Spill Compensation Fund and Blackford*, 95 N.J.A.R.2d (EPE) 240.

**7:1J-2.5 Overlapping claims**

(a) A claim shall not be eligible for compensation from the Fund to the extent that the Fund has already paid or settled another claim for the same damages.

(b) If two or more claims include an assertion of the same damages, the administrator shall apportion payment for such damages among the claimants or exclude certain of the claims from payment. The administrator shall base the apportionment or exclusion upon the administrator's determination of which claimants have actually incurred the damages in question.

**7:1J-2.6 Waiver of damages not set forth in claim**

The claimant shall be deemed to have waived any damages which are not set forth in the claim or in any response to the Department's request for information under N.J.A.C. 7:1J-6.3(b), or in any amendment to such claim or response under N.J.A.C. 7:1J-6.4.

**7:1J-2.7 Claims by responsible parties or by owners or occupants of property from which discharge has emanated**

(a) If a person in any way responsible for a discharge which is the subject of the claim, or for any hazardous substance which is the subject of the claim makes a claim in connection with the subject discharge, the claim shall be ineligible for compensation from the Fund unless:

1. The claimant is the owner or operator of a major facility or vessel responsible for the discharge; and
2. The claimant establishes one or more of the defenses provided under N.J.S.A. 58:10-23.11g(d).

(b) If, after a discharge occurs, a person purchases or otherwise voluntarily acquires or obtains title to the land from which the discharge emanated, claims by such purchaser in connection with the discharge are ineligible for compensation from the Fund, unless such purchaser can establish to the satisfaction of the Department that the claim satisfies one of the following requirements:

1. Despite exercising reasonable diligence and intelligence before purchasing or otherwise acquiring or obtain-

ing title to the land, the claimant did not discover until after purchasing or otherwise acquiring or obtaining title to the land that any hazardous substance has been discharged or was discharging from the property in question; and, before purchasing or otherwise acquiring or obtaining title to the land, the claimant conducted a diligent and thorough inquiry into previous ownership and uses of the property;

2. The claimant is a government entity and acquired the property by escheat or other involuntary transfer or by operation of law, and not by any affirmative or voluntary act such as exercise of the power of eminent domain. If the government entity acquired or obtained title to the property by an affirmative or voluntary act, the standard set forth in (b)1 above shall govern eligibility of the government entity's claim; or

3. The claimant acquired the subject property after the Department issued a No Further Action letter concerning the subject property or a portion of the subject property and all of the following apply:

i. The remediation which is the subject of the No Further Action letter involves the use of an institutional control only;

ii. The claimant is a person who is relieved from liability pursuant to N.J.S.A. 58:10-23.11g(d) or (f) for the contamination at the subject property; and

iii. The claim is for the payment of damages in response to a Department order that the claimant conduct additional remediation at the subject property; except if the order is for any additional remediation that is required to remove an institutional control.

(c) Notwithstanding (a)2 above, a claimant who is relieved from liability pursuant to N.J.S.A. 58:10-23.11g(d) is not eligible for compensation from the Fund if the claimant:

1. Benefits from a covenant not to sue issued by the Department pursuant to N.J.S.A. 58:10B-13.1 for a remediation that involves engineering controls at the property, or acquired the subject property after the Department issued a no further action letter for a remediation at the subject property that involves the use of engineering controls and seeks payment for damages relating to the real property and remediation covered by the covenant not to sue; or

2. Benefits from a covenant not to sue issued by the Department pursuant to N.J.S.A. 58:10B-13.1 for a remediation that involves only the use of institutional controls at the subject property, or acquired the subject property after the Department issued a no further action letter for a remediation at the subject property that involves only the use of institutional controls, if the damages claimed proximately result from removing the institutional controls from the subject property.

Amended by R.1999 d.91, effective March 15, 1999.

See: 30 N.J.R. 4157(a), 31 N.J.R. 763(a).

In (b), added 3 and made a corresponding language change; and added (c).

#### Law Review and Journal Commentaries

Court Tightens Spill Fund's Purse Strings. Lewis Goldshore and Marsha Wolff, 151 N.J.L.J. 268 (1998).

Course Correction: A Reasonable Reading of the Spill Act's Responsible Party and Due Diligence Language. Mark Oshinskie, 152 N.J.L.J. 940 (1998).

#### Case Notes

Spill Compensation and Control Act regulation establishing that owners of contaminated property could not recover from Spill Compensation Fund if they failed to exercise reasonable diligence before acquiring their property was not invalid merely because it preceded enactment of Industrial Site Recovery Act amendments. *Marsh v. New Jersey Department of Environmental Protection*, 152 N.J. 137, 703 A.2d 927 (N.J. 1997).

Although owner did not own property when it was leased to polluter, and thus had no capacity or obligation to exercise her authority as lessor to prevent or end pollution, if she failed to take preventative or remedial action when she knew or should have known of discharge, that failure would constitute "intentional or unintentional act or omission," rendering her ineligible for reimbursement of cleanup costs under Spill Compensation and Control Act. *Marsh v. New Jersey Spill Compensation Fund and Environmental Claims Admin.*, 286 N.J.Super. 620, 670 A.2d 67 (A.D.1996).

Donee's right to recover from Spill Compensation Fund no greater than donor's; Spill Act does not permit property owner who has profited by contaminating or permitting contamination of property to obtain public financing for cleaning up pollution by expedient of making gift. *Marsh v. New Jersey Spill Compensation Fund and Environmental Claims Admin.*, 286 N.J.Super. 620, 670 A.2d 67 (A.D. 1996).

Donee's right to recover reimbursement from Spill Compensation Fund is no greater than donor's; Spill Act does not permit property owner who has profited by contaminating or permitting contamination of property to obtain public financing for cleaning up pollution by expedient of making gift. *Marsh v. New Jersey Spill Compensation Fund and Environmental Claims Admin.*, 286 N.J.Super. 620, 670 A.2d 67 (A.D.1996).

Property owner was strictly liable for clean-up of termiticide applied to property by private contractor hired by owner. *Bonilla v. Department of Environmental Protection*, 96 N.J.A.R.2d (EPE) 75.

Property purchaser's lack of diligence in investigating known oil spills precludes recovery of remediation costs. *Newhan Properties and Management Corp. v. Spill Compensation Fund*, 96 N.J.A.R.2d (EPE) 41.

Lack of due diligence following conversion from oil to gas precluded owners from obtaining compensation for discharge from leaking oil tank. *Katz v. Spill Compensation Fund and Blackford*, 95 N.J.A.R.2d (EPE) 240.

Landowner precluded from relief under Spill Fund. *Marsh v. Department of Environmental Protection*, 94 N.J.A.R.2d (EPE) 231.

Landowner's claim for reimbursement for cleanup of contaminated property was denied. *Pitman Art Supply Co., Inc. v. Department of Environmental Protection*, 94 N.J.A.R.2d (EPE) 225.

#### 7:1J-2.8 Administrative closure of claims

(a) The administrator may, in his or her discretion, administratively close any claim for which the claimant has:

1. Failed to take actions required by this chapter within 60 days after the claimant was required to take such action; or

2. Failed to respond to a request for information by the Department within the time period set forth in the request.

(b) Administrative closure of a claim is without prejudice. The claimant may reactivate the claim by rectifying the failure under (a)1 or 2 above and making a written request to the Department for reactivation within six months of receiving notice of administrative closure from the Department.

(c) Before closing a claim under (a) above, the administrator shall send the claimant written notice of the administrator's intent to administratively close the claim. The administrator shall state in the written notice the reason for the administrative closure, and the procedure to avoid administrative closure under (d) below.

(d) The administrator shall administratively close the claim unless:

1. Within 30 days after the claimant's receipt of the notice described in (c) above, the claimant has submitted to the Department an affidavit explaining why the claim should not be administratively closed (which affidavit may include an explanation of why the time allotted to take action or provide information was insufficient); and
2. The administrator determines that the affidavit provides an adequate explanation of why the claim should not be administratively closed.

Amended by R.1998 d.67, effective January 20, 1998.

See: 29 N.J.R. 4365(a), 29 N.J.R. 4594(a), 30 N.J.R. 336(b).

In (b), added a six month time limit to reactivate a claim.

### SUBCHAPTER 3. WATER SUPPLY SYSTEMS CLAIMS

#### 7:1J-3.1 Eligibility of water supply systems claims for compensation

(a) Water Supply Systems Claims (WSSCs) are eligible for compensation from the Fund only in accordance with the requirements of this chapter, and only to the extent permitted under this subchapter.

(b) If the Department determines that as a result of a discharge, a water purveyor's existing supply of water is or will become unsuitable to serve the needs of the water purveyor's existing customers, the water purveyor may make a WSSC for the cost of replacing or treating the existing water supply. No portion of such a WSSC which represents costs beyond those necessary to replace or treat the existing water supply is eligible for compensation from the Fund. Such a WSSC is eligible for compensation from the Fund only in accordance with those requirements of this chapter which are listed at (b)1 through 8 below, and only to the extent permitted under such listed requirements.

1. N.J.A.C. 7:1J-3.1(b);
2. N.J.A.C. 7:1J-3.2;
3. N.J.A.C. 7:1J-3.3;
4. N.J.A.C. 7:1J-3.5(c) and (d);
5. N.J.A.C. 7:1J-3.6;
6. N.J.A.C. 7:1J-3.7;
7. N.J.A.C. 7:1J-3.8; and
8. N.J.A.C. 7:1J-3.9.

#### 7:1J-3.2 Spill Fund claims area

(a) To be compensable from the Fund, costs expended by a claimant in connection with a WSSC shall be either:

1. Directly associated with damages to natural resources located within the Spill Fund Claims Area (SFCA), if the Department has delineated an SFCA;
2. Directly associated with supplying potable water to real property in an area within or outside the SFCA for which the Department has determined, pursuant to the Safe Drinking Water regulations set forth at N.J.A.C. 7:10, that the existing source of potable water is unsuitable for human consumption due to a discharge; or
3. Directly associated with damages to natural resources resulting from a discharge, notwithstanding whether the Department has delineated an SFCA.

Amended by R.1998 d.67, effective January 20, 1998.  
See: 29 N.J.R. 4365(a), 29 N.J.R. 4594(a), 30 N.J.R. 336(b).

#### 7:1J-3.3 Most cost-effective environmentally sound alternative

(a) A WSSC shall be eligible for compensation from the Fund only if the WSSC is for costs associated with remedial actions which the Department has determined to be an environmentally sound means of ameliorating the damages resulting from a discharge.

(b) A WSSC shall be eligible for compensation from the Fund only to the extent of the cost (as such cost is determined by the Department) of the most cost-effective means which the Department has determined to be an environmentally sound means of ameliorating the damages resulting from a discharge. To determine what remedy is the most cost-effective, for each alternative the Department will consider initial capital costs, 20-year operation and maintenance costs, monitoring costs, reliability, feasibility of implementation, and acceptability to the public.

(c) The Department may evaluate alternatives as well as any new technologies, to determine whether any other environmentally sound means of ameliorating the damages resulting from a discharge are more cost-effective than the remedial actions for which the claim has been made. Such alternatives may include, without limitation, the following (or any combination thereof):

1. Filtration of water supply at point of entry;
2. Extension of existing water lines;
3. Drilling of deeper wells for individual residences;
4. Provision of interim alternative water supplies, such as bottled water or waterbuffaloes;
5. Containment of discharge and treatment of water supply;
6. Stand-alone satellite water supply systems/installation of production wells;
7. Contaminant removal;
8. No remedial action;
9. Drilling new wells;
10. Treatment of the contaminated water supply, by methods such as air stripping or filtration; and/or
11. Any other remediation in accordance with N.J.A.C. 7:26E.

Amended by R.1998 d.67, effective January 20, 1998.  
See: 29 N.J.R. 4365(a), 29 N.J.R. 4594(a), 30 N.J.R. 336(b).  
Added new (c)11.

**7:1J-3.4 Reductions in costs eligible for compensation if alternative water supply actually constructed exceeds requirements for provision of adequate alternative water supply**

(a) If a WSSC is a claim for compensation for the cost of a water well or wells, the amount otherwise eligible for compensation from the Fund shall be reduced as follows:

1. The amount eligible for compensation from the Fund shall be reduced by the following amount:

$$RA = AC - NC$$

where:

- i. RA equals the amount of the reduction;
  - ii. AC equals the cost (including without limitation construction costs, design and engineering costs, and finance charges incurred in the design and construction of the water well or wells) of the water well or wells actually constructed; and
  - iii. NC equals the cost (including without limitation construction costs, design and engineering costs, and finance charges incurred in the design and construction of the water well or wells), estimated by the Department after consideration of the report submitted under (a)2 below, of constructing the water well or wells with the minimum capacity necessary to supply potable water to the affected area. Such minimum necessary capacity shall be the amount required to satisfy the users' requirements set forth in (d) below.
2. The claimant shall cause the water purveyor to submit a report (or, if the water purveyor is the claimant, the water purveyor shall submit the report), certified by a licensed professional engineer, setting forth the following:
    - i. Such information as is required to satisfy the requirements of N.J.A.C. 7:10-11.2(c)3 and 4, with respect to the water well or wells actually constructed; and
    - ii. The design and specifications of the water well or wells that would be required to provide an adequate supply of potable water to the total number of residential and nonresidential users listed in (d) below. The engineer's computation of such design and specifications shall be justified by hydraulic analysis without consideration of additional capacity necessary for use in firefighting. The engineer's report shall contain a calculation of the minimum necessary capacity of the wells determined in accordance with (a)1 above.

(b) If a WSSC is a claim for compensation for the cost of water storage facilities, the amount otherwise eligible for compensation from the Fund shall be reduced as follows:

1. The amount eligible for compensation from the Fund shall be reduced by the following amount:

$$RA = AC - NC$$

where:

- i. RA equals the amount of the reduction;
  - ii. AC equals the cost (including without limitation construction costs, design and engineering costs, and finance charges incurred in the design and construction of the water storage facilities) of the water storage facilities actually constructed; and
  - iii. NC equals the cost (including without limitation construction costs, design and engineering costs, and finance charges incurred in the design and construction of the water storage facilities), estimated by the Department after consideration of the report submitted under (b)2 below, of the water storage facilities with the minimum useful storage capacity necessary to supply potable water sufficient to satisfy the users' requirements set forth in (d) below. Such capacity shall be the minimum necessary to satisfy the requirements of N.J.A.C. 7:19-6.7, and maintain a minimum of 20 pounds per square inch gauge (psig) water pressure at street level throughout the distribution network, under all required flow conditions, but shall not include any additional capacity required for use in firefighting.
2. The claimant shall cause the water purveyor to submit a report (or, if the water purveyor is the claimant, the water purveyor shall submit the report), certified by a licensed professional engineer, setting forth the following:
    - i. Such information as is required to satisfy the requirements of N.J.A.C. 7:10-11.8, with respect to the water storage facilities actually constructed; and
    - ii. The design and specifications of the water storage facilities that would be required to provide an adequate supply of potable water to the total number of residential and nonresidential users listed in (d) below. The engineer's computation of such design and specifications shall be justified by hydraulic analysis without consideration of additional capacity necessary for use in firefighting. The engineer's report shall contain a calculation of the minimum useful storage capacity necessary to supply potable water to the users described in (d) below.
- (c) If a WSSC is a claim for compensation for the cost of water transmission and distribution lines, the amount otherwise eligible for compensation from the Fund shall be reduced as follows:

1. The amount eligible for compensation from the Fund shall be reduced by the following amount:

$$RA = AC - NC$$

where:

- i. RA equals the amount of the reduction;

ii. AC equals the cost (including without limitation construction costs, design and engineering costs, and finance charges incurred in the design and construction of the water transmission and distribution lines) of the water transmission and distribution lines actually constructed; and

iii. NC equals the cost (including without limitation construction costs, design and engineering costs, and finance charges incurred in the design and construction of the water transmission and distribution lines), estimated by the Department after consideration of the report submitted under (c)2 below, of constructing the water transmission and distribution lines with the minimum capacity necessary to supply potable water to the affected area. Such minimum necessary capacity shall be determined as follows:

$$\text{Minimum necessary capacity} = (\text{RC} + \text{NRC})$$

where:

(1) RC is the capacity, expressed in GPM and computed pursuant to (c)3 below, of water transmission and distribution lines required to serve the number of residences listed in (d)1 below; and

(2) NRC is the capacity, expressed in GPM and computed pursuant to (c)3 below, of water transmission and distribution lines required to serve all non-residential and multifamily users listed in (d)2 and (d)3 below.

2. The claimant shall cause the water purveyor to submit a report (or, if the water purveyor is the claimant, the water purveyor shall submit the report), certified by a licensed professional engineer, setting forth the following:

i. Such information as is required to satisfy the requirements of N.J.A.C. 7:10-11.7(c), with respect to the water transmission and distribution lines actually installed; and

ii. The design and specifications of the transmission and distribution line or lines that would be required to provide an adequate supply of potable water to all of the users listed in (d) below. The engineer's computation of such design and specifications shall be justified by hydraulic analysis without consideration of additional capacity necessary for use in firefighting. The engineer's report shall contain a calculation of the minimum necessary capacity of the lines (designated as "(RC + NRC)" in the formula set forth in (c)1 above), computed in accordance with (c)3 below.

3. RC and NRC shall not include such additional capacity as may be necessary for use in firefighting. RC and NRC shall be computed in accordance with the following:

i. Instantaneous water demands for residential service connections to the types of residences not listed in (d)2 below shall be based upon a flow of 12 gpm per residence for the first 14 residences, and three gpm for each additional residence, not multiplied by any peaking factor. Instantaneous water demands for service connections to the types of establishments listed in (d)2 below shall be equal to the requirements set forth in (d)2 below, multiplied by the peaking factor of 10 (unless the Department determines that a different peaking factor would be more accurate), and expressed in gpm. For the purposes of (c)1 above, (RC + NRC) shall equal the total instantaneous water demands, adjusted pursuant to (c)3vi below;

ii. The maximum velocity in the water main shall not exceed five feet per second;

iii. The coefficient of friction "c" value as used in the Hazen-Williams formula shall be 100;

iv. The residual pressure in the main at the street level under the maximum flow condition as indicated herein shall not be less than 20 pounds per square inch;

v. The hydraulic analyses shall be performed using the Hazen-Williams formula for determining friction losses and the Hardy-Cross method for determining flow conditions for multiple piping systems; and

vi. If the maximum water demands, maximum velocity, "c" value, residual pressure, and hydraulic analysis pursuant to (c)3i through v above require a diameter of water pipe which is not a commonly commercially available size, then the total instantaneous water demands shall be adjusted to reflect the use of the next largest commonly commercially available diameter of water pipes.

4. If any section of transmission or distribution line has been extended beyond the point necessary to service any property within the affected area, then any and all costs associated with that section of line beyond the boundary of the affected area shall be the sole responsibility of the water purveyor and will not be eligible for compensation from the Fund. This exclusion from eligibility shall not apply to extensions which the Department has stated in writing are required for effective operation of the water system.

(d) For the purpose of calculating the minimal capacity needed for water wells under (a) above and water storage facilities under (b) above, the potable water requirement of the users of such wells or storage facilities is the aggregate of the potable water requirements listed in (d)1, 2 and 3 below.

1. The potable water requirements of residential users in the affected area equals the following:



$$RR = (R \times 360 PF)$$

where:

i. RR equals the potable water requirements of residential users in the affected area;

ii. R equals the sum of (1) and (2) below:

(1) The number of single-family residences within the affected area which are in existence or under construction, or for which building permits have been issued, before the Department delineated the SFCA; and

(2) The number of tax lots contained in the affected area upon which no residences or nonresidential improvements have been constructed or are under construction as of the time when the Department delineated the SFCA, and for which no building permit to construct one or more residences or non-residential improvements has been issued prior to the time when the Department delineated the SFCA;

iii. 360 represents a potable water requirement of 360 gallons per day (gpd) per bedroom to serve each single-family residence; and

iv. PF represents the peaking factor by which the 360 gpd requirement will be multiplied, which peaking factor will be equal to two unless the Department determines that a different peaking factor would be more accurate.

2. The potable water requirements of nonresidential and multifamily users are set forth in the following table, and include all nonresidential and multifamily residential facilities within the affected area which are in existence or under construction, or for which building permits have been issued, prior to the time when the Department delineated the SFCA:

Type of Establishment	Potable water requirements (in GPD per person except as noted)
1. Apartment buildings (assuming one person per bedroom)	75
2. Rooming houses	50
3. Boarding houses	75
Add for each nonresident boarder:	15
4. Hotels	75
Add if laundry facilities are on premises:	37.5
5. Motels and tourist cabins	75
6. Mobile home parks	100
7. Restaurants	10
8. Camps	
Barracks type	50
Cottage type	40
Day camps	15
9. Day schools	10
Add for cafeteria:	5
Add for showers:	5
Add for laboratories:	5
10. Boarding schools	100
Add if laundry facilities are on premises:	50
11. Industrial property (per eight hour shift)	25

Type of Establishment	Potable water requirements (in GPD per person except as noted)
12. Hospitals (depending on type)	150-250
13. Institutions other than hospitals	75-125
14. Picnic grounds and comfort stations	10
Add if showers are on premises:	5
15. Swimming pools and bathhouses	10
16. Clubhouses (per resident member)	60
Add per nonresident member:	25
17. Nursing homes	150
18. Campgrounds (GPD per individual sewer hookup)	100
Add if laundry facilities are on premises:	50
19. Retail and office space (GPD per square foot)	125
20. Self-service laundries (gallons per wash)	50

To determine the well capacity or storage capacity required to serve the above establishments, the potable water requirements set forth in the table shall be multiplied by a peaking factor of two, unless the Department determines that a different peaking factor would be more accurate. To determine the instantaneous water demands of the above establishments for the purpose of calculating the required capacity of transmission or distribution lines, the potable water requirements set forth in the table shall be multiplied by the peaking factor provided under (c)3i above.

3. The potable water requirements of agricultural, silvicultural, industrial or other users not listed in the table at (d)2 above are actual requirements of all such users which are located in the affected area and meet the requirements of both 3i and ii below:

i. Before the Department delineated the SFCA, the user's facility was in existence or under construction, or a building permit had been issued for its construction;

ii. The user is unable to use the existing source of potable water, because such source has become unsuitable for the user's particular use as a result of the discharge; and

iii. Connection to the replacement water supply system is the most cost-effective environmentally sound means of remedying the damages incurred by the user as a result of the discharge.

Amended by R.1998 d.67, effective January 20, 1998.

See: 29 N.J.R. 4365(a), 29 N.J.R. 4594(a), 30 N.J.R. 336(b).

In (d), changed formula for potable water requirements.

### 7:1J-3.5 Other reductions in amount eligible for compensation from Fund

(a) If the water supply system which is the subject of the claim is to be operated by a private water purveyor, the aggregate amount eligible for compensation from the Fund for such water supply system shall be reduced by an amount equal to five times the aggregate expected average annual water bill of all residential and nonresidential users within the affected area. If the water supply system which is the subject of the claim will supply only part of the needs of such residential and nonresidential users, the reduction

described above shall be prorated to the percentage of such needs which the system will serve.

(b) If the claimant is the water purveyor, the amount eligible for compensation from the Fund shall be reduced further by the surplus debt service payments received by the water purveyor, calculated as follows:

$$\text{SDSP} = \frac{(\text{DSP}) (\text{NR})}{\text{ER}}$$

where:

1. SDSP represents the surplus debt service payments;
  2. DSP equals the aggregate amount of the payments due on all debt obligations of the water purveyor reflected in the computation of the water purveyor's rates, and incurred before the making of the WSSC, which payments are due during the period beginning on the date on which water service commences to new ratepayers not previously served by the water purveyor before the construction of the water supply system which is the subject of the claim, and ending on the first anniversary of the effective date of the water purveyor's rates in effect as of the commencement of such service;
  3. NR equals the number of new ratepayers served by the new water supply system, who were not served by such water purveyor before the construction of such facilities; and
  4. ER equals the number of existing ratepayers served by the water purveyor immediately prior to the making of the WSSC.
- (c) No portion of the cost of any water supply system which had been installed or for which installation had begun before the discharge, and which commences operation after the discharge, shall be eligible for compensation from the Fund.
- (d) If all or part of the cost of any water supply system has been paid from the Fund, no part of the cost incurred in connection with any replacement equipment for such system shall be eligible for compensation from the Fund. If, as a result of an error or omission in the design, construction, installation or operation of a water supply system, corrective action (including, without limitation, the installation of replacement or additional equipment) is necessary for proper operation of the water supply system, no part of the cost of such corrective action shall be eligible for compensation from the Fund.
- (e) Costs required under Board of Public Utilities (BPU) regulations: No costs which a water purveyor is required to incur under regulations promulgated by the BPU (including, without limitation, the cost of meters required to be provided under N.J.A.C. 14:3-4.1, and the cost of the work to be done under N.J.A.C. 14:9-2.1 upon making service connections) shall be eligible for compensation from the Fund.

(f) If the water purveyor or a government entity has charged fees or other costs for connecting individual properties to the water supply system which is the subject of the claim, the amount of the water purveyor or government entity's claim, eligible for compensation from the Fund shall be reduced by the aggregate amount of such fees or costs.

(g) With respect to any connection fee or tapping fee which the claimant pays for connection of any property to the water system, only the portion of such fee which represents the actual cost of the physical connection shall be eligible for compensation from the Fund. Any portion of such fee which represents other amounts allowed under N.J.S.A. 40:14B-21 is ineligible for compensation from the Fund.

Amended by R.1998 d.67, effective January 20, 1998.  
See: 29 N.J.R. 4365(a), 29 N.J.R. 4594(a), 30 N.J.R. 336(b).

#### 7:1J-3.6 Delineation of Spill Fund Claims Area (SFCA)

The Spill Fund Claims Area (SFCA) is the geographic area delineated by the Department, consisting of the currently known extent of ground water pollution determined by the Department pursuant to N.J.A.C. 7:1J-3.7, combined with the most probable pollution migration zone determined by the Department pursuant to N.J.A.C. 7:1J-3.8.

#### 7:1J-3.7 Currently known extent of ground water pollution

(a) The currently known extent of ground water pollution is the volumetric extent of ground water in which concentrations of one or more hazardous substances exceed the applicable contaminant standard for such hazardous substances.

(b) The delineation of the currently known extent of ground water pollution shall be based upon sampling data collected by the Department or by other persons approved by the Department in writing, pursuant to a sampling plan approved by the Department in writing. Such sampling data shall be plotted on a copy of the tax map of the municipality in which the sampling is being performed.

#### 7:1J-3.8 Most probable pollution migration zone

(a) The most probable pollution migration zone is the volumetric extent of ground water for which the Department determines under (b) below that, within the remediation period (as defined below), it is most probable that concentrations of one or more hazardous substances in ground water will exceed the applicable contaminant standard for any such hazardous substances. The remediation period shall be the three years after delineation of the Spill Fund Claims Area, unless the Department determines, in its best professional judgment based upon the particular circumstances of the aquifer contamination, that the remediation of the aquifer contamination will not be completed within three years. In such event, the remediation period shall be the time the Department estimates for the completion of the remediation, in its best professional judgment based upon the particular circumstances of the aquifer contamination.



(b) The delineation of the most probable pollution migration zone is based upon the most probable ground water flow directions, and the most probable pollutant transport rate, for each hazardous substance present in the ground water. In delineating the most probable pollution migration zone, the Department will consider factors including, without limitation, ground water elevations, the location and distribution of pumping wells, the distribution and concentration of pollutants in affected wells, topography, and geology.

(c) The Department shall calculate the most probable pollutant transport rate pursuant to the following formula:

$$V_{pt} = \frac{K_i}{(n_e)(R_d)}$$

where:

1.  $V_{pt}$  equals the most probable pollutant transport rate, expressed in feet per day, of each hazardous substance present in the ground water in a concentration exceeding the applicable contaminant standard;
2.  $K$  equals aquifer hydraulic conductivity, measured in affected wells and expressed in feet per day;
3.  $i$  equals hydraulic gradient, expressed in feet per foot;
4.  $n_e$  equals aquifer effective porosity; and
5.  $R_d$  equals the retardation factor, calculated pursuant to the following formula:

$$R_d = 1 + \frac{K_d(pb)}{n_e}$$

where:

- i.  $K_d$  equals distribution coefficient;
- ii.  $pb$  equals average dry bulk density; and
- iii.  $n_e$  equals effective porosity.

(d) The most probable pollutant transport rate (expressed in feet per day), multiplied by the remediation period (expressed in days), yields the migration distance. The migration distance, projected along the most probable ground water flow directions from the currently known extent of ground water pollution (that is, the leading edge of the plume), yields the most probable pollution migration zone.

#### 7:1J-3.9 Cost of obtaining estimate by Department consultant of amount eligible for compensation

(a) Upon the written request of a government entity claimant, accompanied by preliminary plans and specifications for the water supply system which is the subject of a WSSC (including, without limitation, the engineer's reports required under N.J.A.C. 7:1J-3.4(a)2, (b)2 and (c)2), the Department shall cause its consultant to review such plans and specifications and make a preliminary estimate of the amount of the WSSC which will be eligible for compensation from the Fund. The Department shall not be bound or estopped by the preliminary estimate in making a final determination of the amount of the claim eligible for compensation, if there are any changes in the preliminary plans and specifications which are the subject of the preliminary

estimate, or if the Department finds that there are errors, omissions or other changes necessary from the preliminary plans and specifications, or if there are other changes in circumstances affecting the WSSC.

(b) The preliminary estimate prepared under (a) above shall be at the claimant's expense. Before the preliminary estimate is performed, the Department shall inform the claimant of the cost of the preliminary estimate, and shall cause the preliminary estimate to be performed only if the claimant provides the Department with written consent to the performance of the estimate at the claimant's expense. The amount eligible for compensation from the Fund shall be reduced by the cost of such estimate.

#### 7:1J-3.10 Sealing of well

The administrator may require as a condition of receiving compensation from the Fund for an alternate water supply, that a claimant shall seal his or her private well in accordance with the Department's requirements.

New Rule, R.1998 d.67, effective January 20, 1998.

See: 29 N.J.R. 4365(a), 29 N.J.R. 4594(a), 30 N.J.R. 336(b).

### SUBCHAPTER 4. PROPERTY VALUE DIMINUTION CLAIMS

#### 7:1J-4.1 Extent of eligibility

Claims for diminution of property value shall be eligible for compensation from the Fund only to the extent that such diminution is attributable to the discharge of a hazardous substance. A diminution of property value may be deemed attributable to a discharge of a hazardous substance notwithstanding the lack of any physical intrusion of the hazardous substance onto the subject property. A diminution in the value of any improvements to the subject property made after the date of discovery of damages shall not be eligible for compensation from the Fund.

#### Case Notes

Spill Fund compensation; vandals caused spill. Ultramar Petroleum, Inc. v. DEPE, 94 N.J.A.R.2d (EPE) 163.

#### 7:1J-4.2 Requirements for eligibility

(a) Except for claims settled under N.J.A.C. 7:1J-4.6 or 4.7, claims for diminution of property value are not eligible for compensation by the Fund unless the claimant has sold the subject properties and the administrator determines that the claimant's sale of the subject property was in good faith, based upon the appraisals made pursuant to N.J.A.C. 7:1J-4.3, 4.4 and the information submitted pursuant to N.J.A.C. 7:1J-4.5.

(b) The claimant shall list the subject property for sale with one or more licensed real estate brokers who are members of a multiple listing service (or its commercial equivalent for nonresidential property). The claimant shall so list the subject property for sale continuously, until entering into an agreement for the sale of the subject property; provided, however, that discontinuities made necessary by claimant's good faith choice to list the subject property with another broker shall not be deemed to violate this requirement. One discontinuity of less than 14 days shall presumed to be in good faith.

(c) Claimants may file a property value diminution claim with the Department prior to the sale of property.

(d) All claimants shall provide the Department with an executed copy of a contract for sale of the subject property within 30 days after signature, and shall provide the Department or its agents with access to the property to conduct an appraisal and inspection.

Amended by R.1998 d.67, effective January 20, 1998.

See: 29 N.J.R. 4365(a), 29 N.J.R. 4594(a), 30 N.J.R. 336(b).

Added new (c) and (d).

#### Case Notes

Unsuccessful effort to sell does not satisfy property sale requirement for diminution in value claim against Spill Compensation Fund. *Atlantic City Airport Travelodge v. New Jersey Department of Environmental Protection*, 96 N.J.A.R.2d (EPE) 362.

Property owners were not entitled to damages for loss allegedly resulting from contaminated soil which they had delivered to their property. *Bluszcz v. ECA*, 96 N.J.A.R.2d (EPE) 115.

#### 7:1J-4.3 Appraisal of subject property

(a) After the claimant has elected under N.J.A.C. 7:1J-4.9 to pursue the claim, or in the case of a new claim filed after January 4, 1993, the administrator shall obtain appraisals of the value of the subject property. The appraisals shall be as of the time of the sale of the subject property (or, for claims under N.J.A.C. 7:1J-4.6 or 4.7, as of the date the administrator makes the settlement offer). One such appraisal shall state the value of the subject property as affected by the discharge (unless the administrator elects not to obtain such an appraisal, pursuant to (b) below), and one appraisal shall state the value of the subject property absent the effect of the discharge. The appraisals may, in the administrator's discretion, be based upon one or more of the following factors:

1. Sales of comparable properties in the immediate area;
2. Income generated by the subject property;
3. Replacement cost of the subject property; and/or

4. Such other factors as are ordinarily considered by real estate appraisers who are members of the Appraisal Institute or who are licensed or certified to perform real estate appraisals in New Jersey.

(b) The administrator may elect not to obtain an appraisal of the subject property as affected by the discharge if the administrator determines, in his or her discretion, that there is insufficient information to obtain a meaningful appraisal of the subject property reflecting the effect of the discharge. Without limiting the discretion of the administrator under this subsection, the administrator may determine that there is insufficient information if fewer than three comparable properties which have been affected by the discharge have been sold as of the date on which the claim is filed.

#### 7:1J-4.4 Valuation of claim

(a) If the administrator has obtained appraisals pursuant to N.J.A.C. 7:1J-4.3(a), the amount of the claim eligible for compensation from the Fund shall be computed by the difference between (a)1 and 2 below, adjusted in accordance with (c) below:

1. The appraised value of the subject property determined pursuant to N.J.A.C. 7:1J-4.3(a), excluding the effect of the discharge on such value; and
2. The greater of:
  - i. The appraised value of the subject property determined pursuant to N.J.A.C. 7:1J-4.3(a), reflecting the effect of the discharge on such value; or
  - ii. The price actually obtained by the claimant upon the sale of the subject property, without closing adjustments.

(b) If, pursuant to N.J.A.C. 7:1J-4.3(b), the administrator has elected not to obtain an appraisal of the subject property as affected by the discharge, the amount of the claim eligible for compensation from the Fund shall be equal to the difference between (b)1 and 2 below, adjusted in accordance with (c) below:

1. The appraised value of the subject property determined pursuant to N.J.A.C. 7:1J-4.3(a), excluding the effect of the discharge on such value; and
2. The price actually obtained by the claimant upon the sale of the subject property, without closing adjustments.

(c) The administrator may, in his or her discretion, adjust the amount determined pursuant to (a) or (b) above by considering other information available to the administrator which supports a conclusion that the amount determined pursuant to (a) or (b) above does not accurately reflect the diminution in the value of the subject property resulting from the discharge. Such information may include, but is not limited to, any of the following:

1. Information concerning sales of comparable properties considered in establishing an appraisal pursuant to N.J.A.C. 7:1J-4.3(a), indicating that factors other than the discharge affected the sale prices of such properties. Such information may include, without limitation, the prices of comparable properties within and outside the area in which the discharge may have affected real prop-

erty values; the time elapsed between listing for sale and execution of an agreement of sale for comparable properties within and outside the area in which the discharge may have affected real property values; and specific terms of the agreements of sale (such as financing terms, personal property included in the sale, and apportionments of closing costs);