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NEW JERSEY ADMINISTRATIVE CODE.

**N.J.A.C. 7:1J**

**Processing of Damage Claims Pursuant to the Spill Compensation and Control Act**

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

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## **Processing of Damage Claims Pursuant to the Spill Compensation and Control Act, N.J.A.C. 7:1J**

### **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.

#### **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 the remediation standard developed pursuant to N.J.A.C. 7:26D or N.J.S.A. 58:10B-12, for any particular hazardous substance.

"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 and Energy.

"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 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. 7:26C.

"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.

"Point-of-entry water treatment system" or "POET" means a water treatment system used to remove contaminants from the water entering a structure from a potable well.

"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, for agricultural purposes, or for other non-potable 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. Ancillary costs shall not include the cost of operation, monitoring and maintenance.

### **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."

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

(a) Subject to (c) below, 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 communications submitted pursuant to this subsection shall be sent to the Department by certified mail to the following address:

Department of Environmental Protection  
Environmental Claims Administration  
PO Box 413  
Trenton, New Jersey 08625-0413

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.

(b) Subject to (c) below, all invoices for compensation for POET installation, operation and maintenance shall be submitted in an electronic format acceptable to the Department, and in accordance with the following:

1. Invoices for the cost of the installation of a POET shall be submitted within 60 days after the installation a POET;

2. Invoices for the cost of the operation and maintenance of the POET shall be submitted within 60 days after each date on which the POET is serviced;

3. The results of all analytical monitoring for POETs required by the Department shall be submitted within 60 days after each sampling event; and

4. Any invoices and analytical monitoring data submitted electronically under this subsection may be submitted to the Department by a water treatment vendor or laboratory that is chosen by the claimant to provide these services.

(c) Electronic submittal of invoices and analytical monitoring data for POET claims as required pursuant to (b) above shall be required on or after the date that is 60 days from the date that the Department publishes a notice in the New Jersey Register that the Department's system for receiving electronic submittals is functioning. All claims other than POET claims shall continue to be submitted in accordance with subsection (a) above.

### **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**

(a) 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.

(b) The Administrator shall prioritize the categories of claims that are eligible for compensation in the following order:

1. Potable water restoration and vapor intrusion mitigation at residential properties;
  2. Potable water restoration and vapor intrusion mitigation at schools and child care facilities;
- and
3. All other categories of claims.

### **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.

### **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, the Department's administrative costs, reliability and feasibility of implementation.

#### **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.

(c) On or after February 2, 2009, the purchaser of a property on which a POET has been installed and maintained at the expense of the Fund may not make a claim for compensation from the Fund for ongoing POET operation, monitoring and maintenance costs. The seller of a property on which a POET has been installed and maintained at the expense of the Fund shall notify the Department in writing within 30 days of executing a binding contract of sale for that property.

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

he 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 obtaining 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.

### **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.

## **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.

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

(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) 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, the Department's administrative costs, reliability, feasibility of implementation, and acceptability to the public.

(c) Operation, maintenance and monitoring costs for a WSSC by a water purveyor shall not be included as part of the evaluation of water system alternatives.

(d) 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.

**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 or future demand. 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 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 and future demand. 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 following restrictions apply:

1. The amount eligible for compensation from the Fund for the cost of the construction of a water transmission and distribution line shall be limited to the cost of a 6 or 8 inch diameter water line. If the claimant chooses to install a larger diameter water line, the claimant must pay the difference between the cost of the 6 or 8 inch diameter water line and the cost of the larger water line.

2. 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:

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

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 nonresidential 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 multi-family 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:

Potable water requirements  
(in GPD per person except as noted)

Type of Establishment	
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
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
Retail and office space (GPD per square foot)	.125
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.

### **7:1J-3.5 Other reductions in amount eligible for compensation from the 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 calculated in accordance with the Board of Public Utilities' All Utilities rules at N.J.A.C. 14:3-8.

(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:

$$RA = AC - NC$$

(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 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. The cost of the installation of a water meter is 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.

### **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. The Department may include in the SFCA 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:

$$V_{pt} = \frac{Ki}{(ne)(Rd)}$$

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 day;
4.  $ne$  equals aquifer effective porosity; and
5.  $Rd$  equals the retardation factor, calculated pursuant to the following formula:

$$Rd = 1 + \frac{Kd(pb)}{ne}$$

where:

- i.  $Kd$  equals distribution coefficient;
- ii.  $pb$  equals average dry bulk density; and
- iii.  $ne$  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 shall require as a condition of receiving compensation from the Fund for an alternate water supply, that within 60 days after the connection to a water supply system, the claimant shall decommission and permanently seal the contaminated well pursuant to N.J.A.C. 7:9D-3. The Administrator may approve an exemption from this requirement for a well that is used in a geothermal heating and cooling system.

## **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.

### **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 be 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.

(e) On or after February 2, 2009, a claim for property value diminution shall not be eligible for compensation from the fund where, at the expense of the Fund, a POET has been installed and maintained at the property that is the subject of the claim, or where the property that is the subject of the claim has been connected to a public or private municipal water system at the expense of the Fund. Additionally, a claim for property value diminution shall not be eligible for compensation from the Fund where such claimant was offered, but declined, a POET or a water line connection as compensation from the Fund.

#### **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 property 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);
2. Information concerning sales of comparable properties considered in establishing an appraisal pursuant to N.J.A.C. 7:1J-4.3(a), indicating that such properties have characteristics which distinguish them from the subject property, and which affect the values of such properties;
3. Information concerning the sale of the subject property, indicating that the difference between the sale price and the appraised value of the property reflected factors other than the discharge. Such information may include, but is not limited to, the time elapsed between listing of the subject property for sale and execution of an agreement of sale; the length of time the subject property was offered for sale; the nature and number of any offers to purchase the subject property; the difference between the initial

listing price and the sale price; the number and extent of intermediate reductions in the listing price; specific terms of the agreement of sale for the subject property (such as financing terms, personal property included in the sale, and apportionments of closing costs); data concerning the real estate market generally at the time of the sale of the subject property; and other evidence of the good faith nature of the sale required to be submitted under N.J.A.C. 7:1J-4.5; and

4. The effect of the cleanup and removal of a discharged hazardous substance or of other amelioration of the damages resulting from a discharge.

#### **7:1J-4.5 Evidence of good faith sale**

(a) Except as provided in N.J.A.C. 7:1J-4.7 and 4.8, within 60 days after the closing of a sale of the subject property, the claimant shall submit the following documents to the Department:

1. Copies of all listing agreements for the sale of the subject property;
2. Copies of all written offers to purchase the subject property;
3. A copy of the contract of sale of the subject property;
4. Copies of all settlement statements, including without limitation the HUD-1 Uniform Settlement Statement form if required by 24 CFR 3500.8;
5. A copy of the deed conveying the subject property, together with a copy of the transmittal letter forwarding the deed to the county clerk or register of deeds and mortgages for recording;
6. An affidavit by the claimant, signed by the person required to sign the claim and certified in accordance with N.J.A.C. 7:1J-1.6, stating the following:
  - i. The sale price of the subject property without closing adjustments;
  - ii. That neither the claimant nor any person not listed on the settlement statements has received any money or other compensation from any party in connection with the subject property, except as set forth on the settlement statements; and
  - iii. That the documents submitted pursuant to (a)1 through 5 above are true copies of the original documents executed and delivered in connection with the sale of the subject property; and
7. An affidavit by the claimant's realtor, stating the following:
  - i. That the realtor is a member of the multiple listing service, and listed the property for sale with the multiple listing service (unless the subject property is of a type not normally sold through a multiple listing service);
  - ii. The period of time the subject property was offered for sale, and the period of time the property was listed for sale with the multiple listing service;
  - iii. The initial listing price;
  - iv. All changes in the listing price, and the dates of such changes;

v. A record of all inquiries received from potential purchasers regarding the subject property, and of all showings or open houses held in the course of offering the subject property for sale, including the names and addresses of all persons who inquired about the subject property, were shown the subject property, or attended open houses at the subject property, and a description of the responses of these persons to the subject property; and

vi. A record of the amount and date of each offer made for the purchase of the subject property.

(b) A determination by the administrator that the claimant arrived at the sale price in good faith shall not preclude the administrator from determining that any other aspect of the sale of the subject property was not in good faith.

(c) The administrator may deny the claim or adjust the amount eligible for compensation, if based upon the evidence required under (a) above, the administrator determines that any aspects of the sale of the subject property was not in good faith.

#### **7:1J-4.6 Settlement based upon legal inability to sell the subject property**

(a) If, solely as a result of the discharge, the claimant is legally unable to sell the subject property (for example, if a certificate of occupancy cannot be issued for the subject property as a result of the discharge, and the subject property is located in a municipality in which a certificate of occupancy is required for the sale), the administrator may, in his or her discretion, offer to settle the claimant's claim against the Fund in accordance with this section.

(b) If the administrator elects to settle a claim pursuant to this section, the administrator shall determine the amount of the claim eligible for compensation pursuant to N.J.A.C. 7:1J-4.4. An offer by the administrator to settle the claim shall be in such amount.

(c) The making, acceptance or rejection, and arbitration of such settlement offer pursuant to (b) above shall be in accordance with N.J.A.C. 7:1J-8 and 9.

(d) As a condition of the settlement of the claim pursuant to this section, the claimant shall cause all persons having an ownership interest in the subject property (including without limitation any dower or courtesy interest preserved pursuant to N.J.S.A. 3B:28-1) to execute, acknowledge and deliver to the Department a document, in recordable form, granting to the Fund a lien on the subject property securing repayment of the full amount of the settlement. The Department shall forward such document to the county clerk or register of deeds and mortgages of the county in which the subject property is located. Such document shall be prepared and recorded at the claimant's expense.

(e) The administrator shall execute, acknowledge and deliver to the claimant a discharge of the lien upon payment of the following amount (provided however, that if the payment amount calculated below is less than zero, the administrator shall execute, acknowledge and deliver the discharge of the lien upon the claimant's written request, without the payment of any money; and provided further, that if the payment amount calculated below exceeds the amount of the settlement, the administrator shall execute, acknowledge and deliver the discharge of the lien upon repayment of the settlement amount, plus interest at the rate for post-judgment interest established in the Rules Governing the Courts of the State of New Jersey, as such rate is in effect as of the date of the settlement):

Payment amount =  $SP - (AV - S)$

where:

1. SP equals the sale price of the subject property, as adjusted pursuant to the criteria listed in N.J.A.C. 7:1J-4.4(c), if the administrator determines that the actual sale price does not accurately reflect the diminution in the value of the subject property resulting from the discharge;
2. AV equals the appraised value of the subject property, absent the effects of the discharge, as adjusted under N.J.A.C. 7:1J-4.4(c); and
3. S equals the amount of the settlement made pursuant to this section.

#### **7:1J-4.7 Settlement when emergency relocation is necessary**

If the administrator determines, in his or her discretion, that environmental conditions at the subject property which result from a discharge occurring after April 1, 1977 create a substantial risk of imminent harm to the health and safety of the occupants of the subject property, the administrator may suspend any or all of the requirements of N.J.A.C. 7:1J-4.2, 4.3, 4.4 and 4.5 and may immediately award compensation to enable the occupants of the property to relocate temporarily or permanently. Such an award may include all or part of the purchase price, relocation costs, and assumption of the costs of property encumbrances.

#### **7:1J-4.8 Contract for sale of property entered into before filing of claim**

(a) If a claimant has entered into a contract for the sale of property before filing a property value diminution claim with respect to such property, the administrator may, in his or her discretion, settle such a claim in accordance with this section.

(b) Claims made pursuant to this section shall be eligible for compensation only to the extent provided in N.J.A.C. 7:1J-4.1, and only if the subject property satisfies the eligibility requirements set forth in N.J.A.C. 7:1J-4.2.

(c) Subject to the limitation in N.J.A.C. 7:1J-4.1, the administrator shall determine the amount of the settlement offer pursuant to N.J.A.C. 7:1J-4.4.

(d) Together with the claim (or, if the claim is made before closing of the sale of the subject property, within 10 days after closing), the claimant shall submit to the Department all documents required pursuant to N.J.A.C. 7:1J-4.5; provided, however, that the Department may, in its discretion, refrain from requiring submission of the documents normally required under N.J.A.C. 7:1J-4.5(a)1 and 4.5(a)7.

#### **7:1J-4.9 Suspension of claims**

(a) The Department shall send notice of the requirements of this chapter to each claimant who filed a property value diminution claim before January 4, 1993. Within 60 days after receipt of such notice, each claimant shall notify the Department of his or her election to:

1. Pursue the claim;
2. Suspend the claim for the period provided in (c) below; or

3. Withdraw the claim.

(b) If a claimant fails to notify the Department of his or her election under (a) above, the claimant shall be deemed to have suspended the claim for the period provided in (c) below.

(c) All claims suspended pursuant to (a) or (b) above will remain in suspension until one of the following occurs:

1. The Department receives notice from the claimant, stating that the claimant desires to reinstate the claim; or

2. The claimant receives notice from the Department, stating that the remediation of the discharge has been completed to the satisfaction of the Department, and that the administrator is therefore denying the claim; provided, however, that if the Department has required as a condition of its satisfaction that a restriction running with the subject property be recorded with the applicable county clerk or register of deeds, the claimant may make a claim for diminution resulting from such restriction.

(d) At any time during the period of suspension under (c) above, a claimant may request reinstatement of the claim by notice to the Department.

(e) At the end of the suspension period provided in (c) above, the claim will be automatically reactivated, unless the claimant has previously withdrawn the claim.

(f) The administrator may, in his or her discretion, reactivate a claim suspended under N.J.A.C. 7:1J-2.4(b) upon the conclusion of litigation or arbitration between the claimant and any potentially responsible parties, which litigation or arbitration concerns such damages. For the purpose of this subsection, litigation or arbitration shall be deemed to have concluded upon the occurrence of any of the following: a complete settlement of the litigation or arbitration; or the entry of a certification, judgment or order completely resolving the litigation or arbitration, followed by the expiration of time allotted to appeal or otherwise challenge such certification, judgment or order.

(g) Upon reactivation of a suspended claim:

1. The administrator shall confirm the reactivation by written notice to the claimant;

2. The claim will be processed in accordance with this chapter; and

3. Within 30 days after receiving notice of the reactivation, the claimant shall list the subject property for sale with one or more licensed brokers who are members of a multiple listing service (or its commercial equivalent, for claims involving commercial property or other properties not normally offered for sale through a multiple listing service).

(h) Upon the claimant's second suspension of the claim, the administrator shall dismiss the claim, without prejudice. If the claimant subsequently files a new claim for the same damages contained in the original dismissed claim, the new claim will be deemed to have been filed as of the date of filing of the original dismissed claim.

## **Subchapter 5. Emergency Response Claims by Local Units**

### **7:1J-5.1 Eligibility of emergency response claims for compensation**

Emergency response claims are eligible for compensation from the Fund in accordance with the requirements of this chapter, to the extent permitted under this subchapter.

### **7:1J-5.2 Procedure for making emergency response claim**

(a) Emergency response claims shall be subject to the claims procedure requirements of N.J.A.C. 7:1J-1, 2 and 6.

(b) In addition to the information and documents required to be submitted under N.J.A.C. 7:1J-6.3(a), a claimant making an emergency response claim shall submit the following:

1. An affidavit by the claimant, signed by the person required to sign the claim and certified in accordance with N.J.A.C. 7:1J-1.6, stating that the claimant obtained the approval of the Department before taking the emergency response action which is the subject of the claim, identifying the Department employee from whom the approval was obtained, stating the date of the approval, and the form in which the approval was transmitted to the claimant (for example, by telephone, mail, or facsimile transmission);
2. Reports by the police department and fire department concerning the emergency response action which is the subject of the claim, if such reports have been prepared;
3. Reports by the local hazardous materials unit and the local health department concerning the emergency response action which is the subject of the claim, if such reports have been prepared;
4. Documentation of the time spent by the claimant's personnel, personnel of other local units, and personnel acting at the request of the claimant or other local units, in connection with the emergency response action which is the subject of the claim; and
5. Receipts or other evidence of payment of costs incurred in the emergency response action which is the subject of the claim.

### **7:1J-5.3 Processing of emergency response claims**

(a) Within 10 days after an emergency response claim is filed, the Department shall notify the claimant whether the claim is complete. If the claim is incomplete, the Department shall list in the notice the information necessary to make the claim complete, and specify in the notice the date by which the necessary information is to be submitted. The administrator may administratively close the claim under N.J.A.C. 7:1J-2.8 for failure to submit the necessary information in the allotted time.

(b) The administrator shall approve or deny an emergency response claim, without regard to the requirements of N.J.A.C. 7:1J-7, 8 and 9, within 120 days after the filing of a completed claim, including all supportive information or documentation required under N.J.A.C. 7:1J-5.2, (a) above, and N.J.A.C. 7:1J-6.

(c) If the administrator fails to approve (in whole or in part) or deny the emergency response claim within the 120 days allotted under (b) above, all costs in the claim shall be deemed approved.

(d) If the administrator denies the emergency response claim or approves only part of the costs claimed,

the claimant shall not be precluded from seeking recovery of the costs denied by the administrator under any other provision of statutory law or in accordance with any remedies available under common law.

#### **7:1J-5.4 Notice to potentially responsible parties**

If the Department determines that a person is a potentially responsible party in connection with a discharge or threatened discharge which is the subject of an emergency response claim, the Department shall provide such person with written notice of the nature of the claim and the identity of the claimant.

#### **7:1J-5.5 Eligible costs**

Only those costs determined by the Department to be necessary and reasonable additional and extraordinary costs incurred by a local unit shall be compensable from the Fund.

### **Subchapter 6. Claims Procedures**

#### **7:1J-6.1 Time for filing of claims**

Claimants shall submit any claims to the Department not later than one year after the date of discovery. With regard to claims filed by government entities, for damages resulting from contamination to private potable wells other than the claimant's own well(s), the date of discovery of damages is when the government entity agrees by vote, ordinance, resolution or other binding commitment, whichever occurs first, to restore, repair or replace the contaminated potable wells in question. With regard to property value diminution claims under N.J.A.C. 7:1J-4, the date of discovery of damages is the date when property is sold, unless the requirements of N.J.A.C. 7:1J-4.6 or 4.7 apply. If a claimant fails to submit a claim to the Department within such one-year period, the claimant shall be deemed to have waived such claim. Such waiver is with prejudice and shall bar all recourse by the claimant against the Fund for any damages arising out of or related to the discharge or threatened discharge.

#### **7:1J-6.2 Submission of claim**

(a) For the purposes of determining whether a claim has been timely filed pursuant to N.J.A.C. 7:1J-6.1, the following shall apply:

1. If the claimant submits the claim by United States mail, the claim will be deemed filed as of the date of mailing by the claimant.
2. If the claimant submits the claim via another means of delivery, the claim will be deemed filed as of the date of receipt by the Department.

#### **7:1J-6.3 Contents of claim**

(a) Claims shall be typewritten or written legibly in ink, and shall contain the following information:

1. The name of the claimant;
2. The street address of the claimant;



3. The mailing address of the claimant;
4. The telephone number of the claimant during normal daytime business hours;
5. The name, mailing address, telephone number, and relationship to the claimant of any person designated to receive communications from the Department pursuant to N.J.A.C. 7:1J-6.7;
6. Whether the claimant is an individual, general partnership, limited partnership, corporation, local government entity, Federal government entity, or state government entity;
7. A statement that the claimant claims to have actually incurred damages, as such term is defined in N.J.A.C. 7:1J-1.4, that the claimant has not received compensation from any other source for such damages, and that the claimant is not a potentially responsible party in connection with the discharge which is the subject of the claim. Such statement need not be specific about the amount or the nature of such damages;
8. If the claim is for property value diminution, all documents required by N.J.A.C. 7:1J-4.5 to be submitted with the claim, and a statement that the claimant has contracted to sell or has sold the subject property;
9. A statement that the claimant cannot benefit from a covenant not to sue if one has been issued by the Department for the subject property and why;
10. A statement that the damages being claimed are not the proximate result of additional remediation to remove an institutional control at the subject property; and
11. A statement that the claimant is the purchaser of a subject property for which the Department issued a No Further Action letter for the entire property or any part thereof, and that all of the following apply:
  - i. The remediation which is the subject of the No Further Action letter involved the use of an institutional control and not an engineering control;
  - ii. The claimant is a person who qualifies to be relieved from liability pursuant to N.J.S.A. 58:10-23.11g(d) or (f) for the contamination at the subject property and why; and
  - iii. The Department has ordered the claimant to remediate the contamination.

(b) The claimant shall submit to the Department any of the following types of information requested by the Department:

1. The location of the property from which the claimant believes the discharge to have emanated or at which the threatened discharge occurred, including the name of the site, the street address, the municipality, and the county;
2. With respect to all persons whom the claimant believes to be responsible for the discharge or threatened discharge:
  - i. The name and address of each such person;
  - ii. If known to the claimant, whether each such person is an individual, general partnership, limited partnership, corporation or government entity;

iii. Whether any such person has admitted responsibility for the discharge or threatened discharge from which the claim arose, or liability for the amount of damages for which the claim is being made; and

iv. If any such person has admitted responsibility or liability pursuant to (b)iii above, the names of such persons and the nature of such admissions;

3. With respect to a claim involving damage to personal property:

i. The date or dates on which the damage occurred;

ii. The location of the personal property at the time the damage occurred;

iii. A description of the personal property which was damaged;

iv. A description of the damage;

v. The original cost paid by the claimant for the damaged personal property;

vi. The date the claimant acquired the damaged personal property;

vii. Evidence of the claimant's ownership of the damaged personal property;

viii. An estimate of the cost of repairing the damage to the personal property, and an estimate of the value of the damaged personal property as of the time of the damage;

ix. The name, address and qualifications of any persons who prepared the estimates required by (b)3viii above; and

x. The location at which the administrator or his designee can inspect the damaged personal property;

4. A description of any damage to real property located thereon, including:

i. The date on which the damage occurred;

ii. The precise location of the damaged real property, including the street address, the tax lot and block, the municipality, and the county;

iii. A description of the predominant use of the damaged real property;

iv. A detailed description of the damage to the real property, including whether the damages include costs associated with installing, maintaining, monitoring or removing engineering or institutional controls;

v. An estimate of the cost of remediating the damage, and the name, address and qualifications of the person making the estimate; and

vi. A description of the claimant's interest in the damaged real property; and documents evidencing such interest. Documents evidencing fee title to the damaged real property shall include an affidavit of title executed by the claimant, together with either a copy of the recorded deed conveying title to the claimant, or an owner's title insurance policy insuring the claimant's interest in the property. Documents evidencing a leasehold interest

in the property shall include a copy of the lease for the property, together with an affidavit of the claimant stating that the lease is in full force and effect;

5. A detailed description of the facts known to the claimant which support the claim, including without limitation the following:

- i. The facts which lead the claimant to believe that the discharge caused the damages suffered by the claimant; and
- ii. The facts which lead the claimant to believe that a person is a potentially responsible party;

6. The names and addresses of any witnesses known to the claimant who may have knowledge concerning the discharge, threatened discharge, or damage;

7. The names of any public agencies (including without limitation any local or state police or any other local, state, interstate or federal agencies) who have investigated the discharge or threatened discharge, and, if known to the claimant, the names of the persons who conducted the investigations on behalf of such agencies;

8. If any of the damaged real or personal property or any of the asserted lost income or tax revenue may be covered by any insurance policy or policies, or other financial agreement or instrument under which compensation may be available, the following information:

- i. The name and address of the insurance carrier which issued the policy, or issuer of the other financial agreement or instrument;
- ii. The policy number or other applicable reference number;
- iii. A copy of the certificate of insurance or other financial agreement or instrument; and
- iv. Copies of any correspondence between the insurance carrier or issuer of the other financial agreement or instrument and the claimant or the claimant's representatives concerning the discharge or threatened discharge;

9. The names and addresses of any persons other than the Fund (including without limitation insurance companies) against whom the claimant has asserted a claim;

10. Whether the claimant has received or agreed to receive any compensation from any person in connection with the discharge or threatened discharge, and the details of any such compensation or agreement to receive compensation;

11. A description of any action taken to repair, restore or replace damaged real property, including without limitation the following:

- i. The name and address of the person who has taken such action; and
- ii. The cost of such action;

12. If the claimant asserts damages which include a loss of income, the claim shall include the following information:

- i. The total amount of the claimed loss of income;
- ii. The period of time during which the claimant asserts that the loss of income has occurred;
- iii. If the claimant asserts that the loss of income has occurred over a period exceeding 12 months, a breakdown of the loss of income by three-month periods, with the first such period commencing on the date of discovery;
- iv. A detailed description of the method employed by the claimant in calculating the claimed loss of income;
- v. A statement of whether all income, sales and other accounting and financial information supporting the claim is available for inspection, copying and audit by the Department;
- vi. If any of the information described in (b)12v above is not available for inspection, copying and audit, an explanation of why such information is unavailable for such purposes;
- vii. With respect to any of the information described in (b)12v above which is available for inspection, copying and audit, a description of where and when the Department can obtain access to such information; and
- viii. If any of the information described in (b)12v above has been audited, certified or reviewed by a certified public accountant, the name, address, and telephone number of such accountant, and the date of such audit, certification or review. If such information has been audited, the claimant shall attach copies of all audited statements and of the auditors' reports;

13. If the claimant asserts damages which include a loss of tax revenue, the claim shall include the following information:

- i. The total amount of the claimed loss of tax revenue;
- ii. The period of time during which the claimant asserts that the loss of tax revenue has occurred;
- iii. A detailed description of the method employed by the claimant in calculating the claimed loss of tax revenue;
- iv. A statement of whether all financial information supporting the claim is available for inspection, copying and audit by the Department;
- v. If any of the information described in (b)13iv above is not available for inspection, copying and audit, an explanation of why such information is unavailable for such purposes;
- vi. With respect to the information described in (b)13iv above which is available for inspection, copying and audit, a description of where and when the Department can obtain access to such information;
- vii. If any of the information described in (b)13iv above has been audited, certified or

reviewed by a certified public accountant, the name, address, and telephone number of such accountant, and the date of such audit, certification or review. If such information has been audited, the claimant shall attach copies of all audited statements and of the auditors' reports;

14. If the claimant is a limited partnership, the names and addresses of all general partners;
15. If the claimant is a general partnership, the names and addresses of all partners;
16. If the claimant is a corporation, the names and addresses of all directors and of all officers;
17. Any other information which the claimant believes to be relevant to the claim; and
18. Any other information which the Department deems necessary to process the claim, including, but not limited to, the following:
  - i. Whether the Department ever issued a No Further Action letter concerning the subject property or a portion thereof, and whether the remediation at the subject property involved an institutional control and/or engineering control;
  - ii. Whether the Department issued a covenant not to sue pursuant to N.J.S.A. 58:10B-13.1 concerning the subject property or a portion of the property; and
  - iii. Whether the claimant has applied for financial assistance or a grant from the Hazardous Discharge Site Remediation Fund established pursuant to N.J.S.A. 58:10B-4 or the Petroleum Underground Storage Tank Remediation, Upgrade and Closure Fund, N.J.S.A. 58:10A-37.3.

(c) Any documents supporting the claimant's assertion of costs incurred in ameliorating damage resulting from a discharge shall be presented as follows:

1. The claimant shall submit a compilation of all such costs, stating the aggregate amount of the costs incurred; and
2. The claimant shall submit a breakdown of the aggregate costs incurred, stating which portion of the aggregate cost is attributable to ameliorating damage resulting from the discharge, and which portion is not.

(d) The claimant shall submit all bills, invoices, receipts and other documentation in an orderly fashion, accompanied by an index and/or a summary if the Department determines that an index or summary would assist in the organized and expeditious processing of the claim.

(e) The administrator may administratively close the claim pursuant to N.J.A.C. 7:1J-2.8 for failure to provide information under this section.

#### **7:1J-6.4 Amendment of claim**

A claimant may amend a claim, or a response to the Department's request for information, with respect to the nature or extent of the damages, the cause of the damages, the amount of the claim, or any other information relevant to the claim, until the occurrence of the earliest of the following: the approval of the claim by the administrator; the denial of the claim by the administrator; or the agreement to a settlement among a claimant

and one or more potentially responsible parties.

### **7:1J-6.5 Consent to inspection**

(a) Submission of a claim shall constitute consent by the claimant to the following:

1. The inspection of the damaged real and personal property by the administrator, the Department, a Board of Arbitration convened by the administrator pursuant to N.J.A.C. 7:1J-9.1 (Board) and other persons designated by the administrator, the Department or the Board;

2. For all information submitted pursuant to N.J.A.C. 7:1J-6.3(b)12, 13, 14 or 15, the inspection, copying and audit of such information by the Department, the Board, and other persons designated by the administrator, the Department or the Board; and

3. The entry by the administrator, the Department, the Board, and other persons designated by the administrator or by the Board, onto any property to which the claimant has the right to grant access, or to which the claimant has the right to compel another person to grant access to perform remediation activities. Any cost which the claimant incurs in compelling such access shall be borne solely by the claimant.

### **7:1J-6.6 Notice of Intent to Deny; Denial**

(a) The administrator shall deny a claim which, on its face, appears to be ineligible for compensation from the Fund.

(b) The administrator may issue a Notice of Intent to Deny (NOI) with respect to any claim which, on its face, does not contain information sufficient to support a determination that the claim is eligible for compensation from the Fund. The administrator shall send the claimant the NOI by certified mail, return receipt requested.

(c) The claimant may contest the NOI by submitting to the Department additional evidence in support of the claim, and evidence that any material fact set forth in the NOI is incorrect. The claimant shall submit such evidence within 30 days after the date on which the claimant received the NOI; provided however, that if the claimant has refused delivery of the NOI, the claimant shall submit such evidence within 30 days after the date the administrator mailed the NOI.

(d) If, after reviewing the evidence submitted pursuant to (c) above, the administrator determines that the claim does not clearly fail to satisfy the requirements for eligibility for compensation from the Fund, the administrator shall withdraw the NOI and process the claim in accordance with this chapter.

(e) The administrator shall deny the claim after the expiration of the 30-day period allotted under (c) above, if:

1. The claimant fails to submit any evidence to the Department within the 30-day period; or

2. After reviewing the evidence submitted pursuant to (c) above, the administrator determines that the claim clearly fails to satisfy the requirements for eligibility for compensation from the Fund.

(f) If the administrator denies the claim pursuant to (a) or (e) above, the administrator shall prepare a

written statement setting forth the denial and the reasons therefor. The administrator shall send the claimant a copy of the statement by certified mail, return receipt requested.

(g) A claimant may request that a denial of a claim be arbitrated under N.J.A.C. 7:1J-9 if the denial was based solely upon the validity of the claim, and not upon other matters including, without limitation, untimely filing of the claim as shown on the face of the claim. The claimant shall make the request in writing within 20 days after receiving the administrator's written statement under (f) above; provided however, that if the claimant refuses delivery of the administrator's written statement, the claimant shall make the request for arbitration within 20 days after the date the administrator mailed the written statement. Failure to request arbitration before the expiration of such 20-day period shall operate as a waiver of any right to have the claim submitted to arbitration.

(h) A request for arbitration under (g) above shall contain the following information:

1. A denial of each fact disputed by the claimant which the administrator has asserted in the denial of the claim. The claimant's denial shall fairly meet the substance of the disputed facts, and shall contain assertions of the facts as the claimant believes them to be;

2. If the claimant asserts that, based upon the facts asserted in the administrator's denial of the claim, the administrator's denial is improper as a matter of law, a specific explanation of the legal basis for that assertion;

3. Copies of written documents which the claimant is relying upon to support the request, provided however, that if the claimant has previously submitted such documents to the Department, a specific reference to such documents will be sufficient;

4. An estimate of the time required for the hearing; and

5. A request, if necessary, for a barrier-free hearing location for physically disabled persons.

(i) If the claimant does not submit the information required under (h) above within the time allotted under (g) above, the administrator shall deny the request. If the claimant fails to include all of the information required under (h) above, the administrator may deny the request.

(j) The administrator may require that the claimant submit additional information beyond that required under (h) above, if the administrator determines that such information is necessary to provide the administrator, the Department or the Board with adequate notice of the specific factual or legal bases for the claimant's objections to the denial.

#### **7:1J-6.7 Communication with claimant or representative**

The Department will direct all communications in connection with the claim to the person who signed the claim, unless the claimant submits to the Department a written statement, signed by the person required to sign the claim, designating a representative to receive communications from the Department.

#### **7:1J-6.8 Relaxation of procedural requirements**

(a) Except as provided by (b) below, the Department may relax any of the procedural requirements of this chapter if the administrator determines that strict adherence to such requirements would result in unfairness or

injustice.

(b) Notwithstanding (a) above, the Department shall not relax procedural requirements of this chapter if such requirements are imposed by the Act, by other applicable State or Federal statutes, or by applicable decision, order or decree of a court of competent jurisdiction.

### **7:1J-6.9 Remediation of discharge which is subject of claim**

The Department may require the claimant to enter into an oversight document pursuant to the Procedures for Department Oversight of the Remediation of Contaminated Sites, N.J.A.C. 7:26C, to review any information regarding the remediation of a discharge that is the subject of a claim. In the instance where the claimant has a compensable claim, the Department will waive oversight costs pursuant to N.J.A.C. 7:26C-9.

## **Subchapter 7. Settlement of Claims Between Claimant and Potentially Responsible Parties**

### **7:1J-7.1 Notice of claim to potentially responsible party**

(a) If the administrator determines that a person is a potentially responsible party in connection with a discharge which is the subject of a claim, the administrator shall provide such person with written notice of the claim.

(b) The written notice provided under (a) above shall state the following:

1. The nature of the claim;
2. The identity of the claimant;
3. The time period established for settlement negotiations under N.J.A.C. 7:1J-7.2; and
4. The right to contest the validity or amount of the claim by requesting arbitration under N.J.A.C. 7:1J-8.2(a).

### **7:1J-7.2 Settlement negotiations**

(a) If the administrator determines that one or more persons are potentially responsible parties in connection with a discharge which is the subject of a claim, the administrator shall establish a time period for settlement negotiations between all potentially responsible parties and the claimant. Such time period shall be no longer than 60 days, commencing as of the date set forth in the written notice under N.J.A.C. 7:1J-7.1, unless the administrator, the claimant and all potentially responsible parties agree upon a longer period. During this settlement negotiation period, all parties shall negotiate in good faith in attempt to resolve the subject claim. Such settlement negotiation period may be extended upon the agreement of the administrator, the claimant and all potentially responsible parties.

b) The administrator may arrange for the assistance of a neutral third party to attempt to promote and arrange a settlement between the claimant and the potentially responsible parties.



### **7:1J-7.3 Effect of settlement between claimant and potentially responsible party**

(a) If the source of the discharge which is the subject of the claim is determined, and one or more potentially responsible parties concede liability, the claimant and such potentially responsible parties may agree to a settlement which shall be final and binding upon the parties and which will waive all recourse by that claimant against the Fund in connection with the discharge which is the subject of the claim. Such waiver shall be effective regardless of any communications or understanding between or among the claimant, potentially responsible parties, and/or the administrator or the Department.

(b) If the source of the discharge which is the subject of the claim has not been determined, or if no potentially responsible party has conceded liability, the claimant and such potentially responsible parties may nonetheless agree to a settlement. Such settlement shall operate as a waiver by that claimant of all recourse against the Fund in connection with the discharge which is the subject of the claim, if the terms of the settlement in any way prejudice the subrogation or assignment rights of the Fund, or in any way impair the Fund's ability to obtain cost recovery. Such waiver shall be effective regardless of any communications or understanding between or among the claimant, potentially responsible parties, and/or the administrator or the Department.

(c) Notwithstanding the waiver under (a) or (b) above, if the settling potentially responsible party is or becomes insolvent or otherwise unable to perform its obligations under the settlement, the administrator may, in its discretion, allow the claimant to reinstate the claim against the Fund. If the claim is reinstated, the Fund shall not be bound by any aspect of the settlement with the 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**

(a) A claimant may request payment of a claim from the Fund, if:

1. Based upon the information supplied by the claimant and other information obtained by the Department, the administrator has determined that he or she cannot identify any potentially responsible parties for the discharge from which the claim arose; or

2. The claimant has made good faith efforts to enter into a settlement with one or more potentially responsible parties, but has not entered into any such settlement within the time allotted under N.J.A.C. 7:1J-7.2.

(b) Upon receipt of a request under (a) above for payment of a claim from the Fund, the administrator shall provide written notice of the request to any potentially responsible parties who have been designated at or before the time of such claim.

### **7:1J-8.2 Contest of validity or amount of claim**

(a) Any potentially responsible party may contest the amount or validity of the claim by requesting that the administrator submit the claim to arbitration. If a person receiving notice of the claim under N.J.A.C. 7:1J-7.1 has not delivered a request for arbitration within 20 days after the date of delivery of the notice of the claim (or, if such person has refused delivery of the notice, 20 days after the date of mailing of the notice), such person shall be deemed to have waived any right to have the claim submitted to arbitration.

(b) The administrator may contest the amount or validity of the claim by submitting the claim to arbitration.

(c) Any other person may contest the amount or validity of the claim by requesting that the administrator submit the claim to arbitration. If the person seeking to contest the claim has not delivered a request for arbitration within 20 days after receiving actual notice of the claim such person shall be deemed to have waived any right to have the claim submitted to arbitration.

(d) Upon receipt of a request for arbitration under (a) or (c) above, the administrator shall provide the person requesting arbitration with a copy of all information submitted to the administrator under N.J.A.C. 7:1J-6.3(a) and (b). Within 20 days after receipt of such information, the person requesting arbitration shall submit the following information to the administrator in writing:

1. The name, address and telephone number of the person requesting arbitration, and such person's authorized representative;
2. A denial of each fact asserted in the information submitted under N.J.A.C. 7:1J-6.3(a) and (b) which the person requesting arbitration disputes. The denial shall fairly meet the substance of the disputed facts, and shall contain assertions of the facts as the person requesting arbitration believes them to be;
3. If the person requesting arbitration asserts that, based upon the facts asserted in the information submitted under N.J.A.C. 7:1J-6.3(a) and (b), the claim is invalid or the amount is unreasonable as a matter of law, a specific explanation of the legal basis for that assertion;
4. Copies of written documents which the person requesting arbitration is relying upon to support its assertions and the request;
5. An estimate of the time required for the hearing; and
6. A request, if necessary, for a barrier-free hearing location for physically disabled persons.

(e) If the person requesting arbitration does not submit the information required under (d) above within the time allotted under (d) above, the administrator shall deny the request. If the person requesting arbitration fails to include all of the information required under (d) above, the administrator may deny the request.

(f) The administrator may require that the person requesting arbitration submit additional information beyond that required under (d) above, if the administrator determines that such information is necessary to provide the administrator, the Department, the claimant or the Board with adequate notice of the specific factual or legal bases for the objections by the person requesting arbitration to the validity or amount of the claim.

### **7:1J-8.3 Settlement offer by the administrator**

- (a) The administrator, on behalf of the Fund, may make a written settlement offer to the claimant if:
1. The claim is eligible for compensation from the Fund;
  2. The claimant has requested payment of the claim under N.J.A.C. 7:1J-8.1;
  3. The Department has not received any requests for arbitration of the claim within 30 days after the date of delivery of the last notice under N.J.A.C. 7:1J-8.1(b) (or, if any potentially responsible party

has refused delivery, within 30 days after the date of mailing of the notice, if such date is later than the date of delivery to other potentially responsible parties); and

4. The claimant has made good faith efforts to enter into a settlement with one or more potentially responsible parties, but has not entered into any such settlement within the time allotted under N.J.A.C. 7:1J-7.2.

(b) The administrator, on behalf of the Fund, shall make a written settlement offer to the claimant if the claim is eligible for compensation from the Fund, the claimant has requested payment of the claim under N.J.A.C. 7:1J-8.1, and the administrator determines that the source of the discharge is unknown or cannot be determined.

(c) If the administrator is not required to make a settlement offer under (b) above, has elected not to make a settlement offer under (a) above, and has not denied the claim pursuant to N.J.A.C. 7:1J-6.6(e), the administrator shall submit the claim to arbitration in accordance with N.J.A.C. 7:1J-9.

#### **7:1J-8.4 Action on administrator's settlement offer**

(a) The claimant shall either accept or reject the settlement offer made pursuant to N.J.A.C. 7:1J-8.3 no later than 20 days after the date the claimant receives the settlement offer (or, if the claimant refuses delivery of the settlement offer, 20 days after the date of mailing of the settlement offer). The administrator may extend this 20-day period by written notice to the claimant.

(b) If the claimant accepts the administrator's settlement offer made pursuant to N.J.A.C. 7:1J-8.3, the claimant shall be deemed to have waived all further claims against the Fund arising in connection with the discharge which was the subject of the settled claim. Upon such acceptance, the administrator shall be subrogated to all rights of the claimant against all other persons arising in connection with the damages which were the subject of the settled claim.

(c) If the claimant rejects the settlement offer within the time allotted by (a) above, the administrator shall submit the claim to arbitration pursuant to N.J.A.C. 7:1J-9, unless the administrator and the claimant expressly agree otherwise in writing.

(d) If no acceptance or rejection of the offer is delivered to the administrator before the expiration of the 20-day period allotted by (a) above (as such period may be extended), the claimant shall be deemed to have rejected the offer, and the offer shall be deemed to have terminated.

### **Subchapter 9. Boards of Arbitration**

#### **7:1J-9.1 Convening a board of arbitration**

(a) The administrator shall convene a board of arbitration upon the occurrence of any of the following:

1. When a claimant contests in writing the denial of a claim issued by the administrator pursuant to N.J.A.C. 7:1J-6.6(e), and requests arbitration pursuant to N.J.A.C. 7:1J-6.6(g); provided, however, that arbitration of denial of a claim shall be granted only if the denial was based solely upon the lack of validity of the claim;

2. When a claimant rejects a settlement offer made by the administrator pursuant to N.J.A.C. 7:1J-8.4(c);

3. When any potentially responsible party contests the validity or amount of the claim under N.J.A.C. 7:1J-8.2(a), the administrator contests the validity or amount of the claim under N.J.A.C. 7:1J-8.2(b), or any other person contests the validity or amount of the claim under N.J.A.C. 7:1J-8.2(c); or

4. When a claimant has failed to agree upon a settlement with a potentially responsible party within the time allotted pursuant to N.J.A.C. 7:1J-7.2, and the administrator has elected not to make a settlement offer pursuant to N.J.A.C. 7:1J-8.3(a).

(b) The administrator shall deny a request for arbitration if the requesting party fails to submit all of the information required under N.J.A.C. 7:1J-8.2, within the time allotted under that section.

### **7:1J-9.2 Notice of arbitration**

The administrator shall provide written notice of the arbitration to the claimant, to all potentially responsible parties identified as of the date of the notice, and to any other person who has contested the validity or amount of damage claims or cleanup and removal costs presented to the Fund for payment.

### **7:1J-9.3 Membership of Board**

(a) In the administrator's discretion, the board of arbitration shall consist of either three individuals, or one individual.

(b) The arbitrator for a one-member board shall be selected by one of the following methods, in the administrator's discretion:

1. Selection by the administrator;
2. Selection by agreement of the claimant and any potentially responsible parties, with the consent of the administrator; or
3. Selection by the American Arbitration Association.

(c) Membership of a three-member board shall be as follows:

1. One member appointed by the potentially responsible party, provided however, that if the administrator has not identified a potentially responsible party for the discharge, the administrator shall request the American Arbitration Association to select the member who would otherwise be appointed by a potentially responsible party;
2. One member appointed by the claimant; and
3. One member appointed by the members listed in (c)1 and 2 above. This member shall serve as chairman of the board.

(d) The claimant and the potentially responsible party each shall make the appointments required by (c) above within 30 days after each such person has received notice that a board will be convened. If either the potentially responsible party or the claimant fails to appoint a member within the allotted 30-day period, the administrator shall request the American Arbitration Association to select that member, and said member and the other member shall select the neutral arbitrator; provided however, that if both the claimant and the potentially responsible party fail to appoint a member within the allotted 30-day period, the administrator shall request the

American Arbitration Association to select both members, and said members shall select the neutral arbitrator. Within 30 days after the appointment of the second of the members selected pursuant to (c)1 and (c)2 above, such members shall make the appointment required by (c)3 above. If such members fail to appoint the third arbitrator within such time period, the administrator shall request the American Arbitration Association to select the neutral arbitrator.

(e) Before the appointment of any person appointed as arbitrator becomes effective, the appointee shall disclose to the administrator any circumstance likely to affect the arbitrator's impartiality, including without limitation any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with any of the parties or any of their representatives. Upon receipt of such information from the appointee, the administrator shall communicate the information to the parties and to the board. Upon receipt of such information from a source other than the appointee, the administrator shall communicate the information to the appointee, to the parties and to the board.

(f) The selection of an arbitrator by a potentially responsible party shall not be construed as an admission of liability by any such person.

(g) Before proceeding with the first hearing, each arbitrator shall take the following oath of office:

I hereby solemnly swear to fairly, impartially and faithfully execute my duties as an arbitrator in accordance with the Spill Compensation and Control Act, and all other applicable laws and regulations.

(h) The administrator may declare the position of an arbitrator to be vacant, if presented with sufficient proof to reasonably support the conclusion that a member of the board has become unable to perform the duties of the office. A substitute member shall be appointed in accordance with this section, unless the administrator and the parties consent to proceed without a substitute member.

#### **7:1J-9.4 Jurisdiction over all claims related to discharge**

One board may be convened to hear and determine all claims arising from or related to a common discharge.

#### **7:1J-9.5 Class actions**

The board may acknowledge a class of claimants, pursuant to and in accordance with N.J.S.A. 58:10-23.11p.

#### **7:1J-9.6 Administrative conference, preliminary hearing, and mediation conference**

(a) The board, in its discretion, may schedule an administrative conference with the board and the parties and/or their representatives to expedite the arbitration proceedings.

(b) The board, in its discretion, may schedule a preliminary hearing with the parties and/or their representatives and the board to specify the issues to be resolved, to stipulate to uncontested facts, and to consider any other matters that will expedite the arbitration proceedings. Consistent with the expedited nature of arbitration, at the preliminary hearing the board may establish:

1. The extent of the schedule for the production of relevant documents and other information;

2. The identification of any witnesses to be called;
3. A schedule for further hearings to resolve the dispute; and
4. Such other procedural requirements which the board deems necessary.

(c) With the consent of the parties, the board at any stage of the proceeding may arrange a mediation conference in order to facilitate settlement.

#### **7:1J-9.7 Discovery**

(a) The board shall have complete discretion regarding discovery, provided however, that the board shall exercise such discretion in light of the expedited nature of Spill Fund Arbitration as outlined in N.J.S.A. 58:10-23.11n.

(b) The board shall reduce any proposed discovery orders to writing which shall be presented to the parties. Any exceptions to the board's proposed discovery order shall be filed within seven days after receipt of the order.

(c) The board may authorize the use of telephone conferences with the parties and the board to raise, argue and resolve any disputes regarding discovery.

#### **7:1J-9.8 Prehearing requirements**

(a) At least 10 days before the commencement of the hearing, the parties shall have:

1. Met and prepared a stipulation of facts not in dispute, and provided it to the board;
2. Met and pre-marked a joint set of exhibits as to which neither authenticity nor relevance is disputed, and provided it to the board;
3. Met and resolved all questions of authenticity as to any evidence with respect to which relevance remains in dispute, and advised the board of such resolution;
4. Identified and advised the board of all evidentiary and procedural issues which must be resolved in limine; and
5. If required by the board, filed trial briefs with the board and served copies of the trial briefs upon all parties.

#### **7:1J-9.9 Conduct of hearing**

(a) The board shall set the date, time, and place for each hearing. The board shall mail to each party notice thereof at least 10 days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof. For good cause shown, the board may postpone any hearing upon the request of a party or upon the board's own initiative.

(b) Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the board of the name and address of the representative at least

three days prior to the date set for the hearing at which the person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

(c) The board shall make arrangements to obtain a record, stenographic or otherwise, and the administrator shall bear the expense thereof.

(d) Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall pay the costs of the service.

(e) The arbitrator shall maintain the privacy of the hearings unless the Act or any other applicable law or regulation provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

(f) The parties shall have leave to present to the arbitrator such motions as the arbitrator deems appropriate for purposes of resolving procedural and substantive issues and evidentiary issues. The arbitrator may require oral argument upon such motions.

(g) A hearing shall be opened by the filing of the oath of the arbitrator, by the recording of the date, time, and place of the hearing, and the presence of the board, the parties, and their representatives, if any; and by the receipt by the arbitrator of the statement of the claim and the answering statement.

(h) Following the opening of the hearing, the board may ask for opening statements from the parties or from parties' counsel, clarifying the issues involved.

(i) After any opening statements, the claim shall be presented. If the board, in its discretion, so directs, the claimant shall appear and present his or her proofs. Any witness appearing for the purpose of substantiating the validity or amount of the claim shall then submit to questions and cross-examination by the board and by all other parties. The potentially responsible party or other party contesting the validity and amount of a damage claim shall then present its proofs and direct examination of its witnesses, who shall submit to questions and cross-examination by the board and by all other parties. In its discretion, the board may allow rebuttal testimony. The board may vary this procedure but shall afford full and equal opportunity to all parties for the presentation of any material and relevant evidence concerning a contest to the validity or amount of damage claims or damages presented to the Fund for payment. The requirements of N.J.A.C. 7:1J-2.3 shall apply to all proceedings under this subchapter.

(j) The arbitrator may receive in evidence exhibits offered by either party. The names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of the record.

(k) The order in which multiple claimants and multiple potentially responsible parties present their cases shall be determined by the board. The order in which contesting parties present their respective cases shall be determined by the board.

(l) Unless the Act or any other applicable law or regulation provides otherwise, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

(m) The hearing shall be completed within one day; provided however, that the board may, for good

cause shown, schedule one or more additional days of hearing, which shall be consecutive days if possible.

(n) Before closing the hearing, the board shall specifically inquire of the parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the board shall declare the hearing closed and the time of such closing shall be recorded. If post-hearing submissions (such as briefs or finding of facts and conclusions of law) are to be filed after the presentation of all proofs and witnesses in the hearing, the hearing shall be declared closed as of the final date set by the board for the receipt of such post-hearing submissions. If documents are to be filed with the board after the presentation of proofs and witnesses, and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be deemed the date of closing of the hearing.

(o) The board may reopen the hearing on its own initiative, or upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time mandated in N.J.A.C. 7:1J-9.16, in N.J.A.C. 7:1J-9.20, or in the Act, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed, the arbitrator may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to make an award.

(p) There shall be no oral communication between the parties and any member of the board, except at the hearing, unless the parties and the arbitrator agree otherwise. Any written communication from the parties to the board shall be directed to the board, the administrator, and to all of the parties.

(q) All pleadings, notices, motions, correspondence or any submissions whatsoever to the board shall be served upon all parties and upon the administrator.

#### **7:1J-9.10 Consent to service of process**

Each party shall be deemed to have consented to accept service of all papers, notices, process, or awards necessary or proper for the initiation or continuation of an arbitration under these rules, or for any court action in connection therewith. The entry of any award made under these rules shall be served on a party in accordance with N.J.A.C. 7:1J-1.7.

#### **7:1J-9.11 Evidence**

(a) The parties may offer evidence which is supportive of their claim or such evidence which is relevant and material relating to a contest to the validity or amount of damage claims or cleanup and removal costs presented to the Fund for payment and shall, to the fullest extent practicable, produce such evidence as the board may deem relevant to an understanding and determination of such issues or such a contest.

(b) The board shall be the judge of the relevance and materiality of the evidence offered. Strict conformity to the legal rules of evidence shall not be necessary; provided however, that the board shall respect all privileges recognized by the New Jersey Rules of Evidence.

(c) All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent in default or has waived the right to be present.

(d) Exhibits, when offered by any party, may be received in evidence by the board, and shall be retained in the board's custody until the board renders a decision. After the board renders its decision, the board shall transfer custody of all exhibits to the administrator.



(e) The board may receive and consider the evidence of witnesses by affidavit certified in accordance with N.J.A.C. 7:1J-1.6, giving it such weight as the board deems it to be entitled to after consideration of any objections made to its admission.

(f) If the parties agree or the board directs that documents or other evidence be submitted to the board after the hearing, the documents or other evidence shall be filed with the administrator for transmission to the board. All parties shall be afforded an opportunity to examine such documents or other evidence.

#### **7:1J-9.12 Subpoenas; witnesses**

(a) The board may order testimony under oath and may subpoena attendance and testimony of witnesses and the production of such documentary materials pertinent to the issues presented to the board for determination. The board may cross-examine and ask questions of any witness. All oaths and affirmations shall be made and taken before any of the persons designated in N.J.S.A. 41:2-1.

(b) The expenses of witnesses (including, without limitation, expert witnesses) for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the board, and any witness and the cost of any proof produced at the direct request of the board, shall be borne by the Fund unless the parties agree otherwise or unless the board in the award assesses such expenses or any part thereof against any specified party or parties.

#### **7:1J-9.13 Inspections and investigations by the Board**

The board may conduct inspections or investigations of any real or personal property which is relevant to the claim. An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall advise the administrator and the parties. The board shall set the date and time and shall notify the administrator and the parties thereof. Any party may be present at such inspection or investigation. If one or all parties are not present at the inspection or investigation, the board shall make a verbal or written report to the parties and afford them an opportunity to comment.

#### **7:1J-9.14 Submission of briefs**

(a) At any time before or during the hearing, the board may direct the parties to submit briefs on such legal issues as the board deems necessary for final determination of the claim. All parties shall serve copies of such briefs on each arbitrator, on all parties, and on the administrator. The board shall determine when the briefs are to be filed and shall notify the parties and the administrator of the filing date. The failure of a party to file such a brief shall not operate to delay the proceedings or the rendering of a decision by the board within the time limits specified in this subchapter or in the Act.

(b) Within 10 days after the board has determined that the parties have no further proofs to offer or witnesses to be heard, the board may direct the parties to submit to the board proposed findings of fact and conclusions of law. The board may also require any party to prepare supplemental legal memoranda on any issue that the board deems appropriate.

(c) Any party desiring reconsideration of any of the rulings of the Board rendered under N.J.A.C. 7:1J-9.16 shall move within 10 days after receiving the determination of the Board.

### **7:1J-9.15 Default**

Where there is only one known potentially responsible party, and that party fails to appear at the hearing without obtaining an adjournment thereof, and where neither the administrator nor other persons contest either the validity or amount of the claim presented to the Fund for payment, a decision may be made solely on the default of the potentially responsible party. In all other cases, a decision may not be made solely on the default of a party, and the board shall require the party who is present to submit such evidence as is deemed necessary to arbitrate the issues before the board, except that issues raised only by a defaulting party need not be addressed by the board, and the board's determination of all issues before it shall be binding as to the defaulting party.

### **7:1J-9.16 Decisions of the board; award; payment of claim**

(a) All decisions of the board shall be in writing, with notification to all parties, and shall be rendered within 60 days after the last member of the board takes the oath of office under N.J.A.C. 7:1J-9.3(g), unless the parties otherwise agree in writing to an extension. If all parties agree to such an extension, the board shall render its decision within 20 days after the date for final post-hearing submissions determined under N.J.A.C. 7:1J-9.9(n).

(b) No sooner than 30 days after the determination of the board, nor more than 60 days thereafter, the board shall certify all claims settled or arbitrated to the administrator, who, in turn, shall certify the amount of the award and the name of the claimant to the Commissioner of the Department, who shall direct the administrator to pay the award from the Fund.

(c) The award shall be in writing, signed by a majority of the arbitrators and filed with the administrator. The award shall be executed in the manner required by law.

(d) Any member of the board who disagrees with the award shall file a dissent which shall be certified and delivered to the administrator with the majority award.

(e) The board may grant any remedy or relief that the board deems just and equitable and within the scope of the arbitration provision of the Act. The arbitrator has no authority or power whatsoever to adjudicate the liability of any potentially responsible party for a discharge or threatened discharge; nonetheless, the board may deny any claim upon a finding that a particular claim is invalid for any reason or that the amount of the damage claim or cleanup and removal costs are not justified given the evidence presented to the board. The board has no authority to determine the scope of coverage or the applicability of any insurance policy pertaining to a potentially responsible party. This limitation upon the board's authority shall not be construed to limit the board's authority to determine whether the administrator's rights to subrogation or right to effectuate cost recovery have been impaired.

(f) If the parties settle their dispute during the course of the arbitration, the board may set forth the terms of the agreed settlement in a consent award.

(g) The administrator shall deliver the award in accordance with N.J.A.C. 7:1J-1.7.

(h) Determinations made by the board shall be final. Any action for judicial review shall be filed in the Appellate Division of the Superior Court within 30 days after the filing of the decision with the administrator pursuant to (b) above.

(i) All payments from the Fund pursuant to an award by the board shall be conditioned upon the administrator acquiring by subrogation all rights of the claimant to recovery of cleanup and removal costs and damages from any potentially responsible party; and provided further that the claimant has not received any compensation for said damages or cleanup and removal costs pursuant to any other State or Federal law. In any case in which a potentially responsible party seeks judicial review, reasonable attorney's fees and costs shall be awarded to the claimant if the decision of the board is affirmed.

#### **7:1J-9.17 Waiver of hearing**

(a) If the parties and the administrator agree in writing, signed by all parties and by the administrator, to waive the oral hearing, the board shall not hold a hearing.

(b) If the parties and the administrator waive the hearing pursuant to (a) above, the Board shall designate a date for submission of proofs. The Board shall notify all parties and the administrator of the date at least one week prior to the designated date. All parties shall submit all their respective proofs to the Board. The parties and the administrator shall have the opportunity to respond in writing to the proofs submitted by the other parties. The Board shall designate the time by which any such response must be filed.

(c) If the board thereafter requires additional documentation from any party, it shall notify the party of such requirement and of the date by which such material must be submitted to the board.

(d) The failure of any party to submit proofs, other documentation required by the board pursuant to (c) above, or permitted responses within the time specified by the board shall not operate to delay the rendering of a decision within the time limits specified in N.J.A.C. 7:1J-9.16, 9.20, or the Act. The board may, in its discretion, extend the time within which a party may submit information and responses so long as such extension will not operate to delay the rendering of a decision within the time limits specified in N.J.A.C. 7:1J-9.16, or the Act.

#### **7:1J-9.18 Variance from procedural requirements**

(a) Except as provided in (c) below, the board may relax any of the procedural requirements of this subchapter if the board determines that strict adherence to such requirements would result in unfairness or injustice.

(b) Nothing herein shall be deemed to preclude the parties from voluntarily agreeing to procedures more detailed than those found in this subchapter, provided that such supplemental agreements are approved by the board, and do not violate the limitations of (c) below. By way of illustration, such procedures may include guidelines for the presentation of expert testimony and the use and exchange of such testimony, or specific discovery procedures.

(c) Notwithstanding (a) and (b) above, the board shall not relax procedural requirements of this subchapter if such requirements are imposed by the Act, by other applicable State or Federal statutes, or by applicable decision, order or decree of a court of competent jurisdiction.

#### **7:1J-9.19 Extensions of time**

For good cause shown, the board may extend any period of time established by this subchapter, except the time for certifying the award. The board shall notify the parties of any extension.

### **7:1J-9.20 Expedited procedures**

(a) The parties, the administrator and the board may unanimously agree to conduct the arbitration proceeding pursuant to the expedited procedures in this section. If the parties so agree, and if there is any conflict between this section and any other provision of this subchapter, this section shall control.

(b) Notwithstanding N.J.A.C. 7:1J-1.7, the parties shall accept all notices from the board by telephone. The board shall subsequently confirm such notices to the parties in writing, provided however, that the failure to provide written confirmation shall not invalidate the telephone notice.

(c) The board shall set the date, time and place of the hearing, and so notify the parties at least seven days before the scheduled hearing date.

(d) The hearing shall be completed within one day, unless the board, for good cause shown, schedules one or more additional hearing dates.

(e) Unless the parties agree otherwise, the board shall render its decision within 14 days after the date of the close of the hearing.

### **7:1J-9.21 Waiver of rules**

Any party who proceeds with the arbitration after knowledge that any provision or requirement of this subchapter has not been complied with and who fails to state an objection thereto in writing shall be deemed to have waived the right to object.

### **7:1J-9.22 Interpretation and application of rules**

The board shall interpret and apply this subchapter insofar as it relates to the board's powers and duties. When the board consists of more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, the difference shall be decided by a majority vote. If no majority of the board agrees upon one resolution of the difference, the board shall refer the issue to a neutral party acceptable to the board, the administrator and the parties. If the board, the administrator and the parties cannot agree upon a neutral party, the administrator shall request that the American Arbitration Association apply its procedures to select the neutral party.

### **7:1J-9.23 Copies of papers for judicial proceedings**

The board shall, upon the written request of a party, furnish to the party, at the party's expense, certified copies of any papers in the board's possession that may be required in judicial proceedings relating to the arbitration.

### **7:1J-9.24 Exculpation of arbitrators**

No arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.