



NJDEP Guidance Explains Procedures for Spill Act Liens

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Under the New Jersey Spill Compensation and Control Act (“Spill Act”), NJDEP may remediate hazardous substances and then file a lien on the property of a person responsible for the discharge of the hazardous substance in order to recover its remediation costs. NJDEP has a “superlien” with priority over all previously filed liens or claims. On February 9, NJDEP published a guidance document explaining its procedures for hearing challenges to these liens by affected property owners. The guidance requires lien challengers to make a series of written submissions to NJDEP and provides multiple layers of agency review. Property owners subject to a Spill Act lien should take care to meet the deadlines set out in the guidance and use this opportunity to present their side of the story to NJDEP in order to preserve their right to judicial review of the lien.

The Spill Act gives NJDEP a lien on the revenues and all real and personal property of the person responsible for the amount that NJDEP expended for investigation and remediation. The lien is two-tiered. With respect to the property cleaned up, NJDEP’s lien is superior to all other claims. For all other real and personal property of the person responsible, NJDEP has an ordinary lien that may be subordinate to other creditors’ prior claims under the law. [N.J.S.A. 58:10-23.11\(f\)](#).

As set forth in the guidance, NJDEP provides two notices, one before filing the lien and one after. Thirty days before filing the lien, NJDEP notifies the property owner of the amount of the lien. NJDEP also creates a record supporting its decision to file the lien, which includes (1) naming the current owner of the property NJDEP remediated with public funds and the current owners of all property against which NJDEP filed the lien, and (2) a summary and invoice detailing NJDEP’s cleanup costs. Thirty days after filing the lien, NJDEP sends another notice of the property owners’ opportunity to contest the lien that also explains how to obtain the lien filing record under

the Open Public Records Act (“OPRA”).

To contest the lien, the property owner must write to NJDEP within sixty days of receiving the post-filing notice and support its challenge with specific facts from the lien filing record. In order to meet the sixty-day deadline, the challenger should make an OPRA request for the lien filing record expeditiously. NJDEP submits the dispute to a Neutral Agency Officer who has had no previous involvement with the site or the property owner. The challenger then has ten days to make its own case in writing to the Neutral Agency Officer. If relying on evidence outside of the lien filing record, the challenger should be sure to supplement the record at this stage to put its best foot forward to defeat the lien. The Neutral Agency Officer will uphold the lien unless the challenger can demonstrate that NJDEP did not have a reasonable basis to file the lien. NJDEP’s action cannot be appealed until the administrator of the Spill Compensation Fund either removes or affirms the lien based on the recommendation of the Neutral Agency Officer.

Property owners challenging a Spill Act lien should follow the procedures laid out in this guidance carefully. Even if NJDEP ultimately upholds its own lien, a court challenge to the lien could be dismissed if the challenger does not follow the procedures and exhaust its administrative remedies. A challenger also should not miss the opportunity to supplement the administrative record at the NJDEP level, as a reviewing court may not consider evidence that was not before the Agency.

Attorney:

Michael S. Kettler

Practice:

Environmental Law

Headquarters Plaza, One Speedwell Avenue, Morristown, New Jersey 07962-1981 • t: 973.538.0800 f: 973.538.1984

50 West State Street, Suite 1010, Trenton, New Jersey 08608-1220 • t: 609.396.2121 f: 609.396.4578

500 Fifth Avenue, New York, New York 10110 • t: 212.302.6574 f: 212.302.6628

399 Knollwood Road, Suite 201, White Plains, NY 10603 • t: 914.539.3360 f: 914.539.3361

1200 Summer Street, Suite 201C, Stamford, CT 06905 • t: 203.326.6740 f: 914.539.3361

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