

CHAPTER II**PROCESSING OF DAMAGE CLAIMS PURSUANT TO THE SANITARY LANDFILL FACILITY CLOSURE AND CONTINGENCY FUND ACT****Authority**

N.J.S.A. 13:1B-3, 13:1D-9, 13:1E-100 et seq. (particularly 13:1E-106 and 13:1E-114), and 58:10-23.11 et seq.

Source and Effective Date

R.2004 d.329, effective July 29, 2004.
See: 36 N.J.R. 1269(a), 36 N.J.R. 4127(a).

Chapter Expiration Date

In accordance with N.J.S.A. 52:14B-5.1c, Chapter II, Processing of Damage Claims Pursuant to the Sanitary Landfill Facility Closure and Contingency Fund Act, expires on January 25, 2010. See: 41 N.J.R. 1759(a).

Chapter Historical Note

Chapter II, Processing of Damage Claims Pursuant to the Sanitary Landfill Facility Closure and Contingency Fund Act, was adopted as R.1983 d.571, effective December 5, 1983. See: 15 N.J.R. 1213(a), 15 N.J.R. 2034(d).

Chapter II, Processing of Damage Claims Pursuant to the Sanitary Facility Closure and Contingency Fund Act, was repealed and Chapter II, Processing of Damage Claims Pursuant to the Sanitary Facility Closure and Contingency Fund Act, was adopted as new rules by R.1988 d.337, effective July 18, 1988. See: 20 N.J.R. 443(a), 20 N.J.R. 1732(b).

Public Notice. See: 21 N.J.R. 1911(b).

Administrative Change. See: 23 N.J.R. 3325(b).

Chapter II, Processing of Damage Claims Pursuant to the Sanitary Facility Closure and Contingency Fund Act, was repealed and Chapter II, Processing of Damage Claims Pursuant to the Sanitary Facility Closure and Contingency Fund Act, was adopted as new rules by R.1994 d.83, effective February 22, 1994. See: 25 N.J.R. 5116(a), 26 N.J.R. 1114(a).

Pursuant to Executive Order No. 66(1978), Chapter II, Processing of Damage Claims Pursuant to the Sanitary Facility Closure and Contingency Fund Act, was readopted as R.1999 d.91, effective February 22, 1999. See: 30 N.J.R. 4157(a), 31 N.J.R. 763(a).

Chapter II, Processing of Damage Claims Pursuant to the Sanitary Landfill Facility Closure and Contingency Fund Act, was readopted as R.2004 d.329, effective July 29, 2004. See: Source and Effective Date.

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SUBCHAPTER 1. GENERAL PROVISIONS**7:11-1.1 Purpose and scope**

(a) This chapter constitutes the rules of the Department concerning the processing of all claims under the Sanitary Landfill Facility Closure and Contingency Fund Act, N.J.S.A. 13:1E-100 et seq. (the "Act"), for damages proximately resulting from the improper operation or improper closure of a sanitary landfill facility, pursuant to the Act, including Department procedures for review and decision making regarding such claims.

(b) This chapter is promulgated for the following purposes:

1. To implement the purposes and objectives of the Sanitary Landfill Facility Closure and Contingency Fund Act, N.J.S.A. 13:1E-100 et seq.;
2. To establish rules for administration of the Sanitary Landfill Facility Contingency Fund, established pursuant to the Act, for the purpose of providing prompt and adequate compensation for damages as defined herein; and
3. To protect and insure that the taxes credited to the Fund are spent in a proper manner and for the intended purposes.

7:1I-1.2 Construction and applicability

(a) This chapter shall be liberally construed to allow the Department to fulfill the purposes of the Act concerning claims for compensation for damages proximately resulting from the improper operation or improper closure of a sanitary landfill facility. 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, denied or the subject of a final decision by the Commissioner of the Department on or before February 22, 1994, notwithstanding the date upon which any such claim was filed with the Department.

Case Notes

Township that consented to installation and maintenance of leachate monitoring wells on property, which was former sanitary landfill site, and assumed obligation to do work and provide funding work was not barred from applying for statutory damages under Sanitary Landfill Closure and Contingency Fund Act. Matter of Adoption of N.J.A.C. 7:1I, 291 N.J.Super. 183, 677 A.2d 218 (A.D.1996).

7:1I-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.

7:1I-1.4 Delegation

The Department may delegate administrative, supervisory, or investigatory authority to members of the Department's staff. The Department 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 Department under the Act, including, but not limited to, the performance of claims adjustment services.

7:1I-1.5 Definitions

The following words and terms, when used in this chapter, shall have the following meanings. Where words and terms are used which are not defined herein, the definitions of those words and terms will be the same as the definitions found at N.J.A.C. 7:26-1.4.

"Act" means the Sanitary Landfill Facility Closure and Contingency Fund Act, N.J.S.A. 13:1E-100 et seq.

"Claim" means the 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. 7:1I-3.4.

"Claimant" means the person filing a claim.

"Closure" means all activities and costs associated with the design, purchase, construction or maintenance of all measures required by the Department, pursuant to law, in order to prevent, minimize or monitor pollution or health hazards resulting from sanitary landfill facilities subsequent to the termination of operations at any portion thereof, including, but not necessarily limited to, the costs of the placement of earthen or vegetative cover, the installation of methane gas vents or monitors and leachate monitoring wells or collection systems at the site of any sanitary landfill facility, and the cost of general liability insurance, including environmental impairment liability insurance, or an amount sufficient to create a self-insurance fund as may be determined by the Board of Public Utilities pursuant to section 10 of P.L. 1981, c.306 (N.J.S.A. 13:1E-109), to fund potential claims against the owner or operator of the sanitary landfill facility during the closure and post-closure period.

"Commissioner" means the Commissioner of the Department of Environmental Protection.

"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 and includes, but is not limited to, the following:

1. The cost of restoring, repairing or replacing any real or personal property damaged or destroyed;
2. The diminution in fair market value of any real property where such diminution can be shown by a preponderance of the evidence to have solely resulted from the improper operation or improper closure of a sanitary landfill facility. Any property valuation calculations made for the purpose of this chapter shall expressly take into consideration any and all other factors which directly or indirectly affect the fair market value of the property;

3. The cost of any personal injuries, including any medical expenses incurred and income lost as a result thereof; and

4. The costs of the design, construction, installation, operation and maintenance of any device or action deemed necessary by the Department to clean up, remedy, mitigate, monitor or analyze any threat to the environment and public health, safety or welfare of the citizens of this State, including the installation and maintenance of methane gas monitors and vents and leachate monitoring wells and collection systems, and the sampling and analysis of any public or private potable water supply.

5. Damages do not include legal fees incurred in filing claims or for participation in an administrative hearing or any legal action against the Fund and costs normally associated with the listing, sale and transfer of property which is the subject of a claim. Additionally, damages do not include interest on any monetary award assessed against the Fund.

“Department” means the New Jersey Department of Environmental Protection.

“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.

“Disposal” or “disposed” means the use of the term which is expressly discussed and defined at N.J.S.A. 13:1E-3.

“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 Sanitary Landfill Facility Contingency 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.

“Improper operation” or “improper closure” of a sanitary landfill facility means the operation or closure of a sanitary landfill facility that results in a substantial deviation from applicable operation and closure requirements. A de minimis deviation from such applicable operation and closure requirements shall not constitute grounds for a determination that a sanitary landfill facility is being improperly operated or has at any time been improperly closed. A finding of improper operation or improper closure shall only be made upon the basis of a preponderance of the evidence being introduced by the claimant.

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

“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.

“Notice of Intent,” or “NOI,” means a notice issued by the Department to a claimant pursuant to N.J.A.C. 7:11-5.4, informing the claimant that the Department intends to pay or deny his or her claim.

“Owner or operator” means and includes, in addition to the usual meanings thereof, every owner of record of any interest in land whereon a sanitary landfill facility is located, has been located, had been located or at any time was located, and any person or corporation which owns a majority interest in any other corporation which is the owner or operator of any sanitary landfill facility and every person who operates or operated a sanitary landfill facility at any point in time and every agent or representative of such operator.

“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.

“Physical intrusion” means the existence of methane gas, leachate or other material emanating from the sanitary landfill facility on or under a claimant’s real property.

“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 fire fighting or for agricultural purposes.

“Responsible party” means any person who directly or indirectly contributed at any point in time to the occurrence, event, action or damages upon which any person’s claim or other claims are based.

“Sanitary landfill facility” means a governmentally approved solid waste facility at which solid waste is deposited, or has ever been deposited, on or in the land as fill for the purpose of permanent disposal or storage for a period exceeding six months, except that it shall not include any waste facility approved for disposal of hazardous waste.

“Solid waste” means the use of the term which is expressly discussed and defined at N.J.S.A. 13:1E-3(a).

Amended by R.1999 d.91, effective March 15, 1999.
See: 30 N.J.R. 4157(a), 31 N.J.R. 763(a).

In “Closure” substituted a reference to the Board of Public Utilities for a reference to the Board of Regulatory Commissioners; in “Com-

missioner", substituted a reference to the Commissioner of the Department of Environmental Protection for a reference to the Commissioner of Environmental Protection and Energy in the State Department of Environmental Protection; inserted "Covenant not to sue", "Engineering controls", "Institutional controls" and "No further action letter"; rewrote "Person"; and in "Sanitary landfill facility", inserted ", or has ever been deposited," following "is deposited".

Case Notes

Landfill was "sanitary landfill". State of N.J. Dept. of Environmental Protection and Energy v. Gloucester Environmental Management Services, Inc., D.N.J.1994, 866 F.Supp. 826.

Township that consented to installation and maintenance of leachate monitoring wells on property, which was former sanitary landfill site, and assumed obligation to do work and provide funding work was not barred from applying for statutory damages under Sanitary Landfill Closure and Contingency Fund Act. Matter of Adoption of N.J.A.C. 711, 291 N.J.Super. 183, 677 A.2d 218 (A.D.1996).

Sanitary Landfill Facility Closure and Contingency Fund Act regulations defined "sanitary landfill" and "governmental approval." Johnson Machinery Co., Inc. v. Manville Sales Corp., 248 N.J.Super. 285, 590 A.2d 1206 (A.D.1991).

Township qualified as owner of sanitary landfill and could not recover costs of installing monitoring wells. Township of Voorhees v. Department of Environmental Protection and Energy, 95 N.J.A.R.2d (EPE) 104, reversed 291 N.J.Super 183, 677 A.2d 218.

7:11-1.6 Liabilities for damages

(a) Every owner or operator of a sanitary landfill facility shall be jointly and severally liable for the proper operation and closure of the sanitary landfill facility, as required by law, and for any damages, no matter by whom sustained, proximately resulting from the operation or closure of the sanitary landfill facility.

(b) The Fund shall be strictly liable for all direct and indirect damages proximately resulting from the improper operation or improper closure of any sanitary landfill facility. The Fund shall not be liable for any damages resulting from the proper operation or proper closure of any sanitary landfill facility.

Case Notes

Diminution in fair market value of real property in absence of tangible physical damage could be compensable under Sanitary Landfill Closure and Contingency Fund Act. State of N.J. Dept. of Environmental Protection and Energy v. Gloucester Environmental Management Services, Inc., D.N.J.1994, 866 F.Supp. 826.

Former procedure of deducting 25% to reflect estimated decrease in property's fair market value. State of N.J. Dept. of Environmental Protection and Energy v. Gloucester Environmental Management Services, Inc., D.N.J.1994, 866 F.Supp. 826.

Amended mechanism for paying diminution of value claims was not arbitrary or capricious. State of N.J. Dept. of Environmental Protection and Energy v. Gloucester Environmental Management Services, Inc., D.N.J.1994, 866 F.Supp. 826.

Township qualified as owner of sanitary landfill and could not recover costs of installing monitoring wells. Township of Voorhees v. Department of Environmental Protection and Energy, 95 N.J.A.R.2d (EPE) 104, reversed 291 N.J.Super. 183, 677 A.2d 218.

7:11-1.7 Signatures; certifications

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

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

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

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

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

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

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

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

Amended by R.1999 d.91, effective March 15, 1999.
See: 30 N.J.R. 4157(a), 31 N.J.R. 763(a).

Rewrote (b).

Case Notes

Sanitary Landfill Facility Contingency Fund award regulation reducing award by any prior compensation for damages is valid. *Citizens for Equity v. New Jersey Dept. of Environmental Protection*, 252 N.J.Super. 62, 599 A.2d 516 (A.D.1990), affirmed 126 N.J. 391, 599 A.2d 507.

7:1I-1.8 Notices and other communications

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

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

(b) 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

(c) All such communications to the claimant shall be sent to the mailing address set forth in the claim under N.J.A.C. 7:1I-3.3(a)3 unless the claimant directs otherwise under N.J.A.C. 7:1I-3.6.

Amended by R.1999 d.91, effective March 15, 1999.
See: 30 N.J.R. 4157(a), 31 N.J.R. 763(a).
In (b), changed the street address.

7:1I-1.9 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.

Case Notes

Developer's claim against Sanitary Landfill Contingency Fund was properly denied due to out-of-time filing. *Bruce & Riiff v. Department of Environmental Protection*, 96 N.J.A.R.2d (EPE) 334.

SUBCHAPTER 2. CLAIMS GENERALLY

7:1I-2.1 Persons who may submit a claim

Any person claiming to have incurred damages proximately resulting from the improper operation or improper closure of a sanitary landfill facility 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.

Case Notes

Sale was prerequisite to claim for damages to property located next to old dump site. *Russell v. Department of Environmental Protection*, 95 N.J.A.R.2d (EPE) 67.

7:1I-2.2 Burden of proof

(a) 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. No claimant shall be entitled to payment from the Fund unless the claimant shows by a preponderance of the evidence that the damages sustained are a proximate result of the improper operation or improper closure of a sanitary landfill facility.

(b) A claimant shall affirmatively rebut any and all reasons for denial as stated in a Notice of Intent (NOI) to deny pursuant to N.J.A.C. 7:1I-5.4 or a Denial pursuant to N.J.A.C. 7:1I-5.5.

Case Notes

Diminution in fair market value of real property in absence of tangible physical damage could be compensable under Sanitary Landfill Closure and Contingency Fund Act. *State of N.J. Dept. of Environmental Protection and Energy v. Gloucester Environmental Management Services, Inc.*, D.N.J.1994, 866 F.Supp. 826.

Former procedure of deducting 25% to reflect estimated decrease in property's fair market value was arbitrary and capricious. *State of N.J. Dept. of Environmental Protection and Energy v. Gloucester Environmental Management Services, Inc.*, D.N.J.1994, 866 F.Supp. 826.

Amended mechanism for paying diminution of value claims was not arbitrary or capricious. *State of N.J. Dept. of Environmental Protection and Energy v. Gloucester Environmental Management Services, Inc.*, D.N.J.1994, 866 F.Supp. 826.

7:1I-2.3 Damages actually incurred; mitigation

(a) A claim shall be ineligible for compensation from the Fund unless the claimant has actually incurred 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 compensa-

tion 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. The Department may suspend processing of any claim pending the completion of the claimant's efforts to obtain compensation from such other sources. In determining the amount of an award, if any, the Department shall reduce the award by the amount of compensation already received by the claimant for the damage which is the subject of the claim.

(c) Claimants must fully disclose an award or settlement received or sought from any other source within 10 days of receiving compensation or within 10 days of seeking compensation from any other source. Failure to disclose such action shall result in denial of the claim.

(d) A claim involving the purchase and subsequent sale of property near a sanitary landfill facility shall be ineligible for compensation if the claimant knew or reasonably should have known of the potential that damages, including, but not limited to, property value diminution, could result by virtue of purchasing property near the particular sanitary landfill facility in question.

(e) The claimant shall exercise reasonable diligence and ordinary care and take affirmative measures to mitigate or prevent the damages incurred by the claimant from occurring in the first instance or 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.

(f) Any costs incurred by the claimant prior to filing of a claim or during the pendency of a claim shall not prejudice the rights of the Department to evaluate the reasonableness of said costs prior to the granting of an award.

Amended by R.1999 d.91, effective March 15, 1999.
See: 30 N.J.R. 4157(a), 31 N.J.R. 763(a).

Rewrote (b); in (d), inserted ", including, but not limited to, property value diminution," following "damages"; and in (e), added a second sentence.

Case Notes

Township that consented to installation and maintenance of leachate monitoring wells on property, which was former sanitary landfill site, and assumed obligation to do work and provide funding work was not barred from applying for statutory damages under Sanitary Landfill Closure and Contingency Fund Act. Matter of Adoption of N.J.A.C. 7:1I, 291 N.J.Super. 183, 677 A.2d 218 (A.D.1996).

Sanitary Landfill Contingency Fund claimants should have been notified processing was temporarily suspended. Citizens for Equity v. New Jersey Dept. of Environmental Protection, 126 N.J. 391, 599 A.2d 507 (1991).

Department of Environmental Protection's newly adopted claims processing regulations applied to pending claims. Citizens for Equity v. New Jersey Dept. of Environmental Protection, 126 N.J. 391, 599 A.2d 507 (1991).

Department of Environmental Protection regulation requiring sale of property as precondition to value diminution damage award was valid. Citizens for Equity v. New Jersey Dept. of Environmental Protection, 126 N.J. 391, 599 A.2d 507 (1991).

7:1I-2.4 Overlapping claims

(a) A claim shall be ineligible 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 Department shall apportion payment for such damages among the claimants or exclude certain of the claims from payment. The Department shall base the apportionment or exclusion upon the Department's determination of which claimants have actually incurred the damages in question.

7:1I-2.5 Waiver of damages not set forth in claim

The claimant shall be deemed to have waived any damages which are not set forth in the claim or in any response to the Department's request for information under N.J.A.C. 7:1I-3.3, or in any amendment to such claim or response under N.J.A.C. 7:1I-3.4.

7:1I-2.6 Claims by responsible parties or by owners or operators of a sanitary landfill facility

(a) No responsible party for a particular sanitary landfill facility shall receive compensation from the Fund for damages proximately resulting from the very sanitary landfill facility for which they are a responsible party.

(b) No owner or operator for a particular sanitary landfill facility shall receive compensation from the Fund for damages proximately resulting from the very sanitary landfill facility for which they are an owner or operator.

(c) No person who at any time deposited, disposed or otherwise discarded solid waste on or into any land at a particular sanitary landfill facility shall receive compensation from the Fund for damages proximately resulting from the very sanitary landfill facility at which they, at any time, deposited, disposed or otherwise discarded solid waste. This express prohibition shall particularly apply to any person who at any time hauled or carted solid waste to the sanitary landfill facility in question.

(d) No person who 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 the use of engineering controls at a sanitary landfill facility, or who acquired the sanitary landfill facility after the Department issued a no further action letter for a remediation at the sanitary landfill facility 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, shall receive compensation from the Fund for damages proximately resulting from the very sanitary landfill facility for which they are an owner, operator, or otherwise responsible party.

(e) No person who 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 a sanitary landfill facility, or who acquired the sanitary landfill facility after the Department issued a no further action letter for a remediation at the sanitary landfill facility that involves only the use of institutional controls shall receive compensation from the Fund for damages proximately resulting from removing the institutional control at the very sanitary landfill facility for which they are an owner, operator or otherwise responsible party.

(f) Notwithstanding (b), (d) and (e) above, an owner or operator may be eligible for damages if such owner or operator 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 a sanitary landfill facility is located, has been located, had been located or at any time was located on the subject property, 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. In order for a person to satisfy the requirement to engage in a diligent and thorough inquiry into previous ownership and uses of the property, a person must perform a preliminary assessment and site investigation in accordance with N.J.S.A. 58:10-23.11g(d)(2)(d) and N.J.A.C. 7:26E-3;

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 an affirmative 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 (d)1 above shall govern eligibility of the government entity's claim;

3. The claimant is the current owner of the sanitary landfill facility who acquired the sanitary landfill facility after the facility ceased operating, but prior to the effective

date of the Act, January 1, 1982, and took no part in the operation of the sanitary landfill facility; or

4. The claimant acquired the sanitary landfill facility after the Department issued a No Further Action letter concerning the sanitary landfill facility or a portion of the sanitary landfill facility 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 sanitary landfill facility; and

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

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

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

Inserted new (d) and (e); and recodified former (d) as (f), made internal citation changes, and added 3 and 4 and made a corresponding language change.

Case Notes

Owner of closed landfill was eligible for Contingency Fund reimbursement of cleanup costs, despite owner's prior knowledge of site's previous use as landfill, and owner's earlier utilization of landfill for waste disposal, where owner purchased site after landfill facility was closed, and after passage of Sanitary Landfill Facility Closure and Contingency Fund Act. Matter of Adoption of N.J.A.C. 7:11, 149 N.J. 119, 693 A.2d 97 (1997).

Landowner was not entitled to compensation for contamination emanating from its former use of property. Estate of Sommer v. Environmental Claims Administration, Department of Environmental Protection, 96 N.J.A.R.2d (EPE) 241.

7:11-2.7 Administrative closure of claims

(a) The Department may, in its 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.

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

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

1. Within six months 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 such action or provide information was insufficient); and

2. The Department determines that the affidavit provides an adequate explanation of why the claim should not be administratively closed.

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

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

In (d), substituted a reference to six months for a reference to 30 days in 1.

7:11-2.8 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 Department 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.

7:11-2.9 Imminent hazard

Priority review of claims may occur in cases where the claimant has demonstrated to the Department's satisfaction that extreme hardship or extreme existing or imminent hazard will proximately result from the improper operation or improper closure of the sanitary landfill facility.

SUBCHAPTER 3. CLAIMS PROCEDURE

7:11-3.1 Time for filing of claims

Claimants shall submit any claims to the Department not later than one year after the date of discovery of damages. 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, damages, if any, are incurred when the property is sold. Claims for property value diminution, therefore, must be filed within one year of sale of the property. If a claimant fails to submit any 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 improper operation or improper closure of the sanitary landfill facility.

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

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

Inserted a new second sentence.

Case Notes

No compensation permissible for landfill location-related damages when claim filed beyond one-year limitations period. *Cocco v. DEP*, 96 N.J.A.R.2d (EPE) 131.

Limitations under Sanitary Landfill Facility Closure and Contingency Fund Act would not be tolled. *Hurst v. Sanitary Landfill Contingency Fund*, 93 N.J.A.R.2d (EPE) 265.

Claim under Sanitary Landfill Facility Closure and Contingency Fund Act against Sanitary Landfill Contingency Fund was time-barred. *DeLuca v. DEPE*, 93 N.J.A.R.2d (EPE) 259.

Date of discovery of damage was date property owners should have discovered basis for claim against fund. *Wilde v. Department of Environmental Protection*, 93 N.J.A.R.2d (EPE) 47.

Claim for damages under the Sanitary Landfill Facility Contingency Fund filed more than one year after owners had knowledge of damage was untimely. *N.J.S.A. 13:1E-107. Curcio v. Environmental Claims Admin.*, 91 N.J.A.R.2d 5 (EPE).

7:11-3.2 Submission of claim

(a) For the purposes of determining whether a claim has been timely filed pursuant to N.J.A.C. 7:11-3.1, 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. Claims submitted by mail must be sent in accordance with N.J.A.C. 7:11-1.8; or
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.

7:11-3.3 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. 7:11-3.6;
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 has actually incurred damages, as such term is defined in N.J.A.C. 7:11-1.5, that the claimant has not received compensation from any other source for such damages, and that the claimant is not an owner or operator or responsible party in relation to the claim. Such statement need not be specific about the amount or nature of such damages;

8. If the claim is for property value diminution, a statement that the claimant is attempting to sell the subject property. The Department shall deny, without prejudice, a claim for property value diminution which is filed after the effective date of these rules which does not contain this statement. The claimant may again file the claim upon commencing efforts to sell the subject property;

9. In accordance with N.J.A.C. 7:11-2.3(f), a statement that the claimant did not know of the existence of the sanitary landfill facility and did not know, nor reasonably could have known, of the potential that property value diminution could result by virtue of purchasing property near the particular sanitary landfill facility in question;

10. If the claim is for property value diminution and is made pursuant to N.J.A.C. 7:11-4.8, all documents required by N.J.A.C. 7:11-4.8 are to be submitted with the claim, including a statement that the claimant has contracted to sell or has sold the subject property and that the claimant will allow the Department or its agents access to the property if claimant still maintains title to the property. If the property has not been sold, claimant must submit within 30 days of the signing of a binding agreement of sale a copy of the contract of sale to allow adequate time for the Department to schedule an appraisal;

11. A statement that the claimant cannot benefit from a covenant not to sue if one has been issued by the Department for the sanitary landfill facility at issue and why;

12. A statement that the damages being claimed are not the proximate result of additional remediation to remove an institutional control at the sanitary landfill facility;

13. In accordance with N.J.A.C. 7:11-2.6(f)3, a statement that the claimant is the current owner of the sanitary landfill facility who acquired the sanitary landfill facility after the facility ceased operating, but prior to January 1, 1982, and the claimant took no part in the sanitary landfill facility's operation; and

14. A statement that the claimant is the owner of a sanitary landfill facility for which the Department issued a no further action letter for the entire sanitary landfill facility 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 sanitary landfill facility and why; and

iii. The Department has ordered the claimant to remediate the contamination.

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

1. The location of the sanitary landfill facility which the claimant believes to be the proximate cause of the damages incurred, including the name of the site, the street address, the municipality, and the county, including without limitation the following:

i. Whether any person, or owner or operator of the sanitary landfill facility has admitted responsibility for the damages claimed or for the condition from which the claim arose, or liability for the amount of damages for which the claim is being made;

ii. If any such person has admitted responsibility or liability pursuant to (b)1i above, the names of such persons and the nature of such statements or admissions;

iii. Whether the Department ever issued a no further action letter concerning the sanitary landfill facility or a portion thereof, and whether the remediation at the sanitary landfill facility involved an institutional control and/or engineering control;

iv. Whether the Department issued a covenant not to sue pursuant to N.J.S.A. 58:10B-13.1 concerning the sanitary landfill facility or a portion of the sanitary landfill facility;

v. Whether the claimant filed a claim against the sanitary landfill facility's Environmental Impairment Liability Fund established pursuant to N.J.S.A. 13:1E-109;

vi. Whether the claimant filed a claim for reimbursement against the Municipal Landfill Closure and Remediation Fund established pursuant to N.J.S.A. 13:1E-116.1; and

vii. 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.

2. A description of any damage to real property located thereon, including without limitation the following:

- 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 for the cost to remedy 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;
3. A description of any damage to personal property located thereon, including without limitation:
- 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)2viii above; and
 - x. The location at which the Department's designee can inspect the damaged personal property;
4. A detailed description of the facts known to the claimant which support the claim, such as the facts which lead the claimant to believe that the improper operation or improper closure of the sanitary landfill facility cause the damages suffered by the claimant;
 5. The names and addresses of any witnesses known to the claimant who may have knowledge concerning the improper operation or improper closure, threatened damage, or damage caused by the sanitary landfill facility;
 6. The names of any public agencies (including without limitation any local or state police or any other local, county, state, interstate or Federal agencies) who have investigated the improper operation or improper closure activities and, if known to the claimant, the names of the persons who conducted the investigations on behalf of such agencies;
 7. If any of the damaged real or personal property or any of the asserted lost income may be covered by any insurance policy or policies, or other financial agreement or instrument under which compensation is reasonably likely to be available, claimant shall exercise best efforts to obtain compensation from such sources for the damages sustained in accordance with N.J.A.C. 7:1I-2.3(b), and shall provide as proof of such action 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 claimant's representatives concerning the damages claimed;
 8. The names and addresses of any persons other than the Fund (including without limitation insurance companies) against whom the claimant has asserted a claim;
 9. Whether the claimant has received or agreed to receive any compensation from any person in connection with the damages claimed, and the details of any such compensation or agreement to receive compensation;
 10. A description of any action taken to repair, restore or replace damaged real or personal 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;

11. If the claimant asserts any personal injury damages including medical expenses incurred and income lost as a result thereof, 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)11v 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)11v above, which is available for inspection, copying and audit, a description of where and when the Department can obtain access to such information;
 - viii. If any of the information described in (b)11i through vii 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 the auditor's reports;
 - ix. A specific statement as to the nature of the health injuries and how the health injuries are related to the improper operation or improper closure of the sanitary landfill facility in question; and
 - x. Detailed records substantiating the personal injuries; effects or damages suffered by the claimant including any medical records, prognosis statements, and documentation indicating the monetary value of medical attention;
12. If the claimant is a limited partnership, the names and addresses of all general partners;
13. If the claimant is a general partnership, the names and addresses of all partners;
14. If the claimant is a corporation, the names and addresses of all directors and of all officers;
15. Any other information which the claimant believes to be relevant to the claim; and

16. Any other information which the Department deems necessary to process the claim.

(c) Any documents supporting the claimant's assertion of costs incurred in ameliorating the damage resulting from the improper operation or improper closure of a sanitary landfill facility 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 improper operation or improper closure of the sanitary landfill facility, 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 Department may administratively close the claim pursuant to N.J.A.C. 7:11-2.7 for failure to provide information under this section.

Amended by R.1999 d.91, effective March 15, 1999.
See: 30 N.J.R. 4157(a), 31 N.J.R. 763(a).

In (a), made an internal citation change in 9, substituted a reference to 30 days for a reference to 10 days in the last sentence of 10, and added 11 through 14; in (b)1, inserted new iii and iv, recodified former iii as v, and added vi and vii; and in (b)2, rewrote iv.

Case Notes

Environmental Protection Department's regulations enacted during claims processing suspension were applicable to previously filed claims. *Citizens for Equity v. New Jersey Dept. of Environmental Protection*, 252 N.J.Super. 62, 599 A.2d 516 (A.D.1990), affirmed 126 N.J. 391, 599 A.2d 507.

Sanitary Landfill Facility Contingency Fund regulation which required a sale or attempt to sell property to prove damages was reasonable. *Citizens for Equity v. New Jersey Dept. of Environmental Protection*, 252 N.J.Super. 62, 599 A.2d 516 (A.D.1990), affirmed 126 N.J. 391, 599 A.2d 507.

Department of Environmental Protection regulation prohibiting value diminution damage award was contrary to Sanitary Landfill Contingency Fund Act. *Citizens for Equity v. New Jersey Dept. of Environmental Protection*, 252 N.J.Super. 62, 599 A.2d 516 (A.D.1990), affirmed 126 N.J. 391, 599 A.2d 507.

Department of Environmental Protection regulation preconditioning value diminution award was properly applied to pending claims. *Citizens for Equity v. New Jersey Dept. of Environmental Protection*, 252 N.J.Super. 62, 599 A.2d 516 (A.D.1990), affirmed 126 N.J. 391, 599 A.2d 507.

Homeowners' claim against Sanitary Landfill Facility Contingency Fund was properly denied due to homeowners' failure to prove damages. *Gulite v. Department of Environmental Protection*, 96 N.J.A.R.2d (EPE) 326.

Homeowner was not entitled to compensation under landfill fund for unproven damages. *Dickel v. Environmental Claims Administration*, 96 N.J.A.R.2d (EPE) 139.

Properly run landfill; no basis for compensation claim. *Rizzi v. New Jersey Department of Environmental Protection*, 93 N.J.A.R.2d (EPE) 108.

Homeowners' claim would be granted despite contention that they sold home without obtaining required appraisal figure and without offering it for sale according to formula set in regulation. *Allen v. Department of Environmental Protection*, 93 N.J.A.R.2d (EPE) 101.

Date of discovery of damage was date property owners should have discovered basis for claim against fund. *Wilde v. Department of Environmental Protection*, 93 N.J.A.R.2d (EPE) 47.

7:1I-3.4 Amendment of claim

(a) 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:

1. The approval of the claim by the Department;
2. The denial of the claim by the Department; or
3. The agreement to a settlement among a claimant and one or more owners or operators or other persons in connection with the sanitary landfill facility which is the subject of the claim.

7:1I-3.5 Consent to inspection; investigation

(a) Submission of a claim shall constitute consent by the claimant to allow the Department, and other persons designated by the Department:

1. To inspect all documents and property relating to his or her claim for damages including, but not limited to:
 - i. Financial, medical, employment and property records;
 - ii. Insurance policies; and
 - iii. Damaged real and personal property;
2. For all information submitted pursuant to N.J.A.C. 7:1I-3.3, to copy and audit the information; and
3. To enter 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. Any cost which the claimant incurs in compelling such access shall be borne solely by the claimant and shall not constitute a compensable damage payable by the Fund.

(b) In investigating claims for personal injuries, the Department may direct a medical examination of the claimant by an independent physician selected by the Department. The claimant shall present himself or herself to the physician selected at the time and place designated by the physician.

1. A written report of such examination shall be filed by the examining physician with the Department and a copy mailed by the Department to the claimant; and

2. If the Department has directed a medical examination by a physician selected by the Department, such physician's fee shall be paid by the Department from the Fund.

7:1I-3.6 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.

7:1I-3.7 Notice to owner or operator

When, in the opinion of the Department, the claim is complete for payment pursuant to N.J.A.C. 7:1I-2.2 and 3.3, the Department shall notify the owner or operator of the sanitary landfill facility by mailing a notice of the claim by certified mail, return receipt requested, to such owner or operator. In the case of multiple, related claims (series claims), the Department will notify the owner or operator of the sanitary landfill facility of the first claim of the series only. This notification will include an estimate of the approximate number of claims expected in that series if known, and will give notice that copies of all further claims must be requested in writing.

SUBCHAPTER 4. PROPERTY VALUE DIMINUTION CLAIMS

7:1I-4.1 Extent of eligibility

Claims for diminution of property value shall be eligible for compensation from the Fund only to the extent that the subject property has been sold and such diminution proximately results from the improper operation or improper closure of a sanitary landfill facility. A diminution of property value may be deemed attributable to the improper operation or improper closure of a sanitary landfill facility notwithstanding the lack of any physical intrusion resulting from the sanitary landfill facility onto the subject property.

Case Notes

Possible ground water contamination resulting from the discharge of hazardous substance entitled homeowners to damages. *McDonald v. DEPE*, 94 N.J.A.R.2d (EPE) 10.

7:1I-4.2 Requirements for eligibility

(a) Except for claims settled under N.J.A.C. 7:1I-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 property and the Department 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. 7:1I-4.3 and the information submitted pursuant to N.J.A.C. 7:1I-4.5.