

CHAPTER 1I**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 and 13:1E-100 et seq., particularly 13:1E-106 and 13:1E-114.

Source and Effective Date

R.1994 d.83, effective February 22, 1994.
See: 25 N.J.R. 5116(a), 26 N.J.R. 1114(a).

Executive Order No. 66(1978) Expiration Date

Chapter 1I, Processing of Damage Claims Pursuant to the Sanitary Landfill Facility Closure and Contingency Fund Act, expires on February 22, 1999.

Chapter Historical Note

Chapter 1I, 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). Amendments were adopted as R.1984 d.351, effective August 20, 1984. See: 16 N.J.R. 958(a), 16 N.J.R. 2268(a). The text of Chapter 1I was repealed and new rules regarding damage claims were adopted as R.1988 d.337, effective July 18, 1988.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). Amendments were adopted as R.1991 d.582, effective December 2, 1991, and R.1993 d.303, effective June 21, 1993. See: 22 N.J.R. 3675(a), 23 N.J.R. 3647(b); 25 N.J.R. 741(a), 25 N.J.R. 2715(a).

Chapter 1I was repealed and new rules regarding damage claims were adopted as R.1994 d.83. See: Source and Effective Date.

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SUBCHAPTER 1. GENERAL PROVISIONS**7:1I-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 Regulatory Commissioners 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 Environmental Protection and Energy in the State Department of Environmental Protection.

“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.

“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.

“Notice of Intent,” or “NOI,” means a notice issued by the Department to a claimant pursuant to N.J.A.C. 7:1I-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 individual or entity, including without limitation, a public or private corporation, company, association, society, firm, partnership, joint stock company,

foreign individual or entity and its agents, interstate agency or authority, the United States or any of its political subdivisions or agents, the State of New Jersey and its agents or any of the political subdivisions of or found within the State of New Jersey and their agents, or any of the other meanings which apply to the common understanding of the term.

“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 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).

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. 7:1I, 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.

7:1I-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.

7:II-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 section 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 in this document, and that to the best of my knowledge, after diligent investigation including inquiry of those individuals immediately responsible for obtaining the information, the information contained in this claim is true, accurate and complete. I am aware that there are significant civil and criminal penalties, including fines and/or imprisonment, for submitting false information."

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:II-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
CN 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
506 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:II-3.3(a)3 unless the claimant directs otherwise under N.J.A.C. 7:II-3.6.

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.

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 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. 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, the Department shall reduce the award by the amount of any prior compensation for the claimed damages received by the claimant, including without limitation, compensation received from insurance policies, court awards, contractual rights, and any other remedies provided under statutory or common law.

(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 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.

(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.

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) Notwithstanding (b) 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 either 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; or

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.

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. 7:1I, 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.*

7:1I-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 De-

partment 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 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 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.

7:1I-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.

7:1I-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

7:1I-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 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.

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).

7:1I-3.2 Submission of claim

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

7:1I-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. 7:1I-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. 7:1I-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. 7:1I-2.3(d), 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; and

10. If the claim is for property value diminution and is made pursuant to N.J.A.C. 7:1I-4.8, all documents required by N.J.A.C. 7:1I-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 10 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.

(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; and

iii. 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;

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;

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;

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 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 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.

7:II-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:II-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:II-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 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.

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:II-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:II-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:II-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:II-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:II-3.6;
6. Whether the claimant is an individual, *general partnership*, limited partnership, corporation, local govern-

ment 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. 7:1I-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. 7:1I-2.3(d), 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; and

10. If the claim is for property value diminution and is made pursuant to N.J.A.C. 7:1I-4.8, all documents required by N.J.A.C. 7:1I-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 10 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.

(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; and

iii. 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;

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;

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 damaged 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. 7:1I-2.7 for failure to provide information under this section.

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.

(b) Within 30 days after filing the claim, 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 discontinuances made necessary by the 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.

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.

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 preconditioning value diminution award was valid. *Citizens for Equity v. New Jersey Dept. of Environmental Protection*, 126 N.J. 391, 599 A.2d 507 (1991).

Homeowners not entitled to recover claimed costs other than diminution of value of property. *Kane v. Department of Environmental Protection*. 93 N.J.A.R.2d (EPE) 231.

7:1I-4.3 Appraisal of subject property

(a) After the claimant has elected under N.J.A.C. 7:1I-4.9(a)1 to pursue the claim, or in the case of a new claim filed after February 22, 1994, the Department shall obtain appraisals of the value of the subject property. The claimant shall notify the Department of the sale, in writing,

within 10 days of signing a binding agreement of sale in order to allow the Department sufficient time to have an appraisal completed before settlement. The appraisals shall be as of the time of the sale of the subject property (or, for claims under N.J.A.C. 7:1I-4.6 or 4.7, as of the date the Department issues an NOI to pay). One such appraisal shall state the value of the subject property as affected by the sanitary landfill facility (unless the Department elects not to obtain such appraisal, pursuant to N.J.A.C. 7:1I-4.3(b)), and one appraisal shall state the value of the subject property absent the effect of the sanitary landfill facility. The appraisals may, in the Department'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 Department may elect not to obtain an appraisal of the subject property as affected by the sanitary landfill facility if the Department determines in its discretion that there is insufficient information to obtain a meaningful appraisal of the subject property reflecting the effect of the sanitary landfill facility. Without limiting the discretion of the Department under this subsection, the Department may determine that there is insufficient information if fewer than three comparable properties which have been affected by the sanitary landfill facility have been sold as of the date on which the claim is filed.

7:1I-4.4 Valuation of a claim

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

1. The appraised value of the subject property determined pursuant to N.J.A.C. 7:1I-4.3(a), excluding the effect of the sanitary landfill facility on such value; and
2. The greater of:
 - i. The appraised value of the subject property determined pursuant to N.J.A.C. 7:1I-4.3(a), reflecting the effect of the sanitary landfill facility 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. 7:1I-4.3(b), the Department has elected not to obtain an appraisal of the subject property as affected by the sanitary landfill facility, the amount of the claim eligible for compensation from the Fund shall be equal to the difference between (b)1 and (b)2 below, adjusted in accordance with (c) below:

1. The appraised value of the subject property determined pursuant to N.J.A.C. 7:1I-4.3(a), excluding the effect of the sanitary landfill facility on such value; and

2. The price actually obtained by the claimant upon the sale of the subject property, without closing adjustments.

(c) The Department may, in its discretion, adjust the amount determined pursuant to (a) or (b) above by considering other information available to the Department 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 improper operation or improper closure of the sanitary landfill facility. 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. 7:1I-4.3(a), indicating that factors other than the sanitary landfill facility 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 sanitary landfill facility may have affected real property values; general market conditions; 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 sanitary landfill facility 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. 7:1I-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 sanitary landfill facility. 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. 7:1I-4.5; and

4. The effect of the completion of the construction phase of the sanitary landfill facility remediation or of other amelioration of the damages resulting from the improper operation or improper closure of the 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 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-4.5 Evidence of good faith sale

(a) Except as provided in N.J.A.C. 7:1I-4.7 and 4.8, within 10 days after the signing of a binding agreement of sale and the closing of the sale for 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 Settlement sheet(s) required by the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C.A. 2601 et seq. and 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. 7:1I-1.7, 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 person 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 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 a multiple listing service, and listed the property for sale with 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);
- 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 Department that the claimant arrived at the sale price in good faith shall not preclude the Department from determining that any other aspect of the sale of the subject property was not in good faith.

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

7:1I-4.6 Settlement based upon legal inability to sell the subject property

(a) If, solely as a result of the improper operation or improper closure of a sanitary landfill facility, 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 sanitary landfill facility, and the subject property is located in a municipality in which a certificate of occupancy is required for the sale), the Department may, in its discretion, offer to settle the claimant’s claim against the Fund in accordance with this section.

(b) If the Department elects to settle a claim pursuant to this section, the Department shall determine the amount of the claim eligible for compensation pursuant to N.J.A.C.

7:1I-4.4. An offer by the Department to settle the claim shall be in such amount.

(c) The making, acceptance or rejection of such settlement offer pursuant to (b) above shall be in accordance with N.J.A.C. 7:1I-5.4.

(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. This lien shall serve as a basis for reimbursement to the Fund of any excess payments made in settlement.

(e) The Department 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 Department 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 Department shall execute, acknowledge and deliver the discharge of the lien upon repayment of the settlement amount by the claimant, 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):

$$\text{Payment amount} = SP - (AV - S)$$

where:

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

7:1I-4.7 Settlement when emergency relocation is necessary

If the Department determines, in its discretion, that environmental conditions at the subject property which result from the improper operation or improper closure of a sanitary landfill facility create a substantial risk of an imminent health or safety hazard to the occupants of the subject property, the Department may suspend any or all of the requirements of N.J.A.C. 7:1I-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.

7:1I-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 Department may, in its 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. 7:1I-4.1, and only if the subject property satisfies the eligibility requirements set forth in N.J.A.C. 7:1I-4.2.

(c) Subject to the limitation in N.J.A.C. 7:1I-4.1, the Department shall determine the amount of the settlement offer pursuant to N.J.A.C. 7:1I-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. 7:1I-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. 7:1I-4.5(a)1 and (a)7.

7:1I-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 February 22, 1994. 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 written 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 or proper closure of the sanitary landfill facility has been completed to the satisfaction of the Department, and that the Department 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 in accordance with the requirements of this chapter.

(d) At any time during the period of suspension under (c) above, a claimant may request reinstatement of the claim by written 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 Department may, in its discretion, reactivate a claim suspended under N.J.A.C. 7:1I-2.3(b) upon the conclusion of litigation or negotiations between the claimant and any owner or operator or any other responsible party, which litigation or negotiations concerns such damages. For the purpose of this subsection, litigation or negotiations shall be deemed to have concluded upon the occurrence of any of the following: a complete settlement of the litigation or matter; or the entry of a settlement, judgment or order completely resolving the litigation or matter, followed by the expiration of time allotted to appeal or otherwise challenge such settlement, judgment or order.

(g) Upon reactivation of a suspended claim:

1. The Department 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 Department 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. SETTLEMENT AND DETERMINATION OF CLAIM

7:1I-5.1 Settlement of claim with owner, operator or other person

(a) At least two weeks prior to any private settlement with any owner or operator or other person, the claimant shall notify the Department by certified mail of the terms of the settlement.

(b) If the claimant privately settles with any owner or operator or other person in connection with the sanitary landfill facility in question, any payment the claimant receives as a result of that settlement shall be deducted from the amount of compensation awarded by the Department regarding the claimant's damages; provided, however, that if the settlement terms release any owner or operator from further liability, the settlement shall be an absolute bar to any claim for damages from the Fund.

7:1I-5.2 Actual real or personal property damage

If the claimant submits all evidence required by N.J.A.C. 7:1I-3.3, and if, after verification of the reasonableness of all estimates and receipts submitted, the Department is satisfied with the evidence submitted, the Department shall issue a Notice of Intent pursuant to N.J.A.C. 7:1I-5.4.

7:1I-5.3 Personal injuries

If the claimant submits all evidence required by N.J.A.C. 7:1I-3.3, and if, after verification of the reasonableness of receipts and opinions supplied, the Department is satisfied with the evidence submitted, the Department shall issue a Notice of Intent pursuant to N.J.A.C. 7:1I-5.4.

7:1I-5.4 Notices of Intent

(a) The Department shall issue a Notice of Intent (NOI) to deny 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 Department shall issue a Notice of Intent (NOI) to pay with respect to any claim which contains sufficient information to support a determination that the claim is eligible for compensation from the Fund. The Department shall send the claimant the NOI by certified mail, return receipt requested.

(b) The claimant shall either accept the NOI or 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. Legal arguments will not be accepted. 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 30 days after the date the Department mailed the NOI.

(c) In the case of an NOI to deny, if after reviewing the evidence submitted pursuant to (b) above, the Department determines that the claim does not clearly fail to satisfy the requirements for eligibility for compensation from the Fund, then the Department shall withdraw the NOI and reconsider the claim. However, if after reviewing the evidence submitted pursuant to (b) above, the Department determines that the claim does clearly fail to satisfy the requirements for eligibility for compensation from the Fund, then the Department will process the claim in accordance with N.J.A.C. 7:1I-5.5. The claimant may contest the Department's final decision by proceeding in accordance with N.J.A.C. 7:1I-5.6.

(d) In the case of a NOI to pay, if after reviewing the evidence submitted pursuant to (b) above, the Department determines that the claimant has clearly demonstrated its entitlement to a payment greater than the amount contained in the NOI to pay, then the Department shall make a new offer of payment with regard to the claim. However, if after receiving the evidence submitted under (b) above, the Department determines that the claimant has not clearly demonstrated its entitlement to a payment greater than the amount contained in the NOI to pay, then the Department shall issue a final decision on the claim. If the claimant wishes to contest the Department's final decision, the claimant shall proceed in accordance with N.J.A.C. 7:1I-5.6.

Case Notes

Sanitary Landfill Closure and Contingency Fund Act, and regulations adopted thereunder, did not violate equal protection. *State of N.J. Dept. of Environmental Protection and Energy v. Gloucester Environmental Management Services, Inc.*, D.N.J.1994, 866 F.Supp. 826.

Claims procedure under Sanitary Landfill Closure and Contingency Fund Act did not violate due process. *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-5.5 Denials

(a) The Department shall deny the claim after the expiration of the 30-day period allotted under N.J.A.C. 7:1I-5.4(b), if the claimant fails to submit any evidence to the Department within the 30-day period.

(b) The Department shall deny any claim if, after reviewing the evidence submitted pursuant to N.J.A.C. 7:1I-5.4(b), the Department determines that the claim clearly fails to satisfy the requirements for eligibility for compensation from the Fund.

(c) If the Department denies the claim pursuant to this section, the Department shall prepare a written statement setting forth the denial and the reasons therefor. The Department shall send the claimant a copy of the final decision by certified mail, return receipt requested.

7:1I-5.6 Adjudicatory hearings

(a) A claimant may contest a final claim decision by requesting a hearing before the Office of Administrative Law. The claimant shall make the request in writing within

30 days after receiving the Department's written statement under N.J.A.C. 7:1I-5.5(c); provided, however, that if the claimant has refused delivery of the Department's final decision, the claimant shall make the request for a hearing within 30 days after the date of mailing of the final decision. Failure to request a hearing before the expiration of such 30-day period shall operate as a waiver of any right to have the claim submitted to a hearing.

(b) A request for a hearing under (a) above shall contain the following information:

1. A denial of each fact disputed by the claimant which the Department has asserted in the final claim decision. 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 Department's final claim decision, the Department's decision 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.

(c) If the claimant does not submit the information required under (b) above within the time allotted under (a) above, the Department, after proper notice to the claimant, may deny the request.

(d) The Department may require that the claimant submit additional information beyond that required under (b) above, if the Department determines that such information is necessary to provide the Department with adequate notice of the specific factual or legal bases for the claimant's objections to the final claim decision.

(e) A request for an adjudicatory hearing shall be filed with the Department at the following address:

Office of Legal Affairs
ATTENTION: Adjudicatory Hearing Requests
Department of Environmental Protection
CN 402
Trenton, New Jersey 08625-0402

All such communications regarding adjudicatory hearings for which a street address is required shall be sent to the following address:

Office of Legal Affairs
ATTENTION: Adjudicatory Hearing Requests
Department of Environmental Protection
401 East State Street
Trenton, New Jersey 08609

(f) If the Department grants the hearing request, the Department shall file the request for a hearing with the Office of Administrative Law. The hearing shall be held before an administrative law judge in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

Case Notes

Claims procedure under Sanitary Landfill Closure and Contingency Fund Act did not violate due process. *State of N.J. Dept. of Environmental Protection and Energy v. Gloucester Environmental Management Services, Inc.*, D.N.J.1994, 866 F.Supp. 826.

Sanitary Landfill Closure and Contingency Fund Act, and regulations adopted thereunder, did not violate equal protection. *State of N.J. Dept. of Environmental Protection and Energy v. Gloucester Environmental Management Services, Inc.*, D.N.J.1994, 866 F.Supp. 826.

SUBCHAPTER 6. CONDITIONS OF PAYMENT

7:1I-6.1 Payment of claim

(a) Except as provided in (b) below, the Department shall make claim payments in a single lump sum payment.

(b) The Department may bifurcate multiple damages filed in a single claim and make payments separately thereon.

(c) In the event that the total amount of claims awarded exceeds the current balance of the Fund, each award shall be paid, without interest, on a prorated basis over time until the awards are paid in full. Claims initially paid on a prorated basis will be satisfied in full before any payments are made on new claims.

7:1I-6.2 Conditions of payment

(a) No payment of any damages from the Fund shall be made unless the Department acquires, by subrogation, all rights of the claimant to recovery of such damages from an owner or operator of a sanitary landfill facility.

1. The claimant shall not prejudice such subrogation rights in any manner;

2. The claimant shall cooperate fully with the Department in the preparation of a case for trial, should the Department commence a civil action to recover any amount awarded; and

3. The claimant shall allow the Department to join his or her claim with as many claims as the Department may have against any person in any civil action commenced to recover any amounts awarded.

(b) No payment of any damages from the Fund shall be made unless the claimant executes a written release of all

damages occurring prior to execution of the release except those damages which could not reasonably have been discovered prior to signing the release. The release shall satisfy all conditions precedent to payment of the claim required by this chapter.