

New Jersey Appeals Court Clarifies Methodology for Valuing Contaminated Property

by John M. Scagnelli on August 3, 2012

The Appellate Division in *Paulsboro v. Essex Chemical Corp.* recently ruled on how the value of a contaminated property must be calculated in a New Jersey eminent domain action where the property contained a landfill that had been closed with the approval of the New Jersey Department of Environmental Protection (NJDEP). The Appellate Division ruled that the property owner in that case did not have to escrow money from the condemnation award to pay for the costs of remediation.

The *Paulsboro* decision raises further questions concerning how this issue will be handled where remediation is being handled by a New Jersey Licensed Site Remediation Professional (LSRP), particularly where contamination is left on site under institutional and engineering controls approved by the LSRP.

Under the existing standard established in *Housing Authority of the City of New Brunswick v. Suydam Investors*, contaminated properties must be valued as if they have already been remediated, and the portion of the condemnation award required to pay the costs of remediation must be deposited into a trust-escrow account.

Paulsboro v. Essex Chemical Corp. involved a sixty-seven-acre riverfront tract owned by Essex Chemical Corp. The land includes a closed seventeen-acre landfill, which consists of a forty-foot high mound of gypsum. Its closure was approved by NJDEP, who deemed the property to be fully remediated. Paulsboro, who wanted the land to build a marine terminal, appraised the entire site as worth \$1.215 million and deposited that amount in court. Essex Chemical moved to withdraw the money from escrow but Paulsboro argued that a portion of the funds would be needed for further remediation, including leveling the landfill to ground level.

The court ultimately concluded that the *Suydam* valuation methodology was not applicable because the property owner, having already obtained approval from NJDEP of its plan for closure of the landfill, is not subject to any additional liability for remediation of the site. Therefore, the court held that the property owner should receive the full fair market value of its property as determined by ordinary valuation methodologies.

“If a site has already been remediated with the DEP’s approval and the condemnee is not subject to any additional liability for remediation, the condemnee is no longer exposed to what the Court in *Suydam* referred to as a ‘double liability’ ... and therefore, the special valuation methodology established in that case does not apply,” the Appellate Division explained.

“Although that former landfill is subject to continued maintenance and monitoring ... Essex is not subject to any additional obligation for remediation of that site,” the court added. While it acknowledged that reducing the landfill to ground level might increase the property’s value, the court held that the necessary remediation had already been completed.

In *Paulsboro*, NJDEP had approved closure of the landfill. Most New Jersey environmental remediations are now proceeding under the supervision and approval of New Jersey LSRPs, who issue remediation approvals, called Response Action Outcomes (RAOs). The RAOs are subject to NJDEP review and invalidation during a three-year period following their issuance.

Will LSRP approvals constitute the approval required in *Paulsboro*, so that money from the condemnation award does not have to be escrowed? Will approval be deemed to have occurred after passage of the three year NJDEP review period? Are contaminated sites other than those with NJDEP approved closed landfills considered to be sites where remediation has been completed with NJDEP approval, so that money from the condemnation award also does not have to be escrowed? The answers to these questions will need to await further litigation.