Appellate Division Rejects The DEC's Denial Of A Hearing And Unilateral Cleanup Of Contaminated Property At The Responsible Party's Expense

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Chuck focuses his practice on a variety of issues involving environmental, energy, land-use, and municipal law, and also real estate development. He has experience working with both private and public clients on issues involving both state and federal environmental statutes, and he assists municipalities with a wide range of legal issues, including environmental review and zoning.

In 1979, the Legislature enacted Article 27, Title 13 of the Environmental Conservation Law ("ECL"), creating the statutory framework to address inactive hazardous waste disposal sites, which are defined as "any area or structure used for long term storage or final placement of hazardous waste . . . ." ECL § 27-1301(2). The inactive hazardous waste disposal site program (the "Program") is administered by the New York State Department of Environmental Conservation ("DEC") and sets forth the structure for the cleanup of contaminated property. *See, generally*, 6 N.Y.C.R.R. Part 375-2. As identified in the statute, the DEC is responsible for identifying, investigating, and remediating sites where substantial contamination may exist.

In furtherance of the Program, Section 97-b of the State Finance Law establishes a "hazardous waste remedial fund" (the "State Superfund"), which is available to the DEC for Program administration. N.Y. STATE FIN. LAW § 97-b(3)(a). While the State Superfund may be used to implement remedial programs (i.e., to conduct a cleanup of contaminated property), its use must comply with ECL § 27-1313 and, with limited exceptions, may only be used after failure to secure voluntary payment of costs by the property owner or other responsible persons. N.Y. STATE FIN. LAW § 97-b(4).

If voluntary compliance cannot be achieved, the DEC may utilize State Superfund moneys and then seek recovery of those funds, plus other damages and statutory penalties. N.Y. STATE FIN. LAW § 97-b(6); ECL § 27-1313(5)(b).

In addressing any hazardous waste disposal site, DEC will attempt to secure compliance from a responsible party, whether that is current or former owners/operators of the site. DEC will first demand the responsible party agree to complete an investigation of site contamination through the execution of a consent order. Failure to do so, DEC asserts, will result in the DEC undertaking the remedial work directly through the use of the State Superfund. In this scenario, the responsible party loses control of the remedy investigation and selection process, which makes implementation of the final remedial selection much more expensive. Following the DEC's expenditure of State Superfund moneys, it will utilize the statutory mechanisms to recover those costs from the responsible party in the form of a cost recovery action by the New York State Attorney General's Office. Therefore, the responsible party's choice becomes either: (1) accept the DEC's demands and agree to pay to complete the remedial work; or (2) refuse and pay more after the DEC completes the work itself. Up until recently, no one had completely challenged the legitimacy of this structure.

In a decision handed down on October 20, 2016, the Appellate Division, Third Department dealt a significant blow to this practice. FMC Corp. v. New York State Dep't of Envtl. Conserv., Docket No. 522187 (3d Dep't 2016). In FMC Corp., the company had already been working with the State and Federal government cooperatively on a remedial investigation plan that had been executed jointly in the form of an Administrative Order on Consent ("AOC"). The AOC called for the company to make a submission to the State identifying its analysis as it pertained to a series of potential remedial options to an area. The AOC's authority did not dictate remedy selection; only the need to make the submission. The DEC unilaterally selected a remedial plan to address contaminated properties that was not included in the submission by FMC. The DEC then requested that FMC enter into an order to effectuate the implementation of the remedy it had selected, which FMC declined to do under the specific circumstance. The DEC then sent a letter advising FMC that in light of its refusal to implement the remedy, DEC would complete the work at FMC's expense. The DEC refused to offer the company the ability to seek an administrative hearing on the matter, and determined that it would move forward to undertake the remedy through the use of State Superfund moneys without providing FMC an opportunity to contest the validity of the selected remedy.

FMC sued DEC on this matter, and lost at the trial level. However, the Third Department rejected DEC's approach and agreed with FMC. The Court held that once the DEC determines that a site poses a significant threat to the environment, as it must do under the ECL and the implementing regulations, then the agency may order the owner to develop and implement a remediation program. However, such an order "shall be issued only after notice and the opportunity for a hearing . . . ." ECL § 27-1313(4). This means that, absent giving the party proper due process, DEC may not implement the

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the remedial program and seek a recovery of costs until a circumstance exists where the responsible party has failed to comply with a remedial order after such a hearing, if it is sought.

In summary, the Court reasoned that while DEC attempted to order FMC to complete the remedial work, its failure to provide FMC with a hearing was not proper under the ECL. Thus, DEC's efforts to move forward with the remedy, with the goal of seeking cost recovery from FMC after-the-fact, was arbitrary and capricious. The Third Department remitted the matter back to the DEC for a hearing. As of this writing, the DEC has not yet attempted to appeal this decision to the Court of Appeals.

The Court's holding has the potential to significantly change the way DEC administers the Program. Before implementing remedial activities on its own, absent an emergency, the ruling indicates that DEC must first provide notice and the opportunity for a hearing prior implementing a remedy using State Superfund moneys. The ultimate decision by the DEC in the course of the administrative process would then be subject to Court review, once final.

Hodgson Russ LLP was co-counsel for FMC in this matter.