

State of New York Court of Appeals

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To be argued Wednesday, March 21, 2018

No. 41 Matter of FMC Corporation v New York State Department of Environmental Conservation

FMC Corporation owns a 103-acre facility in the Village of Middleport, Niagara County, where it produced pesticides and herbicides for more than 60 years and, in the process, contaminated the facility itself and surrounding areas with arsenic, lead, and other toxic chemicals. The FMC facility has been listed on New York's registry of hazardous waste disposal sites since 1980. In 2010, at the direction of the state Department of Environmental Conservation (DEC) and federal authorities, FMC submitted a report proposing eight remedial plans, known as corrective measure alternatives (CMAs), to address contamination on about 500 acres of off-site residential, commercial, and school properties. In 2012, the DEC proposed a more thorough cleanup plan, CMA 9, which mandated that arsenic remaining in the soil could not exceed 20 parts per million. FMC challenged the proposal. In 2013, after a public comment period, DEC issued a "final statement of basis" in which it formally selected CMA 9. FMC continued to dispute the decision. In 2014, the DEC advised FMC that, due to its "refusal" to implement CMA 9, the DEC would do the work at FMC's expense using the State Superfund.

FMC then brought this article 78 proceeding against the DEC, alleging the agency exceeded its authority in proceeding with the remedial work and that its selection of CMA 9 was arbitrary and capricious. Supreme Court granted DEC's motion to dismiss the suit as time-barred, finding it was commenced more than four months after the DEC's determination.

The Appellate Division, Third Department reversed, ruling the suit was timely based on a series of tolling agreements the parties executed as they tried to negotiate a voluntary cleanup plan. Turning to the merits, it said DEC "has the authority to undertake remedial work" under both title 9 and title 13 of Environmental Conservation Law (ECL) article 27, but neither provision permitted DEC's actions in this case. Under title 9, DEC's "authority to act exists where the hazardous waste is managed 'unlawfully in violation of [ECL] 27-0914,' i.e., without authorization.... But here, [DEC] explained in the statement of basis that [FMC] 'does not presently have an operating permit but is subject to what are called 'interim status' requirements.' Thus, it appears that ... [FMC] was operating lawfully pursuant to its 'interim status'...." Under title 13, the court said, FMC "was entitled to ... an opportunity for a hearing prior to the issuance of an order directing [it] to implement CMA 9. As it turns out, [FMC] was not accorded an opportunity for a hearing to assert its challenge to CMA 9 and no implementation order was issued. Absent such an order, we must agree ... that [DEC's] determination that it was authorized to proceed with the remedial work based on [FMC's] 'refusal' to perform the work was arbitrary and capricious." It remitted the matter to DEC to provide a hearing.

The DEC argues that both title 9 and title 13 of ECL article 27 authorized it to remediate the site at FMC's expense using CMA 9. Under title 9, "'Interim status' ... does not mean a facility is 'operating lawfully' when it releases hazardous waste to the environment. It means only that the facility may operate prior to completing the permitting process. And the record here shows that FMC *unlawfully* released contaminants into the environment on multiple occasions.... Title 13 requires DEC to afford a hearing only when it issues an order identifying a responsible person and directing that party to clean up hazardous waste. DEC is not required to issue such an order when, as here, it undertakes a cleanup itself after making reasonable efforts to secure a voluntary agreement with the responsible person." It says a hearing under title 13 "is intended to give a party an opportunity to contest its responsibility for cleanup" and was not needed here, since "FMC does not contest its responsibility, but rather seeks only to challenge DEC's determination to adopt a particular remediation measure."

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