

Hazardous Waste

What Is 'Refusing' Cleanup? N.Y. State Recoveries at Issue



Snapshot

- When does a party 'refuse' to do a cleanup? Ruling could shake up N.Y. cleanup program
- Ruling affects ability of state to fund cleanups and then recover from private parties
- New York state hazardous waste program could "grind to a halt," an attorney says

The New York state hazardous waste program could "grind to a halt" under a recent appeals court ruling requiring notice, hearing and an order before a party may be deemed to have refused to perform cleanup work, an environmental attorney told Bloomberg BNA (*Matter of FMC Corp. v. N.Y. State Dep't of Env'tl. Conservation*, 2016 BL 349531, N.Y. App. Div., 3d Dep't, No. 522187, 10/20/16).

The ruling bars the state from recovering money spent conducting a unilateral cleanup unless it first meets those procedural requirements and the responsible party refuses.

"It would turn the state superfund and Resource Conservation and Recovery Act program on its head," attorney Lawrence P. Schnapf of Schnapf LLC in New York City told Bloomberg BNA.

Schnapf, who isn't involved in the case, is the chair of the Environmental Law Section of the New York State Bar Association. His focus includes environmental risks associated with corporate, real estate and brownfield transactions.

"It says the Department of Environmental Conservation can't respond to a public health problem. That's inconsistent with case law, and would tie the hands of the DEC," he said.

But another environmental attorney says the court got it right.

"The court correctly decided that, if DEC is proceeding under the state superfund law, it generally needs to provide notice and an opportunity for a hearing prior to the issuance of an order requiring a responsible party to clean up a site," David Freeman, an environmental attorney with Gibbons P.C. in New York, told Bloomberg BNA.

Freeman represents buyers, sellers, and developers of contaminated properties as well as both plaintiffs and defendants in federal and state litigation involving the cleanup of hazardous waste sites.

"There are a number of exceptions to this rule, such as when a responsible party cannot be found, but none of those exceptions applied in this case," Freeman said.

Love Canal

The state superfund law was passed in response to Love Canal, Schnapf said, which was a large public health issue involving a New York residential area that was heavily contaminated in the 1970s.

The appeals court in this case ignored the hazardous waste statute "by finding that the DEC can't spend money to protect public health unless there's a responsible party they identify that won't respond, and then have to offer them an opportunity for a hearing," he said.

"It eviscerates the DEC authority under RCRA and the state superfund program to protect public health," Schnapf said.

But Freeman says the state statute contains an exception for emergencies.

"The DEC commissioner has to make findings and a declaration," he said. "Findings can be done quickly if they have to. And if there's an emergency, courts will be lenient," he said.

Freeman agreed, however, that the ruling creates a new hurdle for the state.

"It's burdensome to have to go through the process and no agency wants to do extra work."

No Sword of Damocles

The ruling also may strengthen the bargaining position of private parties in negotiating cleanup agreements with the state.

"They will no longer have the Sword of Damocles hanging over them," Schnapf said.

The case stems from arsenic contamination at and near a facility in Middleport, N.Y., now owned and operated by FMC Corp.

FMC entered into an administrative consent order with the state in 1991, agreeing to address the contamination.

In May 2013, the state elected a remedy for certain portions of the site, which the company argued was unnecessary.

FMC filed an action challenging state regulators' remedy selection and its determination to implement the remedy at the company's expense.

The trial court ruled in favor of the DEC. But the appeals court reversed.

The basis for the company's claim, the court said, is that state regulators' "unilateral selection of CMA 9 as the remedial plan and decision to use the hazardous waste remedial fund to pay for the remediation was arbitrary and capricious."

The court concluded that FMC was entitled both to notice and an opportunity for a hearing before the DEC could issue an order directing it to implement the cleanup.

Absent such an order, the court said, the regulators' "determination that it was authorized to proceed with the remedial work based on petitioner's 'refusal' to perform the work was arbitrary and capricious."

Judge John C. Lynch wrote the opinion. Judges Michael C. Lynch, Eugene P. Devine, Christine M. Clark and Robert C. Mulvey concurred.

FMC was represented by Greenberg Traurig LLP and Hodgson Russ LLP.