

DUE PROCESS REQUIRED FOR ENVIRONMENTAL REMEDY SELECTION: APPELLATE DIVISION RULES NYSDEC MUST AFFORD RESPONSIBLE PARTIES AN OPPORTUNITY FOR A HEARING BEFORE SPENDING STATE FUNDS TO UNILATERALLY IMPLEMENT A REMEDY

Hodgson Russ Alert
October 24, 2016

Hodgson Russ LLP and Greenberg Traurig LLP successfully challenged the New York State Department of Environmental Conservation's (NYSDEC) ability to implement a remedy without first providing a party an opportunity for a hearing. In a decision issued on October 20, 2016 (*FMC Corp. v. NYSDEC*, No. 522187, N.Y. App. Div., 3d Dep't, Oct. 20, 2016) the Third Department held that NYSDEC has to provide a responsible party an opportunity for an administrative hearing before a neutral Administrative Law Judge before the State can unilaterally implement a remedy at a State Superfund site.

NYSDEC argued if it presents a responsible party with a consent order to implement a cleanup, and if that responsible party declines to execute or perform under that consent order, then NYSDEC may unilaterally implement a cleanup using State Superfund money. The State would later sue the responsible party under CERCLA to recover the cleanup costs.

Hodgson Russ LLP and Greenberg Traurig LLP argued the Environmental Conservation Law limits NYSDEC's ability to proceed unilaterally to emergencies, to situations in which NYSDEC cannot identify a responsible party, or to situations in which the responsible party refuses to perform under an enforceable order from the State. Hodgson Russ argued a remedial order is enforceable only if it is preceded by notice and opportunity for a hearing, and that "refusal" could not mean a refusal to sign a consent order under terms dictated by the State.

In *FMC*, the Third Department ruled NYSDEC did not have the power to perform a unilateral cleanup in these circumstances. Although NYSDEC had already spent nearly two years unilaterally implementing a remedy, the Third Department decided that NYSDEC could *not* implement the remedy using state money without first giving the responsible party a hearing on the remedy selection and then issuing an

Attorneys

Julia Hilliker
Rick Kennedy

Practices & Industries

Environmental

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enforceable order with which the responsible party then refuses to comply. Justice Lynch wrote:

Here, under the consent order, petitioner developed the CMA report. The focus in this proceeding turns to remedy selection and implementation. Under this statutory framework, petitioner was entitled to both notice (which was provided through the statement of basis process) and an opportunity for a hearing prior to the issuance of an order directing petitioner to implement CMA 9. As it turns out, petitioner 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 with petitioner that respondent's determination that it was authorized to proceed with the remedial work based on petitioner's "refusal" to perform the work was arbitrary and capricious. In light of our determination, it is not necessary to consider petitioner's remaining contentions.

A copy of the opinion is attached here. To discuss the decision further, please contact Rick Kennedy or Julia Hilliker. Julia Hilliker Rick Kennedy jhilliker@hodgsonruss.com rkennedy@hodgsonruss.com 716.848.1547 716.848.1407