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STATE ENVIRONMENTAL REGULATION

Expert Analysis

Court of Appeals Upholds Inactive Hazardous Waste Disposal Site Rules

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In a significant environmental law decision, the New York Court of Appeals has upheld regulations[1] of the Department of Environmental Conservation (DEC) that call for the restoration of inactive hazardous waste disposal sites to "pre-disposal conditions, to the extent feasible." The Court found that the regulations do not exceed the enabling authority of Section 27-1313(5)(d) of the Environmental Conservation Law (ECL), which provides, in pertinent part, that the goal of a remedial program is "a complete cleanup of the site through the elimination of the significant threat to the environment posed by the disposal of hazardous wastes at the site."

The Court's 5-2 ruling, in *Matter of N.Y.S. Superfund Coalition Inc., v. N.Y.S. Dept. of Env. Conserv.*,[2] may very well encourage the DEC to insist on more—and more complete—cleanups of inactive hazardous waste disposal sites throughout the state. Importantly, however, the Court made clear that these environmental cleanups are restrained by economics and statutory procedural requirements.

Background

More than 30 years ago, in 1979, the New York State Legislature enacted ECL article 27, title 13, to address the issue of inactive hazardous waste disposal sites.[3] As noted in the Court of Appeals decision, at the time this provision was enacted, the DEC had identified approximately 530 sites throughout the state that posed a threat to public health and the environment given their proximity to densely populated areas or water courses or aquifers.[4]

Because inactive hazardous waste disposal sites were largely unregulated (unlike active waste disposal sites monitored by state and federal regulators), there was no standard practice of ensuring adequate disposal or containment of hazards to minimize environmental impacts. The 1979 law placed the burden of remedying these sites on those responsible for the presence of waste material; where a responsible party was unknown, unable, or unwilling to ameliorate the situation, the DEC was authorized to implement a remedial program.

> The Court's decision has made it clear that the DEC is authorized to identify inactive hazardous waste disposal sites under the 'significant threat' standard.

The Superfund Coalition, a not-for-profit corporation whose members consist of commercial entities that own land within New York listed on a registry of sites subject to DEC regulation, challenged a DEC regulation regarding the identification of "inactive hazardous waste disposal sites" requiring remedial action. In 1989, in *Matter of N.Y.S. Superfund Coalition v. N.Y.S. Dept. of Env. Conserv.,*[5] the Court annulled the regulation, finding that it would allow the DEC to order the remediation of every inactive hazardous waste disposal site regardless of whether the site posed a "significant threat," as required by the statute.[6] The Court found that the Legislature had envisioned the utilization of a "significant threat" standard in the identification of inactive hazardous waste disposal sites that contemplated the existence of an actual threat, or "more than the mere presence of hazardous waste."[7]

The DEC's regulation, the Court found, permitted the DEC to identify waste sites based on the potential existence of hazardous waste and would have allowed remedial programs to be ordered for all inactive hazardous waste disposal sites, not just those that posed a "significant threat."[8] The Court concluded that the DEC had acted beyond its authority by enacting overreaching regulations that conflicted with the statutory scheme.[9]

The DEC went back to the drawing board and issued new regulations concerning the nature and breadth of remedial programs implemented to clean up inactive hazardous waste disposal sites following their identification under the "significant threat" standard; the DEC amended those regulations in 2006.

The Coalition again went to court. In a combined CPLR article 78 proceeding and declaratory judgment action, the Coalition challenged the regulations on the grounds that their adoption exceeded the DEC's jurisdiction, and that they were arbitrary and capricious. This time, the Court of Appeals sided with the DEC.

The Court's Ruling

As the Court pointed out, ECL §27-1313(5)(d) provides that the goal of a remedial program for an inactive hazardous waste disposal site "shall be a complete cleanup of the site through the elimination of the significant threat to the environment." One of the challenged regulations, 6 NYCRR 375-2.8(a), provides that the goal of the remedial program for a specific site "is to restore that site to pre-disposal conditions, to the extent feasible." This regulation adds that, "[a]t a minimum, the remedy selected shall eliminate or mitigate all significant threats to the public health and to the

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environment presented by contaminants disposed at the site."[10] The regulation at 6 NYCRR 375-1.8(f)(9)(i), which incorporates the remedial goal contained in 6 NYCRR 375-2.8(a) into the consideration of land use when implementing a remedial program, provides that:

> In assessing reasonable certainty [of land use], the Department shall consider:
> (i) the current, intended, and reasonably anticipated future land uses of the site and its surroundings in the selection of the remedy for soil remediation under the brownfield cleanup and environmental restoration programs, and may consider land use in the State superfund program, where cleanup to pre-disposal conditions is determined not feasible.[11]

The Coalition argued that a plain reading of §27-1313(5)(d) limited the phrase "complete cleanup" to a cleanup that eliminated "the significant threat to the environment," and because the DEC's regulations went beyond that and required achieving pre-disposal conditions, the regulations exceeded the statutory standard.[12] The Court was not persuaded by this argument, finding this contention to be a "strained reading" of the law because the law, on its face, requires the DEC to eliminate significant threats— the existence of actual waste on a site or the existence of an actual threat—and also states a preference for a more thorough or "complete" cleanup.

The Court explained that §27-1313(5)(d) addresses only those situations where the DEC determines that it is "cost-effective" for the DEC to develop and implement a remedial program at a site, and that the DEC may implement limited actions that reduce rather than completely eliminate dangers. Moreover, the Court pointed out, ECL §27-1301(3), which defines inactive hazardous waste disposal site remedial programs, permits measures of abatement or control in addition to elimination and removal and thus suggests a preference for "the most thorough cleanup that makes sense in light of technical feasibility and cost-effectiveness."[13] As the Court noted, a responsible party, for example, may prepare a site for a "restricted use"[14] instead of performing a complete cleanup.

Simply put, the Court said, although "the cleanup of an inactive hazardous waste disposal site is triggered by a finding of a 'significant threat'…that standard does not limit the scope of the ensuing remedial program when a more thorough cleanup is justified."[15] As further noted by the Court, the remedial goal stated in the regulation of achieving "predisposal conditions, *to the extent feasible*,"[16] is a "shorthand way" of saying the same thing and is consistent with the aims of article 27, title 13, and the statutory language. Indeed, the Court said, there is "no discernible difference" between the use of the phrase "complete cleanup" in §27-1313(5)(d) and "pre-disposal conditions, to the extent feasible" in the DEC's regulations.[17] The Court explained that a "remedial program may encompass measures that run a gamut from removal of wastes to institutional controls, implemented to address harms that range from potential to actual hazards."[18]

Limited Power

Interestingly, the Court did not accept the Coalition's contention that a standard of "pre-disposal conditions, to the extent feasible" would compel a reversion to pristine environmental conditions, adding that there is "no statutory authority, or indication in the regulations" that the DEC is empowered to arbitrarily fashion a remedial program.[19]

> The Court seemed to go out of its way to emphasize that the DEC's authority to order a remedial program is 'not unfettered' and that the DEC is 'not empowered to unilaterally fashion a remedial program without due consideration of the practicalities of such a measure.'

Moreover, the Court seemed to go out of its way to emphasize that the DEC's authority to order a remedial program is "not unfettered" and that the DEC is "not empowered to unilaterally fashion a remedial program without due consideration of the practicalities of such a measure."[20] As the Court recognized, the issuance of an order directing a remedial program must provide "notice and the opportunity for a hearing" to persons subject to such an order;[21] any person subject to such an order is entitled to present a defense or comment on the matter; no order shall be issued until a final determination is rendered by the DEC commissioner subsequent to a hearing; and a person subject to an order may challenge it through a CPLR article 78 proceeding within 30 days after the service of an order.[22]

Conclusion

The Court's decision has made it clear that the DEC is authorized to identify inactive hazardous waste disposal sites under the "significant threat" standard—that is, the existence of actual waste on the site. If an actual significant threat is not present, then the site is not subject to remediation. Where a significant threat is found and remediation deemed necessary, an appropriately tailored program can be implemented to encompass dangers ranging from potential harms to actual, significant threats as the Legislature has separately defined "remedial program" to permit the DEC to address other harms.[23] These administrative directives, the Court declared, can be constrained "by technological feasibility, cost-effectiveness and procedural due process, among other things." Consequently, the Court concluded, the DEC regulations challenged by the Coalition are reasonable interpretations that incorporate the essential statutory goals and do not exceed the enabling authority of the legislation with respect to the cleanup of inactive hazardous waste sites.

1. 6 NYCRR 375-2.8(a); 6 NYCRR 375-1.8(f)(9)(i).
2. No. 189 (N.Y. Dec. 15, 2011).
3. Generally speaking, an inactive hazardous waste disposal site is an area or structure used for long-term storage or final placement of hazardous waste that does not have a DEC or federal permit or authorization for the disposal of hazardous wastes. See ECL §27-1301(2).
4. See Budget Report on Bills, Bill Jacket, L 1979, c 282. See also No. 189 (N.Y. Dec. 15, 2011), at p. 2.
5. 75 N.Y.2d 88 (1989).
6. Id. at pp. 93-94.
7. Id. at p. 93.
8. Id. at p. 93.
9. Id. at pp. 93-94.
10. No. 189 (N.Y. Dec. 15, 2011) at p. 7.
11. Id. at p. 7.
12. Id. at p. 8.
13. Id.
14. 6 NYCRR 375-2.8(c).
15. No 189 (N.Y. Dec. 15, 2011) at pp. 10-11.
16. Emphasis added.
17. No. 189 (N.Y. Dec. 15, 2011) at p. 11.
18. Id. at pp. 11-12.
19. Id. at p. 12.
20. Id. at pp. 12-13.
21. ECL §27-1313(4).
22. No. 189 (Dec. 15, 2011) at p. 13.
23. ECL §27-1301(3).