NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Application for a Permit pursuant to Article 27 of the Environmental Conservation Law (ECL) and 6 NYCRR Part 373 (Hazardous Waste Management Facilities),

by

FMC CORPORATION,

Applicant (RE: FMC-Agricultural Products).

DEC Permit Application No.: 9-2936-00017/02004
EPA RCRA ID No.: NYD002126845

RULING ON DEPARTMENT STAFF'S MOTION FOR RECONSIDERATION

January 5, 2018

Introduction

FMC Corporation (FMC) is the owner of a facility in Middleport, New York that manufactured pesticides from 1946 to 1985. Since 1985 FMC has formulated and packaged pesticides at the facility. In 1985, FMC submitted a permit application pursuant to the Resource Conservation and Recovery Act (RCRA) to the United States Environmental Protection Agency (EPA) for the management of hazardous waste generated at FMC's facility. After the EPA authorized the New York State Department of Environmental Conservation (Department or DEC) to administer the RCRA permitting program, FMC submitted its first hazardous waste management facility permit application to the Department in 1986. Thereafter, FMC requested a suspension of the permit application, and EPA, DEC and FMC entered into an Administrative Order on Consent (AOC) in 1991 under the interim status provisions of RCRA.

The AOC required FMC to investigate on-site and off-site deposition and migration of hazardous waste. In 2009, EPA and DEC approved FMC's draft investigation report and, for purposes of this discussion, directed FMC to develop a corrective measures study that would recommend ways to remediate the contamination of off-site areas known as operable units (OUs) 2, 4 and 5. OUs 2, 4 and 5 include residential, commercial and school properties within the Village of Middleport. FMC provided the EPA and DEC with a draft Corrective Measures Study in June 2010 that included Corrective Measures Alternatives (CMAs) 1, 2, 3, 4, 5, 6A, 6B, 7A, 7B and 8 to address the arsenic contamination of soils in those OUs.

In June 2012, Department staff issued a draft Statement of Basis in which staff selected a CMA to address the arsenic contamination in OUs 2, 4 and 5. The CMA selected by staff, CMA 9, varied from those submitted in FMC's Corrective Measures Study and required the remediation of soils containing a concentration of arsenic greater than 20 parts per million. FMC challenged the selection of CMA 9 in the Department's draft Statement of Basis. In May 2013, Department staff issued a Final Statement of Basis for Air Deposition Area #1 (OU2 and OU4) and Culvert 105 (OU5) that selected CMA 9.

FMC disputed the Department's Final Statement of Basis and selection of CMA 9. On May 7, 2014, the Department advised FMC that due to FMC's refusal to implement CMA 9, the Department would exercise its right to expend State monies and fund the remedial work. On May 30, 2014, FMC commenced a CPLR article 78 proceeding against the Department alleging Department staff exceeded its authority by issuing the statement of basis and conducting remedial activities. FMC also challenged the Department's selection of CMA 9.

In March 2015, the Department requested an updated hazardous waste management facility permit application from FMC. On May 18, 2015, FMC submitted an updated permit application.

On August 20, 2015, Supreme Court, Albany County, issued a decision and order granting the Department's motion to dismiss FMC's article 78 petition holding that the petition was barred by the CPLR article 78 four-month statute of limitations (see Matter of FMC Corp. v New York State Dept. of Envtl. Conservation, Sup Ct., Albany County, August 10, 2015, Elliot, III, J., index No. 2884-14). In September 2015, FMC appealed from the Albany County

Supreme Court's decision and order to the Appellate Division, Third Department. The Third Department reversed, holding that FMC's petition was timely (see Matter of FMC Corp. v New York State Dept. of Envtl. Conservation, 143 AD3d 1128, 1132 [3d Dept 2016]). In the exercise of discretion, the court considered the substantive claims in FMC's petition (see id.).

On the merits, the Third Department ruled in favor of FMC, holding FMC was entitled to notice and an opportunity for a hearing regarding the CMA chosen by Department staff before the Department could issue an order directing FMC to implement the corrective measure. The court applied the procedural framework set forth in ECL 27-1313 and concluded that FMC "was not provided with an opportunity for a hearing to assert its challenge to CMA 9 and no implementation order was issued" (see id. at 1135). The Third Department remitted the matter to the Department for "further proceedings not inconsistent with" the court's decision (see id.).

The Department moved for reargument or, in the alternative, for leave to appeal to the Court of Appeals. The Third Department denied the motion for reargument but granted the motion for permission to appeal to the Court of Appeals. In so doing, the Third Department certified the following question: "Did this Court err, as a matter of law, in reversing, on the law, the judgment of the Supreme Court which granted respondent's motion to dismiss, denying the motion, granting the petition and remitting the matter to respondent for further proceedings not inconsistent with this Court's decision?" (see Matter of FMC Corp. v New York State Dept. of Envtl. Conservation, 2017 WL 509845 [3d Dept February 2, 2017]).

In June 2017, the Department determined FMC's hazardous waste management facility permit application was complete. As discussed above, the facility formulates pesticide products and operates as a large quantity generator (LQG) of hazardous waste. Hazardous wastes generated at the facility are accumulated in containers or tanks prior to off-site disposal within 90 days of generation, or are managed in water treatment units exempt from permitting requirements pursuant to 6 NYCRR 373-1.1(d)(1)(xii). The draft permit includes requirements, conditions and schedules for on and off-site corrective actions, including the operation, maintenance and closure of on-site surface impoundments and remediation of off-site operable units, including OUs 2, 4 and 5.

Department staff referred the permit matter to the Department's Office of Hearings and Mediation Services on June 20, 2017, and the matter was assigned to the undersigned Administrative Law Judge.

On July 21 and August 3, 2017, I convened conference calls with the parties to discuss scheduling a legislative hearing and issues conference and publishing the required notices pursuant to 6 NYCRR part 624. During the calls, FMC requested that the permit proceeding be placed on hold pending the outcome of the case between FMC and the Department before the New York State Court of Appeals. Staff opposed this request. FMC argued that several issues before the Court of Appeals could affect the permit, including whether FMC was entitled to a hearing on the Department's remedy selection for OUs 2, 4 and 5 before the corrective measure alternative (CMA 9) chosen by the Department and contained in the Department's Statement of Basis became final.

Department staff, on the other hand, argued that the issue before the Court of Appeals was whether a hearing was required before the Department could use State Superfund money on CMA 9. Staff also argued that the draft permit addresses the litigated issues.

By correspondence to the parties, dated August 4, 2017, I ruled on FMC's request to hold the permit proceeding in abeyance. I concluded that the decision of the Court of Appeals may affect issues that may be raised by FMC in the permit proceeding as well as issues that may be raised by public comment and petitions for party status. I also concluded that the Court decision may have res judicata effect on the permit proceeding. I based my conclusions on the parties' oral arguments and my review of the draft permit, the Albany County Supreme Court decision, the decision of the Appellate Division, Third Department, and the certified question before the Court of Appeals.

I concluded that the publication of notices of complete application, legislative hearing and public comment period would be scheduled and published, but granted FMC's request, in part, and ruled that the notice for petitions for party status and the scheduling of an issues conference would not proceed until a final decision was reached by the courts.

On August 16, 2017, a combined notice of complete application, availability of draft 6 NYCRR part 373 permit, public comment period, and 6 NYCRR part 624 (Part 624) legislative hearing was published in the *Environmental Notice Bulletin*. The combined notice was also published in the *Lockport Union Sun and Journal* and the *Batavia Daily News* on August 16, 2017. On August 18, 2017, radio announcements regarding the legislative hearing were also broadcast on radio stations WBEN NewsRadio 930 and Newsradio WHAM 1830.

The legislative hearing sessions were held on September 27, 2017 at 1:00 p.m. and 7:00 p.m. at the Middleport Fire Department, 28 Main Street, Middleport, New York. The hearings were attended by Department staff and FMC representatives with one member of the public attending the afternoon session and less than ten members of the public attending the evening session. No written or oral public comments were received at the hearings. Department staff provided a statement regarding the draft permit at both sessions, and FMC provided a statement at the evening session.

The public comment period expired on October 20, 2017, with Department staff receiving comments on the draft permit from applicant FMC. No other comments were received.

By letter dated October 13, 2017, Department staff requested leave to file a motion for reconsideration of my August 4, 2017 letter ruling and provide argument why this matter should not be adjourned pending a decision from the Court of Appeals. By letter of the same date, FMC opposed staff's request. By letter dated October 31, 2017, I granted staff's request for leave to submit a motion for reconsideration or reargument.

On November 17, 2017, Department staff filed a notice of motion for reconsideration, motion for reconsideration, and affirmation of Benjamin Conlon, Esq. in support of staff's motion for reconsideration, all dated November 17, 2017.

On December 8, 2017, FMC submitted the affirmation of Julia M. Hilliker, Esq., dated December 8, 2017, (Hilliker Affirmation) in opposition to staff's motion. FMC attached the following exhibits to the affirmation:

A. The Department's June 2, 2017 brief to the Court of Appeals;
B. FMC's July 18, 2017 brief in opposition;
C. The Department's August 11, 2017 reply brief;
D. Matter of FMC Corp. v New York State Dept. of Envtl. Conservation, 143 AD3d 1128 [3d Dept 2016];
E. FMC's Notice of Dispute, dated May 1, 2014, submitted to EPA to set aside DEC's Final Statement of Basis;
F. The Department's extension requests to the Court of Appeals; and
G. FMC's October 19, 2017 comments on the draft permit.

DISCUSSION

The standards applicable to motions for leave to reargue pursuant to CPLR 2221(d) are applied to Department staff's motion for reconsideration of my prior ruling (see Matter of 2526 Valentine LLC, Ruling of the Chief Administrative Law Judge on Motion for Reconsideration, March 10, 2010, at 3 [internal citations omitted]). Accordingly, Department staff must demonstrate on its motion for reargument or reconsideration that the decision-maker overlooked or misapprehended the facts or law, or for some reason mistakenly arrived at the earlier ruling (see id.; Matter of Izzo, Ruling of the Administrative Law Judge on Motion for Reconsideration, March 28, 2006, at 2; CPLR 2221[d]).

Department staff argues that the August 4, 2017 ruling was a misinterpretation of the case pending before the Court of the Appeals (see Department Staff's Motion for Reconsideration, dated November 17, 2017, ¶ 13). According to staff, the only issues on appeal to the Court of Appeals are whether titles 9 or 13 of ECL article 27 "authorized DEC to use State Superfund money to clean up properties and implement corrective action at OUs 2, 4, and 5, notwithstanding FMC's objection to the corrective action DEC chose in the Statement of Basis" (id.).

Department staff argues that the outcome of the case will not affect the chosen corrective action for OUs 2, 4 and 5 contained in the Statement of Basis or the Department's authority to require further remediation of OUs 2, 4 and 5 in the draft permit (see id., ¶ 13). In summary, staff argues that the outcome of the case will only affect the Department's authority to use State Superfund money, which is not relevant to the issuance of the draft permit (id.). Nonetheless, staff argues that in the unlikely event that the outcome of the case does affect the corrective actions for OUs 2, 4 and 5, any necessary changes can be incorporated into the draft permit, subject to regulations governing permit modifications (see id., ¶ 18).

In opposition to staff's motion, FMC argues: 1) that the August 4, 2017 ruling did not misinterpret the law or overlook any facts; 2) that the decision of the Court of Appeals will directly affect the remedy selection provision of the proposed permit; and 3) DEC is not

prejudiced by the decision to hold the permit proceeding in abeyance, but the delay will benefit the parties and promote judicial and resource economy (see Hilliker Affirmation, ¶¶ 4-6, 7- 13, and 14-19 respectively). FMC also argues that allowing the permit process to continue before a decision from the Court of Appeals will be punitive to the public and FMC (id., ¶ 20).

As noted above, the disputed ruling was based on the parties' oral arguments, the draft permit, the Albany County Supreme Court decision (Matter of FMC Corp. v New York State Dept. of Envtl. Conservation, Sup Ct., Albany County, August 10, 2015, Elliot, III, J., index No. 2884-14), the Third Department decision (Matter of FMC Corp. v New York State Dept. of Envtl. Conservation, 143 AD3d 1128 [3d Dept 2016]), and the question certified to the Court of Appeals (Matter of FMC Corp. v New York State Dept. of Envtl. Conservation, 2017 WL 509845 [3d Dept February 2, 2017]).

As expressed in the Third Department's certified question, the case before the Court of Appeals concerns more than the Department's ability to use State Superfund money to clean up properties and implement corrective action at off-site areas known as OUs 2, 4 and 5. The case involves the issue whether FMC is entitled to a hearing on the remedy selection chosen by Department staff in the Final Statement of Basis (see Matter of FMC Corp., 143 AD3d at 1135).

During the July and August conference calls, and as expressed in the August 4, 2017 letter ruling, I was concerned that the decision of the Court of Appeals may affect public comment and petitions for party status. Given the lack of written or oral public comment regarding the draft permit during the public comment period, that concern is no longer persuasive.

Disputes between FMC and Department staff regarding the draft permit can be addressed through the Part 624 permit hearing procedures. For instance, if a court decision has any effect on this process, those issues can be addressed by reopening the issues conference or allowing the parties to supplement their previous arguments and factual submissions. Because Part 624 expressly provides an ALJ with the discretion to reconvene an issues conference "at any time to consider issues based on new information upon a showing that such information was not reasonably available at the time of the issues conference," (see 6 NYCRR 624.4[b][1]), neither applicant nor staff will be prejudiced if the permit hearing moves ahead with the procedure contemplated by 6 NYCRR 624.4 and 624.5. Likewise, if petitions for party status are received and are potentially affected by a court decision, those petitioners may be allowed to supplement their petitions. Moreover, late filed petitions for party status may be considered pursuant to 6 NYCRR 624.5(c).

Administrative precedent exists for moving ahead even when litigation is pending that may affect the draft permit as long as the parties are afforded the opportunity to raise any potential factual issues created by the resolution of the legal issue before the courts (see e.g. Matter of Niagara Mohawk Power Corp., Rulings of the Administrative Law Judge, 1994 WL 1720233 [April 20, 1994]; Matter of Niagara Mohawk Power Corp., Rulings of the Administrative Law Judge, 1994 WL 1735337 [April 20, 1994]; Matter of Finch, Pruyn & Company, Inc., Ruling of the Administrative Law Judge, 1994 WL 1735228 [April 20, 1994]).

FMC also expressed its concern that a court decision may result in a major modification of the draft permit that would require the revisions to the draft permit to be treated as a new application (see Hilliker Affirmation, ¶ 17, citing 6 NYCRR 621.1[i]). Subdivision 621.1(i), however, applies to applications for the renewal or modification of a permit, not to an ongoing permit proceeding. The potential for major modifications to a draft permit involving disputes between the applicant and Department staff over a substantial term or condition of the draft permit or a substantive and significant issue raised by a potential party is covered by Part 624 (see 6 NYCRR 624.4[c][1][i] and [iii]). One of the purposes of Part 624 is for the parties to identify any issues that may result in the major modification of the draft permit and, if necessary, adjudicate those issues. The applicant is not required to submit a new application when a major modification of the draft permit results from the Part 624 proceeding.

Likewise, the major modification provisions of 6 NYCRR 373-1.7 are applicable when an application to modify a permit is submitted. To the extent that a court decision may require the draft permit to be modified, that modification will be proceed pursuant to the current Part 624 proceeding.

CONCLUSION

Department staff has not met its burden of demonstrating that my previous ruling overlooked or misapprehended the facts or law. It has been held, however, that "[e]ven in situations where the criteria for granting a reconsideration motion are not technically met, courts retain the flexibility to grant such a motion when it is deemed appropriate" (see Loris v S & W Realty Corp., 16 AD3d 729, 730 [3d Dept 2005]). Accordingly, for the reasons stated above, I modify that portion of my previous ruling that held this permit proceeding in abeyance until a final decision was reached by the courts.

RULING

Staff's motion for reconsideration is granted, and upon consideration, the August 4, 2017 ruling is modified, and applicant's request to adjourn the present proceeding pending a decision by the Court of Appeals is denied. The matter will be scheduled and noticed for the filing of petitions for party status and an issues conference, if necessary. A conference call will be scheduled in furtherance of those purposes.

/s/
Michael S. Caruso
Administrative Law Judge

To: Attached service list