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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF FMC CORPORATION,

Respondent,

-against-

NO. 41

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Appellant.

20 Eagle Street
Albany, New York
March 21, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 41, the
2 Matter of FMC Corporation v. the New York State Department
3 of Environmental Conservation.

4 MR. BRODIE: May it please the court, Frederick
5 Brodie for the State. I'll reserve three minutes for
6 rebuttal.

7 CHIEF JUDGE DIFIORE: Thank you.

8 MR. BRODIE: FMC is trying to stop DEC from
9 cleaning up contamination in neighboring properties around
10 FMC's pesticide plant, including homes and a school.

11 JUDGE WILSON: Can you - - - can you help me with
12 the statutory scheme a little bit?

13 MR. BRODIE: Yes.

14 JUDGE WILSON: So starting with Section 914.

15 MR. BRODIE: Um-hum.

16 JUDGE WILSON: Does FMC have an authorization of
17 any sort as that's meant in the statute?

18 MR. BRODIE: It does not.

19 JUDGE WILSON: So how is it then operating to
20 deal with or store hazardous wastes?

21 MR. BRODIE: It's got them in various solid waste
22 - - -

23 JUDGE WILSON: No, no, I mean, what's the legal
24 authority?

25 MR. BRODIE: What's - - - what's the legal



1 authority - - -

2 JUDGE WILSON: Or let me ask it a different - - -
3 what does the interim status authorize FMC to do?

4 MR. BRODIE: It just authorizes it to continue
5 operating before it receives a permit. But they must still
6 comply with the environmental laws. Now Title 9,
7 0913(1)(b), tells you that interim status is neither a
8 permit nor a license. So - - -

9 JUDGE WILSON: So 0914 says, it - - - there are
10 three things they can't do without authorization, right?

11 MR. BRODIE: Right.

12 JUDGE WILSON: And one of them is to handle - - -

13 MR. BRODIE: Right.

14 JUDGE WILSON: - - - hazardous wastes, which they
15 are.

16 MR. BRODIE: What - - -

17 JUDGE WILSON: Are they doing that with
18 authorization or without?

19 MR. BRODIE: But what we're talking about here,
20 where - - - where the wastes are getting over to - - -

21 JUDGE WILSON: No, I'm - - - I'm deliberately not
22 asking about the wastes getting over. They have other
23 waste that isn't getting over, right?

24 MR. BRODIE: Yes, they've got wastes that's not -
25 - - -



1 JUDGE WILSON: Or some - - - or - - - or somebody
2 hypothetically who is operating an inactive storage site,
3 under interim status, has got hazardous wastes, and they
4 can't even have those without authorization under 0914;
5 isn't that right?

6 MR. BRODIE: That - - - that's right.

7 JUDGE WILSON: So what gives them the
8 authorization to do that? Forget about the leakage; just
9 to hold the stuff they have. Is it the interim status or
10 is it some auth - - - other authorization?

11 MR. BRODIE: The interim status would allow them
12 to keep going as they had been going. As they had been
13 going, the waste was in solid waste and hazardous waste
14 management units.

15 JUDGE WILSON: Okay, so is the interim status a
16 permanent license order or is it - - - is - - - there's a -
17 - - there's a definition of authorization that's included
18 in Section 71-2702(3), that is the definition of
19 authorization that is to be used for se - - - for Section
20 0914. Are you familiar with that or no?

21 MR. BRODIE: No, I don't - - - I don't - - - I
22 don't think that's the - - - Section 0914 says no - - - no
23 person shall dispose of hazardous waste without
24 authorization. Authorization - - -

25 JUDGE WILSON: Right, and authorization in - - -



1 in 71-2702(3), it defines authorization for the purpose of
2 Section 0914.

3 MR. BRODIE: Well, I believe that - - - that
4 section - - -

5 JUDGE WILSON: I'm asking how you meet that
6 definition. Is it under the permit license - - - but if
7 you're not familiar with it, I can't really ask you.

8 MR. BRODIE: I - - - I - - - I'm afraid that
9 hasn't come up in the briefing.

10 JUDGE WILSON: Okay.

11 MR. BRODIE: So - - - but - - - but I will say
12 this. The - - - the - - - they have the waste in these
13 units. So interim status, they're allowed to keep going.
14 They're allowed to keep the waste in the units. But the
15 waste can't escape from the units. And that's a fallacy to
16 which the Third Department and appellees fall prey. "No
17 person shall dispose of hazardous waste without
18 authorization." Disposal meaning "Abandonment, discharge,
19 deposit, spilling, leaking, or placing any substance so
20 that the substance can enter the environment."

21 JUDGE WILSON: Now, some of that entered the
22 environment a long time ago, before 0914 existed.

23 MR. BRODIE: That - - - that's right, but it
24 doesn't matter, for instance, that FMC stopped using
25 arsenic in 1974 or that it polluted before 1980 when the -



1 - - the Act was passed. The fact is that after FMC was
2 done making arsenic, the arsenic-contaminated waste
3 remained at the facility, in these storage units.

4 JUDGE STEIN: But don't you have to show that - -
5 - assuming that leaking, for example, is not authorized.
6 Don't you have to show that at least some of that leaking
7 took place after Article - - - or Title 9 even came into
8 being?

9 MR. BRODIE: Yes. And we have shown that.

10 JUDGE WILSON: And that's the arsenic leak after
11 that?

12 MR. BRODIE: There - - - there is a - - - on
13 pages 1671 to 1677 of the record, there's a list of - - -
14 of overflow incidents, among others.

15 JUDGE STEIN: And - - - and - - - and does that
16 apply to OUs 2, 4, and 5 - - -

17 MR. BRODIE: Yes.

18 JUDGE STEIN: - - - specifically?

19 MR. BRODIE: Yes. And the - - - the overflow
20 from - - - in - - -

21 JUDGE STEIN: And what - - - what time period?

22 MR. BRODIE: What time period? It - - - 1671 to
23 1677 deals with the period of 1981 to 2008.

24 JUDGE WILSON: So I'm doing this - - - I'm sorry
25 - - - from memory; I should have brought the whole record



1 up here; it's quite large - - - but in my quick perusal of
2 that, I thought that I couldn't find arsenic listed in
3 those pages. Is that wrong?

4 MR. BRODIE: Oh, no, ar - - - arsenic is
5 definitely - - -

6 JUDGE WILSON: It's listed, okay.

7 MR. BRODIE: - - - it's - - - it's - - - if - - -
8 if one looks at the consent order, it lists, starting on
9 page 1148 going through - - -

10 JUDGE WILSON: No, I'm asking - - -

11 MR. BRODIE: - - - 1170 - - -

12 JUDGE WILSON: I'm asking about the pages you
13 just identified before the - - -

14 MR. BRODIE: Oh, oh, no - - -

15 JUDGE WILSON: - - - table of things that leaked
16 afterward.

17 MR. BRODIE: Yes, yes.

18 JUDGE WILSON: Is arsenic in there?

19 MR. BRODIE: Arsenic - - - the - - - the wastes
20 are contaminated with arsenic. That's - - - that's - - -
21 it's in this lagoon or impoundment, and in heavy rains the
22 impoundment overflows or would overflow, resulting in
23 flooding of off-site properties, including the schoolyard,
24 including these houses that are surrounding the facility.
25 Now, in - - -

1 JUDGE FAHEY: Can I - - -

2 MR. BRODIE: - - - the 1991 - - -

3 JUDGE FAHEY: Can I - - - excuse me - - - can I
4 turn you to - - - to just a - - - a different question for
5 a second here? You - - - we're here because of the hearing
6 question, and how long was interim status in place on these
7 - - - on this particular site?

8 MR. BRODIE: I think they've had interim status
9 since 1981 - - -

10 JUDGE FAHEY: So - - -

11 MR. BRODIE: - - - but, again, they still have to
12 comply with - - -

13 JUDGE FAHEY: No, no, I'm not - - - it's - - -
14 it's not meant to be critical. I just want to know how
15 long it's been in place. So - - - so - - -

16 MR. BRODIE: I think since 1981.

17 JUDGE FAHEY: Since '81, okay. Now, was - - - in
18 a - - - in a situation where you're over thirty years, has
19 - - - does the DEC normally act unilaterally without a
20 hearing going forward, saying we're going to clean it up
21 ourselves?

22 MR. BRODIE: Well, I - - - I - - - what happened
23 here was - - - you had - - - they were supposed to do three
24 things under this consent order. They did some emergency
25 work - - -



1 JUDGE FAHEY: Right.

2 MR. BRODIE: - - - then a study of where was the
3 pollution - - -

4 JUDGE FAHEY: Right.

5 MR. BRODIE: - - - and then they had to recommend
6 remedial - - -

7 JUDGE FAHEY: Right.

8 MR. BRODIE: - - - remedies and - - - and - - -

9 JUDGE FAHEY: Right, and then - - - then - - - I
10 got that, and you went forward and you - - -

11 MR. BRODIE: - - - we did all of that. That's
12 most of the twenty years.

13 JUDGE FAHEY: I - - - I really want to foc - - -
14 you don't have - - - only have so much time. I want to
15 focus in on the hearing. I understand that. So you - - -
16 so you get to there and you've got - - - you got whatever
17 it is, CMA 9 - - -

18 MR. BRODIE: Right.

19 JUDGE FAHEY: - - - which is a combination of two
20 other CMAs that were in the report. You decided - - - the
21 DEC then decided CMA 9 would apply, and you created CMA 9.
22 In this situation, in your experience, is a hearing
23 normally held when someone's under interim status for
24 thirty years?

25 MR. BRODIE: I don't know that there are



1 comparable cases where someone is in interim status for
2 thirty years, but I will say this - - -

3 JUDGE FAHEY: No, just the hearing question.

4 MR. BRODIE: Just - - - just the hearing
5 question.

6 JUDGE FAHEY: The hearing question is why we're
7 here.

8 MR. BRODIE: Well - - - well, no, because there's
9 two independent reasons.

10 JUDGE FAHEY: I want - - - I want to stick with
11 it, though. So is a hearing normally held for that period
12 - - - when something's been there for thirty years? Don't
13 you have a hearing before you say you got to go and do
14 this?

15 MR. BRODIE: I - - - I don't know of a comparable
16 situation, but I think that once it's there for thirty
17 years, and - - - and you have fruitless negotiations with
18 the other side to clean it up according - - -

19 JUDGE FAHEY: So, all right, that's a good point.
20 So what's the basis, then, of your unilateral action? It
21 seems that there's three statutory bases that are popular -
22 - - po - - - possible. What are you relying on?

23 MR. BRODIE: Well, we're relying on both Article
24 - - - Title 9, which doesn't require a hearing at all - - -

25 JUDGE FAHEY: Right.



1 MR. BRODIE: - - - and Title 13, specifically,
2 Section 27-1313 - - -

3 JUDGE FAHEY: 4.

4 MR. BRODIE: 5(d).

5 JUDGE WILSON: 5(d).

6 JUDGE FAHEY: Oh, 5(d).

7 MR. BRODIE: 5(d).

8 JUDGE FAHEY: Okay.

9 MR. BRODIE: Now - - - now - - -

10 JUDGE FAHEY: So when - - -

11 MR. BRODIE: - - - Section 4 says there has to be
12 a hearing as to Section 3.

13 JUDGE FAHEY: Uh-huh.

14 MR. BRODIE: But we're not going under Section 3.

15 JUDGE FAHEY: So under - - -

16 MR. BRODIE: We're going under Section 5(d).

17 JUDGE WILSON: - - - under - - - and under 5(d),
18 the issue seems to be cost effectiveness. So I have two
19 questions for you about cost effectiveness.

20 MR. BRODIE: Yes.

21 JUDGE WILSON: One is, reading 5, sort of as a
22 whole, I can imagine - - - and maybe - - - maybe my
23 imagination is limited, but I can - - - I can imagine two
24 different things that cost effectiveness might mean. It
25 means - - - it might mean, can DEC do this more cheaply or

1 better or more efficiently than somebody else? And/or it
2 might mean, when you look particularly at C and D together,
3 cost of - - - so D, has, as its objective, the complete
4 cleanup. Where C has its - - - has its objective, the rem
5 - - - the remediation of an immediate threat, something - -
6 - something that is happening right now, not the complete
7 cleanup.

8 And so cost effectiveness might mean, does it
9 make sense to pay the additional fifteen percent to do a
10 complete cleanup, instead of do - - - spending eighty-five
11 percent to do a partial cleanup. So first question is, do
12 you have a view of whether either of those or both of those
13 or neither of those is what's meant by cost effectiveness?
14 And then whatever your answer is about cost effectiveness,
15 what is the cost-effective decision, if any, that DEC made
16 and where do we find it?

17 MR. BRODIE: You - - - let me answer the second
18 question first, because it's easy. Cost effectiveness is
19 found on page 2551 of the record, and it's also discussed
20 in response to some comments from FMC on 2644 to 2646.

21 JUDGE STEIN: Is that your final statement? Is
22 that what you're referring to?

23 MR. BRODIE: That - - - right. That's the final
24 statement - - -

25 JUDGE STEIN: So but is - - - is that - - -



1 doesn't that refer to the cost effectiveness of that
2 particular rem - - - remedial action in and of itself?

3 MR. BRODIE: That's - - -

4 JUDGE STEIN: Okay. So - - -

5 MR. BRODIE: - - - that's right.

6 JUDGE STEIN: So it doesn't compare it to any - -
7 - whether it's cost effective compared to what it would
8 cost someone else or cost effective in - - - in terms of -
9 - - Judge Wilson's question - - - immediate threat versus
10 complete cleanup?

11 MR. BRODIE: No, I would - - - I would disagree
12 with that, because the whole Statement of Basis is an
13 exercise of comparing CMA 9 to these other eight remedial
14 measures that - - -

15 JUDGE STEIN: But that's - - -

16 MR. BRODIE: - - - FMC recommended.

17 JUDGE STEIN: - - - completely different, I
18 think, from Judge Wilson's question. It's comparing it to
19 other remedial measures, but is it comparing it to what
20 someone else could do or - - - or - - -

21 MR. BRODIE: Well, at the - - - at the - - -

22 JUDGE STEIN: - - - are you saying that those
23 other remedial measures are not complete cleanups?

24 MR. BRODIE: Well, no, at - - - at the - - - DEC
25 weighed the effectiveness and the cost, and you see that in

1 the Statement of Basis on the - - - on the pages I cited.
2 Now, at the time the Statement of Basis is issued, FMC
3 hasn't yet refused. So we don't need to make that
4 determination at that time, you know, as to whether we can
5 do it better than FMC, or FMC can do it better than us.

6 JUDGE STEIN: So your answer is that all you have
7 to show is that this is a cost effective measure, what?
8 Compared to what?

9 MR. BRODIE: Well, certainly compared to the
10 other measures that - - - that were proposed by FMC, and -
11 - - and that's analyzed in the Statement of Basis. But the
12 point is, that then after the Statement of Basis, we
13 engaged in almost a year of negotiations with FMC, and they
14 ultimately sent - - - and this is on page 2711 of the
15 record - - - an email saying, we don't see a path forward;
16 we - - - we don't see any way to go forward.

17 So now you have a choice between DEC doing the
18 remedy and nobody doing the remedy. And at that point, it
19 is certainly, both the remedy is cost effective itself, as
20 DEC found, and it's cost effective for DEC to do it.

21 CHIEF JUDGE DIFIORE: Counsel, if we were to
22 agree with you, what's the remedy you're seeking here?

23 MR. BRODIE: We'd like reversal - - - first of
24 all, reversal of this interim status holding that says that
25 facilities in interim status don't have to comply with the



1 environmental laws, because that's wrong. Secondly,
2 reversal of the holding that you have to have a hearing - -
3 - an adversary hearing - - - on the selection of remedy.
4 The hearing provision isn't implicated by 5(d). And also
5 the hearing provision, which is - - - which is Section 4 -
6 - - only applies to hearings for - - - it - - - it says,
7 hearings to determine who is the responsible party.

8 Well, you know, we know who the responsible party
9 is. So we don't need that hearing. There's no provision
10 that says that you get a hearing on the selection of
11 remedy. And why? Because the - - - the polluter does not
12 choose the remedy. DEC chooses the remedy. And what
13 happens due-process-wise is, you get an Article 78, if you
14 don't like the remedy - - -

15 JUDGE WILSON: Well, that sort of - - - that sort
16 of goes - - -

17 MR. BRODIE: - - - and unfortunately this Article
18 78 went by the boards.

19 JUDGE WILSON: But that really sort of goes to
20 the question Judge Fahey was asking you. Put the thirty
21 years aside, what is the normal practice? That is, if it
22 comes down to a choice of remedy, is anyone ever given a
23 hearing?

24 MR. BRODIE: Hearings are few and far between,
25 and I'll - - - and I'll tell you why - - -



1 JUDGE WILSON: No, are they always for the
2 purpose of identifying the polluter?

3 MR. BRODIE: Well, right, yes, because - - -

4 JUDGE WILSON: That's what they're for.

5 MR. BRODIE: - - - because we know who the
6 polluter is.

7 JUDGE WILSON: No, no, no. When you - - - you do
8 hold hearings sometimes, right?

9 MR. BRODIE: I'm sorry?

10 JUDGE WILSON: You hold hearings sometimes?

11 MR. BRODIE: Sometimes, yes.

12 JUDGE WILSON: Okay, when those hearings are
13 held, are they always for the purpose of identifying the
14 polluter, the responsible party? Are they sometimes for
15 that? Are they never for that? Are they sometimes for the
16 purpose of choosing the remedy or getting evidence about
17 the possible remedy?

18 MR. BRODIE: There has been, to my knowledge, no
19 hearing - - - no administrative hearing - - - for the
20 purpose of choosing a remedy. The hearings are for the
21 purpose of identifying, are you a responsible party; are
22 you not a responsible party.

23 And - - - and if I can wrap up with one thought,
24 as far - - -

25 JUDGE RIVERA: Well, just - - - I'm sorry. So



1 the - - - when is the opportunity to challenge DEC's choice
2 of remedy? When do they have the opportunity to challenge
3 that? Other than to argue - - -

4 MR. BRODIE: They have - - - they have - - -

5 JUDGE RIVERA: - - - with you back and forth, and
6 you say, well, we've decided this is the remedy.

7 MR. BRODIE: They have two opportunities.

8 JUDGE RIVERA: Yeah.

9 MR. BRODIE: Number one, in the Article 78 - - -

10 JUDGE RIVERA: Okay.

11 MR. BRODIE: And they did challenge it. They
12 said it's arbitrary and capricious. On remand, the court
13 can assess that challenge and it can assess our defenses,
14 none of which were assessed.

15 And - - - and secondly, when FMC - - - when DEC's
16 spends the money, then comes back with a bill and sues them
17 under CERCLA, they get all the defenses in federal court
18 that CERCLA provides, including the defense that the remedy
19 is not consistent with the National Contingency Plan. And
20 one of the things that the National Contingency Plan
21 requires is that the remedy be cost effective. And there
22 are also case law - - - there's also case law that we're
23 citing in our brief that says that remedies that are
24 arbitrary and capricious can be challenged as not in
25 compliance with the National Contingency Plan.



1 And it's a very long regulatory cite for the
2 National Contingency Plan. I will get it for you in the
3 rebuttal.

4 CHIEF JUDGE DIFIORE: Thank you, Counsel.
5 Counsel?

6 MR. MANDELBAUM: Thank you, Your Honors. Good
7 afternoon. My name is David Mandelbaum, of Greenberg
8 Traurig for FMC.

9 CHIEF JUDGE DIFIORE: Mr. Mandelbaum?

10 MR. MANDELBAUM: Yes.

11 CHIEF JUDGE DIFIORE: I have a question for you.
12 So - - - so no one has ordered you, FMC, to take any
13 action? No one has ordered you to pay any money yet? So
14 focus right in for me, why is it that you get to dictate
15 what they do on someone else's property?

16 MR. MANDELBAUM: Okay. It's not exactly true
17 that no one's ordered us to do anything - - -

18 CHIEF JUDGE DIFIORE: So what have - - -

19 MR. BRODIE: The 1991 - - -

20 CHIEF JUDGE DIFIORE: What have you been ordered
21 to do?

22 MR. MANDELBAUM: - - - AOC, Administrative Order
23 on Consent, is a correctly action order.

24 JUDGE WILSON: That's - - -

25 MR. MANDELBAUM: That is - - -



1 JUDGE WILSON: That's an order that you consented
2 to - - -

3 MR. MANDELBAUM: That's right and we - - -

4 JUDGE WILSON: - - - and it's been terminated.

5 MR. MANDELBAUM: No, it's only - - - they say it
6 was closed for operable units 2, 4, and 5. It remains open
7 as to everything else, and it has no closure provision.

8 JUDGE WILSON: But we're only here about 2, 4,
9 and 5.

10 MR. MANDELBAUM: I understand that, Your Honor.
11 The - - - we've - - - in 2, 4, and 5, we have done a number
12 of interim corrective measures, under that order.

13 If - - - if you'll allow me, the - - - I want to
14 get to your question, which is "Why do we get to be here?"
15 We get to be here because they wrote us a letter. The
16 letter said, you have refused and therefore we are
17 proceeding. We challenged the premise of that, which was -
18 - - the predicate to that in the letter was that the final
19 Statement of Basis created a present obligation on FMC to
20 implement CMA 9, which we don't believe is true. We
21 believe the selection of CMA 9 is an interim step in fixing
22 that obligation on FMC.

23 JUDGE FAHEY: Can I take you a step back to - - -

24 MR. MANDELBAUM: Yes, sir.

25 JUDGE FAHEY: - - - to your challenge, Mr.



1 Mandelbaum, initially? Did you ever challenge the fact
2 that you weren't given a hearing in Supreme Court on any of
3 the issues that you're raising before us outside of the
4 hearing issue?

5 MR. MANDELBAUM: Yes, we didn't - - - we didn't
6 specifically focus on the hearing aspect. We focused on
7 the fact that we req - - - that in order for that
8 obligation to perform - - - to attach - - -

9 JUDGE FAHEY: So that it was procedurally
10 defective; is that right?

11 MR. MANDELBAUM: No.

12 JUDGE FAHEY: No? Go ahead.

13 MR. MANDELBAUM: No, because we said, you have to
14 either issue us an order - - -

15 JUDGE FAHEY: Um-hum.

16 MR. MANDELBAUM: - - - or you have to issue us a
17 permit. And both - - -

18 JUDGE FAHEY: And I'm wondering - - - here's why
19 I'm asking. I'm wondering what the basis is for the
20 Appellate Division to have moved to this hearing question
21 when I could not find it in the - - - in the underlying
22 actions that were taken by Supreme Court, and while - - -
23 and it's really not in the briefs in the Appellate Division
24 either.

25 So unless you can point me to a place that you



1 want me to look at on, I'll be happy to do that in the
2 Appellate Division briefs. You don't have to do it now;
3 you - - - but - - - but I - - - are they there or am I
4 missing something?

5 MR. MANDELBAUM: Yeah, we said - - - which I
6 think is actually more precise than what the Appellate
7 Division said - - - we said, look, there are three ways
8 that you can impose this obligation on FMC. You can do it
9 the way it has been done and is, in effect, the regular way
10 under RCRA interim status, right. Interim status is the
11 way legacy industrial sites are managed.

12 JUDGE FAHEY: Um-hum.

13 MR. MANDELBAUM: The - - - the task of writing a
14 - - - a full hazardous waste management facility permit is
15 very onerous, and when you have a facility, like FMC, which
16 no longer creates new hazardous waste, you have this
17 interim status, which is continuous. There is a corrective
18 action obligation there. The way corrective obli - - -
19 action obligation for past releases or continuing releases
20 of hazardous waste from that facility is addressed is by
21 issuance of an order under 3008(h) of the federal statute
22 and check - - -

23 JUDGE FAHEY: You - - - you're losing me. I - -
24 - I want to know, did you request a hearing?

25 MR. MANDELBAUM: We said, you need to give us a



1 permit or an order. Every way to a permit or an order
2 requires a hearing. The Appellate Division fixed on the
3 hearing requirement, rather than the permit or order
4 requirement.

5 JUDGE FAHEY: The reason I ask is because it
6 doesn't appear to me that they had a basis in the arguments
7 before them to go to this hearing issue, outside of
8 reviewing the entire record and saying there wasn't a
9 hearing, and they went, aha, there wasn't a hearing here.
10 In other words, it wasn't really argued, and it wasn't - -
11 - it wasn't argued by you or your opponent that a hearing
12 was requested or required.

13 MR. MANDELBAUM: Well, it was argued that we said
14 - - - we said, you must give us an order - - -

15 JUDGE FAHEY: Yes.

16 MR. MANDELBAUM: - - - that would require a
17 hearing, or you must give us a permit with a corrective
18 action condition - - -

19 JUDGE FAHEY: So - - -

20 MR. MANDELBAUM: - - - that would require a
21 hearing.

22 JUDGE RIVERA: So they disagreed with both - - -

23 MR. MANDELBAUM: No.

24 JUDGE RIVERA: Excuse me. They disagreed with
25 what you argued, right? What you're arguing. Their



1 position is, I don't have to give you a hearing; I can
2 decide on - - - DEC gets to decide this. We've made a
3 decision of what's the appropriate corrective action.
4 You've got - - - as he's an - - - responded to me - - -
5 you've got two paths by which you can challenge. One is
6 the Article 78, which you have; you can make your arguments
7 about arbitrary and capriciousness of the decision. Or
8 when they come around and - - - and do the cleanup, and
9 they say, you now have to foot this bill, you can make an
10 argument at that time, whatever your argument may be.

11 But they claim that they can proceed without this
12 hearing, because there are provisions, and they are correct
13 in this way, that there are provisions under the law that
14 let them do so without a hearing. You are identifying
15 other provisions that do require hearings. But why is he
16 wrong, when he says there are provisions that let us
17 proceed without a hearing, that's - - - that is what we
18 used as the basis for imposing this particular requirement
19 or choosing this corrective action?

20 MR. MANDELBAUM: Because I believe Mr. Brodie is
21 incorrect in identifying authority that DEC has to proceed
22 under 1313(5) (d).

23 JUDGE RIVERA: Why?

24 JUDGE STEIN: What about Title 9?

25 JUDGE RIVERA: Well, let - - - I'm sorry. Just -



1 - -

2 JUDGE STEIN: Sorry, go ahead.

3 JUDGE RIVERA: - - - Judge, give me that one.

4 JUDGE STEIN: Yeah.

5 JUDGE RIVERA: Why?

6 MR. MANDELBAUM: Because the - - - the sentence
7 about cost effectiveness, which Mr. Brodie wants to make
8 apply to the remedy - - - to CMA 9 - - - doesn't make cost
9 effectiveness apply to the remedy. It applies to the
10 decision by DEC to proceed unilaterally. The sentence is -
11 - - or the phrase is "If, in the discretion of the
12 Department, it is cost effective for the Department to
13 develop and implement such a remedial program." Right, so
14 the cost effectiveness moni - - - is a test for whether the
15 Department should act. And among the factors the
16 Department has - - -

17 JUDGE RIVERA: And where - - - where does it say
18 that that's the interpretation?

19 MR. MANDELBAUM: I think that's - - - I mean, the
20 modifier - - - it's the - - - it's modifying the - - - the
21 next phrase, right - - - cost effective for the Department,
22 yes.

23 JUDGE RIVERA: You're saying based on the
24 language found in this provision, you're saying this is the
25 only way one could interpret.



1 MR. MANDELBAUM: No, because if you look at the
2 factors that the Department must consider, one of the
3 things that the factor must consider is the availability of
4 someone else to do it, a responsible party, that's d(2),
5 and - - -

6 JUDGE WILSON: But that still leaves open my
7 question I think, which is, is cost effectiveness vis-a-vis
8 - - - that is, let's take your argument for granted, that
9 it's about whether the Department should act, right, but it
10 still might be, should - - - is this cost effective for the
11 Department to do a total cleanup - - - cleanup versus a
12 partial one, or is it cost effective vis-a-vis somebody
13 else doing it. Do you have a view on that?

14 MR. MANDELBAUM: Yes, I think it's cost effective
15 vis-a somebody else doing it, and it can't possibly be - -
16 - be cost - - - it cannot possibly be more cost effective
17 to the State for the State to do it itself, than for it to
18 issue an order to FMC, where FMC has said, all we want is
19 our day in court. So if that order becomes effective, FMC
20 will comply with it, until such time as a court rules and
21 says it's an improper order. This is going to be decades.

22 JUDGE STEIN: Maybe the State can get labor done
23 more cheaply than you can. I mean - - -

24 MR. MANDELBAUM: That actually is - - -

25 JUDGE STEIN: - - - it's not impossible, right?



1 MR. MANDELBAUM: That's - - - that's - - - that's
2 contrary to, sort of, my entire experience, in a Superfund
3 world.

4 JUDGE STEIN: Well, theoretically.
5 Hypothetically.

6 MR. MANDELBAUM: But it - - - but there's no such
7 finding. The finding here is - - -

8 JUDGE RIVERA: But what - - - what - - - what if
9 - - - what if you're wrangling for another thirty years?
10 And they say, well, we're not going to wait around for all
11 of the toxic results of allowing this waste to contaminate
12 these surrounding areas; we're going to act now.

13 MR. MANDELBAUM: We have not been wrangling, Your
14 Honor. We've been - - - we've been following the process
15 as laid out by the regulators. We got to the end a few
16 years ago and came to - - -

17 JUDGE RIVERA: All right, let me ask it a
18 different way. What happens when - - - what he describes,
19 you and the DEC are at - - - are at this impasse. You say,
20 we think this is good enough to - - - to clean up and make
21 this a safe area, and they say, no, it's not good enough;
22 we need more; we need X to happen.

23 MR. MANDELBAUM: Issue us an order.

24 JUDGE RIVERA: What happens now?

25 MR. MANDELBAUM: They should issue us an order.



1 We will get a hearing. The hearing should go promptly.

2 CHIEF JUDGE DIFIORE: Should or must?

3 MR. MANDELBAUM: They mu - - - they must either
4 issue us an order - - -

5 CHIEF JUDGE DIFIORE: Pursuant to - - -

6 MR. MANDELBAUM: To either - - - it would either
7 be a corrective action order, under 71-2727, which would
8 require a hearing, or it - - - or they would issue us an
9 order under 1313, the Superfund provision. Or they would,
10 as they have started to do, issue a permit for the
11 facility, which has corrective action conditions in it,
12 which would require a hearing, right. Those are the three
13 ways - - -

14 JUDGE STEIN: But - - - but - - -

15 JUDGE WILSON: And back to Judge - - -

16 JUDGE STEIN: - - - but if they qualify under
17 5(d), right, then they don't need to issue an order and
18 give you a hearing, correct?

19 MR. MANDELBAUM: Yes, I disagree that they - - -
20 they're qualified under 5(d).

21 JUDGE STEIN: So you disagree as to whether they
22 qualify, but you agree that if they qualify, then no order
23 is necessary and no hearing is necessary?

24 MR. MANDELBAUM: That's right, but they haven't
25 made the findings that would allow 5(d) - - -



1 JUDGE STEIN: Okay.

2 MR. MANDELBAUM: - - - to occur.

3 JUDGE STEIN: And what about also under Title 9?
4 If they - - -

5 MR. MANDELBAUM: Under - - - yes.

6 JUDGE STEIN: - - - qualify under Title 9,
7 there's no provision for a hearing, right?

8 MR. MANDELBAUM: That's right. Mr. Brodie is
9 simply incorrect as to the releases from the facility.
10 First of all, he's quoting from the remedial fi - - - the
11 remedial facilities investigation, the document prepared
12 under the AOC, right. And - - - and all of the - - - all
13 of the releases that he's describing are overflows from the
14 Western Surface Impoundment. There are, like, two or three
15 of them there. You'll notice each one mentions comparisons
16 to the permit. The permit is the wastewater discharge
17 permit, because the Western Surface Impoundment goes
18 through - - - the waste water discharge system does not go
19 to OU 2, 4, and 5 - - - is regulated under the wastewater
20 discharge laws and is exempt from hazardous waste
21 regulation. I mean, this is something that came up very
22 late. It came up in - - - in supplemental affidavits in
23 the Appellate Division, and it's - - - pardon me - - -
24 concocted.

25 JUDGE WILSON: Right, I mean, you're authorized.



1 But let me - - - let me - - - but so let me leave the facts
2 for a second to go back to Judge Stein's question on 0914,
3 0916.

4 MR. MANDELBAUM: Yeah.

5 JUDGE WILSON: It - - - and put FMC aside - - -
6 if it - - - if I go and dump a bunch of toxic waste
7 somewhere, they don't have to give a hearing. They can go
8 - - -

9 MR. MANDELBAUM: That's correct.

10 JUDGE WILSON: - - - right on - - - okay.

11 MR. MANDELBAUM: That's correct.

12 JUDGE WILSON: I just want to make sure I have
13 that right.

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.

15 MR. MANDELBAUM: Thank you.

16 CHIEF JUDGE DIFIORE: Mr. Brodie?

17 MR. BRODIE: Thank you, Your Honor.

18 Ministerial items first. National Contingency
19 Plan, cost effectiveness, 40 C.F.R. 300.430(f)(1)(ii)(D).
20 So if FMC wants to challenge cost effectiveness at the
21 CERCLA lawsuit in federal court, they can do that.

22 Now do - - - you do not need an order or a
23 hearing under 5(d). Why is that? The order and hearing
24 provisions were adopted in 1979. That's 4 and 3(a). At
25 the time, the State Superfund didn't exist. DEC,



1 therefore, lacked significant funds to conduct the
2 remediation itself. It had - - - if it wanted to remediate
3 a big site, it had to order the responsible person to do
4 so.

5 The legislature then determined that FMC needed
6 more flexibility, and some of this legislative history is
7 cited in our briefs. So it passed the State Superfund Law
8 in 1982, three years later. After that, the State could
9 remediate using the State Superfund Law, and it was no
10 longer required to order the responsible party to clean up.

11 And here is the critical, critical point. 5(d),
12 the provision under which we're going - - - under which we
13 say there's no hearing, no order required, was adopted in
14 the very same enactment as the State Superfund Law. Laws
15 of 1982, Chapter 857. So look what the legislature does.
16 It says, DEC, here's some money, plus you no longer have to
17 have an - - - issue an order or have a hearing. Under
18 5(d), as long as you think it's cost effective, you can go
19 forward.

20 Now the State Superfund - - -

21 JUDGE RIVERA: What's - - - what's the - - -
22 what's the point of 5(d)(ii), identifying the owner who
23 financially has resources?

24 MR. BRODIE: Well, they have to - - - that's
25 something they should consider, and DEC, in fact,



1 considered that. It identified the owner. Everyone knew
2 who the owner was. And after the - - -

3 JUDGE RIVERA: But I'm saying, what - - - what's
4 the point of the identification of the person, if - - - if
5 this - - - if it says cost effectiveness?

6 MR. BRODIE: Well, it certainly - - - and the
7 legislature knew how to set conditions, and they didn't set
8 as a condition that you find that you are a - - - a better
9 remediator than the owner. Although I would argue that
10 when the owner says, no, we're not going to remediate, then
11 that, by default, makes you a better remediator.

12 JUDGE STEIN: Does our Superfund Coalition case
13 suggest that a hearing is necessary under 5(d)?

14 MR. BRODIE: Superfund hearing - - - Superfund
15 Coalition case, actually - - - and I've got the cite on it
16 - - - it - - - it actually supports DEC's argument, because
17 it says 1313(5)(d) does not apply where DEC orders a
18 responsible party to implement a remedial program. That's
19 18 N.Y.3d at 296 to 297. Now later on, they talk about the
20 right to a hearing, but they talk about that specifically
21 with regard to the issuance of an order.

22 When you're not issuing an order, under
23 1313(5)(d), the Superfund Coalition case, on the pages I
24 cited, is absolutely clear that you - - - that you - - -
25 you don't need an order. You can go without one, and



1 that's - - - that's what we're saying.

2 Now, does this mean that the provisions requiring
3 an order are unnecessary? No, it doesn't. Among other
4 things, DEC needs those provisions when there's
5 insufficient money in the Superfund. At the moment,
6 though, we have the money, and we want to remediate and
7 this toxic waste has been on these people's lawns and the
8 schoolyard for thirty years. And we need to get rid of it.

9 CHIEF JUDGE DIFIORE: Thank you, Counsel.

10 MR. BRODIE: Thank you.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of FMC Corporation v. New York State Department of Environmental Conservation, No. 41 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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