

PUBLISHED BY



Court Holds That NJDEP's Informal Determination Not to Pursue PRP for Natural Resources Damages Cannot Later Be Reversed

Posted at 12:07 PM on January 13, 2011 by Gerard M. Giordano

A federal District Court in New Jersey recently ruled that the New Jersey Department of Environmental Protection (“NJDEP”) waived its rights to pursue Natural Resource Damages (“NRDs”) as a result of a letter sent to the defendant indicating that NJDEP did not intend to pursue the defendant for NRDs. FMC Corp. v. American Cyanamid, No. 01-0476 (D.N.J. 9/29/10). FMC involved a site in Franklin Township, New Jersey (the “Site”), which was placed on the federal Superfund National Priorities List in 1990. FMC Corp. (“FMC”) and the United States initiated settlement negotiations in 1997 regarding environmental remediation of the Site. During negotiations, FMC, in order to determine the extent of its liability at the Site for the environmental contamination, contacted the New Jersey Attorney General’s Office. Subsequently, the Deputy Attorney General for the State wrote to FMC in 2003 setting forth the costs the State intended to pursue for the Site. The letter also attached a memorandum from the NJDEP’s Office of Natural Resource Restoration indicating that the State would not pursue FMC for NRDs.

The State’s decision not to pursue FMC for NRDs was based on NJDEP’s policy adopted in the late 1990s that excluded on-site groundwater contamination from the assessment of NRDs in instances where there was no off-site groundwater contamination and where no other natural

resources were impacted by the discharge of hazardous substances. This policy was in effect when the Deputy Attorney General wrote to FMC informing FMC that the State would not pursue FMC for NRDs.

The NJDEP subsequently revised its policy, and in 2006 filed suit against FMC seeking NRDs. FMC moved for summary judgment based on the fact that NJDEP waived its right to pursue FMC for NRDs at the Site citing the 2003 letter from the Deputy Attorney General. NJDEP cross moved to strike the affirmative defense of waiver plead by FMC arguing that its letter did not amount to a waiver. NJDEP also argued that even if a waiver had been made, “the doctrine of waiver should not be applied under the circumstances because a government agency may change policies for the benefit of the public without creating rights in parties who claim to have relied on the old policy.”

The Court agreed with FMC. While acknowledging that questions of waiver are usually questions of intent, which are factual determinations, the Court determined that there was no real question that NJDEP did not intend to pursue FMC for NRDs. The Court further noted that at the time the State wrote to FMC indicating that it would not pursue FMC for NRDs, it did not state that such a determination was subject to change in policy within NJDEP. Accordingly, the Court found that the State expressly waived its right to seek NRDs against FMC. The Court also ruled that the State could not waive its right to assess NRDs against FMC s and then later reverse its decision.

The obvious lesson from this case is that when obtaining a determination from an administrative agency, it is critical that the terms be spelled out in writing. Having the determination in writing may be your only defense in the future to protect you from an agency’s decision to reverse its determination. Although an agency may argue that it has the right to reverse its policies, as NJDEP argued in FMC, the Court may decline to uphold such a reversal.

Cole, Schotz, Meisel, Forman & Leonard, P.A.

Court Plaza North
25 Main Street
Hackensack, NJ 07601
Phone: (201) 489-3000

900 Third Avenue
16th Floor
New York, NY 10022
Phone: (212) 752-8000

500 Delaware Avenue
Suite 1410
Wilmington, DE 19801
Phone: (302) 652-3131

300 East Lombard Street Suite 2000
Baltimore, MD 21202
Phone: (410) 230-0660

301 Commerce Street
Suite 1700
Fort Worth, TX 76102
Phone: (817) 810-5250