

FMC wins suit against NY over cost of Middleport arsenic cleanup



A backhoe excavates soil on Thursday, Oct. 27, 2016 in Middleport, N.Y., where the state has imposed a plan requiring FMC Corp. pay to remove arsenic-contaminated soil from outside more than 200 properties. (Thomas J. Prohaska / The Buffalo News)

MIDDLEPORT - The state Department of Environmental Conservation failed to follow state law in imposing a plan for the ongoing cleanup of arsenic in the soil of the Village of Middleport, an appeals court has ruled.

The court ruling last week comes in a case filed by FMC Corp. (<http://www.fmc-middleport.com/>), operators of an agricultural chemical plant in Middleport that was the source of the arsenic contamination.

FMC had contended that the remedial plan the DEC adopted in 2013 was overkill, removing far more soil than the company deemed necessary and costing FMC more than twice what it thought it should have to pay.

At the time the DEC made its choice, the estimated cost of the state's cleanup plan was \$70 million. FMC's preferred option was estimated to cost \$27 million. While its lawsuit was pending, the company refused to pay anything toward the latest round of work, which began in 2015 and continued this summer.

The dispute focused on how clean 202 affected properties should be. FMC sought to remove enough soil to bring the average arsenic reading for each lot below 20 parts per million, which is regarded as the naturally occurring "background level" for arsenic in the soil of eastern Niagara County. The DEC wanted to remove more soil, to make sure the arsenic level went below 20 parts per million at every point on every lot.

Related story: FMC plans more arsenic testing in Middleport

(<http://buffalonews.com/2016/08/02/fmc-plans-more-arsenic-testing-in-middleport/>)

A five-judge panel of the Third Department of the Appellate Division of State Supreme Court in Albany unanimously ruled that the DEC was "arbitrary and capricious" in approving the more expensive option without giving FMC a chance for a hearing, which was required under the terms of a 1991 consent order in which FMC agreed to foot the bill to clean up arsenic and other chemicals in Middleport soil.

Since then, FMC has spent more than \$200 million on studies and excavations in Middleport, company spokesman Robert P. Carr said Wednesday.

There have been eight rounds of soil excavation in Middleport over the past 20 years, including work on the Royalton-Hartland Central School campus (<http://buffalonews.com/2016/05/07/dec-to-continue-cleanup-of-arsenic-on-roy-hart-campus-middleport/>) as recently as this summer. The DEC put its preferred plan into effect in 2015 even though the lawsuit FMC filed (<http://buffalonews.com/2014/06/30/fmc-challenges-agencies-in-court-over-middleport-cleanup/>) in 2013 was still pending. A State Supreme Court justice in Albany ruled in the DEC's favor in August 2015, but FMC promptly appealed.

The DEC said when it decided to go ahead with the latest round of work that it intended to bill FMC for it, but the company refused to pay.

The Appellate Division order returned to the matter to the DEC for new action in accordance with the court's ruling. FMC issued a statement Wednesday envisioning renewed negotiations with the DEC.

"FMC is grateful that the New York Supreme Court ruled on the merits of this case in a manner that ensures FMC's due process rights," FMC said in its statement. "FMC now hopes to engage NYSDEC in discussions concerning an appropriate remedy which best serves the Village of Middleport."

DEC spokesman Kevin O. Frazier said, "DEC is reviewing the 3rd Department's ruling and considering all legal options."

Those 202 properties, mostly residential, were considered to have been mostly downwind of the plant, with arsenic having been deposited in the soil because of the wind.

At several public meetings in recent years, Middleport residents have said that they have seen no negative health impacts from the arsenic. Many said they were tired of the frequent digging that destroyed trees, shrubs and lawns, turning parts of the village into dusty wastelands until new soil was laid down and new grass was planted. In 2014, the DEC said it would let residents opt out of cleanups from now on.

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