State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 22, 2017 523354

In the Matter of FMC CORPORATION,
Appellant,
v MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Respondent.

Calendar Date: May 3, 2017

Before: Garry, J.P., Lynch, Rose, Mulvey and Aarons, JJ.

Hodgson Russ, LLP, Buffalo (David G. Mandelbaum of Greenberg Traurig, LLP, Philadelphia, Pennsylvania, admitted pro hac vice), for appellant.

Eric T. Schneiderman, Attorney General, Albany (Frederick A. Brodie of counsel), for respondent.

Aarons, J.

Appeal from a judgment of the Supreme Court (Zwack, J.), entered April 7, 2016 in Albany County, which, in a proceeding pursuant to CPLR article 78, granted respondent's motion to dismiss the petition.

Petitioner commenced this CPLR article 78 proceeding challenging respondent's determination in a June 2015 letter demanding that petitioner pay $2.8 million as expenses incurred in connection with a remediation plan and another determination in an August 2015 letter that referred the matter to the Attorney General. Respondent moved to dismiss the petition on the basis

that the letters did not constitute a final agency determination. Supreme Court granted the motion and petitioner now appeals.

After petitioner perfected its appeal, but before it was fully briefed, this Court issued a decision in a prior related appeal involving these parties (Matter of FMC Corp. v New York State Dept. of Envtl. Conservation, 143 AD3d 1128 [2016], lv granted 2017 NY Slip Op 63646[U] [2017]). In view of this decision, petitioner acknowledges in its reply brief that Supreme Court's "judgment is correct," that the "judgment should be affirmed" and that this appeal is now moot. Based upon these concessions, petitioner is no longer aggrieved (see CPLR 5511).

While petitioner still challenges certain statements in Supreme Court's decision as objectionable, at oral argument, the parties agreed that such statements were dicta. Because disagreement with dicta does not provide a basis to take an appeal (see B & N Props., LLC v Elmar Assoc., LLC, 51 AD3d 831, 832 [2008]; Edge Mgt. Consulting v Irmas, 306 AD2d 69, 69 [2003]; see generally Pennsylvania Gen. Ins. Co. v Austin Powder Co., 68 NY2d 465, 472-473 [1986]), the appeal must be dismissed.

Garry, J.P., Lynch, Rose and Mulvey, JJ., concur.

ORDERED that the appeal is dismissed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court