

Appeal Decision re. Settlement Approval
S. area.

UNITED STATES COURT OF APPEALS
For the Second Circuit

Cal. No. 172
(Argued October 11, 1985)

August Term, 1985
Decided NOV 6 1985

Docket No. 85-6130

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UNITED STATES OF AMERICA and
THE STATE OF NEW YORK,

Plaintiffs-Appellees,

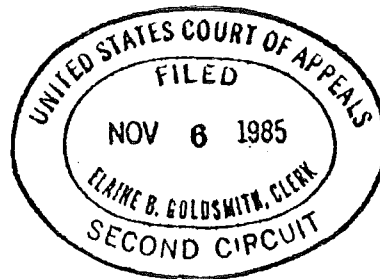
THE PROVINCE OF ONTARIO, CANADA,
and the MINISTER OF THE ENVIRONMENT
OF THE PROVINCE OF ONTARIO, CANADA,

Plaintiffs-Intervenors-
Appellants,

v.

HOOVER CHEMICAL & PLASTICS CORP.,
HOOVER CHEMICAL CORP., OCCIDENTAL
PETROLEUM INVESTMENT CO., OCCIDENTAL
PETROLEUM CORP., and THE CITY OF NIAGARA
FALLS ("S" Area Landfill),

Defendants-Appellees.
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BEFORE: LUMBARD, VAN GRAAFEILAND and MESKILL, Circuit Judges.

Intervenors, The Province of Ontario, Canada, and the Minister of the Environment of the Province of Ontario, Canada, appeal from a judgment of the United States District Court for the Western District of New York (Curtin, C.J.) approving the settlement of litigation aimed at remedying a chemically contaminated, seven-acre area in the City of Niagara Falls.

Affirmed.

BRUCE J. TERRIS, Washington, D.C. (Terris and Sunderland, Washington, D.C., of Counsel), for Plaintiffs-Intervenors-Appellants.

JACQUES B. GELIN, Dep't of Justice, Washington, D.C. (R. Henry Habicht II, Ass't Att'y General and Salvatore R. Martoche, U.S. Att'y, Buffalo, N.Y.; David C. Shilton and Bruce J. Berger, Att'ys, Dep't of Justice, Washington, D.C.; and William Walsh, Att'y, Environmental Protection Agency, Washington, D.C., of Counsel), for Plaintiff-Appellee United States of America.

BERYL KUDER, Ass't Att'y General, Environmental Protection Bureau, Dep't of Law, New York, N.Y., for Plaintiff-Appellee The State of New York.

JOEL E. SCHWEITZER, Niagara Falls, N.Y. (Gellman, Brydges, Schroff & Schweitzer, Niagara Falls, N.Y., of Counsel), for Defendant-Appellee The City of Niagara Falls.

GEORGE BERGER, New York, N.Y. (Louis Nizer and Martin B. Wasser of Phillips, Nizer, Benjamin, Krim & Ballon, New York, N.Y.; Thomas H. Truitt, William R. Weissman and Keith S. Watson of Wald, Harkrader & Ross, Washington, D.C.; and David K. Floyd of Phillips, Lytle, Hitchcock, Blaine & Huber, Buffalo, N.Y., of Counsel), for Defendants-Appellees Hooker Chemical & Plastics Corp., et al.

1 Because the City of Niagara Falls has an abundant supply of
2 water and electric power close at hand, it is the situs of
3 several electrochemical manufacturing plants. It is also the
4 situs of a number of dumping grounds for chemical refuse, one of
5 which is a seven-acre parcel adjoining the plant of Hooker
6 Chemical & Plastics Corporation. It is estimated that, between
7 1947 and 1961, Hooker disposed of 63,000 tons of chemical waste
8 in this parcel. Unfortunately, putting chemicals into the ground
9 is a lot simpler than getting them out.

10 In 1969, the United States brought the above action against
11 Hooker and its several parent corporations in the United States
12 District Court for the Western District of New York for the
13 purpose of remedying the allegedly dangerous condition which
14 existed at this seven-acre parcel. Since that time, experts
15 retained by the Government and Hooker spent over 50,000 hours
16 developing what they believed to be a feasible, effective remedy.
17 The end result was a 208-page settlement agreement, which has
18 been approved by Chief Judge Curtin. 607 F. Supp. 1052. The
19 Province of Ontario, Canada and the Minister of the Environment
20 of the Province of Ontario, Canada, who were permitted to
21 intervene on the basis of their claim that the dumping site
22 constituted a common law nuisance, 101 F.R.D. 444, now appeal.
23 We affirm.

24 Because the terms of the settlement agreement are reviewed
25 at length in Chief Judge Curtin's opinion, 607 F. Supp.
26 1057-1066, and more briefly in a prior opinion of this Court, 749

1 F.2d 968, 975-76, there is no need for another detailed review.
2 In brief, the program agreed upon is one of containment, i.e.,
3 the prevention of chemical migration from the contaminated site,
4 together with the gradual removal through a system of drainage of
5 all save immovably saturated chemicals. ^{settling} This, the parties agree,
6 is the best solution of the problem in the present stage of
7 scientific, ecological development. Should this long-range
8 program prove ineffective at some future time, Hooker is required
9 to use whatever "Requisite Remedial Technology" then is available
10 to remedy the deficiency. The district court correctly stated
11 that the concept of Requisite Remedial Technology, as provided
12 for in the agreement, "is very flexible" and that "[e]xcavation
13 and incineration are not excluded from the realm of possible
14 future alternative solutions if they become necessary." 607
15 F. Supp. at 1070. See also Chief Judge Curtin's interpretation
16 of "Requisite Remedial Technology" as used in a similar
17 settlement agreement covering another contaminated Hooker
18 landfill, United States v. Hooker Chemicals & Plastics Corp., 540
19 F. Supp. 1067, 1076-79 (W.D.N.Y. 1982).

20 The test for affirmance of the district court's judgment is
21 abuse of discretion. Berkman v. City of New York, 705 F.2d 584,
22 597 (2d Cir. 1983). Bearing in mind the well-established policy
23 of encouraging settlements, Patterson v. Newspaper and Mail
24 Deliverers' Union of New York and Vicinity, 514 F.2d 767, 771 (2d
25 Cir. 1975), cert. denied, 427 U.S. 911 (1976), and the fact that
26 the instant settlement has the approval of the government

1 agencies charged with the enforcement of the environmental
2 protection statutes, United States v. Hooker Chemicals & Plastics
3 Corp., supra, 540 F. Supp. at 1080, we have no hesitation in
4 affirming.

5 Intervenor's arguments against affirmance are not
6 persuasive. Despite intervenors' allegations of common law
7 nuisance, the evidence is uncontroverted that no chemicals have
8 migrated over one and one-half miles to the Canadian side of the
9 Niagara River, and there is no evidence of a potential for them
10 to migrate that far. We find no merit in intervenors' argument
11 that, in the event this latter prognostication proves to be
12 wrong, Hooker's obligation to undertake Requisite Remedial
13 Technology will not give Ontario sufficient protection. The
14 district court's broad interpretation of this phrase is
15 determinative of that issue.

16 Because the district court has retained jurisdiction to
17 enforce its judgment, it undoubtedly will have a substantial
18 concern for the consistency of its holdings, see Heyman v. Kline,
19 456 F.2d 123, 131 (2d Cir.), cert. denied, 409 U.S. 847 (1972),
20 and cannot be expected to reexamine its broad interpretation
21 absent a strong showing of clear error, United States v. Turtle
22 Mountain Band of Chippewa Indians, 612 F.2d 517, 521 (Ct. Cl.
23 1979); Zdanok v. Glidden Co., Durkee Famous Foods Division, 327
24 F.2d 944, 953 (2d Cir.), cert. denied, 377 U.S. 934 (1964).
25 Moreover, because intervenors have participated fully in
26 litigating the meaning of the phrase, Requisite Remedial

1 Technology, this is a clear case of issue preclusion by way of
2 either res judicata or collateral estoppel. Siegel v. National
3 Periodical Publications, Inc., 508 F.2d 909, 913 (2d Cir. 1974);
4 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 336 n.23 (1979);
5 Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 593 (1974).

6 Assuming for the argument that Ontario and its Minister of
7 Environment, who were permitted to intervene for the purpose of
8 arguing their claim of common law nuisance, may also claim the
9 benefit of federal environmental statutes, their contentions
10 concerning these statutes were rejected by the district court.
11 607 F. Supp. 1067-70. We agree with the district court's
12 analysis, and see no need to add to what already has been said.

13 Having reviewed almost 1900 pages of appendices and over 200
14 pages of legal arguments, we cannot help but be impressed with
15 Chief Judge Curtin's handling of the burdensome environmental
16 litigation originating in Niagara Falls, of which the instant
17 case is but a part. The district court docket sheet in this case
18 alone contains over 225 entries, 14 of which indicate meetings
19 between court and counsel. We commend Chief Judge Curtin for his
20 dedication to a difficult task. His judgment in the instant case
21 is affirmed.