TOWN OF FORT EDWARD, Intervenor-Appellant, v. UNITE D STATES OF AMERICA, Plaintiff-Appellee, GENERAL ELECTRIC CO., Defendant.

No. 06-5535-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCU IT

2008 U.S. App. LEXIS 62

January 3, 2008, Decided

PRIOR HISTORY: [*1]
Appeal from the United States District Court for the Northern District of New York (David N. Hurd, Judge).

COUNSEL: FOR APPELLANT: MARK SCHACHNER, Miller, Mannix, Schachner & Hafner, Glen Falls, N.Y. (Jeffrey Bernstein, Barbara Landau , BCK LAW, PC, Boston, MA, on the brief).

FOR APPELLEE: JENNIFER L. SCHELLER, U.S. Dep't of Justice Env't & Natural Res. Div., Washing ton, DC (Douglas Fischer, Paul Simon, U.S. Envt'l Protec tion Agency, New York, N.Y., of counsel; Charles Openchowski, U.S. Envt'l Protection Agency, Washington, DC, of counsel).

JUDGES: PRESENT: HONORABLE GUIDO CALABRESI, HONORABLE ROBERT A. KATZMANN, HONORABLE REENA RAGGI, Circuit Judges.

OPINION

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment approving the consent decree, entered on November 2, 2006, is AFFIRMED.

Intervenor Town of Fort Edward ("Fort Edward") appeals from the entry of a consent decree between Plaintiff-Appellee United States of America, acting through the Environmental Protection Agency ("EPA") , and Defendant General Electric Company. Fort Edward contends that paragraph 8(a) of the consent decree, which exempts the Sediment Processing Transfer Facility ("Facility") from local permit **[*2]** requirements, violates *Section 121* of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and *40 C.F.R. § 300.400(3)* . We assume the parties' familiarity with the facts and the record ofsomewhat complex prior proceedings, which we reference only as necessary to explain our decision.

We review a district court's entry of a consent decree for abuse of discretion. *See United States v. Hooker Chem. & Plastics Corp., 776 F.2d 410, 411 (2d Cir. 1985)*. Where, as in this case, the consent decree is the result of settlement negotiations between a federal administrative agency and a private entity, it is entitled to "twofold deference," i.e., we defer first to "the a gency's expertise and the voluntary agreement of the partie s in proposing the settlement," and second to "the infor med discretion of the trial court in approving the sett lement." *In re Cuyahoga Equip. Corp., 980 F.2d 110, 118 (2d Cir. 1992)*. The district court's entry of a consent decree wi ll not be overturned unless the parties can "point to an error of judgment or law." *Id.*; *see also 42 U.S.C. § 9613(j)(2)* (requiring courts to uphold executive's decisions concerning CERCLA response actions "unless **[*3]** objecting party can demonstrate . . . that the deci sion was arbitrary and capricious or otherwise not in accord ance with law").

Here, Fort Edward submits the district court erred as a matter of law in concluding that the Facility qua lifies as "on-site" for purposes of *40 C.F.R. § 300.400(e)(1)* . Our review of the court's resolution of this issue, as with all conclusions of law, is undertaken *de novo*. *See Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 114-15 (2d Cir. 2007)* (reviewing questions of law *de novo*); *Phong Thanh Nguyen v. Chertoff, 501 F.3d 107, 111 (2d Cir . 2007)* (applying *de novo* review to questions of law raised in petition for review of agency decision). As an application of law to fact, EPA's conclusion that t he Facility is "on-site" pursuant to CERCLA is similar ly

reviewed *de novo*. *See United States v. Haggar Apparel Co., 526 U.S. 380, 391, 119 S. Ct. 1392, 143 L. Ed. 2d 480 (1999)* (noting deference given to agency regulations does not impair "the authority of the court to make factual determinations, and to apply those determinations to the law, *de novo* "); *London v. Polishook, 189 F.3d 196, 200 (2d Cir. 1999)* ; *see generally Beverly Enters. v. NLRB, 139 F.3d 135, 140 (2d Cir. 1998)* (reviewingagency's application **[*4]** of law to facts *de novo*).

The main issue in contention between the parties is whether the Facility meets the *Section 300.400(e)(1)* permit exemption's precondition of being in "in very close proximity" to the area of contamination. *See 40 C.F.R. § 300.400(e)(1)* ("The term 'on-site' means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action."); *42 U.S.C. § 9621(e)(1)* ("No Federal, State or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite . . . ."). While EPA has indicated that "very close proximity" will generally mean adjacent to the contamination site, *see 55 Fed. Reg. 8666, 8690 (March 8, 1990)* , it is plain from examples cited at the time of the regulation's promulgation that the "very close proximity" limitation within the definition of "on-site" was intended to afford EPA some flexibility in identifying proximate sites necessary to achieve CERCLA objectives. *See, e.g., 53 Fed. Reg. 51394, 51406-407 (Dec. 21, 1988)* (providing examples of instances where "[f]lexibility in defining a site is necessary in order to provide expeditious **[*5]** response to site hazards"). While there are spatial limits to whatthe agency may label "in very close proximity" to a contaminated site, *see In the Matter of U.S. Dep't of Energy Hanford Nuclear Reservation*, No. RCRA-10-99-0106, 2000 EPA ALJ LEXIS 11, 2000 WL 341006 (EPA Feb. 9, 2000) (holding that facility located four miles from contaminated area was not "on-site"), we need not identify any bright-line rule in this case. The 1.4 miles separating the Facility from the contaminated area, viewed within the totality of circumstances, including the adjacent canal that affords easy access to the contaminated river, is a sufficiently minimal distance to preclude us from identifying legal error in EPA's or the district court's challenged assessments of the Facility's compliance with the regulatory requirement.

We note that EPA is required to comply with the substance of state and local permit laws, and is merely exempted from "the administrative processes" of obtaining the necessary permits that "could otherwise delay implementation of a response action." See *53 Fed. Reg. 51394, 51406*.

Accordingly, the judgment approving the consent decree is AFFIRMED.