

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

**JUANITA SANCHEZ (ON BEHALF
OF MINOR CHILD DEBORA
RIVERA-SANCHEZ), et al.,**

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

Civil Action No. 3:09-cv-1260 (SEC)

ECF

**DEFENDANT UNITED STATES OF AMERICA'S MEMORANDUM
OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR
LACK OF SUBJECT MATTER JURISDICTION UNDER FED. R. CIV. P. 12(B)(1)**

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TO THE HONORABLE COURT:

Defendant United States of America respectfully submits the following Memorandum in Support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction under Fed. R. Civ. P. 12(b)(1).

PROCEDURAL BACKGROUND AND STATEMENT OF RELEVANT FACTS

1. Plaintiffs' Allegations And Procedural Background

On September 5, 2007, Plaintiffs, consisting of 7,125 individuals and estates, filed their Original Complaint in this action in the United States District Court for the District of Columbia. *Sanchez v. United States*, Civ. No. 1:07-cv-01573-RMU; Orig. Compl. ¶¶ 20-7142 (D.C. Docket No. 1). Plaintiffs' Complaint sought money damages for "widespread injuries and permanent damage" allegedly caused by the United States Navy's operation of the Atlantic Fleet Weapons Training Facility ("AFWTF") on Vieques Island, Puerto Rico. Orig. Compl. ¶¶ 3-4. Plaintiffs originally named as defendants the United States of America, the United States Department of Defense, the United States Department of Navy, Robert M. Gates, Secretary of Defense, and Donald C. Winter, Secretary of Navy. *Id.* ¶¶ 7143-7145. Subsequently, Plaintiffs voluntarily dismissed all of the defendants except the United States. (D.C. Docket No. 19, May 9, 2008).

On February 1, 2008, the United States filed a motion to dismiss the Original Complaint for lack of venue pursuant to Fed. R. Civ. P. 12(b)(3) (D.C. Docket No. 13). The United States' motion showed that venue was not proper in the District of Columbia under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, because, under the applicable venue statute, 28 U.S.C. §1402(b), none of Plaintiffs resided in the District of Columbia and the allegedly negligent conduct did not occur in that district. On March 11, 2008, four days before

their response to the United States' motion was due, Plaintiffs filed their First Amended Complaint ("FAC") (D.C. Docket No. 15). Plaintiffs amended their Original Complaint in an attempt to establish a basis for venue in the District of Columbia. Plaintiffs added allegations of further statutory and regulatory violations. FAC ¶¶ 14-19

Plaintiffs allege that Defendant used the AFWTF, on Vieques Island, Puerto Rico, as a firing range and weapons testing site from World War II until 2003. FAC ¶ 4. Plaintiffs claim that the use of the AFWTF resulted in large volumes of toxic and hazardous waste and that Defendant negligently failed to store or dispose the toxic waste safely. *Id.* ¶ 8. Plaintiffs contend that Defendant violated federal laws and regulations, which included operating an open burning and open detonation facility at the AFWTF without a valid permit under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* FAC ¶¶ 9-13. Plaintiffs also contend that a failure to comply with regulations and a failure to warn the public "led to the continuing dangerous conditions on Vieques." *Id.* ¶ 14. Plaintiffs allege that the Secretary of Defense was required to notify appropriate state and local authorities of releases of hazardous substances and of proposed responses to those releases. *Id.* ¶ 16. Moreover, Plaintiffs allege that the military was required to monitor compliance with environmental laws and ensure appropriate remedial action, which created reporting requirements "that should have triggered a warning to the people of Vieques." *Id.* ¶¶ 16-19.

The substantive counts of Plaintiffs' FAC include the following allegations of negligence:

(1) Defendant has occupied over two-thirds of the Island of Vieques and "negligently engaged in training and support activities consisting of utilization of all manners of live fire delivery mechanisms," and, in the course of these activities, Defendant "used highly toxic and known carcinogenic materials" (*id.* ¶ 7182);

(2) Defendant has “conducted support services on the Island of Vieques” along with the live fire training operations and “negligently stored numerous known carcinogenic, hazardous and/or otherwise toxic substances” (*id.* ¶ 7183);

(3) Defendant has “negligently, recklessly, and/or intentionally exposed the citizens of Vieques to a multitude of toxic substances” (*id.* ¶ 7187);

(4) Defendant has “stored many toxic compounds on the Island of Vieques” and has “negligently maintained . . . storage facilities and/or has intentionally disposed of hazardous material in a manner that constitutes a danger to human life and well being” (*id.* ¶ 7199-7200);

(5) Defendant “ha[s] been negligent, grossly negligent, and/or reckless in [failing] to monitor the environmental impact of . . . training and storage facilities on the Island of Vieques” (*id.* ¶ 7208); and

(6) Defendant “ha[s] negligently failed to warn the citizens of the Island of Vieques of the harmful effects of many of the toxic substances utilized by the Defendant[] on the Island” (*id.* ¶ 7210).

The United States moved to dismiss the FAC for lack of venue. On March 4, 2009, the District Court for the District of Columbia found that there was no venue in that district and transferred the case to this Court (D.C. Docket No. 22).^{1/}

2. The Military’s Mission On Vieques Island And Its Environmental History

The United States Court of Appeals for the First Circuit has previously described the Vieques AFWTF history, layout, and operation in detail. *See Abreu v. United States*, 468 F.3d 20 (1st Cir. 2006); *Romero-Barcelo v. Brown*, 643 F.2d 835 (1st Cir. 1981), *rev’d on other grounds*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). The background of the military’s use of Vieques is also described in a 1999 government report authored by Admiral William Fallon and General Peter Pace. (U.S. Exh. 1, William J. Fallon, Peter Pace, *The National Security Need for*

^{1/} The FAC listed various federal agencies and officials as defendants, but Plaintiffs subsequently voluntarily dismissed all defendants except the United States. (Docket No. 19)

Vieques (July 15, 1999), Chapter 1 to Chapter 3, Section 2). The following description of the military's mission and environmental history is derived from these sources.

A. The Military's Mission On Vieques Island

Vieques is a municipality of the Commonwealth of Puerto Rico; it is a hilly island located south and east of the main island of Puerto Rico. U.S. Exh. 1 at 2-1-1. The island is approximately 18 miles long and four miles wide, at its widest point. U.S. Exh. 1 at 2-1-1. Vieques has had a population of over 9,000 citizens, living primarily in the central part of the island, in the towns of Isabel Segunda on the north coast and Esperanza on the south coast. U.S. Exh. 1 at 2-1-2.

Between 1941 and 1950, the United States Navy purchased over 22,000 of the island's 33,000 acres for use as a live ordnance range in support of World War II training requirements. U.S. Exh. 1 at 2-1-1. The Navy purchased much of this land between 1941 and 1943 to meet increasing wartime needs and to supplement the training taking place on the nearby island of Culebra. U.S. Exh. 1 at 2-2-1. *See also Abreu*, 468 F.3d at 23. Throughout the 1950s, the Marine Corps primarily used Vieques for training, including amphibious landing operations supported by live firing of small arms, mortars, artillery and aircraft, while the Navy used Culebra for Air-to-Ground and surface fire support training. U.S. Exh. 1 at 2-2-1. In 1960, the Navy began training on Vieques, and, in 1975, the Navy withdrew entirely from Culebra. U.S. Exh. 1 at 2-2-1. *See also Abreu*, 468 F.3d at 23; *Romero-Barcelo*, 643 F.2d at 841-43. Ultimately, the Navy established an ammunition facility in a large area on the western end of Vieques and used the eastern third of the island as a training range, which included a "live impact area" on the extreme eastern end of the island, and an adjacent "maneuver area." U.S. Exh. 1 at

2-1-2. *See also Romero-Barcelo*, 643 F.2d at 838-39.^{2/}

The military facilities on Vieques became part of the AFWTF that was headquartered at the former Naval Station Roosevelt Roads (“Roosevelt Roads”) on the main island of Puerto Rico. U.S. Exh. 1 at 3-1-1; *Romero-Barcelo*, 643 F.2d at 838-39. Roosevelt Roads was “a full service, deep-water facility” with a “large, capable airfield” in close proximity to the firing ranges, and was considered the “world’s premier naval training facility.” U.S. Exh. 1 at 3-1-1. The AFWTF consisted of firing ranges, amphibious landing beaches and maneuvering areas for Marines and spread over thousands of square miles in Puerto Rico and the U.S Virgin Islands. U.S. Exh. 1 at 3-1-1; *Romero-Barcelo*, 643 F.2d at 838-39. Vieques Island is located seven miles southeast of Roosevelt Roads. U.S. Exh. 1 at 2-1-1.

Beginning in 1975, the Navy and the Marines Corps relied primarily on Vieques to provide training opportunities to ensure combat ready forces. U.S. Exh. 1 at ii. The military considered Vieques to be a unique location in the Atlantic “where realistic multi-dimensional combat training” could be conducted “in a combined and coordinated manner.” U.S. Exh. 1 at ii. Vieques offered a live fire land target complex, with an immediately adjacent large area of low traffic airspace, and deep water seaspace; it also offered co-located underwater and electronic warfare ranges, amphibious landing beaches and maneuver areas, a full service naval base and air station in close proximity, and interconnected support facilities. U.S. Exh. 1 at ii, 1-3. In particular, the military considered the ability to train with live ordnance to be vitally important

^{2/} In addition to the various training facilities on Vieques, the Navy operated an open burning and open detonation facility on the easternmost end of the Island. *Abreu*, 468 F.3d at 23. The Navy used this facility to detonate or otherwise incinerate unused ordnance that was stored on the western end of the Island. *Id.*

for military training. As stated in the 1999 Report:

Experience with live ordnance and exposure to live fire conditions are essential to combat readiness and are prerequisites for Sailors and Marines who may be called to engage in combat. Foregoing this experience, for whatever reason, is likely to result in increased casualties and suboptimized performance in battle.

U.S. Exh. 1 at iii. According to military commanders at the time, the use of live ordnance in training “serves both technical and professional purposes.” U.S. Exh. 1 at 3-1-3. “It reinforces responsibility and provides technical experience with complex procedures for managing, storing, handling, and employing weapons for everyone in the chain of command.” U.S. Exh. 1 at 3-1-3. Moreover, the commanders considered warfare “an art as well as a science,” because it combined practical skills and technical knowledge “with human factors including control of emotions, and the complex functions required to overcome the unexpected during high stress operations.” U.S. Exh. 1 at 3-1-3. Consequently, the use of live ordnance was important in training because it “rivets the attention of those who manage, handle, and employ it with a combination of fear and reverence that inert ordnance cannot convey.” U.S. Exh. 1 at 3-1-3.

Vieques uniquely provided opportunities for combined arms live fire training which could realistically simulate combat conditions. *See* U.S. Exh. 1 at 3-1-8, 3-1-13. The Vieques training range could support coordinated artillery, mortar, small arms fire, naval surface fire, and aircraft strikes. U.S. Exh. 1 at 3-1-13. As the First Circuit described military training at Vieques in *Romero-Barcelo*:

An amphibious landing usually is accompanied by low-level support flights by fixed wing jet aircraft and helicopter gunships. An amphibious exercise may involve anywhere from two to twenty thousand troops; it may be independent of other inner range operations, or it may be part of a single large-scale maneuver in concert with the Navy’s sea and air forces.

643 F.2d at 839. Consequently, Navy Carrier Battlegroups, Marine Expeditionary Forces, and

Navy Airwings all used Vieques for coordinated training. U.S. Exh. 1 at 3-1-13 to 3-1-19.

Additionally, the Navy sponsored NATO and allied use of Vieques for training in procedures for combined and joint combat activities. U.S. Exh. 1 at 3-2-10 to 3-2-11.^{3/}

In May 2000, the Navy discontinued live fire training on Vieques, and, on April 30, 2003, the Navy terminated all military exercises on Vieques Island. *See Abreu*, 468 F.3d at 24.

B. A Brief Environmental History For Vieques

Concerned with the environmental impact of military operations on Vieques, in 1977, the Commonwealth of Puerto Rico initiated litigation which ultimately required the Navy to comply with certain federal environmental statutes at Vieques, including the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251-1357 (2000) and the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.* *See Abreu*, 468 F.3d at 23-24. In 1980, the Navy completed an Environmental Impact Statement (“EIS”) regarding the continued use of the Vieques training range. U.S. Exh. 1 at 2-3-2. The report concluded that the proposed continuation of military activities on Vieques would not significantly impact the environment beyond that which had occurred during the previous 20 years of operations. U.S. Exh. 1 at 2-3-2. The Navy also obtained an interim environmental permit. *See Abreu*, 468 F.3d at 24.

On October 11, 1983, after several years of litigation, the United States Navy and the Commonwealth of Puerto Rico entered a Memorandum of Understanding (“MOU”). U.S. Exh. 1 at 2-3-2. The MOU addressed historic site preservation initiatives, land use, environmental

^{3/} In 1999, the military described the Vieques Training range as the “premier U.S. Naval training facility, reflecting more than 50 years of investment and development,” providing East Coast based forces “training in several warfare competencies which are essential for combat readiness; most importantly live ordnance combined arms training.” U.S. Exh. 1 at ii.

matters and ordnance delivery on Vieques. U.S. Exh. 1 at xii. In 1986, the Navy completed an Environmental Assessment (“EA”) of Vieques. U.S. Exh. 1 at 2-3-3. The report found that the continued use of the Vieques training range at current and projected levels would not result in any significant impact to the environment. U.S. Exh. 1 at 2-3-3. On January 10, 2000, the United States Environmental Protection Agency (“EPA”), with the Navy’s agreement, issued a consent order, requiring certain changes at the AFWTF as a condition for the final issuance of a permit under RCRA. *See Abreu*, 468 F.3d at 24. The Navy needed to obtain this permit to continue to operate an open burning and open detonation facility in compliance with RCRA. *Id.*

3. The *Rivera-Acevedo* And *Abreu* Litigation

In 2004, two separate groups of plaintiffs brought similar FTCA actions against the United States in this Court. *See Abreu*, 468 F.3d at 24. Like Plaintiffs in the instant suit, the plaintiffs in the previous actions “alleged that the Navy’s past military exercises and waste disposal activities at the AFWTF had exposed them to hazardous substances,” and “sought damages for physical injury, [and] emotional distress. . . .” *See id.* This Court consolidated the actions, and, in April 2005, concluded that there was no subject matter jurisdiction because the Navy’s allegedly harmful conduct was within the discretionary function exception to the waiver of sovereign immunity in the FTCA, 28 U.S.C. § 2680(a). *Rivera-Acevedo v. United States*, Nos. 04-1232, 04-1372, 2005 WL 5610230, at *4-8 (D.P.R. April 25, 2005).

At the outset, the Court reasoned that “there can be little question that the military activities carried out by the Navy on Vieques over the past several decades have involved discretionary decision-making of the most fundamental kind. Clearly, the government’s mission on Vieques, at all times, required balancing competing concerns of secrecy and safety, national

security and public health.” *Rivera-Acevedo*, 2005 WL 5610230, at *4 (citing *Shuman v. United States*, 765 F.2d 283, 291-93 (1st Cir. 1985); *Allen v. United States*, 816 F.2d 1417, 1424 (10th Cir. 1987); *Loughlin v. United States*, 393 F.3d 155, 163 (D.C. Cir. 2004)). The Court found “[e]qually clear” that “the Navy’s presence on Vieques, throughout the past 60 years, was authorized by Congress and in accord with executive orders and regulations.” 2005 WL 5610230, at *4. While the plaintiffs, like Plaintiffs here, alleged violations of certain environmental laws, the Court noted that a “violation of a federal law or regulation in some general sense is insufficient to avoid discretionary function immunity. The law or directive allegedly violated must be so specific and mandatory that there is no room for judgment or choice on the part of the government actor involved.” *Id.* (citing *C.R.S. by D.B.S. v. United States*, 11 F.3d 791, 799 (8th Cir.1993)). Moreover, even if there is a violation of a specific and mandatory directive, it “must be relevant to plaintiffs’ claims of injury. This means that the alleged violation must have a causal nexus to the individual fear of injury and/or property damage claims at issue.” 2005 WL 5610230, at *4 (citing *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 285-88 (3d Cir. 1995); *Loughlin v. United States*, 286 F. Supp. 2d 1, 17 (D.D.C. 2003)).

This Court then analyzed the plaintiffs’ claims of violations of federal laws and regulations and found the plaintiffs’ allegations insufficient to defeat the discretionary function exception. The Court found that the Navy’s “authority to conduct military operations on Vieques” was not “in violation of any specific mandate.” 2005 WL 5610230, at *4. The Court also found that the 1983 MOU between the Navy and the Commonwealth of Puerto Rico did “not contain any specific and mandatory directives,” but instead “broad goals for the Navy to

attempt to meet.” *Id.* at *5. Indeed, the Court noted that the MOU “underscore[d] the applicability of the discretionary function exception to the Navy’s mission on Vieques, for clearly, the Navy was always faced with how to achieve environmental protection and safety while still fulfilling its crucial mission.” *Id.* With respect to the plaintiffs’ claims of “compliance, or non-compliance, with various environmental laws and regulations,” the Court found that the plaintiffs could not demonstrate any environmental violations, and that even if there were a violation, the plaintiffs could not show how it would have resulted in “consequences in the nature of fear of injury or property damage to people living several miles away.” *Id.* at *5-7. For instance, the plaintiffs alleged that the Navy violated RCRA by failing to secure a final permit to operate its open burning and open detonation facility. *Id.* at *5. The Court noted that the Navy had demonstrated that it had obtained interim status under RCRA and had complied with applicable requirements until the time that it had ceased using live ordnance and no longer needed the detonation facility. *Id.* The Court found that “at most” the plaintiffs could show that the Navy had received “notices” of violations for the facility, but even if there had been an unpermitted release, the plaintiffs could not show how those releases caused their injuries when they lived several miles away. *Id.* at *6. Additionally, the plaintiffs alleged that the Navy lacked a valid National Pollution Discharge Elimination System permit (“NPDES permit”) to discharge ordnance over water under the CWA, 33 U.S.C. §§ 1311(a), 1323(a), which the plaintiffs claimed was necessary because of the potential for an accidental discharge into the ocean during ship-to-shore or air-to-shore weapons delivery exercises. 2005 WL 5610230, at *6. The Court concluded that the Navy obtained an initial NPDES permit in 1984 and the Navy continued to hold a valid NPDES permit for the time frame at issue. *Id.*

In concluding, the Court noted that while the plaintiffs' claims were "sweeping in nature, involving allegations about almost every aspect of the Navy's presence on Vieques over a 60-year period," the plaintiffs had failed to establish that any of the challenged Navy conduct on Vieques was "nondiscretionary." *Id.* at *8. "To the contrary," the Navy's "authority . . . to conduct military exercises on Vieques" and "discretion to conduct the waste disposal activities in connection with its mission" were established. *Id.* Accordingly, the Court dismissed the case for lack of subject matter jurisdiction.

The plaintiffs appealed this Court's ruling, and in November, 2006, the First Circuit affirmed the Court and agreed that there was no waiver of the FTCA's sovereign immunity from the plaintiffs' claims and that, therefore, this Court had correctly concluded that it lacked subject matter jurisdiction over the action. 468 F.3d at 25-33. Significantly, the First Circuit noted that the Navy exercised discretion through its authority to conduct military operations, and referenced the "numerous cases cautioning the courts to avoid interfering with the exercise of discretionary military authority." *Id.* at 27-28.

The First Circuit agreed with this Court that the FTCA's discretionary function exception applied to claimed violations of the CWA because the Navy, in fact, complied with the CWA through holding a valid NPDES permit during the relevant time period. *Id.* at 28-29.

With respect to the plaintiffs' claimed violations of RCRA, the First Circuit found that the traditional discretionary function analysis under *United States v. Gaubert*, 499 U.S. 315 (1991), was not appropriate. 468 F.3d at 29. Instead, the court noted that the waiver of sovereign immunity in the FTCA must be "interpreted in light of significant policies reflected in other related federal statutes" and where the United States is being sued in its capacity as a

regulated entity, the “imposition of damages liability . . . under the FTCA” cannot “undermine the policies of the regulatory statute.” *Id.* at 30. The court concluded that there was no waiver of sovereign immunity to compensatory tort damages for alleged RCRA violations because allowing such a tort remedy “would adversely affect the RCRA statutory scheme.” *Id.* at 30-31. The court reasoned that Congress had affirmatively limited the available remedies for RCRA violations to preclude recovery of compensatory damages, in particular precluding such remedies from the government. *Id.* at 31-32.

Finally, the First Circuit concluded that the Noise Control Act (“NCA”), 42 U.S.C. §§ 4901-4918 (2000), did not require the Navy to comply with the Puerto Rico Noise Prohibition Act, because the military’s use of “weapons or equipment” is specifically excluded from the NCA. 468 F.3d at 32-33. Consequently, the court found that the NCA did not remove government discretion under the discretionary function exception. *Id.* at 33.

SUMMARY OF ARGUMENT

Prior decisions of this Court, the First Circuit, and other federal courts show that there is no subject matter jurisdiction over Plaintiffs’ FTCA claims in this case. Specifically, this Court and the First Circuit have addressed very similar FTCA claims alleging negligence with respect to the government’s military operations on the Island of Vieques and found jurisdiction lacking. The reasoning of those cases is conclusive here.

Initially, Plaintiffs’ claims are barred by the discretionary function exception of the FTCA because the claims challenge discretionary conduct that was susceptible to policy analysis. Through the discretionary function exception “Congress wished to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political

policy through the medium of an action in tort.” *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). The application of the discretionary function exception is determined by a two-part test. The exception applies if (1) there was no violation of a specific and mandatory federal policy, regulation, or directive prescribing a specific course of conduct for a government employee; and (2) the conduct was susceptible to an analysis involving social, economic, or political policy considerations. *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988); *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991).

Here, Plaintiffs essentially claim that the United States was negligent in storing, disposing, and handling hazardous materials; in monitoring the environmental impact of hazardous materials; and in failing to notify the residents of Vieques of hazardous materials in their environment. *See* FAC ¶¶ 9-19, 7182-7208. Under the first part of the discretionary function exception analysis, however, Plaintiffs have failed to identify any provision that prescribed a specific course of conduct for government employees with respect to these matters. Instead, Plaintiffs cite several general provisions. These provisions are not sufficiently specific to remove discretion, and, in any event, Plaintiffs fail to allege how the provisions are relevant to their alleged injuries.

Under the second part of the discretionary function exception analysis, the alleged negligent conduct of the military at the relevant time was susceptible to policy analysis. Given the military missions underlying operations on Vieques, there is a strong presumption that the operations were grounded in national defense policies. *Gaubert*, 499 U.S. at 324. Moreover, as this Court previously found, “the government’s mission on Vieques, at all times, required balancing competing concerns of secrecy and safety, national security and public health.”

Rivera-Acevedo v. United States, 2005 WL 5610230, at *4 (D.P.R. April 25, 2005). Finally, other courts have consistently concluded that government operations that are related to military missions – whether involving waste disposal or determining whether to notify the public of potential hazards – are susceptible to policy analysis, including security, safety, and health considerations.

Additionally, there is no jurisdiction over Plaintiffs’ tort claims to the extent that the claims rely upon alleged violations of RCRA and CERCLA. The First Circuit has held that there is no waiver of sovereign immunity under the FTCA for a claim based upon a violation of a regulatory statute when imposition of tort liability would adversely affect the statutory scheme. *Abreu v. United States*, 468 F.3d 20, 30-32 (1st Cir. 2006). Here, because RCRA and CERCLA both limit private causes of actions to enumerated remedies, which do not include compensatory damages, allowing a tort remedy under the FTCA for RCRA or CERCLA violations would undermine the policies of these laws.

ARGUMENT

I. Plaintiffs Bear The Burden Of Proving Subject Matter Jurisdiction Under The Federal Tort Claims Act, And Federal Courts Should Resolve The Jurisdictional Question At The Outset Using The Standards Applicable Under Fed. R. Civ. P. 12(b)(1).

A. The Determination Of Whether The United States Has Waived Its Sovereign Immunity To Plaintiffs’ Damages Claims Through The FTCA Is A Determination Of Subject Matter Jurisdiction.

“The United States, as sovereign, is immune from suit except as it consents to be sued, and the terms of its consent define the federal courts’ jurisdiction over suits against the United States.” *Thames Shipyard and Repair Co. v. United States*, 350 F.3d 247, 253 (1st Cir. 2003) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Here, Plaintiffs have asserted their

claims against the Defendants under the FTCA and have alleged that subject matter jurisdiction exists under that Act, 28 U.S.C. § 1346(b). *See* FAC ¶¶ 1, 2. The FTCA provides a limited waiver of the United States’ sovereign immunity to tort suits in two sections of the United States Code, 28 U.S.C §§ 1346(b)(1), 2674. *See Dolan v. United States Postal Serv.*, 546 U.S. 481, 484-85 (2006). At 28 U.S.C. § 1346(b)(1), the FTCA provides that:

district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

In the second section, the FTCA states that the United States “shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.” *Id.* § 2674.

The FTCA specifically reserves the federal government’s immunity with respect to enumerated exceptions. In particular, through the “discretionary function exception” of the FTCA, Congress has reserved the United States’ sovereign immunity to “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a). If a claim falls within the FTCA’s discretionary function exception, it is outside of the FTCA’s limited waiver of immunity, and the Court must dismiss the action for lack of subject matter jurisdiction. *Abreu*, 468 F.3d at 25 (quoting *Santoni v. Potter*, 369 F.3d 594, 602 (1st Cir. 2004)). *See also Sherwood*, 312 U.S. at 586-87 (stating that the terms of United States’ waiver of sovereign immunity establish and limit a court’s jurisdiction to entertain a suit against the government).

In determining whether subject matter jurisdiction exists, courts must strictly construe all waivers of the federal government's sovereign immunity in favor of the United States. *See Muirhead v. Mecham*, 427 F.3d 14, 17 (1st Cir. 2005). In *Abreu*, the First Circuit held that when the United States is being sued in its capacity as a regulated entity, the "imposition of damages liability . . . under the FTCA" cannot "undermine the policies of the regulatory statute." 468 F.3d at 30. Accordingly, under *Abreu*, the Court cannot construe the FTCA's waiver of sovereign immunity to allow for compensatory tort damages against the United States for the violation of a mandatory regulatory provision if the regulatory scheme itself precludes a damages remedy. *See id.* at 30-32. The court noted that this interpretation was in keeping with its obligation to construe "waivers [of sovereign immunity] narrowly and to resolve any ambiguity or uncertainty in favor of immunity." *Id.* at 30 (citing *United States v. Williams*, 514 U.S. 527, 531 (1995)).

B. Plaintiffs Bear The Burden Of Establishing Federal Jurisdiction.

The party seeking to invoke the jurisdiction of the federal court, "carries the burden of proving its existence." *Skwira v. United States*, 344 F.3d 64, 71 (1st Cir. 2003) (quoting *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995)). *See also Nogueras-Cartagena v. United States*, 172 F. Supp. 2d 296, 311-12 (D.P.R. 2001), *aff'd*, 75 Fed. Appx. 795 (1st Cir. 2003) (stating that under the FTCA, the plaintiff has the burden to prove the existence of subject matter jurisdiction). In establishing jurisdiction through a waiver of immunity, a plaintiff may not "rest merely on 'unsupported conclusions or interpretations of law.'" *Murphy*, 45 F.3d at 522 (quoting *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 971 (1st Cir. 1993)).

Because federal courts are courts of limited jurisdiction, the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,

377 (1994). Specifically, with respect to the FTCA’s discretionary function exception, the “plaintiff bears the burden of persuasion if subject matter jurisdiction is challenged” because “[t]he party who sues the United States bears the burden of pointing to . . . an unequivocal waiver of immunity.” *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (citations and internal quotation omitted). *See also OSI, Inc. v. United States*, 285 F.3d 947, 951 (11th Cir. 2002) (finding that the burden of proof concerning the discretionary function exception, as with all assertions of federal jurisdiction, lies with the plaintiff as the party asserting jurisdiction); *Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998) (stating that the plaintiff must show that the discretionary function exception does not apply because it “poses a jurisdictional prerequisite to suit”). Therefore, Plaintiffs must show by a preponderance of proof that the Court has subject matter jurisdiction under the FTCA, which includes showing that the discretionary function exception does not apply.^{4/}

^{4/} The United States recognizes that the Ninth Circuit has found that the government bears the burden of proof regarding application of the discretionary function exception. *See Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992). *But see Sharp v. United States*, 401 F.3d 440, 443 n. 1 (6th Cir. 2005) (noting that other circuit courts have declined to follow *Prescott* and reserving judgment on the issue); *Kiehn v. United States*, 984 F.2d 1100, 1105 n. 7 (10th Cir. 1993) (noting that “the reasoning in *Prescott* may be suspect” in light of *United States v. Gaubert*, 499 U.S. 315 (1991), but not making a formal ruling on the issue); *Laurence v. United States*, 851 F. Supp. 1445, 1450 (N.D. Cal. 1994), *aff’d on other grounds*, 59 F.3d 112 (9th Cir. 1995) (questioning whether the burden of proof rule as articulated in *Prescott* is harmonious with *United States v. Gaubert*). While research has not revealed a First Circuit case specifically addressing the burden of proof for the FTCA’s discretionary function exception, the First Circuit has held that the plaintiff bears “the devoir of persuasion” on the second part of the discretionary function exception test. *Bolduc v. United States*, 402 F.3d 50, 60 (1st Cir. 2005). The First Circuit has also held that the plaintiff bears the burden of proving jurisdiction in a case regarding another condition on the government’s waiver of sovereign immunity in the FTCA, namely its statute of limitations. *See Skwira v. United States*, 344 F.3d at 71 & n.8. Regardless of who bears the burden of proof, the preponderance of evidence shows that the discretionary function exception bars Plaintiffs’ claims.

C. This Court Should Determine At The Outset Whether There Is A Waiver Of Sovereign Immunity And Whether Subject Matter Jurisdiction Exists.

Jurisdiction is a threshold issue, and the separation of powers doctrine requires a federal court to try to determine whether it has jurisdiction at the outset, rather than defer the issue until trial. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). In *Steel Co.*, the Supreme Court explained that “[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)).

On a Rule 12(b)(1) motion to dismiss, a court is not limited to the allegations of the Complaint, but may consider materials outside of the pleadings. *See Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) (stating that on a motion to dismiss for lack of jurisdiction, a court “may inquire by affidavits or otherwise, into the facts as they exist”). Thus, the court may consider exhibits on a challenge to the court’s subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), without converting the motion into a motion for summary judgment under Fed. R. Civ. P. 56. *See Gonzalez v. United States*, 284 F.3d 281, 287-88 (1st Cir. 2002). *See generally* 2 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 12.30[4], at 12-39 to 12-41 (3d ed. 1999).

Because jurisdictional issues, whether they involve questions of law or fact, are for the Court to decide, the standard of decision for a factual motion to dismiss for lack of subject matter jurisdiction is much different than the standard for a summary judgment motion under Rule 56 or for a motion to dismiss under Rule 12(b)(6).

[T]he trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court’s jurisdiction – its very power to hear the case – there is substantial authority that the trial court is

free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Mortensen v. First Federal Savings & Loan Ass'n., 549 F.2d 884, 891 (3d Cir. 1977). See also *Valentín v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001) (stating that on a factual Rule 12(b)(1) motion, “jurisdictional averments are entitled to no presumptive weight [and] the court must address the merits of the jurisdictional claim by resolving the factual disputes between the parties”).^{5/}

II. The FTCA's Discretionary Function Exception Deprives The Court Of Subject Matter Jurisdiction Over Plaintiffs' Claims Because The Challenged Government Conduct Is Discretionary And Susceptible To Policy Analysis.

All of Plaintiffs' claims are precluded by the FTCA's discretionary function exception. This exception “marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.” *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808

^{5/} In some circumstances, courts have converted motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) into motions for summary judgment under Fed. R. Civ. P. 56 when resolution of the jurisdictional question is intertwined with the merits of the case and materials outside of the pleadings have been submitted. See *Gonzalez v. United States*, 284 F.3d 281, 287 (1st Cir. 2002); *Valentín v. Hosp. Bella Vista*, 254 F.3d 358, 363 n.3 (1st Cir. 2001). Here, however, the resolution of the jurisdictional questions – (1) whether the discretionary function exception applies because the alleged negligent conduct was discretionary and susceptible to policy analysis, and (2) whether Plaintiffs are asserting FTCA claims for violations of regulatory provisions which would undermine the policies of the regulatory statutes – are not intertwined with the substantive determination of whether the United States was negligent. See *Gonzalez*, 284 F.3d at 287 (finding Rule 12(b)(1) standard applicable because FTCA jurisdictional issue involving the statute of limitations did not bear any relationship to negligence or the merits of the case). In fact, these jurisdictional limitations apply whether or not the government was negligent. See *Santana-Rosa v. United States*, 335 F.3d 39, 42 (1st Cir. 2003).

(1984)). When Congress enacted the FTCA, its “thought was centered on granting relief for the run-of-the-mine accidents” as distinguished from injuries resulting from discretionary governmental activities. *Dalehite v. United States*, 346 U.S. 15, 28 n.19 (1953). “Uppermost in the collective mind of Congress were the ordinary common-law torts.” *Id.* at 28. The example that was reiterated most frequently in the legislative history was “negligence in the operation of vehicles.” *Id.* (citing legislative history; internal quotations omitted).^{6/}

The Supreme Court subsequently established a two-part test to determine the applicability of the discretionary function exception. First, for the exception to apply, the allegedly negligent act or failure to act must **not** have violated a statute, regulation, or policy that prescribed a **specific course of action** for a government employee to follow. See *United States v. Gaubert*, 499 U.S. 315, 322 (1991); *Berkovitz*, 486 U.S. at 536. If such a provision applied, then the alleged negligent act or omission could not be “discretionary.” Second, assuming that the government employee had discretion, the discretionary function exception applies if the employee’s conduct was “susceptible to policy analysis” involving “social, economic, or political” policy considerations. *Gaubert*, 499 U.S. at 322-23, 325. See also *Abreu*, 468 F.3d at 25-26. The second part of the test ensures that the exception only applies to the type of discretionary conduct that Congress sought to protect through the exception. *Abreu*, 468 F.3d at 25-26. Under the Supreme Court’s two-part test, the focus of the discretionary function inquiry must be on “the nature of the [alleged] conduct” and not the “status of the actor.” *Gaubert*, 499 U.S. at 322 (quoting *Varig Airlines*, 467 U.S. at 813). This exception preserves sovereign

^{6/} See also *Gaubert*, 499 U.S. at 325 n.7 (citing the negligent operation of an automobile as a discretionary act that would not be within the discretionary function exception because the operation of a car could not be said to be grounded in policy).

immunity even when the government was negligent. *Santana-Rosa v. United States*, 335 F.3d 39, 42 (1st Cir. 2003) (stating that if the discretionary function exception applies, the government is “shielded from liability, no matter how negligently an employee may have acted”).

The Supreme Court most recently applied the FTCA’s discretionary function exception in *United States v. Gaubert*. In *Gaubert*, the plaintiffs claimed that officials of the Federal Home Loan Bank Board and the Federal Home Loan Bank-Dallas were negligent in carrying out day-to-day supervisory activities with respect to a savings and loan in Texas. 499 U.S. at 320. The Court found that the allegations were barred by the discretionary function exception. *Id.* at 325. The *Gaubert* decision is instructive in several respects.

First, the Supreme Court rejected the Court of Appeals’ reasoning that only high-level planning or policy activities were exempt from liability under the discretionary function exception. *Id.* at 325-26. The Supreme Court emphasized that the exception can apply to discretionary activities of government employees regardless of whether those decisions are characterized as “operational” or “planning” decisions, as long as the activities are grounded in policy considerations. *See id.* at 325-26.

Second, the Supreme Court demonstrated that the government need not show that an employee actually conducted a policy analysis as part of the challenged action or inaction. *Id.* at 325. The Court instructed that the “focus of the inquiry is not on the agent’s subjective intent . . . but on the nature of the actions taken and on whether they are *susceptible to policy analysis*.” *Id.* (emphasis added). *See also Shansky v. United States*, 164 F.3d 688, 692 (1st Cir. 1999) (stating that a court need not determine whether the government actually made a decision because “the inquiry hinges instead on whether some plausible policy justification could have

undergirded the challenged conduct. The critical question is whether the acts or omissions that form the basis of the suit are susceptible to a policy-driven analysis, not whether they were the end product of a policy-driven analysis”).

Finally, the *Gaubert* Court stated that when a government employee is acting pursuant to a discretionary statute, regulation or guideline there is a “strong presumption” that the employee’s conduct is grounded in the policies of that provision. 499 U.S. at 324. *See also Wood v. United States*, 290 F.3d 29, 37 (1st Cir. 2002) (stating that “[b]ecause the law presumes that the exercise of official discretion implicates policy judgments,” the plaintiff “bears the burden . . . of demonstrating that the [government’s] conduct was not at least susceptible to policy related judgments”); *Irving v. United States*, 162 F.3d 154, 168 (1st Cir. 1999) (en banc) (citing *Gaubert* and stating that because there is a presumption that discretionary governmental conduct is grounded in policy, the government has no burden of production to show policy).

Here, the discretionary function exception bars Plaintiffs’ claims regarding alleged negligent government conduct on Vieques because (1) there were no provisions at the relevant times prescribing a specific course of conduct that the government failed to follow and (2) any discretionary governmental conduct relating to Plaintiffs’ claims was susceptible to a policy analysis.

A. There Were No Specific And Mandatory Provisions At The Relevant Time Removing Discretion From Government Employees Regarding The Conduct That Plaintiffs Challenge.

Plaintiffs make several allegations of negligence, which essentially claim that the United States was negligent in storing, disposing, and handling hazardous materials; in monitoring the environmental impact of hazardous materials; and in failing to notify the residents of Vieques of

hazardous materials in their environment. See FAC ¶¶ 9-19, 7182-7208. Initially, Plaintiff cannot identify any *specific and mandatory provisions that the United States failed to follow* with respect to the challenged conduct on Vieques. Even if mandatory, a provision is not sufficiently specific to remove discretion unless it tells a government employee precisely how to act. See *Berkovitz*, 486 U.S. at 536. A general directive that leaves implementation decisions in the hands of federal employees is not enough; instead, only those regulations that “mandate a particular *modus operandi*,” “materially restrict [a government employee’s] flexibility,” or “prescribe [a] specific regimen . . . governing . . . scope or detail,” take away government discretion under the first part of the discretionary function exception test. See *Irving*, 162 F.3d at 163. See also *Muniz-Rivera v. United States*, 326 F.3d 8, 16 (1st Cir. 2003) (stating that certain provisions which operate at a “high level of generality” do not remove discretion, nor do other regulations which fail to direct the manner of conduct or specify particular action); *Shansky*, 164 F.3d at 691 (explaining that general directives that do not prescribe specific measures are insufficient to brand particular conduct as non-discretionary); *Miller v. United States*, 163 F.3d 591, 595 (9th Cir. 1998) (finding that firefighting regulations did not remove discretion because there was no provision requiring government employees to fight a fire in a specific manner).

Here, Plaintiffs have failed to cite any provisions in their FAC that are sufficiently specific to remove discretion. While Plaintiffs cite certain provisions of RCRA and CERCLA, the existence of those provisions does not overcome the hurdle posed by the discretionary function exception. With respect to the alleged RCRA violation, as this Court found is *Rivera-Acevedo*, the United States in fact *complied* with the mandatory provision of RCRA that Plaintiffs cite. 2005 WL 5610230, at *5. The Court concluded that the Navy had obtained

interim status under RCRA and complied with applicable requirements until it ceased using live ordnance and no longer needed its detonation facility. *Id.*^{7/} Accordingly, the discretionary function exception bars this claim. *See Abreu*, 468 F.3d at 26 (actions of a government employee complying with a mandatory directive are protected by the discretionary function exception).^{8/}

With respect to CERCLA, Plaintiffs cite 10 U.S.C. § 2705 and allege that it required the Secretary of Defense “to take action to ensure the EPA and appropriate State and local authorities in Vieques received prompt notice of” environmental releases and other environmental matters. FAC ¶ 16. Plaintiffs claim that the provision also required the Secretary of Defense to consult with and seek the advice of a Technical Review Committee or Restoration Advisory Board with respect to certain environmental issues. *See* FAC ¶ 17. The Secretary of Defense, however, has discretion under this statute to take action “as necessary” and establish a committee or board “[w]henever possible and practicable.” *See* 10 U.S.C. § 2705(a), (c). Thus, this statute is not sufficiently specific to remove discretion. *See Loughlin v. United States*, 286 F. Supp. 2d 1, 16 (D.D.C. 2003), *aff’d*, 393 F.3d 155 (D.C. Cir. 2004) (finding provisions of 10 U.S.C. § 2705 not sufficiently specific to remove discretion because provisions leave decisions within the discretionary judgment of the Secretary of Defense). *See also Aragon*, 146 F.3d at 824 (finding requirement to take such action “as may be practicable” was “a prime example of discretionary

^{7/} The First Circuit found it unnecessary to determine whether the Navy complied with RCRA because it concluded that the United States had not waived sovereign immunity for tort claims alleging RCRA violations. *Abreu*, 468 F.3d at 29 & n.6. *See* pages 36-40 *infra*.

^{8/} Plaintiffs vaguely reference violations of the Clean Water Act (“CWA”) in the negligence count of their FAC. FAC ¶ 7194. As both this Court and the First Circuit has found, however, the Navy had a valid National Pollutant Discharge Elimination System permit (“NPDES permit”), and thus did not violate any CWA requirement. *Rivera-Acevedo*, 2005 WL 5610230, at *6; *Abreu*, 486 F.3d at 28-29.

language, which gave federal agencies a choice or judgment on what action to take, *if any*”) (emphasis original).^{9/}

Aside from RCRA and CERCLA, Plaintiffs cite a few other provisions that they claim the United States violated. Plaintiffs cite one federal regulation stating that:

The commanding officer shall cooperate with Federal, state and local governmental authorities in the prevention, control and abatement of environmental pollution. If the requirements of any environmental law cannot be achieved because of operational considerations, insufficient resources or other reason, the commanding officer shall report to the immediate superior in the chain of command. The commanding officer shall be aware of existing policies regarding pollution control, and should recommend remedial measures when appropriate.

FAC ¶ 15 (citing 32 C.F.R. § 700.832).^{10/} While this provision may be mandatory in some respects, it is not sufficiently specific in requiring a particular course of action that is relevant to Plaintiffs’ claims. In *Aragon*, 146 F.3d at 824, the Tenth Circuit ruled that a provision containing similar language regarding cooperation with local authorities was not sufficiently specific to remove government discretion. Specifically, the Tenth Circuit found that an Executive Order which required federal departments and agencies to take such actions as may be practicable to cooperate with state and local authorities in preventing pollution was not sufficiently specific. The court reasoned, that while “the Order promoted a policy of cooperation with state and local water authorities . . . the Order alone contained no specific, mandatory directives for the Air Force to follow in disposing its waste water from aircraft washdown operations.” *Id.* Moreover,

^{9/} In *United States v. JG-24, Inc.*, 309 F. Supp. 2d 230 (D.P.R. 2004), this Court noted that “[n]umerous cases interpreting the discretionary function exception within the context of CERCLA response actions and conduct relating to security issues have clearly established the United States’ immunity from suit.” *Id.* at 233-34 (citing *United States Fidelity & Guar. Co. v. United States*, 837 F. 2d 116, 123 (3rd Cir. 1988); *United States v. Skipper*, 781 F.Supp. 1106, 1114 (E.D.N.C. 1991); *United States v. Green*, 33 F. Supp. 2d 203 (W.D.N.Y. 1998)).

^{10/} Plaintiffs incorrectly cite this provision in their FAC as **300** C.F.R. § 700.832.

this regulation on its face vested discretion in the commanding officer by allowing the officer to recommend remedial measures “when appropriate.” 32 C.F.R. § 700.832. Finally, Plaintiffs fail to make any allegation regarding *when* this regulation was effective, as the current version was enacted in 1999, *see* 64 Fed. Reg. 56062, shortly before the Navy discontinued live fire training exercises on Vieques, or *how* it is related to their claims for damages.

Plaintiffs also cite OPNAVINST 5090.1B, CH-20 § 20-5.1 to allege that it is the policy of the United States to “monitor compliance with environmental requirements; identify problems, their root causes, process improvements, and pollution prevention opportunities; and, ensure appropriate corrective actions and process improvements are completed.” FAC ¶ 18. *See* U.S. Exh. 2, CH-20 § 20-5.1 (OPNAVINST 5090.1B, Chapters 1 & 20).^{11/} By its terms, however, the language of this provision fails to prescribe a specific course of conduct for the military with respect to Vieques. Instead of requiring particular procedures, the provision leaves government actors with “latitude to make decisions and choose among alternative courses of action.” *Bolduc v. United States*, 402 F.3d 50, 61 (1st Cir. 2005).^{12/} Therefore, the provision does not remove discretion under the first part of the discretionary function exception test. *See Santana-Rosa*, 335 F.3d at 43 (finding that the government satisfied the first part of the test where the government program and plan outlined “broad guidelines . . . without any explicit controlling directives”); *Irving*, 162 F.3d at 163 (holding that while the Occupation Safety and Health Act contained a

^{11/} Plaintiffs’ incorrectly cite this provision in their FAC as Chapter 2 of OPNAVINST 5090.1B.

^{12/} Additionally, this instruction manual which is dated November 1994, “does not apply to Marine Corps activities.” U.S. Exh. 2, CH-1 § 1-1.2. The manual also states that it “describes the internal management of the Navy’s environmental program, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by any party against the Department of the Navy (DON), its officers, employees, or any person.” *Id.* § 1-1.3.

“sprinkling of mandatory directives,” it did not constrain discretion but, rather, left “the scope, manner, and detail of general administrative inspections” to the discretion of government employees).

Aside from the particular provisions that Plaintiffs cite, Plaintiffs vaguely reference violations of “internal guidelines, policies and mandatory directives,” “mandatory internal environmental regulations,” and “internal mandatory regulations, policies, directives and orders.” FAC ¶¶ 9, 13, 31. These allegations are “too amorphous and ill-defined” to bring a suit outside of the discretionary function exception. *See Loughlin*, 286 F. Supp. 2d at 17. Plaintiffs “cannot simply accuse the government of violating a law, regulation, or scientific standard in some general sense. The nature of the specific, mandatory constraint on its discretion must be clearly identified.” *Id.* (quoting *Gould Elec. Inc. v. United States*, 2002 WL 27834, at *9 n.4 (E.D. Pa. Jan. 10, 2002)).

Finally, Plaintiffs do not allege and cannot show any causal connection between a failure to follow a government directive and their alleged tort damages. The First Circuit has held that unless there is a causal relationship between the alleged violation and the plaintiffs’ damages, the discretionary function exception will still bar the action. *See Montijo-Reyes v. United States*, 436 F.3d 19, 25-26 (1st Cir. 2006). This Court found similar causation problems regarding the plaintiffs’ allegations of violations in *Rivera-Acevedo*. *See* 2005 WL 5610230, at *6. For example, with respect to alleged environmental violations at the open burning and open detonation facility on Vieques, the Court stated, “even if it could be shown that the Navy violated the terms of the permit that resulted in some release of hazardous materials, plaintiffs have not demonstrated how this could have resulted in consequences in the nature of fear of injury or

property damage to people living several miles away.” *Id.* at *6. Likewise, this Court found that the plaintiffs could not establish any connection between alleged Clean Water Act and Endangered Species Act violations and their alleged injuries. *Id.*

In sum, because Plaintiffs have failed to allege the violation of a specific and mandatory provision that caused their injuries, they are challenging discretionary government conduct under the first part of the discretionary function exception test.

B. The Conduct Of Government Employees Regarding Military Operations At Vieques Was Based In Public Policy.

The conduct of government employees was not only discretionary, but it was also grounded in important policy considerations and susceptible to policy analysis.

1. The Navy Regulations And The Missions Of The Military At Vieques Establish A Strong Presumption That Operations At Vieques Were Grounded In Military Policies.

The implementing regulations for the Navy and the Marine Corps, in general, and the specific missions of the Navy and Marine Corps at Vieques, in particular, demonstrate the important national defense policies underlying military activities there. Department of Navy regulations provide that the Navy “shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea. It is responsible for the preparation of naval forces necessary for the effective prosecution of war except as otherwise assigned . . .” 32 C.F.R. § 700.202(a) (2002).^{13/} The Marine Corps is “to provide fleet marine forces of combined arms, together with supporting air components . . . for the conduct of such land operations as may be

^{13/} While these statements of the objectives of the Navy and the Marine Corps are from a recent federal regulation, 64 Fed. Reg. 56,062 (Oct. 15, 1999), they describe the mission of the government employees throughout the operation of AWFTF at Vieques. *See* U.S. Exh. 1.

essential to the prosecution of a naval campaign.” *Id.* § 700.202(c). In addition, the Marine Corps is to “develop, in coordination with the Army and the Air Force, those phases of amphibious operations that pertain to the tactics, technique and equipment used by landing forces.” *Id.* § 700.202(d). Accordingly, the Navy and Marine Corps are trained, organized and equipped for operations at sea, offensive amphibious deployment, and as a force in readiness. *See* 10 U.S.C. §§ 5062, 5063.

As discussed in detail in the statement of facts, the military operations on Vieques as part of the AFWTF have long filled the critical need for training in the Atlantic, playing a vital role in the missions of the Navy and Marine Corps to preserve the national security of the United States. The central activity for the AFWTF at Vieques during its operational period has been the combat training of American Sailors and Marines in the unique military functions that they perform. The military considered Vieques to be a unique location for realistic, coordinated combat training. U.S. Exh. 1 at ii, 3-1-8, 3-1-13. In particular, the military considered the ability to train with live ordnance on Vieques to be vitally important for military training. U.S. Exh. 1 at iii, 3-1-3. Indeed, in 1999, the military described the Vieques Training range as the “premier U.S. Naval training facility, reflecting more than 50 years of investment and development,” providing East Coast based forces “training in several warfare competencies which are essential for combat readiness; most importantly live ordnance combined arms training.” U.S. Exh. 1 at ii.

In *Gaubert*, the Supreme Court stated that when a government employee is acting pursuant to a discretionary statute, regulation or guideline there is a “strong presumption” that the employee’s conduct is grounded in the policies of that provision. 499 U.S. at 324. Given the missions of the Navy and the Marine Corps, together with the military purposes underlying

operations of the AFWTF on Vieques, there is a strong presumption here that the challenged conduct of the military was grounded in national defense policies. That does not mean that all actions of military employees are immune to suit under the FTCA. If a military employee was bound by a specific and mandatory provision, then the discretionary function exception does not apply. Additionally, the conduct of a military employee may be so far removed from the military mission that a plaintiff can overcome the *Gaubert* presumption that the employee's conduct was grounded in policy. The military's exercise of its discretion, however, is subject to great deference, as the First Circuit noted in *Abreu*, citing "numerous cases cautioning the courts to avoid interfering with the exercise of discretionary military authority." 468 F.3d at 28 (citing *United States v. Shearer*, 473 U.S. 52, 57 (1985) ("civilian court [should not] second-guess military decisions"); *United States v. Muniz*, 374 U.S. 150, 162 (1963), *United States v. Brown*, 348 U.S. 110, 112 (1954)).

Here, the military's actions regarding the alleged environmental impacts are directly related to the policies underlying the military's mission, as embodied in Department of Navy regulations. *See* 32 C.F.R. § 700.202 (2002). *See also* 10 U.S.C. §§ 5062, 5063. Plaintiffs' claims do not challenge the kinds of activity that courts have found to be outside of the discretionary function exception, such as the negligent operation of an automobile or the failure to provide a handrail on a footpath. *See Gotha v. United States*, 115 F.3d 176, 181 (3d Cir. 1997) (involving a failure to provide a handrail which the Court found to be "mundane, administrative, garden-variety, housekeeping problem" that was "far removed from the Navy's mission"). *See also Shansky*, 164 F.3d at 693 (stating that "an attenuated tie [to government policy] is not enough to show that conduct is grounded in policy"). Rather, Plaintiffs' claims challenge

decisions that were integrally intertwined with the military operations of AFWTF on Vieques. Thus, pursuant to *Gaubert*, the strong presumption that the actions of the military at Vieques were grounded in national defense policies applies. *See* 499 U.S. at 324.

2. The Military’s Conduct At Vieques Was Susceptible To Policy Analysis.

This Court has previously stated that “there can be little question that the military activities carried out by the Navy on Vieques over the past several decades have involved discretionary decision-making of the most fundamental kind. Clearly, the government’s mission on Vieques, at all times, required balancing competing concerns of secrecy and safety, national security and public health.” *Rivera-Acevedo*, 2005 WL 5610230, at *4. This Court has also noted that 1983 MOU between the Navy and the Commonwealth of Puerto Rico “underscore[d] the applicability of the discretionary function exception to the Navy’s mission on Vieques, for clearly, the Navy was always faced with how to achieve environmental protection and safety while still fulfilling its crucial [military] mission.” *Id.* at *5. There is no reason to depart from these findings which are equally applicable to Plaintiffs’ claims in this case.

Here, Plaintiffs essentially claim that the United States was negligent in storing, disposing, and handling hazardous materials; in monitoring the environmental impact of hazardous materials; and in failing to notify the residents of Vieques of hazardous materials in their environment. *See* FAC ¶¶ 9-19, 7182-7208. Significantly, Plaintiffs’ FAC directly implicates government policymakers in these decisions. For example, as discussed above, *see* page 24 *supra*, Plaintiffs claim that the United States was negligent because the Secretary of

Defense failed to take certain actions as required by federal statute. FAC ¶¶ 16, 17.^{14/} Plaintiffs also claim that negligent conduct was the result of “government agencies and inter-agency working groups” that “initiated investigations, reviewed results, met and discussed findings, debated the merits of various plans and policies, created plans and policy, monitored and reviewed results of plans and policy in Washington, DC.” *Id.* ¶ 24. Plaintiffs further allege that negligent decisions were “centered at the highest levels of the US military and civilian government in Washington, DC.” *Id.* ¶ 26. Clearly, these allegations implicate the type of policy-based discretion that Congress intended to shield from tort liability through the discretionary function exception.

Courts have routinely held that the discretionary function exception bars these types of allegations – whether or not the claims specifically reference government policymakers – when the alleged negligent conduct is grounded in broader policy considerations, including considerations involving military readiness, national security, public safety, and public health. For example, in *Aragon*, a case in which the plaintiffs challenged the Air Force’s waste disposal decisions, the Tenth Circuit found that the Air Force’s conduct involved policy choices, explaining that the “Base operated under military exigencies during World War II, the Korean Conflict, the Vietnam Conflict, and the Cold War. Operational decisions during this twenty-five year active period undoubtedly were subject to defense and security considerations which encompass the heart of military policy.” 146 F.3d at 826. Thus, the court stated,

“there is little doubt . . . the Air Force’s actions involved policy choices of the most basic kind” . . . [i]ndeed, the record makes clear the military recognized it

^{14/} As noted at pages 22-28 *supra*, Plaintiffs have not presented any specific and mandatory requirements that were violated by the United States.

needed flexibility to weigh its groundwater protection policies against broader public and military policies; thus it allowed the Air Force to place security and military concerns above any other concerns.

Id. (quoting *Aragon v. United States*, 950 F. Supp. 321, 325 (D. N.M. 1996)).

Likewise, in *Ross v. United States*, 129 Fed. Appx. 449 (10th Cir. 2005), the plaintiffs challenged the military's disposal of hazardous wastes at Tinker Air Force Base. Plaintiffs alleged that from the 1940s through the 1980s, the military buried waste in unlined pits or other storage areas without any special precautions to prevent the wastes from migrating through the groundwater to local neighborhoods. *Id.* at 450. Following the Tenth Circuit's rationale in *Aragon*, the *Ross* Court noted the "broader public and military policies" affecting air base operations which "allowed the Air Force 'to place security and military concerns above any other concerns,' including – unfortunately – concerns about hazardous waste disposal." *Id.* at 451 (quoting *Aragon*, 146 F.3d at 826). Consequently, the *Ross* Court found that the plaintiffs' claims were barred by the discretionary function exception. *Ross*, 129 Fed. Appx. at 450-52. *See also OSI, Inc. v. United States*, 285 F.3d 947, 953 (11th Cir. 2002) (finding that the second part of the discretionary function analysis was satisfied where "[t]he nature of the military's function requires that it be free to weigh environmental policies against security and military concerns"); *Western Greenhouses v. United States*, 878 F. Supp. 917, 929 (W.D. Tex. 1995) (finding that decisions regarding whether or not to take measures for environmental protection at a military base were protected by the discretionary function exception; such conduct implicated public policy because decision-makers must "balance two of the nation's top priorities: national defense and environmental protection. Few decisions could have a greater impact on public policy").

Here, military training on the Island of Vieques took place from World War II through the

Korean War, the Vietnam War, and the Cold War in support of the government's military missions. Any decisions that the military might have made regarding environmental matters were susceptible to defense and security considerations. *See OSI*, 285 F.3d at 953; *Aragon*, 146 F.3d at 826; *Ross*, 129 Fed. Appx. at 451-52; *Western Greenhouses*, 878 F. Supp. at 929. The government had to have the flexibility to place these considerations above all others, including any consideration there might have been for protecting the environment from contaminant releases. *See Aragon*, 146 F.3d at 826; *Ross*, 129 Fed. Appx. at 451-52. Such government conduct, occurring during time of heightened military readiness, was certainly susceptible to policy analysis. *See id.*

Plaintiffs' allegations of failure to monitor and failure to warn also implicate important policy considerations. Decisions regarding how to monitor, and whether to warn, particularly in the context of military operations, are "fraught with . . . public policy considerations." *See Loughlin*, 393 F.3d at 164 (internal quotations omitted). In *Loughlin v. United States*, the plaintiffs, residents of a Washington, D.C. neighborhood, claimed that the government failed to warn them of buried munitions and the resulting toxic soil contamination from a World War I military research program. 393 F.3d at 158, 163. In finding that the discretionary function exception barred the plaintiffs' claims, the District of Columbia Circuit concluded that, at the time the munitions were buried, any warning decision "required balancing 'competing concerns of secrecy and safety, national security and public health.'" *Id.* at 164 (quoting *Loughlin*, 286 F. Supp. 2d at 23). Additionally, the court noted that any "judicially constructed requirement to rethink particular decisions not to warn" would constitute "judicial second-guessing" by inserting "the courts into prioritization and resource allocation decisions that implicate serious political,

social, and economic considerations.” 393 F.3d at 164. Finally, the government’s knowledge of specific hazards at various points in time did not render decisions not to warn void of public policy; any warning decision impacted several policy factors, including determinations regarding the significance of the hazard and the possibility of unnecessarily alarming the residents of the neighborhood. *Id.* at 165.

The Ninth Circuit reached the same conclusion in *In re Consol. U.S. Atmos. Testing Litig.*, 820 F.2d 982, 993-99 (9th Cir. 1987), in which the plaintiffs alleged a failure to warn of radiation hazards from a military nuclear testing program. The court concluded that the discretionary function exception barred the plaintiffs’ failure to warn claims, noting that warning decisions “required difficult judgments balancing the magnitude of the risk from radiation exposure – of which there was only fragmentary knowledge – against the risks and burdens” of a program of warnings. *Id.* at 997. Those risks “included the potential consequences of creating public anxiety,” so that decisions “call[ed] for the exercise of judgment and discretion.” *Id.* In reaching its decision, the court rejected the argument that the discretionary function exception could not apply in the absence of a conscious decision, stating that “[i]f the decision to issue or not to issue a ‘warning’ is within the discretionary function exception, then logically the failure to consider whether to issue one necessarily falls within the exception as well.” *Id.* at 998-99.^{15/}

^{15/} In the only First Circuit case dealing with FTCA claims alleging a failure to warn of toxic hazards, the court found that the discretionary function exception did not apply to a claim of failing to warn domestic bystanders of shipyard workers regarding risks associated with exposure to asbestos dust. *Dube v. Pittsburgh Corning*, 870 F.2d 790, 798-801 (1st Cir. 1989). The decision was based upon the fact that the government had not made an affirmative decision to forego warning the bystanders. *Id.* at 798-800. The First Circuit subsequently recognized that the Supreme Court had abrogated this reasoning in *Dube*, by merely requiring that the challenged conduct be “susceptible to policy analysis” under the second part of the discretionary function exception test. *See Shansky*, 164 F.3d at 692 & n.4.

Other courts have also found that failure to warn claims are barred by the discretionary function exception. *See Terbush v. United States*, 516 F.3d 1125, 1135-37 (9th Cir. 2008) (reviewing failure to warn cases and finding claims challenge policy-weighting decisions that the discretionary function exception shielded from tort liability); *Blackburn v. United States*, 100 F.3d 1426, 1431 (9th Cir. 1996) (stating that a “broad mandate to warn the public of and protect it from special hazards involves the exercise of discretion in identifying such hazards, in determining which hazards require an explicit warning and in determining the precise manner in which to warn it of those hazards”); *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1542-43 (10th Cir. 1992) (finding that the discretionary function exception barred claims that the Army was negligent in failing to give adequate warnings regarding toxic air emissions at a hazardous waste site); *Wells v. United States*, 851 F.2d 1471, 1472-73, 1476-78 (D.C. Cir. 1988) (holding that the discretionary function exception barred claims that the EPA negligently failed to inform residents near three lead smelters of potential risks).

Accordingly, because Plaintiffs’ claims challenge discretionary conduct that was susceptible to policy analysis, the FTCA’s discretionary function exception bars their claims.

III. The FTCA Does Not Waive Sovereign Immunity For Plaintiffs’ Claims Alleging Violations Of Regulatory Provisions Of A Statute When Such Claims Would Undermine The Policies Of The Regulatory Statute.

In any event, Plaintiffs’ claims fail to the extent they rely upon alleged violations of regulatory statutes which preclude a tort damages remedy. In *Abreu*, the First Circuit stated that the FTCA’s waiver of sovereign immunity “must be interpreted in light of significant policies reflected in other related federal statutes.” 468 F.3d at 30. The court noted that where there is an FTCA suit against the United States in its capacity as a regulated entity “there is a potential

conflict between enforcement by the agency charged by Congress with enforcement responsibility and what amounts to indirect enforcement of the same statutory requirements through the FTCA.” *Id.* Accordingly, where the United States is being sued in its capacity as a regulated entity, the “imposition of damages liability . . . under the FTCA” cannot “undermine the policies of the regulatory statute.” *Id.*

The First Circuit noted that the FTCA should be construed to fit ““into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole,”” *id.* (quoting *Feres v. United States*, 340 U.S. 135, 139 (1950)), and cited situations in which courts had found statutory remedies inapplicable where Congress had provided an alternative statutory scheme specifically related to the plaintiffs’ claims. 468 F.3d at 30 (citing *Feres*, 340 U.S. at 139 (precluding FTCA remedies for injuries related to military service because Congress had created an alternative remedial scheme for such injuries); *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1372-73 (Fed. Cir. 2005) (finding Tucker Act remedies inapplicable where Congress had provided alternative remedies under other statutes); *United States v. Fausto*, 484 U.S. 439, 448 & 455 (1988) (finding Back Pay Act inapplicable where employees were deliberately denied a remedy under the comprehensive Civil Service Reform Act)). Relying upon the logic of these cases, the First Circuit stated:

Imposing liability under the FTCA because of the failure of a federal employee to comply with a mandatory directive is not permissible if the imposition of such liability on a regulated entity would undermine the purposes of the regulatory statute creating the mandatory directive.

468 F.3d at 30.

Accordingly, the court concluded that there was no waiver of sovereign immunity to FTCA claims based upon alleged violations of mandatory provisions of RCRA because allowing

such tort remedies would adversely affect RCRA’s statutory scheme. *Id.* at 30-32. The court noted that Congress had affirmatively limited the available remedies for RCRA violations to preclude recovery of compensatory damages, in particular precluding such remedies from the government. *Id.* at 31-32 (citing *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484-87 (1996) (finding no private compensatory damages remedy under RCRA); H. Rep. No. 102-111, at 15 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 1301 (stating that RCRA amendment allowing civil fines was not intended “in any manner to authorize civil tort actions against the federal government for damages”)). Therefore, allowing an FTCA suit based upon a violation of a RCRA provision “would effectively be enforcing RCRA under the guise of an FTCA claim,” and “would undermine the intent of Congress to preclude compensatory damages awards for RCRA violations.” 468 F.3d at 32.

Here, as in the *Rivera-Acevedo/Abreu* litigation, Plaintiffs have alleged tort liability based upon a claimed violation of RCRA. Plaintiffs contend that the Defendant violated RCRA by operating an open burning and open detonation facility at the AFWTF without a valid permit under the statute. *See* FAC ¶¶ 9-13. This claim, however, is clearly precluded by the *Abreu* decision.

Unlike the plaintiffs in *Rivera-Acevedo/Abreu*, however, Plaintiffs here have also asserted violations of provisions of the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”),^{16/} particularly provisions of the Superfund Amendments and

^{16/} Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 26 and 42 U.S.C.).

Reauthorization Act of 1986 (“SARA”),^{17/} which established the Defense Environmental Restoration Program (“DERP”).^{18/} Specifically, Plaintiffs allege that the United States violated 10 U.S.C. § 2705, which Plaintiffs claim required the Secretary of Defense to take action “to ensure the EPA and appropriate State and local authorities in Vieques received prompt notice of” environmental releases and other environmental matters, and to “consult with and seek the advice of” a Technical Review Committee or Restoration Advisory Board with respect to certain environmental issues. FAC ¶¶ 16, 17.

However, CERCLA, like RCRA, is a comprehensive regulatory statute that specifically provides for limited private causes of action. Under CERCLA, private actions are limited to actions seeking recovery of “response costs.” *See* 42 U.S.C. §§ 9607(a), 9613(h). The legislative history of CERCLA reveals that Congress specifically omitted private causes of action for money damages from the statute. Private causes of action for personal injury and property damage were included in earlier versions of CERCLA in both the House and Senate versions of the bill, but were deleted from the final statute. Senate Bill S. 1480 provided that responsible parties shall be liable for “all damages for economic loss or loss due to personal injury”^{19/} House Bill H.R. 7020 similarly included a liability section encompassing “all damages for

^{17/} Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of 10, 26 and 42 U.S.C.).

^{18/} 10 U.S.C. § 2701 *et seq.*

^{19/} S. 1480, 96th Cong., 2nd Sess. § 4(a)(2) (draft of July 11, 1979), *reprinted in* 1 Senate Comm. on Env’t and Pub. Works, A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), Public Law 96-510 (hereinafter Legis. Hist.) 155, 169 (1983) (relevant portions of the CERCLA legislative history are attached as U.S. Exh. 3).

personal injury, injury to real or personal property, and economic loss”^{20/} During discussion of the final compromise bill which became CERCLA, Senator Randolph, the co-author of the compromise bill, in comparing CERCLA to the original Senate bill explained “[w]e have deleted the Federal cause of action for medical expenses or property or income loss.”^{21/} *See also Daigle*, 972 F.2d at 1535-36 (examining the legislative history of CERCLA and finding “obvious implication” that Congress intentionally deleted personal rights to recovery of medical expenses).

By specifically limiting recovery in CERCLA to the enumerated remedies, Congress manifested its intent to preclude a compensatory damages remedy for violations of CERCLA provisions. *See Nelson v. RSR*, No. 3:03-CV-0156, 2003 WL 22053955, at *2 (N.D. Tex. April 8, 2003) (finding no private cause of action under CERCLA for personal injury damages); *Middlebury Office Park Ltd. P’ship v. Timex Corp.*, No. 3:95-CV-2160, 1998 WL 351583, at *4 (D. Conn. June 16, 1998) (same); *Polcha v. AT & T Nassau Metals Corp.*, 837 F. Supp. 94, 96-97 (M.D. Pa. 1993) (same). Following the *Abreu* Court’s reasoning, there can be no waiver of sovereign immunity to FTCA claims based upon alleged violations of mandatory provisions of CERCLA when allowing such tort remedies would adversely affect CERCLA’s statutory scheme. *See* 468 F.3d at 30. As with RCRA, allowing an FTCA suit based upon a violation of a CERCLA provision, “would effectively be enforcing [CERCLA] under the guise of an FTCA claim,” and “would undermine the intent of Congress to preclude compensatory damages awards

^{20/} H.R. 7020, 96th Cong., 2nd Sess. § 3071(b) (draft of April 2, 1980), *reprinted in* 2 Legis. Hist. 3, 40.

^{21/} 126 Cong. Rec. S. 14964 (daily ed. Nov. 24, 1980) (statement of Senator Randolph) *reprinted in* 1 Legis. Hist. 685. *See also* 126 Cong. Rec. H. 11791 (daily ed. Dec. 3, 1980) (statement of Representative Broyhill), *reprinted in* 1 Legis. Hist. 787 (“Compensation for personal injury and lost profits or wages and property . . . has not been included”).

for [CERCLA] violations.” *See id.* at 32.^{22/}

In sum, pursuant to *Abreu*, there is no waiver of sovereign immunity for tort claims based upon alleged violations of RCRA or CERCLA.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss this case for lack of subject matter jurisdiction.

Dated: May 18, 2009

Respectfully submitted,

ROSA EMILIA RODRIGUEZ-VELEZ
United States Attorney

ISABEL MUNOZ-ACOSTA
Assistant United States Attorney

TONY WEST
Assistant Attorney General, Civil Division

J. PATRICK GLYNN
Director, Torts Branch, Civil Division

DAVID S. FISHBACK
Assistant Director, Torts Branch, Civil Division

^{22/} In any event the FTCA’s discretionary function exception is dispositive regarding the alleged CERCLA violations, even if Plaintiffs’ claims did not undermine CERCLA’s regulatory scheme. *See* pages 24-25 *supra*.

/s/ Adam Bain

ADAM BAIN (IN Bar #11134-49)

Senior Trial Counsel

MARGARET JANE MAHONEY

Trial Attorney (PA Bar # 24635)

United States Department of Justice

Torts Branch, Civil Division

1331 Pennsylvania Ave., N.W., Room 8016S

Washington, D.C. 20004

Tel: (202) 616-4209 (Bain)

Fax: (202) 616-4473

Adam.Bain@usdoj.gov

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2009, I caused to be served a copy of the Defendant's Motion to Dismiss For Lack of Subject Matter Jurisdiction, Memorandum of Points and Authorities, Exhibits and Proposed Order, through Electronic Case Filing on counsel for plaintiffs at the addresses listed below.

John Arthur Eaves, Jr.
EAVES LAW FIRM
101 North State St.
Jackson, MS 39201
Telephone: (601) 355-7961

Steven R. Perles
Edward MacAllistar
THE PERLES LAW FIRM
1146 19th Street, N.W.
5th Floor
Washington, DC 20036
Telephone: (202) 955-9055

/s/ Adam Bain
ADAM BAIN (IN Bar #11134-49)
Senior Trial Counsel
United States Department of Justice
Torts Branch, Civil Division
1331 Pennsylvania Ave., N.W., Room 8016S
Washington, D.C. 20004
Tel: (202) 616-4209
Fax: (202) 616-4473
Adam.Bain@usdoj.gov