

**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 REPLY BRIEF
IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION UNDER FED. R. CIV. P. 12(b)(1)**

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INTRODUCTION

In response to the United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction, Plaintiffs do not dispute many of the United States' arguments. Plaintiffs do not dispute that alleged violations of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),^{1/} or the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, could not overcome the Federal Tort Claims Act's ("FTCA") discretionary function exception, 28 U.S.C. § 2680(a), because: (1) the regulations were not sufficiently specific and mandatory to remove discretion, and (2) the claims would undermine Congressional intent to limit available remedies for violations of these statutes. Further, Plaintiffs do not dispute the absence of any specific and mandatory provisions requiring the Navy to warn persons on Vieques regarding hazardous materials in their environment. Finally, Plaintiffs do not dispute that claims alleging Navy negligence in storing, disposing, and handling hazardous materials on Vieques were susceptible to policy analysis, given the Navy's mission on the island.

Instead, Plaintiffs now rely solely on: (1) alleged violations of a Navy National Pollution Discharge Elimination System ("NPDES") permit under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1357; (2) alleged violations of a license, permit and regulation prohibiting the firing of depleted uranium shells; and (3) alleged violations of other "internal regulations." Plaintiffs also devote many pages to attempting to show that the alleged environmental violations are related to their claimed injuries. Further, Plaintiffs argue that their failure to warn claims are not "susceptible to policy analysis" under the second part of the discretionary function exception analysis. Finally, Plaintiffs request that the Court allow "jurisdictional discovery" if it were

^{1/} Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 26 and 42 U.S.C.).

inclined to grant the United States' motion to dismiss.

As we show in detail below, Plaintiffs have failed to meet their burden of establishing federal jurisdiction, and no "jurisdictional discovery" would change the outcome. The key points are:

1. As with Plaintiffs' alleged RCRA and CERCLA violations (which, in light of *Abreu v. United States*, 468 F.3d 20 (1st Cir. 2006), Plaintiffs recognize are not a basis for avoiding the discretionary function exception), allowing violations of an NPDES permit to overcome the discretionary function exception would undermine Congressional intent to limit private remedies for CWA violations.
2. The provisions that Plaintiffs cite do not compel a *specific course of conduct* which would overcome the discretionary function exception.
3. While Plaintiffs submit declarations to show a connection between Navy activities and contamination in the Vieques ecosystem and harmful exposure of citizens of Vieques to contaminants (contrary to the public health assessments performed by the Agency for Toxic Substances Disease Registry ("ATSDR")), there is not a sufficient showing of any connection between the alleged violations and Plaintiffs' injuries, including those related to monitoring and the use of depleted uranium.
4. Plaintiffs' claims alleging a failure to warn cannot avoid the discretionary function exception because public policy considerations would clearly underlie any warning decision regarding environmental contamination on Vieques given the Navy's mission there. The cases Plaintiffs cite to argue otherwise are readily distinguishable.
5. There is no basis for jurisdictional discovery given Plaintiffs' vague, unsupported allegations that the Navy has withheld information, and the great amount of information that is publicly available regarding military operations and environmental impacts on Vieques.

ARGUMENT

I. Plaintiffs Cannot Rely Upon Alleged Violations Of The Clean Water Act To Overcome The Discretionary Function Exception Because Such Claims Would Undermine Congressional Intent To Limit Available Remedies Under The Act.

Plaintiffs have not disputed the United States' argument that violations of RCRA and CERCLA cannot overcome the discretionary function exception based upon the First Circuit's

analysis in *Abreu v. United States*, 468 F.3d 20 (1st Cir. 2006). There, the First Circuit noted that when 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.* at 30. Therefore, 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.” *Id.* Specifically, when Congress has affirmatively limited available remedies for regulatory violations to preclude recovery of compensatory damages, as it did in RCRA, a court cannot allow an FTCA suit based upon a violation of the regulatory statute because doing so “would undermine the intent of Congress to preclude compensatory damages awards” for such regulatory violations. *Id.* at 32.

The CWA, like RCRA and CERCLA, is a comprehensive regulatory statute that specifically provides for limited private causes of action. The CWA limits the remedies available to citizen plaintiffs to injunctive relief, the assessment of civil penalties, and attorney’s fees. *See* 33 U.S.C. § 1365(a), (d); *see also Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs., Inc.*, 528 U.S. 167, 175 (2000). Significantly, the Supreme Court has held that Congress did not authorize compensatory damages under the CWA. *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 17-18 (1981). *See also SURCCO v. PRASA*, 157 F. Supp. 2d 160, 166 (D.P.R. 2001) (this Court stating that “the CWA **only allows** civil suits which pray for injunctive relief and/or civil penalties. At no point does the CWA permit a civil suit which claims personal damages”) (emphasis original). In *Middlesex County*, the Supreme Court held that, given the elaborate provisions of the CWA authorizing enforcement suits by government

officials and private citizen suits, there was no implied private right of action. *Id.* at 13-15. The Court specifically found that the CWA’s legislative history showed Congressional intent to limit private remedies for CWA violations to those specifically enumerated in the statute, excluding, in particular, any remedy for compensatory damages. *Id.* at 17-18 & n.27.^{2/} Thus, as with RCRA and CERCLA, allowing an FTCA suit based upon a violation of the CWA, “would effectively be enforcing [the CWA] under the guise of an FTCA claim,” and “would undermine the intent of Congress to preclude compensatory damages awards for [CWA] violations.” *See Abreu*, 468 F.3d at 32. Congress clearly did not intend to waive the government’s sovereign immunity to tort suit through the establishment of constituent levels and monitoring requirements in an NPDES permit under the CWA. Thus, pursuant to *Abreu*, there is no waiver of sovereign immunity for tort claims based upon alleged violations of the CWA.

II. Plaintiffs Fail To Demonstrate That The Navy Violated A Specific And Mandatory Regulation That Controlled The Navy’s Conduct On Vieques And Caused Plaintiffs’ Injuries.

Plaintiffs concede that they bear the burden of establishing federal jurisdiction under the discretionary function exception. (Pl. Opp. at 12). Yet, Plaintiffs fail to prove that the Navy violated a specific and mandatory provision that both controlled the government’s conduct and

^{2/} The Court stated that the Senate Report for the CWA emphasized the limited nature of citizen suits authorized under the statute. 453 U.S. at 17 n.27. Additionally, the Court noted that the citizen suit provision of the CWA was modeled on a parallel provision in the Clean Air Act. *Id.* (citing 42 U.S.C. § 7604), and the legislative history of that law contained “explicit indications” of an intent to preclude private damages remedies. 453 U.S. at 17 n.27. For instance, Senator Hart stated “the bill makes no provision for damages to the individual,” and Senator Muskie remarked that the act “expressly excludes damage actions.” *Id.* (quoting 116 Cong. Rec. 33104, 33102 (1970)). Further, Senator Muskie placed a staff memorandum in the Record stating that the availability of damages “would encourage frivolous or harassing suits against industries and government agencies.” 453 U.S. at 17 n.27 (quoting 116 Cong. Rec. 33103).

led to their injuries under the first part of the discretionary function exception analysis. A provision is sufficiently specific to remove discretion only if it tells a government employee precisely how to act. *See Berkovitz v. United States*, 486 U.S. 531, 536 (1988). First Circuit cases have demonstrated that 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. *Irving v. United States*, 162 F.3d 154, 163 (1st Cir. 1998) (*en banc*). *See also Muniz-Rivera v. United States*, 326 F.3d 8, 16 (1st Cir. 2003) (stating that regulations which fail to direct the manner of conduct or specify particular action do not remove discretion); *Shansky v. United States*, 164 F.3d 688, 691 (1st Cir. 1999) (explaining that general directives that do not prescribe specific measures are insufficient to brand particular conduct as non-discretionary). Additionally, the First Circuit has made it clear that unless there is a causal relationship between the alleged violation of a specific and mandatory provision 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).

Significantly, while Plaintiffs claim violations of several pollution provisions, they fail to quote any regulations mandating a specific “course of conduct.” Additionally, while Plaintiffs submit several expert affidavits in an attempt to show a causal connection between the alleged violations and health effects on Vieques, these affidavits are not sufficient to connect any alleged violations to their claimed injuries.

A. Alleged Violations Of The NPDES Permit Under The CWA.

Despite the fact that any FTCA claims for violations of the CWA are precluded because,

as discussed in Section I *supra*, Congress limited the remedies available under that statute, Plaintiffs argue that violations of NPDES permit levels are sufficient to remove discretion under the discretionary function exception.

1. Certain Permit Requirements Do Not Specify A Court Of Conduct.

Even had Congress not limited the CWA remedies, the NPDES permit levels are objectives and do not mandate a specific course of conduct. Courts have consistently held that objective-based water pollution provisions do not prescribe *a specific course of conduct* under the first part of the discretionary function exception test. *See OSI Inc. v. United States*, 285 F.3d 947, 952 (11th Cir. 2002) (finding that objectives and principles do not create mandatory directives that overcome the discretionary function exception); *Aragon v. United States*, 146 F.3d 819, 825-26 (10th Cir. 1998) (finding that a pollution prevention provision suggested “principles rather than practices,” and stating that “[a]n objective, alone, does not equate to a specific, mandatory directive”). Some provisions of the CWA may mandate a specific course of conduct, such as the requirement to “obtain a certificate or waiver prior to discharging dredged material in navigable waters,” *see Montijo-Reyes*, 436 F.3d at 25, but a constituent level in an NPDES permit does not specify conduct.^{3/} *See Loughlin v. United States*, 286 F. Supp. 2d 1, 17 (D.D.C.

^{3/} A review of Plaintiffs’ Exhibit 2, AFTWF NPDES Compliance Status and Permit Decision Process, shows that a purpose of monitoring compliance with permit levels is to determine whether to approve or deny a permit renewal application. *See* Pl. Exh. 2 at 3. This Court found in *Rivera-Acevedo v. United States*, Nos. 04-1232, 04-1372, 2005 WL 5610230, *6 (D.P.R. April 25, 2005), that the Navy continued to hold a valid NPDES permit through the relevant time period. Notwithstanding the refusal of the Puerto Rico Environmental Quality Board (“EQB”) to certify the Navy’s compliance with water quality standards, “the EPA did not revoke or terminate the Navy’s permit” and it “administratively continued in force and effect.” *Id.* (citing *United States v. Zenon-Encarnacion*, 387 F.3d 60, 63-64 (1st Cir. 2004)). This *Rivera-Acevedo* holding was affirmed by the First Circuit. *Abreu v. United States*, 468 F.3d 20, 28-29 (1st Cir. 2006).

2003), *aff'd*, 393 F.3d 155 (D.C. Cir. 2004) (noting plaintiffs' allegations of violations of the CWA and other statutes and stating that plaintiffs cannot simply accuse the government of violating a law, but "[t]he nature of the specific, mandatory constraint on its discretion must be clearly identified") (internal quotation and citation omitted). A court ruling that the violation of an objective alone could overcome the discretionary function exception would defeat the purpose of the exception to protect policy-based discretionary conduct from judicial second-guessing of how the government may meet those objectives. *See United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

2. Certain Permit Requirements Are Not Sufficiently Specific.

Additionally, without quoting any specific and mandatory language from the CWA, its regulations, or the Navy's NPDES permit (which Plaintiffs attach as Pl. Exh. 17), Plaintiffs claim that the discretionary function exception does not apply because of "numerous reporting and monitoring violations" that the Environmental Protection Agency ("EPA") discovered during an August 1999 inspection. (Pl. Opp. at 17-18). The NPDES permit called for sampling "[a]t least in two discrete instances per month . . . in which live ordnance hits the water." Pl. Exh. 17 at 5. However, the permit also stated that "[n]o sampling is required if ordnance doesn't hit the water." Pl. Exh. 17 at 5-6. Plaintiffs allege sampling and reporting violations concerning sampling in "salt flats," which the EPA determined to be "waters of the United States" based upon the interpretation of certain maps. Pl. Exh. 10 at 2. The EPA inspector observed ground holes in three salt flats "which suggest[ed] that ordnance [had] landed in these areas." Pl. Exh. 10 at 2. In contrast, the Navy did not interpret the permit to require sampling of the salt flats after ordnance hits in those areas; referring to a fact sheet that accompanied the permit, the Navy

assumed that the permit tied the sampling requirement “to ordnance hits in the offshore waters.” See U.S. Exh. 4 at 2 (Navy Response to NPDES, Notice of Violations). Given these circumstances, it is clear that the NPDES permit is not sufficiently specific and mandatory on its face to require the Navy’s reporting and testing of these areas. Because the EPA and the Navy had different legal interpretations of what the permit required – and the Navy’s view was certainly reasonable – it cannot be said that these permit requirements are sufficiently specific to trump the discretionary function exception.^{4/}

3. The Permit Requirements Cannot Be Connected To Alleged Injuries.

Further, despite the several expert affidavits that Plaintiffs submitted, they do not show a connection between the alleged NPDES permit violations and their claimed health effects. The exceedences of the water quality limits in the NPDES permit involved “boron, cadmium, chromium (hexavalent and total), copper, iron, lead, manganese, oil and grease, phenolics, selenium, silver, sulfide and zinc.” Pl. Exh. 2 at 3. Of these chemicals, only cadmium, chromium, copper, and lead are referenced in the expert affidavits. The affidavits refer extensively to other chemicals which have not been cited in any NPDES violations, including 1,3,5-Trinitrobenzene, 1,3-Dinitrobenzene, 2,4,6-Trinitrotoluene, 2,4 Dinitrotoluene + 2,6-Dinitrotoluene, 4-Nitrotoluene, Hexahydro 1,3,5-trinitro-1,3,5-triazine, nickel, cobalt, magnesium, aluminum, arsenic, and mercury. See Pl. Exh. 4 at 3-4; Pl. Exh. 5 at 2-3; Pl. Exh. 8

^{4/} For other alleged violations in monitoring, the Navy acknowledged that for certain limited times no samples were taken despite ordnance discharges. The Navy responded that this was likely due to contract services being unavailable or weather conditions which interfered with the ability to take samples. The Navy responded that this was not representative of the Navy’s standard practices, and the Navy would implement procedures to avoid the situation from recurring in the future. U.S. Exh. 4 at 5-6. Moreover, as we show in Section II.A.3, *infra*, these alleged violations cannot be related to Plaintiffs’ alleged injuries.

at 3; Pl. Exh. 9 at 2-4. Additionally, Plaintiffs do not even attempt to explain the causal relationship between alleged reporting and monitoring violations for instances when live “ordnance [struck] the water” and their injuries. Significantly, these alleged NPDES violations occurred in the late 1990s and were reported in 1999; Plaintiffs cannot show how these violations can be related to their injuries when their Complaint alleges damages as result of military activities over the past “sixty years” dating back to World War II. *See* First Amended Complaint (“FAC”) ¶¶ 4, 7182, 7184, 7188, 7199, 7200, 7210. Most of Plaintiffs’ administrative claims were filed with the Navy in 2001 and 2002. Accordingly, the consequences of an alleged violation must have migrated through the ecosystem and caused Plaintiffs manifest injuries in a matter of a few short years; none of Plaintiffs’ experts attest to this. Thus, Plaintiffs cannot rely upon these alleged NPDES violations to overcome the discretionary function exception.^{5/}

B. Alleged Violations In The Firing Of Depleted Uranium Shells.

Likewise, Plaintiffs cannot establish jurisdiction by alleging that the Navy violated a

^{5/} In the early 2000s, the ATSDR evaluated the pathways most likely to result in exposure to contaminants from the Navy’s bombing activities *during the entire history* of the Navy’s military operations on Vieques. The ATSDR concluded:

Based on a thorough review and evaluation of all relevant information pertaining to the pathways, ATSDR concludes that, overall, residents of Vieques might have been exposed to very low levels of environmental contamination. However, the contamination levels that people were most likely exposed to *are too low to cause harmful effects*. For that reason ATSDR has categorized exposure to environmental contaminants at Vieques as “*no apparent public health hazard*.”

U.S. Exh. 5 at 1 (A Summary of ATSDR’s Environmental Health Evaluations for the Isla de Vieques Bombing Range) (emphasis added). Plaintiffs state certain Congressmen have criticized the ATSDR’s health assessments and that the ATSDR Director has committed to reassess the agency’s findings. (Pl. Opp. at 28 n.70). However, this information remains available on ATSDR’s publicly accessible web site. <http://www.atsdr.cdc.gov/sites/vieques/vieques.html>.

license, regulation, and permit by firing depleted uranium shells. There can be no tort claim related to the firing of depleted uranium shells because Plaintiffs cannot show any causal relationship between the alleged violation and Plaintiffs' damages. See *Montijo-Reyes*, 436 F.3d at 25-26. While the Navy admitted a violation in 1999, Plaintiffs cannot show how the consequences of this violation were more than *de minimis* and caused them exposure and manifest injuries in a few months or years. Following the firing, "[v]isual searches and radiological surveys indicated that only a limited area of the North Convoy site was actually affected." Pl. Exh. 13 at 2. Consequently, Plaintiffs cannot show how this alleged violation could have resulted in consequences "to people living several miles away." See *Rivera-Acevedo*, 2005 WL 5610230, at *5-7. Most significantly, none of the several expert affidavits that Plaintiffs submit references uranium or radiation. If there was any potential connection between this violation and Plaintiffs' injuries, Plaintiffs would surely have submitted evidence of this.^{6/}

C. Alleged Violations Of Other Internal Regulations.

Plaintiffs also argue that the United States violated "mandatory internal environmental regulations," and "internal mandatory regulations, policies, directives and orders." (Pl. Opp. at 20). 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." See *Loughlin*, 286 F. Supp. 2d at 17 (quoting *Gould Elec. Inc. v. United States*, 2002 WL 27834, at *9 n.4 (E.D. Pa. Jan. 10, 2002)). Aside from relying upon 32

^{6/} The best Plaintiffs can do is offer speculation that elevated radiation levels elsewhere on the Island "support an inference" that depleted uranium "may have been used" elsewhere. Pl. Opp. at 20. But their experts do not assert that any of Plaintiffs' illnesses were caused by radiation.

C.F.R. § 700.832 and OPNAVINST 5090.1B, CH-20 § 20-5.1, which the United States addressed in its Opening Brief at 25-26, Plaintiffs generally reference two provisions in the 1999 AFWTF Range Manual. The first provision states that “[n]o intentional discharge of live ordnance into water is permitted,” and “[i]nert ordnance discharges must be approved by AFWTF.” Pl. Exh. 6 at H-3. Plaintiffs, however, have no basis to claim *intentional* discharges of live ordnance into water or *unapproved* inert ordnance discharges. Even if Plaintiffs could show instances of such discharges, they could not connect those discharges to their injuries. The second provision that Plaintiffs cite states that “[n]aval vessels will not discard refuse overboard or pump bilge’s while in the vicinity of Vieques.” Pl. Exh. 6 at H-4. This provision is not sufficiently specific and mandatory since it does not define the “vicinity of Vieques.” Additionally, Plaintiffs have not provided any evidence that this provision was violated during the time it was in effect. The Range Manual that Plaintiffs submitted, AFWTFINST 3120.1M, is dated September 28, 1999 (*See* U.S. Exh. 6); however, all of the claimed discharges from ships in Plaintiffs’ FAC occurred prior to 1980. *See* FAC ¶¶ 7195, 7203.

III. Plaintiffs’ Failure To Warn Claims Are Susceptible To Policy Analysis And Barred By The Discretionary Function Exception.

Plaintiffs do not argue that there were any specific and mandatory provisions that required the Navy to warn citizens of Vieques of hazardous chemicals in their environment. Instead, Plaintiffs argue that the discretionary function exception does not apply because any warning decisions on Vieques were not susceptible to policy analysis. (Pl. Opp. at 25-32). Plaintiffs argue that the Navy not only knew of hazardous contaminants on Vieques but allowed fishing and agricultural activities on the “most contaminated eastern part of Vieques.” (Pl. Opp. at 26-27). Even accepting Plaintiffs’ allegations, any Navy decisions regarding citizens’ use of certain

parts of the island and the necessity of warnings are susceptible to policy analysis.

In its Opening Brief, the United States cited the abundant case law regarding failure to warn claims, particularly in the context of military operations. (U.S. Br. at 34-36.) Plaintiffs seek to distinguish the cases by arguing that the government did not “facilitate” the plaintiffs’ exposure to hazards in those cases. (Pl. Opp. at 31). That distinction, to the extent that it is a distinction at all, simply does not make sense. Here, the government merely allowed fishermen and farmers to engage in activities by which they had sustained a livelihood for years. Plaintiffs have not alleged or produced evidence that the government affirmatively took any actions to put people in harm’s way, even if that were a relevant distinction, which, as we show below, it is not.^{7/}

Contrary to Plaintiffs’ arguments, *Loughlin v. United States*, 393 F.3d 155 (D.C. Cir. 2004), and *In re Consol. U.S. Atmos. Testing Litig.*, 820 F.2d 982 (9th Cir. 1987), are directly on point. One could as easily argue that the government facilitated exposure to hazardous substances in those cases by allowing persons to purchase property in a contaminated neighborhood (*Loughlin*) or by allowing people to participate in a nuclear testing program (*In re Consolidated Atmospheric Testing*). As the court in *Loughlin* noted, decisions regarding how to monitor, and whether to warn, particularly in the context of military operations, are “fraught with . . . public policy considerations.” 393 F.3d at 164 (internal quotations omitted). Any warning decision in that context would require “balancing ‘competing concerns of secrecy and safety,

^{7/} The only documents that Plaintiffs cite are: (1) a Range Manual which states that the Navy closed the inner range periodically to allow “local fisherman to retrieve fishing traps from adjacent waters,” Pl. Exh. 6 at H-1, and (2) a journal article which states, without citation, that the Navy “allowed local farmers to graze cows in the eastern part of Vieques including at the AFWTF.” Pl. Exh. 7 at 264.

national security and public health.” *Id.* (quoting *Loughlin*, 286 F. Supp. 2d at 23). In fact, for the nuclear tests at issue in *Consolidated Atmospheric Testing*, the government did affirmatively place civilians in harm’s way to determine the “effects of nuclear explosions on the equipment, clothing, weapons and fighting capability of military personnel.” 820 F.2d at 985. The government knew the “inherently dangerous” nature of the tests given “recognized radiation hazards,” “the dangers associated with any explosive devices,” and “the risks of injury inherent in any large-scale military operation.” *Id.* at 986. But, because the testing program involved the military and national security considerations, and because any program of warnings would have “risks and burdens,” and potentially “create[] public anxiety,” the court found that any failure to warn claims were barred by the discretionary function exception. *Id.* at 997.

The cases upon which Plaintiffs rely are inapposite. Initially, Plaintiffs cite *Indian Towing v. United States*, 350 U.S. 61 (1955) (Pl. Br. at 29-30), a case in which United States did not raise the discretionary function exception, but argued that cases involving “uniquely governmental functions” were not within the FTCA. *Id.* at 64. The Supreme Court found that once the United States had undertaken operation of a lighthouse, it had to use due care to make certain the light was kept in good working order. *Id.* at 69. Seeking to rely upon this reasoning of *Indian Towing*, Plaintiffs argue that once the United States permitted fishermen and farmers to use the eastern end of the island, the United States became obligated to warn them of the hazards of which it was aware. (Pl. Br. at 30). This argument seeks to revive a mode of discretionary function exception analysis that the Supreme Court and many other federal courts – ***including the First Circuit and this Court*** – have discredited. Indeed, in *United States v. Gaubert*, 499 U.S. 315 (1991), the Supreme Court unequivocally rejected any distinction between undertaking

an activity at the planning level and performing an activity at the operational level, explaining that “[t]he United States was held liable [in *Indian Towing*], not because the negligence occurred at the operational level but because making sure the light was operational ‘did not involve any permissible exercise of policy judgment.’” *Id.* at 326 (quoting *Berkovitz v. United States*, 486 U.S. 531, 538 n.3 (1988))

The First Circuit has found that reliance upon *Indian Towing* in analyzing the application of the discretionary function exception is misplaced. In *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 255 (1st Cir. 2003), the plaintiffs sought to rely upon *Indian Towing* to argue that the discretionary function exception did not apply to the Coast Guard’s decision to forcibly evacuate a fishing vessel. The First Circuit stated:

Indian Towing is inapposite for two reasons. First, the discretionary function exception was not at issue because the government conceded that it did not apply. [350 U.S. at 64.] Second, as this Court has interpreted the case, through the lens of later Supreme Court decisions, it illustrates a situation where there was no exercise of policy judgment but rather involved purely technical or scientific considerations. *Ayer v. United States*, 902 F.2d 1038, 1042 (1st Cir. 1990). Indeed, we have suggested that had a policy-based reason for failing to maintain the lighthouse been articulated, the result might have been different. *See id.*

350 F.3d at 255. Finally, in *Compagnie Maritime Marfret v. San Juan Bay Pilots Corp.*, 532 F. Supp. 2d 369 (D.P.R. 2008), this Court engaged in an in-depth analysis of *Indian Towing* and found that the plaintiffs’ reliance on *Indian Towing* was misguided because the decision “‘has been severely undercut, if not altogether disavowed by the Supreme Court in *Gaubert*’” and *Indian Towing* “‘is no longer ‘persuasive authority in the context of the discretionary function exception.’” 532 F. Supp. 2d at 389-93 (quoting *Cranford v. United States*, 466 F.3d 955, 959 (11th Cir. 2006), and *Harrell v. United States*, 443 F.3d 1231, 1237 (10th Cir. 2006)).

The only appropriate analysis, pursuant to *Berkovitz*, 486 U.S. at 536-37, and *Gaubert*,

499 U.S. at 322-23, is to determine whether the conduct that Plaintiffs are challenging was (1) discretionary and (2) susceptible to policy analysis. Here, there was no specific and mandatory provision requiring any warning to citizens of Vieques regarding environmental hazards, and any warning would have required balancing competing concerns of secrecy and safety, national security and public health.

The other two cases that Plaintiffs cite, *Andrulonis v. United States*, 952 F.2d 652 (2d Cir. 1991), and *Whisnant v. United States*, 400 F.3d 1177 (9th Cir. 2005), are not on point because they involved alleged obvious and imminent hazards where there were no countervailing public policy considerations that government actors could weigh. In *Andrulonis*, a government scientist became aware of an obvious and imminent danger posed by the laboratory conditions (use of a highly virulent form of rabies provided by the government, without adequate safety precautions) while observing a researcher performing a rabies vaccine experiment, but failed to intervene. 952 F.2d at 653. The court, quoting *Gaubert*, likened the scientist's negligence to that of the driver who collides with another car while on official business. *Id.* at 655. Although operating an automobile and conducting a scientific experiment are both activities that involve the exercise of judgment, neither a driver's misjudgment of the distance to another vehicle, nor the decision challenged in *Andrulonis* – not to warn another of a known immediate danger to life, when there was no time for policy consideration – could be said to be grounded in policy. *Id.* Indeed, the First Circuit has characterized the alleged negligence of the scientist in *Andrulonis* as an “objective professional judgment[]” that was “not readily amenable to policy analysis.” *Shansky*, 164 F.3d at 694.

In *Whisnant*, the plaintiff alleged negligence in the government's maintenance of the

commissary on a naval base, which he alleged caused his exposure to “toxic mold.” 400 F.3d at 1179. The court noted that the mold in the commissary was “an obvious health hazard” that the government “ignored” when “called to its attention.” *Id.* at 1183, 1185. The court also found that the agency’s duty to maintain its grocery store as a safe and healthy environment for employees and customers was not a policy choice of the type that the discretionary function exception shields, because “[c]leaning up mold involves professional and scientific judgment, not decisions of social, economic, or political policy,” and ““a failure to adhere to accepted professional standards is not susceptible to a policy analysis.”” 400 F.3d at 1183 (citation omitted). Plaintiffs here argue that their failure to warn claim likewise “involves professional and scientific judgment, not decisions of social, economic, or political policy.” (Pl. Opp. at 31). *Whisnant*, however, did not involve a failure to warn claim, and the court simply found that cleaning up an obvious mold hazard was not the type of policy-based discretionary conduct that the exception was designed to shield. 400 F.3d at 1183. The court in *Whisnant* explicitly recognized that the discretionary function exception shielded government conduct that was “susceptible to policy analysis,” 400 F.3d at 1182, and even acknowledged that government conduct impacting safety was protected when it could involve complex decisions and allocation of limited resources among competing government tasks. *Id.* at 1184.

Thus, unlike *Andrulonis* and *Whisnant*, which involved the government’s failure to act in response to imminent and obvious hazards in situations that were not amenable to policy analysis, Plaintiffs’ failure to warn claim here is certainly susceptible to policy analysis. Government conduct in determining whether to allow continued access to certain parts of Vieques Island and whether to warn citizens of any potential hazards would involve complex

policy considerations. Initially, as this Court has already held, “[c]learly, 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. With respect to any warning, the Navy would have had to balance its military and national security needs against any perceived benefits to public health and safety in light of the risks and burdens of a warning program and the great public anxiety warnings could create. Few decisions could have a greater impact on public policy than those that balance two of the nation’s top priorities, national defense and protection of citizens from environmental hazards. *See Western Greenhouses v. United States*, 878 F. Supp. 917, 929 (W.D. Tex. 1995).

IV. This Court Should Deny Plaintiffs’ Request For Discovery On Jurisdiction.

Plaintiffs argue that they are entitled to discovery on jurisdiction “in the event the Court is inclined to grant Defendant’s motion to dismiss.” (Pl. Br. at 32). In support of this request, Plaintiffs make unsupported claims that the Navy has withheld information from the EPA and vaguely allege that “there remain numerous relevant documents which are in the exclusive possession of the Navy and are not publicly available.” (Pl. Br. at 33-34).

While this Court has discretion to permit or deny discovery on preliminary matters such as jurisdiction and venue, *see, e.g., Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978), this Court should deny Plaintiffs’ request for discovery here because Plaintiffs do not show how discovery could make any difference in their arguments concerning application of the discretionary function exception. *See Dynamic Image Techs., Inc. v. United States*, 221 F.3d 34, 38 (1st Cir. 2000) (stating that court has broad discretion to deny discovery “if the record indicates that discovery is unnecessary (or, at least, is unlikely to be useful) in regard to

establishing the essential jurisdictional facts”). The detailed allegations of Plaintiffs’ FAC and the arguments in the briefs show that the discretionary function exception applies to Plaintiffs’ claims. Regarding the first part of the discretionary function exception analysis, Plaintiffs do not claim that they lack access to any documents that might contain specific and mandatory provisions, which would allow them to show that the government’s conduct on Vieques was non-discretionary. Rather, Plaintiffs argue that the allegedly unavailable documents that they seek may provide evidence of environmental violations. But, unless Plaintiffs can show that the violations were in contravention of a specific and mandatory provision, this evidence is meaningless to the discretionary function exception analysis. The second part of the discretionary function exception test only requires that the alleged conduct be susceptible to policy analysis. Plaintiffs do not explain how any discovery might be relevant to that objective inquiry. *See Rothrock v. United States*, 62 F.3d 196, 200 (7th Cir. 1995) (finding that district court did not abuse its discretion in refusing discovery on discretionary function exception given that the second part of the discretionary function exception test does not depend on whether employees actually considered policy factors).

While Plaintiffs argue that the Navy has exclusive possession of unspecified “relevant documents,” extensive information regarding Navy operations at the AFWTF is publicly available as evidenced by Plaintiffs’ opposition. The Navy’s operations at the AFWTF have been the subject of litigation in several previous lawsuits, going back over twenty years. *See, e.g., Abreu v. United States*, 468 F.3d 20 (1st Cir. 2006); *Romero-Barcelo v. Brown*, 643 F.2d 835 (1st Cir. 1986). Indeed, substantial information regarding the Navy’s operations at the AFWTF, and environmental investigations there, is in the public domain. The Navy and the

EPA have websites containing information regarding access to most, if not all, of the potentially relevant documents pertaining to the history of environmental compliance by the Navy at Vieques.^{8/} Also, EPA maintains repositories of potentially relevant documents in New York and San Juan, and there is a repository of such documents at the public library on Vieques. As Plaintiffs concede (Pl. Opp. 32), in *Rivera-Acevedo*, this Court denied the plaintiffs’ requested discovery regarding application of the discretionary function exception to claims alleging negligent acts and omissions with respect to the Navy’s operations of the AFWTF. 2005 WL 5610230, at *7. Among other things, the Court reasoned “[i]n light of the extensive information available in the public domain relating to the Navy’s mission on Vieques over the past several decades, this court concludes that additional discovery would do very little, if anything, to further enlighten the question of subject matter jurisdiction” *Id.*

Plaintiffs’ argument for discovery is akin to the unsuccessful argument they made regarding venue discovery before the District Court for the District of Columbia. *Sanchez v. United States*, 600 F. Supp. 2d 19, 23 (D.D.C. 2009). There, the court found that Plaintiffs failed to offer more than “rank speculation” that they would find relevant information in discovery, and “such discovery would amount to ‘nothing more than a fishing expedition.’” *Id.* (quoting *Bastin v. Fed. Nat’l Mortgage Ass’n*, 104 F.3d 1392, 1396 (D.C. Cir. 1997)). Moreover, as with the discovery that Plaintiffs request here, the court found that Plaintiffs’ requested discovery on venue would not help Plaintiffs prevail on the motion. 600 F. Supp. 2d at 23.

^{8/} See, e.g., <http://public.lantops-ir.org/sites/public/vieques/default.aspx> (Navy website regarding environmental investigations related to Navy operations on the Island of Vieques); <http://www.epa.gov/region02/vieques/> (EPA website regarding environmental work on the Island of Vieques); <http://www.atsdr.cdc.gov/sites/vieques/vieques.html> (Agency for Toxic Substances and Disease Registry website relating to Navy operations on the Island of Vieques).

V. Plaintiffs Have Failed To Offer Any Justification For Departing From Prior Binding Precedent Applying The Discretionary Function Exception To Environmental Tort Claims Challenging The Navy's Conduct On Vieques.

Despite Plaintiffs' attempts to show "fundamental differences" between their lawsuit and the previous decisions of the First Circuit and this Court in *Abreu* and *Rivera-Acevedo*, respectively (Pl. Opp. At 8-9), the principles articulated in those decisions apply equally to foreclose Plaintiffs' lawsuit here. Under those decisions, to overcome the discretionary function exception, Plaintiffs must identify provisions requiring a specific "course of conduct" and cannot rely upon environmental statutes that foreclose private damage remedies. Moreover, any alleged violations must be related to the alleged damages. Finally, as was found in those decisions, the Navy's conduct on Vieques was grounded in important policy considerations, involving national security, safety, secrecy and public health; this applies whether that conduct involved waste disposal, public access to land, or disseminating information to the citizens. Under these principles, Plaintiffs have clearly failed to establish jurisdiction for their claims in this case. If anything, by referencing high-level government policy makers involved with Vieques in their FAC (See U.S. Br. at 31-32, citing FAC ¶¶16, 17, 24, 26), Plaintiffs have demonstrated even more why the discretionary function exception must foreclose their claims to prevent judicial second-guessing of government conduct that is susceptible to policy analysis.

CONCLUSION

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

Dated: July 1, 2009

Respectfully submitted,

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