

exercises on the Island, which would be shielded by the discretionary function exception to the Federal Tort Claims Act (FTCA). In so doing Defendant misleads the Court. The object of the Plaintiffs' lawsuit is to compensate them for years of both physical injury and mental pain and suffering caused by Defendant's negligent failure to comply with environmental laws and failure to warn the people of Vieques of the harmful heavy metals and other toxins that they were exposed to as a result of Defendant's actions. As the Plaintiffs will show herein, while the decision to conduct live fire naval training on Vieques may have included some decisions grounded in public policy and shielded by the discretionary function, the multiple failures of the Defendant to comply with specific, mandatory environmental regulations and the Defendant's failures to warn the people of Vieques of the harmful effects of toxins released into the air, water and ground of the Island are not protected by the discretionary function exception of the FTCA.

II. THE ENVIRONMENTAL CONSEQUENCES OF THE MILITARY'S ACTIVITIES ON VIEQUES

As addressed by Defendant, the United States Court of Appeals for the First Circuit has previously described the history of the Atlantic Fleet Weapons Training Facility (AFWTF) located on Vieques. *See generally 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). For the sake of brevity Plaintiffs will not restate the basic facts behind the Navy's presence and training exercises on Vieques.

Plaintiffs would be amiss however if they failed to address the environmental contamination that has resulted from Defendant's use of the Island of Vieques, and the resultant harm that contamination has caused the people who live on the Island, which the Defendant has not addressed.¹ On February 11, 2005, the United States Environmental Protection Agency

¹ A concise summation of the environmental impacts of Navy training on Vieques is attached as Exh. 1.

(EPA) added portions of Vieques to the Superfund National Priorities List. For more than thirty years prior environmental alarms have been sounding in Vieques, yet the civilian inhabitants were provided no warnings of the harms to which they were exposed. In 1978, a water quality survey was conducted by the Navy which detected high levels of zinc and lead in the surface water in eastern Vieques.² The same study revealed the presence of RDX – a toxic component of military explosives – in several drinking water supply sources on civilian land.³

On October 20, 1984, the United States EPA issued a National Pollutant Discharge Elimination System (NPDES) Permit No. PRG990001 to the United States Navy’s AFWTF.⁴ The NPDES permit regulates the Navy’s discharge of stray ordnance during training exercises within a specified geographic area in the waters near Vieques.⁵ On October 11, 1983 the Commonwealth of Puerto Rico Environmental Quality Board (EQB) issued a Water Quality Certificate to the Navy which was incorporated into its 1984 NPDES permit. Among the requirements imposed on the Navy in its NPDES permit by the Commonwealth was that the Navy meet either of the following limitations: “(1) Water quality-based numerical limits, as required by the Puerto Rico EQB Certification of October 11, 1983 which assured compliance with EQB’s water quality standards, as provided by Section 401(d) of the Clean Water Act; or (2) natural background concentrations (NBCs), whichever concentration is higher.”⁶ The permit also required that “at no time shall the maximum values contained in the effluent exceed the water quality standards after mixing with the receiving water.”⁷

² Exh. 1, at 1.

³ *Id.*

⁴ Authorization to Discharge Under the NPDES, 49 Fed. Reg. 43,585 (Oct. 30, 1984), attached hereto for the Court’s convenience as Exh. 17.

⁵ Exh. 2 at Page 1.

⁶ Exh. 2 at Page 1.

⁷ *Id.*

By August 27, 1999 the EPA had determined that the Navy had violated its NPDES permit conditions. In attachments to a letter to Frank Rush, Assistant Secretary of Defense, dated August 27, 1999, William L. Muszynski, Deputy Regional Administrator for the EPA-Region II stated that “[f]or the period 1994 through April 1999, based upon the Navy’s DMRs [Discharge Monitoring Reports], EPA has documented **102 exceedances of the water quality-based permit limits . . .**”⁸ Specifically, the EPA noted that the parameters which were violated were “boron, cadmium, chromium (hexavalent and total) copper, iron, lead, manganese, mercury, oil and grease, phenolics, selenium, silver, sulfide, and zinc”⁹ Alarming, the EPA also documented that due to monitoring deficiencies “[t]he potential for a greater number of actual violations exists than is evidenced in the DMRs.”¹⁰ On September 15, 1999 Captain J. K. Stark, Jr. the Commanding Officer of the U.S. Naval Site at Roosevelt Roads received formal notice from the EPA that the AFWTF “**has violated the Clean Water Act.**”¹¹

On February 19, 1999 two AV-8 Harrier aircraft fired at least 263 depleted uranium (DU) 25mm rounds on Vieques. Each 25mm round contained 148 grams of DU in the form of a pencil shaped penetrator.¹² The firing of depleted uranium shells violated the Navy’s Master Material License No. 40-23648-01NA; Title 10 CFR, Part 20 (1999); and the Naval Radioactive Material Permit No. 13-00164-L1NP.¹³ As of 2001 only 116 of the 263 radioactive DU rounds had been found and removed. A study conducted in the area surrounding where the DU rounds were recovered in 1999 revealed significantly higher than background radiation levels about a mile

⁸ *Id.* at Page 2 (emphasis added).

⁹ *Id.* at Page 3.

¹⁰ *Id.*

¹¹ Exh. 3 (emphasis added).

¹² Plaintiffs’ FAC ¶7190.

¹³ Plaintiffs’ FAC ¶7191.

from where the DU was fired, suggesting DU has been used on several other occasions on Vieques in violation of federal law.¹⁴

Between April 1999 and May 2000 intensive soil analysis was carried out by several independent researchers. These studies revealed high levels of arsenic, barium, cadmium, chromium, cobalt, copper, lead, nickel, tin, vanadium, zinc, and cyanide in the soil. These same metals are found in munitions and targets used by the Navy in Vieques.¹⁵ Dr. Arturo Massol-Deyá and radiochemist Elba Diaz conducted a study in February and March of 2000 which found high levels of cadmium, cobalt, nickel, and manganese in violin crabs; the metal concentrations found were above levels considered excessive.¹⁶ Further studies conducted in 2000 and 2001 found that vegetables and crops growing in some areas of Vieques were highly contaminated with lead, cadmium, copper and other metals.

In 2003-2004 Dr. James W. Porter conducted a study of the sediment, water, and selected marine invertebrates and fish in the vicinity of corroding underwater unexploded munitions (UXO) on coral reefs off the eastern end of Vieques.¹⁷ The results of Dr. Porter's study revealed the UXO is leaking six known carcinogens in levels which exceed EPA's allowable Risk-Based Concentrations for both fish and water.¹⁸ In addition to finding known carcinogens in the water and sediment, Dr. Porter found the carcinogens in the living organisms of the reef, including: coral, sea urchins, feather duster worms, and fish.¹⁹ Furthermore, lobster found at the site contained arsenic in levels which were more than two orders of magnitude above the EPA Risk-Based Concentration Guideline.²⁰ The carcinogens Dr. Porter found in the water, sediment and

¹⁴ Exh. 1, at 1.

¹⁵ *Id.*

¹⁶ *Id.* at 1-2.

¹⁷ Porter Affidavit, Exh. 4.

¹⁸ *Id.*

¹⁹ *Id.* 4.

²⁰ *Id.* 4.

reef organisms are man-made and never found in the natural world except as leachate from man-made explosives.

Dr. Arturo Massol-Deyá, as biologist, has directed several scientific studies pertaining to heavy metal accumulation in terrestrial and marine plants collected at the AFWTF.²¹ His studies found the accumulation of heavy metals above normal and safe levels in plants, crops, marine, plants, and other bioindicator species in the ecosystem.²² Some of his specific findings show that plants in Vieques had 10 times more lead and 3 times more cadmium than samples from mainland Puerto Rico, as well as excessive amounts of nickel, cobalt, magnesium, and copper.²³ These elevated levels have no natural explanation. At the AFWTF inner range, crabs contained 10 to 20 times more cadmium in their tissue than crabs from the east and west coast of the United States.²⁴ Goats, which grazed on the AFWTF's contaminated grasslands, contained 5-7 times more cadmium, 6 times more cobalt, and 5 times more aluminum than goats on the Puerto Rican mainland.²⁵ Dr. Massol-Deyá has concluded from his field studies in Vieques that heavy metals are being actively mobilized through the base of the food chain and being passed to higher ecological groups within the food chain.²⁶

Despite knowledge of the heavy metal contamination which pervaded the Island, the Navy not only did not warn, but facilitated the mechanisms by which the people of Vieques were exposed to these toxins. The Navy's discharge monitoring reports for Vieques indicate that at least since 1984 the Navy had knowledge of a number of known toxins including arsenic, cadmium, lead, mercury and others which exceeded its NPDES permit levels. Nonetheless, the

²¹ Massol-Deyá Affidavit Exh. 5.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

Range Manual for the Atlantic Fleet Weapons Training Facility provided for inner range closure two times a week so the local commercial fishermen could collect their fish traps from the contaminated water.²⁷ Furthermore, the range manual acknowledged the presence of fish traps off the eastern half of Vieques. Yet despite this knowledge no warnings were provided to the fishermen of the dangers of eating fish from these waters.²⁸ The Navy further facilitated the exposure of the Plaintiffs to these carcinogenic toxins by allowing local farmers to graze their cattle on the eastern part of Vieques from 1984 to 2000 in vegetation known to contain dangerous toxins including lead, mercury and cadmium.²⁹

Dr. John Wargo, a Professor of Risk Analysis and Environmental Policy at Yale University, has studied the environmental impacts of the Navy's operations on Vieques since 2003.³⁰ Specifically, Dr. Wargo has investigated the potential for human exposure to the environmental contaminants via food, water, and air.³¹ Dr. Wargo's studies have indicated many of the Plaintiffs have elevated levels of mercury in their hair samples, and many also have more than one contaminant in their hair samples.³² Other contaminants commonly found are lead, cadmium, and arsenic.³³ Dr. Wargo's studies recognize the high level of contamination in the waters off the eastern shores of Vieques which happen to contain some of the Island's best fishing sites.³⁴ Moreover, as many of the Plaintiffs consume fish regularly, fish intake is a likely explanation of the presence of toxic chemicals in many of the Plaintiffs.

For over ten years Dr. Carmen Ortiz Roque has studied the heavy metal contamination present in the people of Vieques as well as the pathways by which they were exposed to these

²⁷ Range Manual, Exh. 6 at H-1.

²⁸ Exh. 6 at 4-3.

²⁹ Exh. 7 at 264.

³⁰ Wargo Affidavit, Exh. 8.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

elements.³⁵ Dr. Ortiz Roque's studies have found heavy metal contamination to be pervasive in the people of Vieques. Her studies revealed the Plaintiffs' hair contained toxic levels of mercury, lead, aluminum, and cadmium.³⁶ In epidemiological studies Dr. Ortiz Roque found Vieques had a 55% higher infant mortality rate; 33% more low birth-weight babies and pre-term deliveries; 30% higher rate of cancer; 381% higher rate of hypertension; 95% higher rate of cirrhosis; and a 41% higher rate of diabetes than the rates found on the main island of Puerto Rico located just a few miles away.³⁷ Dr. Ortiz Roque's studies concluded the human population of Vieques has been exposed to metabolized toxic substances that are generated by military activities on Vieques. In addition to the epidemiological studies, Dr. Ortiz Roque personally examined the medical records of 2000 of the Plaintiffs and oversaw medical review of over 3000 individual medical files examined by numerous doctors from Puerto Rico, who opined as to which illnesses were caused by the military contamination on the Island providing the basis of this lawsuit. The medical records were collected over a period of three years from medical providers in Vieques, Fajardo, and throughout Puerto Rico, and they establish a causal connection between the health problems of the Plaintiffs and the heavy metal contamination from the AFWTF.

III. PLAINTIFFS' CLAIMS ARE UNIQUE AND DEFENDANT'S RELIANCE UPON *ABREU* IS MISTAKEN

Throughout the course of this litigation Defendant has sought to argue the Plaintiffs' claims are foreclosed by the United States Court of Appeals for the First Circuit's decision in

³⁵ Ortiz Affidavit Exh. 9.

³⁶ *Id.*

³⁷ *Id.*

Abreu v. United States, 468 F.3d 20 (1st Cir. 2006).³⁸ Fundamental differences exist which distinguish the present case from the *Abreu* decision, and reveal the flaws in any attempted comparison between the two.

The *Abreu* plaintiffs filed suit against the United States under the FTCA and alleged that as a result of the Navy's military exercises and disposal activities on the Island the plaintiffs suffered "physical injuries in the nature of emotional distress, fear, mental anguish and suffering . . ." *Rivera-Acevedo v. United States*, Nos. 04-1232, 04-1372, 2005 WL 5610230 *1 (D.P.R. April 25, 2005). In so pleading the *Abreu* plaintiffs did not allege the Navy's activities on Vieques resulted in documented physical harm to the plaintiffs; rather, they alleged the Navy's activities caused them to suffer emotional distress, fear, mental anguish and suffering. This distinction is central to why the *Abreu* case was dismissed.

After the filing of the *Abreu* complaint the United States filed a motion to dismiss for lack of subject matter jurisdiction and argued the plaintiffs' claims were barred by the discretionary function exception of the FTCA. In an effort to oppose the United States' motion to dismiss, the *Abreu* plaintiffs alleged violations of certain environmental regulations and statutes including: Resource Conservation and Recovery Act (RCRA) based on the Navy's failure to secure a final permit to operate the open burning/open detonation facility; the Clean Water Act (CWA) for not having a valid National Pollutant Discharge Elimination System (NPDES) permit to discharge ordnance over the ocean; the Endangered Species Act (ESA); and the federal Noise Control Act (NCA) by failing to comply with Puerto Rico's Noise Prohibition

³⁸ *Abreu* consists of two separate cases filed in the United States District Court for the District of Puerto Rico which were later consolidated. *Rivera-Acevedo v. United States*, No. 3:04-cv-01232; *Abreu v. United States*, No. 3:04-cv-1372.

Act of 2001.³⁹ The district court addressed the alleged violations and found in each instance either that no violation actually occurred or if there was a violation, it could not have caused the plaintiffs' injuries. *Id.* at *8. Specifically, as pointed out by the Defendant in its present motion to dismiss, the *Abreu* Court noted that even if there was a violation of a mandatory regulation, the plaintiffs could not show 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.

On appeal the First Circuit upheld the lower court's ruling. *Abreu*, 468 F.3d at 23. The First Circuit rejected plaintiffs' claims that the Navy did not hold a valid NPDES permit during the relevant time period and plaintiffs' contention that the Navy operated an open burning/open detonation facility without a valid RCRA permit. *Id.* at 28-29. Finally, the First Circuit rejected the plaintiffs' argument that the Navy violated the Federal Noise Control Act. *Id.* at 33. As such, the precedential value of *Abreu* is extremely limited as the plaintiffs therein maintained their fear and fright was the result of the failure of the Navy to have valid permits under these laws as well as violations of the federal NCA, which are claims that are not present in this case.

The Plaintiffs before this Court, unlike the *Abreu* plaintiffs, have alleged in their complaint that the violation of certain federal environmental laws has resulted in their negligent exposure to numerous toxic substances which has caused them harm both in the form of and in the increased risk of cancer, diabetes, cirrhosis, hypertension, and every disease caused by heavy metal contamination, which are claims that the *Abreu* plaintiffs did not make. Moreover, Plaintiffs have documented scientific evidence that the heavy metals and other toxins, which are

³⁹ The *Abreu* plaintiffs conceded to the United States that "the use of Vieques for military purposes 'has been susceptible to policy considerations of the most fundamental kind . . .'" *Rivera-Acevedo*, 2005 WL 5610230 at *3. This is a key concession which was made in the previous lawsuit. For the reasons stated *infra* while the decision to use Vieques for training exercises was discretionary conduct that was susceptible to policy analysis, the failure of the Navy to warn the citizens of Vieques of the harmful contaminants to which they were exposed was not a decision that was susceptible to policy analysis and thereby not afforded protection under the discretionary function exception.

found in their hair in elevated concentrations, are the very same chemicals the Navy repeatedly discharged in the waters surrounding Vieques in levels which violated the mandatory terms of the Navy's NPDES permit. Indeed, the United States District Court for the District of Columbia acknowledged that while the Plaintiffs herein have alleged some claims which are similar to those raised in *Abreu*, they "also allege numerous other claims that are beyond the ambit of the *Abreu* decision, including failure to warn and negligent maintenance." *Sanchez ex rel. Riveria-Sanchez v. U.S.*, 600 F.Supp.2d 19, 23 (D.D.C. 2009). Accordingly, this Court should reject Defendant's suggestions that the First Circuit's *Abreu* decision forecloses any recovery for Plaintiffs herein.

STANDARD OF REVIEW

Defendant has challenged Plaintiffs' Amended Complaint with a motion to dismiss based upon lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). The standard of review for a motion to dismiss pursuant to Rule 12(b)(1) varies depending on the legal basis of the motion. If a party "dispute[s] the predicate facts allegedly giving rise to the court's jurisdiction, the district court will often need to engage in some preliminary fact-finding." *Skwira v. U.S.*, 344 F.3d 64, 71-72 (1st Cir. 2003). In such a situation the district court "enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction." *Id.* at 72. (*quoting Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001)). The First Circuit has cautioned that "[i]n certain situations, the predicate facts can be so inextricably linked to the merits of the controversy that the district court should 'defer resolution of the jurisdictional issue until the time of trial.'" *Id.* at 72 n.10 (*quoting Valentina*, 254 F.3d at 364 n. 3).

The Third Circuit has discussed this sliding scale standard of review of motions to dismiss for lack of subject matter jurisdiction in cases brought under the Federal Tort Act Claims (“FTCA”). *Gould Elec. Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000). The court explained that challenges to subject matter jurisdiction under Rule 12(b)(1) can be facial or factual in form. *Id.* at 176. A facial challenge attacks the complaint on its face. If such an attack is made the court must consider the complaint’s allegations and do so in the light most favorable to the plaintiff. *Id.* On the other hand, a factual challenge contests the existence of subject matter jurisdiction apart from any pleadings. *Id.* A court which considers a factual challenge is “free to weigh the evidence and satisfy itself as to the existence of its power to hear the case,” even when disputed material facts exist. *Mortenson v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977).

In a factual challenge, the plaintiff has the burden of persuasion to show that jurisdiction exists. *Gould*, 220 F.3d at 178. If the defendant presents evidence contesting any of the allegations in the pleadings, the presumption of truthfulness does not attach to the plaintiff’s allegations and the plaintiff may present facts by affidavit or deposition or in an evidentiary hearing. *Id.* at 177. “[I]f there is a dispute of material fact, the court must conduct a plenary trial on the contested facts prior to making a jurisdictional determination.” *Id.* However, when deciding a factual challenge under Rule 12(b)(1) the court “must demand *less* in the way of jurisdictional proof than would be appropriate at a trial stage.” *Mortenson*, 549 F.2d at 892 (emphasis added).

The Supreme Court has cautioned that dismissal of a complaint for lack of subject matter jurisdiction is warranted “only when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal

controversy.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (citations omitted). Indeed, the Court instructed that a district court has jurisdiction over a case “unless the claim ‘clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is insubstantial and frivolous.’” *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

ARGUMENT

I. THE DISCRETIONARY FUNCTION EXCEPTION DOES NOT APPLY IN THIS CASE BECAUSE DEFENDANT’S ACTIONS VIOLATED SPECIFIC MANDATORY DIRECTIVES AND WERE NOT SUSCEPTIBLE TO POLICY CONSIDERATIONS

The United States may be sued in tort only to the extent that Congress has waived sovereign immunity. *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 475 (1994). The Federal Tort Claims Act (“FTCA”) generally authorizes suits against the United States for damages:

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.

28 U.S.C. § 1346(b).

The FTCA provides a waiver of the federal government’s sovereign immunity subject to certain exceptions. *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984). Among the statutory exceptions to the FTCA’s waiver of sovereign immunity is the discretionary function exception. This exception prohibits a waiver of sovereign immunity for claims “based upon the exercise or performance or failure to exercise or perform a discretionary duty . . . whether or not that discretion is abused.” 28 U.S.C. § 2680(a). The discretionary function 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." *Varig Airlines*, 467 U.S. at 808.

The discretionary function exception insulates from tort suit liability governmental actions and decisions which are unconstrained by mandatory and specific regulations and statutes and are grounded in consideration of public policy. *United States v. Gaubert*, 499 U.S. 315, 323 (1991). The Supreme Court has articulated a two-pronged test to determine whether the government's conduct falls within the discretionary function exception: (1) whether the alleged wrongful government conduct violated a specific and mandatory regulation or statute, and thus the government lacked discretion; and (2) if not, whether the governmental action challenged was susceptible to being based upon social, economic, or political policy considerations. *Gaubert*, 499 U.S. at 325.

As such, the discretionary function exception will not apply "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S. 536. In such a case there is no discretionary conduct for the discretionary function exception to protect.

On the other hand, even in the absence of a statutory directive the court must "determine whether the judgment is the kind that the discretionary function exception was designed to shield." *Id.* As the Court explained the exception was premised upon Congress' desire 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." *Id.* at 536-37 (quoting *Varig Airlines*, 467 U.S. at 814). Accordingly, the exception **only** protects

“governmental actions and decisions based on considerations of policy.” *Id.* “The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of government activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of private laws.” *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955). In construing the FTCA and the discretionary function exception courts should not act “as a self-constituted guardian of the Treasury [to] import immunity back into a statute designed to limit it.” *Id.*

Therefore, in order “for a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.” *Gaubert*, 499 U.S. at 324-25.

Liability attaches under the FTCA against the government for harms caused “if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b). Accordingly, the civil law of the Commonwealth of Puerto Rico determines here whether Defendant, “if a private person”, would be liable to Plaintiffs for their injuries. The law of negligence in Puerto Rico is found in the Civil Code which provides “[a] person who by an act or omission causes damage to another through fault or negligence shall be obligated to repair the damage so done.” Art. 1802 P.R.C.C., 31 L.P.R.A. § 5141. In their First Amended Complaint Plaintiffs allege numerous acts of negligence on the part of Defendant including: negligently exposing them to toxic materials; negligently maintaining their facilities; negligently failing to monitor the environmental impacts of the hazardous materials and negligently failing to warn the Plaintiffs of the harms to which they were exposed. FAC ¶¶ 7181-7211. The Plaintiffs’ allegations in their FAC fall outside the

discretionary function exception as Defendant's actions violated specific, mandatory directives and were not based upon policy considerations.

A. DEFENDANT'S ACTIVITIES ON VIEQUES HAVE VIOLATED MANDATORY DIRECTIVES

Defendant's violation of multiple mandatory regulations creates subject matter jurisdiction for the Court. "[I]f the [defendant] violates a mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." *Gaubert*, 499 U.S. at 324. Thus, when a statute or regulation "clearly and specifically define[s] what the employees are to do" violation of that statute or regulation prevents the government from invoking the protections of the discretionary function exception. *C.R.S. by D.B.S. v. United States*, 11 F.3d 791, 799 (8th Cir. 1993).

1. *Defendant repeatedly failed to comply with its NPDES permit and thereby violated the terms of its permit and the Clean Water Act*

Defendant's reluctance to confront Plaintiffs' allegations⁴⁰ of over 102 violations of the CWA act is understandable as Defendant cannot escape the fact that the NPDES permit was a mandatory directive that the Navy repeatedly violated and the Navy's violations have been shown to have caused the Plaintiffs' injuries.

On October 20, 1984, the EPA issued NPDES Permit No. PRG990001 to the United States Navy AFWTF facility. 49 Fed. Red. 43,585 (Oct. 30, 1984). The NPDES permit regulated the Navy's discharge of stray ordnance during training exercises within a specified geographic area in the waters near Vieques.⁴¹ Among the requirements imposed on the Navy in its NPDES permit was that the Navy meet either of the following limitations: "(1) Water quality-

⁴⁰ In its motion to dismiss, Defendant only addresses Plaintiffs' allegations in a footnote by arguing that the Navy had a valid NPDES permit that allowed it to discharge pollutants into the waters off the eastern end of Vieques. Defendant's Motion to Dismiss, at 24, n. 8. Defendant fails to address, however, the Plaintiffs' allegations which do not concern whether or not the Navy's permit was valid, but whether or not Defendant complied with that permit, and Plaintiffs' complaint alleges at least 102 instances of Defendant's failure to comply with its permit.

⁴¹ Exh. 2 at Page 1.

based numerical limits, as required by the Puerto Rico EQB Certification of October 11, 1983 which assured compliance with EQB's water quality standards, as provided by Section 401(d) of the Clean Water Act; or (2) natural background concentrations (NBCs), whichever concentration is higher."⁴² The permit also required that "at no time shall the maximum values contained in the effluent exceed the water quality standards after mixing with the receiving water."⁴³

By August 27, 1999 the EPA determined that the Navy had violated its NPDES permit conditions over 102 times. In correspondence dated August 27, 1999, the EPA noted its findings that "[f]or the period 1994 through April 1999, based upon the Navy's DMRs, EPA has documented **102 exceedances of the water quality-based permit limits . . .**"⁴⁴ Specifically, the EPA noted that the parameters which were violated were "boron, cadmium, chromium (hexavalent and total) copper, iron, lead, manganese, mercury, oil and grease, phenolics, selenium, silver, sulfide, and zinc"⁴⁵ Moreover, due to monitoring deficiencies "[t]he potential for a greater number of actual violations exists than is evidenced in the DMRs."⁴⁶

In addition to the Navy's effluent violations which the EPA found in 1999, the EPA further found the Navy was in violation of the monitoring requirements of its NPDES permit. During August 17-19, 1999 the EPA conducted a site inspection of the AFWTF to assess the Navy's compliance with its NPDES permit. The EPA discovered numerous reporting and monitoring violations during its inspection.

During the site inspection the EPA found three salt flats which are waters of the United States based upon the National Wetlands Inventory Map and are therefore regulated under the

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at Page 2.

⁴⁵ *Id.* at Page 3. A complete list of the Navy's effluent violations is attached as Exh. 11.

⁴⁶ *Id.*

Navy's NPDES permit.⁴⁷ Despite observation of numerous holes on the ground indicating ordnance had fallen on the salt flats, the Navy failed to take samples within the salt flats as required by its NPDES permit. The EPA noted the NPDES required two samples per month to be taken when live ordnance struck the flats "even if no sea discharges occur and salt flat discharges do occur."⁴⁸

During the two quarters from August 1, 1997 through January 31, 1998 the Navy reported no samples were taken. Yet the EPA review of the Navy's water round report, which documented rounds that strike any water surface, noted 12 rounds of ordnance that struck the water on eight different days during the two quarters.⁴⁹ The Navy's NPDES permit required samples to be taken, and the failure of the Navy to take the required samples during that period violated the permit.

The Navy's Discharge Monitoring Reports (DMR) reveal another reporting violation during the period of November 1, 1998 through January 31, 1999. The DMRs do not record any ordnance discharges. The water round report shows, however, that ordnance was discharged on November 20, 1998, December 7, 1998 and December 11, 1998. The EPA advised "[f]ailure to monitor in accordance with permit conditions, by taking two samples on two different days when live ordnance strikes the water is a permit violation."⁵⁰ The EPA also noted that the Navy failed to take the required samples on April 10, 11, 15, 16, 17, 18, and 19 in 1999, in violation of its permit.⁵¹ Finally, the Navy also violated the terms of its NPDES, a mandatory directive, by discharging ordnance into the waters surrounding Vieques beyond its NPDES permit boundary.⁵²

⁴⁷ Exh. 10 at 2.

⁴⁸ Exh. 10, at 2.

⁴⁹ *Id.* at 4.

⁵⁰ *Id.* at 5.

⁵¹ *Id.* at 5.

⁵² Exh. 12.

As set forth above the Navy's NPDES permit allowed it to discharge certain effluents into the waters surrounding the eastern end of Vieques, the live fire facility. The Navy's NPDES permit however established maximum effluent limits, and requirements that the Navy sample the water surrounding any ordnance that was discharged into the water. The NPDES permit's requirements were both clear and specific, which means that either the Navy was in compliance with its terms or it was not. The EPA therefore had little trouble in finding that the Navy routinely violated the terms of its permit and did not demonstrate any capability to comply with its permit. *See Berkovitz*, 486 U.S. at 536 (“[W]hen a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow . . . the employee has no rightful option but to adhere to the directive.”) The violation of the mandatory directives found in the NPDES permit can not be protected by the discretionary function exception.

2. *Defendant conducted training exercises with depleted uranium in violation of specific mandatory directives*

The Navy has previously acknowledged that two AV-8 Harrier aircraft assigned to VMA-231 operating from the *USS Kearsarge* in support of the 26 Marine Expeditionary Unit fired at least 263 depleted uranium 25mm rounds on the live firing range on February 19, 1999. Each 25mm round contained 148 grams of depleted uranium in the form of a pencil shaped penetrator. The Navy's actions were in violation of its Master Material License No. 40-23645-01NA; Title 10 CFR, Part 20 (1999); and the Navy's Radioactive Material Permit No. 13-00164-L1NP.⁵³ It is beyond dispute that the Navy violated its licenses by using DU in this training exercise.

This was not the Navy's only violation of its licenses prohibition of the use of DU for a training mission in Vieques. In both 1999 and 2001 radiation measurements revealed significantly higher than background radiation levels in a civilian sector a mile from the site of

⁵³ Exh. 13.

the single acknowledged violation, supporting an inference that DU may have been used on several occasions.⁵⁴ Any use of DU would likewise be in violation of the applicable naval licenses and permits, and grounds for the Court to assert subject matter jurisdiction over this case.

3. *Upon information and belief Plaintiffs allege internal regulations were violated*

Plaintiffs further alleged Defendant's activities violated "internal guidelines, policies and mandatory directives," "mandatory internal environmental regulations," and "internal mandatory regulations, policies, directives and orders." FAC ¶¶ 9, 13, 31. Defendant takes issue with Plaintiffs' allegations on the grounds they are "too amorphous and ill-defined" to bring a suit outside the discretionary function exception. Defendant's Memorandum at 27. As described below, these allegations are sufficiently precise to allow the Court to conclude that actions of the Navy exceeded the scope of protection of the discretionary function exception to the FTCA.

The AFWTF range manual required documentation of either compliance with or violations of the range's environmental procedures. Moreover, the range manual contained many different specific mandatory directives, such as a directive prohibiting the intentional discharge of live ordnance into the water, and requiring pre-approval of all inert ordnance discharges.⁵⁵ Other policies included a prohibition on the discarding of refuse or bilge from Naval vessels while in the vicinity of Vieques.⁵⁶ The range manual included mandatory reporting requirements that will demonstrate either compliance with such mandatory directives or will document any reported violations of environmental policies. Plaintiffs will be unable to determine if any of these mandatory directives have been violated until discovery has been completed.

This discovery is especially important in the light of Plaintiffs' allegation that Defendants

⁵⁴ Exh. 1.

⁵⁵ Exh. 6 at H-3.

⁵⁶ Exh. 6 at H-4.

violated 32 C.F.R. § 700.832. FAC ¶ 15. This provision mandates that “[t]he commanding officer shall cooperate with Federal, state and local governmental authorities in the prevention, control and abatement of environmental pollution.” 32 C.F.R. § 700.832. Defendant’s attempt to brush this aside relies upon *Aragon v. United States*, which found that language from a different directive “vested discretion in the commanding officer” and was not specific or mandatory. 146 F.3d 819, 824 (10th Cir. 1998). The directive at issue in *Aragon* required the federal agencies to take action as may be practicable. Defendant’s Motion to Dismiss, at 25. 32 C.F.R. § 700.832 does not vest any discretion in the commanding officer with respect to its first two sentences: “shall cooperate” and “shall report”. Defendant then argues that this particular claim of Defendant’s violation of a mandatory directive is nonetheless non-viable because Plaintiffs do not describe how it is related to their claims for damages. Plaintiffs have attached several affidavits as exhibits that detail how environmental contamination caused their injuries. Further discovery is necessary to document Defendant’s violations of 32 C.F.R. § 700.832 so that they may be linked with the active mechanism that Plaintiffs have identified.

Plaintiffs also identify 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. This provision directs the Defendant to comply with numerous other specific environmental guidelines that do not give “latitude to make decisions and choose among alternative courses of action”. A violation of the specific directives that compose the environmental requirements that the Defendant is required to comply with, as a result of this provision, provide the “specific

course of conduct” that the Defendant argues is lacking in OPNAVINST 5090.1B, CH-20 § 20-5.1 itself.

The existence of the internal regulations and directives found in the range manual proves that such regulations exist. Plaintiffs are entitled to plead them generally until discovery is completed and the precise nature of the regulations and the full extent of the Navy’s compliance with or violation of these regulations is known. *See* Fed. R. Civ. P. 8.

4. *Defendant’s violations caused Plaintiffs’ injuries*

Plaintiffs have identified many examples of actions by Defendant that violated mandatory directives, which cannot be shielded from litigation by the discretionary function exception. The only remaining question is whether the Navy’s violations caused the Plaintiffs injuries. In other words, the alleged violation must have a causal nexus to injuries at issue. *Fisher Bros. Sales Inc. v United States*, 46 F3d 279, 285-88 (3d Cir. 1995). As detailed *supra* Plaintiffs have established that the toxic chemicals found in the waters off the eastern shores of Vieques as a result of the Navy’s violations of mandatory directives have traveled up the food chain and are now found in many of the Plaintiffs’ bodies.

Dr. Porter’s study of the sediment, water, and selected marine invertebrates and fish in the vicinity of corroding UXO on coral reefs off the eastern end of Vieques revealed the UXO is leaking six known carcinogens in levels which exceed EPA’s allowable Risk-Based Concentrations for both fish and water.⁵⁷ These carcinogens were found in the water, the sediment and the living organisms of the reef, including fish and lobsters.⁵⁸ These carcinogens

⁵⁷ Porter Affidavit, Exh. 4.

⁵⁸ *Id.*

are man-made and never found in the natural world except as leachate from man-made explosives.⁵⁹

Dr. Massol-Deyá's studies found the accumulation of heavy metals above normal and exceeding safe levels in plants, crops, marine, plants, and other bioindicator species in the ecosystem.⁶⁰ This included findings that plants in Vieques had 10 times more lead and 3 times more cadmium than samples from mainland Puerto Rico, as well as excessive amounts of nickel, cobalt, magnesium, and copper.⁶¹ These elevated levels have no natural explanation. Crabs found at the bombing range on Vieques contained 10 to 20 times more cadmium in their tissue than crabs from the east and west coast of the United States.⁶² Goats, which grazed on the contaminated grasslands, contained 5-7 times more cadmium, 6 times more cobalt, and 5 times the aluminum than goats on the Puerto Rican mainland.⁶³ Dr. Massol-Deyá concluded from his field studies that heavy metals are being actively mobilized through the base of the food chain and being passed to higher ecological groups within the food chain.⁶⁴

Dr. Ortiz Roque's studies have found heavy metal contamination to be pervasive in the people of Vieques. Her studies revealed the Plaintiffs' hair contained toxic levels of mercury, lead, aluminum, and cadmium.⁶⁵ As a result of these elevated levels of toxic compounds the people of Vieques have a 55% higher infant mortality rate; 33% more low birth-weight babies and pre-term deliveries; 30% higher rate of cancer; 381% higher rate of hypertension; 95% higher rate of cirrhosis; and a 41% higher rate of diabetes than the rates found on the main island

⁵⁹ *Id.*

⁶⁰ Massol-Deyá Affidavit, Exh. 5.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Ortiz Affidavit, Exh. 9.

of Puerto Rico located just a few miles away.⁶⁶ Dr. Ortíz Roque's studies concluded the human population of Vieques has been exposed to metabolized toxic substances that are generated by military activities on Vieques.

Defendant argues in passing that "Plaintiffs do not allege and cannot show any causal connection between a failure to follow a government directive and their alleged tort damages." Defendant Memorandum at 27. Defendant cites to the *Abreu* and *Rivera-Acevedo* decisions to support its contentions. Citation to these cases reveals Defendant's failure to comprehend the fundamental difference between the injuries suffered by these Plaintiffs and the *Abreu* and *Rivera-Acevedo* plaintiffs. The previous plaintiffs neither alleged, nor did they present proof of personal physical harm suffered as a result of the Navy's alleged violations; rather, they sought damages for mental injuries i.e. fear and fright.

As Defendant points out, this Court previously advised in *Rivera-Acevedo* that "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." *Rivera-Acevedo*, 2005 WL 5610230, at *6. This Court supported its decision in *Abreu* by finding that even if the plaintiffs could show Navy violations of the open burning and open detonation facility they could not show how those violations caused "fear of injury or property damage." Such is not the case here.

Plaintiffs have already demonstrated the Navy's actions on the eastern end of the Island violated the terms of its NPDES permit. During these violations effluents were released by the Navy into the waters surrounding Vieques which exceeded maximum permitted levels. Further, the EPA cited the Navy for violating its NPDES permit in failing to monitor and report DMRs as

⁶⁶ *Id.*

required under the permit. Thus, the potential for many more effluent violations exist. These present two of the main allegations of Plaintiffs' complaint: negligent failure to monitor, and negligent exposure to toxic materials. In failing to monitor and in releasing toxic chemicals into the waters off the eastern shore of Vieques Defendant violated a binding and mandatory directive. Furthermore, Dr. Porter, Dr. Massol-Deyá, and Dr. Ortíz Roque will be able to establish how the contaminants traveled through the food chain from the waters of the eastern shore, into the animals, and ultimately into the people themselves. As mentioned above, in contrast to the previous plaintiffs in *Abreu* and *Rivera-Acevedo*, approximately 1,124 of the plaintiffs herein have hair samples 984 of which have already tested positive for elevated and toxic levels of heavy metal contamination which includes lead, mercury, cadmium, arsenic, and aluminum.⁶⁷

Defendant's attempt to analogize the present Plaintiffs with those in a previous lawsuit is fundamentally flawed. The facts herein are that the Defendant has been found by the EPA to be in violation of its NPDES permit on numerous occasions, the Defendant has discharged DU at AFWTF on at least one (and possibly more) occasion in violation of its licenses, and the Plaintiffs have assembled a team of scientists who will be able to demonstrate the flow of the toxic materials from the waters off the eastern shore into the plant and marine life, the food chain, and the Plaintiffs themselves. Plaintiffs are not confronted with any causation problems and Defendant's contentions otherwise are without basis in law or fact.

B. THE NAVY'S FAILURE TO WARN THE PLAINTIFFS OF THEIR EXPOSURE TO TOXINS RELEASED BY THE NAVY WAS NOT SUSCEPTIBLE TO POLICY CONSIDERATION AND NOT WITHIN THE PROTECTION OF THE DISCRETIONARY FUNCTION EXCEPTION

Defendant responds to Plaintiffs' precise allegations by broadly arguing that the conduct of the government at AFWTF was susceptible to policy analysis and thus within the

⁶⁷ Hardin Affidavit, Exh. 14.

discretionary function exception. This is an attempt to conflate the narrow issues in Plaintiffs' complaint with the entire operation of the AFWTF, which invariably would be shielded by the discretionary function exception. Defendant intentionally recasts Plaintiffs' allegations in this effort to broaden the scope of the allegations and ensure that the Court will not pierce the Defendants' immunity. The question before the Court is not whether the *operation* of the AFWTF was a discretionary act but whether the Navy's failure to monitor and failure to warn the people of Vieques of their exposure to harmful and dangerous substances released by the Navy was susceptible to policy analysis and thereby discretionary. To which the only answer is an emphatic **No**. The precedent that guides this resolution makes clear that these failures are not protected by the discretionary function exception because they were not decisions that were susceptible to policy analysis.

Defendant knew from at least 1984 that the waters bordering the eastern shore of the Island contained elevated levels of heavy metals, including mercury, lead, cadmium, and arsenic. Indeed, from 1994 through 1999 alone the EPA cited Defendant for violating its own NPDES permit at least 102 times by exceeding maximum effluent levels. During that same time period the Navy had knowledge that Plaintiffs and commercial fishermen set fish traps off the eastern shore of the Island, which is well-documented by the AFWTF range manual that states the Navy closed the inner range every Tuesday and Friday from 0700Q – 0900Q “to permit local fishermen to retrieve fishing traps from adjacent waters.”⁶⁸ At the same time the Navy was documenting in its DMRs heavy metal effluent discharges off the eastern shore, which exceeded the permissible limits of its NPDES permit, the Navy was also facilitating fishing activities in the contaminated waters. Not only did the Navy fail to warn and fail to monitor its impacts on the

⁶⁸ Exh. 6 at H-1.

environment of Vieques, but it affirmatively **assisted** the exposure of the Plaintiffs to these dangerous and toxic substances. These activities were not susceptible policy analysis.

In addition to exposing Plaintiffs to dangerous toxins through the waters and fish off the eastern shore of Vieques, both causing illegal contamination and failing to warn of the dangers, Defendant poisoned the land and vegetation on the inner range in same manner. The lands and vegetation of the inner range are heavily contaminated with toxic heavy metals as documented by independent scientists. If it were not for the persistent contamination on the Island, Vieques would not have been declared a Superfund site. Nonetheless, from 1984 through 2000 “the US Navy allowed local farmers to graze cows in the eastern part of Vieques including at the AFWTF.”⁶⁹ By allowing local farmers access to the most contaminated eastern part of Vieques, Defendant once again not only allowed, but it facilitated agricultural activities in what Defendant knew to be a highly contaminated and highly toxic environment. In doing so Defendant undertook a duty to warn the Plaintiffs who consumed the livestock of the dangers to which they were knowingly exposed. These activities were not susceptible to policy considerations.

Thus, Plaintiffs ingested fish, wildlife, and agriculture which had been heavily contaminated as a result of Defendant’s violations of mandatory directives. Throughout this entire time, Plaintiffs were permitted access to the contaminated fishing waters and the contaminated pasture lands without any warnings from the Defendant, despite its knowledge of illegal discharges and failures to document further discharges. Defendant’s conduct is shielded by the discretionary function exception if the “governmental actions and decisions are based on

⁶⁹ Exh. 7 at 264.

considerations of public policy.” *Gaubert*, 499 U.S. at 323. The failure to warn the Plaintiffs of the harmful toxins to which they were exposed was not susceptible to policy considerations.⁷⁰

Defendant relies heavily upon *Loughlin v. United States*, 393 F.3d 155 (D.C. Cir. 2004), to support its position that “how to monitor, and whether to warn particularly in the context of military operations is fraught with public policy considerations.” Defendant’s Memorandum at 34. Defendant’s reliance upon *Loughlin* is misplaced. In *Loughlin* the plaintiffs brought a FTCA action against the United States for claims that the government failed to warn them of buried munitions in their neighborhood. Although a precise date is not given from the case, it appears the munitions were buried either during or shortly after World War I, decades before plaintiffs’ claims arose or before the government itself knew that toxic substances were contained in the buried munitions. *Id.* at 159-60. After finding the land contaminated with arsenic the Loughlins filed suit. While *Loughlin* involved a failure to warn claim of a toxic release from military munitions, *Loughlin* did not involve a situation where the military facilitated the individuals’ exposure to the toxic substances which distinguishes *Loughlin* and the other precedent relied upon by the Defendant from this case.

⁷⁰ The Navy’s pollution of Vieques with heavy metal and other toxins, and the deleterious effect those substances have had on the health of the people of Vieques is currently under congressional scrutiny. The House Committee on Science and Technology Subcommittee on Investigation and Oversight held a hearing on March 12, 2009 where committee members denounced the flawed public health assessment the Agency for Toxic Substances and Disease Registry (ATSDR) conducted on Vieques. Committee member and Congressman Alan Grayson of Florida called on the agency to “reassess the [Vieques] site, taking into account the various independent studies which show elevated health risks in the area . . . In Vieques, heavy metals poison the land and water. And the population carries this poison in its bloodstream. None of this is in dispute.” Victor Manuel Ramos, *Orlando Congressman: Cleanup “work in Vieques is flawed”*, Mar. 12, 2009, http://blogs.orlandosentinel.com/news_hispanicaaffairs/2009/03/orlando-congressman-cleanup-work-in-vieques-is-flawed.html.

In the March 12, 2009 hearing, in response to questioning from Congressman Steve Rothman of New Jersey the director of the ATSDR, Dr. Howard Frumkin, agreed to reopen and reassess what Congressman Rothman called the ATSDR’s “inadequate health assessments” of Vieques in order to conduct “a more and new reliable study” given the “health crisis that has been well documented by several independent studies and reports.” Congressman Rothman Gets Federal Government to Re-Open Investigation into Health of Vieques Residents, http://www.rothman.house.gov/index.php?option=com_content&task=view&id=1060&Itemid=1 (last visited June 11, 2009). Thus, Congress has recognized the wealth of evidence which correlates the Navy’s actions to the health of the people.

Defendant also relies upon a Ninth Circuit opinion that is inapplicable for similar reasons. *In re Consol. U.S. Atmos. Testing Litig.*, 820 F2d 982 (9th Cir. 1987), involved allegations of a failure to warn of radiation hazards from a nuclear testing program prior to 1977. Just as in *Loughlin* the *Atmospheric Testing Litigation* merely involved claims of individuals exposed to hazardous substances through their proximity to, in this case, a military testing facility. In neither *Loughlin* nor the *Atmospheric Testing Litigation* did the government facilitate and aid the respective plaintiffs in raising crops, grazing livestock, or fishing the waters, which were contaminated by its munitions. In the present case, Defendant not only knew the lands and waters were contaminated and that the Plaintiffs were fishing in the waters and raising crops and animals on the land, but the Defendant permitted and aided in allowing such activities to take place. In facilitating the Plaintiffs' exposure to these toxins, Defendant undertook a duty to warn them of the perils to which they were exposed.⁷¹

An analogous case which provides guidance is *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). *Indian Towing* involved claims made against the government for harms suffered when a tug went aground and a barge was damaged as a result of the negligent operation of a lighthouse by the Coast Guard. In finding the United States liable for failure to warn under the FTCA the Court stated the following:

The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning.

⁷¹ Unlike the defendants in *Loughlin* and *In re Consol. U.S. Atmos. Testing Litig.*, Defendant in the present case violated binding directives, and therefore Defendant's actions are not protected by the discretionary function exception.

Id. at 69. Similarly, in the present case the Defendant was not obliged to permit fishermen access to the fishing grounds off the eastern shore of the Island. Nor was the Defendant obliged to allow access to the AFWTF lands on the eastern end of the Island for grazing cattle and agricultural cultivation. Once Defendant permitted such access, the Defendant became obligated to warn Plaintiffs of the harms Defendant knew Plaintiffs were exposed to, especially when it had knowledge of their use of such lands and waters to obtain sustenance. The failure of the Defendant to exercise such care and to warn the Plaintiffs was not grounded in any public policy consideration and is therefore not afforded protection under the discretionary function exception.

The government's conduct herein is similar to that involved in *Andrulonis v. United States*, 952 F.2d 652 (2d Cir. 1991), wherein the Second Circuit found the discretionary function exception did not apply to the failure of a federal official to warn of hazards associated with the use of a rabies vaccine furnished by the federal government. Andrulonis, a bacteriologist, became tragically ill and suffered severe injuries when he contracted rabies while conducting a laboratory experiment. *Id.* at 653. The rabies strain used was provided by a government scientist from the Centers for Disease Control. *Id.* In finding the government's failure to warn to be outside the discretionary function exception, the Second Circuit stressed that *Gaubert* "protects only governmental actions and decisions based on *considerations of public policy*." *Id.* at 654. In order to be protected, the actions must involve both an element of choice and be grounded in social, economic, or political goals. *Id.* In rejecting the government's claims the court stated "it is hardly conceivable that the CDC would ever have a policy to keep silent about obvious, easily-correctable dangers in experiments using drugs supplied by the CDC." *Id.* at 655. It is inconceivable that the Navy, knowing the water off the shores of the eastern end of the Island where Plaintiffs were fishing was contaminated, and knowing the land which Plaintiffs

were given access to let their livestock graze was contaminated, made a policy decision to allow the people to unknowingly expose themselves to these dangerous substances.

In *Whisnant v. United States*, 400 F.3d 1177 (9th Cir. 2005), the plaintiff brought suit under the FTCA for a failure to warn customers of health hazards in a commissary, which it knew or should have known about. Whisnant sought compensation for injuries sustained when he was exposed to a toxic mold in the meat department of the commissary; safety reports had shown the presence of the mold approximately three years prior to Whisnant's exposure. *Id.* at 1179. The Ninth Circuit advised "**matters of scientific and professional judgment—particularly judgments concerning safety—are rarely considered to be susceptible to social, economic, or political policy**" and went on to find Whisnant's claims were not barred by the discretionary function exception. *Id.* at 1181 (emphasis added)⁷². Providing warnings or health advisories to the Plaintiffs on the dangers of eating the fish, or preventing them from accessing the lands and waters bounding the inner range involves professional and scientific judgment, not decisions of social, economic, or political policy. Either the environment was safe enough to ingest the flora and fauna or it was not; such a decision is one grounded in science not public policy. Defendant's failure to warn of "an obvious health hazard is a matter of safety and not policy . . ." *Id.* at 1183.

The failures of the Defendant to monitor and warn the Plaintiffs of the dangers to which they were exposed –facilitated by Defendant – were not decisions susceptible to policy considerations.⁷³ The decision to allow Plaintiffs access to these lands and waters was grounded

⁷² "...In order to effectuate Congress's intent to compensate individuals harmed by government negligence, the FTCA, as a remedial statute, should be construed liberally, and its exceptions should be read narrowly." *Whisnant v. United States*, 400 F.3d at 1184 (citation omitted).

⁷³ The government is liable in tort, under the FTCA, "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Federal Courts across the Country have held that

in professional judgment and science as set forth in *Whisnant* and not in public policy. *Id.* at 1181. Thus, the discretionary function exception is inapplicable.

II. SHOULD THE COURT BE INCLINED TO GRANT DEFENDANT'S MOTION PLAINTIFFS REQUEST LIMITED JURISDICTIONAL DISCOVERY

Plaintiffs move for limited jurisdictional discovery in the event the Court is inclined to grant Defendant's motion to dismiss. "[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues." *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978). Where facts are in the exclusive possession of Defendant, discovery on jurisdiction or venue is appropriate. *Hansen v. Neumueller GmbH*, 163 F.R.D. 471, 475 (D. Del. 1995)(citing *Compagnie Des Bauxites de Guinee v. L'Union Atlantique S.A. D'Assurances*, 723 F.2d 357, 361 (3d Cir. Pa. 1983); *Doe v. Casey*, 601 F.Supp. 581, 584 (D.D.C. 1985).

Plaintiffs are aware that jurisdictional discovery was requested and denied in *Rivera-Acevedo v. United States*, Nos. 04-1232, 04-1372, 2005 WL 5610230 *1 (D.P.R. April 25, 2005). However, this Court is not bound by the previous court's decision and several factors herein weigh in favor of allowing plaintiffs limited jurisdictional discovery in lieu of dismissal. "Trial courts have broad discretion in determining the timing of pretrial discovery." *Dynamic Image Technologies, Inc. v. U.S.*, 221 F.3d 34, 38 (1st Cir. 2000); *see also Loughlin v. U.S.*, 393

that the government is not excepted from liability under the discretionary function exception to the FTCA for its breach of a duty to warn. See, e.g., *Angel v. United States*, 775 F.2d 132, 145 (6th Cir. 1985) (failure to warn of danger of high voltage wire); *Aretz v. United States*, 604 F.2d 417 (5th Cir. 1979) (failure to label substance as explosive); *Smith v. United States*, 546 F.2d 872 (10th Cir. 1976) (citing cases) (failure as landowner to post warning signs in national park); *Stephens v. United States*, 472 F. Supp. 998, 1009 (C.D. Ill. 1979) (same); *United States v. White*, 211 F.2d 79 (9th Cir. 1954) (failure of government as land owner to warn business invitee of danger from unexploded projectiles); *Pierce v. United States*, 142 F. Supp. 721 (E.D. Tenn. 1955), *aff'd*, 235 F.2d 466 (6th Cir. 1956) (failure to warn lineman of dangerous conditions in government-owned transmission facility); See also *Henderson v. United States*, 784 F.2d 942, 943 n. 2 (9th Cir. 1986) (safety decisions at government facility are operational in nature, and therefore not within the discretionary function exception); *Merklin v. United States*, 788 F.2d 172, 177 (3rd Cir. 1986) (duty of government as supplier of dangerous chattel to warn those who will foreseeably come in contact with the product of its inherent risks not within the exception).

F.3d 155, 167 (D.C. Cir. 2004)(“Jurisdictional discovery on the data that was available when a particular decision was made may be especially salient in the failure-to-warn context . . .”).

Over the years of its operation of the AFWTF, Defendant has displayed a reluctance to follow and adhere to environmental laws, and to apprise the Plaintiffs of the actual and potential harms to which they were repeatedly exposed. The Defendant’s reluctance was so pervasive that even other federal agencies, with their vastly superior resources and powers in comparison to the Plaintiffs, had difficulty receiving information from the Defendant.

On November 26, 2002, the EPA questioned the Navy regarding media reports that the Navy conducted chemical weapons tests on the beaches of Vieques in May of 1969 with the compound Tris (2ethylhexyl) Phosphate. The EPA requested that the Navy provide information regarding the use of Tris (2ethylhexyl) Phosphate on Vieques including: dates of testing, locations where tested, methods of delivery, quantities used, sampling done before and after test exercises, and DOD toxicity data for Tris (2ethylhexyl) Phosphate.⁷⁴ An EPA fact sheet states there are limited studies on the toxicity of Tris (2ethylhexyl) Phosphate; however, these studies identify it as a potential human carcinogen.⁷⁵

In January of 2008, Plaintiffs sent the EPA a FOIA request which resulted in the production of a substantial amount of information in the EPA’s file on the AFWTF. Notably absent from any documents received from the EPA is the Navy’s responses to any of EPA’s questions concerning Tris (2ethylhexyl) Phosphate. This information is especially relevant as the trade winds on Vieques blow from the live firing range on the east end of the Island where the munitions were used towards the civilian population. Thus, any chemical weapons dispersed would have been blown over the civilian populations. Needless to say, if the EPA did not know

⁷⁴ Exh. 15.

⁷⁵ Exh. 16.

of this occurrence in 2002 the Plaintiffs did not know of their exposure in 1969 and any subsequent years the chemicals were tested.

Other types of information which Plaintiffs seek in jurisdictional discovery, includes but is not limited to, the Navy's complete discharge monitoring reports which may demonstrate further violations of the CWA, and other environmental regulations, as well as environmental compliance, interpretations, or violation reports filed with the Naval Station Environmental Engineer at the Public Works Department pursuant to the range policies.⁷⁶

The facts of this case simply do not lend themselves to the application and the use of the discretionary function exception for the purpose of shielding the Defendant from discovery and forever keeping Defendant's negligent disregard for the value of human life in secrecy. Defendant cannot in good conscience argue to this Court that knowingly facilitating and negligently causing harm and injury to the lives and health of the Plaintiffs herein, who are residents of Vieques and citizens of the United States, falls within any conceivable definition of public policy.

Despite Plaintiffs' diligence in requesting information and their review of thousands of pages of documents regarding the Navy's activities on AFWTF, there remain numerous relevant documents which are in the exclusive possession of the Navy and not publicly available. Although Plaintiffs contend that based on the evidence now before this Court jurisdiction under the FTCA has been firmly established, should this Court be inclined to find otherwise Plaintiffs respectfully move for limited jurisdictional discovery to obtain further documents from the Defendant which will establish further grounds for this Court's jurisdiction.

⁷⁶ The AFWTF Range Manual forbids the "intentional discharge of live ordnance into the water . . ." and further provides "[i]nert ordnance discharges must be approved by AFWTF." Furthermore, range rules forbid naval vessels from discarding refuse overboard or pump bilge while in the vicinity of Vieques. Any violation of these internal range rules required a report which would be in the possession of the Naval Environmental Engineer, and would be further grounds for jurisdiction. See Exh. 6 at H-3, H-4.

CONCLUSION

Pursuant to the FTCA the United States has waived its sovereign immunity. Defendant's attempt to raise the discretionary function exception as a bar to Plaintiffs' claims fails for two reasons: (1) Defendant violated mandatory directives which caused Plaintiffs' injuries; and (2) Defendant's actions were not grounded in public policy and not susceptible to protection under the discretionary function exception. Accordingly, Defendant's Motion to Dismiss is properly denied.

Plaintiffs respectfully request a hearing on Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction under Fed. R. Civ. P. 12(B)(1).

RESPECTFULLY SUBMITTED, this the 15th day of June, 2009.

/s/ John Arthur Eaves, Jr.
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CERTIFICATE OF SERVICE

I, John Arthur Eaves, Jr., hereby certify that on June 15, 2009, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to all registered attorneys.

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