UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: CAMP LEJEUNE NORTH CAROLINA WATER CONTAMINATION LITIGATION	)	**MULTI-DISTRICT LITIGATION 1:11-md-02218-JOF**

UNITED STATES' REPLY TO PLAINTIFFS' OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION BASED UPON THE DISCRETIONARY FUNCTION EXCEPTION

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

PAGE

PAGE

STATUTE

RULE

REGULATIONS

MISCELLANEOUS

INTRODUCTION

In their Response, Plaintiffs have failed to meet their burden of showing that the discretionary function exception does not bar their claims. With respect to the first prong of the discretionary function analysis set forth by the Supreme Court in *United States v. Gaubert*, 499 U.S. 315 (1991), Plaintiffs have not identified a statute, regulation, or policy that prescribed a ***specific course of action***, with a ***fixed or readily ascertainable standard***, which a government employee failed to follow. In fact, Plaintiffs do not even acknowledge the specificity requirement under this first prong, focusing solely on whether various instructions and orders were mandatory. Moreover, Plaintiffs have completely ignored the relevant statute, the Safe Drinking Water Act (SDWA), and the Maximum Contaminant Limits (MCLs) established by regulation under the SDWA. MCLs for the contaminants identified in the Complaints were not set by the Environmental Protection Agency or incorporated by the Navy into its instructions until the late 1980s, several years after the contaminated wells were closed.

As to the second prong of discretionary function analysis, Plaintiffs have failed to demonstrate that the government's conduct could not implicate competing public policy considerations. As the United States explained in its opening brief, the challenged conduct was clearly susceptible to policy analysis given: (1) the

critical need to maintain sufficient water services to operate the base; (2) the obligation to monitor drinking water standards for ***regulated*** substances (as opposed to the then-unregulated chemicals named by Plaintiffs); and (3) the Navy's multi-step program (the "NACIP") for investigating and remediating contamination on its properties, which ultimately led to the discovery and closure of contaminated Camp Lejeune wells.

Plaintiffs' Response also incorrectly asserts that the now-dismissed *Laura Jones* decision is "law of the case" while failing to address several closely analogous cases that the United States cited in its opening brief. Finally, Plaintiffs' Response contains no answers to the arguments in the United States' opening brief concerning the individual circumstances – as alleged in the *Wright, Park, Edwards,* and *Linda Jones* Complaints – which require dismissal.

I. The *Laura Jones* Decision Is Not Law of the Case

Plaintiffs' attempt to bypass their obligation to address the substance of the discretionary function exception by asserting that the decision in *Laura Jones* is "law of the case" has already been correctly rejected by this Court. (Docket No. 68 at n.1.)[1] The *Laura Jones* case has been dismissed on other grounds, so the *Jones*

[1] While Plaintiffs recognize the existence of the Court's ruling on this point (Pl. Br. 6 n.5), they argue against it to preserve the issue on appeal. For the Court's use, we set forth the arguments supporting the Court's ruling in this section.

court's analysis is of no greater significance to the remaining MDL cases than any other district court decision in unrelated cases.[2]

Moreover, none of Plaintiffs' citations support their argument that a transferee court in a multidistrict litigation (MDL) is bound to extend a prior decision by ***one*** transferor court in ***one*** case to every other case in the MDL under the "law of the case" doctrine. As a preliminary matter, Plaintiffs appear to have confused the term "transferor" (referring to the court where the case was filed and would ultimately be tried) with "transferee" (referring to the MDL court). (Pl. Br. 8.) As a result, none of Plaintiffs' cited authorities apply to their argument. For instance, the section of the *Manual for Complex Litigation (MCL)* cited by Plaintiffs addresses the situation when a case that ***was*** consolidated with others in an MDL has been remanded back to the transferor court; in that situation, it is the ***MDL court's*** decisions that become "law of the case." *See MCL* 4th § 20.11, at 226. This is not the situation here.

The purpose of multidistrict litigation is to provide "centralized pretrial proceedings." *MCL* 4th § 20.11, at 226. Therefore, MDL courts have the authority to decide issues that will impact all of the consolidated proceedings. *In re Multi-*

[2] The reasoning in *Laura Jones* is fundamentally incorrect, as the United States showed at pages 28-33 of its opening brief.

Piece Rim Prods. Liab. Litig., 653 F.2d 671, 676 (D.C. Cir. 1981). Accordingly, the Court should reject Plaintiffs' "law of the case" argument and consider the United States' motion on its own merits.

II. Plaintiffs Have the Burden of Proving That the Discretionary Function Does Not Apply

As the Eleventh Circuit held in *OSI, Inc. v. United States*, 285 F.3d 947, 951 (11th Cir. 2002), where "the government has asserted lack of subject matter jurisdiction, OSI [the plaintiff] must prove that the discretionary function exception does not apply . . . ." *See also Cranford v. United States*, 466 F.3d 955, 958 (11th Cir. 2006). In their Response, Plaintiffs do not even cite *OSI*'s discussion of the burden of proof. Instead, they incorrectly state that "apparently the Eleventh Circuit has not made an explicit holding in this regard" (Pl. Br. 10 n. 6, citing *Autery v. United States*, 992 F.2d 1523, 1527 (11th Cir. 1993), which pre-dated *OSI* by nine years) and rely upon out-of-Circuit decisions that have not been followed by the Eleventh Circuit. (Pl. Br. 10)

III. The Standard of Review Under Rule 12(b)(1)

As the United States set forth in its opening brief, Plaintiffs must prove that the United States has waived its sovereign immunity to their claims, and Rule 12(b)(1) is the appropriate procedure for such a jurisdictional challenge. Plaintiffs concede that, in a factual challenge to the Court's jurisdiction under Rule 12(b) (1),

the Court may consider matters outside the pleadings, including affidavits, and that the Court is free to weigh the evidence. (Pl. Br. 11.) However, Plaintiffs' citation to *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884 (3d Cir. 1977), to support an argument that the court should delay ruling on the motion is inapposite. *Mortensen* did not involve a suit against the United States or the issue of sovereign immunity. It was an antitrust case, and the court limited its holding to that context. *See id.* at 894 (limiting the holding to "motions to dismiss … when a Sherman Act claim is involved"). Significantly, the Supreme Court has since emphasized that the separation of powers doctrine requires a federal court to determine in most instances whether it has jurisdiction at the outset, rather than defer the issue. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).[3]

Furthermore, Plaintiffs' suggestion that "there may be other documents that have been subject of discovery for nearly two years but which have not yet been produced" has no basis. (Pl. Br. 12.) The United States has completed its

[3] Contrary to Plaintiffs' contention (Pl. Br. 31-32), the Court need not give deference to Plaintiffs' assertions or defer ruling on the United States' motion. Here, the jurisdictional question – whether Plaintiffs' claims implicate discretionary, policy-based conduct – is not intertwined with the substantive determination of whether the United States was negligent. *See Morrison v. Amway Corp.*, 323 F.3d 920, 924-25) (11th Cir. 2003); *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). In any event, even if the Court were to apply the summary judgment standard, there would be no genuine issue of material fact with respect to any issue concerning application of the discretionary function exception.

responses to all of Plaintiffs' discovery requests, including those allowed in the supplemental discovery period granted by the Court. Despite several false accusations in Plaintiffs' brief that the United States has not produced certain documents,[4] Plaintiffs have not shown that the United States has withheld any documents relevant to its motion.

IV. Plaintiffs Have Failed to Meet Their Burden of Showing That the Discretionary Function Exception to the FTCA Does Not Bar Their Claims

Plaintiffs assert that the government's arguments about the discretionary function exception can be distilled into "[w]e do not have to follow policy, orders or instructions …." (Pl. Br. 14.) This is an unfair caricature of both the government's position and the settled law in this area. To show that a claim falls outside of the discretionary function exception, a plaintiff must show either: (1) that the government had no discretion because a relevant mandatory ***and specific*** provision controlled the government's conduct and that that provision was

[4] For example, Plaintiffs assert that they have not received a copy of Navy Bureau of Medicine Instructions (BUMEDs) 6240.3A (1959) and 6240.3 (1957). (Pl. Br. 2 n.1.) In fact, the United States produced these as Attachments 5 and 6 to its February 15, 2012, First Response to Interrogatories. *See* Declaration of Geoffrey Cook, U.S. Ex. 35. In another example, Plaintiffs assert that they do not have a copy of NAVMED P-5010-5 (Pl. Br. 14 n.8 [mis-numbered as n.6]), but the 1963 edition of that document was Attachment 13 to the government's First Response to Interrogatories, and Plaintiffs attach the same document as Exhibit 3 to their Response. U.S. Ex. 35. With respect to other documents, it is not surprising that some historical records over a sixty-year period may no longer exist.

violated, or (2) that the claim does not challenge the type of conduct that Congress sought to protect because the conduct is not susceptible to a policy analysis. *See Gaubert*, 499 U.S. at 322-25. Plaintiffs have failed to make either showing here.

A. Plaintiffs Have Failed to Show That the United States Violated a Mandatory and Specific Provision at Camp Lejeune That Caused Exposure to Contaminants

First, Plaintiffs cannot demonstrate that Camp Lejeune employees violated any mandatory and specific provision. Plaintiffs focus on several provisions that they claim are mandatory because they use the word "shall." (Pl. Br. 20, 23-26.) But, as the Supreme Court made clear in *Berkovitz*, to take a challenged action out of the discretionary function exception, a provision must not only be mandatory but it also must be ***specific*** in its application to the challenged conduct. *See Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

A provision is sufficiently specific to remove discretion only if it tells the government precisely how to act. Under Eleventh Circuit law, a provision must include a "***fixed or readily ascertainable standard***" to meet that requirement. *See, e.g.*, *Cranford*, 466 F.3d at 958; *Hughes v. United States*, 110 F.3d 765, 768 (11th Cir. 1997); *Autery*, 992 F.2d at 1529. This means that "the controlling statute or regulation mandates that a government agent perform his or her function ***in a***

specific manner."[5] *Powers v. United States*, 996 F.2d 1121, 1125 (11th Cir. 1993) (emphasis added).

In their Response, Plaintiffs rely primarily on 1963 and 1972 Navy Bureau of Medicine (BUMED) Instructions and a 1974 Base Order. (Pl. Br. 2-4, 23-26.) But as the United States showed in its opening brief, and as ignored by the Plaintiffs, these provisions contain discretionary language[6] and do not even reference the chemicals at issue in this case – TCE, PCE, DCE, vinyl chloride, or benzene. (U.S. Br. 22-23.) Later BUMED and NAVMED instructions, issued in 1988 and 1993, years after the contaminated wells at Camp Lejeune were closed,

[5] The cases that Plaintiffs cite actually illustrate the high level of specificity necessary to remove discretion. (Pl. Br. at 37-40.) In *McMichael v. United States*, 856 F.2d 1026, 1033 (8th Cir. 1988), a federal safety inspector's failure to ensure that a contractor evacuated a plant after an electrical storm resulted from the inspector's failure to follow a required fifty-one step checklist. Similarly, in *Fleming v. United States*, 69 F. Supp. 2d 837, 841 (W.D. Va. 1999), the plaintiff identified four violations of specific inspection procedures regarding the frequency and types of tests required to be administered by a federal inspector.

[6] Plaintiffs correctly assert that the "grounds for rejection" language in the 1972 BUMED is a "term of art" used in the 1962 Public Health Service Drinking Water Standards. (Pl. Br. 4, 24.) But, that fact does not make the language any less discretionary. The Public Health Standards, which provided the basis for the 1972 BUMED, likewise accorded discretion to decision-makers, explaining that the "'grounds for rejection' limits" are "limits, which should not be exceeded ***when more suitable water supplies can be made available***" and explained that the limits are "based on factors which render a ***supply less desirable*** for use." (Pl. Ex. 5 at 22 (emphasis added).) Notably, the Public Health Standards, like the 1972 BUMED, did not set limits for any of the chemicals at issue in this case.

actually ***did*** specifically apply to the chemicals at issue. This contrast between the early and later Navy instructions demonstrates that there was no relevant specific and mandatory rule that could have been violated in the pertinent period.

As the United States discussed in its opening brief, the only relevant statute governing drinking water systems at any relevant time was the Safe Drinking Water Act of 1974.[7] (U.S. Br. 19.) The SDWA empowered EPA to establish drinking water standards for public water supply systems. *See* 42 U.S.C. §§ 300f *et seq*. Under the Act, the EPA regulated particular chemicals by proposing "Recommended Maximum Contaminant Levels" (RMCLs), which are "non-enforceable health goals," and by setting "Maximum Contaminant Levels" (MCLs), which are "the enforceable standards." 48 Fed. Reg. 45502 (Oct 5, 1983) (U.S. Ex. 36 at CLW 0957); *see also* U.S. Ex. 9 at 14. The EPA's very first MCLs, which became effective on June 24, 1977, were for only "ten organic compounds (i.e., six pesticides and [four] total trihalomethanes [byproducts of the chlorination process])," in addition to "ten inorganic compounds, microbial contaminants (coliforms and turbidity), and radionuclides." (U.S. Ex. 36 at CLW

[7] Plaintiffs almost completely ignore the SDWA, relegating it to a brief reference in a footnote. Notably, the same footnote purportedly disclaims any reliance upon two of the three grounds mentioned in the now-dismissed *Laura Jones* decision – provisions of the Clean Water Act and the Resource Conservation and Recovery Act, and the EPA's "Suggested No Adverse Response Levels." (Pl. Br. 6 n.4.)

0959.) These MCLs, which were part of the EPA's National Interim Primary Drinking Water Regulations, were the only SDWA regulations in effect during the 1970s and early 1980s. The pesticides were the chemicals Endrin, Lindane, Methoxychlor, Toxaphene, which the EPA described as "Chlorinated Hydrocarbon Insecticides," as well as two "Chlorophenoxy Herbicides," 2,4-D, and 2,4-5 TP. (U.S. Ex. 36 at CLW 0972.) Significantly, the Interim Regulations did ***not*** establish any limits for the organic chemicals at issue, such as TCE or PCE.

The EPA did not even announce until the early 1980s its intent to regulate additional organic chemicals known as volatile organic chemicals (VOCs) under the SDWA. (U.S. Ex. 36 at CLW 0973.) In October 1983, the EPA described its "objective . . . [as being] to ***initiate discussions*** on the most appropriate approach to reduce human exposure to VOCs in drinking water." *Id*. (emphasis added). The EPA added that "[a] proposal will soon be published to establish RMCLs, MCLs and monitoring requirements for certain VOCs as part of the NPDWR [National Revised Primary Drinking Water Regulations]." *Id*. That proposal, published in June of 1984, announced EPA's intent to propose RMCLs for VOCs, including TCE, PCE, DCE, and vinyl chloride. 49 Fed. Reg. 24330 (June 12, 1984) (U.S. Ex. 37 at CLW 1007-26.) Importantly, the EPA stated in 1984:

> ***This proposal is the initial stage in rulemaking*** for the establishment of primary drinking water regulations for the VOCs. Following this

> proposal, Maximum Contaminant Levels [MCLs] and monitoring/reporting requirements will be proposed when the RMCLs are promulgated. ***MCLs are enforceable standards*** and are to be set as close to the RMCLs as is feasible ***and are based upon health, treatment technologies, cost and other factors***.

Id. at CLW 1007 (emphasis added).

Importantly, several years elapsed between the "initial stage" of the EPA's process in mid-1984 and the setting of MCLs for the types of volatile organic solvents detected at Camp Lejeune. MCLs for benzene, TCE, and vinyl chloride were not even proposed until July 8, 1987, and did not become effective until January 9, 1989. *See* 52 Fed. Reg. 25690, 26691 (July 8, 1987) (U.S. Ex. 10). Similarly, MCLs for DCE and PCE were not proposed until January 30, 1991, and did not become effective until July 30, 1992. *See* 56 Fed. Reg. 3526, 3528 (Jan. 30, 1991) (U.S. Ex. 11); *see also* U.S. Ex. 9 at 15. Plaintiffs' own expert confirms these dates for the first MCLs for TCE and PCE, and states the MCLs "were based upon ***significant new scientific knowledge about toxicity***." Havics Aff. ¶¶ 24, 25 (submitted with Plaintiffs response to U.S. Motion to Dismiss based upon *Feres* doctrine, Docket No. 71-2) (emphasis added).

Volatile organic solvents were not incorporated into the Navy's medical instructions until the 1988 NAVMEDCOM Instruction 6240.1, which explicitly listed benzene, vinyl chloride, TCE, and DCE, and the 1993 BUMEDINST

6240.10, which added PCE.[8] (U.S. Exs. 18 and 19.) Significantly, Camp Lejeune closed the contaminated wells at issue in late 1984 and early 1985, several years ***before*** the new 1988 and 1993 Navy instructions. (U.S. Ex. 7 at 20, 27.)

It is against this background of the SDWA and its process for proposing, analyzing, and ultimately establishing enforceable limits for particular chemicals that Plaintiffs' reliance upon the general language of the earlier 1963 and 1972 BUMEDs must be considered. Plaintiffs focus on a few provisions from the 1963 and 1972 BUMEDs, but none of them prescribe a specific course of action, with a fixed or readily ascertainable standard, that Base officials failed to follow.

First, Plaintiffs rely on language in the 1972 BUMED Instruction which states, "[s]ubstances which may have deleterious physiological effect, or for which physiological effects are not known, shall not be ***introduced*** into the system in a manner which would permit them to reach the consumer." (Pl. Br. 24 and Ex. 4 at 0148.) However, it is only when this language is read in context with the preceding sentence, which Plaintiffs fail to quote, that its meaning becomes clear:

> Substances used in [drinking water] treatment shall not remain in the water in concentrations greater than required by good practice. Substances which may have deleterious physiological effect, or for which physiological effects are not known, shall not be ***introduced***

[8] The 1988 NAVMEDCOM Instruction 6240.1 explicitly cancelled and replaced the 1972 BUMED upon which Plaintiffs rely (which in turn had replaced the 1963 BUMED).

> into the system in a manner which would permit them to reach the consumer.

(Pl. Ex. 4 at 0148 (emphasis added).) When these two sentences are read together, it is clear that the term "introduced" refers to substances deliberately added to the water supply for water treatment. There are no allegations that the United States ever introduced TCE, PCE, DCE, vinyl chloride, or benzene into Camp Lejeune's drinking water as part of its treatment.

Even if one could read this statement more broadly and out of context to prohibit inadvertent contamination of the water supply, such a provision would 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*, 285 F.3d at 952; *Aragon v. United States*, 146 F.3d 819, 825-26 (10th Cir. 1998); *Snyder v. United States*, 504 F. Supp. 2d 136, 140-41 (S.D. Miss. 2007), *aff'd*, 296 F. App'x 399 (5th Cir. 2008), *cert. denied*, 556 U.S. 1281 (2009). The BUMED's language cited above, as well as its general provision that "[d]rinking water shall not contain impurities in concentrations which may be hazardous to the health of the consumers" (Pl. Ex. 4 at CLW 0147 (cited in Pl. Br. 24)), are not sufficiently specific to remove discretion, as demonstrated by the cases that the United States cited in its opening brief. U.S. Br. 25-27, 32-33. Notably, Plaintiffs acknowledge

the existence of these cases only to point out that they did not involve the BUMED instructions (Pl. Br. 14-15), yet Plaintiffs fail to explain how any language in the BUMED instructions is sufficiently specific to remove discretion.

Plaintiffs' next argument is that the 1972 BUMED Instruction includes a mandatory maximum level for "chlorinated hydrocarbons," and they assert, without citation, that the volatile organic solvents at Camp Lejeune were "chlorinated hydrocarbons" covered by the 1972 BUMED. (Pl. Br. 24.) Plaintiffs' assertion is baseless and misleading by omission. Before the late 1980s, the term "chlorinated hydrocarbons" in drinking water provisions applied only to pesticides. The 1972 BUMED itself listed the term "chlorinated hydrocarbons" as a subcategory of "Pesticides, Herbicides, Fungicides" (Pl. Ex. 4 at CLW 0149). (Pl. Br. 24.) By the late 1970s and early 1980s, the EPA's Interim Regulations under the SDWA used the term "chlorinated hydrocarbons" to cover only the specific pesticides referenced earlier. (U.S. Ex. 36 at CLW 0959, 0972.) [9] In addition, the 1972 BUMED was based upon the 1962 Public Health Service Drinking Water Standards, which did not list any of the volatile organic solvents at issue. (Pls. Ex. 4 at CLW 0145; Ex. 5 at 6-8.) Moreover, the Plaintiffs assertion that "[n]one of the tests and analyses ever differentiated levels of chlorinated organics as coming

[9] *See*, *supra*, pp. 10-12 (EPA specified "Chlorinated Hydrocarbon Insecticides").

from pesticides or solvents" (Pl. Br. 32) is simply incorrect. One of the first tests done in February 1981 for trihalomethanes referred to contamination by "chlorinated hydrocarbons ***(solvents)***." (Pl. Ex. 8) (emphasis added). The volatile organic solvents at issue were not covered by any BUMED or NAVMED instructions until the late 1980s, in the versions that replaced the 1972 BUMED. *See, supra* pp. 11-12; U.S. Br. 23-24.

In support of the United States' motion, the United States submitted a report of an expert environmental engineer, Dr. Davis Ford, and an affidavit of an expert geochemist, Dr. Remy Hennet. Dr. Ford explained that the chemicals at issue in this case were not regulated prior to the closure of the Camp Lejeune wells in 1985, and Dr. Hennet attested that there was not even a standard analytical method to detect TCE and PCE at the concentration levels listed for "chlorinated hydrocarbons" at the time that the 1972 BUMED was issued. (U.S. Ex. 9 at 14-15; U.S. Ex. 20 at ¶ 5.) In their Response, Plaintiffs argue that Dr. Ford, in his deposition, agreed that the Marine Corps did not have any discretion to ignore a mandatory order. (Pl. Br. 27-31.) But, this general argument misses the mark because it says nothing about the specificity of the 1972 BUMED Instruction. In this respect, Plaintiffs fail to show that Dr. Ford, or any other expert, agrees that 1972 BUMED specifically applied to any of the chemicals at issue in this case.

Plaintiffs proffer their own experts, Dr. Benjamin Ross and Mr. Steven Amter, for the general proposition that TCE, PCE, and other organic solvents have been known since 1949 to "have carcinogenic properties" and that therefore "it must have been clear" to the Navy that their presence constituted a health hazard. (Pl. Ex. 1, 2, 6.) Notably, the Ross and Amter thesis regarding knowledge of chlorinated solvent contamination has been disputed by other environmental scientists.[10] But the ***legally salient point*** for purposes of the discretionary function exception is that Plaintiffs' experts nowhere claim that there was any mandatory and specific federal provision restricting the use of water containing such chemicals that was effective before the late 1980s.

The last provision in the 1972 BUMED that Plaintiffs cite states that "[f]requent sanitary surveys ***shall*** be made of the water supply system." (Pl. Br. 4, 23 (Plaintiffs' emphasis).) This provision, however, is not sufficiently specific in that it does not state when the surveys will be conducted, what the surveys will entail, or how the surveys will lead to specific actions. In their brief, Plaintiffs suggest that the government failed to conduct any sanitary surveys of the water system at Camp Lejeune before 1980 (Pl. Br. 4), but that suggestion (for which

[10] *See, e.g., Chlorinated Solvents and the Historical Record: A Response to Amter and Ross*, Richard E. Jackson, Environmental Forensics, 4:3-9 (2003) (concluding that the Ross and Amter analysis and thesis "are without merit" and citing other experts who disagree with them) (attached as U.S. Ex. 38.)

Plaintiffs provide no factual support) is contrary to the facts. The Director of Camp Lejeune's Office of Natural Resources and Environmental Affairs in the 1980s, Julian Wooten, testified that, prior to being a Director, he had worked in a "potable water" laboratory at Camp Lejeune where he had done a variety of testing, including "bacteria type work, chloroform bacteria tests, salinity maybe, chlorine, and fluoride" and "[t]here may have been some others [tests]." (U.S. Ex. 39 (Wooten Depo., 1-12, 22-27).) In addition, the United States has produced documents to Plaintiffs demonstrating the evaluation of water supplies, including sampling for pesticides, from the late 1950s to the 1970s. (*See* U.S. Ex. 40 at CLW 0001-31; U.S. Ex. 41 at CLW 0044-102; U.S. Ex. 42 at CLW 0169-172.) Significantly, the 1970s testing included the six "chlorinated hydrocarbon" pesticides/herbicides covered by the EPA's SDWA Interim Regulations referenced above. (U.S. Ex. 42 at CLW 0169-172.) Ultimately, Plaintiffs cannot demonstrate that any specific action or inaction regarding surveys was required or is relevant to any claim of injury.

Finally, Plaintiffs briefly cite a 1974 Base Order, which they argue required the disposal of organic solvents in a particular location at Camp Lejeune. (Pl. Br. 5, 26.) As is clear from the "Action" paragraphs in the Order, however, the Commander or Officer-in-Charge had discretion, during periodic inspections, to

determine whether hazardous material in stock was "serviceable" or "in a deteriorated or hazardous condition." (Pl. Ex. 9.) Only if the appropriate officer had determined that material was not "serviceable," *i.e.*, "salable or usable," was safe disposition in the designated area necessary. *Id*. Furthermore, the Order provides that the material could be taken to areas other than the designated disposal area if authorized by Headquarters. Thus, government employees had discretion regarding how to treat hazardous materials. Moreover, Plaintiffs have not shown any direct violation of the Order, *i.e.*, that the government determined that certain material was in a deteriorated or hazardous condition under this Order yet failed to send the material to an authorized disposal site. (*See* Pl. Ex. 9.)

Plaintiffs' remaining arguments regarding the first prong of the discretionary function exception analysis have no merit. First, Plaintiffs' reliance upon *Phillips v. United States*, 956 F.2d 1071 (11th Cir. 1992); *Hurst v. United States*, 882 F.2d 306 (8th Cir. 1989); and *Matthews v. United States*, 720 F. Supp. 1535 (D. Kan. 1989), is misplaced because plaintiffs in those cases presented ***specific*** provisions that removed government discretion**.** *See Autery*, 992 F.2d at 1529 (pointing out that in *Phillips*, "[a]n accident prevention plan and a safety manual … prescribed ***specific*** safety procedures [that] three employees were to carry out every day") (emphasis added); *Hurst*, 882 F.2d at 309 (***specific*** regulation

required an engineer to issue a stop-work order upon finding unauthorized activity); *Matthews*, 720 F. Supp. at 1539 (contract incorporated a ***specific*** safety requirement). Plaintiffs have presented no such specific provisions here.

Similarly without merit is Plaintiffs' reliance (Pl. Br. 21-22) on *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), and *Berkovitz*, 486 U.S. at 536. In *Indian Towing*, the government did not raise the discretionary function exception, and the Supreme Court noted that the discretionary function exception was "not involved." *See* 350 U.S. at 63; *see also Cranford*, 466 F.3d at 959 (*Gaubert* severely undercut, if not altogether disavowed *Indian Towing*). Moreover, in that case the government, having assumed the responsibility to have a lighthouse, simply failed to keep the light lit; therefore, no policy issues were implicated by that failure. *See Kennewick Irrigation District v. United States*, 880 F.2d 1018, 1023-25 (9th Cir. 1989). Similarly, *Berkovitz* is not on point because Plaintiffs here cannot show that the government violated any self-imposed mandatory ***and specific*** rule.

Finally, Plaintiffs argue that the FTCA does not distinguish between large and small cases (Pl. Br. 16-18), but the government has not made such an argument in this litigation. The United States cited *Dalehite v. United States*, 346 U.S. 15 (1953), only to show that Congress' intent in enacting the FTCA was to grant relief

for accidents arising from "ordinary common-law torts" rather than in cases involving discretionary policy-based governmental activities. (U.S. Br. 12.)

In sum, Plaintiffs have failed to show that the 1963 and 1972 BUMED instructions and the 1974 Base Order upon which they rely, or any other provision, prescribed a specific course of conduct with a "reasonably ascertainable standard" for governmental conduct, compliance with which would have prevented Plaintiffs' alleged exposure to contaminated water.

B. Plaintiffs Have Failed to Show That the Alleged Negligent Conduct at Camp Lejeune Is Devoid of Public Policy Considerations.

Plaintiffs have also failed to satisfy the second prong of the discretionary function analysis by demonstrating that their allegations of negligence do not implicate social, political or economic policy considerations. In the opening brief, the United States established a strong presumption that government operations at Camp Lejeune were policy-based given the important national security policies underlying the United States Marine Corps' missions at the Base. (U.S. Br. 39-45.) In their Response, Plaintiffs argue that the United States failed to cite any "social, economic, political or defense excuses for allowing contamination of the drinking water." (Pl. Br. 33.) Of course, it is well-settled that the United States need not show that an employee actually conducted a policy analysis as part of the

challenged action or inaction. *Gaubert*, 499 U.S. at 325. The Supreme Court has instructed that the "focus on the inquiry is not on the agent's subjective intent . . . , but on the nature of the actions taken and on whether they are ***susceptible to policy analysis***." *Id*. (emphasis added). *Accord OSI*, 285 F.3d at 950-51.

Camp Lejeune officials' actions were certainly susceptible to policy analysis, since Navy personnel had to consider (1) the need to maintain sufficient water services to operate the base at all times;[11] (2) the need to maintain military equipment in readiness for training and deployment; (3) the need to prioritize limited financial resources to meet military objectives; (4) the requirement to focus on monitoring drinking water standards for ***regulated*** substances, such as trihalomethanes (as opposed to ***unregulated*** organic solvents); and (5) the pursuit of environmental goals through the DOD's Installation Restoration Program (IRP) and the Navy's Assessment and Control of Installation Pollutants (NACIP) program. (U.S. Br. 4-10, 39-40.) It was through the NACIP program that the Navy discovered contamination in certain individual wells which led directly to the closure of those wells. (U.S. Ex. 7, at 26-27.) Plaintiffs' Response ignores the fact that the DOD's IRP had to prioritize cleanup at 27,950 sites at 3,449 current and

[11] By way of illustration, after the contaminated wells were closed, Base officials, in a March 1, 1985 Action Brief, expected a shortage of 300,000 gallons per day and had to evaluate the engineering, cost, and other implications of several alternative methods of making up the shortage. (U.S. Ex. 43 at CLW 1129-1131.)

former military installations (U.S. Ex. 13 at 9-10), nor do they even mention the NACIP program. Furthermore, Plaintiffs do not address the substance of the many cases finding that military conduct regarding environmental contamination was susceptible to policy analysis and a discretionary function. (*See* U.S. Br. 40-45.)

Instead of confronting the relevant cases, Plaintiffs rely upon cases which are clearly inapposite. For example, Plaintiffs cite *Eastern Airlines v. Union Trust Co.*, 221 F.2d 62, 78 (D.C. Cir. 1955),[12] in which a court found that the type of discretion that air traffic controllers exercised in controlling an aircraft was not the sort of conduct protected by the discretionary function exception. (Pl. Br. 35.) In any event, *Eastern Airlines* relied upon an analytical distinction between conduct at the "operational level" versus conduct at the "planning level," 221 F.2d at 77-78, a distinction that the Supreme Court squarely rejected in *Gaubert*. 499 U.S. at 325-26.[13]

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[12] Contrary to Plaintiffs' representation that this decision was summarily affirmed by the Supreme Court (Pl. Br. 35), the discretionary function issues were not before the Supreme Court, which actually reversed the decision and then remanded it for rehearing. *See* 350 U.S. 907 (1955); 350 U.S. 962 (1956).

[13] Plaintiffs also cite *Mandel v. United States*, 793 F.2d 964, 967-68 (8th Cir. 1986) (involving the Park Service's failure to comply with a previously adopted safety policy), which similarly relies upon this now-discredited distinction. Plaintiffs' other cases also do not support their argument that Camp Lejeune officials' actions were not susceptible to policy analysis under prong two of the discretionary function exception analysis. The *McMichael* and *Fleming* decisions

Lastly, Plaintiffs rely upon Ninth Circuit decisions holding that the discretionary function does not apply to circumstances involving safety considerations ***with no other competing policy considerations***. (Pl. Br. at 42-43 (citing *Bolt v. United States*, 509 F.3d 1028, 1034 (9th Cir. 2007); *Soldano v. United States*, 453 F.3d 1140, 1148-50 (9th Cir. 2006); *Whisnant v. United States*, 400 F.3d 1177, 1181-82 (9th Cir. 2005);[14] *ARA Leisure Servs. v. United States*, 831 F.2d 193, 195 (9th Cir. 1987)). In this litigation, however, safety was not the only policy implicated by the government's decisions at Camp Lejeune. Rather, these decisions were susceptible to a number of concerns, including providing an

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focus on prong one of the discretionary function exception analysis. Similarly, *Appley Brothers v. United States*, 164 F.3d 1164, 1170-73 (8th Cir. 1999), is a prong one decision; the court there affirmed a finding that a specific paragraph in a government handbook required a grain inspector to report damaged grain. Plaintiffs cite a panel decision of the First Circuit in *Irving v. United States*, 909 F.2d 598 (1st Cir. 1990), to argue that when violations are "obvious" there is no discretion. (Pl. Br. at 37.) However, the panel merely held that, depending upon the thoroughness of the inspection required, the conduct may not be protected by the discretionary function exception, and remanded the case. *Id*. at 604-05. After remand and additional appeals, the *en banc* First Circuit ultimately held that the discretionary function exception barred the negligence claims. *Irving v. United States*, 162 F.3d 154, 162-69 (1st Cir. 1998) (*en banc*).

[14] As the Ninth Circuit recently explained in *Bailey v. United States*, 623 F.3d 855 (9th Cir. 2010), the failure to discover mold in *Whisnant* involved a situation in which no balancing of competing policy considerations was implicated. By contrast, where, as in this case, the government must "balance competing concerns, immunity shields the decision." *Id*. at 862 (*citing Miller v. United States*, 163 F.3d 591, 596 (9th Cir. 1998)).

adequate water supply to the base, allocating limited resources, and avoiding undue public anxiety. (U.S. Br. 42-45.) As one court remarked regarding similar claims at a military base, decision-makers allocating scare budget resources must "balance two of the nation's top priorities: national defense and environmental protection" and "[f]ew decisions could have a greater impact on public policy." *Western Greenhouses v. United States*, 878 F. Supp. 917, 929 (N.D. Tex. 1995).[15]

Finally, Plaintiffs do not address the federal court decisions cited by the United States which make clear that when a federal agency undertakes environmental investigation and restoration activities, any decisions regarding whom to warn, when to warn, and what warnings to give are susceptible to policy analysis and thus insulated from FTCA claims. (U.S. Br. 43-45.)

In sum, Plaintiffs have failed to show that the challenged government conduct at Camp Lejeune could not implicate competing policy considerations. Accordingly, the discretionary function exception bars their claims.

V. Plaintiffs Have Not Rebutted the Specific Weaknesses in the Edwards, Jones, Wright, and Park Complaints.

In its motion, the United States also explained that, even if the Court were to

[15] The Ninth Circuit has also held that when broad public policy considerations are at stake, the discretionary function exception applies. *E.g. In re Consol. Atmospheric Testing Litig.*, 820 F.2d 982, 996-98 (9th Cir. 1987) (failure to warn former participants of nuclear weapons testing program of radiation exposure was protected because warning decisions required balancing several considerations).

conclude that the discretionary function exception does not bar every claim that might be premised upon Plaintiffs' Complaints, the claims of the *Edwards, Jones, Wright,* and *Park* Plaintiffs must be dismissed. (U.S. Br. 47-50.) The *Wright* and *Park P*laintiffs' claims cannot survive because they were only at Camp Lejeune before 1980, the year that Plaintiffs allege that Base officials first learned of any water contamination. The *Edwards* and *Linda Jones* Plaintiffs' claims are foreclosed because they were not present at Camp Lejeune until after February 1985 when the ten contaminated wells were shut down and because they cannot show that, after that time, the government violated any relevant specific and mandatory provision.[16] Plaintiffs do not even attempt to rebut the arguments that the *Edwards, Jones, Wright,* and *Park C*omplaints are each barred by the discretionary function exception due to their individual circumstances.

CONCLUSION

For all of the foregoing reasons, the United States' motion to dismiss for lack of subject matter jurisdiction should be granted.

[16] During the time the *Edwards* and *Linda Jones* Plaintiffs were at the base, the government used one previously closed well on four days in the spring of 1985 to meet base water needs. Another Camp Lejeune well was closed in 1987, but it never exceeded subsequently-adopted MCLs. (*See* U.S. Br. 49-50.)

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CERTIFICATION UNDER L.R. 7.1D

Pursuant to Northern District of Georgia Local Rule 7.1D, the undersigned counsel for the United States hereby certifies that the above and foregoing pleading is a computer document prepared in Times New Roman (14 point) font in accordance with Local Rule 5.1.

So certified this 4th day of June, 2012.

/s/ Geoffrey C. Cook
GEOFFREY C. COOK (DC Bar No. 460301)

CERTIFICATE OF SERVICE

In accordance with Local Rule 26.3, I certify that on June 4, 2012, as a Trial Attorney for the United States, I served Plaintiffs with the foregoing United States' Reply in Support of its Motion to Dismiss, via the U.S. District Court's CM/ECF electronic filing system. Notice to all counsel of record is provided via the filing of this Certificate of Service in the CM/ECF system.

Respectfully submitted this 4th day of June, 2012

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