

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GOULD ELECTRONICS INC.	:	
f/k/a GOULD INC., AMERICAN	:	CIVIL ACTION
PREMIER UNDERWRITERS, INC.	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	NO. 99-1130
	:	
O'NEILL, J.	:	JANUARY , 2002

MEMORANDUM

Defendant United States has moved to dismiss plaintiffs' ("Gould") claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, pursuant to the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), §§ 1346(b).

BACKGROUND

At the outset of the Korean war the United States recognized a need for the production of a particular type of nickel-cadmium battery. Due to its prior research in the field Sonotone Corp. was selected by the Army to help manage and operate a manufacturing plant to be constructed by the government in Cold Spring, New York. The plant was the first in the country designed to produce this type of battery, which was eventually used in the production of certain types of missiles and in weapons constructed by the Atomic Energy Commission. Prior to the plant's construction Sonotone employees recommended that a closed waste-water system be installed that would remove all harmful material before the water was released from the plant. The Army

contends that this design was rejected due to a lack of funds. During the construction of the plant the Army, acting through contractors, installed a waste-water disposal system that during periods of heavy water usage discharged waste-water directly into Foundry Cove, a branch of the Hudson River adjacent to the plant. According to the Army, this system was used because the Army understood that if such discharges were not allowed the plant ran the risk of being shut down during periods of heavy water usage. Plaintiffs allege that as a result of this system contaminated water was released into the area surrounding the plant. Plaintiffs also allege that the plant's operation generated fumes, dust, vapors, and mists which contained toxic substances that were released into the air.

The plant began operations in January, 1953 and completed its first shipment of batteries in March, 1953. In September, 1962 the Army sold the plant to Sonotone. In December 1967 Sonotone became a wholly owned subsidiary of Clevite Corporation. On July 21, 1969 Clevite merged with Gould, Inc. Prior to the merger Gould sold the plant to Business Funds, Inc. subsequently known as Marathon Manufacturing Company. In 1970 the United States brought suit against Marathon alleging it had violated the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 et seq., by dumping toxic chemicals into a public waterway. As a result of this litigation, in 1972 Foundry Cove was dredged and contaminated material removed and stored at the plant. In December 1979 Marathon merged into PCC Holdings which eventually became American Premier Underwriters, Inc. In 1979 the plant was sold to Merchandise Dynamics, Inc. and it ceased operations in 1980.

## PROCEDURAL HISTORY

In August 1990, seventy-three residents of Cold Spring, New York sued plaintiffs for personal injuries and property damage allegedly caused by their operation of the plant. Cheryl Allen, et. al. v. Gould, Inc., No 1074/90 (N.Y. Super. Ct.). In January 1994, plaintiffs in this action approached the United States to determine if the government would consider joining ongoing settlement negotiations in Allen. In a letter dated February 2, 1994, the government declined, stating “a review of the documents. . . leads us to conclude that the United States has jurisdictional defenses to either a direct suit by the [p]laintiffs or a claim for contribution or indemnification by the defendants.” Presumably because of its immunity to suit in state court the government was not made a party to Allen. In 1997 Gould settled with the Allen plaintiffs, agreeing to pay them \$4.5 million. In 1998, Gould filed administrative claims with the Army seeking contribution and indemnity for the Allen settlement. These claims were denied and on March 3, 1999, Gould filed this action seeking contribution and indemnity from the government.

On May 5, 1999, the government moved under Rule 12(b)(1) to dismiss the case for lack of subject matter jurisdiction contending that New York Law applies, and there is no private liability under New York law for the claims asserted by plaintiffs and therefore no claim under the FTCA. Plaintiffs responded that Pennsylvania law applies and permits the assertion of its claims. I granted the government’s motion and dismissed the action holding: (1) under Pennsylvania choice of law rules, New York law applies; (2) I had no jurisdiction over the contribution claim because the government would not be liable for contribution under New York law; (3) the government had not waived protection of New York’s bar against contribution; and (4) the government was not liable for indemnity under New York law. On July 21, 2000, the

Court of Appeals partially reversed this ruling, stating: “we hold that Ohio law governs the jurisdictional inquiry and, under Ohio law, the United States would be liable for contribution, but not indemnity.” Gould Electronics v. United States of America, 220 F.3d 169, 174 (3d Cir. 2000)(“Gould I”).

On January 31, 2001 the government filed a second motion seeking to dismiss plaintiffs’ claims for lack of subject matter jurisdiction, this time arguing that plaintiffs’ claims challenged governmental decisions insulated from judicial review by the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a), and also impermissibly sought recovery for the negligent acts of an independent contractor, 28 U.S.C. § 2671. Plaintiffs responded by contending: (1) the United States had lost its challenge to subject matter jurisdiction before the Court of Appeals and therefore could not relitigate this issue in a subsequent motion; and (2) the specific defenses raised by the government’s second motion had been decided in favor of plaintiffs by the Court of Appeals. On June 5, 2001, I issued a Memorandum and Order rejecting plaintiffs’ contention that the government could not again raise an objection to subject matter jurisdiction. This Order also, however, granted plaintiffs’ motion to deny that portion of the government’s motion challenging subject matter jurisdiction under the independent contractor exception.<sup>1</sup> On June 13,

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<sup>1</sup> As explained in my Memorandum and Order of June 5, 2001, and reiterated in my Order of June 13, 2001, the basis for my decision to deny the government immunity under the independent contractor exception was the high degree of oversight the government had over Sonotone. This determination is supported by the Court of Appeals in Gould I, which characterized the government as “an operator” due to the extensive interaction the government had with the plant. 220 F.3d at 182 n.18. Whether or not the decision of the Court of Appeals is binding upon me, my determination was based on my own review of the materials submitted by the parties, which in my view show the government’s level of involvement with the plant was extensive enough to render it an operator for purposes of the FTCA. See infra at 20 (detailing the level of the government’s control). My prior Memorandum and Order also rejected plaintiff’s contention that the Gould I Court had disposed of the government’s contention that it was entitled to immunity from suit under the discretionary function exception.

2001 I denied the government's motion to reconsider this ruling and directed the plaintiffs to respond to the government's contention that it is immune from suit under the discretionary function exception of the FTCA. On September 20, 2001 plaintiffs moved to compel the government to comply more fully with discovery requests as well as for sanctions for failure to cooperate in discovery procedures. On November 28, 2001 I heard oral argument on defendant's motion to dismiss.

Before me now is the on-going discovery dispute and the government's motion to dismiss plaintiffs' complaint.

#### STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) may present either a facial or a factual challenge to subject matter jurisdiction. See Mortensen v. First Federal Savings and Loan, 549 F.2d 884, 891 (3d Cir.1977). A motion which makes a facial challenge to a complaint requires that I consider the allegations of the complaint as true and make all reasonable inferences in plaintiffs' favor. Id. In the case of a factual challenge to the complaint, however, I am free to consider and weigh evidence outside the pleadings to resolve factual issues bearing on jurisdiction, and to "satisfy [my]self as to the existence of [my] power to hear the case." Id. In resolving a factual 12(b)(1) motion, no presumptive truthfulness attaches to the plaintiffs' allegations, and the existence of disputed material facts will not preclude me from evaluating the merits of the jurisdictional claims. Id.

In the matter before me the government has raised a factual jurisdictional challenge based on the discretionary function exception to the FTCA. 28 U.S.C. § 2680(a). In addition to the

pleadings, I have before me a large amount of material submitted in the form of exhibits or appendices attached to the parties' respective briefs. As a general rule, it is the plaintiff's burden in a factual 12(b)(1) challenge to prove that subject matter jurisdiction exists. See Mortensen 549 F.2d at 891. Under the law of this Circuit, however, it is the government's ultimate burden to prove the applicability of the discretionary function exception. Cestonaro v. United States, 211 F.3d 749, 756 n.5 (3d Cir. 2000).

## DISCUSSION

In enacting the FTCA Congress abrogated the sovereign immunity of the federal government with respect to tort claims for money damages. However, there exist a number of statutory exceptions to the Act including the one relied on by the United States in this case, the "discretionary function exception." Under this exception the waiver of the government's immunity "shall not apply to. . .[a]ny claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Although the statute does not define "discretionary function," the Court of Appeals has stated that

[t]he discretionary function exception is designed to protect policy making by the politically accountable branches of government from interference in the form of "second-guessing" by the judiciary – second guessing the result of which burdens the public fisc and the prospect of which skews the decision making process of the executive and legislative policy makers.

Fisher Bros. Sales, Inc. v. United States, 46 F.3d 279, 284 (3d Cir. 1995); see also Gotha v. United States, 115 F.3d 176, 179 (3d Cir. 1997), quoting United States v. S.A. Empresa de

Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984)(“The reason for ‘fashioning an exception for discretionary governmental functions’ was to ‘protect the government from liability that would seriously handicap efficient government operations.’”) This exception, like all waivers of sovereign immunity, is to be construed strictly in favor of the sovereign. See Sea-Land Service, Inc. v. U.S.A., 919 F.2d 888, 889 (3d Cir. 1990).

In United States v. Gaubert, 499 U.S. 315, 322-323 (1991), the Supreme Court provided a two-part inquiry to guide the application of the discretionary function exception. First, I must determine whether the act involves an “element of judgment or choice.” Id. at 322. This requirement is not satisfied if a “federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. . . .” Berkovitz v. United States, 486 U.S. 531, 536 (1988). If such a directive exists “the employee has no rightful option but to adhere” to it. Id. In this event no discretion exists and therefore the exception is not applicable. Second, even if the challenged conduct involves an element of judgment, I must determine “whether that judgment is of the kind that the discretionary function exception was designed to shield.” Gaubert, 499 U.S. at 322-323. The “focus of the inquiry is not on the agent’s subjective intent in exercising the discretion conferred by the statute, but on the nature of the actions taken and on whether they are susceptible to policy analysis.” Id. at 325.

#### A.

Before beginning the inquiry outlined in Gaubert I must first identify the challenged action the government claims is protected by the exception. See Cestonaro, 211 F.3d. at 753 (noting the importance of determining exactly what conduct is at issue). In their complaint

plaintiffs state the government “breached its duties to the Allen plaintiffs by designing, building and operating the [p]lant in a negligent, careless, and/or reckless manner.” (Pl.’s Comp. ¶ 58). Further, plaintiffs allege that the government failed to take “appropriate remedial action” to correct the release of toxic material; failed to monitor the release of these materials to ensure they were kept to safe levels; failed to warn the Allen plaintiffs that harmful materials were being released in the area; failed to develop safer alternative methods for operating the plant; and failed to warn or impose obligations on successor owners of the plant regarding the need to modify the plant’s air and water discharge systems. Id.

It appears the government agrees with plaintiffs that the design of the plant is one decision at issue. (Def.’s Mot. to Dism. at 14). With respect to the operation of the plant, the government characterizes its actions as a “decision to delegate responsibility to operate the plant to a contractor.” (Def.’s Rep. Br. at 2). Plaintiffs characterize the government’s conduct as “allowing the knowing discharge of admittedly harmful toxins to invade the Allen plaintiffs’ yards and contaminate their surrounding environment without so much as a warning of the dangers to which they were subjected.” (Pl.’s Br. in Opp. at 8). Plaintiffs do not allege, however, that the plant was operated or constructed in a manner other than as designed. Rather their chief allegation is that plant’s mechanisms for disposing of waste materials were inadequate and were the cause of the injuries suffered by the Allen plaintiffs.

Examining the record before me, in my view there are two potential “decisions” that might form the basis for government liability and therefore require a determination as to whether they fall within the discretionary function of the FTCA: (1) the design of the plant; and (2) the

failure to warn local residents of any hazardous substances emitted by the plant.<sup>2</sup>

B.

The first prong of the test outlined in Gaubert requires that I determine whether the government's actions involved an "element of judgment or choice." 499 U.S. at 322. This criterion is not satisfied where these actions are in violation of a "federal statute, regulation, or policy specifically prescrib[ing] a course of action for an employee to follow. . . ." Berkovitz v. United States, 486 U.S. 531, 536 (1988). In other words, "when a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply." Id. at 544. Interpreting Berkowitz, the Court of Appeals in Gotha characterized those regulations that take away the exercise of discretion under the FTCA as those "imposing compulsion" on the federal government or those that "give no options to a government agency." Gotha, 115 F.3d at 179, 181. See also C.R.S. by D.B.S. v. United States, 11 F.3d 791, 799 (8th Cir. 1993)("to remove discretion from government employees, a regulation must be mandatory and it must clearly and specifically define what the employees are supposed to do.")

Plaintiffs contend that the government should be denied the protection of the

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<sup>2</sup> Plaintiffs claim that these actions also form the basis for the following causes of action: negligent operation of a dangerous instrumentality, private nuisance, public nuisance and trespass. While these claims provide alternate or additional means for establishing liability, they are not relevant in determining what actions or inactions by the government may be immune from suit under the discretionary function exception to the FTCA. For example, plaintiffs' trespass claim is based upon their allegation that defendant "released contaminated industrial waste . . . which physically invaded the Allen plaintiffs . . . property. . . ." (Pl.'s Comp. ¶ 74). This alleged trespass however is the result of the plant's functioning as designed. If the decision to design the plant as it was designed is ultimately protected from FTCA liability as a discretionary function, plaintiffs' trespass claim cannot survive.

discretionary function exception due to its violation of: (1) the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (“RHA”); (2) Executive Orders #10014 and #10779; (3) Army Safety Codes; (4) New York environmental regulations; (5) Contractual duties between the government and Sonotone; and (6) provisions of the easement granting the government a right-of-way for the construction and operation of an underground storm drain.

i. Rivers and Harbors Act of 1899

Section 13 of the RHA provides:

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited . . . from . . . the shore, . . . manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: Provided, that nothing herein contained shall extend to . . . the operations in connection with the improvement of navigable waters or construction of public works, considered necessary . . . by the United States . . . . And provided further, that the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

33 U.S.C. § 407. The question before me is whether during the period the Army was in control of Sonotone, 1953-1962, its actions were in violation of specific directives contained in the RHA.

The government argues that the above provision “on its face, specifically applied only to deposits which would or might impede or obstruct navigation.” (Def.’s Rep. at 9). I disagree.

The second clause, which prohibits the deposit of refuse on the bank of any navigable water or tributary where such refuse may be washed into the water, is expressly limited to deposits that shall or may impede or obstruct navigation. The first clause of the statute however, which is set off from the second clause by a semicolon, contains no language limiting its prohibition to navigation-impeding deposits, instead prohibiting the discharge of “any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state.”

Plaintiffs contend that the “plain language of this section imposes a flat ban on the discharge of pollutants into the waterways of the United States without a permit.” (Pl.’s Br. Opp. at 11). Citing the Supreme Court’s decisions in United States v. Standard Oil Co., 384 U.S. 224 (1966), and United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973), plaintiffs argue that the RHA’s prohibition on the discharge of “any refuse matter of any kind or description” necessarily encompasses all foreign substances. Id. at 12. Plaintiffs further maintain that any suggestion that the RHA does not apply to the material discharged by the Cold Water plant is “particularly offensive in light of the fact that [the government] used the very same provision of the RHA as a sword when, in 1970, it sued Marathon Manufacturing Co. to force a cleanup of . . . contamination caused by the [government] itself.” Id. at 13. In order for the Army’s decisions to be non-discretionary however, the statute must have imposed specific requirements upon the Army at the time such decisions were made. The government is potentially liable only for decisions made prior to its sale of the plant to Sonotone in September, 1962. As the government points out, both Standard Oil (1966) and Pennsylvania Industrial (1973) were decided after that date.

Indeed in Pennsylvania Industrial, 411 U.S. at 670-72, the Court acknowledged that prior to Standard Oil the law in this area was unsettled, stating:

At the outset, we observe that the issue here is not whether [the RHA] in fact applies to water deposits that have no tendency to affect navigation. For, although there was much dispute on this question in the past, in United States v. Standard Oil Co., . . . we held that ‘the ‘serious injury’ to our watercourses . . . sought to be remedied (by the 1899 Act) was caused in part by obstacles that impeded navigation and in part by pollution,’ and that the term ‘refuse’ as used in [the RHA] ‘includes all foreign substances and pollutants . . . .’ 384 U.S. 224, 228-229, 230 (1966). Since then, the lower courts have almost universally agreed . . . that [the RHA] is to be read in accordance with its plain language as imposing a flat ban on the unauthorized deposit of foreign substances into navigable waters, regardless of the effect on navigation.

. . . .

[I]t is undisputed that prior to December 1970 the Army Corps of Engineers consistently construed § 13 [of the RHA] as limited to water deposits that affected navigation. Thus, at the time of our decision in Standard Oil, the published [Army] regulation pertaining to § 13 [of the RHA] read as follows:

§ 209.395. Deposit of refuse. Section 13 of the River and Harbor Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407), prohibits the deposit in navigable waters generally of ‘refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state.’ The jurisdiction of the Department of the Army, derived from the Federal laws enacted for the protection and preservation of the navigable waters of the United States, is limited and directed to such control as may be necessary to protect the public right of navigation. Action under section 13 has therefore been directed by the Department principally against the discharge of those materials that are obstructive or injurious to navigation.’ 33 C.F.R. § 209.395 (1967).

Plaintiffs state that “[i]gnorance of the law has never been a valid defense and is not now,” (Pl.’s Br. in Opp. at 13). Apparently plaintiff’s believe that even though Standard Oil was not decided until several years after the Cold Spring plant was sold, the RHA sufficiently prescribed the Army’s conduct so that it could not constitute a proper exercise of discretion. I disagree. During the period defendant operated the plant the RHA was not mandatory or specific enough to eliminate the government’s discretion in placing contaminated waste water into the river.<sup>3</sup>

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<sup>3</sup> See also United States v. Republic Steel Corp., 362 U.S. 482 (1960), holding that the clogging of a channel with deposits of inorganic solids affected the navigable capacity of a river

ii.

Plaintiffs contend the government violated Executive Orders 10014, 13 Fed. Reg. 6601 (1948) and 10779, 23 Fed. Reg. 6487 (1958). Order 10014 states that the government shall:

take such action as may be practicable, in cooperation with State and local authorities concerned with control of water pollution, to insure the disposal of sewage, garbage, refuse, and other wastes accumulated in the course or as a result of Federal activities, and industrial or manufactured foodstuffs and other products destroyed by order or under the supervision of Federal regulatory authorities, in such manner as will conform with programs formulated under State law and applicable to State agencies and the public generally for the preservation and improvement of the quality of surface and underground waters.

Similarly, Order 10779 states that the government shall:

take such action as may be practicable and consistent with the law, in cooperation with State and local authorities concerned with control of air pollution, to insure the prevention or abatement of atmospheric pollution caused by or resulting from Federal activities, including industrial and manufacturing processes operated or controlled by the Federal Government and the destruction of foodstuffs or other materials by order, or under the supervision, of Federal regulatory authorities, in a manner consistent, so far as feasible, with programs authorized under State or local law pertaining to the preservation of the cleanliness of the atmosphere and applicable to the agencies of governmental bodies creating such law and to the public generally.

In Aragon v. United States, 146 F.3d 819, 824 (10th Cir. 1998), the Court examined whether Executive Order 10014 sufficiently prescribed the government's conduct to render the discretionary function exception unavailable. The plaintiffs in Aragon contended that Order 10014 did not permit the Air Force to allow contaminated waste water to run into open ditches around an Air Force base. The Aragon Court disagreed, stating:

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and therefore was enough of an obstruction to constitute a violation of the RHA. 362 U.S. at 489. Justice Harlan's dissent in Republic Steel, joined by three other Justices, strongly disagreed with the majority's contention that section 13 of the RHA's exception for matter "flowing from streets and sewers and passing therefrom in a liquid state" could never apply to any matter suspended in water other than sewage. 362 U.S. at 489, 506.

‘[A]s may be practicable’ is a prime example of discretionary language, which gave federal agencies a choice or judgment on what action to take, if any. It is clear the Order promoted a policy of cooperation with state and local water authorities; however, the Order alone contained no specific, mandatory directives for the Air Force to follow in disposing its waste water from aircraft wash down operations. Moreover, with respect to the Plaintiffs’ argument that Order 10014 did not permit the Air Force to simply do nothing, the record fails to support the Plaintiffs’ suggestion the Air Force never considered the impact of its method for disposing the . . . contaminated waste water on groundwater pollution. Thus, the Plaintiffs cannot rely on Order 10014 to establish jurisdiction under the Federal Tort Claims Act.

Id. (citations omitted). As the language contained in these two Executive Orders, such as “as may be practicable” and “so far as feasible,” is clearly precatory, I agree with the Court in Aragon that it is not sufficiently specific or mandatory to remove the element of choice from defendant for the purposes of the discretionary function of the FTCA.

Plaintiffs also argue that the wording of the Executive Orders “required the [g]overnment, at a minimum to make some determination as to the practicability of complying with state wastewater and air pollution control requirements. . . .” (emphasis in original), and that the government “can point to no such determinations.” (Pl.’s Br. in Opp. at 14). Were the government able to produce evidence that it engaged in the analysis plaintiffs suggest it would indeed constitute evidence of compliance with the Executive Orders at issue. For the discretionary function exception to the FTCA to be unavailable, however, the action or inaction of the government must have been in violation of a federal regulation that specifically prescribed a course of conduct. Therefore the task before me is not to examine whether the government’s actions were in harmony with the policy behind the Executive Orders, but rather to determine whether the Orders contain mandatory and specific directives that deprive the government of discretion in conducting its affairs in the areas covered by the Orders. In my view the language of the Orders does not compel specific behavior on the part of the government and plaintiffs may

not establish jurisdiction on that basis.

iii.

Plaintiffs also contend that the Army violated its own safety regulations by failing to employ an air emissions system to reduce the release of airborne contaminants from the plant. They rely on the 1951 Safety Requirements for the Army Corps of Engineers, § VIII, p. 10-11, which states:

All dusts, mists, fumes, gases, or other atmospheric impurities in areas where persons are employed, and in such quantities as are determined to be harmful to the health of such employees, shall be brought within safe limits by elimination, ventilation, or filtration. Where the above methods are impracticable, airline respirators shall be provided for continued exposure. For intermittent or casual exposures, appropriate chemical cartridge or filter type respirators approved by the United States Bureau of Mines may be used.

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Contaminated materials removed by exhaust systems shall be disposed of in such a manner that they do not reenter the breathing zone of the worker or create a hazard to other employees or to the public.

Pointing to the use of the word “shall” plaintiffs argue that the above regulation is mandatory and state further that the Army could “easily” have complied with the above requirement “by the simple expedient of using roof vents that extended ten feet above the plant roof, as opposed to using vents that extended only three feet above the roof.” (Pl.’s Br. in Opp. at 17).

As the Court of Appeals has stated, “the inclusion of the word ‘shall’ . . . does not necessarily destroy [an agency’s] discretion.” Cestonaro, 211 F.3d at 755. Further, the manual relied on by plaintiffs states in the “Foreword” that the safety requirements therein “have been developed specifically as considerations to be incorporated into planning, layout, and methods, and not as rules to be super-imposed thereon.” There is also a section entitled “Scope” which authorized the Army to deviate from the safety requirements when “literal application of a requirement to a specific job has impractical aspects.” In that circumstance the Army was

authorized to “approve an adaption which meets the obvious intent of the requirement. . . .” This language clearly granted the Army discretion with respect to the implementation of the safety regulations contained in the manual. See Vallier v. Jet Propulsion Laboratory, 120 F. Supp. 2d 887, 913 (C.D. Cal. 2000)(holding that the identical regulation “necessarily involves judgment and choice.”) Further, as stated by the Court in Aragon, “[a]n agency manual, in contrast to a regulation, is not necessarily entitled to the force and effect of law. This is particularly true if the agency did not intend the manual to be mandatory, but rather intended it as a guidance or advisory document.” 146 F.3d at 824-25. Moreover, there is in my view nothing in the above regulation that made it clear to the government that a three foot ventilation stack was in violation of the regulation while a stack of some greater height would not be.

Where a “previously determined policy established objective scientific criteria” and the government subsequently violated those criteria such an action would not constitute a protected exercise of discretionary function. Fisher Bros. Sales Inc. v. United States, 46 F.3d 279, 287 (3d Cir. 1995); see also Marlys Bear Medicine v. United States ex rel. Sec. of Dept. of the Interior, 241 F.3d 1208, 1215 (9th Cir. 2001)(stating that while “the assumption of a general statutory duty to promote safety would not be sufficient to meet the Berkovitz requirement for specific regulations setting out a clear duty. . .,” where a contract incorporated specific standards such as those required under OSHA, the government may not claim that a failure to meet those standards was the result of a policy choice). In their briefs and at oral argument plaintiffs relied on the affidavit of Robert Zoch, an environmental consultant, to prove that the government’s air ventilation system and its waste water disposal system were below accepted scientific standards. There is nothing in the record before me, however, informing me how Mr. Zoch arrived at his

conclusions, whether they represent accepted scientific standards for the time period in question, or whether these conclusions were or should have been adopted in some fashion by the government. Perhaps the government could have built the plant differently and included modifications that would have lessened its negative environmental impact. In order to remove discretion, however, the government must have violated a standard clearly established either by agreement or industry practice.<sup>4</sup> To state simply that the government could have designed a better plant is insufficient to establish FTCA liability. See Fisher Bros. 46 F.3d at 307 n.10 (“The fact that the plan implemented may, in hindsight, seem ill-advised, imprudent, or lacking in a rational policy basis in no way changes the character of the function under scrutiny.”) (citations omitted); Allen v. United States, 816 F.2d 1417 (10th Cir. 1987)(“Plaintiffs’ entire case rests on the fact that the government could have made better plans. This is probably correct, but it is insufficient for FTCA liability.”)

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<sup>4</sup> At oral argument and in their letter brief dated December 21, 2001, plaintiffs make much of the fact that Mr. Zoch’s testimony is the only evidence submitted by either party concerning the propriety of the plant’s design and point out the government has the burden of proving the application of the discretionary function exception. The government need only show, however, that it was entitled to exercise discretion when it made the particular decision is at issue. Plaintiffs cannot simply accuse the government of violating a law, regulation or scientific standard in some general sense. The nature of the specific, mandatory constraint on its discretion must be clearly identified. The government is not required to generate a comprehensive list of all the laws, regulations and standards that do not apply to its decision in order to establish that it acted with permissible discretion. Clearly it is plaintiffs’ burden to identify which specific law or regulation the government violated. So too plaintiffs must show with some degree of specificity what accepted scientific standard was violated at the time the decision at issue was made in order to establish that the government’s discretion was constrained. Reviewing the record before me, I find there is insufficient evidence that the government’s design of the plant was in violation of an accepted scientific standard. See Prescott v. United States, 973 F.2d 696, 701 (9th Cir.1992); Carlyle v. United States, 674 F.2d 554, 556 (6th Cir.1982)(each holding that while it is the government’s burden to prove that the exception applies, this burden arises only if the plaintiff first pleads matters that are facially outside the FTCA’s exceptions).

Plaintiffs also maintain that defendant is not entitled to the protection of the discretionary function exception because its actions violated certain laws of the state of New York. Specifically, plaintiffs contend that the government “blatantly disregarded” a state law requiring a permit to be obtained before the construction of an outlet discharging waste into state waters. (Pl.’s Br. in Opp. at 18). Plaintiffs rely on Clark v. United States, 660 F. Supp. 1164 (W.D. Wash. 1987), and Aragon v. United States, 146 F.3d 819 (10th Cir. 1998), for the proposition: “[s]tate laws that prescribe or prohibit certain conduct may create a mandatory duty with which the United States must comply for purposes of the discretionary function exception.” (Pl.’s Br. in Opp. at 18). I agree that just as a federal agency may adopt specific, mandatory standards or contractual obligations that thereafter curtail its discretion so too it may adopt the laws or regulations of a particular state. In Clark the Court found that a state environmental law was applicable to the federal government by virtue of its adoption by the federal agency in question.<sup>5</sup> In the absence of such an adoption, however, it is the only the presence of federal laws, regulations and policies containing specific, mandatory provisions that deprive the government of discretion for purposes of the FTCA. In Aragon the Court stated:

Plaintiffs further maintain that New Mexico has extensive state law regulating the use and particularly the contamination of, water, including ground water, and that the Air Force had no discretion to disregard it. This argument misses the point. Under the discretionary function analysis the crucial inquiry is whether there were any federal

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<sup>5</sup> In Clark the Court stated that the “duty attributable to a private person, to follow various Washington state statutes and Washington Administrative Code regulations concerning water pollution. . . was recognized in applicable Air Force manuals.” 660 F. Supp. at 1176 pt.7. I also note that the specificity of the regulations adopted by the government in Clark is greater than in the case before me. “For example, [one such regulation required] that the location of the fill should be such that run-off can be disposed of without polluting surface or sub-surface water supplies.” Id. at 1172 pt. 34.

statutes or regulations mandating specific conduct.

950 F. Supp. at 325. As there is nothing before me suggesting that the government adopted a state law that specifically prohibited its actions plaintiffs may not establish jurisdiction on this basis.<sup>6</sup>

v.

Plaintiffs also maintain that the contract between the Army and Sonotone “imposed mandatory duties on the government to procure all necessary permits.” (Pl.’s Br. in Opp. at 20). The provision referred to by plaintiffs requires “the Contractor” to obtain any permit or license required by state law. While plaintiffs do not dispute that this requirement is directed to Sonotone, they argue that since I have determined that “the government was the operator of the plant for purposes of the FTCA”<sup>7</sup> Sonotone and its employees were government employees and therefore any failure to obtain permits or abide by state law on Sonotone’s part may be imputed to the government. Id. at 21. In other words, plaintiffs maintain that when the contract was signed the government was essentially making a contract with itself thereby adopting all the duties and obligations on both sides of the contract. I disagree.

In my prior Order, I held the Army was sufficiently involved with the operation of the plant prior to its sale in 1962 that it could not shield itself from suit under the FTCA by claiming that Sonotone operated as an independent contractor during that period. This determination involved an assessment of the level of interaction between the Army and the plant. The basis for

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<sup>6</sup> The government also argues that under the contract it entered into with Sonotone Sonotone was responsible for obtaining all necessary permits and that, therefore, any “blatant” disregard of state law was committed by Sonotone. I will address the government’s contractual obligations in the following section.

<sup>7</sup> See Memorandum & Order, June 5, 2001.

my decision was the fact that the Army initiated and oversaw the design and construction of the plant, owned all real and personal property at the plant, installed all its equipment, owned all its materials and supplies, controlled what and how much the plant would produce, had access to the plant at all times, reserved the right to dismantle or repair the plant, reserved the right to shut down the plant, conducted inspections, had the ability to exercise day-to-day control of the plant and set the price terms for the products produced by the plant. As the operator of the plant the Army was free to enter contracts with other entities. For example, the Army hired the firm of Fletcher Thompson to build the plant. In addition, the Army entered into a contract with Sonotone detailing its obligations in assisting in the plant's operations. My prior Order simply held that the government could not shield itself from liability by claiming that in fact Sonotone and not the Army was the true operator of the plant. This does not mean that any obligation undertaken by Sonotone may be enforced against the government.

Plaintiffs cite Kirchmann v. United States, 8 F.3d 1273, 1275 (8th Cir. 1993), for the proposition that where the government exerts sufficient control "employees of a contractor are essentially transformed into government employees for purposes of the FTCA." (Pl. Br. in Opp. at 21). The discussion in Kirchmann cited by plaintiffs, however, appears in the context of the court's determination whether the government could rely on the independent contractor exception to the FTCA. The issue of whether the contractual obligations of an entity later determined not to be an independent contractor create mandatory and specific duties depriving the government of discretion was not before the Court in Kirchmann. The inquiry to be conducted in determining the applicability of the discretionary function exception involves examining whether the government was under an obligation to follow a specific course of

conduct at the time of its decision. It defies logic that the government violated a mandatory duty by failing to carry out particular provisions of a contract, when at the time of the alleged failure the contract had specifically assigned these provisions to another party. This situation does not change simply because it is determined fifty years later that as a matter of law the Army is not entitled to defend plaintiffs' claims by labeling Sonotone an independent contractor. Therefore jurisdiction may not be based on an allegation that the government violated contractual duties by reason of Sonotone's failure to obtain permits which the contract required it to obtain.

vi.

Finally, plaintiffs argue that the government violated the terms of an easement granted to it by an adjoining property owner for the construction and use of the storm drain that eventually would be used to discharge contaminated waste water into the river. The easement provided in pertinent part:

the Grantor. . . hereby. . .conveys unto the United States of America and its assigns, an easement and right-of-way for the construction, operation and maintenance of an underground storm drain through the following described property. . . .

. . .

The easement and right-of-way is granted subject to the following provisions and conditions . . . The United States . . . shall be responsible for damages which may arise to any structure or the contents thereof now or hereafter situated upon the property owned by the Grantor, resulting from the construction, maintenance, repair, operation . . . of the . . . underground storm drain or any part or parts thereof.

Plaintiffs maintain that this language restricts the rights of the government to “construct and use a storm drain to carry off the [p]lant’s rainwater, and not its wastewater.” (Pl.’s Br. in Opp. at 24)(emphasis in original). However, as the defendant points out the word “rainwater” is nowhere mentioned in the easement. In support of their interpretation of the easement plaintiffs cite a letter sent by the grantor to Sonotone in 1953 stating that the grantor believed the easement was

for “the distinct use of carrying off rainwater.” Whether or not this is a colorable reading of the easement it is not specifically reflected in the language used. Essentially plaintiffs argue that in agreeing to construct and maintain a “storm drain” for its use the government adopted a mandatory duty not to use it for anything but the specific purpose of discharging rainwater and rainwater only. I disagree. In my view the language used was not specific enough to reflect the adoption of a mandatory duty that the government later violated through its operation of the plant.

In summary, since none of the sources relied on by plaintiffs provided specific, mandatory directives for the Army to follow in the disposal of its waste material, its decisions were discretionary.

### C.

Having concluded that the government exercised discretion in deciding how to dispose of the plant’s waste water, I now proceed to the second prong under Gaubert, which requires that I determine whether the challenged conduct involved judgment that “is of the kind that the discretionary function was designed to shield.” 499 U.S. at 322-23 (citations omitted). Only decisions and actions “based on considerations of public policy” are protected from liability. Berkovitz, 486 U.S. at 536. The “focus of the inquiry is not on the agent’s subjective intent in exercising the discretion conferred. . . but on the nature of the actions taken and on whether they are susceptible to policy analysis.” Gaubert, 499 U.S. at 325. As the Gaubert Court noted, “there are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be

said to be based on the purposes that the regulatory regime seeks to accomplish.” 499 U.S. at 325

n.7. By way of illustration the Court stated,

if one of the officials involved in this [type of] case drove an automobile on a mission connected with his official duties and negligently collided with another car, the [discretionary function] exception would not apply. Although driving requires the constant exercise of discretion, the official’s decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.

Id. As stated above, there are two distinct “decisions” that require a determination as to the applicability of the discretionary function exception: (1) the design of the plant, and (2) the failure to warn local residents of any hazardous substances emitted by the plant. I will examine each separately.

i.

The government argues that the design of the plant constituted a protected discretionary decision because it concerned the production of a vital weapon component made during the exigencies of the Korean War. In Aragon the Court of Appeals for the Tenth Circuit held that washing military aircraft with a toxic solvent that eventually contaminated nearby groundwater constituted a “policy choice of the most basic kind.” 146 F.3d at 826. Explaining its rationale, the Aragon Court stated “[t]he Base operated under military exigencies during World War II, the Korean Conflict, the Vietnam Conflict and the Cold War.” Id. Noting that the Gaubert decision required it to focus “not on the agent’s subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis,” Gaubert 499 U.S. at 325, the Aragon Court continued:

[a]ccordingly, we need not determine what specific factors led Air Force personnel to dispose of the . . . contaminated waste water as it did. The record before us sufficiently

demonstrates that Base operational decisions, including industrial waste disposal decisions, were subject to public policy analysis due to the military exigencies of the time.”

146 F.3d at 826.

Plaintiffs point out that the Court of Appeals for the Third Circuit has held that the military may not escape liability under the FTCA in every instance merely by raising the specter of national security. In Gotha v. United States, 115 F.3d 176, 181 (3d Cir. 1997), the Court held the Navy did not function within the ambit of statutory agency discretion when it failed to provide a handrail along a steep, unlit, twenty-foot long path where there was evidence it had prior notice of the danger. The Navy was not entitled to the protection of the discretionary function exception because in the Court’s view the government had failed to articulate a policy rationale sufficiently connected to the Navy’s mission that factored into its decision not to rebuild the stairway or install a handrail. Id. at 181-182. The Court rejected the government’s attempt to characterize the decision not to take action as one implicating national security, stating: “[t]his case is not about a national security concern, but rather a mundane, administrative, garden-variety, housekeeping problem that is about as far removed from the policies applicable to the Navy’s mission as it is possible to get.” Id. at 181.

Plaintiffs also rely on Redland Soccer Club, Inc. v. United States, 835 F. Supp. 803 (M.D. Pa. 1993), rev’d on other grounds, 55 F.3d 827 (3d Cir. 1995). In Redland the government contended that the Army’s decision to bury toxic waste in a landfill that it later conveyed to a local township for use as a soccer field was “dominated by considerations of affordability, efficiency and safety” and therefore entitled to protection under the discretionary function exception. Id. at 807. The Redland court disagreed, stating that while it had “little doubt that

there was a process of deliberation involved” it was “dubious” that decisions such as where to place a landfill, what to commit to a landfill, and whether to transfer the land to the township were of the sort that the discretionary function exception was designed to shield. Id. at 810.

While not the only area within their ambit of discretion, there can be little doubt that decisions related to the defense of the country or the prosecution of an armed conflict are central to the mission of the armed services. The availability of the discretionary function exception often depends upon the government’s ability to demonstrate the extent to which such decisions are clearly related to those missions. In Redland Soccer the decision at issue was the method of disposal of toxic waste. Unlike the case before me there was no suggestion that the decision in Redland was in any way related to the Army’s ability to conduct specific war-time operations or any other military prerogative. Similarly, in Gotha the government was not able to establish a solid link between the failure to install a handrail and any policy sufficiently related to the furtherance of the Navy’s mission. In Aragon, as in Redland, the challenged decision involved the method of disposal of hazardous waste. Yet in Aragon, unlike in Redland, the Court held that the Army’s decision was entitled to the protection of the discretionary function exception. The crucial difference between these two cases is that in Aragon the Air Force’s choice of waste disposal was directly related to its method of care and maintenance for aircraft during a period of heightened military alert and therefore involved military “policy choices of the most basic kind.” 146 F.3d at 826.

In the case before me, while conceding that there may have been a need to manufacture nickel cadmium batteries plaintiffs state that the government “overstates the urgency of this project.” (Pl.’s Rep. Br. at 6). Even if such a need existed, according to plaintiffs the decisions

regarding the design and operation of the plant were neither rooted in policy considerations nor susceptible to policy analysis but were instead “routine chores” or “mundane tasks” common to any manufacturing enterprise. (Pl.’s Br. in Opp. at 26). In plaintiffs’ view the government “has simply failed to offer any policy reasons (other than generalized national defense concerns) to justify its activities.” (Pl.’s Sur. Rep. at 8). I disagree.

The government maintains that the design of the plant arose out of an urgent need for a vital weapons component and was a direct reflection of policy considerations surrounding the Cold War in general and the Korean War in particular. In support of this contention the government points to a number of documents, including a letter to Irving Schachtel, the President of Sonotone Corp., from the Army’s Chief Signal Officer, Major General R. T. Nelson dated February 28, 1962, six months prior to the sale of the plant to Sonotone. Contained in the letter is the following description of the environment in which the Army built the plant:

At the beginning of the Korean Emergency the United States did not have either a manufacturer or a production facility capable of producing in quantity, nickel cadmium batteries of the sintered plate type.

....

Various challenges encountered during the construction were met by your company with responsiveness and sound judgment. Within eight months from the time of occupancy in October 1952, production of batteries was begun. The performance of [Sonotone] in the production of critically needed nickel cadmium batteries. . . and the performance and maintenance of the [plant] since are highly commendable and have been instrumental in meeting a vital need of the United States Army.

(Def.’s Br. App. #000197). This letter is clear evidence of the high degree of urgency under which the plant was constructed and is supported by another document entitled “Request for Expediting Production Funds - Expansion of Sonotone Corporation for Production of Batteries” dated July, 1951. In this document Chief Signal Officer, Major General Back stated that the plant was to be constructed “in accordance with the wishes of Army Ordinance that all possible

measures be taken to prevent possible failure in supply of these extremely critical batteries,” and concluded: “In view of the urgency of this project and its importance for the national defense, early and favorable action is requested.” (Def.’s Rep. Br. Supp. App. #000839, 000842).

Similarly, in a memorandum dated December 4, 1951, concerning the priority attached to the construction of the plant, the batteries are described as “in Urgency I . . . critical to the defense of the United States.” (Def.’s Rep. Br. Supp. App. #000904). The memorandum also states that at the time it was written, December 4, 1951, three or four months production of the type of missile the batteries were designed for were awaiting production of the batteries and further noted that the plant was to produce batteries “for the Atomic Energy Commission whose requirements may have even a higher urgency. . . .”

Not only did the plant need to begin production as soon as possible, there is also evidence that the plant needed to be built cheaply. In the General Back’s request for production funds mentioned above, he described the plant to be built as “of the simplest and most economical type, consistent with production requirements. . . .” (Def.’s Rep. Br. Supp. App. #000839). In addition, John Gresko, Sonotone’s General manufacturing manager from 1950 to 1952, testified that at a meeting in 1951 concerning the plant he was told funds were not available for a closed waste-water system and therefore a by-pass line would have to be cut. (Def. App. #000129-132). In my view at the time the plant was designed there was an urgent need for it to be built as fast and cheaply as possible. Further, decisions regarding the manner in which the batteries were to be produced, including how the plant was designed, fall squarely with the Army’s prerogative and were the kind of determinations the discretionary function exception was designed to shield.

Much of plaintiffs’ argument centers around a perceived failure on the part of the

government to explain why it designed the plant as it did. For example, plaintiff states: “it can hardly be maintained that the [g]overnment’s decisions to discharge contaminated wastewater directly into the Cove or to build vents that stood only three feet instead of ten feet were central to its mission of producing batteries.” (Pl. Br. in Opp. at 31). The government need make no such justification however. In Sea-Land Service, Inc. v. United States, 919 F.2d 888, 982 (3d Cir. 1990), a case involving the government’s use and subsequent failure to remove asbestos in the construction of a particular class of ships, the Court of Appeals stated:

[t]he question of what options were feasible at the time of the government’s actions is not relevant. In determining whether the action of the government involves the permissible exercise of policy judgment, [a court] need not examine the record for evidence of a conscious policy decision regarding the use of asbestos in ship construction. The relevant inquiry is whether the use of asbestos is a matter “susceptible to policy analysis.” An oversight or a failure to weigh the relevant factors does not affect whether we treat the conduct as a matter susceptible to policy analysis. Indeed, even a showing that the Army was negligent in proceeding as it did would not mean that it was barred from claiming the protection of the discretionary function exception.

(citations omitted). Contrary to plaintiffs’ assertions the government need not justify why it failed to take a different course. See also Smith v. Johns-Mansville Corp., 795 F.2d 301, 307 n.10 (3d Cir. 1986)(“[t]he fact that the plan implemented may, in hindsight, seem ill-advised, imprudent, or lacking in a rational policy basis in no way changes the character of the function under scrutiny.”).

Plaintiffs contend that “there comes a point at which a governmental decision ceases to be central to or in any way related to a proclaimed policy consideration.” (Pl.’s Br. in Opp. at 31). I do not believe that is the situation in this case. The relevant governmental decision was to design the plant as it did, which included the choice of three foot smoke stacks and provisions for periodic discharge of excess waste water into the river. The related policy consideration was

how best to cheaply and quickly produce vital weapon components in the midst of the Korean conflict at arguably the height of the Cold War. In my view the design of a facility by the United States Army to produce equipment exclusively for use by the American military is a discretionary function entitled to protection from liability under the FTCA. This holding is in keeping with a number of other courts who have faced similar issues.<sup>8</sup>

Plaintiffs also maintain that even if the government's initial decision to build the plant is protected "its subsequent operation of the plant in a manner which resulted in the discharge and release of contaminants is not so protected." (Pl.'s Br. in Opp. at 30). To the extent that this assertion refers to the alleged failure on the part of the government to warn local residents of both the airborne and waste water contaminants released by the plant I will address plaintiffs' argument in the following section. If however plaintiffs are attempting to distinguish between the Army's decision to design the plant in a particular fashion from a separate "decision" to operate the plant as designed, I reject such a distinction. In other words, the protection I afford

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<sup>8</sup> See Boyle v. United Technologies Corp., 487 U.S. 500, 511 (1988) ("selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function [since it] often involves ... judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness."); Dalehite v. United States, 346 U.S. 15 (1953)(claims against the Army arising from the explosion of ammonium nitrate fertilizer awaiting export to devastated areas after World War II barred by discretionary function exception); Sea-Land, 919 F.2d at 891 ("the government's use of asbestos in ships built during its rapid World War II ship construction program was a matter susceptible to policy analysis"); W.C. & A.N. Miller Companies v. U.S., 963 F. Supp. 1231, 1240 (D.D.C.1997) (decisions regarding the disposal of munitions by the Army are of the type that require a balancing of objectives sought to be obtained against such considerations as staffing, funding, national security, and safety); Vallier v. Jet Propulsion Laboratory, 120 F. Supp.2d 887, 912 (C.D. Cal. 2000)("[t]he Ninth Circuit has repeatedly found claims based upon design choice to be barred by the discretionary function exception)(citations omitted);Laurence v. United States, 851 F. Supp. 1445, 1450-52 (N.D. Cal.1994)(discretionary function applied to shield government from suit based upon alleged contaminated soil used in the construction of a housing complex to support a World War II emergency need for immediate housing).

the Army with respect to its decision to design the plant as it did extends to the implementation of that design, including the plant's construction and operation.<sup>9</sup>

ii.

Plaintiffs also contend that “allowing the knowing discharge of admittedly harmful toxins to invade the Allen plaintiffs’ yards and contaminate their surrounding environment without so much as a warning of the dangers to which they were subjected, does not square with Congress’ purpose in adopting the discretionary function exception.” (Pl.’s Br. in Opp. at 8). Depending upon the facts of the particular case, the United States has been either immunized or held liable under the FTCA for alleged failures to warn of hazards created by governmental acts or omissions. See Donald T. Kramer, Liability of United States for Failure to Warn of Danger or Hazard Resulting from Governmental Act or Omission as Affected by “Discretionary Function or Duty” Exception to Federal Tort Claims Act, 170 A.L.R. Fed. 170 (2001).

In the case before me, plaintiffs state that the government’s failure to warn private residents near the plant of their potential exposure to harmful toxins would be entitled to

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<sup>9</sup> Another possibility is that plaintiffs’ seek to have the government justify the continued operation of the plant beyond the period of alleged military exigency. This argument is not squarely addressed by either party; however, the government states that the plant produced “vital weapons components during the Korean War and during the height of the Cold War” thereafter. (Def.’s Br. at 19). The Army operated the plant from January 1953 to September 1962. While the government has submitted nothing indicating why this period should be considered the “height” of the Cold War or what the specific concerns of the military were at this time, under the Federal Rules of Evidence I may take judicial notice of any fact generally known within my jurisdiction, and I note that this decade indeed was one of heightened military concern for the United States. Fed. R. Evid. 201(b). Whether or not simply stating that weapon components were built during the Cold War is sufficient to establish that the method of their production is a protected discretionary decision is not before me. Having accepted that the initial decision to build these particular components, as well as their method of production, at that particular time was within the prerogative of the military I hold that the decision to continue to produce them throughout this period was similarly susceptible to military policy analysis and is therefore also entitled to the protection of the discretionary function exception.

protection under the discretionary function exception only “if, and only if, in the first instance, the failure to warn was the result of an affirmative decision by the government not to warn.” (Pl.’s Resp. Br. at 32). This is incorrect. In Smith v. Johns-Mansville Corp., 795 F.2d 301, 308-09 n.10 (3d Cir. 1986), the Court of Appeals stated that “[t]he test is not whether the government actually considered each possible alternative in the universe of options, but whether the conduct was of the type associated with the exercise of official discretion.” See also Sea-Land Services, Inc. v. United States, 919 F.3d 888, 892 (3d Cir. 1990)(holding there need be no evidence of a conscious policy decision for the government to be protected under the discretionary function exception); U.S. Fidelity & Guar. Co. v. United States., 837 F.2d 116, 121 (3d Cir. 1988) (quoting Allen v. United States, 816 F.2d 1417, 1422 n.5 (10th Cir.1987): “it is irrelevant whether the alleged failure to warn was a matter of ‘deliberate choice’ or a mere oversight”)(citations omitted).

In Sea-Land, as an alternative to a claim about the use of asbestos in the construction of ships during World War II, plaintiff attempted to establish liability for the government’s failure to warn of the dangers of exposure to this substance. The Sea-Land Court stated that this argument “confuse[d] negligence with immunity.” 919 F.2d at 892. The Court continued: “[t]he government’s failure, both during and after the war, to warn of the potential health risks of asbestos once it learned of them was a matter susceptible to policy analysis and within the discretionary function exception.” Id. Further, the Court held the government’s failure to warn was “similar” to its choice to use asbestos in the first instance and therefore also entitled to protection from liability. Id. In other words, any lack of due care in failing to warn of the dangers of asbestos was simply activity stemming from the government’s protected decision to

use asbestos in the first place. Even if this lack of care rose to the level of negligence the government would nonetheless be immune from tort liability. Id.

Applying the rationale employed in Sea-Land to the case before me, the government is immune from suit for its failure to warn residents living near the plant of their potential exposure to harmful materials. Plaintiffs repeatedly point to a perceived inability on the part of the government to show how a decision not to warn local residents of the presence of hazardous materials could possibly be related to any military prerogative. Under Sea-Land this is not the relevant inquiry. The failure to warn is not to be examined in isolation; rather I must determine whether it is susceptible to classification as an aspect of the government's decision concerning the plant's design, a decision I have already determined to be discretionary, based on policy considerations and therefore entitled to immunity from suit. In other words whether or not the government could have warned the residents living near the plant, or even violated a duty of care in failing to issue a warning is not relevant. Instead I must examine whether it is the kind of decision that is susceptible to policy analysis. Id. This determination is to be conducted even in the absence of any showing on the part of the government that it actually weighed policy alternatives in this instance. Accordingly, I hold that where a manufacturing plant was producing a vital war-time weapons component and where speed and efficiency were of the essence, decisions relating to the release of information concerning what is discharged from the plant can be characterized as a policy judgment reflecting one aspect of the Army's decision on how best to design and operate the facility.

Plaintiffs point out, and I agree, that once a discretionary decision is made all subsequent decisions are not necessarily protected by the exception. See Cestonaro v. United States, 211

F.3d 749, 757 (3d Cir. 2000). However, in this case the government's failure to warn was in my view not a subsequent decision at all but rather another aspect of the government's decision on how to best dispose of its waste material. This type of decision implicates safety, economic, efficiency and military concerns and is of the type that Congress determined should not be "second-guessed" by the judiciary.

A similar rationale has been employed by the Court of Appeals for the Fourth Circuit in Minns v. United States, 155 F.3d 445 (4th Cir. 1998). In Minns plaintiffs complained of the military's failure to warn servicemen of the dangers inherent in certain inoculations and toxins to which they were exposed in preparation for the Gulf War. These substances were later linked to birth defects in the children of these servicemen. Relying on the discretionary function exception, the Minns court found in favor of the government stating that the failure to warn implicated policy decisions. Id. at 452. The Minns Court found that the protected decision to expose the servicemen to these substances initially was closely related to the subsequent "decision" not to warn of any possible ill effects that might result as a consequence of such exposure. See id. The same is true in the case before me. See also Bloom v. Waste Management, Inc., 615 F. Supp. 1002 (E.D. Pa. 1985), aff'd 800 F.2d. 1131 (3d Cir. 1986)(holding that where the Atomic Energy Commission undertook a study of the health effects of mine radiation and failed to disclose its results to affected miners due to national security concerns the decision not to warn was discretionary and protected from FTCA liability); In re Agent Orange Product Liability Litigation, 818 F.2d 194 (2d Cir. 1987)(holding the government had no duty to warn servicemen about the possible health hazards of Agent Orange under the discretionary function exception); Shuman v. United States, 765 F.2d 283 (1st. Cir.

1985)(holding that whether the government should have warned the employees of a government contractor about the dangers of working with asbestos was a matter of administrative discretion protected by the discretionary function exception).

The goal of the FTCA was in large part to hold the government accountable in a manner similar to the way private individuals and entities are held accountable for those harms that result in injuries to others. However, in an effort to prevent judicial “second-guessing” of “discretionary decisions grounded in social, economic, and political policy through the medium of an action in tort,” Congress included the discretionary function exception within the framework of the FTCA. United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984). Since the government’s decision with respect to the design of the plant is the type of decision that is susceptible to policy analysis the government is entitled to protection under the discretionary function exception. The same is true with respect to its failure to warn local residents of the potential health hazards associated with this decision.

D.

Finally, there remains before me a discovery dispute between the parties concerning the production of documents. As I have determined that the government is immune from suit under the discretionary function exception of the FTCA this dispute need not be resolved.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GOULD ELECTRONICS INC.	:	
f/k/a GOULD INC., AMERICAN	:	CIVIL ACTION
PREMIER UNDERWRITERS, INC.	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	NO. 99-1130

**ORDER**

AND NOW, this            day of January, 2002, it is ORDERED:

1. Defendant's motion to dismiss plaintiffs' complaint for lack of subject matter jurisdiction pursuant to the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a), is GRANTED and the complaint is DISMISSED.
2. Plaintiffs' motion to compel discovery and for sanctions is DENIED as moot.

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THOMAS N. O'NEILL, JR., J.