UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

In re: Gold King Mine Release in San Juan County, Colorado on August 5, 2015	MDL No. 1:18-md-02824-WJ
THIS DOCUMENT RELATES TO:	
Allen et al. v. United States et al. **Case No. 1:18-cv-00744**	

FEDERAL DEFENDANTS' MOTION TO DISMISS AND INCORPORATED MEMORANDUM IN SUPPORT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

FEDERAL STATUTES

FEDERAL RULES

FEDERAL REGULATIONS

The Federal Defendants, the United States of America and the United States Environmental Protection Agency ("EPA" or "the Agency"), hereby move to dismiss the claims against them in *Allen et al. v. United States et al.*, No. 1:18-cv-00744, for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). The memorandum of points and authorities supporting the Federal Defendants' motion to dismiss is set forth below.

INTRODUCTION AND SUMMARY OF ARGUMENT FOR DISMISSAL

This litigation arises from an inadvertent release of contaminated water from the Gold King Mine ("GKM") on August 5, 2015. This accidental release occurred in the course of efforts that EPA and others had undertaken to respond to mining contamination, the legacy of a century of mining activity in the area. Prior to this accident, EPA had begun exercising its authority under the Comprehensive Environmental Response, Compensation and Liability Act, ("CERCLA"), 42 U.S.C. § 9604, to investigate the GKM and other nearby mines that are sources of this legacy mining contamination. In the accident's aftermath, EPA increased its efforts to protect public health and the environment, including by adding the mining releases to its "National Priorities List" for remediation (as determined necessary) pursuant to CERCLA, 81 Fed. Reg. 62,397, 62,400 (Sept. 9, 2016). To date, EPA has spent well over $29 million on past and continuing response efforts, including building and maintaining a treatment facility and investigating contamination throughout the Bonita Peak Mining District.

Plaintiffs have brought tort claims against the United States and EPA under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-80 ("FTCA"). Plaintiffs' claims against EPA cannot go forward because the United States is the only proper party to an FTCA action; a federal agency cannot be sued under the statute. Moreover, none of Plaintiffs' claims against the United States can proceed because the "discretionary function exception" to the FTCA's waiver

of sovereign immunity bars the claims. This exception prohibits any claims seeking to challenge EPA's discretionary, policy-based decisions in investigating the abandoned GKM pursuant to CERCLA and responding to the release. The discretionary function exception applies because EPA's conduct at the GKM was not constrained by a federal statute, regulation, or policy and is susceptible to policy analysis. Indeed, EPA was acting pursuant to the very purpose of CERCLA in evaluating for remedial action a serious source of environmental pollution of the Animas River watershed—pollution which resulted from decades of hard rock mining without environmental controls—and in responding to the inadvertent release that occurred.

LEGAL BACKGROUND

A. The Comprehensive Environmental Response, Compensation and Liability Act

In 1980 Congress enacted CERCLA, 42 U.S.C. §§ 9601-75, "to provide a mechanism for the prompt and efficient cleanup of hazardous waste sites." *United States v. City & Cty. of Denver*, 100 F.3d 1509, 1511 (10th Cir. 1996). Section 9604 authorizes the President to take action to respond to a release or substantial threat of release of any hazardous substance. 42 U.S.C. § 9604. The President has delegated some of that authority to EPA. *See* 52 Fed. Reg. 2923 (Exec. Order No. 12,580) (Jan. 23, 1987). EPA can address releases under section 9604 by performing "removal" or "remedial actions," collectively termed "response" actions. 42 U.S.C. § 9601(23)-(25). "Removal action" is defined to include, among other actions, "the cleanup or removal of released hazardous substances from the environment," as well as actions "necessary to monitor, assess, and evaluate the release" of hazardous substances. *Id.* § 9601(23). "Remedial action" is defined to include, *inter alia*, "actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment." *Id.* § 9601(24). EPA may conduct a "removal site evaluation"

to aid the agency in determining whether a removal or remedial action would be appropriate. *See* 40 C.F.R. § 300.410.

B. The Federal Tort Claims Act

The Federal Tort Claims Act "'is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment.'" *Garling v. U.S. Envtl. Prot. Agency*, 849 F.3d 1289, 1294 (10th Cir. 2017) (quoting *United States v. Orleans*, 425 U.S. 807, 814 (1976)). The FTCA lists exceptions to the waiver of sovereign immunity in 28 U.S.C. § 2680. "When an exception applies, sovereign immunity remains, and federal courts lack jurisdiction." *Garling*, 849 F.3d at 1294. The discretionary function exception, 28 U.S.C. § 2680(a), provides that the United States is not liable for:

> [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.

"This discretionary function exception 'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.'" *Garling*, 849 F.3d at 1295 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense ("Varig Airlines")*, 467 U.S. 797, 808 (1984)).

STANDARD OF REVIEW

The federal courts are courts of limited jurisdiction and may exercise only that jurisdiction which has been granted to them by Congress. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Plaintiffs bear the burden of proving that subject-matter jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Because

subject-matter jurisdiction focuses on the court's power to hear the plaintiff's claim, a Rule 12(b)(1) motion imposes on the court an affirmative obligation to ensure that it has jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). The United States brings a facial jurisdictional challenge to Plaintiffs' Complaint under Fed. R. Civ. P. 12(b)(1). The United States disputes many allegations in Plaintiffs' Complaint; however, for purposes of this jurisdictional challenge based solely on the allegations of the Complaint, the Court should accept the factual allegations as true as it would for a motion under Fed. R. Civ. P. 12(b)(6). *See Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995).

PLAINTIFFS' ALLEGATIONS AGAINST THE FEDERAL DEFENDANTS

The *Allen* lawsuit stems in large part from the legacy of more than a century of mining activity and its associated impacts on the environment. Plaintiffs allege that the GKM is "a former gold mine located in southwestern Colorado." Compl. ¶ 308. The mine operated under a mining permit which "required at the end of mining activities, the mining company close all four mine portals." *Id.* ¶ 319. "In 2007, increased wastewater flow from the Gold King Mine Level 7 Adit caused a slope failure and landslide at the adit's waste-rock dump. The debris blocked the entrance to the adit." *Id.* ¶ 321. The Colorado Division of Reclamation, Mining and Safety ("DRMS") "expressed concern that water could build up behind the collapsed material at the adit and eventually result in a blowout." *Id.* ¶ 322. "In 2009, DRMS unsuccessfully attempted to penetrate the debris blocking the adit. . . ." *Id.* ¶ 323.

"In 2014, DRMS requested EPA to reopen and stabilize the adit." *Id.* ¶ 324. That year, "EPA began a removal site evaluation to investigate the possibility of opening the collapsed mine portal," using the services of EPA contractors, Environmental Restoration and Weston

Solutions. *Id.* ¶¶ 325, 326. "EPA and the Contractor Defendants suspended their work until 2015 because they uncovered conditions that required them to plan to treat a greater quantity of water potentially accumulated behind the blockage." *Id.* ¶ 332.

"On August 4, 2015, EPA, DRMS, Environmental Restoration, and Weston Solutions ('EPA On Site Team') created a plan to conduct excavation activities at the Level 7 Adit." *Id.* ¶ 335. On August 5, 2015, the "EPA On Site Team performed work at the Level 7 Adit." *Id.* ¶ 347. Plaintiffs claim that "[m]embers of EPA On Site Team have given conflicting reports regarding their work." *Id.* ¶ 349. Plaintiffs allege that "[s]ome believed their objective was to excavate the adit to create an opening . . . [but] [o]thers believed the objective was to use a backhoe excavator to scratch the earth around the adit." *Id.* Plaintiffs contend that "this conflict was caused by miscommunication among EPA and the Contractor Defendants." *Id.* ¶ 350. Consequently, Plaintiffs allege that the "EPA On Site Team intentionally performed their actions but did not clearly understand their work, or how to safely and properly accomplish the work given the dangers presented by the site. *Id.* Plaintiffs conclude that "[t]he intentional actions of EPA and Contractor Defendants caused a breach in the adit, resulting in the blowout." *Id.* ¶ 351. "The blowout released approximately 3,000,000 gallons of hazardous, toxic orange-brown wastewater into the Animas River." *Id.* ¶ 353.

Plaintiffs have brought counts against the Federal Defendants for negligence, negligence per se, and gross negligence. Plaintiffs allege that the Federal Defendants are liable for several negligent actions and omissions:

- "Failing to ascertain the level of pressure present behind the collapsed material at the adit before beginning to excavate." *Id.* ¶ 364(a).
- "Assuming that the seepage level outside the Gold King Mine indicated the water level inside the mine." *Id.* ¶ 364(b).

- "Failing to use excavation methods proven to reduce the likelihood of a blowout, including failing to provide the required support system to stabilize the mine portal prior to excavation, as required by the work plan and by the applicable 'Specific excavation requirements' of 29 C.F.R. § 1926.651(i)." Compl. ¶ 364(c).

- "Initiating excavation work at the Gold King Mine prior to the arrival of the licensed experts and without otherwise engaging an employee, consultant, or other agent with the requisite level of engineering experience to inspect the Gold King Mine conditions, as required by the 'Specific excavation requirements' of 29 C.F.R. § 1926.651(k)." Compl. ¶ 364(d).

- "Carelessly overseeing the operation of heavy machinery near the earthen plug in the Gold King Mine in violation of 40 C.F.R. § 300 et seq." Compl. ¶ 364(e).

- "Commencing work at the Gold King Mine on August 5, 2015 without having the proper water management and treatment equipment in place, contrary to instructions and the work plan, and contrary to the requirements of the applicable 'Specific excavation requirements' of 29 CFR § 1926.651(h)." Compl. ¶ 364(f).

- "Neglecting to follow instructions, regulations, and best management practices when carrying out activities at and related to the Gold King Mine." Compl. ¶ 364(g).

- "Failing to comply with the work plan's provision for 'ramping up' to a higher elevation before excavating, as required by 29 C.F.R. § 1910.120(b)(1)(iii)." Compl. ¶ 364(h).

- "Failing to have in place an adequate emergency response plan sufficient to guide them in the event of a blowout like the one that occurred on August 5, 2015, as required by 29 C.F.R. § 1910.120(l)." Compl. ¶ 364(i).

- "Failing to adequately train workers on-site to deal with expected emergencies like the blowout that occurred on August 5, 2015, as required by 29 C.F.R. § 1910.120(e)(7)." Compl. ¶ 364(j).

- "Failing to exercise reasonable care in their immediate efforts to halt or otherwise mitigate the release of the toxic wastewater and other contaminants into Cement Creek." Compl. ¶ 364(k)

- Failing to notify those impacted by the release in a timely and reasonable fashion, as required by 40 C.F.R. § 300.135(j)(1)." Compl. ¶ 364(l).

ARGUMENT

Plaintiffs have alleged tort causes of action against the United States of America and EPA pursuant to the FTCA, 28 U.S.C. §§ 1346(b), 2671-80. The Federal Defendants move to dismiss all of Plaintiffs' tort claims under the FTCA because the claims on their face are jurisdictionally barred.

I. EPA Is Not an Appropriate Party Under the FTCA.

This Court lacks jurisdiction over Plaintiffs' tort claims against EPA because EPA is not an appropriate party under the FTCA. Congress has never waived sovereign immunity for tort suits against federal agencies, such as EPA. The FTCA specifically states:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title [FTCA], and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. § 2679(a). It is well established that a federal agency "cannot be sued for damages *eo nomine* [under that name] without explicit statutory authorization." *Navy, Marshall & Gordon, P.C. v. U.S. Int'l Dev.–Coop. Agency*, 557 F. Supp. 484, 488 n.4 (D.D.C. 1983); *see also Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998). Consequently, this Court has previously held, "Congress has explicitly provided . . . that the only proper party in an action under the FTCA is the United States, not the [federal] agency." *Cortez v. EEOC*, 585 F. Supp. 2d 1273, 1284 (D.N.M. 2007) (citing 28 U.S.C. § 2679(a)). Thus, this Court lacks jurisdiction over Plaintiffs' tort claims against EPA.

II. The FTCA's Discretionary Function Exception Bars Plaintiffs' Claims Against the United States.

Plaintiffs' tort claims against the United States are barred by the FTCA's discretionary function exception. The FTCA creates a limited waiver of sovereign immunity by authorizing

damage actions for injuries caused by negligent or wrongful conduct of federal employees acting within the scope of their employment, in circumstances where a private person would be liable for such conduct under state law. *See* 28 U.S.C. § 1346(b)(1). This waiver of sovereign immunity, however, is subject to exceptions. "The most important of these exceptions . . . is the discretionary function exception," *McMellon v. United States*, 387 F.3d 329, 335 (4th Cir. 2004) (en banc), which provides that the United States is not liable for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

If a claim falls within the FTCA's discretionary function exception, it is outside the FTCA's limited waiver of immunity, and the action must be dismissed for lack of subject-matter jurisdiction. *See Garcia v. United States Air Force*, 533 F.3d 1170, 1175-76 (10th Cir. 2008); *Domme v. United States*, 61 F.3d 787, 789 (10th Cir. 1995). The FTCA's discretionary function exception "poses a jurisdictional prerequisite to suit;" therefore, a plaintiff must show that the exception does not apply "as part of his overall burden to establish subject matter jurisdiction." *Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998) (quotations omitted); *see also Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1220 (10th Cir. 2016).

The purpose of the exception is to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy" through tort suits. *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988) (quoting *Varig Airlines*, 467 U.S. at 814). When Congress enacted the FTCA, its focus was on granting relief for routine, run-of-the-mill accidents as distinguished from injuries resulting from discretionary policy-based governmental conduct. *Dalehite v. United States*, 346 U.S. 15, 28 n.19 (1953). "Uppermost in the

collective mind of Congress were the ordinary common-law torts." *Id.* at 28. The example that was reiterated most frequently in the legislative history was "'negligence in the operation of vehicles.'" *Id.* (citing legislative history).[1]

The Supreme Court has established a two-part test to determine the applicability of the discretionary function exception. *See United States v. Gaubert*, 499 U.S. 315, 322–24 (1991); *see also Garcia*, 533 F.3d at 1176; *Lopez v. United States*, 376 F.3d 1055, 1057 (10th Cir. 2004). First, for the exception to apply, the allegedly negligent act or omission must not have violated a statute, regulation, or policy that prescribed a specific and mandatory course of action for the government employee to follow. *See Gaubert*, 499 U.S. at 322–24; *Berkovitz*, 486 U.S. at 536; *Garcia*, 533 F.3d at 1176. If such a provision applied and was violated, then the alleged negligent act or omission could not be "discretionary." Second, assuming that the government employee had discretion, the discretionary function exception applies if the conduct at issue is "susceptible to policy analysis" involving social, economic, or political policy considerations. *Gaubert*, 499 U.S. at 322–23, 325; *Garcia*, 533 F.3d at 1176. The government's discretionary acts are presumed to be grounded in policy, "and it is up to the challenger to allege facts showing that the actions were actually not policy-oriented." *Hardscrabble Ranch*, 840 F.3d at 1222 (citing *Gaubert*, 499 U.S. at 324-25).

Under the Supreme Court's two-part test, the focus of the discretionary function inquiry must be on "'the nature of the [alleged] conduct'" and not the "'status of the actor.'" *Gaubert*,

[1] The Supreme Court cited proposals for a federal tort claims act and hearings on proposed legislation. *See* 346 U.S. at 28 n.20 (citing legislative history); *see also United States v. Gaubert*, 499 U.S. 315, 325 n.7 (1991) (citing the negligent operation of an automobile as a discretionary act that would not be within the discretionary function exception because the operation of a car could not be said to be grounded in policy); *Kiehn v. United States*, 984 F.2d 1100, 1105 n.5 (10th Cir. 1993) (noting that "ordinary discretion" such as the discretion involved in driving a car was not the kind of conduct that the exception was meant to protect).

499 U.S. at 322 (quoting *Varig Airlines*, 467 U.S. at 813). Thus, the Court is not to consider the subjective intent of the government actor but rather "consider whether the nature of the actions taken implicate public policy concerns, or are 'susceptible to policy analysis'." *Lopez*, 376 F.3d at 1057 (quoting *Gaubert*, 499 U.S. at 325).

The discretionary function exception preserves sovereign immunity even if the government was negligent and even if the claims allege serious harm. *See Kiehn v. United States*, 984 F.2d 1100, 1108 (10th Cir. 1993); *Daigle v. Shell Oil. Co.*, 972 F.2d 1527, 1538 (10th Cir. 1992). Indeed, beginning with the seminal *Dalehite* decision, in which the Supreme Court applied the exception to claims involving multiple deaths and massive property damage from an explosion that essentially leveled Texas City, Texas, 346 U.S. at 22-23, courts have applied the exception to cases alleging serious and widespread harm from government programs and operations. *See, e.g.*, *Sanchez ex rel. D.R.-S. v. United States*, 671 F.3d 86, 88 (1st Cir. 2012) (thousands of plaintiffs claiming injuries from pollutants released during military exercises); *Allen v. United States*, 816 F.2d 1417, 1418-20 (10th Cir. 1987) (over one thousand plaintiffs claiming death or injury from radioactive fallout from open-air bomb testing).

In this case, both parts of the discretionary function exception test are satisfied. Accepting the allegations of Plaintiffs' Complaint as true for purposes of this motion only, Plaintiffs have failed to allege that: (1) an applicable specific and mandatory obligation removed EPA's discretion in its investigation at the GKM or (2) that EPA's investigation of the environmental threat from the GKM did not implicate public policy considerations. Thus, in the face of a discretionary function challenge, Plaintiffs cannot meet their burden of showing an unequivocal waiver of sovereign immunity to sue the United States in tort.

A. Under the first part of the discretionary function exception test, Plaintiffs have failed to allege facts showing that EPA lacked discretion.

Judge Armijo has ruled that CERCLA itself "did not prescribe a specific course of action for government employees to follow in conducting the response action at the Gold King Mine." *New Mexico v. U.S. Envtl. Prot. Agency*, 310 F. Supp. 3d 1230, 1263 (D.N.M. 2018). Rather than relying on CERCLA, Plaintiffs have gone outside of CERCLA to try to allege that EPA lacked discretion in its investigation decisions at the GKM by pointing to: (1) regulations of the Occupational Safety and Health Act ("OSHA") requiring the contractors to develop an adequate Health and Safety Plan, Compl. ¶ 345; (2) the Federal Mine Safety and Health Act of 1977 ("MSHA"), and regulations under that statute, regarding work in underground coal mines, *id.* ¶ 346; (3) certain OSHA regulations regarding excavation, training, and notification, *id.* ¶ 364; (4) New Mexico and Colorado hazardous waste laws and regulations, *id.* ¶¶ 366, 367; and (5) effluent limitations of the Clean Water Act, *id.* ¶ 368. None of these provisions did, or even could, remove the discretion of EPA in its environmental investigation of the GKM pursuant to CERCLA.

For a statute, regulation, or policy to remove discretion it must *specifically* prescribe a course of action for an employee to follow and leave no "element of judgment or choice." *Berkovitz*, 486 U.S. at 536; *Elder v. United States*, 312 F.3d 1172, 1176-78 (10th Cir. 2002) (finding that mandatory National Park Service safety guidelines were not "sufficiently specific" to remove discretion); *C.R.S. by D.B.S. v. United States*, 11 F.3d 791, 799 (8th Cir. 1993) ("to remove discretion . . . a regulation must . . . clearly and specifically define what the employees are supposed to do."). Courts have recognized that the "existence of some mandatory language does not eliminate discretion when the broader goals sought to be achieved necessarily involve an element of discretion." *Miller v. United States*, 163 F.3d 591, 595 (9th Cir. 1998). Further,

simply stating principles or setting objectives is not enough to remove discretion. *See Aragon*, 146 F.3d at 825–26 (stating that "[a]n objective, alone, does not equate to a specific, mandatory directive"); *OSI Inc. v. United States*, 285 F.3d 947, 952 (11th Cir. 2002) (finding that objectives and principles do not create mandatory directives that overcome the discretionary function exception). The Tenth Circuit has repeatedly emphasized that in order to find that a provision is non-discretionary, the provision must set a "fixed or readily ascertainable standard" for the government employee to follow. *Kiehn*, 984 F.2d at 1106-07; *Flynn v. United States*, 902 F.2d 1524, 1530 (10th Cir. 1990); *Barton v. United States*, 609 F.2d 977, 979 (10th Cir. 1979).

The provisions that Plaintiffs cite fail this test because they do not prescribe a specific course of conduct, through a fixed or readily ascertainable standard, for any EPA employee at the site. EPA's On Scene Coordinators ("OSCs") at the site were acting in accordance with EPA's regulations which establish "general responsibilities." *See* 40 C.F.R. § 300.120. Among the OSC's general responsibilities were "addressing worker health and safety concerns… in accordance with § 300.150," which states that EPA response actions are to comply with the provisions of OSHA. *See id.* §§ 300.135(l), 300.150. EPA regulations, however, did not provide a fixed or readily ascertainable standard specifying *how the OSC is to address* worker health or safety concerns or ensure compliance with OSHA, the MSHA, or any other provisions that Plaintiffs cite. Indeed, as alleged in other complaints it this MDL, EPA fulfilled its general safety responsibilities by requiring, through the Task Order to Environmental Restoration, that site contractors perform the work in "compliance with applicable OSHA standards" and "appropriate [MSHA] regulations inclusive of establishing a safe underground working environment." *See* NM Am. Compl. ¶ 78; NN Am. Compl. ¶ 72. Tellingly, Plaintiffs fail to cite any regulatory provisions providing a fixed or readily ascertainable standard for *an EPA OSC to follow in*

policing contractor compliance with OSHA or the MSHA. Plaintiffs cannot simply allege that EPA had supervisory authority to overcome the discretionary function exception. Plaintiffs must allege that EPA was required to exercise that authority in a specific way. *See Garcia*, 533 F.3d at 1177-78, 1180-81 (supervisory authority under guidelines and a contract was not sufficient to overcome the discretionary function exception without specific procedures controlling the exercise of that authority).[2] Plaintiffs fail to do this.

1. OSHA provisions requiring adequate health and safety plans did not constrain EPA's discretion.

The OSHA provisions that Plaintiffs cite requiring adequate Health and Safety plans are immaterial to EPA's conduct; it was EPA's contractors, not EPA, that developed the Health and Safety plans for the work at the GKM.[3] Thus, to the extent that the OSHA requirements regarding Health and Safety Plans are relevant, they are relevant to actions taken by EPA contractors and cannot form a basis for claiming lack of discretion of EPA employees. In an effort to force the OSHA requirements to have some bearing on its FTCA claims against the United States, Plaintiffs cite 40 C.F.R. §300.700(c)(5)(i) (*see* Compl. ¶¶ 344, 345), which provides that a section on worker health and safety is "*potentially* applicable to *private party* response actions." 40 C.F.R. §300.700(c)(5)(i) (emphasis added). The language itself is discretionary and shows that it does not apply to an EPA directed response action.

Plaintiffs have failed to cite any requirement that EPA ensure contractor compliance with OSHA standards. Certainly, the OSHA standards that Plaintiffs cite regarding site Health and

[2] By contrast, in *Bell v. United States*, 127 F.3d 1226, 1227 (10th Cir. 1997), Bureau of Reclamation employees were contractually required to ensure "strict accordance" with Bureau specifications that were directly applicable to the site.

[3] The FTCA contains a "contractor exclusion" stating that a "federal agency" whose conduct may subject the United States to liability under the Act "does not include any contractor with the United States." 28 U.S.C. § 2671.

Safety Plans impose no specific supervisory duty on EPA. Even if EPA was involved in reviewing the plans, Plaintiffs must allege some specific and mandatory requirement that controlled EPA's review to defeat the discretionary function exception. Specifically, regarding the adequacy of the Health and Safety Plan, Plaintiffs cite 29 C.F.R. § 1910.120, outlining OSHA standards for hazardous waste operations and emergency response. Compl. ¶ 344. Plaintiffs, however, fail to cite any particular provision from this standard to explain how this regulation restricted EPA's discretion. Thus, Plaintiffs' allegations regarding the adequacy of the Health and Safety Plan are wholly insufficient to show that a specific and mandatory regulation constrained EPA's discretion.

2. The Federal Mine Safety and Health Act did not constrain EPA's discretion.

The provisions that Plaintiffs cite of the federal Mine Safety and Health Act ("MSHA") did not constrain EPA's discretion because those provisions specifically apply only to underground coal mines, not to investigations at long abandoned hard rock mines. Compl. ¶ 346. Part 75 of the regulations that Plaintiffs cite is entitled "Mandatory Safety Standards – Underground Coal Mines." 30 C.F.R. Part 75. The regulations are described as setting "forth safety standards compliance with which is mandatory in each underground coal mine subject to the Federal Mine Safety and Health Act of 1977." *Id.* § 75.1.

Plaintiffs cannot claim, as Sovereign Plaintiffs argued, that the MSHA regulations governing underground coal mines are applicable because they are referenced in EPA's GKM Task Order to the contractors. In their complaints Sovereign Plaintiffs identified key language regarding the MSHA, namely language from EPA's Task Order requiring the contractors to perform work in compliance with "*appropriate* [MSHA] regulations inclusive of establishing a safe underground working environment." NM Am. Compl. ¶ 78; NN Am. Compl. ¶ 72

(emphasis added). Importantly, there is no fixed or readily ascertainable standard identified regarding EPA's oversight of any determination of what MSHA regulations were appropriate for the GKM site, which did not involve a coal mine or underground work at the time of the release.

3. Other OSHA regulations that Plaintiffs cite did not constrain EPA's discretion.

Other cited OSHA regulations that Plaintiffs cite do not provide an applicable fixed or readily ascertainable standard of conduct, even if the EPA, rather than the contractor, had been responsible for implementation. For example, Plaintiffs cite 29 C.F.R. § 1926.651(i), regarding "Stability of adjacent structures." Compl. ¶ 364(c). However, this section is inapplicable to the GKM work, which did not involve "adjacent structures." Subsection (1) states "Where the stability of *adjoining buildings, walls, or other structures* is endangered by excavation operations, support systems such as shoring, bracing, or underpinning shall be provided to ensure the stability of such structures for the protection of employees." 29 C.F.R. § 1926.651(i) (emphasis added). Likewise, subsection (2) refers to work below "the base or footing of any foundation or retaining wall," referring to the stability of an adjacent structure. *Id.* Plaintiffs do not allege that any "adjacent structure" was involved in the Gold King Mine work.

Other OSHA provisions that Plaintiffs cite (Compl. ¶ 364) contain discretionary language rather than any fixed or readily ascertainable standard. For example, the provision that Plaintiffs cite regarding "Protection from hazards associated with water accumulation," acknowledges that "[*t*]*he precautions necessary to protect employees adequately vary with each situation*, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline." 29 C.F.R. § 1926.651(h)(1) (emphasis added). Another provision states site excavations "shall be shored or sloped *as appropriate* to prevent accidental collapse…" *Id.* § 1910.120(b)(1)(iii) (emphasis added). With

respect to the OSHA inspection provision that Plaintiffs cite, 29 C.F.R. § 1926.651(k), the competent person responsible for inspection was a contractor, not an EPA, employee. Further, Plaintiffs fail to quote the discretion-conferring final sentence of the provision which states, "These inspections are only required when employee exposure can be reasonably anticipated." 29 C.F.R. § 1926.651(k)(1). Likewise, the OSHA training provision that Plaintiffs cite, 29 C.F.R. § 1910.120(e)(7), confers discretion in determining what constitutes "hazardous emergency situations" that necessitate employee training for such "suspected emergencies."

These OSHA regulations leave the employer with discretion in how to comply at each particular job site. In fact, by their very nature, OSHA regulations usually will not specifically dictate particular courses of conduct because the regulations are intended to apply across many different work places, sites, and situations. Phrases from these regulations, such as "ensure the stability," "reasonably expected to pose a hazard" (§ 1926.651(i)), "adequate precautions" (§ 1926.651(h)), "other hazardous conditions" (§ 1926.651(k)(1)), "as appropriate" (§ 1910.120(b)(1)(iii)), and "necessary precautions" (§ 1926.651(k)(2)), by their very nature grant discretion to determine exactly how to evaluate the workplace situation and how to respond. *See White v. U.S. Dep't of Interior*, 656 F. Supp. 25, 33-34 (M.D. Pa. 1986), *aff'd*, 815 F.2d 697 (3d Cir. 1987). By contrast, *Bobo v. AGCO Corp.*, 981 F. Supp. 2d 1130 (N.D. Ala. 2013), illustrates the specificity necessary for an OSHA regulation to establish a fixed or readily ascertainable standard. In *Bobo*, the court found that the Tennessee Valley Authority violated specific OSHA directives to establish a worksite asbestos exposure limit of 2 fibers per cubic centimeter (because it established a higher level of 5 fibers per cubic centimeter at a facility), and to monitor exposure by a particular method at particular times. *Id.* at 1152-54. Unlike the OSHA regulations that Plaintiffs cite here, the exposure limit of 2 fibers per cubic centimeter and the

particular monitoring requirements established a "fixed or readily ascertainable standard." Here Plaintiffs have failed to identify such a fixed or readily ascertainable standard in the OSHA regulations that applied to EPA's conduct at the GKM site.

4. The Colorado and New Mexico Statutory and Regulatory Provisions did not constrain EPA's discretion.

The provisions Plaintiffs cite from Colorado and New Mexico law (Compl. ¶ 367) cannot overcome the first part of the discretionary function exception test. Fundamentally, under principles of federal supremacy a state statute cannot constrain the federal government's discretion and thus alter the FTCA's waiver of sovereign immunity. *See Sydnes v. United States*, 523 F.3d 1179, 1184 (10th Cir. 2008). *See also Luther v. United States*, No. 2:11-cv-268 BCW, 2014 WL 1255292, *4 (D. Utah. March 26, 2014) (rejecting the argument that Utah state statutes constrained U.S. Forest Service discretion); *Loye v. United States*, No. CV F 10-1581 LJO GSA, 2011 WL 4841604, *9-10 (E.D. Cal. Oct. 12, 2011), *aff'd*, 502 F. App'x 695 (9th Cir. 2012) (finding that state building code provisions, even when incorporated by reference into a Federal regulation, did not remove discretion because they are not "a federal statute, regulation or policy").

Further, Plaintiffs have failed to identify any specific regulation or statute that the United States violated. Plaintiffs cite Colorado's Nutrients Management Control Regulations and Regulations for Effluent Limitation, which establish a Water Quality Control Commission, with authority to issue permits for the discharge of nutrients and to set limitations on the discharge of effluents, *see* 5 C.C.R. §§ 1002-62:62.1, 62.5; 1002-85:85.1, 85.5, and the New Mexico Hazardous Waste Act, which establishes an environmental improvement board to identify hazardous wastes, establish applicable standards for their treatment, and issue discharge permits, *see* N.M.S.A. 1978 §§ 74-4-4.1, 4.2. Compl. ¶¶ 366, 367. These laws, providing for state

government enforcement actions if certain limits are not met, cannot provide a specific and mandatory standard controlling the EPA's conduct.

Finally, Plaintiffs cite these provisions in alleging that the United States was "negligent per se" with respect to conduct at the GKM. Compl. ¶¶ 366, 367. Negligence is irrelevant to the discretionary function inquiry, and, in any event, Plaintiffs fail to allege how the specific provisions applied to the federal government's conduct at the GKM. Even with respect to negligence per se, Plaintiffs do not allege how these provisions can be relevant when they do not contain a private right of action or establish a standard for negligence rather than strict liability.[4]

5. Effluent limitations in the Clean Water Act did not constrain EPA's discretion.

Plaintiffs' claim that the CWA's effluent limitations provision, 33 U.S.C. § 1311, removed EPA's discretion (Compl. ¶ 368) also fails. As explained in *Myers v. United States*, No. 13-CV-03443-MSK-KMT, 2015 WL 6125255, *5 (D. Colo. Mar. 4, 2015), the CWA does not constrain federal employee discretion because it does not "prescribe a *specific course* [of] action." Rather, the CWA authorizes permitting authorities to control discharges of pollutants into the waters of the United States through the National Pollution Discharge Elimination System permits. *See id.*; *see also Aragon*, 146 F.3d at 825–26 (finding that a pollution prevention

[4] Negligence per se liability may be premised upon the violation of a state statute only where that statute provides for a private right of action. *See Gammill v. United States*, 727 F.2d 950, 953–54 (10th Cir. 1984) (Colorado criminal statute did not create private right of action for liability under FTCA); *Portenier v. United States*, 520 F. App'x 707, 712 (10th Cir. 2013) (affirming summary judgment in favor of United States on FTCA claim because Kansas Supreme Court held breach of statute did not create private right of action). Further, the FTCA waived the United States' sovereign immunity for negligent conduct; the United States cannot be held strictly liable. *Laird v. Nelms*, 406 U.S. 797, 799 (1972). The Colorado regulations and New Mexico statutes hold parties strictly liable for violations of discharge limitations under their legal regimes because they do not require proof of negligence to establish a violation. *See* 5 C.C.R. §§ 1002-62:62.4-5, 1002-85:85.5; N.M.S.A. 1978 §§ 74-4-10, 12.

provision suggested "principles rather than practices," and stating that "[a]n objective, alone, does not equate to a specific, mandatory directive"); *Sanchez*, 671 F.3d at 94–95 (allowing plaintiffs to use alleged CWA violations to circumvent the FTCA's discretionary function exception would undermine Congressional intent in enacting the CWA as an exclusive remedy); *OSI Inc.*, 285 F.3d at 952 (finding that objectives and principles do not create mandatory directives that overcome the discretionary function exception). Because the CWA does not prescribe how to control discharges, it does not remove EPA discretion.

Further, Plaintiffs do not identify how EPA supposedly violated the CWA. It is Plaintiffs' burden not only to identify a specific or mandatory statute, regulation or directive but also to allege how that provision was violated. *Daigle*, 972 F.2d at 1539. In *Myers*, the court found that the discretionary function exception applied even though the United States admitted that it needed a NPDES permit for the discharges but had not submitted an application for one in a timely manner. 2015 WL 6125255 at *6. In this case, to the extent that Plaintiffs' claims are based on a failure to get discharge permits, 42 U.S.C. § 9621(e) exempts EPA removal and remedial actions from both federal and state law water quality permit requirements.

B. Under the second part of the discretionary function exception test, Plaintiffs have failed to allege facts showing that EPA's conduct was not policy-oriented.

Significantly, with respect to the second part of the discretionary function exception analysis, the Supreme Court has stated that when government employees are acting pursuant to a discretionary statute, regulation or guideline there is a "strong presumption" that the employees' conduct is grounded in the policies of that provision. *Gaubert*, 499 U.S. at 324; *see also Tippett v. United States*, 108 F.3d 1194, 1198 (10th Cir. 1997) (stating that regulations created a "strong presumption" that discretionary acts authorized by the regulations were grounded in the same

policies that led to the promulgation of the regulations). In such circumstances, the Supreme Court stated that, "[f]or a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Gaubert*, 499 U.S. at 324-25; *see also Hardscrabble Ranch*, 840 F.3d at 1222 (stating "it is up to the challenger to allege facts showing that the actions were actually not policy-oriented").

1. Plaintiffs challenge EPA's conduct under CERCLA, which is grounded in policy.

Plaintiffs' Complaint fails to contain allegations showing that the challenged action was not policy-oriented; rather, Plaintiffs challenge the essence of government policy-making in questioning EPA's conduct implementing CERCLA at the GKM. EPA is authorized under CERCLA to take action whenever there is a release or a substantial threat of release of any hazardous substance into the environment. 42 U.S.C. § 9604(a). When such conditions are present, EPA has authority to remove hazardous substances. *Id.* Indeed, "Congress enacted CERCLA to facilitate the expeditious cleanup of environmental contamination caused by hazardous waste releases." *Daigle*, 972 F.2d at 1533. The regulations implementing CERCLA give EPA great discretion in evaluating whether a removal action is appropriate and in performing the action. *See generally* 40 C.F.R. Part 300. The regulations even state: "[a]ctivities by the federal and state governments in implementing [the National Contingency Plan ("NCP") of CERCLA] are discretionary governmental functions. . . [The NCP] does not create any duty of the federal government to take any response action at any particular time." 40 C.F.R. § 300.400(i)(3). More specific to EPA's conduct in question at the GKM, the regulations preserve EPA's discretion to determine if it should conduct a "removal site evaluation," and if

so, the manner it in which one should be conducted. *See id.* § 300.410 (identifying certain factors EPA can consider in assessing a course of action at a site).

Plaintiffs allege that EPA was negligent while responding to the substantial environmental threat posed by the GKM because EPA failed to investigate hydraulic pressure within the mine; misjudged the elevation of water within the mine; failed to use certain equipment; lacked a contingency plan for particular events; failed to wait for additional advice before proceeding; and failed to timely notify them of the release. *See* Compl. ¶ 364. But these allegations are largely beside the point: Plaintiffs' negligence allegations cannot support a finding that EPA was operating outside the CERCLA response authority, which implements important government policies concerning the investigation and clean-up of hazardous substances in the environment. Rather, Plaintiffs are engaging in precisely the "second guessing" of government policy that Congress sought to avoid through the discretionary function exception—second guessing that is not cognizable under the FTCA even if styled as negligence. *See Berkovitz*, 486 U.S. at 536–37 (quoting *Varig Airlines*, 467 U.S. at 814).

Courts have repeatedly, consistently, and unanimously confirmed this point, holding that activity under CERCLA implicates discretionary policy choices and is therefore immune from liability under the FTCA. Judge Armijo cited several of these decisions in her ruling on Environmental Restoration's motion to dismiss. *See* 310 F. Supp. 3d at 1263. For example, in *Daigle*, 972 F.2d at 1531-32, plaintiffs brought FTCA claims to challenge a CERCLA action taken by the Army at the Rocky Mountain Arsenal. The Tenth Circuit found that the government's work "involved policy choices of the most basic kind." *Id.* at 1541. The government's decisions in addressing "the spread of contamination" involved the "very essence of social, economic, and political decision making" because the government had "to balance

overall priorities— . . . the need for a prompt cleanup and the mandate of safety—with the realities of finite resources and funding considerations." *Id.* (internal quotations omitted).

Likewise, in *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116 (3d Cir. 1988), EPA was undertaking a CERCLA removal action at an abandoned chemical manufacturing facility, with an EPA OSC working with a private contractor and state employees to make suggestions how the work should proceed. *Id.* at 118. Decisions that the OSC and the team made resulted in releases of plumes of toxic gases causing personal injuries and property damage. *Id.* at 119. The Third Circuit held that even though EPA's decisions may have been negligent, the conduct could not be the basis of an FTCA suit against the United States due to the discretionary function exception. *Id.* at 121-23. The court reasoned that EPA's conduct under CERCLA implicated protected policies because execution of CERCLA actions "necessarily require[s] the setting of priorities in light of the risks presented at various sites and the finite resources available to address the problem." *Id.* at 122.

Most recently, in *Gadsden Indus. Park, LLC v. United States*, Case No. 4:15-CV-0956-JEO, 2017 WL 4387217 (N.D. Ala. Oct. 3, 2017), *appeal docketed* No. 17-15325 (11th Cir. Nov. 30, 2017), the plaintiff claimed that EPA was liable for tortious conversion because in the course of remediating hazardous waste, EPA contractors mined and resold recyclable, metal-bearing items that the plaintiff owned to offset remediation costs. *Id.* at *1-3. The court found that the discretionary function exception applied where the claimed loss was a "consequence of the EPA's exercise of its broad discretionary authority under CERCLA to determine appropriate procedures, means, and methods to address a release or threatened release of hazardous substances." *Id.* at *18. *See also Welsh v. U.S. Army*, No. C 08–3599 RS, 2009 WL 250275, *4 (N.D. Cal. Feb. 3, 2009), *aff'd*, 389 F. App'x 660 (9th Cir. 2010) (finding that the discretionary

function exception applied to the "Army's investigation, remediation and reuse decisions" pursuant to CERCLA which implicated "policy choices and decisions"); *W. Greenhouses v. United States*, 878 F. Supp. 917, 928 (N.D. Tex. 1995) (finding discretionary function exception applied as CERCLA response actions involve balancing "several conflicting goals"); *United States v. Amtreco, Inc.*, 790 F. Supp. 1576, 1581 (M.D. Ga. 1992) (stating that "[c]ourts have consistently held that EPA decisions on how to conduct a cleanup operation are shielded by the discretionary function exception").

As the decisions above recognize, the particular decisions and actions taken under CERCLA cannot be divorced from the larger statutory context. Here, EPA's conduct was pursuant to CERCLA and therefore implicated the policy considerations that underlie that statute's purpose. Plaintiffs' complaint fails to contain any allegations overcoming the "strong presumption," that conduct pursuant to CERCLA authority is policy-based. *See Hardscrabble Ranch*, 840 F.3d at 1222 (stating that the challenger must "allege facts showing that the actions were actually not policy-oriented"). Complicated questions of how to best address environmental hazards such as acid mine drainage are guided by many policy considerations, not only with regard to high-level, broad planning decisions such designating the Mining District as a CERCLA National Priorities List site, but also regarding decisions about how and when to conduct response actions, including investigations at individual mines. *See Gaubert* 499 U.S. at 325 (stating that "[d]iscretionary conduct is not confined to the policy or planning level."). In particular, the GKM investigation involved many policy choices related to safety, feasibility, resource allocation, and environmental protection. Further, even if EPA's conduct had not been grounded in policies, it is enough that the conduct is susceptible to policy analysis. *See Lopez*, 376 F.3d at 1057.

Likewise, failure to warn claims involving environmental hazards arising from a CERCLA site are consistently barred by the discretionary function exception because decisions regarding how and when to warn of such hazards inherently involve policy balancing related to CERCLA. *See, e.g.*, *Daigle*, 972 F.2d at 1542-43 (discretionary function exception barred failure to warn claim regarding hazards at a CERCLA site because the claim implicated policy concerns underlying the CERCLA response actions); *W. Greenhouses*, 878 F. Supp. at 928 (discretionary function exception barred failure to warn claim because plaintiffs failed to produce evidence to overcome the presumption that CERCLA remediation conduct, including public notification, was grounded in policy); *see also A.O. Smith Corp. v. United States*, 774 F.3d 359, 369-71 (6th Cir. 2014) (discretionary function exception barred failure to warn claim for downstream residents of flooding from dam discharges because plaintiffs failed to show "how this decision is not susceptible to policy analysis"). Plaintiffs have failed to allege conduct that is not policy-based to fall outside of the bar of the discretionary function exception.

2. Characterizing EPA's conduct as "implementation" is insufficient to overcome the discretionary function exception.

Plaintiffs cannot engage in impermissible and arbitrary line-drawing by broadly arguing that their claims are not barred because they challenge "implementation" of a policy. There are no cases that Plaintiffs can cite to show that this argument overcomes the presumption that conduct pursuant to a statute such as CERCLA is policy-oriented. But, even if this argument were germane, it is unpersuasive.

In *Lopez*, the Tenth Circuit explicitly recognized that when a "relevant law," like CERCLA, "leaves room for officials to exercise policy-oriented discretion in a particular area, that discretion will be protected even with regard to what may seem to be details of implementation." 376 F.3d at 1060-61. Further, in *Zumwalt v. United States*, 928 F.2d 951, 954-

55 (10th Cir. 1991), the Tenth Circuit rejected a plaintiff's argument that implementation of policies is not protected by the discretionary function exception, stating "[a] decision that is a component of an overall policy decision protected by the discretionary function exception also is protected by this exception." Finally, the Tenth Circuit's decision in *Daigle*, involved implementation of CERCLA, as the court noted, plaintiffs were not just raising broad-based challenges to an environmental project, but also the "translation" of CERCLA's provisions into "concrete plans." 972 F.2d at 1541.

Here, any EPA decisions about how to evaluate the site, including when to excavate, where to excavate, and what equipment to use, simply cannot be divorced from the larger statutory context of CERCLA, and therefore implicated the policy considerations that underlie the statute's purpose. Plaintiffs have failed to include any allegations in their Complaint to show that this, or any other conduct, is not policy-oriented.

3. The discretionary function exception applies to EPA conduct at Gold King Mine even when the challenged conduct involves, in part, scientific and technical judgment.

It is clear that the discretionary function exception applies even when some of the allegedly negligent conduct involves scientific or technical judgments. In the seminal Supreme Court decision on the FTCA's discretionary function exception, *Dalehite v. United States*, the Court held that the government's conduct which resulted in a tragic fertilizer explosion was protected by the discretionary function exception. 346 U.S. at 31-45. The Supreme Court found that the exception applied even though some of the alleged negligent conduct – such as determining fertilizer bagging temperatures or applying a chemical coating to the fertilizer to prevent "caking" – could be characterized as scientific or technical misjudgments. *Id.* at 39-42; *see also Boyle v. United Techs. Corp.*, 487 U.S. 500, 511 (1988) (finding the discretionary

function applicable when the conduct at issue involved "engineering analysis"). Subsequently, several appellate courts have found that the mere fact that the conduct may involve some scientific or professional judgment does not remove the conduct from the protection of the discretionary function exception. *See First Nat'l Bank in Albuquerque v. United States*, 552 F.2d 370, 376 (10th Cir. 1977) (finding that the discretionary function exception protected government actions when they "involve[d] scientific as well as public policy considerations"); *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1177 (9th Cir. 2002) (stating in discretionary function exception analysis that "[s]imply because technical data is at issue" does not mean that the conduct is "stripped of its policy implications"); *In re Orthopedic Bone Screw Litig.*, 264 F.3d 344, 364 (3rd Cir. 2001) (holding that the discretionary function exception applied to FDA conduct of clearing bone screws for use because the process involved not only "scientific tasks" but also "safety, efficacy, and cost").

Rather than focusing only on whether there was any scientific or technical judgment involved, numerous appellate decisions show that courts must evaluate the larger context in which conduct occurred to determine whether the discretionary function exception applies. In *Daigle*, the Tenth Circuit found that the alleged negligent *execution* of a CERCLA cleanup was protected. In particular, plaintiffs alleged that the Army "rushed into the cleanup without proper planning concerning the effects of the clean-up activities on site conditions or upon the health and property of those living in surrounding neighborhoods." 972 F.2d at 1541. The Court found that particulars of the clean-up—how the Army went about containing the spread of contamination—"touched on policy choices, not the least of which involved the 'translation' of CERCLA's general health and safety provisions into 'concrete plans.'" *Id.* (quoting *Allen*, 816 F.2d at 1427 (McKay, J., concurring)).

Likewise, in *Kohl v. United States*, 699 F.3d 935, 942-45 (6th Cir. 2012), the court found that the alleged negligent use of a winch in gathering evidence from a damaged car as part of a research experiment was protected by the discretionary function exception. The court noted that the planning and execution of the experiment was susceptible to policy analysis, "including judgments about how to respond to hazards, what level of safety precautions to take, and how best to execute the experiment in a way that balanced the safety needs of the personnel and the need to gather evidence from the vehicles." *Id.* at 943. The court reasoned that decisions regarding "how to extract the evidence from the vehicles after the bombs were detonated, including what equipment to use, were necessary to the execution of the project." *Id.* at 944. Consequently, a challenge to the use of a particular piece of equipment "would amount to a challenge as to the overall execution of the research project." *Id.*

Finally, in *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 451 (5th Cir. 2012), the court found the exception applied even if the Army Corps of Engineers was negligent in calculations that it made in delaying to armor the banks of the Mississippi River Gulf Outlet, which allegedly contributed to the breach of a levee as a result of Hurricane Katrina. The court concluded that determinations regarding protection of the banks could not be separated from the Corps' primary mission to keep the shipping channel open, and its policy-based consideration of other alternatives to armoring the banks. *Id.* (stating that "[i]f the government's discretion is 'grounded in the policy of the regulatory regime' . . . the decision is immune under the [discretionary function exception] even if it also may entail application of scientific principles") (quoting *Gaubert*, 499 U.S. at 325).

By contrast, when courts have found that the discretionary function exception did not protect scientific and technical judgments, the discrete conduct at issue was subject *only* to

objective technical considerations, and was not part of a broader policy-based action. In the case which was the genesis of the scientific and technical judgment analysis, *Berkovitz v. United States*, the Supreme Court, in *dicta*, suggested that the discretionary function exception would not apply if the determination of whether a vaccine complied with agency regulations *only* involved application of objective scientific standards. 486 U.S. at 545; *see In re Katrina Canal Breaches Litig.*, 696 F.3d at 451 (stating that "[i]f [the government action] is susceptible *only* to the application of scientific principles, however, it is not immune") (emphasis added; citing *Bear Med. v. United States*, 241 F.3d 1208, 1214 (9th Cir. 2001); *Ayala v. United States*, 980 F.2d 1342, 1349-51 (10th Cir. 1992)). Thus, "[c]ases involving very narrow technical issues" are distinguishable from cases involving scientific and technical judgment as part of a policy-based program with "mandates to protect the public health and safety of the environment." *Shea Homes Ltd. P'ship v. United States*, 397 F. Supp. 2d 1194, 1200 n.3 (N.D. Cal. 2005).

The Tenth Circuit's analysis of the discretionary function exception is consistent: the discretionary function applies to conduct involving scientific or technical judgment when it is part of a broader policy-based program, but the discretionary function exception does not apply when the conduct is guided *only* by technical considerations. *See Ayala v. Joy Mfg. Co.*, 877 F.2d 846, 848-49 (10th Cir. 1989) (finding that plaintiffs stated sufficient facts to withstand a motion to dismiss based on the discretionary function exception by alleging that only "specific technical assistance" was at issue); *Ayala v. United States*, 980 F.2d 1342, 1349 (10th Cir. 1992) (reaffirming that the discretionary function exception did not apply because "[t]he discretion involved in [the mine inspector's] decision was governed *solely* by technical considerations") (emphasis added). In fact, the Tenth Circuit in *Ayala* explicitly recognized that a "decision based on objective standards can also incorporate policy choice." *Ayala*, 980 F.2d at 1350 n.4.

In this case, the discretionary decisions about how to address the acid mine drainage from the GKM clearly did not *only* involve technical considerations. EPA employees, including individuals with scientific and professional expertise, had to decide the best way to effectuate the broad statutory mandate and policy goals established by CERCLA when investigating acid mine drainage at the GKM. Those judgments necessarily implicated policy considerations such as safety, resource allocation, and environmental protection. For example, the alleged failure to ascertain the precise level of pressure behind the collapsed adit is susceptible to policy analysis, including the following considerations: safety (whether it is worth the risk in placing equipment and personnel on a steep slope that may be prone to cave-ins); environmental protection (whether the fragile natural environment around the mine should be disturbed in order to install the drill rig); feasibility (whether a drill rig can be put in place in the short time period during which weather allows work to take place at the mine adit); and resource allocation (whether EPA has enough money, equipment, and expertise to accomplish the complicated and expensive task given its other priorities in the area). While scientific and technical knowledge undoubtedly played an important role in EPA's conduct leading up to the release, the decisions such as how to unblock the GKM adit cannot be reduced to simple technical choices. The choices were bound up in broader public policy considerations.[5]

[5] Even if it had been technically possible to get perfect information about the physical condition of the mine to inform decisions such as where to excavate, the determination of whether gathering such perfect information is possible, much less advisable in context, is exactly the type of decision that is protected by the discretionary function exception. *Ayala*, 980 F.2d at 1350 n.4 (acknowledging that technical determination could be protected by the discretionary function exception when it reflected a need to balance the goal of safety with the reality of finite agency resources). Often government conduct involves balancing the safety concerns of the project with the overall objectives of the project, as well as other social, political, and economic considerations. *Boyle*, 487 U.S. at 511-512 (finding that judgments about the "trade-offs" between "greater safety" and the effectiveness of the project were the type of conduct protected by the discretionary function exception); *U.S. Fid. & Guar. Co.*, 837 F.2d at 122. (stating that

Furthermore, the discrete technical components of the conduct cannot be divorced from the larger policy-based context; a CERCLA response action is a product of many smaller decisions that are components of the overall policy goals of the statute. As the Sixth Circuit stated, "the conduct at issue must be framed in terms of the scope of administrative authority to use discretion in executing" the government program; to frame the issue more narrowly can beg the question by asking whether the government had discretion to be negligent, which is inappropriate for a discretionary function inquiry. *See Kohl*, 699 F.3d at 942. Similarly, the Tenth Circuit has recognized that "[a] decision that is a component of an overall policy decision protected by the discretionary function exception also is protected by this exception." *Zumwalt*, 928 F.2d at 955. The Supreme Court in *Dalehite* and subsequent circuit court decisions such as *Daigle*, *Kohl*, and *Katrina* correctly looked to the broader context in which the technical components of the decision-making occurred in determining whether the discretionary function exception applied. None of these decisions focused on discrete technical judgments, of which there were many, as separate from the policy-based programs of which they were a part. Here, to cherry-pick one discrete decision, such as judgment of the adit height, is to ignore that the calculation is but a component of a broader policy decision regarding how to evaluate and remediate the problem of acid mine drainage at the GKM. Such an analysis would expose each discrete calculation of an EPA employee at a CERCLA site to second guessing by the courts, a

---

"[e]xecution of [the CERCLA] program and accomplishment of its objective necessarily require the setting of priorities in light of the risks presented at various sites and the finite resources available to address the problem."). Even if there were actions the government could have taken to avoid the blowout, a decision not to take those actions remains protected by the discretionary function exception. *See Daigle*, 972 F.2d at 1542 (stating that "[i]t is insufficient under the discretionary function exception for Plaintiffs simply to allege that the Army 'rushed into the clean-up without proper planning concerning the effects of the clean-up activities on site conditions or upon the health and property of those living in surrounding neighborhoods'").

result that Congress did not intend in the discretionary function exception.[6]

CONCLUSION

For the foregoing reasons, the Court should grant this motion and dismiss Plaintiffs' Complaint against the Federal Defendants.

DATED: November 1, 2018

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

THOMAS G. WARD
Deputy Assistant Attorney General
Torts Branch

J. PATRICK GLYNN
Director, Torts Branch

CHRISTINA M. FALK
Assistant Director

[6] The United States is not arguing that all conduct pursuant to CERCLA is protected by the discretionary function exception. Theoretically, a plaintiff could allege that a government employee, acting under CERCLA authority, was engaged in negligent conduct that did not implicate CERCLA's environmental response policies. The easiest example is an EPA employee who negligently causes a traffic accident while on his way to work at a CERCLA response site. Thus, the Supreme Court in *Gaubert* stated that where an act "cannot be said to be based on the purposes that the regulatory regime seeks to accomplish," the discretionary function exception will not apply. 499 U.S. at 325 n.7. Here, however, the conduct at issue involves the very conduct being taken to address the environmental threat posed by the GKM, which is directly related to the purpose of CERCLA.

/s/ Adam Bain
ADAM BAIN
Senior Trial Counsel
IN Bar No. 11134-49
SARAH B. WILLIAMS
MICHAEL L. WILLIAMS
ALBERT LAI
DAVID HAMMACK
Trial Attorneys
Civil Division, Torts Branch
U.S. Department of Justice
P. O. Box 340
Washington, D.C. 20044
E-mail: adam.bain@usdoj.gov
Telephone: (202) 616-4209

JOHN C. ANDERSON
United States Attorney
ROBERTO D. ORTEGA
Assistant United States Attorney
P.O. Box 607
Albuquerque, New Mexico 87103
(505) 346-7274

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2018, I electronically filed the foregoing Federal Defendants' Motion to Dismiss and Incorporated Memorandum in Support using the Electronic Case Filing ("ECF") system of this Court. The ECF system will send a "Notice of Electronic Filing" to the attorneys of record.

/s/ Adam Bain
Adam Bain