

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b><i>RICHARD J. ROY, et al.,</i></b>	)	
	)	
<b><i>Plaintiffs</i></b>	)	
	)	
<b>v.</b>	)	<b><i>Docket No. 99-148-P-H</i></b>
	)	
<b><i>UNITED STATES OF AMERICA,</i></b>	)	
	)	
<b><i>Defendant</i></b>	)	

***RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS***

The defendant moves this court to dismiss all counts asserted against it in this action arising out of the disposal of allegedly hazardous substances at a site in South Berwick, Maine in the 1960s and 1970s. I recommend that the court grant the motion.

**I. Applicable Legal Standard**

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(1). When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). The court does not draw inferences favorable to the pleader. *Hodgdon v. United States*, 919 F. Supp. 37, 38 (D. Me. 1996). For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter

jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); see *Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

## **II. Factual Background**

The complaint alleges that the Department of the Navy, operator of the Portsmouth Naval Shipyard, contracted with Paul Hussey, Sr. and Paul Hussey, Jr. at various times in the 1960s and 1970s to dispose of waste oil and other chemical waste on property owned by Paul Hussey, Sr. and located in South Berwick, Maine. Complaint (Docket No. 1) ¶¶ 1, 6, 9. At some unidentified time, this property was declared an uncontrolled hazardous waste site as defined by 38 M.R.S.A. § 1362(3). *Id.* ¶ 17. The wells supplying water to the plaintiffs' property in South Berwick, Maine were contaminated by substances originating on the Hussey property. *Id.* ¶¶ 20-25. The complaint specifically alleges that the Navy instructed one or both of the Husseys on the manner in which disposal of its wastes should be accomplished on the property, approved the manner in which the waste materials were stored or finally disposed of, and failed to maintain storage tanks and drums on the property. *Id.* ¶¶ 11-13.

The complaint raises claims under section 1319-U of the Maine Hazardous Waste and Waste Oil Act, 38 M.R.S.A. § 1319-O *et seq.* (Count I) and section 1367 of the Maine Uncontrolled Hazardous Substance Sites Act, 38 M.R.S.A. § 1361 *et seq.* (Count II), as well as common-law claims for negligence (Count III), nuisance (Count IV) and trespass (Count V).

### III. Discussion

All five counts of the complaint arise under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* Complaint ¶ 1. However, the arguments advanced by the defendant for dismissal differ as to the counts based on statutory and common law.

#### A. Count I

Count I of the complaint invokes 38 M.R.S.A. § 1319-U. Complaint ¶ 48. Subsection 5 of that statute provides for civil liability in a private cause of action and provides, in relevant part: “It is not necessary to prove negligence.” This court has held that this subsection of the statute “provides that one who disposes of hazardous waste be held strictly liable for the damage that disposal causes to others.” *Saco Steel Co. v. Saco Defense, Inc.*, 910 F. Supp. 803, 811 (D. Me. 1995). The United States is immune from suit based on state strict liability statutes. *Laird v. Nelms*, 406 U.S. 797, 802-03 (1972); *In re All Maine Asbestos Litig.*, 651 F. Supp. 913, 918 n.3 (D.Me. 1986).

The plaintiffs contend, without citation to authority, that they may establish the defendant’s liability under the statute by “prov[ing] fault.” Plaintiffs’ Objection to Motion to Dismiss with Incorporated Memorandum of Law (Docket No. 6) at 11. Such an exception, if adopted, would swallow up the rule of sovereign immunity. Any litigant hoping for a recovery from the potentially deep pocket of the United States could invoke a state strict-liability statute, contending that he will prove negligence. The plaintiffs here have pleaded a separate count sounding in common-law negligence. That is the appropriate means by which to pursue such a claim.

The defendant is entitled to dismissal of Count I.

## **B. Count II**

Count II invokes 38 M.R.S.A. § 1367. The defendant contends that this statute, dealing with uncontrolled hazardous substance sites, does not create a private cause of action for recovery of costs incurred in cleaning up such a site, but rather authorizes court action only by the state. The plaintiffs do not respond to this argument. My review of chapter 13-B of Title 38 of the Maine Revised Statutes Annotated, in which section 1367 appears, leads me to agree with the defendant. There is no private cause of action under this statute.

The defendant is entitled to dismissal of Count II.

## **C. Counts III-V**

The defendant bases its motion for dismissal of the remaining counts on two separate grounds, both defenses available under the Tort Claims Act: first, that Hussey was an independent contractor and accordingly no liability for the dumping of the defendant's wastes on his property can be imposed upon the defendant; and second, that it is entitled to discretionary function immunity under section 2680 of the Tort Claims Act under the circumstances of this case.

The United States has waived its sovereign immunity by statute, under strictly defined and limited circumstances.

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). Such claims are governed by the Tort Claims Act, 28 U.S.C. § 2671 *et seq.*

The Tort Claims Act does not cover claims against “any contractor with the United States.” 28 U.S.C § 2671; *United States v. Orleans*, 425 U.S. 807, 811-13 (1976). The United States is liable for the negligence of a contractor or its employees under the Tort Claims Act only if the contractor’s “day-to-day operations are supervised by the Federal government.” *Id.* at 815. Even when the United States imposes specific conditions on the contractor to implement federal objectives and takes action to compel compliance with federal standards, it is not liable. *Id.*

The defendant also contends that it is entitled to discretionary act immunity under the Tort Claims Act. If the statutory exception that creates this immunity applies, the court lacks subject matter jurisdiction to hear the case. *Magee v. United States*, 121 F.3d 1, 4 (1st Cir. 1997). The Tort Claims Act provides, in relevant part:

The provisions of this chapter . . . shall not apply to —

(a) Any claim based upon an action or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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 (entitled “Exceptions”). This immunity will apply if (i) the alleged wrongful conduct was in accordance with a specific mandatory statute or regulation or (ii) the challenged action could have been based upon social, economic or political policy. *United States v. Gaubert*, 499 U.S. 315, 324-25 (1991). “For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.” *Id.* The First Circuit has phrased the test applicable to claims of discretionary function immunity under the second prong of the statute

as follows: “Is the conduct discretionary? If so, is the discretion susceptible to policy-related judgments?” *Shansky v. United States*, 164 F.3d 688, 690-91 (1st Cir. 1999).

In fine, an inquiring court need not ask whether the government actors decided the point explicitly or actually discussed it, for the inquiry hinges instead on whether some plausible policy justification could have undergirded the challenged conduct. The critical question is whether the acts or omissions that form the basis of the suit are susceptible to a policy-driven analysis, not whether they were the end product of a policy-driven analysis.

*Id.* at 692. “[I]f the policies and programs formulated by the [governmental agency] allow room for implementing officials to make independent policy judgments, the discretionary function exception protects the acts taken by those officials in the exercise of this discretion.” *Berkovitz v. United States*, 486 U.S. 531, 546 (1988).

#### *1. Independent Contractor Status.*

The plaintiffs do not contend that Hussey was anything other than an independent contractor. Rather, they contend that employees of the Navy themselves were negligent, by giving “specific instruction to Hussey on where and how to dump the hazardous substances[,] . . . in failing to rectify the situation, and in failing to warn the Claimants of the hazardous conditions.” Plaintiffs’ Objection to Motion to Dismiss, etc. (“Plaintiffs’ Objection”) (Docket No. 6) at 7. It is only by showing direct negligence by the defendant, rather than any negligence by Hussey, that the plaintiffs can maintain their claim. *See, e.g., Larsen v. Empresas El Yunque, Inc.*, 812 F.2d 14, 14-16 (1st Cir. 1986) (United States not liable for failure to repair broken pavement or warn visitor of broken pavement at restaurant on leased premises in national forest); *Brooks v. A. R. & S. Enter., Inc.*, 622 F.2d 8, 12 (1st Cir. 1980) (right to daily inspection of work of contractor does not make Navy liable for torts

of contractor). To the extent that the alleged failure to “rectify the situation”<sup>1</sup> and the alleged failure to warn arise only as a result of the actions of Hussey and his employees, therefore, the defendant cannot be held liable.

The approach urged here by the plaintiffs requires careful scrutiny, lest it become a distinction that swallows up the independent contractor exception to the Tort Claims Act. This inquiry is hampered by the absence in this case of any written contract between Hussey and the defendant. However, because I conclude below that discretionary function immunity is applicable in this case, even when the plaintiffs’ characterization of the issues is adopted, it is not necessary to resolve the question whether that characterization is correct.

*2. The discretionary function exception.*

After engaging in additional discovery on the jurisdictional issue, the plaintiffs have added an additional instance of alleged negligence by the defendant that they contend is not subject to the discretionary immunity exception: “an inspection of the Hussey operation to determine whether the handling of substances was appropriate pursuant to the earlier directives against disposals that could contaminate groundwater.” Plaintiffs’ Supplemental Memorandum of Law in Opposition to Defendant’s Motion to Dismiss (“Plaintiffs’ Supplemental Memorandum”) (Docket No. 18) at 9-10.

To the extent that the plaintiffs’ claim is based on the alleged failure to warn about the “hazardous conditions” at the Hussey property and the allegedly negligent inspection, *Williams v.*

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<sup>1</sup> The complaint alleges that the defendant “knew or should have known that the disposal of hazardous substances on the property of Paul Hussey, Sr. at Hooper Sands Road was illegal and would result in an unreasonably dangerous condition harmful to plaintiffs and persons in their position,” Complaint ¶ 16, although it also alleges that the presence in the plaintiffs’ wells of contamination resulting from the leaching of hazardous substances from the Hussey property was not discovered until 1989, *id.* ¶¶ 22-23.

*United States*, 50 F.3d 299 (4th Cir. 1995), is instructive. In that case, the plaintiff slipped and fell in the lobby of a building leased by the United States, which filed a third-party complaint against the contractor that provided custodial and maintenance services for the building. *Id.* at 301-02. “Recognizing that [the contractor’s] status as an independent contractor immunizes the United States from liability for any alleged tortious conduct by [the contractor],” *id.* at 307, the plaintiff argued that the United States was negligent in hiring the contractor, inspecting the contractor’s work and failing to post warnings after learning of the dangerous condition of the floor, *id.* at 308. The Fourth Circuit found that the decision to engage the contractor fell within the discretionary function exception,<sup>2</sup> and, given this finding, that assertions that the government was negligent in inspecting the contractor’s work and not posting warning signs “cannot prevail because these decisions are embraced by the overarching decision to engage” the contractor. *Id.* at 310. I find this reasoning to be persuasive. The discretionary function immunity provided by section 2680 applies to any claims that the defendant injured the plaintiffs by failing to inspect Hussey’s work or premises adequately, *see generally Irving v. United States*, 162 F.3d 154, 163-66 (1st Cir. 1998) (OSHA regulations containing “a sprinkling of mandatory directives” do not mandate a particular method of conducting inspections or otherwise materially restrict inspectors’ flexibility, and general OSHA inspections “fit comfortably within the discretionary function exception”), or by failing to warn them that their property might be harmed as a result of Hussey’s disposal of the defendant’s hazardous waste on his property. None of the evidence cited by the plaintiffs contains a “specific prescription mandating” the conduct of the defendant’s inspection of Hussey’s disposal site, so any inspections that took place

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<sup>2</sup> The plaintiffs do not dispute that the defendant’s decision to award the contract for waste disposal to Hussey falls within the discretionary function immunity of the Tort Claims Act. Plaintiffs’ Objection at 10.

were “squarely in the maw of the discretionary function exception.” *Id.* at 165. The plaintiffs do not even attempt to identify any policy, statute, or regulation requiring the defendant to warn them concerning the Hussey site.

Remaining for consideration are the plaintiffs’ contentions that the defendant was negligent in “failing to rectify the situation,” Plaintiff’s Objection at 7, and in specifically instructing Hussey “on what to do with these chemicals and how to dispose of them by burying them in trenches,” Plaintiffs’ Supplemental Memorandum at 10. The plaintiffs have submitted no evidence to support a conclusion that the defendant had, at any relevant time, a nondiscretionary duty to “rectify the situation” at the Hussey site or that its failure to do so was not susceptible to a policy-driven analysis. With respect to the second argument, the evidence fails to support the plaintiffs’ argument that the defendant was so directly involved in the details of the disposal of the materials at the Hussey site that any negligence involved in the disposal was that of the defendant itself.

*1. Failure to “Rectify the Situation”*

Under section 2680, “challenged conduct is not discretionary if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.” *Heinrich v. Sweet*, 62 F.Supp.2d 282, 324 (D. Mass. 1999). To support their contention that the defendant’s conduct was not discretionary, the plaintiffs rely on the following documents: Executive Order 11507, entitled “Prevention, Control and Abatement of Air and Water Pollution at Federal Facilities,” issued February 4, 1970; OPNAV Instruction 6240.3, sent to the defendant by the Chief of Naval Operations on or about March 2, 1971, and an enclosed document entitled “Guidelines for Prevention, Control, and Abatement of Air and Water Pollution;” a memorandum dated March 1, 1971 of an oral directive from NAVSHIPS to shipyard commanders given between February 23 and

25, 1971; a memorandum from the commander of the Portsmouth Naval Shipyard to its public works department dated March 1, 1971; and documents dated July 1968 and July 26, 1971 addressing the proposed wording of contracts with Hussey. Plaintiffs' Supplemental Memorandum at 2-6; Stipulation (Docket No. 17), ¶¶ 2-4, 8, 11-13. The plaintiffs also seek to rely on the absence of a Shipyard Instruction entitled "Control and Handling of Industrial Wastes of the Portsmouth Naval Shipyard" adopted by the Environmental Control Board of the Portsmouth Naval Shipyard at some time after June 2, 1971, a copy of which the defendant has been unable to locate. Plaintiffs' Supplemental Memorandum at 6-7, 12; Stipulation ¶¶ 14, 17-19.

The first of these documents, the Executive Order, provides, in relevant part:

SECTION 1. *Policy.* It is the intent of this order that the Federal Government in the design, operation, and maintenance of its facilities shall provided leadership in the nationwide effort to protect and enhance the quality of our air and water resources.

\* \* \*

SEC. 4. *Standards.* (a) Heads of agencies shall ensure that the facilities under their jurisdiction are designed, operated, and maintained so as to meet the following requirements:

\* \* \*

(5) No waste shall be disposed of or discharged in such a manner as could result in the pollution of ground water which would endanger the health or welfare of the public.

Executive Order 11507, Exh. 4 to Stipulation, at [1]-2. This order, dated February 4, 1970, *id.* at 4, could not by its terms apply to the defendant's disposal of waste through its contract or contracts with Hussey before that date. The complaint contends that the disposal at issue took place in "the 1960's and 1970's," Complaint ¶¶ 9-10, and the evidence submitted by the parties is that Hussey had contracts with the defendant "for several years ending no earlier than 1973," Stipulation, ¶ 1.<sup>3</sup> As

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<sup>3</sup> In an unsworn interview, Hussey stated in reference to his disposal of the defendant's (continued...)

to any of the defendant's wastes disposed of by Hussey after February 4, 1970, the Executive Order does not "specifically prescribe[] a course of action for an employee to follow" with respect to "rectifying" any pollution caused by prior disposal of waste. Accordingly, assuming that the plaintiffs' injuries result from the pollution of ground water by waste generated by the defendant, the Executive Order provides no basis for a conclusion that the defendant's conduct in this regard was not discretionary.

The next document, OPNAV Instruction 6240.3 from the Chief of Naval Operations, was sent to the Portsmouth Naval Shipyard. Stipulation ¶¶ 10-11. It provides, in pertinent part:

5. Policy.

\* \* \*

b. The Navy will conform to provisions of the Oil Pollution Act, 1961, as amended and the Federal Water Pollution Control Act, as amended, insofar as the Acts prohibit the discharge of oil, and regardless of whether or not the Acts pertain specifically to naval vessels and shore (field) activities. The intent of this policy is to prohibit the discharge of all waste oil and oily mixtures in all areas except when operational emergencies exist.

\* \* \*

7. Action. Addressees are directed to initiate aggressive action to combat environmental pollution in accordance with the responsibilities specified herein, and where appropriate, issue the necessary implementing instructions to ensure that the provisions of this Instruction are adhered to on a continuous basis within their respective commands.

OPNAV Instruction 6240.3, dated March 2, 1971, Exh. 6 to Stipulation, at 2, 6. Again, this document addresses actions taken only after March 2, 1971, and, in the sections upon which the plaintiffs rely, prohibits only the discharge of waste oil and oily mixtures and violation of two federal

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<sup>3</sup>(...continued)

wastes that "1973 was about the last of it" and also that another contractor "won the contract after me. . . .Then I got it back for about 1-2 years." File note dated August 25, 1989, Exh. 12 to Stipulations. It is not clear whether Hussey's loss and regaining of the contract occurred before or after 1973.

statutes, neither of which is cited by the plaintiffs as the basis for their contention that the defendant's alleged failure to "rectify" was not a discretionary act. The issuing of implementing instructions "where necessary" is clearly discretionary and does not, in any even, specifically prescribe any rectification of pollution. The "aggressive action to combat environmental pollution" is to be undertaken "in accordance with the responsibilities specified herein." Section 6 of the Instruction is entitled "Responsibilities," Exh. 6 at 3-5, only one of which could possibly be applicable to the circumstances of the instant case. Subsection j of Section 6 provides, in relevant part: "All other Navy Offices and Commands shall identify environmental quality problems and take corrective measures within their assigned charters and/or mission and tasks and available resources, or seek assistance at the Departmental level via the chain of command . . . ." *Id.* at 5. The direction to take action "within . . . available resources" is not a prescription of a course of action that must be followed, and indeed can only be interpreted to allow the employees to whom the direction is addressed to exercise discretion. The Instruction does not require the defendant to "rectify" any pollution caused by the disposal of its waste at the Hussey site.

The third document, an enclosure to the OPNAV Instruction, provides, in pertinent part:

1. The Navy shall ensure that all facilities (aircraft, vessels, buildings, installations, structures, equipment, vehicles, etc.) are designed, operated, and maintained so as to meet the following requirements.

\* \* \*

d. No waste shall be disposed of or discharged in such a manner as could result in the pollution of ground water which would endanger the health or welfare of the public.

"Guidelines and Standards for Prevention, Control, and Abatement of Air and Water Pollution," attached to OPNAV Instruction, Exh. 6 to Stipulation, at 1-2. This document appears by its terms to apply only to Navy-owned "facilities," which would not include the Hussey site, but even if that

site could be construed to be a “facility” within the scope of the document, nothing in the portions upon which the plaintiffs rely can be construed to require the defendant to “rectify” pollution once it has occurred. *See also Aragon v. United States*, 146 F.3d 819, 826 (10th Cir. 1998) (“[a]n objective, alone, does not equate to a specific, mandatory directive” for purposes of the discretionary function exception).

The fourth document is a memorandum of an oral directive. Oral directives carry much less weight than do written policies, regulations or statutes for the purpose of determining whether an action was discretionary under the Tort Claims Act. *Irving*, 162 F.3d at 166 (declining to accord significance to an area director or compliance officer’s thoughts on OSHA policy requirements). It is only established governmental policy that courts are to consult in the discretionary function inquiry. *Gaubert*, 499 U.S. at 324. In the unlikely event that this document reflects established governmental policy, it nonetheless does not establish a nondiscretionary duty of the defendant to rectify pollution that might have been caused by a contractor’s disposal of its wastes. The pertinent portion of the memorandum reports as follows:

During the Shipyard Commanders’ Conference 23-25 February 1971, NAVSHIPS advised all shipyards to carefully investigate the methods and techniques being used by private contractors serving the shipyards for the disposal of waste oil, sludge, chemicals, etc. Shipyards must be aware of the contractors’ procedures and should be alert to ecology problems that can be generated by improper or inappropriate procedures. The shipyards cannot assume that they have no responsibility in the matter once material is turned over to the contractor for disposal.

Memorandum dated March 1, 1971 From 100 to 400, Exh. 7 to Stipulation. This statement cannot be construed to require the defendant to “rectify” existing pollution caused by contractors’ methods of disposing of the defendant’s waste.

The parties have stipulated that this document is a memorandum from the commander of the Portsmouth Naval Shipyard to its public works department, Stipulation ¶ 13, a fact not apparent on the face of the document. The plaintiffs also rely on the remainder of this memorandum, which issues instructions to that department, to support their contention that the defendant's policy required it to "rectify" pollution caused by the disposal of its waste at the Hussey site. There is no sense in which the instructions of the commander of a particular shipyard to an employee or department of that shipyard can be considered to be the "policy" of the Navy, let alone "federal" policy, as required by the case law. Accordingly, this document, as well as the possible excerpts from the contracts between Hussey and the defendant upon which the plaintiffs rely, cannot be considered as evidence that the defendant's failure to "rectify" pollution at the Hussey site was not discretionary.

Having concluded that the plaintiffs have failed to show that the defendant's alleged failure to "rectify the situation" was not discretionary, I turn to the second step of the *Shansky* inquiry, the question whether the exercise of discretion at issue involved is susceptible to policy-related judgments. 164 F.3d at 691. The law presumes that the exercise of official discretion implicates policy judgments. *Id.* at 692. Accordingly, the plaintiffs cannot prevail on this theory unless they demonstrate that the defendant's failure to "rectify the situation" was not susceptible to policy analysis. *Id.* (citing *Gaubert*, 499 U.S. at 325).

On this point, the plaintiffs argue in conclusory fashion that "not one of the actions at issue in this case reflect the exercise of a policy judgment of the type that the immunity seeks to protect," citing *Shansky* in support of their contention that "at best those actions involve 'the judgment that embodies a professional assessment undertaken pursuant to a policy of settled priorities.'" Plaintiffs' Supplemental Memorandum at 10; 164 F.3d at 694. The quotation from *Shansky* is taken from a

paragraph in which the First Circuit discusses “a line of cases involving plaintiffs who challenge official judgments that implicate technical safety assessments conducted pursuant to prior policy choices. Such decisions come within a category of professional judgments that, without more, are not readily amenable to policy analysis.” *Id.* at 694 (citations omitted). Here, the decision whether to “rectify the situation” at the Hussey site does not involve “application of objective scientific standards,” *id.*, but rather is readily amenable to policy analysis, the most obvious being an economic one. *See generally Kirchmann v. United States*, 8 F.3d 1273, 1274, 1277-78 (8th Cir. 1993) (where plaintiffs alleged contamination of ground water at their farm resulting from defendant’s contractors’ use of certain solvent to clean missile parts on adjoining missile facility, defendant’s failures to act found to be susceptible to policy judgment, citing cases relying on impact of such decisions on feasibility and practicality of government program to undertake such actions and the efficient allocation of agency resources).

Discretionary function immunity applies to the defendant’s alleged failure to “rectify the situation” at the Hussey site.

## 2. *Specific Instructions to Hussey*

As noted above, it is likely that none of the documents upon which the plaintiffs rely to support their argument that the defendant’s instructions to Hussey concerning “where and how to dump the hazardous substances,” Plaintiff’s Objection at 7, establishes that the federal government, or the Navy, had a policy that made such instructions non-discretionary. The instructions themselves cannot constitute a policy, and they clearly are not a statute or a regulation. The plaintiffs have not shown that it was not within the defendant’s discretion to issue such instructions to Hussey, nor that such instructions could not have been susceptible to a policy-driven analysis. Accordingly, the

discretionary function immunity of section 2680 appears to apply to this aspect of the plaintiffs' claim as well.

The authority cited by the plaintiffs in support of their argument on this point is a statement that "[t]he government may lose the protection of the [discretionary function] exception if, having delegated responsibility [for safety procedures to the independent contractor], it has also retained and exercised control over the project's safety." *Andrews v. United States*, 121 F.3d 1430, 1441 (11th Cir. 1997) (internal quotation marks and citation omitted). This statement occurs in a discussion of potential liability for failure to supervise the contractor, *id.* at 1440, a ground for liability expressly disavowed by the plaintiffs here, Plaintiffs' Objection at 6-7; Plaintiffs' Supplemental Memorandum at 9. In addition, none of the contract provisions or oral statements by the defendant's employees upon which the plaintiffs rely demonstrates that the defendant "retained and exercised control" over the safety of the Hussey site or Hussey's methods of disposal.

In addition, the record submitted by the plaintiffs does not support their basic assertion, necessary to the success of their argument, that the defendant's instructions to Hussey were so specific that the harm to the plaintiffs can be said to have resulted from the negligence of the defendant itself. Plaintiffs' Opposition at 7, 10-11; Plaintiffs' Supplemental Memorandum at 10-11. The plaintiffs contend that the defendant instructed Hussey "as to how to dispose of those wastes, including matters such as the size of the trenches in which to dispose of the waste." Plaintiffs' Opposition at 10 & 6 n.2. The complaint alleges that the defendant instructed Hussey "to dump these substances in shallow trenches" and pits on his property; approved Hussey's placement of "these substances" in storage tanks on his property and the "haphazard" piling on his property of drums and cans, both of which the defendant failed to properly maintain, resulting in pollutants leaking into the

groundwater; and instructed Hussey “on the methods of dumping and spreading of these substances on Hussey’s property.” Complaint ¶¶ 11-14. None of these allegations is supported by the evidence submitted by the plaintiffs in connection with this motion.

The plaintiffs rely on the following proffered evidence: an unsworn statement by Hussey as reported by Jim Tayon, an employee of the Portsmouth Naval Shipyard, Plaintiffs’ Objection at 5 n.1., that “The Navy told me that dirt would purify the waste chemicals,” Memorandum dated August 25, 1989, Exh. 12 to Stipulation; Hussey’s interrogatory answer to EPA that “chemicals were handled in tank trucks, dumped in trenches and buried as instructed by Portsmouth Naval Shipyard,” and “All materials handled was done so in response to U.S. Government requirements at that time,” untitled document dated August 21, 1989, Exh. 16 to Stipulation, ¶ 23; an unsworn statement by a former Portsmouth Naval Shipyard employee, as reported by Tayon, that “[a] couple of times [he] went out to the [Hussey] site to make sure [Hussey] was digging the trenches” and that he went there because “[w]e wanted to be sure that the oil went into the trenches instead of being dumped into someone’s ditches or whatever,” Memorandum dated August 30, 1989, Exh. 13 to Stipulation. They also rely on the following specific language found in documents:

I. Removal and Disposal of Scrap Oils

\* \* \*

e. Contractor’s disposal site for scrap oil shall meet all applicable regulations and shall not be on the water shed [sic] of any water supply and cannot contaminate any underground water courses.

II. Removal and Disposal of waste “Ferlon” and Citric Acid Solutions.

\* \* \*

c. Contractor’s disposal site for the combined FERLON and citric acid waste solutions shall meet all applicable regulations and shall not be on the water shed [sic] of any water supply and cannot contaminate any underground water course.

III. Removal and Disposal of Waste Potassium Chromate Solutions

a. . . . Contractor shall remove and effect . . . disposal [of waste potassium chromate solutions] in accordance with the following:

1. Contractor's disposal site for waste potassium chromate solutions shall meet all applicable regulations and shall not be on the water shed [sic] of any water supply and cannot contaminate any underground water courses.

\* \* \*

3. No more than 100 gallons at concentrations between 2000 and 5000 parts per million shall be disposed of in 100 square feet of land area. If land is to be walked on before rainfall soaks and leaches the area, or if dry top soil could blow into occupied areas, contractor shall spread soil over drain area, or trench and backfill.

4. If concentration is less than 2000 parts per million, contractor may dispose of the waste potassium chromate in his leaching field up to the absorption capacity of the soil. No spread of top soil over the disposal area or trenching is required in such cases.

Proposed Wording for Upcoming Waste Disposal Contract — Standard Government Contract

Provisions Omitted, dated July 11, 1968, Exh. 1 to Stipulation, at [1]-[3].

2.4 COMPLIANCE WITH LAWS AND REGULATIONS:

\* \* \*

Wastes that cannot be further reclaimed or recycled shall be disposed of in an approved landfill and/or incinerator equipped with adequate environmental controls.

Two (2) copies of permits issued, by applicable environmental agencies (local, state or Federal), specifically for the transportation, processing and/or disposal of the specific wastes described [herein] shall be furnished to the Government; if permits are not required, two (2) copies of letters from applicable agencies, to this effect, shall be furnished the Government.

\* \* \*

2.6 INSPECTION: The Government reserves the right to inspect any of the contractor's equipment, facilities or disposal sites during the life of this contract.

Specification, Removal and Disposal of Hazardous Wastes at Portsmouth Naval Shipyard,

Portsmouth, New Hampshire, dated December 2, 1976, Exh. 19 to Stipulation, at [12] (identified as 2 of 2).

None of this material establishes that the defendant provided specific instructions to Hussey as to how to handle and dispose of the waste, certainly not that the instructions were so specific that any negligence resulting in harm to the plaintiffs can be deemed to be that of the defendant. There is absolutely nothing to support the allegations that the defendant assumed responsibility for maintenance of storage tanks, barrels and cans on Hussey's property the rupture of which caused pollution affecting the plaintiffs. There is at best some evidence that the defendant wanted to be sure that Hussey was dumping the oil that he took from the shipyard in trenches rather than somewhere else, but no evidence that it instructed Hussey to use trenches, and certainly no evidence that it specified the size or depth of the trenches.

Hussey's statements that disposal was done "in response to government requirements" and "as instructed by" the shipyard could mean that the shipyard instructed him to dispose of its waste in accordance with applicable government regulations, and nothing more. They do not support a conclusion that the defendant "retained and exercise control over the safety" of Hussey's disposal procedures, nor do they support a conclusion that any negligence involved in the disposal was that of the defendant.

None of the cited contract language, including that dated 1976 which may have been in use only after Hussey stopped providing waste disposal services to the defendant, imposes any duty upon the defendant the violation of which could have led to the injuries of which the plaintiffs complain. The proposed contract language is specific as to disposal methods only for the potassium chromate solution. The proposed contract also indicates that disposal of potassium chromate solution would

be “infrequent,” in amounts of 500 to 1000 gallons per disposal, while the amount of oils to be disposed of during the life of the contract was estimated at 90,000 gallons and the amount of Ferlon and citric acid solutions at 50,000 gallons. Exh. 1 to Stipulation at [1]-[3]. Under the circumstances, the specificity of the proposed contract language concerning this one type of waste cannot serve to establish that the defendant’s involvement in the specific details of methods of disposal of its wastes at the Hussey site and protective measures to be taken there was sufficient to make any negligence involved in that disposal the negligence of the defendant. This evidence certainly does not show that the defendant “retained and exercised control over the [site’s] safety.” *Andrews*, 121 F.3d at 1441.

The plaintiffs have not demonstrated that the defendant so controlled the disposal of its waste at the Hussey site that the discretionary function exception to the Tort Claims Act is not applicable.

### 3. *The “missing” document.*

The plaintiffs’ final argument is that they are entitled to an inference that the Shipyard Instruction entitled “Control and Handling of Industrial Wastes of the Portsmouth Naval Shipyard” adopted some time after June 2, 1971 by the shipyard’s Environmental Control Board and intended to provide guidelines for “proper disposal of chemical and other materials that may cause a pollution problem,” a copy of which the defendant has been unable to locate, Stipulation ¶¶ 17-19, set forth a policy that specifically prescribed a course of action for shipyard employees to follow with respect to the disposal of wastes at the Hussey site such that the defendant is not entitled to discretionary function immunity. Plaintiffs’ Supplemental Memorandum at 12. Contrary to the plaintiffs’ assertion that “the Government acknowledges that instructions did exist [in the missing Instruction] on the precise topic at issue,” *id.*, the defendant responds that it is unlikely that the Instruction would have addressed the supervision of waste disposal contractors, citing the deposition testimony of

Raymond Belleville, a shipyard employee who by mid-1972 had been assigned the task of reviewing environmental contracts and permits, including the Hussey contract, Supplemental Memo of the United States in Support of the Motion to Dismiss (Docket No. 19) at 14; Stipulation ¶ 6. Belleville testified that “it would be most unusual” for the shipyard to have an Instruction in 1971 that addressed the supervision of contractors that were used to dispose of wastes. Deposition of Raymond R. Belleville, submitted with Stipulation, at 48-49.

The plaintiffs do not contend that the unavailability of this document is due to bad faith on the part of the defendant. Specifically, they do not suggest that any copies of the 28-year-old document were destroyed or lost only after the defendant had notice that they might be relevant to a claim such as that brought by the plaintiffs, which the First Circuit has long held is a necessary showing before any inference adverse to the non-producing party may be drawn. *Nation-Wide Check Corp. v. Forest Hills Distrib., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982). *See Blinzler v. Marriott Int’l, Inc.*, 81 F.3d 1148, 1159 (1st Cir. 1996) (“Before such an inference may be drawn, there must be a sufficient foundational showing that the party who destroyed the document had notice both of the potential claim and of the document’s potential relevance.”).

Given the lack of this foundational showing, the plaintiffs are not entitled to the benefit of any adverse inference concerning the possible content of the missing Instruction.

The plaintiffs have not refuted the defendant’s claim that the discretionary function immunity provided to it under 28 U.S.C. § 2680 applies to the claims raised in Counts III-V of the complaint. *See Hodgdon*, 919 F. Supp. at 38 (burden of proving subject matter jurisdiction rests on the pleader; court lacks subject matter jurisdiction over suit against United States if plaintiff fails to meet requirements of relevant waiver of sovereign immunity).

#### IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **GRANTED.**

#### NOTICE

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 18th day of February, 2000.*

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*David M. Cohen  
United States Magistrate Judge*