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

NORTH PENN WATER AUTHORITY	:	CIVIL ACTION
	:	
v.	:	
	:	
BAE SYSTEMS, et al.	:	NO. 04-4446
	:	

MEMORANDUM

Baylson, J. **July 19, 2005**

I. Introduction

On September 20, 2004, Plaintiff North Penn Water Authority ("NPWA") filed the Complaint in this action (the "Federal Complaint") against Defendants BAE Systems Aerospace Electronics, Inc. ("BAE"), Fichtel & Sachs Industries, Inc. ("Fichtel"), Stabilus, Gas Spring Corporation ("Gas Spring"), County Line Land Limited Partnership ("County Line"), Honeywell, and Baron-Blakeslee, Inc. ("Baron-Blakeslee"). That same day, NPWA also filed a Complaint (the "State Complaint") in the Court of Common Pleas of Montgomery County, Pennsylvania, setting forth state law claims identical to the state law claims set forth in the Federal Complaint. The Federal Complaint contains two additional counts under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA").

On October 25, 2004, the Montgomery County case was removed to this Court and in a Memorandum and Order dated May 25, 2005, this Court denied NPWA's Motion to Remand the State Complaint and granted Defendants' Motion to Consolidate the two actions. North Penn

Water Authority v. BAE Systems, et al., 2005 WL 1279091 (E.D. Pa. May 25, 2005).[1]

Presently before the Court is Defendant's Motion to Dismiss, filed on November 17, 2004. On January 5, 2005, Plaintiff filed a response brief, and Defendants' filed a reply brief on January 26, 2005. On February 18, 2005, Plaintiff filed a Motion for Leave to File a Surreply to the Defendants Reply Brief, which the Court allows.

Due to the parallel nature of the two Complaints – except for the inclusion of the two federal law claims in the Federal Complaint – Defendants' Motion to Dismiss the State Complaint simply "rel[ies] on, and incorporate[s] by reference herein, all of their arguments and grounds for dismissal of the Original Federal Action." The Plaintiff's response regarding the State Complaint similarly relies on and incorporates by reference the arguments made in the opposition to the Motion to Dismiss the Federal Complaint. Therefore, as the two actions have been consolidated for all purposes, this Memorandum and Order disposes of the Motions to Dismiss in both actions, although the following analysis refers to the Federal Complaint.

II. The Federal Complaint

The factual allegations in the Federal Complaint are identical to those in the State Complaint and are summarized in the May 25, 2005 Memorandum and Order.

The causes of action pleaded in the Federal Complaint are as follows:

In Count I, NPWA alleges that each Defendant is a liable party within the meaning of Section 107(a) of CERCLA, 42 U.S.C. §9607(a), and therefore jointly and severally liable to NPWA for the reimbursement of "reasonable and necessary response costs, which are consistent

[1]The Court believes that its earlier decision is not inconsistent with the Supreme Court's recent decision in Exxon Mobil Corp. v. Allapattah Services, Inc., 125 S. Ct. 2611 (2005).

with the [National Contingency Plan]" that NPWA has incurred and will continue to incur, "including, but not limited to, costs to investigate, assess, monitor and provide an alternative water source." (Federal Complaint, ¶¶ 189-191). NPWA demands judgment against Defendants for the recovery of all response costs incurred, and a declaratory judgment that Defendants are liable for all response costs to be incurred by NPWA in the future, together with costs of litigation.

In Count II, NPWA alleges that "[b]y their actions, Defendants have created an imminent and substantial endangerment to the health of the public in general and/or to the environment, and/or to the users of water from the Authority in violation of Section 7002 and 7003 of RCRA, 42 U.S.C. §6972 and §6973." (Federal Complaint, ¶198). NPWA demands "a declaration of liability against Defendants under RCRA; the issuance of an injunction requiring Defendants to abate the violations described above and provide an appropriate and acceptable treatment system on Well NP-21, which will put the well back into service as a source of public water supply, including the operation and maintenance of such system; the recovery of costs expended by the Authority because of the contamination of Well NP-21; together with the costs of litigation." (Federal Complaint, p. 30).

In Counts III-XV, the Federal Complaint sets forth state law claims identical to those set forth in the State Complaint. In Count III, NPWA demands judgment against Defendants under the Pennsylvania Hazardous Sites Cleanup Act ("HSCA"), 35 P.S. § 6020.103, for the recovery of all response costs incurred by NPWA and all natural resource damages associated with the contamination of Well NP-21, and a declaratory judgment that Defendants are liable for all future response costs and natural resource damages to be incurred, together with the costs of litigation

and interest.

In Count IV, NWPA demands judgment against Defendants under the HSCA to abate the contamination and provide an appropriate and acceptable treatment system on Well NP-21, including the operation and maintenance of such system, together with costs of litigation and interest.

In Count V, NPWA demands judgment against Defendants for costs to compel compliance with the Pennsylvania Storage Tank Act and Spill Prevention Act, 35 P.S. § 6021.101, et seq. ("Storage Tank Act"), costs for corrective action, recovery of response costs, and an order directing Defendants to abate the contamination and provide an acceptable and appropriate treatment system on Well NP-21, including the operation and maintenance of such system, diminution of property value, and litigation costs.

In Count VI, NPWA makes similar claims for judgment and injunction against Defendants, ordering them to abate the violation of the Clean Streams Law, 35 P.S. § 691.601(c), and to provide an acceptable and appropriate treatment system on Well NP-21.

Count VII- XV set forth, respectively, state common law claims of Negligence, Negligence Per Se, Nuisance, Continuing Nuisance, Public Nuisance, Nuisance Per Se, Trespass, Continuing Trespass, and Strict Liability. Each of these counts demands judgment in an amount in excess of $150,000, plus punitive damages, costs of litigation, interest, and any other relief the Court deems just and proper.

Defendants move to dismiss the entirety of the Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), and also move to dismiss the CERCLA, RCRA, HSCA, Pennsylvania Clean Streams Law, and the Storage Tank Act claims for lack of

subject matter jurisdiction, pursuant to Rule 12(b)(1).

III. Parties' Contentions Regarding Subject Matter Jurisdiction under CERCLA

Defendants argue that Section 113(h) of CERCLA, 42 U.S.C. §9613(h), strips the district courts of jurisdiction over claims regarding pre-enforcement review of EPA response actions, thereby limiting "a private party's ability to challenge the EPA's activities under CERCLA until the EPA has completed its clean-up of a hazardous site." Boarhead Corp. v. Erickson, 923 F.2d 1011, 1018 (3d Cir. 1991). According to Defendants, "the entire thrust of NPWA's complaint is to challenge the EPA's activities and decisions at the North Penn Area 5 Superfund Site," and any such challenge to the EPA's ongoing activities due to disagreement with the EPA's Record of Decision ("ROD") – which rejected NPWA's position regarding remedial action – is prohibited by CERCLA. (Defendant's Memo. of Law in Support of Motion to Dismiss, p. 10).

Similarly, Defendants argue that the Court does not have jurisdiction over the claims under RCRA, because those claims also constitute challenges to CERCLA activities that the Third Circuit has prohibited under Section 113(h) of CERCLA. Clinton County Commissioners v. United States Environmental Protection Agency, 116 F.3d 1018, 1027 (3d Cir. 1997)(citations omitted). As to the state statutory claims under the HSCA, Storage Tank Act, and Clean Streams Law, Defendants argue that Section 113(h) precludes this Court's jurisdiction "because granting the requested relief, even if done pursuant to state law, would represent judicial interference with a pending CERCLA remedial action in direct contravention of the statutory bar under CERCLA Section 113(h)." (Defendants' Memo. of Law, p. 23, citing McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 330 (9th Cir. 1995)).

NPWA argues that the Complaint does not challenge the EPA's ROD and that the EPA's

proposed remedy for the BAE facility will not be delayed or disturbed by the relief requested in the Complaint. Specifically, NPWA argues that its CERCLA claim is a cost recovery action under CERCLA §9607(a), and does not constitute a "challenge" to a removal or remedial action under Section 113(h), because NPWA is not seeking to prevent, delay, or interfere with EPA's cleanup of the BAE facility. NPWA asserts that the cases relied upon by Defendants are distinguishable because none involved a private recovery action by an innocent party against potentially responsible parties under CERCLA §9607(a), and that, regardless, such an action falls within the exception provided in Section 113(h)(1) for actions under §9607 to recover response costs or damages for contribution. (Plaintiff's Memo. of Law in Opposition, pp. 10, 12).

Similarly, NPWA argues that the claims under the RCRA do not "challenge" or seek judicial review of an EPA decision, nor seek to prevent, delay or interfere with the cleanup, but instead that the remedies NPWA seeks under the RCRA can be pursued concurrently with the remediation that the EPA or the Defendants implement. As to the state statutory claims, NPWA argues that the Court may exercise supplemental jurisdiction over the claims as they form part of the same case or controversy as the federal claims, and also that the NPWA does not seek to interfere with a pending CERCLA remedial action but instead merely seeks to assert its rights against Defendants under Pennsylvania laws as a supplement to actions taken by the federal government. (Id., pp. 26-28). Therefore, NPWA argues, Section 113(h)'s jurisdictional bar cannot be properly applied to its claims.

In a reply brief, Defendants contend that the Ninth Circuit, in McClellan, 47 F.3d at 325, rejected an argument similar to NPWA's attempt to distinguish itself as an innocent party, and held that Section 113(h) bars all "challenges" to cleanup activities under CERCLA, regardless of

the status of the plaintiff, based on the statute's specific reference to "any challenge" to removal or remedial actions under CERCLA. (Def's Reply Memo., p. 3). Defendants also cite McClellan as contrary to NPWA's argument that this action does not represent a "challenge" to the EPA's decision because NPWA is simply asking for additional measures to be taken beyond those in the EPA's remediation plan. (Id., p. 4).

In a surreply brief, NPWA distinguishes McClellan from the present action on the grounds that in McClellan, the plaintiffs had not incurred any costs to respond to the contamination and were not bringing a cost recovery action under CERCLA §9607. In McClellan, the court determined that any remedy that could be granted would interfere with the EPA's cleanup, whereas NPWA asserts that its CERCLA claim seeks only to recover response costs. (Plaintiff's Surreply, p. 2). As to the RCRA claim, NPWA argues that the cases cited by Defendants in fact support NPWA's assertion that the RCRA claim is not a "challenge" to a CERCLA cleanup because "the EPA's Record of Decision ("ROD") only covers cleanup activity on Defendant BAE's facility and the map of EPA's selected remedial plan (Alternative 5B) clearly shows that the intended source control treatment area does not cover Well NP-21." (Id., p. 5). Thus, argues NPWA, this action is not seeking to "improve" on the EPA's selected cleanup of Well NP-21, because the EPA has not selected a cleanup method for Well NP-21. (Id.).

IV. Legal Standard

When deciding a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of persuading the Court that subject matter jurisdiction exists. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.1991). The court "may not presume the truthfulness of plaintiff's allegations, but rather must evaluate

for itself the merits of the jurisdictional claims." Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005)(brackets omitted)(quoting Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir.1977)).

When considering a motion to dismiss under Rule 12(b)(6), the court may grant a motion to dismiss "only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, the plaintiff is not entitled to relief." Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 183 (3d Cir.2000)(quoting Maio v. Aetna, 221 F.3d 472, 481-82 (3d Cir.2000)). Accordingly, a federal court may dismiss a complaint for failure to state a claim "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the complaint's allegations." Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001)(citation omitted).

V. Discussion

a. Count I – CERCLA

i. Subject Matter Jurisdiction

Congress amended CERCLA in 1986, adding Section 113(h), which provides:

> (h) **Timing of Review.**
> No federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:
>
> (1) An action under section 9607 of this title to recover response costs or damages or for contribution.
> (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
> (3) An action for reimbursement under section 9606(b)(2) of this title.

> (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
> (5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

42 U.S.C.A. § 9613(h). In addressing this provision, the Third Circuit has stated that "CERCLA's language shows Congress concluded that disputes about who is responsible for a hazardous site, what measures actually are necessary to clean-up the site and remove the hazard or who is responsible for its costs should be dealt with after the site has been cleaned up." Boardhead, 923 F.2d at 1019.

Boarhead, however, was addressing a claim under the National Historic Preservation Act, not a claim under CERCLA itself, and it was undisputed in Boarhead that the complaint did not fall within any of the five exceptions enumerated in §113(h). Id. at 1019. Here, NPWA asserts that its CERCLA claim falls within the first exception, §113(h)(1), because it is an action under §9607 to recover response costs. 42 U.S.C.A. § 9613(h)(1). Although stating in a footnote in their Motion to Dismiss that none of the exceptions to §113(h) apply to NPWA's CERCLA claim (Defs' Memo. of Law, p. 9, n. 5), Defendants' reply brief does not address NPWA's assertion that the CERCLA claim in Count I falls within the exception in §113(h)(1) for actions under §9607 to recover response costs, and the Court can find nothing to suggest otherwise. Under §9607(a)(4)(B), "CERCLA permits private parties to bring cost recovery suits against statutorily defined responsible parties for the costs that they have incurred in cleaning up hazardous substances." Reading Co. v. City of Philadelphia, 823 F.Supp. 1218, 1227 (E.D. Pa.

1993). The Court therefore properly exercises jurisdiction over Count I of the Federal Complaint under §113(h)(1).

ii. Whether NPWA's response costs were consistent with the National Contingency Plan ("NCP")

Turning to the substance of NPWA's CERCLA claim, to make out a cost recovery claim under § 9607(a)(4)(B), a plaintiff "must prove the following elements: (1) the defendant comes within one of the four classes of 'covered persons' identified in § 9607(a)(2), (2) there is a release or threatened release of hazardous substances from a facility, (3) the release or threatened release caused the plaintiff to incur response costs, (4) the costs incurred were the necessary costs of response, and (5) the response costs incurred were consistent with the national contingency plan." Reading Co., 823 F.Supp. at 1227-28.

Defendants argue that NPWA has not established the fifth element of a prima facie case under CERCLA §9607 because the Federal Complaint does not establish that NPWA's response costs were consistent with the National Contingency Plan ("NCP"). Defendants argue that NPWA's commencement of its response actions, before a Remedial Investigation/Feasibility Study ("RI/FS") was prepared, as well as its failure to provide an opportunity for appropriate public comment concerning the selection of a response action, demonstrate that NPWA's response costs were inconsistent with the NCP. (Defs' Memo. of Law, pp. 11-14).

NPWA argues that the determination as to whether a private party's response costs are consistent with the NCP cannot be made at this stage of the proceedings, i.e. on a motion to dismiss, without further development of the record. (Plaintiff's Memo. of Law in Opposition, p. 13). NPWA also argues that Defendants' assertions ignore the fact that the regulations regarding

the NCP were amended pursuant to CERCLA in 1982, and revised in 1985 and 1990, and thus differing versions of the NCP may apply to NPWA's various response costs, which NPWA alleges were first incurred in 1979. (Id. at 13-14). NPWA also asserts that the initial investigatory and monitoring costs, and any costs of providing alternative water supplies, are recoverable regardless of consistency with the NCP. (Id. at 14-15).

In response to Defendants' argument that NPWA's response costs do not comply with the NCP because they were incurred before a RI/FS was prepared, NPWA states that this argument unreasonably requires that NPWA have complied with provisions of the NCP before those provisions had been promulgated by the EPA and/or have waited twenty-three years until the RI/FS was completed by the EPA (in 2002) before taking any action with respect to Well NP-21. (Id. at 15-16).

In their reply brief, Defendants argue that a claim for response costs can be dismissed on a motion to dismiss where the inconsistency with the NCP appears on the face of the complaint. (Defs' Reply Brief, p. 4-5). Defendants assert that NPWA need not have waited for the EPA to prepare a RI/FS, but was required under the regulations to prepare its own RI/FS before incurring response costs in order to comply with the NCP. (Id. at 6). As to the timing issue, Defendants argue that any pre-1982 response costs incurred must be later determined to have been consistent with an applicable NCP to be recoverable under CERCLA, and that to recover any initial investigatory and monitoring costs that may be recoverable irrespective of the NCP, NPWA's complaint would need to have differentiated these costs from response costs in general. (Id. at 7-8).

In its Surreply, NPWA argues that the specific regulations cited by Defendants to support

dismissal first became effective on April 9, 1990, and that prior to that date, the NCP contained other requirements, with which NPWA complied, and that, regardless, consistency with the 1990 version of the NCP is determined by a substantial compliance standard, under which NPWA argues that its compliance is a question of fact that should not be determined on a motion to dismiss. (Plaintiff's Surreply, p. 3-4).

The Court agrees. As stated previously, a federal court may dismiss a complaint for failure to state a claim "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the complaint's allegations." Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001)(citation omitted). In Count I of the Federal Complaint, NPWA alleges that "the Authority has incurred and will continue to incur reasonable and necessary response costs, which are consistent with the NCP." (Federal Complaint, ¶189). For response costs to be consistent with the NCP under CERCLA §9607, private parties need only be in "substantial compliance" with the requirements of the regulations that were in place at the time when the response costs were incurred. Con-Tech Sales Defined Benefit Trust v. Cockerham, 1991 WL 209791 at *3 (E.D. Pa. 1991). The determination of which, if any, of NPWA's response costs substantially complied with the relevant versions of the NCP is a question of fact that cannot be determined until the record is further developed.

The cases relied upon by Defendants for the proposition that dismissal of a CERCLA claim is appropriate when the face of the complaint fails to establish consistency with the NCP are distinguishable. In Bello v. Barden Corp., 180 F.Supp.2d 300, 309 (D. Conn. 2002), the complaint did not allege that the costs were consistent with the NCP, and the plaintiff did not indicate in their opposition to the motion to dismiss that they contended that the costs were

consistent with the NCP. In MacGregor v. Industrial Excess Landfill, Inc., 856 F.2d 39, 42-43 (6th Cir. 1988), the complaint failed to allege any factual basis for the conclusory allegation that the plaintiff had incurred response costs consistent with the NCP. That is not the case here. Defendants' Motion to Dismiss is therefore denied as to Count I of the Federal Complaint.

As to the issues of whether NPWA's complaint makes out a claim for initial investigatory and monitoring costs that may be recoverable irrespective of the NCP, and what costs, if any, NPWA may recover under CERCLA will be addressed at a later stage in the proceedings. The Court notes that any request for attorney fees by NPWA must be in accordance with the Supreme Court's decision in Key Tronic Corp. v. United States, 511 U.S. 809 (1994).

b. Count II – RCRA

i. Subject Matter Jurisdiction

In Boarhead, the Third Circuit noted that "[t]he plain language of CERCLA §113 shows that Congress intended to deny the district courts jurisdiction to hear complaints challenging the EPA's Superfund clean-up or preclean-up activities, even if a statute other than CERCLA ordinarily would create a federal claim." 923 F.2d at 1013-14. The Third Circuit has subsequently reiterated its interpretation of §113(h) as precluding "the federal courts from exercising jurisdiction over any challenge to a CERCLA action based on a violation of any other federal law," and applied this interpretation to affirm a district court's dismissal of a RCRA claim for lack of subject matter jurisdiction. Clinton County, 116 F.3d at 1027. The critical question, then, is whether NPWA's RCRA claim constitutes a "challenge" to a CERCLA cleanup.

NPWA's RCRA claim "demands a declaration of liability against Defendants under

RCRA; the issuance of an injunction requiring Defendants to abate the violations described above and provide an appropriate and acceptable treatment system on Well NP-21, which will put the well back into service as a source of public water supply, including the operation and maintenance of such system." (Federal Complaint, p. 29-30).

In it Memorandum and Order of May 25, 2005, the Court found that NPWA's claims under the HSCA, the Storage Tank Act, and the Clean Streams Law, which similarly request that the Court require Defendants to install a treatment system on Well NP-21, sought to dictate remedial action and to alter the method of a CERCLA cleanup, and therefore constituted a "challenge" to a CERCLA cleanup. The Court found "that this relief as sought by the NPWA against Defendants is directly contrary to the EPA's decisions, and would, if ordered, require Defendants to ignore or violate those decisions." North Penn Water Authority, 2005 WL 1279091 at *9.

NPWA asserts, however, that Boarhead and Clinton County are distinguishable, because in those cases the plaintiffs' claims sought to delay or halt the EPA cleanup activities, whereas NPWA's claims do not seek to prevent, delay, or interfere with the EPA's cleanup remedy for the BAE facility. NPWA argues that because the EPA's ROD chose a remedy that did not include the installation of treatment system on Well NP-21, NPWA's pursuit of such an installation in this suit is unrelated to the EPA's cleanup activities. (Plaintiff's Memo. of Law, pp. 16-20).

While it is true that NPWA's RCRA claim does not seek to enjoin or delay the EPA's chosen remedy, it is clear from the alternatives presented and the remedy chosen in the ROD that the EPA considered and rejected the alternative of installing a treatment system on Well NP-21. (ROD, Defendants' Motion to Dismiss, Exh. A). In response to NPWA's criticism of the chosen

remedy's failure to include a treatment system, the EPA stated that it "did not choose Remedial Alternative #3 [NPWA's preferred alternative that included the installation of a treatment system on Well NP-21] because it believes the selected remedy will provide the most overall protection and meet ARARs [applicable or relevant and appropriate requirements]. It provides a long-term effective and permanent remedy which restores the groundwater quality by aggressively treating and eliminating source areas." (Defendant's Motion to Dismiss, Attachment 3, "Response to Comments from North Penn Water Authority (NPWA) dated October 23, 2002," p.7).

NPWA argues that, in McClellan, 47 F.3d at 330, and Natural Resources Defense Council, Inc., 1998 WL 372299 *14 (D. Del. 1998), courts have found that claims "not covered" by the EPA's cleanup activities do not constitute "challenges." But NPWA's argument cannot succeed because the EPA's ROD considered and rejected the remedy NPWA seeks before this Court, and explicitly includes the restoration of the groundwater quality in Well NP-21 within the scope of its cleanup, if not in the manner or on the timetable preferred by NPWA. Courts have held that claims that are "related to the goals of the cleanup" constitute "challenges" under §113(h), even if they seek to improve upon, rather than delay or obstruct, the EPA's chosen remedy. Razore v. Tulalip Tribes, 66 F.3d 236 (9th Cir.1995); McClellan, 47 F.3d at 330.

Although in enacting §113(h) Congress may have been primarily concerned with preventing responsible parties from delaying or obstructing EPA activities through litigation, federal courts have held that, other than the five enumerated exceptions, §113(h) "effectuates a 'blunt withdrawal of federal jurisdiction,' despite its more limited rationale." Oil, Chemical and Atomic Workers International Union v. Richardson, 214 F.3d 1379, 1382 (D.C. Cir. 2000)(holding that union's suit under the National Environmental Policy Act challenging

subcontracting of recycling work was a challenge to a CERCLA removal action and thus not subject to judicial review)(quoting North Shore Gas Co. v. EPA, 930 F.2d 1239, 1244 (7th Cir. 1991)). Although NPWA asserts that the remedy it seeks would not obstruct the EPA's cleanup, "[t]he legal question of when judicial review is available should not depend on the peculiar facts of each case." Lone Pine Steering Committee v. United States Environmental Protection Agency, 777 F.2d 882, 886 (3d Cir. 1985)("Although plaintiffs assert that the remedial action contemplated here could be performed as litigation continues, that may not always be true in other situations.").

The Court is not deaf to the frustrations expressed by NPWA regarding the pace at which the EPA's involvement with Well NP-21 has proceeded. "Section 113(h) is very clear, however, that courts are not to interfere with ongoing cleanup actions." Oil, Chemical & Atomic Workers Inter'l Union v. Pena, 62 F.Supp.2d 1, 12 (D.C. D.C. 1999).

> Congress enacted Section 113(h) for the best of reasons – namely to prevent interference with efforts to cleanup hazardous, contaminated sites. Whether or not the situation here is what Congress had in mind, the Court cannot ignore the clear wording of Section 113(h). At this stage, where the government has structured and begun a complex cleanup action, Section 113(h) makes abundantly clear that the Court is not to interfere.

Id.

The Court therefore concludes that it lacks subject matter jurisdiction over NPWA's RCRA claim under CERCLA §113(h) because the claim constitutes a "challenge" to a CERCLA cleanup. As mentioned previously, and discussed in the May 25, 2005 Memorandum and Order, as well as for the reasons stated here in relation to the RCRA claim, the Court also concludes that NPWA's claims (Count IV-VI) under the HSCA, the Storage Tank Act, and the Clean Streams

Law, which similarly request that the Court require Defendants to install a treatment system on Well NP-21 constitute a "challenge" to a CERCLA cleanup and are therefore barred by §113(h). Defendant's Motion to Dismiss will therefore be granted as to Counts II, IV, V, and VI.

c. Count III – HSCA

In Count III, NPWA demands judgment against Defendants for "the recovery of all response costs incurred by the Authority, all natural resource damages associated with the groundwater contamination in the Authority's service area for Well NP-21, and a declaratory judgment that Defendants are liable for all future response costs to be incurred and natural resource damages to be incurred." (Federal Complaint, pp. 33-34).

HSCA allows "[t]he Department, a Commonwealth agency, or a municipality which undertakes to . . . take a response action [to] recover those response costs and natural resource damages." 35 P.S. §6020.507(a). Defendants argue that NPWA has no standing to assert a claim under HSCA because NPWA is a "municipal authority" and not a municipality. Defendants also argue that NPWA's HSCA claim should be dismissed to the extent that it seeks recovery of any response costs incurred prior to July 30, 1993, under the six-year statute of limitations, which was tolled on July 30, 1999, by a "Tolling Agreement" executed by NPWA and Defendants. (Defs' Memo. of Law, pp. 23-25).

NPWA responds that courts have determined that a private right of action exists under HSCA and that, regardless, NPWA is considered "municipality" under the definition contained in other state environmental statutes, which NPWA asserts is the applicable definition. (Plaintiff's Memo. of Law, pp. 28-30). NPWA also argues that the six-year statute of limitations should not apply here, because its claims are not limited to an action to recover response costs,

but also seek natural resource damages, and declaratory judgment, litigation costs, and interest. (Id. at 31).

Although there was previously disagreement among district courts over the matter, as evidenced by the caselaw cited in the parties' briefs, a private right of action for response costs under HSCA does exist, see In re Joshua Hill, Inc., 294 F.3d 482, 491 (3d Cir. 2002)("This case, therefore, is a private action for response costs under sections 702 and 1101 of HSCA"). The Court therefore need not address the question of which definition of "municipality" applies under HSCA, and Defendants Motion to Dismiss will be denied as to Count III.

As to the question of any limitation to recovery created by the statute of limitations, this issue can be addressed at a later stage of the proceedings. Similarly, the issue of what litigation costs, if any, are recoverable under the HSCA will be addressed at a later stage of the proceedings.

d. Counts IV-VI – HSCA, Storage Tank Act, and Clean Streams Law

As explained above, Defendants Motion to Dismiss will be granted as to Counts IV, V, and VI, as these claims are found to constitute "challenges" to a CERCLA cleanup, and the Court therefore lacks subject matter jurisdiction over these claims under CERCLA §113(h).

e. Counts VII-XV – State Common Law Claims

Defendants argue that most of NPWA's common law claims (Counts VII, VIII, IX, XI, XII, XIII, and XV) are untimely and barred by a two-year statute of limitations, because NPWA's Complaint indicates that it became aware of the contamination 25 years ago and the EPA issued its report on the site 18 years ago. (Defs' Memo. of Law, pp. 29-30). NPWA does not dispute the applicability of the two-year statute of limitations on these claims, but argues that the causes of

action did not arise until the EPA issued its 2004 ROD, identifying the responsible parties and the full nature and extent of the contamination, because this was "the time when the plaintiff could have first maintained the action to a successful conclusion." Kapil v. Association of Pennsylvania State College and University Faculties, 470 A.2d 482, 485 (Pa. 1983). (Plaintiff's Memo. of Law, p. 42). NPWA also argues that the flow of contamination in this case is ongoing, and thus distinguishable from the authorities cited by Defendants. (Id. at 42-43).

It appears to the Court that Defendants' arguments better reflect Pennsylvania law. In F.P. Woll & Co. v. Fifth and Mitchell Street Corp., 1999 WL 79059 *10 (E.D. Pa. 1999), the court explained that "[t]he so-called 'discovery rule' tolls the running of a statute of limitations until the plaintiff knows or reasonably should know that he has sustained an injury caused by another party's conduct." The statute of limitations is tolled "only if the person in plaintiff's position exercising reasonable diligence would not have been aware of the salient facts." Id. It is clear that "[o]nce any damages are known, the statue begins to run" and a plaintiff's ignorance of "the precise extent of his injuries will not stop the running of the limitations period." Id.

NPWA argues that the alleged ongoing nature of Defendant BAE's activities that "have exerted an influence on the fate and transport of TCE in groundwater" (Federal Complaint, ¶95) indicates that the statute of limitations should be tolled until Defendants have ceased all such activities, but it cites no authority for this proposition, and the argument appears more relevant to the Continuing Nuisance and Continuing Trespass claims in Counts X and XIV.

In support of its Continuing Trespass claim, NPWA cites Miller v. Stroud Township, 804 A.2d 749, 754 (Pa. Commw. Ct. 2002), in which the court held that the two-year statute of limitations was improperly applied to a continuing trespass claim involving a sanitary sewer

line's continual trespass of water and fecal matter which caused damage to plaintiff's property. Again, NPWA bases its claim on its allegation that Defendant BAE's activities continue to contaminate the relevant area, which Defendants dispute. According to Defendants, the activities referred to as influencing "the fate and transport of TCE in groundwater" are in fact clean-up efforts by the defendants and their predecessors, and not acts resulting in new contamination. (Def's Reply, p. 30). The Court is not currently in a position, on the record before it, to determine the validity of NPWA's assertions that Defendants' activities continue to cause the damages that the common law claims seek to redress. Thus, while expressing doubt as to the timeliness of many, if not all, of NPWA's common law claims, the Court declines to dismiss these claims at this stage of the proceedings, noting that F.P. Woll & Co. was decided at the summary judgment stage, when the court had a more extensive record before it.

VI. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss will be denied in part and granted in part. The motion is denied as to Counts I and III; granted as to Counts II, IV, V, and VI; and denied as to Counts VII-XV.

An appropriate Order follows.

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

NORTH PENN WATER AUTHORITY	:	CIVIL ACTION
	:	
v.	:	
	:	
BAE SYSTEMS, et al.	:	NO. 04-4446

ORDER

AND NOW this 19th day of July, 2005 upon consideration of Defendants' Motion to Dismiss (Docket No. 4), and the responses thereto, it is ORDERED that the motion is DENIED as to Counts I and III; GRANTED as to Counts II, IV, V, and VI; and DENIED as to Counts VII-XV. Plaintiff's Motion to File a Surreply Brief (Docket No. 10) is GRANTED.

Defendants shall file their Answers to Counts I, III, and VII - XV within twenty (20) days. The parties shall forthwith exchange mandatory disclosures and discuss the preparation of a pretrial order which will cover:

1. The status of state court proceedings.
2. The prospects of settlement, including the timing of a settlement conference.
3. Coordination of discovery in this case with state court discovery.
4. Any legal, logistical or factual issues preventing completion of discovery.
5. A deadline for fact discovery.
6. A deadline for expert discovery.
7. Filing of dispositive motions.

The proposed pretrial order, either by agreement or by separate proposals, shall be filed by August 19, 2005.

A preliminary telephone pretrial conference, under Rule 16, F. R. Civ. P., will be held on Monday, August 22, 2005 at 4:30 p.m. Plaintiff's counsel will initiate the call, and when all counsel are on the line, call chambers at 267.299.7520.

BY THE COURT:

s/Michael M. Baylson
Michael M. Baylson, U.S.D.J.

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