No. 17-2473

IN THE UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT

Kristen Giovanni, et al,

Appellants

v.

United States Department of the Navy

Appellee

On Appeal from the Order of the District Court of the Eastern District of Pennsylvania, Civil Action No. 16-04873 (Honorable J. Pappert)

Delaware Riverkeeper Network and the Delaware Riverkeeper Maya van Rossum's Amicus Curiae Brief in Support of Appellants Kristen Giovanni et al.

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RULE 26.1 DISCLOSURE STATEMENT

The Delaware Riverkeeper Network is a nonprofit 501(c)(3) membership organization that advocates for the protection of the Delaware River, its tributaries, and the communities of its watershed. The Delaware Riverkeeper Network does not have any parent corporation, nor does it issue stock.

Respectfully submitted this 18th day of September 2017.

By: *s/ Deanna Tanner*

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I. Interest of the Amicus Curiae

The Delaware Riverkeeper Network, headed by its executive officer the Delaware Riverkeeper, Maya van Rossum, is a non-profit organization dedicated to preserving and protecting a clean and healthy Delaware River and environment. DRN was established in 1988 and has more than 19,000 members. DRN's mission is to protect and restore the Delaware River and its tributaries, habitats and resources. To achieve these goals, DRN organizes and implements stream bank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the entire Delaware River watershed – an area that includes portions of Pennsylvania, New York, New Jersey and Delaware.

Among its most important projects, DRN has been a leader in petitioning and advocating to have perfluorochemical compounds (PFCs) regulated in Pennsylvania and New Jersey drinking water law. (see infra) DRN has also been an advocate and litigant when hazardous substances contaminate groundwater and impact public and private drinking water. While DRN has no personal stake in the outcome of this case, DRN is interested in participating because the District Court's ruling would have the untoward effect of improperly preventing Pennsylvania citizens from expediently and prudently obtaining a health effects study and medical monitoring to protect from diseases caused by exposures to

toxic water contamination. These studies must be done as early as possible to be most effective in protection from disease. DRN requested to be *Amicus* because the District Court's decision (if not reversed), which precludes Court review of State health effects/ medical monitoring claims, causes significant harm as a precedent for this site and other hazardous drinking water pollution cases and sites.

Amicus file this brief pursuant to Fed. R. App. P. 29(a). Both parties consent to the filing of this *amicus* brief.

STATEMENT REQUIRED BY FED. R. APP. P. 29(E)

No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than the *amici curiae* – contributed money that was intended to fund preparing or submitting the brief.

II. Concise Statement of the Case

In the underlying case, Appellants/Plaintiffs filed a civil action in the Court of Common Pleas of Montgomery County seeking declaratory and injunctive relief in the nature of response costs under the Pennsylvania Hazardous Sites Cleanup Act for a health risk assessment and medical monitoring.[1] Appellants ("Giovanni") asserted that the Appellee/Defendant ("Navy") engaged in the improper disposal of PFCs at Naval Facilities in Willow Grove and Warminster ("Site"). JA 21 at ¶ 11.

Giovanni has resided across the street from the Willow Grove Naval facility since 2003. JA 22 at ¶ 24. In 2014, she learned that her private well was contaminated above health advisory levels ("HAL") for PFCs.[2] JA 22 at¶ 26.

[1] This could be accomplished by awarding the Plaintiff (assuming she prevails in the case) a trust fund to accomplish these preventive activities.

[2] Initially EPA had a health advisory level ("HAL")of .2 ug/l for PFOS and .4 ug/l for PFOAs. In May 2016, EPA revised its level and set a combined HAL of 0.007 (70 parts per trillion). The Giovanni's well exceeded the aforementioned combined HAL by over forty times. In May 2017 DRN petitioned to establish a PFC maximum contaminate level "MCL" for drinking water in Pennsylvania of

After being switched to public water, she also learned that the municipal wells were likewise contaminated by PFCs, above the HAL established by the Environmental Protection Agency. JA23-24 at ¶ 32-36. PFC exposure has been shown to cause an increased risk of testicular, kidney and thyroid cancer, among other dangerous health harms (see infra). JA26 at ¶ 58. The nature of the health harms is that they may take years to manifest. JA21 at ¶ 19. Giovanni has pled that, despite requests by citizens and public officials for a human health risk assessment and biomonitoring for those exposed to the severely contaminated drinking water, no studies have been performed by the involved Federal Agencies. JA24-25 at ¶ 43-45. The Site has been listed on the National Priorities List ("NPL") since 1995.[3]

https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.topics&id=0303820#Why

The Navy removed the case to Federal Court and argued, *inter alia*, that the case should be dismissed because there is an ongoing CERCLA remediation and therefore claims in State Court and Federal Court under HSCA were barred as an

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less than 6 parts per trillion. Current studies on PFCs indicate that even a low level of exposure could cause significant health harms, especially in children.

[3] The ATSDR is required to perform a health assessment on all sites on the NPL but apparently cannot get to all of them in any type of timely fashion. An ATSDR study was performed in 2002 but that study preceded the discovery of the PFOAS and focused on other contamination (TCE and PCE). See gen 42 U.S.C. § 9604(i)(6)

improper challenge to the CERCLA remediation. On July 7, 2017, the United States District Court for the Eastern District of Pennsylvania dismissed the Complaint and held that Giovanni's suit is a challenge to a removal or remedial action under § 9613(h) and thus no Court could exercise jurisdiction. Giovanni asserts that the District Court has made an error of law and timely filed an appeal. DRN agrees with the Giovanni's position and requests that the Honorable Court reinstate the Complaint.

III. **Summary Argument**

Taking the District Court's ruling to its logical conclusion leads to the sweeping and erroneous position that, in each and every case in which a site has been placed on the National Priorities List, a victim of the toxic contamination has no recourse to any Court -- State or Federal -- to seek or obtain a health study/medical monitoring, until there is complete remediation of the site, which may take decades. Such delay will likely render medical monitoring meaningless as too little and too late, where plaintiffs have unwittingly ingested and been exposed to toxic compounds that have the likelihood of causing cancers and other diseases.

Giovanni's claims for medical monitoring were brought solely under State law, the Hazardous Sites Cleanup Act, which ***does*** offer health assessment and medical monitoring as a private response cost to injured citizens. Contrary to the

Court's ruling and its broad implications, CERCLA does not preclude HSCA claims, except in the rare case of a true conflict. The District Court never made factual findings suggesting such a frank conflict between State and Federal law. A private health assessment and medical monitoring, pursuant to HSCA, provides no conflict or challenge to any ongoing EPA-ordered remediation or investigation of ground water, particularly when the ATSDR has not engaged in any health assessment pursuant to CERCLA.

The District Court's reliance on the Third Circuit Court of Appeals opinion in Boarhead Corp. v. Erickson, 923 F.2d 1011 (3d. Cir. 1991) was misplaced, because that case is readily distinguishable. In that case, there was a facial and direct challenge to an ongoing EPA remedy where the responsible party sought to "stay" the EPA remediation. This case is against a responsible party and will not in any manner require the Court to interfere with ongoing activities of the EPA or of the responsible party.

Legislative history demonstrates that Congress did not intend CERCLA to be a complete remedial framework nor to preclude State law governing the same subject matter. CERCLA contains statutory "savings clauses" to indicate that it was to be supplemented by common law and State law, which offer additional and/or "new" remedies to provide victims of a toxic release with more complete relief.

DRN seeks, in accordance with its mission, to protect citizens' rights and to preserve access to the courts to enforce Pennsylvania remedies to hazardous water pollution, in order to promote health and safety. The victims of toxic contamination should not be victimized a second time by being summarily thrown out of court, without even a chance to demonstrate that their request for a health effects study/medical monitoring does not challenge or conflict with any current or intended CERCLA removal or remediation. No Federal Agency has undertaken to provide such an important health study.

IV. Argument

A. The District Court made a premature evidentiary decision without proper factual analysis and disregarded the usual deference accorded to the Plaintiffs' factual pleading.

In a Rule 12(b)(6) motion, the Court evaluates the merits of the claims by accepting all allegations in the complaint as true, viewing them in the light most favorable to the plaintiffs, and determining whether they state a claim as a matter of law. Gould Electronics Inc. v. U.S., 220 F.3d 169, 178 (3rd Cir. 2000), citing In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1420 (3d Cir.1997).

In this case, the District Court did not adhere to this fundamental standard; rather, it disregarded Plaintiffs' pleading. Despite requests by both citizens and policy-makers for a health effects study and medical monitoring, there has not been

such study done in the more than two decades since the Site was placed on the National Priorities List. In further disregard of the preliminary stage of the case, the Court opined that the proposed damage demand conflicted with ongoing CERCLA remediation. JA112. Yet, the Court did not state the nature of the ongoing remediation nor how the alleged conflict arises.[4] The Court noted merely that medical monitoring would involve an inquiry into "who" caused the contamination. JA115. The Court did not even indicate whether the Navy has disputed its liability for the contamination. Accordingly, the Court engaged in a premature decision; no evidence has been presented as to the current remedial stage and plans for the site, the nature of the ongoing remediation under CERCLA and how it would conflict with Giovanni's requested remedy, namely a health risk assessment and medical monitoring.[5] See Browning v. Flexsteel Industries, Inc., 959 F.Supp.2d 1134 (N.D. Ind. 2014)(premature for court to dismiss based upon CERCLA 113(h) on the limited record available where it is unclear whether the

[4] Counsel for the Navy admitted in oral argument that she did not know the precise nature of the remediation and the Court declined the offer to even consider the involved facts of the remedial activity.JA42. JA 102-103.

[5] Although we keep referring to an injunction for a health assessment and medical monitoring, we believe that the way it would likely work is that a trust fund would be established to first permit a health effects study by a competent expert that would review the health risks to those exposed and based upon that study if a risk was established then money toward medical monitoring would be allotted to undertake the necessary surveillance.

RCRA action will delay the completion or enforcement of a cleanup action; this is very much dependent on the nature and concreteness of the remedial plans).

B. Background Analysis of the Hazard of PFC Contamination of Drinking Water and Pennsylvania Law on Medical Monitoring as a Necessary and Important Remedy to Offer Exposed Citizens.

Some background information may be of assistance to the Court.

1. PFCs, at even low levels, present a serious hazard to health such that a health risk assessment is reasonable relief and evidence regarding the requested relief should have been taken by the Court.

The history of PFC contamination and the hazards it poses is greater than can be summarized in a limited section of a short amicus brief.[6] It is another sordid and sad story of chemical manufacturers who knew and failed to disclose the dangers of a product that they introduced into the marketplace and became common in many uses. In 2006, the EPA ordered the use of this family of chemicals phased out; federal rulemaking issued in 2006 removed exemptions previously given to these chemicals, making them subject to toxic chemical control requirements.

The Pennsylvania Department of Environmental Protection ("DEP") describes PFCs as follows:

[6] A detailed description of the problem and DRN's interest in addressing the problem appears on DRN's website at http://www.delawareriverkeeper.org/ongoing-issues/perfluorooctanoic-acid.

> Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonate (PFOS) are part of a larger group of chemicals referred to as perfluorinated chemicals (PFCs). PFCs are not found naturally in the environment. PFOA and PFOS have been the most extensively produced and studied of these chemicals. They have been used to make cookware, carpets, clothing, fabrics for furniture, paper packaging for food, and other materials that are resistant to water, grease, or stains. They are also used in firefighting foams and in a number of industrial processes….

http://files.dep.state.pa.us/Water/DrinkingWater/Perfluorinated%20Chemicals/PFC%20Info%20Sheet.pdf

One of the many organizations that became an end-user of PFCs was the United States Military, who used it in firefighting foam. Ultimately, as contamination of water supplies was investigated, overwhelming evidence – some from Court Ordered studies -- demonstrated that PFC exposures are correlated with Kidney Disease, Testicular Cancer, Thyroid Disease, High Cholesterol, Pregnancy-Induced Hypertension/Preeclampsia and Ulcerative Colitis. See JA21, 26 at ¶s16, 17, 58, 61. See also "DRN Petition"[7],

http://files.dep.state.pa.us/PublicParticipation/Public%20Participation%20Center/P

[7] On August 15, 2017, the Environmental Quality Board ("EQB") approved DRN's petition to establish a State maximum contaminant level for drinking water for PFOAs (hereinafter "DRN Petition"). DRN provides the Court with a hyperlink to this Petition from the DEP website which includes all of the voluminous substantive scientific data that supported the Petition. This is provided to the Court solely as background material to aid the Court's understanding of the toxic nature of PFCs in drinking water and not as record evidence in this case. However, to the extent that the Petition has been filed and accepted by a State governmental entity, the Court may take judicial notice of it. Schmidt v. Skolas, 770 F.3d 241 (3rd Cir 2014)(court could take judicial notice of matters of public record).

ubPartCenterPortalFiles/Environmental%20Quality%20Board/2017/August%2015/PFOA%20Petition/PFOA%20Petition.pdf .

In 2016, the EPA -- after much public outcry -- lowered its health advisory level ("HAL") for PFCs to 70 ppt. DRN has advocated that the current EPA HAL is not sufficiently protective of health. Due to the well-developed evidence of harms, state environmental agencies have begun to take a focused look at these compounds and how best to protect their citizens. On August 15, 2017, Pennsylvania's EQB and DEP unanimously accepted DRN's petition to have a state maximum contaminant level ("MCL") for drinking water for PFOAs established. See "DRN Petition." DRN asked for a low level of no greater than 6 parts per trillion, because studies have shown that this level is required for the protection of vulnerable children based upon epidemiologic study. See Id. This represented the first time in its long existence that the DEP agreed to investigate and establish a state drinking water standard where the federal government had not done so. On February 16, 2017, the New Jersey Drinking Water Quality Institute unanimously approved a recommendation of an MCL for drinking water for PFOAs of 14 parts per trillion. See Id. The fact that two states in this Circuit saw the need to establish State Drinking Water regulations for PFOAs, where the federal government has not yet done so, indicates that state agencies in this Circuit have serious concerns for the health harms related to these toxic compounds.

Unfortunately, studies have shown that the contamination in Pennsylvania is among the worst in the nation. See Id.

Sadly for the Giovanni family, even if one applies the higher EPA HAL for PFCs, the water that they drank for a lengthy period was many times higher, and thus they reasonably have a grave fear for their health and that of their children, who may be more vulnerable. The Giovannis reasonably seek funding for a health effect study and medical monitoring so as to engage in the early detection of diseases known to be correlated with PFCs and for which there is a monitoring protocol. Instead, the District Court dismissed their complaint without taking any evidence of how their requested relief would or would not interfere with ongoing remediation on a CERCLA site.

2. A Health Effect Study and Medical Monitoring are Response Costs that the Pennsylvania Legislature Sought to Allow an Injured Citizen to Collect under HSCA and are not preempted by CERCLA.

In 1980, in partial response to the horrors to the community of Love Canal, Congress passed and authorized the Comprehensive Environmental Response and Compensation Act (CERCLA). Although CERCLA has the word "Compensation" within its title, it is well-known that the law does not include private "compensation" and was rather a legislative compromise so as to quickly enact the needed law. It is not uncommon that victims of toxic contamination must look elsewhere to obtain some remedies not contained within CERCLA. For example,

monetary damages to victims for property harms or personal injury are not a form of relief that may be obtained through CERCLA. See Clinton County Commisioners v. US E.P.A., 116 F.3d 1018, 1025 (3d. Cir. 1997)("Congress apparently left Citizens the option of obtaining relief in state court nuisance actions").

This is recognized within the CERCLA framework and in response the law contains a general savings clause that specifically allows for other, non-CERCLA, causes of action. Section 9652 provides in pertinent part as follows:

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants…

42 USCA § 9652. "The purpose of CERCLA's savings clause is to preserve to victims of toxic wastes the other remedies they may have under federal or state law." PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 617 (7th Cir. 1998) See also Manor Care, Inc. v. Yaskin, 950 F.2d 122 (3d Cir. 1991) (CERCLA did not preempt directives issued by New Jersey Department of Environmental Protection under New Jersey Spill Act -"Congress did not intend for CERCLA to occupy the field or to prevent the states from enacting laws to supplement federal measures relating to the cleanup of hazardous wastes").

In terms of a human health risk assessment, CERCLA established a procedure by which the ATSDR may be called upon to conduct a health risk

assessment and order medical monitoring if such health risk assessment provides that this would be appropriate. The purpose of such ATSDR health assessment was explained as follows:

> The purpose of health assessments under this subsection shall be to assist in determining whether actions under paragraph (11) of this subsection should be taken to reduce human exposure to hazardous substances from a facility and whether additional information on human exposure and associated health risks is needed and should be acquired by conducting epidemiological studies under paragraph (7), establishing a registry under paragraph (8), establishing a health surveillance program under paragraph (9), or through other means. In using the results of health assessments for determining additional actions to be taken under this section, the Administrator of ATSDR may consider additional information on the risks to the potentially affected population from all sources of such hazardous substances including known point or nonpoint sources other than those from the facility in question

42 USCA § 9604(i)(6)(G).

A private citizen under CERCLA does not have a right to obtain medical monitoring as it is not deemed a private CERCLA response cost. Murray v. Bath Iron Works Corp., 867 F.Supp. 33, 46 (D.Me.1994) ("the general consensus among federal courts is that private medical monitoring costs are not recoverable as response costs under CERCLA, since they do not relate to preventing public contact with the released contaminants, which is the type of action set forth in the definitions of 'removal' or 'remedial' action"), citing Daigle v. Shell Oil Co., 972 F.2d 1527, 1532–37 (10th Cir. 1992); Yslava v. Hughes Aircraft Co., 845 F.Supp. 705, 708 (D.Ariz. 1993); Price v. United States Navy, 818 F.Supp. 1322, 1322–23

(S.D.Cal. 1992); Bolin v. Cesna Aircraft Co., 759 F.Supp. 692, 713–14 (D.Kan. 1991); Lutz v. Chromatex, Inc., 718 F.Supp. 413, 417–18 (M.D.Pa.1989); See also Redland Soccer Club, Inc. v. Department of Army of U.S., 55 F.3d 827, 850 (3rd Cir.1995)(health risk assessments conducted long after the Park was closed to recreational use and have nothing to do with any remedial or response action at the Park itself was not a CERCLA response cost).[8]

With the experience and implementation of CERCLA, Pennsylvania's legislature passed HSCA in 1988 to offer "new remedies" to victims of contamination. See gen. General Elec. Environmental Services, Inc. v. Envirotech Corp., 763 F.Supp. 113, 121 (M.D.Pa.1991)(HSCA was enacted specifically for remedial purposes — to create new remedies to address the growing problem of contamination through the dumping of hazardous waste); See also, Redland Soccer

[8] The District Court has cited Redland Soccer Club Inc. v. Dep't of the Army, 801 F.Supp.1432, 1435 (M.D. Pa. 1992).
The Redland Soccer Club case has spawned much litigation in both State and Federal Court. The issue of whether a HSCA medical monitoring claim would be barred by Section 113(h) was an issue that was appealed to this Honorable Court. Because the Court resolved the case on other grounds, it never reached that issue. The Honorable Court noted in footnote 14 as follows:
"The Redland Plaintiffs also argue that the district court erred in dismissing their citizen suits for injunctive and remedial relief, as well as attorney's fees, expert fees and health risk assessment costs under HSCA. In view of our disposition, we need not decide that issue. We note, however, that the test of HSCA is markedly different from that of CERCLA. We express no opinion, however, about any claim for medical monitoring under state law."
Redland Soccer Club, Inc. v. Department of the Army and Dept. of Defense of the U.S., 55 F.3d 827 at nt 14.

Club, Inc. v. Department of the Army and Dept. of Defense of the U.S., 696 A.2d 137, 141, 548 Pa. 178, 187 (Pa. 1997) (General Assembly created HSCA, which is an "independent site cleanup program" designed to "promptly and comprehensively address the problem of hazardous substance releases in this Commonwealth, whether or not these sites qualify for cleanup under[CERCLA]").

In its Declaration of Policy, HSCA provides inter alia:

> Traditional legal remedies have not proved adequate for preventing the release of hazardous substances into the environment or for preventing the contamination of water supplies. It is necessary, therefore, to clarify the responsibility of persons who own, possess, control or dispose of hazardous substances; to provide new remedies to protect the citizens of this Commonwealth against the release of hazardous substances; and to assure the replacement of water supplies.

35 P.S. § 6020.102(5).

Unlike CERCLA, HSCA expressly permits a citizen to file suit to obtain a private health risk assessment and medical monitoring as a response cost. 35 Pa. Cons.Stat. § 6020.702(a)(5); Diess v. PennDot, 935 A.2d 895, 908 (Commw. Ct. 2007) Black v. Metso Paper USA, Inc., 240 F.R.D. 155, 161 (M.D.Pa.2006); See also Fiorentino v. Cabot Oil & Gas, 750 F.Supp.2d 506 (M.D. Pa. 2010).

Further, the Pennsylvania legislature did not establish a pre-existing governmental body to discern and perform the health risk assessment. Instead, HSCA allows a private process wherein a court or plaintiff can select the health risk assessor if they otherwise meet the stringent criteria such that the response cost

is warranted. See gen. Patrick v. FirstEnergy Corporation, 2014 WL 1318017 (W.D. Pa 2014) (unreported)(discussing the standards applicable to determining whether a health effects study under HSCA is warranted) (J. Conti).[9]

The Pennsylvania legislature specifically provided a Pennsylvania citizen with a remedy that is not part of the CERCLA scheme and mechanism. In this appeal, the Navy is asking this Honorable Court to exclude a remedy that the Pennsylvania legislature intentionally provided to its citizens who have been harmed by a toxic site. The Navy asks the Court to make a sweeping determination that, in each and every case in which a site has been placed on the National Priorities List (a CERCLA site), a victim of the toxic contamination has no recourse to any court -- federal or state -- to obtain private medical monitoring costs until there is complete remediation of the site -- which may take decades.

[9] In order to prevail on a claim for a health assessment, a plaintiff must prove the following:

(1) Exposure greater than background levels;
(2) To a proven hazardous substance
(3) Caused by a defendant's negligence
(4) As a proximate result of the exposure, plaintiff has a significant increased risk of contracting a serious disease, latent or otherwise
(5) A health assessment or health effects study procedure exists that makes screening for such a disease possible and
(6) The prescribed health assessment or health effects study is reasonably necessary according to contemporary scientific principles.

Patrick v. FirstEnergy, supra. Such health effects study may further show and dictate the need for medical monitoring.

The Navy ask for such a ruling even in this case where the ATSDR has conducted no public health assessment on PFOA contamination.[10]

CERCLA was not intended to preempt the Pennsylvania Hazardous Substance Cleanup Act, except under very specific circumstances -- not applicable herein -- where there exists a conflict. See gen. Trinity Industries, Inc. v. Greenlease Holding Co., 35 F.Supp.3d 698 (W.D.Pa. 2014)(CERCLA does not preempt every state law governing the same subject matter); See also 42 U.S.C. § 9614(a) ("Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.").

3. The Pennsylvania Supreme Court elected to allow a HSCA claim for medical monitoring because it recognized the great importance of this remedy for citizens.

In Redland Soccer Club, Inc. v. Department of the Army and Dept. of Defense of the U.S., 696 A.2d 137, 145, 548 Pa. 178, 194–95 (Pa. 1997), the Pennsylvania Supreme Court established that a citizen may bring an action for a

[10]A District Court that examined a case in which the ATSDR had conducted a health assessment still permitted a case for a medical monitoring trust fund to go forward. The court reasoned, "Herein, the Plaintiffs seek, as a remedy, an order requiring the Defendants to pay a sum of money to fund a program of diagnosis and treatment for themselves and members of the class. Awarding that remedy will not in any manner require this Court to interfere with the ongoing activities of the ATSDR." Boggs v. Divested Atomic Corp. 1997 WL 33377790 (S.D. Ohio 1997) (unpublished).

medical monitoring trust fund as a response cost under HSCA. The Pennsylvania Supreme Court quoted the Supreme Court of Utah in explaining the importance of a claim for medical monitoring:

> [M]edical surveillance damages promote early diagnosis and treatment of disease or illness resulting from exposure to toxic substances caused by a tortfeasor's negligence. *Ayers,* 525 A.2d at 311. Allowing recovery for such expenses avoids the potential injustice of forcing an economically disadvantaged person to pay for expensive diagnostic examinations necessitated by another's negligence. Indeed, in many cases a person will not be able to afford such tests, and refusing to allow medical monitoring damages would in effect deny him or her access to potentially life-saving treatment. It also affords toxic-tort victims, for whom other sorts of recovery may prove difficult, immediate compensation for medical monitoring needed as a result of exposure. Additionally, it furthers the deterrent function of the tort system by compelling those who expose others to toxic substances to minimize risks and costs of exposure. Allowing such recovery is also in harmony with "the important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease."

Redland Soccer Club, Inc. v. Department of the Army and Dept. of Defense of the U.S., 696 A.2d 137, 145, 548 Pa. 178, 194–95 (Pa. 1997), citing Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 980 (Utah 1993).

In this matter and indeed others, the remediation of groundwater could take decades. By depriving the toxic contamination victim of medical surveillance -- where it is reasonable and needed -- for decades, the Court will obviate the benefit of the claim that the Pennsylvania Supreme Court had intended for Plaintiffs to obtain. See Id.

While the Navy's litigation position may be indifferent to waiting for the injured victims of water pollution to become ill or die from ingesting the contamination while remediation of groundwater is slowly occurring, this is not in concert with what the Pennsylvania Supreme Court anticipated when it permitted a medical monitoring cause of action pursuant to HSCA and under common law. Nor is it what the Pennsylvania legislature intended when including a health assessment as a response cost available to a private Plaintiff in HSCA. It is also not what the Congress had in mind when enacting Section 113(h). 42 U.S.C. 9613(h).

C. **Health Risk Assessment and medical monitoring are not a challenge to the ongoing CERCLA remediation.**

Section 9613(h) of CERCLA is the crux of the controversy in this matter. This Section provides in pertinent part as follows:

> **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…
>
> 42 USCA § 9613 (emphasis added)

The District Court held that it could not exercise jurisdiction over this case because the request for a health effects study and medical monitoring[11] constitutes a "challenge" that would interfere with the EPA's cleanup. JA113. However, the EPA has not been sued in this case nor is there any request for any injunctive relief regarding any remediation being performed or to be performed. This is a case of a victim of toxic contamination suing a potentially responsible party for injunctive relief in the form of a monetary trust for private medical monitoring. There is simply no state law claim relating to "cleanup standards." See 42 USCA § 9613(h).

The District Court relied upon this Honorable Court's opinion in Boarhead Corp. v. Erickson, 923 F.2d 1011 (3d. Cir. 1991). In Boarhead Corp., a potentially responsible party sued the EPA claiming that the involved property was eligible for listing as a historic place and raised historic preservation issues as a mechanism to "stay" the EPA's remedial investigation and feasibility study in the CERCLA Site. Id. This Honorable Court opined that Boarhead Corp.'s suit was a challenge to the EPA under CERCLA and that the Court must refrain from exercising jurisdiction over the suit.Id. Both Boarhead Corp. v. Erikson, and Clinton County Commissioners v. EPA, 116 F.3d 1018 (3rd Cir. 1997) (County commissioners sought to enjoin trial burn and incineration remedy ordered by EPA for clean-up of chemical manufacturing facility) were cases in which citizens and

[11] It appears that what Plaintiffs really seeks is a trust fund to be created for this purpose.

responsible parties sought to directly enjoin the EPA's investigation and/or cleanup of a CERCLA site. It is well settled that such actions are indeed the type of challenge to EPA that are expressly prohibited by Section 113(h).

DRN does not read the prior Third Circuit Court of Appeals opinions as carte blanche for a District Court to refuse to exercise jurisdiction in every single possible state law claim involving a CERCLA site in which there is some remedial activity underway. The Court of Appeals for the D.C. Circuit commented on the improper use of Section 113(h) and stated as follows:

> *If* EPA's *ipse dixit* is enough to trigger § 113(h), and *if* EPA can also do nothing for as long as it pleases, then CERCLA § 113(h) becomes a license for EPA to do as it will for as long as it would like, all the while free of judicial review. **And where federal facilities are involved, this carte blanche has the potential to be used by the Government to avoid liability. We doubt this is what Congress intended in CERCLA § 113(h).**

El Paso Natural Gas Co. v. U.S., 750 F.3d 863, 877–78, 409 U.S.App.D.C. 367, 381–82 (C.A.D.C. 2014) (emphasis added).

It is clear from Section 113(h) and this Honorable Court's opinions that the bar to jurisdiction only applies in case of a "challenge" to EPA removal or remedial action. By determining whether Plaintiffs are entitled to a monetary trust fund for a health assessment or medical surveillance (assuming the health assessment requires it), the District Court has not pointed to any remedial action or cleanup standard that will be impaired. The Court of Appeals for the D.C. Circuit

has reasonably opined that a court should assess the nexus between the suit and the cleanup:

> In some situations, the nature and degree of interference are sufficiently direct and clear that it will be obvious that the suit is a "challenge" barred by § 113(h). *See, e.g., Boarhead Corp. v. Erickson,* 923 F.2d 1011, 1012 (3d Cir.1991) (concluding that § 113(h) barred jurisdiction over a request to stay a CERCLA cleanup until EPA conducted a review of the site as required under the National Historic Preservation Act**). In other situations, it may be necessary to assess the nexus between the nature of the suit and the CERCLA cleanup: the more closely related, the clearer it will be that the suit is a "challenge."**

Id.at 880.

In sum, the Navy should not be allowed to avoid a claim of liability for private medical monitoring simply because it has provided bottled water (after the exposure) or done other preliminary investigative activities to characterize or remedy ongoing groundwater contamination. At this juncture, the Court must accept as true the Giovanni's pleading that there has been no action or plan for action for any biomonitoring of health consequences. The District Court apparently rejected the Ninth Circuit's opinion in Durfey v. E.I. Dupont De Nemours Company, 59 F.3d 121 (9th Cir. 1995), in which the Ninth Circuit clearly held that medical monitoring costs were not deemed to be response costs under CERCLA or otherwise to challenge an ongoing CERCLA remediation such that there was no bar to Court jurisdiction. See also Yslava v. Hughes Aircraft Co., 845

F. Supp. 705 (D. Ariz. 1993), Stepp v. Monsanto Research Corp., 1993 WL 1367349 (S.D. Ohio 1993)(unpublished).

The District Court complained that Durfey, supra and other opinions do not discuss why state law medical monitoring claims are not "disputes about who is responsible." If the Court's concern is taken to its logical conclusion, then any state law nuisance action would likewise be barred while remediation is ongoing because any tort action will require a finding of causation. This Court's prior opinions cannot be read so broadly as to mean that every case that requires a finding of causation is prohibited while remedial action is taking place. See gen. Beck v. Atlantic Richfield Co., 62 F.3d 1240 (9th Cir. 1995)("Although determination of whether ARCO's diversions (of water) were wrongful may require examination of EPA's orders, resolution of the damage claim would not involve altering the terms of the cleanup order. If plaintiffs prevail, the remedy would be financial compensation for lost crops and lost profits. Such a remedy would not interfere with ARCO's implementation of cleanup"). Rather, courts in this Circuit should decline jurisdiction only in cases in which there is a direct conflict with a cleanup action or standard. See gen Mayor and Council of Borough of Rockaway v. Klockner & Klockner, 811 F.Supp. 1039 (D. N.J. 1993) ("All the cases involving dismissal under Section 113(h) involve actions brought against the EPA in which the plaintiff sought to enjoin or otherwise challenge a remedy

pursued by the EPA.… Klockner is not seeking to challenge any remedial or removal action taken by the EPA. Rather, Klockner seeks to enforce particular New Jersey state statutes under the ERA against private parties").

In this case, a determination of whether or not the Navy may be liable to Plaintiffs for a trust fund for a health assessment and potentially medical surveillance under HSCA does not conflict in any way with any ongoing remedial plan under CERCLA to sample well water or investigate sources of the ground water pollution. At very least, the Eastern District Court should have taken evidence on the specific nature of the EPA's remedial plan to determine whether or not any direct conflict is present, which *Amicus* argues is not.

Conclusion

For the foregoing reasons, it is respectfully requested that this Honorable Court reverse the decision of the District Court and remand the matter for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

I hereby certify that this Brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) because this Brief contains text of 6135 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

I hereby certify that this Brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in14 Point Times New Roman.

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I hereby certify that I am a member in good standing of the Bar of the U.S. Court of Appeals for the Third Circuit. I was admitted to this Bar in 1990.

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Dated: September 18, 2017 *s/ Deanna Kaplan Tanner*

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CERTIFICATE OF SERVICE

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