RECEIVED
OCT 12 2022
ROOM 521

IN THE COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

ACE AMERICAN INSURANCE COMPANY, ILLINOIS UNION INSURANCE COMPANY; and FEDERAL INSURANCE COMPANY,	:	SEPTEMBER TERM, 2021
	:	NO. 02208
Plaintiff,	:	COMMERCE PROGRAM
v.	:	Control No. 22042762
PARDEE RESOURCES COMPANY; and PARDEE & CURTIN REALTY LLC,	:	
Defendants.	:	

DOCKETED
OCT 12 2022
R. POSTELL
COMMERCE PROGRAM

ORDER

AND NOW, this 12th day of October 2022, upon consideration of plaintiffs' Motion for Judgment on the Pleadings, the responses thereto, and all other matters of record, and in accord with the Opinion issued simultaneously, it is hereby **ORDERED** as follows:

1. Said Motion is **GRANTED** and the Court hereby enters a **DECLARATORY JUDGMENT** against defendants and in favor of plaintiffs on the claims asserted in plaintiffs' Complaint;
2. Plaintiffs have no obligation, either in whole or in part, to defend, to indemnify, or to reimburse the costs of, defendants Pardee Resources Company and Pardee & Curtin Realty LLC (collectively "Pardee") in connection with the alleged pollution arising out of the Johnson Fork/Loop Creek Watershed in Fayette County, West Virginia, the West Virginia Code Enforcement Agency's abatement order, or the Complaint in the United States District Court for the Southern District of West Virginia (Case No. 2:21-cv-00307) (collectively, the "Underlying Action"); and

210902208 Ace American Insurance Company Etal Vs Pardee Reso
21090220800041

3. Because Plaintiffs have no obligation, either in whole or in part, to defend, to indemnify, or to reimburse defense costs in connection with the Underlying Action, Pardee's Counterclaim against Plaintiffs is **DISMISSED** with **PREJUDICE**.

BY THE COURT

RAMY I. DJERASSI, J.

IN THE COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

ACE AMERICAN INSURANCE COMPANY, ILLINOIS UNION INSURANCE COMPANY; and FEDERAL INSURANCE COMPANY,	:	SEPTEMBER TERM, 2021
	:	NO. 02208
Plaintiff,	:	COMMERCE PROGRAM
v.	:	Control No. 22042762
PARDEE RESOURCES COMPANY; and PARDEE & CURTIN REALTY LLC,	:	
Defendants.	:	

OPINION

In this action, plaintiffs ACE American Insurance Company ("ACE"), Illinois Union Insurance Company ("IUIC"), and Federal Insurance Company ("FIC"), (collectively, the "Insurers"), seek a declaratory judgment that:

- the Insurers have no duty to defend or indemnify their insureds, defendants Pardee Resources Company and Pardee & Curtin Realty LLC, (collectively "Pardee" or the "Insured")
- under 11 separate Commercial General Liability ("CGL") and two Umbrella Policies issued by the Insurers between 2002 and 2013 (collectively, the "Policies")
- with respect to a Fayette County, West Virginia ("Fayette County") Code Enforcement Agency's amended Abatement Order and a related Complaint filed by the County Commission of Fayette County in the United States District Court for the Southern District of West Virginia (collectively, the "Underlying Action")

- concerning certain environmentally contaminated real property and waterways in the Johnson Fork-Loop Creek Watershed in West Virginia (the "Watershed"), portions of which real property were previously owned by Pardee (the "Subject Property") from June 7, 2003 through June 27, 2013.[1]

Specifically, in the Underlying Action, Fayette County complains about "releases of hazardous substances, hazardous wastes, solid wastes, pollutants and contaminants, toxic wastes, and leachate from each of . . . five (5) surface piles of coal mining waste," as well as from other mining activities that took place on the Subject Property.[2]

In response to the Insurers' claims for declaratory judgment, Pardee filed a Counterclaim seeking a declaratory judgment that the Insurers have a duty to defend and indemnify Pardee with respect to the Underlying Action under the terms of the Policies at issue.[3] The Insurers filed a Motion for Judgment on the Pleadings with respect to the parties' competing claims for declaratory judgment, which Motion is presently before the court.

I. The Standards for Determining Whether an Insurer Has a Duty to Defend or Duty to Indemnify an Insured Under an Insurance Policy.

The determination of whether an insurer has a duty to defend its insured is well suited to a Motion for Judgment on the Pleadings because it is a question of law for the court to make after comparing the terms of the Policies at issue with the allegations of the Complaint in the

[1] Pardee appears to have "owned and managed [only] the surface estate appertaining to the [Property]." *See* Complaint in Underlying Action, ¶ 64, attached to the Complaint in this action as Ex. 1.

[2] *Id.*, ¶¶ 67, 99.

[3] According to Pardee, "ACE also issued a number of other potentially applicable policies to Pardee, but [ACE] has not sought a declaration of no coverage under those policies." Pardee Memorandum of Law in Opposition to Motion for Judgment on the Pleadings, p. 4, n. 2.

Underlying Action. If the Complaint alleges no claims for which there may be coverage, then the determination that there is no duty to indemnify can also be made at this stage.

> The interpretation of an insurance contract regarding the existence or non-existence of coverage is generally performed by the court. The interpretation of an insurance contract is a question of law. . . . [The]purpose in interpreting insurance contracts is to ascertain the intent of the parties as manifested by the terms used in the written insurance policy. When the language of the policy is clear and unambiguous, [the court] must give effect to that language.
>
> * * *
>
> An insurer's duty to defend an action against the insured is measured, in the first instance, by the allegations in the [underlying] plaintiff's pleadings. In determining the duty to defend, the complaint claiming damages must be compared to the policy and a determination made as to whether, if the allegations are sustained, the insurer would be required to pay [the] resulting judgment. . . . The language of the policy and the allegations of the complaint must be construed together to determine the insurers' obligation. Therefore, a carrier's duties to defend and indemnify an insured in a [underlying] suit brought by a third party depend upon a determination of whether the third party's complaint triggers coverage.[4]

In this case, the claims made in the Abatement Order and the Complaint in the Underlying Action are substantially similar, so they will be analyzed as one. The language of some of the thirteen Policies differs one from another, so they must be analyzed singly in some instances or in groups of similarly worded Policies.

II. The Claims Asserted in the Underlying Action Against Pardee.

In 2021, approximately eight years after Pardee ceased to own any portion of the Subject Property, Fayette County issued the amended Abatement Order to Pardee and other defendants and filed the Complaint against them in the Underlying Action

> to obtain timely judicial abatement to be conducted at the sole cost of Remedial Defendants [including] Pardee and Curtin Realty LLC . . . jointly and severally, pursuant to this Court's Orders and with appropriate oversight and supervision by the Fayette Co. Code Enforcement Agency, the governmental agency charged with securing and overseeing appropriate abatement of public nuisance conditions within Fayette County, of conditions at and emanating from the Subject Property

[4] Donegal Mut. Ins. Co. v. Baumhammers, 595 Pa. 147, 154-55, 938 A.2d 286, 290–91 (2007).

that present or may present an imminent and substantial endangerment to health or the environment within the Subject Watershed arising from the past handling of a solid waste or hazardous waste pursuant to Section 7002(a)(1)(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as further amended, 42 U.S.C. § 6972(a)(1)(b) ("RCRA"); all in a manner consistent with the requirements of the National Contingency Plan[.][5]

* * *

Beginning no later than the late 1920s, [a previous owner of the Subject Property] continuously conducted, until at least the mid-1950s, extensive underground coal mining operations throughout the subject watershed, which operations included very extensive underground coal mining, associated surface processing and transportation of extracted coal and overburden from its Powellton No. 6 mine, and the creation, operation and maintenance of at least five (5) separate, associated piles of coal mining waste, each of which was constructed and maintained without a liner and without any associated leachate collection, control or monitoring system, on the surface of separate locations within the subject watershed.[6]

* * *

Continuously since their original creation, each of the five (5) surface piles of coal mining waste created by [the prior owner of the Subject Property] in the subject watershed have discharged and released hazardous substances, hazardous wastes, solid waste, pollutants and contaminants, and leachate into the environment.[7]

* * *

From June 7, 2003 until June 27, 2013, Pardee and Curtin Realty LLC . . . owned and managed the surface estate appertaining to the real property in Fayette County, West Virginia that specifically includes the real property upon the surface of which all five (5) of the coal mining waste piles created by [the prior owner] are located.[8]

* * *

During its period of ownership of the surface estate appertaining to the [Subject Property], Pardee and Curtin Realty LLC did not take any action to abate any of the adverse impacts on the health or the environment within the JF-LC Watershed that had resulted and were continuing to result from the past and on-going releases of hazardous substances, hazardous wastes, solid wastes, pollutants and contaminants, toxic wastes, and leachate from each of the five (5) surface piles of coal mining waste.[9]

---

[5] Underlying Complaint, ¶ 6(a).

[6] *Id.*, ¶ 27.

[7] *Id.*, ¶ 39.

[8] *Id.*, ¶ 64.

[9] *Id.*, ¶ 67.

* * *

Because of its quantity, concentration, physical and chemical characteristics, all of the mining waste that has been disposed of on the Subject Property and all of the [Acid Mine Drainage ("AMD")] that has been and is being discharged into the environment from the five (5) coal mining waste disposal facilities on the surface of the Subject Property is a solid waste and a "waste" (as that term is defined in the West Virginia Hazardous Waste Management Act) that "may pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed" within the meaning of that phrase as set forth in both RCRA § 1004(5), 42 U.S.C. § 6903(5), and in the West Virginia Hazardous Waste Management Act, W. Va. Code § § 22-18-3(6). Consequently, all such AMD is a hazardous waste as that term is defined in RCRA § 1004(5), 42 U.S.C. § 6903(5), and as the same term is used in RCRA Subtitle G, specifically including RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B), and in the West Virginia Hazardous Waste Management Act, W. Va. Code § 22-18-3(6). [10]

* * *

AMD and mining waste discharges that have resulted and are continuing to result from the surface coal mining waste piles within the subject watershed have caused or contributed to, and continue to cause and contribute to, impairments to the quality and beneficial uses of the waters of the subject Watershed, and have commingled within the groundwater, surface water system, and sediments of Johnson Fork. This commingled, single plume of toxic contaminants has caused or contributed to, and is causing and contributing to, the existing and imminently threatened future impairments of the quality and beneficial uses of the waters within the subject Watershed, a "navigable waters," and a WV "§ 303d" listed or TMDL impaired stream. [11]

* * *

The cumulative adverse impacts on the environment that have resulted and are continuing to result from the commingled, single plume of toxic contaminants that has and is continuing to be discharged as a result of mining and mining waste disposal operations and subsequent maintenance of resulting public nuisance conditions and illegal uses of the Subject Property by [Pardee and others] within the subject Watershed include loss and continued degradations of biodiversity in the receiving stream, and bioaccumulation within the plants and animals within the subject Watershed that are in direct or indirect contact with the food chain and adversely impact the health of these organisms and the organisms that feed upon those organisms. [12]

* * *

Continuously since the date of the original creation of each of the five (5) open dumps of coal mining waste within the subject watershed each such open dump

---

[10] *Id.*, ¶ 151.

[11] *Id.*, ¶ 153.

[12] *Id.*, ¶ 155.

has been releasing, and each is continuing to release, hazardous waste, hazardous substances, solid wastes and pollutants and contaminants into the waters of the State, including the groundwaters, within the subject Watershed, thereby causing and contributing to the presence within waters of the State within that Watershed of **pollutants** or contaminants, including **Iron,**[13] **Cadmium,**[14] **Manganese,**[15] **Arsenic,**[16] **and Beryllium** at elevated levels that may present, and, in fact do present, a significant, adverse impact to the chemical and biological components of the aquatic ecosystem within the subject Watershed. Accordingly, each of the five (5) unlined open dump facilities on the surface of land within the subject Watershed is a public nuisance lawfully declared by Section V(a)(10), Subparagraph (6) of the FCoWV Public Nuisance Abatement Ordinance and, therefore, a Per Se Public Nuisance under the common law of West Virginia.[17]

---

[13] "[I]ron precipitates have been observed associated with coal-waste dumps within the Watershed. Precipitation of ferric hydroxide may result in a complete blanketing of the stream bottom, adversely affecting both macroinvertebrates and fish. Because the gill surface of the fish tends to be alkaline, soluble ferrous iron can be oxidized to insoluble ferric compounds which then cover the gill lamellae and inhibit respiration. . . . The precipitated iron compounds and tufts of the iron bacteria reduce the gill area available for respiration, damage the respiratory epithelium and may thus suffocate the fish. In a similar toxic action, iron compounds can precipitate on the surface of fish eggs which then die due to a lack of oxygen." Complaint in the Underlying Action, ¶ 95(D)

[14] "Cadmium is a non-essential metal with no biological function in aquatic animals. In addition to acute effects such as mortality, chronic exposure to cadmium can lead to adverse effects on growth, reproduction, immune and endocrine systems, development, and behavior dysfunction in aquatic organisms. Kidney damage has long since been described to be the main problem for humans chronically exposed to cadmium, and cadmium exposure is associated with bone damage. There is some proof that cadmium exposure can cause cancer." *Id.* ¶ 95(C).

[15] "Manganese precipitates along with siltation significantly lower macroinvertebrate species diversity and change stream community structure. Manganese is an essential trace element in humans that can elicit a variety of serious toxic responses upon prolonged exposure to elevated concentrations either orally or by inhalation. The central nervous system is the primary target." *Id.* ¶ 95(E).

[16] "Inorganic arsenic has been recognized as a human poison since ancient times and is a carcinogen. Arsenic is a well-documented human carcinogen affecting numerous organs. The cancers that have been associated with Arsenic include cancer of the bladder, lungs, skin, kidney, nasal passages, liver, and prostate. . . . Arsenic compounds cause short-term and long-term adverse effects in individual plants and animals and in populations and communities of organisms. . . . Arsenic is a teratogen and carcinogen that can traverse placental barriers and produce fetal death and malformations in many species of mammals. Many species of freshwater biota are adversely affected by high concentrations of arsenic or various organ arsenicals. Adverse effects of Arsenic include death and malformations of toad embryos, growth inhibition of algae, mortality of amphipods and gastropods, and behavioral impairment of goldfish." *Id.* ¶ 95 (B).

[17] *Id.* ¶ 238 (emphasis added).

III. There is No Coverage Under the Property Damage Provisions of FIC Policy 3710-87-91 PIT - June 18, 2002 to June 18, 2003.

The language of the first, 2002-2003, CGL Policy is relatively straightforward in that it contains a provision covering property damage and a Pollution Exclusion limiting that coverage provision, as follows:

> [FIC] will pay those sums that [Pardee] becomes legally obligated to pay as damages because of . . . property damage to which this insurance applies.[18]
>
> * * *
>
> PROPERTY DAMAGE means . . . [p]hysical injury to tangible property, including all resulting loss of use of that property.[19]
>
> * * *
>
> This insurance does not apply to:[20]
>
> * * *
>
> a. [P]roperty damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants . . . [a]t or from any premises, site or location which is or was at any time owned or occupied by [Pardee];
> b. Any loss, cost or expense arising out of any request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or
> c. Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.[21]

---

[18] General Liability Insurance Form 42-02-0041, p. 1 of 17, attached to the Counterclaim as Ex A.

[19] *Id.*, p. 16 of 17.

[20] *Id.*, p. 1 of 17.

[21] Endorsement 42-02-0166, p. 1-2, attached to the Counterclaim as Ex. A (the "Pollution Exclusion").

In the Underlying Complaint, Fayette County claims contamination of the "soils, subsurface soils and groundwater" of the Subject Property,[22] as well as "impairments of the quality and beneficial uses of the waters" in the Watershed,[23] which constitute "physical injury to tangible property" and, therefore, "property damage" under the coverage provisions of the Policy. Fayette County also claims such damage was caused by the "discharge" of "A[cid] M[ine] D[rainage] and mining waste discharges" from the Property[24] formerly owned and occupied, at least in part, by Pardee,[25] which claims appear to satisfy the Pollution Exclusion provisions of the Policy.

In order to avoid the application of the Pollution Exclusion, Pardee claims that the issue of whether there has been a discharge, dispersal, seepage, migration, release or escape of pollutants is an issue of fact that cannot be determined at this point. However, the Underlying Claims expressly allege a "discharge,"[26] which is a commonly used term that courts do not generally find to be ambiguous:

> When it applies to water, "discharge" commonly means a "flowing or issuing out," Webster's New International Dictionary 742 (2d ed.1954); see also *ibid.* ("[t]o emit; to give outlet to; to pour forth; as, the Hudson discharges its waters into the bay"), and this ordinary sense has consistently been the meaning intended when this Court has used the term in prior water cases.[27]

---

[22] Complaint in Underlying Action, ¶ 141.

[23] *Id.*, ¶ 153.

[24] *See id.*

[25] *Id.*, ¶ 64.

[26] *Id.*, ¶¶ 151-155.

[27] S.D. Warren Co. v. Maine Bd. of Env't Prot., 547 U.S. 370, 376, 126 S. Ct. 1843, 1847, 164 L. Ed. 2d 625 (2006).

> Webster's Ninth New Collegiate Dictionary (1990) defines "discharge" as, in pertinent part, "a flowing or issuing out." The same source defines "dispersal" as "the act or result of dispersing," especially "the process or result of the spreading of organisms from one place to another." "Seepage" is "the process of seeping," that is, "flow[ing] or pass[ing] slowly through fine pores or small openings." "Migration" is "move[ment] from one country, place, or locality to another" or "chang[ing] position in an organism or substance." A "release" is "the act or an instance of liberating or freeing (as from restraint)." Finally, an "escape" is "an act or instance of escaping: as flight from confinement [or] leakage or outflow[,] esp[.] of a fluid." . . . Common to all of these terms is, obviously, the element of movement. The listing of numerous similar terms such as "discharge" and "dispersal," preceded by the phrase "actual, alleged or threatened," indicates an intent to comprehend all such types and degrees of movement. [28]

Throughout its Complaint, Fayette County clearly states that the AMD and other contaminants have been and continue to be "discharged" and "released" from the Property into the environment, especially into the waters of the Watershed.[29] The Complaint is awash with descriptions of the movement or flow of contaminants from the 5 coal mining dumps on the Subject Property into the Watershed.[30] Clearly, Fayette County's claims in the Underlying Action arise from the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of contaminants from and through the Subject Property formerly owned, at least in part, by Pardee.

---

[28] Madison Const. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 609, 735 A.2d 100, 108 (1999). *See also* W. Virginia Highlands Conservancy, Inc. v. Huffman, 651 F. Supp. 2d 512, 519 (S.D.W. Va. 2009) ("With respect to the first element, 'discharged or added,' the court reiterates the Secretary's admission that AMD is being released at the sites. It is thus indisputable that discharge of pollutants is occurring.")

[29] *See, e.g.*, Complaint in Underlying Action, ¶¶ 2, 39, 40, 67, 70, 95, 98, 101, 103, 104, 106, 114, 116, 117, 118, 122, 123, 124.

[30] *See, e.g., id.* ¶ 133 ("Each of the coal mining waste piles in the JF-LC Watershed is now and has been continuously since their creation discharging, spilling, leaking, or otherwise placing hazardous substances, solid waste and leachate into and on land and water within the subject Watershed so that such solid waste or any constituent thereof may enter the environment or be emitted into the air, or discharged into any waters, including groundwaters[.]")

Pardee also disputes whether the court may find as a matter of law that acid mine drainage and discharges from coal mining waste constitute "pollutants" within the meaning of the Pollution Exclusion. Perhaps, if this was the first coal mine to leach contaminants into Appalachian waters, the court would feel compelled to perform some factual analysis on this point. However, after approximately 50 years of state and federal environmental regulation, there is a firm consensus among courts and governmental authorities that acid mine drainage and discharges from coal mining waste are "pollutants:"

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water.[31]

> The objective of the Clean Streams Law, as amended, is to prevent the further discharge of pollution into the waters of the Commonwealth and not simply the cessation of future activities which are responsible for the creation of the polluting condition. The deleterious condition of our waterways attributable to acid mine drainage, which is being discharged from abandoned underground mines, has reached a critical state. . . . More than 3.5 million tons of acid mine water are discharged annually into the nation's streams and rivers. The estimated annual damage from acid mine drainage in the Appalachian region is nearly ten million dollars, including loss of aquatic life, increased water treatment costs for industries and municipalities, corrosion of barges, boats, bridge piers, dams and other structures, and diminished recreational value of affected rivers and streams. Of the 5,700 miles of streams in Appalachia continuously or intermittently affected by acid mine drainage, three-fourth are found in the Susquehanna,

---

[31] 33 U.S.C. § 1326(6 (the Federal Water Pollution Prevention and Control Act a/k/the Clean Water Act ("CWA")); 40 C.F.R. § 401.11(f) (implementing and interpreting the CWA).

As asserted in the Complaint in the Underlying Action, "Consistent with its definition in CERCLA § 101(33), 42 U.S.C. § 9601(33), the term 'Pollutant or Contaminant' shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring." Complaint, ¶ 16(p). The toxic metals and other contaminants allegedly being discharged from the Subject property clearly satisfy that definition.

Allegheny, Potomac and Delaware River basins in Pennsylvania, northern West Virginia and Maryland.[32]

Inasmuch as AMD is obviously a pollutant under the definition of "pollution" in 33 U.S.C. § 1362(19) [the Clean Water Act ("CWA")], the second element is fulfilled.[33]

Under the CWA, it is a felony to (a) knowingly (b) discharge (c) a pollutant (d) from a point source (e) into a navigable water of the United States (f) without, or in violation of, an NPDES permit. Appellants do not contest that they added untreated acid mine drainage to Wolf and Arbuckle Creeks [in Fayette County, West Virginia] from the collection pond and the settling pond, respectively, knowing that they lacked the requisite NPDES permit.[34]

[A prior owner] owned a certain coal mining refuse pile or spoil pile ("gob pile")[35] in conjunction with deep mining operations . . . [It] constructed a sedimentation pond at the base of this huge gob pile, and such pond collected water runoff and drainage from the gob pile before it entered a body of water known as Storch's Run. The drainage from the gob pile consisted of low pH, high iron and manganese, that is, "acid mine drainage."

* * *

The collecting and channeling of rainwater runoff from coal mining "spoil" piles into sediment basins and ditches, resulting, with gravity flow, in the discharge of acid mine drainage into adjacent streams, were held by the court in [a similar] case to constitute a "point source" of pollution under the Federal Water Pollution Control Act.[36]

---

[32] Com. v. Barnes & Tucker Co., 472 Pa. 115, 124–27, 371 A.2d 461, 465–67 (1977).

[33] W. Virginia Highlands Conservancy, Inc. v. Huffman, 651 F. Supp. 2d 512, 518–19 (S.D.W. Va. 2009).

[34] United States v. L., 979 F.2d 977, 978 (4th Cir. 1992) (court affirmed defendants' "felony convictions for violating the [CWA] by knowingly discharging polluted water into Wolf and Arbuckle Creeks in Fayette County, West Virginia without a National Pollution Discharge Elimination System ("NPDES") permit.")

[35] Fayette County alleges that the five coal mining waste dumps on the Subject Property are also "gob piles." *See* Complaint in the Underlying Action, ¶ 111.

[36] Rayle Coal Co. v. Chief, Div. of Water Res., State Dep't of Nat. Res., 184 W. Va. 549, 553, 401 S.E.2d 682, 686 (1990) citing Sierra Club v. Abston Construction Co., 620 F.2d 41 (5th Cir. 1980)

More specifically, three of the five contaminants that Fayette County alleges are leaching from the Subject Property into the Watershed, i.e., arsenic, beryllium, and cadmium, are deemed to be "toxic pollutants" by the federal government under the Clean Water Act.[37]

Since Fayette County claims in its Complaint that the offending discharges containing arsenic, beryllium, cadmium, iron and manganese are both "acids" and "waste," such discharges fit the definition of "pollutant" for which coverage is precluded under the Pollution Exclusion of the Policy. Furthermore, such claims are made "by or on behalf of a governmental authority," Fayette County, which expressly claims damages for clean-up costs described in the Pollution Exclusion.[38]

For all these reasons, all of the claims for property damage alleged in the Underlying Action are excluded from coverage by the pollution exclusion in the first Policy, and there are no claims for which coverage may be found. Therefore, FIC has no duty to defend or indemnify Pardee under the property damage provisions of the 2002-2003 CGL Policy.

IV. There is No Coverage Under the Personal Injury Provisions of FIC Policy 3710-87-91 PIT June 18, 2002 to June 18, 2003

The Pollution Exclusion in the first, 2002-2003, CGL Policy does not apply to the coverage provision for personal injuries, so Pardee attempts to fit the claims in the Underlying Action within that coverage, to no avail. The personal injury provision provides as follows:

> [FIC] will pay those sums that [Pardee] becomes legally obligated to pay as damages because of personal injury . . . to which this coverage part applies.[39]
>
> * * *
>
> PERSONAL INJURY means injury, other than bodily injury, arising out of one or more of the following offenses:

---

[37] *See* 40 C.F.R. §401.15 (6), (10), (11).

[38] Complaint in the Underlying Action, ¶ 6 (a) – (j).

[39] GLI Form 42-02-0041, p. 5 of 17, attached to the Counterclaim as Ex A.

* * *

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor[.][40]

In the Underlying Action, Fayette County alleges contamination of the "soils, subsurface soils and groundwater" of the Property[41] and "impairments of the quality and beneficial uses of the waters" in the Watershed. [42] However, soil and water do not constitute "a room, dwelling or premises that a person occupies." Therefore, those pollution claims do not qualify as claims for personal injury covered under the Policy. FIC has no duty to defend or indemnify Pardee under the personal injury provisions of the 2002-2003 CGL Policy.

V. There is No Coverage Under Any of the Provisions of: [43]
FIC Policy 3710-87-91 PIT - June 18, 2003 to June 18, 2004;
FIC Policy 3710-87-91 PIT - June 18, 2004 to June 18, 2005;
FIC Policy 3710-87-91 PIT - June 18, 2005 to June 18, 2006.

The next three CGL Policies, covering the years 2003-2006, contain the same definition of "pollutant" as the first CGL Policy, with a more crafted Pollution Exclusion, which as before, applies to both property damage and personal injury coverage under the Policies:

> Subject to all the terms and conditions of this insurance, [FIC] will pay damages that [Pardee] becomes legally obligated to pay by reason of liability
>
> * * *
>
> for . . . property damage caused by an occurrence to which this coverage applies.
>
> * * *
>
> for . . . personal injury to which this coverage applies.[44]

---

[40] *Id.*, p. 15 of 17.

[41] *See, e.g.*, Complaint in the Underlying Action, ¶ 141.

[42] *See, e.g., id.*, ¶ 153.

[43] Pardee does not argue that there is any coverage under the personal injury provision of these three Policies, likely because the Pollution Exclusion clearly applies to those provisions as well as to the property damage provisions. Pardee also does not make the personal injury argument with respect to any of the later Policies.

[44] Liability Insurance Form 42-02-1004, p. 3 of 30, attached to the Counterclaim as Exs. B, C and D.

* * *

A. This insurance does not apply to . . . property damage . . . or personal injury arising out of actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants.

B. This insurance does not apply to any loss, cost or expense arising out of any:

1. request, demand or order that [Pardee] or others test for, monitor, clean-up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or

2 claim or suit by or on behalf of a governmental authority or others for damages because of testing for, monitoring, cleaning-up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.

This exclusion applies regardless of whether or not the pollution was accidental, expected, gradual, intended, preventable or sudden.[45]

* * *

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.[46]

As set forth in Section III above, Fayette County's demand in the Underlying Action for damages for cleaning-up acid mine drainage and coal mining waste contaminants discharged from the Subject Property into the Watershed are clearly precluded from coverage under the Pollution Exclusion of these three Policies, just as they were precluded under the Pollution Exclusion in the first Policy. For this reason, FIC has no duty to defend or indemnify Pardee under the provisions of the 2003-2004, 2004-2005, and 2005-2006 CGL Policies.

[45] *Id.*, Endorsement Form 80-02-2397, Exclusion – Pollution, Total, pp 1-2.

[46] *Id.*, Liability Insurance Form 42-02-1004, p. 28 of 30.

VI. There is No Coverage Under the Provisions of IUIC Policy PMG G22079177 – July 18, 2006 to July 18, 2007.

The fifth policy, covering 2006-2007, contains the same definition of "pollutants" as the previous Policies, but it also contains additional definitions for "pollution" and "environment." It is also the first policy to contain a "Time Element Exception" to the Pollution Exclusion, which was apparently carved out to provide some coverage for sudden and immediate leaks of contaminants. In addition to this new Exception to the Pollution Exclusion, there is also an Absolute Waste Exclusion applicable to the Exception with respect to waste sites. Regardless of the new language, the outcome is the same.

> [IUIC] will pay those sums that [Pardee] becomes legally obligated to pay as damages because of . . . property damage to which this insurance applies.[47]
>
> * * *
>
> [IUIC] will pay those sums that [Pardee] becomes legally obligated to pay as damages because of personal . . . injury to which this insurance applies.[48]
>
> * * *
>
> This insurance does not apply to any injury, damage, expense, cost, loss, liability or legal obligation arising out of or in any way related to pollution, however caused.
>
> Pollution incudes the actual, alleged, or potential presence in or introduction into the environment of any pollutants, if such pollutants have, or are alleged to have, the effect of making the environment impure, harmful, or dangerous. Environment includes any air, land, structure or the air therein, watercourse or water, including underground water, and biota.
>
> Pollutants include any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, as defined herein.[49]
>
> * * *
>
> [The Pollution Exclusion] does not apply to . . . property damage caused by pollution if the discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> * * *

---

[47] CGL Form CG 01 10 01, p. 1 of 24, attached to the Counterclaim as Ex. E.

[48] *Id.*, p. 8 of 24.

[49] Pollution Exclusion – Time Element Exception Form LD 12291, p. 1 of 2, attached to the Counterclaim as Ex. E (the "Pollution Exclusion").

3. commenced abruptly and instantaneously and can be clearly identified as having commenced entirely at a specific time on a specific date during the policy period;
4. is known by [Pardee] within 30 days of the commencement of the discharge, dispersal, seepage, migration, release or escape of pollutants; and
5. is reported to [IUIC] within 60 days of the commencement of discharge, dispersal, seepage, migration, release or escape of pollutants.[50]

Notwithstanding anything to the contrary in the foregoing paragraphs and regardless of the cause of the pollution, this policy shall not apply to:

* * *

2. any injury, damage, expense, cost, loss, liability or legal obligation arising out of or in any way related to actual or alleged pollution or contamination at or from a waste site, meaning the part of any premises, site or location which is or was at the time used by [Pardee] or by others for the storage, disposal, processing or treatment of waste of any kind. Waste site includes but is not limited to any landfill, pit or dumping ground, treatment, storage and disposal facility, lagoon or pond, drum storage or disposal area, disposal pipe outfall, injection well or any other repository of waste of any kind, whether permitted or not. Waste means any substance that:
   a. is left over, or no longer in use, or discarded[.][51]

As with the prior Policies, the Pollution Exclusion precludes coverage for the clean-up and other related costs claimed by Fayette County in the Underlying Action with respect to the contamination of the Subject Property and the Watershed with acid mine drainage and coal waste discharge. Since the drainage and discharges are alleged to have continued from at least the 1950s through the present, Pardee cannot claim that they commenced "abruptly and instantaneously" and "at a specific time on a specific date" within the Policy period of July 18, 2006 to July 18, 2007. Therefore, the Time Element Exception to the Pollution Exclusion does not apply to the facts of this case.[52] Furthermore, the 5 piles of coal waste from which

---

[50] *Id.* (the "Time Element Exception").

[51] *Id.*, p. 2 of 2 (the "Absolute Waste Exclusion").

[52] *See* O'Brien Energy Sys., Inc. v. Am. Employers' Ins. Co., 427 Pa. Super. 456, 465, 629 A.2d 957, 962 (1993) ("The exclusionary language in the policies would seem to be controlling. The language is clear. There is no coverage for liability for damages caused by the escape of pollutants or the migration of gases from appellant's operation unless . . . there has been a "sudden and accidental" discharge thereof. Here, it is clear that the basis for the underlying litigation is not the "sudden and accidental" discharge of polluting gases but the gradual migration thereof from the County's landfill and/or appellant's gas

discharges are emanating render the Subject Property a "waste site" within the meaning of the Absolute Exclusion to the Time Element Exception, so the Exception would not apply no matter when the discharge commenced. For these reasons, IUIC has no duty to defend or indemnify Pardee under the provisions of the 2006-2007 CGL Policy.

VII. There is No Coverage Under the Provisions of: IUIC Policy PMG G23857789 – July 18, 2007 to July 18, 2008 ACE Policy PMD G24651265 – July 18, 2008 to July 18, 2009 ACE Policy PMD G24651265 002 – July 18, 2009 to July 18, 2010 ACE Policy PMD G24651265 003 – July 18, 2010 to July 18, 2011 ACE Policy PMD G24651265 004 – July 18, 2011 to July 18, 2012 ACE Policy PMD G24651265 005 – July 18, 2012 to July 18, 2013 ACE Umbrella Policy XOO G24650947 002 – July 18, 2009 to July 18, 2010 ACE Umbrella Policy XOO G2491561A 001– July 18, 2010 to July 18, 2011

The last six CGL Policies and the two Umbrella Policies all contain very similar language to that of the 2006-2007 CGL Policy and to one another. The definition of Pollutants is the same as in the prior Policies. Each Policy includes an "Energy Pollution Liability Extension Endorsement," which contains a "Pollution Exclusion" with an exception granting "Pollution Liability Coverage" for sudden, recent discharges. The Policies also contain an Absolute Exclusion for "Pollution Liability That Is Never Covered" though their definition of "waste site" differs from that of the 2006-2007 CGL Policy. These eight Policies provide substantially as follows:

> [IUIC or ACE] will pay those sums that [Pardee] becomes legally obligated to pay as damages because of . . . property damage to which this insurance applies.[53]

---

recovery project. Because the language of the policies is clear and unequivocal, there is no reason why the same should be avoided or ignored by a court which has been asked to interpret the same.")

[53] CGL Coverage Form CG 00 01 12 04, p. 1 of 15, attached to the Counterclaim as Ex. F; CGL Coverage Form CG 00 01 12 07, p. 1 of 16, attached to the Counterclaim as Exs. G, H, J, L, M. The insuring provisions of the two Umbrella Policies are worded slightly differently, but that difference does not affect the court's analysis of these provisions. *See* Commercial Umbrella Liability Policy Form XS 4U17b, p. 1 of 11, attached to the Counterclaim as Ex. I; Commercial Umbrella Liability Policy Form XS 20835, p. 1 of 19, attached to the Counterclaim as Ex. K; (ACE "will pay on behalf of [Pardee] those

* * *

[IUIC or ACE] will pay those sums that [Pardee] becomes legally obligated to pay as damages because of personal . . . injury to which this insurance applies.[54]

* * *

Except as provided by [the Energy Pollution Liability Extension Endorsement] only, this insurance does not apply to any injury, damage, expense, cost, loss, liability or legal obligation arising out of or in any way related to pollutants, however caused.[55]

* * *

Pollutants mean[56] any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste[57] includes materials to be recycled, reconditioned or reclaimed.[58]

* * *

Subject to [subsequent provisions] which exclude certain pollution liability, this Pollution Exclusion does not apply to . . . property damage or remediation costs caused by a pollution incident, *meaning a discharge of pollutants into the environment*,[59] (Italics added) provided that . . .

---

sums in excess of the retained limit that [Pardee] becomes legally obligated to pay as damages because of . . . property damage or personal . . . injury to which this insurance applies.")

[54] CGL Coverage Form CG 00 01 12 04, p. 5 of 15, attached to the Counterclaim as Ex. F; CGL Coverage Form CG 00 01 12 07, p. 6 of 16, attached to the Counterclaim as Exs. G, H, J, L. M.

[55] Energy Pollution Liability Extension Endorsement Form LD 20562, p. 2 of 6, attached to the Counterclaim as Exs. F, G, H; Energy Pollution Liability Extension Endorsement Form LD 20562a, p. 2 of 7, attached to the Counterclaim as Exs. J, L; Energy Pollution Liability Extension Endorsement Form LD 20562b, p. 2 of 7, attached to the Counterclaim as Ex. M; Energy Pollution Liability Extension Endorsement Form XS 20324, p. 2 of 3, attached to the Counterclaim as Exs. I, K (the "Pollution Exclusion").

[56] One Policy uses the word "include" instead of "mean," but that change does not affect the court's analysis of this provision. *See* Commercial Umbrella Liability Policy Form XS 4U17b, p. 5 of 11, attached to the Counterclaim as Ex. I.

[57] One Policy includes the words "As used in this definition" before the word "waste," but that addition does not affect the court's analysis of this provision. *See* Commercial Umbrella Liability Policy Form XS 20835, p. 18 of 19, attached to the Counterclaim as Ex. K.

[58] CGL Coverage Form CG 00 01 12 04, p. 14 of 15, attached to the Counterclaim as Ex. F; CGL Coverage Form CG 00 01 12 07, p. 15 of 16, attached to the Counterclaim as Exs. G, H, J. L, M; Commercial Umbrella Liability Policy Form XS 4U17b, p. 5 of 11, attached to the Counterclaim as Ex. I; Commercial Umbrella Liability Policy Form XS 20835, p. 18 of 19, attached to the Counterclaim as Ex. K.

[59] The italicized phrase is not included in all of the Policies covered in this section, but its omission does not affect the court's analysis of this provision. In the 2007-2008, 2008-2009, 2009-2010 CGL Policies, and the 2009-2010 and 2010-2011 Umbrella Policies, the word 'Environment' means "air, land, structure or the air therein, watercourse or water, including underground water, and biota." Energy Pollution Liability Extension Endorsement Form LD 20562, p. 4 of 6, attached to the Counterclaim as

2. the discharge commenced abruptly and instantaneously and can be clearly identified as having commenced entirely at a specific time on a specific date during the policy period; and

* * *

4. the discharge was known by [Pardee] within 30 days of the commencement of the discharge of pollutants; and

5. the discharge was reported to [IUIC or ACE] within 60 days of the commencement of the discharge of pollutants.[60]

* * *

Notwithstanding anything to the contrary in the foregoing paragraphs and regardless of the cause of the discharge of pollutants . . . this insurance does not apply to any injury, damage, expense, cost, loss, liability or legal obligation arising out of or in any way related to any actual or alleged discharge, dispersal, seepage, migration, release or escape of pollutants at, from or related to any:

1. waste site,

* * *

3. premises, site, or location [Pardee] has sold, given away or abandoned.[61]

* * *

"Waste site" means the part of any premises, site or location not owned, occupied by, or rented or loaned to [Pardee] which is or was at any time licensed, or subject to licensing or reporting requirements, by a regulatory authority for the recycling, reconditioning, reclamation, storage, disposal, processing or treatment of waste, including any materials: that were left over, or no longer in use, or discarded; or are to be reclaimed or recycled, or reconditioned; or have been removed, treated, stored or disposed of as part of any environmental remediation effort.[62]

Exs. F, G, H; Energy Pollution Liability Extension Endorsement Form XS 20324, p. 3 of 3, attached to the Counterclaim as Exs. I, K.

[60] Energy Pollution Liability Extension Endorsement Form LD 20562, p. 2 of 6, attached to the Counterclaim as Exs. F, G, H; Energy Pollution Liability Extension Endorsement Form LD 20562a, p. 2 of 7, attached to the Counterclaim as Exs. J, L; Energy Pollution Liability Extension Endorsement Form LD 20562b, pp. 2-3 of 7, attached to the Counterclaim as Ex. M; Energy Pollution Liability Extension Endorsement Form XS 20324, p. 2 of 3, attached to the Counterclaim as Exs. I, K (the "Time Element Exception").

[61] Energy Pollution Liability Extension Endorsement Form LD 20562, p. 3 of 6, attached to the Counterclaim as Exs. F, G, H; Energy Pollution Liability Extension Endorsement Form LD 20562a, p. 3 of 7, attached to the Counterclaim as Exs. J, L; Energy Pollution Liability Extension Endorsement Form LD 20562b, p. 3 of 7, attached to the Counterclaim as Ex. M; Energy Pollution Liability Extension Endorsement Form XS 20324, p. 2 of 3, attached to the Counterclaim as Exs. I, K (the "Absolute Pollution Exclusion").

[62] Energy Pollution Liability Extension Endorsement Form LD 20562, p. 5 of 6, attached to the Counterclaim as Exs. F, G, H; Energy Pollution Liability Extension Endorsement Form LD 20562a, p. 5 of 7, attached to the Counterclaim as Exs. J, L; Energy Pollution Liability Extension Endorsement Form

As with previous Policies, the acid mine drainage and mining waste discharges that are the subject of Fayette County's Underlying Action are "pollutants" within the meaning of the Pollution Exclusion since they are both "acids" and "wastes." Since the injury, damage, expenses, etc. claimed by Fayette County all arise out of, and are related to, those pollutants, there is no coverage for those claims under the Pollution Exclusion. Since the discharge of those pollutants did not commence abruptly and instantaneously within any of the Policy periods, the Time Element Exception to the Pollution Exclusion does not create coverage for the claims in the Underlying Action.

Therefore, in summary, IUIC and ACE have no duty to defend or indemnify Pardee under the terms of the 2007 through 2013 CGL Policies, nor under the 2009 through 2011 Umbrella Policies.

CONCLUSION

For the foregoing reasons, the Insurers' Motion for Judgment on the Pleadings is granted, and a declaratory judgment will be entered in their favor.

DATE: October 12, 2022

BY THE COURT

RAMY I. DJERASSI, J.

LD 20562b, p. 5 of 7, attached to the Counterclaim as Ex. M; Energy Pollution Liability Extension Endorsement Form XS 20324, p. 3 of 3, attached to the Counterclaim as Exs. I, K.