



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

# Absolute Pollution Exclusion/Quarry Operations: Federal Appellate Court Addresses Coverage for Unplanned Discharge of Rock Fines

02/05/2020

The United States Court of Appeals for the Fifth Circuit ("Court") addressed in a January 17th opinion a company's umbrella insurance policy's absolute pollution exclusion. See *Eastern Concrete Materials, Inc., v. Ace American Insurance Company*, 2020 WL 254822.

The issue involved whether an unplanned discharge of "rock fines" pellets produced during the course of the company's quarry operations is encompassed by this exclusion.

Eastern Concrete Materials, Inc., ("Eastern") purchased a commercial umbrella insurance policy for itself and various subsidiaries from Great American Insurance Company ("GAIC"). The GAIC policy included an "absolute pollution exclusion." The language of this provision is stated to not apply to:

. . . Any liability, including, but not limited to settlements, judgments, costs, charges, expenses, costs of investigations, or the fees of attorneys, experts, or consultants arising out of or in any way related to:

1. The actual, allege or threatened presence, discharge, dispersal, seepage, migration, release or escape of "pollutants," however caused.
  2. Any request, demand, or order that any "Insured" or others test for, monitor, clean up, remove, contain, treat, detoxify, neutralize or in any way respond to or assess the effects of "pollutants."
- ...

This exclusion will apply to any liability, costs, charges or expenses, or any judgments or settlements, arising directly or indirectly out of pollution ....

As used in this exclusion "pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including, but not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste material. Waste material includes materials which are intended to be or have been recycled, reconditioned or reclaimed.

Eastern's rock quarry in Glen Gardner, New Jersey lowered water levels in a settling pond in July 2017 because of an anticipation of rain. The quarry manager is stated to have accidentally failed to shut off pumping before the stone fines from the bottom of the settlement ponds began to be pumped into a creek. Consequently, substantial amounts of rock fines were released into the creek causing:

. . . physical damage to the stream and stream bed by changing the flow and contours of the stream.

The New Jersey Department of Environmental Protection (“Department”) issued a Notice of Violation to Eastern. The company was required to remove the rock fines and take preventive measures to stem the migration downstream. It was also determined to be liable for violating various state statutes.

Eastern undertook the prescribed remediation.

Eastern notified GAIC of the incident and demanded reimbursement for the costs of removing the rock fines and of defending the claim. GAIC filed a declaratory judgment seeking a declaration that the incident fell within the previously referenced absolute pollution exclusion and that it had no duty to defend or indemnify.

The Federal District Court granted GAIC’s motion for summary judgment, holding that the absolute pollution exclusion applied.

In addressing the potential application of this pollution exclusion to the relevant incident the Court applied the rules of interpreting insurance policies under Texas law.

Eastern argued on appeal that rock fines are simply particles of rock and therefore not dangerous and do not contaminate.

In support of the argument it stated that to hold otherwise would mean rock fines become contaminants when they are discharged and dispersed where they did not belong. This was stated to be overbroad because it would allow anything (referencing water or bricks) to become contaminants if left in an inappropriate place.

GAIC countered by stating that this would be the invention of a “hazardousness” requirement. It further argued that nothing in the ordinary sense of the word “contaminant” or in the caselaw imposes such a restriction. The caselaw was argued to hold that rocks and similar materials are contaminants for purposes of the absolute pollution exclusion. Decisions in which a court will determine that salt water, sand, and drilling mud were contaminants under a contractual pollution exclusion even if they did not or could not cause environmental damage were cited. See *Cleere Drilling Co. v. Dominion Expl. & Prod., Inc.*, 351 F.3d 642, 651 (5th Cir. 2003) is cited.

The Court agreed that the *Cleere Drilling Co.* is instructive. It cites *Black’s Law Dictionary* which defines contamination as a condition of impurity resulting from mixture or contact with foreign substance. The Court notes that rock fines might have been undesirable elements when discharged into the creek but did not mix with the creek in a way that made it impure. Further, they did not soil, stain, corrupt, or infect the creek or render it unfit for use.

The Court stated, “when we look at the effects on the overall ecosystem, rock fines are contaminants.” Its descriptions of the incident and its negative impact on a trout producing stream, including change in the flow and contour, are referenced. This was deemed the reason why Eastern was required to remove the rock fines from the creek. As a result, the Court holds that they qualify as contaminants and subject to the absolute pollution exclusion.

A copy of the opinion can be downloaded [here](#).