UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ORANGE COUNTY WATER DISTRICT,

Plaintiff,

v. 04 Civ. 4968 (SAS)

UNOCAL, et al.,

Defendants.

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March 11, 2008
11:05 a.m.

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

APPEARANCES

MILLER, AXLINE & SAWYER
Attorneys for Plaintiff
BY: MIKE AXLINE

MCDERMOTT, WILL & EMERY
Attorneys for Defendant Exxon Mobil Corp/Defendants' Liaison Counsel
BY: STEPHEN J. RICCARDULLI

ARNOLD & PORTER, L.L.P.
Attorneys for Defendant BP Products North America, Inc., BP West Coast Products LLC and Atlantic Richfield, Co.
BY: MATTHEW HEARTNEY

KING & SPALDING, L.L.P.
Attorneys for Defendant Chevron U.S.A., Inc.
BY: CHARLES C. CORRELL, JR.

MUNGER, TOLLES & OLSON, L.L.P.
Attorneys for Defendant Shell
BY: WILLIAM D. TEMKO

WALLACE, KING, DOMIKE & REISKIN
Attorneys for Defendant Shell, Texaco, Chevron and Unocal
BY: RICHARD E. WALLACE, JR.

(Case called)

THE COURT: Mr. Axline.

MR. AXLINE: Good morning, your Honor.

THE COURT: Mr. Riccardulli, good morning.

MR. RICCARDULLI: Good morning.

THE COURT: Mr. Heartney.

MR. HEARTNEY: Good morning, your Honor.

THE COURT: Is there a Mr. Correll?

MR. CORRELL: Good morning, your Honor.

THE COURT: Mr. Temko.

MR. TEMKO: Good morning, your Honor.

THE COURT: And Mr. Wallace.

MR. WALLACE: Good morning, your Honor.

THE COURT: Good morning.

Well, I thought we had a telephone conference and my clerk said *you made them come in all the way from California.* I guess I did. I'm sorry about that. Mr. Axline has just said if it is a serious dispute of promotion issue it is still kind of hard to do on the phone. Still, I'm sorry. I came in thinking it was by phone.

MR. AXLINE: I have a daughter here, your Honor, so it gives me an opportunity --

THE COURT: That makes me feel much better.

In any event, I have a letter dated February 19th -- and forgive my lack of voice, it is an asthma situation --

anyway, February 19th from the plaintiff asking for a pre-motion conference stating its intent to request leave to file an amended complaint and to request an extension of time to file the Orange County Water District's brief on the statute of limitations.

It seems the parties don't disagree on a small change with respect to paragraphs 104 and 106 which is, the defense says all they accepted, but there is a bigger change that plaintiffs want to make which is to replace the term "groundwater" with such terms as "public drinking water supplies" and "principal aquifer."

The defense wrote a letter dated February 22nd, 2008 saying they had thought they negotiated an agreement on an amended complaint. They had no problem, again, with paragraphs 104 and 106, but they think the change with respect to the phrase "groundwater resources," which has been around since the beginning of this case but certainly since the briefing on the statute of limitations motion, is a major change and it implicates the Court's reasoning in the earlier statute of limitations decision and in the permission to have supplemental briefing.

So, the defense writes, and I quote, by replacing the term groundwater with phrases such as "principal aquifer," "public drinking water supplies" and "usable water," the District evidently hopes to salvage its statute of limitations

opposition by arguing that its jurisdiction is limited only to parts of the groundwater basin under its management and only some of the groundwater found there.

And, they oppose the amendment saying it is dilatory and it is prejudicial.

So, that's the summary of the letter writing. I thought it would be useful to hear you orally. I don't want to say any more if I can possibly help it. If I could switch the talking to you folks it would be a lot better.

So, they say you have the burden Mr. Axline, so and in a sense you didn't have a chance to reply to their February 22nd letter. So, in the nature of reply in further support of the application, can you explain why the Court should allow it?

MR. AXLINE: I will, your Honor. And I will do so by explaining my reasoning.

We were working cooperatively in response to a suggestion from the Court to amend the Orange County Water District Act language in the complaint, and we did reach an agreement on that. Simultaneously with that work our office has been working on the supplemental brief on the statute of limitations.

Reading back over the briefs and this Court's opinions on primary jurisdiction and some of the work that has happened in this case --

THE COURT: Yes.

MR. AXLINE: -- although I think the initial complaint was accurate and still is accurate with respect to the scope of the Orange County Water District's jurisdiction, the nature of the claims that it is making in this case has been clarified through briefing hearings with the Court.

For example, as the Court and defendants know, the District injects sea water at a certain point along the coast -- or injects, I'm sorry, water at a certain point along the coast to hold back sea water. And although the District has jurisdiction over the groundwater that is present in the area between those injection wells and the coast, the District is not asserting in this case any injury to that groundwater.

Similarly, in the briefing on primary jurisdiction the District explained, and the Court agreed, that with respect to discharges that are currently being remediated by the regional water quality control board, although the District has jurisdiction over those discharges it has a memorandum of understanding with the regional board and therefore is not asserting claims in this case for discharges that are being remediated by the regional water quality control board.

In addition to that, some of the discharges may have occurred in what are called perched aquifers where there is, it is a narrow band of groundwater close to the surface that doesn't present a threat to the principal aquifer that the drinking water supply that the District is concerned with.

To be candid about my thinking, it may have been fine -- I think it probably would have been to leave the complaint as it was and simply argue these points with regard to describing the District's injuries. But, I thought as I was working through this and looking at the complaint in a way that it would benefit all parties if the District took advantage of this point where we are and amended the language of the complaint to clarify in the complaint itself more precisely the nature of the District's injuries.

So, that was the thinking behind that.

THE COURT: Would you agree it is a narrowing of the claim?

MR. AXLINE: Yes.

THE COURT: It is a limiting of the claim?

MR. AXLINE: Yes.

THE COURT: That's what it sounds like.

MR. AXLINE: Yes.

THE COURT: What about answering their point about prejudice?

MR. AXLINE: I will let them explain that in more detail. I frankly don't see it, your Honor. I don't think that anything we are saying here is inconsistent with what we've presented to the Court today in the briefing on the case.

THE COURT: Well, relating it to the statute of limitations I guess it affects the date of known or should have

known; right?

MR. AXLINE: Well, I think that it takes out of the defendant's concerns discharges in the areas that I've been talking about on the coast or confined to aquifers and so it is not just the statute of limitations.

THE COURT: That's why I said it does sound like a narrowing. It is a narrowing of the claim.

MR. AXLINE: Yes.

THE COURT: It is a limitation of the claim. So, to that extent, the defendants should be happy. On the other hand, it probably pushes the date as to when you knew or should have known of the injury forward. Because with the broad term groundwater, there was certain proof in some instances that there was no way no way you didn't know. There was litigation, there was an injury. They think you are trying to get out of that problem by this newer definition.

MR. AXLINE: That may be what they think is prejudice, your Honor. I don't think it is because it is perfectly consistent with our prior briefing.

We have taken the position in all of the prior briefing on the statute of limitations and on primary jurisdiction that the District is not harmed until contamination escapes remediation efforts in amount sufficient to threaten drinking water. And that's what we are seeking to amend the complaint to specify as well.

THE COURT: So now are you saying it is a matter of having the pleadings conform to the proof? Which is an old concept and not an unheard of one; that the proof that you have been eliciting in the discovery process is that while there may be groundwater contamination, we aren't injured until the drinking water is affected and that's why we want to change those words in the complaint. We want to conform our pleadings to what the case really is.

MR. AXLINE: Yes, your Honor. And I can understand the defendants have done an excellent job of seizing on that word groundwater.

THE COURT: Correct; because it is broader.

MR. AXLINE: It is broader and it does describe the District's jurisdiction but it is too broad for what this case is about.

THE COURT: May be. But you pled.

MR. AXLINE: Yes.

THE COURT: It may be too broad, but you put them through four or five years of discovery with respect to a word that you now say is too broad. They say that not only does it affect the statute of limitations motions but we may have to have a "do-over" of earlier motions like primary jurisdiction.

MR. AXLINE: I don't agree with that, your Honor. I think, in part, this reflects the Court's opinion and the briefing on the primary jurisdiction motion.

The fact that the regional board is operating at some sites is, I mean the Court's opinion on that is what it is and nothing in this proposed amendment would suggest you have to revisit that. In fact it is intended to account for it. If they can explain how it inaccurately accounts for it I guess I could respond to that.

THE COURT: Okay. Then who wants to start. Mr. Heartney?

MR. HEARTNEY: Yes, your Honor. Thank you.

I guess to explain our concerns I would like to go back to the spring of 2006 when we were about to file the statute of limitations motion.

THE COURT: That's two years ago.

MR. HEARTNEY: Two years ago.

THE COURT: Oh dear.

MR. HEARTNEY: At that time we were developing our motion and deciding what arguments to make in our motion, obviously, and what we had in front of us were on the one hand the complaint that the District had already filed which did use the term "groundwater" and made other statements, and we had other statements by the District some of which we cited in our letter such as their December 2005 statement that the District is charged with protecting all groundwater in its jurisdiction.

Beyond that, when we looked at the complaint and we looked at their case and we said what is it that this case is

about? What have they said that is the crux of their case? What they said was that there are 400 MTBE release sites that are contaminating and threatening to contaminate the groundwater in the District. And we had, through your Honor's assistance, gotten a list of those and they included every single underground storage tank release site in the District's territory as tabulated by the regional water quality control board.

So, when we filed the motion we focused it on the two injuries that we understood them to be asserting because that's -- obviously from our accrual standpoint we had to focus on the injuries that they were making the basis of their --

THE COURT: You say two injuries, two injuries being --

MR. HEARTNEY: Two injuries in fact. Injury in fact number one is when they are injured -- when MTBE or TBA contaminates groundwater that they're managing it, groundwater that is within their jurisdiction that they're managing. And we coupled that in our minds in this first injury with their statement that they're charged with protecting all groundwater in the district.

The other injury was their need to investigate, remediate, take steps, spend money, expend resources to focus on the MTBE release sites, the 400 sites which they identified as the crux of their case. And their complaint stated at that

time that the District is required to investigate every UST release site in its territory. That statement is in the complaint. In fact, I think it is still in the present complaint, I don't think they've taken that one out.

But, so, we said based on this that what they're doing is focusing on these underground storage tank release sites. And so, we developed a factual record that focused on those. And we showed that with a view few exceptions all of them had been known, they existed, they were known either to the District directly or they were -- the District was charged with that knowledge but they were known in the regional board sites.

THE COURT: I'm sorry. Known on the --

MR. HEARTNEY: Regional board field, your Honor.

THE COURT: Okay.

MR. HEARTNEY: So, that's what we focused our motion on.

Then, in the supplemental briefing, we kept the same focus. Your Honor asked for certain things to be examined. First, had the MTBE reached groundwater? And we were able to show that in all about again a very, very small number of cases before May 6, 2000 at these sites it had in fact reached groundwater. And the second issue was had it reached groundwater in levels sufficient to constitute an injury. And so, we compared it to the regulatory standard and in virtually all cases, again, the MTBE that was known to exist at these

release sites before May 6, 2000 exceeded the regulatory standard.

And so, your Honor, the problem we have with these amendments, we are familiar with the arguments that the District started to make in its supplemental briefing and said, well, we have a new four-part test that we believe should be used. We, of course, dispute that that four-part test is appropriate. In part that's based on the complaint that we were working with and it is based on the statement that had been made to us before we filed our motion. But, it is also based on the statutes that the District has which don't make any distinction between protecting drinking water and protecting other water. The statutes, at least as interpreted by the District as quoted by the District, they refer to any contamination of groundwater.

And so, your Honor, from our perspective if they now say -- if they're now permitted to say, well, our case is not about the 400 plumes that were the basis that were in our complaint originally and they've actually changed the allegations that relate to those to now say that only some of those plumes are at issue, they don't identify which one which was not what they said before. But, if they're allowed to change that focus, then the motion that we made is not aimed at what they've now made the basis of their case. They have, by stepping in a different direction, they have stepped away from

the target of our motion even though the target of our motion, I believe I can demonstrate, was very much on point at the time that we presented it.

And so, we believe that there are many admissions by the District that would block it and discovery, other factual materials that can't be changed by just changing the allegations of your complaint, that would mean that they're really stuck with the old focus. But, if they were to succeed in changing the focus, then what that would mean is we would have to start over with a different statute of limitations argument because we would be facing a different target.

THE COURT: Right.

But, one question I have is if you have a case where somebody says there are 400 releases that have injured me and then they amend the complaint to say there are 30 releases that injured me; generally speaking, one would think the defense would be happy about that because it takes out of the case a huge number of releases that theoretically the plaintiff would press for damages, to recover damages based on those releases. So, generally, a narrowing or cutting back is a good thing.

The only reason, I suppose, that troubles me, is the impact on the statute of limitations. Because if they want to rule out a lot of alleged bad conduct, so to speak, and not seek recovery for it, that's with prejudice. I mean, that's a pretty powerful thing. And they're now willing to say we are

not pursuing that and not just for today we are not pursuing it, we want to focus only on that which threatens the drinking water. We don't want to talk about contamination of the groundwater. It is a narrower case.

So, while I agree that there is a lot of effort that the defense and the lawyers put into preparing a motion targeted at the old complaint, one should maybe consider the compensation for all that time. It is really not a bad thing to narrow a complaint. And, it is not unheard of.

As I said before, we often have this notion of conforming the pleadings to the proof.

So, Mr. Axline, when he mentioned that it is not all 400 anymore, it is only some, can you give the Court any idea of how many is the some?

MR. AXLINE: I can't give you a precise idea.

THE COURT: I didn't ask for precise. Do you have any idea? Because I'm talking about a narrowing and am telling them that's kind of a good thing but I don't know if you are narrowing by very little or by something substantial.

MR. AXLINE: Well, I do know that there were several stations in the coastal area that we previously informed both the defendants and the Court we are not making claims with respect to.

Your Honor also said in your opinion that not every release to groundwater constitutes an injury and the reason is

because we did brief this precise issue before.

We have, by agreement, narrowed the focus of the case for present purposes to 10 bellwether plumes.

THE COURT: That's bellwether, that is not with prejudice of writing off the other 390 releases.

MR. AXLINE: Correct. But we have been focusing on those for purposes of the current briefing.

THE COURT: I know that.

MR. AXLINE: That's why I can't give you a -- I can't give you any kind of a precise number. All I can say is it will narrow it. Stations that are being remedied by the regional board now are not going to be the subject of a current claim.

THE COURT: Stations that are being remedied by the regional board now are not going to be the subject of?

MR. AXLINE: -- of a current claim where there is no evidence that the plume has escaped that remedial effort.

Now, I do want to say that if the District later finds out that that plume has escaped and is threatening drinking water, then we would not agree that we would be dismissing those claims. But, we are working now to narrow -- and we are doing this in the context of statute of limitations briefing this month.

THE COURT: Yes.

MR. AXLINE: That's one of the reasons why we asked

for some additional time.

THE COURT: Right.

MR. AXLINE: To assess these a little more closely so that we can explain, in more detail, the status of each station. And, I do expect that there will be some stations that will be taken out of the mix as a result of that closer assessment.

THE COURT: But you can't tell me about the 400 -- how far down the 400 is going.

MR. AXLINE: No, I can't tell you. Off the top of my head I would be very reluctant to even attempt that.

MR. HEARTNEY: Your Honor, as I hear your question suggests and it is very much on point, yes, if there was going to be a meaningful substantial reduction in the case, that is something we would obviously see as a benefit.

THE COURT: Right.

MR. HEARTNEY: Our belief is that the terms that have been adopted to replace the concept of groundwater are -- they're very multitudinous, there are many different words and they mean different things -- usable water, public drinking water supplies, common water supplies of the district.

Our problem is we don't think that a standard has been adopted here which does create a meaningful narrowing. We think that there is still so much flexibility in these terms for the district that what we have is a sidestep that is more

conceptual in its basis and not concrete. If we, in fact, had a list that said it has gone from 500 to 20, then it would be a whole different story.

THE COURT: You know, I think after all of these years -- and I don't remember the year that this case began, maybe '03? Does somebody remember?

MR. HEARTNEY: '03.

MR. AXLINE: Yes.

THE COURT: After five years, Mr. Axline, I think it is -- what is a good word for it -- I was going to say chutzpah -- it is kind of chutzpah to say at this point I want to change the case after five years and after five years of discovery and five years of effort by the defendants without giving something back which would be rather specific narrowing.

So, I think that if you are going to make this motion and they're going to have to oppose this motion because, after all, this is only a pre-motion conference, I'm not inclined to grant it unless it is very specific as to how it narrows the case. It is just unfair five years later to change the focus to avoid the statute of limitations problem, which I think you have, and I think you have come to realize you have.

But, one way around it is to focus on getting rid of the overbroad -- what you called earlier the overbroad term groundwater and looking more narrowly at the idea of the public drinking water and then being able to defend on the statute of

limitations ground when we knew or should have known that the threat, that there was threat to the actual drinking water.

So, everybody knows why you want to do it but I would like to know and I think the defense might be satisfied if they saw how it took a broader case and made it narrower. But, if it is just theoretical and you don't want to identify sort of the benefit of the change, I don't think you are just entitled to, willy-nilly, use a bunch of new words that are vague and don't create a bright-line cutoff for what is in the case and not in the case. There has to be a benefit if, after five years, you get to change the theory such that you avoid the statute of limitations problems but we don't know what is in the case and what's outside the case.

So, I think a bright-line is needed as to what those terms mean rather than a bunch of amorphous terms that don't cut things out and leave things in.

MR. AXLINE: I understand what you are saying, your Honor. I disagree with the defendants that we are changing the case in any way.

THE COURT: You are narrowing it. You said before the term "groundwater" is overbroad. You conceded that on this record.

MR. AXLINE: Correct.

THE COURT: All right. So, you are trying to narrow, you are trying to be more specific than this broad term

"groundwater" and you realize that that means that certain spills/releases will be out of the case because of that. You said we are not going for releases on the coast, big releases that were years ago and clearly we knew and they're being remediated, etc.

So, you know you are cutting something out but you, at this point, decline to say what. And, you also decline to come up with one bright-line term of what you are talking about. They say you float between "public drinking water supplies," "principal aquifer," "usable" and maybe other terms. They're saying if you are going to make this kind of major change after five years, you should be held to a bright-line test of what is in and what is out.

If you want to talk about public drinking water rather than groundwater, that's one change.

If you want to -- I mean, I don't know some of the terms, but if you want to talk about principal aquifer as opposed to everything else, that's a specific term.

To be able to sort of use all terms such that you can expand or contract at will is really not fair. It is just not fair to the years that they've been litigating the case and I have been making decisions. It is not fair to either of us.

So, you know, I'm not going to allow the proposed amended complaint as I see it attached to these letters. It is going to have to be some level of specificity that is a benefit

at the same time to the defense as it is to you, both sides benefit. Because, to narrow a case is a good thing.

Now, it may be that after you narrow it they will lose the statute of limitations motion. But, they will have won something. A percent of the case that was once there is not there and will not be there because you have conceded it is not there. And then the statute of limitations continues to run all these other years and you can't do it.

So, there is a real narrowing here. Has to be. Has to be. It can't just be sort of a wordsmithing to get around a motion. I can't allow that at this date. Too many years of effort.

MR. AXLINE: I have two responses, your Honor.

THE COURT: Okay.

MR. AXLINE: I do understand what you are saying and I would like to figure out a little more precisely where to go with it.

THE COURT: Right.

MR. AXLINE: I do want to say that our initial complaint did refer to public drinking water and it used the same terms. It didn't use them consistently. It switched back and forth between groundwater and those terms.

As the course of the litigation has proceeded, the District has refined its claims and so we, I think at this point maybe everybody is in agreement that given that

refinement, it would benefit the defendants if we were able to identify some release sites --

THE COURT: Oh yes.

MR. AXLINE: -- that are no longer within our definition of injury.

THE COURT: Correct.

MR. AXLINE: And if that will assist with reducing prejudice to the defendants and with the Court's decision on the motion to amend, I think we can do that.

I do think, however, that the terminology that we have used in this complaint is the correct terminology for describing the actual injury that the District is suffering as a result of MTBE releases in the District service area.

THE COURT: Well, why do you need so many different terms? What is wrong with public drinking water supplies?

MR. AXLINE: One of the terms, public drinking water supplies defines the other term, principal aquifer in a colloquial way because that is where the drinking water supply comes from.

THE COURT: What about usable water, very elastic. What is usable water?

MR. AXLINE: That, your Honor -- frankly, there are going to be some aquifers -- this is a very complicated hydrogeological setting. There are going to be some usable aquifers that don't -- that are not part of the principal

aquifer that drinking water supplies are taken from and --

THE COURT: Well then public drinking water supplies.

MR. AXLINE: -- or that where public drinking water could be taken but is not currently taken.

THE COURT: It still comes under public drinking water supplies. I think they're fearful once you start using "usable water" how long that will last and it will come back to groundwater. They need to get a grip on the statute of limitations motion after all these years. And, they quote from your second amended complaint several paragraphs where you do talk about claiming damages, to investigate, monitor, prevent, abate or contain any contamination of or pollution to groundwaters. That's not where you want to be now.

MR. AXLINE: That, your Honor, is a separate matter.

The Orange County Water District Act, like CERCLA, awards some costs that you would not be able to get under common law claims, and that includes investigatory claims whether they lead to evidence of a common law compensable claim or not. The Act is much broader than the underlying common law claims.

THE COURT: That may be but they may be time-barred.

MR. AXLINE: But we have amended the Act to say we are not going to request any investigatory costs --

THE COURT: Okay.

MR. AXLINE: -- that were incurred prior to May 6,

2000. So, we have done that in the complaint.

THE COURT: Which complaint? The proposed amended complaint?

MR. AXLINE: The proposed amended complaint in the paragraphs that we stipulated to.

THE COURT: 104 and 106.

MR. AXLINE: Correct. We have said we are not going to claim those costs but going forward those costs are much broader than the underlying claims.

THE COURT: But I have to deal with the statute of limitations.

So, where does this friendly conversation leave us? Mr. Heartney did you address why you thought this amendment in any form might lead to re-litigating older motions like primary jurisdiction?

MR. HEARTNEY: Your Honor --

THE COURT: Do you have any thoughts?

MR. HEARTNEY: -- I will say we alerted the Court to this possibility. We have not studied it to the point where I can give you chapter and verse but, generally, here is the thought:

The thought was that when we made our primary jurisdiction motion the District portrayed itself as a co-equal to the regional board having the same jurisdiction as the regional board and therefore under no obligation to defer to

the regional board. There is no reason why the Court need await what the regional board is doing. It doesn't need to wait to tell the regional board it has finished its work because the District is fully capable and has every right to go and clean up the spills itself. And, we have heard again from Mr. Axline that we believe they have that jurisdiction.

But now -- well, when we look at the complaint we see and they're saying that's not our job. Our real job is just to protect drinking water supplies.

In that case we think we would need to look hard at what happened on the primary jurisdiction motion with where we were essentially saying wait until the regional board has finished its work before you come in and start making claims. This would also depend, in part, on what the universal sites are that's left. You know, it is hard to speak in the abstract when we don't know the nature of the situations that they may now want to focus their case on.

It is, at this point, your Honor, I would simply say we see it as a possibility because it seems to be a narrowing of their powers or at least of their role vis-a-vis the regional board compared to what they said in the primary jurisdiction.

I can't say more than that.

THE COURT: Mr. Axline, would this affect any of the 10 focused releases? Do you know?

MR. AXLINE: I believe that it is going to affect several of the stations that have contributed to the 10 focused plumes, yes.

THE COURT: They would be out?

MR. AXLINE: Yes.

THE COURT: See, people need to know that I mean we can't not know that and continue the briefing.

So, what comes next? Your brief was due February 28th.

MR. AXLINE: It is now due March 28th.

THE COURT: Now due March 28th.

MR. AXLINE: Yes, a couple of weeks.

THE COURT: Are you going to make that date?

MR. AXLINE: Yes, we are, your Honor.

THE COURT: What about the amended complaint? Do you want to make the motion on that or do you want to negotiate first?

MR. AXLINE: I am happy to discuss this with the defendants to see if we can come to an agreement on it. I think at a minimum those discussions might lead to me being able to give you some more precision with respect to the effects of the amendment that we are seeking in narrowing the case after we discuss that with the defendants.

THE COURT: Do you have another reply on this motion after March 28th?

MR. HEARTNEY: I believe the briefing schedule, your Honor, is that the first supplemental briefing is March 28th, it comes from the District. 21 days later we have an opposition. Two weeks after that, they have a reply.

There is three more briefs.

THE COURT: Right. The question is will you be in a position to file your papers three weeks later if we don't know what the complaint is?

MR. HEARTNEY: It is very hard to say, your Honor, without seeing what their paper is and what the next step would be.

MR. AXLINE: Your Honor, we are not going to be presenting anything different or new beyond what we have done in the prior briefing. That's what, as I said at the beginning, what I think our proposed amendments are consistent with what we have said in the prior briefing on the statute of limitations.

THE COURT: So, why did you need an extra month?

MR. AXLINE: Because we are going into much more detail on specific sites in this additional briefing but it is all consistent with what we have said before.

And, just to respond briefly to Mr. Heartney's comment on the primary jurisdiction motion? One of the reasons we have gotten to where we are here is because of the outcome of the primary jurisdiction motion. And we said there and are saying

it again in all of our statute of limitations briefing including what has been filed is that the District isn't injured. Even though it has jurisdiction it is not injured at those sites unless and until the regional board's remedial efforts fail and there is some indication that the contaminant is threatening.

THE COURT: So, in other words, you are saying you do wait for the outcome of the regional board's efforts.

MR. AXLINE: Correct. Although I'm not sure "outcome" is the right term. If there is some indication, some testing outside of the remedial area that the regional board oversees, that contamination has escaped, then the district knows that it is injured. But, the District doesn't oversee the regional board's remedial efforts and presumes, until it is given information otherwise, that the Board's efforts are going to address the problem.

THE COURT: So, it doesn't claim injury until the board is done.

MR. AXLINE: Right. And we have said that consistently including prior briefing on the statute of limitations motion.

THE COURT: So, you think the schedule can be kept?

MR. AXLINE: I do.

THE COURT: March 28th; April 18th for the defense is 21 days; and then two more weeks, May 2.

That's fine. That's good. But, I'm not entirely sure how this plays into the amended complaint issue. I am not entirely sure where we are heading with this.

MR. AXLINE: I'm not sure, your Honor. As I said it myself, as I said at the beginning, this was an effort to conform the pleadings to the proof and we think it does that. We can certainly talk to the defendants about the uniform phrase to use.

THE COURT: And how it narrows the case.

MR. AXLINE: And we can identify -- I'm not sure that because it is so expert intensive I'm not sure that we can go through all 400 release sites and say well --

THE COURT: But maybe definitionally how it narrows the case.

MR. AXLINE: Yes. And maybe the defendants would withdraw their opposition. I don't know. If they don't, we are going to be back before you.

THE COURT: Well you are going to be back. We don't need a pre-motion conference again, we need a briefing schedule.

So, if you think -- today is March 11th. Should it be on the same schedule? Should you submit the moving papers on the motion to amend on the same date if you can't negotiate? Or does that not give you enough time for negotiating?

MR. AXLINE: I'm afraid that doesn't give us enough

time to negotiate or, more importantly, to come up with what I hear your Honor saying would be useful which is a better description of how this narrows the case.

THE COURT: Yes.

Mr. Heartney?

MR. HEARTNEY: Your Honor, the timing is everything, of course, because we have this briefing coming up. To the extent that the amended complaint is intended to create a focus that is a critical part of their or substantive part of the briefing they're going to be filing on March 28th, it seems to me we need to know -- we need to have it resolved whether that new pleading will be accepted or not before we --

THE COURT: I can't possibly resolve it by March 28th. You can't possibly brief it by March 28th.

MR. HEARTNEY: I guess what I --

THE COURT: He says he can make his opposition regardless. The arguments are much the same.

MR. HEARTNEY: Okay. Then, your Honor, I suggest we stick with the current schedule, although I would like to note that if something unexpected comes up on March 28th, we may need to ask the Court for some adjustment.

THE COURT: That is always the case. But, back to the amended complaint. If you can't negotiate successfully, what do you propose as briefing schedule?

MR. AXLINE: Your Honor, I guess what makes the most

sense to me would be to say let's not set a briefing schedule now, let's do the briefing on the statute of limitations, see -- and maybe even await the Court's ruling on the statute of limitations. And then, since we are simply trying to amend to conform to the proof as we see it, all parties are going to have a better sense of the Court's view of the proof. And I don't think it is going to change the briefing at all because, at least in our minds, the complaint simply is consistent with the prior briefing.

THE COURT: Maybe that's right. When you get the ruling you will see what is left in the case and maybe that creates the amended complaint so to speak, it is what is left of the old complaint. It may come together that way. In the ruling certain things are ruled out because they're time-barred. Whatever is left, essentially, is the complaint. And it may come to the same thing you are proposing.

MR. AXLINE: I'm going to be candid with the Court -- as I think I have been since the beginning of this discussion. My thinking on this was that we have, over the course of the litigation, I think, become more precise in determining the nature of the District's injury and the District has been very forthcoming in describing the nature of the injury.

So, what I didn't want to happen was to, after all of that process have, where we have already conceded, for example, the stations in the coastal zone that don't affect drinking

water and are not in the case, that have that come back against us because even though we have narrowed it in the briefing, there is still the word "groundwater" in the complaint.

THE COURT: Right. But when you brief it you are not going to try to defend the statute of limitations with respect to such releases.

MR. AXLINE: That's correct. We are not.

THE COURT: All right. So that makes it easy for the Court.

All right. So, maybe it will sort itself out through the decision on the statute of limitations motion. That is the better way to go.

Okay. I don't have anything further unless you do. Thank you.

MR. RICCARDULLI: Thank you, your Honor.

MR. AXLINE: Thank you, your Honor.

MR. HEARTNEY: Thank you, your Honor.

THE COURT: Oh. One other thing my clerk asked me to ask. There was an order from the special master, pretrial order No. 40, and the question is objections, if any, would be due March 18th. Is anybody planing to file any objections on that order? It was issued February 27th, 2008.

MR. AXLINE: On the plaintiff's side we are not planning on objecting.

MR. CORRELL: If that's the order on the plaintiff's

motion to compel?

THE COURT: Yes.

MR. CORRELL: I don't think so.

MR. HEARTNEY: No.

THE COURT: Okay. Good. Thank you.

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