

## Fifth Circuit Rules That Rock Fines Released Into Stream Are Contaminants, Even Though Not Inherently Hazardous

01.31.20



(Article from *Insurance Law Alert*, January 2020)

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The Fifth Circuit ruled that coverage for damage caused by the release of small rock particles into a nearby water source was barred by a pollution exclusion because the particles acted as a contaminant once discharged into the water. *E. Concrete Materials, Inc. v. Ace Am. Ins. Co.*, 2020 WL 254822 (5th Cir. Jan. 17, 2020).

The underlying claims arose out of the dispersal of rock fines (small rock particles resulting from the stone-crushing process at the insured's quarry) into an adjacent reservoir. The rock fines were supposed to be contained in settling ponds, but due to a pumping accident, were carried into a waterway that led to a reservoir. According to government agencies, the rock fines damaged the stream bed and required remediation. The insurers denied coverage to the quarry based on a pollution exclusion.

A Texas federal district court enforced the exclusion, ruling that the rock fines were pollutants notwithstanding their "ordinary usefulness." Rejecting the quarry's assertion that rock fines are a nonhazardous material, the district court stated: "If they were indeed innocuous, the State of New Jersey would not have required remediation." See [July/August 2018 Alert](#).

The Fifth Circuit affirmed, ruling that the rock fines were "contaminants" because they were "discharged and dispersed where they did not belong." The court rejected the insured's contention that this interpretation was "dangerously overbroad because it allows anything (even water or bricks) to become contaminants if left in an inappropriate place." The court explained that the rock fines must be deemed contaminants based on their effects on the overall ecosystem, including harm to habitat, fish and other species.

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