

1 **UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF COLUMBIA**

3 BASEL ACTION NETWORK, a Sub-Project)
4 of the Tides Center; and SIERRA CLUB,)

5 Plaintiffs,)

6 v.)

7 MARITIME ADMINISTRATION; Capt.)
8 WILLIAM G. SCHUBERT, in his official)
9 capacity as Administrator; and U.S.)
10 ENVIRONMENTAL PROTECTION)
11 AGENCY; MIKE LEAVITT in his official)
12 capacity as Administrator,)

13 Defendants.)

Case No.: 03-02000 (RMC)
Honorable Rosemary M. Collyer
Courtroom 6

August 6, 2004, 9:30am

PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT

12 Plaintiffs Basel Action Network and Sierra Club hereby move for summary judgment
13 pursuant to FED. R. CIV. P. 56. As explained in the accompanying Memorandum of Points and
14 Authorities and the exhibits thereto, Plaintiffs contend that Defendant Maritime Administration
15 has violated the Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.* and its implementing
16 regulations, the Resource Conservation and Recovery Act, 42 U.S.C § 6901 *et seq.* and its
17 implementing regulations, and the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*
18 (“NEPA”), by exporting four defunct naval vessels and deciding to export nine more such
19 vessels to the United Kingdom for disposal and recovery.

20 Respectfully submitted this 1st day of June, 2004.

21
22
23 /s J. Martin Wagner

J. Martin Wagner (DCB #435730)

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24
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26
27
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the Tides Center; and the Sierra Club

1 **UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF COLUMBIA**

3 BASEL ACTION NETWORK, a Sub-Project)
4 of the Tides Center; and SIERRA CLUB,) Case No.: 03CV2000
5 Plaintiffs,) Honorable Rosemary M. Collyer
6 v.) Courtroom 6
7 MARITIME ADMINISTRATION; Capt.) August 6, 2004, 9:30am
8 WILLIAM G. SCHUBERT, in his official)
9 capacity as Administrator; and U.S.)
10 ENVIRONMENTAL PROTECTION) STATEMENT OF MATERIAL FACTS AS
11 AGENCY; MIKE LEAVITT in his official) TO WHICH PLAINTIFFS CONTEND
12 capacity as Administrator,) THERE IS NO GENUINE ISSUE
13 Defendants.) PURSUANT TO LCvR 7(h)
14)
15)
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13 **STATEMENT OF UNDISPUTED MATERIAL FACTS**

14 Pursuant to LCvR 7(h) and in support of Plaintiffs' motion for summary judgment, Plaintiffs
15 submit the following statement of material facts as to which Plaintiffs contend there is no
16 genuine issue:
17

- 18
- 19 1. MARAD is responsible for managing a fleet of decommissioned military vessels, the
20 National Defense Reserve Fleet (NDRF). *See, e.g.,* MARAD, Transfer of National
21 Defense Reserve Fleet Vessels from the James River Reserve Fleet for Disposal at Able
22 UK Facilities, Teesside, UK, Environmental Assessment – *FINAL* (May 14, 2004)
23 (“2004 EA”) at 1, Ex. 12; Report of the Interagency Panel on Ship Scrapping (April
24 1998) (“Interagency Report”) at 4, Ex. 14.
25
 - 26 2. The NDRF is divided into two components. The Ready Reserve Fleet is kept in a state of
27 readiness for emergencies. 2004 EA at 1; Interagency Report at 4, n.2. The non-
28 Retention Reserve Fleet consists of vessels designated for disposal. *See, e.g.,* MARAD,

1 James River Reserve Fleet Power Point Presentation (October 17, 2000) at slide 5, Ex.
2 15.

3
4 3. As of October 2000, there were 162 non-retention vessels in the NDRF. *Id.* at slide 6.
5 Approximately 70 of these non-retention vessels are moored in the James River Reserve
6 Fleet (JRRF), in Virginia. *See* 2004 EA at 2.

7
8 4. Among these vessels are the thirteen at issue in this lawsuit: American Banker,
9 American Ranger, Donner, Mormacmoon, Mormacwave, Protector, Rigel, Santa Cruz,
10 Santa Isabel, Caloosahatchee, Canisteo, Canopus, and Compass Island. *See* 2004 EA,
11 Table 2-1 at 11, Ex. 12; RAND, Disposal Options for Ships (2001) (“RAND Report”),
12 Appendix A at Table A.1, Ex. 16.

13
14 5. MARAD has characterized these vessels as having “reached the end of their useful life,”
15 2004 EA at 1, and the vessels have been retired and designated for scrapping at least
16 since November 2000. *See, e.g.*, RAND Report, Appendix A at Table A.1 (listing each
17 vessel as “retired” as of November 2000).

18
19 6. The vessels each contain large quantities of harmful PCBs, *see* Appendix A, presumed
20 under TSCA’s implementing regulations to be at concentrations of at least 50 ppm. *See*
21 40 C.F.R. § 761.97(a)(2) (“PCBs and PCB Items of unknown concentrations shall be
22 treated as if they contain \geq 50 ppm”).

23
24 7. MARAD has acknowledged that TSCA prohibits the export of such PCBs. *See* 2004 EA
25 at 37 (“PCBs in concentrations greater than 50 ppm are not to be exported.”); MARAD,
26 Environmental Assessment of the Sale of the National Defense Reserve Fleet for
27 Scrapping (July 1997) (“1997 EA”) at 8, Ex. 13 (“EPA’s TSCA regulations authorize the
28 import and export for disposal of PCBs only at concentrations less than 50 ppm.”);

1 Defendants' Opposition to Plaintiffs' Motion for Temporary Restraining Order, Sept. 30,
2 2003 at 6 ("MARAD TRO Brief") ("PCB waste [can] only be imported or exported for
3 disposal through an exemption regulation promulgated under TSCA section 6(e)(3).")
4

5 8. Each vessel also contains asbestos, mercury and waste oils. *See* Appendix A. The waste
6 oils contain "benzene and polynuclear aromatic hydrocarbons, and may contain lead,
7 cadmium, chromium, arsenic, and xylene." 1997 EA at 12.
8

9 9. Each vessel also contains unspecified quantities of arsenic, lead, freon, and ethylene
10 glycol; lead-based paints that may contain red lead tetroxide, tributyl tin, lead chromate,
11 chromic oxide; and discarded paints that may contain formaldehyde, toluene, methyl
12 ethyl ketone, trichloroethylene, and methylene chloride. *See* 1997 EA at 12; *see also*
13 RAND Report at 6. The vessels are also likely to contain halons. RAND Report at 6.
14

15 10. In July 2003, MARAD entered into a contract with Post Service Remediation Partners
16 (PRP) wherein, among other things, MARAD agreed to pay PRP to tow 13 NDRF
17 vessels from the James River to the Able UK facility in Teesside, United Kingdom,
18 where Able UK would dismantle the vessels, recycle the scrap metal, contaminated waste
19 oils, and other materials, and dispose of PCBs and other non-recyclable materials. *See*
20 *Contract Between DOT/Maritime Administration and Post-Svc Remediation Partners*
21 *(July 25, 2003)* at 6-7, Ex. 17 ("Able UK Contract."); *see also* OECD Transfrontier
22 *Movement of Waste – Notification Form (June 26, 2003)* ("OECD Waste Notification
23 *Form*"), Annex 1, Ex. 19 (waste oils destined for re-use); Able UK Tender Method
24 *Statement* at 4, ¶3.10.3 ("All non-ferrous material will be reclaimed and delivered to
25 various recycling facilities"), p.13, ¶7.2.4.1, p.14, ¶7.2.5.1 ("The majority of materials
26 received will be reused or recycled"), Ex. 21; EPA Letter to MARAD (May 22, 2003) at
27 4, ¶8(e) (liquid PCBs will be incinerated, solid materials containing PCBs will be
28 landfilled), Ex. 22; EPA, Site Visit – AbleUK, Teesside, North Yorkshire, England – Feb.

1 23-26, 2003 (February 24, 2003) (“EPA Able UK Notes”) at 2, Ex. 23 (PCBs destined
2 for incineration or disposal at landfill).

3
4 11. The contract provided that four vessels would be exported initially, with an additional
5 nine to follow when Able UK had satisfactorily completed its hazardous materials
6 remediation and dismantling processes on the first four vessels. Able UK Contract at
7 page 2; *accord* Modification of Contract Between DOT/Maritime Administration and
8 Post-Svc Remediation Partners (October 3, 2003) (“Modification of Contract”) at 2, Ex.
9 18.

10
11 12. In response to those planned vessels exports, Plaintiffs filed this action on September 26,
12 2003, together with a request for a temporary restraining order and preliminary
13 injunction, on the ground that the export of the vessels would violate several Federal
14 environmental laws.

15
16 13. On October 3, 2003, this Court issued a temporary restraining order with respect to nine
17 of the 13 vessels, and ordered MARAD to conduct a vessel-specific environmental
18 assessment on those nine vessels pursuant to NEPA. *See* Temporary Restraining Order,
19 Oct. 2, 2003 at 8.

20
21 14. On the same day, MARAD and PRP modified the Able UK Contract to specify that four
22 vessels would be exported in October 2003, and that the nine vessels subject to the
23 temporary restraining order would not be exported before July 2004. *See* Modification of
24 Contract at 7.

25
26 15. Shortly thereafter, MARAD exported the Caloosahatchee, Canisteo, Canopus, and
27 Compass Island to the Able UK facility in Teesside, United Kingdom, for dismantling,
28 recycling and disposal.

1
2 16. MARAD documented the export of these vessels on a form entitled “OECD Transfrontier
3 Movement of Waste – Notification Form,” and inventoried some of the on-board
4 hazardous wastes in Annex I of that form. *See* OECD Waste Notification Form, Ex. 19.

5
6 17. The OECD Waste Notification Form was acknowledged by the UK Environment Agency
7 (UKEA) on July 21, 2003, and expires on July 21, 2004. *Id.*, Ex. 20.

8
9 18. Subsequent to the export of the first four vessels, the parties filed a joint motion seeking
10 to continue the still pending motion for preliminary injunction to April 2004. *See* Joint
11 Motion for Continuance of Hearing on Preliminary Injunction, October 17, 2003. By that
12 joint motion, Defendants promised not to export any of the nine remaining vessels
13 without further order of the Court. *Id.* The Court granted that motion by minute order
14 the same day, scheduling a hearing for April 5, 2004. *See* Minute Order dated October
15 17, 2003.

16
17 19. By joint stipulation filed February 23, 2004, the parties proposed a briefing schedule, and
18 requested a hearing date from the Court for as soon as possible after July 23, 2004. *See*
19 Joint Stipulation and Proposed Order Regarding Briefing Schedule and Continuance of
20 Hearing, February 23, 2004. The Court approved that stipulation on March 1, 2004, and
21 scheduled a hearing on preliminary injunction for July 29, 2004. *See* Approved Joint
22 Stipulation, March 1, 2004. By minute order dated April 13, 2004, the hearing was
23 continued to August 6, 2004 at 9:30 a.m. The briefing schedule was modified by minute
24 order dated May 18, 2004.

25
26 20. In their motion for injunctive relief, Plaintiffs explained that there was considerable
27 uncertainty as to whether Able UK was properly licensed to carry out its obligations
28 under the Able UK Contract. *See* Memorandum in Support of Request for TRO,

1 September 26, 2003 at 10, Ins. 10-13; Declaration of Phil Michaels in Support of Request
2 for Injunctive Relief, filed October 1, 2003, Ex. 3; Second Declaration of Phil Michaels
3 in Support of Request for TRO, filed October 1, 2003, Ex. 4.
4

5 21. On October 3, 2003, the same day that MARAD entered into the Modification of
6 Contract to facilitate the export of the first four vessels, the UK Environment Agency
7 (UKEA) requested that MARAD delay the departure of the vessels until the UKEA could
8 settle the pending permit issues. *See* UK Department for Environment, Food and Rural
9 Affairs, US Naval Ships Review of Regulatory Structure (April 2004) (“DEFRA
10 Report”) at 7, ¶16, 27, ¶18, Ex. 24. MARAD did not alter its course of action in response
11 to this request.
12

13 22. As the first four vessels were en route to Able UK, the UKEA informed EPA that EPA
14 needed “to take immediate steps to secure the return to the USA of the ships presently on
15 route to the UK.” *See* UKEA Letter to EPA, November 4, 2003, Annex E to DEFRA
16 Report, Ex. 24; Chronology of US Naval Vessels, Annex A to DEFRA Report, Ex. 24.
17

18 23. In that letter, the UKEA explained that Able UK lacked several important permits,
19 including three related to the construction of the required dry dock, a commercial
20 agreement with the owners of the seabed in the port, and two modifications to Able UK’s
21 waste management license that would permit Able UK to receive and dispose of or
22 recover the PCBs and other hazardous waste on and in the ships. *See* UKEA Letter to
23 EPA, November 4, 2003, Annex E to DEFRA Report, Ex. 24; *see also* UK Environment
24 Agency, US Navy Ships Review – Lessons Learnt (May 5, 2004) at ¶2.3.2, 2.4.4, Ex. 25;
25 DEFRA Report at p.4, ¶1, pp. 5-6, ¶¶ 8, 9, p.16, ¶16, Ex. 24.
26

27 24. The UKEA letter further stated that under UK, European Community, and international
28 law, the vessels had to be returned to the United States until the permitting issues had

1 been resolved and a new import permit issued. *See* UKEA Letter to EPA, Annex E to
2 DEFRA Report, Ex. 24. Notwithstanding this letter, the first four vessels continued to
3 the Able UK facility. DEFRA Report at 27, ¶18; *see also* UKEA Learnt Lessons Review
4 at ¶¶1.2, 2.1.3, Ex. 25.

5
6 25. Able UK remains unlicensed to carry out its obligations under the Able UK Contract, and
7 the first four vessels are presently moored in UK waters pending resolution of this lawsuit
8 and further action by Able UK and the UK authorities. DEFRA Report at 19, ¶10; *see*
9 *also* *Gregan v. Hartlepool Borough Council*, 2003 EWHC 3278 (Eng. Admin), ¶¶89-92,
10 Ex. 26; 2004 EA, Table 2-2 at 13.

11
12 26. MARAD retains title to the first four vessels even once they arrive in the United
13 Kingdom. *See, e.g.*, Transcript of Hearing Before the Honorable Rosemary M. Collyer,
14 Oct. 1, 2003, 9:30 a.m. (“TRO Transcript”) at 47, Ins. 10-11, Ex. 27.

15
16 27. The United Kingdom has not consented to the import of any of the nine additional vessels
17 MARAD has decided to export. Nor has any of the transit nations – France, Belgium or
18 Ireland – consented to the passage of any of these nine vessels through their territorial
19 waters.

20
21 Respectfully submitted this 1st day of June, 2004.

22 /s J. Martin Wagner
23 J. Martin Wagner (DCB #435730)
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Case No.: 03CV2000
Honorable Rosemary M. Collyer
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MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT

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1 **GLOSSARY**

2 APA Administrative Procedure Act

3 Basel Convention Basel Convention on the Control of Transboundary Movements of

4 Hazardous Wastes and Their Disposal

5 DEFRA UK Department for Environment Food and Rural Affairs

6 EA Environmental assessment

7 EIS Environmental impact statement

8 EPA Environmental Protection Agency

9 JRRF James River Reserve Fleet

10 MARAD Maritime Administration

11 NDRF National Defense Reserve Fleet

12 NEPA National Environmental Policy Act

13 NMHA National Maritime Heritage Act

14 OECD Organization for Economic Cooperation and Development

15 PCB Polychlorinated biphenyls

16 ppm Parts per million

17 PRP Post Service Remediation Partners

18 RCRA Resource Conservation and Recovery Act

19 TSCA Toxic Substances Control Act

20 UKEA UK Environment Agency

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1 **INTRODUCTION**

2 Defendant US Maritime Administration (MARAD) has exported four, and has decided to
3 export nine more defunct naval vessels to a facility in the United Kingdom to be dismantled and
4 disposed of. The dilapidated vessels each contain significant quantities of toxic and hazardous
5 wastes, including polychlorinated biphenyls (PCBs) and waste oils contaminated with arsenic,
6 mercury, and lead. According to MARAD’s plan, the majority of these wastes, including the
7 contaminated waste oils and the vessel bodies themselves, would be recycled or reused, while
8 PCBs and other non-reusable materials would be disposed of by incineration or landfill.
9 Plaintiffs presently seek summary judgment pursuant to two Federal environmental laws that
10 regulate the movement of hazardous and toxic waste from the United States to other nations to
11 protect public health and the environment, and one Federal environmental law that requires
12 MARAD to thoroughly assess the environmental impacts of its decision to export the vessels.

13 The Toxic Substances Control Act (TSCA) prohibits the export for disposal of PCBs in
14 concentrations of 50 parts per million (ppm) or more. Each of the vessels MARAD has decided
15 to export contains PCBs, which, by the terms of TSCA’s implementing regulations, are
16 presumed to be at or above this concentration. PCBs are toxic and are suspected to cause liver
17 cancer, other severe liver problems, birth defects, miscarriages, numbness and pain in the
18 extremities, severe skin disorders, and temporary eyesight problems. PCBs are also persistent
19 and bioaccumulative, meaning that they are extremely long-lived in the environment, and tend to
20 concentrate in the tissue of humans and animals.

21 The Resource Conservation and Recovery Act (RCRA) prohibits the movement of
22 hazardous wastes from the United States to or through the territory of other members of the
23 Organization for Economic Cooperation and Development (OECD) unless the waste exporter
24 ensures that each affected OECD member consents to the proposed movement and the facility
25 that will receive the waste is properly licensed under the laws of the receiving nation. Although
26 each of the vessels MARAD plans to export contains RCRA-regulated hazardous wastes, neither
27 the United Kingdom, France, Belgium nor Ireland has issued the requisite consents; nor is the
28 proposed receiving facility, Able UK, properly licensed by the UK authorities. RCRA also

1 requires that MARAD comply with certain manifesting requirements in connection with the
2 transportation of hazardous waste for offsite treatment, which MARAD has failed to do.

3 The National Environmental Policy Act (NEPA) requires all Federal agencies to take a
4 “hard look” at the potentially significant environmental impacts of their actions. In response to
5 this Court’s order in this case, MARAD has prepared an environmental assessment (EA) of its
6 vessel export plan. MARAD has not complied, however, with the Court’s instruction to assess
7 vessels specifically, and has failed to adequately assess all reasonable alternatives to the export
8 of the vessels.

9 For these reasons, MARAD’s export of these vessels violates US law. Plaintiffs
10 respectfully request that the Court grant this motion for summary judgment, permanently enjoin
11 the export of the nine vessels that have not yet been exported, and grant the other relief herein
12 requested.

13 **UNDISPUTED MATERIAL FACTS**

14 MARAD is responsible for managing a fleet of decommissioned military vessels, the
15 National Defense Reserve Fleet (NDRF). *See, e.g.*, MARAD, Transfer of National Defense
16 Reserve Fleet Vessels from the James River Reserve Fleet for Disposal at Able UK Facilities,
17 Teesside, UK, Environmental Assessment – *FINAL* (May 14, 2004) (“2004 EA”) at 1, Ex. 2;
18 Report of the Interagency Panel on Ship Scrapping (April 1998) (“Interagency Report”) at 4
19 (filed September 26, 2003, with Plaintiffs’ motion for temporary restraining order¹). The NDRF
20 is divided into two components. The Ready Reserve Fleet is kept in a state of readiness for
21 emergencies. 2004 EA at 1; Interagency Report at 4, n.2. The non-Retention Reserve Fleet
22 consists of vessels designated for disposal. *See, e.g.*, MARAD, James River Reserve Fleet
23 Power Point Presentation (October 17, 2000) at slide 5 (filed September 26, 2003, with
24 Plaintiffs’ motion for temporary restraining order). As of October 2000, there were 162 non-

25
26
27 ¹ Plaintiffs have not filed with this memorandum several documents filed on September 26 and
28 October 2, 2003, with their motion for temporary restraining order. Plaintiffs will include those
documents in courtesy copies of this memorandum and associated exhibits to be provided to the
Court and counsel for Defendants.

1 retention vessels in the NDRF. *Id.* at slide 6. Approximately 70 of these non-retention vessels
2 are moored in the James River Reserve Fleet (JRRF), in Virginia. *See* 2004 EA at 2. Among
3 these vessels are the thirteen at issue in this lawsuit: American Banker, American Ranger,
4 Donner, Mormacmoon, Mormacwave, Protector, Rigel, Santa Cruz, Santa Isabel,
5 Caloosahatchee, Canisteo, Canopus, and Compass Island. *See* 2004 EA, Table 2-1 at 11, Ex. 2;
6 RAND, Disposal Options for Ships (2001) (“RAND Report”), Appendix A at Table A.1 (filed
7 September 26, 2003, with Plaintiffs’ motion for temporary restraining order). MARAD has
8 characterized these vessels as having “reached the end of their useful life,” 2004 EA at 1, and the
9 vessels have been retired and designated for scrapping at least since November 2000. *See, e.g.,*
10 RAND Report, Appendix A at Table A.1 (listing each vessel as “retired” as of November 2000).

11 The vessels each contain large quantities of harmful PCBs, *see* Appendix A, presumed
12 under TSCA’s implementing regulations to be at concentrations of at least 50 ppm. *See* 40
13 C.F.R. § 761.97(a)(2) (“PCBs and PCB Items of unknown concentrations shall be treated as if
14 they contain \geq 50 ppm”). MARAD has acknowledged that TSCA prohibits the export of such
15 PCBs. *See* 2004 EA at 37 (“PCBs in concentrations greater than 50 ppm are not to be
16 exported.”); MARAD, Environmental Assessment of the Sale of the National Defense Reserve
17 Fleet for Scrapping (July 1997) (“1997 EA”) at 8, Ex. 3 (“EPA’s TSCA regulations authorize the
18 import and export for disposal of PCBs only at concentrations less than 50 ppm.”); Defendants’
19 Opposition to Plaintiffs’ Motion for Temporary Restraining Order, Sept. 30, 2003 at 6
20 (“MARAD TRO Brief”) (“PCB waste [can] only be imported or exported for disposal through an
21 exemption regulation promulgated under TSCA section 6(e)(3).”).

22 Each vessel also contains asbestos, mercury and waste oils. *See* Appendix A. The waste
23 oils contain “benzene and polynuclear aromatic hydrocarbons, and may contain lead, cadmium,
24 chromium, arsenic, and xylene.” 1997 EA at 12. Each vessel also contains unspecified
25 quantities of arsenic, lead, freon, and ethylene glycol; lead-based paints that may contain red lead
26 tetroxide, tributyl tin, lead chromate, chromic oxide; and discarded paints that may contain
27 formaldehyde, toluene, methyl ethyl ketone, trichloroethylene, and methylene chloride. *See*
28

1 1997 EA at 12; *see also* RAND Report at 6. The vessels are also likely to contain halons.
2 RAND Report at 6.

3 Procedural History and Status of Vessels

4 In July 2003, MARAD entered into a contract with Post Service Remediation Partners
5 (PRP) wherein, among other things, MARAD agreed to pay PRP to tow 13 NDRF vessels from
6 the James River to the Able UK facility in Teesside, United Kingdom, where Able UK would
7 dismantle the vessels, recycle the scrap metal, contaminated waste oils, and other materials, and
8 dispose of PCBs and other non-recyclable materials. *See* Contract Between DOT/Maritime
9 Administration and Post-Svc Remediation Partners (July 25, 2003) at 6-7, Ex. 4 (It is Plaintiffs’
10 understanding that PRP’s interest in this contract was transferred to Able UK subsequent to its
11 execution. For this reason, and for convenience, this contract is referred to herein as the “Able
12 UK Contract.”); *see also* OECD Transfrontier Movement of Waste – Notification Form (June 26,
13 2003) (“OECD Waste Notification Form”), Annex 1, Ex. 6 (waste oils destined for re-use); Able
14 UK Tender Method Statement at 4, ¶3.10.3 (“All non-ferrous material will be reclaimed and
15 delivered to various recycling facilities”), p.13, ¶7.2.4.1, p.14, ¶7.2.5.1 (“The majority of
16 materials received will be reused or recycled”), Ex. 8; EPA Letter to MARAD (May 22, 2003) at
17 4, ¶8(e) (liquid PCBs will be incinerated, solid materials containing PCBs will be landfilled)
18 (filed September 26, 2003, with Plaintiffs’ motion for temporary restraining order); EPA, Site
19 Visit – AbleUK, Teesside, North Yorkshire, England – Feb. 23-26, 2003 (February 24, 2003)
20 (“EPA Able UK Notes”) at 2, Ex. 10 (PCBs destined for incineration or disposal at landfill).
21 The contract provided that four vessels would be exported initially, with an additional nine to
22 follow when Able UK had satisfactorily completed its hazardous materials remediation and
23 dismantling processes on the first four vessels. Able UK Contract at page 2; *accord*
24 Modification of Contract Between DOT/Maritime Administration and Post-Svc Remediation
25 Partners (October 3, 2003) (“Modification of Contract”) at 2, Ex. 5.

26 In response to those planned vessels exports, Plaintiffs filed this action on September 26,
27 2003, together with a request for a temporary restraining order and preliminary injunction, on the
28 ground that the export of the vessels would violate several Federal environmental laws. On

1 October 3, 2003, this Court issued a temporary restraining order with respect to nine of the 13
2 vessels, and ordered MARAD to conduct a vessel-specific environmental assessment on those
3 nine vessels pursuant to NEPA. *See* Temporary Restraining Order, Oct. 2, 2003 at 8. On the
4 same day, MARAD and PRP modified the Able UK Contract to specify that four vessels would
5 be exported in October 2003, and that the nine vessels subject to the temporary restraining order
6 would not be exported before July 2004. *See* Modification of Contract at 7.

7 Shortly thereafter, MARAD exported four vessels² to the Able UK facility in Teesside,
8 United Kingdom, for dismantling, recycling and disposal. MARAD documented the export of
9 these vessels on a form entitled “OECD Transfrontier Movement of Waste – Notification Form,”
10 and inventoried some of the on-board hazardous wastes in Annex I of that form. *See* OECD
11 Waste Notification Form, Ex. 6. The OECD Waste Notification Form was acknowledged by the
12 UK Environment Agency (UKEA) on July 21, 2003, and expires on July 21, 2004. *Id.*, Ex. 7.

13 Subsequent to the export of the first four vessels, the parties filed a joint motion seeking
14 to continue the still pending motion for preliminary injunction to April 2004. *See* Joint Motion
15 for Continuance of Hearing on Preliminary Injunction, October 17, 2003. By that joint motion,
16 Defendants promised not to export any of the nine remaining vessels without further order of the
17 Court. *Id.* The Court granted that motion by minute order the same day, scheduling a hearing
18 for April 5, 2004. *See* Minute Order dated October 17, 2003.

19 By joint stipulation filed February 23, 2004, the parties proposed a briefing schedule, and
20 requested a hearing date from the Court for as soon as possible after July 23, 2004. *See* Joint
21 Stipulation and Proposed Order Regarding Briefing Schedule and Continuance of Hearing,
22 February 23, 2004. The Court approved that stipulation on March 1, 2004, and scheduled a
23 hearing on preliminary injunction for July 29, 2004. *See* Approved Joint Stipulation, March 1,
24 2004. By minute order dated April 13, 2004, the hearing was continued to August 6, 2004 at
25 9:30 a.m. The briefing schedule was modified by minute order dated May 18, 2004.

26
27
28

² These were the Caloosahatchee, Canisteo, Canopus, and Compass Island.

1 Permit Status

2 In their motion for injunctive relief, Plaintiffs explained that there was considerable
3 uncertainty as to whether Able UK was properly licensed to carry out its obligations under the
4 Able UK Contract. *See* Memorandum in Support of Request for TRO, September 26, 2003 at
5 10, Ins. 10-13; Declaration of Phil Michaels in Support of Request for Injunctive Relief, filed
6 October 2, 2003 (filed October 2, 2003, with Plaintiffs’ motion for temporary restraining order);
7 Second Declaration of Phil Michaels, filed October 2, 2003 (filed October 2, 2003, with
8 Plaintiffs’ motion for temporary restraining order). On October 3, 2003, the same day that
9 MARAD entered into the Modification of Contract to facilitate the export of the first four
10 vessels, the UK Environment Agency (UKEA) requested that MARAD delay the departure of
11 the vessels until the UKEA could settle the pending permit issues. *See* UK Department for
12 Environment, Food and Rural Affairs, US Naval Ships Review of Regulatory Structure (April
13 2004) (“DEFRA Report”) at 7, ¶16, 27, ¶18, Ex. 11. MARAD did not alter its course of action
14 in response to this request.

15 As the first four vessels were en route to Able UK, the UKEA informed EPA that EPA
16 needed “to take immediate steps to secure the return to the USA of the ships presently on route to
17 the UK.” *See* UKEA Letter to EPA, November 4, 2003, Annex E to DEFRA Report, Ex. 11;
18 Chronology of US Naval Vessels, Annex A to DEFRA Report, Ex. 11. In that letter, the UKEA
19 explained that Able UK lacked several important permits, including three related to the
20 construction of the required dry dock, a commercial agreement with the owners of the seabed in
21 the port, and two modifications to Able UK’s waste management license that would permit Able
22 UK to receive and dispose of or recover the PCBs and other hazardous waste on and in the ships.
23 *See* UKEA Letter to EPA, November 4, 2003, Annex E to DEFRA Report, Ex. 11; *see also* UK
24 Environment Agency, US Navy Ships Review – Lessons Learnt (May 5, 2004) at ¶2.3.2, 2.4.4,
25 Ex. 12; DEFRA Report at p.4, ¶1, pp. 5-6, ¶¶ 8, 9, p.16, ¶16, Ex. 11.

26 The UKEA letter further stated that under UK, European Community, and international
27 law, the vessels had to be returned to the United States until the permitting issues had been
28 resolved and a new import permit issued. *See* UKEA Letter to EPA, Annex E to DEFRA Report,

1 Ex. 11. Notwithstanding this letter, the first four vessels continued to the Able UK facility.
2 DEFRA Report at 27, ¶18; *see also* UKEA Learnt Lessons Review at ¶¶1.2, 2.1.3, Ex. 12. Able
3 UK remains unlicensed to carry out its obligations under the Able UK Contract, and the first four
4 vessels are presently moored in UK waters pending resolution of this lawsuit and further action
5 by Able UK and the UK authorities. DEFRA Report at 19, ¶10; *see also* *Gregan v. Hartlepool*
6 *Borough Council*, 2003 EWHC 3278 (Eng. Admin), ¶¶89-92, Ex. 13; 2004 EA, Table 2-2 at 13.
7 MARAD retains title to the first four vessels even once they arrive in the United Kingdom. *See,*
8 *e.g.*, Transcript of Hearing Before the Honorable Rosemary M. Collyer, Oct. 1, 2003, 9:30 a.m.
9 (“TRO Transcript”) at 47, lns. 10-11, Ex. 14.

10 The United Kingdom has not consented to the import of any of the nine additional vessels
11 MARAD has decided to export. Nor has any of the transit nations – France, Belgium or Ireland
12 – consented to the passage of any of these nine vessels through their territorial waters.

13 ARGUMENT

14 I. This Court Has Jurisdiction to Review Plaintiffs’ Claims

15 This Court has subject matter jurisdiction under 28 U.S.C. § 1331, because this action
16 arises under the laws of the United States. Plaintiffs assert claims against MARAD under TSCA,
17 RCRA, and NEPA. TSCA and RCRA each independently provides for judicial review. *See* 15
18 U.S.C. § 2619; 42 U.S.C. § 6972. NEPA does not independently provide for judicial review.
19 However, Congress provided for review of agency action under the Administrative Procedure
20 Act (APA). 5 U.S.C. §§ 702, 706. MARAD’s past export of four NDRF vessels, and decision to
21 export an additional nine, constitute final agency actions subject to judicial review under the
22 APA. 5 U.S.C. §§ 702, 704; *see, e.g., Bennett v. Spear*, 520 U.S. 154, 177 (1997).

23 Plaintiffs have satisfied the notice requirements of TSCA and RCRA. A citizen suit
24 cannot be filed pursuant to TSCA before the expiration of 60 days after the plaintiff has given
25 notice of such violation to the EPA Administrator and to the person alleged to have violated
26 TSCA. 15 U.S.C. § 2619(b)(1)(A). Plaintiffs gave notice of the TSCA violations alleged herein
27 to the EPA Administrator and to the MARAD Administrator by letter dated September 8, 2003.
28

1 See TSCA Notice of Intent Letter, Ex. 15. Although Plaintiffs' original complaint included
2 claims under the APA involving TSCA violations, suit was not commenced under TSCA's
3 citizen suit provision until November 26, 2003, when Plaintiffs filed their First Amended
4 Complaint. Plaintiffs realleged these claims in their Second Amended Complaint, filed March
5 23, 2004. See *Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989) (suit may not be
6 commenced under citizen suit provision until expiry of statutory notice period); see also
7 *Chicago Ass'n of Commerce and Indus. v. EPA*, 873 F.2d 1025, 1031 (7th Cir. 1989) (timely
8 filing of amended complaint satisfies notice period requirement).

9 A citizen suit under Subchapter III of RCRA, which includes the section of that statute at
10 issue in this case (42 U.S.C. § 6938), may be filed immediately after a plaintiff has given notice
11 of the violation to the EPA Administrator, the State in which the alleged violation occurs, and the
12 person alleged to be violating RCRA. Plaintiffs gave notice to each of those parties of the
13 RCRA violations alleged herein by letters dated December 1, 2003. See RCRA Notice of Intent
14 Letters, Ex. 16. Plaintiffs first asserted claims under RCRA's citizen suit provision, 42 U.S.C. §
15 6972, in their Second Amended Complaint, filed March 23, 2004, well after giving the requisite
16 notice.

17 Further, Plaintiffs have established constitutional and prudential standing, because
18 MARAD's actions to export vessels laden with toxic substances will cause them and their
19 members cognizable injuries under TSCA and RCRA that are also within the zones of interest of
20 NEPA. See, e.g., Declaration of Linda King, Ex. 1; Declarations of Michael Town, Barbara
21 Crosbie, Neil Gregan, Ben Marley, Neil Marley, and Iris Ryder (all filed on October 2, 2003,
22 with Plaintiffs' motion for temporary restraining order); see also *Friends of the Earth v. Laidlaw*,
23 528 U.S. 167, 180-181 (2000). For example, a release of toxic or hazardous waste from one of
24 the vessels at issue in this case into the James River, Chesapeake Bay, or open waters would
25 diminish one Sierra Club member's enjoyment of boating, swimming and fishing in these areas,
26 and make him concerned for the health of his family. See Declaration of Michael Town, ¶6. The
27 same is true of a member of one of BAN's member organizations. See Declaration of Linda
28 King, ¶6. The BAN members living near the proposed disposal facility share similar concerns

1 about their ability to continue to enjoy the natural areas near where they live and to be free from
2 worry about increased toxics load in their immediate and global environment. *See, e.g.*,
3 Declaration of Barbara Crosbie, ¶¶ 4, 10; Declaration of Ben Marley ¶¶ 2, 5, 9.

4 In addition, the Sierra Club has representational standing as a nonprofit membership
5 organization consisting of over 700,000 concerned individuals working to protect the global
6 environment, including members living in and around the James River and greater Chesapeake
7 Bay area. *See* Declaration of Michael Town, ¶¶ 1, 3; *see Hunt v. Washington State Apple*
8 *Advertising Comm'n*, 432 U.S. 333, 343 (1977). BAN also has representational standing because
9 it works on behalf of its worldwide membership to prevent environmental injustice and harm
10 perpetuated by trade in toxic wastes, toxic technologies and toxic products. *See* Declaration of
11 Jim Puckett, ¶1 (filed October 2, 2003, with Plaintiffs' motion for temporary restraining order);
12 *see Hunt*, 432 U.S. at 343 (1977).

13 Further, this Court has authority to redress Plaintiffs' injuries because it is authorized to
14 restrain violations of RCRA, 42 U.S.C. § 6972(a), compel Defendants to comply with TSCA, 15
15 U.S.C. §§ 2616(a), 2619(a)(2), and set aside agency action illegally issued under NEPA. 5
16 U.S.C. § 706(2)(A).

17 18 **II. Standard of Review**

19 Summary judgment must be granted where "there is no genuine issue as to any material
20 fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. PRO.
21 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-27 (1986).

22 23 **III. MARAD's Export of PCB-Laden NDRF Vessels Violates the Federal Prohibition on** 24 **the Export of PCBs**

25 **A. The Risks Posed By PCBs to Health and the Environment Have Long Been** 26 **Acknowledged by Congress, the U.S. Court of Appeals for the D.C. Circuit, and** 27 **EPA**

28 As discussed above, each of the thirteen vessels at issue in this lawsuit contains
significant quantities of PCBs presumed to be in concentrations of at least 50 ppm. *See*

1 Appendix A. Congress, the D.C. Circuit, and EPA have each acknowledged the health and
2 environmental risks associated with PCBs. Congress expressed its concern that PCBs were
3 causing liver cancer, other severe liver problems, birth defects, miscarriages, numbness and pain
4 in the extremities, severe skin disorders, and temporary eyesight problems.³ Congress viewed
5 these effects as especially dangerous because PCBs are extremely long-lived in the environment
6 and tend to concentrate in the tissue of humans and animals, and because elevated concentrations
7 of PCBs had been detected in human breast milk, and in fish, cattle and fowl.⁴

8 The D.C. Circuit has similarly acknowledged that “[t]he special attention accorded to
9 PCBs in [TSCA] resulted from the recognized seriousness of the threat that PCBs pose to the
10 environment and human health.” *EDF v. EPA*, 636 F.2d 1267, 1271-72 (D.C. Cir. 1980). EPA
11 has also determined that PCBs are “toxic and persistent,” may be “oncogenic” (tumor-causing),
12 and “may cause reproductive effects and developmental toxicity in humans.” 63 Fed. Reg.
13 35384, 35385 (June 29, 1998). According to EPA, certain PCBs

14 are among the most stable chemicals known, which decompose very slowly once
15 they are released in the environment. PCBs are absorbed and stored in the fatty
16 tissue of higher organisms as they bioaccumulate up the food chain through
17 invertebrates, fish, and mammals. This ultimately results in human exposure
through consumption of PCB-containing food sources. PCBs also have
reproductive and other toxic effects in aquatic organisms, birds, and mammals.

18 *Id.*

20 ³ See H.R. Rep. No. 1341, 94th Cong., 2d Sess. 1, 133-34 (1976) (“House Report”), *reprinted in*
21 *Legislative History of the Toxic Substances Control Act 508-09 (1976)* (“TSCA Legislative
22 History”); 122 Cong. Rec. 27184-85 (Aug. 23, 1976 (statement of Rep. Dingell), *reprinted in*
23 *TSCA Legislative History* at 580-82; *id.* at 27,188 (statement of Rep. Murphy), *reprinted in*
TSCA Legislative History at 589-90; *id.* at 8291-94 (Mar. 26, 1976) (statement of Sen. Nelson),
24 *reprinted in TSCA Legislative History* at 233-40.

25 ⁴ See House Report at 133-34, *reprinted in TSCA Legislative History* at 508-09; 122 Cong. Rec.
26 27,184-85 (Aug. 23, 1976) (statement of Rep. Dingell), *reprinted in TSCA Legislative History* at
27 580-82; *id.* at 27,188 (statement of Rep. Murphy), *reprinted in TSCA Legislative History* at 589-
28 90; *id.* at 8283 (Mar. 26, 1976) (statement of Sen. Magnuson), *reprinted in TSCA Legislative*
History at 212; *id.* at 8291-94 (statement of Sen. Nelson), *reprinted in TSCA Legislative History*
at 233-40. See also Council on Environmental Quality, Toxic Substances 13-14 (1971),
reprinted in TSCA Legislative History at 757, 776-77. See generally 122 Cong. Rec. 27184-85,
27187-89 (House Debate) (dangers of PCBs).

1 **B. TSCA Prohibits the Export of PCBs for Disposal**

2 In 1976, Congress enacted TSCA, 15 U.S.C. § 2601, *et seq.*, in response to the dangers
3 associated with the use of PCBs and other toxic chemicals. *EDF*, 636 F.2d at 1271-72.

4 Congress intended to prevent risks of harm to health or the environment by regulating the
5 manufacture, processing, use and disposal of the multitude of hazardous chemicals manufactured
6 and used nationwide. S. Rep. No. 698, 94th Cong., 2d Sess. 1 (“Senate Report”), *reprinted in*
7 *TSCA Legislative History* at 157; House Report No. 1341, *reprinted in TSCA Legislative*
8 *History* at 409, Ex. 17.

9 Section 6(e)(1) of TSCA directs the EPA Administrator to promulgate regulations to
10 “prescribe methods for the disposal of [PCBs].” 15 U.S.C. § 2605(e)(1). EPA has promulgated
11 such regulations, 40 C.F.R. § 761 *et seq.*, which explicitly prohibit the export for disposal of
12 PCBs in concentrations of 50 ppm or greater:

13 **Export for Disposal**

14 (a) General Provisions. No person may export PCBs or PCB Items for disposal
without an exemption, except that:

15 (1) PCBs and PCB Items at concentrations <50 ppm (or <10 µg PCB / 100 cm² if
no free-flowing liquids are present) may be exported for disposal;

16 (2) For purposes of this section, PCBs and PCB Items of unknown concentrations
shall be treated as if they contain ≥50 ppm.

17 40 C.F.R. § 761.97; *see also* EPA Letter to MARAD (May 22, 2003) at 3, ¶7 (filed September
18 26, 2003, with Plaintiffs’ motion for temporary restraining order). According to EPA, the
19 “export of PCBs to other countries needs to be limited so as not to pose a risk of injury to health
20 or the environment in those countries and that to the maximum extent practicable, each nation
21 should manage its own waste within its own borders.”⁵ 59 Fed. Reg. 62788, 62817 (Dec. 6,
22 1994).

23 _____
24
25 ⁵ TSCA’s prohibition on the export of PCBs is consistent with the United States’ international
26 obligations to prohibit the export of PCBs. *See* Stockholm Convention on Persistent Organic
27 Pollutants (“POPs Convention”), art. 3(1)(a)(ii); Annex A, Pt. II, entered into force May 17,
2004, *available at* http://www.pops.int/documents/convtext/convtext_en.pdf (last visited May
28 27, 2004) (requiring each party to prohibit or eliminate its export of chemicals including PCBs).
Although the United States has not yet ratified the POPs Convention, its May 23, 2001 signature
creates an international legal obligation to avoid undermining the object and purpose of the
Convention. *See* Vienna Convention on the Law of Treaties, art. 18, 1155 U.N.T.S. 331,

1 The prohibition on the export of PCBs for disposal has been applied to permanently
2 enjoin the export of a PCB-laden former military vessel for disposal. In *USS Cabot/Dedalo*
3 *Museum Foundation v. U.S. Customs Service*, EPA, the US Customs Service, and the US
4 Department of Treasury sought injunctive relief to prevent the export of a defunct military vessel
5 for disposal until PCBs at concentrations greater of 50 ppm or greater had been properly
6 removed. 1995 U.S. Dist. LEXIS 4068 at *1 (E.D. La. March 30, 1995); *see also* United States'
7 Memorandum in Opposition to the USS Cabot/Dedalo Museum Foundation's Application for
8 Preliminary Injunction, November 14, 1994, Ex. 27. The court agreed with the government and
9 recognized that TSCA explicitly prohibits the export for disposal of PCBs in concentrations of
10 50 ppm or greater. *USS Cabot/Dedalo*, 1995 U.S. Dist. LEXIS 4068 at *8. Because the vessel
11 contained PCBs at prohibited concentrations, *id.*, the court held that the proposed export would
12 thwart the legislative purpose of TSCA, and granted the government's motion for a permanent
13 injunction on the proposed export. *Id.* at 14.

14 Similarly, following receipt of a notice of intent to sue to enforce the TSCA PCB export
15 prohibition, EPA has recently stated that "[u]nder 40 CFR 761.97, the export of PCBs at 50 parts
16 per million (ppm) is prohibited." *See* EPA, PCB Inspection and Sampling Report (April 2004)
17 at 3, Ex. 18. MARAD has also acknowledged that TSCA prohibits the export of such PCBs. *See*
18 MARAD TRO Brief at 6 ("PCB waste [can] only be imported or exported for disposal through
19 an exemption regulation promulgated under TSCA section 6(e)(3)."); 2004 EA at 37, Ex. 2
20 ("PCBs in concentrations greater than 50 ppm are not to be exported, except under certain
21 conditions and/or regulatory discretions or rule makings by U.S. EPA."); 1997 EA at 8, Ex. 3
22 ("EPA's TSCA regulations authorize the import and export for disposal of PCBs only at
23 concentrations less than 50 ppm.").

24
25 *reprinted in* 8 I.L.M. 679 (1969) ("A State is obliged to refrain from acts which would defeat the
26 object and purpose of a treaty when ... it has signed the treaty ... subject to ratification ... until it
27 shall have made its intention clear not to become a party to the treaty."). As of June 1, 2004, the
28 United States has not ratified the Vienna Convention, but has recognized that the Convention
represents controlling international law. *See, e.g., Coplin v. United States*, 6 Cl. Ct. 115, 122 n.5
(July 30, 1984)).

1 **C. MARAD is Planning to Export, and Has Already Exported, PCBs for Disposal**
2 **in Violation of TSCA**

3 As discussed above, MARAD has already exported four PCB-laden NDRF vessels for
4 disposal and recovery in the United Kingdom, and has decided to export nine more this summer.
5 *See* Joint Motion for Continuance, filed October 17, 2003; 2004 EA, Table 2-1 at 11. There is no
6 dispute that each vessel contains PCBs in concentrations of 50 ppm or greater, *see* Appendix A,
7 or that MARAD is exporting those PCBs for disposal. *See* EPA Letter to MARAD (May 22,
8 2003) at 4, ¶8(e) (filed September 26, 2003, with Plaintiffs’ motion for temporary restraining
9 order) (PCBs destined for incineration or disposal at landfill); EPA Able UK Notes at 2, Ex. 10.
10 This Court should therefore permanently enjoin MARAD’s export of these vessels. *See* 15
11 U.S.C. § 2619(a)(1); *see also* *USS Cabot/Dedalo*, 1995 U.S. Dist. LEXIS 4068 at *2.

12
13 **IV. MARAD’s Export of Hazardous Waste-Laden NDRF Vessels Violates RCRA’s**
14 **Controls on Hazardous Waste Exports**

15 Each vessel MARAD proposes to export contains various wastes that are considered
16 hazardous under RCRA, are subject to RCRA’s export controls when they are exported for
17 recovery or disposal, and are subject to RCRA’s Federal manifesting requirements. An exporter
18 of hazardous wastes for recovery must ensure, prior to export, that the importing and transit
19 nations have consented to the proposed export, and that the proposed receiving facility is
20 properly permitted. MARAD has failed to obtain the consent of the United Kingdom, France,
21 Belgium and Ireland, and has failed to ensure that the proposed receiving facility, Able UK, is
22 duly licensed under UK law. MARAD’s proposed vessel export therefore violates RCRA and
23 must be permanently enjoined.

24 **A. Prior to Any Export of Hazardous Waste for Recovery, RCRA Requires that All**
25 **Receiving and Transit Nations Consent, and that Facility Permits Be In Place**

26 Congress passed the Solid Waste Disposal Act, as amended by the Resource
27 Conservation and Recovery Act (RCRA) and the Hazardous and Solid Waste Amendments, 42
28 U.S.C. § 6901 *et seq.*, to ensure, among other things, that hazardous waste is “treated, stored, or

1 disposed of so as to minimize the present and future threat to human health and the
2 environment.” 42 U.S.C. § 6902(b). RCRA achieves its goals by creating a “cradle to grave”
3 system for documenting the manufacture, use and disposal of hazardous and other wastes. *See*,
4 *e.g.*, *American Chemistry Council v. E.P.A.*, 337 F.3d 1060, 1062 (D.C. Cir. 2003).

5 RCRA requires EPA to promulgate regulations governing the export of hazardous waste.
6 *See* 42 U.S.C. § 6938(b). Pursuant to that mandate, and further to the United States’
7 international obligations as a member of the Organization for Economic Cooperation and
8 Development (OECD), in 1996 EPA promulgated regulations governing the import and export of
9 hazardous waste for recovery operations within the OECD.⁶ *See* 61 Fed. Reg. 16290 (April 12,
10 1996) (*codified at* 40 C.F.R. §§ 262.80-89 (“Subpart H”)). These Subpart H regulations
11 implement the Decision of the Council concerning the Control of Transfrontier Movements of
12 Wastes destined for Recovery Operations, OECD Doc. C(92)39/FINAL (April 6, 1992) (“OECD
13 Decision”), Ex. 19, as amended by Decision of the Council amending Decision C(92)39/FINAL
14 concerning the Control of Transfrontier Movements of Wastes destined for Recovery Operations,
15 OECD Doc. C(93)74/FINAL (August 5, 1993), Ex. 20, and Decision of the Council amending
16 the Decision concerning the Control of Transfrontier Movements of Wastes destined for
17 Recovery Operations [C(92)39/FINAL] with respect to the Green List of Wastes, OECD Doc.
18 C(94)153/FINAL (September 21, 1994), Ex. 21; *see also* 61 Fed. Reg. at 16291, and incorporate
19 by reference the OECD waste lists set forth therein. *See* 40 C.F.R. § 262.89(e). Like the OECD
20 Decision, the regulations establish a graduated system of procedural and substantive controls that
21 apply when such wastes move across the borders of OECD member nations and are destined for
22 recovery. The level of control is determined by which of three lists – denominated the “green,”
23 “amber” and “red” lists and set forth in appendices to the OECD Decision – includes the
24 particular waste. *See* 40 C.F.R. §§ 262.82; *see also* 61 Fed. Reg. at 16294.

25 If it meets certain other requirements described below, OECD green-, amber- or red-list
26 waste exported for recovery operations must be destined for a facility that, under applicable

27
28 ⁶ Recovery operations are “activities leading to resource recovery, recycling, reclamation, direct re-use” or certain alternative uses. 40 C.F.R. § 262.81(k).

1 domestic law, is operating or is authorized to operate in the importing country. 40 C.F.R.
2 §262.82(b)(1); 262.81(j). In addition, amber- or red-list waste may only be exported for
3 recovery if the competent authorities of the relevant OECD importing and transit countries have
4 consented to import and transit prior to the export. 40 C.F.R. § 262.83(a), (b), (c).

5 These Subpart H export controls apply only to OECD-destined waste that (i) satisfies the
6 Federal definition of hazardous waste in 40 C.F.R. 261.3; (ii) is destined for recovery operations
7 in an OECD country listed in 40 C.F.R. § 262.58(a)(1); and (iii) is subject to the Federal
8 manifesting requirements set forth at 40 C.F.R. §§ 262.20-23. 40 C.F.R. § 262.80(a). As
9 discussed below, the 13 vessels at issue here, and the hazardous wastes onboard the vessels, meet
10 these requirements and are therefore subject to the Subpart H export controls described above.

11 **B. MARAD’s Vessel Exports Meet the Federal Definition of Hazardous Waste**

12 RCRA’s hazardous waste management system, 40 C.F.R. § 260 *et seq.*, applies to wastes
13 defined as “solid waste” pursuant to 40 C.F.R. § 261.2, that also satisfy the definition of
14 “hazardous waste” at 40 C.F.R. § 261.3. *See* 40 C.F.R. Part 260, App. 1 (following 40 C.F.R. §
15 260.41) and Figure 1 thereof.

16 **1. Each of the Vessels Constitutes RCRA Solid Waste**

17 The RCRA regulations define “solid waste” as including materials that are “abandoned
18 by being ... [a]ccumulated [or] stored ... before or in lieu of being ... disposed of.” 40 C.F.R.
19 §261.2(b)(3). MARAD has designated the vessels at issue here as obsolete “non-Retention”
20 vessels that “have reached the end of their useful life.” 2004 EA at 1; *see also* MARAD James
21 River Reserve Fleet Power Point Presentation at slide 4 (filed September 26, 3003, with
22 Plaintiffs’ motion for temporary restraining order) (vessels are non-retention vessels). MARAD
23 has also defined the vessels as “waste” on official forms. *See* OECD Waste Notification Form,
24 Section 13, Ex. 7 (in response to request for “name and chemical composition of the waste,”
25 MARAD responded “waste is merchant type ships ... containing wastes per Annex 1”).
26 MARAD has stored the vessels in the James River in anticipation of their ultimate dismantling
27 and disposal, 2004 EA at 2, which it is carrying out through the exports at issue in this case. *See,*
28

1 e.g., Able UK Contract at 6; Modification of Contract at 6. These vessels are therefore waste
2 under RCRA.

3 This conclusion is supported by the terms of the OECD Decision. The OECD green list
4 of wastes includes “vessels and other floating structures for breaking up.” *See* OECD Decision,
5 App. 3 at 5, Ex. 19. This definition applies under RCRA because the RCRA regulations were
6 intended to implement the OECD decision “virtually as written.” As EPA explained in justifying
7 its decision not to apply notice and comment procedures in implementing the OECD Decision in
8 the Subpart H regulations,

9 the United States has entered into a legally binding commitment with the other
10 OECD countries to implement the Decision *virtually as written*. Accordingly,
11 today’s rulemaking is analogous to a codification of statutory requirements, in
12 which an agency assumes the ministerial, nondiscretionary functions of
translating requirements to regulatory form.... [T]he U.S. Department of State
has determined that the Decision is an international agreement creating binding
commitments on the United States under the terms of the OECD Convention.[⁷]

13 61 Fed. Reg. at 16291 (emphasis added); *see also* Convention on the Organization for Economic
14 Cooperation and Development, art. 5(a), 12 U.S.T. 1728 (*ratified by* United States, April 12,
15 1961, *entered into force* September 30, 1961) (“OECD Convention”) (“In order to achieve its
16 aims, the Organization may ... take decisions which ... shall be binding on all the Members.”).
17 Accordingly, the RCRA regulations are not meant to “deviate materially from the [OECD]
18 decision.” *Id.*

19 Logic also supports the conclusion that each vessel constitutes waste. MARAD has
20 designated the vessels at issue here as obsolete “non-Retention” vessels, *see, e.g.*, MARAD
21 James River Reserve Fleet Power Point Presentation at slide 4 (filed September 26, 2003, with
22 Plaintiffs’ motion for temporary restraining order), and has indicated that they “have reached the
23

24 ⁷ EPA noted that there were two other reasons that it could not “deviate materially from the
25 Decision.” First, “as a practical matter, other OECD countries may refuse to accept U.S.
26 shipments of waste for recycling that do not conform to the procedures agreed to in the
27 Decision.” *Id.* Second, “EPA must implement the Decision virtually as written because
28 modifications [of the Decision’s requirements] could defeat the goal of achieving an
internationally consistent regime to control the import and export of hazardous and other wastes
destined for recovery. EPA believes that parallel implementation of the Decision within the U.S.
and other OECD countries is crucial to ensuring that the import and export of wastes destined for

1 end of their useful life.” 2004 EA at 1. MARAD has furthered specified three potential
2 destinations for NDRF non-Retention vessels: scrap, artificial reef, or museum use. *Id.*
3 MARAD has decided that each of the NDRF vessels at issue in this lawsuit is destined for
4 “dismantling and disposal” at a scrap yard. *See, e.g.,* Able UK Contract at 6, para. 3;
5 Modification of Contract at 6, para. 3. Vessels with no further useful purpose that are being sent
6 to the scrap yard are waste.

7 **2. Each of the Vessels Constitutes RCRA Hazardous Waste**

8 Subpart H provides that OECD green-list wastes that are contaminated and mixed with
9 OECD amber- and red-list wastes are hazardous wastes subject to Subpart H amber- and red-list
10 controls. 40 C.F.R. §§ 262.82(a)(1)(ii), (iii). As demonstrated in Appendix A, and as discussed
11 below, the vessels are each contaminated and mixed with numerous substances listed on the
12 OECD amber-list and red-list that meet the federal definition of hazardous waste. The vessels
13 are therefore themselves subject to Subpart H amber- and red-list controls.

14 In the 2004 Environmental Assessment, MARAD suggests that the vessels are not subject
15 to RCRA because 42 U.S.C. § 6939d provides that “[a]ny hazardous waste generated on a public
16 vessel shall not be subject to the storage, manifest, inspection, or record keeping requirements of
17 this chapter until such waste is transferred to a shore facility, unless . . . the waste is stored on the
18 public vessel for more than 90 days after the public vessel is placed in reserve.” *See* 2004 EA at
19 36. This argument fails for at least two reasons. First, 42 U.S.C. § 6939d does not apply to the
20 hazardous wastes at issue here, which were not “generated on a public vessel.” Rather, the
21 wastes are constituent parts of public vessels that have been designated as “waste” vessels and
22 are being discarded by MARAD. *See* OECD Waste Notification Form; 2004 EA at 1; *see also*
23 1997 EA at 12 (“Hazardous and toxic materials are found throughout older ships.”).

24 Second, even if the hazardous wastes on the vessels were “generated on” the vessel for
25 purposes of 42 U.S.C. § 6939d, the public vessel exception does not apply to hazardous waste
26 stored on the public vessel for more than 90 days. 42 U.S.C. § 6939d(a). Each of the 13 vessels
27 at issue here has been retired and designated for scrapping for well over 90 days. *See, e.g.,*

28

recovery proceed in accordance with an internationally integrated regime.” *Id.* at 16293.

1 Appendix A to RAND Report (listing each vessel as “retired” as of November 2000). Each
2 waste at issue has been present on each vessel since well before the vessel’s retirement date, and
3 has thus been stored on a public vessel for over 90 days.

4 The preceding discussion demonstrates that the vessels being exported by MARAD are
5 hazardous waste for the purpose of RCRA’s Subpart H export controls. Even if RCRA and the
6 regulations were ambiguous on this point, however, the United States’ international obligations,
7 expressed in the OECD Decision, would require that the vessels be treated as waste. As noted
8 above, the OECD Decision designates “vessels and other floating structures for breaking up” as
9 regulated solid waste. *See* OECD Decision, Ex. 19, App. 3 at 5. The OECD Decision
10 constitutes an international obligation of the United States. *See* OECD Convention, art. 5(a) (“In
11 order to achieve its aims, the Organization may ... take decisions which ... shall be binding on
12 all the Members.”); *see also supra* note 7 and accompanying text.

13 This Court should interpret any ambiguity in RCRA or Subpart H consistently with the
14 OECD Decision. As the Supreme Court has stated, “If the United States is to be able to gain the
15 benefits of international accords and have a role as a trusted partner in multilateral endeavors, its
16 courts should be most cautious before interpreting its domestic legislation in such manner as to
17 violate international agreements.” *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515
18 U.S. 528, 539 (1995); *see also George E. Warren Corp. v. EPA*, 159 F.3d 616, 624 (D.C. Cir.
19 1998) (“Since the days of Chief Justice Marshall, the Supreme Court has consistently held that
20 congressional statutes must be construed wherever possible in a manner that will not require the
21 United States to violate the law of nations.” (Citations and quotations omitted.)).

22 **3. Each Vessel Contains Wastes That Meet the Federal Definition of** 23 **Hazardous Waste in 40 C.F.R. 261.3**

24 As detailed in Appendix A, the vessels contain a large variety of RCRA solid wastes.⁸
25 Under RCRA, solid waste is considered hazardous waste if it meets two requirements. First, it

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27 ⁸ Subject to certain exceptions, a solid waste is any discarded material, 40 C.F.R. § 261.2(a)(1),
28 and may be either: garbage refuse, or sludge; or solid, liquid, semi-solid or contained gaseous
material. *See* APPENDIX I TO PART 260—OVERVIEW OF SUBTITLE C REGULATIONS (*Definition of Solid Waste*).

1 must not be excluded from regulation as a hazardous waste under 40 C.F.R. § 261.4(b). *See* 40
2 C.F.R. § 261.3(a)(1). None of the wastes on board the vessels is excluded from regulation as a
3 hazardous waste under 40 C.F.R. § 261.4(b).

4 Second, the waste must either (a) exhibit the characteristic of ignitability, toxicity,
5 reactivity, or corrosivity, or (b) be listed at 40 C.F.R. §§ 261.30-38. 40 C.F.R. §§ 261.3 (a),
6 (b)(i), (ii). Numerous onboard wastes exhibit the characteristic of ignitability or toxicity, and/or
7 are listed at 40 C.F.R. §§ 261.30-38.

8 Arsenic, cadmium, chromium, lead, mercury, waste water, and oily ballast water are all
9 likely to be present on the vessels. *See* 1997 EA at 12; *see also* Appendix A. Arsenic, cadmium,
10 chromium, and lead are each toxic. *See* 40 C.F.R. 261.24 at Table 1. Similarly, each of the oils⁹
11 listed in Appendix A is ignitable. *See* OECD Waste Notification Form (indicating MARAD's
12 intent to export H3 (Flammable Liquids), and H4.1 (Flammable Solids) and H6.1 (Poisonous
13 (acute)) hazardous wastes for recovery); OECD Waste Notification Form, Annex I (designating
14 the oils as H3 (Flammable Liquids) hazards, which are "flammable liquids"); *see* The OECD
15 Control System for Transfrontier Movements of Wastes Destined for Recovery Operations
16 Guidance Manual OECD Doc. GD(95)26 ("OECD Waste Hazard Codes"), Ex. 22.

17 Last, several onboard wastes are listed at 40 C.F.R. §§ 261.30-38. Mercury, which is
18 toxic, 40 C.F.R. § 261.24, Table 1, is listed at 40 C.F.R. § 261.33(f). Lead is listed at 40 C.F.R.
19 § 261.33(f). Also present on the vessels are methyl ethyl ketone, trichloroethylene, methylene
20 chloride, formaldehyde, toluene, benzene, and polynuclear aromatic hydrocarbons. *See* 1997 EA
21 at 12. Each of these substances is listed at 40 C.F.R. § 261.33(f).

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28 ⁹ The ignitable oils listed in Appendix A are also likely to contain hazardous wastes, *see* 1997
EA at 12; 2004 EA at 34, and are therefore considered hazardous waste under RCRA. 40 C.F.R.
§ 279.10(b)(1)(i).

1 **C. MARAD Intends to Export the RCRA Hazardous Waste on these Vessels to the**
2 **United Kingdom for Recovery**

3 **1. The OECD Waste Notification Form Completed by MARAD in Connection**
4 **with its Planned Export Indicates that the Onboard Hazardous Wastes Are**
5 **Destined for Recovery**

6 On June 5, 2003, pursuant to the notification obligations (described above) that RCRA
7 imposes on an exporter, MARAD completed the OECD Waste Notification Form and forwarded
8 it to the UK authorities. *See* MARAD Cover Letter to OECD Waste Notification Form (June 5,
9 2003), Ex. 6. On the same date, EPA forwarded the same information to the UK authorities “in
10 accordance with the [OECD Decision] on the transboundary movement of wastes for recovery.”
11 *See* OECD EPA Cover Letter to Waste Notification Form (June 5, 2003), Ex. 6. In its cover
12 letter, EPA explained that “[c]onsent of the UK Environment Agency to the import of the ships
13 must be provided to the [EPA] before these vessels may be exported for scrapping.” *Id.*

14 In the OECD Waste Notification Form, MARAD indicated that the “waste is merchant
15 type ships moored in Norfolk, Va, USA, containing wastes per Annex 1 (attached).” OECD
16 Waste Notification Form, Ex. 6. In a section requesting that MARAD specify the type of
17 packaging the waste is being shipped in, MARAD responded “whole ship for scrap recovery.”
18 *Id.*

19 Annex 1 to MARAD’s OECD Waste Notification Form lists some of the onboard
20 hazardous wastes, and indicates that waste water and oily water are destined for “treatment,” and
21 that heavy fuel, diesel oil and hydraulic oil, and scrap metal are destined for “re-use.” *See*
22 OECD Waste Notification Form at Annex 1, Ex. 6. Resource recovery and re-use are both
23 considered “recovery operations” under RCRA. 40 C.F.R. § 262.81(k).

24 **2. The Able UK Contract Indicates that the Vessel and the Majority of the**
25 **Onboard Hazardous Wastes are Destined for Recovery**

26 The Able UK contract also indicates that the majority of the onboard hazardous wastes
27 are destined for recovery. *See, e.g.,* Able UK Contract at 6 (“The contractor shall maximize,
28 within reason, recyclable equipment/material proceeds.”); *id.* (“The Government shall ... provide
the Contractor with a written “authorization to Sell” letter for the recyclable

1 material/equipment.); *id.* at 8 (“Upon arrival at the **recycling** facility in Teesside, UK....”
2 (Emphasis in original.)).

3 The Able UK Tender Method Statement similarly provides that “[a]ll non-ferrous
4 material will be reclaimed and delivered to various recycling facilities,” and that “[t]he majority
5 of materials received will be reused or recycled”. See Able UK Tender Method Statement at 4, ¶
6 3.10.3, p.13, ¶7.2.4.1, p.14, ¶7.2.5, Ex. 8.

7 **3. International Law Indicates that the Vessels and the Majority of the** 8 **Onboard Hazardous Wastes Are Destined for Recovery**

9 The international obligations of the United States and the United Kingdom support the
10 conclusion that MARAD is exporting the hazardous materials on these vessels for recovery.
11 Both countries have signed the Basel Convention on the Control of Transboundary Movements
12 of Hazardous Wastes and Their Disposal (“Basel Convention”); the United Kingdom has ratified
13 the agreement. See Status of Ratifications, *available at* <http://www.basel.int/ratif/frsetmain.php>
14 (visited May 12, 2004).¹⁰

15 Article 4(5) of the Basel Convention prohibits the United Kingdom, as a State Party, from
16 importing hazardous waste from a non-Party like the United States unless, under Article 11(1),
17 there is an applicable bilateral or multilateral agreement governing the import from the non-
18 Party. The OECD Decision constitutes such agreement. See DEFRA Report at p.15, ¶¶2-5,
19 p.24, ¶1, Ex. 11; 61 Fed. Reg. 16290, 16291 (April 12, 1996). Because the OECD Decision is
20 limited to transfrontier movements of hazardous wastes destined for recovery, it is illegal for the
21 United Kingdom to import hazardous waste for disposal. This interpretation is consistent with

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23 ¹⁰ Although the United States has not yet ratified the Basel Convention, its signature creates an
24 international legal obligation to avoid undermining the object and purpose of the Convention.
25 See Vienna Convention on the Law of Treaties, art. 18, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M.
26 679 (1969) (“A State is obliged to refrain from acts which would defeat the object and purpose
27 of a treaty when ... it has signed the treaty ... subject to ratification ... until it shall have made its
28 intention clear not to become a party to the treaty.”); see also 1997 EA at 9 (the United States
“intends to act consistent with the spirit and intent of [the Basel Convention]”). As of June 1,
2004, the United States has not ratified the Vienna Convention, but has recognized that the
Convention represents controlling international law. See, e.g., *Coplin v. United States*, 6 Cl. Ct.
115, 122 n.5 (July 30, 1984)).

1 MARAD's use, and UKEA's acknowledgement, of the OECD Transfrontier Movement of Waste
2 – Notification Form. *See* OECD Waste Notification Form. Thus, if there were any ambiguity
3 about whether MARAD's export is for recovery, that ambiguity should be resolved in a manner
4 consistent with the relevant international obligations. *See Vimar Seguros y Reaseguros*, 515 U.S.
5 at 539; *George E. Warren Corp.*, 159 F.3d at 624.

6 **D. MARAD Has Failed to Obtain the Consent of the Importing and Transit**
7 **Nations, or to Ensure that the Proposed Disposal Facility Is Permitted Under**
8 **UK Law, Prior to Exporting the Vessels**

9 Because MARAD is exporting hazardous wastes for recovery, RCRA requires MARAD
10 to ensure that the requisite import, transit and facility permits are in place. Green-, amber- or
11 red-list hazardous waste exported for recovery operations must in all cases be destined for a
12 facility that, under applicable domestic law, is operating or is authorized to operate in the
13 importing country. 40 C.F.R. §262.82(b)(1); 262.81(j). MARAD's proposed receiving facility,
14 Able UK, is neither operating nor authorized to operate in the importing country. As discussed
15 above, Able UK lacks several permits required under UK law to perform the proposed recovery
16 operations on any of the RCRA hazardous wastes at issue in this lawsuit. *See* DEFRA Report at
17 19, ¶10; *see also* *Gregan v. Hartlepool Borough Council*, ¶¶89-92, Ex. 13; 2004 EA, Table 2-2 at
18 13.

19 Similarly, amber- or red-list hazardous waste may only be exported for recovery if the
20 competent authorities of the relevant OECD importing and transit countries have consented to
21 import and transit prior to the export. 40 C.F.R. § 262.83(a), (b), (c). Neither the United
22 Kingdom, Belgium, France nor Ireland has consented to the movement of any of the nine waste
23 vessels MARAD plans to export.

24 **E. To the Extent that Any of the Hazardous Wastes On the Vessels Is Destined for**
25 **Disposal or Incineration Rather than Recovery, the Consent of the Importing**
26 **Country is Required Prior to the Export**

27 In addition to RCRA's Subpart H regulations governing exports of hazardous waste for
28 recovery within the OECD, EPA has also promulgated regulations governing exports of
hazardous waste for disposal or incineration. *See* 51 Fed. Reg. 28682 (August 8, 1986) (*codified*
at 40 C.F.R. §§ 262.50-58) ("Subpart E"). To the extent that MARAD proposes to export any of

1 the onboard hazardous wastes for disposal or incineration, MARAD must first secure the consent
2 of the importing country. 40 C.F.R. § 262.52, 262.58(b). MARAD had not secured the consent
3 of the UK government for the proposed export of any hazardous waste for disposal or
4 incineration. *See* Appendix A.

5 **F. Any Transshipment to a Third Country of the Four NDRF Vessels Currently**
6 **Docked at Teesside Must Comply With the Requirements of RCRA**

7 As explained above, the fate of the four NDRF vessels MARAD exported in October
8 2003 remains uncertain. Media reports have indicated that the vessels might be transferred to a
9 facility in a third nation for dismantling and disposal. *See* Christopher Hope, *Shipyards Look to*
10 *Take 'Ghost' Work Abroad*, TELEGRAPH, March 24, 2004, Ex. 23. If MARAD and/or Able UK
11 decide to take such action, MARAD must comply with RCRA. RCRA requires that RCRA
12 waste may be re-exported from the original importing nation to a third nation only with written
13 consent from the original exporting nation. 40 C.F.R. § 262.82(c)(2), (3).

14 Moreover, RCRA requires that the Able UK Contract specify which party will assume
15 responsibility for alternate management of waste if the contract cannot be completed. 40 C.F.R.
16 § 262.85(c). The Able UK Contract provides that Able UK must notify MARAD of any change
17 to the contract, and that MARAD must consent to such change and modify the contract
18 accordingly. *See* Able UK Contract at 46-47. Because the transshipment of the first four vessels
19 to a third nation would be a change to the terms of the Able UK Contract, MARAD would be
20 required to consent to such change. Such change would involve the transboundary movement of
21 hazardous wastes originally exported from the United States, and RCRA's export controls would
22 therefore apply.¹¹

23 Therefore, the first four vessels may not be transshipped to an third nation unless
24 MARAD ensures that the proposed third nation and the transit nations have consented, and the
25 proposed disposal facility is properly licensed under the laws of the third nation.

26
27 ¹¹ This is also consistent with the United States' obligation to act in a manner consistent with the
28 Basel Convention, *see supra* n.10, which requires that the State of export take responsibility for
repatriating or transshipping hazardous wastes in an environmentally sound manner when a
hazardous waste export contract cannot be completed. *See* Basel Convention, art. 8 (Duty to

1 **G. MARAD’s Vessel Export Violates the Federal Manifesting Requirements at 40**
2 **C.F.R. §§ 262.20-23**

3 Pursuant to the Federal manifesting requirements, any “generator who transports, or
4 offers for transportation, hazardous waste for offsite treatment,” must comply with certain
5 documentation requirements, 40 C.F.R. § 262.20(a), subject to certain exceptions listed at 40
6 C.F.R. § 262.20(e), (f). None of the hazardous waste at issue here falls within any of these
7 exceptions, and the Federal manifesting requirements therefore apply. There is no evidence that
8 MARAD has complied with these requirements.

9
10 For these reasons, RCRA requires MARAD to obtain the consent of the importing and
11 transit nations, and to ensure that the proposed receiving facility is operating or is authorized to
12 operate under U.K. law, *prior* to the export of any RCRA-regulated hazardous waste. MARAD
13 is also required to comply with the Federal hazardous waste manifesting requirements with
14 regard to these wastes. As explained above, MARAD has not met these requirements and is
15 therefore violating RCRA.

16 **V. MARAD’s Environmental Assessment is Inadequate Because It Fails to Adequately**
17 **Assess Reasonable Alternatives and Environmental Impacts**

18 Pursuant to this Court’s order, MARAD prepared a draft Environmental Assessment
19 (“2004 Draft EA”) that was released for public comment on February 27, 2004. *See* 69 Fed.
20 Reg. 9422 (Feb. 27, 2004); Temporary Restraining Order, Oct. 2, 2003 at 8. Plaintiffs and others
21 submitted timely public comments. *See* 2004 EA at App. E, Ex. 2. MARAD released its final
22 Environmental Assessment (“2004 EA”) on May 14, 2004. The 2004 EA does not satisfy the
23 requirements of NEPA because it does not adequately assess the no-action alternative, it ignores
24 reasonable domestic alternatives, and it lacks a vessel-specific environmental assessment.

25 **A. NEPA Standard of Review**

26 NEPA requires federal agencies to prepare an environmental impact statement (“EIS”)
27 for “every ... major Federal action[] significantly affecting the quality of the human

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Reimport).

1 environment.” 42 U.S.C. §4332(2)(C). NEPA’s implementing regulations require the
2 completion of an environmental assessment (“EA”) to determine whether an EIS is required. *See*
3 40 C.F.R. § 1508.9. “If *any* ‘significant’ environmental impacts might result from the proposed
4 agency action then an EIS must be prepared *before* agency action is taken.” *Grand Canyon*
5 *Trust v. F.A.A.*, 290 F.3d 339, 340 (D.C. Cir. 2002) (citing *Sierra Club v. Peterson*, 717 F.2d
6 1409, 1415 (D.C. Cir. 1983)) (emphases in original).

7 The D.C. Circuit has established four criteria for reviewing an agency’s decision not to
8 prepare an EIS: (1) whether the agency took a “hard look” at the problem; (2) whether the
9 agency identified the relevant areas of environmental concern; (3) as to the problems studied and
10 identified, whether the agency made a convincing case that the impact was insignificant; and (4)
11 whether there was an impact of true significance, whether the agency convincingly established
12 that changes in the project sufficiently reduced it to a minimum. *Sierra Club v. Peterson*, 717
13 F.2d at 1413; *see also Maryland-Nat’l Capital Park & Planning Comm’n v. U.S. Postal Serv.*,
14 487 F.2d 1029, 1040 (D.C. Cir. 1973).

15 The Council on Environmental Quality (CEQ) has promulgated regulations governing the
16 application of NEPA. 40 C.F.R. §§ 1500-1508. The CEQ regulations are entitled to substantial
17 deference. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-56 (1989).

18 Based on a preliminary assessment of Plaintiffs’ NEPA claim, this Court ordered
19 MARAD to “perform, at a minimum, a supplemental EA specific to those ships that addresses
20 the environmental impact of such action in the United States.” Temporary Restraining Order,
21 Oct. 2, 2003 at 8.

22 **B. MARAD Has Failed to Adequately Assess the Potential Environmental Impacts**
23 **Specific to the Vessels it Plans to Export**

24 This Court ordered MARAD to “perform, at a minimum, a supplemental EA *specific to*
25 *those ships* that addresses the environmental impact of such action in the United States.”
26 Temporary Restraining Order, Oct. 2, 2003 at 8 (emphasis added). MARAD’s 2004 EA thus
27 should have included a detailed analysis of the toxic and hazardous substances and other unique
28 environmental risks onboard the specific vessels, as well as detailed information on the hull
condition and seaworthiness of each vessel proposed for export. Anything less undermines

1 NEPA’s purpose of “guarantee[ing] that the relevant information will be made available to the
2 larger audience” so that the public can “play a role in both the decisionmaking process and the
3 implementation of that decision.” *Robertson*, 490 U.S. at 349; *see also* 40 C.F.R. § 1500.1(b)
4 (requiring disclosure of environmental information before actions are taken); *Sierra Club*, 717
5 F.2d at 1413 (NEPA requires that agency identify relevant areas of environmental concern). As
6 demonstrated in this section, a description of the general risks arising from the hypothetical
7 export of an average NDRF vessel does not allow either MARAD or the public to assess the
8 possible environmental impacts accurately.

9 **1. Inventory of Toxic and Hazardous Substances and Other Unique Risks**

10 Each of the nine vessels at issue in the 2004 EA contains varying quantities and types of
11 hazardous and toxic substances. *See* Appendix A. Each of these substances poses unique risks
12 when placed into a riverine, marine or coastal environment. MARAD has neither disclosed the
13 specific quantities or types of the toxic and hazardous substances, nor assessed the risks posed by
14 each substance. Instead, MARAD has only generally described the materials likely to be present
15 on the vessels, 2004 EA at 55-56, and assumes that there is no reasonable risk of such material
16 escaping into the environment. The record demonstrates that such substances can escape into the
17 environment, either through spills or catastrophic loss. *See, e.g.*, Comments of Basel Action
18 Network, 2004 EA, App. E at E17.

19 MARAD attempts to assume these risks away by explaining that it may substitute other
20 vessels at a later date based upon last minute vessel tow surveys by the U.S. Coast Guard. 2004
21 EA at 54-56. MARAD’s reliance on generalized waste inventories and last-minute tow surveys
22 illegally deprives the public of meaningful participation in MARAD’s decision whether a
23 particular vessel should be exported for disposal and recovery, based on its particular hazardous
24 waste inventory. This failure also deprives MARAD of sufficient time to adequately assess the
25 environmental impacts of exporting any vessel substituted at the last minute.

26 Similarly, each vessel poses unique environmental risks. For example, at least one
27 NDRF vessel is known to be the site of the nest of a pair of endangered peregrine falcons. *See*
28 1997 EA at 22. MARAD has failed to conduct vessel specific assessments of such unique risks.

1 MARAD's proposal to allow last-minute vessel substitutions will not permit the effective
2 removal of any endangered species from a substituted vessel. *See* 2004 EA at 47 (MARAD to
3 rely on scientists at the College of William and Mary to relocate nests from vessels prior to
4 vessel removal).

5 **2. Hull Condition and Seaworthiness**

6 The 2004 EA likewise fails to adequately assess the environmental risks posed by the
7 deteriorated hull conditions of the vessels proposed for export. *See, e.g.*, Comments of Basel
8 Action Network. The hulls of the vessels at issue here are in various states of decay. *See, e.g.*,
9 Memorandum, U.S. Dept. of Transportation, Office of Inspector General, March 10, 2000 at 3,
10 Ex. 26 ("Some vessels have deteriorated to a point where a hammer can penetrate their hulls.");
11 *see also* Declaration of Werner F. Hoyt, ¶¶ 12-25 (filed October 2, 2003, with Plaintiffs' motion
12 for temporary restraining order). The potentially significant environmental impacts posed by the
13 escape of an onboard toxic or hazardous waste can only be adequately assessed if the likelihood
14 of such spill is first assessed. Rather than provide critical data on hull condition and
15 seaworthiness, MARAD states that such surveys will be carried out by the U.S. Coast Guard at
16 the last minute, 2004 EA at 55-56, and explains that it may substitute other vessels at a later date
17 based upon equally last-minute vessel tow surveys by the U.S. Coast Guard. 2004 EA at 54-56.
18 MARAD's reliance on generalized waste inventories and last-minute tow surveys illegally
19 deprives the public of a meaningful opportunity to participate in MARAD's decision over
20 whether a particular vessel should be exported for disposal and recovery. This failure also
21 deprives MARAD of sufficient time to adequately assess the environmental impacts of exporting
22 any vessels substituted at the last minute. *See, e.g.*, 40 C.F.R. § 1500.1(b) (NEPA's purpose is to
23 "insure that environmental information is available to public officials and citizens before
24 decisions are made and before actions are taken.").

25 MARAD's obligation to thoroughly assess the vessel-specific risks of its proposed action
26 is consistent with the United States' international obligations. The United Nations Convention
27 on the Law of the Sea (UNCLOS), the relevant provisions of which the United States has
28

1 accepted as a binding expression of international law,¹² explicitly requires each nation to take all
2 measures “necessary to prevent, reduce and control pollution of the marine environment from
3 any source,” and to minimize “pollution from vessels, in particular measures for preventing
4 accidents and ... preventing intentional and unintentional discharges.” The United Nations
5 Convention on the Law of the Sea (“UNCLOS”), Dec. 10, 1982, art. 194(1), (3)(b), UN Doc.
6 A/Conf.62/122, *reprinted in* 21 I.L.M. 1261 (1982) (entered into force 1994).

7 **C. MARAD Has Failed to Adequately Assess All Reasonable Alternatives to the**
8 **Proposed Action**

9 In preparing an EA or EIS, NEPA requires all federal agencies “to the fullest extent
10 possible” to “study, develop, and describe appropriate alternatives to recommended courses of
11 action in any proposal which involves unresolved conflicts concerning alternative uses of
12 available resources.” 42 U.S.C. § 4332(2)(C)(iii), (E); *see also* 40 C.F.R. § 1501.2(c). The
13 alternatives analysis is “the heart of the environmental analysis.” *See* 40 C.F.R. § 1502.14; *see*
14 *also Alaska v. Andrus*, 580 F.2d 465, 474 (D.C. Cir.), *vacated in part as moot sub nom. Western*
15 *Oil & Gas Ass'n v. Alaska*, 439 U.S. 922, (1978).

16 MARAD must rigorously explore and objectively evaluate all reasonable alternatives. 40
17 C.F.R. § 1502.14(a), (c). Based upon consideration of the affected environment, 40 C.F.R. §
18 1502.15, and the environmental consequences, 40 C.F.R. § 1502.16, the alternatives “should
19 present the environmental impacts in comparative form, thus sharply defining the issues and
20 providing a clear basis for choice among options by the decisionmakers and the public.” 40 C.F.R.
21 §1502.14.

22 ¹² *See* Presidential Proclamation No. 7219, 64 Fed. Reg. 48701 (Aug. 2, 1999) (UNCLOS
23 reflects international law). Moreover, UNCLOS’s environmental provisions are recognized as
24 an expression of customary international law, making them binding on the United States whether
25 or not it is a party to the convention. *See* Restatement (Third), Part VI (Law of the
26 Environment), Introductory Note at 102 (“Most of the provisions of [UNCLOS] concerning the
27 protection of the marine environment reflect customary international law.”); *id.* Part V (Law of
28 the Sea), Introductory Note at 5 (“[B]y express or tacit agreement accompanied by consistent
practice, the United States, and states generally, have accepted the substantive provisions of the
Convention, other than those addressing deep sea-bed mining, as statements of customary law
binding upon them apart from the Convention.”).

1 An agency may not define the objectives of its action in terms so unreasonably narrow
2 that only one alternative in the agency's power would accomplish the goals of the agency's
3 action. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). An
4 agency should always consider the views of Congress, expressed, to the extent that the agency
5 can determine them, in the agency's statutory authorization to act, as well as in other
6 congressional directives. *Id.* Here, the views of Congress are clear: "Nothing in this section ...
7 shall be construed to establish a preference ... for the export of obsolete vessels ... over other
8 alternatives available ... for the scrapping of such vessels." Pub. L. No. 107-314, §
9 3504(c)(1)(A), 116 Stat. 2457 at 2755 (2002) (*codified at* 16 U.S.C. § 5405 note).

10 **1. MARAD Has Failed to Adequately Assess the No-Action Alternative in the**
11 **2004 EA**

12 In the 2004 EA, MARAD presented its decision as a binary choice between (i) the
13 transfer of "approximately nine obsolete vessels ... from the JRRF to the Able UK facilities for
14 the purposes of disposal of the vessels," 2004 EA at 9, and (ii) not transferring the vessels to
15 Able UK for dismantling and recycling. 2004 EA at 15. MARAD explained that this second
16 "no-action" alternative meant that the vessels "would remain moored at the JRRF until funding
17 was available and/or they were disposed of via another ... [public bidding] process." *Id.*
18 MARAD rejects the no-action alternative based on a conclusion that this alternative is
19 tantamount to "leaving the vessels moored at the JRRF for an indefinite period." *Id.*

20 MARAD mischaracterizes the no-action alternative and misstates its impacts because the
21 record indicates that if the vessels are not exported for disposal, they could be disposed of
22 domestically in the same time frame as the export alternative and without the need for another
23 public bidding process.¹³ In particular, the comments of Kevin J. McCabe, Chairman of Texas-
24 based International Shipbreaking Limited, LLC (ISL), indicate that there are

25 six ship recycling facilities *currently* operating in the United States, four in
26 Brownsville, TX, one in Philadelphia, PA and one in Norfolk, VA. Of these
27 facilities, four can take ships simultaneously, including [ISL] that can
28 accommodate nine vessels simultaneously.

28 ¹³ MARAD ignores the fact that the first four vessels that it exported are now indefinitely
moored in UK waters, posing increasing risks to those waters, due to MARAD's actions.

1
2 Comments of Kevin J. McCabe, 2004 EA, App. E at 2, Ex. 2; *see also* Comments of Esco
3 Marine Inc. at 3 (Esco capable of breaking 5-7 vessels per year at a facility in Brownsville,
4 Texas); Comments of Basel Action Network, ¶III(A); *see also, generally*, Comments of Sierra
5 Club, ¶5; Comments of Ross & Parks, Inc. at 5-6; Comments of All-Star Metals; Comments of
6 Robert E. Rutkowski, ¶6. The record thus does not support MARAD’s assessment of the
7 impacts of the “no-action” alternative but shows instead that reasonable, cost-effective domestic
8 disposal alternatives are available should MARAD choose not to export these vessels.
9 MARAD’s inaccurate and overly narrow assessment of the no-action alternatives does not satisfy
10 the requirements of NEPA. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196
11 (D.C. Cir. 1991); *see also Natural Resources Defense Council v. Hughes*, 437 F. Supp. 981, 990-
12 91 (D.D.C. 1977) (finding NEPA violation because agency “did not take a ‘hard look’ at the no-
13 action alternative during its decision-making process”).

14 **2. MARAD Has Failed to Adequately Assess Alternatives in the 2004 EA**

15 Similarly, MARAD chose not to assess the reasonable alternative of domestic disposal of
16 the nine vessels at issue in the 2004 EA. *See* 2004 EA at 16. MARAD explained that “ship
17 disposal facilities that can accommodate a number of vessels simultaneously are needed,” *id.*,
18 and that “no U.S. disposal facility currently has the capacity to accommodate a large number of
19 ships simultaneously or can fully meet the cost-effectiveness required by MARAD.” *Id.*

20 Again, MARAD’s explanation of its decision violates NEPA, because it is directly
21 contrary to the record evidence cited in the preceding section. Based on that evidence, and
22 absent any concrete information to the contrary, the domestic disposal alternative is a reasonable
23 alternative that MARAD should have assessed. 40 C.F.R. § 1502.14(a). This is especially true
24 because (i) the domestic disposal alternatives may have cost less, *see* Comments of Kevin J.
25 McCabe at 1, and (ii) unlike Able UK, the domestic disposal facilities are actually permitted to
26 engage in vessel disposal and recovery and activities.

27 This is also highlighted by the fact that the US facilities have the capacity to dispose of at
28 least nine vessels simultaneously, *see* Comments of Kevin J. McCabe, 2004 EA, App. E at 2, Ex.
2 (ISL capable of dismantling nine vessels simultaneously), and at least 14 vessels annually. *See*

1 Comments of Esco Marine Inc. at 3 (Esco capable of breaking 5-7 vessels per year). Able UK,
2 on the other hand, has proven unable to dry dock or dispose of even one vessel in the seven
3 months since the first four vessels were exported. *See, e.g.*, DEFRA Report at 19, ¶10, Ex. 11.

4 CONCLUSION

5 For all of the foregoing reasons, Plaintiffs respectfully ask this Court to find the following:

- 6 1. MARAD's export of nine NDRF vessels laden with PCBs destined for disposal
7 would violate TSCA and must be permanently enjoined.
- 8 2. MARAD's export of nine NDRF vessels containing and constituting RCRA
9 hazardous wastes for recovery would violate RCRA and must be permanently
10 enjoined.
- 11 3. Pursuant to RCRA, 40 C.F.R. § 262.82(c)(2), (3), the four NDRF vessels already
12 exported and lying moored in Teesside, UK, may not be transshipped to a third
13 nation unless MARAD secures the consents of the third nation and the transit
14 nations, and unless the proposed alternate disposal facility is properly licensed
15 under the laws of the third nation.
- 16 4. The 2004 EA is inadequate because it fails to properly assess the alternative
17 actions or the vessel-specific environmental impacts of MARAD's decision to
18 export nine NDRF vessels, and that such export must therefore be permanently
19 enjoined.
- 20 5. MARAD must carry out a NEPA-compliant, vessel-specific supplemental
21 environmental assessment should it substitute a vessel that has not already been
22 assessed for export under the Able UK Contract.
- 23 6. MARAD must comply with the requirements of TSCA, RCRA and NEPA should
24 it substitute a vessel under the Able UK Contract.

25 Respectfully submitted this 1st day of June, 2004.

26 /s J. Martin Wagner
27 J. Martin Wagner (DCB #435730)
28 Marcello Mollo
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and Sierra Club

APPENDIX A: SUMMARY OF INVENTORIED HAZARDOUS WASTES
(Metric Tons)

Vessel ³	(OECD “Red List Wastes”) ¹			(OECD “Amber List Wastes”) ²						
	Non-Liquid PCBs ⁴	PCBs 50ppm or greater	Asbestos ⁵	CFC Containers ⁶	Mercury ⁷	Waste Water ⁸	Oily Ballast Water ⁹	Heavy Fuel Oil ¹⁰	Diesel Oil ¹¹	Hydraulic Oil ¹²
NINE VESSELS PROPOSED FOR EXPORT										
American Banker	37.2	Y(Presumed) ¹³	≥ 104	0.04	9.07E-04	322	322	99	266	-
American Ranger	47.3	Y(Presumed)	≥ 79	0.04	2.27E-04	10	279	464	295	2
Donner	13.7	Y(Presumed)	≥ 75	0.01	4.54E-04	408	1	19	-	-
Mormacmoon	33.5	Y(Presumed)	≥ 87	0.04	9.07E-04	823	267	128	-	25
Mormacwave	33.5	Y(Presumed)	≥ 87	0.04	9.07E-04	1553	96	168	17	18
Protector	23.8	Y(Presumed)	≥ 85	0.05	4.54E-04	10	38	646	167	4
Rigel	33.7	Y ¹⁴	≥ 61	0.06	4.54E-04	10	1	-	-	-
Santa Cruz	37.2	Y(Presumed)	≥ 100	0.04	9.07E-04	263	4	370	-	2
Santa Isabel	37.2	Y(Presumed)	≥ 100	0.04	9.07E-04	762	≥12	406	9	1
FOUR VESSELS EXPORTED IN OCTOBER 2003										
Caloosahatchee	34.1	Y	≥ 61	0.01	4.54E-04	4575	1	-	-	-
Canisteo	34.1	Y	≥ 61	0.01	4.54E-04	3419	231	-	12	-
Canopus	286.0	Y(Presumed)	252	-	9.07E-04	-	1,480	-	-	-
Compass Island	47.3	Y(Presumed)	252	-	9.07E-04	-	≥ 137	-	225	15

¹ See Decision of the Council amending Decision C(92)39/FINAL concerning the control of transfrontier movements of wastes destined for recovery operations, Organization for Economic Co-operation and Development Doc. C(93)74/FINAL (August 5, 1993), (“1993 Amended OECD Decision”) at 17, Ex. 34; *see also* 40 C.F.R. §§ 262.89(b), (e) (OECD amber- and red-listed wastes subject to RCRA’s amber- and red-list waste controls; OECD waste lists incorporated RCRA by reference into RCRA).

² See 1993 Amended OECD Decision at 12-16, Ex. 34; *see also* 40 C.F.R. §§ 262.89(b), (e)(same).

³ See Modification of Contract Between DOT/Maritime Administration and Post-Svc Remediation Partners (October 2, 2003) at 7, Ex. 18.

⁴ See Marine Environmental Risk Assessment (September 2003) (“MERA”), Table 2.1 at 2.2, Ex. 38; *see also* MARAD, Transfer of National Defense Reserve Fleet Vessels from the James River Reserve Fleet for Disposal at Able UK Facilities, Teesside, UK, Environmental Assessment (May 14, 2004) (“2004 EA”) at 33; MARAD, Environmental Assessment of the Sale of National Defense Reserve Fleet Vessels for Scrapping (July 1997) (“1997 EA”) at 12, Ex. 13.

⁵ See OECD Transfrontier Movement of Waste – Notification Form, Annex 1 (“OECD Annex I”), Ex. 19; *see also* MERA, Table 2.1 at 2.2; 2004 EA at 34; 1997 EA at 12. The ≥ symbol in this column reflects that one or more other sources report values higher than that included in this table.

⁶ See OECD Annex 1; *see also* 2004 EA at 34; 1997 EA, Appendix D at 31 and Appendix E at 41; RAND, Disposal Options for Ships (2001) (“RAND Report”) at 6, Ex. 16.

⁷ See MERA, Table 2.1 at 2.2; *see also* 2004 EA at 34; 1997 EA at 12 and Appendix D at 31.

⁸ See OECD Annex 1; *see also* 1997 EA, Appendix E at 46; MARAD, Study of Oil Removal Options for Non-Retention Vessels (September 22, 2000) (“MARAD Oil Study”) at 20-21, Ex. 39.

⁹ See OECD Annex I; *see also* MERA, Table 2.1 at 2.2; 2004 EA at 34; 1997 EA at 12; MARAD Oil Study at 20-21; RAND Report at 6. The \geq symbol in this column reflects that one or more other sources report values higher than that included in Table 2.

¹⁰ See OECD Annex 1; *see also* MERA, Table 2.1 at 2.2 (Note: Table 2.1 aggregates the volume of waste oils); 2004 EA at 34; 1997 EA at 12; MARAD Oil Study at 20-21; RAND Report at 6.

¹¹ *Id.*

¹² *Id.*

¹³ For purposes of TSCA's PCB export prohibition, PCBs and PCB Items of unknown concentrations are treated as if they contain ≥ 50 ppm. 40 C.F.R. § 761.97(a)(2). Each of these vessels contains significant quantities of PCBs and PCB Items, *see supra*, note 4, and this presumption therefore applies.

¹⁴ The Rigel, the Caloosahatchee and the Canisteo have each been sampled for PCB concentration and been found to contain PCBs in concentrations ≥ 50 ppm. *See* RAND Report, Appendix A, Table A.1 at 96-102.

LIST OF EXHIBITS

Exhibit 1 – Declaration of Linda King

Exhibit 2 – MARAD, Transfer of National Defense Reserve Fleet Vessels from the James River Reserve Fleet for Disposal at Able UK Facilities, Teesside, UK, Environmental Assessment – *FINAL* (May 14, 2004)

Exhibit 3 – MARAD, Environmental Assessment of the Sale of National Defense Reserve Fleet Vessels for Scrapping (July 1997)

Exhibit 4 – Contract Between DOT/Maritime Administration and Post-Svc Remediation Partners (July 25, 2003)

Exhibit 5 – Modification of Contract Between DOT/Maritime Administration and Post-Svc Remediation Partners (October 3, 2003)

Exhibit 6 – Letters from EPA and MARAD to UK Environment Agency (June 5, 2003), including the OECD Transfrontier Movement of Waste – Notification Form

Exhibit 7 – OECD Transfrontier Movement of Waste – Notification Form (signed by UK Environment Agency on July 21, 2003)

Exhibit 8 – Able UK Tender Method Statement

Exhibit 9 – EPA Letter to MARAD (May 22, 2003)

Exhibit 10 – EPA, Site Visit – AbleUK, Teesside, North Yorkshire, England – Feb. 23-26, 2003 (February 24, 2003)

Exhibit 11 – DEFRA, US Naval Ships Review of Regulatory Structure (April 2004)

Exhibit 12 – UK Environment Agency, US Navy Ships Review – Lessons Learnt (May 5, 2004)

Exhibit 13 – *Gregan v. Hartlepool Borough Council*, 2003 EWHC 3278 (Eng. Admin)

Exhibit 14 – Transcript of Hearing Before the Honorable Rosemary M. Collyer (October 1, 2003)

Exhibit 15 – TSCA Notice of Intent Letters

Exhibit 16 – RCRA Notice of Intent Letters

Exhibit 17 – S. Rep. No. 698, 94th Cong., 2d Sess. 1, *reprinted in* TSCA Legislative History; House Report No. 1341, *reprinted in* TSCA Legislative History

Exhibit 18 – EPA, PCB Inspection and Sampling Report (April 2004)

Exhibit 19 – Decision of the Council concerning the Control of Transfrontier Movements of Wastes destined for Recovery Operations, OECD Doc. C(92)39/FINAL (April 6, 1992)

Exhibit 20 – Decision of the Council amending Decision C(92)39/FINAL concerning the Control of Transfrontier Movements of Wastes destined for Recovery Operations, OECD Doc. C(93)74/FINAL (August 5, 1993)

Exhibit 21 – Decision of the Council amending the Decision concerning the Control of Transfrontier Movements of Wastes destined for Recovery Operations [C(92)39/FINAL] with respect to the Green List of Wastes, OECD Doc. C(94)153/FINAL (September 21, 1994)

Exhibit 22 – The OECD Control System for Transfrontier Movements of Wastes Destined for Recovery Operations Guidance Manual, OECD Doc. GD(95)26

Exhibit 23 – Christopher Hope, *Shipyard Looks to Take 'Ghost' Work Abroad*, TELEGRAPH, March 24, 2004

Exhibit 24 – Marine Environmental Risk Assessment (September 2003)

Exhibit 25 – MARAD, Study of Oil Removal Options for Non-Retention Vessels at the James River Reserve Fleet (JRRF) (September 22, 2000)

Exhibit 26 - Memorandum, U.S. Dept. of Transportation, Office of Inspector General, March 10, 2000

Exhibit 27 - United States' Memorandum in Opposition to the USS Cabot/Dedalo Museum Foundation's Application for Preliminary Injunction, November 14, 1994

1 **UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF COLUMBIA**

3 BASEL ACTION NETWORK, a Sub-Project)
4 of the Tides Center; and SIERRA CLUB,)

5 Plaintiffs,)

6 v.)

7 MARITIME ADMINISTRATION; Capt.)
8 WILLIAM G. SCHUBERT, in his official)
9 capacity as Administrator; and U.S.)
10 ENVIRONMENTAL PROTECTION)
11 AGENCY; MIKE LEAVITT in his official)
12 capacity as Administrator,)

13 Defendants.)

Case No.: 03-02000 (RMC)
Honorable Rosemary M. Collyer
Courtroom 6

August 6, 2004, 9:30am

CERTIFICATE OF SERVICE

14 I am a citizen of the United States and a resident of the State of California. I am over 18
15 years of age and not a party to this action. My business address is 426 Seventeenth Street, 6th
16 Floor, Oakland, California, 94612.

17 On June 1, 2004, I served a true and correct copy of the following documents:

- 18 1) Plaintiffs' Motion for Summary Judgment;
- 19 2) Memorandum of Points and Authorities in Support of Plaintiffs' Motion for
20 Summary Judgment;
- 21 3) Plaintiffs' Statement of Material Facts;
- 22 4) [Proposed] Order; and
- 23 5) Certificate of Service.

24 *via electronic mail using the CM/ECF system* on the party listed below:

25 Brian Toth
26 brian.toth@usdoj.gov

27 and *via electronic mail* on the party listed below:

28 Cynthia Morris
c.j.morris@usdoj.gov

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I, Alyssa Johl, declare under penalty of perjury that the foregoing is true and correct.
Executed this 1st day of June, 2004, at Oakland, California.

/s Alyssa Johl
Alyssa Johl