

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BASEL ACTION NETWORK, a Sub-)
 project of the Tide Center and)
 SIERRA CLUB,)
)
 Plaintiffs,)
)
 v.)
)
 MARITIME ADMINISTRATION; Capt.)
 William G. Schubert, in his official capacity)
 as Administrator;)
)
 UNITED STATES ENVIRONMENTAL)
 PROTECTION AGENCY; Michael Leavitt)
 in his official capacity as Administrator)
)
 Defendants.)

Civ. No. 03-02000-RMC

UNITED STATES' RESPONSE TO
 PLAINTIFFS' STATEMENT OF
 MATERIAL FACTS NOT IN DISPUTE

Pursuant to LCvR 7(h), the Maritime Administration ("MARAD") and Capt. William G. Schubert, in his official capacity as Administrator, and the United States Environmental Protection Agency ("EPA") and Michael Leavitt, in his official capacity as Administrator, submit this response to Plaintiffs' Statement of Material Facts as to Which Plaintiffs Contend There is No Genuine Issue.

Preliminary Statement

The facts upon which Plaintiffs rely in support of their Motion for Summary Judgement have changed substantially and materially since the filing of their Complaint in this matter on September 30, 2003. Therefore, many of the facts upon which Plaintiffs rely, while they may have been accurate and not in dispute at the time the Complaint was filed, are no longer accurate and/or no longer relevant.

At issue in Plaintiffs' Complaint were 13 vessels proposed for export to AbleUK. Following this Court's ruling on Plaintiffs' Motion for Temporary Restraining Order, four of those vessels were towed to AbleUK, where they remain. Those four vessels are at issue in Plaintiffs' Motion for Summary Judgment only to the extent MARAD may tranship the vessels from the United Kingdom to another country (which MARAD has not proposed to do). Of the remaining nine vessels at issue in Plaintiffs' Motion for Summary Judgment, only one of them is

still a candidate for export to AbleUK. Eight of the nine vessels at issue in Plaintiffs' motion are no longer proposed for such export. Rather, MARAD and AbleUK have identified 36 vessels from the NDRF fleet, including only one of the vessels at issue in Plaintiffs' motion, from which the remaining nine vessels to be exported to AbleUK will be selected. MARAD and AbleUK have not yet determined which of those vessels will be exported.

In light of these changes in relevant facts, MARAD responds to each of the statements of fact proposed by Plaintiffs as follows:

1. Agree, except that the National Reserve Defense Fleet ("NDRF") does not consist solely of military vessels. The NDRF is composed of government owned merchant-type ships.
2. Agree, except to clarify that "disposal" options include ship dismantling/recycling, vessel sales, artificial reefing, deep sinking, and donation to humanitarian and historic preservation groups.
3. Agree, as of October, 2000.
4. Agree that the identified vessels were originally at issue in this case. However, as explained above in the Preliminary Statement, 12 of the 13 vessels identified are no longer at issue in this case because four of them have already been exported and eight of them are now proposed for domestic disposal and will not be exported to AbleUK. The remaining vessel may or may not be exported to the United Kingdom.
5. Admit except to clarify that "disposal" options include ship dismantling/recycling, vessel sales, artificial reefing, deep sinking, and donation to humanitarian and historic preservation groups.
6. Disputed because Plaintiffs' use of the term "vessels" is ambiguous. To the extent the reference to "vessels" is limited to the 13 vessels originally at issue in this case, MARAD agrees that the vessels "may" contain PCBs. To the extent the reference to "vessels" includes other NDRF vessels, MARAD disputes the allegation because some of the vessels in the NDRF are not known or presumed

to contain regulated PCBs. MARAD disagrees with the characterization that the vessels may contain “large quantities of harmful PCBs.” The concentration of the PCBs has not been determined.

7. Disputed because Plaintiffs’ use of the term “such PCBs” is ambiguous and Plaintiffs’ characterization of the statute is inaccurate. MARAD agrees that TSCA prohibits, in some circumstances, the export of PCBs in concentrations greater than 50 ppm. However, not all of the NDRF vessels have concentrations of PCBs greater than 50 ppm, and the statute allows for some circumstances in which PCBs in concentrations greater than 50 ppm may be exported, and TSCA section 6(e)(3) is not the only authority for a TSCA exemption.
8. Agree that the vessels “may” contain the identified substances. However, the presence of the identified substances on the vessels is not established, nor is the concentration of such substances established on the vessels.
9. Agree that the vessels “may” contain “unspecified quantities” of some of the identified substances. However, the presence of the identified substances on the vessels is not established, nor is the concentration of such substances established on the vessels.
10. Disputed because the statement purports to summarize a lengthy contract, and the contract is before the Court and speaks for itself. Plaintiffs’ characterization is inaccurate. The contract provided that AbleUK would recycle what could be recycled, and items that could not be recycled would be disposed of in accordance with the environmental standards of the United Kingdom.
11. Disputed because the statement purports to summarize a lengthy contract, and the contract is before the Court and speaks for itself. Plaintiffs’ characterization is inaccurate to the extent they assert that the additional nine vessels would follow when AbleUK had satisfactorily completed its hazardous materials remediation and dismantling processes on the first four vessels. The contract provided that the additional nine vessels would follow only after remediation and dismantlement

was performed to the satisfaction of EPA and MARAD.

12. MARAD does not dispute Plaintiffs' assertion as to why they acted, but does not agree that Plaintiffs' action was justified.
13. Disputed because the statement purports to summarize this Court's Order which speaks for itself, and the characterization of the Order is not accurate.
14. Disputed because the statement purports to summarize a contract modification and the document speaks for itself. Plaintiffs characterization of the document is inaccurate because the modification did not specify that four ships would be exported in October, 2003. The modification established two towing phases: Phase I for six ships to be towed not later than October 31, 2003; and Phase II for seven ships to be towed not later than July 1, 2004.
15. Agree that the four identified vessels left the James River shortly after this Court's Order.
16. Dispute that MARAD inventoried hazardous wastes on the OECD form. MARAD disputes the characterization of the materials as hazardous wastes. MARAD documented the estimated amounts of materials on the vessels as requested on the OECD form.
17. Agree.
18. Agree.
19. Agree.
20. Agree that Plaintiffs made the statements alleged in their Motion for TRO, but disagree that the statements are true. MARAD avers that all licenses and permits were in place prior to the vessels' departure, and MARAD was in possession of documentation from the United Kingdom Environment Agency granting consent to allow the vessels to enter the United Kingdom.
21. Disagree that United Kingdom Environment Agency requested that MARAD delay departure of the vessels.
22. Agree that EPA received the letter referenced but disagree with Plaintiffs'

characterization of the letter. The letter speaks for itself.

23. Agree that EPA received the letter referenced but disagree with Plaintiffs' characterization of the letter. The letter speaks for itself. MARAD avers that the modification to AbleUK's waste management license was approved prior to the departure of the vessels. MARAD disputes that the dry dock was required by MARAD.
24. Agree that EPA received the letter referenced but disagree with Plaintiffs' characterization of the letter. The letter speaks for itself. MARAD avers that the United Kingdom has accepted the vessels and has not demanded that they return to the United States.
25. Agree that AbleUK does not currently have all licenses and permits required to carry out its obligations under the contract with MARAD, but avers that AbleUK did have the necessary licenses and permits at the time the vessels departed the James River.
26. Agree.
27. Agree that the countries have not provided consent, but aver that consent has not been denied. MARAD has not requested consent.

Respectfully submitted this 30th day of July, 2004.

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