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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARC ECOLOGY, et al.,

Plaintiffs,

and

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION,

Plaintiff-Intervenor,

v.

UNITED STATES MARITIME ADMINISTRATION, et al.,

Defendants.

Case No. 2:07-cv-2320 GEB GGH

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: Oct. 13, 2009 (9:00 a.m.)
Judge: Hon.Garland E.Burrell, Jr.

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I. INTRODUCTION

Defendants U.S. Maritime Administration, *et al.* (collectively, "MARAD") admit all of the elements of Clean Water Act ("CWA") liability. MARAD nevertheless contends that it defeated liability, a few hours before filing its summary judgment motion, by filing a "Notice of Intent" to comply with a CWA general permit. MARAD has not received coverage under that general permit, however, and even if it had, the permit would not authorize MARAD's continuing non-stormwater discharges. Nor would MARAD's sudden protestations of "repentance and reform," *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), moot this case, some thirteen years after MARAD learned of the illegal discharges and some two years after MARAD was sued to halt those illegal discharges.

MARAD's arguments concerning Subtitle C of the Resource Conservation and Recovery Act ("RCRA") are directed at straw men. It asserts that, under a statutory exemption, paint waste discharged from Suisun Bay Reserve Fleet ("SBRF") non-retention vessels is not "solid waste" subject to RCRA and that the vessels themselves are not, in their entirety, "hazardous waste." Plaintiffs do not contend that the *discharges* of paint waste from SBRF vessels are subject to RCRA Subtitle C. Nor do Plaintiffs presently contend that the ships themselves are, in their entirety, "hazardous." Rather, Plaintiffs contend – and undisputed evidence shows – that the waste paint debris contained in SBRF non-retention vessels (e.g., accumulating on vessel decks) is "hazardous," is "waste," and is being "stored" and/or "disposed" without a permit.

Regarding the Subtitle D issues, MARAD's argument that the ships are not "waste" ignores MARAD's own testimony that the "vast majority" of SBRF non-retention ships will be scrapped and that scrapping is "the only viable large scale means of disposing of SBRF non-retention vessels." PSUF 32.[1] MARAD's assertion

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[1] To reduce the quantity of paper before this Court, we rely on Plaintiffs and Plaintiff-Intervenor's Joint Statement of Undisputed Fact (Doc. No. 90).

that Subtitle D surface water criterion is not enforceable by citizens relies entirely on non-precedential district court cases that themselves rely on a 1981 EPA regulation and its preamble. What MARAD neglects to reveal is that EPA amended that regulation in 1996, and the amendment makes clear that violations of the surface water criterion "constitute open dumping, which are prohibited under Section 4005 of the Act." 61 Fed. Reg. 34,252, 34,269 (July 1, 1996). Because Congress has specifically determined that citizens may enforce open dumping violations under RCRA § 4005, 42 U.S.C. § 9645(a), MARAD's motion for summary judgment on this issue should be denied.

II. STATEMENT OF FACTS

Plaintiffs hereby incorporate the Statement of Facts presented in their Opening Brief in Support of Motion for Partial Summary Judgment of Liability on Claims 5, 6, and 7. (Doc. No. 93).

MARAD's Statement of Facts requires no rebuttal. MARAD's factual allegations are, for the most part, immaterial to the issues before the Court on any of the pending summary judgment motions. Put more directly, MARAD would not be entitled to summary judgment even if all the facts it asserted were true. Even if this were not the case, most of the evidence on which MARAD relies is inadmissible,[2] disputed, or both – and should not be considered on summary judgment for that reason alone. *See* Plaintiffs and Intervenor-Plaintiff's Response and Opposition to Defendants' Statement of Undisputed Fact (filed concurrently).

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[2] MARAD's evidence consists largely of blanket and ambiguous statements by declarants who lay no foundation for their testimony, statements of opinion by declarants who were not disclosed as experts and whose opinion testimony is therefore precluded under Fed. R. Civ. P. 37(c)(1) and Fed. R. Evid. 701, and hearsay. *See* Plaintiffs and Plaintiff-Intervenor's Opposition and Response to Defendants' Statement of Undisputed Fact (filed concurrently).

III. ARGUMENT

A. PLAINTIFFS' CLEAN WATER ACT CLAIM IS NOT MOOT

Plaintiffs adopt the Regional Water Quality Control Board's ("Regional Water Board") opposition to MARAD's argument that the Clean Water Act claim is moot.

MARAD admits that SBRF non-retention ships have been discharging paint to Suisun Bay for years and continue to do so. DSUF 34; PSUF 138-140, 143-147, 149-153, 162-164. MARAD also concedes that these discharges require a National Pollution Discharge Elimination System ("NPDES") permit. MARAD Mem. of P. & A. in Supp. of Defs.' Mot. for Partial Summ. J. ("MARAD Moving Br.") at 21-22, 33. Because MARAD has no NPDES permit that authorizes these discharges, PSUF 167, it is presently violating the Clean Water Act.

MARAD's last-minute "Notice of Intent" ("NOI") to be covered under California's General Permit for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities ("General Permit") did nothing to moot this claim. The Regional Water Board – the state agency charged with enforcement and implementation of the Clean Water Act in Suisun Bay – has denied MARAD coverage under the General Permit and has therefore directed that MARAD's NOI be rejected. *See* Docket No. ("Doc. No.") 76; Elias Decl., Ex. G (Doc. No. 80.6). "To be in compliance with the CWA, it is necessary not only to apply for, but also to have a permit." *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 1174 (D. Mont. 1995) (finding a discharger liable for violation of the CWA where its application to be covered by a general stormwater permit was denied by the state). MARAD has no such permit.

MARAD's last-minute attempt to moot this case would not have worked even if MARAD had become covered under the General Permit. First, the General Permit covers *stormwater* discharges – that is, discharges from rain.[3] Fernandez Opp.

[3] The General Permit enumerates a limited set of "authorized non-stormwater discharges" that it covers – for example, fire hydrant flushing, drinking

Decl., ¶ 5 & Ex. D (filed concurrently). The SBRF non-retention vessels discharge paint to Suisun Bay even when it is not raining; MARAD itself admits that peeling paint is falling off the vessels' exterior hulls and that more paint blows off vessel decks in the wind. PSUF 140, 143, 144; DSUF 34. MARAD's non-stormwater discharges would *not* be authorized even if the General Permit applied.

Second, under a settled exception to the mootness doctrine, a defendant's voluntary cessation of illegal activity, after being sued, generally "does not deprive the tribunal of power to hear and determine the case." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *Friends of the Earth, Inc. v. Laidlaw Envtl. Svcs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *United States v. Concentrated Phosphate Export Ass'n,* 393 U.S. 199, 203 (1968). A defendant in such circumstances must carry a "heavy burden" of showing that "subsequent events [make] absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." *Concentrated Phosphate*, 393 U.S. at 203; *Laidlaw*, 528 U.S. at 189; *see also Rosemere Neighborhood Ass'n v. United States EPA,* No. 08-35045, 2009 WL 2960712, at *2 (9th Cir. Sept. 17, 2009). "'It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.'" *W.T. Grant Co.,* 345 U.S. at 632 (quoting *United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952)).

MARAD has not even attempted such a showing. Nor could it do so. MARAD has a history of ignoring Regional Water Board CWA enforcement orders. PSUF 41-48; Pls.' Opening Br. in Supp. of Mot. for Partial Summ. J. at 13-15 (Doc No. 93). MARAD has, moreover, declined to provide any schedule for completing paint remediation and ship disposal work it now promises. *See* Cahill Decl., Ex. D (Doc. Nos. 74-9 – 74-11). Even if MARAD eventually did everything it claims it will do,

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fountain water, and irrigation drainage, Fernandez Opp. Decl., ¶ 5 and Ex. D, § D.I.A, at 5 (filed concurrently) – but none of those exceptions is relevant here.

1 the SBRF vessels' illicit discharges may continue for years.[4] The Supreme Court
2 has refused to find enforcement actions moot based on far more compelling
3 demonstrations of "repentance and reform." *See, e.g.*, *City of Erie v. Pap's A.M.*, 529
4 U.S. 277, 287-88 (2000) (refusing to find an indecency case moot where strip club
5 shut down, because owner could decide to reopen); *Laidlaw*, 528 U.S. at 179, 189-94
6 (refusing to find an enforcement action moot as a matter of law where the facility
7 had been "closed, dismantled, and put up for sale," because the defendant retained
8 its NPDES permit).
9 Third, even a genuine and permanent cessation of MARAD's illegal
10 discharges would not render this controversy moot. "[T]he court's power to grant
11 injunctive relief survives discontinuance of the illegal conduct." *W.T. Grant*, 345
12 U.S. at 633. Under the CWA, this Court has broad equitable authority to order any
13 relief "reasonably calculated to 'remedy an established wrong.'" *Natural Res. Def.*
14 *Council v. Southwest Marine, Inc.*, 236 F.3d 989, 985, 1000 (9th Cir. 2000) (citation
15 omitted). This includes the Court's power to order MARAD to remediate the
16 environmental consequences of its past violations. *See U.S. Pub. Interest Research*
17 *Group v. Atlantic Salmon of Maine, LLC,* 339 F.3d 23, 31-33 (1st Cir. 2003).[5]
18 Because the Court may order such relief, this case is not – and will not become –
19 moot.
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23 [4] MARAD does not know how many vessels will be remediated under its current contract with Certified Coatings. PSUF 100; *see also* PSUF 85. 93. 94. 96.
24 MARAD has unilaterally halted remediation efforts in the past when it failed to commit adequate funding. PSUF 84.
25 [5] "[T]here is nothing in the [Clean Water Act] or [precedent] that prevents a
26 court from ordering equitable relief to remedy harm done in the past. Nor would it
27 make policy sense to allow such a suit or remedy, if legitimate when brought, to be defeated by having the offender cease the violation as soon as the suit is filed while
28 leaving the past harm unremedied." *Atlantic Salmon of Maine*, 339 F.3d at 33-34 (citations omitted).

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B. PLAINTIFFS' RCRA CLAIMS ARE NOT DUPLICATIVE OF THEIR CLEAN WATER ACT CLAIM

Defendants mistakenly argue that exfoliated, hazardous paint waste contained in SBRF non-retention vessels is exempt from RCRA because RCRA excludes "industrial discharges" from the statutory definition of "solid waste." This argument erroneously assumes either that Plaintiffs are arguing that discharged paint waste is subject to RCRA or that paint waste, collected in the vessels, is a "discharge." The former argument mischaracterizes Plaintiffs' claim. The latter argument does not comport with statutory language, precedent, or common sense. Indeed, the United States has previously argued precisely the opposite.[6] *See infra*, at 8-9.

To be sure, Congress excluded from the statutory definition of "solid waste" "industrial discharges which are point sources subject to permits" under the Clean Water Act.[7] *See* 42 U.S.C. § 6903(27) (the "industrial discharge exclusion"). Plaintiffs do not contend that *discharge* of hazardous paint waste into Suisun Bay is a RCRA violation, however. On the contrary, those *discharges* are the subject of Plaintiffs' separate CWA claim.

Plaintiffs' RCRA Subtitle C claim addresses waste (*e.g.*, exfoliated paint and paint debris) that is presently contained in SBRF non-retention vessels (*e.g.*, lying

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[6] Following discovery, Plaintiffs withdraw their claim that the SBRF non-retention vessels are "hazardous" in their entirety. Plaintiffs also withdraw their claim that Defendants' acceptance, storage, and disposal of SBRF vessels at the SBRF location is final agency action under the Administrative Procedure Act.

[7] Courts have disagreed about whether the industrial discharge exclusion applies only where defendants have obtained a NPDES permit, or whether it also applies where discharges *should* be subject to a NPDES permit. *Compare, e.g., Allegan Metal Finishing Co.*, 696 F. Supp. at 281, *and Buchholz v. Dayton Int'l Airport*, No. C-3-94-435, 1995 WL 811897, at *23 (S.D. Ohio Oct. 30, 1995), *with State of New York v. PVS Chems., Inc.*, 50 F. Supp. 2d 171, 177-78 (W.D.N.Y. 1998). This Court need not resolve the issue because as discussed above, Plaintiffs do not contend that the SBRF vessels' *discharges* are subject to RCRA.

on the deck of the vessels) and that has not discharged to the surrounding waters.[8] This waste is hazardous and cannot be accumulated on the ships without a hazardous waste permit. *See* 42 U.S.C. §§6924-25 (facilities that store, dispose, and/or treat hazardous wastes must obtain and comply with permits); *see also* Pls.' Opening Br. in Supp. of Mot. for Partial Summ. J. of Liability on Claims 5, 6 and 7, at 25-27 (paint waste contained in SBRF non-retention vessels is hazardous under California and federal standards). Such paint waste should never accumulate on the ships in the first place, but instead should be removed and sent to a hazardous waste landfill.

The industrial discharge exclusion on which MARAD relies does not encompass the accumulation of hazardous paint waste on the non-retention vessels. "[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Here, the plain language of RCRA's solid waste definition, *see* 42 U.S.C. § 6902(27), specifies that only industrial "discharges" are excluded. In common usage, "discharge" means "to pour forth; emit." *Random House Webster's Unabridged Dictionary* 561 (2d ed. 2001). Waste contained in a ship – lying on its deck – is not a "discharge" in this or any other sense. Because the statutory language is clear and addresses the issue at hand, "that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Turner v. McMahon*, 830 F.2d 1003, 1007 (9th Cir. 1987) ("The most persuasive evidence of [congressional] intent is the words selected by Congress." (citation omitted; alteration in original)).

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[8] Some of this paint may ultimately discharge, and at that point become subject to CWA regulation. Some of this paint may be removed for disposal by MARAD.

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Even if the statutory language were not clear, EPA's implementing regulation is. That regulation expressly limits the scope of the industrial discharge exclusion:

> The following materials are not solid wastes for the purpose of this part: . . . Industrial wastewater discharges that are point source discharges subject to regulation under section 402 of the Clean Water Act [the NPDES program], as amended.

40 C.F.R. § 261.4(a)(2). In a comment, the regulation states:

> This exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment.

Id. Under EPA's construction of the industrial wastewater exclusion, then, exfoliated paint collected and stored on ships before its discharge into Suisun Bay is not excluded from the definition of "solid waste."[9]

The United States has itself repeatedly argued in RCRA enforcement actions that material is subject to RCRA up to the moment the material is "*actual[ly] discharg[ed] from [the] point source[s].*" *United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275, 280-81 (W.D. Mich. 1988) (emphasis in original); *accord United States v. Dean*, 969 F.2d 187, 194 (6th Cir. 1992); *Humboldt Baykeeper v. Union Pacific R.R. Co.*, No. C 06-02560 JSW, 2006 WL 411877, at *6 (N.D. Cal. Nov.

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[9] This construction fits into the overall structure of RCRA, which regulates not only disposal, but also storage, of hazardous waste. 42 U.S.C. § 6925. California law, which is applicable under RCRA because the State has received authorization to administer a hazardous waste program, *see* 57 Fed. Reg. 32,726 (July 23, 1992), also regulates "storage" of hazardous waste. Cal. Code Reg., tit. 22, § 66264.1-.1102. "Storage," under California law, means "the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed, or stored elsewhere." Cal. Code. Reg., tit. 22, § 66260.10. Regardless of the exfoliated paint's ultimate disposition (and not all of it will be discharged into Suisun Bay, if MARAD ultimately cleans up and removes the ships), RCRA regulate storage and disposal prior to discharge. *See Inland Steel Co. v. EPA*, 901 F.2d 1419, 1423 (7th Cir. 1990) ("The purpose of the exemption in section 1004(27) of the Resource Conservation and Recovery Act, so far as we can discern it, is to avoid duplicative regulation, not to create a regulatory hole . . . .").

27, 2006) ("The industrial discharge exclusion applies only to the actual point source discharge" (citing *Dean*, 969 F.2d at 194)). For instance, in *United States v. Dean*, the defendant was prosecuted by the United States and criminally convicted under RCRA for disposing of hazardous waste into a lagoon. 969 F.2d at 187. On appeal, the defendant argued that RCRA could not apply because the lagoon discharged into a nearby watercourse and thus the waste in the lagoon fell under the industrial discharge exclusion. *Id.* at 194. The court, citing the EPA regulation at 40 C.F.R. § 261.4(a)(2), rejected that argument:

> The meaning of the regulation is that it is only the actual discharges from a holding pond or similar feature into surface waters which are governed by the Clean Water Act, not the contents of the pond or discharges into it.

Id. at 194.

Williams Pipeline Co. v. Bayer Corp., 964 F. Supp. 1300 (S.D. Iowa 1997), cited by MARAD, actually supports Plaintiffs. The court confirmed the principle that the industrial discharge exclusion "applies only to an 'actual point source discharge' and does not exclude 'industrial wastewaters while they are being collected, stored, or treated before discharge.'" *Id.* at 1328 (quoting 40 C.F.R. § 261.4(a)(2) (comment)). In *Williams*, the plaintiffs sought to have spills and leaks regulated under RCRA, but the court rejected that claim because it found that the spills and leaks were already governed by a NPDES permit. *Id.* at 1328-29 & n.27. By contrast, Plaintiffs here do not seek to regulate the actual discharge of exfoliated paint under RCRA; that discharge is subject to Plaintiffs' CWA claim.[10]

[10] In Plaintiffs' Subtitle D claim (Count 6), Plaintiffs contend that mooring the non-retention ships in Suisun Bay is a violation of Subtitle D's prohibition against open dumping; this is a claim that solid waste laws, not hazardous waste laws, are being violated. The Subtitle D claim essentially asserts that the SBRF is an illegal junkyard. Clearly, a junkyard is subject to regulation under solid waste laws. If the junkyard also discharges waste into a waterway, that discharge is separately governed by the CWA. *Dague v. City of Burlington*, 732 F. Supp. 458, 467 (D. Vt. 1989), *aff'd*, 935 F.2d 1343 (2d Cir. 1991), *rev'd in part on other grounds*,

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C. MARAD IS VIOLATING RCRA'S BAN ON OPEN DUMPING.

MARAD argues that it is not violating RCRA Subtitle D's ban on open dumping because (1) the non-retention vessels are not "solid waste" within the statutory definition, and (2) the SBRF does not fit into the criteria for open dumping. The first argument conflicts with MARAD's own deposition testimony. The second argument relies on cases that interpreted a regulation that EPA subsequently – and materially – revised. Both of MARAD's arguments are wrong.

1. THE NON-RETENTION VESSELS ARE SOLID WASTE

Under Subtitle D of RCRA, open dumping requires disposal of "solid waste."[11] 42 U.S.C. §§ 6903(14), 6945(a). The definition of "solid waste" for open dumping purposes is defined by statute and includes "any discarded material." 42 U.S.C. § 6903(27). The term "discarded" is not itself defined in RCRA. The Ninth Circuit has interpreted this term, however, in deciding whether material was discarded and thus fell under the statutory definition of "solid waste." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004) ("*SAFE*"). The three factors used by the Ninth Circuit to make this determination are:

> (1) whether the material is 'destined for beneficial reuse or recycling in a continuous process by the generating industry itself'; (2) whether the materials are being actively reused, or whether they merely have the *potential* of being reused; (3) whether the materials are being reused by its original owner, as opposed to use by a salvager or reclaimer."

SAFE, 373 F.3d at 1043 (emphasis in original). MARAD's moving brief does not discuss the *SAFE* factors.[12]

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505 U.S. 557 (1992); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. supp. 642, 655 (E.D. Penn. 1981).

[11] There need not be disposal of a "hazardous waste" for the open dumping prohibition to apply. 42 U.S.C. § 6945(a). Regulated hazardous waste is subject to RCRA Subtitle C (and, in this litigation, is the subject of a separate claim, Count 5 of the Amended Complaint).

[12] MARAD instead discusses California's regulatory definition of "solid waste." That regulation is inapposite to Plaintiffs' RCRA Subtitle D open dumping claim because it was adopted only for purposes of California's Subtitle C-authorized

1 Under *SAFE*, the non-retention vessels in the SBRF are plainly "solid waste."
2 The ships are not operational and are generally destined to be scrapped. PSUF 12,
3 32. Thus, with respect to the first *SAFE* factor, the ships are not being reused in a
4 continuous process. The ships have been rotting in Suisun Bay for years and, in
5 many cases for decades. *See, e.g.*, PSUF 15. No matter what their ultimate
6 disposition, they are not part of any process on a "continuous" basis (other than
7 rotting); *see Owen Elec. Steel Co. v. Browner*, 37 F.3d 146, 150 (4th Cir. 1994)
8 (steel-making byproduct lying unused for only six months was "discarded"). Nor are
9 the ships being used by the generating industry, the maritime transportation
10 industry. MARAD testified at its deposition[13] that it expects to dispose of the "vast
11 majority" of SBRF non-retention ships through scrapping, because scrapping is "the
12 only viable large scale means of disposing of SBRF non-retention vessels." PSUF
13 32; *see Owen Elec.*, 37 F.3d at 150 (steel-making byproduct sold to others for use in
14 roadbed construction was not used by the generating industry itself).
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19 hazardous waste regulatory program, Cal. Code Regs. tit. 22, § 66261.1(b), and does not apply to RCRA Subtitle D.
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21 Regulatory definitions of solid waste, adopted for purposes of implementing RCRA Subtitle C, are "distinct from the statutory definition," which applies in non-Subtitle C contexts. *Military Toxics Project v. EPA*, 146 F.3d 948, 951 (D.C. Cir. 1998); *accord Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.,* 989 F.2d 1305, 1308 (2d Cir. 1993) (holding that "a careful perusal of RCRA and its regulations reveals that 'solid waste' plainly means one thing in one part of RCRA and something entirely different in another part of the same statute"); *Ca. Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp*, 298 F. Supp 2d 930, 972-975 (E.D. Cal. 2003) (similar). The regulatory definition of "hazardous waste" is thus "narrower" than, and does not limit, the statutory definition. *Military Toxics Project v. EPA*, 146 F.3d at 951; *Ca. Dept. Toxic Substances Control*, 298 F. Supp. 2d at 974-75.
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28 [13] MARAD designated Curt Michanczyk, MARAD director of Ship Disposal, to testify for it pursuant to Fed. R. Civ. P. 30(b)(6). PSUF 55-56.

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Nor do the vessels satisfy the second *SAFE* factor – *i.e.*, "whether the materials are being actively reused, or whether they merely have the *potential* of being reused." 373 F.3d at 1043. Although MARAD's moving brief claims that the ships "remain functioning vessels" "and can always be reclassified as retention" or "sold as operating vessels," MARAD Moving Br. at 35, MARAD testified at deposition that the vessels generally are not operable, are not actively being reused, and will almost all be scrapped.[14] PSUF 12, 32. MARAD wants "to get rid of these ships as fast as possible," not reuse them. PSUF 33. Congress itself, as recently as January 2006, has called for the "expeditious disposal" of the non-retention ships. PSUF 21. Mr. Cahill and Mr. Michanczyk, on whose declaration testimony MARAD now relies (Doc. Nos. 74-7 & 74-4), does not identify even a single existing SBRF non-retention ship that will ever be elevated to retention status, become a museum, be turned into an artificial reef, or be blown up by the Navy. Even if these witnesses could identify a particular vessel that might eventually serve such a purpose, that possibility would reflect, not "active[] reuse[]," but "merely . . . the *potential* of being reused." 373 F.3d at 1043 (emphasis in original). A mere "potential" for reuse does not satisfy *SAFE*.[15] *See also Am. Mining Congress v. U.S. EPA*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) (rejecting claim that because material "*may* at some time in the future be reclaimed" it is not "discarded") (emphasis in original); *SAFE*, 373 F.3d at 1043.

With respect to the third *SAFE* factor, the ships are not being reused by their original owner as opposed to a salvager or reclaimer. In the past five years, thirteen of the fourteen ships MARAD disposed were removed from the SBRF to be

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[14] According to MARAD's own testimony, there is no demand for the non-retention ships as museums and MARAD does not expect to donate any ships for this purpose in the future. PSUF 28.

[15] In any event, using the ships for target practice by the Navy, sinking them for artificial reefs, and putting them on display as a museum would also not constitute reuse by the generating industry itself and would, therefore, not meet the first *Safe Air* factor.

scrapped. PSUF 24. The only other means by which MARAD has disposed of an SBRF non-retention vessel during that period was by having the vessel transferred to the Navy to "blown up and sunk." PSUF 24, 29.

MARAD's reliance on an August 5, 1994 letter from EPA to a contractor suggesting that unspecified National Defense Reserve Fleet vessels have not been discarded is unpersuasive here. That letter predates *SAFE* and does not conduct the analysis required by the Ninth Circuit. As importantly, the letter's predicate assumption that the vessels "continue to function as . . . ship[s]" and thus serve a "useful purpose" is contrary to the undisputed evidence before this Court. MARAD itself attests to the opposite, offering testimony that a non-retention ship is one that is "determined to be no longer commercially or militarily useful." Cahill Decl. ¶ 6; PSUF 12. As MARAD stated at deposition,

> The non-retention ships, once they go into non-retention status they are not maintained to be put back into operations. So there is a degradation of systems and material condition on-board ship. The longer the ships are in non-retention status, the worse condition they're in."

Michanczyk Dep. 87:4-10.[16] Because EPA's informal 1994 letter does not acknowledge or address the degradation of these vessels that has occurred over the subsequent fifteen years and does not address *SAFE*, the letter is unpersuasive and should be given no weight. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (agency interpretations such as those in opinion letters "lack the force of law" and are "entitled to respect" only to the extent they have the "power to persuade").

The military munitions rule ("MMR"), also cited by MARAD, has nothing to do with this case. The MMR contains a definition of solid waste that is not only

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[16] Since the inoperable non-retention ships are not "used, or capable of being used, as a means of transportation on water," they are not "vessels" within the meaning of 1 U.S.C. § 3. Whether or not they are "vessels" under that provision, however, is irrelevant since even a functioning vessel can be discarded. If someone took an old refrigerator and dumped it into a vacant lot, the refrigerator would surely be "discarded" even though someone might, in theory, later salvage it.

1 limited to Subtitle C, but is even further limited to military munitions.[17] *Military*
2 *Toxics Project v. EPA*, 146 F.3d at 951; *see also* 42 U.S.C. § 6924(y) (congressional
3 directive to EPA to promulgate regulations specifically for military munitions); 40
4 C.F.R. § 260.10 (defining military munitions). That regulation is thus irrelevant to
5 the meaning of the statutory definition of solid waste applicable to Subtitle D.

6 **2. MARAD IS ENGAGING IN OPEN DUMPING**

7 The SBRF has, for years, been managed as a veritable junkyard. MARAD
8 collects inopperable ships at the site, virtually all of which will eventually be
9 scrapped, and then lets them degrade into the surrounding waters. This violates
10 RCRA Subtitle D's "open dumping" prohibition. 42 U.SC. § 6945(a).

11 Congress authorized EPA to promulgate criteria defining practices that are
12 open dumping.[18] 42 U.S.C. § 6907(a)(3). One of these, the surface water criterion,
13 states that a facility cannot cause a discharge of pollutants to navigable waters in
14 violation of the requirements of CWA section 402 (the NPDES program). 40 C.F.R. §
15 257.3-3. In 1996, EPA amended the criteria regulation to specify that violations of
16 "the criteria in §§ 257.1 through 257.4" – a range that includes the surface water
17 criterion – "constitute open dumping." 61 Fed. Reg. 34,252, 34,269 (July 1, 1996);
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20 [17] The MMR was adopted in response to a specific congressional directive to
21 adopt rules specifically for military munitions. *See* 42 U.S.C. § 6924(y). It is thus *sui*
generis; if it were not, there would have been no need for EPA to issue the rule,
22 since there already existed a regulatory definition of solid waste under Subtitle C.
23 Even if the MMR were informative by analogy, however, it would not aid MARAD.
The MMR defines when the military develops an "intent to discard" munitions for
24 purposes of Subtitle C. 62 Fed. Reg. 6622, 6626 (Feb. 12 1997). Here, Congress itself
declared an intent to discard the non-retention ships by three times demanding that
25 they be disposed. PSUF 16, 17, 21.

26 [18] EPA uses the same criteria to define both facilities that qualify as "open
dumps" and practices that constitute "open dumping." 40 C.F.R. § 257.1(a)(1) & (2).
27 The Second Circuit has noted that there is "no functional difference" between the
28 two terms. *S. Rd. Assocs. v. Int'l Bus. Machs. Corp.*, 216 F. 3d 251, 255 n.3 (2d Cir.
2000).

see also 40 C.F.R. § 257.1(a)(2).[19] Because Congress has expressly permitted citizens to enforce the open dumping ban, *see* 42 U.S.C. § 6945(a), a violation of the enumerated criteria is enforceable in a citizen suit.

MARAD does not genuinely dispute that it has been violating the surface water criterion for years. Under 40 C.F.R. § 257.1(a)(2), this violation "constitute[s] open dumping," which Congress has determined is actionable by private citizens. 42 U.S.C. § 6945(a); *Dague v. Burlington*, 732 F. Supp. 458, 467 (D. Vt. 1989) (holding that proof of a NPDES violation at a disposal site "ipso facto establishes a violation of the surface water criterion of RCRA" and enforceable in a citizen suit), *aff'd*, 935 F.3d 1343, 1352 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992).

MARAD's attempt to seek shelter in an outdated version of EPA's Subtitle D regulations is perplexing for what it omits. To be sure, in 1981, EPA amended the federal minimum criteria for open dumps and open dumping for the express purpose of making the surface water criterion unenforceable by private citizens. 46 Fed. Reg. 47,048, 47,050 (Sept. 23, 1981). EPA limited the regulatory specification of "open dumping" – the practice actionable by citizens – to exclude the surface water criterion. Specifically, EPA amended 40 C.F.R. § 257.1(a)(2) to provide that only "[p]ractices failing to satisfy criteria adopted for purposes of section 1008(a)(3) constitute open dumping, which is prohibited under section 4005 of the Act." 46 Fed. Reg. at 47,050.

By negative implication, EPA's 1981 regulatory language suggested that a solid waste criterion that was not "adopted for purposes of section 1008(a)(3)" did

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[19] The LexisNexis version of the regulation was not updated to include the 1996 amendments. The official Code of Federal Regulations published by the Government Printing Office (available in hard copy in legal libraries, of course, available online through www.gpoaccess.gov), as well as Westlaw, both incorporate the 1996 amendments. *Compare* 40 C.F.R. § 257.1(a)(2) (West, Westlaw through Sept. 24, 2009) *and* 40 C.F.R. § 257.1(a)(2) (GPO Access through July 1, 2008) *with* 40 C.F.R. § 257.1(a)(2) (Bender, LEXIS through Sept. 24, 2009). This may have led to some lingering confusion in the case law.

1 not constitute "open dumping" and was therefore unenforceable by private citizens.
2 The surface water criterion begins with the language "for purposes of 4004(a) of the
3 Act," and does not reference RCRA § 1008(a)(3), 42 U.S.C. § 6907(a)(3). *See* 40
4 C.F.R. § 257.3-3. Accordingly, some courts held that the criterion, as amended in
5 1981, could not be enforced by citizens under RCRA § 4005(a). MARAD relies on
6 cases that analyzed that 1981 regulation and its preamble. *See Hackensack*
7 *Riverkeeper, Inc. v. Delaware Ostego Corp.,* 450 F. Supp. 2d 467 (D. N.J. 2006);
8 *Long Island Soundkeeper Fund, Inc. v. New York Athletic Club*, No. 94 Civ. 0436,
9 1996 WL 131863 (S.D. N.Y. Mar. 22, 1996); *see also Jones v. E.R. Snell Contractor,*
10 *Inc.,* 333 F. Supp. 3d 1344, 1349-50 (N.D. Ga. 2004).[20]

11 The flaw in MARAD's argument is that EPA in 1996 revised 40 C.F.R. §
12 257.1 to delete the 1981 proviso that only "[p]ractices failing to satisfy criteria
13 adopted for purposes of section 1008(a)(3) constitute open dumping." 61 Fed. Reg.
14 34,252, 34,269 (July 1, 1996). EPA's revised regulation, in effect today, states:

15 > Practices failing to satisfy either the criteria in §§ 257.1 through 257.4
> [or certain inapplicable criteria] constitute open dumping, which is
16 > prohibited under Section 4005 of the Act.[21]

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20 [20] *Long Island Soundkeeper* pre-dated the 1996 amendment and based its conclusion on the now-superseded 1981 version of the regulation and the preamble
21 discussing that regulation. *See* 1996 WL 131863, at *10-11. Inexplicably, *Hackensack*, and *Jones* also relied on the 1981 regulation and preamble, even
22 though both cases post-date the 1996 amendments to that regulation. Neither case
23 acknowledges those 1996 amendments. 450 F. Supp. 2d at 486-87, 333 F. Supp. 3d at 1350.

24 [21] This 1996 language is notably similar to the original language of the
25 regulation, which pre-dated the 1981 rule adopted by EPA to limit citizen suits. *See*
26 44 Fed. Reg. 53,444, 53,461 (Sept. 13, 1979) (specifying that "[p]ractices failing to satisfy these criteria constitute open dumping, which is prohibited under Section
27 4005 of the Act."). That original, pre-1981 language was the basis for the one court's conclusion that proof of the defendants' NPDES violations constituted a violation of
28 the open dumping prohibition. *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 655 (E.D. Penn. 1981).

1 40 C.F.R. § 251.1(a)(2). As the Second Circuit has explained, under this 1996 rule,
2 "[f]acilities and practices that fail to fulfill the criteria delineated in §§ 257.1
3 through 257.4 are considered (respectively) open dumps and open dumping." *S. Rd.*
4 *Assocs. v. Int'l Bus. Machs. Corp.*, 216 F. 3d 251, 256 (2d Cir. 2000). Because the
5 surface water criterion, 40 C.F.R. § 257.3-3, is "in §§ 257.1 through 257.4," practices
6 that violate that criterion "constitute open dumping."[22] A violation of the surface
7 water criterion is therefore once again enforceable by citizen suit. *See* 42 U.S.C.
8 6945(a).

9 To the extent the 1981 regulation and its preamble said otherwise, they are
10 no longer valid.[23] A majority of cases that post-date the 1996 amendment to the
11 regulation have allowed citizens to enforce RCRA's open dumping ban against
12 defendants who violate the surface water criterion. *See Kersenbrock v. Stoneman*
13 *Cattle Co., LLC*, No. 07-1044-MLB, 2007 WL 2219288, at *3 (D. Kan. July 30, 2007);
14 *Cox v. City of Dallas,* No. 3:98-CV-0291-H, 1999 WL 33756552, at **5-6, *16-
15 17 (N.D. Texas Aug. 4, 1999); *White & Brewer Trucking v. Donley,* 952 F. Supp.
16 1306, 1314-15 (C.D. Ill. 1997). Citizen enforcement of that criterion is allowed by
17 EPA's current rule.[24]

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19 [22] Although EPA did not amend the prefatory clause of § 257.3-3 ("For
20 purposes of Section 4004(a), . . . "), that clause can be read consistently with the rest of the regulation, including the current version of 40 C.F.R. § 257.1(a)(2). Given that
21 EPA's 1996 amendments specifically enumerated violations of the surface water
22 criterion as defining "open dumping," 40 C.F.R. § 257.1(a)(2), it was unnecessary to also amend 40 C.F.R. § 257.3-3.

23 [23] The double-liability policy rationale behind the 1981 amendments, and
24 prominently featured in these three cases, ignores this Court's inherent equitable authority to conform the remedies available under the Clean Water Act and RCRA
25 to avoid any inconsistency or duplication. *See EEOC v. Gen'l Tel. Co.*, 599 F.2d 322,
26 334 (9th Cir. 1979) (holding that courts may fashion appropriate orders to insure defendants are not subjected to unnecessarily duplicative litigation).

27 [24] The following additional cases have also found a RCRA citizen suit to lie
28 against violators of the surface water criterion: *Orange Environment, Inc. v. County of Orange*, 860 F. Supp. 1003, 1022 (S.D. N.Y. 1994); *Gache v. Town of Harrison*, 813 F. Supp. 1037, 1043 (S.D. N.Y. 1993); *Dague,* 732 F. Supp. at 467; *No Dumping*

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IV. CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion for Partial Summary Judgment (Doc No. 74).

September 29, 2009

Respectfully submitted,

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or Unsightly Municipal Pollution v. County of King, No. C82-186V, 1986 WL 12088, at *5 (W.D. Wash., Mar. 26, 1986); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 655 (E.D. Penn. 1981).

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2009, I electronically filed the documents listed below with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

- PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT
- PLAINTIFFS AND PLAINTIFF-INTERVENOR'S OPPOSITION AND RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS
- DECLARATION OF UBALDO FERNANDEZ IN SUPPORT OF PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT
- APPENDIX OF UNPUBLISHED AUTHORITIES CITED IN PLAINTIFFS' OPENING BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIMS 5, 6, AND 7 AND PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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