MICHAEL E. WALL (Cal. Bar No. 170238)
NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter Street, 20th Floor
San Francisco, CA 94104
(415) 875-6100 (ph); (415) 875-6161 (fax)
mwall@nrdc.org

SARAH LIPTON-LUBET (admitted *pro hac vice*)
NATURAL RESOURCES DEFENSE COUNCIL
1200 New York Ave., NW, Suite 400
Washington, DC 20005
(202) 289-2405 (ph); (202) 289-1060 (fax)
slipton-lubet@nrdc.org

DAVID A. NICHOLAS (admitted *pro hac vice*)
20 Whitney Road, Newton, MA 02460
(617) 964-1548 (ph); (617) 663-6233 (fax)
dnicholas@verizon.net

SCOTT ALLEN (Cal. Bar No. 178925)
LARIVIERE, GRUBMAN & PAYNE
19 Upper Ragsdale Drive, Suite 200
Monterey, CA 93940
Tel.: (831) 649-7531; Fax: (831) 649-8835
Email: sallen@lgpatlaw.com

Attorneys for Plaintiffs

[additional counsel listed on signature page]

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' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT OF LIABILITY ON CLAIMS 5, 6, AND 7

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"), do not dispute that they are violating the Clean Water Act (CWA) by discharging hazardous paint chips and other pollutants to Suisun Bay without a permit. Defendants also do not dispute that they are unlawfully storing hazardous, lead-based maritime paint waste on SBRF non-retention vessels in violation of California's Hazardous Waste Control Law ("HWCL") and the Resource Conservation and Recovery Act ("RCRA"). Nor do Defendants dispute that they have known of these conditions for more than a dozen years and followed a policy not to address them. MARAD's present protestations of "repentance and reform," *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 n.5 (1953), on the eve of summary judgment, are legally irrelevant to liability. This Court should now grant summary judgment for Plaintiffs on liability under the CWA and HWCL/RCRA Subtitle C claims.

MARAD's defense to Plaintiffs' "open dumping" claim does not survive factual or legal scrutiny. Undisputed evidence demonstrates that the SBRF non-retention vessels presently moored in Suisun Bay are not operational, are not expected to be used again, and are awaiting the scrap yard or possible sinking. Under Ninth Circuit precedent, these characteristics make the non-retention vessels "solid waste" that must be managed in accordance with the "open dumping" criteria promulgated by the U.S. Environmental Protection Agency ("EPA"). In 1996 EPA amended these "open dumping" criteria explicitly to incorporate the surface water criterion that Plaintiffs seek to enforce. Because MARAD concedes that it is violating that criterion, MARAD should now be found liable for open dumping as well.

II. ARGUMENT

A. MARAD IS UNLAWFULLY STORING HAZARDOUS WASTE ON SBRF VESSELS

Count 5 of the Amended Complaint asserts that MARAD is violating California's HWCL and RCRA by storing and/or disposing hazardous waste without a permit. MARAD does not dispute that it is storing hazardous waste on the SBRF non-retention vessels without a permit in violation of the HWCL and RCRA. On the contrary, MARAD repeatedly admits that it has not complied with the requirements that limit to ninety days the accumulation of hazardous waste on-site before its removal to a permitted treatment, storage, or disposal facility. Defs.' Resp. to Pls.' & Pl.-Intervenor's Mots. for Partial Summ. J. ("MARAD Resp. Br.") (Doc. No. 94) at 5, 6. It is therefore undisputed that MARAD is "storing"[1] hazardous waste and that the SBRF site is an unpermitted "storage facility."[2] Because the HWCL requires such a facility to have a permit, and prohibits unauthorized storage of hazardous waste, MARAD's unpermitted storage of hazardous paint waste on SBRF vessels is unlawful.[3] Cal. Health & Safety Code §§ 25201(a), 25189.2(d), and 25189.5(d).

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[1] "Storage" is defined as "the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, stored, or disposed elsewhere." Cal. Code Regs., tit. 22, § 66260.10

[2] A "storage facility" includes "a hazardous waste facility at which . . . [t]he hazardous waste is held for greater than 90 days at an onsite facility." Cal. Health & Safety Code § 25123.3(b)(1); *see also* Cal. Code Regs., tit. 22, § 66260.10 (defining "onsite facility" as one "at which a hazardous waste is generated and which is owned by, leased to, or under the control of, the generator of the waste").

[3] Although MARAD seems to concede that "the SBRF as a whole" can be considered a hazardous waste storage facility, MARAD Resp. Br. 6, MARAD incorrectly implies some dispute as to whether every vessel in the SBRF is unlawfully accumulating hazardous paint waste, *see id.* As MARAD cites no principle that would require Plaintiffs to prove unlawful storage on every vessel, such a dispute would be immaterial to MARAD's liability. The "dispute," however, is not genuine: Plaintiffs' expert testified, without rebuttal, that the extensive testing of most SBRF non-retention vessels supports an inference that paint on all SBRF non-retention vessels is hazardous. PSUF 209; Rotkin-Elman Decl., ¶¶ 52-73 (Doc.

Plaintiffs respectfully request this Court to find that MARAD has violated the HWCL and RCRA on each day and for each vessel on which the hazardous paint debris has accumulated.

MARAD's claim that it intends to remove the exfoliated paint waste to "bring MARAD into compliance with RCRA's requirements going forward," MARAD Resp. Br. at 6-7, is obviously not a defense to liability, which is the only issue presented on the present motions. In any event, MARAD's claim that it will someday remove the hazardous waste offers cold comfort. MARAD has proposed no schedule for removing the paint and has a long history of intentionally disregarding its illegal accumulation of hazardous waste.

Because MARAD has now confessed to unlawful *storage* of hazardous waste, this Court may find it unnecessary also to address MARAD's unlawful *disposal* of that waste. However, MARAD's present defense that the SBRF is not a "disposal facility" is misdirected. California's HWCL provides that "[t]he disposal of any hazardous waste . . . is prohibited when the disposal is at a facility which does not have a permit . . . *or at any point which is not authorized according to this chapter*."[4] Cal. Health & Safety Code § 25189.5(a). The length of time the exfoliated waste has been on the ships, as well as the lack of a concrete timetable to remove the paint (or the ships that contain them) from Suisun Bay, supports a ruling that disposal has occurred, as more fully set forth in Plaintiffs' Opening Brief in Support

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92). The evidence also shows that paint debris has accumulated on all SBRF non-retention vessels. PSUF 127, 193-95. MARAD has offered no contrary evidence.

[4] MARAD's focus on whether the SBRF is a "disposal facility" is perplexing for a second reason: It is a "disposal *site*" that requires a permit. Cal. Health & Safety Code § 25201(a). "Disposal site" is defined to mean "the location where any final deposition of hazardous waste occurs." Cal. Health & Safety Code § 25114. Exfoliated paint lying on a ship for decades with no committed timetable to remove it could be considered final deposition.

of Motion for Partial Summary Judgment of Liability on Claims 5, 6, and 7 ("Pls.' Opening Br.") (Doc. No. 93).[5]

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

1. MARAD IS ENGAGING IN OPEN DUMPING

Section 1008(a)(3) of RCRA authorizes EPA to promulgate criteria defining practices that are "open dumping." 42 U.S.C. § 6907(a)(3). Section 4005(a) of RCRA in turn bans open dumping and expressly provides that private citizens may enforce this ban. 42 U.S.C. § 6945(a). Plaintiffs seek summary judgment that MARAD is violating one of the open dumping criteria at the SBRF. This criterion, the "surface water criterion," *see* 40 C.F.R. § 257.3-3, prohibits a facility from discharging pollutants to navigable waters in violation of the requirements of CWA section 402 (the NPDES program).

MARAD argues that the surface water criterion is not in fact a criterion that is used to determine when "open dumping" is occurring, but rather is a criterion used to determine only what is an "open dump," under Section 4004(a) of RCRA. MARAD bases this argument on the fact that 40 C.F.R. § 257.3-3 the surface water criterion, contains an introductory clause stating: "[f]or purposes of section 4004(a) of the Act." (Section 4004(a) of RCRA directs EPA to promulgate criteria to determine which facilities are "open dumps.") Thus, according to MARAD, the

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[5] "Disposal" includes either: (1) "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste so that the waste or any constituent of the waste is or may be emitted into the air or discharged into or on any land or waters, including groundwaters, or may otherwise enter the environment" or (2) "the abandonment of any waste." Cal. Health & Safety Code § 25113(a). The exfoliated paint deposited on the decks is then emitted into the air (by wind) and water (when it rains), and so fits into the first part of the "disposal" definition. In addition, the paint was "abandoned" since MARAD intentionally did nothing to remove it.

surface water criterion, 40 C.F.R. § 257.3-3, applies to "open dumps" but not to "open dumping."[6]

MARAD's argument ignores the plain language of EPA's regulations. 40 C.F.R. § 257.1(a)(2) states that "[p]ractices failing to satisfy . . . the criteria in §§ 257.1 through 257.4 . . . constitute open dumping." The surface water criterion falls within these sections. *See generally*, *LAL v. INS*, 255 F.3d 998, 1004 (9th Cir. 2001) (holding that an interpretation of a regulation cannot violate the regulation's plain language).

The regulatory history reinforces the plain language. When EPA first adopted the minimum criteria to determine what is an "open dump" and what is "open dumping," EPA used the same criteria for both. 44 Fed. Reg. 53,438, 53,460-61 (Sept. 13, 1979). The regulation stated: "(1) Facilities failing to satisfy these criteria will be considered open dumps for purposes of State solid waste management planning under the Act. (2) Practices failing to satisfy these criteria constitute open dumping, which is prohibited under the Act." *Id.* At the same time, EPA adopted the surface water criterion, which did not include the introductory "[f]or purposes of section 4004(a) of the Act" language. *Id.* at 53,461 (Sept. 13, 1979). Even under MARAD's analysis, the surface water criterion must have applied to "open dumping" prior to 1981, since according to MARAD, it was to change that application that EPA adopted the 1981 regulatory amendments.

The 1981 amendments changed the regulation in two material ways. First, EPA revised the regulation's "scope," at § 257.1(a)(1) and (2) to provide that "[f]acilities failing to satisfy criteria *adopted for purposes of Section 4004(a)* are open dumps" while "[p]ractices failing to satisfy criteria *adopted for purposes of Section 1008(a)(3)* constitute open dumping." 46 Fed. Reg. 47,048, 47,048 (Sept. 23,

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[6] MARAD is entitled to no deference in the interpretation of EPA's regulations, for "deference is inappropriate when [an agency] interprets regulations promulgated by a different agency." *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1015 (D.C. Cir. 2002).

1981) (emphasis added to highlight new language). Second, EPA added the introductory clause "For purposes of section 4004(a) of the Act" to § 257.3-3. *Id.* at 47,052. Thus, in 1981, EPA appeared to make the surface water criterion inapplicable to a determination of "open dumping," while keeping that criterion applicable for determining what is an "open dump."

In 1996, EPA reversed itself again. EPA amended 40 C.F.R. § 257.1(a)(1) and (2) to their present form:

> (1) Facilities failing to satisfy either the criteria in §§ 257.1 through 257.4 or [criteria that apply to receipt of certain conditionally exempt small-quantity generator ("CESQG") wastes at certain facilities] are considered open dumps, which are prohibited under section 4005 of the Act.
>
> (2) Practices failing to satisfy either the criteria in §§ 257.1 through 257.4 or [criteria that apply to receipt of certain conditionally exempt small-quantity generator ("CESQG") wastes at certain facilities] constitute open dumping, which is prohibited under the Act.

40 C.F.R. § 257.1(a). This amendment made three significant changes. First, it removed the "adopted for purposes of section 1008(a)(3)" qualifier from § 257.1(a)(2). Second, EPA made explicit that *all* the criteria promulgated at §§ 257.1 through 257.4 "constitute open dumping." Third, in paragraph (1), EPA made clear that the criteria used to determine what is an "open dump" are *also* used to determine what is prohibited by § 4005, the "open dumping" ban. Under this language, it is clear that the surface water criterion, 40 C.F.R. § 257.3-3, is incorporated into the definition of "open dumping," notwithstanding the introductory clause of § 257.3-3. If all EPA had intended by the 1996 amendment was to add new criteria for CESQG wastes, it would not have had any reason to make the above changes.

Both of the cases on which MARAD relies fail to analyze EPA's 1996 revision.[7] *Long Island Soundkeeper Fund v. New York Athletic Club*, No. 94 Civ.

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[7] In their opposition brief, Plaintiffs called the Court's attention to a third and similar case, not cited by Defendants. Due to a typographical error, Plaintiffs provided the incorrect citation. The correct citation for the case is *Jones v. E.R. Snell Contractor, Inc.*, 333 F. Supp. 2d 1344 (N.D. Ga. 2004).

0436, 1996 WL 131863 (S.D.N.Y. 1996), was decided before 1996 amendment. In *Hackensack Riverkeeper, Inc. v. Delaware Ostego Corp.*, 450 F. Supp. 2d 467, 486 (D.N.J. 2006), the plaintiffs conceded the § 257.3-3 issue (making that discussion dicta), and the court relied on *Long Island Soundkeeper* and the 1981 regulation's preamble without acknowledging that the 1981 regulatory language had changed.

The first two sentences of 40 C.F.R. § 257.1(a) do not change this analysis. Those sentences state that "[u]nless otherwise provided," the criteria in §§ 257.1 through 257.4 and §§ 257.5 through 257.30, "are adopted for purposes of determining which solid waste disposal facilities pose a reasonable probability of adverse effects on health or the environment under sections 1008(a)(3) and 4004(a) of [RCRA]." The reference to "unless otherwise provided" appears to relate to the exceptions in 40 C.F.R. § 257.1(c). In any event, these sentences pertain to the determination of whether a facility or practice poses "a reasonable probability of adverse effects on health or the environment." That is not a standard set out in statute or regulation for determining whether a facility is "open dumping."[8]

2. THE NON-RETENTION VESSELS ARE SOLID WASTE

MARAD's claim that the SBRF non-retention vessels are not solid waste is unsupported by admissible evidence and is contrary to precedent. The crux of MARAD's argument is that the non-retention vessels, or at least some of them, are being "actively managed" and "can always be reclassified as retention, sold as operating vessels or museum exhibits, or used in Navy exercises." MARAD Resp. Br. at 12. The "active[] manag[ment]" to which MARAD refers appears to be

[8] Even if MARAD's construction of the regulations were correct, citizen enforcement would still not be defeated. In RCRA § 7002(a)(1)(A), Congress expressly permitted any person to sue any other person "alleged to be in violation of any standard [or] regulation . . . which has become effective pursuant to this chapter." 42 U.S.C. § 6972(a)(1)(A). The surface water criterion, even if adopted only for purposes of RCRA § 4004(a), constitutes a "standard [or] regulation" that has become effective pursuant to RCRA. 42 U.S.C. § 6972(a)(1)(A).

MARAD's minimal efforts to begin to address environmental pollution and to prevent the vessels from sinking outright. This sort of active management does not differ in kind from the "active management" of putting one's waste in a tight trash can or shed to prevent dogs from spreading it over the neighborhood. As MARAD itself has testified:

> 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.

MARAD (Michanczyk) Dep. 87:4-10; PSUF 115. MARAD allows this deterioration, it testified, "because the vessels *are not intended to be used again*." MARAD (Magee) Dep. 262:7-10 (emphasis added).

MARAD also points to testimony – essentially all of it lacking foundation, *see* Pls.' and Pl.-Intervenor's Opp. & Resp. to Defs.' Statement of Undisputed Facts (Doc. No. 97) – that in the past some vessels that had been designated as non-retention were recalled to service. MARAD has not offered any testimony that even one of the *remaining* non-retention vessels, those over which this suit is brought, will ever return to service.[9] MARAD's own testimony shows otherwise: The non-retention vessels at issue here are not operable, are not actively being reused, and are never expected to be used as artificial reefs or museums. They are expected to be scrapped, or possibly sunk. PSUF 12, 15, 28, 30, 32, 33.

Under *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1043 (9th Cir. 2004) ("*SAFE*"), the non-retention vessels are plainly solid waste. *See* Pls.' Br. in Opp. to Defs.' Mot. for Part. Summ. J. ("Pls.' Opp.") (Doc. No. 96) at 10-13. MARAD does not dispute that the ships would be so categorized under *SAFE*'s three-factor test. Instead, MARAD contends that *SAFE* is inapplicable because it addresses only

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[9] Even if MARAD could make such a showing for one or a small number of non-retention vessels, that would not make the remaining non-retention vessels, for which there is not even a speculative prospect of reactivation, any less "solid waste."

"spent" material. This is a distinction that MARAD has invented and which finds no support in the Ninth Circuit's opinion. In any event, in light of the undisputed evidence cited above, the vessels are every bit as spent as a threadbare garment, zippers broken, that has been placed in a trash can for disposal; it is *conceivable* that the owner might later retrieve that garment for reuse, but no evidence shows that the owner has any intention to do so.

C. MARAD IS VIOLATING THE CLEAN WATER ACT

MARAD no longer disputes that it is violating the CWA by discharging stormwater contaminated with exfoliated paint into Suisun Bay without a NPDES permit. MARAD also does not dispute that it is violating the CWA through non-stormwater discharges of exfoliating paint from SBRF non-retention vessels without a NPDES permit. *See* MARAD's Resp. Br. at 2-4. This Court should, accordingly, grant summary judgment finding MARAD liable on the CWA claim.

MARAD tries to downplay its violations by suggesting that its stormwater pollution prevention plan ("SWPPP") will someday be "adequate to bring MARAD into compliance with the requirements of the CWA." MARAD Resp. Br. at 4. Given the speculative nature of when that day may arrive, and MARAD's poor record of CWA compliance, *see* Pls.' Opening Br. at 13-15; Pls.' Opp. at 3-5, this suggestion is hardly reassuring. It certainly does not defeat liability.

The *non*-stormwater discharge of pollutants (paint that falls directly from the exterior hulls or blows off the decks in the wind) would not be covered by the General Permit in any event. Those discharges require a separate NPDES permit, for which MARAD has yet to apply or express any intention to apply.[10]

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[10] The limits in such a permit would be set with extensive public involvement, which is guaranteed under the NPDES permit regulations. *See* 40 C.F.R. § 124.6(c)-(d) (draft permit required); 40 C.F.R. §§ 124.6(e), 124.10 (public notice of draft permit required); 40 C.F.R. § 124.10(b)(1) (30-day pubic comment period on draft permit required); 40 C.F.R. § 124.19 (permit appeal allowed). As one court has stated, this public participation is not mere "lip service." *Adams v. EPA*, 38 F.3d 43, 53 (1st Cir. 1994).

III. CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Partial Summary Judgment of Liability on Claims 5, 6, and 7 (Doc No. 81).

October 5, 2009

Respectfully submitted,

MICHAEL E. WALL (Cal. Bar No. 170238)
NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter Street, 20th Floor
San Francisco, CA 94104
Tel: (415) 875-6100; Fax: (415) 875-6161
E-mail: mwall@nrdc.org

THOMAS CMAR (admitted *pro hac vice*)
NATURAL RESOURCES DEFENSE COUNCIL
2 North Riverside Plaza, Suite 2250
Chicago, IL 60606-9997
Tel.: (312) 651-7906; Fax: (312) 651-7919
E-mail: tcmar@nrdc.org

/s/ Sarah Lipton-Lubet
SARAH LIPTON-LUBET (admitted *pro hac vice*)
NATURAL RESOURCES DEFENSE COUNCIL
1200 New York Ave., NW, Suite 400
Washington, DC 20005
Tel.: (202) 289-2405; Fax: (202) 289-1060
E-mail: slipton-lubet@nrdc.org

SCOTT ALLEN (Cal. Bar No. 178925)
LARIVIERE, GRUBMAN & PAYNE
19 Upper Ragsdale Drive, Suite 200
Monterey, CA 93940
Tel.: (831) 649-7531; Fax: (831) 649-8835
Email: sallen@lgpatlaw.com

DAVID A. NICHOLAS (admitted *pro hac vice*)
20 Whitney Road
Newton, MA 02460
Tel.: (617) 964-1548; Fax: (617) 663-6233
E-mail: dnicholas@verizon.net

Attorneys for Plaintiffs Arc Ecology,
San Francisco Baykeeper, and
Natural Resources Defense Council, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 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' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT OF LIABILITY ON CLAIMS 5, 6, AND 7

/s/ Sarah Lipton-Lubet

SARAH LIPTON-LUBET (admitted *pro hac vice*)
NATURAL RESOURCES DEFENSE COUNCIL
1200 New York Ave., NW, Suite 400
Washington, DC 20005
Tel.: (202) 289-2405; Fax: (202) 289-1060
E-mail: slipton-lubet@nrdc.org