

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

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

4 Plaintiffs,)

5 v.)

6 MARITIME ADMINISTRATION; John)
7 Jamian, in his official capacity as Acting)
8 Administrator; and U.S. ENVIRONMENTAL)
PROTECTION AGENCY; Stephen L.)
9 Johnson in his official capacity as Acting)
Administrator,)

10 Defendants.)

Case No.: 03CV2000 (RMC)
Honorable Rosemary M. Collyer
Courtroom 6

MOTION AND MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
OF PLAINTIFFS' RULE 59 MOTION FOR
AMENDMENT OF JUDGMENT

11
12 Plaintiffs file this memorandum in support of their timely¹ Motion for Amendment of
13 Judgment pursuant to Federal Rule of Civil Procedure 59(a)(2).² Specifically, Plaintiffs seek an
14 amendment of this Court's March 2, 2004, dismissal of Plaintiffs' RCRA claim as to nine vessels
15 MARAD has not yet exported to England under the Able UK Contract. The Court found that
16 Plaintiffs failed to satisfy the "imminent endangerment" requirement of RCRA's citizen suit
17 provision based on statements made by MARAD after Plaintiffs' claim was commenced. As
18 discussed herein, however, dismissal of a citizen suit claim based on a defendant's statements of
19 voluntary compliance is not appropriate unless the defendant establishes that it is "absolutely
20 clear the allegedly wrongful behavior could not reasonably be expected to recur." MARAD's
21 statements do not demonstrate an intent to comply with RCRA. MARAD has vehemently and

22
23 ¹ Under Rule 59(e), a motion to alter or amend a judgment "shall be filed no later than 10 days after entry
24 of the judgment." Pursuant to Rule 6(a), intermediate Saturdays and Sundays are not included in this
25 calculation. Therefore, because the Court's judgment was entered on March 2, 2005, this Motion must be
26 filed no later than Wednesday, March 16, 2004.

27 ² A motion for amendment of judgment

is discretionary and need not be granted unless the district court finds that there is an
intervening change of controlling law, the availability of new evidence, or the need to
correct a clear error or prevent manifest injustice.

28 *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (quotations omitted). Here, the motion
should be granted to correct a clear error and prevent manifest injustice, as explained in this
memorandum.

1 consistently argued that RCRA does not apply to the export of the NDRF vessels, and has made
2 no effort to meet the stringent burden necessary to support this Court’s dismissal. An
3 amendment of the Court’s judgment is therefore appropriate.

4
5 **I. MARAD’s Unenforceable Statements in the 2004 Environmental Assessment Do
6 Not Abate the Risk of a RCRA Violation**

7 Plaintiffs’ RCRA claim sought declaratory and injunctive relief to prohibit MARAD
8 from exporting NDRF vessels pursuant to the Able UK contract without first complying with
9 RCRA’s hazardous waste export permit requirements. *See, e.g.*, Pl. SJ Memo at 15; Second
10 Amended Complaint at Relief ¶6; MARAD RCRA Notice Letter, Pl. SJ Memo at Ex. 16. In
11 particular, the claim alleged that RCRA requires MARAD to ensure that the Able UK facility has
12 all required permits, the UK government has consented, and the transit nations have consented,
13 before exporting the NDRF vessels. *Id.* Plaintiffs have presented evidence demonstrating that,
14 when initiated, their RCRA claim was based on conditions that “may present an imminent and
15 substantial endangerment” under RCRA’s citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), and
16 relevant case law. *See* Pl. SJ Memo at 6-7; Pl. SJ Reply at 3-4. Those conditions persist.

17 Subsequent to the filing of Plaintiffs’ RCRA claim, MARAD stated that “the Able UK
18 facility [will] be able to proceed with disposal of the additional nine ships” only “if and when
19 [EPA and MARAD determine] that the Able UK facilities are operating in a safe and
20 environmentally responsible manner.” *See* 2004 EA at 58. MARAD further stated that “ship
21 disposal actions [will not] begin until the UKEA has fully approved Able UK to receive and
22 process the vessels.” *Id.*; *see also* MARAD SJ Memo at 28 n.24; MARAD SJ Reply at 19.

23 Based on those statements, this Court dismissed Plaintiffs’ RCRA claim, stating:

24 There is no *present* activity in which MARAD is engaged that threatens a
25 potential “imminent and substantial” harm in the United States that arises from
26 the absence of an agreement from the U.K. to accept additional ships from the
27 JRRF. While a finding of “imminency” does not require a showing that actual
28 harm will occur immediately, the risk of threatened harm must be present. *See*
Craig Lyle Ltd. P’ship v. Land O’Lakes, Inc., 877 F. Supp. 476, 482 (D. Minn.
1995). Here, MARAD has stated that it will export the remaining vessels to
Teesside “[o]nly if and when the evaluation results in a determination that the
AbleUK facilities are operating in a safe and environmentally responsible manner
. . . .” 2004 EA at 58. Because MARAD will not export the vessels until the
United Kingdom Environmental Agency “has fully approved AbleUK to receive

1 and process the vessels,” there is no threat of “imminent and substantial” harm.
2 *Id.*

3 SJ Opinion at 33. In reaching this conclusion, the Court looked to MARAD’s voluntary action
4 subsequent to commencement of the claim to determine whether it has jurisdiction over the legal
5 questions presented by the claim. This type of analysis has been squarely rejected by the
6 Supreme Court in *Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000).

7 In *Laidlaw*, the Court explained that

8 [i]t is well settled that “a defendant’s voluntary cessation of a challenged practice
9 does not deprive a federal court of its power to determine the legality of the
10 practice.” “[I]f it did, the courts would be compelled to leave ‘[t]he defendant ...
11 free to return to his old ways....’” [T]he standard ... for determining whether a
12 case has been mooted by the defendant’s voluntary conduct is stringent: “A case
13 might become moot if subsequent events made it absolutely clear that the
14 allegedly wrongful behavior could not be reasonably expected to recur.” The
15 “heavy burden of persuad[ing] the court that the challenged conduct cannot
16 reasonably be expected to start up again lies with the party asserting mootness.”

17 *Id.* at 189 (citations omitted).

18 The Supreme Court explained that lower courts’ understandable confusion of mootness
19 with standing stems from its “repeated statements that the doctrine of mootness can be described
20 as ‘the doctrine of standing set in a time frame.’” *Id.* However, the Court continued, this
21 description of mootness is not comprehensive because

22 a defendant claiming that its voluntary compliance moots a case bears the
23 formidable burden of showing that it is absolutely clear the allegedly wrongful
24 behavior could not reasonably be expected to recur.

25 *Id.* at 190; *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67
26 (1987) (mootness doctrine “protects plaintiffs from defendants who seek to evade sanction by
27 predictable protestations of repentance and reform” (quotation omitted)). Moreover, the Court
28 explained,

if mootness were simply “standing set in a time frame,” the exception to mootness
that arises when the defendant’s allegedly unlawful activity is “capable of
repetition, yet evading review,” could not exist.

29 *Laidlaw*, 528 U.S. at 190.

30 The *Laidlaw* analysis applies in the present case because the Court relied on
31 MARAD’s unenforceable post-complaint statements to conclude that there is no
32 possibility of “imminent endangerment,” as required by RCRA’s citizen suit provision.

1 In so doing, the Court permitted MARAD’s “predictable protestations of repentance and
2 reform” to deprive Plaintiffs of the protections of RCRA’s citizen suit provision.
3 *Gwaltney*, 484 U.S. at 66-67 (A defendant’s heavy burden to have a case dismissed as
4 moot ensures against contravention of “the prospective purpose of the citizen suit
5 provisions.”).

6 MARAD’s unsupported assertions that Plaintiffs’ RCRA claim is moot do not
7 meet the *Laidlaw* standard. See MARAD SJ Memo at 2, 46 n.50; MARAD SJ Reply at
8 22 n.17. MARAD has made no effort to meet its “formidable” burden of making
9 “absolutely clear” that it could not reasonably be expected to again attempt to export
10 NDRF vessels to Able UK without complying with RCRA’s permitting requirements.
11 Rather, MARAD has vehemently and consistently argued that RCRA does not apply to
12 the NDRF fleet. See MARAD SJ Memo at 40-48; MARAD SJ Reply Memo at 24-35.

13 Nor do the statements this Court relied on, see SJ Opinion at 33, meet MARAD’s burden.
14 MARAD’s full statement³ was:

15 Only if and when [EPA and MARAD’s] evaluation results in a determination that
16 the Able UK facilities are operating in a safe and environmentally responsible
17 manner, would the Able UK facility be able to proceed with disposal of the
18 additional nine ships.... In no case will ship disposal actions begin until the
19 UKEA has fully approved Able UK to receive and process the vessels.

20 2004 EA at 58; see also MARAD SJ Memo at 28 n.24 (same); MARAD SJ Reply at 19 (same).
21 The most this statement promises is that the *AbleUK* facility will not begin disposing of the
22 vessels until it has the requisite permits, whether the vessels are moored at the AbleUK facility
23 or elsewhere. MARAD has said nothing about MARAD’s intention to postpone exporting
24 additional vessels to England until the AbleUK facility has all requisite permits. Nor has
25 MARAD even mentioned compliance with RCRA’s requirement that it obtain the permission of

26 ³ The Court quoted this statement in part:

27 Here, MARAD has stated that it will export the remaining vessels to Teesside “[o]nly if and when
28 the evaluation results in a determination that the AbleUK facilities are operating in a safe and
environmentally responsible manner” 2004 EA at 58. Because MARAD will not export the
vessels until the United Kingdom Environmental Agency “has fully approved AbleUK to receive
and process the vessels,” there is no threat of “imminent and substantial” harm. *Id.*

SJ Opinion. at 33.

1 the UK and transit nation governments before exporting. To the contrary, in the same 2004 EA,
2 MARAD disputed RCRA's applicability to the NDRF vessels, *see* 2004 EA at 34-35, 36, a
3 position Plaintiffs challenged. *See* Pl. SJ Memo at 17-18.

4 Given MARAD's past conduct, its careful statements in the 2004 EA and elsewhere, its
5 consistent position that RCRA does not apply to the NDRF vessels, and the continuing uncertain
6 status of the first four vessels, it may "reasonably [be] expected," that absent the declaratory and
7 injunctive relief sought by Plaintiffs, MARAD is "free to return to [its] old ways," *Laidlaw*, 528
8 U.S. at 189, and export NDRF vessels to Teesside *before* Able UK is actually permitted and
9 operational. As explained in Plaintiffs' pleadings, such conduct is explicitly prohibited by
10 RCRA. *See* Pl. SJ Memo at 22; 40 C.F.R. §262.82(b)(1); 262.81(j); 262.83(a), (b), (c).

11 Even if MARAD's 2004 EA did include an undertaking not to export vessels without first
12 complying with RCRA, those statements would be insufficient to meet MARAD's heavy burden.
13 The 2004 EA is not binding on the agency or enforceable by anyone, and MARAD's statements
14 thus do not abate Plaintiffs' claim that in addition to facility permits, RCRA requires MARAD to
15 secure an import consent from the UK authorities and transit consents from the relevant transit
16 nations. *See* Pl. SJ Memo at 15; Second Amended Complaint at Relief ¶6; MARAD RCRA
17 Notice Letter, Pl. SJ Memo at Ex. 16.

18 Nor do MARAD's statements that it will delay the export of additional vessels
19 until the UK permits are in place meet MARAD's stringent burden. *See* MARAD SJ
20 Reply at 23-24; *see also* MARAD SJ Memo at 5, 29. Those statements carefully exclude
21 any assurance that MARAD will comply with RCRA or meet RCRA's requirements. *Id.*
22 MARAD suggests its UK-permit duties derive from the Able UK Contract. *Id.*
23 However, MARAD has already demonstrated its willingness to ignore these purported
24 contractual obligations by exporting the first four vessels on October 6 and 17, 2003,
25 despite prior notification from the UK Environment Agency on October 3, 2003, that
26 Able UK was not properly permitted. *See* Pl. SJ Memo at 6-7; *see also* Chronology of
27 US Naval Vessels, Annex A to DEFRA Report, Pl. SJ Memo at Ex. 11. MARAD further
28 demonstrated its willingness to ignore these purported obligations by refusing to bring the

1 vessels back to the United States following a November 4, 2003, request from the UK
2 Environment Agency. *See* Pl. SJ Memo at 6-7; *see also* UKEA Letter to EPA, Annex E
3 to DEFRA Report, Pl. SJ Memo at Ex. 11. Nor is the Able UK Contract enforceable by
4 Plaintiffs or anyone other than Able UK.

5 Because MARAD has not met its heavy burden, and because this Court's decision leaves
6 MARAD "free to return to [its] old ways," *Laidlaw*, 528 U.S. at 189, the harm from MARAD's
7 anticipated export of nine vessels to the AbleUK facility remains imminent and dismissal of
8 Plaintiffs' claim is not appropriate. For these reasons, and based on the entire record, Plaintiffs
9 respectfully request that this Court amend its judgment dismissing Plaintiffs' RCRA claim as to
10 the nine vessels contemplated for export to Able UK, and make a determination on the merits of
11 Plaintiffs' claim based on the extensive record already filed, or provide other appropriate relief to
12 ensure MARAD is not free to violate RCRA by exporting additional vessels to Able UK during
13 the impending shipping season without first complying with RCRA's export permit
14 requirements.

15 Respectfully submitted this 16th day of March, 2005.

16
17
18 /s J. Martin Wagner
19 J. Martin Wagner (DCB #435730)
20 Marcello Mollo
21 Earthjustice
22 426 17th Street, 6th Floor
23 Oakland, CA 94612
24 Tel: (510) 550-6700

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Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

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

15 On March 16, 2005, I served a true and correct copy of the following documents:

- 16 1) Motion and Memorandum of Points and Authorities in Support of Plaintiffs' Rule
17 54(d) Motion for Costs and Fees;
18 2) Affidavit of J. Martin Wagner in Support of Plaintiffs' Motion for Costs and Fees; and
19 3) [Proposed] Order Granting Plaintiffs' Rule 54(d) Motion for Costs and Fees.

20 *via electronic mail using the CM/ECF system* on the parties listed below:

21 Brian Toth
brian.toth@usdoj.gov

22 Cynthia Morris
23 c.j.morris@usdoj.gov

24 I, Alyssa Johl, declare under penalty of perjury that the foregoing is true and correct.
25 Executed this 16th day of March, 2005, at Oakland, California.

26
27 /s Alyssa Johl
28 Alyssa Johl

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[PROPOSED] ORDER GRANTING
PLAINTIFFS' RULE 59 MOTION FOR
AMENDMENT OF JUDGMENT

12 The Court, having reviewed Plaintiffs' Motion for Amendment of Judgment pursuant to
13 Federal Rule of Civil Procedure 59, and for good cause shown, hereby **GRANTS** Plaintiffs'
14 motion.
15

16
17 IT IS SO ORDERED.

18 Dated: _____, 2005
19
20

21 _____
UNITED STATES DISTRICT COURT
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