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6 Basel Action Network, a Sub-Project of the Tides Center; and Sierra Club

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

9 BASEL ACTION NETWORK, a Sub-Project)
10 of the Tides Center,)
11 1827 39th Avenue East)
Seattle, WA 98112, and)
12 SIERRA CLUB,)
11986 Elmgrove Circle)
Cincinnati, OH 45240,)

13)
14 Plaintiffs,)

15 v.)

16 MARITIME ADMINISTRATION, and Capt.)
17 WILLIAM G. SCHUBERT, in his official)
capacity as Administrator,)
18 400 7th Street, SW)
Washington, DC 20590, and)

19 U.S. ENVIRONMENTAL PROTECTION)
20 AGENCY, and MARIANNE HORINKO, in)
her official capacity as Acting Administrator,)
21 1200 Pennsylvania Avenue, NW)
Washington, DC 20460)

22 Defendants.)
23

Case No.:

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

(Toxic Substances Control Act, 15 U.S.C. §§
4321 *et seq.*; National Environmental Policy
Act, 42 U.S.C. §§ 4321 *et seq.*; National
Maritime Heritage Act, 16 U.S.C. §§ 5401 *et*
seq.; Administrative Procedures Act, 5 U.S.C.
§§ 701 *et seq.*)

24 INTRODUCTION

- 25 1. This action is brought under the Toxic Substances Control Act, 15 U.S.C. §§ 4321 *et*
26 *seq.* (TSCA), and its implementing regulations; the National Environmental Policy
27 Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA), and its implementing regulations; the
28 National Maritime Heritage Act, 16 U.S.C. §§ 5401 *et seq.* (NMHA); and the

1 Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (APA). Plaintiffs challenge
2 Defendants' violations of TSCA, NEPA, the NMHA, and the APA related to the
3 imminent and costly export by Defendant Maritime Administration (MARAD) of
4 several defunct naval vessels for disposal in the United Kingdom. These vessels may
5 contain as much as 100 tons of polychlorinated biphenyls (PCBs) in concentrations of
6 at least 50 parts per million (ppm). The export of these vessels constitutes a major
7 Federal action significantly affecting the quality of the human environment.

8 2. Defendant Maritime Administration (MARAD) is planning to export thirteen defunct
9 naval vessels to the United Kingdom for disposal, with two leaving **as early as**
10 **Tuesday, September 30, 2003**. These vessels contain as much as 100 tons of
11 polychlorinated biphenyls (PCBs), as well as significant quantities of asbestos, fuel
12 oil and other hazardous materials, and are in very decrepit condition.

13 3. MARAD plans to tow these vessels in tandem across the North Atlantic during the
14 storm season. There is a well-documented history of accidents and sinkings during
15 such towing operations. Due to the presence of large quantities of hazardous
16 materials on board the vessels, and towing risks, the export of these ships poses
17 serious risks to human health and the environment. Several Federal laws require that
18 MARAD and EPA assess these impacts and solicit public input prior to taking these
19 actions.

20 4. TSCA prohibits these PCB exports without an exemption granted by Defendant
21 Environmental Protection Agency (EPA) following a formal petition from MARAD
22 and based upon a formal rulemaking in which EPA concludes that the Pilot Program
23 does not pose an unreasonable risk to health or the environment. MARAD has not
24 petitioned EPA for such an exemption by rule, and EPA has neither granted such
25 exemption by rule nor made the requisite finding regarding risk. Instead, EPA has
26 promised MARAD, in a letter, that it would not enforce the TSCA PCB export ban
27 with respect to the Pilot Program.
28

1 5. NEPA requires that prior to undertaking these actions, MARAD and EPA conduct an
2 environmental assessment (EA) or environmental impact statement (EIS) to ensure
3 that the actions do not pose a potentially significant risk to the environment and that
4 MARAD and EPA bases their decision-making on complete information subject to
5 public input and scrutiny. Neither MARAD nor EPA has conducted any such EA or
6 EIS.

7 6. The NMHA requires that MARAD use the best value alternative in disposing of these
8 vessels. This statute further requires that in a case where towing presents
9 environmental risks, higher cost alternatives should be used. MARAD has ignored
10 lower cost disposal options that do not require trans-Atlantic towing, in violation of
11 the NMHA.

12
13 JURISDICTION

14 7. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, as this action arises under
15 the laws of the United States.

16 8. An actual controversy exists between the parties within the meaning of 28 U.S.C. §
17 2201(a). This Court may grant declaratory relief and additional relief, including an
18 injunction, pursuant to 28 U.S.C. §§ 2201, 2202 and 5 U.S.C. §§ 705, 706.

19 9. MARAD's request for a grant of enforcement discretion and its related plan to export
20 several vessels from the National Defense Reserve Fleet (NDRF) vessels to Teesside,
21 England, for dismantlement without regard for the requirements of TSCA, NEPA, or
22 the NHMA, and EPA's grant of an exemption from TSCA's PCB export ban without
23 an EA, EIS and/or a rulemaking, are arbitrary, capricious, and not in accordance with
24 procedures required by law. These actions thus violate the APA and are subject to
25 judicial review thereunder. 5 U.S.C. §§ 701 through 706.

26 10. MARAD's plan to export several NDRF vessels to Teesside, England, for
27 dismantlement without regard for the requirements of TSCA, NEPA, or the NHMA,
28 and EPA's grant of an exemption from TSCA's PCB export ban without a

1 rulemaking, are agency actions unreasonably delayed and/or unlawfully withheld as
2 provided by Section 706(1) of the APA and are subject to judicial review thereunder.
3 5 U.S.C. §§ 701 through 706.

- 4 11. Venue lies in this judicial district by virtue of 28 U.S.C. § 1391(e) because the events
5 or omissions out of which the claim arises took place in this district, and the
6 defendants are located here.

7
8 PARTIES

- 9 12. Plaintiff BASEL ACTION NETWORK, A SUB-PROJECT OF THE TIDES
10 CENTER (BAN) is an international network of environmental activists working
11 worldwide to prevent environmental injustice and harm perpetuated by trade in toxic
12 wastes, toxic technologies and toxic products. BAN is administered as a sub-project
13 of the Asia Pacific Environmental Exchange, Seattle, which in turn is a project of the
14 Tides Center, San Francisco, an IRS section 501(c)3 charitable organization. BAN is
15 made up of over 30 organizations worldwide that are working to prevent toxic trade.
- 16 13. IMPACT is one participating member of BAN. IMPACT is a group of residents in
17 Teesside, United Kingdom, the site of the proposed NDRF vessel disposal. IMPACT,
18 on behalf of its members, works in and around Teesside to improve and protect
19 human and environmental health by limiting the adverse impacts of industrial
20 activities on their community.
- 21 14. Plaintiff SIERRA CLUB is a membership organization consisting of over 700,000
22 concerned individuals working to protect the global environment, including members
23 living in and around the James River and greater Chesapeake Bay area. These
24 members are gravely concerned about the risks posed by the failure of MARAD and
25 EPA to comply with the requirements of NEPA, the NMHA, TSCA and the APA,
26 and of the concomitant risks to human health and the environment posed by the Pilot
27 Program.
- 28

1 15. Defendant MARITIME ADMINISTRATION (MARAD) is the Federal agency
2 responsible for managing and disposing of the NDRF vessels in accordance with U.S.
3 laws.

4 16. Defendant CAPTAIN WILLIAM G. SCHUBERT is the Maritime Administrator and
5 is sued in his official capacity.

6 17. Defendant U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA) is the Federal
7 agency responsible for enforcing the provisions of the Toxic Substances Control Act
8 at issue here.

9 18. Defendant MARIANNE HORINKO is the Acting Administrator of the EPA and is
10 sued in her official capacity.

11
12 FACTS

13 19. Pursuant to the NMHA, 16 U.S.C. § 5405(c), by September 30, 2006, MARAD must
14 dispose of vessels listed in the National Defense Reserve Fleet (NDRF) “non-
15 retention” category (consisting of defunct government naval vessels), “in the manner
16 that provides the best value to the Government, *except in any case in which obtaining*
17 *the best value would require towing a vessel and such towing poses a serious threat*
18 *to the environment.”* 16 U.S.C. § 5405(c) (emphasis added).

19 20. In July 1997, in accordance with an internal memorandum dated November 18, 1993,
20 concluding that the MARAD ship scrapping program warrants an environmental
21 review, MARAD prepared an EA (1997 EA) entitled “Environmental Assessment of
22 the Sale of [NDRF] Vessels for Scrapping,” related to MARAD’s plan to sell 65
23 NDRF non-retention vessels for scrapping overseas by September 30, 1999. 1997 EA
24 at ES-1, 1. There are presently 162 NDRF non-retention vessels slated for scrapping.

25 21. The 1997 EA explicitly states that it “is programmatic and does not analyze specific
26 ships or particular ship breaking/recycling facilities,” and that “foreign ship
27 breaking/recycling locations are expected to be on the Mexican Gulf coast, the coast
28 of China, or the Northwestern coast of India.” EA at 1; *see also* EA at 26.

- 1 22. The 1997 EA identifies a series of potential environmental risks related to the
2 proposed export of NDRF vessels, including harms to air and water quality, risks
3 associated with the disposal and transport of hazardous and toxic substances, harms to
4 visual and biological resources, and noise pollution. 1997 EA at 9-15.
- 5 23. In September 1998, the Clinton Administration placed a moratorium on overseas
6 vessel scrapping that lasted until October 1, 1999. To Plaintiffs' knowledge, no
7 NDRF vessels have yet been exported for disposal as envisioned by the 1997 EA.
- 8 24. In December 2002, Congress passed the National Defense Authorization Act for
9 Fiscal Year 2003, P.L. 107-314, Sec. 3501(3) (Dec. 2, 2002). This act appropriated
10 \$20 million to MARAD to pay for a "pilot program" to dispose of four NDRF non-
11 retention vessels (Pilot Program). Congress explicitly stated that the program "shall
12 be carried out in accordance with applicable provisions of law and regulations." *Id.* at
13 Sec. 3501(3)(c)(1)(B).
- 14 25. MARAD has not conducted a programmatic EIS or a site or vessel specific EA of the
15 Pilot Program as required by NEPA. Moreover, despite significant new information
16 related to disposal of the NDRF fleet (*e.g.*, a tripling in the number of vessels to be
17 scrapped, specific information on which ships will be exported, new information
18 about the towing method and season, and specific information about the disposal
19 site), MARAD has failed to conduct any supplement to the 1997 EA as required by
20 NEPA.
- 21 26. The Toxic Substances Control Act (TSCA) and its implementing regulations prohibit
22 the export for disposal of PCBs in concentrations greater than 50 ppm. 15 U.S.C. §
23 2605(e)(1), (3); 40 C.F.R. §§ 761.20, 761.97. TSCA provides, however, that an
24 exporter may petition EPA for an exemption from the prohibition and that EPA "may
25 *grant by rule* such an exemption" if it finds that "an unreasonable risk of injury to
26 health or environment would not result." 15 U.S.C. § 2605(e)(3)(B); 40 C.F.R. §
27 761.20 (emphasis added).
- 28

- 1 27. By letter dated May 7, 2003 (MARAD Letter), MARAD requested EPA to “exercise
2 its enforcement discretion under [TSCA] to allow the export of thirteen MARAD
3 owned vessels, located in the James River Reserve Fleet (JRRF), to the AbleUK
4 facility in Teesside, England for dismantling and recycling.” The MARAD Letter
5 stated that “some or all of the vessels may contain, within the components and/or
6 structure of the vessel, non-readily removable, solid polychlorinated biphenyls
7 (PCBs) in amounts greater than or equal to 50 parts per million (ppm).”
- 8 28. By letter dated May 22, 2003, EPA granted MARAD’s request. EPA did not conduct
9 a rulemaking prior to agreeing not to enforce the PCB export ban, as required by
10 TSCA’s requirement that it grant exemptions only “by rule.” Nor did EPA prepare an
11 EA related to its decision to grant an exemption from the export ban, as required by
12 NEPA.
- 13 29. The EPA Letter states that it “does not eliminate legal requirements which may be
14 applicable to the actions covered by the letter.”
- 15 30. Paragraph 7 of the EPA letter states that “[m]ost of the obsolete NDRF vessels
16 contain PCBs in concentrations above 50 ppm, therefore their export for scrapping
17 may constitute a violation of TSCA.”
- 18 31. MARAD has disclosed in a letter to the U.K. government dated July 15, 2003, that
19 the 13 vessels listed in the May 7, 2003, MARAD Letter to EPA contain
20 approximately 100 tons of PCBs.
- 21 32. MARAD is currently planning to export at least two of the thirteen NDRF vessels,
22 likely the Caloosahatchee and the Canisteo, **as soon as Tuesday, September 30,**
23 **2003.** These ships were both built in 1945 and are in a decrepit condition.

24
25 FIRST CAUSE OF ACTION

26 APA: MARAD and EPA Have Arbitrarily and Capriciously

27 Ignored the Requirements of NEPA, the NMHA and TSCA

- 28 33. Plaintiffs hereby reallege and incorporate paragraphs 1 through 32 above.

- 1 34. The Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, entitles a party to seek
2 judicial review of an agency action where a legal wrong is alleged and the party
3 alleging the violation is adversely affected or aggrieved by the agency action.
4 Pursuant to 5 U.S.C. § 706, a reviewing court shall hold unlawful and set aside
5 agency action found to be arbitrary, capricious, or otherwise not in accordance with
6 the law, and should compel agency action illegally withheld or unreasonably delayed.
- 7 35. MARAD's request that EPA exercise its enforcement discretion concerning TSCA's
8 PCB export ban, and MARAD's related plan to export several NDRF vessels to
9 Teesside, England, for dismantlement without regard for the requirements of TSCA,
10 NEPA, or the NHMA, and EPA's grant of an exemption from TSCA's PCB export
11 ban without a rulemaking, are arbitrary, capricious, and not in accordance with
12 procedures required by law pursuant to the APA. 5 U.S.C. §§ 701 through 706.
- 13 36. MARAD's plan to imminently export several NDRF vessels to Teesside, England, for
14 dismantlement without regard for the requirements of TSCA, NEPA, or the NHMA,
15 and EPA's grant of an exemption from TSCA's PCB export ban without a
16 rulemaking, are agency actions unreasonably delayed and/or unlawfully withheld as
17 provided by Section 706(1) of the APA. 5 U.S.C. §§ 701 through 706.

18
19 SECOND CAUSE OF ACTION

20 NEPA: MARAD and EPA Have Failed to Prepare an Adequate EA or EIS
21 in Connection with the Pilot Program

- 22 37. Plaintiffs hereby reallege and incorporate paragraphs 1 through 32 above.
- 23 38. NEPA, 42 U.S.C. § 4332(2)(c), and its implementing regulations require all Federal
24 agencies to prepare an EIS for all major actions significantly affecting the quality of
25 the human environment. To determine whether an EIS is necessary, Federal agencies
26 will typically first prepare an EA, which is less thorough.
- 27 39. MARAD has acknowledged, by preparing the 1997 EA, that NEPA applies to the
28 export of NDRF non-retention vessels for disposal.

1 40. The 1997 EA does not apply to the Pilot Program and does not satisfy MARAD's or
2 EPA's obligations under NEPA related to the Pilot Program because it was prepared
3 for a different Federal action and new information and changed circumstances require
4 environmental assessment under NEPA.

5
6 RELIEF REQUESTED

7 WHEREFORE, Plaintiffs request that this Court issue:

- 8 1. A temporary restraining order and preliminary injunction (as detailed in the
9 accompanying notice and motion for a temporary restraining order and preliminary
10 injunction and supporting documents), and a permanent injunction, enjoining
11 MARAD from exporting any NDRF non-retention vessel until it complies with the
12 requirements of TSCA, NEPA, the NMHA and the APA;
- 13 2. A judgment declaring that MARAD's request for enforcement discretion, EPA's
14 grant of an exemption from TSCA's PCB export ban without a rulemaking, and
15 MARAD's planned export of several PCB-laden NDRF vessels, fails to comply with
16 the procedures and requirements of TSCA which prohibit the export for disposal of
17 PCBs in concentrations greater than 50 ppm, 15 U.S.C. § 2605(e)(1), (3); 40 C.F.R.
18 §§ 761.20, 761.97, because MARAD has not applied for an exemption to this
19 prohibition and EPA has neither conducted a rulemaking exempting MARAD from
20 the PCB-export prohibition nor found that the Pilot Program would not result in "an
21 unreasonable risk of injury to health or environment." 15 U.S.C. § 2605(e)(3)(B); 40
22 C.F.R. § 761.20;
- 23 3. A judgment declaring that MARAD's plan to export PCB-laden NDRF non-retention
24 vessels fails to comply with the procedures and requirements of NEPA, 42 U.S.C. §§
25 4321-4370f, and the CEQ regulations, 40 C.F.R. §§ 1500-1517.7, because no
26 adequate EA has been conducted relating to the Pilot Program;
- 27 4. A judgment declaring that EPA's grant, without a rulemaking, of MARAD's request
28 for an exemption from TSCA's PCB export ban with respect to the Pilot Program

1 fails to comply with the procedures and requirements of NEPA, 42 U.S.C. §§ 4321-
2 4370f, and the CEQ regulations, 40 C.F.R. §§ 1500-1517.7, because no adequate EA
3 has been conducted relating to EPA's decision;

4 5. A judgment declaring that MARAD has violated the NMHA by failing to obtain the
5 best value in complying with its duties under the NMHA, and by failing to take into
6 account the serious threat to the environment posed by such towing in choosing a
7 method of disposal;

8 6. A judgment declaring that Defendants failed to comply with the requirements of
9 TSCA, NEPA, and the NHPA, and that such failure is arbitrary, capricious, and not in
10 accordance with procedures required by law pursuant to the APA, 5 U.S.C. §§ 701
11 through 706;

12 7. A judgment declaring that Defendants failed to comply with the requirements of
13 TSCA, NEPA, and the NHPA, and that such failure constitutes agency action that is
14 unreasonably delayed and/or unlawfully withheld as provided by Section 706(1) of
15 the APA;

16 8. A judgment and order setting aside EPA's illegal exercise of enforcement discretion
17 pending Defendants' compliance with TSCA, NEPA, the NMHA, and the APA;

18 9. A judgment and order for costs of suit herein, including attorneys fees, pursuant to the
19 Equal Access to Justice Act, 28 U.S.C. § 2412 or other authority; and

20 10. Such other and further relief as the court deems proper and just.

21
22 Respectfully submitted this 26th day of September, 2003.

23
24
25 J. Martin Wagner (DCB #435730)
26 Marcello Mollo

27 *Counsel for Plaintiffs*
28 Basel Action Network, a Sub-Project of the Tides Center;
and the Sierra Club