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16 IN THE UNITED STATES DISTRICT COURT  
17 FOR THE EASTERN DISTRICT OF CALIFORNIA

18 **ARC ECOLOGY, SAN FRANCISCO**  
19 **BAYKEEPER, and NATURAL**  
20 **RESOURCES DEFENSE COUNCIL, INC.,**

Plaintiffs,

21 **and**

22 **CALIFORNIA REGIONAL WATER**  
23 **QUALITY CONTROL BOARD, SAN**  
24 **FRANCISCO BAY REGION,**

Plaintiff-Intervenor

25 **v.**

26 **UNITED STATES MARITIME**  
27 **ADMINISTRATION et al.,**

Defendants.

2:07-CV-2320 GEB GGH

**Plaintiffs and Plaintiff-Intervenor's Joint  
Statement of Undisputed Facts in Support  
of Motions for Partial Summary Judgment  
of Liability**

Date: October 13, 2009

Time: 9:00 a.m.

Courtroom: 10

Judge: Hon. Garland E. Burrell, Jr.

Trial Date: March 9, 2010

Action Filed: October 29, 2007

1 **I. Background Undisputed Facts Concerning the Parties**

2 1. The Maritime Administration (MARAD) is an agency of the Department of  
3 Transportation (DOT) charged by Congress with disposing of the non-retention  
4 vessels of the National Defense Reserve Fleet (NDRF). MARAD maintains three  
5 NDRF fleets: the Suisun Bay Reserve Fleet (SBRF) at Suisun Bay in California,  
6 the James River Fleet (JRF), near Ft. Eustis, Virginia; and the Beaumont Reserve  
7 Fleet (BRF) at Beaumont, Texas. Mueller Decl., Ex. BBB, at 1-1 (Draft  
8 Programmatic Environmental Assessment for Removal of Non-Retention Vessels  
9 from National Defense Reserve Fleet Sites for Disposal, June 2008).

10 2. NRDC has more than 447,000 U.S. members, more than 83,000 of whom  
11 live in California, some 24,000 of whom reside in the San Francisco Bay Area, and  
12 some 300 of whom live in towns bordering Suisun Bay. Lopez Decl. ¶ 4.

13 3. Baykeeper has more than 1330 members, 1280 of whom live in the San  
14 Francisco Bay Area, and 15 of whom live in towns that border Suisun Bay. Self  
15 Decl. ¶ 5.

16 4. NRDC and Baykeeper members fish, hunt, kayak and observe wildlife in  
17 and around Suisun Bay and its surrounding waterways. Essick Decl. ¶¶ 4,5,8;  
18 Howard Decl. ¶3; Albright Decl. ¶¶ 3-4; Nelson Decl. ¶¶ 3,4; Valenzuela Decl. ¶¶  
19 2, 6-8.

20 5. NRDC's and Baykeeper's members' concerns over the pollution in Suisun  
21 Bay, to which these members reasonably believe the SBRF contributes, causes  
22 them to refrain from swimming in the Bay and consuming Bay-caught fish and  
23 ducks, harms their ability to observe wildlife, and diminishes their aesthetic  
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1 enjoyment of the Bay. Albright Decl. ¶¶ 5, 6, 7; Essick Decl. ¶¶ 7, 8; Howard  
2 Decl. ¶ 5; Valenzuela Decl. ¶¶ 6-9; Nelson Decl. ¶¶ 5-6.

3  
4 6. NRDC's and Baykeeper's members are troubled that their children cannot  
5 swim in the Bay, and that their descendants may not be able to enjoy the Bay's  
6 fish, wildlife and recreational opportunities in the future because of pollution from  
7 the SBRF non-retention ships and other sources. Valenzuela Decl. ¶ 7,10; Essick  
8 Decl. ¶ 8.

9  
10 7. Elimination of the SBRF's unlawful discharges of pollutants to Suisun Bay  
11 would increase Plaintiffs' members' use and enjoyment of the Bay. Albright Decl.  
12 ¶¶ 5-6; Essick Decl. ¶¶ 8; Howard Decl. ¶ 5; Nelson Decl. ¶ 5; Valenzuela Decl. ¶¶  
13 6-7.

14 8. Plaintiffs' members reasonably believe, based on their observations of the  
15 SBRF and publicly available information, that Defendants' failure to maintain the  
16 SBRF consistent with CWA and RCRA requirements has resulted in ongoing  
17 contamination of Suisun Bay and surrounding waterways and ecosystems.  
18 Albright Decl. ¶¶ 5-10; Essick Decl. ¶¶ 6, 7; Howard Decl. ¶ 4-8; Nelson Decl. ¶  
19 5-6; Valenzuela Decl. ¶¶ 5-6.

20  
21 9. The interests at stake in this litigation are germane to Plaintiffs' purposes,  
22 which include advocating on behalf of their members to prevent and reduce water  
23 pollution. Lopez Decl. ¶¶ 6-8; Self Decl. ¶¶ 2, 3, 7.

24  
25 10. The California Regional Water Quality Control Board, San Francisco Bay  
26 Region ("Regional Water Board") is an agency of the State of California and is  
27 one of nine such Regional Water Boards which has been delegated authority to  
28

1 implement and enforce the Clean Water Act in California, including authority to  
2 issue National Pollutant Discharge Elimination System (NPDES) permits. Cal.  
3 Water Code §§ 13001, 13160, 13200, 13201(a), 13377.  
4

5 11. Suisun Bay lies within the Regional Water Board's jurisdiction. Cal. Water  
6 Code § 13220(a).

7 **II. The non-retention vessels of the NDRF are obsolete, non-operational, slated for**  
8 **disposal, and expected to be disposed through scrapping or sinking.**

9 **Undisputed Supporting Facts/Supporting Evidence:**

10 12. NRDF non-retention vessels are obsolete, non-operational vessels that  
11 MARAD has determined no longer have a value that warrants further maintenance  
12 and that are intended for disposal. Defs.' Ans. Pls.' First Am. Compl. ¶¶ 1;  
13 MARAD (Magee) Dep. 258:15-20; MARAD (Michanczyk) Dep. 25:7-14, 231:14-  
14 16.  
15

16 13. MARAD currently maintains fifty-seven non-retention vessels at the  
17 SBRF. Defs.' Ans. Comp. Interv., ¶¶ 3, 24, 25; Mueller Decl., Ex. BBB, at 1-4  
18 (*Draft Programmatic Environmental Assessment for Removal of Non-Retention*  
19 *Vessels from National Defense Reserve Fleet Sites for Disposal*, June 2008).  
20

21 14. The SBRF non-retention vessels originally served as tankers, cargo ships,  
22 tenders and in other support roles. Mueller Decl., Ex. BBB, at 1-5 (*Draft*  
23 *Programmatic Environmental Assessment for Removal of Non-Retention Vessels*  
24 *from National Defense Reserve Fleet Sites for Disposal*, June 2008).  
25

26 15. Most SBRF non-retention vessels have been moored in Suisun Bay for  
27 more than a decade, and some have been moored in Suisun Bay for decades.  
28

1 Thirteen were built during World War II. Mueller Decl., Ex. MM, at 2-3; MARAD  
2 (Michanczyk) Dep. 25:15-18.

3  
4 16. Since 1994, Congress repeatedly has mandated that MARAD remove and  
5 dispose of the obsolete NDRF vessels by specified dates. National Maritime  
6 Heritage Act of 1994, Pub. L. 103-451, section 6, 108 Stat. 4769, 4777(1994);  
7 National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85,  
8 section 1026; Stat 1629, 1878 (1997); National Defense Authorization Act for  
9 Fiscal Year 2001, Pub. L. No. 106-398, section 3502, 114 Stat. 1654, 1654A-490-  
10 492 (2000).

11  
12 17. In 2000, Congress directed MARAD to dispose of all non-retention NDRF  
13 vessels by September 30, 2006. National Defense Authorization Act for Fiscal  
14 Year 2001, Pub. L. No. 106-398, section 3502, 114 Stat. 1654, 1654A-490-492  
15 (2000); Ex. BBB to Mueller Decl., p. 1-3, *Draft Programmatic Environmental*  
16 *Assessment for Removal of Non-Retention Vessels from National Defense Reserve*  
17 *Fleet Sites for Disposal*, June 2008.

18  
19 18. MARAD has failed to meet the Congressional deadlines for disposal of  
20 non-retention vessels. Mueller Decl., Ex. BBB, at 1-3 (*Draft Programmatic*  
21 *Environmental Assessment for Removal of Non-Retention Vessels from National*  
22 *Defense Reserve Fleet Sites for Disposal*, June 2008.)

23  
24 19. Between 1997 and 2004, MARAD disposed of only three SBRF non-  
25 retention vessels. Each of these vessels was disposed of pursuant to special  
26 legislation enacted specifically to provide for the donation of a particular ship to a  
27 specific organization. MARAD (Michanczyk) Dep. 95:7-21, 97:4-12, 99:1-101:4;  
28 Mueller Decl., Ex. X (*Vessel Disposals from the Suisun Bay Reserve Fleet Since*

1 1995).

2 20. In a March 2005 U.S. Governmental Accountability Office (GAO) Report  
3 to Congress, the GAO stated that:

4  
5 MARAD is unlikely to meet its statutory deadline of September 30,  
6 2006. As of September 2004, MARAD had disposed of 18 ships from  
7 its inventory, with over 100 ships left to dispose of by the deadline.  
8 MARAD's current approach is not sufficient for disposing of these  
9 remaining ships within the next two years. MARAD's slow progress is  
10 due primarily to program leaders not developing a comprehensive  
11 management approach that could address the myriad of environmental,  
12 legal, and regulatory challenges that the program faces.

13  
14 Mueller Decl., Ex. F, at 1 (GAO Report to Congress: *Maritime Administration:  
15 Improved Program Management Needed to Address Timely Disposal of Obsolete  
16 Ships*, March 2005).

17 21. After the GAO reported to Congress that MARAD was unlikely to meet  
18 the September 30, 2006 deadline for disposal of all non-retention ships, Congress  
19 in 2006 amended the law to require MARAD to prepare a plan for "expeditious  
20 disposal" of the ships, but Congress did not alter or repeal the September 30, 2006  
21 deadline. National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-  
22 163, § 3505(a), 119 Stat. 3136, 3551-52.

23 22. On September 5, 2001, MARAD prepared an internal report in which it  
24 projected that it would increase the number of SBRF non-retention vessels from  
25 forty-one to sixty-one by the September 30, 2006 Congressional deadline for  
26 disposal of all SBRF non-retention vessels. Mueller Decl., Ex. V (*Fleet Workload  
27 Project FY 2001-2008* (Ex. 2 to MARAD (Michanczyk) Dep.)); MARAD  
28 (Michanczyk) Dep. 38:5-42:17.

29 23. As of 2002, MARAD had no plan to meet the September 30, 2006

1 Congressional deadline for disposing of all non-retention vessels. MARAD had no  
2 specific goal for the number of SBRF vessels it would dispose of by the September  
3 30, 2006 Congressional deadline. MARAD (Michanczyk) Dep. 47:8-48:3.

4  
5 24. Between June 2005 and November 2006, MARAD disposed of fourteen  
6 SBRF non-retention vessels. One of these SBRF ships was transferred to the Navy  
7 to be sunk in deep-sea firing exercises. MARAD paid for the other thirteen SBRF  
8 ships to be broken apart and scrapped. MARAD (Michanczyk) Dep. 92:16-22,  
9 99:1-102:11; Mueller Decl., Ex, X (*Vessel Disposals from the Suisun Bay Reserve*  
10 *Fleet Since 1995*).

11  
12 25. MARAD has not awarded contracts for the disposal of any SBRF non-  
13 retention vessels since 2006. MARAD (Michanczyk) Dep. 100:3-14; Mueller  
14 Decl., Ex, X (*Vessel Disposals from the Suisun Bay Reserve Fleet Since 1995*).

15  
16 26. During the period 1997 through March 2009, MARAD contracted for the  
17 disposal of ninety-seven non-retention vessels from the NDRF fleet as a whole, but  
18 only seventeen of these vessels (18 percent of all NDRF vessels disposed) were  
19 from the SBRF. Mueller Decl., Ex. X (*Vessel Disposals from the NDRF Since*  
20 *1995*).

21  
22 27. MARAD has identified various disposal options for SBRF non-retention  
23 ships, but over the past fourteen years, has been able to use only three of these  
24 disposal options: donation, transfer to the Navy for sinking in firing exercises, and  
25 paying a scrapper to scrap the vessels. MARAD (Michanczyk) Dep. 64:7-19, 88:1-  
26 89:17, 92:16-22, 98:10-22; 99:1-102:11; Mueller Decl., Ex. X (*Vessel Disposals*  
27 *from the Suisun Bay Reserve Fleet Since 1995*).

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28. MARAD does not expect to be able to donate any SBRF non-retention vessels in the future, because it is so expensive to refurbish and operate the vessels that no one takes them. MARAD (Michanczyk) Dep. 98:10-22.

29. When MARAD transfers a vessel to the Navy for use in deep-sea firing exercises, the vessel is “basically blown up and sunk.” MARAD (Michanczyk) Dep. 101:5-101:15.

30. MARAD has also identified “artificial reefing” as an option for disposal of SBRF non-retention vessels. However, MARAD has not disposed of any SBRF non-retention vessel through artificial reefing since at least 1995 and MARAD is unaware of any interest in artificially reefing SBRF non-retention vessels from states that would have to sponsor such reefs. MARAD (Michanczyk) Dep. 64:7-19, 88:1-89-17.

31. When a non-retention vessel is scrapped, the scrapper takes out and disposes hazardous material and breaks the rest of the ship down into things that can be resold or scrap metal that can be sent to a mill and reused. MARAD (Michanczyk) Dep. 157:10-18.

32. MARAD expects to dispose of the “vast majority” of SBRF non-retention ships through scrapping, since scrapping is “the only viable large scale means of disposing of SBRF non-retention vessels.” MARAD (Michanczyk) Dep. 329:19-330:7.

33. SBRF non-retention vessels are not being actively reused. MARAD’s admitted goal “has been to get rid of these ships as fast as possible.” MARAD (Michanczyk) Dep. 481:15-17.

1 **III.. Suisun Bay is an ecologically sensitive waterway that has become polluted with**  
2 **contaminants contained in SBRF non-retention vessels.**

3 **Undisputed Supporting Facts/Supporting Evidence:**

4 34. Suisun Bay is located immediately upstream of Carquinez Strait and San  
5 Pablo Bay and immediately downstream of the Sacramento-San Joaquin Delta.  
6 *United States v. State Water Resources Control Board*, 182 Cal. App. 3d 82, 107  
7 (Cal. Ct. App. 1986).

8  
9 35. Suisun Bay is a tidally influenced, navigable waterway. *United States v.*  
10 *State Water Resources Control Board*, 182 Cal. App. 3d 82, 107 (Cal. Ct. App.  
11 1986); *United States v. North Bloomfield Gravel-Mining Co.*, 88 F. 664, 665, 667  
12 (9th Cir. 1898).

13  
14 36. Suisun Bay has been designated under the Endangered Species Act as  
15 “critical habitat” for numerous protected species, including the delta smelt and the  
16 Sacramento River winter-run Chinook salmon. 59 Fed. Reg. 65256-01 (Dec. 19,  
17 1994); 50 C.F.R. 226.204.

18  
19 37. “Two-thirds of California households receive at least some of their  
20 domestic water from the Bay-Delta, and over seven million acres of highly  
21 productive land are irrigated from the same source.” *In re Bay-Delta*  
22 *Programmatic Environmental Impact Report*, 43 Cal. 4th 1143, 1153 (Cal. S. Ct.  
23 2008).

24  
25 38. Suisun Bay is listed by the California Regional Water Quality Control  
26 Board as “impaired” due to both point and non-point sources, by the following  
27 pollutants (among others) mercury, nickel, polychlorinated biphenyls (PCBs),  
28 dioxin and selenium. Mueller Decl., Ex. BBB, at 3-3, 3-4, 3-5 (*Draft*

1 *Programmatic Environmental Assessment for Removal of Non-Retention Vessels*  
2 *from National Defense Reserve Fleet Sites for Disposal*, June 2008); Mueller  
3 Decl., Ex. DDD (State Water Resources Control Board, *2006 CWA Section 303(d)*  
4 *List of Water Quality Limited Segments*).

5  
6 39. The State of California's Office of Environmental Health Hazard  
7 Assessment has issued a formal ongoing health advisory to women of childbearing  
8 age, pregnant and nursing mothers, and children to eat no more than one meal per  
9 month of fish caught in the Bay, and to avoid certain species of fish entirely. A  
10 health advisory has also been issued to adult men and women who are not of  
11 childbearing age. Mueller Decl., Ex. EEE (OEHHA fish advisory).

12  
13 40. In an August 27, 2007 letter to MARAD, the National Marine Fisheries  
14 Service indicated that MARAD's proposal for cleaning SBRF vessels in San  
15 Francisco Bay has the potential to result in adverse effects to water quality which  
16 could result in impacts to several fish species, including species listed under the  
17 federal Endangered Species Act. Ex. A to Lichten Decl., p.14.

18  
19 **IV. Undisputed Fact: The Regional Water Board notified MARAD no later than 2007**  
20 **that discharges of exfoliated paint from SBRF vessels violates the Clean Water Act.**  
21 **Undisputed Supporting Facts/Supporting Evidence:**

22 41. On October 19, 2006, MARAD knew that the Regional Water Board did  
23 not want MARAD to conduct in-water hull cleaning until MARAD worked  
24 through permit issues for that work. Mueller Decl., Ex. CC (October 19, 2009  
25 email chain, Ireland to Carter; Ex. 11 to MARAD (Michanczyk) Dep.) (“[W]e  
26 spoke with the san fran water quality control brd. Bottom line is that they do not  
27 want any further hull cleaning until we work through the permit issues”).  
28

1 42. On December 15, 2006, MARAD notified the Regional Water Board that  
2 MARAD was planning to “scamp” – that is, conduct in-water hull cleaning of –  
3 two vessels in Alameda “immediately following” the vessels’ planned departure  
4 from the SBRF facility. Mueller Decl., Ex. DD (December 15, 2006 email chain,  
5 Carter to Michanczyk; MARAD072449-72451).  
6

7 43. On December 15, 2006, upon receiving MARAD’s unilateral notification,  
8 Regional Water Board staff directed MARAD not to proceed with the in-water  
9 hull cleaning, at least until receipt of lab samples documenting the composition of  
10 the vessels’ hull paint, unless MARAD either obtained a Clean Water Act permit  
11 for the operation or conducted the operation in a manner that prevented any  
12 discharge of pollutants. Mueller Decl., Ex. DD (December 15, 2006 email chain,  
13 Carter to Michanczyk; MARAD072449-72451).  
14

15 44. On December 15, 2006, upon learning of the Regional Water Board’s  
16 direction to MARAD concerning in-water hull cleaning, Mr. Carter, head of  
17 environmental affairs for MARAD, wrote: “I have very little patience with this  
18 cra\_. I feel like ringing some necks. I need to cool down. I am trying to get with  
19 [two MARAD employees] to figure out the best way to respond. I am thinking it  
20 might be best to have the lawyers send out an e-mail that would reflect the  
21 information . . . about [an earlier meeting] and maybe suggest that if the [Regional  
22 Board] pay delay damages, we would wait.” Mueller Decl., Ex. DD (December 15,  
23 2006 email chain, Carter to Michanczyk; MARAD072449-72451).  
24

25 45. On December 15, 2006, upon learning of the Regional Water Board’s  
26 direction to MARAD concerning in-water hull cleaning, MARAD’s Director of  
27 Congressional and Public Affairs wrote to MARAD’s then-Administrator that the  
28

1 Regional Water Board “can’t stop us” from proceeding with in-water cleaning.  
2 Mueller Decl., Ex. DD (December 15, 2006 email chain, Carter to Michanczyk;  
3 MARAD072449-72451).

4  
5 46. On July 6, 2007, the Executive Officer of the Regional Water Board, Bruce  
6 H. Wolfe, informed MARAD in writing that discharges of exfoliating paint from  
7 SBRF vessels constitute violations of the Clean Water Act which pose a  
8 significant risk to San Francisco Bay that “must be abated.” Mr. Wolfe’s July 2007  
9 letter ordered MARAD to submit a “Hazardous Waste Mitigation Workplan” by  
10 August 6, 2007, describing the methods and schedules that MARAD would  
11 employ to remove peeling paint from SBRF vessels “to ensure that no peeling  
12 paint is being discharged to San Francisco Bay.” Elias Decl., Ex. B (Letter from  
13 Bruce H. Wolfe to Shannon Russell re: Water Code Section 13267 Technical  
14 Report Requirement – National Defense Suisun Bay Reserve Fleet – Illicit  
15 Hazardous Waste Discharge, Suisun Bay, Solano County, July 6, 2007).

16  
17 47. On August 7, 2007, MARAD submitted a one-page letter in response to  
18 Mr. Wolfe’s July 2007 letter. The letter did not contain a work plan for removing  
19 peeling paint from SBRF vessels. Elias Decl., Ex. E (Letter from Joseph A. Bryne  
20 to Bruce H. Wolfe, Aug.7, 2007); Defs. Ans. to Comp. Interv., ¶ 32.

21  
22 48. On October 1, 2007, the Executive Officer of the Regional Water Board,  
23 Bruce H. Wolfe, issued a Notice of Violation on behalf of the Board to MARAD  
24 for failure to submit a Hazardous Waste Mitigation Workplan and otherwise  
25 prevent paint and other hazardous waste discharges from the SBRF to waters of  
26 the State and of the United States. Ex. D to Elias Decl., Letter from Bruce H.  
27 Wolfe to Shannon Russell re Notice of Violation – Inadequate Report – National  
28

1 Defense Suisun Bay Reserve Fleet – Illicit Hazardous Waste Discharge Oct. 1,  
2 2007.

3 49. Defendants admitted in their operative answer that they lack a Clean Water  
4 Act permit for discharges to Suisun Bay. Defs.’ Answer to 1st Amend. Compl. ¶ 7.

5  
6 50. On September 8, 2009, MARAD lodged a “notice of intent” to comply  
7 with the State Water Resources Control Board’s general permit for the discharge  
8 of stormwater associated with industrial activities (“stormwater general permit”).  
9 Cahill Decl. ¶¶ 11-12 (Doc. 74-7); Elias Decl., ¶ 8.

10  
11 51. On September 10, 2009, the Regional Water Board notified MARAD that  
12 it was not eligible for coverage under the stormwater general permit and that  
13 MARAD’s “notice of intent” would not be processed. Elias Decl., Ex. G.

14 **V. Undisputed Fact: The Plaintiffs and Plaintiff-Intervenor provided statutorily**  
15 **required notice of their intention to sue to Defendants and to all other appropriate**  
16 **government officials.**

17 **Undisputed Supporting Facts/Supporting Evidence:**

18 52. On October 5, 2007, Arc Ecology, San Francisco Baykeeper and Natural  
19 Resources Defense Council sent Defendants via registered mail, return receipt  
20 requested, a 60-day notice of their intent to sue, which Defendants received on  
21 October 10, 2007. Copies of the notice were sent to and received by the  
22 Administrator of the United States Environmental Protection Agency, the United  
23 States Attorney General, the Regional Administrator for the United States  
24 Environmental Protection Agency (EPA) encompassing this judicial district, the  
25 Director of the California Department of Toxic Substances Control (DTSC), the  
26 Director and Chair of the California State Water Resources Control Board, the  
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1 Chair and Executive Officer of the San Francisco Bay Regional Water Quality  
2 Control Board, the Chair and Executive Director of the California Integrated  
3 Waste Management Board, and the California Secretary for Environmental  
4 Protection. Wall Decl., ¶ 4-5 & Ex. 1; 1st Amend. Compl. ¶ 11; Defs.' Ans. to 1st  
5 Amend. Compl., ¶ 11.  
6

7 53. On August 27, 2008, the Regional Water Board sent Defendants via  
8 certified mail, return receipt requested, a 60-day notice of the Regional Water  
9 Board's intent to sue, which Defendants received on September 2, 2008. In  
10 addition to defendants, copies of the notice were sent to and received by the  
11 Administrator of the United States Environmental Protection Agency, the United  
12 States Attorney General, the Regional Administrator for the United States  
13 Environmental Protection Agency (EPA) encompassing this judicial district, and  
14 the Director and Chair of the California State Water Resources Control Board.  
15 Elias Decl., ¶ 6; Defs.' Ans. to Comp. Interv., ¶¶ 10, 44.  
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18 **VI. Undisputed Fact: MARAD Produced Witnesses Junemann, Magee, Michanczyk, and**  
19 **Pecoraro as witness designated to testify for MARAD pursuant to Fed. R. Civ. P.**  
20 **30(b)(6).**

21 **Undisputed Supporting Facts/Supporting Evidence:**

22 54. On March 4, 2009, Plaintiffs Arc Ecology, San Francisco Baykeeper and  
23 Natural Resources Defense Council noticed a deposition of Defendant MARAD  
24 pursuant to FRCP 30(b)(6). Wall Decl., ¶ 7 & Ex. 2 (Deposition Notice).

25 55. MARAD designated witnesses Carolyn Junemann, Eugene Magee, Curt  
26 Michanczyk and Joe Pecoraro to testify on various aspects of each topic listed in  
27 the notice. Wall Decl., ¶¶ 8-10 & Exs. 3-5 (correspondence from MARAD counsel  
28

1 concerning designations of witnesses).

2 56. MARAD witnesses Junemann, Magee, Michanczyk and Pecoraro appeared  
3 at and testified at deposition in response to Plaintiffs' Fed. R. Civ. P. 30(b)(6)  
4 notice of MARAD's deposition. Wall Decl., ¶ 11; MARAD (Junemann) Dep. 1;  
5 MARAD (Magee) Dep. 1; MARAD (Michanczyk) Dep. 1; MARAD (Pecoraro)  
6 Dep. 1.  
7

8  
9 **VII. Undisputed Fact: MARAD does not routinely maintain the coatings of SBRF non-  
retention vessels.**

10 **Undisputed Supporting Facts/Supporting Evidence:**

11 57. It is MARAD's policy to allow non-retention vessels to deteriorate,  
12 because the vessels are intended for disposal. MARAD (Magee) Dep. 262:3-14;  
13 Mueller Decl., Ex. BBB, at 1-4 (*Draft Programmatic Environmental Assessment  
14 for Removal of Non-Retention Vessels from National Defense Reserve Fleet Sites  
15 for Disposal*, June 2008).  
16

17 58. Before July 9, 2008, it was MARAD's policy not to maintain the paint on  
18 the vessels "at all." Maintenance on exterior surfaces of non-retention ships is  
19 limited to sealing leaks in the topsides. MARAD (Magee) Dep. 45:3-7, 120:1-7;  
20 Mueller Decl., Ex. B, at 2-37 (Tetra Tech, Inc., *Condition Survey Report, Suisun  
21 Bay Reserve Fleet, Benicia, California*, November 2007); MARAD (Pecoraro)  
22 Dep. 47:17-25.  
23

24 59. MARAD did not have any procedures to address exfoliating paint on non-  
25 retention vessels prior to 2008. MARAD (Pecoraro) Dep. 293:25-294:3.  
26

27 60. MARAD did not do any remediation of exfoliating paint on non-retention  
28 SBRF vessels until July 2008. MARAD (Pecoraro) Dep. 73:13-17; MARAD

1 (Magee) Dep. 129:14-17.

2 61. As a pilot program, MARAD commenced work in July 2008 to remove  
3 exfoliating paint from the topsides of four SBRF non-retention vessels: the  
4 Winthrop Victory, the Sagamore, the Bay and the Lincoln. Mueller Decl., Ex. II, at  
5 1, 4 (MARAD (Pecoraro) Dep. 55:4-57:5).

6  
7 62. MARAD did not perform any paint remediation work on the exterior hulls  
8 of the Winthrop Victory, the Sagamore, the Bay, the Lincoln, or any other SBRF  
9 non-retention vessel. MARAD (Pecoraro) Dep. 57:20-59:1, 100:25-102:15.

10  
11 63. MARAD only completed remediation of the topsides of the Winthrop  
12 Victory and the Sagamore, and did not complete the remediation work on the  
13 topsides of the Bay and Lincoln before stopping the work on these vessels.  
14 MARAD (Pecoraro) Dep. 91:15-24; 94:4-14.

15 64. MARAD ceased coating remediation work on the SBRF non-retention  
16 vessel the Bay when the topside remediation work was 40 percent complete.  
17 MARAD ceased coating remediation work on the SBRF non-retention vessel the  
18 Lincoln when the topside remediation was 30 percent complete. MARAD  
19 (Pecoraro) Dep. 91:15-24, 94:4-14; Mueller Decl., Ex. II (MARAD Exfoliation  
20 Paint/Coating Maintenance Survey (MARAD 060905)).  
21

22 65. MARAD commenced remediation of paint on the Winthrop Victory on  
23 July 22, 2008. Mueller Decl. Ex. II (MARAD Exfoliation Paint/Coating  
24 Maintenance Survey (MARAD 060905)).  
25

26 66. After MARAD commenced remediation of paint on the Winthrop Victory,  
27 MARAD “pretty close to immediately” began collecting waste paint in drums.  
28

1 MARAD (Pecoraro) Dep. 399:2-7.

2 67. MARAD subsequently determined that the drums of paint waste it  
3 collected from the Winthrop Victory were hazardous waste that should be disposed  
4 at a hazardous waste landfill. MARAD (Pecoraro) Dep. 405:4-14.  
5

6 68. MARAD sent the drums of hazardous paint waste it collected from the  
7 Winthrop Victory to a hazardous waste landfill on November 6, 2008. MARAD  
8 (Pecoraro) Dep. 406:19-407:5.  
9

10 69. MARAD stored drums of hazardous paint waste from the remediation of  
11 the Winthrop Victory at the SBRF site. MARAD (Pecoraro) Dep. 407:6-14.

12 70. MARAD stored hazardous paint waste from the remediation of the  
13 Winthrop Victory at the SBRF site from the commencement of remediation on  
14 July 22, 2008, until MARAD sent this waste to a hazardous waste landfill on  
15 November 6, 2008 – that is, for 107 days. For all but the last two weeks of this  
16 period, MARAD stored the hazardous paint waste from the remediation of the  
17 Winthrop Victory on that ship. MARAD (Pecoraro) Dep. 407:6-407:20; PSUFs  
18 65-69, *supra*.  
19

20 71. MARAD commenced remediation of paint on the Sagamore on October  
21 25, 2008. Mueller Decl., Ex. II (MARAD Exfoliation Paint/Coating Maintenance  
22 Survey (MARAD 060905)).  
23

24 72. MARAD completed the remediation work it conducted on the Sagamore  
25 on December 19, 2008. Mueller Decl., Ex. II (MARAD Exfoliation Paint/Coating  
26 Maintenance Survey (MARAD 060905)).  
27

28 73. MARAD subsequently determined that the drums of paint waste it

1 collected from the Sagamore were hazardous waste that should be disposed at a  
2 hazardous waste landfill. MARAD (Pecoraro) Dep. 411:4-9.

3  
4 74. MARAD sent the drums of hazardous paint waste it collected from the  
5 Sagamore to a hazardous waste landfill on December 19, 2008. MARAD  
6 (Pecoraro) Dep. 414:3-8.

7  
8 75. Between the time that MARAD commenced remediation of paint on the  
9 Sagamore and the time MARAD completed that remediation work, MARAD  
10 stored hazardous paint waste from that remediation work on the Sagamore.  
11 MARAD (Pecoraro) Dep. 414:9-19.

12  
13 76. MARAD commenced remediation of paint on the topsides of Bay and the  
14 Lincoln on November 28, 2008. Mueller Decl., Ex. II (MARAD Exfoliation  
15 Paint/Coating Maintenance Survey (MARAD 060905)).

16  
17 77. MARAD began collecting paint waste from the Bay and the Lincoln into  
18 drums “soon after” – and “within days” of – November 28, 2008. MARAD  
19 (Pecoraro) Dep. 416:11-22.

20  
21 78. MARAD subsequently determined that the drums of paint waste it  
22 collected from the Bay and the Lincoln were hazardous waste that should be  
23 disposed at a hazardous waste landfill. MARAD (Pecoraro) Dep. 418:19-419:1,  
24 419:19-420:12, 420:21-421:12, 422:20-24.

25  
26 79. MARAD sent the drums of hazardous paint waste it collected from the Bay  
27 and the Lincoln to a hazardous waste landfill on or after May 5, 2009. MARAD  
28 (Pecoraro) Dep. 422:20-423:6.

80. MARAD stored drums of hazardous paint waste from the remediation of

1 the Bay and the Lincoln at the SBRF site from November 28, 2008 until at least  
2 May 5, 2009. MARAD (Pecoraro) Dep. 423:3-15.

3 81. MARAD stored hazardous paint waste from the remediation of the Bay and  
4 the Lincoln on board SBRF non-retention vessels from November 28, 2008 until  
5 sometime after March 10, 2009, a period of more than ninety days. MARAD  
6 (Pecoraro) Dep. 423:7-22; PSUFs 76-80, *supra*.

7  
8 82. Sometime after March 10, 2009, until sometime after May 5, 2009,  
9 MARAD stored drums of paint waste collected from remediation of the Bay and  
10 the Lincoln at a parking lot at the SBRF site. MARAD (Pecoraro) Dep. 423:7-22;  
11 PSUFs 76-81, *supra*.

12  
13 83. MARAD did not label the drums of hazardous paint waste it collected from  
14 the Sagamore, Bay and Lincoln. MARAD (Pecoraro) Dep. 427:18-23.

15 84. MARAD stopped its topside coating remediation work on the Bay and the  
16 Lincoln because the SBRF did not receive sufficient overtime funds from  
17 MARAD to continue to perform such paint remediation work. MARAD (Pecoraro)  
18 Dep. 91:24-92:1, 94:15-17.

19  
20 85. MARAD does not know if or when topside coating maintenance  
21 remediation work on SBRF non-retention vessels will be recommenced. MARAD  
22 (Pecoraro) Dep. 94:21-95:9, 137:15-24, 138:19-139:5, 205:24-206:6.

23  
24 86. Other than work on the topsides of the Winthrop Victory, the Sagamore,  
25 the Bay and the Lincoln, which is no longer being performed, MARAD has not  
26 conducted any paint remediation to prevent discharges of paint from SBRF non-  
27 retention vessels to Suisun Bay. MARAD (Pecoraro) Dep. 433:20-433:16.  
28

- 1 87. MARAD is not currently conducting remediation of exfoliating paint on  
2 either the hulls or topsides of non-retention vessels at the SBRF. MARAD  
3 (Pecoraro) Dep. 280:2-21 .  
4
- 5 88. MARAD established something it refers to as its “Environmental  
6 Excellence Initiative” (EEI) in an initial document dated January 19, 2007. Ex. T  
7 to Mueller Decl., NDRF Environmental Excellence Initiative Summary,  
8 1/19/2007; MARAD (Magee) Dep. 191:12-192:7.  
9
- 10 89. When MARAD established its EEI it was concerned that NRDC would  
11 initiate a lawsuit. Mueller Decl., Ex. T, at 1 (NDRF Environmental Excellence  
12 Initiative Summary, 1/19/2007); MARAD (Magee) Dep. 194:19-195:13.  
13
- 14 90. On May 5, 2008, MARAD finalized the first version of its EEI Best  
15 Management Practices (EEI BMPs). Mueller Decl., Ex. N (Memo from James E.  
16 Caponiti and Joseph A. Byrne re: NDRF Fleet Anchorage Environmental  
17 Excellence Initiative Best Management Practices, May 5, 2008); MARAD  
18 (Magee) Dep. 52:21-22.  
19
- 20 91. On July 9, 2008, MARAD’s May 5, 2008 EEI BMPs went into effect.  
21 MARAD (Magee) Dep. 44:22 – 45:2.  
22
- 23 92. As of June 23, 2009, MARAD had not instituted any general procedures  
24 for implementing the vessel maintenance requirements of the May 5, 2008 EEI  
25 BMPs. MARAD (Pecoraro) Dep. 180:5-8; 293:25-294:3.  
26
- 27 93. MARAD is not currently performing work on a number of the EEI BMPs  
28 related to vessel maintenance identified in the May 5, 2008 BMPs, including BMP  
2.2.14 (maintenance of exterior coatings to prevent releases of exfoliated paint into

1 the local waterways), BMP 2.2.7 (collection and removal of loose debris from  
2 decks) and BMP 2.2.14.2 (remediation of the freeboard and topside coating of the  
3 worst vessels first, with a monitoring schedule for additional remediation of the  
4 remaining painted surfaces). MARAD (Pecoraro) Dep. 192:13-17, 193:18-194:2,  
5 194:12-18; Mueller Decl., Ex. N (Memo from James E. Caponiti and Joseph A.  
6 Byrne re: NDRF Fleet Anchorage Environmental Excellence Initiative Best  
7 Management Practices, May 5, 2008).

9 94. MARAD's EEI BMPs do not require that exfoliated paint that gathers on  
10 the decks of SBRF vessels be removed within any certain period of time. MARAD  
11 (Magee) Dep. 112:20-113:2.

13 95. MARAD has not established any firm criteria for when a vessel would  
14 need to be re-remediated for exfoliating paint. MARAD (Pecoraro) Dep. 85:7-  
15 86:3.

16 96. MARAD does not know how long it will take to implement the EEI BMPs.  
17 MARAD (Pecoraro) Dep. 206:1-6.

18 97. The SBRF staff is not adequate to implement the EEI BMPs. MARAD  
19 (Pecoraro) Dep. 203:17-204:1.

21 98. MARAD's May 2008 EEI BMPs have not halted paint exfoliation of paint  
22 from SBRF non-retention vessels. MARAD (Magee) Dep. 250:17-19.

23 99. MARAD has expressed concern that, due to the weakness of the hulls of  
24 some SBRF non-retention vessels, scrubbing these vessels' underwater hulls with  
25 a metal brush to remove invasive species "might actually cause some kind of  
26 failure in the hull's integrity." MARAD (Junemann) Dep. 149:3-17.  
27  
28

1 100. MARAD has no estimate of the number of SBRF non-retention vessels for which  
2 paint can be remediated under the existing contract between MARAD and  
3 Certified Coatings. MARAD (Pecoraro) Dep. 337:8-11.  
4

5 **VIII. Undisputed Fact: SBRF non-retention vessels are deteriorating, with significant**  
6 **paint exfoliation.**

7 **Undisputed Supporting Facts/Supporting Evidence:**

8 101. “Exfoliation of the paint on non-retention NDRF vessels has occurred and  
9 may continue to occur due to age and weathering.” Defs.’ Ans. Pls.’ First Am.  
10 Compl., ¶ 85.  
11

12 102. In 1996, the SBRF fleet superintendent, Joe Pecoraro, raised concerns  
13 regarding management of exfoliating paint on SBRF vessels with Michael Carter,  
14 the Director of MARAD’s Office of the Environment. Mr. Pecoraro was  
15 concerned in 1996 that some of the non-retention ships in the SBRF had peeling  
16 paint conditions. MARAD (Pecoraro) Dep. 60:14-61:19.  
17

18 103. Following Mr. Pecoraro’s articulation of concerns with exfoliating paint at  
19 the SBRF, MARAD in 1996 formed the Environmental Quality Action Team  
20 (EQAT) to look at issues including exfoliating paint. MARAD (Pecoraro) Dep.  
21 24:20-25, 25:10-12. The EQAT was disbanded after approximately two years.  
22 MARAD (Pecoraro) Dep. 25:1-5.  
23

24 104. MARAD recognized in 1997 that it must consider its obligations under the  
25 Clean Water Act in managing its fleets. Mueller Decl., Ex. P (U.S. Department of  
26 Transportation Maritime Administration Paint Removal Guidelines).

27 105. In 1997, a MARAD employee stated that “[e]xfoliating paint on MARAD  
28

1 ships is an issue that must be addressed.” Mueller Decl., Ex. P, at 2 (U.S.  
2 Department of Transportation Maritime Administration Paint Removal  
3 Guidelines).

4  
5 106. In 1997, Harry Soete, a MARAD safety and environment officer at the  
6 SBRF fleet, surveyed the condition of paint on the SBRF vessels. He determined  
7 that thirty-four vessels had exfoliating paint and that eleven of these vessels had  
8 exfoliating paint on 50 percent or more of the surface area. The current SBRF fleet  
9 program manager, who was employed at the SBRF as its fleet superintendent in  
10 1997, agrees that Mr. Soete’s 1997 assessments were accurate. Mueller Decl., Ex.  
11 HH (MARAD Reserve Fleet Paint Survey Questionnaire) (Ex. 5 to Pecoraro Dep.)  
12 ; MARAD (Pecoraro) Dep. 65:3-7, 67:15-17, 70:11-2, 15:21-16:6.

13  
14 107. A ship roster prepared by Mr. Soete in 1997, which indicated that thirty-  
15 four non-retention vessels in the SBRF had exfoliating paint and that twenty-two  
16 of these vessels had exfoliating paint on 50 percent or more of the surface area,  
17 was sent to the MARAD Office of Environmental Activities. Mueller Decl., Ex. R  
18 (Suisun Bay Reserve Fleet Ships Roster); MARAD (Pecoraro) Dep. 70:13-19.

19  
20 108. No action was taken by MARAD on exfoliating paint from SBRF ships in  
21 response to the ship roster and paint exfoliation questionnaire prepared by Mr.  
22 Soete and sent to the MARAD Office of Environmental Activities. MARAD  
23 (Pecoraro) Dep. 70:22-24, 72:24-73:12; MARAD (Magee) Dep. 45:3-7, 120:1-7.

24  
25 109. In a December 29, 1997 memorandum to the MARAD Deputy Associate  
26 Administrator for Port, Intermodal, and Environmental Activities, Al Lipski, a  
27 Ship Operations Specialist in MARAD’s Western Region, stated that  
28 SBRF/Western Region had recommended an exfoliating paint program for SBRF

1 vessels. Mueller Decl., Ex. WW (Memo from Al Lipski to Carmine P. Gerace,  
2 December 29, 1997).

3 110. Mr. Lipski stated that the SBRF/Western Region exfoliating paint program  
4 had “minimal associated costs but [would] remove potential water contamination.”  
5 Mueller Decl., Ex. WW (Memo from Al Lipski to Carmine P. Gerace, December  
6 29, 1997).

7  
8 111. The SBRF/Western Region paint exfoliation program was never instituted  
9 at the SBRF. MARAD (Pecoraro) Dep. 73:13-17.

10 112. From roughly 1996 through May 2008, MARAD was “aware that there  
11 was an issue associated with exfoliated paint collecting on the decks of SBRF  
12 vessels and falling into Suisun Bay and had a policy of not doing anything about  
13 that.” MARAD Depo (Magee) 120:1-7.

14 113. MARAD knew that “do[ing] nothing” about the exfoliating paint problem  
15 would “only lead to problems in the future.” Mueller Decl., Ex. P (U.S.  
16 Department of Transportation Maritime Administration Paint Removal  
17 Guidelines).

18 114. After it disbanded the EQAT in 1998, MARAD did not raise the issue of  
19 exfoliating paint again until it was put on notice to be sued for Clean Water Act  
20 violations. MARAD (Pecoraro) Dep. 59:19-60:13.

21 115. SBRF vessels have been deteriorating at an increased rate over the past few  
22 years, with paint flakes falling off vessels into the surrounding waters and  
23 accumulating on the decks of vessels. MARAD (Magee) Dep. 87:2-89:2.

24 116. Exposure to the elements and time will continue to weather the paint  
25  
26  
27  
28

1 coatings resulting in further degradation. Rotkin-Ellman Decl., ¶ 40.

2 117. A 2000 audit of MARAD's ship disposal program by the Department of  
3 Transportation's Office of Inspector General reported that "environmental dangers  
4 associated with MARAD's old, deteriorating ships are increasing daily. These  
5 vessels are literally rotting and disintegrating as they await disposal." Mueller  
6 Decl., Ex. CCC, at 3, 8 (*Maritime Administration: Limited Progress in Disposing*  
7 *of Obsolete Vessels*, Statement of Thomas J. Howard, OIG/DOT, June 9, 2000).

8  
9 118. In August 2006, MARAD contracted with R&M Environmental  
10 Infrastructure and Engineering, Inc. (R&M) to "conduct field sampling and  
11 laboratory analysis of deteriorating external coating systems (paint) aboard various  
12 National Defense Reserve Fleet (NRDF) vessels" and "to prepare a written  
13 environmental risk assessment based on their findings." MARAD specifically  
14 requested that the paint samples be analyzed for lead. Mueller Decl., Ex. ZZ, at 3,  
15 5 (MARAD, Order for Supplies or Services, Contract No. GSA GS10F0403R,  
16 Aug. 9, 2006).

17  
18  
19 119. In August 2006, R&M surveyed forty randomly selected SBRF non-  
20 retention vessels and estimated the percentages of surface with exfoliated/lost  
21 paint averaged 16 percent for inboard vertical surfaces, 17 percent for outboard  
22 vertical surfaces, and 58 percent for deck surfaces. Mueller Decl., Ex. A, at ES-2  
23 (R&M Environmental and Infrastructure Engineering, Inc., *National Defense*  
24 *Reserve Fleet Vessel Environmental Review*, Draft, February 15, 2007).

25  
26 120. R&M estimated that the forty SBRF non-retention vessels it surveyed in  
27 August of 2006 have lost a total of 18,271 kg (more than 20 tons) of heavy metals  
28 from exfoliating paint, including 596 kg of chromium, 2,864 kg of copper, 4,045

1 kg of lead and 10,766 kg of zinc, and that 57,179 kg of metals remain on the  
2 exterior surfaces of the ships. Mueller Decl., Ex. A, at ES-2, ES-3, ES-4, 32-34  
3 (R&M Environmental and Infrastructure Engineering, Inc., *National Defense*  
4 *Reserve Fleet Vessel Environmental Review*, Draft, February 15, 2007).

5  
6 121. R&M also concluded that “[s]ignificant exfoliation of paints has occurred  
7 and will continue to occur due to weathering” and that “[c]orrective actions to  
8 arrest further exfoliation and loss of exfoliated paint to the environment are highly  
9 warranted and are recommended.” Mueller Decl., Ex. A, at ES-6 (R&M  
10 Environmental and Infrastructure Engineering, Inc., *National Defense Reserve*  
11 *Fleet Vessel Environmental Review*, Draft, February 15, 2007).

12  
13 122. MARAD does not know the precise fate of all of the paint that has  
14 exfoliated from SBRF vessels, but assumes that some of the paint has accumulated  
15 on deck and some of it has discharged to Suisun Bay. MARAD (Pecoraro) Dep.  
16 299:21-300:13, 431:4-24.

17  
18 123. A June 2007 inspection of SBRF vessels by MARAD’s consultant Tetra  
19 Tech, Inc. indicated that paint was exfoliating from SBRF non-retention vessels.  
20 Mueller Decl., Ex. B, at 2-41 (App. C, Tetra Tech, Inc. *Condition Survey Report,*  
21 *Suisun Bay Reserve Fleet, Benicia, California*, November 2007).

22  
23 124. A draft environmental assessment prepared by MARAD in June of 2008  
24 indicates that many of the SBRF non-retention vessels “have degraded coatings”  
25 and many vessels hulls are in fair to very poor condition. Mueller Decl., Ex. BBB,  
26 at 3-7, 3-9, 4-8 (*Draft Programmatic Environmental Assessment for Removal of*  
27 *Non-Retention Vessels from National Defense Reserve Fleet Sites for Disposal,*  
28 June 2008).

1 125. Three of the SBRF non-retention vessels have known holes in their hulls  
2 “which can be a pathway for potentially hazardous material to leach into the  
3 environment.” Mueller Decl., Ex. BBB, at 3-9, 4-8 (*Draft Programmatic*  
4 *Environmental Assessment for Removal of Non-Retention Vessels from National*  
5 *Defense Reserve Fleet Sites for Disposal*, June 2008).

6  
7 126. A number of SBRF non-retention vessels’ topsides have holes that allow  
8 rainwater to leak into the vessel. MARAD (Pecoraro) Dep. 338:15-339:1, 371:16-  
9 374:3; Mueller Decl., Ex. KK (Vessel Condition Summary, January 2008.  
10 MARAD066536-066539); Rotkin-Ellman Decl. ¶ 37.

11  
12 127. A 2008 MARAD assessment of the condition of vessel coatings on non-  
13 retention SBRF vessels indicates that every non-retention vessel has peeling paint  
14 and/or debris on an exterior surface, and that thirty-six of these vessels required  
15 “immediate attention” to paint on exterior surfaces. Mueller Decl., Ex. JJ (SBRF  
16 Analysis of the Condition of Vessel Coatings); MARAD (Pecoraro) Dep. 153:12-  
17 16. MARAD’s fleet program manager for the SBRF agrees with this assessment  
18 and that these figures remain accurate as of June 24, 2009. MARAD (Pecoraro)  
19 Dep. 111:21-23, 297:24-298:2.

20  
21 128. MARAD collected 15,817 pounds of paint chips and other debris from the  
22 Winthrop Victory during its pilot test for paint remediation. Mueller Decl., Ex. OO  
23 (Winthrop Victory Coating Maintenance Project, Drum Log, 10/26/08).

24  
25 129. MARAD collected 5,534 pounds of paint chips and other debris from the  
26 Sagamore during its pilot test for paint remediation. Mueller Decl., Ex. RR (Paint  
27 Chips Sagamore, 12/18/08).

- 1 130. MARAD collected 22,552 pounds of paint chips and other debris from the  
2 Bay and the Lincoln during its pilot test for paint remediation. Mueller Decl., Ex.  
3 UU (Coating Maintenance Project Drum Log, Bay and Lincoln, 3/10/2009).
- 4  
5 131. Photographs of SBRF non-retention vessels taken during an inspection of  
6 SBRF non-retention vessels by Plaintiffs and Plaintiff-Intervenor document  
7 extensive exfoliating paint on the vessels. Elias Decl., Ex. H (*MARAD Reserve*  
8 *Fleet Vessel Coating Inspection Forms and Photographs*, California Regional  
9 Water Quality Control Board, San Francisco Bay Region, January 2009).
- 10  
11 132. Grass sprouts from the decks of some SBRF non-retention ships. Elias  
12 Decl., Ex. H (photo Bay 79).
- 13  
14 133. It is “very common” for SBRF non-retention vessels to have PCBs on  
15 board. MARAD (Michanczyk) Dep. 59:15-19.
- 16  
17 134. Regulated, friable asbestos has come loose and lies scattered on the deck of  
18 at least one SBRF non-retention vessel, the Glacier. MARAD (Pecoraro) Dep.  
19 375:7-376:23.
- 20  
21 135. During a January 2009 inspection, a breach in the exterior of one vessel’s  
22 hull was observed to be dripping an unknown liquid, which appeared to a  
23 MARAD employee to be water but which MARAD never tested for contaminants.  
24 MARAD (Pecoraro) Dep. 371:16-372:19, 374:5-13; Mueller Decl., Ex. NN (photo  
25 of ship hull); Elias Decl., Ex. H (photo Glacier 421); Rotkin-Ellman Dec. ¶ 37.
- 26  
27 136. The SBRF non-retention vessel Mission Santa Ynez is non-operational. It  
28 contains PCBs in a transformer that MARAD never expects to repower because  
the vessel is slated for disposal. MARAD (Pecoraro) Dep. 381:4-382:8.

1 137. MARAD's *Survey of Ships and Materials* calculated the quantity of loose  
2 paint on the decks of two NDRF non-retention vessels. MARAD estimated that  
3 one of the vessels contained two tons of loose paint on its deck and that the other  
4 vessel contained four tons of loose paint on deck. Wall Decl., Ex. 14, at 42-43;  
5 Mueller Decl., Ex. E, at ES-1, 42 (Environmental Assessment of the Sale of NRDF  
6 Vessel for Scrapping (July 1997)).  
7

8 **IX. Undisputed Fact: SBRF non-retention vessels have discharged and continue to**  
9 **discharge material into Suisun Bay through: (1) direct non-stormwater discharge of**  
10 **exfoliating paint from the outside hulls and topsides of vessels into the Bay and (2)**  
11 **stormwater runoff of exfoliating paint and other material on the decks into the Bay.**

12 **Undisputed Supporting Facts/Supporting Evidence:**

13 138. "Some exfoliated paint may disperse into the waters in which the [SBRF]  
14 vessels are anchored and the land under those waters." Defs.' Ans. Pls.' First Am.  
15 Compl. ¶¶ 2, 85; Defs. Ans. Comp. Interv., ¶ 5.

16 139. "Paint and scale have likely fallen from the [SBRF] vessels into the  
17 surrounding waters." Defs. Ans. Comp. Interv., ¶ 4.

18 140. MARAD agrees that as of June 24, 2009 that paint continues to fall off of  
19 each of the SBRF non-retention vessels into Suisun Bay. MARAD (Pecoraro)  
20 Dep. 433:13-16; 435:13-23.

21 141. MARAD commissioned R&M to study the non-retention vessels of the  
22 SBRF in 2006. MARAD (Junemann) Dep. 53:12-20.

23 142. MARAD commissioned the R&M study because "there was concern about  
24 paint getting into the water or falling into the sediment." MARAD (Magee) Dep.  
25 151:22-152:10. Beginning in early 2007, MARAD was concerned about hull  
26 failures and oil leaking into the waters, degradation of paint, and paint dropping  
27  
28

1 into Suisun Bay. MARAD (Magee) Dep. 88:6-89:22, 85:16-86:2.

2 143. Exfoliating paint falls off of the hulls of SBRF non-retention vessels into  
3 Suisun Bay. MARAD (Magee) Dep. 107:3-11; MARAD (Pecoraro) Dep. 218:16-  
4 24, 222:21-223:17, 435:15-23; Lichten Decl., Ex. A, at 7-8; Rotkin-Ellman Decl.  
5 ¶¶ 44, 45, 46.

7 144. Exfoliated paint on the weather decks of SBRF vessels blows off into  
8 Suisun Bay, including over the last year. MARAD (Pecoraro) Dep. 300:13-14,  
9 306:10-14; MARAD (Magee) Dep. 106:14-107; Lichten Decl., Ex. A., at 10;  
10 Rotkin-Ellman Decl. ¶ 44.

12 145. Exfoliating paint on the weather decks of SBRF non-retention vessels  
13 washes off into Suisun Bay. MARAD (Magee) Dep. 106:9-13; MARAD  
14 (Pecoraro) Dep. 222:21-223:17, 224:10-12; Lichten Decl., Ex. A, at 7-9; Rotkin-  
15 Ellman Dec. ¶¶ 44, 48, 49.

17 146. Oil from machinery on the SBRF non-retention vessels leaks onto the  
18 vessel decks where it can then be discharged into Suisun Bay through storm  
19 events. MARAD (Magee) Dep. 94:7-14; MARAD (Pecoraro) Dep. 326:1-15;  
20 Mueller Decl, Ex. II (Exfoliating Paint/Coating Maintenance Survey for SBRF  
21 Vessels); Rotkin-Ellman Decl. ¶ 41.

23 147. In January 1997, MARAD prepared an environmental assessment on the  
24 sale of National Defense Reserve Fleet vessels which states:

25 The quality of the paint covering the exterior surfaces of these ships varies.  
26 As they are not routinely repainted, the paint on the ships peels off and the  
27 ships tend to rust. As the paint peels, it either collects on the decks of the  
28 ships or falls into the water. A certain portion of the peeled paint, which in  
many cases contains lead, will be washed into the water by rain. Similarly,  
metallic oxides and other materials from the ships' hulls will slowly leach

1 into the water. . . If no action is taken, the ships will continue to age and  
2 corrode and ultimately may sink. The pollutants on the exterior of the  
3 vessel may leach into the surface water, and it is possible that at least the  
4 more mobile, non-degradable pollutants may contaminate an aquifer.

5 Mueller Decl., Ex. E, at 29-30 (MARAD, Environmental Assessment of the Sale  
6 of National Defense Reserve Fleet Vessels for Scrapping, Report MA-ENV-820-  
7 96003-F, Jan. 1997).

8 148. Around the time that Plaintiffs provided MARAD with notice of their  
9 intent to sue, MARAD's Division of Reserve Fleet, Office of Ship Operations,  
10 again raised concerns that paint chips were discharging into Suisun Bay. MARAD  
11 (Pecoraro) Dep. 59:14-60:13.

12 149. In May 2007, MARAD contracted with Tetra Tech, Inc. to conduct a  
13 survey of and prepare a report on the conditions of the SBRF vessels. In the  
14 contract statement of work, a header that reads "SBRF Areas of Concern" states:  
15

16 1. Rain runs off the decks of ships, in some cases, after mixing with  
17 substantial amounts of paint chips that have fallen from topside structures  
18 or bird feces. When the rain is heavy, some of the paint chips may be  
19 carried into the water through the deck scuppers (drains). Sometimes,  
20 workers agitate the residue blocking scuppers to allow accumulated rain  
21 water to drain.

22 Mueller Decl., Ex. YY (Tetra Tech, Inc. Contract Statement of Work  
23 (MARAD003264)).

24 150. In its November 2007 report, Tetra Tech, Inc. identified as a contaminant  
25 release mechanism release of paint chips from the freeboard of the vessels due to  
26 normal weather conditions such as rain and wind. Mueller Decl., Ex. B, at 2-43  
27 (Tetra Tech. Condition Survey Report, Suisun Bay Reserve Fleet, Benicia,  
28 California, Nov. 2007 draft).

1 151. In its November 2007 report, Tetra Tech, Inc. identified as a contaminant  
2 release mechanism stormwater runoff of debris on the decks of SBRF vessels,  
3 including paint chips. Mueller Decl., Ex. B, at 2-43, 2-44 (Tetra Tech. Condition  
4 Survey Report, Suisun Bay Reserve Fleet, Benicia, California, Nov. 2007 draft).

5  
6 152. In its November 2007 report, Tetra Tech, Inc. identified as a contaminant  
7 release mechanism stormwater runoff of oil from leaking hydraulic systems on  
8 SBRF vessels. Mueller Decl., Ex. B, at 2-44 (Tetra Tech. Condition Survey  
9 Report, Suisun Bay Reserve Fleet, Benicia, California, Nov. 2007).

10 153. MARAD agrees that the findings in the Tetra Tech, Inc. condition report  
11 are generally accurate. MARAD (Magee) Dep. 245:15-18, 241:5-8.

12  
13 154. Each of the approximately fifty SBRF non-retention vessels inspected by  
14 Plaintiff-Intervenor the California Regional Water Quality Control Board, San  
15 Francisco Bay Region and Plaintiffs Arc Ecology, Natural Resources Defense  
16 Council, and Baykeeper in January 2009 is now discharging and is likely to  
17 discharge in the future materials from the exterior of the ship to the waters of  
18 Suisun Bay. Lichten Decl., Ex. A, at 7-9; Rotkin Ellman Decl. ¶ 29.

19  
20 155. MARAD commenced installation of 3/16-inch mesh scupper screens on the  
21 decks of SBRF non-retention vessels in July of 2008. MARAD (Pecoraro) Dep.  
22 103:1-2, 104:9-17.

23 156. The decision to install scupper screens was made in response to this  
24 lawsuit. MARAD (Pecoraro) Dep. 103:13-20.

25  
26 157. MARAD is not doing anything to prevent buildup of paint on the scupper  
27 screens. MARAD (Pecoraro) Dep. 131:21-23.

28

1 158. The scupper screens have not been fully effective in preventing discharges  
2 from the decks of SBRF non-retention vessels. Lichten Decl., Ex. A, at 11;  
3 MARAD (Pecoraro) Dep, 347:9-348:2; MARAD (Magee) Dep. 102:2-21; Rotkin-  
4 Ellman Decl. ¶ 34-35; Elias Decl., Ex. H (photos HH Hess 24, General John Pope  
5 126).

6  
7 159. Paint continues to pass through the drains screens that MARAD has  
8 installed and continues to be carried by rain to Suisun Bay. MARAD (Pecoraro)  
9 Dep. 347:9-348:2; MARAD (Magee) Dep. 102:2-21; Rotkin-Ellman Decl. ¶¶ 34,  
10 49; Elias Decl., Ex. H (photos Bolser 236; American Racer 94, 100; Agent 64);  
11 Fernandez Decl., Ex. Z, photo 122, Ex. L (photos 43, 46), Ex. X (photo 114).

12  
13 160. MARAD failed to install screens on some deck drains on SBRF non-  
14 retention ships. Some drain screens that MARAD did install have come loose.  
15 Pecoraro Dep. 351:7-9; Rotkin-Ellman Decl. ¶ 33; Elias Decl., Ex. H (photos  
16 Bolster 237; Dawn 41; Earlham Victory 168; Bay 85; Lincoln 97, Lincoln 310);  
17 Fernandez Decl., Ex. F (photo 7), Ex. I (photo 22), Ex. O (photo 60), Ex. W  
18 (photos 102, 107); Ex. Z (photo 120).

19  
20 161. During a January 2009 inspection of SBRF non-retention vessels,  
21 numerous deck screens were observed to be unscreened. Rotkin-Ellman Decl. ¶  
22 33; Elias Decl., Ex. H (photos Bolster 237; Dawn 41; Earlham Victory 168; Bay  
23 85; Lincoln 97, Lincoln 310); Fernandez Decl., Ex. F (photo 7), Ex. I (photo 22),  
24 Ex. O (photo 60), Ex. W (photos 102, 107); Ex. Z (photo 120).

25  
26 162. Paint chips can flow uninhibited down deck drains that are missing drain  
27 screens. MARAD (Pecoraro) Dep. 353:21-354:5.

28

1 163. Deck drain screens on SBRF non-retention vessels have become clogged  
2 with paint chips and debris. MARAD (Pecoraro) Dep. 345:10-346:18; Rotkin-  
3 Ellman ¶¶ 33, 34 & Ex. D (photos Earlham 4; Pan American 1; Gettysburg 1);  
4 Elias Decl., Ex. H (photos Lincoln 97; H.H. Hess 27; General John Pope 126);  
5 Fernandez Decl., Ex. W (photo 102), Ex. V (photo 99), Ex. U (photo 96); Ex. R  
6 (photo 82).  
7

8 164. When SBRF non-retention vessels' deck drains become clogged, that  
9 clogging "eliminate[s]" the screens' effectiveness by allowing water to back up  
10 and overflow the vessels gunwale directly into Suisun Bay. MARAD (Magee)  
11 Dep. 174:12-175:11.  
12

13 165. During a January 2009 inspection of the SBRF non-retention vessels by  
14 Plaintiffs and Plaintiff-Intervenor, inspectors observed leaks of oil, hydraulic fluids  
15 and similar materials from machinery on the decks of the vessels. Lichten Decl.,  
16 Ex. A, at 8-10; Rotkin-Ellman Decl. ¶ 36.  
17

18 166. Photographs taken during a January 2009 inspection of the SBRF non-  
19 retention vessels by Plaintiffs and Plaintiff-Intervenor depict leaking fluids on the  
20 decks of vessels. Elias Decl., Ex. H (photos Lincoln 93; Agent 58, 60); Fernandez  
21 Decl., Ex. Y (photo 115), Ex. L (photo 39), Ex. Z (photo 117).  
22

23 167. In its answers to the plaintiffs' complaints, MARAD admitted that it does  
24 not have a NPDES permit for the discharge of any pollutant into Suisun Bay.  
25 Defs.' Ans. Pls.' 1st Am. Compl. ¶¶ 7, 170; Defs.' Ans. Comp. Interv., ¶¶ 6, 42;  
26 *compare with* Pls.' 1st Am. Compl. ¶¶ 7, 170.  
27

28 168. On September 8, 2009, the Suisun Bay Reserve Fleet lodged a Notice of

1 Intent (NOI) to Comply with the State Water Board's General Industrial Storm  
2 Water Permit (General Permit) with the State Water Resources Control Board. On  
3 September 10, 2009, Bruce H. Wolfe, the Executive Officer of the Regional Water  
4 Board, sent a letter to David Matsuda, the acting Maritime Administrator for  
5 MARAD, indicating that the SBRF facility is not eligible for coverage under the  
6 General Permit and that it has instructed the State Water Board to terminate  
7 MARAD's notice to seek coverage under that permit for the SBRF facility. Elias  
8 Decl., ¶ 8 & Ex. G.

9  
10  
11 **X. Undisputed Fact: The material being discharged into Suisun Bay from SBRF non-  
12 retention vessels includes toxic pollutants.**

13 **Undisputed Supporting Facts/Supporting Evidence:**

14 169. MARAD admits that some non-retention SBRF vessels contain corrosion,  
15 PCBs, oil, metal and asbestos. Defs. Ans. to Comp. Interv. ¶¶ 4, 5.

16 170. SBRF non-retention vessels are coated with paints, containing lead, copper, zinc  
17 and other heavy metals. MARAD (Junemann) Dep. 115:1-5; Rotkin-Ellman Decl.,  
18 ¶ 22; PSUFs 171-172, *infra*.

19 171. A draft environmental assessment prepared by MARAD states that heavy  
20 metals including mercury, lead, chromium, cadmium, zinc, copper, nickel, tributyl  
21 tin, and manganese are found throughout older ships, including in paint and other  
22 protective coatings. Mueller Decl., Ex. BBB, at 3-7 - 3-8, 4-9 (*Draft*  
23 *Programmatic Environmental Assessment for Removal of Non-Retention Vessels*  
24 *from National Defense Reserve Fleet Sites for Disposal*, June 2008).

25 172. In August 2006, R&M analyzed paint samples from forty of the SBRF  
26 non-retention vessels. The R&M analysis found that the sampled paint contained  
27  
28

1 “high concentrations of toxic metals in exfoliating and exfoliated paint,” including  
2 elevated concentrations of zinc, lead, copper, chromium (including hexavalent  
3 chromium), mercury, cadmium and barium above toxicity criteria. Mueller Decl.,  
4 Ex. A, at 27-34 (R&M Environmental and Infrastructure Engineering, Inc.,  
5 *National Defense Reserve Fleet Vessel Environmental Review*, Draft, February 15,  
6 2007).

8 173. Each vessel sampled by R&M had some paint that exceeded California’s  
9 hazardous waste toxicity criteria for one or more metals. The paint from one or  
10 more structures on all 40 vessels sampled was found to exceed hazardous waste  
11 toxicity criteria for zinc. The paint from one or more structures on 33 vessels  
12 exceeded the toxicity criteria for lead. The paint from one or more structures on 27  
13 vessels exceeded the toxicity criteria for copper. The paint from one or more  
14 structures on 22 vessels exceeded the toxicity criteria for chromium. Mueller  
15 Decl., Ex. A, at ES-2, 27-34 (R&M Environmental and Infrastructure Engineering,  
16 Inc., *National Defense Reserve Fleet Vessel Environmental Review*, Draft, Feb. 15,  
17 2007); Rotkin-Ellman Decl., ¶¶ 22, 57; Mueller Decl., Ex. BBB, at 4-14 (*Draft*  
18 *Programmatic Environmental Assessment for Removal of Non-Retention Vessels*  
19 *from National Defense Reserve Fleet Sites for Disposal*, June 2008).

22 174. R&M tested paint on eight of the forty vessels for hexavalent chromium,  
23 the more toxic form of chromium. Paint on seven of the eight vessels (88 percent  
24 of the vessels tested for this substance) exceeded hazardous waste toxicity criteria  
25 for hexavalent chromium. Mueller Decl., Ex. A, at ES2, 28-29 (R&M  
26 Environmental and Infrastructure Engineering, Inc., *National Defense Reserve*  
27 *Fleet Vessel Environmental Review*, Draft, Feb. 15, 2007).

1 175. The June 2008 draft environmental assessment prepared by MARAD states  
2 that analytical results from the R&M Report “indicated high concentrations of  
3 many toxic substances in paint chip samples from vessel hulls, with values as high  
4 as 33 percent for copper, 23 percent for zinc, 6.6 percent for lead, and 1.2 percent  
5 for total chromium. Based on regulatory standards, the sampled paints would be  
6 classified as hazardous waste with respect to” zinc, lead, copper, chromium,  
7 mercury, cadmium and barium. Mueller Decl., Ex. BBB, at 4-14 (*Draft*  
8 *Programmatic Environmental Assessment for Removal of Non-Retention Vessels*  
9 *from National Defense Reserve Fleet Sites for Disposal*, June 2008).

11 176. MARAD does not have any concerns about the reliability of the R&M  
12 Environmental Engineering paint sampling results and believes that the results of  
13 the sampling are accurate, and “representative of what was onboard the ship.”  
14 MARAD (Junemann) Dep. 74:13-75; MARAD (Pecoraro) Dep. 311:24-25.

16 177. MARAD agrees that paint on all forty vessels assessed by R&M would be  
17 classified as hazardous. MARAD (Junemann) Dep. 76:10-77:2.

19 178. Paint sampling by the California Department of Toxic Substances Control  
20 (DTSC) in December 2006 of the underwater hulls of two former SBRF non-  
21 retention vessels, the Jason and the Queens Victory, detected barium, cadmium,  
22 chromium, cobalt, copper, lead, nickel, selenium, silver, vanadium and zinc in the  
23 marine hull paint of the ships. The DTSC investigation found paint that was  
24 “hazardous for Soluble Copper and Total metals of Chromium, Copper, and Zinc.”  
25 DTSC’s report stated that these findings reflect “the potential disposal of  
26 hazardous waste into the Suisun Bay.” As far as MARAD is aware, that finding is  
27 correct. MARAD (Junemann) Dep. 80:11-83:20. Mueller Decl., Ex. C (California  
28

1 Department of Toxic Substances Control, Sampling Report National Defense  
2 Reserve Fleet, Suisun Bay, February 12, 2007); Lichten Decl., Ex. A, at 8; Rotkin-  
3 Ellman Decl., ¶ 23.

4  
5 179. The DTSC results showed that the paint on the Jason exceeded California's  
6 hazardous waste toxicity criteria for copper, chromium and zinc. Mueller Decl.,  
7 Ex. C (California Department of Toxic Substances Control, Sampling Report  
8 National Defense Reserve Fleet, Suisun Bay, February 12, 2007); Mueller Decl.,  
9 Ex. BBB, at 4-9 (*Draft Programmatic Environmental Assessment for Removal of*  
10 *Non-Retention Vessels from National Defense Reserve Fleet Sites for Disposal,*  
11 *June 2008*).

12  
13 180. Due to high concentrations of heavy metals, paints discharged from non-  
14 retention SBRF vessels are considered toxic pollutants under the federal Clean  
15 Water Act. Lichten Decl., Ex. A, at 13.

16  
17 181. In 2008 and 2009, MARAD tested the metals concentrations of exfoliated  
18 paint it collected from the decks and topsides of four SBRF non-retention vessels:  
19 the Winthrop Victory, the Sagamore, the Bay and the Lincoln. Mueller Decl., Exs.  
20 G-J (Delta Environmental Laboratories Lab Results); Wall Decl., Exs. 6-9.

21  
22 182. Paint chips sampled by MARAD in 2008 from the Winthrop Victory  
23 exceeded California's hazardous waste toxicity criteria for zinc, lead and  
24 chromium. Mueller Decl., Ex. G (Delta Environmental Laboratories Lab Results  
25 for Winthrop Victory); Wall Decl., Ex. 6; Rotkin-Ellman Decl. ¶¶ 71-73.

26  
27 183. Paint chips sampled by MARAD in 2008 from the Sagamore exceeded  
28 California's hazardous waste toxicity criteria for lead and zinc. Mueller Decl., Ex.

1 H (Delta Environmental Laboratories Lab Results for Sagamore); Wall Decl., Ex.  
2 7; Rotkin-Ellman Decl. ¶¶ 71-73.

3 184. Paint chips sampled by MARAD in 2009 from the Bay exceeded  
4 California's hazardous waste toxicity criteria for lead and zinc. Mueller Decl., Ex.  
5 I (Delta Environmental Laboratories Lab Results for Bay); Wall Decl., Ex. 9;  
6 Rotkin-Ellman Decl. ¶¶ 71-73.

7  
8 185. Paint chips sampled by MARAD in 2009 from the Lincoln exceeded  
9 California's hazardous waste toxicity criteria for lead and zinc. Mueller Decl., Ex.  
10 J (Delta Environmental Laboratories Lab Results for Lincoln); Wall Decl., Ex. 8;  
11 Rotkin-Ellman Decl. ¶¶ 71-73.

12  
13 186. Paint-containing debris collected in January 2009 by Plaintiffs' expert,  
14 Miriam Rotkin-Ellman, from the decks of four SBRF non-retention vessels (the  
15 Wilmette, the Holland, the Roanoke and the Wichita) exceeded California's  
16 hazardous waste toxicity criteria for zinc. These samples were comprised of paint  
17 mixed (diluted) with other materials, such as soil, guano and debris found on the  
18 deck. Rotkin-Ellman Decl. ¶ 70.

19  
20 187. On every SBRF non-retention vessels that has been tested, at least some of  
21 the paints were found to exceed California's hazardous waste toxicity criteria.  
22 MARAD (Junemann) Dep. 116:17-117:9.

23 188. Lead is a neurological toxin that, in children, impairs mental development,  
24 coordination, and performance on intelligence tests; in adults, reduces fertility,  
25 increases blood pressure, and causes cataracts, nerve disorders, and memory  
26 problems; and at extreme exposures, can cause convulsions and comas. Wall  
27  
28

1 Decl., Ex. 10 (document created by the National Institute of Environmental Health  
2 Sciences, a federal agency, and available on its web site at  
3 [www.niehs.nih.gov/health/topics/agents/lead/](http://www.niehs.nih.gov/health/topics/agents/lead/)).

4  
5 189. Mercury is a neurotoxin to humans, fish and wildlife, even in relatively low  
6 levels. Humans are particularly susceptible to harm from ingesting mercury  
7 contained in fish and shellfish. Wall Decl., Ex. 11 (document created by the  
8 National Institute of Health Sciences, a federal agency, and available at  
9 <http://www.niehs.nih.gov/health/topics/agents/mercury/index.cfm>).

10  
11 190. PCBs cause reproductive, reproductive, and immunological harms, liver  
12 damage, and skin irritation, and are recognized as a probable human carcinogen. A  
13 primary dietary source of PCBs is through consumption of contaminated fish. Wall  
14 Decl., Ex. 12 (document created by the Agency for Toxic Substances and Disease  
15 Registry, a federal agency, and available on that agency's website at  
16 <http://www.atsdr.cdc.gov/tfacts17.pdf>).

17  
18 **XI. Undisputed Fact: SBRF non-retention ships contain exfoliating paint that is**  
19 **accumulating before, or in lieu of, being disposed.**

20 **Undisputed Supporting Facts/Supporting Evidence:**

21  
22 191. Paint that has peeled off SBRF non-retention vessels' painted surfaces  
23 serves no useful purpose. MARAD (Magee) Dep. 103:20-22.

24 192. Except for paint that falls immediately into the waters below, paint that has  
25 peeled off SBRF non-retention vessels painted surfaces accumulates on deck, often  
26 for years, until either it blows, falls, or washes into Suisun Bay, or is eventually  
27 sent to a hazardous waste landfill. MARAD (Magee) Dep. 96:15-99:20, 103:20-  
28

1 105:8; MARAD (Pecoraro) Dep. 298:3-300:4, 305:18-306:14; Mueller Decl., Ex.  
2 JJ (SBRF Vessel Condition Summary).

3 193. Photographs taken during and testimony concerning a January 2009  
4 inspection reveal that paint debris had accumulated on the deck of every SBRF  
5 non-retention vessel that was inspected. Some of it is scattered like litter, some of  
6 it is collected in small and large piles, some of it stashed in metal troughs or in  
7 bucket. Elias Decl., Ex. H; Rotkin-Ellman Decl., Ex. D; Rotkin-Ellman Decl. ¶ 32.

8  
9 194. MARAD has itself observed that paint is peeling off of and/or damaged on  
10 all SBRF non-retention vessels. Mueller Decl., Ex. JJ (SBRF Vessel Condition  
11 Summary).

12  
13 195. In 2007, MARAD staff reported debris on all SBRF non-retention vessels,  
14 including a “little” debris on seven vessels, “some” debris on seventeen vessels,  
15 and “significant” debris on the remainder. Mueller Decl., Ex. JJ (SBRF Vessel  
16 Condition Summary). MARAD testified that these terms represented relative,  
17 rather than absolute, measurements of the quantity of debris on the decks.  
18  
19 MARAD (Pecoraro) Dep. 299:4-20.

20 196. MARAD plans eventually to sweep up paint waste from vessel decks and  
21 to send it to a hazardous waste landfill. MARAD (Magee) Dep. 96:7-99:16,  
22 103:20-105:8.

23 197. To the extent that loose paint is not landfilled before the vessels themselves  
24 are scrapped, that paint would be disposed by the ship scrapper in compliance with  
25 hazardous waste laws when the ship is disposed. MARAD (Michanczyk) Dep.  
26 157:10-160:6.  
27  
28

1 **XII. Undisputed Fact: Paint contained in SBRF non-retention vessels, including**  
2 **exfoliated paint that has accumulated or is collected on vessel decks, contains levels**  
3 **of heavy metals that exceed applicable toxicity criteria for hazardous waste.**

4 **Undisputed Supporting Facts/Supporting Evidence:**

5 198. As EPA explained in its *Guide for Ship Scrappers: Tips for Regulatory*  
6 *Compliance* (2000): “Lead compounds, such as a red lead tetraoxide (Pb<sub>3</sub>O<sub>4</sub>) and  
7 lead chromate, have been used extensively in marine paint. In general, metal-based  
8 paints, some containing as much as 30 percent heavy metals, were intended to  
9 protect ship surfaces from corrosion due to exposure to the elements. Other paints  
10 containing pesticides, such as tributyl tin, have been used on the hulls of ships to  
11 prevent the buildup of sea organisms (e.g., bacteria, protozoa, barnacles, and  
12 algae).” Mueller Decl., Ex. D, at 6-1 (U.S. Environmental Protection Agency, A  
13 Guide for Ship Scrappers: Tips for Regulatory Compliance (Summer 2000)).

14  
15 199. MARAD concedes that lead was a “primary constituent” of marine paint  
16 that is found in the “vast majority” of coatings on SBRF vessels. MARED Dep.  
17 (Junemann) 110:13-111:5, 111:21-112:21, 115:1-5; Mueller Decl., Ex. K, at 1  
18 (Nov. 12, 2008 email chain, Magee to Nemirow).

19  
20 200. In 1997, MARAD conducted extensive testing for hazardous substances on  
21 three of its non-retention ships to assess “the materials present and the problems  
22 presented to domestic ship breaking/recycling.” MARAD’s 1997 report concluded  
23 that:

24  
25 [H]igh levels of lead exist in paint aboard all three ships. Although not  
26 analyzed, high levels of chromium are also expected because the use of  
27 chromium-containing primer paints was common during the time the three  
28 ships were built and operated. . . . Lead and chromium bearing paints will  
fail the Toxic Characteristic Leachate Procedure test of Federal hazardous  
waste rules and will therefore be subject to regulation.

1 Wall Decl., Ex. 14, at 42; Mueller Decl., Ex. E, at ES-1, 42 (Environmental  
2 Assessment of the Sale of NRDF Vessel for Scrapping, July 1997).

3 201. At its Rule 30(b)(6) deposition in this case, MARAD expressly agreed that  
4 “paint on SBRF vessels, including the decks, outboard hulls, inboard structure and  
5 separated paint and paint debris, exceeds toxicity criteria established by California  
6 under its hazardous waste control law.” MARAD (Pecoraro) Dep. 435:25-436:8.

7  
8 202. MARAD is not aware of any investigation or analysis of the composition  
9 of paint on an SBRF vessel that found that no paint had concentrations of metals  
10 that exceeded California hazardous waste criteria. MARAD (Junemann) Dep.  
11 115:16-116:15.

12  
13 203. Every time an SBRF non-retention vessel has been tested, at least some  
14 paint on that vessel has been found to have metal concentrations that exceeded  
15 California hazardous waste toxicity criteria. MARAD (Junemann) Dep. 116:17-  
16 117:9.

17  
18 204. In late 2008 and early 2009, MARAD tested paint debris collected from  
19 four SBRF non-retention vessels – the Winthrop Victory, the Sagamore, the Bay  
20 and the Lincoln. MARAD determined that all this material was hazardous waste  
21 and that must be disposed at a permitted hazardous waste landfill. MARAD  
22 (Pecoraro) Dep. 405:4-14 (Winthrop Victory), 411:2-19 (Sagamore), 418:19–  
23 419:1 (Lincoln), 419:19-420:12 (Bay); Wall Decl., Exs. 6-9.

24  
25 205. The waste collected by MARAD from its remediation of paint on the  
26 Winthrop Victory exceeded the TCLP toxicity criteria for lead (5 mg/L) by a  
27 factor of two. Wall Decl., Ex. 6, at 3 (Delta Environmental Laboratories Report for  
28

1 Winthrop Victory Ship Paint Chips.); MARAD (Pecoraro) Dep. 401:10-405:11.

2 206. The waste collected by MARAD from its remediation of paint on the  
3 Sagamore exceeded the TTLC toxicity criteria for lead (1000 mg/kg) by more than  
4 five times and the TTLC toxicity criteria for zinc (5000 mg/kg) by more than three  
5 times. Wall Decl., Ex. 7, at 3 (Delta Environmental Laboratories Report for  
6 Sagamore Ship Paint Chips.).  
7

8 207. The waste collected by MARAD from its remediation of paint on the  
9 Lincoln exceeded the TTLC toxicity criteria for lead (1000 mg/kg) by more than  
10 three times and also exceeded the TTLC toxicity criteria for zinc (5000 mg/kg).  
11 Wall Decl., Ex. 8, at 3 (Delta Environmental Laboratories Report for Lincoln Paint  
12 Chips).  
13

14 208. The waste collected by MARAD from its remediation of paint on the Bay  
15 exceeded the TTLC toxicity criteria for lead (1000 mg/kg) by more than a factor of  
16 four and also exceeded the TTLC toxicity criteria for zinc (5000 mg/kg) by a  
17 factor of two. Wall Decl., Ex. 9, at 3 (Delta Environmental Laboratories Report for  
18 Bay Paint Chips).  
19

20 209. Plaintiffs' expert witness reviewed the composition of metals in paint in all  
21 SBRF non-retention vessels that had been tested and concluded that the paint  
22 either is known to contain concentrations of heavy metals that exceed toxicity  
23 criteria for hazardous waste or, for the few ships with paint that has not yet been  
24 tested, likely contains such concentrations. In reaching this conclusion, Plaintiffs'  
25 expert conducted a rigorous statistical analysis of the aggregate levels of metals  
26 across all the ships and an even more conservative statistical analysis of the metals  
27 concentrations on paint on each ship. She also looked at sampling results reported  
28

1 by MARAD and by the California Department of Toxic Substances Control.  
2 Taking into account this extensive, and consistent, evidence, she concluded that  
3 paint on each of the SBRF non-retention vessels is “hazardous” under applicable  
4 regulatory standards. This conclusion is unrebutted by any contrary, competent  
5 expert testimony. Rotkin-Ellman Decl., ¶¶ 52-73, 23.  
6

7 210. William Cahill, MARAD’s Director of the Office of Ship Operations,  
8 wrote an email in 2006 in which he said: “We know the paint on the older ships  
9 contains lead.” Mr. Cahill stated in that email that he did “not believe that the lead  
10 paint flaking into the bay presents any more risk than the paint chips in my  
11 mother’s back yard” or the yards of other old New England homes. “[S]omehow,”  
12 Mr. Cahill wrote in that email, “generations have grown up with no high lead  
13 levels in their blood.” Ex AAA to Mueller Decl. (May 26, 2006 Email from  
14 William Cahill to Bryan Vogel et al.).  
15

16 211. According to the federal Centers for Disease Control and Prevention, lead-  
17 based paint and lead-contaminated dust in older housing are “the main sources of  
18 exposure for lead in U.S. children.” Ex. FFF to Mueller Decl. (Centers of Disease  
19 Control report on lead, <http://www.cdc.gov/nceh/lead/tips.htm>).  
20

21 212. According to the National Institute of Environmental Health Sciences  
22 states that as many as one in ten American children have blood-lead levels  
23 sufficient to impair intellectual development. Ex. GGG to Mueller Decl. (National  
24 Institute of Environmental Health Sciences statement on childhood lead poisoning,  
25 <http://www.niehs.nih.gov/research/supported/sep/2003/lead-IQ.cfm>).  
26

27 213. Paint-containing debris collected in January 2009 by Plaintiffs’ expert,  
28 Miriam Rotkin-Ellman, from the decks of four SBRF non-retention vessels (the

1 Wilmette, the Holland, the Roanoke and the Wichita) exceeded California's  
2 hazardous waste toxicity criteria for zinc. These samples were comprised not only  
3 of paint, but other material such as soil, guano and debris found on the deck.  
4 Rotkin-Ellman Decl., ¶ 69.

5  
6 214. Paint on each of the SBRF non-retention vessels that has been tested  
7 exceeds California's hazardous waste toxicity criteria, is peeling, and has  
8 accumulated on the decks of the vessels. PSUF 187, 204-209.

9  
10 215. On many ships, the accumulation of paint debris on decks has been  
11 substantial. Elias Decl., Ex. H (e.g., photos Earlham Victory 166, 168; Pan  
12 American Victory 304, 305; Dawn 205, 207; American Reliance 20; General  
13 Edwin D. Patrick 117, 122; American Racer 107; Bay 79)

14 216. On some ships, paint appears to have been swept into piles that have been  
15 left in place, or piled in metal troughs or buckets. Elias Decl., Ex. H (photos  
16 Taluga 241; Gettysburg 271); Fernandez Decl., Ex. W (photo 104).

17  
18 217. On four ships, MARAD collected the waste in drums and then held that  
19 waste on shipboard for months, knowing that the material was almost certainly  
20 hazardous. MARAD (Pecoraro) Dep. 254:1-255:7; PSUFs 65-83, *supra*.

21 218. Defendants concede that they do not have a permit to store or dispose  
22 hazardous waste at the SBRF facility. Plfs.' 1st Amend Compl. ¶ 6; Defs.' Answer  
23 to 1st Amend Compl. ¶ 6.  
24  
25  
26  
27  
28

1 **XIII. Undisputed Fact: MARAD intentionally decided to allow lead-based paint to**  
2 **discharge to Suisun Bay and to accumulate in SBRF vessels for more than a decade.**

3 **Undisputed Supporting Facts/Supporting Evidence:**

4 219. In 1996, the United States Navy informed MARAD that the Navy's  
5 lawyers were "concerned" that paint was "getting into the water" from vessels at  
6 the SBRF fleet site. MARAD (Magee) Dep. 116:10-117:1.

7  
8 220. In 1996, the Navy informed MARAD that the Navy had been required to  
9 undertake remediation at the Mare Island Naval Shipyard due to peeling paint  
10 from the U.S.S. Clamp. The Clamp was transferred to the SBRF in 1995. MARAD  
11 (Pecoraro) Depo: 60:14-61:19; Wall Decl., Ex. 13 ("SBRF Paint Deterioration"  
12 (showing year of entry of vessels into SBRF)).

13 221. MARAD in 1996 formed an "Environmental Quality Action Team"  
14 (EQAT) to look at the exfoliating paint problem. MARAD (Pecoraro) Dep. 24: 20-  
15 25, 25: 10-12.

16  
17 222. Handwritten minutes from a January 15, 1998 EQAT meeting state that  
18 "lead paint may have been dropping into the bay" and "could become a problem  
19 later." The meeting minutes also reveal that the superintendent of MARAD's  
20 James River fleet tested and confirmed that non-retention vessel paint was high in  
21 lead. MARAD (Magee) Dep. 163:6-164:19; Mueller Decl., Ex. Q (handwritten  
22 minutes of EQAT conference call, January 5, 1998).

23  
24 223. In June 1997, Harry Soete, the SBRF's safety and environment officer,  
25 conducted a survey of paint conditions on SBRF vessels and found that thirty-four  
26 of the ships were exfoliating paint. MARAD (Pecoraro) Dep. 62:24-70:24;  
27 Mueller Decl., Ex. HH (MARAD Reserve Fleet Paint Survey Questionnaire,  
28

1 MARAD (Pecoraro) Dep. Ex. 5).

2 224. On August 11, 1997 MARAD headquarters faxed a document that was  
3 transmitted to Mr. Soete. The document was entitled “U.S. Department of  
4 Transportation Maritime Administration (MARAD) Paint Removal Guidelines.”  
5  
6 This document stated:

7 Exfoliating paint on MARAD ships is an issue that must be addressed.  
8 The discharge of lead and tributyl tin, commonly found in marine  
9 paints, are prohibited by federal, state, and local environmental  
10 regulations. If MARAD ships are contaminated with these metals, there  
11 may be some impacts on water and biotic resources in the immediate  
12 vicinity of the exfoliating paint. . . . In order for MARAD to stay in  
13 front of environmental regulations, our options are few. Do nothing, or  
14 survey our ships paint conditions.

15 The first option is costly to the government and will only lead to  
16 problems in the future. Although, [sic] MARAD has plans to scrap  
17 many of the ships that may have the most exfoliating paint, the program  
18 may be held in abeyance for various environmental reasons.

19 Mueller Decl., Ex. P, at 2; MARAD (Magee) Dep. 121:13-123:10.

20 225. The “Paint Removal Guidelines” faxed from MARAD headquarters on  
21 August 11, 1997 stated: “It is most likely that almost all abrasive and lead paint  
22 waste from lead coated structure will be classified as hazardous under RCRA” and  
23 that “[p]roper disposal of this material must be ensured.” Mueller Decl., Ex. P, at  
24 3.

25 226. From 1996 through at least May 2008, MARAD was aware that there was  
26 an issue associated with exfoliating paint collecting on the decks of SBRF vessels  
27 and falling into Suisun Bay and had a policy of not doing anything about it.  
28 MARAD (Magee) Dep. 119:13-120:7.

227. Prior to July 9, 2008, MARAD had a policy of not maintaining SBRF non-  
retention vessel paint “at all.” MARAD (Magee) Dep. 45:3-7.

1 228. In January 2007, MARAD launched what it called its “Environmental  
2 Excellence Initiative” (EEI). The memorandum that established the EEI contains  
3 the following statement: “With an eye on what NRDC may be contemplating,  
4 some initiatives are needed . . . . This should look at hull growth-bugs, exfoliating  
5 paint from hull and topsides, and PCB content . . . .” Mueller Decl., Ex. T, at 1-2  
6 (NDRF Environmental Excellence Initiative Summary, January 19, 2007).  
7

8 229. At deposition, MARAD confirmed that “as a result of [its] concern about a  
9 potential NRDC lawsuit, the Environmental Excellence Initiative was going to  
10 look at exfoliating paint.” MARAD (Magee) Dep. 196:2-7.  
11

12 230. In September 2007, MARAD’s SBRF fleet program manager authored an  
13 “NDRF Coating Maintenance Implementation Plan.” Mueller Decl., Ex. GG  
14 (NDRF Anchorage Ship Coating Maintenance Memorandum, September 25,  
15 2007).  
16

17 231. MARAD did not commence any actual paint remediation at the SBRF until  
18 July 2008, when it began remediation work on the Winthrop Victory. MARAD  
19 cannot explain why it waited so long to commence this work after developing its  
20 2007 Coating Maintenance Implementation Plan. MARAD (Pecoraro) Dep. 73:13-  
21 17, 288:15-25, 293:25-294:3.  
22

23 232. On December 15, 2006, Keith Lichten, Senior Engineer with the RWQCB,  
24 sent an email to Ms. Junemann stating that MARAD had three options with respect  
25 to cleaning the hulls of the Jason and Queens Victory: wait for test results and then  
26 make a decision with the Board about how to proceed, apply for and obtain a  
27 NPDES permit for discharges associated with hull cleaning, or clean the hulls of  
28 the vessels in a manner that would result in zero discharges to the waters of the

1 United States. Mueller Decl., Ex. DD (email string, December 15, 2006).

2 233. On December 15, 2006, Shannon Russell, MARAD's Director of  
3 Congressional and Public Affairs, responded to a copy of Mr. Lichten's December  
4 15, 2006 email forwarded to her by Ms. Junemann by sending a message to the  
5 then-Maritime Administration Commissioner Sean Connaughton, stating that the  
6 Water Board "can't stop us" from proceeding with in-water cleaning the hulls of  
7 the Jason and Queens Victory. Mueller Decl., Ex. EE (email string, December 15,  
8 2006).  
9

10 234. MARAD testified that, in December 2006, it was aware of and shared the  
11 Regional Water Board's concerns that discharges of metal hull coatings above  
12 regulatory limits may be released during in-water hull cleaning of NDRF vessels.  
13 MARAD (Michanczyk) Dep. 355:4-17, 358:19-359:4.  
14

15 235. On December 22, 2006, the Executive Officer of the Regional Water Board  
16 notified MARAD in writing that MARAD must either obtain a National Pollution  
17 Discharge Elimination System (NPDES) permit for discharges into the waters of  
18 San Francisco Bay associated with in-water hull cleaning of SBRF non-retention  
19 vessels or use a method for cleaning the hulls of SBRF non-retention vessels, such  
20 as dry docking the vessels, that results in no discharges into the waters of San  
21 Francisco Bay. Elias Decl., Ex. A (Letter from Bruce H. Wolfe to Michael Carter  
22 re Proposed In-Bay Cleaning of Jason and Queens Victory, Dec. 22, 2006);  
23 MARAD (Michanczyk) Dep. 282:19-283:3.  
24

25  
26 236. Following receipt of the December 22, 2006 letter from the Regional Water  
27 Board regarding in-water hull cleaning of SBRF non-retention vessels, MARAD  
28 signaled its intention to continue to perform in-water hull cleaning of SBRF

1 vessels. Elias Decl., Ex. E (Letter from Sean T. Connaughton to Bruce H. Wolfe,  
2 July 5, 2007); Mueller Decl., Ex. BBB, at 2-4, 2-5, 2-6, 2-12, 4-9 - 4-19 (Draft  
3 Programmatic Environmental Assessment for Removal of Non-Retention Vessels  
4 from National Defense Reserve Fleet Sites for Disposal, June 2008).

5  
6 237. MARAD has never applied for a NPDES permit for in-water hull cleaning  
7 of SBRF vessels. MARAD (Michanczyk) Dep. 293:19-294:5.

8  
9 Respectfully submitted,

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11 September 15, 2009

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