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23 UNITED STATES DISTRICT COURT
24 FOR THE EASTERN DISTRICT OF CALIFORNIA

25 ARC ECOLOGY, et al.,

26 Plaintiffs,

27 and

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

Plaintiff-Intervenor,

v.

UNITED STATES MARITIME
ADMINISTRATION, et al.,

Defendants.

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

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

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

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1 **I. INTRODUCTION**

2 Moored in the waters of Suisun Bay float fifty-seven aging ships owned by
3 defendant U.S. Maritime Administration (“MARAD”), an agency of defendant U.S.
4 Department of Transportation (“DOT”) (collectively, “MARAD”). These ships are
5 part of what is called the “Suisun Bay Reserve Fleet (“SBRF”). PSUF 12. The
6 obsolete vessels, some of which date to World War II, once served our Nation and its
7 military as tankers, cargo ships, troop carriers, and in other support roles. PSUF
8 14. The ships now no longer operate, however, and MARAD has determined that
9 each lacks sufficient value to warrant further preservation. PSUF 12. All of the
10 vessels are slated for disposal. PSUF 12. Euphemistically called “non-retention”
11 ships, they comprise, in reality, a floating junkyard.

12 In 2000, the Inspector General of defendant DOT reported that MARAD’s
13 non-retention ships “are literally rotting and disintegrating” into the water. PSUF
14 117. This deterioration presents serious environmental concerns. The ships are
15 coated with marine paints designed to prevent corrosion and to kill marine life that
16 adheres to the ships’ hulls. PSUF 198-199. Such marine paints contain
17 concentrations of heavy metals – including lead, copper, zinc, and chromium, and
18 other toxins – that are so high they exceed the legal criteria for hazardous waste.
19 PSUF 172-175, 177-179, 182-187, 200-208, 213. The ships also contain oil,
20 polychlorinated byphenyls (“PCBs”), and asbestos. PSUF 133, 136, 169.

21 The quantity of pollutants contained in and released from these ships is
22 staggering: A MARAD consultant calculated that forty of them had lost more than
23 an estimated twenty tons of zinc, copper, lead, and chromium as paint peeled off
24 vessel surfaces, a process known as “exfoliation.” PSUF 120. Some exfoliated paint
25 has fallen from exterior hulls, blown off the decks, or washed down vessel storm
26 drains into the surrounding waters; additional exfoliated paint remains on the
27 decks, uncontrolled piles of hazardous waste. PSUF 122, 138-139, 143-145, 147,
28 149-151, 153, 192-193.

1 As MARAD itself explained in 1997:

2 As they are not routinely repainted, the paint on the ships peels off
3 and the ships tend to rust. As the paint peels, it either collects on the
4 decks of the ships or falls into the water. A certain portion of the
5 peeled paint, which in many cases contains lead, will be washed into
6 the water by rain. . . . If no action is taken, the ships will continue to
7 age and corrode and ultimately may sink. . . .

8 PSUF 147. Twelve years after MARAD wrote those words, degradation of vessel
9 paint has only accelerated. PSUF 115-116.

10 MARAD is violating two federal environmental laws. First, it is violating the
11 Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901 *et seq.*
12 Subtitle C of RCRA, and applicable California hazardous waste laws that RCRA
13 makes enforceable, generally prohibit the unpermitted storage and disposal of
14 hazardous waste. MARAD has no permit for storing or disposing hazardous waste
15 at the SBRF, let alone a permit to store or dispose of the toxic paint waste that has
16 accumulated on the ships. MARAD is also violating Subtitle D of RCRA by
17 operating an “open dump,” which is banned.

18 Second, MARAD is violating the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251
19 *et seq.* The CWA prohibits discharges of pollutants into navigable water bodies
20 without a permit. MARAD’s admitted past and ongoing unpermitted discharges
21 violate this requirement, notwithstanding MARAD’s last-minute attempt to
22 manipulate the Court’s jurisdiction by filing a “notice of intent” to comply with
23 California’s general permit for the discharge of industrial stormwater. PSUF 50.
24 The California Regional Water Quality Control Board, which exercises Clean Water
25 Act enforcement jurisdiction over Suisun Bay, has determined that MARAD is
26 ineligible for coverage under this general permit. PSUF 168, 10, 11. The permit does
27 not, in any event, authorize MARAD’s ongoing non-stormwater discharges.

28 Plaintiffs Arc Ecology, San Francisco Baykeeper (“Baykeeper”), and Natural
Resources Defense Council, Inc. (“NRDC”) (collectively, “Plaintiffs”) bring this
citizen enforcement suit under RCRA § 7002(a)(1)(a), 42 U.S.C. § 6972(a)(1)(a), and
CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1). These statutory provisions authorize any

1 person to bring an enforcement action against any other person, including the
2 United States, who is in violation of the requirements of these laws. *See id.* In this
3 suit, Plaintiffs seek a declaration that MARAD is violating RCRA and the CWA and
4 an order compelling MARAD to comply with these statutes, to remediate harms
5 caused by its past and continuing violations, and under RCRA, to pay an
6 appropriate civil penalty. In the present motion for partial summary judgment,
7 Plaintiffs seek a ruling and declaration that Defendants are in violation of RCRA
8 and the CWA.

9 **II. STATEMENT OF UNDISPUTED FACTS**

10 **A. THE “NON-RETENTION” VESSELS OF THE SUISUN BAY** 11 **RESERVE FLEET**

12 The U.S. Maritime Administration, an agency of the U.S. Department of
13 Transportation, is charged with the disposal of the “non-retention” vessels of the
14 National Defense Reserve Fleet (“NDRF”). PSUF 1. MARAD generally moors these
15 vessels, pending disposal, at one of three anchorages, which are located on the
16 James River in Virginia; near Beaumont, Texas; and in Suisun Bay, near Benicia,
17 in California. PSUF 1. The Suisun Bay Reserve Fleet (“SBRF”) presently includes
18 fifty-seven non-retention vessels. PSUF 13.

19 MARAD has determined that each of these fifty-seven “non-retention” vessels
20 lacks sufficient value to merit further preservation. PSUF 12. The ships themselves
21 are not operational. PSUF 12. Accordingly, for many years, MARAD has followed a
22 policy of not maintaining the vessels’ exterior paint or interiors. PSUF 57-60, 112.
23 MARAD instead intentionally allows the vessels to deteriorate. PSUF 57.

24 Since 1994, Congress has three times ordered MARAD to remove and dispose
25 of all non-retention NDRF vessels.¹ PSUF 16. The most recent deadline set by

26 ¹ *See* National Maritime Heritage Act of 1994, Pub. L. 103-451, § 6, 108 Stat.
27 4769, 4777 (1994); National Defense Authorization Act for Fiscal Year 1998, Pub. L.
28 No. 105-85, § 1026; Stat 1629, 1878 (1997); National Defense Authorization Act for
Fiscal Year 2001, Pub. L. No. 106-398, § 3502, 114 Stat. 1654, 1654A-490-492
(2000).

1 Congress expired on September 30, 2006. PSUF 17. MARAD has failed to meet each
2 of these statutory deadlines. PSUF 18. Indeed, as of 2002, MARAD had neither a
3 plan to meet the September 30, 2006 deadline nor a specific goal for the number of
4 SBRF non-retention vessels it would dispose by that date. PSUF 20, 23. MARAD
5 instead planned to increase, by about fifty percent, the number of non-retention
6 vessels moored at the SBRF. PSUF 22.

7 In 2005, the U.S. Government Accountability Office (“GAO”), an investigatory
8 arm of the federal government, reported that:

9 MARAD’s slow progress [in meeting Congressional mandates] is due
10 primarily to program leaders not developing a comprehensive
11 management approach that could address the myriad environmental,
12 legal and regulatory challenges that the program faces. . . . MARAD’s
13 ship disposal program lacks the vision needed to sustain the long term
14 effort.

15 PSUF 20. Congress in January 2006 amended the law to require MARAD to
16 prepare a plan for the “expeditious disposal” of the ships. PSUF 21. Congress did
17 not, however, alter or repeal the September 30, 2006 ship disposal deadline.² PSUF
18 21.

19 **B. SUISUN BAY AND THE BAY-DELTA ESTUARY**

20 Suisun Bay comprises part of the San Francisco Bay-Delta Estuary, which
21 has been selected for the federal National Estuary Program, a program that
22 protects estuaries of national significance. 33 U.S.C. § 1330; *Ca. Pub. Interest*
23 *Research Group v. Shell Oil Co.*, 840 F. Supp. 712, 713 n.1 (N.D. Cal. 1993). Located
24 immediately upstream of Carquinez Strait and San Pablo Bay, and immediately
25 downstream of the Sacramento-San Joaquin Delta, Suisun Bay is tidally influenced
26 and navigable. *See United States v. State Water Resources Control Board*, 182 Cal.
27 App. 3d 82, 107 (Cal. Ct. App. 1986); *United States v. North Bloomfield Gravel-*

28 ² MARAD’s ship disposal program has focused most of its attention on the
ships from fleets other than the SBRF. During the period 1997 through March 2009,
just eighteen percent of all NDRF vessels disposed were from the SBRF. PSUF 26.
MARAD has not awarded contracts for the disposal of any SBRF non-retention
vessels since 2006. PSUF 25.

1 *Mining Co.*, 88 F. 664, 665, 667 (9th Cir. 1898); PSUF 34-35. It is also ecologically
2 unique.

3 The U.S. Fish & Wildlife Service and the National Marine Fisheries Service
4 have designated Suisun Bay as “critical habitat” under the Endangered Species Act
5 for several protected species, including the delta smelt, *see* 50 C.F.R. § 17.95(e), and
6 the Sacramento River winter-run Chinook salmon, *see* 50 C.F.R. § 226.204. PSUF
7 36. Suisun Bay is the delta smelt’s sole habitat for much of that species’ life span.
8 *See Natural Res. Def. Council v. Kempthorne*, No. 1:05-CV-1207, 2007 WL 4462395,
9 at *16 (E.D. Cal. Dec. 14, 2007) (post-trial findings of fact).

10 “Two-thirds of California households receive at least some of their domestic
11 water from the Bay-Delta, and over seven million acres of highly productive land
12 are irrigated from the same source.” *In re Bay-Delta Programmatic Environmental*
13 *Impact Report*, 43 Cal. 4th 1143, 1153 (Cal. S. Ct. 2008); PSUF 37. Due to pollution,
14 however, Suisun Bay has been listed by the State of California as “impaired.” PSUF
15 38. Suisun Bay is “impaired” due to contamination from pollutants including
16 polychlorinated biphenyls (“PCBs”), mercury, and nickel. PSUF 38. Each of these
17 contaminants is found on non-retention vessels of the SBRF. PSUF 133, 136, 171-
18 172.

19 Pollution of Suisun Bay and other reaches of San Francisco Bay has led the
20 State of California to warn its citizens to limit consumption of fish caught in the
21 Bay’s waters. PSUF 39. The State of California’s Office of Environmental Health
22 Hazard Assessment has issued a formal advisory to women of childbearing age,
23 pregnant women, nursing mothers, and children to eat no more than one meal per
24 month of fish caught in the Bay, and to avoid certain species of fish entirely. PSUF
25 39. A more limited consumption advisory has also been issued to adult men and
26 women who are not of childbearing age. PSUF 39.

1 **C. THE COMPOSITION OF SBRF MARINE PAINT**

2 The SBRF non-retention vessels, like most ships of their era, are coated with
3 marine paints that were formulated with heavy metals, including lead, zinc, copper,
4 hexavalent chromium, and mercury, to combat corrosion and to kill organisms that
5 might adhere to the vessels' hulls. As EPA explained in its *Guide for Ship*
6 *Scrappers: Tips for Regulatory Compliance*:

7 Lead compounds, such as a red lead tetraoxide (Pb₃O₄) and lead
8 chromate, have been used extensively in marine paint. In general,
9 metal-based paints, some containing as much as 30 percent heavy
10 metals, were intended to protect ship surfaces from corrosion due to
11 exposure to the elements. Other paints containing pesticides, such as
12 tributyl tin, have been used on the hulls of ships to prevent the buildup
13 of sea organisms (e.g., bacteria, protozoa, barnacles, and algae).

14 PSUF 198. MARAD concedes that lead was a "primary constituent" of marine paint
15 that is found in the "vast majority" of coatings on SBRF vessels. PSUF 199.

16 The concentrations of heavy metals in SBRF non-retention vessel paints are
17 so high that the paint has been found to exceed applicable regulatory criteria for
18 hazardous waste every time that paint has been tested. PSUF 172-179, 181-187,
19 200-203, 205-209. In 1997, for example, MARAD conducted extensive testing for
20 hazardous substances on three of its non-retention ships to better understand "the
21 materials present and the problems presented to domestic ship breaking/recycling."

22 PSUF 200. MARAD concluded:

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

PSUF 200 (emphasis added).

29 In 2006, MARAD's environmental consultant, R&M Environmental and
30 Infrastructure Engineering, Inc. ("R&M"), tested metals concentrations in paint on
31 forty SBRF non-retention vessels and found that the concentrations of metals in
32 these paints exceeded hazardous waste toxicity criteria on every ship. PSUF 172-
33 173. All forty vessels' paint exceeded the toxicity criteria for zinc. PSUF 173. Thirty-

1 three vessels' paint exceeded the toxicity criteria for lead. PSUF 173. The copper
2 and chromium toxicity criteria were exceeded on twenty-seven and twenty-two
3 vessels, respectively.³ PSUF 173. Mercury, cadmium, and barium in excess of
4 hazardous waste toxicity criteria were found for some vessel paints as well. PSUF
5 172. MARAD admits the accuracy of R&M's results. PSUF 176. These contaminants
6 are known to be a threat to public health and the environment.⁴

7 Paint sampling by the California Department of Toxic Substances Control
8 ("DTSC") in 2006 likewise found paint that was "hazardous for Soluble Copper and
9 Total metals of Chromium, Copper, and Zinc" on two former SBRF non-retention
10 vessels. PSUF 178. DTSC's report stated that these findings reflected "the potential
11 disposal of hazardous waste into the Suisun Bay." PSUF 178.

12 In 2008 and 2009, MARAD tested the metals concentrations of exfoliated
13 paint, mixed with other deck debris, that MARAD had vacuumed from the decks of
14 four SBRF non-retention vessels on which it had undertaken a partial remediation:
15 the Winthrop Victory, the Bay, the Lincoln, and the Sagamore. PSUF 181. The
16 Winthrop Victory paint debris exceeded applicable hazardous waste toxicity criteria
17 for lead, zinc, and chromium. PSUF 182. Paint debris from the other three ships
18 exceeded applicable hazardous waste toxicity criteria for lead and zinc. PSUF 183-

19
20 ³ R&M tested paint on only eight vessels for hexavalent chromium, the more
21 toxic form of chromium. Paint on 7 of the 8 vessels (88%) exceeded applicable
22 toxicity criteria for hexavalent chromium. PSUF 174.

23 ⁴ 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. PSUF 188.

27 Mercury is a potent neurotoxin to humans, fish, and wildlife, even in
28 relatively low levels. PSUF 189. Humans are particularly susceptible to harm from
ingesting mercury contained in fish and shellfish, and small children are especially
so, because the mercury harms their developing central nervous systems. PSUF
189.

PCBs causes reproductive, developmental, and immunological harms, liver
damage, and skin irritation, and are recognized as a probable human carcinogen. As
with mercury, the primary way in which humans are exposed to PCBs is by eating
contaminated fish. PSUF 190.

1 185. MARAD determined that all of this paint debris was hazardous waste. PSUF
2 204.

3 In 2009, deck debris that contained a mixture of paint waste, dirt, guano, and
4 other material was collected by Plaintiffs' expert from the decks of four additional
5 SBRF non-retention vessels (the Wilmette, the Holland, the Roanoke and the
6 Wichita) and analyzed for metals content. PSUF 186. All of this paint-contaminated
7 debris exceeded applicable hazardous waste toxicity criteria for zinc. PSUF 186.
8 These samples exceeded the zinc toxicity criteria even though the paint was diluted
9 with guano and dirt. PSUF 213.

10 This extensive, consistent, and undisputed evidence establishes that paint
11 contained within the SBRF non-retention vessels, including the paint waste that
12 has collected on the vessels' decks, is "hazardous" under applicable regulatory
13 criteria.

14 **D. THE CONDITION OF SBRF NON-RETENTION VESSELS**

15 After years of neglect pending eventual scrapping, sinking, or other disposal,
16 many SBRF non-retention vessels have slipped into a deep state of decay. PSUF 57,
17 58, 115, 117-136. Pipes and valves have aged, causing oil to leak from equipment
18 onto the vessels' weather decks. PSUF 146. Friable asbestos has come loose and lies
19 scattered on the deck of at least one ship. PSUF 134. PCBs are common on board.
20 PSUF 133, 136. A number of vessels' topsides have holes, allowing rainwater to leak
21 in. PSUF 126. Three of the SBRF non-retention vessels have known holes in their
22 hulls which, according to MARAD, "can be a pathway for potentially hazardous
23 material to leach into the environment." PSUF 125. During a January 2009
24 inspection, a breach in the exterior of one vessel's hull was observed to be dripping a
25 clear liquid, possibly water, but never tested by MARAD for contaminants. PSUF
26 135. Grass sprouts from the decks of some ships. PSUF 132. Due to the risk that
27 invasive species on underwater hulls, the Coast Guard will not allow SBRF non-
28 retention vessels' removal from San Francisco Bay until their hulls are cleaned.

1 MARAD has expressed concern that, due to the weakness of some of the aging
2 vessels' hulls, scrubbing those hulls with a metal brush to remove invasive species
3 "might actually cause some kind of failure in the hull's integrity." PSUF 99.

4 In 2006, R&M Environmental & Infrastructure Engineering, Inc., under
5 contract to MARAD, inspected and tested forty SBRF vessels. After carefully
6 analyzing the data it collected, R&M estimated that the forty vessels inspected had
7 already lost 18,271 kg – some 40,280 pounds, or 20 tons – of lead, zinc, copper, and
8 chromium due to exfoliation of paint, and that approximately another 125,000
9 pounds of metals remain on the forty ships' exterior surfaces. PSUF 120. Other
10 evidence suggests that this estimate may be low. For example, in late 2008 and
11 early 2009, MARAD staff collected almost 44,000 pounds (or 22 tons) of paint chips
12 mixed with rust, dirt, and dust from the partial remediation of just four ships.⁵
13 PSUF 128-130.

14 The decks of many of the ships are strewn with paint waste, much of which
15 has been accumulating for years. PSUF 192. Some of this paint waste discharges
16 directly to Suisun Bay through both non-stormwater and stormwater discharges.
17 PSUF 144-145, 149, 151, 153, 154, 159. By force of gravity, paint that separates
18 from the vessels' exterior hulls necessarily falls into the tidal currents below. PSUF
19 143. Some of the paint that has accumulated on the vessels' decks blows over the
20 sides in the wind. PSUF 144, 192. And, when it rains, some paint washes down
21 drains to Suisun Bay. PSUF 149-150, 159.

22 To provide visual context, Plaintiffs are concurrently offering in evidence
23 hundreds of photographs shot during an inspection of the SBRF in January 2009.
24 Decl. of David Elias, Ex. H; Decl. of Miriam Rotkin-Ellman, Ex. D. Because of the
25 shear number of photos, Plaintiffs have provided representative excerpts of this

27 ⁵ Similarly, MARAD's *Survey of Ships and Materials* calculated the quantity
28 of loose paint on the decks of two NDRF non-retention vessels. MARAD estimated
that one of the vessels contained two tons of loose paint on its deck and that the
other vessel contained four tons of loose paint on deck. PSUF 137.

1 photographic evidence in a separate declaration. *See* Decl. of Ubaldo Fernandez,
2 Exs. F-BB.

3 **E. MARAD INTENTIONALLY ALLOWED EXFOLIATED LEAD-BASED**
4 **PAINT TO ACCUMULATE IN SBRF VESSELS, AND TO**
5 **DISCHARGE TO SUISUN BAY, FOR MORE THAN A DECADE**

6 MARAD has been aware of legal concerns and environmental risks from
7 SBRF vessel's peeling paint for some thirteen years. In 1996, the United States
8 Navy informed MARAD that the Navy's lawyers were "concerned" that paint was
9 "getting into the water" from vessels at the SBRF fleet site. PSUF 219. The Navy
10 also informed MARAD that the Navy had been required to undertake remediation
11 at the Mare Island Naval Shipyard due to peeling paint from the U.S.S. Clamp – a
12 vessel that, in 1995, MARAD had accepted into the SBRF. PSUF 220.

13 Alerted by the Navy to these concerns, MARAD in 1996 formed an
14 "Environmental Quality Action Team" ("EQAT") to look at the exfoliating paint
15 problem. PSUF 221. Hand-written notes from EQAT's January 1998 meeting
16 observe that "lead paint may have been dropping into the bay" and "could become a
17 problem later." PSUF 222. EQAT meeting minutes also reveal that the
18 superintendent of MARAD's James River fleet tested and confirmed that non-
19 retention vessel paint was high in lead. PSUF 222.

20 In January 1997, MARAD issued an assessment of environmental issues
21 relating to non-retention ships. The 1997 assessment states:

22 As they are not routinely repainted, the paint on the ships peels off
23 and the ships tend to rust. As the paint peels, it either collects on the
24 decks of the ships or falls into the water. A certain portion of the
25 peeled paint, which in many cases contains lead, will be washed into
26 the water by rain.

27 PSUF 147. The assessment also noted that "pollutants on the exterior of the vessel
28 may leach into the surface water, and it is possible that at least the more mobile,
non-degradable pollutants may contaminate an aquifer." PSUF 147.

In June 1997, Harry Soete, the SBRF's safety and environment officer,
conducted a survey of paint conditions on SBRF vessels and found that thirty-four

1 of the ships had exfoliating paint. PSUF 223. Shortly thereafter, MARAD's
2 headquarters transmitted to Mr. Soete a document entitled "U.S. Department of
3 Transportation Maritime Administration (MARAD) Paint Removal Guidelines."
4 PSUF 224. This document observes that "[i]t is most likely that almost all abrasive
5 and lead paint waste from lead coated structure will be classified as hazardous
6 under RCRA" and that "[p]roper disposal of this material must be ensured." PSUF
7 225. The document also states:

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

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

20 PSUF 224 (emphasis added).

21 "Nothing," however is precisely what MARAD did. At its deposition, MARAD
22 admitted that, from at least 1996 until at least mid-2008, it was "aware that there
23 was an issue associated with exfoliating paint collecting on the decks of SBRF
24 vessels and falling into Suisun Bay and had a policy of not doing anything about
25 that." PSUF 112, 226. MARAD adopted this policy notwithstanding its recognition,
26 in 1997, that "do[ing] nothing" would "only lead to problems in the future." PSUF
27 113. MARAD continued to follow its policy of "not doing anything about" the
28 exfoliating paint even after DOT's Inspector General found, in 2000, that
29 "environmental dangers associated with MARAD's old, deteriorating ships are
30 increasing daily" and that the vessels are "literally rotting and disintegrating."
31 PSUF 113, 117, 112, 226.

32 MARAD's willful disregard for this known pollution problem continued for a
33 decade, until the agency grew concerned that NRDC was preparing to file suit.

1 PSUF 226-229. Then, in January 2007, MARAD launched what it called its
2 “Environmental Excellence Initiative” (“EEI”). The memorandum that established
3 this EEI states:

4 With an eye on what NRDC may be contemplating, some initiatives
5 are needed This should look at hull growth-bugs, exfoliating paint
6 from hull and topsides, and PCB content

7 PSUF 228. MARAD confirmed at deposition the obvious import of this language –
8 that is that, “as a result of [MARAD’s] concern about a potential NRDC lawsuit, the
9 Environmental Excellence Initiative was going to look at exfoliating paint.” PSUF
10 229.

11 MARAD’s concerns about being sued were apparently not sufficient to prompt
12 its speedy implementation of the EEI, however. Not until September 2007, some
13 eight months after the EEI was established, did MARAD’s SBRF fleet program
14 manager author an “NDRF Coating Maintenance Implementation Plan.” PSUF 230.
15 MARAD then failed to conduct any paint remediation under that Coating
16 Maintenance Plan for another nine or more months. PSUF. MARAD is unable to
17 explain this delay. PSUF 231.

18 Finally, in July 2008, MARAD staff commenced a pilot program partially to
19 remediate paint on the decks and topsides of four ships, the Winthrop Victory, the
20 Sagamore, the Bay, and the Lincoln. PSUF 61-64. During the course of this
21 remediation, MARAD collected and removed 43,903 pounds of paint-contaminated
22 debris from the four ships, all of which MARAD determined to be hazardous waste.
23 PSUF 128-130, 67-68,73-74, 78-79. Prior to being disposed, waste collected from
24 remediation of the Winthrop Victory, Bay, and Lincoln were stored by MARAD on
25 those ships for more than ninety days. PSUF 65-82.

26 Then, as suddenly as MARAD had started this work, the agency ceased all
27 paint remediation work on the Bay and the Lincoln, leaving those ships only
28 partially cleaned. PSUF 64. MARAD halted the remediation of these ships because
the SBRF did not receive sufficient overtime funds from MARAD to continue to

1 perform the work. PSUF 84. MARAD is not presently conducting coating
2 maintenance operations. PSUF 87. MARAD does not know when such work will be
3 resumed. PSUF 85. Discharges of paint to Suisun Bay, however, are continuing.
4 PSUF 98, 140, 154, 158.

5 After being sued, MARAD also installed screens on many of the deck drains
6 on SBRF non-retention ships. PSUF 155-156. Paint chips continue to discharge
7 through the screens, however. PSUF 158-159. MARAD did not install screens on all
8 drains and some screens have come loose after they were installed. PSUF 160-161.
9 The screens that were installed have become clogged with paint chips and debris.
10 PSUF 157, 163. When a screen becomes clogged, this “eliminate[s]” the screens’
11 effectiveness by allowing water to back up and overflow the vessels gunwale directly
12 into Suisun Bay. PSUF 164.

13 **F. MARAD’S RESISTANCE TO REGIONAL WATER BOARD CLEAN**
14 **WATER ACT ENFORCEMENT AUTHORITY**

15 In the fall of 2006, the California Regional Water Quality Control Board,
16 which is the state agency charged with Clean Water Act enforcement in the San
17 Francisco Bay region, informed MARAD of the need for a Clean Water Act permit
18 for in-water hull cleaning of SBRF non-retention vessels. As revealed through
19 MARAD’s internal email traffic, on October 19, 2006, the director of MARAD’s
20 Office of Environment (Michael Carter) emailed the director of MARAD’s Office of
21 Ship Disposal (Curt Michanczyk) to report that:

22 we spoke with the san fran water quality control brd. Bottom line is
23 that they do not want any further hull cleaning until we work through
24 the permit issues.

25 PSUF 41.

26 What the Regional Water Board “want[ed]” does not appear to have swayed
27 MARAD. Just two months later, MARAD notified the Regional Water Board that it
28 was planning to “scamp” (that is, conduct in-water hull cleaning of) two vessels in

1 Alameda “immediately following” the vessels’ planned departure from the SBRF
2 site. PSUF 42.

3 Upon receiving MARAD’s unilateral notification, Regional Water Board staff
4 directed MARAD not to proceed with the in-water hull cleaning, at least until
5 receipt of lab samples documenting the composition of the vessels’ hull paint, unless
6 MARAD either obtained a Clean Water Act permit for the operation or conducted
7 the operation in a manner that prevented any discharge of pollutants. PSUF 43.

8 Upon learning of the Regional Water Board’s directive, Michael Carter, head
9 of environmental affairs for MARAD, wrote the following email to Curt Michanczyk,
10 head of MARAD’s ship disposal program:

11 I have very little patience with this cra_. I feel like ringing [*sic*] some
12 necks. I need to cool down.

13 PSUF 44. That same day, MARAD’s Director of Congressional and Public Affairs
14 wrote to MARAD’s then-Administrator that the Regional Water Board “can’t stop
15 us” from proceeding with in-water cleaning of the two vessels.⁶ PSUF 45.

16 On July 6, 2007, the Executive Officer of the Regional Water Board informed
17 MARAD in writing that discharges of exfoliating paint from SBRF vessels
18 constitute violations of the Clean Water Act that pose a significant risk to San
19 Francisco Bay and “must be abated.” PSUF 46. Exercising its legal authorities, the
20 Regional Water Board ordered MARAD to submit, by August 6, 2007, a “Hazardous
21 Waste Mitigation Workplan” describing the methods and schedules that MARAD
22 would employ to remove peeling paint from SBRF vessels “to ensure that no peeling
23 paint is being discharged to San Francisco Bay.” PSUF 46. About a month later,
24 MARAD submitted a non-substantive, one-page response that did not provide a
25 work plan for removing peeling SBRF vessel paint. PSUF 47.

26
27 ⁶ MARAD’s reaction to the Regional Water Board’s direction is particularly
28 perplexing because MARAD now asserts that it was, at that very time, aware of and
concerned that its planned in-water hull cleaning could cause discharges of metal
hull coatings above regulatory limits. PSUF 234.

1 On October 1, 2007, the Regional Water Board issued MARAD a Notice of
2 Violation concerning MARAD's failures to submit a Hazardous Waste Mitigation
3 Workplan and to prevent paint and other hazardous waste discharges from the
4 SBRF to waters of the State and United States. PSUF 48. MARAD has not
5 prevented hazardous paint discharges from SBRF non-retention vessels. PSUF 140,
6 159.

7 MARAD has never applied for a permit for non-stormwater discharges from
8 its vessels, PSUF 49-51, 237 and admitted in its operative answer that it had no
9 Clean Water Act discharge permit for Suisun Bay, PSFU 49. Then, on September 8,
10 2009 – more than twelve years after MARAD learned of the exfoliating paint
11 discharges, almost two years after this suit was filed, and just a week before the
12 deadline for filing motions for summary judgment – MARAD lodged with the state a
13 “notice of intent” to comply with California’s general permit for the discharge of
14 stormwater associated with industrial activities (“stormwater general permit”).
15 PSUF 50. On September 10, 2009, the Regional Water Board determined that
16 MARAD was not eligible for coverage under the stormwater general permit. PSUF
17 51.

18 G. HISTORY OF THIS LITIGATION

19 Plaintiffs commenced this litigation on October 29, 2007, following MARAD's
20 failure to respond to the Regional Water Board's administrative enforcement efforts,
21 and after providing the defendants with statutorily required notice of their
22 intention to sue. PSUF 52. Plaintiffs assert claims under, *inter alia*, the citizen suit
23 provisions of the federal Clean Water Act, 33 U.S.C. § 1365(a), the federal Resource
24 Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972(a)(1)(a), and the
25 California Hazardous Waste Control Law (“HWCL”).⁷

26
27 ⁷ On March 28, 2008, this Court approved a stipulation and order that
28 prohibited MARAD from conducting certain operations until it had completed
environmental documentation under the National Environmental Policy Act
 (“NEPA”) and, as a result, staying the plaintiffs’ NEPA claims. Doc. No. 27. On

1 In November 2007, the California Regional Water Quality Control Board
2 sought, and was granted, leave to intervene as a plaintiff. The Regional Water
3 Quality Control Board asserts claims under the federal Clean Water Act. The
4 California Department of Toxic Substances Control, the state agency principally
5 charged with implementing the HWCL and California's authorized RCRA
6 hazardous waste program, is not a party to this litigation.

7 The discovery period has now closed. Because the material facts are not
8 genuinely disputed, Plaintiffs respectfully move for summary judgment on their
9 standing and on Defendants' liability under Plaintiffs' Fifth, Sixth, and Seventh
10 Claims.

11 **III. SUMMARY JUDGMENT STANDARD**

12 Summary judgment is warranted "if the pleadings, depositions, answers to
13 interrogatories, and admissions on file, together with the affidavits, if any, show
14 that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c); *Ca. v.*
15 *Campbell*, 138 F.3d 772, 780 (9th Cir. 1998). The evidence must be viewed in light
16 most favorable to the nonmoving party. *See, e.g., Kraus v. Presidio Trust Facilities*
17 *Div.*, 572 F.2d 1039, 1042-43 (9th Cir. 2009). Once the moving party has met its
18 burden of proof, the non-moving party must produce evidence on which a reasonable
19 trier of fact could find in its favor viewing the record as a whole in light of the
20 evidentiary burden the law places on that party. *Triton Energy Corp. v. Square D*
21 *Co.*, 68 F.3d 1216, 1221 (9th Cir.1995).

22 An interlocutory summary judgment on liability alone may be issued where
23 there are disputed facts related to the remedy. Fed. R. Civ. P. 56(d)(2). In addition,
24 where summary judgment is not rendered on the whole action, the Court should, to
25 the extent practicable, grant summary adjudication of particular facts to narrow the
26 issues for trial. Fed. R. Civ. P. 56(d)(1).

27
28 September 8, 2009, MARAD filed a Notice of Issuance of EA/FONSI. Doc. No. 73.
The instant motion does not involve Plaintiffs' NEPA claims.

1 **IV. ARGUMENT**

2 **A. THIS COURT HAS JURISDICTION**

3 **1. PLAINTIFFS HAVE STANDING**

4 RCRA allows “any person,” and the Clean Water Act allows “any citizen,”⁸ to
5 sue to enforce those statutes’ requirements. 33 U.S.C. § 1365(a)(1); 42 U.S.C. §
6 6972(a)(1)(A). The courts have interpreted this language expansively. As the Ninth
7 Circuit explained in a Clean Water Act citizen suit, this language “extends standing
8 to the outer boundaries set by the ‘case or controversy’ requirement of Article III of
9 the Constitution.” *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141,
10 1147 (9th Cir. 2000) (citing *Middlesex County Sewerage Auth. v. Nat’l Sea*
11 *Clammers Ass’n*, 453 U.S. 1, 16 (1981)); *cf. U.S. Dept. of Energy v. Ohio*, 503 U.S.
12 607 (1992) (“[T]he [RCRA and CWA] citizen-suit sections . . . can be treated
13 together because their relevant provisions are similar.”).

14 Under both RCRA and the CWA, a plaintiff association has Article III
15 standing to sue on behalf of its members “when its members would otherwise have
16 standing to sue in their own right, the interests at stake are germane to the
17 organization's purpose, and neither the claim asserted nor the relief requested
18 requires the participation of individual members in the lawsuit.” *Friends of the*
19 *Earth, Inc. v. Laidlaw Envtl. Svcs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). A member
20 has standing to sue in her own right when she has suffered an injury that is fairly
21 traceable to the defendant’s alleged conduct and capable of being redressed. *Id.* at
22 180-81; *Natural Res. Def. Council v. EPA*, 542 F.3d 1235, 1244-48 (9th Cir. 2008).

23 Injury in an environmental case may include harm to a member’s health,
24 aesthetic values, recreational activities, economic well-being, or ecological concerns.
25 *See Laidlaw*, 528 U.S. at 181-183 (injuries to recreational or aesthetic interests
26 constitute injuries-in-fact for standing purposes); *see also Central Delta Water*

27 ⁸ The Clean Water Act defines “citizen,” for purposes of this provision, to
28 include “a person or persons having an interest which is or may be adversely
affected.” 33 U.S.C. § 1365(g).

1 *Agency v. United States*, 306 F.3d 938, 947-50 (9th Cir. 2002); *Ecological Rights*
2 *Found.*, 230 F.3d at 1148-53; *Natural Res. Def. Council v. S.W. Marine, Inc.*, 236
3 F.3d 985, 994 (9th Cir. 2000) (finding plaintiffs’ curtailed use of bay due to concerns
4 about fish contamination and pollution from defendants’ discharges met Article III
5 injury requirement). In addition, threatened harm – in the form of an increased risk
6 of future injury – suffices for Article III standing purposes. *See Central Delta Water*
7 *Agency*, 306 F.3d at 947-948 (holding that “the possibility of future injury may be
8 sufficient to confer standing on plaintiffs”); *accord Hall v. Norton*, 266 F. 3d. 969,
9 976 (9th Cir. 2001); *Friends of the Earth, Inc. v. Gaston Copper Recycling, Corp.*,
10 204 F.3d 149, 160 (4th Cir.2000) (en banc).

11 The evidence submitted in support of this motion amply establishes
12 Plaintiffs’ standing.⁹ For example, NRDC has more than 447,000 U.S. members,
13 more than 83,000 of whom live in California, some 24,000 of whom reside in the San
14 Francisco Bay area, and some 300 of whom live in towns bordering Suisun Bay.
15 PSUF 2. Baykeeper has over 1330 members, 1280 of whom live in the San Francisco
16 Bay Area, and 15 of whom live in towns that border Suisun Bay. PSUF 3. NRDC
17 and Baykeeper members fish, hunt, kayak, and observe wildlife in and around
18 Suisun Bay and its surrounding waterways. PSUF 4.

19 Plaintiffs’ members’ concerns over the pollution in Suisun Bay – to which
20 these members reasonably believe the SBRF contributes – causes them to refrain
21 from swimming in the Bay and consuming Bay-caught fish and ducks, harms their
22 ability to observe wildlife, and diminishes their aesthetic enjoyment of the Bay.
23 PSUF 5. Members of Plaintiffs are also troubled that their children cannot swim in
24 the Bay and that their descendents may not be able to enjoy the Bay’s fish, wildlife,
25 and recreational opportunities in the future because of pollution from the SBRF

26 ⁹ The interests at stake in this litigation are germane to Plaintiffs’ purposes,
27 which include advocating on behalf of their members to prevent and reduce water
28 pollution. PSUF 9. The relief Plaintiffs seek does not require the participation of the
organizations’ members because Plaintiffs do not seek relief specific to any
individual. *See* *Envtl. Pls.’ 1st Am. Compl.* at 35-36 (Prayer for Relief).

1 non-retention ships and other sources. PSUF 6. Elimination of the SBRF's unlawful
2 discharges of pollutants to Suisun Bay would increase Plaintiffs' members' use and
3 enjoyment of the Bay. PSUF 7.

4 These injuries sustained by Plaintiffs' members are fairly traceable to
5 Defendants. *See Ecological Rights Found.*, 230 F.3d at 1152; *see also Natural Res.*
6 *Def. Council v. S.W. Marine, Inc.*, 236 F.3d at 995 (“[T]raceability does not mean
7 that plaintiffs must show to a scientific certainty that defendant's effluent . . .
8 caused the precise harm suffered by the plaintiffs' in order to establish standing.”)
9 (internal quote marks and citation omitted). Here, Plaintiffs' members reasonably
10 believe, based on their observations of the SBRF and publicly available information,
11 that Defendants' failure to maintain the SBRF consistent with CWA and RCRA
12 requirements has resulted in ongoing contamination of Suisun Bay and surrounding
13 waterways and ecosystems that they use. PSUF 8. A favorable decision would
14 redress the harms that NRDC and Baykeeper members suffer. If Defendants are
15 required to bring the SBRF into compliance with the CWA and RCRA, the actual
16 and threatened harm to NRDC and Baykeeper members from ongoing non-
17 compliant activities at the SBRF site would be eliminated. *See Laidlaw*, 528 U.S. at
18 185-86; *NRDC v. EPA*, 542 F.3d 1235, 1244-48; *Ecological Rights Found.*, 230 F.3d
19 at 1152 & n.12. Congress enacted the citizen suit provisions of the CWA and RCRA
20 to redress harms just such as these. *See* 33 U.S.C. § 1365; 42 U.S.C. § 6972; *see also*
21 *Alaska Ctr. for the Env't. v. Browner*, 20 F.3d 981, 984-85 (9th Cir. 1994) (holding
22 that plaintiffs met redressability requirement because Congress had already
23 determined that the relief they sought was the appropriate means of achieving
24 desired water quality); *accord Natural Res. Def. Council v. EPA*, 542 F.3d at 1248.

25 NRDC and Baykeeper satisfy the tests for associational standing for
26 environmental harm, as set forth by the Supreme Court in *Laidlaw* and the Ninth
27 Circuit in *Ecological Rights Foundation*. Accordingly, Plaintiffs respectfully ask this
28 Court to rule that they have standing.

1 **2. CONGRESS HAS WAIVED THE UNITED STATES’**
2 **SOVEREIGN IMMUNITY**

3 RCRA expressly waives the sovereign immunity of the United States with
4 respect to federal, state, and local solid and hazardous waste laws. 42 U.S.C. § 6961.
5 The Clean Water Act expressly waives the United States’ sovereign immunity with
6 respect to all federal, state, and local requirements to control and abate water
7 pollution. 33 U.S.C. § 1323(a). The United States has, accordingly, consented to
8 being sued.

9 **B. DEFENDANTS ARE UNLAWFULLY STORING AND/OR**
10 **DISPOSING OF HAZARDOUS WASTE CONTAINED IN SBRF NON-**
11 **RETENTION VESSELS.**

12 **1. HAZARDOUS WASTE LEGAL FRAMEWORK**

13 Subtitle C of RCRA, 42 U.S.C. §§ 6921-39e, originally enacted in 1976,
14 provides for “comprehensive . . . regulat[ion] [of] hazardous wastes from cradle to
15 grave, in accordance with the rigorous safeguards and waste management
16 procedures.” *City of Chicago v. Env’tl. Defense Fund*, 511 U.S. 328, 331 (1994); *see*
17 *also Washington v. Chu*, 558 F.3d 1036, 1038 (9th Cir. 2009). Under section 3002 of
18 RCRA, EPA has required hazardous waste generators to comply with specific
19 handling, record-keeping, storage, and monitoring standards. *See* 42 U.S.C. § 6922;
20 40 C.F.R. pt. 262. Under section 3003 of RCRA, EPA has directed transporters of
21 hazardous waste to keep manifests and take other steps to ensure safe delivery of
22 hazardous wastes to permitted facilities. *See* 42 U.S.C. § 6923; 40 C.F.R. pt. 263.
23 And under sections 3004 and 3005 of RCRA, facilities that store, dispose, and/or
24 treat hazardous wastes must obtain and comply with permits. *See* 42 U.S.C. §§
25 6924-25; 40 C.F.R. pts. 264 – 270; *see generally City of Chicago*, 511 U.S. at 331.

26 Solid wastes that are not listed or identified as “hazardous waste” under
27 Subtitle C are regulated “more loosely” under RCRA’s Subtitle D, which will be
28 discussed in part IV.C., below. *See City of Chicago*, 511 U.S. at 331.

1 a. **California’s Hazardous Waste Program Operates “In**
2 **Lieu” of the Federal Hazardous Waste Standards**

3 RCRA is “an exercise of federalism,” *United States v. Marine Shale*
4 *Processors*, 81 F.3d 1361, 1367 (5th Cir. 1996), allowing any state to receive
5 authorization to operate its own hazardous waste program “in lieu of” these federal
6 hazardous waste requirements. 42 U.S.C. § 6926(b). As explained by the Fifth
7 Circuit:

8 Under 42 U.S.C. § 6926(b), . . . states could assume primary
9 responsibility for RCRA enforcement by developing their own
10 programs, which EPA would approve after a review to assure that the
11 state program provided for a level of regulation at least as high as the
12 federal floor. RCRA expressly allowed states to impose regulations
13 more stringent than those outlined in the federal floor.

14 *Marine Shale Processors*, 81 F.3d at 1367. Thus, “[o]nce the EPA authorizes a state
15 program . . . the EPA’s regulations . . . respecting the characterization of solid
16 wastes as hazardous and non-hazardous, are supplanted” by the state standards.
17 *United States v. Elias*, 269 F.3d 1003, 1012 n.30 (9th Cir. 2001) (internal quotation
18 marks and citation omitted).

19 EPA authorized California’s hazardous waste program to operate “in lieu of”
20 the federal hazardous waste program beginning in 1992. *See* 57 Fed. Reg. 32,726
21 (July 23, 1992). EPA has regularly approved subsequent amendments to the
22 California program. *See, e.g.*, 66 Fed. Reg. 49,118 (Sept. 26, 2001). California’s
23 authorized RCRA program is set forth in the California Hazardous Waste Control
24 Law (“HWCL”), Cal. Health & Safety Code §§ 25100 *et seq.*, and implementing
25 regulations.

26 b. **RCRA Section 6001 Requires Federal Agencies to Comply**
27 **with State Hazardous Waste Control Laws**

28 In 1992, Congress adopted the Federal Facilities Compliance Act (“FFCA”).
Pub. L. No. 102-386, § 102(a), 106 Stat. 1505, 1506. As amended by the FFCA,
section 6001 of RCRA waives the United States’ sovereign immunity to injunctive
relief and civil penalties for violations of state hazardous waste requirements. 42
U.S.C. § 6961(a). Section 6001 is not limited to a waiver of sovereign immunity,

1 however. It also expressly requires federal agencies to “comply with, all Federal,
2 State, interstate, and local requirements . . . respecting . . . hazardous waste
3 management in the same manner, and to the same extent, as any person is subject
4 to such requirements . . .” *Id.*

5 Congress enacted the FFCA out of deep concern that “federal facilities
6 present some of the very worst [RCRA] compliance problems.” H.R. Rep. No. 102-
7 111, at 6, *reprinted in* 1992 U.S.C.C.A.N.1287, 1292. The House Committee Report
8 notes that state attorney generals throughout the county had “underscored” the
9 need for legislation that would “induce compliance and deter future misconduct” by
10 federal agencies. *Id.* As the Ninth Circuit recently noted, “[t]he FFCA was enacted
11 specifically to motivate recalcitrant officials at federal facilities. . . .” *Washington*,
12 558 F.3d at 1040.

13 **c. Storage and Disposal of Hazardous Waste Without a**
14 **Permit Is Illegal**

15 The storage and the disposal of hazardous waste without a permit are (with
16 certain exceptions not applicable here) prohibited under both RCRA and the HWCL.
17 *See, e.g.*, 42 U.S.C. §§ 6925(a), 6928(d)(2)(A); 40 C.F.R. § 270.1(b) & (c); Cal. Health
18 and Safety Code (“HSC”) §§ 25201(a), 25189.5, 25189.2. “Storage,” under the
19 California law, means “the holding of hazardous waste for a temporary period, at
20 the end of which the hazardous waste is treated, disposed, or stored elsewhere.” 22
21 Cal. Code. Reg. § 66260.10. “Disposal,” under California law, means:

22 (a) the discharge, deposit, injection, dumping, spilling, leaking
23 or placing of any waste or hazardous waste into or on any land or
24 water so that such waste or hazardous waste or any constituent
25 thereof may enter the environment or be emitted into the air or
26 discharged into any waters, including ground waters;

27 (b) the abandonment of any waste.

28 22 Cal. Code. Reg. § 66260.10.¹⁰

¹⁰ RCRA and the federal regulations contain materially similar definitions.
See 42 U.S.C. § 6903(3) & (33); 40 C.F.R. § 260.10.

1 **2. SBRF VESSEL PAINT WASTE IS “HAZARDOUS WASTE”**

2 In enacting RCRA, Congress did not itself list or identify which particular
3 wastes are “hazardous” for purposes of Subtitle C regulation. Instead, Congress left
4 that initial designation to EPA and, ultimately, to authorized states. *Washington*,
5 558 F.3d at 1039 n. 2; *United States v. Elias*, 269 F.3d at 1012 n.30 (noting that in a
6 state with an authorized hazardous waste program, “EPA’s regulations . . .
7 respecting the characterization of solid wastes as hazardous and non-hazardous, are
8 supplanted” by the state’s standards) (internal quotation marks and citation
9 omitted).

10 Under both EPA’s subtitle C regulations and California hazardous waste
11 regulations, to be deemed a “hazardous waste” a material must meet two
12 requirements. First, it must be a regulated “solid waste” – or in California’s
13 nomenclature, a “waste.” *See* 22 Cal. Code Reg. § 66261.2. Second, that waste must
14 be “hazardous.” *See* 22 Cal. Code Reg. 66261.3. The exfoliated paint contained in
15 SBRF vessels meets both requirements.

16 **a. SBRF Vessel Exfoliated Paint Is Regulated “Waste”**

17 EPA’s Subtitle C implementing regulations generally define a “solid waste”
18 as “any discarded material.” 40 C.F.R. § 261.2(a)(1). These regulations further
19 define a “discarded material” to include any material that is “abandoned” by being,
20 among other things, either “disposed of” or “accumulated [or] stored . . . before or in
21 lieu of being abandoned by being disposed of, burned, or incinerated.” 40 C.F.R. §
22 261.2(a)(2)(i) & (b). California’s definition is materially similar, but substitutes the
23 word “relinquished” for “abandoned.” 22 Cal. Code Reg. § 66261.2. Thus, under
24 California law, a waste is “hazardous” if it is “disposed of” or “accumulated [or]
25 stored . . . before or in lieu of being relinquished by being disposed of . . .” *Id.*

26 The undisputed facts establish that exfoliated paint contained in the SBRF
27 non-retention vessels – including, in particular, paint scattered about the decks,
28 swept into piles, or held in drums, buckets, or metal troughs – is regulated “waste.”

1 This paint has peeled off SBRF vessels' surfaces and now serves no useful purpose.
2 PSUF 191. Except for paint that falls directly into the waters below, exfoliated
3 paint accumulates on the decks, sometimes for years, until it blows, falls, or washes
4 into Suisun Bay, or is eventually sent to a hazardous waste landfill. PSUF 192.

5 Photographs from, and testimony describing, a January 2009 inspection of
6 the SBRF non-retention vessels reveal that paint debris had accumulated on the
7 deck of every SBRF non-retention vessel that was inspected. Some of that paint
8 waste is scattered like litter, some of has accumulated in piles, and some of it is
9 stashed in buckets or troughs. PSUF 193. MARAD has itself observed that paint is
10 peeling off of and/or damaged on all SBRF non-retention vessels.¹¹ MARAD plans
11 eventually to sweep up this paint waste and dispose it. PSUF 196. To the extent
12 that loose paint is not removed for disposal before the vessels themselves are
13 scrapped, the paint would be disposed by the scrapper when the ship is disposed.
14 PSUF 197.

15 These undisputed facts demonstrate that exfoliated paint in SBRF non-
16 retention vessels meets the regulatory definitions of "waste." Specifically, the
17 exfoliated paint contained in these vessels has been "accumulated [or] stored . . .
18 before or in lieu of being relinquished by being disposed of" 40 C.F.R. §
19 261.2(a)(2)(i) & (b); 22 Cal. Code Reg. § 66261.2. Such material is, by definition,
20 waste.¹²

21
22 ¹¹ In 2007, MARAD staff reported debris on all SBRF non-retention vessels,
23 including a "little" debris on seven vessels, "some" debris on seventeen vessels, and
24 "significant" debris on the remainder. PSUF 195. MARAD testified that these terms
represented relative, rather than absolute, measurements of the quantity of debris
on the decks. PSUF 195.

25 ¹² Both the federal and California hazardous waste regulations specify that,
26 in a hazardous waste enforcement action, it is the defendant who must prove its
27 defense that a particular material is not a "solid waste" (on in California, not a
28 "waste") by "demonstrat[ing] that there is a known market or disposition for the
materials." 40 C.F.R. § 261.2(f); 22 Cal. Code Reg. § 66261.2(g). MARAD has
presented no evidence that there is a "known market or disposition for the
materials" at issue in this motion, other than disposal of the paint waste as a
hazardous waste.

1 Third, in late 2008 and early 2009, MARAD tested paint waste collected from
2 four SBRF non-retention vessels – the Winthrop Victory, the Sagamore, the Bay,
3 and the Lincoln. MARAD determined that every sample analyzed exceeded
4 California’s hazardous waste toxicity criteria. PSUF 204-208. MARAD therefore
5 decided that the material was hazardous waste and must be disposed at a permitted
6 hazardous waste landfill. PSUF 204. Other sampling, not conducted by Defendants,
7 shows similar results.¹⁴ MARAD knows of no investigation or analysis of the
8 composition of paint on an SBRF vessel that found that no paint had concentrations
9 of metals that exceeded California hazardous waste criteria. PSUF 202.

10 Fourth, MARAD’s environmental consultant tested the paint on forty SBRF
11 vessels and concluded that “the sampled paints would be classified as hazardous
12 waste” on every vessel tested. PSUF 176-177. The paint exceeded hazardous waste
13 regulatory levels for zinc on all forty vessels, for lead on thirty-three vessels, for
14 copper on twenty-seven vessels, for chromium on twenty-two vessels, and on some
15 other vessels, for mercury, cadmium, or barium. PSUF 173-175. MARAD has
16 testified that these results are accurate and “representative of what was on board
17 the ship.” PSUF 176. MARAD also concedes that paint on the forty ships assessed
18 by its contractor “would be classified as hazardous waste.” PSUF 177.

19 Fifth, Plaintiffs’ expert witness reviewed the composition of metals in paint
20 in all SBRF non-retention vessels that had been tested and concluded that the paint
21 either is known to contain concentrations of heavy metals that exceed toxicity
22 criteria for hazardous waste or, for the few ships with paint that has not yet been
23 tested, is likely to contain such concentrations. PSUF 209. In reaching this
24 conclusion, Plaintiffs’ expert conducted a rigorous statistical analysis of the
25 aggregate levels of metals across all the ships and an even more conservative

26 ¹⁴ For example, samples of paint mixed with deck debris (soil, guano, etc.)
27 collected by Plaintiffs’ expert in January 2010 from the decks of four vessels
28 exceeded toxicity criteria for zinc. These samples were not pure paint, but were
comprised of other material as well, such as soil, guano, and debris from the vessel
decks. PSUF 213.

1 statistical analysis of the metals concentrations on paint on each ship. PSUF 209.
2 She also looked at sampling results reported by MARAD and by the California
3 Department of Toxic Substances Control. PSUF 209. Taking into account this
4 extensive, and consistent, evidence, she concluded that paint on each of the SBRF
5 non-retention vessels is “hazardous,” under applicable regulatory standards. PSUF
6 209. The conclusion of Plaintiffs’ expert is unrebutted by any contrary, competent
7 testimony.

8 **c. Defendants Have Unlawfully Stored and/or Disposed**
9 **Hazardous Paint Waste on SBRF Vessels**

10 Hazardous paint on each of the SBRF non-retention vessels has peeled off
11 and, to a varying degree, accumulated on the decks of the vessels. PSUF 214. On
12 many ships, the accumulation has been substantial (although no particular
13 threshold amount is required to prove a violation of RCRA’s requirements). PSUF
14 215. On some ships, paint appears to have been swept into piles, or placed in
15 troughs and buckets, that have been left in place. PSUF 216. On several of the
16 ships, MARAD collected the waste in drums and held that waste on board the ships
17 for more than three months, knowing that the material was almost certainly
18 hazardous. PSUF 65-70, 76-81, 217.

19 Both RCRA and California’s HWCL require that every person who owns or
20 operates a facility that accepts, treats, stores, or disposes of hazardous waste obtain
21 a permit. Cal. HSC § 25201(a). Treatment, storage, or disposal of hazardous waste
22 without a permit is prohibited, and is punishable by civil penalties, fines, and
23 imprisonment. Cal. HSC §§ 25189.2, 25189.5. Defendants concede that they do not
24 have a permit to store or dispose hazardous waste at the SBRF facility. PSUF 218.

25 MARAD’s management of exfoliated and exfoliating paint on SBRF non-
26 retention vessels constitutes both unpermitted “storage” and unpermitted “disposal”
27 of hazardous waste. As described *supra*, at part IV.B.1.c, “storage” of hazardous
28 waste includes “the holding of hazardous waste for a temporary period, at the end of
which the hazardous waste is treated, disposed, or stored elsewhere.” 22 Cal. Code.

1 Reg. § 66260.10. MARAD’s holding of waste contained in SBRF non-retention
2 vessels – including MARAD’s accumulation of paint waste and paint-contaminated
3 debris on decks, in barrels, and in metal troughs pending remediation and removal
4 of the waste to a hazardous waste landfill – falls within this “storage” definition.

5 “Disposal,” meanwhile, includes the “abandonment” of any hazardous waste.
6 Some of the paint waste that is initially contained in MARAD’s vessels will blow,
7 fall, or wash into Suisun Bay. Such paint waste has been abandoned by MARAD
8 and that abandonment constitutes unlawful disposal.¹⁵

9 **C. MARAD’S ACCUMULATION OF SBRF NON-RETENTION VESSELS**
10 **VIOLATES RCRA’S “OPEN DUMPING” BAN**

11 RCRA Subtitle D bans “open dumping” of any “solid waste.” Defendants are
12 violating this ban by mooring on Suisun Bay a fleet of obsolete, deteriorating
13 vessels, slated for disposal, for which the only realistic disposal option is generally
14 scrapping, in a manner that is causing continuing violations of the Clean Water Act.

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18 ¹⁵ RCRA’s statutory definition of “solid waste” excludes “industrial discharges
19 which are point sources subject to permits” under the Clean Water Act. 42 U.S.C. §
20 6903(27). Plaintiffs’ RCRA claims do not address “industrial discharges which are
21 point sources.” Rather, Plaintiffs’ RCRA claims addresses waste (e.g., paint that has
22 peeled off the ships) that is presently contained in SBRF non-retention vessels (e.g.,
lying on the deck of the vessels) and that has not “discharged.” Such waste is
analogous to hazardous waste managed inside a factory’s grounds or treatment
facilities, before that material is discharged to a water way.

23 The courts have invariably found – and the United States has itself
24 repeatedly argued in RCRA enforcement actions – that such material is subject to
25 RCRA up to the moment the material is “*actual[ly] discharge[d] from [the] point*
26 *source[s].*” *United States v. Allegan Metal Finishing Co.*, 896 F. Supp. 275, 280-81
27 (W.D. Mich. 1988) (emphasis in original); *accord United States v. Dean*, 969 F.2d
28 187, 194 (6th Cir. 1992) (similar); *see also Humboldt Baykeeper v. Union Pacific*
Railroad Co., 2006 WL 3411877, *6 (N.D. Cal. 2006). As EPA has explained, the
RCRA “industrial discharge” exclusion does not apply to wastes “while they are
being collected, stored, or treated before discharge.” 40 C.F.R. § 261.4(a)(2), cmt.
Thus, until a particular paint chip is actually discharged from an SBRF non-
retention vessel, that material is regulated under RCRA and California’s hazardous
waste laws.

1 second disposal option involves transferring a vessel to the Navy to be “basically
2 blown up and sunk” in target practice. PSUF 29. The third of MARAD’s disposal
3 options involves breaking the vessels apart for scrap metal and disposing of the
4 hazardous material. PSUF 31. This is the method by which MARAD expects the
5 “vast majority” of SBRF non-retention ships to will be disposed, since it is “the only
6 viable large scale means of disposing of SBRF non-retention vessels.”¹⁶ PSUF 32.
7 The SBRF non-retention vessels are being moored at Suisun Bay until MARAD
8 figures out how to have them scrapped or sunk.

9 “Solid waste” is defined by the statute to include any “discarded material.” 42
10 U.S.C. § 6903(27). While the statute does not define “discarded,” the ordinary
11 dictionary definition of the term includes “disposed.” *Webster’s Unabridged*
12 *Dictionary* 561 (2d ed. 2001). RCRA defines “disposal” to include “placing of any
13 solid waste . . . into or on any . . . water so that such solid waste . . . or any
14 constituent thereof may enter the environment or be . . . discharged into any waters
15” 42 U.S.C. § 6903(3). MARAD’s management of the SBRF non-retention vessels
16 meets this requirement, for the ships have been “plac[ed]” on the “water so that such
17 solid waste . . . or any constituent thereof may enter the environment or be . . .
18 discharged into any waters.”¹⁷

20 ¹⁶ MARAD has also identified “artificial reefing” as an option for disposal of
21 SBRF non-retention vessels. However, MARAD has not disposed of any SBRF non-
22 retention vessel through artificial reefing since at least 1995 and MARAD is
23 unaware of any interest in artificially reefing SBRF non-retention vessels from the
24 states that would have to sponsor reefing projects. PSUF 30.

25 ¹⁷ EPA’s Subtitle C regulations define “solid waste” more narrowly, to include
26 any material that is “abandoned” by being, among other things, “accumulated [or]
27 stored . . . before being . . . disposed of” 40 C.F.R. § 261.2(a)(1) & (b). This
28 Subtitle C “regulatory” definition of “solid waste” applies only to RCRA’s Subtitle C
hazardous waste program and is narrower than the statutory definition that applies
in other RCRA contexts. *See Military Toxics Project v. E.P.A.*, 146 F. 3d 948, 951
(D.C. Cir. 1998); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.,*
Inc., 989 F. 2d 1305, 1314-15 (2d Cir. 1993). While the regulatory definition is
therefore not dispositive of whether a material is “solid waste” for purposes of the
Subtitle D “open dumping” ban, the regulatory definition is nonetheless informative
precisely because it is narrower than the statutory definition.

1 The SBRF vessels are also “solid waste” under the three-factor test adopted
2 by the Ninth Circuit in *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir.
3 2004). The first factor is whether the material is “destined for beneficial reuse or
4 recycling in a continuous process by the generating industry itself.” *Id.* at 1043.
5 MARAD is not reusing or recycling the ships in a continuous process by the
6 maritime transportation industry itself. Rather, in recent years, MARAD has paid
7 scrappers to take the vessels off its hands to be broken for scrap metal. PSUF 24.

8 The second *Safe Air* factor is whether the material is “being actively reused,”
9 or instead “merely [has] the *potential* of being reused.” *Id.* (emphasis in original).
10 SBRF non-retention vessels are not being actively reused. MARAD’s admitted goal
11 “has been to get rid of these ships as fast as possible.” PSUF 33.

12 The third *Safe Air* factor is whether the material is “being reused by its
13 original owner, as opposed to use by a salvager or reclaimer.” *Id.* The SBRF non-
14 retention vessels fail this test as well. In the past five years, thirteen of the fourteen
15 ships MARAD disposed were removed from the SBRF when MARAD paid for the
16 ships to be scrapped. PSUF 24. The only other means by which MARAD has
17 disposed of an SBRF non-retention vessel during that period was by having the
18 vessel transferred to the Navy to be “blown up and sunk.” PSFU 24, 29.

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25 Under EPA’s regulatory definition, a material is a “solid waste” for purposes
26 of Subtitle C regulation if it is “accumulated [or] stored . . . before being . . . disposed
27 of.” A waste that meets this definition must necessarily also be a solid waste for
28 purposes of RCRA’s broader statutory definition, which applies to Subtitle D.
Because MARAD’s own testimony establishes that SBRF non-retention vessels are
being “accumulated [or] stored” before being scrapped, sunk, or otherwise disposed,
the SBRF non-retention vessels would be deemed “discarded” under EPA’s Subtitle
C regulatory definition of “solid waste.”

1 **b. MARAD’s Mismanagement of the SBRF in Violation of**
2 **the Minimum Federal Criteria for Sanitary Landfills**
3 **Violates RCRA Subtitle D’s Open Dumping Ban**

4 Section 4004(a) of RCRA directs EPA to promulgate “regulations containing
5 criteria for determining which facilities shall be classified as . . . open dumps.”¹⁸ 42
6 U.S.C. § 6944(a). EPA’s has promulgated such criteria. One of these criteria
7 provides:

8 For purposes of Section 4004(a) of the Act, a facility shall not cause a
9 discharge of pollutants into waters of the United States that is in
10 violation of the requirements of the National Pollutant Discharge
11 Elimination System (NPDES) under Section 402 of the Clean Water
12 Act, as amended.

13 40 C.F.R. § 257.3-3 (citing 33 U.S.C. §§ 1251 et seq.); *see also* 40 C.F.R. § 257.1(a)
14 (defining a practice that fails to meet the requirements of 40 C.F.R. § 257.3-3 as
15 “open dumping.”).

16 Section 4005(a) of RCRA, in turn, provides that “any solid waste or hazardous
17 waste management practice or disposal of solid waste or hazardous waste which
18 constitutes open dumping of solid waste or hazardous waste is prohibited.” 42
19 U.S.C. § 6945(a). Section 4005(a) specifically states that this prohibition “shall be
20 enforceable under” RCRA’s citizen suit authority, 42 U.S.C. § 6972.

21 As discussed below, the non-retention vessels of the SBRF have been
22 violating and continue to violate Clean Water Act section 402’s prohibition on
23 unpermitted discharges. *See infra*, at IV.D. The ships are illegally discharging
24 pollutants and will likely continue do so indefinitely unless and until the vessels are
25 – as Congress intended – finally removed.

26 Proof of a NPDES violation at a disposal site “ipso facto establishes a
27 violation of the surface water criterion of RCRA,” and, therefore, a violation of
28 RCRA’s open-dumping prohibition that is enforceable in a citizen suit. *Dague v. City*

29 ¹⁸ Section 1004(14) of RCRA, 42 U.S.C. § 6903(14), defines an “open dump” as
30 “any facility or site where solid waste is disposed of” that is neither a sanitary
31 landfill meeting EPA’s regulatory criteria for disposal of solid waste, nor a
32 hazardous waste disposal facility.

1 *of Burlington*, 732 F. Supp. 458, 467 (D. Vt. 1989), *aff'd*, 935 F.2d 1343 (2d Cir.
2 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992); *see also O'Leary v.*
3 *Moyer's Landfill, Inc.*, 523 F. Supp 642, 655 (E.D. Pa. 1981) (holding that a disposal
4 site that violated this criterion was thus necessarily in violation of the open-
5 dumping prohibition of RCRA 4005(a) and subject to citizen suit enforcement); *No*
6 *Damaging Or Unsightly Mun. Pollution, Inc. v. County of King*, No. C82-186V, 1986
7 WL 12088, at *5, *7 (W.D. Wash. Mar. 26, 1986) (finding that a citizens group that
8 showed unpermitted discharges at local landfill in violation of 40 C.F.R. § 257.3-3
9 was entitled to injunctive relief). MARAD's management of the SBRF non-retention
10 vessels violates this standard and therefore constitutes open dumping.

11 Because there is no genuine dispute that the SBRF non-retention vessels
12 have been causing these unpermitted discharges in violation of 40 C.F.R. § 257.3-3,
13 Plaintiffs are entitled to summary judgment as to MARAD's liability under RCRA's
14 open-dumping prohibition.¹⁹

15 **D. MARAD IS ILLEGALLY DISCHARGING PAINT AND OTHER**
16 **POLLUTANTS TO SUISUN BAY IN VIOLATION OF THE CLEAN**
17 **WATER ACT**

18 Plaintiffs adopt the California Regional Water Quality Control Board's
19 argument that Defendants have discharged and continue to discharge paint and
20 other pollutants to Suisun Bay in violation of the Clean Water Act.

21 A claim for violation of the Clean Water Act's prohibition on unpermitted
22 discharges has five elements. *Committee to Save Mokelumne River v. East Bay*
23 *Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993); *National Wildlife Fed'n. v.*
24 *Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). There is no genuine dispute as to any

25 ¹⁹ In the preamble to a 1981 Federal Register notice, EPA invoked policy
26 concerns to assert that one of these minimum federal criteria, which Plaintiffs seek
27 to enforce in this litigation, is not enforceable by citizens. 46 Fed. Reg. 47,048,
28 47,050 (Sept. 23, 1981). This preamble language does not defeat Plaintiffs' citizen
suit. Among other reasons this is true, Congress expressly authorized citizen suits
to enforce RCRA Subtitle D's open dumping ban. Congress did not authorize EPA to
pick and choose which aspects of that ban would be enforceable by citizens.

1 of these elements here: MARAD has, by its own concession, (1) “discharged” (2) a
2 “pollutant” (a term defined broadly enough to encompasses paint and debris, *see* 33
3 U.S.C. § 1362(6)) into (3) the indisputably “navigable” waters of Suisun Bay (on
4 which large SBRF vessels navigate); from (4) a “point source” (a term statutorily
5 defined to include “vessels,” *see* 33 U.S.C. § 1362(14)) (5) without a valid permit.
6 PSUF 35, 49, 51, 112, 122, 138-140, 143-146, 154, 159, 167-168. Because undisputed
7 evidence establishes each elements of a Clean Water Act violation, summary
8 judgment should be granted.

9 This conclusion is not altered by MARAD’s last-minute submission of a
10 “notice of intent” to comply with the State’s general permit for the discharge of
11 stormwater associated with industrial activities. PSUF 50. The California Regional
12 Water Quality Control Board, which is charged with implementing and enforcing
13 the Clean Water Act in Suisun Bay, has determined that MARAD is not presently
14 eligible for coverage under the stormwater general permit and has terminated the
15 general permit’s coverage at the SBRF site. PSUF 51, 168. MARAD’s “notice of
16 intent” was therefore ineffective.

17 Even if the stormwater general permit applied to the SBRF site, however,
18 that permit does not authorize non-stormwater discharges. The permit specifically
19 states that unauthorized non-stormwater discharges must be permitted under a
20 different permit.²⁰ MARAD admits that such non-stormwater discharges have
21 occurred and are continuing to occur when paint falls off vessel hulls and, in winds,
22 blows of vessel decks. PSUF 140, 143, 144.

23 This claim would not be moot, however, even if MARAD’s “notice of intent”
24 were effective and even if the stormwater general permit covered MARAD’s ongoing
25 non-stormwater discharges. The relief Plaintiffs seek would redress the threat of
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27 ²⁰ The stormwater general permit may be found on California’s website, at
28 http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/induspmt.pdf. The
requirement to obtain “a separate NPDES permit” for unauthorized non-
stormwater discharges is found at Discharge Prohibition A.1 (page 3 of the permit).

1 future injury to Plaintiffs and their members from future violations of the Clean
2 Water Act and of the stormwater general permit. A long and unquestioned line of
3 case has made clear that there is a presumption of such future injury, sufficient for
4 Article III jurisdiction, where a defendant has voluntarily ceased illegal activity in
5 response to litigation. Such a voluntary cessation generally “does not deprive the
6 tribunal of power to hear and determine the case.” *United States v. W.T. Grant Co.*,
7 345 U.S. 629, 632 (1953); *accord Laidlaw*, 528 U.S. at 189; *City of Mesquite v.*
8 *Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982); *United States v. Concentrated*
9 *Phosphate Export Ass’n*, 393 U.S. 199, 203 (1968). While voluntary cessation of
10 illegal activity might terminate the litigation if MARAD could carry its burden that
11 “subsequent events [make] absolutely clear that the alleged wrongful behavior could
12 not reasonably be expected to recur.” *Concentrated Phosphate*, 393 U.S. at 203.
13 MARAD has made no such showing. Nor could MARAD do so, given its long history
14 of knowingly discharging and storing hazardous paint waste, in violation of the
15 Clean Water Act and RCRA, and MARAD’s decade-long recalcitrance and
16 continuing disregard for the Regional Water Board enforcement authority.

17 V. CONCLUSION

18 For these reasons, Plaintiffs respectfully request that this Court enter
19 summary judgment on Defendants’ liability under Plaintiffs’ Fifth, Sixth, and
20 Seventh Claims. In the alternative, Plaintiffs respectfully request the Court to
21 summarily adjudicate undisputed facts to narrow the issues for trial.

22 September 14, 2009

Respectfully submitted,

23
24 /s/ Michael E. Wall

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- DECLARATION OF MIRIAM ROTKIN-ELLMAN, MPH IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OF LIABILITY
- DECLARATION OF MICHAEL E. WALL IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OF LIABILITY ON CLAIMS 5, 6, AND 7
- DECLARATION OF UBALDO FERNANDEZ IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OF LIABILITY

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