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THE GHOULS THAT WON'T GO AWAY—THE DIRE ENVIRONMENTAL CONSEQUENCES POSED BY THE GHOST FLEET IN THE JAMES RIVER

L. CHRISTOPHER NOLAND*

INTRODUCTION

Just off the banks of the James River in Newport News, Virginia, lies the bulk of the National Defense Reserve Fleet (“NDRF”), a floating graveyard of old and decaying government ships known as the “Ghost Fleet.”¹ Polychlorinated biphenyls (“PCBs”), asbestos, and nearly thirteen million gallons of oil and fuel fill these decommissioned cargo military support vessels.² The unused and decaying ships are “antique erector sets left out in the rain,” pose a grave environmental threat, and offer terrorists potential targets.³

Hurricane Isabel, like the hurricanes that ravaged Florida in 2004, caused \$3.37 billion worth of damage and left more than 1.6 million customers without power in the Commonwealth of Virginia.⁴ Had one of the vessels in the Ghost Fleet broken free, it

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¹ Bill Coffin, *Risk Reporter: Ghost Fleet Underscores Ship Recycling Hazards*, RISK MGMT. MAG., Dec. 1, 2003, available at <http://rims.org/MGTtemplate.cfm?Section=RMMMagazine&template=Magazine/DisplayMagazines.cfm&AID=2212&ShowArticle=1>.

² Eric M. Weiss, *Ships Anchored in the Past: U.S. ‘Ghost Fleet’ Poses Environmental and Other Dangers*, WASH. POST, Feb. 16, 2003, at C1.

³ *Id.*

⁴ The Free Dictionary, *Hurricane Isabel*, <http://encyclopedia.thefreedictionary.com/Hurricane%20Isabel> (last visited Feb. 10, 2006).

is easy to imagine a scenario in which the devastation would have been far worse.

Two rusty cargo ships anchored side-by-side in the James River Reserve Fleet rip open in a major storm. More than 282,000 gallons of heavy oil, as dark and thick as molasses, pour into the James [River]. Within 48 hours, a black blanket of petroleum washes north onto Jamestown Island, a national landmark. Across the river, the sticky oil laps against an intake pipe that draws cooling water for the Surry nuclear power plant. The spill also rolls south to the tip of Newport News and Portsmouth. Along the way, it soils sandy beaches, state wildlife sanctuaries, a historical park, prime bird and duck habitat, scenic waterfront properties, oyster seed grounds, clam beds, inland creeks and tidal marshes.⁵

In fact, thirty ships in the fleet broke free during Tropical Storm Floyd in 1999, but fortunately, none of these ships leaked.⁶ Nine spills have occurred between 2000 and 2003, however. The largest spill, from the U.S.S. Donner in August of 2000, poured 1,000 gallons of oil into the James River,⁷ and led Virginia's Governor, Mark Warner, to threaten to sue the U.S. Maritime Administration ("MARAD"), a division of the United States Department of Transportation, to have the ships removed.⁸

As a result of these spills, MARAD increased the thoroughness of its hull inspections and ordered the removal of heavy fuel from a few of the worst-offending ships in the fleet.⁹ While Congress has required that MARAD remove and dismantle all of

⁵ Scott Harper, *'Ghost Fleet' Could Unleash Disastrous Spill in a storm*, THE VIRGINIAN-PILOT, April 7, 2002, available at <http://www.hamptonroads.com/pilotonline/special/ghostfleet/part1.html>.

⁶ *Id.*

⁷ Weiss, *supra* note 2.

⁸ Dave Schleck, *Plans Set to Scrap 4 Ships in Ghost Fleet*, DAILY PRESS, Sept. 28, 2004, at C5.

⁹ Harper, *supra* note 5.

the ships by September 30, 2006, a lack of funding will make meeting the deadline difficult.¹⁰ Robert Berry, co-Chief Operating Officer of International Shipbreaking Limited in Brownsville, Texas, said, "[MARAD] waited too long. There's not enough time. I don't think they can put enough money into it to do it as quick as they need."¹¹

By September of 2004, the James River Reserve Fleet ("JRRF") consisted of eighty-three ships. Sixty have been deemed obsolete and must be disposed of while the remaining twenty-three are identified for military and salvage purposes.¹² While the federal government, through MARAD, acknowledges the need to dispose of these ancient vessels to prevent an environmental catastrophe, it is not adequately funding the disposal effort.¹³ In fact:

The Maritime Administration estimates that it would cost \$2.5 million to scrap each of the 136 obsolete vessels moored today at its three national depositories—on the James River; in Beaumont, Texas; and in Suisun Bay, Calif. In 2000, the agency recommended a 14-year disposal program in which competing American shipyards would be paid to handle all the work. Estimated costs ranged between \$666 million and \$1.33 billion, and the program would involve more ships than just the obsolete ones.¹⁴

Even with this recommendation in place, President Clinton appropriated only \$10 million for the effort in his final budget,¹⁵ and President Bush asked for only \$11 million in his first year in office.¹⁶

¹⁰ *Id.*

¹¹ David Lerman, *Money Lacking for Ship Disposal*, DAILY PRESS, Feb. 13, 2004, at A8.

¹² Schleck, *supra* note 8.

¹³ Harper, *supra* note 5.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

Part One of this Note describes the history of the JRRF and explains the progressing and looming crisis in the James River.¹⁷ Part Two of the note includes an analysis, which concludes that the exportation of retired vessels to foreign countries for recycling is environmentally and socially irresponsible.¹⁸ Part Two also examines the Basel Convention and Europe's ban on the exportation of toxic substances.¹⁹ In addition to describing the potential catastrophe of PCBs, oil leaks, or the sinking of a vessel while in transit, this section examines the methods employed by England and other developed nations in salvaging their aged fleets.²⁰ Part Two concludes by examining the lawsuits filed to keep the ships from leaving American waters.²¹ Part Three focuses on the domestic solutions available to this problem.²² In addition to explaining how to dismantle the ships in the United States, this section addresses the funding necessary to pay for the process and offers explanations for why domestic disposal of the ships, has not occurred.²³ The Note concludes that the Commonwealth of Virginia should sue the federal government for immediate removal of these ships, as violations of the Toxic Substances Control Act and the National Maritime Heritage Act of 1994.²⁴

I. HISTORY OF THE JAMES RIVER RESERVE FLEET

The National Defense Reserve Fleet ("NDRF") is called the "Ghost Fleet,"²⁵ "a flotilla of aging and decrepit government ships."²⁶ The Merchant Sales Act of 1946, as amended, created the NDRF,²⁷

¹⁷ See *infra* Part I.

¹⁸ See *infra* Part II.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See *infra* Part III.

²³ *Id.*

²⁴ See *infra* Part IV.

²⁵ Coffin, *supra* note 1.

²⁶ *Id.*

²⁷ See Merchant Ship Sales Act of 1946, Pub. L. No. 79-321, 60 Stat. 41 (1946) (enacted); see also U.S. DEPT OF TRANSP. MAR. ADMIN., TRANSFER OF NATIONAL

managed by MARAD under the direction of the Department of Transportation, to store "inactive but potentially useful"²⁸ government vessels for future use in "help[ing] meet U.S. shipping requirements during a national emergency."²⁹ "The vessels of the JRRF are anchored in an approximately one square mile area on the James River near Fort Eustis. The vessels are anchored together in rows in a bow-to-stern alignment according to type and size."³⁰

At its largest, the Ghost Fleet in the James River included 800 vessels, stretching from Fort Eustis to the James River Bridge.³¹ The 1950s saw the rapid disposal of some ships through sales to local salvage yards, use in Navy target practice, and U.S. Department of Agriculture surplus grain storage.³² By the 1960s, the number of ships decreased to about 300, as local shipyards and salvage operations purchased them at auction and through the use of purchase contracts,³³ presumably to sell the steel for profit. Government regulation eventually curtailed this practice.

The easy turnover changed dramatically in the 1970s with the advent of federal environmental regulations. And as laws governing waste disposal, clean air and water, oil spills and hazardous materials have become stricter and more complicated, the American scrapping industry has lost interest. "It's not cost effective," said Leo Marshall, executive director of the South Tidewater Association of Ship Repairers. "To comply with all the rules and regulations, you can't break even. It's not worth your time and money."³⁴

DEFENSE RESERVE FLEET VESSELS FROM THE JAMES RIVER RESERVE FLEET FOR DISPOSAL AT ABLE UK FACILITIES, TEESSIDE, UK ENVIRONMENTAL ASSESSMENT, at 1 (2004).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 2.

³¹ Harper, *supra* note 5.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

With the decreased profitability of the domestic scrapping business, MARAD sank many of these ships to create artificial reefs.³⁵ The Environmental Protection Agency ("EPA") ended this disposal method, fearing that PCBs "found throughout ship wires and ducts might harm aquatic life."³⁶ Due to the increased regulation, 130 ships slated for scrap were sent instead to other countries (India, Bangladesh, China, Pakistan, and Turkey),³⁷ where scrapping is comparatively less expensive and employee and environmental regulations are greatly relaxed or non-existent.³⁸

As recently as 1990, a representative of MARAD testified that the reserve fleet was created to fill a surge in vessel demand during national emergencies and that the NDRF stood ready to meet these needs.³⁹ Other testimony at the House of Representatives subcommittee hearings contested MARAD's claims about the fleet's readiness.⁴⁰ Congressman William Broomfield of Michigan commented:

Calling a 45-year-old ship, which has not run in 25 of those years, a national defense asset makes as much military sense as reintroducing the horse cavalry. You don't need to be a military or maritime expert to figure this out. But in the dense bureaucratic forest of MARAD things are obviously hard to see.⁴¹

³⁵ *Id.*

³⁶ *Id.*

³⁷ Coffin, *supra* note 1; Harper, *supra* note 5.

³⁸ Coffin, *supra* note 1.

³⁹ *The Ghost Fleet: Utilization of Surplus Ships of the National Defense Reserve Fleet: Hearing Before the Subcomm. on Regulation, Business Opportunities, and Energy of the H. Comm. on Small Business*, 101st Cong. 30 (1990) (statement of Capt. Warren G. Leback, Administrator, MARAD) [hereinafter *Subcomm. on Regulation-Ghost Fleet*, 101st Cong.].

⁴⁰ *Subcomm. on Regulation-Ghost Fleet*, 101st Cong., *supra* note 39.

⁴¹ *Id.* at 3 (statement of Hon. William S. Broomfield, Member, H. Comm. on Small Business).

In fact, the debate in 1990 did not focus on the environmental risk posed by the vessels, but on MARAD's wasteful spending and the assertion that these ships could be used as a national defense tool.⁴²

In 1990, Congress began examining the NDRF and questioning MARAD about the location of their scrapping practices, hoping to use potential changes to MARAD's practices as a way to create jobs for small business in the United States.⁴³ MARAD claimed that budgetary constraints and the federal mandate for the upkeep of the NDRF forced them to either sell obsolete vessels to the highest bidder or use the old ships in a trade for newer vessels.⁴⁴ MARAD's "responsibility to obtain the greatest possible return in order to replenish the reserve fleet"⁴⁵ required it to export for disposal most of the ships deemed obsolete.⁴⁶ The following exchange between Subcommittee Chairman Ron Wyden and MARAD representative Captain Warren Leback detailed MARAD's policy of putting economic gain ahead of environmental safety:

Chairman WYDEN. But the point is, virtually everyone who is familiar with the program acknowledges that there are serious environmental problems, serious questions of health and safety for those workers who are exposed to these materials [from scraping the NDRF].

Now because of the program that you run these materials go to foreign yards. Are you concerned about foreign workers being exposed to environmental and health hazards?

⁴² See *id.* at 2-3.

⁴³ *Id.* at 2 (statement of Hon. Ron Wyden, Chairman, Subcomm. on Regulation, Business Opportunities, and Energy, H. Comm. on Small Business). Wyden went on to say "[the ships] ought to be finished off in a way that will increase business activity and provide new jobs to our struggling American salvage companies." *Id.*

⁴⁴ *Id.* at 29-31.

⁴⁵ *Id.* at 33; see also *id.* at 30.

⁴⁶ *Id.* at 29-31.

Cpt. LEBACK. I think I would be concerned about anyone being exposed to that.

Chairman WYDEN. But not enough to try to change it? Are you recommending changes?

Cpt. LEBACK. I didn't say that, no.

Chairman WYDEN. What is the agency [MARAD] policy? Is the agency policy to ship everything overseas no matter what kind of environmental hazard?

Cpt. LEBACK. The agency policy is to obtain the greatest return on the sale of the asset for the Federal Government.⁴⁷

Exporting the retired vessels brought a small profit to the United States, but the procedure was shut down in 1994 due to questionable environmental and working conditions in the salvage yards of India, Bangladesh, and China.⁴⁸ The decaying ships have since accumulated in the James River, with the total number doubling between 1998 and 2003.⁴⁹ Governor Warner labeled the resulting situation "somewhat ironic"⁵⁰ in articulating the need to respect international environmental concerns and standards while also protecting the James River and Virginia's ecosystem.⁵¹ Congresswoman Jo Ann Davis, with the aid of Senator John Warner, secured \$20 million for the removal of a few of the ships from the Ghost Fleet in the 2002 Department of Defense Appropriations Bill.⁵² These funds only removed *some* of the worst-offending ships, and the remaining NDRF vessels in the James River contain close to thirteen million gallons of unspent oil and fuel, nearly two million more gallons than released in the Exxon Valdez's catastrophic spill.⁵³

⁴⁷ *Id.* at 46.

⁴⁸ Weiss, *supra* note 2.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² GLOBALSECURITY.ORG, *Military, James River VA*, <http://www.globalsecurity.org/military/facility/james-river.htm> (last visited Feb. 10, 2006).

⁵³ Weiss, *supra* note 2.

II. EXPORTATION OF RETIRED VESSELS

Prior to 1994, and before they deteriorated and posed an environmental hazard, MARAD exported a number of ships to the highest bidder. This was possible due to the small profit that foreign boat yards and the federal government could earn in the recycling process.⁵⁴ In fact, between 1987 and 1994, MARAD sold 130 ships overseas⁵⁵ and earned an average of \$600,000 per vessel.⁵⁶ Following the federal prohibition on the exportation of PCBs and because of worker safety issues in these locations, all foreign ship sales ceased in 1995.⁵⁷ The backlog of decaying ships began to mount due to the limited capacity of domestic firms to scrap these vessels and meet the technical specifications of "environmental [protection], worker health and [worker] safety issues"⁵⁸ required by MARAD. Bonnie Green, Deputy Administrator at MARAD, stated on May 24, 2000, that "[f]our bidders have satisfied the requirements of MARAD's technical review since 1997, and only nine of the 22 ships sold domestically during that time have actually been removed from the fleet sites. Three of these vessels sold for \$10 each."⁵⁹ Due to the risks posed to foreign workers and a lack of environmental safeguards in foreign countries, exporting the problem is not a responsible alternative.⁶⁰

⁵⁴ *Id.*; see also U.S. DEPT OF TRANSP. MAR. ADMIN., *supra* note 27, at 5.

⁵⁵ Coffin, *supra* note 1; see also *Disposal of Obsolete Maritime Administration Vessels: Hearing Before the Subcomm. on Coast Guard and Maritime Transportation of the H. Comm. on Transportation and Infrastructure*, 106th Cong. 5-6 (2000) (statement of Bonnie M. Green, Deputy Administrator for Inland Waterways and Great Lakes, MARAD) [hereinafter *Disposal of Obsolete Vessels*, 106th Cong.].

⁵⁶ *Disposal of Obsolete Vessels*, 106th Cong. (statement of Bonnie M. Green).

⁵⁷ U.S. DEPT OF TRANSP. MAR. ADMIN., *supra* note 27, at 5.

⁵⁸ *Disposal of Obsolete Vessels*, 106th Cong., *supra* note 55, at 6 (statement of Bonnie M. Green).

⁵⁹ *Id.*

⁶⁰ *Id.* at 4 (statement of Hon. Brian Baird). Congressman Baird further noted: "I don't think the United States wants an international reputation that we pass our garbage and toxic waste to other countries. I don't think we want to say that we are going to save our taxpayers' dollars by having foreign workers risk their lives disposing of our ships." *Id.*

The domestic ship recycling business was founded on the concept that the price gained for the scrap would exceed the purchase of the vessel and costs to dismantle the ship.⁶¹ This model ceased to work in 1994, however, and the federal government now finds itself having to pay for recycling services.⁶² With an end to overseas ships sales, MARAD's William Shubert testified to a Congressional subcommittee that "MARAD turned exclusively to the domestic market to sell ships for dismantling. However, only a few domestic facilities expressed an interest in purchasing vessels for dismantling."⁶³ The problems in the domestic scrapping industry started in the 1980s and were exacerbated due to: (1) a "dearth of available [government] ships"⁶⁴ being recycled in the 1980s, (2) "[t]he discovery of PCBs in nonmetallic materials in Navy [vessels]"⁶⁵ and the resulting compliance with "stringent [Environmental Protection Agency] regulations found at 40 CFR 761,"⁶⁶ (3) the increased scrutiny from state and federal monitors to protect worker and environmental safety,⁶⁷ and (4) the "erratic and . . . low"⁶⁸ value of scrap metal in recent years.⁶⁹ The scarcity of ships led to the demise of the domestic industry. Lloyd's register of shipping reports that only 141 of the 7,235 ships recycled globally in the 1990s were from the United States, forty-five of which were MARAD vessels.⁷⁰ In 2001, writers described the domestic industry as follows: "All together, costs are up, profits are

⁶¹ RONALD W. HESS ET AL., DISPOSAL OPTIONS FOR SHIPS 15 (2001).

⁶² *Id.*

⁶³ *Disposal of Obsolete Government Vessels: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine of the S. Comm. on Commerce, Science and Transportation*, 108th Cong. (2003), available at <http://www.marad.dot.gov/Headlines/speeches/2003/7july03.htm> [hereinafter *Disposal of Obsolete Vessels*, 108th Cong.].

⁶⁴ HESS ET AL., *supra* note 61, at 17.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 18.

⁶⁸ *Id.*

⁶⁹ HESS ET AL., *supra* note 61, at 18.

⁷⁰ *Id.*

down, and the industry, under the old paradigm, appears unable to make money in the United States.”⁷¹

In response to the increasing number of decaying ships in the NDRF, Congress took action in 2000 by amending the National Maritime Heritage Act (“NMHA”) of 1994 to include disposal of particular vessels of the NDRF by September 30, 2006.⁷² Applicable vessels include those that “(A) are not assigned to the Ready Reserve Force component of that fleet; and (B) are not specifically authorized or required by statute to be used for a particular purpose.”⁷³ This amendment to the NMHA also provides a set of metrics to use in selecting the scrapping facilities.⁷⁴ The directives in the legislation for choosing scrapping facilities are contradictory and highlight the government’s divergent and mutually exclusive aims.⁷⁵ Simply put, this legislation does not provide the guidance to reconcile scrapping these ships at the least cost to the government,

⁷¹ *Id.*

⁷² National Maritime Heritage Act of 1994, Pub. L. No. 103-451, 108 Stat. 4769 (1994) (enacted).

⁷³ *Id.*

⁷⁴ *Id.*

(b) Selection of Scrapping Facilities—The Secretary of Transportation may scrap obsolete vessels pursuant to section 6(c)(1) of the National Maritime Heritage Act of 1994 (16 U.S.C. 5405(c)(1)) through qualified scrapping facilities, using the most expeditious scrapping methodology and location practicable. Scrapping facilities shall be selected under that section on a best value basis consistent with the Federal Acquisition Regulation, as in effect on the date of the enactment of this Act, without any predisposition toward foreign or domestic facilities taking into consideration, among other things, the ability of the facility to scrap vessels—

- (1) at least cost to the Government;
- (2) in a timely manner;
- (3) giving consideration to worker safety and the environment; and
- (4) in a manner that minimized the geographic distance that a vessel must be towed when towing a vessel poses a serious threat to the environment.

16 U.S.C.S. § 5405 (LexisNexis 2005).

⁷⁵ *See id.*

with consideration of worker and environmental safety, and moving them the shortest possible distance. The language of the statute specifically precludes "any predisposition toward foreign or domestic facilities,"⁷⁶ but Congress was aware of the dangers the toxin-laden vessels posed to foreign environments.⁷⁷ Additionally, vessel exportation would "violate[] the Toxic Substances Control Act, which bans the export of PCBs with rare exceptions."⁷⁸ This legislation provides no explicit guidance for MARAD, as it is internally contradictory.

Using the \$10 million appropriated for the task in fiscal year 2001, MARAD dismantled six of the vessels domestically, but quickly recognized that both the funding and capacity of the domestic scrapping industry was insufficient to meet the Congressional order.⁷⁹ "The high costs and limited cost-effective capacity of the domestic ship dismantling industry made it necessary to consider the disposal of obsolete ships at qualified foreign facilities in addition to considering other disposal options such as artificial reefing and deep sinking of ships through a Navy program."⁸⁰ The domestic industry is not as cost-effective as foreign providers due to the high standard of environmental and worker protection in the

⁷⁶ *Id.*

⁷⁷ See *Disposal of Obsolete Vessels*, 106th Cong., *supra* note 55, at 9 (statement of Thomas J. Howard, Dep't of Transp. Inspector General's Office). Mr. Howard further elaborated that

environmental dangers associated with these old, deteriorating ships are increasing daily. The so-called "worst condition" ships average 50 years old and have been awaiting disposal for 22 years on average. The ships contain hazardous materials such as polychlorinated biphenyls (PCBs), asbestos, lead-based paint and fuel oil. Some have deteriorated to the point where a hammer can penetrate their hulls. If the oil from these ships were to leak into the water, immediate and potentially expensive Federal and State action would be required.

Id.

⁷⁸ David Lerman, *Court Hears 'Ghost Ship' Disposal Case Debate*, DAILY PRESS, Oct. 16, 2004, at C3.

⁷⁹ U.S. DEPT OF TRANSP. MAR. ADMIN., *supra* note 27, at 6.

⁸⁰ *Id.* (citation omitted).

United States. It is irresponsible for the government to ship this problem to offshore firms that can offer cheaper disposal rates at the expense of employee health and environmental safety.

A. *The Basel Convention*

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposals ("Basel Convention") came about in the 1980s in response to increasing environmental scrutiny of the need for industrialized nations to dispose of their toxic waste.⁸¹ The Basel Convention introduced the Basel Ban in 1989, with the intent of preventing developed countries from shipping their hazardous wastes to Antarctica for disposal.⁸² It was amended so that "[t]he Basel Ban decision effectively banned as of 1 January 1998, all forms of hazardous waste exports from the 29 wealthiest most industrialized countries of the Organization of Economic Cooperation and Development (OECD) to all non-OECD countries."⁸³ The primary objective of the Basel Convention is to minimize the quantity and hazard levels of materials produced, to dispose of these substances as close as possible to their point of production, and to prevent the movement of such wastes from one country to another.⁸⁴ A study published by the OECD in 2000 explained the logic of the Basel Ban in this way:

By raising the costs of disposing of wastes, firms face an incentive to produce less wastes, or produce wastes that are less hazardous to handle, through cleaner production processes for example. The same

⁸¹ Secretariat of the Basel Convention, *Origins of the Convention*, <http://www.basel.int/pub/basics.html> (last visited Feb. 10, 2006); Secretariat of the Basel Convention, *Frequently Asked Questions*, <http://www.basel.int/pub/basics.html> (last visited Feb. 10, 2006).

⁸² Secretariat of the Basel Convention, *Frequently Asked Questions*, <http://www.basel.int/pub/basics.html> (last visited Feb. 10, 2006).

⁸³ BASEL ACTION NETWORK, *What is the Basel Ban?*, http://www.ban.org/about_basel_ban/what_is_basel_ban.html (last visited Feb. 10, 2006).

⁸⁴ See *Frequently Asked Questions*, *supra* note 81.

logic can be extended to restrictions on transfrontier waste movements: restricting access to one more of the alternative disposal options increases the pressure for waste generation in industrialized countries to be minimized at its source.⁸⁵

More than 100 nations adopted "the 1995 Basel Ban amendment prohibiting the export of hazardous wastes from OECD to non-OECD countries."⁸⁶ The United States, Australia, Canada, and New Zealand led the charge to defeat the ban⁸⁷ and remain non-signatories to the convention. "[I]n order for the amendment to enter the force of [international] law[,] it will need to be ratified by 62 [sic] of the Basel Parties."⁸⁸ Sixty-one of the Basel Parties have ratified the ban, including the United Kingdom, France, Germany, and the European Community.⁸⁹ Basel Ban opponents have argued that "developing countries might . . . want hazardous wastes as a cheap source of metals that can be obtained through recycling rather than . . . extraction."⁹⁰ It was reported, however, that "[i]n almost every case where this claim is made, a true costing of the long-term impacts of pollution and health impacts in the recipient country reveals the scheme to be a poor bargain for the country importing the hazardous waste."⁹¹ The opposing countries also do not like the way the ban splits the world

⁸⁵ BASEL ACTION NETWORK, *The Basel Ban Amendment: The First Step Toward Environmentally Sound Management of Hazardous Wastes* (Apr. 2000) (citation omitted), available at http://www.ban.org/about_basel_ban/esmban2.html.

⁸⁶ GREENPEACE.ORG, *Basel Ban: "Countries Reaffirm Their Commitment to Stop Waste Trade"*, Feb. 27, 1998, available at http://archive.greenpeace.org/press_releases/toxics/1998feb27.html.

⁸⁷ *Id.*

⁸⁸ BASEL ACTION NETWORK, *supra* note 83. Basel parties refer to the 82 nations present at the Third Conference of the Parties. Three-fourths of those present, or sixty-two parties, are needed for ratification.

⁸⁹ *Id.*

⁹⁰ Jim Puckett, *The Basel Treaty's Ban on Hazardous Waste Exports: An Unfinished Success Story*, 23 INT'L ENVTL. REP. 984 (2000), available at <http://www.ban.org/Library/ierarticle.html> (last visited Feb. 10, 2006).

⁹¹ *Id.*

into two classes: either OECD or non-OECD countries.⁹² No classification system is perfect, but when the OECD countries produce an estimated ninety percent of the world's waste, these countries should take responsibility for "minimizing them at the source."⁹³

Although the United States did not adopt the Basel Convention, it previously passed a law to monitor hazardous materials.⁹⁴ Congress adopted the Toxic Substances Control Act in 1976 in order to allow the EPA "to track the 75,000 industrial chemicals currently produced or imported into the United States."⁹⁵ The law in part reads:

(a) Scope of regulation. If the Administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment, the Administrator shall by rule apply one or more of the following requirements to such substance or mixture to the extent necessary to protect adequately against such risk using the least burdensome requirements:

...

(6)(A) A requirement prohibiting or otherwise regulating any manner or method of disposal of such substance or mixture, or of any article containing such substance or mixture, by its manufacturer or processor or by any other person who uses, or disposes of, it for commercial purposes.⁹⁶

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See Toxic Substances Control Act, 15 U.S.C.A. §§ 2601-2629 (West 1976).

⁹⁵ U.S. Environmental Protection Agency, *Toxic Substances Control Act*, <http://www.epa.gov/region5/defs/html/tsca.htm> (last visited Feb. 10, 2006).

⁹⁶ See 15 U.S.C.S. § 2605 (LexisNexis 2005).

Under TSCA, the EPA determines the proper disposal of PCBs and other hazardous wastes. TSCA also outlaws the manufacture of PCBs after 1979: "[N]o person may manufacture any polychlorinated biphenyl after two years after the effective date of this Act [January 1, 1977], and . . . no person may process or distribute in commerce any polychlorinated biphenyl after two and one-half years after such date."⁹⁷ TSCA, therefore, dictates that MARAD could not export PCBs from the Ghost Fleet vessels unless the EPA Administrator, upon petition, finds that "an unreasonable risk of injury to health or environment would not result."⁹⁸

The TSCA's prohibitions on the manufacture and disposal of PCBs forced MARAD to petition the EPA in order to dispose of the vessels and the toxins contained within.⁹⁹ Although John Peter Suarez, Assistant Administrator for the EPA, admitted that "[m]ost of the obsolete NDRF vessels contain PCBs in concentrations above 50 ppm [parts per million], [and] therefore their export for scrapping may constitute a violation of TSCA,"¹⁰⁰ the EPA granted MARAD's 2003 request to export these ships from the James River.¹⁰¹ This move supercedes the EPA's 1997 decision to not allow the export of these ships for scrapping.¹⁰²

The new letter does require MARAD to remove all liquid PCBs and readily available non-liquid PCBs prior to moving any ships.¹⁰³ Even with the mandated PCBs removed, however, an estimated 100 tons of non-readily removable PCBs still remain on the thirteen ships that EPA approved for export.¹⁰⁴ Whether

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Letter from John Peter Suarez, Assistant Administrator for the Office of Enforcement and Compliance Assurance, Environmental Protection Agency, to James E. Caponiti, Associate Administrator for National Security, Maritime Administration (May 22, 2003), *available at* http://www.foe.co.uk/resource/evidence/epa_enforcement_discretion.pdf [hereinafter Letter from Suarez to Caponiti].

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1.

¹⁰² *Id.*

¹⁰³ Letter from Suarez to Caponiti, *supra* note 99, at 5.

¹⁰⁴ BASEL ACTION NETWORK, NEEDLESS RISK: THE BUSH ADMINISTRATION'S SCHEME TO EXPORT TOXIC WASTE SHIPS TO EUROPE 16, n.42 (citing Letter from

the ships stay on the James River or are moved to foreign countries, PCB remnants present a potential disaster wherever these vessels reside.

B. Potential Catastrophe of PCBs and Oil Leaks

Looking for the lowest dismantling price, an insufficient capacity in the domestic ship breaking industry, and an indifference in exporting toxic wastes, MARAD contracted with Post-Service Remediation Partners ("PRP") in 2003 to dismantle thirteen of the most decayed ships in the Able UK boatyard at Graythorp on Teesside, with the hazardous wastes going to a nearby landfill.¹⁰⁵ The obvious problem is that the plan requires towing the most fragile vessels 4,000 miles to England from their current location in the James River. This decision makes clear that MARAD considers the towing distance the lowest priority in the calculus of dismantling these vessels. "Towing these particular vessels, particularly in a tandem tow, can pose a very serious threat to the environment, and yet the US [sic] government has opted for a very long towing distance compared to the highly reputable options available to it domestically."¹⁰⁶ Indeed, the 698 tons of PCBs, 1,402 tons of asbestos, and 3,300 tons of fuel oil aboard these ships pose a grave environmental risk, one that increases the further the distance the ships move from their current location.¹⁰⁷

Leaks of on-board PCBs and other toxic substances pose one of the major risks in moving these vessels such long distances. PCBs are "synthesized compounds . . . marketed . . . in electrical equipment, paints and pesticides. . . [They] have several valuable characteristics, including non-flamability, stability, low solubility

Curt J. Michanezyk, Ship Disposal Program Manager of MARAD, to David Fellows, UK Environmental Agency (July 15, 2003)).

¹⁰⁵ Impact, *Able UK and the US Ghost Fleet, Breaking Up the Ghost Fleet—a Factsheet*, <http://www.impact-teesside.org/able1.htm> (last visited Feb. 10, 2006).

¹⁰⁶ NEEDLESS RISK, *supra* note 104, at 13.

¹⁰⁷ *Id.* at 1.

in water, and low electrical conductivity.”¹⁰⁸ MARAD has suggested that non-liquid PCBs do not pose the same risk to the environment as their liquid forms, but

[t]he notion that liquid PCBs pose a greater threat to the marine environment denies the chemical properties of PCBs. They were used and coveted for their propensity not to solidify. When placed into a solid or non-liquid matrix, they still retained that quality and easily leach out into the environment.¹⁰⁹

PCBs separate from water, attach to the sediment at the bottom of a water body, and can push the contamination up the food chain through bottom feeders and other aquatic life.¹¹⁰

One of the most unsettling aspects of PCB contamination is that through the process of bioaccumulation, the chemicals become more toxic as they move up the food chain.¹¹¹ Extended exposure to these agents in humans can lead to cancer, reproductive failures, and hormone imbalances.¹¹² The EPA suggests that parental exposure to PCBs can lead to problems in their children, including learning disabilities, hyperactivity, low birth weight and reduced immunity to fight infections.¹¹³ Uncertainty exists about how much PCB exposure is necessary to incur these health risks, but when evaluating the impact of General Electric's release of PCBs into the Hudson River, the EPA found that “people who eat fish from the Upper Hudson River once a week face the risk of one additional

¹⁰⁸ Lauren MacLanahan, Note, *Polychlorinated Biphenyls and the “Mega Rule”*: Will it Have the Mega-Impact the EPA Desired?, 24 WM. & MARY ENVTL. L. & POL'Y REV. 345 (2000) (citations omitted).

¹⁰⁹ NEEDLESS RISK, *supra* note 104, at 24.

¹¹⁰ ExttoxNet FAQs, PCB Contamination of Food, <http://exttoxnet.orst.edu/faqs/foodcon/pcb.htm> (last visited Feb. 10, 2006).

¹¹¹ Eric Claudio, Comment, *How the EPA May Be Selling General Electric Down the River: A Law and Economics Analysis fo the \$460 Million Hudson River Clean Up Plan*, 13 FORDHAM ENVTL. L.J. 409, 411 (2002).

¹¹² ExttoxNet FAQs, *supra* note 110.

¹¹³ NEEDLESS RISK, *supra* note 104, at 39 (citing Clearwater Fact Sheet 12, What are the Human Health Effects of PCBs, available at www.clearwater.org).

case of cancer for every 1,000 people, which is unacceptable under Superfund's tolerated risk of 1 in 10,000."¹¹⁴

It is difficult to estimate the devastation from the release of PCBs if one of the Ghost Fleet were to sink because the vessel(s) could sink in the James River, or in another body of water during transit. If not removed from the James River and properly dismantled, the devastating impact of PCB contamination in our fisheries is well documented.¹¹⁵ Contaminated fish pose the greatest risk of PCB exposure to humans, but exposure through contaminated drinking water and PCB releases in the air can also occur.¹¹⁶

There is great debate about the most effective clean-up method once contamination occurs. One solution offered for the Hudson River clean-up involved using the cutterhead suction dredge, a method designed to remove contaminated sediments while decreasing the risk of sediment resuspension in the water column.¹¹⁷ The PCBs can be separated from the removed sediment or destroyed by breaking apart the molecules.¹¹⁸ Dr. Dick Luthy, a professor at Stanford University, does not endorse dredging technology because "[i]f you dredge, you basically destroy the habitat."¹¹⁹ Another method to handle PCB contamination is capping, where clean sediment is placed on top of contaminated soil.¹²⁰ Dr. Luthy favors a process called Aquamog, which "us[es] a giant floating rototiller . . . [to mix] activated carbon"¹²¹ with the

¹¹⁴ Claudio, *supra* note 111, at 435.

¹¹⁵ See, e.g., U.S. Env'tl Prot. Agency, Sheboygan River Area of Concern, <http://www.epa.gov/glnpo/aoc/sheboygan.html> (last visited Mar. 9, 2006).

¹¹⁶ Clearwater Fact Sheet 8, *PCB Contamination of the Hudson—Is Dredging an Appropriate Cleanup Strategy?*, <http://www.clearwater.org/news/fs8.html> (last visited Feb. 10, 2006).

¹¹⁷ *Id.*

¹¹⁸ *Id.* (stating that "separation technologies . . . remove PCBs from sediments to produce a smaller volume of more concentrated PCBs[,] and destruction technologies . . . break apart PCB molecules").

¹¹⁹ Amit Asaravala, *Cleaning Up After Ourselves*, WIRED NEWS, Sept. 3, 2004, available at <http://www.wired.com/news/technology/0,1282,64832,00.html> (quoting Dr. Dick Luthy, Stanford Professor).

¹²⁰ *Id.*

¹²¹ *Id.*

PCBs, so that the PCBs will be "less likely to accumulate in [living organisms]." ¹²² No clean-up method can eradicate all PCB contamination, and the best course of action is prevention—these ships out from the water and have them dismantled before the chemicals can do any damage to our waterways.

The unspent oil in the Ghost Fleet poses a significant threat to the environment from a spill, or if one of the vessels sinks. "Scientists studying the aftermath of the [*Exxon*] *Valdez* spill discovered that the environmental devastation caused by an oil spill of that magnitude lasts much longer than previously thought . . . [a]nd . . . that toxic compounds found in oil can adversely affect marine species even at very low concentrations." ¹²³ Buried and subsurface oil that remains after a spill poses a greater long term danger because of the difficulty of removing unseen deposits and because these pockets of oil may appear after storms, animal disruptions, or any disturbance event. ¹²⁴ Even after the clean-up efforts in Prince William Sound from the *Valdez* spill, a 2001 study by the National Oceanic and Atmospheric Administration found that oil remained at fifty-eight percent of the sites. ¹²⁵ In fact, 5,800 meters of the 8,000 meters of shoreline were still contaminated twelve years later. ¹²⁶ One of the lessons learned from studying the *Valdez* spill is that

natural resource restoration as a concept is much easier to deal with than restoration in practice. The complexities of the natural environment, the diverse interests and priorities of concerned constituencies, and the number of trustee agencies each with a differing mission, make restoration in the real world

¹²² *Id.*

¹²³ Bill Kearny, *The Myriad Sources of Oil in the Sea*, 2 NAT'L ACADS. IN FOCUS 16, 17 (Summer/Fall 2002), available at <http://infocusmagazine.org/portable/2.2.pdf> (last visited Feb. 10, 2006).

¹²⁴ *Exxon Valdez* Oil Spill Trustee Council, *Lingering Oil*, <http://www.evostc.state.ak.us/Habitat/lingering.htm> (last visited Mar. 9, 2006).

¹²⁵ *Id.*

¹²⁶ *Id.*

an incredibly difficult matter. In many instances, proposed restoration strategies must be designed and implemented with unproven methods, technology, and ecological theory. Thus, the science of planning, implementing, and monitoring the success of restoration is both expensive and inexact, pointing to the need for restoration research and planning in a broad ecosystem context.¹²⁷

Another major risk to MARAD's proposed move of the NDRF vessels is that the transport is greatly under-insured.¹²⁸ In fact, "the amount of insurance for Pollution (sudden and accidental liability) will be at \$5 million per occurrence,"¹²⁹ which is grossly inadequate considering that "MARAD's own worst-case scenario for a spill in the James River from the JRRF fleet would entail damages of \$123 million dollars [sic]."¹³⁰ Additionally, two domestic salvage firms satisfactory to MARAD placed bids lower for the same thirteen vessels than did PRP/Able UK, which ultimately secured the contract.¹³¹ ISL, located in Brownsville, Texas, submitted a bid that was \$4.9 million lower.¹³² Had that bid been accepted, it would have decreased the towing distance by 3,400 nautical miles.¹³³ MARAD might have avoided the open sea tow altogether and saved almost \$500,000 by selecting Bay Bridge Enterprises, LLC, a company in Chesapeake, Virginia.¹³⁴ This record illustrates the government's desire to export our waste at the expense of creating jobs domestically and potentially contaminating foreign environments.

¹²⁷ Grayson Reed Cecil & Nancy Foster, *Natural Resource Injury at Oil Spills: A New Approach*, 45 BAYLOR L. REV. 423, 426 (1993).

¹²⁸ BASEL ACTION NETWORK, *supra* note 104, at 12.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ BASEL ACTION NETWORK, *supra* note 104, at 15.

¹³² *Id.*

¹³³ *Id.* (the towing distance to Texas of 1,428 nautical miles subtracted from the 4,829 nautical miles distance to the U.K.).

¹³⁴ *Id.*

C. *Methods Employed by England and Other Developed Nations in Salvaging Their Fleets*

Understanding the scope and context of the United States' problems in recycling their aged fleets requires an examination of how other developed nations dispose of their ships, particularly since other countries do not support the exportation of toxic wastes. The ship breaking needs of Britain, France, and Germany are substantially different from those of the United States. The European navies supply a minuscule number of ships to the ship recycling industry, because the European fleets are so small relative to the United States.

Together [European navies] deploy only six small aircraft carriers, including four VSTOL/helicopter carriers, compared to the U.S. active inventory of 12 very large aircraft carriers. European members of NATO operate a total of 225 principal surface combatants (frigates or larger warships); the U.S. inventory is 130. Thus, the individual European navies simply lack the raw numbers in terms of ships and tonnage to contribute much to the international supply of ships for recycling.¹³⁵

As a result of this reduced supply, the European navies often sell their ships to developing countries' navies and escape the ship scrapping duty by passing it on to the purchasing country.¹³⁶ In fact, the purchasers, whether a government or private actor, can "dump the ships in India and avoid paying"¹³⁷ the high costs associated with a healthy and environmentally sound dismantling effort.¹³⁸ It has been suggested that the few small European ships

¹³⁵ HESS ET AL., *supra* note 61, at 51.

¹³⁶ *Id.*

¹³⁷ David Lerman, *Fleet Casts Shadow on Ship-Breaking*, DAILY PRESS, Nov. 28, 2004, at A8.

¹³⁸ *Id.*

scrapped by their original owners are indicative of Europe's greater emphasis on environmental matters and efforts to abide by the Basel Convention.¹³⁹ This seems to be a dubious claim, however, as these European nations have not taken an active role in helping developing countries dismantle the ships in a safe and environmentally friendly manner.

In addition to selling their vessels, European nations also reserve some in long term storage, an idea similar to the United States' NDRF, or convert the ships to new functions.¹⁴⁰ The United Kingdom's House of Commons Select Committee on Environment, Food, and Rural Affairs recognized in November 2004 that they were "not aware of any facilities in England and Wales with the full complement of licenses required to recycle defunct vessels."¹⁴¹ In addition to the environmental problems associated with ship recycling, economic evidence indicates a lack of demand for recycled materials among industry in Western Europe. The steel in a vessel is worth \$10 a ton in Europe, compared to a price of \$390 to \$410 a ton in India and Bangladesh.¹⁴² Also, the great fluctuations in the supply of vessels for the recycling industry cannot adequately support a permanent labor force or high fixed costs, pushing the industry to approach less developed countries with a large supply of cheap labor and little need for capital equipment.¹⁴³

Ship recycling exists in seventy-nine countries, but is currently handled primarily in India and Pakistan and supplemented by dismantling efforts in China, Turkey, and Bangladesh.¹⁴⁴ The yards in India, home to the world's largest ship recycling industry,

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Memorandum Submitted by the Maritime and Coastguard Agency: Dismantling of Defunct Ships, The United Kingdom Parliament—House of Commons, Select Committee on Environment, Food, and Rural Affairs (Nov. 11, 2004) ¶ 7, available at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmenvfru/834/834we09.htm> (last visited Feb. 10, 2006) [hereinafter Memorandum on Dismantling of Defunct Ships].

¹⁴² *Id.* ¶ 12.

¹⁴³ HESS ET AL., *supra* note 61, at 42.

¹⁴⁴ *Id.*

recycled forty-one percent of the world's ships in 1998 due in part to the fact that labor only accounts for six percent of the expense in dismantling a ship.¹⁴⁵ The following account made by an Indian consulting firm illustrates the environmental impacts of recycling a merchant ship and underlines the importance of creating universal regulations on the dismantling of retired ships.

On average, between 4,000 and 5,000 kg of asbestos insulation is also present, along with an additional 50 tons as joiner bulkheads. Paint is left on the steel plates when they are removed and sent for rerolling or remelting. Asbestos products are sold for reuse, as are PCB oils from the ship's electric and hydraulic machinery. The Alang yards annually generate about 2,400 metric tons of hazardous wastes such as oil sludge and paint chips. In the past, all wastes, hazardous or not, were dumped in the sea or in nearby low-lying areas.¹⁴⁶

The "[l]ack of ship recycling facilities . . . in OECD countries"¹⁴⁷ that can properly "handle hazardous wastes"¹⁴⁸ and decontaminate vessels presents a major challenge in disposing of these ships and can lead to great expense in terms of "port dues, maintenance and crew costs."¹⁴⁹ Additionally, the legal status of a ship at the end of its life is complicated due to the international nature of shipping and the various guidelines that have been recommended for the world; including the European Union's Waste Shipment Regulation, International Maritime Organization ("IMO") guidelines under the auspices of the United Nations, and

¹⁴⁵ *Id.* at 43. See generally *id.* at 43-47 (outlining costs and revenues of ship recycling/dismantling activities for India).

¹⁴⁶ *Id.* at 47 (citations omitted).

¹⁴⁷ Memorandum on Dismantling of Defunct Ships, *supra* note 141, ¶ 10.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

the Basel Ban.¹⁵⁰ Greenpeace and other environmental organizations have been very critical of the lack of cohesion amongst the various plans.

The present IMO guidelines appears [sic] to be an elaborate exercise to protect the shipping industry from responsibility by pretending that the Basel Convention, its obligations and decisions, has little scope over ships-as-hazardous-waste (a position that is legally indefensible). Even more egregious from a moral point of view, is that the present guidelines pass the burden for economically motivated toxic waste export on the "recycling state"—these are the developing countries that to this day the shipping industry has seen fit to exploit.¹⁵¹

The United Kingdom's House of Commons Select Committee on Environment, Food, and Rural Affairs suggested a two prong solution to the problem: specifically, to keep vessels of OECD nations in their countries of origin (i.e., do not export the waste) and most importantly, to spread safe technologies and environmental safeguards to non-OECD nations (mainly due to the increasing number of ships on these countries' registers).¹⁵² Britain's top environmental minister has pushed for a ship dismantling yard in his country because the country's need for such a facility with high environmental standards will only increase.¹⁵³ Because the European Union decided to phase out the use of single-hulled oil tankers by 2007, two thousand such ships will possibly need to be recycled, and there are currently no adequate facilities.¹⁵⁴ As a

¹⁵⁰ *Id.* ¶ 14.

¹⁵¹ GREENPEACE INTERNATIONAL/BASEL ACTION NETWORK ("BAN"), *The IMO Guidelines on Ship Recycling Annotated*, Nov. 21, 2003, at 1, available at <http://www.ban.org/Library/greenpeace-ban-iii-3e.pdf>.

¹⁵² *Supra* note 141.

¹⁵³ David Lerman, *Ships Still Idle—James River Reserve Ships Locked in Limbo*, DAILY PRESS, Nov. 30, 2004, at A6.

¹⁵⁴ Lerman, *supra* note 137.

result, the United Kingdom's executive director of Greenpeace suggested that "Britain must take an international lead in recycling ships and support the development of state-of-the-art facilities in the U.K."¹⁵⁵

D. *State of Current Legal Challenges*

Once the sale of ships overseas as a disposal method was ended in 1994, MARAD was forced to turn to the domestic market to get rid of the ships.¹⁵⁶ Due to declining prices in the scrap metal industry, and increased safety and hazardous material disposal costs, the domestic program came to an end and the ships began to accumulate in the James River.¹⁵⁷ From 1997 to 2000, the fleet grew by 60 vessels because MARAD was prohibited by statute from paying for dismantling services.¹⁵⁸ This problem prompted the Department of Transportation's Office of Inspector General to name the disposal of these ships as a top-ten challenge facing the department in 2000 and 2001.¹⁵⁹

Another problem was that both the EPA and a directive from then-Vice President Al Gore forbade the exportation of these ships due to the PCBs on board.¹⁶⁰ While the EPA initially acknowledged that "[m]ost of the obsolete NDRF vessels contain PCBs in concentrations above 50 ppm, therefore their export for scrapping may constitute a violation of TSCA,"¹⁶¹ the agency nevertheless granted permission to export as long as MARAD agreed that the ships would "be free of liquid and readily removable solid PCBs equal to or greater than 50 ppm."¹⁶²

¹⁵⁵ Lerman, *supra* note 153 (quoting Stephen Tindale, Greenpeace UK Executive Director).

¹⁵⁶ Disposal of Obsolete Vessels, 108th Cong., *supra* note 63.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Letter from Suarez to Caponiti, *supra* note 99.

¹⁶² Letter from James E. Caponiti, Associate Administrator for National Security, to John P. Suarez, Assistant Administrator for Enforcement and Compliance

In spite of the economic strength and industrial might of the United States, there are only about six domestic companies with the ability to scrap ships.¹⁶³ Large shipyards, including Northrop Grumman Newport News, do not want to engage in the business due to the risks involved and the specialized abilities needed to perform the scrapping properly.¹⁶⁴ While MARAD contracted with some of these domestic companies for disposal, MARAD found that “no U.S. disposal facility currently has the capacity to accommodate a large number of ships simultaneously or can fully meet the cost-effectiveness required by MARAD to meet the congressionally-imposed deadline of September 2006, especially given the level of funding appropriated.”¹⁶⁵

In July 2003, MARAD announced a contract that paid Able UK \$17.8 million to dispose of fifteen ships from the NDRF in the James River.¹⁶⁶ The plan involved “tow[ing] the ships [across the Atlantic Ocean and] through the English Channel—the world’s busiest commercial shipping lane”¹⁶⁷ for delivery in England.¹⁶⁸ The plan called for thirteen ships to be scrapped at the facilities in Hartlepool, England.¹⁶⁹ The two remaining ships were unfinished oil refueling ships, valued in the contract at a price of \$3 million.¹⁷⁰

Arguably, the two refueling ships sweetened the deal¹⁷¹ because both were ninety-five percent complete,¹⁷² and construction costs of \$150 million had already been borne by United States taxpayers.¹⁷³ These ships sat idle for many years because it was

Assurance, at 2 (May 7, 2003), available at http://www.foe.co.uk/resource/evidence/epa_enforcement_discretion.pdf [hereinafter Letter from Caponiti to Suarez].

¹⁶³ Lerman, *supra* note 137.

¹⁶⁴ *Id.*

¹⁶⁵ U.S. DEP’T OF TRANSP. MAR. ADMIN., *supra* note 27, at 16.

¹⁶⁶ Lerman, *supra* note 137.

¹⁶⁷ Coffin, *supra* note 1.

¹⁶⁸ *Id.*

¹⁶⁹ Lerman, *supra* note 137.

¹⁷⁰ *Id.*

¹⁷¹ BASEL ACTION NETWORK, *supra* note 104, at 36.

¹⁷² *Id.*

¹⁷³ BASEL ACTION NETWORK, *supra* note 104, at 36.

illegal to sell them, but language placed in the 1999 Defense Appropriations Bill would have allowed MARAD to sell them to member nations of the North Atlantic Treaty Organization ("NATO").¹⁷⁴ According to industry insiders, these two ships could have yielded a profit of \$150 million once completed,¹⁷⁵ and provided a huge financial incentive for Able UK to take the other thirteen ships, thereby shrouding the whole contract in a cloud of suspicion.¹⁷⁶

One of the greatest risks posed by the transport of these ships was that they were to be towed to England in tandem, even though insurance was difficult to find for transport using that method.¹⁷⁷ Tandem towing makes the vessels more difficult to control in bad weather and has previously caused vessels to sink after they collided.¹⁷⁸ Although MARAD agreed to remove readily available non-liquid PCBs and all liquid PCBs, an abundance of non-liquid PCBs still remained, posing a terrible threat to marine life in the event one of these ships sank.¹⁷⁹ In addition to the hazards posed by the transportation of these vessels, Britain's willingness to accept them was itself an apparent violation of the Basel Convention.¹⁸⁰ Under the Basel Convention, the exportation of hazardous wastes is only acceptable when the exporting country lacks the technical ability to handle the waste or when the importing country needs the waste as a raw material.¹⁸¹ Neither the United States as the exporting country nor England as the importing country appears to meet these standards.

Tremendous debate waged in Hartlepool and throughout England regarding the ships, with some residents excited about the 200 jobs created, while others were angered by "American

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ BASEL ACTION NETWORK, *supra* note 104, at 12.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 20.

¹⁸⁰ BASEL ACTION NETWORK, *supra* note 104, at 34.

¹⁸¹ *Id.*

bully-boy tactics in the international arena.”¹⁸² In addition, Able UK's problems attaining the necessary permits resulted in its inability to build the necessary dry dock.¹⁸³ Although Able UK received a planning permit in 1997 to build the dry dock, the permit lapsed when the British High Court ruled that the permit only applied to the dismantling of marine structures, such as oil rigs, and did not apply to ships.¹⁸⁴ As a result, no work has taken place on the four MARAD ships now in Hartlepool.¹⁸⁵

Additionally, some in the international community fear that the Able UK dismantling contract was “the need by MARAD to establish a legal precedent for getting around the Toxic Substances Control Act's PCB export ban,”¹⁸⁶ so that the United States could export its remaining obsolete ships to the lowest cost dismantling services provider.¹⁸⁷ Environmental groups brought suit against the ships' exportation to England. The judge in the case allowed four ships to be transported to Hartlepool, but issued a temporary restraining order preventing the other nine from leaving the James River without further review.¹⁸⁸

The Sierra Club, Basel Action Network, and Earthjustice were the first groups to sue MARAD to enjoin it from exporting these ships to England for recycling.¹⁸⁹ On September 23, 2003, the consortium of environmental groups “filed a motion for a temporary restraining order (‘TRO’) to enjoin [MARAD] from exporting

¹⁸² David Lerman, *For and Against—Some Say Environmental Risks Not High; Others Disagree*, DAILY PRESS, Nov. 29, 2004, at A1 (quoting Hartlepool resident Neil Marley).

¹⁸³ Lerman, *supra* note 137.

¹⁸⁴ *Id.*

¹⁸⁵ Lerman, *supra* note 182, at A6.

¹⁸⁶ BASEL ACTION NETWORK, *supra* note 104, at 36.

¹⁸⁷ *Id.*

¹⁸⁸ *Environmentalists Lose Lawsuit Over “Ghost Fleet,”* RICHMOND TIMES-DISPATCH, Mar. 7, 2004, available at http://www.timesdispatch.com/servlet/Satellite?pagename=RTD/MGArticle/RTD_BasicArticle&c=MGArticle&cid=1031781420175.

¹⁸⁹ BASEL ACTION NETWORK, *supra* note 104, at 32.

ships listed in the National Defense Reserve Fleet's ('NDRF') non-retention category,"¹⁹⁰ and the court heard oral arguments on October 1, 2003.¹⁹¹ The plaintiffs made the following three arguments: (1) exporting the PCBs contained in the ships violated TSCA, (2) the exportation did not provide MARAD "the best value alternative," as required by the National Maritime Heritage Act, due to the risk in towing the ships across the North Atlantic Sea, and (3) MARAD failed to conduct an environmental impact statement as required by the National Environmental Policy Act ("NEPA").¹⁹²

The TSCA allows for exceptions to the law "in extraordinary circumstances but not without first undertaking a formal rule-making process."¹⁹³ The EPA granted an exception to MARAD to move the ships, but did so after receiving a written request from MARAD, not after following a formal rule-making process.¹⁹⁴ The plaintiffs brought their TSCA violation claim under the Administrative Procedure Act ("APA"), which "by its terms, provides a right to judicial review of all 'final agency action for which there is no other adequate remedy in a court,' . . . and applies universally 'except to the extent that — (1) statutes preclude judicial review[,] or (2) agency action is committed to agency discretion by law. . . .'"¹⁹⁵

The attorneys arguing for MARAD explained that the TSCA did not apply to the ships because the vessels themselves are not hazardous waste:

Cynthia J. Morris, a Justice Department attorney who is representing the Maritime Administration, said a car should not be considered hazardous waste

¹⁹⁰ *Basel Action Network v. Maritime Administration*, 285 F. Supp. 2d 58, 59 (D.D.C. 2003).

¹⁹¹ *Id.*

¹⁹² *Id.* at 60.

¹⁹³ *BASEL ACTION NETWORK*, *supra* note 104, at 32.

¹⁹⁴ Letter from Suarez to Caponiti, *supra* note 99; Letter from Caponiti to Suarez, *supra* note 162.

¹⁹⁵ *Basel Action Network*, 285 F. Supp. 2d at 61 (quoting APA §§ 701(a), 704 (citation omitted)); *see also* *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

just because it may have a thermometer that contains a small amount of mercury. Likewise, she said, the ships are not hazardous although they contain some hazardous materials.¹⁹⁶

The court found that the plaintiffs did not present a “substantial likelihood” of success on the merits of a TSCA violation and did not grant “the extraordinary remedy of an injunction” on this claim.¹⁹⁷

In order to allege that the movement of the vessels did not provide the best value alternative for the federal government under the National Maritime Heritage Act (“NMHA”), the plaintiffs raises a claim under the APA.¹⁹⁸ For the purposes of the temporary restraining order, the court found that MARAD had been working diligently within the mandates of the NMHA to find domestic ship breakers.¹⁹⁹ In fact, the court was convinced that MARAD “reasonably determined that the proposal by Post-Remediation Partners, LLC, submitted through the competitive program, to dismantle and recycle ships at the Able UK facility would result in the best value.”²⁰⁰ Additionally, the court did not grant the injunction because it found that MARAD had adequately proved the limited risks in a tandem, open-sea tow, and that MARAD would remove liquid PCBs prior to moving the vessels.²⁰¹

In determining whether an agency has to perform an environmental impact statement, the D.C. Circuit applies the following test:

(1) whether the agency took a “hard look” at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) as to the problems studied and identified, whether the agency

¹⁹⁶ David Lerman, *Court Hears ‘Ghost Ship’ Disposal Case Debate*, DAILY PRESS, Oct. 16, 2004, at C3.

¹⁹⁷ *Basel Action Network*, 285 F. Supp. 2d at 61-62.

¹⁹⁸ *Basel Action Network v. Maritime Administration*, 370 F. Supp. 2d 57, 65 (D.D.C. 2005).

¹⁹⁹ *Basel Action Network*, 285 F. Supp. 2d at 62.

²⁰⁰ *Id.* (citation omitted).

²⁰¹ *Id.*

made a convincing case that the impact was insignificant; and (4) if there were an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.²⁰²

Following the preliminary hearing in 2003, the judge found that MARAD failed to comply with environmental laws and had no viable reason for failing to produce the impact study, except that the four ships were excluded as part of a pilot program specifically instituted by Congress.²⁰³ As such, the judge made the following determination during the temporary restraining order hearing: “[b]efore sending any additional NDRF vessels through the Chesapeake Bay and United States coastal waters, MARAD must perform, at a minimum, a supplemental [Environmental Assessment] specific to [the remaining nine] ships that addresses the environmental impact of such action in the United States.”²⁰⁴ The court recently found that the 2004 Environmental Assessment (“EA”) and the successful tow of the first four ships sufficiently met the requirements of the NEPA, and the remaining nine ships may now be exported to England.²⁰⁵

On March 2, 2005, MARAD’s motion for summary judgment was granted and the environmental groups lost their case to prevent the exportation of the remaining nine ships.²⁰⁶ Aaron Isherwood, an attorney for the Sierra Club, explained that all was not lost, as the case brought attention to a “reckless” effort on the part of the Bush Administration to export these wastes and “brought the time and scrutiny needed to reduce safety risks at home and abroad.”²⁰⁷ The lawsuit also prompted MARAD to apply to the EPA for a formal and public rulemaking procedure to

²⁰² *Id.* at 70.

²⁰³ *Id.* at 63.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 70-76.

²⁰⁶ *Id.* at 79.

²⁰⁷ David Lerman, *Ruling Isn't End of Fight to Tow Ships to U.K.*, DAILY PRESS, Mar. 4, 2005, at C2 (quoting Aaron Isherwood, Sierra Club attorney).

address whether its exportation of PCBs is prohibited, or whether the EPA will grant an official exemption for future vessels.²⁰⁸ While the media coverage of the case raised awareness of the issue, Aaron Isherwood is still skeptical of the Bush Administration's approach to the exportation of toxic waste: "[I]f we are serious about building trust around the world, America needs to demonstrate a clearer commitment to public safety and environmental justice beyond its borders."²⁰⁹

With the federal court challenge removed, MARAD can now export the remaining nine ships included in the Able UK contract to England.²¹⁰ MARAD remains committed to using oversea scrappers such as Able UK when they meet high environmental standards, and they publically stated that "[w]hile the court's decision represents one critical step, MARAD will not send these ships until all necessary permits from the U.K. are firmly in place."²¹¹ This illustrates both U.S. and British governmental agency sensitivity to obtaining the necessary licenses before transporting any ships.²¹² A spokesman for the British Environmental Agency said that it would issue no waste-management licenses until Able UK obtains its permit to build the drydock.²¹³ As much as the mayor of Hartlepool would like to receive these ships to create jobs and develop a ship breaking industry, he admits that "[i]f they [Able UK] don't get a planning permit, I'm afraid the ships won't be able to come over."²¹⁴

A resident of Williamsburg, Virginia, and retired maritime attorney Morton Clark filed the second lawsuit against MARAD and the EPA on behalf of his wife, Lynn Clark. The couple retired to the Kingsmill development just outside of the city limits of

²⁰⁸ Press Release, Earthjustice, Groups Claim Success Despite Dismissal of Ghost Fleet Export Case, Mar. 3, 2005, *available at* <http://www.earthjustice.org/news/print.html?ID=966>.

²⁰⁹ *Id.*

²¹⁰ Lerman, *supra* note 207, at C2.

²¹¹ *Id.* (quoting MARAD written report not fully cited in article).

²¹² *Id.* at C1.

²¹³ *Id.*

²¹⁴ *Id.* (quoting Stuart Drummond, mayor of Hartlepool, England).

Williamsburg, Virginia, and have sued to protect the James River and their investment in a riverfront home.²¹⁵ Morton Clark succinctly expressed the potential for disaster in the James River when he said, "[I]t's just a matter of time before a storm or hurricane blows those ships adrift, or causes collisions or sinkings. . . . Fuel oil would be all over the place. It's time [MARAD] got serious about this."²¹⁶ The petitioner's argument in the suit is that MARAD and the EPA violated the Clean Water Act²¹⁷ and another federal law by not disposing of the Ghost Fleet sooner.²¹⁸ The complaint seeks to secure a court order to remove and dispose of the ships "without further delay."²¹⁹ Like many residents of the Tidewater region, Mr. Clark wants to protect the natural beauty of the area and he insists that the federal government must take true ownership of these decayed vessels and remove them from the James River.

In an effort to save money and resolve the cases more quickly, MARAD sought to have the Clark suit consolidated with the suit brought by Sierra Club, Basel Action Network, and Earthjustice.²²⁰ Because Clark sued solely to have the vessels taken out of the James River, and is not concerned with whether they are exported, he opposed consolidation because of the differing legal arguments of the cases.²²¹ The suits were not ultimately consolidated, and the presiding judge in the environmentalists' case, Judge Rosemary M. Collyer, indicated that "I'm not sure that [consolidating the two suits is] going to work."²²² In the end, a

²¹⁵ Scott Harper, *Couple Sue, Fear Possible Mishaps with Ghost Fleet*, THE VIRGINIAN-PILOT, July 22, 2004, at B1.

²¹⁶ *Id.*

²¹⁷ See Federal Water Pollution Control Act (Clean Water Act), Pub. L. No. 845, 62 Stat. 1155 (1948) (enacted) and Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (enacted).

²¹⁸ *Id.*

²¹⁹ Scott Harper, *Ghost Fleet Proposal Leaves the Rust Up to Them*, THE VIRGINIAN-PILOT, July 27, 2004, at B2, available at <http://home.hamptonroads.com/stories/print.cfm?story=73578&ran=217730>.

²²⁰ *Id.*

²²¹ See *id.*

²²² Lerman, *supra* note 207.

group of maritime businessmen approached Clark to submit a bid to MARAD to remove and dismantle all the ships docked in the James River.²²³ Clark indicated that he “will act for the group only if their proposal is accepted”²²⁴ and explained that their offer was the first to encompass the removal of the entire Ghost Fleet.²²⁵ As of July 2004, MARAD had announced no decision on the proposal, because bids for government contracts are confidential.²²⁶

III. DOMESTIC SOLUTIONS TO DISPOSAL OF GHOST FLEET

Following the dismissal of its lawsuit, Martin Wagner, an attorney for Earthjustice, said “[t]he best and safest plan [to remove and dismantle the Ghost Fleet] is to scrap the Ghost Fleet here at home.”²²⁷ While this is a logical argument from the perspective of a nation taking responsibility for the waste it creates, the real debate on domestic ship scrapping usually addresses the capacity of the industry, the costs of domestic scrapping, and a source of funding to meet these costs. While the lawsuit against MARAD concerning the export of the ships to Able UK was pending, MARAD was forced to use domestic scrappers to dismantle “about two-dozen other high priority vessels stateside.”²²⁸ In the past few years, three firms in Brownsville, Texas—Esco Marine, All Star Metals, and Marine Metals, have won contracts from MARAD as well as North American Ship Recycling in Baltimore, Maryland.²²⁹ The use of domestic ship scrappers supports some environmentalists’ argument that American firms *can* provide the dismantling service more safely

²²³ Harper, *supra* note 219.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Press Release, Earthjustice, Legal Challenge Keeping ‘Ghost Fleet’ Ship Scrapping Jobs in the US, Oct. 15, 2004, *available at* <http://www.earthjustice.org/news/display.html?ID=915>.

²²⁸ *Id.*

²²⁹ *Id.*

than can foreign entities by avoiding the long and potentially treacherous open-water tows.²³⁰

Since 1996, MARAD has investigated the domestic ship breaking industry. It utilizes the following protocol in researching prospective firms. "[B]idders are required to submit a technical compliance plan addressing environmental, worker health, and safety issues. They must also provide business and operational plans that describe their knowledge and ability to scrap ships."²³¹ Between 1997 and May of 2000, MARAD approved only four domestic ship scrappers after the firms went through MARAD's technical review process.²³² Although MARAD did not approve many domestic ship recycling firms, Frank Foti, President and CEO of Cascade General, Inc., submitted a white paper to Congress in 2000, which provided a plan to scrap the entire MARAD fleet in five years:

We can [scrap the entire MARAD fleet using three locations] We don't need to ask the government to make additional capital expenditures for us to be able to do this. We need only that there is a vehicle to do this and a different law and structure and some money to do it.²³³

While this proposal was not accepted, MARAD has awarded a number of dismantling contracts to domestic operators since the filing of the lawsuit over the Able UK contract in 2003.²³⁴ In September 2004, MARAD contracted with a new firm in Baltimore harbor, North American Ship Recycling, to dismantle two ships from the James River's Ghost Fleet.²³⁵ This firm reconfigured the

²³⁰ See *id.*

²³¹ *Disposal of Obsolete Vessels*, 106th Cong., *supra* note 55, at 6 (statement of Bonnie M. Green).

²³² *Id.*

²³³ *Disposal of Obsolete Vessels*, 106th Cong. *supra* note 55, at 27 (2000) (statement of Frank Foti, President and CEO, Cascade General, Inc.).

²³⁴ See discussion *supra* note 227 and accompanying text.

²³⁵ Scott Harper, *2 More in "Ghost Fleet" Slated for Environmentally Safe Scrap*, THE VIRGINIAN-PILOT, Sept. 14, 2004, at B2.

Sparrows Point Shipyard, recently in bankruptcy, with a focus on recycling vessels, like those still found in the James River.²³⁶

Part of the problem of the domestic ship scrapping industry is MARAD's inclination to use foreign scrappers.²³⁷ When MARAD was taking bids for the contract ultimately awarded to Able UK, a MARAD representative said "the best option from a cost-effectiveness standpoint (assuming it was legal), was to export the vessels."²³⁸ MARAD was not totally unwilling to award contracts to domestic providers, as it had awarded a five vessel contract to Bay Bridge Enterprises, but it is telling that two domestic firms bid lower than the winning bid of Able UK.²³⁹ International Shipbreaking Limited, with operations in Brownsville, Texas, bid almost five million dollars less than Able UK, and Bay Bridge Enterprises's bid was lower by \$500,000.²⁴⁰ From an environmental standpoint, the Texas bid would have cut the open sea tow by seventy-five percent, and the Bay Bridge Enterprises bid would have eliminated the need for an open sea tow altogether.²⁴¹

In addition to MARAD's apparent belief that they can get the best value by dismantling the ships overseas, the larger problem is that Congress has not properly funded the dismantling effort.²⁴² As the September 30, 2006, deadline nears, it is apparent that it will not be met—even though Virginia Representative Jo Ann Davis warns, "[i]f you extend the deadline, it takes the pressure off of MARAD, and I want to keep the pressure on to get those ships out of [the James River]."²⁴³ The Bush Administration has recommended spending \$21 million next year to scrap the fleet, the same amount authorized in the 2005 budget.²⁴⁴ While the political push behind this issue is evident from both sides of the

²³⁶ *Id.*

²³⁷ BASEL ACTION NETWORK, *supra* note 104, at 14 (citation omitted).

²³⁸ *Id.*

²³⁹ *Id.* at 14-15.

²⁴⁰ *Id.*

²⁴¹ *See id.*

²⁴² *See* Lerman, *supra* note 11.

²⁴³ *Id.*

²⁴⁴ *Id.* at A1.

aisle, Representative Bobby Scott labels the situation in the James River "an environmental disaster waiting to happen."²⁴⁵ The contracts issued so far indicate that an additional \$80 million dollars would be needed to complete the removal.²⁴⁶ It is doubtful that the requisite funds will materialize, as President Bush's 2006 budget increases do not even keep pace with inflation.²⁴⁷

Not only does MARAD need additional funding from Congress, but the entire agency needs reworking. The Government Accountability Office ("GAO") issued an evaluation report of MARAD in early 2005 and reached the following conclusions: (1) MARAD did not seek adequate funding for disposal of its vessels; (2) MARAD is poorly managed and fails to make "sound decisions;"²⁴⁸ and (3) MARAD used a faulty bidding procedure that led to a "lack of transparency."²⁴⁹ Since October 2000, when Congress extended the deadline for disposal of MARAD ships to September 30, 2006, MARAD has only disposed of eighteen ships, or twelve percent of their total inventory.²⁵⁰ The GAO report faulted MARAD for not seeking sufficient funding: "MARAD's budget requests totaled only \$54.1 million between 2002 and 2005—or about one-sixth of the \$350 million the agency had estimated would be needed."²⁵¹ The report also raised concerns about the "ill-defined, open-ended solicitation for bids" that did not provide sufficient transparency, and it addressed an absence of fairness in the bidding process.²⁵² Although the GAO report does not allege any fraud or corruption in the bidding process, it is particularly critical of the Able UK contract.²⁵³ As a result of the

²⁴⁵ Schleck, *supra* note 8 (quoting Rep. Robert C. Scott, D-Newport News, Va).

²⁴⁶ Lerman, *supra* note 11.

²⁴⁷ *Id.*

²⁴⁸ David Lerman, *Agency Finds Faults in Ship Disposal Plan*, DAILY PRESS, Mar. 3, 2005, at A1 (quoting uncited GAO report).

²⁴⁹ *Id.*

²⁵⁰ Lerman, *supra* note 11.

²⁵¹ *Id.* (quoting uncited GAO report).

²⁵² *Id.*

²⁵³ *Id.*

criticism, MARAD claims it will abandon this contract bidding process and establish a more simplified process that will provide "a flexible, streamlined contracting approach."²⁵⁴

IV. CONCLUSION

The Ghost Fleet in the James River, and more specifically the PCBs, asbestos, and oil contained in those vessels, presents a potential disaster that could permanently alter Virginia's ecosystem. It would not take much more than a strong storm or hurricane to sink one of the ships, causing the release of PCBs into the food chain and thousands of gallons of oil into the James River and its tributaries. The media has publicized devastation in the past few years, but the federal government has not responded by funding the disposal efforts adequately.

Despite inadequate funding, the need to dispose of these vessels safely and expeditiously has not gone away. The Commonwealth of Virginia has no other recourse than to sue the federal government for TSCA²⁵⁵ and NMHA²⁵⁶ violations. The TSCA provides that if "there is a reasonable basis to conclude that . . . disposal of a chemical substance or mixture [PCBs, oil, asbestos, etc.], or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment, the Administrator shall by rule apply [specific] requirements."²⁵⁷ Failing to remove these vessels and the toxic wastes contained in them is a clear violation of this provision, and Governor Kaine should follow through on former Governor Warner's threat to sue for their removal.²⁵⁸

²⁵⁴ David Lerman, *Maritime Agency Halts Contracting Process*, DAILY PRESS, Mar. 15, 2005, at C4 (quoting uncited written statement by the Maritime Administration).

²⁵⁵ See 15 U.S.C.S. § 2605 (LexisNexis 2005).

²⁵⁶ National Maritime Heritage Act of 1994, Pub. L. No. 103-451, 108 Stat. 4769 (1994) (enacted).

²⁵⁷ 15 U.S.C.S. § 2605(a) (LexisNexis 2005).

²⁵⁸ See Schleck, *supra* note 8.

As part of the NMHA, the following policy is detailed:

It shall be the policy of the Federal Government, in partnership with the States and local governments and private organizations and individuals, to—

- (1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our historic maritime resources can exist in productive harmony;
- (2) provide leadership in the preservation of the historic maritime resources of the United States;
- (3) contribute to the preservation of historic maritime resources and give maximum encouragement to organizations and individuals undertaking preservation by private means²⁵⁹

Again, the federal government's failure to remove the toxic Ghost Fleet is a direct contravention of the NMHA. The most egregious aspect of the government's violation is that it simultaneously requires that MARAD ships be disposed of by September 30, 2006,²⁶⁰ and articulates the government policy to "use measures, including financial and technical assistance," but then fails to provide the funding to meet these legal obligations.²⁶¹

While the disposal of the Ghost Fleet is required by law and there is no dispute about the increased potential of catastrophe by not removing these ships, the government has failed to sufficiently fund the operation. In addition to the immediate health and safety, concerns that could be assuaged by removing these vessels, it is paramount that domestic ship breaking operations be used to dismantle these ships. Not only should the United States bear the burden of disposing of its own waste, domestic disposal of these ships will spur the growth of a ship scrapping industry. A domestic ship scrapping industry has been slow to form historically due to

²⁵⁹ 16 U.S.C.S. § 5402 (LexisNexis 2005).

²⁶⁰ See 16 U.S.C.S. § 5405 (LexisNexis 2005).

²⁶¹ See *id.*

a sporadic supply of ships to dismantle, but with the MARAD fleet and the impending ban on single hull oil tankers, the future holds no shortage of such ships. In addition to the moral responsibility of disposing of one's own waste, the United States will be violating the Basel Ban in exporting PCB-laden vessels to other OECD nations when the ban becomes international law. The United States government and MARAD must take responsibility for disposing of their fleet domestically, in the most safe, efficient, and expeditious manner available to them.