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David Killion

*University of Richmond School of Law*

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## COMMENTS

### TRANS-ATLANTIC GHOST BUSTING: THE FAILED ATTEMPT TO DISPOSE OF THE CHESAPEAKE “GHOST FLEET” IN THE UNITED KINGDOM

For over fifty years a fleet of obsolete and deteriorating ships has been anchored in Virginia’s Chesapeake Bay.<sup>1</sup> The fleet, owned and managed by the United States government, has become more than a simple eyesore over the past decade due to the environmental contaminants onboard many of the vessels.<sup>2</sup> Aware that domestic disposal of this “ghost fleet” was proceeding slower than expected, Congress created a pilot program in 2002 to explore the possibility of disposal abroad in an environmentally friendly and cost-effective manner.<sup>3</sup> During the past five years such a program was set in motion, but the results were far from what Congress had hoped to achieve. The program produced constant confusion and delay, accompanied by multiple lawsuits and administrative hearings in the United States and the United Kingdom (“UK”).<sup>4</sup> Though an English ship-breaking company named Able UK (“Able”) continues its attempts to begin operations in England, its efforts to build the necessary facilities so far have been unsuccessful, and the pilot program has been terminated.<sup>5</sup> Able was repeatedly thwarted, first by the UK Environ-

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1. See Scott Harper, *Ghost Fleet Will Not Be Dismantled by Deadline*, VIRGINIAN-PILOT (Norfolk, Va.), Mar. 23, 2006, at B3.

2. See *id.*

3. See Bob Stump National Defense Authorization Act, Pub. L. No. 107-314, § 3504(c), 116 Stat. 2458, 2755 (2002).

4. See Scott Harper, *No More “Ghost Fleet” Ships Will Be Sent to Britain for Scraping*, VIRGINIAN-PILOT (Norfolk, Va.), June 1, 2007, at B1.

5. See *id.*

ment Agency (“UKEA”)<sup>6</sup> and later by the Hartlepool, England planning council.<sup>7</sup> Able began its efforts by negotiating with the UKEA, and worked for four years to honor the contract it procured under the international pilot program. Four years after Able began its efforts, however, the ships that sailed from the Chesapeake were still stranded on the shores of England and the program was scrapped.<sup>8</sup> The failure of the program was largely due to a series of decisions handed down over a period of two years by the thirteen-member Hartlepool planning council.<sup>9</sup>

This comment critically examines the pilot program approved by Congress in 2002 and the decisions made by Hartlepool’s planning council which led to the international disposal program’s demise. In order to fully explain the pilot program, this comment first details the history of the Chesapeake ghost fleet and its place in the U.S. government’s National Defense Reserve Fleet (“NDRF”) and Vessel Disposal Program. Additionally, it explores the obstacles that have prevented international disposal of the fleet in the past and highlights the failure of the Maritime Administration (“MARAD”) to develop a workable plan for ship disposal by the congressionally mandated deadline of September 2006.

Part I of this comment details the history of the NDRF and its usefulness throughout the past eighty years. Part II explains the administrative obstacles faced by MARAD in operating the Vessel Disposal Program, both domestically and abroad. Part III details the creation of the international pilot program and discusses the program’s resulting U.S. litigation. Part IV examines the difficulties encountered by Able UK in beginning operations in Hartlepool, and the comment concludes by critiquing the failure of the pilot program and assessing feasible options for safe and timely disposal of the Chesapeake ghost fleet.

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6. *See Green Group Wins “Ghost Fleet” Rule*, BBC NEWS, Dec. 8, 2003, <http://news.bbc.co.uk/1/hi/england/tees/3301419.stm>.

7. Harper, *supra* note 4.

8. *See id.*

9. *See id.*

## I. HISTORY OF THE NATIONAL DEFENSE RESERVE FLEET

The Chesapeake ghost fleet consists of dozens of warships and merchant-class ships anchored near Fort Eustis, Virginia, where the James River empties into the Chesapeake Bay.<sup>10</sup> These vessels, strung together in rows across the river, are part of the U.S. military's NDRF, a program currently administered by MARAD, which is an agency of the U.S. Department of Transportation.<sup>11</sup> MARAD oversees operation of the three NDRF fleet divisions, which include the James River Fleet, commonly referred to by locals as the Chesapeake "ghost fleet" or "mothball fleet," as well as the Beaumont Reserve Fleet in Texas and the Suisun Bay Reserve Fleet in Benicia, California.<sup>12</sup>

The rapidly deteriorating condition of many of these obsolete vessels has become the source of much concern lately in the Chesapeake region.<sup>13</sup> A large number of these war-built ships contain alarming amounts of asbestos, lead paint, gas, oil, and polychlorinated biphenyls ("PCBs"), all of which present significant environmental concerns.<sup>14</sup> As these obsolete ships continue to deteriorate, the surrounding bay is put at risk.<sup>15</sup> Many local residents fear the consequences to their environment that could result from another storm the size of Hurricane Isabelle.<sup>16</sup> One study predicted that if just two of the fleet's ships were damaged in a storm, waste would spread approximately fifty miles up and down the James River, contaminating nearby Jamestown Is-

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10. *See id.*

11. *See* JAMES K. MATTHEWS, UNITED STATES TRANSPORTATION COMMAND THE NATIONAL DEFENSE RESERVE FLEET AND THE READY RESERVE FORCE: A CHRONOLOGY 2 (1999) (providing a historical timeline of the NDRF).

12. *See id.* at 1.

13. *See* Patrick Lynch, *Ghost Fleet Ship Shifted in Storm*, DAILY PRESS (Newport News, Va.), Oct. 13, 2006, at C6.

14. *See* Matt Cohen, *U.S. Shipbreaking Exports: Balancing Safe Disposal with Economic Realities*, 28 ENVIRONS ENVTL. L. & POL'Y J. 237, 239-42 (2005).

15. In 2000, the Deputy Assistant Inspector General for Maritime and Departmental Programs of the U.S. Department of Transportation stated in a report to Congress: "These vessels are literally rotting and disintegrating as they await disposal. Some vessels have deteriorated to a point where a hammer can penetrate their hulls." *Maritime Administration: Limited Progress In Disposing of Obsolete Vessels: Hearing Before the Subcomm. on Coast Guard and Maritime Transp. of the Comm. on Transp. and Infrastructure*, 106th Cong. 8 (2000) (statement of Thomas J. Howard, Deputy Assistant Inspector General for Maritime and Departmental Programs, U.S. Dep't of Transp.).

16. *See, e.g.*, Henry Fisher, Editorial, "Ghost Fleet" Is Still a Disaster Waiting to Happen, VIRGINIAN-PILOT (Norfolk, Va.), Feb. 9, 2006, at B10.

land.<sup>17</sup> In response, MARAD, under the direction of Congress, put into place a Vessel Disposal Program that seeks the aid of private investors to dismantle these ships and rid the Chesapeake of this potential environmental threat.<sup>18</sup> Though the program's stated goal was to dispose of the entire fleet of decaying and potentially dangerous vessels by September of 2006, tightened environmental standards and other international obstacles combined to thwart the achievement of this goal.<sup>19</sup>

The policy of maintaining a reserve fleet of outdated merchant ships during peacetime dates back to the years immediately following World War I.<sup>20</sup> The purpose of the policy is to always have a fleet of ships on hand that can rapidly deploy U.S. forces and equipment should such a need arise during peacetime.<sup>21</sup> The duty of managing the fleet originally fell on the U.S. Shipping Board. In fact, by 1922 the Shipping Board was in charge of overseeing a fleet of over 1200 retired war-built vessels.<sup>22</sup> By the time the U.S. Maritime Commission was created in 1936 and took over the program, the Shipping Board already had years of experience managing the fleet and had established the practice of selling many of the older reserve ships for scrap metal and parts.<sup>23</sup>

Between 1936 and 1946, the fleet contained approximately 500 to 600 ships.<sup>24</sup> Ships from the fleet were lent to various nations at the outset of World War II, and the U.S. used other fleet ships at the beginning of its involvement in the war.<sup>25</sup> At the end of World War II, Congress passed the Merchant Ship Sales Act of 1946, which authorized the sale of certain government-owned ships to

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17. Harper, *supra* note 4. Ironically, one ship in the fleet recently became a nesting ground for endangered peregrine falcons. Scott Harper, 'Ghost Fleet' Ship Guards Va. Falcons: A Peregrine Pair Mates Successfully for the Second Year Aboard One Ship, RICH. TIMES-DISPATCH, June 6, 2007, at B5.

18. See Mar. Admin., U.S. Dep't of Transp., Standing Quotations/Vessel Sales, [https://voa.marad.dot.gov/programs/ship\\_disposal/standing\\_quot/index.asp](https://voa.marad.dot.gov/programs/ship_disposal/standing_quot/index.asp) (last visited Nov. 9, 2007).

19. See Constantine G. Papavizas & Lawrence I. Kiern, 2003-2004 U.S. Maritime Legislative Developments, 36 J. MAR. L. & COM. 379, 396 (2005).

20. See MATTHEWS, *supra* note 11, at 1.

21. Merchant Ship Sales Act of 1946, Pub. L. No. 321, § 2, 60 Stat. 41, 41 (codified as amended at 50 U.S.C. app. §§ 1735-46 (2000)).

22. See MATTHEWS, *supra* note 11, at 1.

23. *Id.*

24. *Id.*

25. *Id.*

private purchasers.<sup>26</sup> The act stated that all appropriate government-owned ships, if not sold within an allotted time period, would be placed in the NDRF.<sup>27</sup> This fleet was designed to be available to the government for various national defense and national emergency purposes.<sup>28</sup> While government records are not clear, the fleet likely contained approximately 2000 ships at the time of its genesis.

In 1950, Congress created the Maritime Administration under the Department of Commerce to replace the U.S. Maritime Commission.<sup>29</sup> As one of its first acts, MARAD consolidated its widely scattered fleet into eight anchorages in the states of New York, Virginia, North Carolina, Alabama, Texas, California, Oregon, and Washington.<sup>30</sup> As a result of war-time buildup the NDRF reached its peak at this time, containing over 2200 vessels.<sup>31</sup> For the next thirty years the NDRF provided military support and emergency shipping during seven wars and civilian crises, including the Korean War, Vietnam War, and numerous shipping crises resulting from tonnage shortfalls.<sup>32</sup> In 1972, Congress established an Artificial Reef Program, whereby Liberty ships<sup>33</sup> in the NDRF designated for scrapping could be transferred to individual states for sinking in order to create artificial reefs.<sup>34</sup> This program remains a feasible option today for the disposal of some NDRF ships, and over fifty vessels from the fleet have been donated to individual states to create artificial reefs.<sup>35</sup>

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26. Merchant Ship Sales Act § 2, 60 Stat. at 41.

27. *Id.* § 11, 60 Stat. at 49.

28. See MATTHEWS, *supra* note 11, at 1–3.

29. See *id.* at 2.

30. See MAR. ADMIN., U.S. DEP'T OF TRANSP., THE NATIONAL DEFENSE RESERVE FLEET (2005), available at [http://www.marad.dot.gov/Ship%20Disposal/PRESS\\_NDRF\\_RRF\\_4qtr05.pdf](http://www.marad.dot.gov/Ship%20Disposal/PRESS_NDRF_RRF_4qtr05.pdf) [hereinafter NDRF].

31. See *id.*

32. See *id.*

33. Over 2000 Liberty ships were built during the early 1940s, first for use by the UK through the lend-lease program with the United States and later for use by the United States as well. Because of the large need for this type of ship during the war, some Liberty ships were constructed in less than fifty days. See generally JOHN GORLEY BUNKER, LIBERTY SHIPS: THE UGLY DUCKLINGS OF WORLD WAR II (1972) (detailing the history of Liberty ships).

34. See Pub. L. No. 92-402, § 3, 86 Stat. 617–18 (1972) (codified as amended at 16 U.S.C. § 1220 (2000)). This law was amended in 1984 to include any obsolete vessel in the NDRF designated for scrapping. See Pub. L. No. 98-623, § 207, 98 Stat. 3394, 3397–98 (codified as amended at 16 U.S.C. § 1220 (2000)).

35. MATTHEWS, *supra* note 11, at 4.

Thirty years after the end of World War II, the Navy and MARAD signed a Memorandum of Agreement that established the Ready Reserve Force (“RRF”) as a subset of the NDRF.<sup>36</sup> The two departments combined to establish the RRF in reaction to a General Accounting Office report questioning the utility of maintaining a fleet of obsolete vessels.<sup>37</sup> The RRF was created from NDRF vessels that could be called upon at a moment’s notice to rapidly deploy U.S. military forces, and today “the RRF primarily supports transport of Army and Marine Corps unit equipment, combat support equipment, and initial resupply during the critical surge period before commercial ships can be marshaled.”<sup>38</sup> Beginning with six ships and reaching its peak in 1994 with over 100 ships, the RRF today contains fifty-eight vessels maintained on four, five, ten or twenty-day readiness status.<sup>39</sup> The RRF continues to provide significant supplemental support to the U.S. military. During Operations Enduring Freedom and Iraqi Freedom, the RRF deployed forty vessels.<sup>40</sup> The RRF also sent eight vessels to provide disaster relief to the Gulf Coast following Hurricanes Katrina and Rita.<sup>41</sup>

The NDRF today contains a total of 226 vessels,<sup>42</sup> all anchored in Virginia, Texas, and California.<sup>43</sup> Forty-four of the vessels are maintained regularly, some even with skeleton crews, as part of the RRF.<sup>44</sup> Another thirty-five vessels in the NDRF are listed as being in “retention status,”<sup>45</sup> which means MARAD maintains the vessels by installing dehumidifiers to prevent mold growth and cathodic protection systems to prevent exterior and underwater corrosion.<sup>46</sup> External painting and cosmetic work is generally de-

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36. See MAR. ADMIN., U.S. DEP’T OF TRANSP., THE READY RESERVE FORCE (2005) available at, [http://www.marad.dot.gov/ship%20Disposal/PRESS\\_NDRF\\_RRF\\_4qtr05.pdf](http://www.marad.dot.gov/ship%20Disposal/PRESS_NDRF_RRF_4qtr05.pdf) [hereinafter RRF].

37. See MATTHEWS, *supra* note 11, at 4.

38. RRF, *supra* note 36.

39. See *id.* A current listing of the NDRF and RRF’s inventory, updated monthly, can be found at Mar. Admin., U.S. Dep’t of Transp., [http://www.marad.dot.gov/offices/ship/reserve\\_Fleet.html](http://www.marad.dot.gov/offices/ship/reserve_Fleet.html) (last visited Nov. 9, 2007).

40. RRF, *supra* note 36.

41. See *id.*

42. MAR. ADMIN., U.S. DEP’T OF TRANSP., NATIONAL DEFENSE RESERVE FLEET INVENTORY FOR THE MONTH ENDING AUGUST 31, 2007, at 5 (2007), [http://www.marad.dot.gov/offices/ship/Current\\_Inventory.pdf](http://www.marad.dot.gov/offices/ship/Current_Inventory.pdf) [hereinafter INVENTORY].

43. NDRF, *supra* note 30.

44. See INVENTORY, *supra* note 42, at 5; NDRF, *supra* note 30.

45. INVENTORY, *supra* note 42, at 5.

46. See NDRF, *supra* note 30.

ferred for all vessels, including retention status and RRF vessels. MARAD is holding a smaller number of NDRF vessels with historical significance for donation or for further evaluation of their historical significance.<sup>47</sup> This leaves 118 vessels (as of the last official count in February of 2007) that are currently obsolete yet are not under contract for disposal.<sup>48</sup> These ships make up the heart of the “ghost fleet,” and their disposal has been the subject of considerable controversy over the past five years.

## II. THE VESSEL DISPOSAL PROGRAM

Most NDRF vessels contain some salvageable equipment or large quantities of recyclable scrap metal, so the U.S. government historically has maintained a policy of selling the obsolete ships to private investors.<sup>49</sup> These investors in turn would take on the responsibility of breaking up the ships and abiding by all relevant environmental regulations. While MARAD disposed of hundreds of ships in this manner throughout the 1960s and 1970s, ship-scrapping essentially ended during the 1980s.<sup>50</sup> It was then that President Ronald Reagan began a policy of naval build-up and invested over \$2 trillion in the military.<sup>51</sup> As a result, significant funds were spent to convert numerous NDRF ships to active military use, virtually eliminating the need for scrapping operations.<sup>52</sup> Though ship scrapping resumed in 1991, the discovery of PCBs on board many of the NDRF vessels led MARAD in 1995 to

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47. *See id.*

48. MAR. ADMIN., U.S. DEP'T OF TRANSP., REPORT TO CONGRESS ON THE PROGRESS OF THE VESSEL DISPOSAL PROGRAM, at 2 (2007) available at [http://www.marad.dot.gov/Ship%20Disposal/ReportToCongressFinal03\\_19\\_07.pdf](http://www.marad.dot.gov/Ship%20Disposal/ReportToCongressFinal03_19_07.pdf) [hereinafter 2007 REPORT].

49. The former aircraft carrier *USS Oriskany* recently became the largest vessel sunk to create an artificial reef. *See* Susan Cocking, *Panhandle's USS Oriskany is One of the World's Largest Artificial Reefs*, MIAMI HERALD, Nov. 16, 2006, at D6. The *Texas Clipper* is the latest ship to be sunk for the purpose of creating an artificial reef. *See* Press Release, U.S. Dep't of Transp., *New Life for an Old Ship: Former Training Ship to Become Artificial Reef* (Nov. 3, 2006), available at <http://www.marad.dot.gov/Headlines/announcements/2006/TX%20Clipper.htm>.

50. DEP'T OF DEFENSE INTERAGENCY SHIP SCRAPPING REVIEW PANEL, REPORT OF THE INTERAGENCY PANEL ON SHIP SCRAPPING, pt. II (1998), available at <http://www.marad.dot.gov/Ship%20Disposal/Interagency%20report%20on%20ship%20scrapping.pdf> [hereinafter SHIP SCRAPPING].

51. Takako Morita, Note, *N.I.M.B.Y. Syndrome and the Ticking Time Bomb: Disputes Over the Dismantling of Naval Obsolete Vessels*, 17 GEO. INT'L ENVTL. L. REV. 723, 726 (2005).

52. *See id.*



decide that these vessels could no longer be exported internationally under U.S. law.<sup>53</sup> Between 1983 and 1994, MARAD managed to scrap over 200 vessels almost exclusively through the practice of selling the ships “as is/where is” to foreign investors who would then dispose of the ships in foreign countries with lax environmental standards.<sup>54</sup> With the main method of disposal cut off due to serious environmental concerns, however, the fleet began to build back up as more merchant class ships were retired.<sup>55</sup> After significant news coverage of the build-up and associated environmental accidents during the late 1990s,<sup>56</sup> Congress finally acted in 2000 in a serious effort to begin to remedy the problem.

The National Maritime Heritage Act of 1994 (“NMHA”) originally directed MARAD to dispose of all NDRF vessels not assigned to the RRF or already designated for another purpose by September of 1999.<sup>57</sup> Because little headway was made towards reaching the original deadline, in September of 2000, Congress realized that the process would now take much longer than expected. Congress thus included in its 2001 defense budget bill an amendment to the NMHA that delayed the deadline for disposal of all obsolete NDRF ships until September 30, 2006.<sup>58</sup> Congress also updated the mandate of the NMHA to comply with environmental regulations for PCBs and directed the Department of Transportation by statute to dispose of the vessels “in the manner that provides the best value to the Government, except in any

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53. See LOUIS BERGER GROUP, INC., TRANSFER OF NATIONAL DEFENSE RESERVE FLEET VESSELS FROM THE JAMES RIVER FLEET FOR DISPOSAL AT ABLE UK FACILITIES, TEESIDE, UK: ENVIRONMENTAL ASSESSMENT 5 (2004), available at [http://www.marad.dot.gov/programs/Scrapping/web/02-MARAD%20UK%20FinalEA%20Text\\_cameraready\\_062904.pdf](http://www.marad.dot.gov/programs/Scrapping/web/02-MARAD%20UK%20FinalEA%20Text_cameraready_062904.pdf). For a more detailed history of the U.S. domestic laws that have governed the export of hazardous materials, including PCBs, see Morita, *supra* note 51, at 737–39.

54. See U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. GA0-05-264, MARITIME ADMINISTRATION: IMPROVED PROGRAM MANAGEMENT NEEDED TO ADDRESS TIMELY DISPOSAL OF OBSOLETE SHIPS, at 7 (2005), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-05-264> [hereinafter GAO REPORT].

55. See *id.* at 7–8.

56. Gary Cohn and Will Englund were awarded a Pulitzer Prize for their series of investigative articles on the negative environmental consequences of international ship-breaking. These reports are archived at 1998 Pulitzer Prizes-Investigative Reporting, available at <http://www.pulitzer.org/year/1998/investigative-reporting/works/> (last visited Nov. 9, 2007).

57. National Maritime Heritage Act of 1994, Pub. L. No. 103-451, § 6(c), 108 Stat. 4769, 4777 (codified as amended at 16 U.S.C. § 5405(c) (2000)).

58. See Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398 app. § 3502(a)(1), 114 Stat. 1654A-1, 1654A-490 (2000) (codified at 16 U.S.C. § 5405(c)(1)(A) (2000)).

case in which obtaining the best value would require towing a vessel and such towing poses a serious threat to the environment.”<sup>59</sup>

The 2001 defense bill also contained specific guidance on how to choose ship-scraping facilities. The bill stated that facilities should be able to dispose of 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 minimizes the geographic distance that a vessel must be towed when towing a vessel poses a serious threat to the environment.”<sup>60</sup> As is apparent from this guidance, cost has always been a key issue to determining the fate of the obsolete NDRF vessels. Unfavorable scrap metal prices between 2000 and 2003, combined with the fact that only domestic scrapping was considered a viable option under the guidelines, led to less than twenty vessels being scrapped during this time period.<sup>61</sup>

The Environmental Protection Agency (“EPA”) guidelines contained in the Toxic Substances Control Act (“TSCA”) prohibit the distribution of materials in commerce that contain PCBs.<sup>62</sup> Such materials may only be distributed or used if the Administrator of the EPA determines that the particular distribution or use “will not present an unreasonable risk of injury to health or the environment.”<sup>63</sup> Even though MARAD does not have the authority to transfer PCB-laden ships in the NDRF to foreign countries under current law, the 2001 Act created a pilot program to study whether international ship-breaking could be done in an environmentally friendly manner.<sup>64</sup> The EPA agreed to cooperate with the pilot program and issued an “enforcement discretion” letter in May of 2003 “stating that it would not enforce the PCB export ban against MARAD so long as certain conditions affecting the disposition of the ships are met.”<sup>65</sup>

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59. *Id.* § 3502(a)(2), 114 Stat. at 1654A-490 (codified at 16 U.S.C. § 5405(c)(1) (B) (2000)).

60. *Id.* § 3502(b), 114 Stat. at 1654A-490 (2000).

61. See GAO REPORT, *supra* note 54, at 14.

62. 15 U.S.C. § 2605(e)(2)(A) (2000).

63. *Id.* § 2605(e)(2)(B).

64. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 3504(c), 116 Stat. 2458, 2755–56 (2002).

65. *Basel Action Network v. Mar. Admin.* (*Basel I*), 285 F. Supp. 2d 58, 60 (D.D.C. 2003).

Both MARAD and Congress had known for some time that the target date of September 30, 2006 for disposal of all obsolete vessels was not an attainable goal.<sup>66</sup> A report by the Government Accountability Office ("GAO") in the spring of 2005 harshly criticized MARAD for not making more progress towards its goal and stated that the slow progress was due to inept management.<sup>67</sup> Congress appropriated over \$80 million for ship disposal between 2001 and 2004, but MARAD only disposed of twelve percent of its 2001 inventory by 2004 and more obsolete ships continued to join the fleet during this time.<sup>68</sup> The GAO report noted that MARAD had little transparency in its process of awarding contracts and stated, "MARAD's ship disposal program lacks the vision needed to sustain a long-term effort."<sup>69</sup> The report concluded by cautioning: "As a result of its slow progress, MARAD will continue to have a backlog of obsolete and deteriorating ships that pose a threat to the coastal waterways where they are anchored because of the toxic materials that they contain."<sup>70</sup> The GAO report made it clear that MARAD had to employ significant changes for its domestic Vessel Disposal Program to be effective. Though once viewed as a possible alternative to the domestic Vessel Disposal Program, by 2005 it had become clear that the international pilot program which Congress adopted in 2002 was destined to fail as well.

### III. INTERNATIONAL DISPOSAL PILOT PROGRAM AND RESULTING U.S. LITIGATION

MARAD has consistently promoted foreign disposal of NDRF vessels as one way to quickly and economically dispose of the ghost fleet.<sup>71</sup> Because of widespread opposition to the lax environmental controls involved in international disposal, however, then-Vice President Al Gore imposed a one-year moratorium on

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66. See GAO REPORT, *supra* note 54, at 43.

67. See *id.*

68. *Id.* at 14, 43.

69. *Id.* at 43.

70. *Id.* at 44.

71. See MAR. ADMIN., U.S. DEPT' OF TRANSP., REPORT TO CONGRESS ON THE PROGRESS OF THE VESSEL DISPOSAL PROGRAM 5 (2005), available at [http://www.marad.dot.gov/Publications/FY%2006/ReportToCongress11\\_05%20Final%20ver%202-21-2006.pdf](http://www.marad.dot.gov/Publications/FY%2006/ReportToCongress11_05%20Final%20ver%202-21-2006.pdf) ("MARAD continues to believe that environmentally sound facilities exist abroad that offer the United States very competitive prices for the disposal of MARAD's obsolete vessels.").

international disposal in 1998.<sup>72</sup> It would be another five years before MARAD resumed its international disposal efforts.

The pilot program, approved by Congress in 2002 and put into action by MARAD in 2003, renewed interest in international disposal. The program was designed to explore “the extent to which the cost-effective dismantlement or recycling of obsolete vessels in the National Defense Reserve Fleet can be accomplished abroad in [a] manner that appropriately addresses concerns regarding worker health and safety and the environment.”<sup>73</sup> Though the program gave MARAD permission to begin multiple pilot programs of no more than four ships each,<sup>74</sup> the only pilot program MARAD pursued was a contract between the agency and Post-Service Remediation Partners, LLC, a company located in Tees-side, England.<sup>75</sup>

The contract originally called for the sale of thirteen deteriorating ships and two uncompleted ships to Post-Service Remediation’s subcontractor and parent corporation, Able UK.<sup>76</sup> After word spread of the contract, though, the Sierra Club and Basel Action Network (“BAN”)<sup>77</sup> immediately filed a lawsuit in the U.S. to stop MARAD from dispatching the ships from the Chesapeake

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72. See Eric M. Weiss, *Ships Anchored in the Past: U.S. “Ghost Fleet” Poses Environmental and Other Dangers*, WASH. POST, Feb. 16, 2003, at C1. Vice President Gore stated that the one-year moratorium would be official Clinton administration policy in an executive memorandum delivered to Secretary of Defense William Cohen and Secretary of Transportation Rodney Slater. See Gary Cohn, *U.S. Halts Scrapping of Ships Overseas: One-Year Ban Ordered in Response to Health, Ecological Concerns*, BALT. SUN, Sept. 24, 1998, at A1.

73. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 3504(c)(3)(C), 116 Stat. 2458, 2755 (2002).

74. *Id.* § 3504(c)(2)(B), 116 Stat. at 2755.

75. See *Basel Action Network v. Mar. Admin. (Basel II)*, 370 F. Supp. 2d 57, 61–62 (D.D.C. 2005).

76. See *id.*; see also GAO REPORT, *supra* note 54, at 19.

77. The district court later determined BAN to be one of many organizations under the umbrella of the California non-profit organization “The Tides Center.” *Basel II*, 370 F. Supp. 2d at 68. The court stated:

On an organizational chart, the Tides Center would be at the top, with a series of approximately 350 Projects under it. One such Project is the Asia Pacific Environmental Exchange in Seattle. Under each Project is one or more Sub-Projects. BAN is a Sub-Project under the Asia Pacific Environmental Exchange Project.

*Id.* BAN describes itself as “the world’s only organization focused on confronting global environmental injustice and economic inefficiency of toxic trade (toxic wastes, products and technologies) and its devastating impacts.” Basel Action Network, About the Basel Action Network, [http://www.ban.org/main/about\\_BAN.html](http://www.ban.org/main/about_BAN.html) (last visited Nov. 9, 2007).

overseas.<sup>78</sup> The United States District Court for the District of Columbia subsequently granted BAN's requested temporary restraining order ("TRO") and limited the transfer to just four "seaworthy" ships.<sup>79</sup> Though the plaintiffs argued three reasons for why the transfer should be stopped, the TRO was solely based on MARAD's failure to comply with the National Environmental Policy Act ("NEPA").<sup>80</sup> The Sierra Club and BAN argued that the transfer violated TSCA, NMHA, and NEPA.<sup>81</sup> The district court ruled that the plaintiffs had failed to show, for the purposes of a TRO, a substantial likelihood of success for their TSCA and NMHA claims, but the court still granted the TRO for nine of the thirteen ships based on the NEPA claims.<sup>82</sup> The court explained that MARAD had prepared a valid environmental assessment ("EA") as required by NEPA for four ships, but "[b]efore sending any additional NDRF vessels through the Chesapeake Bay and United States coastal waters, MARAD must perform, at a minimum, a supplemental EA specific to those ships that addresses the environmental impact of such action in the United States."<sup>83</sup>

The TRO for nine of the thirteen ships remained in place for the next two years, and after briefing and argument of the case before the district court, the court ultimately dismissed the case on a motion for summary judgment in the spring of 2005.<sup>84</sup> Between 2003 and 2005, the plaintiffs had restated their objections to include violations of TSCA, NEPA, and the Resource Conservation and Recovery Act ("RCRA").<sup>85</sup> The first question the court addressed in its 2005 decision was whether BAN and the Sierra Club had standing to sue. After a thorough discussion of the concept of associational standing, the court held that BAN was a Sub-Project of the Tides Center and thus did not meet the test for

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78. *Basel II*, 370 F. Supp. 2d at 61.

79. *Basel I*, 285 F. Supp. 2d 58, 64 (D.D.C. 2003).

80. *See id.* at 63 (citing National Environmental Policy Act, Pub. L. No. 91-190, § 102(c), 83 Stat. 852, 853 (1970) (codified as amended at 42 U.S.C. § 4332(c) (2000))).

81. *Id.* at 60.

82. *Id.* at 61-63.

83. *Id.* at 63. Following the court's decision on the TRO, the first four ships were successfully dispatched to Teesside, England. *Basel II*, 370 F. Supp. 2d at 62. The *Caloosahatchee*, *Canisteo*, *Canopus*, and *Compassisland* all remain moored at a facility operated by Able UK in England as Able UK continues to pursue the proper permits to begin ship-breaking operations. *Id.* For the final EA, see LOUIS BERGER GROUP, INC., *supra* note 53.

84. *See Basel II*, 370 F. Supp. 2d at 61.

85. *Id.* at 63-65. RCRA regulates the storage and disposal of hazardous waste. *See* 42 U.S.C. § 6902(a) (2000).

associational standing.<sup>86</sup> Because MARAD did not challenge the Sierra Club's standing, however, the court found that the organization did have associational standing.<sup>87</sup>

Turning to the merits, the court sided with MARAD for procedural reasons with respect to the TSCA claims.<sup>88</sup> The court also ruled in favor of MARAD on the RCRA claims, holding that no "imminent and substantial' harm" existed in 2005 to warrant relief under that statute.<sup>89</sup> The majority of the court's opinion, however, was dedicated to a challenge of MARAD's 2004 EA. The Sierra Club challenged this EA "as failing to consider the impacts of towing ships across the high seas, failing to analyze each ship separately, and inadequately considering the alternative use of only domestic ship-breakers."<sup>90</sup> In response to the first challenge, the court held that NEPA did not require an analysis of environmental effects beyond U.S. territorial waters.<sup>91</sup> The EA studied the environmental impact to all U.S. waters that would be used in the tow, and because of the "customary presumption against the application of NEPA outside U.S. territorial waters," the court held that MARAD did all that was required.<sup>92</sup>

The plaintiffs also argued that MARAD failed to take a "hard look" at the possible environmental effects in its 2004 EA before issuing a finding of no significant impact ("FONSI").<sup>93</sup> The plaintiffs claimed that NEPA required a separate EA for each of the nine ships that still awaited towing to England under the pilot program.<sup>94</sup> The court disagreed, holding that "the 2004 EA represents a reasoned 'hard look' at the kinds of materials found on-board that are 'typical' of vessels of a similar age and type/

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86. See *Basel II*, 370 F. Supp. 2d at 70.

87. *Id.* at 68 n.7, 70.

88. The court explained that the plaintiffs failed to give the United States sixty days notice before filing their claims as required by statute. *Id.* at 75.

89. *Id.* at 78-79 (citing 42 U.S.C. § 6972(a)(1)(B) (2000)).

90. *Id.* at 71.

91. *Id.*

92. *Id.* at 71 & n.8.

93. *Id.* at 71.

94. *Id.* at 72. Of the original nine ships listed in the Able UK contract, the *Santa Cruz*, *American Banker*, and *Mormacmoon* were sold to a domestic shipbreaker in Texas. The *Donnor* and the *Protector* are also slated to be disposed of domestically. The *Cape Isabel*, *Mormacwave*, and *American Range* are currently under consideration for domestic ship-breaking as well, leaving the *Rigel* as the only ship still available to Able UK that was originally listed in the contract. *Id.* at 62.

class.”<sup>95</sup> The court also found that MARAD was not required to conduct an in-depth analysis of tow accidents and noted that “[b]etween 1984 and 1994 (when foreign sales were halted), approximately 173 MARAD vessels were towed to overseas locations for scrapping’ without any losses during the tows.”<sup>96</sup>

Finally, the court addressed the Sierra Club’s claim that the 2004 EA did not adequately consider the alternative of using only domestic ship-breaking corporations. The Sierra Club argued that MARAD’s EA was too narrow because it only considered the two alternatives of tandem tows to the UK and taking no action at all.<sup>97</sup> The court classified this argument as a “policy disagreement” rather than a valid NEPA claim against an inadequate FONSI, and thus dismissed the claim.<sup>98</sup> The court held that “[i]n context, there were only two alternatives necessary for the 2004 EA to consider, particularly since MARAD [was] already relying on The Sierra Club’s preferred alternative of domestic ship-breaking.”<sup>99</sup> With this decision, the court essentially gave MARAD the green light to transfer all thirteen ships under contract to Able UK, though as discussed below, the decision did not make international disposal of NDRF vessels a reality.

#### IV. OBSTACLES TO SHIP-BREAKING IN THE UNITED KINGDOM

Four days after the district court cleared the way for four ships to be transported to England, the first two departed from Virginia.<sup>100</sup> Less than two weeks later, the remaining two ships were dispatched as well.<sup>101</sup> Though everything appeared on course, all interested parties would soon learn that one procedural defect, the roots of which dated back to 1997, would derail the entire program for at least the next four years. Opposition to Able’s plans in the UK began in mid-2003 when a group called Friends of the Earth alerted the media to potentially disastrous consequences from “waste ships” en-route from the United States.<sup>102</sup>

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95. *Id.* at 73.

96. *Id.* at 73–74.

97. *Id.* at 74. Tandem towing is the process of towing one ship behind another.

98. *Id.*

99. *Id.*

100. Morita, *supra* note 51, at 742.

101. *Id.*

102. See ENVIRONMENT AGENCY, US NAVAL VESSELS—LESSONS LEARNED REVIEW ¶ 1.1

Though the ships did not carry any waste cargo and had been stripped of all major PCB-containing parts by MARAD before transport,<sup>103</sup> interest groups characterized the ships in the local press as “waste ships” from a “toxic fleet.”<sup>104</sup>

The publicity campaign by the program’s opponents led to increased scrutiny of Able’s ship-breaking plans. In order to begin operations, Able was required to obtain permits from the local planning council in Hartlepool, the UK Maritime and Coastguard Agency, the UK Department for Environment, Food, and Rural Affairs, and the UKEA.<sup>105</sup> Though Able believed it had received the necessary permits from all of these agencies, the advocacy group English Nature suggested in a public hearing in July of 2003 that Able did not have proper permission to construct an integral cofferdam.<sup>106</sup>

Able received a permit to build the cofferdam in 1997 from the Hartlepool planning council. English Nature argued, however, that Able failed to begin construction within the time allotted by the permit and thus no longer had permission.<sup>107</sup> The UKEA, which was represented at this meeting, subsequently contacted MARAD in mid-September and facilitated contact between MARAD and Hartlepool.<sup>108</sup> The UKEA suggested that transfer of the ships be put on hold until questions regarding proper permission were resolved, though both MARAD and Able ignored this advice.<sup>109</sup> The Hartlepool planning council finally explained to Able in a letter dated October 7, 2003—one day after the first ships were dispatched—that while Able had taken some prelimi-

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(2004), <http://www.environment-agency.gov.uk/commondata/103599/lessonslearnedus775945.doc> [hereinafter LESSONS LEARNED].

103. *Id.* ¶ 1.4.

104. *See, e.g.*, BASEL ACTION NETWORK, NEEDLESS RISK: THE BUSH ADMINISTRATION’S SCHEME TO EXPORT TOXIC WASTE SHIPS TO EUROPE (Oct. 2003), <http://www.ban.org/Library/Needless%20Risk%20Final.pdf>; John Vidal, *Rusting, Toxic “Ghost Fleet” on Way to UK*, THE GUARDIAN (U.K.), Sept. 3, 2003, <http://www.guardian.co.uk/waste/story/0,12188,1034598,00.html>.

105. *See* Morita, *supra* note 51, at 743.

106. ENVIRONMENT, FOOD, AND RURAL AFFAIRS COMM., ENVIRONMENTAL AGENCY INQUIRY INTO UNITED STATES “GHOST SHIPS” ¶¶ 25–26 (2003), [http://www.environment-agency.gov.uk/commondata/acrobat/efra\\_com\\_evidence\\_630119.pdf](http://www.environment-agency.gov.uk/commondata/acrobat/efra_com_evidence_630119.pdf) [hereinafter COMMITTEE INQUIRY]. Cofferdams are temporary structures built to exclude water from areas that are usually submerged. They are commonly used during construction of locks or dry docks.

107. *See id.* ¶ 26.

108. *See* LESSONS LEARNED, *supra* note 102, ¶ 2.3.3.

109. *Id.*



nary steps towards building the cofferdam in 2002, the council did not consider those actions sufficient to meet the time restrictions contained in the 1997 permit.<sup>110</sup> Able was thus instructed that it did not have the council's permission to begin construction on the facilities necessary to begin ship-breaking.

Completely separate from these proceedings was Able's application to the UKEA to obtain permission to transfer the ships across the Atlantic Ocean from Virginia to Hartlepool. Able submitted this application in June of 2003 and received a permit from the UKEA on July 22, 2003.<sup>111</sup> Once Able learned that it no longer had the required permission to begin construction of its dry dock ship-breaking facility, it informed the UKEA of its plans to appeal Hartlepool's decision. Able notified the UKEA that should Able not receive permission for a dry dock, it alternatively planned to continue its ship-breaking program in a wet dock.<sup>112</sup> After obtaining a legal opinion on how to proceed, in late October of 2003 the UKEA withdrew the waste management license that Able needed to begin construction. Though the UKEA had issued the license just weeks earlier, the agency explained that the issuance had been based on a report that only considered plans for a dry-dock operation and it was not allowed to issue licenses for any projects when local permits had not first been obtained.<sup>113</sup> After conferring with Able and MARAD on possible risks, the UKEA decided that although the proper permits had not been obtained, the safest course of action was to allow the ships already en-route to continue their journey.<sup>114</sup> The four ships arrived in mid-December of 2003 and have been docked at Able's facility since then.<sup>115</sup>

The UK High Court's Administrative Court has supervisory and appellate jurisdiction for decisions of the UKEA and Hartlepool planning council.<sup>116</sup> The High Court conducted a series of hearings in December of 2003 regarding the legality of the

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110. COMMITTEE INQUIRY, *supra* note 106, ¶ 27.

111. See Environment Agency, U.S. Naval Ships: A Synopsis of the Issue, [http://www.environment-agency.gov.uk/regions/northeast/588494/752576/?Version=1&lang=\\_e](http://www.environment-agency.gov.uk/regions/northeast/588494/752576/?Version=1&lang=_e) (last visited Nov. 9, 2007) [hereinafter Synopsis].

112. See COMMITTEE INQUIRY, *supra* note 106, ¶ 32.

113. See *id.* ¶¶ 33–34.

114. See Synopsis, *supra* note 111.

115. See *id.*

116. See PETER CANE, AN INTRODUCTION TO ADMINISTRATIVE LAW 8 (2d ed. 1992).

UKEA's permit withdrawal and Hartlepool's determination that Able had failed to acquire the proper building and ship-breaking permits.<sup>117</sup> On December 18, 2003, Justice Sullivan released a lengthy opinion that addressed numerous issues relating to Able's permits, but stated the question presented as: "What is the meaning of the 1997 planning permission?"<sup>118</sup> Justice Sullivan held that Able did not have the proper permits in place to begin dismantling the ships.<sup>119</sup> Able had received permission in 1997 for the "[d]ismantling/refurbishment of redundant marine structures and equipment."<sup>120</sup> The council and Able had argued that ships qualified as "marine structures,"<sup>121</sup> but Justice Sullivan disagreed, holding, "In ordinary language a ship is no more described as a 'marine structure' than a car is described as a 'highway structure', a narrowboat a 'canal structure', or a steam locomotive a 'railway structure'."<sup>122</sup>

The claimants in the application before the court challenged the legality of a letter sent by a Hartlepool council member to Able on September 30, 2003.<sup>123</sup> The letter expressed the council member's view that Able obtained the proper permits needed to begin ship-breaking.<sup>124</sup> The court held that no decision was contained in the letter, however, and described the letter as "merely an informal expression of an officer's view" before granting the claimants "a Declaration to the effect that the words 'marine structures' in the 1997 planning permission do not include ships."<sup>125</sup> In his decision, Justice Sullivan ordered that Able would be prevented from beginning work until it obtained the proper permission.<sup>126</sup>

After receiving word from the High Court in December of 2003 that it did not have the proper permission to begin work, Able began drafting new applications for the Hartlepool planning council. The company spent the next year preparing its applications and

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117. Morita, *supra* note 51, at 744.

118. *Gregan v. Hartlepool Borough Council*, [2003] EWHC (Admin) 3278, [16] (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/Admin/2003/3278.html>.

119. *See id.* at [88].

120. *Id.* at [18], [35].

121. *Id.* at [29].

122. *Id.* at [35].

123. *Id.* at [1].

124. *Id.*

125. *Id.* at [88].

126. *Id.*

accompanying environmental statement, and in January of 2005 it submitted the new applications.<sup>127</sup> Because of the high level of public interest in the project, numerous objections were made.<sup>128</sup> Able worked with the council throughout 2005 in responding to requests for further information and updated its applications three times.<sup>129</sup> After Able finalized the applications, the council held three public notice and comment sessions and reviewed 485 letters and five petitions in opposition.<sup>130</sup>

The opposition letters stated nearly seventy reasons why Able's applications should be denied.<sup>131</sup> Chief among the arguments presented was the idea that the U.S. should be responsible for its own waste.<sup>132</sup> Those in opposition feared that approving Able's applications would open the door to more ships from the ghost fleet and possibly other types of toxic waste.<sup>133</sup> Other environmental concerns were expressed, including potential harm to a nearby environmental sanctuary and danger to birds from wind turbines that were part of Able's proposed facilities.<sup>134</sup> Many local citizens also opposed the applications for purely economic reasons. They argued that the presence of deteriorating ships in Hartlepool's harbor and reputation as a foreign toxic waste site would damage the town's growing tourism industry.<sup>135</sup> The council received only nine letters in support of Able's applications. Those letters highlighted several facts: Able's project would bring jobs to the community; little toxic waste was involved in the ship-breaking process; and no other government agency had outstanding objections to the project.<sup>136</sup>

On October 12, 2006, the Hartlepool planning council finally addressed Able's applications. After Able's representatives ex-

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127. See Hartlepool Borough Council, Planning Committee Minutes and Decision Record, Oct. 12, 2006, at 5 (Nov. 6, 2006), [http://www.hartlepool.gov.uk/downloads/06.11.06\\_-\\_Planning\\_Committee\\_Agenda\\_1\\_.pdf](http://www.hartlepool.gov.uk/downloads/06.11.06_-_Planning_Committee_Agenda_1_.pdf) [hereinafter Hartlepool Minutes].

128. See *id.* at 4–5.

129. *Id.* at 5.

130. See Hartlepool Borough Council, Planning Committee Agenda, at 13, 16 (Oct. 12, 2006), [http://www.hartlepool.gov.uk/downloads/12.10.06\\_-\\_Planning\\_Committee\\_Agenda\\_1\\_.pdf](http://www.hartlepool.gov.uk/downloads/12.10.06_-_Planning_Committee_Agenda_1_.pdf) [hereinafter Hartlepool Agenda].

131. *Id.* at 14–16.

132. See *id.* at 13.

133. See *id.*

134. See *id.* at 13–16.

135. See *id.* at 13.

136. See *id.* at 17.

plained the technical details of the company's applications to the council, those in opposition had the chance to speak. Individuals opposing the applications cited a survey that found that ninety-two percent of town residents were opposed to the applications and pleaded for the council not to turn the town into a "toxic waste dump."<sup>137</sup> Additionally, those opposed cited Able's spotty environmental record, which included over 300 citations by the UKEA and two revoked environmental permits.<sup>138</sup> After further questioning and discussion by the council, a motion to deny the applications was made and seconded.<sup>139</sup> A vote was then taken, and each application was denied by a margin of ten or eleven votes to one.<sup>140</sup>

The explanation accompanying each denied application was short and conclusive. The council stated five reasons for denying Able's applications, first citing the possibility of a "significant adverse effect on the integrity of nearby sites of ecological importance."<sup>141</sup> Second, the council noted that the applications presented a risk of a "significant adverse effect on the health and well being of people living near to the application site by reason of potential emissions to water and air."<sup>142</sup> Third, the council noted that Able's prediction of over 700 new jobs had not been independently verified, and even if the project did create jobs, the benefit would not outweigh the negative environmental impact.<sup>143</sup> The council next cited the argument that Able's project would hurt tourism, before finally stating that it was the council's belief that importation of waste materials was against earlier Council Directives.<sup>144</sup> Able tried to convince the council to reconsider its denial in the days following the October 12, 2006 meeting, but its efforts were unsuccessful.<sup>145</sup> The council's denial became official with the public release of its decision on November 6, 2006.<sup>146</sup>

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137. Hartlepool Minutes, *supra* note 127, at 4–5.

138. *Id.* at 5.

139. *Id.* at 6–12.

140. *Id.* at 12–14.

141. *Id.* at 12–13.

142. *Id.*

143. *Id.* at 13. In response to questions regarding the creation of jobs, Able's representatives estimated that 239 jobs would be created in decommissioning work and 510 workers would be needed for construction of a wind turbine. *Id.* at 7.

144. *Id.* at 13.

145. See Mike Blackburn, *Anger over Ships Plans*, EVENING GAZETTE (Middlesbrough, Eng.), Nov. 7, 2006, Local News, at 4.

146. Press Release, Hartlepool Borough Council, Council Rejects Able UK Planning

Able stated that it would appeal the decision to the High Court, though it believed that a completely new application responding to the concerns of the council would be more successful.<sup>147</sup>

Though Hartlepool presented five reasons for denying Able's permit applications, only one of the five reasons can remotely be considered a "legal" ground for denial. The council's first stated reason of opposition—environmental concerns<sup>148</sup>—represents little more than an overture to the many environmental interest groups that registered their opposition. Able's environmental statement was never challenged as legally inadequate, and the UKEA stated publicly that it had no objections, environmental or otherwise, to the applications. Even though Able submitted detailed plans regarding its environmental safeguards, those plans were ultimately ignored in the council's decision. The council's second environmental objection, regarding the health and well-being of the town's citizens, has even less merit. The only environmental effects mentioned in Able's application was noise customarily associated with normal construction and the increased use of the roadways around the dock site because of the large number of jobs the project would create. For the council to list these concerns as an official reason for rejecting the applications shows that the decision was made almost purely on policy grounds, ignoring the fact that the applications met all relevant legal requirements.

The council's argument that Able failed to verify job creation predictions<sup>149</sup> is equally unfounded. No group, either in written objections or at the planning meeting, accused Able of falsifying its prediction that the project would create more than 700 jobs. Because the environmental consequences were relatively minor for a project of its size, the council's assertion that uncertain job predictions were outweighed by environmental considerations also demonstrates the lack of a well-reasoned denial. Similarly, the council's argument that Able's project would hurt Hartlepool's

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Request (Nov. 6, 2006), available at <http://www.hartlepool.gov.uk/site/scripts/newsarticle.php?newsID=499>.

147. See Press Release, Able UK, Ltd., Disappointment Over Ships Contract—But Appeal Continues (May 30, 2007), available at <http://www.ableuk.com/ableshiprecycling/press-able-070530.html>; see also Helen Cook, *No U-Turn over "Ghost Ships,"* N. ECHO (Parlington, Eng.), Nov. 7, 2006, at 1, available at [http://www.thenorthernecho.co.uk/sea\\_rch/display.var.1006444.ono\\_urn\\_over\\_ghost\\_ships.php](http://www.thenorthernecho.co.uk/sea_rch/display.var.1006444.ono_urn_over_ghost_ships.php).

148. See Hartlepool Minutes, *supra* note 127, at 12–13.

149. See *id.* at 13.

tourism is without merit. No evidence was presented at the council meeting that the town even has a viable tourism industry, much less one that would be impacted by the presence of ships being recycled in its harbor.

Finally, the council did put forth one colorable legal argument to support its denial of Able's application. The council stated that importation of foreign waste was in conflict with earlier Council Directives.<sup>150</sup> The problem with this argument is that the council voted in 1997 to approve roughly the same project, and no mention of a policy against importation of waste was made at that time. If the importation of foreign waste did in fact conflict with earlier Council Directives, the council could easily overrule the earlier directives or classify the ships as obsolete vessels being imported for recycling purposes rather than waste. The lack of any compelling legal argument in the council's October 12 decision shows that the denial was nothing more than a reflection of public sentiment against importing an American problem.

After the October 2006 denial by the Hartlepool town council, MARAD decided that international disposal in the United Kingdom was no longer feasible. MARAD subsequently renegotiated its 2003 contract with Able to only cover ship-breaking for the four ships already delivered to Able, along with the two unfinished ships, at a cost of \$10.1 million—assuming that Able could successfully obtain the proper permits to begin ship-breaking sometime in the future.<sup>151</sup> By the spring of 2007, eight of the nine ships originally part of the contract had already been disposed of, and plans were in place to dispose of the ninth ship by the end of 2008.<sup>152</sup> The renegotiation essentially reformed the contract to reflect the reality of the situation. Even so, the fact that MARAD agreed to keep giving incentives to Able to complete its contract in the United Kingdom was met with opposition by other domestic ship-breaking companies.<sup>153</sup>

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150. *See id.*

151. *U.S. Ends Junk-Ship Deal with British: Permit Delays Held Up Firm's Scrapping of 'Ghost Fleet' Vessels*, RICH. TIMES-DISPATCH (Va.), June 11, 2007, at B5.

152. David Lerman, *Revised Deal Ends One of Fights over Ghost Fleet*, DAILY PRESS (Newport News, Va.), June 2, 2007, at B1. For more information on these eight ships, see *supra* note 94.

153. Southern Scrap Material Company filed a request with the U.S. Comptroller General in the summer of 2007 to void and re-bid Able's contract because the price seemed too high and the contract with Able had not been released publicly. Scott Harper, *Two More*

## V. CONCLUSION

The Hartlepool planning council's October 12, 2006 decision appears to be one of the latest examples of a phenomenon commonly seen in the toxic waste disposal debate. The phenomenon, known as "Not in My Backyard," or NIMBY, is one of the main obstacles to increasing the rate of disposal for NDRF ships in the United States.<sup>154</sup> While all parties involved would like to see the vessels disposed of quickly and in an environmentally friendly manner, ship-breaking companies have often encountered strong resistance while attempting to build the necessary facilities.<sup>155</sup> Luckily, favorable scrap prices have recently spurred growth in the U.S. domestic ship-breaking industry.<sup>156</sup> That fact, along with an increased economic commitment from Congress towards the Vessel Disposal Program, has combined to steer the domestic ship-breaking program in the right direction.<sup>157</sup> Today eight companies have been certified by MARAD as qualified to compete for domestic recycling contracts, and seven of those companies have either begun or already completed some ship-scraping projects in the United States.<sup>158</sup> Even with these developments, however, Congress and MARAD are not moving fast enough to avert a possible environmental disaster.

Because the 2003 pilot program only gave MARAD permission to pursue international disposal options and enter into contracts during 2003,<sup>159</sup> further exploration of environmentally friendly international disposal options is not currently a possibility. Though Able UK was not successful in its bid to start operations in England to dispose of American ships, Congress should nonetheless give MARAD the flexibility to enter into contracts with

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*Rusted Vessels are Slated to be Scrapped*, VIRGINIAN-PILOT (Norfolk, Va.), June 14, 2007, at D1.

154. See Morita, *supra* note 51, at 727-28.

155. One ship-breaking company made headlines in Oregon after its plans to build a wet dock ship-breaking facility there were rebuked by the state government. See Editorial, *Only in Dry Dock: The Governor Gets it Right*, OREGONIAN (Portland, Or.), Feb. 11, 2006, at B4 (supporting Governor Kulongoski's decision to allow ship-breaking only in dry docks).

156. See Paul Glader, *Hot Metal: With Steel Soaring, A Ghost Fleet Is in High Demand*, WALL ST. J., Jan. 10, 2006, at A1.

157. Congress increased funding for the Vessel Disposal Program between 2004 and 2005 from \$16.1 million to \$21.6 million. See Morita, *supra* note 51, at 731.

158. See 2007 REPORT, *supra* note 48, at 1-2.

159. See Pub. L. No. 107-314, § 3504(c)(2)(A), 116 Stat. 2755, 2755 (2002).

other qualified international ship-breaking companies in the future. Congress should also study the possibility of amending the TSCA to make it easier for international disposal projects to gain approval in a timely manner.<sup>160</sup> If Congress takes these actions, international disposal could once again become a viable option to help speed the rate of ghost fleet disposal.

The U.S. ship-breaking industry and the Vessel Disposal Program have both come a long way in the past fifty years. Instead of selling the obsolete NDRF vessels to the highest international bidder and sending the ships off to be disposed of in countries with lax environmental standards, MARAD now pays domestic ship-breaking firms to scrap the vessels in the United States. Companies such as Chesapeake, Virginia's Bay Bridge Enterprises have proven this model can work, as evidenced by the number of contracts the company repeatedly has won in recent years from MARAD and the company's ability, so far, to avoid environmental complaints.<sup>161</sup> Before 2005, the Vessel Disposal Program featured poor management, slow progress, and a failure to discover any real solutions. Fortunately, with the GAO's 2005 report and recent expansion of domestic companies such as Bay Bridge, it appears that Congress and MARAD are finally beginning to make real progress in disposing of the ghost fleet. Congress should continue these efforts by increasing funding for the domestic Vessel Disposal Program, giving MARAD the ability to pursue other environmentally friendly international disposal options, and continuing to work with private ship-breaking companies to ensure that the ghost fleet continues to be disposed of in an environmentally friendly but efficient manner.

*David Killion*

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160. In particular, Congress should consider creating an exception to 15 U.S.C. § 2605(e)(2)(A) (2000).

161. See Bay Bridge LLC, <http://www.globalsecurity.org/military/facility/bay-bridge.htm> (last visited Nov. 9, 2007); see also Range Bayer, Virginia Dept. of Environmental Quality's (DEQ) Reconnaissance Inspections of In-water Shipbreaking at Bay Bridge Enterprises LLC During May–November 2005, <http://www.oregonvos.net/~rbayer/salvage/vdeq.htm> (last visited Nov. 9, 2007).



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