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Alert

Federal Court Says Reserve Fleet Violates Clean Water and Hazardous Waste Laws

BY WILLIAM A. ANDERSON, II AND JOSEPH A. KRAWCZEL

A federal district court in California has held that idle vessels in the Suisun Bay Reserve Fleet (“SBRF”) are violating the federal Clean Water Act and hazardous waste laws. In *Arc Ecology v. Maritime Administration*, No. 2:07-cv-2320-GEB-GGH (E.D. Cal., Jan. 20, 2010), the court found that the leaching and sloughing of exfoliating paint and other materials from the vessels constitute illegal discharges under the Clean Water Act (“CWA”). It also held that the accumulation of paint debris onboard the vessels constitutes illegal storage of hazardous wastes in violation of California law and the federal Resource Conservation and Recovery Act (“RCRA”). The Maritime Administration (“MARAD”) within the U.S. Department of Transportation is responsible for the SBRF. MARAD had previously designated over 50 of the SBRF vessels as “non-retention,” meaning that they were no longer commercially or militarily useful. The court’s holding was limited to the non-retention vessels. A later hearing will determine penalties and relief. But this case already has ominous implications for the Hampton Roads Reserve Fleet, as well as scores of commercial vessels idled by the economic recession.

On motions for summary judgment, the district court agreed with Arc Ecology, the Natural Resources Defense Council and other environmental plaintiffs that the

non-retention vessels had been abandoned and left to decay in the Bay. The court held that “[t]he non-retention vessels ... are ‘point sources’ subject to the permitting requirements” of the CWA and that the exfoliated paint “and other materials discharged from the SBRF non-retention vessels” are pollutants under the CWA. MARAD’s own environmental consulting firm had informed it in 2006 that 40 of the SBRF vessels had already lost more than 20 tons of exfoliated paint containing heavy metals, including lead, zinc, copper and cadmium. Because the vessels discharged these pollutants into waters of the U.S. without a National Pollutant Discharge Elimination System (“NPDES”) permit, MARAD violated the CWA.

The court also granted summary judgment to the plaintiffs on one of their hazardous waste counts. It held that the non-retention vessels are storage facilities for hazardous wastes. MARAD had allowed the vessels to accumulate paint flakes and waste for more than 90 days without obtaining permits for them as treatment, storage or disposal facilities, and, therefore, the court ruled it is in violation of California’s Hazardous Waste Control

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Editorial inquiries should be directed to Marc G. Marling, 757.629.0616 or mmarling@williamsmullen.com and Evelyn M. Suarez, 202.293.8116 or esuarez@williamsmullen.com.

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Law. That law, which implements provisions of RCRA, is mirrored in the laws of almost every other state.

Arc Ecology offers two sobering lessons for prudent vessel owners/operators. First, they should be chary of classifying any idle vessels as “surplus” or “for salvage” or similar terms. As soon as a vessel ceases to be engaged in normal operations or held for future use or for sale as a means of transportation, there are two legal consequences:

1. Assuming that the vessel owner qualified the vessel for coverage under EPA’s Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels (“VGP”), that permit coverage would end because any discharges from the vessel would no longer be “incidental to the normal operation of a vessel.”
2. On-board paints, thinners, and other chemicals that were stores or supplies only yesterday may be transformed into hazardous wastes once the vessel is taken out of operation. Under the *Arc Ecology* ruling, the vessel would constitute a hazardous waste storage facility and would need a hazardous waste permit, if the hazardous wastes remained on board beyond the allowable accumulation period, generally 90 days.

Had MARAD not declared the SBRF vessels “non-retention,” it might have defended against the hazardous waste count on the ground that the paints were not (yet) wastes.

Second, vessel owners need to be sure that all discharges from the vessels are covered by discharge permits to avoid liability under the CWA and similar state environmental laws. Discharges incidental to the normal operation of a vessel are now covered by EPA’s VGP, if the vessels were the subject of a Notice of Intent (“NOI”), or are below a size cutoff that qualifies for automatic coverage. To obtain VGP coverage, owners of vessels of 300 gross tons or greater were required to file a NOI with EPA by Sept. 19, 2009. The VGP automatically covers vessels of less than 300 gross tons, unless they have the capacity to hold or discharge more than 8 cubic meters of water, in which case an NOI was also required.

If a planned reclassification (or other disposition) of a vessel in U.S. waters threatens to end its VGP coverage, vessel owners should consider applying for an individual NPDES permit for discharges. The application process can be simplified, and skillfully-structured permit coverage can bring with it significant benefits, such as an exclusion from spill and release reporting requirements for federally-permitted discharges. This exclusion may help vessel owner/operators deal with the practical difficulties of attempting to monitor idle vessels at scattered U.S. locations.

For more information about this topic and Williams Mullen’s Transportation & Logistics Industry Service Group, please contact William A. Anderson, II at wanderson@williamsmullen.com or 202.327.5060.

Transportation & Logistics Team

Marc G. Marling
Co-Chair, Transportation & Logistics
Industry Service Group
757.629.0616
mmarling@williamsmullen.com

Evelyn M. Suarez
Co-Chair, Transportation & Logistics
Industry Service Group
202.293.8116
esuarez@williamsmullen.com

William A. Anderson, II

Ralph L. Axelle, Jr.

William J. Benos

George H. Bowles

Daniel L. Brawley

Judy Lin Bristow

Lawrence H. Bryant

Stephen W. Burke

David C. Burton

Adam Casagrande

Christian H. Chiles

Edward J. Coyne, III

Benjamin C. Crumpler

David L. Dallas, Jr.

John R. Easter

John Erbach

M. Bruce Harper

Michael R. Higgs

Monroe Kelly, III

Sean M. King

Robert E. Korroch

Gilbert C. Laite

Shane L. Smith

Maria S. Stefanis

Ashley K. Williams



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