

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

PUGET SOUNDKEEPER ALLIANCE, et al.,

Plaintiffs,

v.

The UNITED STATES DEPARTMENT OF
THE NAVY, et al.,

Defendants.

NO. 3:17-cv-05458-RBL

STATE OF WASHINGTON'S
COMPLAINT IN
INTERVENTION

I. INTRODUCTION

1.1 Plaintiff-Intervenor, the State of Washington, by and through its attorneys Robert W. Ferguson, Attorney General, and Kelly T. Wood, Assistant Attorney General, and Aurora Janke, Special Assistant Attorney General, brings this action against the Defendants named below for violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* and the Washington Water Pollution Control Act, Chapter 90.48 RCW.

II. JURISDICTION

2.1 This action arises under the Clean Water Act, 33 U.S.C. § 1365. This Court has subject matter jurisdiction over Clean Water Act claims under 33 U.S.C. § 1365(a). This Court also has subject matter jurisdiction under 28 U.S.C. § 1331, as well as under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

1 2.2 This Court has subject matter jurisdiction over the State’s Chapter 90.48 RCW
2 claim under 28 U.S.C. § 1367(a).

3 2.3 The United States has waived sovereign immunity for claims related to
4 compliance with all federal and state requirements respecting the control and abatement of water
5 pollution. 33 U.S.C. § 1323(a).

6 2.4 The Clean Water Act authorizes citizen suits against “any person,” including the
7 United States or its agencies, alleged to be in violation of an effluent standard or limitation.
8 33 U.S.C. § 1365(a)(1). District courts have the authority to “enforce such an effluent standard
9 or limitation ... and to apply any appropriate civil penalties....” 33 U.S.C. § 1365(a)(2). The
10 State of Washington is a “citizen” authorized to sue under the Clean Water Act. *U.S. Dep’t of*
11 *Energy v. Ohio*, 503 U.S. 607, 614, 616 & nn.5, 9 (1992) (“A State is a ‘citizen’ under the
12 CWA.”).

13 2.5 Pursuant to the notice requirements in 33 U.S.C. § 1365(b)(1)(A), the
14 Washington State Attorney General’s Office on January 17, 2019 notified Defendants of
15 Washington’s intent to file suit to restrain or abate the violations described in this Complaint
16 (Notice Letter). A copy of the Notice Letter is attached as **Exhibit 1**.

17 2.6 More than 60 days have passed since the Attorney General’s Office sent its Clean
18 Water Act Notice Letter. The conditions complained of are continuing, or are reasonably likely
19 to continue to reoccur.

20 2.7 The United States Environmental Protection Agency (EPA), which has Clean
21 Water Act jurisdiction over federal facilities in Washington State, is not prosecuting Defendants
22 under the Clean Water Act to restrain or abate the conditions described herein.

23 III. VENUE

24 3.1 Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because a
25 substantial part of the events or omissions giving rise to Washington’s claims occurred within
26

1 this judicial district. Venue is also proper in this Court pursuant to 33 U.S.C. § 1365(c)(1)
2 because the source of the discharge is located within this judicial district.

3 **IV. PARTIES**

4 4.1 Plaintiff is the State of Washington. The State owns the groundwater and surface
5 waters of the State, including the waters in and around Naval Base Kitsap. The State, through
6 the Washington Department of Ecology (Ecology), is also responsible for promulgating Water
7 Quality Standards designed to protect human health, aquatic life, and aesthetic and recreational
8 uses of state waters.

9 4.2 Defendant United States Navy is an agency within the United States Department
10 of Defense.

11 4.3 Defendant Patrick M. Shanahan is United States Secretary of Defense and is
12 named as a defendant in his official capacity.

13 4.4 Defendant Richard V. Spencer is the Secretary of the Navy and is named as a
14 defendant in his official capacity.

15 4.5 Defendant Captain Alan Schrader is the commanding officer of Naval Base
16 Kitsap and is named as a defendant in his official capacity.

17 **V. LEGAL BACKGROUND**

18 5.1 The Clean Water Act prohibits the discharge of pollutants by any person to waters
19 of the United States, unless in compliance with the provisions of the Act. 33 U.S.C. § 1311(a).
20 As a result, discharges of pollutants from a point source is unlawful unless the discharger first
21 obtains a National Pollutant Discharge Elimination System (NPDES) permit in accordance with
22 Section 402 of the Clean Water Act. 33 U.S.C. § 1342.

23 5.2 The Clean Water Act grants EPA authority over NPDES permitting, but EPA
24 may delegate that authority to states. 33 U.S.C. §§ 1251(d), 1342(b). Although EPA has
25 delegated NPDES permitting authority to Washington for most permits, EPA retains NPDES
26 permitting authority over federal facilities in Washington, including the Puget Sound Naval

1 Shipyard at Naval Base Kitsap, pursuant to a continuing Memorandum of Agreement between
2 EPA and Ecology.

3 5.3 The Washington Water Pollution Control Act, Chapter 90.48 RCW, prohibits the
4 unpermitted discharge of any materials into waters of the state that cause or tend to cause
5 pollution. RCW 90.48.080. Even when permitted, all discharges—including those from Federal
6 facilities—must also comply with Washington’s Water Quality Standards (Chapter 173-201A
7 WAC) (including the incorporated Sediment Management Standards (Chapter 173-204 WAC)).
8 33 U.S.C. § 1323(a). These standards, approved by EPA, are designed to protect designated uses
9 of state waters, including human health, aquatic life, and recreation. 33 U.S.C. 1313; *see also*
10 Chapter 173-201A WAC; Chapter 173-204 WAC.

11 VI. FACTS

12 6.1 Sinclair Inlet is a navigable water body located in southwestern Puget Sound near
13 Bremerton, Washington, and is a water of the United States. Sinclair Inlet is also a “water of the
14 state” pursuant to RCW 90.48.020.

15 6.2 For over a century, the Navy has owned and operated facilities on the northwest
16 shore of Sinclair Inlet, including the Puget Sound Naval Shipyard where the Navy performs
17 overhaul, maintenance, modernization, repair, docking, and decommissioning of ships and
18 submarines.

19 6.3 Over the years, the Navy’s activities have released significant amounts of
20 hazardous substances into Sinclair Inlet, including mercury, zinc, copper, cadmium, arsenic,
21 chromium, other metals, and polychlorinated biphenyls (PCBs). This pollution led EPA to list
22 the Puget Sound Naval Shipyard Complex as a “Superfund” site under the Comprehensive
23 Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et al.*.
24 The Naval Shipyard Complex Superfund site includes the in-water sediment of Sinclair Inlet in
25 and around the Puget Sound Naval Shipyard, and the federal government has spent millions of
26 dollars remediating those sediments. Because of this contamination, Sinclair Inlet is also listed

1 under Section 303(d) of the Clean Water Act as an impaired water body for copper and other
2 contaminants.

3 6.4 The Puget Sound Naval Shipyard is one of three Naval Inactive Ship Maintenance
4 Facilities in the country. As a result, the Navy provides moorage for decommissioned, non-
5 operational former military vessels at the Puget Sound Naval Shipyard.

6 6.5 The ex-U.S.S. INDEPENDENCE (ex-INDEPENDENCE), a 1,070 foot-long,
7 60,000 ton former aircraft carrier that the Navy decommissioned in 1998 was moored at the
8 Puget Sound Naval Shipyard for approximately 19 years. At all times relevant to the current
9 action, the ex-INDEPENDENCE was non-operational, lacked a means of propulsion, and
10 stripped of the means of independent navigation, including a steering mechanism. Accordingly,
11 the ex-INDEPENDENCE is a “floating craft” under the definition of “point source” in 33 U.S.C
12 § 1362(14) and not a “vessel” as defined under 33 U.S.C. § 1322(a)(1)–(2).

13 6.6 On or around the summer of 2016, the Navy decided to tow the ex-
14 INDEPENDENCE to Brownsville Texas for dismantling. Before towing the ex-
15 INDEPENDENCE, the Navy was required to comply with Section 7 of the Endangered Species
16 Act, which requires federal agencies to consult with the National Marine Fisheries Service
17 (NMFS) ensure that their actions will not jeopardize the continued existence of any endangered
18 or threatened species or result in the destruction or adverse modification of critical habitat.
19 16 U.S.C. § 1536.

20 6.7 On April 16, 2016, the Navy sent a request to NMFS to concur that the towing of
21 the inactive ex-INDEPENDENCE to Brownsville, Texas was not likely to adversely affect listed
22 species or their habitat. NMFS responded in August 2016, with a request for informal
23 consultation under the ESA and the Magnuson-Stevens Fishery Conservation and Management
24 Act, 16 U.S.C. § 1855(b). In its August 2016 letter, NMFS stated that discussions between
25 NMFS and the Navy regarding the Navy’s inactive ship tow program begin in 2012, and since
26 that time NMFS conducted four informal Section 7 consultations prior to the Navy’s request for

1 concurrence on the ex-INDEPENDENCE. During each consultation and related discussions,
2 NMFS expressed concern about the transport of potentially invasive species on the
3 decommissioned ships. NMFS and the Navy also discussed a formal programmatic consultation
4 on the Navy's inactive ship tow program that would address other inactive ships including the
5 ex-U.S.S. KITTY HAWK (ex-KITTY HAWK), but ultimately agreed to consider the towing of
6 the ex-INDEPENDENCE as an independent action.

7 6.8 During the informal consultation process for the ex-INDEPENDENCE, NMFS
8 recommended that the Navy minimize the risk of transporting potentially invasive species by
9 removing barnacles and other marine debris through hull cleaning prior to moving the former
10 vessel, and the Navy agreed to do so. The Navy also agreed to perform certain sediment sampling
11 before and after hull cleaning. However, the Navy declined to adopt NMFS's other
12 recommendations to minimize the effects of the hull cleaning on marine habitat and water quality
13 by using a silt curtain and cleaning up the accumulated debris as soon as possible after cleaning.
14 In doing so, the Navy asserted that metals loading would be minimal.

15 6.9 Both EPA and Ecology expressed strong concerns about the Navy's plan to
16 perform this in-water hull cleaning because, among other concerns, the cleaning process would
17 remove "anti-fouling" paint containing significant amounts of metals, including copper and zinc,
18 that are toxic to marine life. Specifically, EPA stated that it believed that the Navy was exposing
19 itself to significant risk by proceeding and that it has concerns that the Navy underestimated the
20 pollutant loadings and cumulative amount of contamination that the scraping would introduce
21 into Sinclair Inlet. Both EPA and Ecology warned the Navy that its actions could be subject to
22 applicable state and local regulation and federal law.

23 6.10 The Navy began in-water hull scraping of the ex-INDEPENDENCE on or around
24 January 6, 2017. The cleaning was predicted to take approximately 30 days. The cleaning process
25 utilized rotary brushes and high-powered jets of water to pulverize, scrape, and blast debris
26

1 (including anti-fouling paint and marine growth) from the hull. The cleaning also resulted in a
2 turbid discharge to Sinclair Inlet.

3 6.11 The Navy took no steps to contain this debris, and the wastes were discharged
4 directly to the water column and sediments of Sinclair Inlet, including the marine habitat in and
5 around where the ex-INDEPENDENCE was moored. The materials discharged included
6 biological materials, paint chips and particles, copper, zinc, other metals (both particulate and
7 dissolved), suspended solids, turbidity, and other debris. On information and belief,
8 approximately 490 to 730 cubic yards of debris were discharged during the hull cleaning of the
9 ex-INDEPENDENCE.

10 6.12 The Navy did not obtain an NPDES permit prior to performing the in-water hull
11 cleaning of the ex-INDEPENDENCE and has not obtained an NPDES permit related to the
12 ongoing release of pollutants from that hull cleaning.

13 6.13 The Navy conducted limited sediment sampling in the area around the ex-
14 INDEPENDENCE both before and after the in-water hull cleaning event described above. The
15 results of this sampling indicate that metals, particularly copper and zinc, were released to the
16 marine environment by the in-water hull cleaning.

17 6.14 The pollutants discharged by the Navy's in-water hull cleaning of the ex-
18 INDEPENDENCE remain uncontained and continue to release dissolved copper, other dissolved
19 metals, and other metals and pollutants to the waters and sediments of Sinclair Inlet. The debris
20 from the Navy's scraping constitutes both an ongoing discharge from the Navy's scraping of the
21 ex-INDEPENDENCE and a distinct point source that continues to discharge dissolved copper,
22 other dissolved metals, and other pollutants to the ambient waters and sediments of Sinclair Inlet.

23 6.15 The ex-INDEPENDENCE departed the Puget Sound Naval Shipyard on
24 March 11, 2017 for dismantling in Brownsville, Texas.

25 6.16 The ex-KITTY HAWK, a 1,070 foot-long, 60,000 ton former aircraft carrier is
26 currently moored at the Puget Sound Naval Shipyard and has been so for approximately 10 years.

1 The ex-KITTY HAWK was stricken from the Naval Vessel Register (the Navy’s list of active
2 assets) in 2017. Based on information and belief, the ex-KITTY HAWK has been utilized as a
3 source of spare parts for operational vessels. The ex-KITTY HAWK thus lacks a means of
4 propulsion and has been stripped of the means of independent navigation, including a steering
5 mechanism.

6 6.17 In October 2017, the Navy announced its decision to dispose of the ex-KITTY
7 HAWK in a manner similar to that of the ex-INDEPENDENCE. To facilitate this disposal (and
8 others), the Navy engaged in a programmatic ESA consultation with NMFS.

9 6.18 On March 4, 2019, NMFS released its Programmatic Biological and Conference
10 Opinion on the Towing of Inactive U.S. Navy Ships from their Existing Berths to Dismantling
11 Facilities or other Inactive Ship Sites (NMFS BiOp). The NMFS BiOp confirmed that hull
12 cleanings will be required for the Navy’s towing of decommissioned vessels, including the
13 ex-KITTY HAWK and others currently moored at the Bremerton Naval Shipyard. The NMFS
14 BiOp “conservatively” estimated that the expected frequency of in-water hull cleanings in Puget
15 Sound will be approximately one ship per year. It is therefore anticipated that the Navy will
16 conduct in-water hull scraping on the ex-KITTY HAWK in the near future and in a manner
17 similar to that utilized on the ex-INDEPENDENCE.

18 **VII. FIRST CAUSE OF ACTION**
19 **VIOLATIONS OF THE CLEAN WATER ACT**
20 **(33 U.S.C. § 1251 et seq.)**

21 7.1 Plaintiff-Intervenor re-alleges the facts set out in Paragraphs 1.1 through 6.18 as
22 fully set out herein.

23 7.2 The United States has waived sovereign immunity with regard to claims
24 respecting the control and abatement of water pollution, including violations of state
25 requirements. 33 U.S.C. § 1323(a).

26 7.3 Section 301 of the Clean Water Act prohibits the discharge of pollutants from a
point source to Waters of the United States except as authorized pursuant to a valid permit.

1 33 U.S.C. § 1311(a). Section 301 also prohibits violations of effluent limitations established
2 pursuant to the Clean Water Act, including those promulgated by states. 33 U.S.C.
3 § 1311(b)(1)(C).

4 7.4 Section 505 of the Clean Water Act permits citizen suits against any person,
5 including the United States, who is alleged to be in violation of an effluent standard or limitation,
6 including those promulgated pursuant to Section 301 of the Act. 33 U.S.C. § 1365(a), (f).

7 7.5 Defendants' actions as set out above constitute a discharge of pollutants from
8 point sources in violation of the Clean Water Act's ban on unpermitted discharges. Defendants'
9 discharges also violate applicable effluent standards or limitations.

10 7.6 Defendants' violations are continuing, ongoing, and reasonably likely to reoccur.

11 **VIII. SECOND CAUSE OF ACTION**
12 **VIOLATIONS OF WASHINGTON WATER POLLUTION CONTROL ACT**
13 **(CHAPTER 90.48 RCW)**

14 8.1 Plaintiff-Intervenor re-alleges the facts set out in Paragraphs 1.1 through 6.18 as
15 fully set out herein.

16 8.2 The United States has waived sovereign immunity with regard to claims
17 respecting the control and abatement of water pollution, including violations of state
18 requirements. 33 U.S.C. § 1323(a).

19 8.3 The Washington Water Pollution Control Act prohibits the unpermitted discharge
20 of any materials into waters of the state that cause or tend to cause pollution. The Washington
21 Water Pollution Control Act and federal Clean Water Act also require Ecology to develop Water
22 Quality Standards (Chapter 173-201A) that are protective of designated uses of state waters,
23 including suitability for aquatic life and recreation. These Water Quality Standards—which
24 expressly incorporate Washington's Sediment Management Standards (Chapter 173-204
25 WAC)—contain numeric and narrative criteria for marine waters and have been approved by
26 EPA as part of Washington's authorized federal Clean Water Act program. All actions within
state waters must comply with the Water Quality Standards.

1 8.4 Defendants' actions as set out above violate the Washington Water Pollution
2 Control Act's ban on the unpermitted discharge matter causing or tending to cause pollution.
3 Defendants' discharges also violate applicable Washington Water Quality Standards.

4 **IX. RELIEF REQUESTED**

5 WHEREFORE, the State respectfully requests that this Court:

6 A. Adjudge and decree that Defendants' conduct complained of herein violates
7 Section 301 of the Clean Water Act, 33 U.S.C. § 1311 and the Washington Water Pollution
8 Control Act, Chapter 90.48 RCW.

9 B. Order Defendants to cease the ongoing unpermitted discharges of pollutants
10 emanating from the debris pile on the floor of Sinclair Inlet.

11 D. Order Defendants to remove the debris pile from the floor of Sinclair Inlet and
12 take other actions appropriate to remediate the environmental harm caused by their violations.

13 C. Permanently restrain and enjoin Defendants and all persons or entities in active
14 concert or participation thereof, from conducting operations on decommissioned ships in a
15 manner that results in further violations of the Clean Water Act and the Washington Water
16 Pollution Control Act.

17 E. Award Plaintiff-Intervenor, State of Washington, the costs of this action,
18 including reasonable attorneys' fees.

19 ///

1 F. Such other relief as the Court may deem just and proper.

2 DATED this 20th day of March, 2019.

3 ROBERT W. FERGUSON
4 Attorney General of Washington

5 /s/ Kelly T. Wood
6 Kelly Thomas Wood, WSBA #40067
7 Assistant Attorney General
8 Aurora Janke, WSBA #45862
9 Special Assistant Attorney General
10 Washington Attorney General's Office
11 Counsel for Environmental Protection
12 800 5th Ave Ste. 2000 TB-14
13 Seattle, Washington 98104
14 (206) 326-5493
15
16
17
18
19
20
21
22
23
24
25
26