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## A Sinking Feeling: The Problem of Abandoned Boats in Washington Waterways

Michael A. Schueler

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# A Sinking Feeling: The Problem of Abandoned Boats in Washington Waterways

*Michael A. Schueler*<sup>†</sup>

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## I. INTRODUCTION

In 2012, The *Deep Sea*, a 128-foot vessel known to be derelict, was moved to Penn Cove, Washington, and left to rot near vulnerable oyster beds. After a few days, the *Deep Sea* caught fire and sunk, causing significant damage to local wildlife and the local economy, and costing the state millions to cleanup. The *Deep Sea* is one of hundreds of boats that have been abandoned in Washington waters and though the Department of Natural Resources (DNR) is making some progress in removing derelict and abandoned boats from Washington's waterways, the progress is slow and cannot keep up with the need, due in no small part to the amount of abandoned boats and the Department's budget constraints.

Between 2012 and 2014 there has continuously been over one hundred boats left abandoned or derelict in Washington waters.<sup>1</sup> Should any of these boats sink, these vessels all pose significant environmental risks, due to contaminants commonly found on ships, including excess fuel, lead paint, and asbestos. Between January 2012 and November 2012, the state removed 23 of the 226 vessels listed on the DNR's list of abandoned and derelict vessels.<sup>2</sup> In this same time period, however, 18 vessels were added to the DNR's list.<sup>3</sup> As of publication, 153 vessels are still on the DNR's list, including numerous ships over 100 feet in length.<sup>4</sup>

The DNR's Derelict Vessel Removal Program operates on a scant \$750,000 budget each year. Dismantling even one large vessel can cost more than the entire budget. Small fishing ships, among the cheapest of vessels to remove, can still cost between \$5,000 and \$10,000<sup>5</sup> to remove, with one recently costing \$7,600 in Gig Harbor.<sup>6</sup> Assuming each boat's removal cost is as little as \$7,600, the DNR would be able to remove less than 100 vessels a year—less than two-thirds of the currently maintained

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1. Maureen O'Hagen, *Derelict Vessels Create Headaches on NW Waters*, SEATTLE TIMES, Sept. 9, 2012, [http://seattletimes.com/html/localnews/2019108294\\_apwaderelictvessels.html](http://seattletimes.com/html/localnews/2019108294_apwaderelictvessels.html); *Inventory of Vessels of Concern*, WASH. DEP'T OF NAT. RES. (Apr. 20, 2014, 10:38 PM), [http://www.dnr.wa.gov/Publications/aqr\\_dv\\_vessels\\_of\\_concern.pdf](http://www.dnr.wa.gov/Publications/aqr_dv_vessels_of_concern.pdf).

2. O'Hagen, *supra* note 1.

3. *Id.*

4. WASH. DEP'T OF NAT. RES., *supra* note 1.

5. Deborah Bach, *Left to Rot and Sink, Dozens of Abandoned Boats Litter Washington's Waterways*, THREE SHEETS NORTHWEST, (July 14, 2009), <http://threesheetsnw.com/blog/2009/06/left-to-rot-and-sink-dozens-of-abandoned-boats-litter-washingtons-waterways/>.

6. Brett Davis, *Gig Harbor Cracks Down on Derelict and Abandoned Boats*, SEATTLE TIMES, (Dec. 28, 2011, 8:13 PM), [http://seattletimes.com/html/localnews/2017113697\\_gigharborboats.html](http://seattletimes.com/html/localnews/2017113697_gigharborboats.html).

list of derelict and abandoned ships.<sup>7</sup> However, many abandoned or derelict ships in Washington that are far larger than small fishing vessels and are far costlier remove.<sup>8</sup> Compounding this problem further, many boats removed from the list end up back on the list for a second or third time.<sup>9</sup> With this budgetary limitation, the DNR will be unable to remove the existing boats this season, or keep up with the ships added to the list this year, digging the state into a deeper hole and adding additional liability to Washington's economy and environment.<sup>10</sup>

Many of the ships on the DNR's list are "large vessels" containing pollutants that can cause significant environmental damage and require significant funding to properly cleanup. During a flyover of the Columbia River to look into the growing problem of abandoned and derelict vessels, then Governors Gregoire of Washington and Kitzhaber of Oregon noted approximately 40 vessels on the Columbia River between Washington and Oregon.<sup>11</sup> Of these vessels at least half fall into the category of large ships, "between 100 and 181 feet long."<sup>12</sup> One of these vessels, the LST-1166 is 373 feet long and would likely require "legislative action" to remove.<sup>13</sup> Many of these boats contain large amounts of fuel and other environmental pollutants including PCBs, copper wiring, lead paint, asbestos insulation.<sup>14</sup> These pollutants can cause significant environmental damage if released into the environment and also can cost the state millions in cleanup costs. For example, the cleanup of the *Davy Crocket* in 2011 cost the state nearly \$24 million in removal and cleanup costs when it was broken apart.<sup>15</sup> Given its current budget constraints, Washington cannot endure cleanup costs similar to this, especially considering that there may be 20 or more ships that could cost this much. There will likely be more boats abandoned in the coming

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7. *Id.*

8. O'Hagen, *supra* note 1.

9. *Id.* Although not discussed in this article, many boats may be temporarily shored up, or sold to dismantling agencies, only to be added to the list again when future problems arise. This is the exact scenario that played out with the *Deep Sea*, discussed in more detail below.

10. *Id.* (noting that derelict vessels seem to "appear out of nowhere in state waters . . .")

11. Bonnie Stewart, *Oregon and Washington Governors set to Fly Over Derelict Vessels*, OR. PUB. BROADCASTING, July 29, 2012, <http://earthfix.opb.org./water/article/oregon-and-washington-governors-set-to-flyover-der/>; Rachel La Corte, *Wash., Ore. Governors Want Help for Derelict Boats*, SEATTLE TIMES, (June 29, 2012), [http://seattletimes.com/html/localnews/2018563974\\_apwaderelictvessels2ndldwritethru.html](http://seattletimes.com/html/localnews/2018563974_apwaderelictvessels2ndldwritethru.html).

12. Stewart, *supra* note 11.

13. *Id.*

14. Scott Learn, *A Man, a Barge, a Bucket, and the Struggle to Get Derelict Vessels Off the Columbia*, OR. LIVE, (Sept. 21, 2011), [http://www.oregonlive.com/environment/index.ssf/2011/09/a\\_man\\_a\\_barge\\_a\\_bucket\\_and\\_the.html](http://www.oregonlive.com/environment/index.ssf/2011/09/a_man_a_barge_a_bucket_and_the.html); O'Hagen, *supra* note 1.

15. La Corte, *supra* note 11.

year as the recession continues, increasing the likelihood of further environmental damage.<sup>16</sup> As more and more of these ships continue to fall into derelict status and are abandoned, Washington takes a huge gamble in letting these ships sink. Each large ship left unattended could cost the state tens of millions of dollars and poses significant environmental risks to local waterways and wildlife should the vessel sink.

Though Washington has a well thought-out enforcement scheme for derelict and abandoned boats, this scheme is underutilized due to chronic underfunding, a lack of support from the legislature in promulgating new laws, and prohibitively high cleanup costs associated with the sinking of large vessels. By failing to set harsh penalties for abandoning boats in waterways and allowing moored vessels to become derelict, Washington has created a culture where abandoned or derelict vessels are tolerated. In allowing these vessels to stay in the waterways, Washington has opened the door to the possibility of catastrophic environmental and economic damage should any more of these boats sink. If Washington's enforcement efforts were bolstered and properly enforced, the state could avoid further damage to sensitive ecosystems and limit cleanup costs by reducing the amount of vessels that actually sink due to being derelict or abandoned.

To rectify this imbalance in finances and prevent future environmental disasters like the sinking of the *Deep Sea*, Washington's laws should be changed to impose: (1) an increase in boating taxes from \$8 to \$18 to help raise additional revenue for existing maintenance programs; (2) changing existing laws so that cities and localities will not incur liability should a taken ship sink while in their custody; (3) a three strike warning system that results in mandatory felony charges for those abandoning boats (except for emergency situations); (4) a limitation on sales of vessels that are in a derelict shape (unseaworthy) unless they are first fixed or unless they are sold for scrapping, and (5) revise and fully fund the existing vessel amnesty program so that individuals who are unable to properly maintain a vessel would be able to surrender it to the state and hopefully avoid any environmental disaster. These strict penalties and alternative enforcement mechanisms would impress on all actors, private or corporate, the severity of leaving abandoned and derelict vessels on the water and shift incentives so that individual actors and the state can proactively engage vessels that are in danger of becoming abandoned or derelict.

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16. Bach, *supra* note 5.

This article attempts to evaluate the current situation in Washington State regarding abandoned and derelict vessels in Washington waterways and how best to solve the growing ecological hazard that exists with large abandoned boats. Part Two examines Washington's current enforcement mechanism, focusing specifically on current state laws and the problems associated with the lax enforcement of these laws. Part Two also examines the Washington Department of Natural Resources (DNR) Derelict Vessel Program and explains its scope and operation, including its current limitations. Part Three examines some recent enforcement breakdowns in Washington that have led to environmental and economic damage, including the sinking of the *Deep Sea* in 2012. Finally, Part Four suggests ways to fix the current problem in Washington so future environmental disasters can be avoided.

## II. ENFORCEMENT MECHANISMS

### *A. Washington State Law – Definitions and General Rules*

Washington State has a number of laws and administrative codes dealing with derelict and abandoned vessels, including ships. These laws allow the state, through various cities and programs, to seize derelict or abandoned boats in the hopes of preventing an environmental catastrophe. In fact, Washington revamped many of its laws regarding derelict and abandoned vessels in 2013<sup>17</sup>. Washington passed the “Derelict Vessels” law in 2002 to deal with:

[A]n increase in the number of derelict and abandoned vessels that are either grounded or anchored upon publically or privately owned submerged lands. These vessels are public nuisances and safety hazards as they often pose hazards to navigation, detract from the aesthetics of Washington's waterways, and threaten the environment with the potential release of hazardous materials.<sup>18</sup>

This language emphasizes that the legislature was cognizant of the massive problem the state faced with abandoned and derelict vessels. Washington defines an abandoned vessel as:

[A] vessel that has been left, moored, or anchored in the same area without the express consent, or contrary to the rules of, the owner, manager, or lessee of the aquatic lands below or on which the vessel is located for either a period of more than thirty consecutive days or

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17. WASH. REV. CODE §§ 79.100.040, .060, .100, .120, .130, .160 (2013).

18. WASH. REV. CODE § 79.100.005 (2012).

for more than a total of ninety days in any three hundred sixty-five-day period<sup>19</sup>.

Further, in order to be truly considered abandoned, “the vessel's owner is: (a) [n]ot known or cannot be located; or (b) known and located but is unwilling to take control of the vessel.”<sup>20</sup> Abandoned vessels thus constitute a narrow subset of vessels within Washington State requiring the vessel be truly or constructively ownerless. Finally, “‘in the same area’ means within a radius of five miles of any location where the vessel was previously moored or anchored on aquatic lands.”<sup>21</sup> This location element ensures that a vessel is truly abandoned and is not simply being moved around by a presumptive owner.

Washington defines a derelict vessel far more broadly, noting that “the vessel's owner is known and can be located, and exerts control of a vessel”<sup>22</sup>, but has failed to maintain the seaworthiness of the vessel. Further, a vessel that will be deemed derelict:

(a) Has been moored, anchored, or otherwise left in the waters of the state or on public property contrary to title 79, chapter 02, section 300 of The Revised Code of Washington [civil trespass statute] or rules adopted by an authorized public entity; (b) Has been left on private property without authorization of the owner; or (c) Has been left for a period of seven consecutive days, and: (i) Is sunk or in danger of sinking; (ii) Is obstructing a waterway; or (iii) Is endangering life or property.<sup>23</sup>

The definition of derelict vessels is distinctly broader than abandoned vessels, targeting any vessel left in public or private state waters that is sunk or near sinking and is either an obstruction or a danger to life or property. Between this designation and the definitions of abandoned boats, most problem ships will be properly designated, leaving them open to state action.

Washington allows public entities to “store, strip, use, auction, sell, salvage, scrap, or dispose of an abandoned or derelict vessel found on or above aquatic lands . . . .”<sup>24</sup> However, “the authority granted by this chapter is permissive, and no authorized public entity has a duty to exercise the authority.”<sup>25</sup> This means that any public entity that designates

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19. WASH. REV. CODE § 79.100.010(1) (2013).

20. *Id.*

21. WASH. REV. CODE § 79.100.010(1) (2013).

22. WASH. REV. CODE § 79.100.010(5) (2013).

23. WASH. REV. CODE §§ 79.100.010(5)(a)-(c)(i)-(iii) (2013).

24. WASH. REV. CODE § 79.100.030(1) (2012).

25. WASH. REV. CODE § 79.100.030(3) (2012).

a vessel as derelict or abandoned is not required to take or seize the vessel, a fact which creates many of the problems with abandoned and derelict vessels, as described in Part Four. The law does give some incentive to the state to seize vessels, stating that “any costs associated with this Act are made responsible to the owner of the boat.”<sup>26</sup> However, this incentive assumes that an owner can be found. If no owner can be found, the seizing entity will then assume liability for the vessel.<sup>27</sup>

Should a public entity decide to attempt to obtain custody of a vessel, an authorized public entity (APE)<sup>28</sup> must attempt to serve notice to any possible owner of the vessel by either (1) mailing notice to the owner at least 20 days prior to seizure; or (2) publishing notice of intent to seize within 30 days of seizure as well as posting notice on the vessel; and (3) post notice on the seizing entity's website.<sup>29</sup> This notice must also explain the steps an owner may take in order to contest a seizure along with any potential financial liabilities that an owner may face through this action.<sup>30</sup>

The procedure for seizing a derelict or abandoned vessel does change in the case of an emergency, allowing for temporary seizures that may result in a more permanent seizure. Should an emergency arise, seizure may occur provided that:

(3)(a) If a vessel is: (i) In immediate danger of sinking, breaking up, or blocking navigational channels; or (ii) poses a reasonably imminent threat to human health or safety, including a threat of environmental contamination; and (iii) the owner of the vessel cannot be located or is unwilling or unable to assume immediate responsibility for the vessel, any authorized public entity may tow, beach, or otherwise take temporary possession of the vessel.<sup>31</sup>

However, even if such a seizure is permissible by law, it may not be undertaken.

This common sense provision allows for the reality that many abandoned and derelict vessels pose an imminent danger to both persons

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26. WASH. REV. CODE § 79.100.030(2) (2013).

27. WASH. REV. CODE § 53.08.320(5)(d) (2012).

28. The following qualify as APEs: the DNR; Department of Fish and Wildlife; Parks and Recreation Commission; Metropolitan park districts; Port districts; Cities, towns, or counties with ownership, management, or jurisdiction over the aquatic lands where the vessel is located. See *Derelict Vessel Removal Program*, WASH. DEP'T OF NAT. RES. (Nov. 25, 2012, 6:52 PM), [http://www.dnr.wa.gov/recreationeducation/topics/derelictvessels/pages/aqr\\_derelict\\_vessel\\_removal\\_program.aspx](http://www.dnr.wa.gov/recreationeducation/topics/derelictvessels/pages/aqr_derelict_vessel_removal_program.aspx).

29. See WASH. REV. CODE § 79.100.040(1) (2013).

30. WASH. REV. CODE § 79.100.040(2) (2013).

31. WASH. REV. CODE § 79.100.040(3)(a) (2013).

and the environment. Still, “[b]efore taking temporary possession of the vessel, the authorized public entity must make reasonable attempts to consult with the department or the United States coast guard to ensure that other remedies are not available.”<sup>32</sup> Further, the APE must attempt to contact any prospective owner of the temporarily seized vessel within seven days of the seizure and explain why the seizure and actions were undertaken.<sup>33</sup> At this point, should the APE wish to undertake more permanent removal proceedings, it must go through all of the notice requirements, and must further dispose of the vessel as provided by statute.<sup>34</sup>

Once a vessel is taken, the APE may “use or dispose of the vessel in any appropriate and environmentally sound manner without further notice to any owners.” but the APE must do so in a way that attempts to recoup some costs from the vessel, such as through scrapping it.<sup>35</sup> This provision helps to ensure that APEs dispose of vessels in a cost-effective manner that will save Washington money by hopefully defraying the costs of proper disposal. Though unlikely, if the APE is able to gain more money than it costs to seize the vessel, such as by selling an offending vessel for scrap, the APE must deposit the extra monies in the “derelict vessel removal account.”<sup>36</sup>

A more likely scenario, however, is that a vessel will cost more to remove than any recuperative efforts undertaken by an APE. Should this occur, liability for the excess funds falls on the owner.<sup>37</sup> As above, however, this owner may well be the state if it has taken possession of a vessel, which can create problems in attempting to recuperate funds expended to remove a vessel.

Once liability has attached, the APE must notify the owner of the costs of cleaning up the derelict or abandoned vessel. If full payment is not received within thirty days of notifying the party in arrears, the APE may seek to recover reasonable attorney fees and any costs incurred by the APE.<sup>38</sup> However, APEs have no guarantee of reimbursement for removing these vessels.<sup>39</sup> Even where the state foots the bill, the DNR fund that is used to repay APEs for vessel removal must notify the APE of the amount of money available and the “likelihood of

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32. WASH. REV. CODE § 79.100.040(3)(b) (2013).

33. WASH. REV. CODE § 79.100.040(3)(b) (2013).

34. *Id.* Notice requirements under this act are found *supra* note 28.

35. WASH. REV. CODE § 79.100.050(1) (2012).

36. WASH. REV. CODE § 79.100.050(4) (2012).

37. WASH. REV. CODE § 79.100.060(1) (2013).

38. WASH. REV. CODE § 79.100.060(3) (2013).

39. WASH. REV. CODE § 79.100.100(6) (2012).

reimbursement.”<sup>40</sup> This means that any entity that seizes a ship and disposes of it may be left with a large and significant bill that will not be reimbursed by either the state, through the DNR, or by the ship owner. As discussed in Part Four, this creates a counter-incentive for agencies to seize a ship. Why would an agency seize a ship, assert ownership, and then be left to foot the bill for costs when the state will pay for cleanup costs should a disaster occur? The legislature must act to remove this correct this perverse incentive and to entice APEs to be proactive in addressing derelict and abandoned vessels.

In the Washington Administrative Code (WAC), Washington State considers a narrower notion of abandoned vessels: those left at moorage facilities where owners stop paying requisite fees.<sup>41</sup> Vessels at a public moorage facility are considered abandoned “when the vessel owner fails to pay the port charges owed.”<sup>42</sup> When this occurs at a public moorage facility, the facility must follow the rules as laid out in Title 53, Chapter 08, Section 320 of The Revised Code of Washington,<sup>43</sup> which allows for a moorage operator to sell abandoned ships at a public sale.<sup>44</sup> These sales help recoup any expenses incurred by a moorage facility or any APE in removing an abandoned vessel. However, before a vessel is sold, its owner (or last known address of owner) must be notified of the sale, including “time and place of the sale, a reasonable description of the vessel to be sold, and the amount of port charges owed with respect to the vessel.”<sup>45</sup> This notice must be published at least once between ten and twenty days from the sales in a newspaper of general circulation in the county, and must include descriptions of the boat so that any possible owner may be notified.<sup>46</sup>

If a seizure is effectuated by a moorage facility or an APE, anyone claiming ownership may file suit in superior court to challenge the validity of the seizure and the moorage fees.<sup>47</sup> In the hopes of ensuring only valid seizures and valid challenges to seizure, the law authorizes the winning party to receive attorney fees.<sup>48</sup>

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40. *Id.*

41. WASH. ADMIN. CODE § 308-93-275 (2012).

42. WASH. ADMIN. CODE § 308-93-275(3) (2012).

43. *Id.*

44. WASH. REV. CODE § 53.08.320(5) (2012).

45. WASH. REV. CODE § 53.08.320(5)(a) (2012).

46. *Id.*

47. WASH. REV. CODE § 53.08.320(5)(b) (2012).

48. *Id.*

As with other collection provisions, the excess funds will be deposited to the DVRP account if a moorage facility or an APE finds itself in a financial windfall through a seizure.<sup>49</sup>

Despite allowing wide latitude for moorage facilities and APEs to seize abandoned vessels, if no one purchases the vessel or if it remains abandoned at the moorage facility within ten days after a seizure, the facility will take over ownership of the vessel.<sup>50</sup> This is problematic because as soon as the facility asserts title, all liability associated with the ship will transfer with the title.<sup>51</sup> As it stands, this law serves as a barrier to removing abandoned boats from public moorage facilities. Few facilities would ever want to incur this liability. If something goes wrong, the facility would be liable to pay for any fees associated with cleanup.

Similarly, the laws for abandonment at a private moorage facility follow the same rules laid out for public facilities—going so far as to use identical language.<sup>52</sup>

#### *B. Washington State Law – Criminal Liability and Punishment*

Having these seemingly strict laws and regulations in place is somewhat helpful for curtailing the issue of abandoned and derelict vessels, but they are insufficient to stop the problem without effective enforcement and recourse mechanisms. Title 79A, Chapter 60 of The Revised Code of Washington serves as the criminal enforcement mechanism for the state's abandoned vehicle scheme and provides some criminal teeth to otherwise civil seizures. Various chapters within this overarching act utilize language similar to that found in other seizure laws, including that: within ten days of taking a vessel; notice must be given to boats found adrift<sup>53</sup>; notice must be posted in a post office<sup>54</sup>; compensation must be paid to whoever takes the vessel from the true owner (unless there is a failure to attempt notice)<sup>55</sup>; owners may use the courts to attempt to challenge a false taking<sup>56</sup>; and if the taking party uses

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49. WASH. REV. CODE § 53.08.320(5)(c) (2012).

50. WASH. REV. CODE § 53.08.320(5)(d) (2012).

51. *See* WASH. REV. CODE § 79.100.060(1) (2013) (requiring cleanup fees to be handled by the owner of the vessel).

52. WASH. ADMIN. CODE § 308-93-275(3) (2012); WASH. REV. CODE § 88.26.020 (2012).

53. WASH. REV. CODE § 79A.60.240 (2012). Compare language with WASH. REV. CODE § 79.100 (2012) and WASH. ADMIN. CODE 308-93-275 (2012).

54. WASH. REV. CODE § 79A.60.250 (2012).

55. WASH. REV. CODE § 79A.60.260 (2012).

56. WASH. REV. CODE § 79A.60.270 (2012).

the vessel more than is necessary to secure it, any damage caused in this excessive use attaches liability to the taker.<sup>57</sup>

Further, this act provides that “(1) A violation of this chapter designated as an infraction is a misdemeanor, punishable . . . if the current violation is the person’s third violation of the same provision of this chapter during the past three hundred sixty-five days.”<sup>58</sup> The misdemeanor penalties associated with Title 9, Chapter 92, Section 020 of The Revised Code of Washington affix a penalty of “imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars or both such imprisonment and fine.”<sup>59</sup> However, this chapter only attaches to vessels abandoned and left adrift.<sup>60</sup> Other vessels are not subject to any criminal liability when they are subsequently abandoned and not adrift, such as those left at moorage facilities.<sup>61</sup> Thus, Washington State, considers vessels adrift to be the only type of abandonment that warrants criminal action. As discussed later, only criminalizing abandoned vessels that are left adrift does not go far enough in addressing this problem. Rather, the statute should encompass all abandonment with the exception of emergency situations in order to adequately reflect the severity of abandoning a vessel.

*C. Washington State Department of Natural Resources Derelict Vessel Removal Program (DVRP)*

Along with all of the state laws allowing for APE seizures of vessels, Washington’s DNR has also instituted a program that specifically targets and helps fight against derelict and abandoned vessels in Washington’s waterways. The DVRP works to provide “funding and expertise to assist public agencies in the removal and disposal of vessels across the state.”<sup>62</sup> Further, the DVRP provides:

[R]eimbursement of up to 90% of the cost of removal and disposal [of derelict and abandoned vessels]. [T]he remaining 10% of the cost can be in the form of ‘in-kind’ services. Authorized Public Entities not able to undertake the removal of a derelict vessel may ask DNR to assume the lead. Priority for the use of funds is for vessels in danger of breaking up, sinking, or blocking a navigational chan-

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57. WASH. REV. CODE § 79A.60.280 (2012).

58. WASH. REV. CODE § 79A.60.020(1) (2012).

59. WASH. REV. CODE § 9.92.030 (2012).

60. WASH. REV. CODE § 79A.60.240 (2012).

61. *Id.*

62. WASH. DEP’T OF NAT. RES., *supra* note 28.

nel, or vessels that present a risk to human health, safety, or the environment.<sup>63</sup>

In order to provide these services, the DVRP levies a \$3 fee on annual boater registration and an additional \$5 fee on out of state vessels using Washington waterways.<sup>64</sup> The DVRP also collects a \$5 fee specifically for the Derelict Vessel Removal Account.<sup>65</sup> This leaves the DVRP with a yearly operating budget of about \$750,000.<sup>66</sup>

#### D. DVRP Priority Definitions

The DVRP is the primary tool Washington uses to take custody of a vessel and helps to pay back costs incurred by local governments and APEs.<sup>67</sup> In choosing which vessels should be removed first, the DVRP uses a five category ranking system: Priority 1 vessels being the most severe and the first to be removed, Priority 5 being the least severe, and the last vessels to be removed.<sup>68</sup> The DVRP uses these definitions to categorize known vessels, set the DVRP's removal schedule, and allocate funding across the state. Yet, even with a strong organizational scheme and categorization of problem vessels, the DVRP can be too ponderous to address even the most serious problem vessels before these vessels sink, as evinced by the *Deep Sea* and other vessels, addressed below in Part Three.

Priority 1 vessels, vessels that are the most dangerous to the environment and economy, are further divided into four categories, category 1A-1D.<sup>69</sup> Category 1A vessels are the most dangerous, which "if allowed to sink, break up, or drift and beach will be responsible for significant impacts to human health or safety."<sup>70</sup> Category 1B deals with vessels which, if allowed to sink, would damage the environment and natural resources.<sup>71</sup> Category 1C vessels are defined as those which will become significant navigational impacts if allowed to break apart or sink.<sup>72</sup> Category 1D vessels are in immediate/imminent danger of sinking, breaking up, or drifting and beaching, but pose little danger to

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63. *Id.*

64. *Id.*; WASH. REV. CODE §§ 88.02.640(3)(b), (4) (2013).

65. WASH. REV. CODE § 88.02.640(6)(a) (2013).

66. O'Hagen, *supra* note 1.

67. *Derelict Vessel Removal Program Guidelines*, WASH. DEP'T OF NAT. RES. 5 (Sept. 15, 2007), [http://www.dnr.wa.gov/Publications/aqr\\_dv\\_guidelines\\_0907.pdf](http://www.dnr.wa.gov/Publications/aqr_dv_guidelines_0907.pdf).

68. *Id.* at 15-18.

69. *Id.* at 16.

70. *Id.*

71. *Id.*

72. *Id.*

people, the environment, or navigation.<sup>73</sup> All vessels categorized as Priority 1 vessels are the most dangerous and should be removed as quickly as possible. If left in the water and allowed to break apart or sink, they can end up causing as much environmental damage as the *Deep Sea*, which will be discussed in Part Four.

Priority 2 vessels are defined as those which are dangerous to human safety if allowed to sink, and are further divided into two categories: 2A-2B.<sup>74</sup> Category 2A is comprised of “any vessel floating or sunken, which presents an existing threat to human safety.”<sup>75</sup> Though similar to priority 1 vessels, Category 2A vessels seemingly present a less severe and imminent threat to human life or health. Any floating or sunken vessels that will probably become a future threat to people or the environment are considered to be Priority 2, Category 2B vessels—these vessels will likely become Priority 1 vessel if any slight change occurs.<sup>76</sup>

Broken down into five subsections, 3A-3E, Priority 3 vessels may become a danger to the environment, specifically plants and animals, if not removed.<sup>77</sup> Category 3A vessels impact any plant or animal considered: “endangered, threatened, proposed, sensitive, candidate, concern or monitor list.”<sup>78</sup> These vessels are most dangerous because of the animals that are affected by the vessel's location—even if that vessel is not significantly likely to immediate break apart or sink. Category 3B vessels impact any plant or animal afforded protection by any government.<sup>79</sup> Category 3C vessels impact aquaculture, such as oyster beds, fishing, and other related activities.<sup>80</sup> Category 3D vessels impact a “marine protected area, restoration area or aquatic reserve.”<sup>81</sup> Finally, Category 3E vessels impact water or air quality through pollutants found in or on the vessel.<sup>82</sup>

Priority 4 vessels create navigational hazards, such as blocking major waterways or being sunk below the waterline, but which ships could still run into and are broken into three sub categories 4A-4C.<sup>83</sup> Category 4A vessels are those that block an “entrance to an embayment

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73. *Id.*

74. *Id.* at 16-17.

75. *Id.* at 17.

76. *Id.*

77. *Id.* at 17-18.

78. *Id.* at 17.

79. *Id.* at 16.

80. *Id.* at 17-18.

81. *Id.* at 18.

82. *Id.*

83. *Id.*

or other important navigation route, which causes other vessels to find other, more lengthy routes around the hazard.”<sup>84</sup> Category 4B vessels could be a navigational issue, but do not lie in a “navigation channel, route, or area commonly used as a navigation route.”<sup>85</sup> These vessels will sink in areas where ships may travel, but not regularly navigation or recreational areas. Category 4C vessels are located “in a location such that it prohibits other vessels from entering a marina or utilizing a marina slip.”<sup>86</sup> Vessels categorized as 4C only impact recreational uses, and thus are categorized as one of the lowest priorities for removal by the DVRP.

Finally, Priority 5 vessels “are those vessels that meet the criteria of abandoned or derelict but do not satisfy any of the criteria listed above.”<sup>87</sup> These vessels, thus, do not pose any sort of threat to life, property, or waterways, nor are they close to breaking apart or sinking, but are nonetheless abandoned or left derelict.

#### *E. DVRP Seizures*

Pursuant to these priority categorizations, the DVRP can seize problem vessels for removal. In order to find out about vessels that may be derelict or abandoned and which may be problematic in nature, the DVRP allows for anyone to report vessels that may be abandoned or derelict.<sup>88</sup> Once these vessels have been identified, the DVRP may obtain custody of vessels pursuant to the notice requirements listed above.<sup>89</sup> However, before the DVRP will be able to remove a vessel, it must obtain actual custody of that vessel and ensure that the original seizing APE is properly authorized to make a seizure in the jurisdiction where the vessel was located.<sup>90</sup>

Once a seizure has been made, the DVRP allows any APE to “use or dispose of the vessel in any appropriate and environmentally sound manner without further notice to any owners.”<sup>91</sup> The listed methods include: Auction, Proceeds of Sale, or Ocean Disposal.<sup>92</sup> Should these actions be taken, the DVRP’s reimbursement provisions will be followed pursuant to Title 79, Chapter 100 of The Revised Code of Washington in the hopes of helping defray some of the costs incurred by the APE in

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84. *Id.*

85. *Id.* at 16.

86. *Id.*

87. *Id.*

88. *Id.* at 15.

89. *Id.* at 19.

90. *Id.* at 21.

91. *Id.* at 23.

92. *Id.* at 23-24.

disposing of the vessel.<sup>93</sup> The Derelict Vessels Removal Account (DVRA) will reimburse an APE for up to 90% of their non-recuperated costs.<sup>94</sup> Prior to an APE receiving recuperative funds, the APE must make “an honest and reasonable search effort . . . to identify and locate the owner.”<sup>95</sup> If an owner is found, he or she will be responsible for any cleanup costs.<sup>96</sup> However, even if an owner is found, he or she will often be deemed insolvent, and thus unable to pay back any debts owed to the government.<sup>97</sup>

Thus, reimbursing APEs for removals is often problematic and mired by underfunding. When figuring how to properly reimburse APEs for their removal activity, the DVRA will prioritize its reimbursement based on the aforementioned categories, and will always hold \$50,000 in reserve in case excess Priority 1 vessel removals need reimbursement.<sup>98</sup> However, this fund of \$50,000 often is inadequate to properly dispose of a Priority 1 vessel, as further discussed in Part Four.

Because of this, the legislature finally proposed a vessel amnesty program in 2013 to help alleviate the problem of owners unable to properly care for their vessels. As the program’s name implies, the program is designed to allow the DNR and the DVRP to remove vessels that pose a “high risk of becoming a derelict vessel or abandoned vessel” but are not in bad enough shape to warrant immediate action by either organization.<sup>99</sup> In order to capture the widest berth of vessels possible, the program “shall accept and review” vessel application from private citizens, businesses, and APE that have seized vessels.<sup>100</sup> The criteria that should be considered by the DNR and/or the DVRP are (1) whether the applicant is a Washington resident or business; (2) whether the vessel is in an advanced state of disrepair, has little or no value, and a high likelihood of becoming abandoned or derelict; and (3) whether that the person or business has no other means of dealing with their vessel other than turning it into the vessel amnesty program.<sup>101</sup> This program, however, has one major flaw: the legislature did not make its creation mandatory, instead stating that the DNR “may develop and administer a voluntary vessel turn in program, showing a lack of true support for such

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93. *Id.* at 24.

94. *Id.*

95. *Id.* at 25.

96. WASH. REV. CODE § 79.100.030(2) (2012).

97. WASH. DEP’T OF NATURAL RES., *supra* note 67, at 25.

98. *Id.*

99. WASH. REV. CODE § 79.100.160(2) (2013).

100. WASH. REV. CODE § 79.100.160(4) (2013).

101. WASH. REV. CODE §§ 79.100.160(4)(a)-(c) (2013).

a program.”<sup>102</sup> Similar to the DVRP, this program is drastically underfunded, with the legislature only allocating up to \$200,000 for any two year period.<sup>103</sup>

### III. BREAKDOWN IN ENFORCEMENT IN WASHINGTON

Despite all of the laws and enforcement mechanisms in Washington to help remove derelict and abandoned vessels before they become a problem, there are many examples of breakdowns in the enforcement system. Beginning with the *Deep Sea*, one of the most recent and costly environmental disasters Washington has faced, I will examine what problems arise with derelict and abandoned vessels left afloat. Each of these incidents created a number of significant environmental and economic ramifications for the State that had long lasting impacts. With proper follow through on current enforcement mechanisms, these issues could have been avoided, saving Washington valuable resources and money.

A large vessel, *Deep Sea*, sank in Penn Cove near Coupeville, Washington, on May 12, 2012.<sup>104</sup> Upon sinking, the *Deep Sea* dumped 3,500 gallons of oil near the fragile mussel beds of Penn Cove.<sup>105</sup> The cleanup costs associated with removing this vessel, containing and cleaning the spilled oil, and ensuring that the mussel beds were not contaminated, cost Washington State around \$60,000 a day.<sup>106</sup> Simply raising the sunken vessel from the cove after it sank, in order to ensure a proper disposal, cost the State upwards of \$500,000.<sup>107</sup> All said, total costs, including lost mussel harvests, raising and transporting the vessel

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102. WASH. REV. CODE § 79.100.160(1) (2013). The DNR has created such a program, however, it is limited in scope and only will take in vessels 45 feet in length or shorter, and then only after the DNR evaluates if it has the resources to accept a turn in. See *DVRP Vessel Turn in Program*, WASH. DEP'T OF NAT. RES. (Apr. 20, 2014, 10:48 PM), [http://www.dnr.wa.gov/RecreationEducation/Topics/DerelictVessels/Pages/aqr\\_dvrp\\_vtip.aspx](http://www.dnr.wa.gov/RecreationEducation/Topics/DerelictVessels/Pages/aqr_dvrp_vtip.aspx). The author has been unable to find any statistics about how many vessels have been turned over to the DVRP via this program.

103. WASH. REV. CODE § 79.100.160(7) (2013).

104. *Refloated Ship in Penn Cove Heading to Seattle*, SEATTLE TIMES (June 6, 2012), [http://seattletimes.com/html/localnews/2018367044\\_apwapenncovederelict1stld.html](http://seattletimes.com/html/localnews/2018367044_apwapenncovederelict1stld.html).

105. Sandi Doughton, *Oil From Sunken Crabber Drags Penn Cove Mussel Farm into Limbo*, SEATTLE TIMES (May 16, 2012), [http://seattletimes.com/html/localnews/2018225150\\_penncove17m.html](http://seattletimes.com/html/localnews/2018225150_penncove17m.html).

106. *Id.*

107. Jonathan Martin, *State Expects Moving Sunken Boat from Penn Cove to Cost \$500,000*, SEATTLE TIMES (May 16, 2012), [http://seattletimes.com/html/localnews/2018225155\\_deepsea17m.html](http://seattletimes.com/html/localnews/2018225155_deepsea17m.html).

for proper disposal, and cleaning up debris and oil, cost the state over \$5 million.<sup>108</sup>

The story begins when the original owner of the *Deep Sea*, Factotum Fisheries, failed to pay moorage fees at Seattle Fisherman's Terminal.<sup>109</sup> Tired of subsidizing a delinquent ship, the Port of Seattle ended up seizing the vessel pursuant to Title 308, Chapter 97, Section 275(3) of the Washington Administrative Code. Once seized, the Port of Seattle's attorney noted in 2011 that the vessel was a "pollution and liability hazard."<sup>110</sup> The Port of Seattle quickly realized that in seizing the ship, they had assumed liability for any damages caused by the derelict vessel should it sink.<sup>111</sup> The Port of Seattle calculated proper disposal costs would be upwards of \$500,000.<sup>112</sup> Finding this cost untenably high, the Port of Seattle decided to offload the ship to someone who could restore it or scrap it without the Port's involvement.<sup>113</sup>

Enter Rory Westmoreland, a Renton Scrap dealer who had all of the tools necessary to scrap a large vessel like *Deep Sea*.<sup>114</sup> Mr. Westmoreland stepped forward and agreed to purchase the *Deep Sea* for \$2,500, ostensibly to scrap the vessel out and make a profit, and began moving it around to various locations waiting to be scrapped.<sup>115</sup> However, soon after purchasing the ship, Mr. Westmoreland towed the *Deep Sea* to Penn Cove, where residents warned that he was trespassing. Mr. Westmoreland ignored these trespassing warnings and also ignored DNR imposed fines of \$83 a day unless and until the *Deep Sea* was moved from Penn Cove.<sup>116</sup> At this point, the DNR felt helpless to do anything to alleviate the situation: Mr. Westmoreland was unfazed by the possibility of criminal charges by trespassing and was unwilling, or unable, to pay the \$83 a day fine imposed by the DNR.<sup>117</sup> The DNR further ascertained that Mr. Westmoreland lacked the funds necessary to shore up the *Deep Sea*.<sup>118</sup> The DVRP decided not to step in and seize the vessel because of a previous problem with *The Davy Crockett*, discussed

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108. Gerry O'Keefe, *The Deep Sea Debacle: State Needs to Address Threat of Derelict Boats*, SEATTLE TIMES, (June 12, 2012), [http://seattletimes.com/html/opinion/2018416220\\_guest13okeefe.html](http://seattletimes.com/html/opinion/2018416220_guest13okeefe.html); O'Hagen, *supra* note 1.

109. O'Keefe, *supra* note 108.

110. O'Hagen, *supra* note 1.

111. WASH. REV. CODE § 79.100.060(1) (2013).

112. O'Keefe, *supra* note 108.

113. *Id.*

114. Martin, *supra* note 107.

115. *Id.*

116. *Id.*

117. O'Hagen, *supra* note 1.

118. *Id.*

below; a mistake which would prove incredibly costly.<sup>119</sup> Here, the state had in place all of the mechanisms necessary to seize the *Deep Sea*; it was in imminent danger of sinking, left on private property without permission, and located near fragile mussel beds. However, due to fear of high costs incurred in seizing the vessel, the DNR chose not to seize the *Deep Sea*, ultimately costing the state over \$5 million dollars in costs to raise the *Deep Sea* and cleanup associated damages. Mr. Westmoreland was assessed a fine of approximately \$1.3 million and was charged with a misdemeanor.<sup>120</sup> He failed to appear for his court hearing and has failed to pay back any money.<sup>121</sup> Without context, this sinking sounds like a tragic coincidence where an old boat was left to age in a poorly chosen location. In reality, the history of how the ship came to be in Penn Cove is troubling, and were it not for breakdowns in the state's enforcement mechanisms, the *Deep Sea* never would have ended up in Penn Cove to begin with.

Though the *Deep Sea* sinking is the most recent and major incident in Washington involving a derelict or abandoned vessel, there have been a few other high profile cases of note, including *The Davy Crockett*, *The Cactus*, and the *Northern Retriever*.

*The Davy Crockett* is a 431-foot flat decked barge that was converted from a World War Two Liberty Ship.<sup>122</sup> The ship was being illegally dismantled on the Columbia River near Camas, Washington and ended up partially sinking, causing a release of 38,397 gallons of oil into the Columbia River.<sup>123</sup> Currently, since cleanup has begun on *The Davy Crockett*, the state has paid approximately \$22 million dollars, which makes it the worst disaster of its kind.<sup>124</sup> Among other hazards left onboard, the state removed nearly 5,000 pounds of asbestos.<sup>125</sup> Federal criminal action was taken against the owner of *The Davy Crockett*, who

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119. *Id.*

120. Phuong Le, *Abandoned Boats Prove Costly for the State*, THE NEWS TRIBUNE, (Feb. 10, 2014), <http://www.thenewstribune.com/2014/02/10/3038058/abandoned-boats-prove-costly-for.html>.

121. *Id.*

122. *Barge Davey Crockett Response*, WASH. DEP'T OF ECOLOGY (Mar. 19, 2013), <http://www.ecy.wa.gov/programs/spills/incidents/DavyCrockett/DavyCrockett.html>.

123. *Id.*; *Barge Davey Crockett Response Incident Timeline January-November 2011*, WASH. DEP'T OF ECOLOGY (Nov. 25, 2012), <http://www.ecy.wa.gov/programs/spills/incidents/DavyCrockett/Davy%20Crockett%20Cleanup%20Poster.pdf>.

124. WASH. DEP'T OF ECOLOGY, *supra* note 122; Maureen O'Hagan, *Derelict Vessels Cause Boatloads of Trouble in State*, SEATTLE TIMES (Sept. 8, 2012), [http://seattletimes.com/html/localnews/2019103617\\_derelicts09.html](http://seattletimes.com/html/localnews/2019103617_derelicts09.html).

125. WASH. DEP'T OF ECOLOGY, *supra* note 122.

ended up pleading guilty for failing to report an oil discharge, and unlawfully discharging oil into the Columbia River.<sup>126</sup>

*The Cactus* showcases another incident where a large boat ended up causing the state problems. *The Cactus* was purchased for \$35,000 with the intentions of turning it into a floating log mill, but instead was left to rot in the Foss Waterway, located in Tacoma, Washington.<sup>127</sup> In 2003, the vessel received a 30-day seizure notice unless the vessel was moved—which it was on the 29<sup>th</sup> day.<sup>128</sup> The owner of *The Cactus* moved the vessel to Murray Island, near Vashon, Washington.<sup>129</sup> At this point, the DNR backed off until 2008, when *The Cactus* was finally seized due to its rapidly deteriorating condition.<sup>130</sup> As of 2009, the vessel had cost the state \$348,000 in cleanup costs, along with additional \$3,000 a month in moorage fees.<sup>131</sup> Assuming these moorage fees have stayed constant, Washington has paid an additional \$114,000 since *The Cactus* was taken by the DNR, which was scheduled for removed sometime in 2012.<sup>132</sup> At the time of publication, no reports of the completed removal of *The Cactus* have been published. *The Cactus* serves as an example of the problem of forcing liability onto a seizing entity; the state may well be de-incentivized to effectuate seizures of dangerous vessels in the future due to the massive costs associated with a seizure, even if it is significantly less than if a vessel sinks and releases pollutants into the environment.

One final example of a problem ship is the *Northern Retriever*, an 186-foot vessel that was stuck in Grays Harbor with holes in the hull and no means of propulsion.<sup>133</sup> The vessel ended up costing the state \$835,000 to properly dismantle, and the scrap metal salvaged only generated \$78,000, less than 1/10<sup>th</sup> of the total cost.<sup>134</sup> Of an interesting note, the only Washington case law involving a seizure by the DNR DVRP stems from the *Northern Retriever* seizure: *Matheson v. City of Hoquiam*.<sup>135</sup> In *Matheson*, the owner of the *Northern Retriever* sued the DNR for seizing his vessel, claiming they lacked authority to do so under

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126. *Id.*

127. O'Hagan, *supra* note 1.

128. *Id.*

129. *Id.*

130. *Id.*

131. O'Hagan, *supra* note 1.

132. *Id.*

133. Maureen O'Hagan, *Derelict Vessels Cause Boatloads of Trouble in State*, SEATTLE TIMES (Sept. 8, 2012), [http://seattletimes.com/html/localnews/2019103617\\_derelicts09.html](http://seattletimes.com/html/localnews/2019103617_derelicts09.html).

134. *Id.*

135. *Matheson v. City of Hoquiam*, 170 Wash. App. 811, 287 P.3d 619 (2012).

federal admiralty law.<sup>136</sup> The court ultimately concluded that abandoned or derelict vessels were public nuisances, which could be properly seized under the state's inherent ability to police nuisances.<sup>137</sup> Finally, the court found that a seizure in this nature was not merely an *in rem* seizure, meaning that the court had personal jurisdiction over Mr. Matheson, and that fees could be properly assessed against him.<sup>138</sup> Mr. Matheson was assessed a fine of \$834,643.95 for cleanup and demolition costs associated with the *Northern Retriever*.<sup>139</sup>

Seemingly, this lack of legal action seems to indicate that there are few seizures by the DNR and even fewer attempts to recover funds. Further, with few criminal charges on record stemming from abandoned vessel violation, it appears that criminal charges are not being utilized as a means of curbing this problem. Though Washington State has failed to effectively criminally adjudicate violators of derelict and abandoned vessel laws, the United States Government has taken action against the owner of the *Davy Crockett* for a violation of the Clean Water Act<sup>140</sup>, and is currently investigating the sinking of the *Deep Sea*<sup>141</sup>.

#### IV. PROBLEMS WITH WASHINGTON'S LAW AND SUGGESTION FOR CHANGE

##### *A. Problems with Washington Enforcement Mechanisms*

The largest problem with the current enforcement scheme in Washington is the transfer of ownership and liability to any entity seizing a vessel if no owner can be found. By transferring this liability to the seizing entity, Washington State law creates a disincentive to act proactively in stopping abandoned and derelict vessels from becoming a problem. As noted, the DVRP, Washington's primary enforcement agency for derelict and abandoned vessels, was unwilling to effectuate a seizure on the *Deep Sea*, despite having the legal right to do so. The DVRP failed to act because it feared the seizure would turn into a costly

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136. *Id.* at 813.

137. *Id.* at 820-21.

138. *Id.* at 826.

139. *Id.* at 817.

140. Jenny A. Durkan, *United States Attorney's Office for the Western District of Washington, Owner of 'Davy Crockett' Barge Sentenced to Prison for Clean Water Act Violations for Oil Spill on Columbia River*, U.S. ATT'Y OFF. W. DISTRICT WA. (Mar. 18, 2013), available at <http://www.justice.gov/usao/waw/press/2013/March/simpson.html>.

141. Gary Chittim, *Feds Launch Criminal Investigation into Sinking of Deep Sea*, KING 5 NEWS (Sept. 4, 2012), <http://www.king5.com/news/environment/Federal-agencies-launch-criminal-probe-into-sinking-of-Deep-Sea-168547256.html>.

baby-sitting situation like it did with *The Cactus*.<sup>142</sup> If a fully funded state run agency is hesitant to undertake a possibly costly seizure, what incentives would a much smaller municipality, city, or even private marina, have to undertake a seizure when it would likely become liable for any and all cleanup costs as well as any legal fees incurred should the seizure have been wrongful?<sup>143</sup> It seems that the logical solution to this situation would be for potential seizing agencies to leave the ships where they lie and hope that nothing bad happens. Of course, should something bad happen, liability will fall to the owner of the vessel (if one can be found) or to the state through the DVRA, leaving smaller localities free of any liability and costs.<sup>144</sup>

Further compounding this disincentive for seizure, any agency that does seize and dispose of an abandoned or derelict vessel may not have its costs recuperated by the DVRA, a fund set up specifically to repay smaller agencies for removing these vessels.<sup>145</sup> As previously discussed, the DVRA must prioritize payment to APEs based on the priority scheduling, and with an operating budget of around \$750,000, one large project could expend the entire fund, leaving no money to defray the cost for smaller removal projects.<sup>146</sup> With cities increasingly cutting funding to other programs, it seems unlikely that a municipality would gamble on seizing and removing a vessel, especially when there is no guarantee that state funding will help recover costs.

Another serious issue is that criminal liability under Washington law only attaches if a boat was abandoned adrift, and even then, the penalty is only a misdemeanor.<sup>147</sup> Of the four cases noted in Part Four, none of the vessels were abandoned or left derelict adrift. To be sure, abandoning a vessel that is adrift is a serious and very dangerous situation and it should be a criminal act, but willfully abandoning a vessel that is moored somewhere is equally dangerous, and can have disastrous environmental implications for the state.

On top of this, criminal liability only occurs if there are three or more violations within a one year period of time—meaning a person must abandon a vessel adrift and be caught at least three times in a year

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142. O'Hagen, *supra* note 1.

143. WASH. REV. CODE § 79.100.060(3) (2013). This section notes that in an action contesting a seizure, the prevailing party may be able to collect attorney fees at the summation of legal proceedings.

144. WASH. REV. CODE § 79.100.060(1) (2013); WASH. DEP'T OF NAT. RES., *supra* note 28.

145. WASH. DEP'T OF NAT. RES., *supra* note 28.

146. *See generally* WASH. DEP'T OF NAT. RES., *supra* note 67.

147. WASH. REV. CODE § 79A.60.240 (2012).

before any criminal liability affixes.<sup>148</sup> As previously described, this is an incredibly unlikely scenario, and thus, in practice, there is no criminal liability for those abandoning vessels in Washington. Even assuming that a person was found criminally liable for abandoning a vessel, the maximum sentence they could receive would be a \$1,000 fine and/or a jail sentence less than ninety days.<sup>149</sup> Simply put, these punishments are not proportionate with the harm caused by abandoning a vessel. Therefore, the laws must be changed to show Washington's dedication to keeping the waterways free from abandoned vessels.

Another notable issue concerns the kinds of vessels the DVRP is willing to seize. As it stands, the DVRP will only remove vessels up to 200 feet in length, meaning that any larger vessel will not be subject to state action and will be left either on the water or left to municipalities or APEs seizing and removing these vessels.<sup>150</sup> As noted in Part Four, vessels larger than 200 feet have astronomical cleanup costs,<sup>151</sup> again helping to create a disincentive for seizing these most dangerous of vessels.

### *B. Suggestions for Change*

In dealing with these problems with enforcement in Washington State, there are a number of possible ways to address the issue of stemming the tide of abandoned and derelict vessels in Washington. First, imposing an increase in boating taxes from \$8 a year to \$18 a year will help the woefully underfunded DVRP generate enough funds to tackle the ever expanding derelict vessel list. Second, by changing the current laws to remove liability from seizing entities, the state will allow for proactive taking of vessels as soon as they become derelict or abandoned which will help ensure that vessels do not become environmental dangers. Third, by creating stricter criminal penalties for individuals abandoning or allowing a ship to become derelict, the state will further de incentivize individuals from engaging in dangerous and damaging behaviors. Fourth, by creating a law that limits the sale of vessels which are not seaworthy (except to be scrapped) without first having them fixed, the state can limit sales of vessels like the *Deep Sea* to less than reputable purchasers and help prevent future environmental

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148. WASH. REV. CODE § 79A.60.020(1) (2012); WASH. REV. CODE § 9.92.030 (2012).

149. WASH. REV. CODE § 9.92.030 (2012).

150. *Washington State Derelict Vessel Removal Program*, WASH. DEP'T OF NAT. RES. DERELICT VESSEL REMOVAL PROGRAM 2 (Nov. 26, 2012 12:41 AM), [http://www.dnr.wa.gov/Publications/aqr\\_dv\\_derelict\\_brochure.pdf](http://www.dnr.wa.gov/Publications/aqr_dv_derelict_brochure.pdf).

151. WASH. DEP'T OF ECOLOGY, *supra* note 122.

issues. Fifth, and finally, the state should create and implement an amnesty program wherein owners of vessels who can no longer afford their upkeep can turn them into the state for proper dismantling. A well-funded and properly implemented amnesty program would likely stem the tide of vessels that are left abandoned and to rot in Washington's waterways.

### 1. Increasing Washington's Boat Tax and Funding for the DVRP

The biggest issues facing the DVRP and the DVRA stem from a lack of funds. While \$750,000 is sufficient when only dealing with small vessels, this amount pales in comparison to the funds needed to cleanup even one disaster like the *Deep Sea* or *The Davey Crockett*. Because the DVRP is primarily funded via taxes levied on Washington boaters,<sup>152</sup> increasing this taxed amount should help to alleviate the problems combating abandoned and derelict vessels. In 2002, there were 264,393 boats registered in Washington State.<sup>153</sup> At \$8 a year in taxes, per boat, this provides nearly \$800,000 in funds the DVRP and DVRA per annum.<sup>154</sup> If the state increases this boat surcharge by \$15 (\$18 a year total—a very modest amount of yearly taxes), the state would generate \$4,759,074 in revenue that could be spent on cleaning up additional derelict and abandoned vessels. If this figure were collected every year, the state could potentially establish a surplus and ensure that vessels removed by APEs can be fully compensated. Beyond this, the DVRP could begin to remove many of the vessels on the list—including large vessels that pose a grave danger to the environment.

With proper funding, the state could also eliminate any disincentive to seize and dispose of abandoned and derelict vessels by ensuring that APEs are properly compensated for their removal efforts, from vessels large and small. By ensuring funds exist to compensate APEs for any vessel removals, APEs should be incentivized to act proactively and seize problem vessels before they sink. Further, if APEs could be reimbursed quickly for a vessel disposal, the associated liability shift to a seizing APE would be mitigated and the seized vessel would be properly disposed of before it could cause property or environmental damage.

In many situations, APEs are in the best position to act proactively in addressing derelict and abandoned vessels. Though not always located in marinas or ports, many derelict vessels that end up sinking are found

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152. WASH. DEP'T OF NAT. RES., *supra* note 67, at 5.

153. *Washington Boating Information*, BOAT U.S. GOVERNMENT AFFAIRS (Nov. 26, 2012, 1:08 AM), <http://www.boatus.com/gov/states/WA.asp>.

154. \$793,179 to be exact—assuming all funds were collected.

in marinas operated by APEs.<sup>155</sup> Giving APEs the tools to proactively seize ships once they meet the DVRP derelict vessel standards should significantly reduce the amount of vessels that sink in Washington.

Alternatively, the state could carve out a bankruptcy exception for vessel owners found civilly liable for costs associated with cleaning up a sunken vessel. Currently, there is no such language. This means that if an owner of a vessel is located by the state and found to be liable for damage caused by their vessel, he or she can simply discharge any costs in a bankruptcy action.<sup>156</sup> Washington could ensure a constant stream of funds to help recuperate costs from sunken vessels by making these debts non-dischargeable. However, this alternative is not ideal because many owners, even if found, are severely lacking in the funds necessary to pay for any clean-up costs at all.<sup>157</sup> Nevertheless, placing a harsh penalty like a non-dischargeable debt on owners who let their vessels cause environmental damage could make owners who are near this situation think twice before letting their vessels slip into disrepair.

Without a change in collecting schemes, the DVRP's annual budget only allows for the removal of approximately one large vessel a year, and no other vessels.<sup>158</sup> At such a slow rate of vessel removal, it is likely that another vessel will sink and cause additional damage to the environment before problem vessels are disposed of. It is imperative that the tax structure change quickly to ensure the DVRP has adequate funding to deal with the backlog of hundreds of smaller vessels that remain on the water to mitigate the risk of continued environmental damage.<sup>159</sup> Finally, an increase in funds could be used to create patrols to go out and identify other vessels that are abandoned or derelict in order to flag future problem ships.

## 2. Changing the Seizure-Liability Laws

Current state laws that transfer ownership and liability to APEs if they seize a vessel should be changed to remove liability from APEs

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155. See, Doug Esser, *Two Derelict Ships Sink at Tacoma Marina*, KING 5 NEWS (Jan. 25, 2013), <http://www.king5.com/news/cities/tacoma/Coast-Guard-responds-to-sinking-vessels-at-Mason-Marina-188370531.html>. This is an excellent example of how an APE could have seized these vessels as soon as they became a problem—when the Helena Star began listing a year before the current sinking and subsequent million dollar plus cleanup.

156. 11 U.S.C. § 727 (2012).

157. Martin, *supra* note 107.

158. See *Problems and Questions for Discussion*, WASH DEP'T OF NAT. RES. DERELICT VESSEL REMOVAL PROGRAM 2 (Oct. 1, 2012), [http://www.ecy.wa.gov/programs/sea/ocean/pdf/DerelictVessel\\_Oct2012.pdf](http://www.ecy.wa.gov/programs/sea/ocean/pdf/DerelictVessel_Oct2012.pdf).

159. *Id.*

acting proactively. As written, the laws<sup>160</sup> place liability with a seizing entity should no owner be found—making a seizing entity entirely responsible for many seized abandoned and derelict vessels. Because of this, APEs are unlikely to seize vessels for fear of incurring liability. The problem is that APEs could be held liable if the vessel should sink before the APE can arrange for proper disposal. If, however, a vessel is not seized by an APE and sinks without an owner, the DVRP steps in and cleans up the environmental damage. This places costs on the tax payers of Washington because the state has to fund cleanup. This creates a perverse incentive for APEs—it makes fiscal sense not to seize vessels because doing so would trigger clean-up liability.

Due to this perverse incentive, it makes sense to place all liability for seized vessels where no owner can be located to the state, not APEs. Ultimately, by revising the seizure-liability laws, APEs will be able to act proactively and without fear of liability should a vessel sink before funds can be secured to remove the vessel. By changing the laws in this way, the state, which has the most funds on hand to deal with derelict and abandoned vessels, can immediately triage the situation and decide on a plan of action for each vessel. Further, by placing liability with the state instead of a seizing APE, APEs may be more likely to proactively seize offending vessels. Such a system could help stave off future problems such as those experienced in the sinking of the *Deep Sea*.

It is senseless for the state to punish APEs acting proactively by placing liability on them for seizing vessels where no owner can be found. This system is punitive and ironically incentivizes APEs to wait until it is too late to begin remedial action on vessels that would otherwise be subject to seizure. The state should reward proactive APEs who can act before a vessel sinks by keeping them free of liability for seizure if it wants to get a handle on many of the derelict and abandoned vessels in Washington.

### **3. Increasing Criminal Penalties for those Abandoning Vessels.**

By increasing the criminal penalties for persons willfully abandoning vessels, or allowing vessels to become derelict, the state ensures that persons are deterred from engaging in this sort of action. First, the action of willfully allowing a vessel to become derelict, or willfully abandoning a vessel (except in emergency situations) should be classified as a class C felony, carrying with it a maximum jail sentence of

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160. WASH. REV. CODE § 53.08.320(5)(d) (2012).

five years and/or a fine of not more than \$10,000.<sup>161</sup> The penalty should automatically trigger on a willful abandonment, but should only trigger for allowing a vessel to become derelict after a three-strike warning system is used to notify an owner that their ship is in a derelict condition. The warnings should be spaced three months apart to allow an owner to attempt to shore up existing problems with his or her vessel before an additional warning is issued.

If implemented correctly, increased criminal penalties would allow for the state to keep better track of vessels that are in danger of becoming derelict and will also act as a serious deterrent for those who willfully allow their vessels to become derelict or abandoned. The current law is woefully inadequate in addressing the seriousness of the impact a derelict or abandoned vessel can have on the environment.<sup>162</sup> The costs borne by Washington for cleaning up sunken vessels are a major issue. When there is a potential for millions of dollars in environmental damage, those who willingly allow their vessels to reach this state should be liable for criminal penalties including serious jail time and a felony record. Beyond this, once a vessel is noted as derelict, a warning system would ensure that law enforcement and other government officials would keep tabs on the vessel, hopefully avoiding issues of a ship moving from port to port (as was done by the *Deep Sea* to avoid trespassing issues).<sup>163</sup>

A warning system is necessary to ensure that those unaware of possible criminal charges will become notified before serious legal ramifications attach. The system proposed here—that a warning will only occur once every three months—ensures that owners have ample time to fix their vessels before criminal liability (and civil seizure) occurs. At very worst, assuming three warnings do not prove fruitful and a vessel remains derelict, a vessel would be seized within nine months and at that point criminal liability would attach to the owner. This scenario still takes a derelict vessel off the water in less than a year, a system much more streamlined than the current DVRP timeframe.

#### **4. Make it Unlawful to Sell a non-Seaworthy Vessel**

One recurring problem in all of the Part Four problem cases listed is that non-seaworthy vessels were sold to owners who could not properly

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161. WASH. REV. CODE § 9a.20.021 (2012) sets these as the guideline penalties for a class C felony. Comparatively, Massachusetts state law, MASS. GEN. LAWS ANN. ch. 91, § 43B (West Supp. 2011), sets a penalty for abandoning a vessel at \$10,000 in order to showcase the seriousness of the offense.

162. WASH. REV. CODE § 79A.60.020(1) (2012); WASH. REV. CODE § 9.92.030 (2012).

163. Martin, *supra* note 107.

fix up, or scrap the vessels. Accordingly, state law should place a limitation on the sales of vessels that are not being sold to scrapping companies to ensure that the vessels are seaworthy at the time of sale, or that the purchaser has the means to bring the vessel up to seaworthy condition within three months. If a new owner cannot bring the vessel up to seaworthy condition within three months, then the criminal warnings discussed above, will begin to accumulate. If limitations were implemented to ensure that only capable owners purchases derelict or near derelict vessels, debacles such as the *Deep Sea*, *The Cactus*, and *The Davey Crockett* could be avoided in the future.

The legislature has sought to shore up this problem with a new section to the Derelict Vessels law, title 79, chapter 100, section 150 of The Revised Code of Washington, but has not gone far enough. Under this new section, persons seeking to transfer vessels that are sixty-five feet in length *and* more than forty years old *and* either listed as homes or vessels must secure an inspection before transfer is allowable.<sup>164</sup> This law begins by presuming that only old vessels can have significant issues making them liable to become derelict or abandoned. The law should be amended that all large vessels (sixty-five feet and over) be subject to some form of inspection upon sale. Even worse, the DNR or the DVRP are not required to complete this inspection.<sup>165</sup> Furthermore, there is no indication of what this inspection would require or check for. Without more guidance, there is little to ensure that persons follow this law scrupulously, allowing for vessels that are liable to become derelict or abandoned to still be sold, and likely, not subject to the scrutiny the legislature intended by passing this law.

Despite this new law, it stands to reason that the transfer of vessels in a derelict state from owner to owner makes it significantly more difficult to track these vessels and ensure they do not become environmental hazards. As a potential solution, any owner seeking to purchase a derelict vessel might be required to either show financial means and a plan to renovate the ship to seaworthy conditions or must show they can scrap it. If a prospective buyer could not meet these two requirements, a boat owner should not be able to sell a derelict vessel to that buyer.

If a policy like this existed, the *Deep Sea* disaster would never have happened. Selling a derelict vessel to a private individual without knowing his financial capabilities or ability to sell the vessel for scrap

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164. WASH. REV. CODE §§ 79.100.150(1)(a)-(b) (2013).

165. WASH. REV. CODE § 79.100.150(2) (2013).

was inviting a disaster. Proper monitoring of the sale of derelict vessels will ensure that future environmental damage will not occur.

### 5. Revisit and Expand the Existing Vessel Amnesty Program

Finally, should an owner be unable to properly maintain a vessel, an amnesty program should be created by the state to allow persons to offload vessels that otherwise would be left to become derelict and which could be harmful to the environment. California currently has a law similar to this,<sup>166</sup> and the same idea was suggested in a recent law review article in South Carolina.<sup>167</sup> By providing an amnesty program, criminal liability would only attach to those who willfully skirt the law, and would not penalize boat owners who simply become unable to pay for their vessel.

The benefits of an amnesty program include the allowance for the state to effectively take control of numerous problematic vessels, identify the order the vessels should be scrapped or otherwise disposed of, and should cost the state little money. Assuming the other suggestions in this paper are implemented, the amnesty program would give owners a way out when they are incapable of shoring up, maintaining, or dismantling vessels that are becoming derelict. Amnesty would allow these owners to walk away from both civil and criminal liability by handing title to the state. Once the state has control of these vessels, it can adequately determine which vessels must be disposed of first based on the current risk of environmental degradation. Finally, any amnesty program would likely cost the state little to implement and maintain. Vessels that are in good condition could be auctioned off and the rest of the vessels sold for scrap—and any excess funds from these sales could be used to further fund the DVRP.

In these difficult economic times, it is important to allow boat owners an out from vessels they cannot afford to maintain. When owners cannot afford vessels, they often turn to desperate measure to off-load their burdensome pieces of property.<sup>168</sup> Amnesty provides a simple and effective solution to this problem. By allowing people to legally dispose

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166. See CAL. HARB. & NAV. CODE §§ 525(d)(1)(A)- 526.1(a)(2) (West Supp. 2011) (noting that these must be recreational vessels that are in danger of being abandoned or having any “likelihood of causing environmental degradation or becoming a hazard to navigation.”).

167. Susanna Cartwright Brailsford, *Abandoned Ship!: Legal Approaches to South Carolina’s Derelict Vessel Problem*, 62 S. C. L. REV. 587, 605 (2011).

168. See, David Streitfeld, *Boats too Costly to Keep are Littering Coastlines*, N.Y. TIMES (Mar. 11, 2013) [http://www.nytimes.com/2009/04/01/business/01boats.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/04/01/business/01boats.html?pagewanted=all&_r=0). This article looks at some interesting anecdotal evidence of how vessel owners deal with boats that have become too expensive to maintain during this economic recession.

of their vessels before they become unmanageable, the boat owner benefits because they are free from a costly obligation, and the state benefits because it is one fewer boat left to become an environmental disaster.

The current law passed by the Washington legislature in 2013 regarding vessel amnesty goes a long way to remedy this situation, but is still fraught with problems. A solution might be making the program mandatory—changing “may” language<sup>169</sup> to something more concrete and showing the legislature’s desire to solve this grave problem. Given the tremendous boon fully supporting such a program can have in terms of saving Washington money from environmental cleanup costs, the legislature should have used “shall” language, showing its support for a robust amnesty program and encourage the DNR and the DVRP to implement a program that can accept large vessels before they become a problem.

As noted before, a small scale vessel amnesty program has been implemented in Washington.<sup>170</sup> This program, however, is very limited in its discretion and explicitly states that any vessel larger than 45 feet in length will not be considered eligible for amnesty.<sup>171</sup> While the majority of vessels currently on the DVRP’s list of vessels of concern fall into this category, there are still 35 vessels on the list that exceed 45 feet in length.<sup>172</sup> Without a change to this requirement, the DVRP is excluding from consideration the very vessels which have caused such dramatic economic damage to Washington. Categorically denying amnesty to large vessels could give rise to other disasters on the same scale as the *Deep Sea* and is a requirement that should be revisited.

Of course, this size limitation may be due to the little funding the current amnesty program receives—only \$200,000 for any two year period.<sup>173</sup> Removing and cleaning up large vessels, those which prove the most dangerous to Washington’s economy and environment, is costly, even if a vessel has not sunk.<sup>174</sup> Because of this, funding would need to be significantly increased, or at the very least, subject to increase on an as-needed basis to help dismantle these large vessel. Such increases could be submitted from the DNR or the DVRP to the legislature for immediate emergency funds to help remove dangerous materials from

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169. WASH. REV. CODE § 79.100.160(1) (2013).

170. WASH. DEP’T OF NAT. RES., *supra* note 102.

171. *Id.*

172. WASH. DEP’T OF NAT. RES., *supra* note 1.

173. WASH. REV. CODE § 79.100.160(7) (2013).

174. Learn, *supra* note 14 (noting that many large vessels contain contaminants such as asbestos, lead piping, and PCBs).

vessels before they could harm people or the environment. Thus, even though the proposed amnesty program does help lay the groundwork for an effective means to combat derelict and abandoned vessels, the proposal needs to include provisions for additional funding, and further, needs to be expanded to allow for vessels larger than 45 feet to be turned over to Washington for dismantling.

#### V. CONCLUSION

Washington State currently has a robust system of laws and regulations regarding abandoned and derelict vessels, yet this system is flawed. There are currently over 200 derelict or abandoned vessels known to the state, and the current financial situation precludes an easy cleanup of these offending vessels. The Department of Natural Resources and its Derelict Vessel Removal Program have begun the difficult task of removing many abandoned and derelict vessels, but still face numerous problems in enforcement of existing laws. Large disasters such as those experienced in the sinking of the *Deep Sea*, the breaking apart of *The Davy Crockett*, and the seizure of *The Cactus* and the *Northern Retriever* show how this system still suffers massive failures. Changing state law to include additional funds for the Derelict Vessel Removal Program, a shift in seizure incentives for agencies, and increased criminal penalties for abandoning a vessel or allowing it to become derelict will help Washington combat the ever-present and costly problem of derelict and abandoned vessels in waterways.

As its citizens face a struggling economy, the state cannot operate in a way that incentivizes abandonment and dereliction of vessels. Without change, the state will continue to hemorrhage millions of dollars each year cleaning up environmental disasters that could have been avoided. Despite the costs of implementing the suggested changes, these costs fall far below the millions already spent on damages related to derelict and abandoned vessel. More importantly, they are a small price to pay for ensuring the sanctity of Washington's delicate waterways and ecosystems. Simply put, Washington cannot afford *not* to make these key changes.