Case Nos. 03-74795, 06-17187, 06-17188

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST ENVIRONMENTAL ADVOCATES, et. al.
Plaintiffs-Appellees; Petitioners,

and

THE STATES OF NEW YORK, et. al.
Plaintiff-Intervenors Appellees

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Defendant-Appellant; Respondent,

and

THE SHIPPING INDUSTRY BALLAST WATER COALITION
Defendant-Intervenor Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. 03-05760 SI

BRIEF OF AMICUS CURIAE
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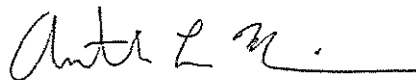
Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae National Marine Manufacturers Association certifies that it has no parent corporation, and that no publicly held company owns 10% or more of its stock.



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STATEMENT OF IDENTITY

The National Marine Manufacturers Association (NMMA) submits this *amicus* brief in support of Appellant-Respondents United States Environmental Protection Agency (EPA or Agency) and the Shipping Industry Ballast Water Coalition (SIBWC). NMMA respectfully requests that this Court reverse the district court, and dismiss the Petition for Review filed by Plaintiff-Appellee-Petitioners (Plaintiffs). A Motion for Leave to File is being submitted with this brief.

NMMA is the nation's leading recreational marine industry association, representing over 1,600 boat builders, engine manufacturers, marine accessory manufacturers, and industry service providers. NMMA members produce over 80 percent of all recreational marine products sold in the U.S. Recreational boating is a popular U.S. activity, with approximately 71.3 million boaters and 18 million boats in use. The recreational boating industry employs approximately 373,000 people in the U.S.

NMMA's mission is to protect and defend recreational boating, the industry, and the environment. Among other member services, NMMA provides technical expertise, safety improvements, and statistical analysis. NMMA operates a mandatory certification program where independent inspectors verify that member product lines satisfy the Federal Boat Safety Act, 46 U.S.C. §§ 4301-11, and

consensus standards including those of the American Boat and Yacht Council (ABYC) and the Society of Automotive Engineers (SAE).

The district court's ruling would invalidate the decades-old incidental discharge exemption of 40 C.F.R. § 122.3(a), and require virtually every boat in the U.S. obtain a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act (CWA) by September 2008. However, the proceedings below focused almost exclusively on ballast water, and the administrative record includes virtually no consideration of other incidental discharges from boats. NMMA has strong interests in preserving the economic viability of boating, and maintaining consistent and well-considered legal requirements -- both of which are implicated by this case.

ARGUMENT

I. EPA Reasonably Concluded That Congress Did Not Intend to Mandate NPDES Permits for Incidental Discharges From Boats Used for Transportation

In addition to being 30 years untimely (*see* Section III, below), Plaintiffs' claims fail on the merits. The statutory scheme, at a minimum, does not unambiguously evince Congressional intent to mandate NPDES permits for incidental discharges, and EPA reasonably interpreted the CWA to allow 40 C.F.R. § 122.3(a). EPA at 26-46; SIBWC at 13-36.

Indeed, the only legislative history on the subject directly supports EPA's interpretation, and refutes Plaintiffs'. *See* Congressional Record for Oct. 10, 1972, P. E8454, Extension of Remarks of Robert E. Jones, Committee Chairman ("[The Conference Committee] would not expect the Administrator to require permits to be obtained for any discharges from properly functioning marine engines."); *quoted in* 38 Fed. Reg. 1362, 1364 (Jan. 11, 1973).

As discussed below, further support for EPA's conclusion is provided by: (A) the nature of recreational boating and incidental discharges; (B) the NPDES statutory scheme as a whole, which was designed to regulate stationary sources, and includes provisions inconsistent with an intent to regulate mobile source incidental discharges; and (C) Congress' repeated reinforcement of this conclusion

by adopting non-NPDES approaches in every instance where it determined that a particular type of incidental discharge warranted regulation.

A. The Nature of Recreational Boating and Incidental Discharges Belies Any Congressional Intent to Mandate NPDES Permitting

1. Existing Recreational Boats Vastly Outnumber all Other Permitted Sources Combined

EPA estimates there are 17,500 ballast vessels in U.S. waters (10,000 U.S. flagged and 7,500 foreign). *See* Excerpts of Record for Federal Defendant-Appellant ("ER") at 146. These vessels are typically large cargo ships, which may carry 100,000 to 28,000,000 gallons of ballast. As cargo is loaded and unloaded, the ship adjusts by taking on or discharging ballast water. Most ballast is discharged in port as cargo is loaded. ER 141.

By contrast, there are approximately *18 million* recreational boats in use in the United States -- or *1,000 times* the number of ballast sources.[1] There are also millions of other commercial boats. For comparison, today there are about 600,000 total facilities that require NPDES permits (100,000 non-stormwater, and 500,000 stormwater).[2] Adding recreational boats to the NPDES program would increase the number of permitted sources by over 30 times (3,000%). Adding just

[1] *E.g.*, NMMA 2005 Recreational Boating Statistical Abstract at 2 ("NMMA 2005 Abstract") (17.95 million recreational boats in 2005). The 16 million figure cited by EPA was for 1997. EPA at 47; ER 145.

[2] ER 278-79.

ballast boats (virtually the exclusive focus below) would expand the number of permittees by only about 3% (from 600,000 to 617,500).

Among other things, given that Congress specially amended the CWA in 1987 to require EPA to exercise its authority to permit stormwater discharges (about 500,000 permittees), it would be quite odd to conclude that Congress in 1972 intended to require EPA to permit *36 times* that number of boats, but never noticed or sought to correct EPA's failure to do so.

2. There are a Staggering Variety of Recreational Boats and Incidental Discharges Which Would Evidently Require NPDES Permits Under the District Court's Ruling

Of the 18 million recreational boats, there are about 8.55 million outboard motor boats, 1.76 million inboard boats, 1.86 million sterndrive boats, 1.55 million personal watercraft (e.g., jet skis), 1.57 million sailboats, and 2.65 million canoes, kayaks, and other types.[3] Within each category, boats vary dramatically by size, hull type, capacity limits, power, and other design elements that affect the ability to add discharge-related features without impacting seaworthiness and safety.

Virtually all transportation by boat entails some measure of incidental discharges. Neither the Agency in denying the petition nor the district court considered the nature of non-ballast incidental discharges. Nor did they perform any meaningful analysis of such discharges under the CWA -- including which, if

[3] NMMA 2005 Abstract at 2.

any, constitute "pollutants," and whether such ongoing incidental discharges from underway vessels (as opposed to large premeditated releases, such as ballast, or releases from a floating industrial facility) must be considered the "discharge of a pollutant" from a "point source," within the meaning of CWA § 502(6), (12), (14), (16), (19).

The District Court barely mentioned non-ballast discharges until after summary judgment. At the remedy stage, the district court provided only a brief description of "graywater" (water from sinks and gallies), "bilge water" (water that collects in the bilge) and "black water" (treated or untreated sewage),[4] citing no support from the administrative record. ER 354.

In fact, boats routinely experience a number of incidental discharges. For example, boats inevitably take on water from spray, waves, and weather, and must promptly drain it, resulting in discharges of deck run-off and bilge water. Some boats collect water in the bilge, which must then be pumped out, and others drain continuously. Even a canoe or kayak that takes on significant water will either drain immediately through boat design (if outside the cockpit), or must be bailed. Boating design standards require that boats drain quickly to maintain weight

[4] Sewage is not at issue here. It is exempt from NPDES permitting by statute and regulated separately under the Clean Vessel Act and CWA § 312. *See* Section I.C, below.

limits.[5] These standards are critical because exceeding a boat's certified capacity can endanger the lives of all onboard.

The administrative record is silent concerning the contents of bilge and deck run-off from various boats under various circumstances. However, some such discharges may contain, for example, suspended solids, dirt, sea shells, mildew, sediment, wood particles, or other substances.[6]

In addition, because it is difficult to achieve air-cooling within the confined spaces of a boat, marine engines must be water cooled. 46 C.F.R. § 58.10-5. Boat engines also commonly use a wet exhaust system whereby water is continuously pumped through exhaust piping and discharged. This results in fewer air emissions

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[5] For example, ABYC Standard H-4 imposes drainage capacity requirements based on cockpit size or a drainage test. The test requires 75% of water volume to drain in 90 seconds. STANDARDS FOR COCKPITS AND SCUPPERS H-4.5.9.1 (ABYC 1999).

[6] After summary judgment, Plaintiffs alleged below that bilge water often contains oil. Riskedahl Decl. ¶ 6 (Nov. 10, 2005). However, existing law prohibits oil discharges sufficient to create a sheen or film, and impose measures to prevent oil from entering the bilge. 33 U.S.C. § 1321; 33 C.F.R. § 153.103(h). The same declarant asserts that he was "aware" or "read reports" that boats also discharge detergents, metals, pesticides, and bacteria, along with an anti-fouling agent called tributyltin (notwithstanding that Congress banned its use on boats under 25 feet in 1998). Riskedahl Decl. ¶¶ 6, 8. It is unclear whether these assertions were intended to refer only to discharges from large passenger vessels (like cruise ships that function as virtual "mini-cities"), or to include small recreational boats. The declarant identifies no support for these assertions, which were not presented to the Agency, and were not addressed by the district court.

(regulated under the Clean Air Act), and is cooler and quieter than a dry exhaust system.[7] The administrative record is silent as to the composition of such discharges.

3. Recreational Boating Involves Multiple Receiving Waters and Multiple States

The navigable waters of the United States include over 250,000 square miles of inland waters, and 88,000 linear miles of tidal shoreline. Recreational boaters regularly transport boats by trailer hundreds of miles to enter suitable bodies of water,[8] and travel by boat from reach to reach, and port to port, via connected waterways. One popular recreational boating route is the Atlantic Intracoastal Waterway -- a network of natural waterbodies and man-made canals that spans the Gulf Coast and Atlantic seaboard. Recreational boats regularly travel between states, from waters under federal jurisdiction to waters under primarily state jurisdiction, and (as discussed below) among waters with different CWA water quality designations.

[7] Exhaust installations must conform to National Fire Protection Association Standard 302 and ABYC P-1. 46 C.F.R. § 58.10-5(d).

[8] California Boating Facilities Needs Assessment, at 2-15 (Oct. 15, 2002) (Table 2-10).

4. Boating Design and Construction Standards Have Developed for 30 Years in Reliance on 40 C.F.R. § 122.3(a)

The recreational boating industry has developed for over 30 years in reliance on 40 C.F.R. § 122.3(a). In addition to investments in new boat design and production capacity, the 18 million existing boats were designed, manufactured, and sold based on demanding federal and state laws and industry standards for safety and environmental protection that have evolved premised on 40 C.F.R. § 122.3(a). *See*, *e.g.*, 46 C.F.R. Part 58 (Coast Guard equipment requirements, incorporating industry standards); 33 C.F.R. Part 183 (weight capacity, floatation, safe powering, stability testing, and capacity labeling); 33 C.F.R. Part 155 (oil and hazardous materials); Part 159 (marine sanitation devices and sewage treatment); 33 C.F.R. Part 181, subpart B (compliance certification).

Boat safety depends on exacting specifications relating to weight, stability, floatation, drainage, and reliable and safe powering. NPDES permitting would expose boats and boaters to standards, management practices, and other requirements that are potentially far reaching and comprehensive, and inconsistent with existing standards. (*See*, *e.g.*, Section I.B., below). The reliance on 40 C.F.R. § 122.3(a) by private and government stakeholders was particularly justified given Congress' clear directive in favor of regulatory finality, expressed in the 120-day limit on judicial review in CWA § 509(b)(1). (*See* Section III, below).

5. The Burdens and Costs of Subjecting Recreational Boats to NPDES Could be Devastating

In addition to overwhelming burdens on EPA (diverting resources from discharges it believes should be permitted),[9] mandating permits for 18 million recreational boats will impose potentially devastating burdens and costs on boaters and the industry. Although the administrative record is silent on the subject, even a cursory examination of the nature of NPDES and recreational boating makes clear the magnitude of the problem. At a minimum, NPDES permits must impose technology-based controls on every existing source (under standards that vary by pollutant type), and installation of the "best available demonstrated control technology" on new sources. 33 U.S.C. § 1311(b); ER 168. As discussed below, each NPDES permit must also impose additional controls and limits needed to comply with the water quality standards of individual receiving waters (which for recreational boats are unknowable). Violations are enforceable by the state or federal permit issuer, or "any citizen," with penalties up to $25,000 per violation. CWA §§ 309(d), 505(a).

Whatever the costs of retrofitting with control technologies for each type of boat and incidental discharge, they will likely be overwhelming relative to the value of the boat. Owners of existing boats implicitly relied on 40 C.F.R.

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[9] ER 275-310.

§ 122.3(a) in purchasing and outfitting their boats. In 2005, the average price of a new recreational boat was $13,389, and for used boats (the majority of sales, with over one million in 2005) the average was under $9,000.[10]

In addition, the administrative burdens of applying the NPDES program to boating would be staggering (and achieving compliance by the district court's deadline likely impossible). At the outset, it would require a massive outreach effort to educate the boating community about the new NPDES requirements -- an effort not contemplated or provided for by Congress in establishing a NPDES program intended to govern stationary (and primarily commercial) sources. Each boater would be required to either apply for an individual NPDES permit, or submit a Notice of Intent for coverage under any future EPA or state general permit(s) after determining whether the individual boat and its incidental discharges qualify for coverage (a task that, as discussed below, cannot be achieved for mobile sources given statutory requirements).

Moreover, unlike the industrial facilities and other stationary sources that Congress intended for NPDES permitting, recreational boats are not typically

[10] NMMA Boating Statistics, 2005 Recreational Boating Abstract, Table 3.1.

owned by businesses, and lack full-time personnel to interpret and comply with monitoring, recordkeeping, and other permit requirements.[11]

In sum, the nature of recreational boats and their incidental discharges -- not even considered by the Agency or district court in evaluating the merits or the remedy[12] -- further support EPA's conclusion that Congress did not unambiguously mandate that EPA require NPDES permits for all such discharges.

B. The Statutory Scheme is Inconsistent With Requiring NPDES Permits for Incidental Discharges From Mobile Sources

In addition, a number of statutory requirements for NPDES permits are inconsistent with the notion that Congress unambiguously intended to require EPA to permit incidental discharges from mobile sources used for transportation. In concluding at *Chevron* step one that Congress had directly addressed this issue, the district court failed to heed the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in

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[11] Many larger recreational boats are stored in water, and would experience run-off and possibly other discharges while vacant.

[12] In considering ballast vessels at the remedy stage, the district court recognized that "the economic consequences of misguided regulation on the North American and global shipping industry could be enormous." ER 370. But the district court considered none of the burdens and costs to recreational boating, and paid little heed even to the harms that it did consider, in imposing a remedy that mandates inflexible NPDES permitting for all boats within an unworkable timeframe.

the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). According to the Supreme Court:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning -- or ambiguity -- of certain words or phrases may only become evident when placed in context.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000). A statute must be interpreted "as a symmetrical and coherent regulatory scheme" and the interpretation must "fit, if possible, all parts into an harmonious whole." *Id.* (citations omitted).

As discussed below in Section II, neither the district court nor the Agency performed a comprehensive review of the statutory scheme and subsequent legislation, except in the narrow context of ballast. However, even a brief review of key NPDES statutory provisions provides additional support for EPA's interpretation of the statute to allow 40 C.F.R. § 122.3(a), particularly for recreational boats.

1. The CWA Contemplates That a Permitted Source Will Not Move Among States

The administrative structure established by Congress -- whereby each state may adopt more stringent standards, or interpret and apply federal standards to dischargers within the state -- is at odds with the notion that Congress intended NPDES to apply to incidental discharges from mobile sources. Under CWA

Section 402(b), "each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction" may apply for EPA approval of the state program. 33 U.S.C. § 1342(b). EPA has no significant discretion to withhold approval. 33 U.S.C. § 1342(c) (EPA "shall approve" each state program unless supported by inadequate state-law authority).

To date, EPA has approved NPDES permitting programs of 45 states and the Virgin Islands. ER 25. Once a state program is approved, EPA "shall suspend" issuing permits for sources within that jurisdiction covered by the program. 33 U.S.C. § 1342(c); ER 25. It is undisputed that state regulations "frequently differ from those of the Federal government and from other States." ER 25. As concluded by EPA in denying plaintiffs' petition to repeal:

> EPA reasonably interprets the CWA to authorize the exclusion of discharges incidental to the normal operation of a vessel because otherwise every vessel engaged in interstate commerce would be required to apply for and obtain a different, potentially conflicting, NPDES permit for each of the various State waters through which they travel. *There is no provision under the CWA that would enable EPA to issue any type of general permit to establish consistent, nationwide standards for vessels in State waters.*

ER 25 (emphasis added).

The district court ignored this reasonable interpretation by EPA of the scope of its own regulatory authority. At the remedy phase, the district court stated that "[g]eneral permits allow [EPA] to regulate large numbers of vessels." ER 368. To the contrary, however, a general permit issued by EPA has no effect in states with

approved NPDES programs. 33 U.S.C. § 1342(c)(1). As the Agency reasonably concluded, under the district court's ruling a recreational boat traveling in interstate commerce could be required to obtain multiple, and potentially conflicting, NPDES permits from each approved state and from EPA.

2. NPDES Permits Must Include Requirements that Vary Based on Local Water Quality Standards

Separate and apart from who issues the permits, a number of substantive NPDES requirements are inconsistent with the nature of mobile source incidental discharges and provide additional evidence that Congress did not intend to mandate NPDES permits for the normal operation of recreational boats. For example, in addition to technology-based standards for control of discharges, each NPDES permit must contain "any more stringent limitation . . . necessary to meet" or "required to implement" the water quality standards for the water body that is to receive the discharge ("receiving waters"). 33 U.S.C. § 1311(b)(1)(C). Water quality standards are established by states applying CWA criteria. 33 U.S.C. § 1313. There are hundreds of different water quality designations tailored to the individual needs of navigable water bodies throughout the nation. *See generally* 40 C.F.R. Part 131.

Unlike stationary sources (and to some extent ballast discharges), recreational boats discharge to a virtually unlimited number of receiving waters which cannot be identified in advance to allow NPDES permitting. Moreover,

even if water quality standards, or the manner in which a permit writer will impose them, could be known, it is not possible for a boater to install any different control technologies necessary to meet the standards when entering each waterbody.

Plaintiffs below recognized this incongruity between their position and the statutory scheme, and suggested that "[p]ermittees that discharge into waters in multiple jurisdictions can adjust to this variability by complying with the most stringent state standard, which will necessarily result in compliance" with water quality standards for every other water body.[13] However, this fails to answer the fundamental legal question of what the NPDES permit(s) must require, and there is no authority to impose permit standards more stringent than required for a specific water body. 33 U.S.C. § 1311(b) (NPDES permit to contain limitations "necessary" or "required" to meet water quality standards of receiving waters).

In addition, Plaintiffs' view would severely restrict recreational boating by effectively applying the most stringent water quality standards (intended for the most sensitive waters and uses) to boaters in every waterbody in the United States, regardless of actual water quality standards, including waters designated for recreational uses under the CWA. This would be inconsistent with the statute, which identifies recreational boating among the water "uses" to be preserved.

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[13] Plaintiffs' Motion for Permanent Injunctive Relief, at 10 n.3 (Sept. 6, 2005).

33 U.S.C. § 1312(a); *cf. Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002) (*Hammersley*) ("It would be anomalous to conclude that the living shellfish sought to be *protected* under the Act are, at the same time, 'pollutants,' the discharge of which may be *proscribed* by the Act.").

In addition, the approach of using "general permits," cited by the district court, will not resolve the fundamental conflict between NPDES and mobile sources. ER 368. EPA and states use general permits to regulate stationary stormwater dischargers (each of whom may discharge to different receiving waters) within the geographic reach of the permit. However, as noted above, an EPA general permit is not effective in states with approved NPDES programs. Moreover, "EPA may not issue an NPDES permit without state certification that the permit conforms to state water quality standards." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 309 (1982).

More fundamentally, general permits for stationary stormwater sources remain consistent with CWA § 302(b) by effectively requiring each applicant for coverage to confirm that its discharges do not violate the water quality standards of the receiving waters. If the discharges do violate receiving water standards, the

discharger cannot obtain permit coverage.[14] However, even if the contents of incidental discharges could be known, a recreational boater cannot confirm in advance compliance with water quality standards of the receiving waters to be entered, and thus cannot secure effective general permit coverage.

C. Where Congress Has Determined that Particular Mobile Source Discharges Warrant Regulation, it Has Not Used NPDES

Congress' repeated choice not to apply NPDES when addressing particular discharges, further confirms that Congress did not intend NPDES for mobile sources. As addressed by Appellants, when Congress decided to regulate invasive species in ballast water, it did not turn to the NPDES program, but enacted NANPCA and NISA. EPA at 36-39; SIBWC at 27-28.

Similarly, Congress enacted the 1980 Act to Prevent Pollution from Ships (APPS), and directed the Coast Guard to adopt regulations prohibiting discharges of oil and harmful substances. 33 U.S.C. §§ 1901-1915; 33 C.F.R. Part 151, Subpart A. Coast Guard regulations under APPS and CWA § 311(j) recognize the characteristics and limitations of boats, including a prohibition on draining oil into

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[14] *See, e.g.*, 65 Fed. Reg. 64745, 64811, 64809 (Oct. 30, 2000) (NPDES Multi-Sector General Permits for Storm Water), Section 3.3 ("Your discharges must not be causing or have the reasonable potential to cause or contribute to a violation of a water quality standard."); *id.* Section 1.2.3.8 (no authorization for discharges that exceed Total Maximum Daily Load for receiving waters); 40 C.F.R. § 122.4(d) (no permit can be issued when imposing conditions cannot ensure compliance with applicable water quality requirements).

the bilge (in recognition that excess bilge water must be promptly discharged). 33 C.F.R. § 155.770.

In 1992, Congress enacted the Clean Vessels Act, a regulatory framework tailored to address boat sewage, Public Law 102-587, §§ 5601-08 (Nov. 4, 1992), operating in conjunction with Coast Guard regulations mandating marine sanitation devices for new boats, based on size. *See* 33 C.F.R. Part 159. The Act initiated a recreational boater sewage disposal program, that:

- Provided federal grants for construction and operation of pumpout stations nationwide to allow disposal of recreational boater sewage, and limited user fees.
- Required coastal states to survey the locations of sewage pumpout facilities, and the numbers of recreational boats with marine sanitation devices.
- Required coastal states to submit plans for constructing pumpout stations.
- Required the Commerce Department to publish charts showing locations of pumpout stations.
- Funded a national outreach campaign to educate boaters concerning the requirements.

Congress authorized $30 million for this program during 1993-1997. Congress reauthorized it in 1998 transportation legislation, adding $10 million in annual funding,[15] and again in 2005.[16]

In sum, whenever Congress has intended to regulate incidental discharges, it has done so explicitly, and selected a non-NPDES approach carefully tailored to the particular discharges and boating activities at issue.[17]

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[15] Transportation Equity Act for the 21st Century, Pub.L.No. 105-178, 112 Stat. 107 (1998).

[16] Safe, Accountable, Flexible, Efficient Transportation Equity Act, Pub.L.No. 109-59, 119 Stat. 1144 (2005).

[17] Similarly, in adopting other recreational boating requirements, such as safety standards, Congress has again recognized the importance of uniformity in regulating mobile sources, and imposed requirements on new boats rather than requiring retrofit of millions of existing boats. *See* 43 U.S.C. § 4302(c) (in establishing uniform safety standards for recreational boats, preempting state requirements, the Coast Guard ordinarily "shall . . . not compel substantial alteration of a recreational vessel or item of associated equipment that is in existence").

Congress has also recognized in other contexts the unique challenges of regulating mobile sources. For example, the Clean Air Act (CAA) subjected stationary sources to state-administered permitting, but not the millions of existing mobile sources (*e.g.*, cars and trucks). 42 U.S.C. §§ 7661-7661f (Permits); *id.* §§ 7521-7554 (Emission Standards for Moving Sources). Congress addressed mobile sources through technology standards on new engine manufacturers, who are in the best position to implement them. 42 U.S.C. § 7521. Congress carefully circumscribed state authority in recognition of the enhanced need for uniformity in regulating mobile sources. 42 U.S.C. § 7543.

II. Even if EPA Improperly Denied Repeal of the Ballast Exemption, the Appropriate Remedy Would be to Vacate that Denial, and Remand

EPA is correct that any challenge to the exemption for non-ballast discharges is barred for failure to exhaust administrative remedies. EPA at 43-46. Plaintiffs provided no evidence concerning such discharges, and no argument regarding which, if any, should be considered the "discharge of a pollutant," or how they otherwise satisfy prerequisites to NPDES permitting under the CWA.

EPA is also correct that, even if EPA abused its discretion or acted contrary to law in denying the petition to repeal the ballast exemption, the appropriate remedy is not to vacate 40 C.F.R. § 122.3(a), but to vacate EPA's denial of the petition to repeal -- the Agency action under review -- and remand for further proceedings.[18] EPA at 46-48.

This result is particularly appropriate here, because the administrative record is incomplete concerning non-ballast incidental discharges. Regardless of whether this was caused by Plaintiffs' failure to raise the issue, or EPA's failure to address it, if EPA improperly denied the petition the appropriate remedy is to remand to

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[18] As noted by Appellants, while the district court's Order used the term "injunction," its judgment merely *vacated* 40 C.F.R. § 122.3(a) as of September 2008. ER 350. If the district court issued an injunction, imposing that "extraordinary remedy," and extending it to non-ballast discharges, would be reversible error on numerous grounds. *Weinberger*, 456 U.S. at 312. For example, the district court provided no reasoned basis for finding declaratory relief inadequate, and failed to even consider the burdens on non-ballast boats.

allow EPA to develop the facts concerning non-ballast discharges and interpret the CWA in the first instance. As the Supreme Court has held:

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

Here, the Agency fully analyzed the nature and contents of *ballast*, the circumstances of its discharge, and its status under the CWA. EPA reviewed in detail all subsequent legislation relevant to ballast, and provided its interpretation of whether Congress intended to subject it to NPDES. ER 14-30. EPA identified substances in ballast water that constitute "pollutants" under the CWA (although it did not address "whether and under what circumstances" invasive species constitute "pollutants"). ER 283-84.

However, the administrative record contains virtually no information or analysis concerning non-ballast incidental discharges. EPA did not consider or develop a record concerning the nature and components of such discharges, the numbers and types of sources involved, or the circumstances and purposes of the discharges. EPA did not provide its interpretation of whether the CWA mandates NPDES permitting for such discharges, or undertake a comprehensive review of other federal enactments focused on non-ballast discharges.

The silent administrative record provides no basis for EPA or the Court to determine (for example) which, if any, non-ballast incidental discharges contain "pollutants," or whether, given the circumstances and purposes of such discharges, they constitute the "discharge of a pollutant" from a "point source," within the meaning of the CWA. If EPA improperly denied the petition to repeal the ballast exemption, the Agency should be afforded the opportunity to develop the facts concerning non-ballast discharges, apply those facts to the statute, and provide its interpretation in the first instance of whether the CWA statutory scheme mandates NPDES permits for such discharges. *Gonzales v. Thomas*, 547 U.S. 183 (2006).

Moreover, even if Plaintiffs were correct that EPA lacked general authority to exempt a "category of point sources"[19] from NPDES (and if that description fit 40 C.F.R. 122.3(a), which addresses particular discharges, not a category of sources),[20] on remand EPA may readily conclude that the exemption for certain non-ballast discharges is supported on other grounds (including grounds that may suggest themselves only with a complete factual record), and thus need not be repealed, in whole or in part.

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[19] Mem. in Support of Plaintiffs' Motion for Summary Judgment, at 27 (Dec. 3, 2004).

[20] *See* ER 26 (EPA interpretation that, while incidental discharges are exempt, "[v]essels, as a category, remain point sources otherwise subject to Section 402");

As one example, EPA may conclude that certain non-ballast discharges are not "pollutants," based on their quantity or nature. *See, e.g.*, *Hammersley*, 299 F.3d at 1015-16 (shells and materials emitted from mussels grown on harvesting rafts are not "pollutants," despite statutory definition that includes "biological materials," due to statutory ambiguity concerning "whether 'biological materials' means *all* biological matter regardless of quantum and nature"). Or, EPA may conclude that incidental discharges from normally operating boats used for transportation do not constitute "discharge of a pollutant" from a "point source" under the CWA.[21] *See, e.g.*, *id.* at 1018-19 (mussel harvesting rafts not "point sources" under CWA, relying on EPA regulatory interpretation excluding operations from "point source" definition based on certain thresholds).

This Court's previous recognition that aspects of the CWA definition of "pollutant" are ambiguous regarding whether "all" matter within a listed category

[21] Certain discharges from vessels were clearly intended to constitute discharges from a "point source" -- likely including the more discrete or episodic disposals of "rubbish, trash, garbage, or other such materials discharged overboard" (which require a permit under 40 C.F.R. § 122.3(a) and are therefore effectively prohibited), or when a vessel is used as an industrial facility or for other purposes apart from transportation. 33 U.S.C. § 1362(14); 40 C.F.R. § 122.3(a). However, interpreting the statutory scheme as a whole, EPA may reasonably conclude that ongoing discharges inherent to transportation by boat constitute "nonpoint source" discharges, requiring no NPDES permit. *Cf.* ER 26; *Hammersley*, 299 F.3d at 1018-19.

is covered "regardless of quantum and nature," is noteworthy,[22] but not exclusive of other relevant ambiguities in the CWA. *Id.* at 1016.

Moreover, without the benefit of a factual record or the Agency's analysis and statutory interpretation, it would be imprudent for this Court to seek to review and resolve whether alternative grounds exist to support the decades-old exemption for non-ballast discharges. Accordingly, if this Court concludes that EPA improperly denied the petition to repeal, it should vacate that denial -- not the entire underlying regulation -- and remand for further proceedings on the petition.

Importantly, this remedy is also consistent with the appropriate roles of the courts and agencies in administrative decisionmaking. In providing EPA with only two years to develop a NPDES permitting scheme for both ballast and non-ballast incidental discharges, the district court engaged in an ad hoc evaluation of the costs

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[22] When the parties below realized the contemplated remedy would extend beyond ballast, EPA suggested a *de minimis* rationale could support the non-ballast exemption. The district court erroneously concluded that EPA should have presented supporting facts at summary judgment. ER 363-64 ("Even assuming that *de minimis* sources of pollution can be exempted . . . the Court finds it undesirable to cross that bridge at this juncture."); *Cf. Hammersley*, 299 F.3d at 1016-17 & n.9 (holding certain materials were not "pollutants" based in part on their concentrations). This misapprehended the nature of judicial review, which is limited to the administrative record, "not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Upon concluding the regulation might be supportable in part on other grounds, the district court should not have vacated the regulation, but at most remanded to the agency to develop the record. *See Florida Power & Light*, 470 U.S. at 744.

and equities, without the benefit of a complete factual record concerning non-ballast discharges. The district court suggested that EPA may dispense with public comment to comply with the court's arbitrary deadline. ER 368. This result is inconsistent with the importance of the public rulemaking process reflected in the Administrative Procedures Act (APA).

Since any rulemaking to alter or repeal 40 C.F.R. § 122.3(a) would be subject to notice and comment,[23] remanding Plaintiffs' petition to EPA would ensure an opportunity for public notice and input from parties (unlike the Plaintiffs) with concrete knowledge and interest in non-ballast discharges. By contrast, the district court's judicial repeal of 40 C.F.R. § 122.3(a) afforded no notice to millions of stakeholders with an interest in its continued validity. This concern is heightened here, given the longstanding nature of the regulation, and the nearly exclusive focus below on ballast. Indeed, the Federal Register notice announcing the denial of Plaintiffs' petition indicated that only the ballast exemption was under challenge. 68 Fed. Reg. 53165 (Sept. 9, 2003) ("Availability of Decision on Petition for Rulemaking to Repeal Regulation Related to Ballast Water").

[23] *Mada-Luna v. INS*, 813 F.2d 1006 (9th Cir. 1987).

Given the national implications of the remedy sought, and the longstanding nature of 40 C.F.R. § 122.3(a), it is particularly important that the Agency's role and public participation in the rulemaking process be preserved and respected. These reasons, in addition to ordinary principles of judicial review of agency action, further counsel that any remedy should be limited to vacatur of EPA's denial of the petition to repeal, and remand to the Agency for further proceedings.

III. Plaintiffs' Claim That 40 C.F.R. § 122.3(a) is Contrary to the Statute is Untimely Under CWA § 509(b)(1)

As addressed by Appellants, this Court has exclusive jurisdiction over Plaintiffs' claims under CWA § 509(b)(1). *See* EPA at 13-21; SIBWC at 36-44. In addition, however, Plaintiffs' Petition for Review to this Court is untimely under CWA § 509(b)(1). Whether styled as a challenge to EPA's promulgation of 40 C.F.R. § 122.3(a) in the 1970s, or to EPA's 2003 denial of Plaintiffs' petition to repeal that regulation, Plaintiffs' claim that the regulation is inconsistent with the statute is barred and must be dismissed for lack of jurisdiction.

Any application to this Court for judicial review of a CWA regulation "shall be made within 120 days from the date of...promulgation...*or after such date only if such application is based solely on grounds which arose after such 120th day.*" CWA § 509(b)(1) (emphasis added). Plaintiffs' claim that 40 C.F.R. § 122.3(a) is *ultra vires* is based on grounds (the statutory language) that existed when the Agency adopted the regulation.

In asserting timeliness notwithstanding CWA § 509(b)(1), Plaintiffs invoke a D.C. Circuit doctrine adopted in *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991) (*Wind River*). Under this doctrine, "an agency regulation . . . may be challenged after a limitations period has expired if the ground for challenge is that the issuing agency acted in excess of its statutory authority" -- by filing a petition to repeal the regulation and seeking judicial review from its denial.

Wind River, 946 F.2d at 714-15 (citing, *inter alia*, *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546-47 (D.C. Cir. 1958)). Under the doctrine, an *ultra vires* challenge to a regulation may be deemed timely based on the date the subsequent petition to repeal was denied. *Id.*; ER 213.

However, the *Wind River / Functional Music* doctrine does not apply here. In CWA § 509(b)(1), as in certain other statutes, Congress has expressly barred untimely judicial review of regulations unless based "solely" on new grounds. Plaintiffs' *ultra vires* challenge is barred under CWA § 509(b)(1) regardless of how it is styled.

The D.C. Circuit's decision in *National Mining Association v. United States Department of the Interior* (*NMA*) is on point. 70 F.3d 1345 (D.C. Cir. 1995). That case involved an *ultra vires* challenge to a regulation promulgated under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). SMCRA includes language indistinguishable from CWA § 509(b)(1) in all relevant respects: "A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, *or after such date if the petition is based solely on grounds arising after the sixtieth day.*" *NMA*, 70 F.3d at 1350 (quoting 30 U.S.C. § 1276(a)(1)).

The *NMA* plaintiffs sought judicial review of DOI's denial of a petition to repeal 30 C.F.R. § 843.12(a)(2) -- a regulation promulgated in 1979. *NMA*, 70

F.3d at 1348. The regulation allowed DOI to issue a Notice of Violation (NOV) after "any inspection," notwithstanding a statutory provision listing the types of inspections that could result in an NOV. *Id.* at 1348. In 1986, seven years after the regulation was adopted, the *NMA* plaintiffs petitioned DOI to repeal the regulation as contrary to the statute. *Id.* at 1348. DOI denied the petition and the plaintiffs immediately sought judicial review, contending the regulation was contrary to "the language, structure, purpose, and legislative history of the statute." *Id.* As here, the *NMA* plaintiffs' case "although phrased as a petition for a new rulemaking that would repeal the rule, [was] based on the claim that the rule is *ultra vires*." *Id.* at 1350.

The *NMA* plaintiffs argued that SMCRA's judicial review limitation provision "extends only to direct attacks on a rule after the 60-day period, not to the procedural device utilized in *Functional Music* and its progeny -- petitioning for a new rulemaking and seeking review of its denial." *NMA*, 70 F.3d at 1350-51. The D.C. Circuit rejected plaintiffs' argument, and held that the *Functional Music* doctrine does not apply under statutes like SMRCA, where "Congress directly focused on the issue, stating that review is barred unless and only to the extent that it is sought on grounds arising after the sixtieth day." *Id.* at 1350. Applying the doctrine "would make a mockery of Congress' careful effort to force potential

litigants to bring challenges to a rule issued under this statute at the outset unless they can meet the after-arising test." *Id.* at 1351.

The virtually identical language in CWA Section 509(b)(1)[24] would be similarly thwarted if the Plaintiffs here are permitted to bring their *ultra vires* challenge. As with SMCRA:

> Congress in [CWA § 509(b)(1)] struck a careful balance between the need for administrative finality and the need to provide for subsequent review in the event of unexpected difficulties. Permitting review of appellants' petition based on grounds clearly available within [120] days of the rule's promulgation would thwart Congress' well-laid plan.

NMA, 70 F.3d at 1350.

Plaintiffs' claims challenging the validity of a regulatory exemption relied upon for 30 years by governments, boaters, and industry, are untimely and barred under CWA § 509(b)(1). Plaintiffs' Petition for Review should be dismissed.[25]

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[24] The *NMA* court quoted CWA § 509(b)(1) and identified it as one of the other environmental statutes where "Congress has adopted similar limitations on judicial review." *NMA*, 70 F.3d at 1350, n.2.

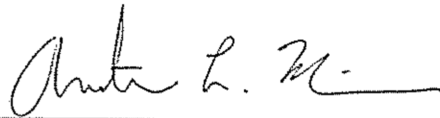
[25] Plaintiffs claims should be dismissed as untimely even if original jurisdiction was proper in the district court. While CWA § 509(b)(1) applies to Court of Appeals review, the six-year statute of limitations of 28 U.S.C. § 2401(a) barred Plaintiffs' suit in District Court. It would be anomalous, and inconsistent with Congress' directive for "administrative finality" in CWA § 509(b)(1), to apply the procedural device of *Wind River / Functional Music* to allow indefinite district court challenges to regulations deemed to fall outside the vague categories listed in CWA § 509(b)(1). This would create an "irrational bifurcated system" of judicial review, *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196-97 (1980),

(Continued ...)

See Stone v. INS, 514 U.S. 386, 405 (1995) (statutory provisions specifying the timing of review are mandatory and jurisdictional).

CONCLUSION

For these reasons, NMMA respectfully requests that this Court reverse the district court, and dismiss Plaintiffs' Petition for Review.



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and this Court should find the *Wind River / Functional Music* doctrine inapplicable. Although the parties challenged the timeliness of only one of Plaintiffs' Counts below, the limitation period of 28 U.S.C. § 2401(a) is jurisdictional and not waivable. *Nesovic v. United States*, 71 F.3d 776, 778 (9th Cir. 1995).

Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Nos. 03-74795, 06-17187, 06-1788

I certify that:

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less.

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Dated: March 21, 2007

CERTIFICATE OF SERVICE

I, Anthony L. Michaels, hereby certify that true and correct copies of the Brief Of Amicus Curiae National Marine Manufacturers Association were served on this 21st day of March 2007, by FedEx overnight delivery on the individuals listed below:

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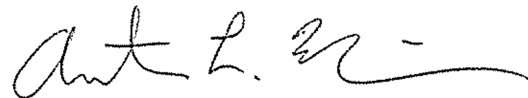

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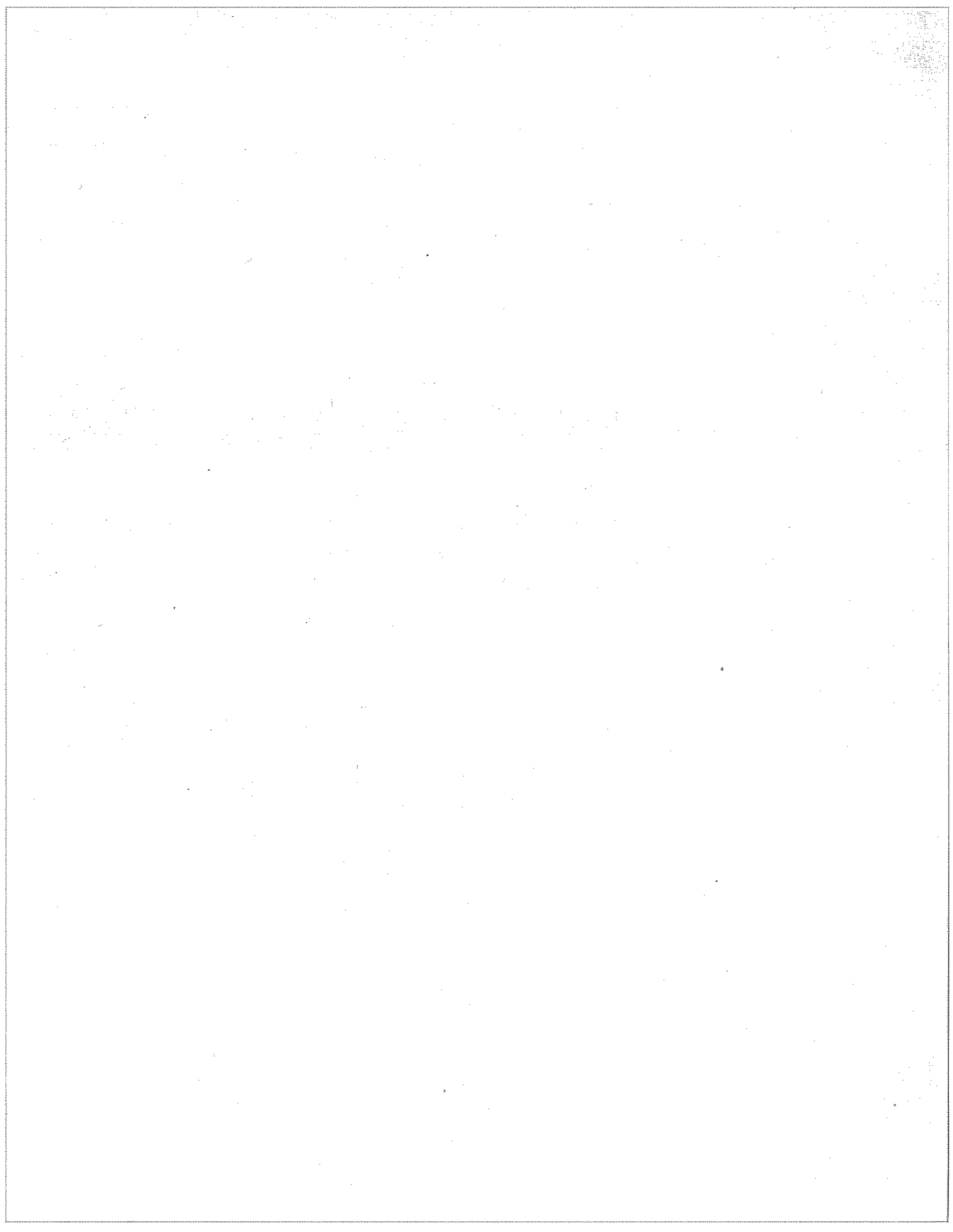

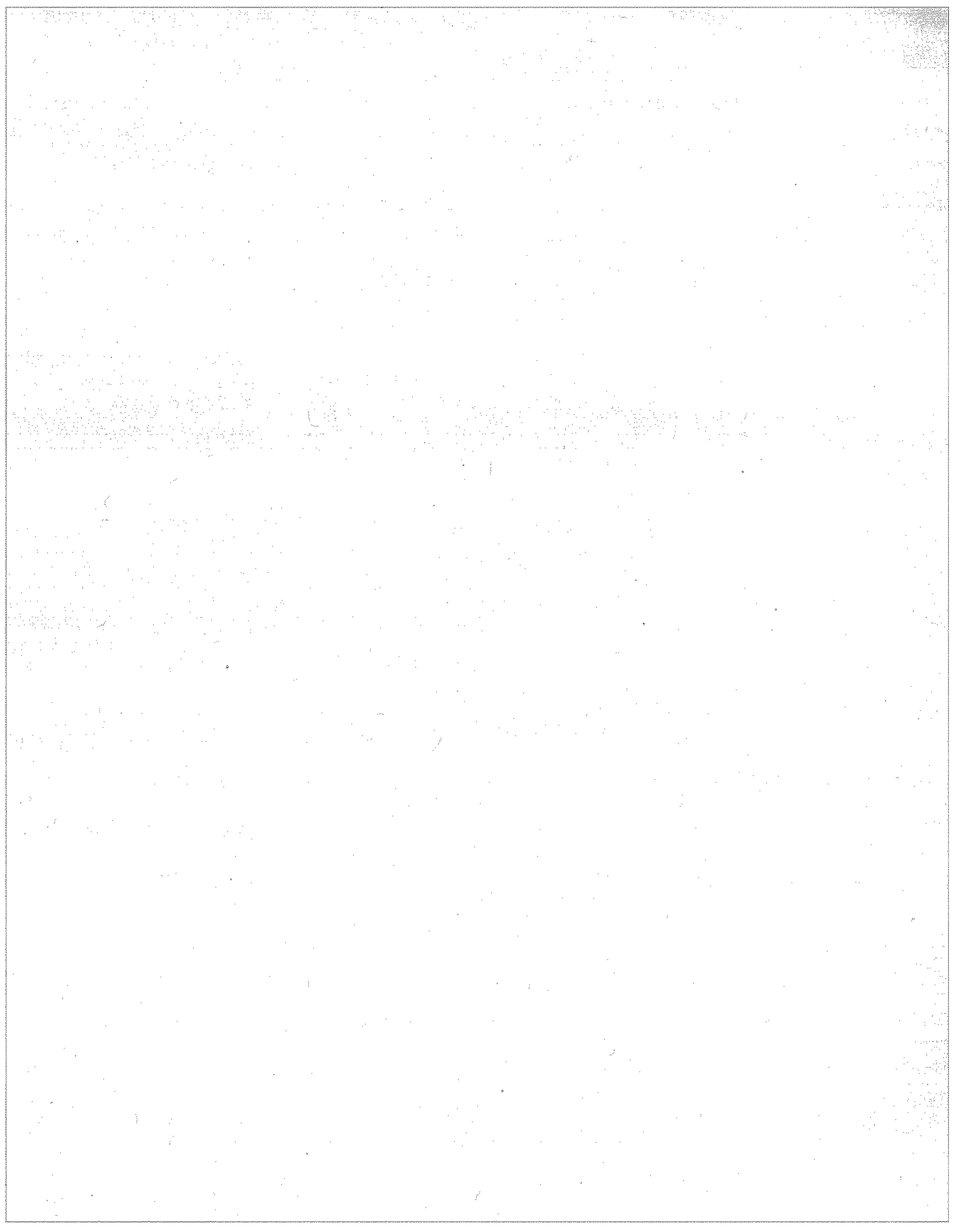

Clean Water Act jurisdiction remains with EPA.

Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Whole effluent toxicity means the aggregate toxic effect of an effluent measured directly by a toxicity test.

NOTE: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning "This exclusion applies . . ." in the definition of "Waters of the United States." This revision continues that suspension.[1]

(Clean Water Act (33 U.S.C. 1251 *et seq.*), Safe Drinking Water Act (42 U.S.C. 300f *et seq.*), Clean Air Act (42 U.S.C. 7401 *et seq.*), Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*))

[48 FR 14153, Apr. 1, 1983, as amended at 48 FR 39619, Sept. 1, 1983; 50 FR 6940, 6941, Feb. 19, 1985; 54 FR 254, Jan. 4, 1989; 54 FR 18781, May 2, 1989; 54 FR 23895, June 2, 1989; 58 FR 45039, Aug. 25, 1993; 58 FR 67980, Dec. 22, 1993; 64 FR 42462, Aug. 4, 1999; 65 FR 30905, May 15, 2000]

§ 122.3 Exclusions.

The following discharges do not require NPDES permits:

(a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.

(b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

(c) The introduction of sewage, industrial wastes or other pollutants into publicly owned treatment works by indirect dischargers. Plans or agreements to switch to this method of disposal in the future do not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants to waters of the United States are eliminated. (See also § 122.47(b)). This exclusion does not apply to the introduction of pollutants to privately owned treatment works or to other discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other party not leading to treatment works.

(d) Any discharge in compliance with the instructions of an On-Scene Coordinator pursuant to 40 CFR part 300 (The National Oil and Hazardous Substances Pollution Contingency Plan) or 33 CFR 153.10(e) (Pollution by Oil and Hazardous Substances).

(e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.

(f) Return flows from irrigated agriculture.

(g) Discharges into a privately owned treatment works, except as the Director may otherwise require under § 122.44(m).

[48 FR 14153, Apr. 1, 1983, as amended at 54 FR 254, 258, Jan. 4, 1989]

§ 122.4 Prohibitions (applicable to State NPDES programs, see § 123.25).

No permit may be issued:

(a) When the conditions of the permit do not provide for compliance with the

[1] EDITORIAL NOTE: The words "This revision" refer to the document published at 48 FR 14153, Apr. 1, 1983.