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.*,
Plaintiffs-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

ANSWERING BRIEF FOR THE PLAINTIFFS-INTERVENORS-APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

FEDERAL CASES **Page(s)**

TABLE OF AUTHORITIES, cont'd

Page(s)

TABLE OF AUTHORITIES, cont'd

Page(s)

TABLE OF AUTHORITIES, cont'd

Page(s)

TABLE OF AUTHORITIES, cont'd

Page(s)

TABLE OF AUTHORITIES, cont'd

Page(s)

FEDERAL STATUTES

TABLE OF AUTHORITIES, cont'd

Page(s)

TABLE OF AUTHORITIES, cont'd

FEDERAL REGULATIONS

Code of Federal Regulations ("C.F.R.")

TABLE OF AUTHORITIES, cont'd

TABLE OF AUTHORITIES, cont'd

Page(s)

PRELIMINARY STATEMENT

Appellees States of New York, Illinois, Michigan, Minnesota, Wisconsin and the Commonwealth of Pennsylvania (collectively, "the States"), submit this brief opposing appeals by the U.S. Environmental Protection Agency ("EPA") and the Shipping Industry Ballast Water Coalition ("Shippers"), from orders of the United States District Court for the Northern District of California (Illston, J.) granting Appellees Northwest Environmental Advocates, et al. (collectively "NWEA") summary judgment, and granting permanent injunctive relief. The district court invalidated EPA's exemption from the Clean Water Act's ("CWA" or the "Act") permitting requirements for "discharge(s) incidental to the normal operation of a vessel." 40 C.F.R. § 122.3(a). The exemption allows unregulated vessel ballast water discharges that release harmful invasive species (known as "aquatic nuisance species" or "ANS") into U.S. waters. The court found the exemption contrary to the plain language and purpose of the CWA, and thus beyond EPA's authority, and ordered it vacated by September 30, 2008. The decision should be affirmed.

The record establishes that the discharge from ships of ballast water containing invasive species creates serious, costly environmental problems. Aquatic nuisance species push native species to extinction. Through direct predation and competition for nutrients, these resilient invaders disrupt food webs, alter physical habitats, and come to dominate and fundamentally degrade aquatic ecosystems. These problems increase over time because once introduced, aquatic nuisance species reproduce and rapidly grow in numbers. As they grow, they spread to multiple waterways, and the magnitude of their impact grows. Because ANS multiply across state boundaries, strong, effective federal controls are needed to supplement state action. The

full extent of cumulative detrimental impacts from multiple ANS invasions is only beginning to be understood, but the high economic cost associated with ANS infestations is undisputed. Ballast water discharges from ships are the main source of ongoing, and increasing, introductions of aquatic nuisance species to U.S. waters.

The district court correctly determined that EPA's vessel exemption was fundamentally at odds with the Act's express, absolute prohibition of unpermitted pollutant discharges. The court's decision is consistent with the overwhelming weight of authority recognizing the CWA's broad and uncompromising purpose – "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" – and the breadth of the Act's comprehensive National Pollutant Discharge Elimination System ("NPDES") of permits for controlling water pollution. 33 U.S.C. §§ 1251(a), 1342. Appellants attack the decision on several grounds, making strained procedural arguments, wrongly suggesting that Congress has done away with core CWA protections against harmful vessel discharges, and erroneously challenging the remedy. Their arguments are legally and factually without merit, and this Court should reject them.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because the action arises under the CWA and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. These are appeals from the court's orders granting plaintiffs summary judgment and permanent injunctive relief. This Court has jurisdiction under 28 U.S.C. § 1291 because these are appeals from a final decision of the district court. Appellants timely filed notices of appeal.

QUESTIONS PRESENTED

1. Did the district court have jurisdiction over plaintiffs' challenge to EPA's categorical exemption when challenges to "limitations" and "permits," but not exemptions, are assigned to the circuit court of appeals?

2. Do plaintiffs allege a timely challenge to EPA's ongoing application of an ultra vires regulation?

3. Is EPA's exemption of vessel discharges contrary to the plain language of the Clean Water Act, which requires a permit for the discharge of pollutants from any point source, including "any . . . vessel or other floating craft from which pollutants are or may be discharged"?

4. Was the district court's remedy remanding the matter to EPA, with vacatur of the exemption in two years time, a proper exercise of equitable discretion given the ongoing environmental injury caused by the illegally exempted discharges?

STATEMENT OF THE CASE

A. Factual and Statutory Background.

1. Aquatic Nuisance Species in Vessel Ballast Water Discharges.

This case involves a matter of utmost urgency to the States. ANS in untreated ballast water discharges are polluting and devastating the nation's waters. Unlike chemical pollution, the biological pollution of invasive species is self-replicating, so the problem worsens over time.

ER 146; SER 59.[1] A handful of individuals, when released into a new waterbody, are able to reproduce and colonize entire watersheds, thereby damaging recreational and commercial fisheries, wreaking havoc on aquatic ecosystems, and threatening biodiversity, natural resources and human health. ER 143, 146. Without natural predators to control them, ANS outcompete and overwhelm native flora and fauna, reducing their populations and pushing some species toward extinction. Id. ANS such as zebra mussels have had well-known and costly effects on water intakes and other public infrastructure. Governments have borne large direct costs for control programs and equally large indirect costs in natural resource damages. ER 146; SER 87-88.

EPA acknowledges that ANS cause enormous environmental damage, and that ballast water discharges from oceangoing vessels are the predominant pathway for ANS entry to our nation's waters. ER 141. Ships trading internationally take on ANS-contaminated water as ballast in foreign ports and store it in multi-million gallon tanks. Each day thousands of marine species are transported in those tanks, and each year billions of gallons of ballast water are discharged from vessels to U.S. waters, causing an uncontrolled, rising tide of ANS invasions. Id.

The insidious effects of ANS are felt from coast to coast. In San Francisco Bay, an invasive Chinese clam has become so abundant that the spring phytoplankton bloom, one of the core elements of the bay's food web, had virtually disappeared by the 1990s. SER 7. In Tampa Bay, an invasive Asian mussel has clogged power plant tunnels and threatens the oyster fishery.

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[1] ER refers to EPA's Excerpts of Record, and SER refers to appellees' Supplemental Excerpts of Record, which includes materials provided to the district court by the States and noted in the court's September 9, 2004 order. SER 100.

SER 96. The Great Lakes, containing 95 percent of the nation's fresh surface water, is among the most ANS-invaded ecosystems on the planet because of vessel ballast water. SER 11, 14, 86, 93; see A. Ricciardi, Patterns of Invasion in the Laurentian Great Lakes in Relation to Changes in Vector Activity, Diversity and Distributions 12, 425-33 (2006).[2] In EPA's words, "[a]ll mainland coasts of the United States - - East, West, Gulf, and Great Lakes, as well as the coastal waters of Alaska [and] Hawaii . . . have felt the effects of [ANS] invasions."[3]

Despite years of putative federal action, the rate of ANS invasions to the Great Lakes has increased. ER 141. Now a new invader is discovered every 28 weeks. A. Ricciardi, supra, at 425. This increased invasion rate is directly correlated with international shipping activity. Id. Such multiple ANS invasions cause synergistic ecosystem disruptions. SER 79, 91. For example, interactions between the invasive round goby and invasive mussels in Lake Erie are implicated in recurring outbreaks of avian botulism. The filter-feeding mussels take up botulism from sediments and then are eaten by round gobies, which in turn are eaten by waterfowl, which then succumb to the toxin. A. Ricciardi, supra, at 431; SER 50-57, 94.

2. The Clean Water Act.

The CWA's purpose is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). It is a comprehensive statute for control and elimination of water pollution. Milwaukee v. Illinois, 451 U.S. 304, 318 (1981); Save our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1123 (9th Cir. 2005). Besides eliminating pollutant discharges to navigable waters, the Act's goals include achievement of water quality that

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[2] Available at http://redpath-staff.mcgill.ca/ricciardi/Ricciardi2006DAD.pdf

[3] See http://www.epa.gov/owow/invasive_species/

"provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation in and on the water. . ." Id. To meet these goals, the CWA mandates permits for discharge of pollutants into navigable waters, provides monitoring and enforcement mechanisms, imposes federal effluent limitations and state water quality standards, and authorizes funding for research and other efforts to eliminate water pollution. See, e.g., 33 U.S.C. §§ 1252, 1254, 1311, 1318, 1342, 1365. Primary authority for implementation and enforcement of the CWA resides with EPA. Envtl. Def. Ctr., Inc. ("EDC") v. EPA, 344 F.3d 832, 853 (9th Cir. 2003) (citing 33 U.S.C. §§ 1251(d), 1361(a)).

To achieve its "broad and uncompromising" purposes (Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 494 (2d Cir. 2001) ("Catskill I"), the Act's cornerstone is the prohibition of any pollutant discharge not authorized by permit. 33 U.S.C. § 1311(a); Rapanos v. United States, 126 S.Ct. 2208, 2215 (2006) (plurality opinion); EDC, 344 F.3d at 853. The NPDES permit program established by CWA Section 402, 33 U.S.C. § 1342, is the "primary means" for protecting and improving water quality within the "comprehensive regulatory regime" established by Congress. Arkansas v. Oklahoma, 503 U.S. 91, 99, 101 (1992). Whether issued by EPA or a delegated state, an NPDES permit sets forth conditions for discharge of pollutants consistent with the Act's other provisions, including those assuring that each receiving water body will achieve applicable "water quality standards." See 33 U.S.C. §§ 1311(b)(1)(C), 1312(a), 1313(a)-(c).

The CWA requires a permit for "discharge of a pollutant" from a "point source" into "navigable waters." See 33 U.S.C. §§ 1311(a), 1342(a),(b), 1362(6),(7),(12),(14). The Act broadly defines these key terms. The term "pollutant" includes "biological materials," like ANS,

"discharged into water." 33 U.S.C. § 1362 (6). "[D]ischarge of a pollutant" is defined in pertinent part as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Point source" is expansively defined as "any discernible, confined and discrete conveyance, including but not limited to any . . . vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. §1362(14) (emphasis supplied).[4]

The NPDES program translates general "effluent limitations"[5] into permit obligations that dischargers must satisfy. EPA v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 205 (1976); NRDC v. Costle, 568 F.2d 1369, 1374 (D.C. Cir. 1977). To be permitted under the NPDES, a discharge must meet effluent limitations requirements under CWA Section 301, 33 U.S.C. § 1311. See 33 U.S.C.§ 1342(a)(1). The Act requires compliance with effluent limitations by categories and classes of point sources, and application of the best available treatment technology that is economically achievable. 33 U.S.C. § 1311(b)(2)(A). Section 304(b) requires EPA to issue effluent limitation guidelines for categories of point sources, taking into account technology costs, engineering processes and other relevant factors. 33 U.S.C. § 1314(b). These guidelines "provide uniformity in the permit conditions imposed on similar sources within the same category. . . ." NRDC v. Train, 510 F.2d 692, 707 (D.C. Cir. 1975).

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[4] Congress narrowly excluded from NPDES permitting certain vessel discharges other than those involved here. First, vessel pollutant discharges in the ocean more than three miles offshore are excluded from the definition of "discharge of a pollutant" under 33 U.S.C. § 1362(12)(B). Second, the Act excludes from the definition of "pollutant" under 33 U.S.C. § 1362(6)(A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces." As discussed at Point III(B)(1)(b) below, the CWA creates a separate program under 33 U.S.C. § 1322 (CWA Section 312) for regulating military vessel discharges.

[5] An effluent limitation is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . . . " 33 U.S.C. § 1362(11).

The Act creates a uniform "national floor" of protective measures against water pollution. See Arkansas, 503 U.S. at 110 (citing "Act's purpose of authorizing EPA to create and manage a uniform system of interstate water pollution regulation"); NRDC v. Costle, 568 F.2d at 1378 ("[T]he primary purpose of the effluent limitations and guidelines was to provide uniformity among federal and state jurisdictions enforcing the NPDES program . . ."). Congress intended CWA Sections 301(b), 304(b) and 402 to work together to achieve this goal. Thus, the Section 304(b) effluent limitation guidelines are used to identify the increasingly more protective technological controls required by Section 301(b), so those controls can be implemented as permit conditions under Section 402. See Washington v. U.S. EPA, 573 F.2d 583, 591-92 (9th Cir. 1978); NRDC v. Train, 510 F.2d at 708; see also Defenders of Wildlife v. Browner, 191 F.3d 1159, 1163 (9th Cir. 1999) (Section 301(a) prohibits point source pollutant discharges absent NPDES permit, and Section 301(b)'s effluent limitations supply permit's technological controls).

In recognition of the urgency of water pollution control, the CWA prohibits unpermitted point source pollution even in the absence of regulatory action setting effluent levels or providing for issuance of NPDES permits. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 309 (1982) ("[T]he release of ordnance from aircraft or from ships into navigable waters is a discharge of pollutants, even though the EPA, which administers the Act, had not promulgated any regulations setting effluent levels or providing for the issuance of an NPDES permit for this category of pollutants."). Section 402(a)(1)(B) provides for permit issuance upon "such conditions as the Administrator determines are necessary to carry out the provisions of the Act," prior to issuance of specific numeric effluent limitations. 33 U.S.C. § 1342(a)(1)(B). Under this

provision, permitting agencies apply their "best professional judgment" in issuing NPDES permits with pollution-reducing terms and conditions. NRDC v. Train, 510 F.2d at 709-10. Congress recognized that development of numeric effluent limits may take time, but did not want permit controls to wait:

> [W]hen numerical effluent limitations are infeasible, EPA may issue permits with conditions designed to reduce the level of effluent discharges to acceptable levels. This may well mean opting for a gross reduction in pollutant discharge rather than the fine-tuning suggested by numerical limitations. But this ambitious statute is not hospitable to the concept that the appropriate response to a difficult pollution problem is not to try at all.

NRDC v. Costle, 568 F.2d at 1380 (emphasis supplied).

3. EPA's Exemption of Vessel Discharges from Clean Water Act Permit Requirements.

EPA categorically exempted routine vessel discharges from CWA permit control requirements. 40 C.F.R. §122.3(a) exempts:

> (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.

Id. (emphasis supplied). When originally promulgated, EPA stated that "this type of discharge generally causes little pollution and exclusion of vessel wastes from the permit requirements will reduce administrative costs drastically." 38 Fed. Reg. 13,528 (May 22, 1973).[6]

[6] Four months earlier, EPA proposed a much more limited NPDES exclusion for "[d]ischarges from properly functioning marine engines," referencing a statement in the Congressional Record by Congressman Jones that "(The Conference Committee) would not expect the Administrator to require permits to be obtained for any discharges from properly functioning marine engines." 38 Fed. Reg. 1362, 1364 & n.1 (Jan. 11, 1973).

B. EPA's Denial of NWEA's Petition to Repeal the Exemption.

NWEA petitioned EPA in 1999 to repeal the exemption as inconsistent with the CWA, and sued EPA in 2001 for its lack of response. An adjudication of unreasonable delay was settled by this Court's consent decree requiring EPA's response to the petition by September 2, 2003. NWEA, et al. v. U.S. EPA, 340 F.3d 853 (2003). EPA denied the petition on that date. ER 30.

EPA based its denial largely on activities of other federal agencies, noting Coast Guard actions under the Act to Prevent Pollution from Ships, 33 U.S.C. § 1901, et seq., and under the Non-indigenous Aquatic Nuisance Prevention and Control Act of 1990, as amended by the National Invasive Species Act of 1996, 16 U.S.C. § 4701 et seq. EPA stated that "[t]here are many ongoing activities within the federal government related to control of invasive species in ballast water, many of which are likely to be more effective and efficient than reliance on NPDES permits under the CWA." ER 20. EPA referred to various Coast Guard activities, including "fostering the development of new BWT (ballast water treatment) technologies," "maximiz[ing] the use of existing ballast water management ("BWM") techniques by all vessels," and establishing "regulations that make voluntary guidelines for ballast water exchange into mandatory and enforceable requirements." ER 21, 23.

EPA stated that "the use of NPDES permits would add a resource burden," and maintained that "[a]n NPDES-authorized State that identifies the discharge of invasive species in ballast water as a significant concern in its waters" could address such discharges on its own. ER 20, 22. EPA defended the exemption as a longstanding interpretation entitled to deference. ER 27. Finally, EPA asserted that Congress had "acknowledged and acquiesced to" the exemption,

relying on (1) Congress' assertion of CWA jurisdiction over discharges from vessels engaged in offshore industrial operations in the Deep Seabed Hard Mineral Resources Act in 1979, 30 U.S.C. § 1419(e); and on (2) Congress's exemption of incidental Armed Forces vessel discharges from the CWA definition of "pollutant" in the National Defense Authorization Act for Fiscal Year 1996, Pub.L. No. 104-106 § 325(b), 110 Stat. 186 (1996). ER 28-29.

C. The Proceedings Below.

Plaintiffs commenced this action on December 22, 2003, asserting two claims under 5 U.S.C. § 706(2): 1) that EPA's vessel discharge exemption is inconsistent with and in excess of the agency's authority under the CWA; and 2) that EPA's denial of plaintiffs' petition to repeal the exemption was illegal and not in accordance with the Act. NWEA and EPA each moved for summary judgment. The States participated as amici curiae, raising concerns about harm to the Great Lakes ecosystem from vessel-discharged ANS.

On March 31, 2005, the district court granted NWEA's motion for summary judgment. The court determined it had subject matter jurisdiction because the challenge to the exemption did not constitute a challenge to limitations, permits or permitting procedures within the meaning of CWA Section 509(b)(1) (requiring such challenges be brought in the Court of Appeals). ER 207-12. The court also determined that plaintiffs' first cause of action was a timely "as applied" challenge to an ultra vires regulation relied upon by EPA. ER 212-13. On the merits, the court found that EPA had no authority to exempt an entire category of discharges from the NPDES because "the unambiguously expressed intent of Congress" in the CWA "requires that discharges of pollutants from non-military vessels into the nation's [waters] occur only under the regulation

of an NPDES permit." ER 215, 219-20. The court found no "overwhelming evidence" that Congress had acquiesced in the exemption. ER 215-19.

The States then intervened as plaintiffs, and the Shippers intervened as a defendant. On September 18, 2006, the court issued a permanent injunction that remanded the case to EPA and vacated, in two years time, those portions of 40 C.F.R. §122.3(a) that exempt vessel discharges from the NPDES. The court reasoned that the ANS pollutants in the ballast water discharges EPA had exempted cause severe, costly environmental problems, and noted that other regimes addressing ANS in ballast water are neither fully effective nor mandatory. ER 354-58. The court explained that ANS released to marine ecosystems from uncontrolled vessel discharges pose an immediate threat of irreparable injury, and determined that leaving the exemption in place indefinitely would thwart accomplishment of CWA objectives. ER 366, 369. The court determined that remand with vacatur of the illegal exemption by September 30, 2008 was consistent with the federal courts' broad equitable authority to achieve compliance with the CWA, and struck the right balance between effectuating the Act and allowing EPA adequate time. ER 360-61, 364-70. The court reasoned that requiring action within two years would not unduly burden government or industry because of the Act's inherent flexibilities, its requirement of best available technology economically achievable, and EPA's institutional expertise and efforts already undertaken. ER 368-70.

SUMMARY OF ARGUMENT

The district court had jurisdiction over plaintiffs' CWA/APA claims. The district court correctly rejected EPA's argument that this Court had original jurisdiction over plaintiff's claims under 33 U.S.C. § 1369(b)(1)(E) or (F). EPA's blanket exemption of vessel discharges from all CWA pollution controls is neither an "effluent limitation or other limitation" nor the issuance or denial of "any permit" within the meaning of section 1369(b)(1). Appellants' attempts to shoehorn plaintiffs' claims into that section are contrary to the language of the statute and to this Court's decisions narrowly construing that language.

Appellants' arguments that judicial review of the vessel exemption is barred by the applicable statute of limitations are also meritless. Plaintiffs assert that EPA's blanket exemption of vessel discharges exceeds EPA's statutory authority. Because this claim challenges the validity of the regulation as applied, it is timely under this Court's precedent, even though EPA promulgated the exemption long before anyone knew the harm it would cause.

On the merits, the vessel exemption is contrary to the plain language of the CWA. The Act states that vessel pollutant discharges require NPDES permits. EPA's exemption, allowing uncontrolled discharges of harmful ANS pollutants into the nation's waters, violates the CWA's language and is directly at odds with the Act's strong remedial purpose and comprehensive regulatory structure. EPA lacks authority categorically to exempt point source polluters from CWA controls. Nor is there "overwhelming evidence" of congressional acquiescence in EPA's adoption of this exemption in disregard of the statutory text. Nor do subsequent congressional enactments expressly preserving the applicability of the CWA repeal the Act's permit requirements, either expressly or by implication.

Finally, in fashioning a remedy the district court carefully balanced the equities, taking into account the growing threat of irreparable environmental injury from ANS, the concerns of EPA and industry, and the CWA's purpose and inherent flexibilities. By remanding the matter to EPA, with vacatur of the ultra vires exemption in two years, the court ensured that a dangerous pollution control gap of EPA's making is appropriately remedied. The court's order is well within its broad equitable powers to achieve statutory objectives, and is consistent with established standards for injunctive relief.

STANDARD OF REVIEW

This Court reviews questions of law de novo. Davis v. U.S. EPA, 348 F.3d 772, 786 (9th Cir. 2003). The Court reviews a district court's decision to grant a permanent injunction for abuse of discretion. Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, 1176 (9th Cir. 2002). Rulings of law relied upon in awarding injunctive relief are reviewed de novo. Id.

ARGUMENT

POINT I

THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION

A. The District Court Had Jurisdiction Under 28 U.S.C. § 1331.

Plaintiffs challenged federal agency action under the CWA and APA pursuant to 28 U.S.C. § 1331, which provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Section 1331 confers general federal question jurisdiction on district courts to review agency action "[i]n the absence of a specific statutory provision to the contrary," Provecto San Pablo v. I.N.S., 189 F.3d

1130, 1136 n.5 (9th Cir. 1999); Owner-Operators Independent Drivers Ass'n of America, Inc. v. Skinner, 931 F.2d 582, 585 (9th Cir. 1991) (district court jurisdiction to review agency action "unless Congress specifically maps" an alternative review path, citing Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967)). NWEA's claims under the APA, 5 U.S.C. § 706(2), that EPA's exemption and petition denial were "not in accordance" with, and "in excess of statutory jurisdiction" under, the CWA are squarely within the district court's federal question jurisdiction. Hoefler v. Babbitt, 139 F.3d 726, 728 (9th Cir. 1998) (basis for subject matter jurisdiction to review APA claims is 28 U.S.C. § 1331 absent other applicable review path); Clouser v. Espy, 42 F.3d 1522, 1528 n.5 (9th Cir. 1994) (claims that actions "were taken without statutory authority, or that they violate statutory standards" are claims under the APA).

B. NWEA's Claims Are Not Among Those Committed to The Original Jurisdiction of This Court by Section 1369(b)(1).

Appellants erroneously argue that EPA's blanket regulatory exemption from the CWA permit requirements constitutes either a "limitation" or a "permit" under subsections (E) or (F) of CWA Section 509(b)(1), 33 U.S.C. § 1369(b)(1). That section provides for court of appeals review of certain specified types of actions of the Administrator including those "approving or promulgating any effluent limitation or other limitation" and "issuing or denying any permit." 33 U.S.C. §§ 1369(b)(1)(E), (F). As the district court correctly observed, plaintiffs do not challenge either of the actions specified in section 1369(b)(1)(E) or (F), and thus the district court, not this Court, had jurisdiction.

As this Court has observed, exceptions to the district court's general federal question jurisdiction must be narrowly construed. See League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002) ("[T]his Court has counseled against expansive application of section 1369(b)"); Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1313 (9th Cir. 1992) ("The specificity and precision of section 1369, and the sense of it, persuade us that it is designed to exclude" unlisted actions). Forsgren involved a different subsection of the same regulation, purporting to exclude certain types of discharges from NPDES permitting requirements. 309 F.3d at 1185. While this Court did not reach defendant's argument that the challenge fell within section 1369(b), it noted that the agency sought a "broad reading to the sweep of section 1369(b)" and that "[i]t is far from clear" that section 1369(b) applies to a claim regarding an NPDES permit exemption, "particularly in light of the fact that this Court has counseled against expansive application of section 1369(b)." Id. at 1190 n.8. Forsgren in turn cited Longview Fibre, where, in dismissing the case for lack of jurisdiction, this Court found that the limited availability of review under section 1369(b) "cuts against petitioners' argument that a grant of appellate review should be construed liberally." 980 F.2d at 1313.

1. The Regulatory Exemption Is Not Action "Approving or Promulgating Any Effluent Limitation or Other Limitation" Under Section 1369(b)(1)(E).

EPA's permanent regulatory exemption of vessel discharges from CWA controls is not an action "in approving or promulgating any effluent limitation or other limitation under sections 1311, 1312, 1316, or 1345." 33 U.S.C. § 1369(b)(1)(E). Appellants' arguments fail for several reasons. Preliminarily, section 1369(b)(1) is inapplicable by its terms because EPA relied upon CWA section 402 (33 U.S.C. § 1342) when it promulgated the vessel exemption regulation,

rather than sections 1311, 1312, 1316 or 1345. See 38 Fed. Reg. 13,528, 13,530 (May 22, 1973) (expressly relying on Section 402).[7]

More importantly, the regulatory exemption is not an "effluent limitation or other limitation" under the plain meaning of those terms or the structure of the CWA. The CWA defines "effluent limitation" as "any restriction . . . on the quantities, rates, and concentration of chemical, physical, biological and other constituents . . . discharged from point sources into navigable waters . . . including schedules of compliance."[8] 33 U.S.C. § 1362(11). Likewise, in common usage, a "limitation" is defined as "[t]he act of limiting; the state of being limited" or "a restriction." Black's Law Dictionary (7th ed. 1999). Plain language and common sense dictate that permanently exempting an entire category of discharges from CWA requirements cannot be construed as a "limitation" under Section 509(b)(1)(E). See id. (defining "exemption" as "[f]reedom from a duty, liability, or other requirement"); see also Longview Fibre, 980 F.2d at 1313 ("No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated."); Environmental Protection Information Center ("EPIC") v. Pacific Lumber Co., 266 F.Supp. 2d 1101, 1116-19 (N.D. Cal. 2003) (rejecting argument that NPDES permit exemption for silvicultural discharges falls within section 1369(b)(1)(E)).

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[7] The 1973 regulations also contain provisions regarding disposal of sewage sludge from land-based sewage collection and treatment plants pursuant to CWA sections 405 and 211 (33 U.S.C. §§ 1345 and 1291) that are unrelated to the basis for the vessel exemption.

[8] A "schedule of compliance" means "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." 33 U.S.C. § 1362(17).

In trying to squeeze plaintiffs' claims into the "effluent limitation" language of Section 509(b)(1)(E), appellants misread NRDC v. EPA, 673 F.2d 400 (D.C. Cir. 1982). That court held that subsection (E) jurisdiction extends beyond "numerical limitations on pollutants . . . [to include the] complex set of procedures for issuing or denying NPDES permits" contained in the consolidated permit regulations ("CPR's") under review there. 673 F.2d at 402. Relying on an incomplete quote from NRDC, EPA argues the vessel exemption is a subsection (E) "limitation" because it is "a limitation on permit issuers in that it provides that no permits are required for certain discharges." EPA Br. at 20. However, the complete sentence reads: "Like the regulations in VEPCO, the CPR's are a 'limitation on point sources and permit issuers' and 'a restriction on the untrammeled discretion of the industry' that existed before passage of the CWA." 673 F.2d at 405 (emphasis supplied and citation omitted). Thus, section 1369(b)(1)(E) applied because the regulations in NRDC were limitations on point sources and restrictions on industry; the court did not need to determine whether a "limitation" on "permit issuers" alone would have invoked the section. Moreover, in NRDC, EPA conceded "that certain actions under the CWA are outside of section 509(b)(1)," including, among others, "rules governing . . . vessel wastes . . ." NRDC, 673 F.2d at 404 n.14. Thus, as the district court correctly concluded, EPA's strained, semantic argument fails because "the exemption in question cannot be classified as presenting any restriction or limitation; instead it is a categorical exemption for all discharges incidental to the normal operation of a vessel." ER 209.

In addition, EPA's argument mischaracterizes both its own exemption and the nature of plaintiffs' action. In arguing for subsection (F) as well as subsection (E) applicability, EPA maintains that 40 C.F.R. § 122.3(a)'s second sentence actually subjects some vessel discharges to

permit limitations. EPA Br. at 17, 20. But this "exception to the exception" by itself imposes no such limitations. Instead, actual effluent limitations restricting such discharges are affirmatively established in detailed regulations EPA has promulgated for the various industrial facilities that are merely mentioned in 40 C.F.R. § 122.3(a). See, e.g., 40 C.F.R. Parts 408, 435 and 436 (establishing effluent guidelines and standards for seafood processing, oil and gas extraction, and mineral mining and processing point source categories, respectively). See also 33 U.S.C. § 1362(11).

Also without merit is EPA's contention that the exclusion is "closely related to approval or promulgation of effluent limitations" (EPA Br. at 19), premised on EPA's assertion that plaintiffs are requesting development of certain standards or that EPA undertake certain administrative actions. First, the "closely related" standard is not provided in the statute or in this Court's narrow construction of it. In addition, appellants' argument mischaracterizes both the complaint in this case and the prior petition. Plaintiffs have not requested such relief. Rather, they seek to have nullified as ultra vires EPA's categorical exemption that allows harmful vessel discharges to occur without any regulation or consequence.[9]

EPA mistakenly relies on EDC for the proposition that subsection (E) is broad enough to cover EPA's categorical exemption from the NPDES because, like stormwater controls in EDC, both are about "the scope of the NPDES permitting program." EPA Br. at 21. But in EDC, subsection (E) jurisdiction was uncontested, as the regulations under review clearly limited the

[9] As explained below, Congress provided EPA with multiple regulatory tools under the CWA to address harmful pollutant discharges like those illegally exempted here. And as provided by the district court, the manner in which EPA will bring these discharges under CWA control is left to EPA's discretion on remand. ER 368-69.

amount of storm sewer pollutants by requiring permits for sewer systems, including small municipal systems and construction sites. 344 F.3d at 842-43. EDC is not relevant here because the stormwater permitting controls involved in that case are different in kind, not degree, from the complete absence of vessel permitting controls involved here. EPA's contention that no controls are "closely related" to some controls stretches language, logic and precedent too far. The "expansive application" of Section 509(b)(1)(E) urged by appellants should be rejected. Forsgren, 309 F.3d at 1190 n.8.

2. The Exemption Is Not Action "Issuing or Denying Any Permit" Under Section 1369(b)(1)(F).

Equally flawed is appellants' contention that the exemption is, under 33 U.S.C. § 1369(b)(1)(F), an agency action "in issuing or denying any permit under section 1342." Section 1342 establishes the NPDES permitting system. EPA's regulatory exemption of vessel discharges from all NPDES controls is not the issuance or denial of a permit within the ordinary meaning of those terms. Nor is it, as EPA contends, "functionally similar to the issuance or denial of a permit" (EPA Br. at 15). Instead, the exemption is the total exclusion of an entire category of pollutant discharges from any permit controls whatsoever.

In addition, EPA's reliance on this court's holding that section 1369(b)(1)(F) applies to "rules that regulate the underlying permit procedures" is misplaced. See NRDC v. EPA, 966 F.2d 1292, 1296 (9th Cir. 1992). In that case, the Court relied on D.C. Circuit and Supreme Court decisions concluding that circuit court jurisdiction was necessary to avoid the "perverse situation" whereby an appellate court "will be able to review the grant or denial of the permit, but will be without authority to review directly the regulations on which the permit is based." NRDC

v. EPA, 656 F.2d 768, 775 (D.C. Cir. 1981) (quoting E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 136 (1977)) (cited in NRDC v. EPA, 966 F.2d at 1297). In the present case, however, EPA's vessel discharge exemption is not a rule regulating permit procedures; it is a rule ensuring that no permit procedures will ever apply to an entire category of discharges. Thus, the rationale for subsection (F) jurisdiction is absent, and NRDC v. EPA does not help appellants.[10] As Chief Judge Patel explained in EPIC:

> Because EPIC challenges a decision that in effect excludes sources from the NPDES program, the circuit courts will never have to confront the issuance or denial of a permit for these sources. The Ninth Circuit, by virtue of [the regulatory exemption], will never have to consider on direct review an action involving the denial of a NPDES permit for pollutant discharges . . . . Thus, a district court taking jurisdiction over a challenge to the . . . regulation does not create the same awkwardness for a circuit court as that described in the D.C. Circuit case of NRDC v. EPA.

266 F. Supp. 2d at 1115-16. As in EPIC, district court jurisdiction here does not create the "irrational, bifurcated" system of judicial review that appellants suggest. EPA Br. at 17; Shippers Br. at 41.

Moreover, EPA wrongly criticizes the district court's observation that, unlike a temporary exclusion from permitting, EPA's exemption permanently eliminates an entire category of discharges from permitting requirements, and thus does not govern permit issuance or regulate

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[10] Equally unhelpful is appellants' reliance on American Mining Congress v. EPA, 965 F.2d 759 (9th Cir. 1992). That case involved a challenge to the timing of storm water regulations and their inclusion of certain mining activities, but contains no analysis of Section 509(b)(1), instead merely citing to NRDC v. EPA, decided on the same day. Nor does EDC assist appellants on subsection (F) jurisdiction. As discussed above regarding subsection (E), in EDC this Court's jurisdiction was uncontested, thus the Court did not analyze Section 509(b)(1), but merely made the accurate statement that "EPA effluent and permitting regulations" come within the provision. Id. at 843.

underlying permit procedures. EPA contends, for example, that "both 'temporary exclusions' and the exclusion here are functionally similar to issuing a permit with limitations because both permits and the exclusions allow discharges." EPA Br. at 17 n.7. This argument ignores the word "permit" in subsection (F), and betrays a fundamental misunderstanding of the CWA. Unlike a pollutant discharge under permit limitations, a discharge permanently exempted from permitting will never be subject to any CWA pollution controls, let alone the progressively more protective controls required by the Act.

In keeping with this Court's reasoned, narrow construction of section 1369(b)(1), the district court correctly determined that EPA's permanent exemption of an entire category of point source discharges from NPDES permit controls is not an action covered by section 1369(b)(1)(E) or (F).[11]

POINT II

PLAINTIFFS' CHALLENGE TO THE REGULATION'S VESSEL DISCHARGE EXEMPTION WAS TIMELY

The district court correctly held that plaintiffs' challenge to the vessel discharge exemption was timely.[12] Appellants argue that the exemption's ongoing application is insulated from judicial review by 28 U.S.C. § 2401(a), which provides a six-year limitations period, because the regulation was promulgated more than six years before this action was brought. This

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[11] The leading case on the illegality of EPA categorical exemptions of point sources from CWA permit requirements was properly brought and litigated in the district court before being affirmed on appeal. See NRDC v. Train, 396 F.Supp 1393 (D.D.C. 1975), aff'd sub nom. NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977).

[12] EPA concedes that the second cause of action seeking review of the denial of the petition was timely. EPA Br. at 22 n.8.

argument is foreclosed by decisions of this Court and other courts allowing a party to challenge the application of a regulation on the ground that the regulation is ultra vires, when the challenged regulation is applied more than six years after the agency illegally adopted it.[13]

In Wind River Mining Corp. v. United States, 946 F.2d 710, 715 (9th Cir. 1991), this Court held that where "a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger." The six-year limitations period on such an "as applied" challenge begins to run "upon completion of the administrative proceedings" - - in this case, upon denial of plaintiffs' petition to rescind the vessel discharge exemption as ultra vires. Id. at 716 (quoting Crown Coat Front Co. v. United States, 386 U.S. 503, 511 (1967)).

In Wind River, a mining corporation brought an APA challenge to a Bureau of Land Management ("BLM") designation of certain federal lands as a "wilderness study area." The designation occurred in 1979, and plaintiff's 1989 lawsuit "assert(ed) that the BLM's designation . . . was ultra vires as exceeding the agency's statutory authority." 946 F.2d at 714. This Court determined that plaintiff's challenge was not time-barred, agreeing with other circuits that "an agency regulation or other action of continuing application may be challenged after a limitations period has expired if the ground for the challenge is that the issuing agency acted in excess of its

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[13] In their Complaint in Intervention, the States' "as applied" claim points out the continuing harms caused when the ultra vires regulation is an exemption from required statutory controls: "The States . . . have been negatively impacted by EPA's ongoing application of the regulatory exclusion. EPA's failure to properly regulate ANS-containing discharges from vessels into the waters of the United States, including but not limited to the Great Lakes, has harmed and continues to harm the States' interests." ER 224, 227.

statutory authority." Id. Such challenges include claims that a regulation is directly contrary to the rule of the statute being implemented. For example, even the dissenting Circuit Judge in Wind River, who did not believe plaintiff's claim was an ultra vires challenge, explained that an agency action that directly contravened the rule of the statute was ultra vires and could be challenged when applied, even after six years had passed since its initial promulgation. 946 F.2d at 717 n.2. NWEA's first claim alleges continuing harm due to EPA's exemption of vessel discharges from pollution controls, in direct contravention of EPA's authority under the CWA. ER 4-7. NWEA's first claim was brought within six years after EPA denied its petition and is thus timely under Wind River.

This Court's decision in Wind River relied upon a line of D.C. Circuit cases recognizing that where an agency relies upon an ultra vires regulation of continuing application, the regulation may be challenged even though it went uncontested throughout the otherwise applicable statutory limitations period. For example, Wind River cited with approval Functional Music, Inc. v. FCC, 274 F.2d 543, 546 (D.C. Cir. 1958), cert. denied, 361 U.S. 813 (1959), and other D.C. Circuit cases finding timely parties' challenges to the validity of regulations of ongoing application relied upon by agencies. Wind River, 946 F.2d at 714-15. In Functional Music, the court held that the regulation remains reviewable in actions challenging its application:

> [The statute of limitations] does not foreclose subsequent examination of a rule where properly brought before this court for review of further [agency] action applying it. For unlike ordinary adjudicative orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.

274 F.2d at 546; see also Public Citizen v. Nuclear Regulatory Com'n, 901 F.2d 147, 152-53 (D.C. Cir. 1990) ("[W]here an agency reiterates a rule or policy in such a way as to render the rule or policy subject to renewed challenge on any substantive grounds, a coordinate challenge that the rule or policy is contrary to law will not be held untimely because of a limited statutory review period.").

Other courts have followed Wind River, allowing as applied ultra vires challenges like that at issue here. For example, in Legal Environmental Assistance Foundation, Inc. ("LEAF") v. EPA, 118 F.3d 1467 (11th Cir. 1997), the court rejected the arguments that appellants advance here:

> [W]e conclude as the D.C. Circuit did in similar circumstances - - that, in the course of reviewing EPA's order denying LEAF's petition, over which our jurisdiction is not questioned, we also have jurisdiction to entertain LEAF's contention that the regulations upon which EPA relies are contrary to the statute and therefore invalid, regardless of the fact that LEAF's challenge is brought outside the statutory period for a direct challenge to the regulations.

118 F.3d at 1473 (citing NLRB Union v. Fed. Labor Relations Auth., 834 F.2d 191, 196-97 (D.C. Cir. 1987)).

In this case, plaintiffs assert a timely claim that the regulatory vessel exemption relied upon and applied by EPA exceeds of the agency's statutory authority. In this case, as in Wind River, "The government should not be permitted to avoid all challenges to its actions, even if ultra vires, simply because the agency took the action long before anyone discovered the true state of affairs." Wind River, 946 F.2d at 715.

POINT III

EPA'S EXEMPTION OF VESSEL DISCHARGES IS UNLAWFUL

A. EPA's Exemption of Vessel Discharges from NPDES Permit Controls Is Contrary to the Language And Purpose of the Clean Water Act.

EPA's claim that the vessel discharge exemption is entitled to deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ("Chevron"), is mistaken. The CWA unambiguously requires NPDES permits for the vessel discharges that EPA has chosen to exempt. Where, as here, the statutory language is clear, no deference is due the agency's contrary interpretation:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-43 (footnotes omitted; emphasis supplied).

Under Chevron, the starting point for interpreting a statute is its language. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 56 (1987); The Wilderness Society v. U.S. Fish and Wildlife Service, 353 F.3d 1051, 1060 (9th Cir. 2003); Defenders of Wildlife, 191 F.3d at 1164 ("[W]hen interpreting a statute, we look first to the words that Congress used."). "The judiciary is the final authority on issues of statutory construction and

must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Chevron, 467 U.S. at 843 n.9 (citations omitted); see also Medtronic, Inc. v. Lohr, 518 U.S. 470, 512 (1996) ("Where the language of the statute is clear, resort to the agency's interpretation is improper."); Securities and Exchange Comm'n v. Sloan, 436 U.S. 103, 118-19 (1978) (even a long-standing agency interpretation is not entitled to deference when inconsistent with statutory mandate). Here, EPA identifies no statutory silence or ambiguity giving rise to deference. The CWA is clear and contrary to EPA's interpretation.

1. The Exempted Vessel Discharges Are Covered by the Clean Water Act.

The CWA unambiguously declares that "the discharge of any pollutant by any person shall be unlawful" except in compliance with specified sections of the Act, including the NPDES requirements of CWA Section 402. 33 U.S.C. § 1311(a). Despite this plain language, EPA has categorically exempted from NPDES permitting requirements "any . . . discharge incidental to the normal operation of a vessel." 40 C.F.R. § 122.3(a). EPA's exemption directly conflicts with the CWA's plain text and fundamental objectives and is not entitled to deference under Chevron. Here, "[t]here is no reason, much less a compelling reason, to accept EPA's invitation to read ambiguity into a clear statute." Massachusetts v. EPA, 127 S.Ct. 1438, 2007 U.S. LEXIS 3785 at *59 (2007).

EPA does not contest that the vessel discharges it has exempted are point source discharges to navigable waters that are covered by the CWA. First, the CWA's plain language

states that "vessel[s] or other floating craft" are "point sources" subject to the NPDES permitting system. 33 U.S.C. § 1362(14); Forsgren, 309 F.3d at 1185. See South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004) (it is "plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters'"); Catskill I, 273 F.3d at 491 ("the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit.").

Second, as noted above, supra p.6-7, ANS are plainly "pollutants" within the meaning of the CWA. The Act includes a broad definition of the term "pollutant" that expressly includes, among other things, solid waste, chemical wastes, and "biological materials." 33 U.S.C. § 1362(6). It is beyond dispute that ANS – consisting of fish and other aquatic organisms – are "biological materials." Moreover, there is a substantial body of case law finding that the discharge of water containing fish that are not naturally occurring constitutes a discharge of pollutants within the meaning of the CWA. See U.S. Pub. Interest Research Group v. Atlantic Salmon of Maine, 215 F.Supp. 2d 239, 247 (D.Me. 2002), aff'd, 339 F.3d 23 (1st Cir. 2003) ("Fish that do not naturally occur in the water . . . fall within the term 'biological material' and are therefore pollutants under the Act"); see also National Wildlife Federation v. Consumers Power Co., 862 F.2d 580, 583, 586 (6th Cir. 1988) (finding that fish and fish remains are "biological materials" and therefore "pollutants," but holding in that case that the fish were not "added" to the waters in question); Association of Pacific Fisheries v. EPA, 615 F.2d 794 (9th Cir. 1980) (discussing EPA regulation of fish processors that discharge fish parts into navigable waters); 40 C.F.R. §122.24 (requiring NPDES permits for hatcheries, fish farms, and other

concentrated aquatic animal production facilities). Any contrary conclusion "would improperly undermine the integrity of [the CWA's] prohibitions." Northern Plains Res. Council v. Fidelity Exploration & Dev. Co., 325 F.3d 1155, 1160 (9th Cir. 2003).[14]

This Court has confirmed that natural materials are pollutants where their discharge into receiving waters degrades those waters. In Northern Plains, a company extracted methane gas from deep underground coal seams in Montana, in the process drawing large quantities of deep ground water to the surface. 325 F.3d at 1158. The company did not add any chemicals to the water before dumping it into the Tongue River. Id. In its "natural state," however, the water contained suspended solids, numerous metals and was "salty," raising concerns by those using the river for agricultural irrigation that the salt would break down soil structure on farms and ranches. Id. This Court held that the discharged water was a CWA "pollutant" and that a NPDES permit was required under the "plain language" of the Act. Id. at 1160. "Were we to conclude otherwise, and hold that the massive pumping of salty, industrial waste water into protected waters does not involve discharge of a 'pollutant,' even though it would degrade the receiving waters to the detriment of farmers and ranchers, we would improperly undermine the integrity of [the CWA's] prohibitions." Id. at 1162 (internal quotations omitted). This Court stated that to not require a permit would pave the way for someone to pipe "the Atlantic Ocean into the Great Lakes and then argue that there is no liability under the CWA" because the oceanwater was not altered before being discharged into the freshwater lakes. Id. at 1163.

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[14] Although EPA urges this Court not to consider whether ANS are "pollutants" under the Act, as EPA "has not . . . taken a formal position" on the subject, EPA Br. at 44 n.13, the plain language of the CWA and judicial interpretation of that language make clear that ANS are pollutants within the Act's broad coverage.

Similarly, vessel ballast water discharges of ANS are introductions of contaminated waters to CWA-protected waters. The potential for significant environmental harm caused by ANS demonstrates that controlling them as CWA pollutants is consistent with the Act's fundamental purpose to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

EPA's vessel discharge exemption conflicts not only with the plain language of the CWA, but also with its overall purpose and structure. See Kmart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); The Wilderness Society, 353 F.3d at 1060 ("If necessary to discern Congress's intent, we may read statutory terms in light of the purpose of the statute."). The Act's strong remedial purpose and comprehensive structure demonstrate that damaging vessel pollutant discharges cannot properly be excluded from CWA controls. Allowing ANS discharges that irreparably harm water quality is inconsistent with the Act's purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). See United States v. Riverside Bayview, 474 U.S. 121, 132 (1985) ("This objective incorporated a broad, systematic view of maintaining and improving water quality: as the House Report on the legislation put it, 'the word "integrity" . . . refers to a condition in which the natural structure and functions of ecosystems [are] maintained.'") (citation omitted). Exempting an entire class of sources of water pollution is contrary to Congress' intent that "discharge of pollutants be controlled at the source." Riverside Bayview, 474 U.S. at 133 (citing S. Rep. No. 92-414 at 77

(1972)) (emphasis supplied). The exemption is also contrary to the Act's cornerstone principle that all discharges require a permit:

> The "major purpose" of the 1972 Amendments was "to establish a comprehensive long-range policy for the elimination of water pollution." S. Rep. No. 92-414, supra, at 95. The permit system was the key to that policy. "The Amendments established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit." Milwaukee v. Illinois, supra, at 310-311; see generally EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200 (1976).

Weinberger, 456 U.S. at 319 (emphasis supplied).

EPA cannot establish that Congress did not mean what it said when it required permits for all discharges of pollutants, including discharges of ballast water from vessels. See Engine Mfrs. Ass'n. v. EPA, 88 F.3d 1075, 1089 (D.C. Cir. 1996) ("[F]or the EPA to avoid a literal interpretation at Chevron step one, it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it."). Indeed, the CWA's comprehensive structure for addressing water pollution would be significantly undermined if the Act's fundamental permitting requirement were read to exclude an entire category of harmful point source pollutant discharges. Accordingly, the court below correctly held that EPA's categorical exemption of vessel pollutant discharges from CWA controls is illegal and not entitled to deference.

2. The Vessel Exemption Exceeds EPA's Authority Under the Act.

EPA's blanket exemption of vessel discharges from the Act's NPDES requirements is not authorized by the Act. Courts repeatedly have held that EPA does not have the authority to

exempt an entire category of point source discharges from the NPDES permit program. The leading case is NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977), where the court concluded that "[t]he wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of [CWA] § 402." Id. at 1377. The court vacated EPA regulations that would have exempted from CWA controls a number of discharge sources such as "all silvicultural point sources." Id. at 1372. Recognizing that the NPDES program "is central to the enforcement of the [CWA]," the D.C. Circuit explained that the legislative history of the NPDES provisions evidences congressional intent to establish a "tough law that relied on explicit mandates to a degree uncommon in legislation of this type," and demonstrates that the Act's "basic premise" is that any discharge of pollutants without a permit is unlawful. Id. at 1374, 1375.

In Forsgren, this Court followed NRDC v. Costle and held that an aircraft from which the Forest Service discharged pesticides constituted a point source subject to the NPDES. There the Forest Service, relying on EPA regulations and guidance, maintained that EPA had defined the activity as a "non-point source" discharge not subject to NPDES requirements. This Court rejected that argument, agreeing with NRDC v. Costle that "EPA may not exempt from NPDES permit requirements that which clearly meets the statutory definition of a point source by 'defining' it as a non-point source." Forsgren, 309 F.3d at 1190. See also Northern Plains, 325 F.3d at 1164 ("EPA does not have the authority to exempt discharges otherwise subject to the CWA. Only Congress may amend the CWA to create exemptions from regulation.").

Congress knew how to create an exemption when it determined that one was appropriate. See, e.g., 33 U.S.C. §1362(6) (excluding from definition of "pollutant" "a discharge incidental to

the normal operation of a vessel of the Armed Forces"); 33 U.S.C. §1362(14) (excluding from definition of "point source" "agricultural stormwater discharges and return flows from irrigated agriculture," but including concentrated animal feeding operations). Where Congress exempts one form of otherwise regulated activity but not another, EPA may not create additional exceptions. See, e.g., TRW Inc. v. Andrews, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent."). Accordingly, where Congress in the CWA exempted only military vessel discharges, rather than all vessel discharges, that distinction must be given effect by the courts. See Russello v. United States, 464 U.S. 16, 23 (1983) (recognizing general presumption that by including language in one part of statute and omitting it in another, "Congress acts intentionally and purposely in the disparate inclusion or exclusion"); Defenders of Wildlife, 191 F.3d at 1165 ("Congress' choice to require industrial stormwater discharges to comply with 33 U.S.C. § 1311, but not to include the same requirement for municipal discharges, must be given effect.").

The CWA's plain language, its legislative history, and controlling precedent establish that EPA's blanket exemption of vessel pollutant discharges from NPDES permit requirements is beyond the agency's authority.

B. Congress Has Not Acquiesced in EPA's Regulatory Exemption.

To avoid the Act's plain language, purpose and structure, EPA contends that Congress acquiesced in the vessel exemption when it amended the CWA in the National Defense Authorization Act for Fiscal Year 1996 ("NDAA"), Pub. L. No. 104-106 § 325(b), 110 Stat. 186

(1996), and the Deep Seabed Hard Mineral Resources Act ("DSHMRA") in 1979, 30 U.S.C. § 1419(e). However, neither amendment establishes the "overwhelming evidence" required for congressional acquiescence.

1. Congressional Actions Unrelated to the Vessel Exemption Do Not Meet the High Standard for Congressional Acquiescence.

a. "Overwhelming Evidence" Is Required For Congressional Acquiescence.

The Supreme Court requires "overwhelming evidence" that Congress considered and rejected the "precise issue" presented to the Court before it will hold that Congress has acquiesced in an agency interpretation that is contrary to the governing statute. See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 170 n.5 (2001) ("SWANCC"). Because "subsequent history is less illuminating than the contemporaneous evidence . . . [the agency] face[s] a difficult task in overcoming the plain text and import of [the statute]." SWANCC, 531 U.S. at 170. The Court in SWANCC pointed to Bob Jones Univ. v. United States, 461 U.S. 574 (1983), as an example of the overwhelming showing needed to overcome plain statutory text. There, "Congress had held 'hearings on this precise issue,' making it 'hardly conceivable that Congress - - and in this setting, any Member of Congress - - was not abundantly aware of what was going on'" and that "'no fewer than 13 bills introduced to overturn the IRS' interpretation' had failed." SWANCC, 531 U.S. at 170 n.5 (quoting Bob Jones Univ., 461 U.S. at 600-01); see also United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135-38 (relying on a specific refusal by Congress to overrule an agency's interpretation found by the Court to be a reasonable construction of the statute). "Absent such overwhelming evidence of acquiescence, we are loath to replace the plain text and

original understanding of a statute with an amended agency interpretation." Id.[15] In contrast, in SWANCC, the Court found "no persuasive evidence that the House bill was proposed in response to the Corps' claim of jurisdiction over non-navigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction." 531 U.S. at 171.

Appellants mistakenly contend that FDA v. Brown & Williamson Tobacco, Inc., 529 U.S. 120 (2000), rather than SWANCC, is the controlling decision here. In Brown & Williamson, the Court held that the Food and Drug Administration ("FDA") was without authority under the Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 et seq., to regulate tobacco products as customarily marketed. The situation in Brown & Williamson differed markedly from that involved here. The statute there did not mention tobacco at all, in stark contrast to the language of the CWA, which specifically encompasses vessel discharges. See Massachusetts, 2007 U.S. LEXIS 3785 at *58 (distinguishing Brown & Williamson and finding "nothing counterintuitive" to EPA regulation of greenhouse gases under the Clean Air Act).

Furthermore, focusing on the FDCA's "essential purpose" to ensure that regulated products are "safe" and "effective" for their intended use, the Court found no room in that statutory scheme for regulation of inherently unsafe tobacco products. 529 U.S. at 135. The Court noted that subjecting tobacco products to FDA regulation was contrary to decades of tobacco-specific legislation repeatedly rejecting such FDA authority under the FDCA. Id. at 143-44. Moreover, in finding "unmistakable" evidence that subsequent legislation ratified FDA's lack of regulatory authority (529 U.S. at 158), Brown & Williamson described a long history of congressional action specifically addressing that precise question, including Congress' use of

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[15] See also Rapanos v. United States, 126 S.Ct. 2208, 2231 (2006) (plurality opinion).

express preemption and preclusion of federal agency authority. Id. at 157-58. Finally, in Brown & Williamson, FDA regulation would necessarily result in a complete ban on tobacco products, an outcome that is inconsistent with a half dozen other tobacco-specific enactments that were all premised on tobacco remaining legally for sale. 529 U.S. at 137, 143-44.

In contrast, here, "EPA has not identified any congressional action that conflicts in any way with the regulation" of vessel discharges under the CWA. See Massachusetts, 2007 U.S. LEXIS 3785 at *59. As explained below, the two statutes cited by appellants here do not constitute unmistakable or overwhelming evidence that Congress has acquiesced in EPA's longstanding disregard of the statutory text. See SWANCC, 531 U.S. at 170 n.5; Morales-Izquierdo v. Gonzalez, 477 F.3d 691, 699 (9th Cir. 2007) ("Congressional acquiescence can only be inferred when there is overwhelming evidence that Congress explicitly considered the precise issue presented to the court.") (citations and internal quotations omitted).

b. Two Subsequent CWA Amendments Unrelated to the Vessel Exemption Do Not Constitute Overwhelming Evidence of Congressional Acquiescence.

In neither of the statutes relied on by appellants did Congress focus on overturning EPA's blanket vessel discharge exemption. Indeed, Congress has never considered legislation to approve or disapprove of the exemption. Nor has it ever held hearings on the matter. The best appellants can do is note that Congress twice specifically focused its attention on other aspects of the NPDES permitting system, and claim that Congress thereby "acknowledged and accepted" EPA's vessel exclusion (EPA Br. at 31). As in SWANCC, these arguments merely "cite some legislative history showing Congress' recognition" of the vessel exemption, but do not demonstrate congressional acquiescence through "persuasive evidence" that Congress' action

was "in response" to the exemption. SWANCC, 531 U.S. at 170-71. In neither of these enactments was the vessel exemption "brought to Congress' attention through legislation specifically designed to supplant it." Riverside Bayview, 474 U.S. at 137. Rather, in carving out a limited permit exemption and a corresponding replacement regulatory program for Armed Forces vessels under the NDDA, and in deleting a permit exemption for off-shore mining operations under the DSHMRA, Congress' focus was elsewhere, and overwhelming evidence of its acquiescence to EPA's vessel exemption is absent.

First, the legislative history regarding the NDAA Armed Forces vessels exemption, and the concurrently enacted Uniform National Discharge Standards ("UNDS") program codified at 33 U.S.C. § 1322(n), demonstrates that Congress responded to the Navy's concern about potential state-by-state regulation of military vessels, and the need for federal uniformity with respect to military vessel discharges.

> The Navy wishes to clarify the regulatory status of certain non-sewage discharges from Navy vessels. Vessels are point sources of pollution under the Clean Water Act. Any discharge of pollutants from a point source, including a vessel, into the waters of the United States is prohibited unless specifically permitted . . . Although EPA regulations generally exempt non-sewage discharge from vessels from the permit requirements of the Act, some coastal states have imposed regulations or inspection programs that may have application to these types of discharges. A series of events in the waters of several coastal states prompted concern at the Navy as to state authorities to regulate these discharges.

S. Rep. No. 104-113, at 1-2 (1995). See also S. Rep. No. 104-112, at 211 (1995) ("The lack of uniformity has presented operational problems for the Navy."). At most, Congress acknowledged EPA's vessel discharge exemption as background for its consideration of military vessel legislation. The legislative history does not establish that either congressional committees

or Congress as a whole acquiesced in the non-military vessel exemption. To the contrary, the Senate report expressly affirmed that vessel discharges are point sources subject to the NPDES permit program, and summarized the purpose of the legislation: "The effect of this [UNDS] amendment is to remove the statutory requirement for a permit for these [military vessel] point source discharges to the waters of the United States." S. Rep. No. 104-113, at 3.

EPA suggests that a reference to 40 C.F.R. § 122.3 in the definitional section accompanying the UNDS (33 U.S.C. § 1322(a)(12)(B)(iii)) "demonstrate[s] Congress' understanding of the regulation . . . [and is] strong evidence of acquiescence." EPA Br. at 33. But as EPA itself points out, the NDAA amended the CWA definition of "pollutant" at 33 U.S.C. § 1362(6) to exclude "discharge[s] incidental to the normal operation of a vessel of the Armed Forces," and preventing state-by-state regulation of these military vessel discharges was, in EPA's words, "Congress['] . . . one narrow drafting task in mind." EPA Br. at 34 n.10. Thus, as 33 U.S.C. § 1322(a) states, "[f]or purposes of this section" (which establishes, inter alia, the UNDS at section 1322(n)), 40 C.F.R. § 122.3 is referenced for the narrow purpose of eliminating the potential for state regulation of incidental military vessel discharges. See S. Rep. No. 104-113, at 1-2 (1995). Congress's explicit decision to exempt only military vessel discharges from the CWA's permit requirements does not constitute "overwhelming," or even strong, evidence of congressional acquiescence in EPA's blanket exemption of vessel discharges generally. Indeed, the narrow exemption that Congress enacted suggests that Congress intended that non-military vessel discharges remain within the scope of the CWA. See supra pp. 33-34. In any event, passage of this special Armed Services legislation falls far short of the extensive, direct

congressional scrutiny given to the particular agency practice at issue in cases like Bob Jones Univ. and Riverside Bayview.

Second, appellants' assertion that the DSHMRA demonstrates congressional acquiescence to the vessel exemption is equally meritless. This legislation extended the scope of the NPDES program by requiring permits for discharges from industrial mining operations in the contiguous zone or ocean that otherwise would be outside the scope of the permit program. 30 U.S.C. § 1419(e). Congress sought to avoid creating a perverse incentive for industrial operations to move to off-shore platforms as a way to avoid CWA regulation. See S. Rep. No. 96-360, at 3 (1979) ("Failure to apply comparability [sic] stringent treatment requirements to processors at sea as are applied to land processors could prove to be an incentive to move such industrial processes off U.S. shores. The impact of such a move would be detrimental to the ocean environment and could also cost American jobs.").

The DSHMRA amendment had nothing to do with EPA's vessel discharge exemption. Appellants' suggestion that Congress acquiesced in the exemption because the Senate Report mentions EPA's regulation is unpersuasive. As with the UNDS, the DSHMRA committee report acknowledged the existence of EPA's regulation as background, in this case for a discussion of vessel discharges that would fall outside the scope of the NPDES requirements if they occurred beyond the three-mile territorial seas. By specifically mandating that deep-sea mining operations beyond U.S. navigable waters or territorial seas would require NPDES permits, the DSHMRA brought discharges from such industrial operations conducted on vessels or floating craft within the NPDES permit program. Nothing in this specific legislative fix approaches overwhelming evidence of congressional acquiescence in EPA's vessel exemption.

C. Congress Has Not Expressly or Impliedly Repealed the Act's Prohibition of Unpermitted Vessel Discharges.

EPA and Shippers maintain that "Congress chose" to regulate vessel discharges "under programs other than the CWA NPDES." EPA Br. at 36. They assert that subsequent statutes "specifically addressing the problem" can "overturn some of the implications" of an earlier statute when necessary to "reconcile" various laws to get them to "make sense" as part of a "harmonious whole." EPA Br. at 27-28; Shippers Br. at 16-18. But the statutes cited by appellants were not intended to repeal any aspect of the CWA explicitly or by implication. These statutes do not supplant the CWA's coverage of vessel discharges.

1. Congress Expressly Preserved the CWA's Authority over Vessel Discharges When It Enacted NANPCA, NISA and AAPS.

In the Non-indigenous Aquatic Nuisance Prevention and Control Act of 1990 ("NANPCA"), as amended by the National Invasive Species Act of 1996 ("NISA"), 16 U.S.C. § 4701 et seq., Congress made clear that those laws would not supersede, implicitly repeal, or otherwise diminish the CWA's applicability to ballast water discharges. 16 U.S.C. § 4711(b)(2)(C). In NANPCA, Congress directed the Coast Guard to develop, in consultation with other agencies including EPA, control measures over ANS introductions into the Great Lakes and Hudson River from ballast water discharges. 16 U.S.C. § 4711(b). Congress explicitly preserved CWA controls over these discharges: "The regulations issued under this subsection shall . . . not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the United States under the Federal Water Pollution Control Act." 16 U.S.C. § 4711(b)(2)(C). And in NISA, Congress again preserved the CWA's application to

polluted ballast water discharges: "The voluntary guidelines issued under this subsection shall . . . not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the United States under the Federal Water Pollution Control Act . . ." 16 U.S.C. § 4711(c)(2)(J). Yet EPA's brief fails even to acknowledge the plain language of these savings clauses preserving CWA authority over ballast water discharges.

In addition to the statutory language, the legislative history of NANPCA/NISA demonstrates that Congress intended to preserve all requirements of the CWA, including its applicability to vessel discharges. To the limited extent members of Congress discussed the CWA when enacting these laws, they explained "that nothing in the bill supersedes any requirement or prohibition under any other law pertaining to the discharge or exchange of ballast water." 104 Cong. Rec. H12146 (H.R. 4283) (Sept. 28, 1996). See also H.R. Rep. 815, Part 1 at 16 (Sept. 20, 1996) ("The guidelines may not supersede or affect any Federal Water Pollution Control Act (Clean Water Act) requirements.").

Congress also clearly stated that the Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C. § 1901, et seq., did not supersede or repeal any other existing law, including the CWA. See 33 U.S.C. § 1907(f) ("Remedies and requirements of this Act supplement and neither amend nor repeal any other provisions of law, except as expressly provided in this Act.") (emphasis supplied). Here too, legislative history confirms that Congress intended that the savings clause expressly preserve CWA requirements. H.R. Rep. No. 96-1224, at 34-35 (1980), reprinted in U.S.C.C.A.N. 4849, 4863 (Aug. 18, 1980) ("Besides requiring the Secretary to take action in accordance with MARPOL Protocol requirements (namely, one of notification), the section preserves the right of action under other provisions of law, such as the Federal Water Pollution

Control Act, the Ports and Tanker Safety Act of 1978, and any other marine safety and environmental acts."). EPA itself acknowledges that this "savings clause mak[es] clear that it does not amend or repeal the CWA." EPA Br. at 39.

2. NANPCA, NISA and APPS Do Not Impliedly Repeal the CWA as It Applies to Vessel Discharges.

The savings clauses and legislative history quoted above preclude appellants' argument that United States v. Fausto, 484 U.S. 439 (1988), and United States v. Estate of Romani, 523 U.S. 517 (1998), require the conclusion that NANPCA, NISA, and APPS repeal the CWA's vessel discharge controls.[16] See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 406 (2006) (specific savings clause bars finding of implied repeal). Contrary to appellants' suggestions, Fausto and Romani do not hold that courts may ignore the plain meaning of earlier statutory text that is expressly preserved by a subsequent statute. See Fausto, 484 U.S. at 452-53 (while subsequent statute can effect a case-specific legal disposition, repeals by implication of express statutory text are strongly disfavored); J.E.M. Ag Supply v. Pioneer Hi-Bred Int'l, 534 U.S. 124, 137 & n.9 (2001) (finding the absence of "overwhelming evidence needed to establish repeal by implication" where prior statute's terms had been "interpreted broadly to evolve with developments in science and technology," and distinguishing

[16] The underlying premise of appellants' argument – that the CWA is necessarily the more general, less comprehensive law subject to repeal by more specific laws – has already been rejected by this Court. In Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 491-92 (9th Cir. 1984), this Court rejected Chevron's argument that the comprehensiveness of the Ports and Tanker Safety Act ("PTSA") demonstrated Congress' intent to preempt state regulation under the CWA of discharges of oil into state waters, finding that the CWA and PTSA were equally comprehensive in their regulation of separate activities. As demonstrated below, the CWA's regulatory scheme is far more comprehensive, and not in conflict, with other regulatory programs subsequently enacted.

Estate of Romani as a case where earlier statute's meaning remained "unresolved"). Instead, Fausto and Romani require simply that where Congress has not clearly established how two statutes may coexist, courts should seek to harmonize them.

This Court has made clear that repeals by implication are strongly disfavored, and may be found only if the two statutes are in "irreconcilable conflict" or the second statute is clearly intended to replace the first one:

> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . . .

National Wildlife Fed'n v. Army Corps of Engrs, 384 F.3d 1163, 1178 (9th Cir. 2004) (quoting Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976)). Where the two laws are capable of coexistence, the courts must give each effect. Radzanower, 426 U.S. at 155. Examination of the statutes relied upon by appellants demonstrates that rather than conflicting with or subsuming the CWA's vessel discharge provision, they plainly coexist with it. Not only did Congress specifically preserve the CWA when it enacted NANPCA and NISA, but the scope of regulation under NANPCA/NISA and APPS leaves ample room for CWA protections.

That these later statutes may coexist with CWA is shown by the fact that none of them regulates the universe of pollutants discharged from vessels. NANPCA/NISA addresses a subset of pollutants – ANS – found in ballast water discharges. As EPA acknowledges (Br. at 6), ballast water discharges also contain heavy metals, suspended solids and other contaminants subject to regulation under the CWA. See 33 U.S.C. §§ 1311(a), 1362(6). Congress recognized

this in NANPCA/NISA and, as explained above, specifically provided that the CWA remains the appropriate mechanism for controlling these discharges. See 16 U.S.C. §§ 4711(b)(2)(C), (c)(2)(J). Accordingly, the Coast Guard's regulations similarly acknowledge that the Act's ballast water discharge provisions continue unabated:

> Nothing in this subpart affects or supersedes any requirement or prohibitions pertaining to the discharge of ballast water into the waters of the United States under the Federal Water Pollution Control Act.

33 C.F.R. § 151.1510(c). NANPCA/NISA clearly does not wholly address the subject matter regulated under, or conflict with, the CWA.

Similarly, APPS, which implements Annexes I, II, and V of the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL), governing certain discharges of oil, noxious liquid substances carried in bulk, and garbage, respectively, does not regulate the universe of pollutants subject to the CWA. 33 U.S.C. §§ 1901 et seq. (1980). As explained above, supra p. 41, Congress expressly preserved CWA authority over activities also regulated under the APPS. 33 U.S.C. § 1907(f). In an analogous situation, this Court has found CWA controls to be compatible with and not superseded by the Ports and Tanker Safety Act of 1978, which establishes oil pollution prevention standards consistent with Annex I. See Hammond, 726 F.2d at 495-97. Appellants have failed to demonstrate that the APPS either irreconcilably conflicts with or subsumes CWA controls over the vessel discharges EPA has exempted.

Contrary to appellants' suggestions, nothing in NANPCA/NISA or APPS demonstrates Congress' intent that the Coast Guard have exclusive control over ballast water discharges. This Court has rejected the argument that Congress intended for "one single decisionmaker" to have

authority over all vessel-related discharges. Hammond, 726 F.2d at 492 ("While design standards need to be uniform nationwide so that vessels do not confront conflicting requirements in different ports, and so that the Coast Guard can promote international consensus on design standards, there is no corresponding dominant national interest in uniformity of coastal environmental regulation.").

Moreover, as EPA has acknowledged, the CWA specifically provides for harmonization of its requirements with Coast Guard regulations. Both CWA Section 402(g) (33 U.S.C. § 1342(g)), and EPA's NPDES regulations at 40 CFR § 122.44(p), provide respectively that vessel NPDES permits "be subject to," and that vessel permit conditions require the discharge to "comply with," applicable Coast Guard regulations. EPA has stated:

> [CWA] Section 402(g) may be a way to harmonize NPDES and NISA requirements. Moreover, if there are any jurisdictional gaps in NISA's coverage with respect to vessel commerce in internal waters, then coverage through an NPDES permit might fill those potential gaps.

ER 174. See also 33 U.S.C. §§ 1321, 1322 (directing EPA and the Coast Guard to work cooperatively to control certain discharges from vessels). Thus, appellants' broad argument that the Coast Guard should have exclusive control over vessel discharges under non-CWA statutes is belied by the schemes Congress established to address vessel discharges and water pollution generally.

In summary, nothing in any of the statutes relied upon by appellants undermines the plain language of the CWA requiring vessel discharge permits. Therefore, EPA's contrary interpretation of the statute is unlawful.

POINT IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REMANDING TO EPA WITH VACATUR OF THE EXEMPTION IN TWO YEARS

Appellants' challenges to the remedy ordered by the district court – remand to EPA, with vacatur of the ultra vires exemption in two years – are without merit. Under applicable statutes and the federal courts' inherent equitable jurisdiction, the district court possessed broad latitude to fashion injunctive relief necessary to achieve statutory objectives, remedy established wrongs and further the public interest. Here, EPA's illegal vessel exemption results in uncontrolled ANS point source discharges that thwart CWA objectives and endanger the nation's waters. Under these circumstances, the district court did not abuse its discretion.

A. The Remedy Is Consistent with Statutory Requirements.

1. The Remedy Is Consistent with the Clean Water Act.

The CWA acknowledges the courts' equitable jurisdiction. See Weinberger, 456 U.S. at 320 ("[The CWA] permits the district court to order the relief it considers necessary to secure prompt compliance with the Act."). Thus, the federal courts have "the power . . . to do equity and mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." Id. at 312. See also NRDC v. Train, 510 F.2d at 713 ("A federal equity court may exercise its discretion to give or withhold its mandate in furtherance of the public interest, including specifically the interest in effectuating the congressional objective incorporated in regulatory legislation.").

The CWA is a comprehensive statute, employing a progressive strategy to further its goals of abating pollution and restoring the nation's waters. Milwaukee v. Illinois, 451 U.S. at

318-19; Washington v. U.S. EPA, 573 F.2d at 591-92. EPA's illegal vessel exemption has thwarted achievement of the progressively stricter pollution controls called for by the Act. The observation of the court in the seminal case decades ago is prescient: the "exemption tends to become indefinite: the problem drops out of sight, into a pool of inertia, unlikely to be recalled in the absence of crisis . . . " NRDC v. Costle, 568 F.2d at 1382. The exemption has had the domino effect of forestalling all of the CWA's interrelated requirements as applicable to vessel discharges, and its vacatur by the district court effectuates the Act's objectives.

In this regard, EPA's claim (Br. at 43-46) that the court's remedy should be limited to vessel ballast water discharges is without merit. As correctly noted by the district court, both NWEA's petition and complaint seek to invalidate the entirety of the vessel discharge exemption contained in 40 C.F.R. § 122.3(a) as ultra vires, and plaintiffs' complaint and subsequent summary judgment argument explicitly reference vessel discharges besides ballast water that EPA had categorically exempted from CWA controls. ER 361-62. These clear statements, supported by argument, certainly cannot be described as "cryptic" or "obscure" references, nor are they the type of "unjustified obstructionism," that concerned the Court in Vermont Yankee Nuclear Power v. NRDC, 435 U.S. 519, 553-54 (1978). As explained by the district court, "[a]lthough plaintiffs' arguments focus on ballast water, given that the regulation deals with vessel discharges in a blanket manner, it is understandable that plaintiffs would treat vessel discharges in a similar fashion." ER 362. EPA's argument is untimely as well because the agency failed to raise the issue at summary judgment. See Hopkins v. Oklahoma Pub. Employees Retirement Sys., 150 F.3d 1155, 1163 (10th Cir. 1998) (declining to consider an

argument when party failed to raise the issue before the district court rendered summary judgment and party was put "fully on notice" by opposing party's briefing at that stage).

2. The Remedy Is Consistent with the Administrative Procedure Act.

The APA provides that rules "found to be . . . in excess of statutory jurisdiction" shall be both held unlawful and vacated, or "set aside." 5 U.S.C. § 706(2)(C); Nat'l Mining Ass'n. v. United States Army Corps of Engineers, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("We have made clear that [w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated - - not that their individual application to the individual petitioners is proscribed") (internal quotation omitted); see also Defenders of Wildlife v. U.S. EPA, 420 F.3d 946, 978 (9th Cir. 2005) (court should "vacate the agency's action and remand to the agency to act in compliance with its statutory obligations"). Courts "must, of course, set aside [agency] decisions which rest on an erroneous legal foundation." Oregon v. Ashcroft, 368 F.3d 1118, 1129 (9th Cir. 2004) (quoting NLRB v. Brown, 380 U.S. 278, 291-92 (1965)), aff'd, Gonzalez v. Oregon, 546 U.S. 243 (2006).

Accordingly, this Court recently affirmed a district court's permanent injunction precluding nationwide enforcement and implementation of an ultra vires regulation, noting that the text of the APA compels that the regulation be "[held] unlawful and set aside." Earth Island Inst. v. Ruthenbeck, 459 F.3d 954, 966 (9th Cir. 2006). While courts are not "mechanically obligated to grant such an injunction," where Congress "has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978); see also United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 497 (2001) ("[A] court sitting in equity cannot ignore the judgment

of Congress, deliberately expressed in legislation.") (internal quotation omitted). Because EPA's exemption is plainly contrary to Congress's express prohibitions, the district court's injunction vacating it is the "remedy [that] best accounts for the injury suffered . . . while minimizing any frustration of the purposes" of the applicable statute, here the CWA. Western Oil & Gas Ass'n v. EPA, 633 F.2d 803, 813 (9th Cir. 1980).

EPA argues for a remedy limited to remanding its illegal petition denial, premised entirely on its erroneous assertion that plaintiffs' "as applied" challenge to the ultra vires exemption is untimely (see supra pp. 22-25). This attempt to limit the district court's injunction lacks merit because the reason EPA's petition denial was illegal is that the exemption is ultra vires. Remand of the petition denial alone will result only in further delay and likely additional litigation over a regulation that, because it "operates to create a rule out of harmony with the statute, is a mere nullity." Dixon v. United States 381 U.S. 68, 74 (1965) (quoting Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 n. 7 (1936)). Here the court's injunction obviates such repetitious litigation, over a regulation that is on its face unlawful, in a manner consistent with the APA. See Nat'l Mining Ass'n., 145 F.3d at 1408-09.

B. The Remedy Is Consistent with Injunctive Relief Standards.

As this Court observed:

> The traditional bases for injunctive relief are irreparable injury and inadequacy of legal remedies. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987). In issuing an injunction, the court must balance the equities between the parties and give due regard to the public interest.

Idaho Watersheds Project v. Hahn, 307 F.3d 815, 833 (9th Cir. 2002). "If environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of the injunction to protect the environment." High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004) (citing Amoco, 480 U.S. at 545).

Here, the record establishes that nationwide environmental injury from ANS discharged in vessel ballast water has been ecologically devastating and costly; that the threat of fundamental, permanent ecosystem degradation from vessel-discharged ANS is real and growing; and that EPA for years has been aware of and acknowledged the same, yet steadfastly has refused to bring these discharges under CWA controls. Under any meaningful application of injunctive relief standards, continuing application of this illegal categorical exemption is causing irreparable harm. Indeed, few forms of environmental injury are less reparable than ANS invasions. Here legal remedies are inadequate, and the balancing of equities and public interest validate the court's permanent injunction.

C. The Remedy Is Necessary Given Ineffective Efforts to Address Ballast Water.

1. Domestic Efforts Are Inadequate.

Appellants premise their challenge to the district court's remedy on the existence of a comprehensive federal program addressing ballast water-discharged ANS. Shippers Br. at 8-11; EPA Br. at 36-38. However, the existing federal effort has been no match for the scale and severity of the ANS problem. As the district court explained, protections against ANS invasions provided by the Coast Guard's program are incomplete because key aspects of the program are voluntary. ER 357. For example, the Coast Guard does not require ballast water management for the vast majority of transoceanic vessels entering the Great Lakes. SER 3-4, 61, 66. Though

claiming to have "no ballast on board," these 'NOBOB' vessels typically carry tons of ANS-containing residual ballast water that they discharge into the Lakes. Id.[17] The Coast Guard itself has confirmed that its ballast water management program is voluntary in the Great Lakes. While the agency acknowledges that purported NOBOB vessels do indeed carry ballast water containing ANS (see 70 Fed. Reg. 1448-49 (Jan. 7, 2005)), its policy is merely to recommend, but not require, ballast water management practices for NOBOBs. 70 Fed. Reg. 51,831, 51,835 (Aug. 31, 2005). As stated by the Coast Guard, "we cannot enforce vessel compliance with a voluntary program." Id. (emphasis supplied). The Coast Guard has yet to require any ballast water management for NOBOBs in the Great Lakes.

EPA contends erroneously that the district court considered only "evidence of past harm" from ANS, and "not . . . whether that harm was likely to occur in the future." EPA Br. at 51. This view is refuted by the record. See ER 233 (court's observation that because of ANS' mobility, these "pollutants flow freely from state to state, which causes ballast water discharges throughout the country to impact" states' interests). The problem of vessel-discharged ANS is national in scope, growing, and requires that EPA take the leadership role Congress intended in the CWA.

In short, federal efforts to date have not stemmed the tide of ANS invasions. Moreover, Congress did not intend programs like the Coast Guard's to take the place of CWA pollution

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[17]A major study sponsored by EPA and others confirms that vessels claiming NOBOB comprise over 90% of the ocean ships entering the Great Lakes, and that these vessels' discharges present the greatest threat to the Lakes of continuing ANS invasions. See Johengen, Reid, et al., Assessment of Transoceanic NOBOB Vessels and Low-Salinity Ballast Water as Vectors for Non-Indigenous Species Introductions to the Great Lakes, at vii, 2-7, 2-20, 6-2, 6-10 (NOAA, Univ.of Michigan April 2005). Available at www.glerl.noaa.gov/res/projects/nobob/products/NOBOBFinalReport20050415.pdf

controls. The district court's remedy is critical to mitigate the ongoing harm from uncontrolled vessel discharges.

2. The Remedy Is Not Contrary to International Efforts.

Appellants' suggestions that the court's remedy is inconsistent with international ballast water efforts are misguided. Article 2 of The International Convention for the Control and Management of Ships' Ballast Water and Sediments ("Convention")[18] explicitly recognizes each nation's sovereign right to develop more stringent standards to protect its domestic waters. The United States delegation considered this provision its most important achievement in the negotiations because the U.S. did not support the "very weak and very distant schedule" set forth in the final standards of the Convention. See Ballast Water Management: New International Standards and National Invasive Species Act Reauthorization: Joint Hearing before the Subcomms. On Coast Guard & Maritime Trans. and Water Resources & Env. of the H.R. Comm. On Trans. and Infrastructure, 108th Cong., 2nd Sess. (March 25, 2004) ("H.R. Hearing") at 12.[19] Establishment by any nation of more stringent standards, either through faster implementation of regulatory controls, or more protective controls, is consistent with the Convention. See H.R. Hearing at 18.

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[18]An outline of the Convention's main features is available at http://www.imo.org/Conventions/mainframe.asp?topic_id=867

[19] In his testimony before Congress, Coast Guard Rear Admiral Thomas Gilmour stated, "The key objectives achieved by the U.S. delegation in the negotiations were, number one, the retention of the sovereign right of a party to impose more stringent measures than the measures in the Convention consistent with international law . . . " H.R. Hearing at 8. For example, when voting on the acceptable concentration of organisms per cubic meter in ballast water discharged, the United States abstained from voting so not to support the accepted standard of 10. The United States advocated a standard of .01, a concentration 1,000 times lower than that accepted. See H.R. Hearing at 12, 15.

The Convention, on its own, does little to address the imminent threat posed by ANS. It will not become legally binding until 12 months after 30 nations representing 35 percent of global shipping ratify it. Currently, only 6 nations representing .62 percent of world shipping tonnage have ratified it. See Summary of Conventions (IMO, January 30, 2007).[20] The Coast Guard has stated that estimating the entry-into-force date for the Convention is guesswork. See H.R. Hearing at 17.[21]

Even after it becomes binding, the Convention alone does not provide sufficient protection for U.S. waters, and is not a substitute for domestic legislation. The CWA expressly accommodates the use of international instruments to supplement domestic efforts to eliminate the discharge of pollutants. CWA Section 101(c) authorizes the Executive to take appropriate action through national and international organizations in order to ensure that other countries take meaningful action to eliminate the discharge of pollutants in international waters "to at least the same extent as the United States does under its laws." 33 U.S.C. § 1251(c) (emphasis supplied). Thus, the CWA remains the primary means of protection for domestic waters, and the existence of the Convention is not to the contrary.

D. The Remedy Is Reasonable and Feasible.

Remand of the ultra vires vessel exemption to EPA with vacatur in two years time achieves compliance with the CWA in a reasonable way, within a feasible time frame. Appellants' criticisms of the remedy, besides minimizing the seriousness of the ongoing

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[20]Available at http://www.imo.org/Conventions/mainframe.asp?topic_id=247

[21]Congressman Vernon J. Ehlers noted that another IMO Convention, adopted in 2001 with a much lower threshold for adoption, had yet to enter into force. See H.R. Hearing at 17.

environmental threat, overstate exigencies and ignore flexibilities inherent in the Act. Moreover, the district court structured its decree to give EPA substantial flexibility on remand.

EPA bemoans the two year timeframe for even initiating the process of bringing these damaging discharges under CWA control, yet acknowledges (ER 281) that Congress, frustrated with the agency's slow pace in taking the subsequent step of developing effluent guidelines, has required that process to take no more than three years.[22] See 33 U.S.C. § 1314(m)(1)(C). Indeed, the CWA contemplates effluent guideline development for multiple categories of discharges no later than three years from the categories' identification. 33 U.S.C. § 1314(m)(1)(B),(C). EPA has long known that oceangoing vessels are the primary vector for ANS invasions, and trumpets years of federal effort to achieve ANS controls, yet incongruously maintains that this work is of no use in accomplishing even the initial steps required by the CWA. Under the Act, and the court's remedy, these first steps do not require rushed development of new technologies that appellants fear, but instead only the best of what is currently economically achievable.

EPA erroneously invokes the specter of tens of millions of permit-requiring recreational boaters. EPA acknowledges that approximately seven thousand transoceanic vessels present by far the greatest threat of harmful ANS from other ecosystems. ER 277. The CWA empowers EPA on remand to focus its attention on this most threatening class of discharges, to exempt truly de minimis discharges, and to employ flexible administrative devices where necessary to regulate varying sources of pollution in a practical way. See ER 363-64, 366-70. CWA Section 402(a)

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[22]See, e.g., NRDC v. EPA, 32 ERC 1969, 1975 (D.D.C. 1991) ("Surely the Congress which passed § 304(m) (33 U.S.C. § 1314(m)) out of frustration with the agency's sluggishness did not intend to confer upon the agency discretion to limit the scope and set the pace of effluent guideline preparation simply by refraining from 'identifying' known polluters." (citations omitted)).

"gives EPA considerable flexibility in framing the permit to achieve a desired reduction in pollutant discharges. The permit may proscribe industry practices that aggravate the problem of point source pollution." NRDC v. Costle, 568 F.2d at 1380. Transoceanic vessel ballast water discharges of ANS are "industry practices that aggravate the problem of point source pollution." Id. Fortunately, the CWA provides the means necessary to achieve much needed ANS pollution controls.

EPA itself has acknowledged its ability to regulate ballast water discharges and develop permitting requirements that minimize administrative exigencies and promote uniformity among jurisdictions:

> EPA believes it would probably couple . . . rulemaking with the development of a general permit for ballast water discharges. This permit would provide coverage to EPA permitting jurisdictions and serve as a model for authorized States. A general permit would provide the benefits of increased uniformity and predictability over individual permits, and would reduce the administrative burden associated with this approach.

ER 172. EPA stated that "[a] regulation could probably be drafted in a manner to allow States and permittees flexibility in meeting Federal requirements." Id.

This approach is not new. General or area-wide permits are well-established CWA methods for regulating large numbers of similar dischargers. General permits identify permit requirements for a class of dischargers, who then file their notices of intent to abide by the general permit conditions. General permits have been used to cover hundreds of thousands of pollutant discharges from such varied activities as urbanized storm water runoff, 40 C.F.R. §§

122.26, 122.30-37; sediment discharges from construction sites more than one acre in size, 40 C.F.R. §§ 122.26(a)(9)(i), (b)(14)(x), (b)(15)(i),122.34(b)(4)(i); and concentrated land animal and aquatic animal feeding operations, 40 C.F.R. §§ 122.23, 122.24. General permitting has long been recognized as a lawful, practical way of adhering to the Act's strict prohibition of unpermitted pollutant discharges. EDC, 344 F.3d at 853 (citing NRDC v. Costle). And where technological or cost limitations make it necessary, the NPDES program provides for "schedules of compliance" to allow for long-term implementation of corrective measures. 33 U.S.C. § 1362(17).

CONCLUSION

Based on the foregoing, the district court's judgment should be affirmed.

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Respectfully submitted,

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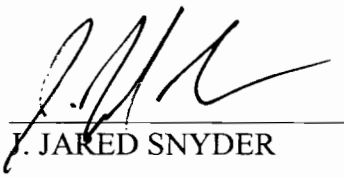
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies that the foregoing brief complies with the volume limitation of Rule 28.1(e)(2)(B)(i) in that the brief contains 16,442 words of text, including headings, footnotes, and quotations, as measured by the word-processing system used to prepare the brief (Corel Word Perfect 12).

By: 

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CERTIFICATE OF SERVICE

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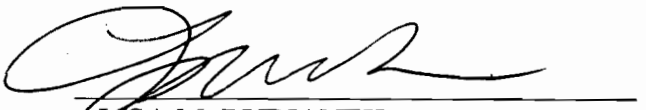

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